# THE INDIAN LAW REPORTS

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Year-6

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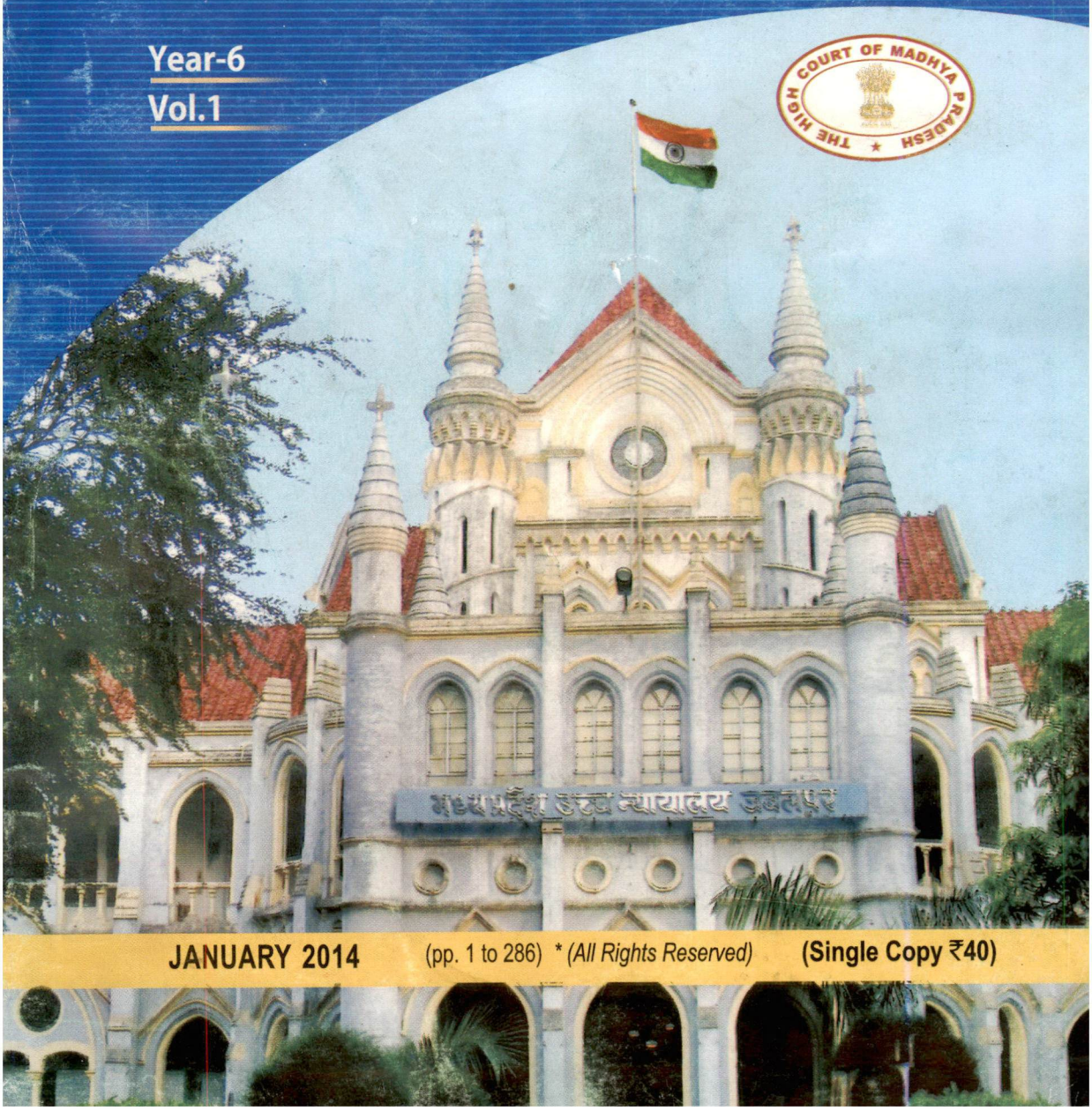


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## 2014

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

**or capricious action on the part of public authorities/functionaries - The present petitioner has not established the aforesaid aspect and has filed this petition after three years - Not entitled to compensation & cost. [Samiksha Gupta Vs. Board of Secondary Education, M.P.] ...105**

*संविधान – अनुच्छेद 226 – अनुकरणीय व्यय व प्रतिकर हेतु रिट* – मूल प्रश्न है कि क्या लोक अधिकारी द्वारा लोक कर्तव्य के प्रत्येक व्यतिक्रम हेतु, प्रतिकर देने के लिये प्रत्यर्थीगण बाध्य है ? – अभिनिर्धारित – यह धारणा करना सही नहीं होगा कि लोक अधिकारी द्वारा लोक कर्तव्य का प्रत्येक गौण व्यतिक्रम, न्यायालय को प्रतिकर प्रदान करने के लिये प्रेरित करेगा – इसके अतिरिक्त, अनुकरणीय क्षतिपूर्ति अवार्ड करने से पूर्व यह दर्शाया जाना चाहिए कि लोक प्राधिकारियों / कृत्यकारियों की ओर से मनमानी या अनुचित कार्यवाही द्वारा अनुच्छेद 21 के अंतर्गत मूलभूत अधिकार का उल्लंघन किया गया है – वर्तमान याची ने उपरोक्त पहलू को स्थापित नहीं किया और तीन वर्ष पश्चात यह याचिका प्रस्तुत की है – प्रतिकर व व्यय का हकदार नहीं। (समीक्षा गुप्ता वि. बोर्ड ऑफ सेकेण्डरी एजुकेशन, एम.पी.) ...105

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*संविधान – अनुच्छेद 227 व केन्द्रीय उत्पाद–शुल्क अधिनियम (1944 का 1), धारा 35 (एफ) – अपील प्रस्तुत करने के लिए रकम जमा करने से छूट – अपीली प्राधिकारी ने आवेदन को आंशिक रुप से मंजूर किया – अधीक्षण की शक्ति* – अंतर्ग्रस्त प्रश्न यह है कि "क्या अंतर्वर्ती आदेश के विरुद्ध, अनुच्छेद 227 के अंतर्गत याचिका ग्रहण की जा सकती है ?" – अभिनिर्धारित – अपीली प्राधिकारी द्वारा उसमें निहित वैवेकिक अधिकारिता के अंतर्गत पारित किये गये किसी अंतर्वर्ती आदेश में उच्च न्यायालय की अधीक्षण या पुनरीक्षण अधिकारिता के अंतर्गत हस्तक्षेप नहीं किया जा सकता – आगे अभिनिर्धारित किया गया कि बिना किसी गुणदोषों की याचिका, समावेदन की सुनवाई के प्रक्रम पर खारिज किये जाने योग्य है। (चौहान

**exercise all the powers and perform all the duties conferred or imposed on the Commissioner by or under this Act, throughout the State and for this purpose any reference to the Commissioner in this Act shall be deemed to include a reference to the Additional Commissioner of Sales Tax - Board of Revenue without considering the aforesaid provisions have wrongly rejected - Application filed by the Additional Commissioner on behalf of the Commissioner, Sales Tax was maintainable - Matter is remitted back. [State of M.P. Vs. M/s. Surya Agro Oils Ltd.] (DB)...30**

*साधारण विक्रय–कर अधिनियम, म.प्र. 1958 (1959 का 2), धाराऐं 44(1),(2),(3) व 3(3)* – राजस्व मंडल ने मात्र इस तकनीकी आधार पर धारा 44 के अंतर्गत किया गया आवेदन अस्वीकार किया कि उसे अतिरिक्त आयुक्त, विक्रय कर द्वारा प्रस्तुत किया गया था जो कि उसे प्रस्तुत करने के लिये सक्षम नहीं था – अभिनिर्धारित – धारा 44, यह स्पष्ट है कि कानून उपबंधित करता है कि आयुक्त, लिखित आवेदन द्वारा अधिनियम की धारा 44(1) अथवा (2) के अंतर्गत निर्देश चाह सकता है – धारा 3 की उप धारा 3 विनिर्दिष्ट रुप से उपबंधित करती है कि विक्रय कर आयुक्त पूरे राज्य में इस अधिनियम के द्वारा या उसके अधीन प्रदत्त या अधिरोपित सभी कर्तव्यों का पालन करेगा और सभी शक्तियों का प्रयोग करेगा और इस प्रयोजन हेतु इस अधिनियम में किये गये आयुक्त के उल्लेख में विक्रय कर अतिरिक्त आयुक्त का संदर्भ समाविष्ट माना जायेगा – राजस्व मंडल ने उपरोक्त उपबंधों को विचार में लिये बिना अनुचित रुप से खारिज किया – विक्रय कर आयुक्त की ओर से अतिरिक्त आयुक्त द्वारा प्रस्तुत किया गया आवेदन पोषणीय था – मामला प्रतिप्रेषित। (म.प्र. राज्य वि. मे. सूर्या एग्रो ऑइल्स लि.) (DB)...30

***Hindu Marriage Act (25 of 1955), Sections 26 & 13-B - Decree of divorce by mutual consent* - Respondent/Wife granted custody of the children - Appellant/husband was granted visiting rights and appellant/husband filed application for custody of children after one year - Application was dismissed as not maintainable after decree of divorce - Held - Even after the decree, the court is empowered to make order in regard to the custody, maintenance and education and is empowered from time to time to revoke, suspend or vary any such orders - Matter remanded to trial Court to decide case afresh. [Rajendra Singh Vs. Garima] (DB)...154**

*हिन्दू विवाह अधिनियम (1955 का 25), धाराऐं 26 व 13–बी – आपसी सहमति से विवाह विच्छेद की डिक्री* – प्रत्यर्थी / पत्नी को बच्चों की अभिरक्षा दी गयी

*Motor Vehicles Act (59 of 1988), Section 173 - Amount of Compensation - Enhancement* - **When one is considering the case of a gravely injured child who is going to live for many years into adult life, very different considerations apply - There are compelling social reasons why a sum of money should be awarded for his future loss of earnings - Damages awarded for her future loss of earnings will in the future be available to provide a home for her and to feed her and provide for such extra comforts as she can appreciate - It can not be assumed that her parents will remain able to house, feed and care for her throughout the rest of her life - Further held, that, if of course, damages have been awarded on the basis of the full cost of residential care so that they include the cost of roof and board, any award for future loss of earning will be small because there will be a very large overlap between the two heads of damage. [Puja (Ku.) Vs. M.P.S.R.T.C.]** ...178

*मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर की रकम – बढ़ाया जाना* – जब कोई किसी गंभीर रुप से आहत बालक जो वयस्क जीवन के कई वर्षों तक जीवित रहने वाला है, के प्रकरण पर विचार करता है तब, बहुत भिन्न विचारण लागू होगा – बाध्यकारी सामाजिक कारण है कि क्यों उसके भविष्य अर्जन की हानि के लिए राशि अवार्ड की जाये – उसके भविष्य के अर्जन की हानि हेतु अवार्ड की गई क्षतिपूर्ति उसे भविष्य में अपने घर की व्यवस्था करने के लिये और स्वयं का पोषण करने तथा ऐसे अतिरिक्त सुविधाओं की व्यवस्था करने के लिये उपलब्ध हो जिसे वह पर्याप्त समझ सके – यह धारणा नहीं की जा सकती कि उसके माता–पिता उसे आद्योपांत उसके शेष जीवन भर घर में रखने, पोषण करने और देखभाल करने में सक्षम बने रहेंगे – आगे अभिनिर्धारित किया गया कि निश्चित रुप से यदि निवासी देखभाल के पूर्ण व्यय के आधार पर क्षतिपूर्ति अवार्ड की गई जिसमें रहने और खाने का व्यय समाविष्ट होगा, भविष्य के अर्जन की हानि के लिये कोई भी अवार्ड कम ही होगा क्योंकि क्षतिपूर्ति के दोनों मद के बीच में बहुत अधिक अतिव्यापन होगा। (पूजा (कुमारी) वि. एम.पी.एस.आर.टी.सी.) ...178

*Motor Vehicles Act (59 of 1988), Section 173* - **Claim was dismissed on the ground that appellant is not the same person whose name was stated in the F.I.R. and due to lack of any M.L.C. report and medical papers of the appellant with the charge sheet - Further because of lack of deposition of any doctor in support of documents**

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# FAREWELL

***HON'BLE MR. JUSTICE A.K. SHRIVASTAVA***

Born on January 31, 1952. Did B.Sc. and LL.B. Was enrolled as an Advocate and started practise in the year 1976. Practised in all fields like Constitution, Civil, Criminal and Labour etc. Mainly practised in High Court and in Supreme Court of India. While practising as an advocate was Standing Counsel for several industries and companies like J.K. Tyre, SRF company, Punj Alloyd Company, Gwalior Dugdh Sangh, Gwalior Sugar Factory, M.P. State Road Transport Corporation, Cadbury India Ltd., Jiwaji Rao Cotton Mills, Grasim Industries, CIMCO, J.B. Mangharam, Hotline Teletubes, Hotline Glass etc. Was also appointed as Sole Arbitrator in some cases.

Elevated as Additional Judge of the High Court of Madhya Pradesh on September 2, 2002. Appointed as permanent Judge on September 8, 2003 and demitted office on January 30, 2014.

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

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## FAREWELL OVATION TO HON'BLE MR. JUSTICE A.K. SHRIVASTAVA GIVEN ON 30-01-2014 IN THE CONFERENCE HALL OF HIGH COURT OF M.P. AT JABALPUR.

**Hon'ble Mr. Justice A.M.Khanwilkar, Chief Justice, bids farewell to the demitting Judge:-**

We have assembled here to bid a warm and affectionate farewell to Hon'ble Shri Justice Akhil Kumar Shrivastava, who will be demitting office today on attaining the age of superannuation.

Justice A. K. Shrivastava was born on 31st January, 1952 on the auspicious day of Vasant Panchami. After graduating in Science from Jiwaji University, Gwalior in 1973 Justice Shrivastava earned the degree of Law in 1976. The same year he got himself enrolled with the Bar Council of Madhya Pradesh and joined the chambers of Shri B. C. Verma, Advocate, who was later on elevated as Judge of this High Court and thereafter appointed as Chief Justice of Punjab and Haryana High Court.

Justice Shrivastava hails from the family of lawyers and judges. His father Late Shri J. P. Shrivastava was an eminent lawyer of Gwalior. His grandfather Babu Parmeshwar Dayal Shrivastava was also a renowned personality of Gwalior. He practiced in the erstwhile High Court of Gwalior State and was member of Majlis-I-Qanoon and Majlis-I-Aam and also a pioneer in Lexicography as he compiled the very first English Hindi Law Dictionary in the year 1939. His uncle Shri Justice Shiv Dayal Shrivastava was Chief Justice of this Court.

Justice Shrivastava joined the chamber of his father in 1977 and thereafter continued to practice at Gwalior till his elevation to this High Court. Justice Shrivastava enjoyed an outstanding career at the Bar. He practiced in all branches of law - Civil, Criminal, Constitutional and Revenue. He was standing counsel for various bodies including Madhya Pradesh State Road Transport Corporation, Uttar Pradesh State Road Transport Corporation and United India Insurance Corporation.

Recognizing his merit and legal acumen, brother Shrivastava was elevated as an Additional Judge of the High Court of Madhya Pradesh on 2nd September, 2002 and thereafter appointed as permanent Judge on 8th September, 2003.

Justice Shrivastava, in his reply to the welcome ovation, extended to him at the time of his elevation, had said that-

*"while joining as a Judge of this Court, he was reminded of the four-fold responsibilities of a Judge in the words of*

*Socrates -*
*to hear courteously,*
*to answer wisely;*
*to consider soberly; and*
*to decide impartially and expeditiously."*

Justice Shrivastava in his career as a Judge of this Court has meticulously followed these principles.

Justice Shrivastava not only possesses vast knowledge of law but also of subjects of general importance. His wisdom, learning, courtesy,grace and razor sharp judicial mind is manifested in his judicial work. During his tenure, he has rendered several land mark Judgments which adorn the Law Journals.

Justice Shrivastava besides doing exemplary judicial work also contributed in administrative matters of the High Court. He was Adm. Judge of Gwalior Bench from 26-12-2009 to 16-01-2011. He remained associated with various Administrative Committees of the High Court and was also member of the Rule Making Committee of the High Court. He was also most sought after faculty member of the State Judicial Academy and delivered several lectures on varied topics.

Justice Shrivastava is the embodiment of most desirable qualities reasonably expected of a Judge and indeed of a noble human being. Thus, he commanded enduring respect and admiration of the members of the Bar.

Justice Shrivastava epitomises the dictum of Thomas Jefferson, who in his letter to George Wythe observed:

> "Judges.....should always be men of learning and experience in the laws, of exemplary morals, great patience, calmness and attention; their minds should not be distracted with jarring interests; they should not be dependent upon any man or body of men."

Justice Shrivastava, amongst his colleagues is known for his wits and sense of humour and also to be kind hearted, honest, frank and full of love and compassion.

I found Justice Shrivastava to be very supportive both on the Bench as well as of great help in administrative matters. He always gave his unflinching and meaningful support and advice in the interest of the Institution as well as of the common man. I found his advise to be selfless and without any bias.

Besides the academic and professional achievements, His Lordship has

keen interest in Social Work and Spirituality.

His Lordship has indepth knowledge of commandments of Ramayana and Bhagwat Gita.

The vacuum caused because of departure of Justice Shrivastava, would be a big loss to our High Court as well as the common man of Madhya Pradesh, for whom, Justice Shrivastava has served selflessly.

Cathrin Pulsifer says - retirement, is a time to do what you want to do, when you want to do it, and, how you want to do it.

I am sure, Justice Shrivastava would make most of his time hereafter with Dr.(Mrs.) Vineeta Shrivastava, his life partner, who is present amongst us here and has been a guiding force for him. Justice Shrivastava will also be able to share some happiest moments with his son Pavan Kumar Shrivastava, Sameer Kumar Shrivastava,daughters-in-law Deepali Shrivastava and Deepshikha Shrivastava.

I on my behalf and on behalf of my esteemed brother Judges and the Registry of the High Court, wish Justice Shrivastava and his family members a very happy, prosperous and glorious future.

"Jai Hind"

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**Shri R.D. Jain, Advocate General, M.P., bids farewell :-**

We have assembled here this afternoon to bid farewell to My Lord Hon'ble Justice A.K. Shrivastava. Though all of us know the date of retirement of a judge on the date of his appointment, in some cases we feel that date would never come and when it arrives we feel sad. Today is one of those days.

Justice A.K. Shrivastava hails from the family of Late Babu Parameshwar Dayal Shrivastava, grandfather of Shri A.K.Shrivastava who was an eminent Jurist and was a member of "Majlis-I-Aam" and "Majlis-I-Kanoon" of the Gwalior State. He worked on publishing legal Journals in Hindi. He was a veteran jurist of Gwalior.

Father of Shri A.K.Shrivastava Late Shri Jagnnath Prasad Shrivastava was one of the most popular and distinguished Advocate of Gwalior. His "Tauji" Ex- Chief Justice Shri Shiv Dayalji had genuine and respectful affection for the members of the Bar. Justice A.K. Shrivastava has also embodied qualities of these renowned predecessors in the field of law.

Enrolled as an Advocate in July 1976, joined the Chamber of Shri B.C. Verma of Jabalpur who later became a Judge of this Court. For some time he also

worked as part time law professor in MLB College, Gwalior.

After joining the profession in the year 1976 Shri A.K. Shrivastava continued to touch heights and never looked behind. You had the courage of conviction and with your thorough preparation in marshalling of facts of the case supported by case law you had been presenting your client's cause before Hon'ble Judges with clarity and effortless ease. Thus you soon became pioneer in the field of advocacy.

As a judge your Lordship endeared one and all. Irrespective of seniority at the Bar, your Lordship treated all advocates alike. In the Court members of the Bar had to be thorough on facts and law and usually Your Lordship used to update new comers with the recent trend of law, a practice adopted by my Lord right from the beginning.

A fearless Judge, a sincere conscientious and a painstaking Judge, a Judge who was good and kind to the Junior-most appearing before Your Lordship and respectful to the seniors in the profession and above all, a Judge who by sturdy independence upheld the highest traditions of the High Court. Your Lordship's sense of respect to the senior members of the Bar was proverbial and you never let them waste time in the court. In personal relations with the members of the Bar and the public Your Lordship has been extremely courteous and you were always anxious to show sincere interest in the Court upholding the superiority, of law. Your Lordship exhibited rare qualities of being sweet in temper, courageous and considerate, capable, sympathetic yet very strong.

Your lordship possessed all characteristics which a Judge should possess and in future your life would be such as conceived by great poet Bharathiyar:

"O mind, Be firm in your principles and speech. Be pleasant and refined. Cherish noble thoughts and may cherished desires be attained. May your dreams come true. May you achieve your future goals quickly".

Your Lordship worked as an Advocate for almost 26 years before elevation on 2nd September 2002 and has been discharging duties as a judge for about 11 years. Taking successful years in calculation, it can be said that you have about one half of the total number of years on the Bench then what you have spent at the Bar. But if we assess the two terms by reference to performance we can safely say that the volume and merit of performance in terms of weight has been double on the Bench then what was exhibited at the Bar.

As a Judge your Lordship had occasion to deal almost every branch of law. Justice never failed in the court under any circumstance. Your Lordship has

left an indelible mark in this court and when posterity will go through your judgments they will admire your Lordship's profound knowledge of law and cogent and convincing reason in coming to a particular conclusion.

The strength of judiciary lies in public confidence, which in turn depends upon good relation ship between the Bar and the Bench and honest, sincere discharge of duties while performing the function by each of them with probity.

Though your Lordship would be retiring from the Bench today, I am sure your Lordship's learning and knowledge would be available to society in general and advocates in particular in some form or the other and you would continue to serve the cause of justice in the times to come. In that sense it is not a farewell address but it is a farewell to your Lordship from the High Court work only.

In the words of Justice D. M. Dharmadhikari "being a Judge is a difficult and responsible job making intellectual and moral demands. Unlike most others they do not and should not seek popularity". Your Lordship followed this difficult task with perfection.

It would be appropriate to refer the speech of Justice R.C. Lahoti who spoke on the occasion of Dr. Justice Shiv Raj Patil's farewell as under :-

"We do not like to compliment his Lordship by writing the usual cant that there was never a breeze in his Lordship's Court. In the case of Lordship, we have witnessed many a positive department. His ever smiling countenance and the depth and intensity of his learning and these are aspects one will like to cherish proudly."

On the occasion of elevation your Lordship expressed the working method of a Judge in religious perspective in the following words:

> "It shall be my endeavour to seek Thee in my action knowing that it is Thy power which gives me strength to act".

Your strong regard for Hindu ideals is borne out by the above expression and we have seen that you always bowed with deep respect to the judgment seat before starting the work giving holistic touch to your judgments. Further, this campus and the members of the Bar will always remember a simple person in you bowing down and seeking blessings of Lord Hanuman every evening before leaving the Court premises after the court work is over.

This religious attitude was the principle force which guided Your Lordship in performing function as a judge.

Usually it is customary to refer landmark judgments of the judges. Your decision in Jeevanlal Vs. Deepchand laid the scope of a compromise degree and it

was emphasized that a compromise can also be arrived at in relation to the property which is not the subject matter of the suit. This judgment reduced the possibilities of unnecessary litigation. In the case of Agrawal Trading Company Vs. State the judgment was given upholding the rights of elected bodies. The parameters of negligence have been vividly explained in the case of Santosh Devi Vs. State and in the case of Rajendra Prasad Vs. Union of India the effect of fraud on insurance has been dealt with, explaining the scope of liability in such cases.

The judgments delivered by Your Lordship speak volume about the thrust to deliver Justice to the litigants.

To bid farewell is always very sad and specially when you say good-by to one whom you like and admire most and I am feeling the pinch of this moment.

On behalf of the Government of Madhya Pradesh and Law Officers of the State and on my own behalf I wish my Lord and your family, healthy happy and long life.

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

This is the sweet spring time. The flowers appear on the dew-pearled earth, the birds on their wings are singing the melodic songs, the wind is odorous with blooming of roses; but it is today the old misty autumn for all of us; as we have congregated here to bid a farewell to Your Lordship Shri Justice Akhil Kumar Shrivastava born on auspicious day of 'Basant Panchami', the day of love on wings; on your demitting the High Office of a Judge of this High Court.

Your Lordship have born on 31st January, 1952 and did your B.Sc. and LL.B.; Joined practice as an advocate being enrolled in year 1976 with State Bar Council of Madhya Pradesh and practised for a while in High Court of M.P. at Jabalpur after joining the chamber of Shri B.C. Verma, Advocate, a great lawyer of his time and now retired Chief Justice of Punjab and Haryana High Court and thereafter, started practice at Gwalior Bench of this High Court. Your Lordship belong to a family of great tradition of lawyers and your elder father Shri Justice Shiv Dayalji was Chief Justice of this High Court of M.P.. Your Lordship practiced on all disciplines of law like Constitutional Law, Civil Law, Criminal Law, Labour Law, in field of service jurisprudence and arbitration law etc. in High Court of M.P. as well as Supreme Court.

While practicing as an advocate Your Lordship were Standing Counsel for several industries and companies like J.K. Tyre, SRF company, Punj Alloyed

company, Gwalior Dugdh Sangh, Gwalior Sugar Factory, M.P. State Road Transport Corporation, Cadbury India Ltd.; Jiwaji Rao Cotton Mills, Grasim Industries, CIMCO, J.B. Mangharam, Hotline Teletubes, Hotline Glass etc. and was also appointed Sole Arbitrator in some cases.

Your Lordship adorned the High Office of a Judge of this High Court on 2nd September, 2002; and during last about an era of twelve years decided several cases on each side of law-field; constitutional, civil, criminal with equal competence. As a Judge Your Lordship had the quality of adapt quickly and have rendered qualitative Judgments of great importance and long lasting legal effects. Your ideology as a Judge comes across as two things - pristine pure and innocent, full of great lofty ideas and sincere Judgments, human and emotional towards those who as a last ray of hope knocked the doors of this Temple of Justice. Your Lordship have juxtaposed your dreams with your experience while imparting substantial Justice, sometimes even by breaking the rigid norms and hyper technicalities of law; as sentient, sensitive and sensible Judge. Your Lordship were always humorous, soft-spoken and rational while on Board and always helpful like a great teacher to young and junior lawyers; which always created a ravishing atmosphere of top flight nature in the court room and a lawyer never returned from your court room in a tensile mood. Your rule was never one laws for the lion and an ox. Rousseau says :-

"All Justice comes from God, He alone is its source."

It is why the seat of a Judge is praised as a godly seat and in Indian culture, the Court of Justice is always regarded as a 'Temple of Justice', and in words of Cicero :-

"The Justice is the crowning glory of the virtues."- and your Lordship have maintained this gory of the virtues in your entire tenure of 12years; and it is why the entire Bar loves and respects you as a true sentinel of Justice. This love is the crowning grace of humanity, the holiest right of the soul and the golden link of attitude which binds the Bench and the Bar with the heart of life prophetic of eternal good. Your Lordship have all the seven colours of spectrum of light the patience, kindness, generosity, courtesy, sincerity, unselfishness and humility.

Your name 'Akhil' stands for the English word 'infinite', having no limits, no bounds, a grand space in whose expansion everything pervades. 'Akhil' is attributed to the God as 'Akhil Brimhand Nayak', as He is Infinite Existence, Infinite Knowledge and Infinite Bliss and He regards these three as one ; and your personality and qualities resembles your name to its infinite character. This is an endless song of your life. The great writer Mark Twain says :-

"Praise is well, compliment is well, but affection that is the last and final and most precious reward that any man wins, whether by character or achievement ".

And it is that affection on our part to your Lordship, a reward from the Bar forever and would be everlasting. We all wish you a precious life in future and let each day provide you its own pleasure.

"जीवेद् शरदः शतम्"

You live long for one hundred years and more and more to keep your future resolutions with enduring physical and mental energies fluttering on golden wings. The entire Bar joins me in such feelings towards Your Lordship.

At this Juncture, we the Members of M.P. High Court Bar Association express our deep gratitude towards Your Lordship, Hon'ble the Chief Justice for the vital changes brought into the system of this High Court for betterment in administration of Justice and your dynamic approach to deal with under-achievements and non performance and to keep the entire system energized. Your Lordship are an infinitely renewable source of energy for the entire High Court and we hope that your efforts will bring marvelous results. The surge may take some time for new changes to work its way through the long lasting system, but it will surely be proved effective. Your Lordship have experimented a lot with new visions by breaking the stagnant norms, designing mechanisms and implementing it successfully within no time. In the words of William Shakespeare in 'Julius Caesar', we may say :-

"You came, You saw, You conquered."

And more than that Your Lordship have conquered our hearts as well, by your ever-smiling face, and your commitment towards better relationship between the Bench and the Bar.

And at last our enshrined sentiments to Your Lordship :-

"खग कलरव से अम्बर भरकर।
कलियों को पुष्पित सुरभित कर।।
कण कण में अखिल राग भर कर।
फिर गाये विरह गीत निष्ठुर।।
पवन वसन्ती जोगी बनकर।
किस डगर चले वैराग्य धरे।।"
With all regards.

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**Shri D.K. Dixit, President, M.P. High Court Advocates' Bar Association, bids farewell :-**

Today we are bidding farewell to Hon'ble Shri Justice A.K. Shrivastava who is demiting the office on 30/01/2014 and that is why we have assembled today in this ovation.

My lords I recollect the memory of ovation when my lord Hon'ble Justice took oath and ovation followed as if it was just yesterday. Time passes very fast.

In fact it is the time who regulates this world. If we go in the past, we all have witnessed the ovation of my lord Hon'ble Shri Justice A.K. Shrivastava when he took oath of the office of the judge of this August institution and today the circle of time is complete. Everybody has to face this moment and it is inevitable. But some are really unforgettable creates history Hon'ble Shri Justice A.K. Shrivastava is one of them; he will be remembered by one and all for all the time to come.

My lord Hon'ble Shri Justice A.K. Shrivastava played his role of a judge and must be remembered in the annuals of the history of this great institution Honble Shri Justice A.K. Shrivastava possessed all the qualities of a good judge and to appear before him was always an experience of learning and knowledge.

Hon'ble Justice A.K. Shrivastava born on 31/01/1952, obtained the degrees of B.Sc. and LL.B. and joined the profession, appointed as Additional Judge on 02/09/2002 and permanent Judge on 08/09/2003. Before elevation while practicing he worked in all the fields of law and was a very successful lawyer. He was appointed sole arbitrator in so many cases. As on today he has completed almost 12 years as a Judge.

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 bad treatment in his court.

My lord Hon'ble Shri Justice A.K. Shrivastava as a Judge delivered several landmark judgments which are published in the law journal in golden words, quite helpfull for the lawyers and it is sure that Hon'ble Shri Justice A.K. Shrivastava will always be remembered for his contribution in the legal field.

I on behalf of the members of High Court Advocates' Bar Association and on my own behalf convey our good wishes to Hon'ble Justice A.K. Shrivastava and his family and pray to god to give him good health and prosperity in future life. I also request him to make himself available for us whenever we remember him and keep himself busy in catering the need of society at large.

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

माननीय न्यायमूर्ति श्री अखिल कुमार श्रीवास्तव काफी लंबे समय तक अधिवक्ता के रूप में मध्यप्रदेश उच्च न्यायालय की सभी खंडपीठों सहित उच्चतम न्यायालय में सफलतापूर्वक कार्य करने के उपरांत दिनांक 2.9.2002 से मध्यप्रदेश उच्च न्यायालय की विभिन्न खंडपीठों में न्यायमूर्ति के रूप में न्यायदान का कार्य सफलतापूर्वक निर्वहन किया। इसके लिये मध्यप्रदेश राज्य अधिवक्ता परिषद की ओर से एवं स्वयं अपनी ओर से मैं आपको धन्यवाद व साधुवाद देता हूं।

माननीय न्यायमूर्ति श्री अखिल कुमार श्रीवास्तव विधि की सभी विधाओं से ओतप्रोत है, व उन्होंने जितने सफलता से विधि की सभी विधाओं की सूक्ष्म परख रखकर त्वरित न्यायिक निर्णय दिये, वह आने वाली पीढ़ी के लिये प्रेरणा स्त्रोत होंगे। न्याय जगत में आने वाली पीढ़ी न्यायमूर्ति श्रीवास्तव की विधि की पारंगतता से सीख लेगी। उनके संयमित मधुर व्यवहार एवं विभिन्न न्यायालयों के न्यायिक निर्णयों की अध्ययनशीलता व रोजमर्रा की कार्यवाहियों में उपयोगिता की विशिष्ट शैली से भी आने वाली पीढ़ी को मार्गदर्शन प्राप्त होगा। हम सब आपकी उक्त शैली से वंचित हो रहे हैं, इसका हमें अफसोस है लेकिन जैसा कि आपकी बातचीत से ज्ञात हुआ कि अभी विधि जगत की सेवा की तीसरी पारी उसी तन्मयता से शुरू करेंगे, इसके लिये हम सभी आशान्वित हैं, कि अभी विधिक जगत को आपके ज्ञान का लाभ प्राप्त होता रहेगा। मध्यप्रदेश राज्य अधिवक्ता परिषद की ओर से एवं स्वयं अपनी ओर से आपकी नयी शुरूआत की सफलता हेतु ईश्वर से कामना करता हूं, आप विधि जगत में ध्रुवतारा जैसे उदीयमान हों, व आपकी सफलता की शुभकामना के साथ आपके द्वारा मध्यप्रदेश के न्यायिक जगत को दिये गये योगदान के प्रति कृतज्ञता व्यक्त करता हूं।

धन्यवाद।

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**Shri Rashid Suhal Siddiqui, Asstt. Solicitor General, bids farewell:-**

We have assembled here today to bid farewell to one of our eminent Judge Hon'ble Justice Shri Akhil Kumar Shrivastava on his last working day at Jabalpur High Court. Your lordship was born on 31 Jan 1952 at Gwalior. His father Late Jagannath Pd Shrivastava was a lawyer who practiced in High Court Bench at Gwalior. Your lordship did his graduation and LLB from Gwalior and started practice in the year 1976. Your lordship has specialized in Civil/ Criminal / Labour /Constitution including all types of service matter. Your lordship mainly practiced in High Court as well as Supreme Court of India.

Your lordship took oath as Additional Judge on 02 Sep 2002 and thereafter appointed as permanent judge on 08 Sep 2003. During long period of 12 years as a judge of High Court of Madhya Pradesh, your lordship has decided several cases on all branches of Law.

Your lordship is a courteous, multilingual judge with a great sense of humor. He is known for his intelligence, hard work and punctuality. He is a thorough gentleman both in and outside the court. He treats all with the same standard without bias or favour. Your lordship is a simple and moderate person. Known for his integrity, hard work and judicial reticence, a man full of wisdom, self imposed discipline and loved by many people as he stood for what he has decided. He is known for his ruthless candour.

There are lesser numbers of Judges who are remembered after they demit their office and Hon'ble Justice Shri Akhil Kumar Shrivastava is one of them, whose memory would continue in the minds of advocates, often orthodox never controversial and a believer in equitable dispensation of justice. Your Lordship has become an ideal in his own way, several controversial issues were solved by your Lordship's judgments. On every subject your Lordship interpreted the law in such a manner that the purpose and object of law maker is not frustrated.

He had a way of making everyone comfortable with his wit and compassion. He will be sadly missed. I wish him all the best for his post retirement life.

I on behalf of Government of India, all the Law Officers of Central Government and on my own behalf, express our best wishes for good health, happiness and peace for the days ahead.

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

Today we have assembled here in this conference hall of South Block of the High Court to bid farewell to My Lord Justice A.K. Shrivastava. My Lord belongs to an illustrious family of Gwalior. Your Lordship's uncle Late Justice Shiv Dayal Shrivastava was a Chief Justice of this Court. After a distinguished career a Judge of this Court you are retiring today the 30th January 2014. You were appointed as a Judge of MP High Court on 02/09/2002. Prior to your elevation you were an eminent member of Gwalior Bar and had a lucrative practice. Every Judge has his own way of working and so you do. Your Lordship was quick to understand a case and came to prima facie conclusion in no time. You performed your judicial duty with all judicial norms, culture and decorum. The judgments delivered by your Lordship as reported in the law reports, show your deep understanding of law and learning. My Lord, I am reminded of an anecdote when a Chief Justice remarked to an Advocate, "it is high time you should become a Judge". The Advocate said "Sir I am a fine speaker and cut out for profession and not for a Judge's role, don't you see intelligence on

my face." After a split of a second the CJ gave a hearty laugh and said "You don't see it on my face Mr. Advocate."

Your Lordship was always cordial and courteous to all, we will miss you. There is enough strength and energy left in your lordship. Your Lordship can perform public service and also work in other avenues. An essay always remembered by Nani Palkiwala, the towering colossus of Bombay Bar and of lawyer's fraternity and I quote a part from it "Nobody grows old by merely living in number of years, people grow old only by deserting their ideals. Years wrinkle the skin but to give up enthusiasm wrinkles soul. Worry, doubt, self-interest, fear and despair these are the quick equivalents of the long-long years that bow the head and turn the growing spirit back to dust. Whether 70 or 16 there is in every being's heart, the love of wonder, the sweet amazement of star and star like things and thoughts, the undaunted challenge of events, of unfailing childlike appetite for "What Next". unquote.

These wise words spoken will remind your Lordship in times to come to remain young and energetic. On behalf of Senior Advocates Council and on' my own behalf I wish your Lordship and all the family members well and pray God that he may provide your Lordship excellent health and a long happy life.

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**Farewell speech delivered by Hon'ble Mr. Justice A.K. Shrivastava :-**

The sentiments and the words, which you have expressed, indicate your greatness coupled with the affection towards me. I do not know how far I succeeded on the touchstone which you have expressed about me but my entire endeavour for last 12 years was to serve the humanity with the best of my abilities within the four corners of the law and to decide the cases on the anvil of the four tests which are laid down for a Judge by Socrates :-

(i) to hear courteously;

(ii) to answer wisely;

(iii) to consider soberly; and

(iv) to decide impartially.

I would like to quote few lines quoted by Aristotle:

*"The public looks upon the Judges as living justice that is, justice personified."*

When there is no justice there can be no peace, no welfare, no liberty, judiciary is the backbone of democracy.

James Bryce, once said:

*"Law will never be strong or respected unless it has the sentiment of the people behind it. If the people of a state make bad laws, they will suffer for it. They will be the first to suffer. Suffering, and nothing else, will implant that sentiment of responsibility which is the first step to reform."*

Let me go back to the days when I was 6-7 years old child. During those days, I saw my revered uncle Late Hon'ble Shri Justice Shiv Dayal Ji when he was a practising lawyer and my father Late Shri J.P. Shrivastava, Advocate going together wearing black coat in the car to the High Court. The impact of their personality in the robes had sown the seed of law in my mind to become a lawyer. Although my revered uncle and my parents were keen to see me as a surgeon but when I expressed my desire to become a lawyer, the only view which they expressed with the bliss on their faces that if I want to accept the noble profession of my family then I have to work like a horse and to live like a hermit.

It was the Kripa of the Almighty that I was born in the family of lawyers. My grandfather Late Babu Parmeshwar Dayal Ji was a senior lawyer of the High Court of the erstwhile Gwalior State. Indeed, in my family the seed of advocacy was sown by him in the year 1916. He heavenly abode on 11th July, 1939. Before he left this world and refuged permanently in the lotus feet of the Almighty, my revered uncle Shri Shiv Dayal Ji joined the Bar in the year 1938 and started his career as lawyer with my revered grandfather. Needless to say that my uncle after having practised for two decades adorned the seat of Judge of this prestigious High Court on 3rd November, 1958 and thereafter he played another very successful inning of two decades to serve this prestigious High Court. He ultimately demitted the office while holding the post of Chief Justice of this Court on 27th February, 1978. Indeed, before he was elevated to the Bench my revered father Late Shri J.P. Shrivastava Ji joined his hands with my uncle in the year 1951 and started practice with him.

On 1st January 1977, I joined my hands with my revered father in the profession. Earlier to it from 28th June, 1976 to 31st December, 1976 I was in the Chamber of Hon'ble Shri Justice B.C. Verma Ji for whom I am having great respect. These two great personalities moulded me in the shape of lawyer and

played the role of Guru Vashishth and Vishwamitraji in my life.

I would also like to mention that I owe a great respect in the lotus feet of my revered father Late Shri J.P. Shrivastava Ji for another reason that he was also my Guru when I was a law student since he was a part-time law professor and taught me various subjects of law during the year 1973 to 1976. After becoming lawyer when I asked my father how to prepare a case, in answer he told that similar type of question was asked by Arjun to Lord Sri Krishna in Chapter-II of Srimad Bhagavad Gita and I quote it:

*अर्जुन उवाच–*

*स्थितप्रज्ञस्य का भाषा समाधिस्थस्य केशव।*

*स्थितधीः कं प्रभाषेत किमासीत व्रजेत किम्।।54।।*

I would also like to mention its meaning:

***Arjun asked:***

*O Keshav, what are the characteristics of one who is accomplished in meditation and steady in intelligence? How does such a steady person speak? How does he sit? How does he move?*

Indeed, in Chapter-2 of Srimad Bhagavad Gita, this conversation between Arjün and Yogeshwar Sri Krishna is known as "स्थितप्रज्ञा के लक्षण" in which Lord Sri Krishna explained what are the characteristics of a steady person. This anxiety and query of Arjun was explained by Yogeshwar in several Shlokas but my revered father told me that I should prepare the case as explained by Lord Sri Krishna in *Shlok* 58, which I would like to quote:

यदा संहरतेचायं कूर्मोऽगानीव सर्वशः।

इन्द्रियाणीन्द्रियार्थेभ्यस्तस्य प्रज्ञा प्रतिष्ठिता।।58।।

I would also like to explain its meaning in English:-

*'And when he completely controls his senses and keeps them away from their objects, like a tortoise drawing its limbs within its shell, his wisdom stands steady.*

Needless to say that by the grace of Almighty I was elevated to this Bench on 2nd September, 2002 and now my son Shri Sameer Kumar Shrivastava has joined this noble profession in July, 2008. I feel proud to say

that to share the responsibility of the profession of advocacy the Almighty has given another hand to my son when he got married with Saubhagyawati Deepshikha who before the marriage was a practising lawyer in the High Court of Jharkhand at Ranchi and now she is also practising in the High Court at Gwalior Bench. I am having proud to share with you that in my family the profession of advocacy is nonagenarian and will soon reach the target of centenarian after two years in the year 2016.

I am feeling proud to say that the first English Hindi Law dictionary given to this Nation was written by my late grandfather Babu Parmeshwar Dayal Ji in the year 1939, which was also kept in the exhibition of the Golden Jubilee celebration of High Court. I would also like to share this golden moment with you that there is a history why the said dictionary was written by my grandfather. Indeed, somewhere earlier to 1930 when the laws of Gwalior were being enacted, the then Ruler His Highness Late Madhao Rao Scindia (grandfather of Late Madhav Rao Scindia) openly in Darbar gave a verdict that the law of the country should be enacted in the language which is known to the public at large and not in English language. In Gwalior State Hindi language was being spoken by the public at large. But there was a big question mark that how these difficult legal English words could be translated in Hindi language and that too with authenticity having its hallmark in the field of law. Indeed, my grandfather accepted the said challenge and devoted his entire life to prepare the English-Hindi law dictionary. My late uncle Hon'ble Shri Justice Shiv Dayal Ji gave a new look to it in the year 1970 and thereafter its revised edition was also published in the year 1975.

Indeed, judicial traditions of Gwalior have been great. They are not built within a year or few but it requires generation to be established. The High Court in Gwalior State was established in the year 1894. In the year 1911, the High Court Judicature Act of Gwalior State was enacted and came into force. The credit goes to the rulers of Gwalior State for establishing the High Court for the people at large of that State,. The senior Bar members would be knowing, but, in brief I would like to mention to young members of the Bar who might not be knowing that there was a complete separation of judiciary from the executive in Gwalior State and the judiciary was totally independent in the sense that executive never tried to interfere in the judicial process. In that regard the Darbar Policy relating to Legislative and Judicial department Vol. VII may be seen. The Ruler was also paying great respect to the judgment of the High Court and never passed any administrative order from Darbar to overrule the judicial verdict. After the

independence the High Court of Gwalior State was merged into Madhya Bharat High Court in 1948 and Principal Seat of Madhya Bharat High Court was at Gwalior. Similarly, the Indore State also had the High Court. On coming into force of State Reorganization Act from 1st November, 1956 the Madhya Bharat High Court was converted into benches at Gwalior and Indore of the Madhya Pradesh High Court.

I will be demitting the office of this prestigious High Court on the last moment of today's golden date and again will join the Bar which I always treat it to be my family. Because I am going to join my family, now I will share my sentiments with you in my own family language which certainly you people will also like and therefore, now I will shift to speak in Hindi.

अभिभाषक मित्रों एवं सम्मानीयजन मुझे आज उसी प्रकार हर्ष का अनुभव हो रहा है जैसे एक विद्यार्थी अपनी शिक्षा को पूर्ण करके पुनः वापस अपने परिवार में हर्ष एवं उमंग के साथ जाकर मिलता है। इसमें लेशमात्र भी संदेह नहीं है कि अभिभाषक की महत्वपूर्ण भूमिका न्यायदान के निष्पादन के कार्य में होती है और उसके महत्वपूर्ण योगदान के बिना न्यायदान किये जाने का स्वप्न भी प्रतिफल रहित है। मित्रों जब मेरे पूज्य ताउजी पूर्व मुख्य न्यायाधीश स्व. श्री शिवदयालजी ने अभिभाषकीय कार्य प्रारंभ किया था तब मेरे पूज्य पितामह बाबू परमेश्वर दयालजी ने उनसे कहा था कि वे बाबू भगवान स्वरूप अभिभाषक जो कि ग्वालियर राज्य के एक सुविख्यात अभिभाषक थे की बहस के समय न्यायालय में उपस्थित रह कर उनकी बहस का मनन किया करें। मेरे पूज्य पिताश्री ने जब अभिभाषक के रूप में मेरे पूज्य ताउजी के साथ वकालत का व्यवसाय प्रारंभ किया तब उनके निर्देश पर वे श्री बाबू भगवानस्वरूप, श्री भगवानदास गुप्ताजी, श्री बाबूलाल अग्रवाल, श्री जी.पी. पाटनकर अभिभाषकों के तर्कों का श्रवण करने के लिए प्रेरित करते थे। उसी प्रकार मेरे पूज्य पिता श्री ने मुझे निर्देशित किया कि मैं श्री भगवानदासजी गुप्ता, श्री बाबूलालजी अग्रवाल, श्री हरिहर निवास द्विवेदी, श्री रामकृष्ण दीक्षित, वरिष्ठ अभिभाषक श्री जे.पी. गुप्ताजी, सहस्त्रबुद्धेजी, श्री स्वामी शरण जी एवं श्री आर.डी. जैनजी, जो कि वर्तमान में एडवोकेट जनरल है के तर्कों को श्रवण किया करूं। स्व. श्री हरिहर निवास द्विवेदी जी ने मेरे पूज्य पितामह बाबू परमेश्वर दयाल के साथ उनके अंतिम समय तक कनिष्ठ अभिभाषक के रूप में काम किया था। यहां यह कहने की आवश्यकता नहीं है कि श्री द्विवेदीजी एक सुप्रसिद्ध न्यायविद् होने के साथ साथ साहित्य वाचस्पति भी थे। उन्होंने म.प्र. लैण्ड रेवेन्यू कोड, सीलिंग ऑनएग्रीकल्चर होल्डिंग एक्ट आदि जैसी अनेक पुस्तकें लिखकर विधि जगत की सेवा की है। उनके स्वर्गवास के 20 वर्षों के लंबे अंतराल के पश्चात अभी तक एक अच्छे लेखक की पुस्तक म.प्र. लैण्ड रेवेन्यू कोड तथा सीलिंग ऑन एग्रीकल्चर होल्डिंग एक्ट पर आना शेष है।

स्वर्गीय श्री गोविंद राव गर्दे, अधिवक्ता, जो कि मेरे पूज्य पितामह के काल के सुप्रसिद्ध अभिभाषक थे, के विरूद्ध राजस्व मंडल में मुझे एक प्रकरण में बहस करने का मौका मिला। मेरे परिचय देने पर वे अत्यंत प्रफुल्लित हुए और विशेष आशीष वचन दिये।

अपने अभिभाषकीय व्यवसाय के दौरान मैंने प्रकरण की तैयारी एवं किस प्रकार बहस की जानी चाहिए, अपने पूज्य पिता स्व. श्री जे.पी. श्रीवास्तव जी से सीखी और मैं आजीवन उनका ऋणी रहूंगा।

कई अभिभाषक मित्र बहस के दौरान मुझसे पूछते थे कि मुझे रूलिंग्स पृष्ठ सहित जुबानी याद कैसे रहती है तो मैं उन्हें बताता था कि यह कला मैंने अपने पूज्य पिताजी से ही सीखी है। मैं पूर्व मुख्य न्यायाधिपति स्व. श्री शिवदयाल का आजीवन ऋणी रहूंगा। जब भी न्यायदान में मैं किसी विधि के क्लिष्ट बिन्दु की गुत्थी सुलझाने में उलझ रहा होता हूं तो हमेशा उनके निर्णय ने मुझे प्रकाशित किया है।

अपने कार्यकाल में मुझे प्रत्येक अभिभाषक चाहे वह वरिष्ठ अभिभाषक हो या कनिष्ठ का भरपूर सहयोग जबलपुर, ग्वालियर एवं इंदौर में मिला है। मैं उनके तर्कों के श्रवण से हमेशा लाभांवित हुआ हूं। मैं यहां यह उल्लेख करना उचित समझता हूं कि इन तीनों स्थानों के अभिभाषकों ने भी मेरा हमेशा ही ज्ञान वर्द्धन किया है और उनके तर्कों के श्रवण से मैं हमेशा लाभांवित हुआ हूं।

मैं नये अभिभाषकों को यह संदेश देना चाहता हूं कि प्रकरण की तैयारी उत्साह एवं लगन के साथ निम्न पांच सूत्रों पर किया करें।

1. You win the case.
2. You win the Court.
3. You win the opposing counsel
4. You win the client and
5. You win yourself.

आज जब मैं इस गरिमामय पद से विदा ले रहा हूं तो मुझे पूर्व मुख्य न्यायाधिपति श्री भवानीसिंह जी, माननीय न्यायमूर्ति स्वर्गीय श्री एस.पी. श्रीवास्तवजी एवं पूर्व मुख्य न्यायाधिपति श्री राजीव गुप्ताजी का विशेष स्मरण हो रहा है, जिन्होंने मुझ में जो भी गुण थे उनको परखते हुए इस गौरवमयी पद से लिए उपयुक्त समझकर मेरे नाम को अपने कॉलेजियम के माध्यम से स्वीकृति दी थी। माननीय न्यायमूर्ति श्री कुमार राजारत्नमजी का भी आभारी हूं जिन्होंने मुझे स्थायी न्यायमूर्ति के पद की शपथ दिलायी थी। मेरे कार्यकाल में मेरे उपर तत्कालीन मुख्य न्यायाधीश श्री आर.व्ही. रवीन्द्रन एवं श्री ए. के. पटनायक जी ने अमिट छाप छोड़ी है।

न्यायालय आने के पूर्व मेरी परमपिता से यही प्रार्थना रहती थी कि मैं सभी दुखी एवं पीड़ित प्राणियों का दुख दूर करना चाहता हूं।

**न त्वहं कामये राज्यं न स्वर्ग नापुनर्भवम्।**
**कायमये दुःख तप्तानां प्राणि नामार्तिनाशनम्।।**

मुझे मेरे वकालत काल के दौरान कड़ी मेहनत करने की प्रेरणा मेरे स्वर्गीय पूज्य पिताजी के अतिरिक्त मेरी ताईजी स्वर्गीय श्रीमती सरोजनीदेवी, मेरी स्वर्गीय पूज्य माताजी श्रीमती कृष्णाकुमारी जी एवं मेरे पत्नी डॉ. (श्रीमती) विनीताजी का विशेष सहयोग रहा है। मेरे उपर मेरी स्वर्गीयपूज्य माताजी की विशेष कृपा रही है। मैं जब भी उनके चरण स्पर्श करता था तो वे यही आशीर्वाद हमेशा देती थी कि एक दिन तुम अवश्य उच्च न्यायालय के जज बनोगे, लेकिन वह शुभ दिन देखने के लिए मैं इस संसार में नहीं रहूंगी। यह आशीर्वाद ब्रम्ह मुहूर्त में जब मैं उनको एवं पूज्य पिताजी को प्रणाम करने जाता था, तब मुझे मिलता था। वे भौतिक रूप से तो आज उपस्थित नहीं है, किन्तु मुझे उनकी कृपा की आज भी अनुभूति है। मेरी निश्चित धारणा श्री रामचरितमानस की इन चौपाइयों पर है–

प्रातकाल उठि कै रघुनाथा।
मातु पिता, गुरू नावहिं माथा।।

मातु पिता गुर प्रभु के बानी।
बिनहिं बिचार करिअ सुभ जानि।।

यदि कोई अमल करें तो माता–पिता और गुरूजन का आशीर्वाद एक साधक के जीवन में उत्प्रेरक का काम करता है, जो कि मेरे साथ फलिभूत हुआ है। मित्रों पुत्र कपूत हो सकता है, किंतू माता–पिता कुमाता व कुपिता नहीं हो सकते।

मैं अत्यंत आभारी हूं अपनी धर्म पत्नी डॉ. श्रीमती विनीता श्रीवास्तवजी का, जिन्होंने मेरे अभिभाषकीय कार्यकाल के दौरान कभी रात्रि में शीघ्र घर आने के लिए आग्रह नहीं किया। मेरे दोनों पुत्र पवन कुमार एवं समीर कुमार के जीवन को प्रगति देने में उन्हीं का पूर्ण योगदान रहा है। यहां मैं विशेष रूप से उल्लिखित करना चाहता हूं कि कैंसर जैसे घातक रोग से जब मेरी पत्नि पीड़ित हुई तब उन पर प्रभु की असीम कृपा एवं गुरूजन के आशीर्वाद के साथ उन्होंने अपनी दृढ़ इच्छाशक्ति के साथ इस गंभीर रोग पर विजय पायी। मैं यह गर्व के साथ कहना चाहूंगा कि इस गंभीर बीमारी के दौरान उन्होंने मुझे एक दिन का भी न्यायालय में अवकाश लेने के लिए कभी नहीं कहा। मैं उनका हमेशा ऋणी रहूंगा।

इस शुभ अवसर पर शामिल होने वाले मेरे बड़े भाई डॉ. अशोक कुमार श्रीवास्तव, जो कि इस नगर के सुप्रसिद्ध हृदय रोग विशेषज्ञ है, भाभी डॉ. (श्रीमती) निर्मला श्रीवास्तव, मेरे बड़े भाई श्री अजेय श्रीवास्तव जो कि ज्वाइन्ट प्रेसिडेन्ट हिंडाल्को के गौरवमयी पद से सेवा निवृत्त हुए हैं, मेरे बहनोई श्री भूपेन्द्र निगम, जो कि इंचार्ज प्रिंसीपल, कॉलेज ऑफ साइकोलोजी, जबलपुर के गौरवमयी पद से सेवानिवृत्त हुए हैं, मेरी बहन श्रीमती उषा निगम एवं मेरे साढु भाई श्री अनिल श्रीवास्तव, रिटायर्ड मैनेजर, यूको बैंक के गौरवमयी पद से सेवानिवृत्त हुए है, मेरे पुत्र श्री पवन श्रीवास्तव एवं पुत्रवधू श्रीमती दीपाली, श्री समीर श्रीवास्तव, अधिवक्ता एवं श्रीमती दीपशिखा, अधिवक्ता, पौत्री कु. वृंदा, डॉ. भरत श्रीवास्तव, सौ. डॉ. छवि श्रीवास्तव, श्रीमती रूही श्रीवास्तव तथा अन्य सभी परिवारजन मेरी खुशी में शामिल हुए हैं, मैं उनका भी आभारी हूं। मेरे अन्य मित्रगण एवं सभी जन जो अपना मूल्यवान समय निकालकर मेरी खुशी में शामिल हुए हैं, मैं उनका भी आभारी हूं।

मेरे कार्यकाल के दौरान मुझे जबलपुर, इंदौर एवं ग्वालियर में समस्त रजिस्ट्री के अधिकारीगण एवं कर्मचारीगण का पूर्ण सहयोग मिला है, जिसका मैं हमेशा आभारी रहूंगा। रजिस्ट्रार जनरल श्री वेद प्रकाश शर्मा, प्रिंसीपल रजिस्ट्रार (संतर्कता), श्री एस.डी. दुबे, जिला न्यायाधीश (निरीक्षण) श्री के.एस. ठाकुर, प्रिंसीपल रजिस्ट्रार (परीक्षा) श्री ए.के. श्रीवास्तव, प्रिंसीपल रजिस्ट्रार (न्यायिक) श्री ए.एम. सक्सेना, सभी रजिस्ट्रार श्री बी.बी. शुक्ला, श्री बी.के. निगम, श्रीमती गिरिबाला सिंह, श्री नवीन सक्सेना, श्री एस.बी. वर्मा, श्री आर.के. गुप्त, श्री विजय चन्द्रा का भी आभारी हूं। ग्वालियर में पदस्थ रजिस्ट्रार श्री जे.पी. गुप्त एवं रजिस्ट्रार पी.सी. मिश्रा का भी आभारी हूं। मैं श्री व्ही.बी. सिंह, रजिस्ट्रार कम पी. पी.एस., तत्कालीन बजट आफिसर, ग्वालियर एवं श्री एस.के. साहा, रजिस्ट्रार, तत्कालीन डिप्टी रजिस्ट्रार कम चीफ प्रोटोकाल आफिसर का भी आभारी हूं मैं जबलपुर, इंदौर एवं ग्वालियर के समस्त प्रोटोकॉल अधिकारियों का भी आभारी रहूंगा, जब जब भी मैंने उन्हें जो भी कार्य करने के लिए कहा है उन्होंने वे पूर्ण लगन एवं उत्साह के साथ किया है। जबलपुर में विशेषतः श्री राधेश्याम एवं श्री जयप्रकाश

काले का नाम उल्लिखित करना चाहता हूं। ग्वालियर में श्री अभिषेक भार्गव, दीपक मिश्रा, श्री मनोज शर्मा, श्री कुलदीप अदालतवाले, श्री हरेन्द्र सविता श्री आशीष लोधी एवं भूषण तैलंग तथा इंदौर प्रोटोकॉल आफिसर श्री सुनील देशमुख तथा मैं रेलवे मजिस्ट्रेट श्री दिनेश मिश्रा तथा वे सभी रेलवे मजिस्ट्रेट जो मेरे कार्यकाल के दौरान ग्वालियर, जबलपुर एवं इंदौर में रहे हैं, का भी आभारी हूं। मैं डॉ. सोनकर तथा ग्वालियर के डॉ. चतुर्वेदी का भी आभारी हूं।

मैं अपने पर्सनल स्टाफ पी.ए. श्री सत्यसाईं राव, पी.ए.श्री सुदेश कुमार शुक्ला, पी.ए. श्री सचिन चौधरी, एवं पी.ए. श्री अनिन्द्या मुखोपाध्याय का भी आभारी रहूंगा, जिन्होंने मेरे कार्यकाल के दौरान भरपूर सहयोग दिया है। इनके अतिरिक्त मेरे साथ लम्बे अंतराल तक रहे श्री अनिल पवार, जो आजकल असिस्टेंट रजिस्ट्रार के पद पर हैं, पी.एस. श्री दिनेश वर्मा, पी.ए. श्री तुलसा सिंह का भी आभारी रहूंगा। मैं अपने रीडर श्री राघवेन्द्र सिंह चौधरी, श्री सुरेन्द्र रिछारिया एवं श्री देवीलाल लववंशी पी.एस.का भी आभारी रहूंगा जिन्होंने मुझे मेरे संपूर्ण कार्यकाल के दौरान भरपूर सहयोग दिया है।

मैं ग्वालियर में पदस्थ पी.एस.श्री मेहफूज अहमद, पी.एस. श्री प्रशांत गाड़े, पी.ए. श्री आशीष पवार, पी.ए. श्री मधुसूदन प्रसाद, पी.ए. श्री अरूण मिश्रा एवं श्री लाल सिंह बघेल जो मेरे साथ ग्वालियर बेंच में कार्यकाल के दौरान थे, एवं इंदौर बेंच में कार्य के दौरान श्रीमती माहरूख जिल्ला का भी आभारी रहूंगा।

मैं जमादार श्री रामसखा दुबे, श्री मिश्रा तथा श्री दीनानाथ पंथ तथा ग्वालियर में श्री फूलसिंह का भी आभारी रहूंगा, जिन्होंने एक सच्चे कर्मचारी की भांति अपने कर्तव्यों का निर्वहन किया है। मेरे कार्यकाल के दौरान मेरे साथ जो वाहन चालक श्री मुकेश राजपूत, श्री दिनेश श्रीवास्तव, श्री अन्नूलाल कुशवाहा, श्री बजरंग तथा इंदौर में श्री लीलाधर एवं श्री अभिषेक तथा मेरे कार्यकाल के दौरान जबलपुर एवं ग्वालियर में बंगले में पदस्थ चतुर्थ श्रेणी कर्मचारीगण श्री राम प्रसाद कोईराला एवं श्रीपाद जो अपनी मेहनत के आधार पर आज तृतीय श्रेणी कर्मचारी हैं, श्री रामाश्रय, श्री हेमराज केवट, श्री जगन्नाथ, श्री रामदीन जैसवाल, श्री देवेन्द्र राणा एवं ग्वालियर के श्री प्रदीप रजक, श्री अरविंद शुक्ला, श्री नरेश चौरसिया, श्रीमती मृदुला दुबे एवं श्री अतरसिंह का आभारी रहूंगा, जिन्होंने लगन एवं परिश्रम से अपने कर्तव्य निभाते हुए मेरी सेवा की है। मैं जबलपुर में पीएसओ श्री सुंदरलाल कुशवाहा, श्री हरेन्द्र सिंह एवं श्रीं उमेश सिंह का तथा ग्वालियर में श्री विकास पांडेय, श्री योगेन्द्र एवं श्री प्रेमनारायण का भी आभारी हूं।

मैं आज सभी लोगों का भी आभारी हूं जिन्होंने मुझे आज आपके सामने अपने विचार रखने हेतु अवसर दिया।

धन्यवाद। जयहिंद।

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*NOTES OF CASES SECTION*

*Short Note*

**(1) (DB)*

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

W.P. No. 8348/2012 (Gwalior) decided on 5 July, 2013

CHOUHAN CONSTRUCTION (M/S) ...Petitioner

Vs.

UNION OF INDIA & ors. ...Respondents

***Constitution - Article 227 & Central Excise Act (1 of 1944), Section 35 (F) - Exemption from depositing amount for filing appeal -*** **Appellate Authority partly allowed the application - Power of Superintendence - The question involved is "whether a petition can be entertained under Article 227 against the Interlocutory Order?" - Held - That an interlocutory order passed by appellate authority under its vested discretionary jurisdiction could not be interfered under superintending or revisional jurisdiction of the High Court - Further held, petition devoid of any merits deserves to be dismissed at the stage of motion hearing.**

*संविधान – अनुच्छेद 227 व केन्द्रीय उत्पाद–शुल्क अधिनियम (1944 का 1), धारा 35 (एफ) – अपील प्रस्तुत करने के लिए रकम जमा करने से छूट – अपीली प्राधिकारी ने आवेदन को आंशिक रुप से मंजूर किया – अधीक्षण की शक्ति –* अंतर्ग्रस्त प्रश्न यह है कि "क्या अंतर्वर्ती आदेश के विरुद्ध, अनुच्छेद 227 के अंतर्गत याचिका ग्रहण की जा सकती है ?" – अभिनिर्धारित – अपीली प्राधिकारी द्वारा उसमें निहित वैवेकिक अधिकारिता के अंतर्गत पारित किये गये किसी अंतर्वर्ती आदेश में उच्च न्यायालय की अधीक्षण या पुनरीक्षण अधिकारिता के अंतर्गत हस्तक्षेप नहीं किया जा सकता – आगे अभिनिर्धारित किया गया कि बिना किसी गुणदोषों की याचिका, समावेदन की सुनवाई के प्रक्रम पर खारिज किये जाने योग्य है।

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

**Cases referred :**

1993(66) ELT 161(Del.), 2009 (248) ELT 181 (Del.), 1989 (42) ELT 220 (Ker.), 1994 (69) ELT 193 (Cal.), 1999 (111) ELT 684(Cal.), 2012 (283) ELT 485 (Mad.), 2005 (184) ELT 347 (All.), 2011(21) STR 457 (Tri. Ahmd.), 2010(20) STR 309 (Tri, LB), 2003 (10) SCC 121, AIR 1973 SC 76, AIR 1984 SC 38, AIR 1999 SC 745, AIR 2011 SC 1353.

*Yogesh Chaturvedi*, for the petitioner.

*Anuradha Singh*, for the respondents.

*NOTES OF CASES SECTION*

*Short Note*

**(2)*

*Before Mr. Justice G.D. Saxena*

M.A. No. 200/2004 (Gwalior) decided on 1 August, 2013

SURENDRA SINGH ...Appellant

Vs.

MAMTA & ors. ...Respondents

***Motor Vehicles Act (59 of 1988), Section 166 - Grant of Compensation - Pay and Recover* - If there is a breach of conditions of insurance on the part of the driver and the owner as the vehicle was being driven by a person not having a valid licence, in such a situation, learned Tribunal is entitled to award an amount of compensation to be paid jointly and severally against the owner, driver and may direct the Insurance company to recover the award amount which is deposited by it before the Tribunal from the owner of the offending vehicle.**

*मोटर यान अधिनियम (1988 का 59), धारा 166 – प्रतिकर प्रदान किया जाना – भुगतान एवं वसूली* – यदि वाहन चालक एवं स्वामी की ओर से बीमा की शर्तों को भंग किया गया क्योंकि वाहन को ऐसे व्यक्ति द्वारा चलाया जा रहा था जिसके पास वैध अनुज्ञप्ति नहीं थी, ऐसी स्थिति में, स्वामी, वाहन चालक के विरुद्ध संयुक्त रुप से एवं पृथक रुप से प्रतिकर की रकम अदा करने के लिये विद्वान अधिकरण अवार्ड करने का हकदार है तथा बीमा कम्पनी को दोषी वाहन के स्वामी से अवार्ड की रकम वसूल करने के लिये निदेशित कर सकता है जिसे उसके द्वारा अधिकरण के समक्ष जमा किया गया है।

***Case referred :***

AIR 2004 SC 1340.

*R.P. Gupta,* for the appellant.

*B.K. Agrawal,* for the respondent No. 7.

**I.L.R. [2014] M.P., 01**
**WRIT APPEAL**

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

W.A. No. 621/2012 (Indore) decided on 13 March, 2013

MADHUBALA SHARMA (DR.) & ors. ...Appellants

Vs.

UNION OF INDIA & ors. ...Respondents

***Service Law - Absorption*** - **Deputationist does not have any right to be absorbed on the deputation post - Held - No statutory Rule, Regulation and Order has been pointed out for being absorbed - Mere correspondence cannot come in the way of State for recalling the service from the borrowing department - There is no malafides or arbitrariness in issuance of the order - They have rightly been repatriated.**

**(Paras 11 & 12)**

*सेवा विधि – संविलयन* – प्रतिनियुक्त को प्रतिनियुक्ति के पद पर संविलयित किये जाने का कोई अधिकार नहीं – अभिनिर्धारित – संविलयित किये जाने हेतु किसी कानूनी नियम, विनियमन एवं आदेश की ओर इंगित नहीं किया गया – सेवा उधार लेने वाले विभाग से सेवा वापस लेने के लिए राज्य के रास्ते में मात्र पत्राचार आड़े नहीं आ सकता – आदेश जारी करने में कोई कदाशय अथवा मनमानापन नहीं – उन्हें उचित रुप से प्रत्यावर्तित किया गया।

**Cases referred :**

1999 (8) SCC 381, 2004 Part 2 MPJR 89, AIR 2000 SC 2076.

*A.M. Mathur* with *Abhinav Dhanodkar,* for the appellant.
*S.C. Agrawal,* for the respondents No. 1, 3 & 6.
*Mini Raveendran,* Dy. G.A. for the respondents No. 4 & 5.

**ORDER**

The Order of the court was delivered by: SHANTANU KEMKAR, J.:- All these writ appeals involve identical facts and question of law and they arise out of common order dated 21.11.2012 passed by the learned Single Judge as such they were being heard together and are decided by this common order.

For the sake of convenience facts are taken from Writ Appeal No.621/2012 arising out of Writ Petition No.4237/2012.

2. Challenging the order dated 03.02.2012 issued by the State Government repatriating her services which were on deputation with the Employees State Insurance Corporation under the Central Government (for short ESIC) to the State Government and the Consequential orders issued by the ESIC to implement the order of repatriation issued by the State Government, the petitioner had filed the aforesaid writ petition seeking declaration of her to have been absorbed in the services of the ESIC.

3. The petitioner is a Doctor by profession. She is an employee of the State Government. She was posted in the ESI Hospital run by the State Government. On account of the decision being taken for handing over the said hospital belonging to the State Government to the ESIC, it was resolved that all the employees serving in the said hospital of the State Government situated at Nandanagar, Indore shall he treated as on deputation with ESIC initially for a period of one year which can be extended upto three years. In furtherance to the said decision various correspondence including Annexures P-1 to P-11 took place between the State Government and the ESIC, reflecting therein that a process for absorption of those employees who were sent on deputation was also initiated.

4. It is not in dispute that the initial period of deputation was extended by the State Government from time to time upto 31-11-2012. However, by the impugned order dated 03.02.2012 the State Government informed the petitioner and the ESIC that the petitioner's period of deputation is not extended further and she along with the entire staff which was on deputation was ordered to be repatriated on account of shortage of employees with the State Government. Feeling aggrieved, the petitioner and various other Doctors have filed the writ petitions which have been decided by the common order impugned in this writ appeal.

5. The learned Single Judge after considering the record and after hearing the parties dealt with the matter exhaustively and rejected the petitioner's prayer for absorption of her services in the ESIC holding that the deputationist does not have any right to be absorbed on the deputation post. The learned Single Judge held that the relief claimed by the petitioner cannot be granted as she is employee of the State Government and she has rightly been repatriated. The learned Single Judge also considered the judgment passed by the Supreme Court in the case of *Rameshwaram Prasad Vs. Managing Director, U.P. Rajkiya Nirman Nigam Ltd. and others* 1999 (8) SCC 381 on which strong reliance was placed by the petitioner. The learned Single Judge was of the view that in the said case rules were framed for absorption and in the circumstances it was held by the Supreme

Court that though the power of absorption is discretionary it cannot be exercised arbitrarily or at the whim or capricious of any individual.

6. Feeling aggrieved by the said order dated 21.11.2012 passed by the learned Single Judge the petitioner has filed this intra Court appeal under Section 2(1) of the M.P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005.

7. We have heard learned counsel for the parties at length and perused the documents.

8. Shri A.M. Mathur learned Senior counsel for the petitioner strenuously urged that the decision of sending the petitioner along with other employees on deputation in the ESIC and for absorption of their services in ESIC could not have been revoked by the State Government, by way of cancellation of the deputation and by issuance of the order of the repatriation. He argued that the petitioner having been given an understanding that her services will be absorbed in the borrowing Department where she has been sent on deputation and the various steps being taken towards process of absorption by the lending and the borrowing department, her services could not have been repatriated. In support of his submissions, he has taken us to the various documents filed along with Writ Petition including Annexures P-1 to P-11.

9. On the other hand Shri S.C. Agrawal, learned counsel for the respondents No.1, 2 and 3 and Ms. Mini Raveendran, learned Dy. Govt. Advocate for the respondents No. 4, 5 and 6 have supported the order passed by the learned Single Judge. According to them, the parent department has a right to recall the services of empoyees sent on deputation. They contended that although there was some correspodence going on for absorption of the petitioner with other Doctors in the borrowing department but it never took a final shape and it remained only proposal. In the circumstances, according to them mere proposal for absorption as would be clear from the correspondence will not come in the way of the parent department for recalling of service of its employees which were sent of deputation.

10. Admittedly, the appellant/ petitioner is a State Government employee and was sent on deputation to the ESIC. True it is, that there was some correspondence going on between the lending and borrowing department about the absorption of the deputationist in the borrowing department, however as would be clear from the correspondence that no final decision about absorption of empoyees could be

taken. Be that as it may, the petitioner is undisputedly a State Government empolyee and she was sent on deputation to the ESIC and before any order of absorption was passed she has been ordered to be repatriated by her parent department along with all the similarly placed employees.

11. A Division Bench of this Court in the case of *Dr. S.M.P. Sharma Vs. State of M.P.* 2004 Part 2 MPJR 89 had occasion to deal with somewhat identical situation. Taking note of the law laid down by the Supreme Court in the case of *Kunal Nanda Vs. Union of India and another* AIR 2000 SC 2076 the Division Bench held that the parent department has always right to recall the services of its employees sent on deputation. In the absence of any specific contract assuring the employee of a particular tenure in respect of the deputation post, the person concerned can always and at any time be repatriated to its parent department to serve in his substantive post therein at the instance of either of the department and there is no vested right insuch a person to continue for a long on deputation. It further observed that unless the claim of the deputationist for permanent absorption in the department where he works on deputationist based upon statutory Rule, Regulation or Order having the force of law, a deputationist cannot assert and succeed in any such claim for absorption.

12. In the present case no statutory Rule, Regulation and Order is being pointed out giving any right to the petitioner for being absorbed. Mere correspondence without there being any order for absorption cannot come in the way of the State Government which is the lending department for recalling the service of the petitioner from the borrowing deparmtent. We find no malafides or arbitrariness in issuance of the order by the State Government for recalling of the petitioner's service. On the other hand, we find that their exists a justified reason for issuing order of repatriation which as is clear from the order is shortage of staff in the State Government services.

13. In this view of the matter and the clear legal position in our considered view the learned Single Judge has committed no error in upholding the decision of the State Government to repatriate the services of the petitioner and denying the petitioner the relief of declaring her to be absorbed in the borrowing department. No case for interference in this intra Court appeal is made out.

14. Accordingly, the appeal fails and is hereby dismissed. No orders as to the costs.

*Appeal dismissed.*

**I.L.R. [2014] M.P., 05**
**WRIT APPEAL**

***Before Mr. Justice Shantanu Kemkar & Mr. Justice J.K. Maheshwari***
W.A. No. 435/2013 (Indore) decided on 13 March, 2013

MOHAMMAD YAKUB & anr. ...Appellants
Vs.
REGIONAL TRANSPORT AUTHORITY, UJJAIN & ors....Respondents

***Motor Vehicles Act (59 of 1988), Section 68 & Motor Vehicles Rules, M.P. 1994, Rule 67 - Vires* - Delegation of powers by the Regional Transport Authority vide order dated 17.10.1994 is challenged as contrary to the provisions of Motor Vehicles Act, 1988 and the Rules of 1994 - Held - The order of delegation of power dated 17.10.1994 being not in consonance with Rules 67(1)(f) of the Rules 1994, the same cannot be sustained - Hence, quashed. (Paras 3 & 10)**

*मोटर यान अधिनियम (1988 का 59), धारा 68 व मोटर यान नियम, म.प्र. 1994, नियम 67 – अधिकारातीत* – आदेश दि. 17.10.1994 द्वारा प्रादेशिक परिवहन प्राधिकरण द्वारा शक्तियों के प्रत्यायोजन को, मोटरयान अधि. 1988 व नियम 1994 के उपबंधों के विपरीत होने के आधार पर चुनौती दी गई – अभिनिर्धारित – शक्ति के प्रत्यायोजन का आदेश दि. 17.10.1994, नियम 1994 के नियम 67(1)(एफ) के अनुरुप नहीं होने के कारण, कायम नहीं रखे जा सकते – अतः अभिखंडित।

*Amit S. Agrawal*, for the appellants.
*Mini Ravindran*, Dy. G.A. for the respondents No. 1 & 2.
*A.S. Kutumbale* with *B.S. Gandhi* & *A.K. Jain*, for the respondent No.3.

**ORDER**

The Order of the court was delivered by : SHANTANU KEMKAR, J.:- This appeal is filed against the order dated 21.02.2013 passed by the learned Single Judge of this Court in Writ Petition No.979/2013.

2. At the outset, it has not been disputed by the learned counsel for the appellants / writ petitioners that the order impugned in writ petition regarding grant of temporary permit for the route Rampura to Ujjain and the temporary permit granted in pursuance of the said grant have been set aside by the writ Court with an observation that in case fresh temporary permit is granted by the Secretary to the Regional Transport Authority (for short, RTA), the same

Authority who is granting a temporary permit shall decide the objections of the objectors, while passing the order in the matter of grant of temporary permit. According to him, he is satisfied with the said part of the order.

3. However, subsisting grievance of the appellants is that the writ Court, while disposing of the writ petition, has upheld the notification dated 17.10.1994 delegating powers to the Secretary holding it to be in consonance with the statutory powers contained in Section 68 of the Motor Vehicles Act, 1988 (for short, the MV Act, 1988) and Rule 67 of the Madhya Pradesh Motor Vehicles Rules, 1994 (for short, the Rules of 1994). He submits that this finding is contrary to the provisions of law. As according to him, delegation of powers by the RTA vide order dated 17.10.1994 is contrary to the provisions of the MV Act, 1988 and the Rules of 1994.

4. We have heard learned counsel for the parties on this question.

5. In order to decide the controversy raised, it would be appropriate to quote the relevant provision of the MV Act, 1988. Section 68 (5) of which provides power of delegation reads thus: -

> **"68. Transport Authorities. -**
>
> (5) The State Transport Authority and any Regional Transport Authority, if authorized in this behalf by rules made under Section 96, may delegate such of its powers and functions to such authority or person subject to such restrictions, limitations and conditions as may be prescribed by the said rules."

6. Rule 67 (1) (f) of the Rules of 1994 provides for delegation of powers by RTA by a general or special resolution to Chairman, Secretary, Additional Secretary or Assistant Secretary of the Authority. Rule 67 (1) (f) which is relevant for deciding the controversy about delegation in regard to temporary permit reads thus: -

> **"67. Delegation of powers by Regional Transport Authority. -**
>
> (1) A Regional Transport Authority may, by general or special resolution recorded in its proceedings and subject to such restrictions, limitations and conditions, as may be specified, delegate to Chairman, Secretary, Additional Secretary, or Assistant Secretary of the Authority all or any of the following

powers, namely: -

(f) to grant or refuse to grant a temporary permit under Section 87 or under sub-sections (7) and (8) of Section 88, as the case may be."

7. In exercise of powers conferred upon the RTA under the aforesaid Rule 67 (1) (f) of the Rules, RTA delegated the powers regarding temporary permit vide order dated 17.10.1994. Relevant Clause (i) of the same reads thus:-

"विषयः–क्षेत्रीय परिवहन प्राधिकार द्वारा शक्तियों का प्रत्यायोजन।

(एक) क्षेत्रीय परिवहन प्राधिकार द्वारा स्वीकृत किए गए मोटर यान अधिनियम 1988 की धारा 87 (1–सी) के अंतर्गत अस्थाई परमिटों को आगामी अवधि के लिए निरन्तरता बनाये रखने हेतु सचिव द्वारा स्वीकृत कर जारी किया जाएगा।"

8. A plain reading of the aforesaid Clause (i) of the order of delegation dated 17.10.1994 demonstrates that the RTA has delegated to the Secretary the power to grant the temporary permit in order to maintain the continuity of the temporary permit, initially granted by the RTA under Section 87 (i) (c) of the Act.

9. In our considered view, Rule 67 (1) (f) of the Rules of 1994, which empowers delegation of powers by RTA does not empower delegation of powers by the RTA in the manner in which it has been done. Such a delegation also appears to be contrary to the spirit of Section 87 of the Act of 1988. The powers to grant or refuse to grant a temporary permit under Section 87 or under sub-sections (7) (8) of Section 88 of the Act, as the case may be, can absolutely be delegated to the Secretary but cannot be delegated in the manner in which it has been done.

10. In view of the aforesaid, in our considered view, the order of delegation dated 17.10.1994 being not in consonance with Rule 67 (1) (f) of the Rules of 1994, the same cannot be sustained, and as such, is hereby quashed. However, the RTA shall be free to pass a fresh order of delegation in conformity with the provision contained in Rule 67 (1) (f) of the Rules of 1994.

11. With the aforesaid modification in the order passed by the learned Single Judge, the writ appeal is disposed of.

C.c. within three days.

*Appeal disposed of.*

**I.L.R. [2014] M.P., 08**
**WRIT APPEAL**
***Before Mr. A.M. Khanwilkar, Chief Justice***
***& Mr. Justice Krishn Kumar Lahoti***
W.A. No.1485/2012 (Jabalpur) decided on 26 November, 2013

ADHAR SINGH BISEN ...Appellant
Vs:
STATE OF M.P. & ors. ...Respondents

*A.* ***Industrial Disputes Act (14 of 1947), Section 2(j)*** **- Forest Department is an "Industry" within the meaning of Section 2(j) of Industrial Disputes Act - Provisions of Industrial Employment (Standing Orders) Act, 1961 are applicable to the employees of the Forest Department. (Para 4)**

*क.* *औद्योगिक विवाद अधिनियम (1947 का 14), धारा 2(जे)* – औद्योगिक विवाद अधिनियम की धारा 2(जे) के अर्थान्तर्गत, वन विभाग "उद्योग" है – औद्योगिक नियोजन (स्थाई आदेश) अधिनियम, 1961 के उपबंध, वन विभाग के कर्मचारियों को लागू होते हैं।

*B.* ***Industrial Employment (Standing Orders) Act, M.P. (26 of 1961), Section 2*** **- Provisions of the Act are applicable to the appellant - Employee of the Forest Department. (Para 4)**

*ख.* *औद्योगिक नियोजन (स्थायी आदेश) अधिनियम, म.प्र. (1961 का 26), धारा 2* – अधिनियम के उपबंध, अपीलार्थी को लागू होते हैं – वन विभाग का कर्मचारी।

*C.* ***Industrial Employment (Standing Orders) Rules, M.P. 1963, Rule 14-A*** **- Appellant engaged in the Forest Department on daily rated and was discontinued from service after completing 30 years of service - Appellant entitled to the benefit to continue in service upto the age of 58 years in accordance with Rule 14-A of the "Standard Standing Order" Annexure to the Rules of 1963, a statutory protection available to the appellant - There is no distinction between daily rated employee or regular employee. (Paras 4 & 5)**

*ग.* *औद्योगिक नियोजन (स्थायी आदेश) नियम, म.प्र. 1963, नियम 14–ए* – अपीलार्थी, दैनिक वेतन पर वन विभाग में नियुक्त था और 30 वर्षों की सेवा पूर्ण करने के पश्चात उसकी सेवा समाप्त की गई – नियम 1963 के अनुलग्नक

"मानक स्थायी आदेश" के नियम 14–ए एक कानूनी सुरक्षा जो अपीलार्थी को उपलब्ध है, के अनुसार अपीलार्थी 58 वर्ष की आयु तक सेवा में बने रहने के लाभ का हकदार – दैनिक वेतन प्राप्त कर्मचारी एवं नियमित कर्मचारी के बीच कोई भेद नहीं।

**Cases referred :**

2012 (4) MPLJ 366, 2011 (3) MPLJ 310, 2011 (4) MPLJ 86.

*P.C. Chandak,* for the appellant.
*Samdarshi Tiwari,* G.A. for the respondents.

**ORDER**

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

1. This appeal takes exception to the decision of learned single Judge dt.18.11.2011 in W.P.No.16122/2011(S). The appellant had challenged the communication dt.31.5.2011 issued under the signature of Divisional Forest Officer, at page No.68 of the appeal paper book, whereby the appellant was disengaged from service w.e.f. 30.11.2011. It is common ground that the appellant was in service on daily rated basis since year 1981. The appellant would claim that his services were governed by the provisions of the Standard Standing Orders, as applicable to State of Madhya Pradesh, and as a result of which his services could not be discontinued until his completion of 58 years of age. The Department, however, relies on notification dated 28.3.2006 issued by the Forest Department of Government of Madhya Pradesh which provides that the services of daily rated workman should be discontinued on completion of 30 years of service or 60 years of age whichever is earlier.

2. The appellant relies on a recent decision of Division Bench of our High Court in *Mahesh Rajak vs. State of M.P. and ors.*, 2012 (4) MPLJ 366, to buttress the above submission. The learned single Judge, however, non-suited the appellant essentially on the basis of preliminary issue that the applicability of Standard Standing Orders can be adjudicated only by the appropriate Court dealing with the disputes covered under the Industrial Disputes Act and the Standard Standing Orders and not in exercise of powers under Articles 226 and 227 of the Constitution of India. In other words, learned single Judge has not dealt with the merits of the controversy at all.

3. Counsel appearing for the respondents supported the final conclusion reached by learned single Judge in dismissing the writ petition referred by the appellant. He further submits that even on merits the appellant has no case as the issue is covered by the decision of the Full Bench of our High Court in case of *Mamta Shukla vs. State of M.P.and ors,* 2011(3) MPLJ 310.

4. Having considered the rival submissions, we are not impressed by the preliminary issue of maintainability of writ petition, considering the relief sought by the appellant. The appellant in writ petition had challenged the decision of the authority disengaging him from service w.e.f. 30.11.2011 on the premise that the appellant had already completed 30 years of service and, therefore, could not be continued in service in terms of notification dt.28.3.2006 issued by the Forest Department of Government of Madhya Pradesh. This very question, in our opinion, is squarely answered by the Division Bench of our High Court in *Mahesh Rajak's case* (supra). The Division Bench was called upon to consider the case of employees of the Forest Department of Government of Madhya Pradesh. After taking into account the provisions of M.P. Industrial Employment (Standard Standing Orders) Act 1961 and the schedule enacted thereunder, the Division Bench opined that the employees of the Forest Department- being an industry, will be governed by the provisions of Standard Standing Orders by virtue of which they could be disengaged only upon completion of 58 years of age. This opinion is rendered taking into account the relevant decisions on the point in issue as to whether the Forest Department is an industry and including the decision in *Badri v. State of M.P. and ors.*, 2011(4) MPLJ 86, which in turn relies on the Full Bench decision in *Mamta Shukla's case* (supra). The Division Bench in *Mahesh Rajak's case* has opined that the later decisions are distinguishable and cannot be cited as precedent in respect of the matter in issue. For, in those cases the Court was not called upon to consider the efficacy of provisions of the Act of 1961 which applies to the employees of Forest Department and of the provisions of the Standard Standing Orders which guarantees their employment till attaining the age of 58 years. Notably, the provisions of the Act of 1961 and the Standard Standing Orders make no distinction between a regular employee and the daily rated employee..

5. It is not argued before us that the decision in the case of *Mahesh Rajak* requires reconsideration. All that has been argued, is that, *Mahesh*

*Rajak's* case runs counter to the principles stated and the exposition in the case of *Mamta Shukla* by the Full Bench. As aforesaid, the Division Bench deciding the case of *Mahesh Rajak* has already considered this shade of argument in paragraphs No.20 and 22. It has rejected the same by concluding that the said decisions are distinguishable. We are not inclined to take a different view of the matter. As aforesaid, the appellant is admittedly employed in the Forest Department of the State. For the same reasons as recorded in the case of *Mahesh Rajak* – which admittedly has attained finality and implemented by the Forest Department of the State - this appeal succeeds. The impugned judgment is set aside and instead the communication dated 31.5.2011 issued under the signature of Divisional Forest Officer, South Seoni Production Forest Division, Annexure-P/6 to the writ petition, is also quashed and set aside. It is, however, made clear that the appellant would remain in service until completion of 58 years of age as provided by the provisions of the Act of 1961 and the Standard Standing Orders framed thereunder. The appellant will be entitled to all the consequential benefits in terms of this order as if he was deemed to be in service all along.

6. Appeal disposed of on the above terms with no order as to costs.

*Order accordingly.*

**I.L.R. [2014] M.P., 11**
**WRIT APPEAL**

***Before Mr. A.M. Khanwilkar, Chief Justice & Mr. Justice Ajit Singh***

W.A. No.1261/2013 (Jabalpur) decided on 29 November, 2013

GULAB MAKODE ...Appellant
Vs.
STATE OF M.P. ...Respondent

***Constitution - Article 226* - Similar writ petitions involving similar questions pending - Single Judge proceeded to dispose of the petition in disregard of pendency of other companion matters - It cannot be countenanced - Matter remanded back for analogous hearing with companion writ petitions. (Para 2)**

*संविधान – अनुच्छेद 226* – समान रिट याचिकाऐं लंबित जिसमें समान प्रश्न अंतर्ग्रस्त है – साथ के अन्य मामलों के लंबन की अवहेलना में एकल न्यायाधिपति द्वारा याचिका का निपटारा करने की कार्यवाही की गई – इसका

समर्थन नहीं किया जा सकता – साथ की रिट याचिकाओं के साथ समान सुनवाई हेतु मामला प्रतिप्रेषित।

**Case referred :**

AIR 1987 SC 1345.

*D.K. Tripathi,* for the appellant.
*K. Pathak,* Dy. A.G. for the respondent.

**ORDER**

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

1. As short question is involved in this appeal, it is taken up for final disposal forthwith, by consent.

2. This appeal takes exception to the decision of the learned Single Judge dated 24/9/2013 in W.P. No.15339/13. The appellant, as also seventy other employees challenged similar show-cause notice issued to them by the same employer. Those writ petitions, admittedly, are still pending, inter alia W.P. No. 20473/12, and connected cases, in which interim order has been passed by co-ordinate Bench on 6/12/12. Copy of the said order was placed on record by the appellant. Nevertheless, the learned single Judge proceeded to dispose of the writ petition filed by this appellant in disregard of the pendency of other companion matters involving similar question. That cannot be countenanced in view of the Apex Court decision in the case of *Bir Bajrang Kumar V. State of Bihar & Ors.* in AIR 1987 SC 1345.

3. As a result, we set aside the impugned decision and relegate the parties before the learned Single Judge by restoring the writ petition to the file to its original number, to be heard along with companion writ petitions, list whereof shall be furnished by the counsel appearing for the parties.

4. Registry shall ensure that all writ petitions are listed before one Bench for analogous hearing.

Appeal disposed of. No order as to costs.

*Appeal disposed of.*

**I.L.R. [2014] M.P., 13**
**WRIT APPEAL**

***Before Mr. Justice Shantanu Kemkar & Mr. Justice S.C. Sharma***
W. A. No. 916/2013 (Indore) decided on 29 November, 2013

STATE OF M.P. & ors. ...Appellants
Vs.
DULE SINGH SOLANKI ...Respondent

***Constitution - Article 341 - Caste Certificate*** **- Respondent applied for issuance of caste certificate - Contending that 'Mogia' caste has been included as a Scheduled Tribe as per the presidential notification issued under Constitution (Schedule Tribe) Order 1950 - Held - 'Mogia' community is a Scheduled Tribe as per Presidential Order - Once it has been established that the respondent is a member of 'Mogia' community and is a resident of Madhya Pradesh, he has to be treated as a Scheduled Tribe and not as a Scheduled Caste.**
**(Paras 10 & 11)**

*संविधान – अनुच्छेद 341* – जाति प्रमाण पत्र – प्रत्यर्थी ने जाति प्रमाण पत्र जारी करने हेतु आवेदन किया – यह तर्क देते हुए कि 'मोगिया' जाति को संविधान (अनुसूचित जनजाति) आदेश 1950 के अंतर्गत जारी की गई राष्ट्रपति की अधिसूचना के अनुसार अनुसूचित जनजाति के रुप में सम्मिलित किया गया है – अभिनिर्धारित – राष्ट्रपति के आदेश के अनुसार 'मोगिया' समुदाय अनुसूचित जनजाति है – एक बार यह स्थापित हो जाता है कि प्रत्यर्थी 'मोगिया' समुदाय का सदस्य है और म. प्र. का निवासी है, उसे अनुसूचित जनजाति का समझा जाना चाहिए और न कि अनुसूचित जाति का।

**Cases referred :**

W.P.No. 6762/2007 (PIL) decided on 23.01.2008, (2012) 1 SCC (L&S) 43.

*M. Ravindran,* Dy. G.A. for the appellants.
*L.C. Patne,* for the respondent.

**ORDER**

The Order of the court was delivered by :

**S.C. SHARMA, J.:-** Regard being had to the similar controversy involved in these cases, they have been heard analogously together with the consent of the parties and a common order is being passed in the matter. Facts of Writ

Appeal No.916/2013 are narrated as under :-

2. The present writ appeal has been filed by the State of Madhya Pradesh being aggrieved by the order dated 27.4.13 (Annexure-A/1) passed in WP No.9296/12, by which the learned Single Judge has allowed the writ petition and has directed the Sub Divisional Officer, Revenue to decide the representation preferred by the respondent Dule Singh Solanki after granting an opportunity of hearing by passing a reasoned order. The facts necessary for adjudicating the present writ appeal are narrated as under :

3. Sole respondent Dule Singh Solanki claiming himself to be a member of Mogia Caste, submitted an application dated 24.11.11 before the Sub Divisional Officer, Revenue Tehsil Tarana District Ujjain for issuance of a caste certificate. It was stated in the application that Mogia Caste has been included as a Scheduled Tribe as per the Presidential Notification issued under the provisions of Constitution (Schedule Tribe) Order 1950. The application of the sole respondent was processed and a report was obtained from Patwari of the village. The Patwari has submitted his report after due enquiry to the Naib Tehsildar, Tarana on 18.12.11 duly certifying that the sole respondent Dule Singh Solanki is a member of Mogia Tribe. It was also reflected in the Patwari's report that based upon the pre-independence land record documents, the caste of the sole respondent is Mogia and statement of villagers was also recorded as well as a Panchnama was also prepared. The Naib Tehsildar forwarded the report of the Patwari to the Sub-Divisional Officer with a recommendation for issuing a caste certificate treating Dule Singh Solanki as a member of Scheduled Tribe category. The Sub Divisional Officer, however has rejected the petitioner's claim for issuance of a caste certificate of schedule tribe category vide order dated 4.1.12. The sole respondent being aggrieved by the order dated 4.1.12 preferred a revision petition under Section 50 of M.P. Land Revenue Code, 1959, however the same was dismissed by the Collector, District Ujjain and being aggrieved by the order passed by the Sub Divisional Officer dated 4.1.12 and the order passed by the Collector dated 30th April, 2012, a writ petition preferred before this Court. A ground was raised by the petitioner therein i.e. in WP No.9296/12 that as per Constitution (Scheduled Tribe) Order 1950 'Mogia Caste' in the State of Madhya Pradesh at item number 16 finds place and its a Scheduled Tribe. It was also argued that in a similar case, the Division Bench of this Court i.e. in the case of *Krashnapalsing and Ors. Vs. State of Madhya Pradesh and Ors* [WP No.6762/2007 (PIL)] decided on 23.1.2008 has held that the Mogia is a

Scheduled Tribe in the entire State of Madhya Pradesh. It was also brought to the notice of the learned Single Judge that all the relatives of the sole respondent Dule Singh Solanki have been issued a caste certificate certifying them as a member of Scheduled Tribe "Mogia".

4. A reply was filed by the State Government to the writ petition and it was stated in the reply and based upon some studies conducted by Schedule Tribe Research Centre, Madhya Pradesh, Mogia and Moghiya are two different castes and Moghiya has to be treated as Scheduled Caste and not Scheduled Tribe. It was also stated in the return that in certain districts of State of Madhya Pradesh "Mogia" is a Scheduled Caste and not a Scheduled Tribe and based upon the research conducted by the Schedule Tribe Research Centre, Madhya Pradesh, the Sub Divisional Officer was justified in rejecting the claim. Another document has been filed by the State Government as Annexure-R/1, wherein it was stated that Mogia is a Scheduled Tribe and Moghiya is a Scheduled Caste and certificate be issued accordingly. Learned Single Judge based upon the documents on record and the undisputed fact that the sole respondent-Dule Singh Solanki is a member of Mogia Tribe, has disposed of the writ petition by quashing the order passed by the Sub Divisional Officer on 4.1.12 and has directed the Sub Divisional Officer to decide the representation of the sole respondent by passing a reasoned order.

5. Learned counsel appearing for the State Government and its functionaries has vehemently argued before this Court that Moghiya is not covered under the category of Scheduled Tribe and it is included in the category of Scheduled Caste and therefore, the Sub Divisional Officer was justified in rejecting the application of Dule Singh Solanki. The respondents before this Court have placed heavy reliance upon the Executive Instructions issued by the Scheduled Tribe Institute dated 26.11.2007 and the contention of the learned counsel is that Moghiya is a Schedule Caste and Mogia is a Schedule Tribe and therefore, persons belonging to the Moghiya cannot be issued a caste certificate certifying them to be a member of Scheduled Tribe category. Heavy reliance has been placed upon the research conducted by the Tribal Research Institute.

6. Heard the learned Dy. GA and Shri L.C. Patne learned counsel appearing on behalf of the respondents and perused the record.

7. In the present case, the sole respondent-Dule Singh Solanki has preferred an application before the Sub Divisional Officer Revenue, Tarana

for issuance of a Scheduled Tribe (ST) Category certificate in terms of the Constitution (Scheduled Tribes) Orders, 1950 as amended from time to time and a case was registered as Case No.394-B-121/2011-12 by the Sub Divisional Officer. The Sub Divisional Officer directed the Patwari, Halka No.26, Village Makron, Tehsil Tarana District Ujjain to submit a report about the residential and social status of the sole respondent-Dule Singh Solanki. The Patwari after recording the statement of witnesses/villagers, prepared a Panchnama dated 18.12.2011 and also verified the pre-independence land records. The Patwari submitted a detailed and exhaustive report on 18.12.11 certifying the sole respondent Dule Singh Solanki to be a member of Mogia Tribe. The report of the Patwari was forwarded by the Naib Tehsildar, Tehsil Tarana District Ujjain to the Sub Divisional Officer and the Sub Divisional Officer vide impugned order dated 4.1.12 has rejected the claim of the sole respondent for issuance of a Scheduled Tribe category caste certificate. A revision petition was preferred before the Collector under Section 50 of M.P. Land Revenue Code, 1959 and the same has also been rejected vide order dated 30.4.12. The Amendment of the Constitution (Scheduled Tribes) Order 1950 in respect of Madhya Pradesh includes Mogia as a Scheduled Tribe. The relevant extract of the Presidential Order is reproduced as under :-

"THE FOURTH SCHEDULE

(See Section 20)

AMENDMENT OF THE CONSTITTUION

(SCHEDULED TRIBES), ORDER, 1950

In the constitution (Schedule Tribes) Order,1950-

(a) In paragraph 2, for the figures "XIX" the figures "XIX" shall be substituted:

(b) In the Schedule:-

(i) for Part VIII, the following Part shall be substituted, namely:-

"PART VIII- MADHYA PRADESH

1. Agariya

2. Andh

3. Baiga

4. Bhaina

5. Bharia Bhumia, Bhunhar Bhumia, Bhumiya, Bharia, Paliha, Pando

6. Bhattra

7. Bhil, Bhilala, Barcla, patelia

8. Bhil Mina

9. Bhanjia

10. Bir, Biyar

11. Binjhwar

12. Birhul,Birhor

13. Damor, Damaria

14. Dhanwar

15. Gadaba, Gadba

16. Gond, Arakh, Agaria, Asur,, Badi Maraia, Bada Matia, Bhatola, Bhimma, Bhata, Koilalashuta, Koliabhuti, Bhar, Bisonhorn maria, Chota Mrai, Dandami Maria, Dhuru, Dhurwam Dhoba, Dhulia, Dorla, Gaiki, Gutta, Gatti,Gaita, Gond, Gowari, Hill Marai,Kandra, Kalanga, Khatola, Koitrm Koya, Khirwar,Khirwara, Kucha Maria, Kuchki Maria, Madia, maria, Mana, Mannewar, Moghya, Mogia, Monghya, Mudoia, Muria, Nagarchi, Nagwanshi, Ojha, Raj Gond, Sonjhari Jhareka, Thatoa, Thotya, Wade Mrai, Vade Maria, Daroi.

17. Haiba, Halbi."

8. Contention of the appellants is that Mogia is a Scheduled Caste and therefore, the Sub Divisional Officer has rightly passed the order dated 4.1.12 rejecting the claim of Dule Singh Solanki. The appellants have placed heavy reliance upon a document dated 26.11.2007 (Annexure-R/1) enclosed alongwith the reply to the writ petition, which reads as under :-

"आदिम जाति अनुसंधान एवं विकास संस्थान, म.प्र. शासन
35, श्यामला हिल्स, भोपाल म0प्र0 462002

कमांक/सं–अन्वे/2–39/07/9291 भोपाल दिनांक 26/11/02

प्रति,

अनुविभागीय अधिकारी,
राजस्व तराना, जिला उज्जैन

विषयः– मोगिया जाति का अनुसांगिक अनुसंधान कर जॉच करने के संबंध में।
संदर्भः– आपका पत्र कमांक, क्यू/रीडर/07/1610 दिनांक 26.10.07

कृपया संदर्भित पत्र का अवलोकन करें । प्रकरण के सम्बन्ध में उल्लेख है कि मोगिया जाति के प्रकरण पर संस्थान स्तर से अनेकों बार/जानकारी/अभिमत शासन को भेजा जा चुका है ।

अनुसूचित जनजाति सूची के कमांक 16 पर गोंड़ जनजाति के साथ "मोगिया" अंकित है, जिसे निर्विवाद रूप से अनुसूचित जनजाति प्रमाण पत्र पाने की पात्रता है ।

अनुसूचित जाति की सूची में कमांक 39 पर "मोघिया" जाति अंकित है, जिसे अनुसूचित जाति का प्रमाण पत्र पाने की पात्रता है ।

इस प्रकार म.प्र. में दो तरह के मोगिया/मोघिया समुदाय निवासरत है । जिन्हें नियमानुसार यथास्थिति अनुसार जाति प्रमाण पत्र व अन्य लाभ पाने की पात्रता है ।

प्रकरण के संबंध में अध्ययन/अनुसंधान कर स्पष्ट निर्देश देने के लिये शासन को अवगत कराने का अनुरोध के सम्बन्ध में उल्लेख है कि इस विषय पर संस्थान द्वारा पूर्व में अध्ययन किया जा चुका है । अध्ययन प्रतिवेदन समय–समय पर प्रकरण के संदर्भ में शासन को भेजा जा चुका है जिसमें मोगिया (अनुसूचित जनजाति) तथा मोघिया (अनुसूचित जाति) की स्थिति स्पष्ट की गई है ।

अतः मोगिया अनुसूचित जनजाति एवं मोघिया अनुसूचित जाति के सम्बन्ध में कोई संदेह न होने के कारण संस्थान द्वारा पुनः अनुसंधान करने की आवश्यकता प्रतीत नहीं होती है । अध्ययन के निष्कर्ष संलग्न प्रेषित ।

संचालक,
आदिम जाति अनुसंधान एवं विकास संस्थान
भोपाल

9. This court has carefully gone through the Presidential Order as well as the letter issued by the Scheduled Tribe Research Development Institute, Bhopal and the aforesaid letter dated 26.11.2007 also makes it very clear that persons belong to Mogia are members of Scheduled Tribe as in Presidential Order Mogia is mentioned at Sr. No.16. Heavy reliance has been placed upon some research conducted by the Tribal Development Institute and this Court is of the considered opinion that the research conducted by the Tribal Development Institute will certainly not supersede the Presidential Order 1950. A detailed and exhaustive enquiry took place in the matter and the revenue authorities have arrived at a conclusion that the sole respondent is a member of Mogia Tribe. The affinity test conducted in the matter establishes that the sole respondent Dule Singh Solanki is a member of Mogia Tribe. A similar situation has been dealt with in the case of *Anand Vs. Committee for Scrutiny and Verification of Tribes Claims and Ors.*, (2012) 1 SCC (L&S) 43 and the Apex Court in paragraphs 20 to 26 has held under under :-

> "20. The rules further stipulate that the Vigilance Officer shall personally verify and collect all the facts about the social status claimed by the applicant or his parents or guardians, as the case may be. He is also required to examine the parents or the guardians or the applicant for the purpose of verification of their tribe. It is evident that the scope of enquiry by the Vigilance Officer is broad-based and is not confined only to the verification of documents filed by the applicant with the application or the disclosures made therein. Obviously, the enquiry, supposed to be conducted by the Vigilance Officer, would include the affinity test of the applicant to a particular tribe to which he claims to belong. In other words, an enquiry into the kinship and affinity of the applicant to a particular Scheduled Tribe is not alien to the scheme of the Act and the Rules. In fact, it is relevant and germane to the determination of social status of an applicant.
>
> 21. We are of the view that for the purpose of examining the caste claim under the Rules, the following observations of this Court in *Kumari Madhuri Patil* (supra), still hold the field:"
>
> > 13....The vigilance officer should personally verify and collect all the facts of the social status claimed by the

candidate or the parent or guardian, as the case may be. He should also examine the school records, birth registration, if any. He should also examine the parent, guardian or the candidate in relation to their caste etc. or such other persons who have knowledge of the social status of the candidate and then submit a report to the Directorate together with all particulars as envisaged in the pro forma, in particular, of the Scheduled Tribes relating to their peculiar anthropological and ethnological traits, deity, rituals, customs, mode of marriage, death ceremonies, method of burial of dead bodies etc. by the castes or tribes or tribal communities concerned etc."

22. It is manifest from the afore-extracted paragraph that the genuineness of a caste claim has to be considered not only on a thorough examination of the documents submitted in support of the claim but also on the affinity test, which would include the anthropological and ethnological traits etc., of the applicant. However, it is neither feasible nor desirable to lay down an absolute rule, which could be applied mechanically to examine a caste claim. Nevertheless, we feel that the following broad parameters could be kept in view while dealing with a caste claim:

"(i) While dealing with documentary evidence, greater reliance may be placed on pre-Independence documents because they furnish a higher degree of probative value to the declaration of status of a caste, as compared to post-Independence documents. In case the applicant is the first generation ever to attend school, the availability of any documentary evidence becomes difficult, but that ipso facto does not call for the rejection of his claim. In fact the mere fact that he is the first generation ever to attend school, some benefit of doubt in favour of the applicant may be given. Needless to add that in the event of a doubt on the credibility of a document, its veracity has to be tested on the basis of oral evidence, for which an opportunity has to be afforded to the applicant;

(ii) While applying the affinity test, which focuses on the ethnological connections with the scheduled tribe, a cautious approach has to be adopted. A few decades ago, when the tribes were somewhat immune to the cultural development happening around them, the affinity test could serve as a determinative factor. However, with the migrations, modernisation and contact with other communities, these communities tend to develop and adopt new traits which may not essentially match with the traditional characteristics of the tribe. Hence, affinity test may not be regarded as a litmus test for establishing the link of the applicant with a Scheduled Tribe. Nevertheless, the claim by an applicant that he is a part of a scheduled tribe and is entitled to the benefit extended to that tribe, cannot per se be disregarded on the ground that his present traits do not match his tribes' peculiar anthropological and ethnological traits, deity, rituals, customs, mode of marriage, death ceremonies, method of burial of dead bodies etc. Thus, the affinity test may be used to corroborate the documentary evidence and should not be the sole criteria to reject a claim."

23. Needless to add that the burden of proving the caste claim is upon the applicant. He has to produce all the requisite documents in support of his claim. The Caste Scrutiny Committee merely performs the role of verification of the claim and therefore, can only scrutinise the documents and material produced by the applicant. In case, the material produced by the applicant does not prove his claim, the Committee cannot gather evidence on its own to prove or disprove his claim.

24. Having examined the present case on the touchstone of the aforesaid broad parameters, we are of the opinion that the claim of the appellant has not been examined properly. We feel that the documentary evidence produced by the appellant in support of his claim had been lightly brushed aside by the Vigilance Officer as also by the Caste Scrutiny Committee. In so far as the High Court is concerned, it has

rejected the claim solely on the basis of the affinity test. It is pertinent to note that some of these documents date back to the pre-Independence era, issued to appellant's grandfather and thus, hold great probative value as there can be no reason for suppression of facts to claim a non-existent benefit to the 'Halbi' Scheduled Tribe at that point of time.

25. From the documents produced by the appellant, it appears that his near paternal relatives had been regarded as belonging to the 'Halbi' Scheduled Tribe. The Vigilance Officer's report does not indicate that the documents produced by the appellant in support of his claim are false. It merely refers to the comments made by the Head Master with reference to the school records of appellant's father's maternal brother and his aunt, which had been alleged to be tampered with, to change the entry from Koshti Halba to Halba and nothing more. Neither the Head Master was examined, nor any further enquiry was conducted to verify the veracity of Head Master's statement. It is of some importance to note at this juncture that in similar cases, involving appellant's first cousin and his paternal uncle, the High Court, while observing non-application of mind by the Caste Scrutiny Committee, had decided a similar claim in their favour.

26. We are convinced that the documentary evidence produced by the appellant was not examined and appreciated in its proper perspective and the High Court laid undue stress on the affinity test. Thus, the decision of the Caste Scrutiny Committee to cancel and confiscate the caste certificate as well as the decision of the High Court, affirming the said decision is untenable. We are, therefore, of the opinion that the claim of the appellant deserves to be re-examined by the Caste Scrutiny Committee. For the view we have taken on facts in hand, we deem it unnecessary to refer to the decisions cited at the bar.

10. In the present case, keeping in view the judgment delivered by the apex court, the revenue authorities have verified the genuineness of the caste claim on the basis of documents and affinity test, and the claim has been turned down in a mechanical manner by the Sub Divisional Officer based upon some

research conducted by the Tribal Development Institute and therefore, in light of the judgment delivered by the Apex Court as the revenue authorities have held that the petitioner is a member of Mogia Tribe, this Court does not find any reason to interfere with the order passed by the learned Single Judge. Not only this, a similar situation arose earlier also and the caste certificates were being denied to the member of Mogia Tribe certifying them to be a member of Scheduled Tribe. A circular was issued by the Naib Tehsildar, Rajgarh on 9.8.2007 stating therein that Mogia Community should be treated as Scheduled Caste and not as Scheduled Tribe. The Division Bench of this Court vide order dated 23.1.2008 has disposed of the writ petition by holding that Mogia Community in the State of Madhya Pradesh will be treated as Scheduled Tribe. The order passed by the Division Bench of this Court on 23.1.2008 in the case of *Krishanpal Singh & Ors. Vs. State of M.P. & Ors.* {WP No.6762/2007 (PIL)} reads as under :-

> "The petitioner who claims to be member of Mogia community has filed this writ petition as a Public Interest Litigation contending that by the Constitution( Scheduled Tribes ) Order, 1950, Mogia community has been included in the entry '16' of the list relating to Madhya Pradesh as a Scheduled Tribe but by a circular dated 09.08.2007 issued by the Naib Tahsiladar, Pachore, District Rajgarh, all concerned authorities under him have been informed that 'Mogia' community has been treated as a Schedule Caste and not a Scheduled Tribe. The petitioner has accordingly prayed that the said circular dated 09.08.2007 issued by the Naib Tahsiladar, Pachore, District, Rajgarh be quashed.
>
> We find that the in the Constitution ( Scheduled Castes) Order, 1950, as amended, in the list relating to Madhya Pradesh, in entry '39' the community 'Moghia' has been included as a Schedule Cast and it is perhaps for this reason that the Naib Tahsildar, Pachore has issued the circular dated 09.08.2007 saying that 'Mogia' community should be treated as Scheduled Caste and not Scheduled Tribe. But the circular has led to some confusion because of the fact that while 'Mogia' community has been included as Scheduled Tribe in the list of Madhya Pradesh appended to Constitution( Scheduled Tribes) Order, 1950, the community 'Moghia' has been included as a Scheduled Cast in the list relating to Madhya Pradesh

appended to Constitution, (Scheduled Castes) Order, 1950.

We dispose of this writ petition with a direction that the Naib Tahsiladar, Pachore, District, Rajgarh will clarify that it is the 'Moghia' community in Madhya Pradesh which will be treated as Scheduled Caste, whereas the 'Mogia' community in Madhya Pradesh will be treated as Scheduled Tribe.

With the aforesaid direction, the writ petition is disposed of. If the petitioner is aggrieved by any particular order passed against him, he may move the appropriate authority."

11. The aforesaid order of the Division Bench has been passed after dealing with the Constitution (Scheduled Tribes) Order, 1950 and it has held that Mogia community be treated as Scheduled Tribe and therefore, once it has been established that that petitioner is a member of Mogia community and is a resident of Madhya Pradesh, he has to be treated as a Scheduled Tribe and not as a Scheduled Caste, and therefore, this Court is of the considered opinion that no illegality/irregularity or legal infirmity is in existence in the order passed by the learned Single Judge dated 24.7.13, hence, the writ appeal preferred by the appellants (State of Madhya Pradesh) being devoid of merits and substance, is accordingly dismissed.

9. The other connected writ appeal i.e. WA No. and WA No. is also dismissed.

10. No order as to costs.

*Appeal dismissed.*

**I.L.R. [2014] M.P., 24**
**WRIT APPEAL**
***Before Mr. A.M. Khanwilkar, Chief Justice &***
***Mr. Justice Krishn Kumar Lahoti***
W.A. No.1074/2006 (Jabalpur) decided on 5 December, 2013

MANAGING DIRECTOR, M.P. KHADI & GRAMODYOG BOARD & anr. ...Appellants
Vs.
SHRI INDRABHAN GAUTAM & ors. ...Respondents

***Service Law - ACRs* - Whether the confidential report pertaining to year 1994-95 in the case of writ petitioner can be treated as 'advisory'**

**or 'adverse' as such - Held - Depending on the finding recorded in that behalf, the learned Single Judge may pass appropriate further directions, as may required in the matter, in accordance with law.**

**(Para 3)**

*सेवा विधि – वार्षिक गोपनीय प्रतिवेदन* – क्या रिट याची के संबंध में वर्ष 1994–95 के गोपनीय प्रतिवेदन को 'सलाह' माना जा सकता है या 'प्रतिकूल' माना जा सकता है – अभिनिर्धारित – इस संबंध में अभिलिखित किये गये निष्कर्ष के आधार पर, विद्वान एकल न्यायाधिपति समुचित अतिरिक्त निदेश पारित कर सकता है जैसा कि विधिनुसार, मामले में आवश्यक हो।

*Udyan Tiwari,* for the appellants.

*L.S. Singh* with *Lavkush Mishra*, for the respondents.

**ORDER**

The Order of the court was delivered by :

**A.M.KHANWILKAR, C.J.:-** This appeal takes exception to the decision of the learned Single Judge dated 7.9.2006 in W. P. No.1564/1996.

02. By the said writ petition the respondents had made grievance about having been superseded by his juniors (Respondents No.4 to 8) as Dy. Director from the post of Manager. The stand taken by the respondents in the writ petition/appellants herein to counter the grievance of the writ petitioner was founded on the ACRs for the years 1992-93, 1993-94 and 1994-95. At the same time, the appellants plainly accepted the position that the ACRs pertaining to years 1992-93 and 1993-94, even on a closer scrutiny, were nothing, but, advisory. However, according to them, the ACR for the year 1994-95, by no stretch of imagination, could be described as advisory. That on the face of it, was adverse remark noted against the writ petitioner. No doubt the learned Single Judge has opined that even the said confidential report pertaining to year 1994-95 was advisory in nature. However, the learned Single Judge has not recorded any reason as to why in spite of the stand taken by the appellant that it was adverse in nature, ought to be treated as advisory only. Notably, the learned Single Judge has not even adverted to the contents of the said document, Annexure R-9 (Annexure P-6 to the writ petition). That cannot be countenanced.

03. In the circumstances, we set aside the finding recorded by the learned Single Judge that the ACRs pertaining to year 1994-95 was advisory in nature; and instead we relegate the parties before the learned Single Judge for re-

examination of the issue afresh. Learned Single Judge after analyzing the relevant document, Annexure R-9 (Annexure P-6 to the writ petition) and the documents to be relied upon by the writ petitioners in support of the arguments that the contents of Annexure R-9, even if taken at its face value, ought to be treated as advisory or adverse, as the case may be. After examination of the relevant documents, the learned Single Judge ought to record a clear finding as to whether the confidential report pertaining to year 1994-95 in the case of writ petitioner can be treated as 'advisory' or 'adverse' as such. Depending on the finding recorded in that behalf, the learned Single Judge may pass appropriate further directions, as may required in the matter, in accordance with law.

04. The restored writ petition be proceeded before the learned Single Judge as per its turn, under appropriate caption, after winter vacation.

05. The writ appeal is disposed of, accordingly.

*Appeal disposed of.*

**I.L.R. [2014] M.P., 26**
**WRIT APPEAL**

***Before Mr. Justice Brij Kishore Dube & Mr. Justice Rohit Arya***

W.A. No. 108/2008 (Gwalior) decided on 12 December, 2013

SUBHASH GUPTA ...Appellant

Vs.

THE MANAGING DIRECTOR & anr. ...Respondents

***Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P. 2005 (14 of 2006), Under Clause 2(1), Constitution - Article 227 - Maintainability*** **- Learned Single Judge upon perusal of the order passed by the Labour Court and the Industrial Court, found no jurisdiction error or patent illegality or perversity in orders passed by both the Courts below - Held - Learned Single Judge has chosen not to exercise the original jurisdiction under Article 226/227 of the Constitution of India while not interfering with the finding of Courts below - Besides, the learned Single Judge has also not passed any order on merits, for the reason the respondent Corporation has also filed a writ petition against the order of the Industrial Court, which is pending consideration - Appeal is not maintainable. (Paras 3, 8 & 9)**

*उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006*

*का 14), खंड 2(1) के अंतर्गत, संविधान – अनुच्छेद 227 – पोषणीयता* – विद्वान एकल न्यायाधिपति ने श्रम न्यायालय एवं औद्योगिक न्यायालय द्वारा पारित आदेश का अवलोकन करने पर पाया कि दोनों निचले न्यायालयों द्वारा पारित आदेशों में अधिकारिता की भूल या प्रकट अवैधता एवं विपर्यस्तता नहीं – अभिनिर्धारित – विद्वान एकल न्यायाधिपति ने निचले न्यायालयों के निष्कर्ष के साथ हस्तक्षेप न करते हुए भारत के संविधान के अनुच्छेद 226/227 के अंतर्गत प्रारंभिक अधिकारिता का प्रयोग नहीं करना पसंद किया – इसके अलावा, विद्वान एकल न्यायाधिपति ने गुणदोषों पर कोई आदेश पारित नहीं किया, इस कारण से कि प्रत्यर्थी निगम ने औद्योगिक न्यायालय के आदेश के विरुद्ध रिट याचिका भी प्रस्तुत की है, जो कि विचाराधीन है – अपील पोषणीय नहीं।

**Cases referred :**

2008 (1) MPLJ 152, (1999) 6 SCC 275.

*Vivek Jain,* for the appellant.
*Prashant Sharma,* for the respondents.

**ORDER**

The Order of the court was delivered by : **ROHIT ARYA, J.:-** Challenge made in this writ appeal is to the order dated 27.11.2007 passed in Writ Petition. Petitioner was dismissed from service on account of serious mis-conduct of misbehavior and hurling abuses upon his senior officers.

2. Application filed by the petitioner before Labour Court was dismissed vide order dated 19.4.2006. The Labour Court has recorded the finding upon due appreciation of evidence on record, that the charges levelled against the petitioner were serious in nature and found proved. In appeal before the Industrial Court, the Industrial Court did not interfere with the finding as regards misconduct. However, modified the order of punishment with the imposition of fine of Rs. 7,000/- and set aside the order of dismissal but without back wages.

3. The learned Single Judge upon perusal of the order passed by the Labour Court and the Industrial Court, found no jurisdictional error or patent illegality or perversity in orders passed by both the Courts below and did, therefore not interfere with the finding of facts in exercise of power of superintendence under Article 227 of the Constitutional of India.

4. The instant writ appeal is preferred under Clause 2 (1) of M.P. Uchcha

Nyayalaya (Khand Nyay Peet Ko Appeal) Adhiniyam, 2005.

> "2. Appeal to the Division Bench of the High Court from a judgment or order of one Judge of the High Court made in exercise of original jurisdiction.- (1) An appeal shall lie from a judgment or order passed by one Judge of the High Court in exercise of original jurisdiction under Article 226 of the Constitution of India to a Division Bench comprising of two Judges of the same High Court:
>
> Provided that no such appeal shall lie against an interlocutory order or against an order passed in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.
>
> (2) An appeal under sub-section (1) shall be filed within 45 days from the date of order passed by a Single Judge:
>
> Provided that any appeal may be admitted after the prescribed period of 45 days if the petitioner satisfies the Division Bench that he had sufficient cause of not preferring the appeal within such period"

5. Upon perusal of the aforesaid provision, it is clear that the appeal shall lie from a judgment or order passed by the one Judge of the High Court in exercise of original jurisdiction under Article 226 of the Constitution of India, and no such appeal shall lie against the order passed in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

6. The five Judges of Bench in the case of *Manoj Kumar Vs. Board of Revenue and others* (2008 (1) M.P.L.J 152, on critical examination of catena of judgments of Hon'ble Supreme Court, including the one cited by the petitioner namely, *Lokmat Newspapers Pvt. Ltd Vs. Shankarprasad* (1999) 6 SCC 275 as well as other High Courts, including this High Court crystallized the distinction between the original jurisdiction and powers of superintendence under Article 226 and 227 of the Constitution of India. Para 62 thereof is quoted below:

> From the aforesaid it is quote vivid that the maintainability of a writ appeal from an order or the learned Single Judge would depend upon many an aspect and cannot be put into a

straitjacket formula. It cannot be stated with mathematical exactitude. It would depend upon the pleadings in the writ petition, nature of the order passed by the learned Single Judge, character and the contour of the order, directions issued, nomenclature given and the jurisdictional prospective in the constitutional contexts are to be perceived. It cannot be said in a hyper technical manner that an order passed in a writ petition, if there is assail to the order emerging from the Inferior Tribunal or Subordinate Courts has to be treated all the time for all purposes to be under Article 227 of the Constitution of India. It would depend upon the real nature of the order passed by the learned Single Judge. To elaborate : whether the learned Single Judge has exercised his jurisdiction under Article 226 or under 227 or both would depend upon various aspects and many a facet as has been emphasized in the afore quoted decisions of the Apex Court. The pleadings, as has been indicated hereinabove, also assume immense significance. It would not be an overemphasis to state that an order in a writ petition can fit into the subtle contour of Articles 226 and 227 of the Constitution in a composite manner and they can coincide, co-exit, overlap or imbricate. In this context it is apt to note that there may be cases where the learned Single Judge may feel disposed or inclined to issue a writ to do full and complete justice because it is to be borne in mind that Article 226 of the Constitution is fundamentally a repository and reservoir of justice based on equity and good conscience. It will depend upon factual matrix of each case.

(Emphasis Supplied)

7. In para 67 the Hon'ble Bench has concluded in the ratio of the judgment.

8. In the light of law laid down by the aforesaid judgment, we have examined the nature of the order passed by the learned Single Judge in the instant case. We are of the considered view that the learned Single Judge, has chosen not to exercise the original jurisdiction under Article 226 / 227 of the Constitution of India while not interfering with the finding of courts below. Besides, the learned Single Judge has also not passed any order on merits,

for the reason the respondent Corporation has also filed a writ petition against the order of the Industrial Court, which is pending consideration.

9. In view of the proviso of Clause 2 of Section 1 of the Adhiniyam, the instant appeal is not maintainable, hence, it is hereby dismissed.

*Appeal dismissed.*

**I.L.R. [2014] M.P., 30**
**WRIT PETITION**

***Before Mr. Krishn Kumar Lahoti, Acting Chief Justice & Mr. Justice Subhash Kakade***

W.P. No. 1303/1998 (Jabalpur) decided on 18 June, 2013

STATE OF M.P. & ors. ...Petitioners
Vs.
M/S SURYA AGRO OILS LTD. ...Respondent

***General Sales Tax Act, M.P. 1958 (2 of 1959), Sections 44(1), (2), (3) & 3(3)*** **- Board of Revenue rejected the application u/s 44 of the Act only on technical ground that it was filed by the Additional Commissioner Sales Tax who was not competent to file it - Held - Section 44, it is apparent that the statute provides that the Commissioner may, by application in writing can seek a reference u/s 44(1) or (2) of the Act - Sub Section 3 of Section 3 specifically provides that the Additional Commissioner of the Sales Tax shall exercise all the powers and perform all the duties conferred or imposed on the Commissioner by or under this Act, throughout the State and for this purpose any reference to the Commissioner in this Act shall be deemed to include a reference to the Additional Commissioner of Sales Tax - Board of Revenue without considering the aforesaid provisions have wrongly rejected - Application filed by the Additional Commissioner on behalf of the Commissioner, Sales Tax was maintainable - Matter is remitted back. (Paras 8, 12 & 13)**

*साधारण विक्रय–कर अधिनियम, म.प्र. 1958 (1959 का 2), धाराऐं 44(1),(2),(3) व 3(3)* – राजस्व मंडल ने मात्र इस तकनीकी आधार पर धारा 44 के अंतर्गत किया गया आवेदन अस्वीकार किया कि उसे अतिरिक्त आयुक्त, विक्रय कर द्वारा प्रस्तुत किया गया था जो कि उसे प्रस्तुत करने के लिये सक्षम नहीं था – अभिनिर्धारित – धारा 44, यह स्पष्ट है कि कानून उपबंधित करता है कि आयुक्त, लिखित आवेदन द्वारा अधिनियम की धारा 44(1) अथवा (2) के अंतर्गत निर्देश चाह सकता है – धारा

3 की उप धारा 3 विनिर्दिष्ट रुप से उपबंधित करती है कि विक्रय कर आयुक्त पूरे राज्य में इस अधिनियम के द्वारा या उसके अधीन प्रदत्त या अधिरोपित सभी कर्तव्यों का पालन करेगा और सभी शक्तियों का प्रयोग करेगा और इस प्रयोजन हेतु इस अधिनियम में किये गये आयुक्त के उल्लेख में विक्रय कर अतिरिक्त आयुक्त का संदर्भ समाविष्ट माना जायेगा – राजस्व मंडल ने उपरोक्त उपबंधों को विचार में लिये बिना अनुचित रुप से खारिज किया – विक्रय कर आयुक्त की ओर से अतिरिक्त आयुक्त द्वारा प्रस्तुत किया गया आवेदन पोषणीय था – मामला प्रतिप्रेषित।

*P.K. Kaurav,* Addl. A.G. for the petitioners.
None for the respondent inspite of service.

**ORDER**

The Order of the court was delivered by :
**K.K. LAHOTI, AG.C.J.:-** The petitioner has invoked jurisdiction of this Court under Articles 226/227 of the Constitution of India by challenging two orders passed by the Board of Revenue, Madhya Pradesh, Gwalior. First is the order Annexure P-3 dated 27.7.1990 which was passed in appeal, filed on behalf of the respondents, allowing the appeal in part, setting aside part of the order passed by the Appellate Authority, Dy. Commissioner, Sales Tax, Bhopal and remanding the matter to the Assessing Officer for levying additional tax as per the directions contained in paragraph 33 of the order. The another order Annexure P-4 dated 10.9.1991 is also under challenge by which an application preferred by the Commissioner of Sales Tax, M.P. under Section 44 of M.P. General Sales Tax Act 1958, was rejected on the ground that the application was filed by the Additional Commissioner while under Section 44 of the Act, only Commissioner of Sales Tax could have filed an application. These orders are under challenge in this petition.

2. Before considering the case on merits, it would be appropriate that before filing of this petition, the petitioner herein had filed an application before this Court, under Section 44 (2) (b) of the M.P. General Sales Tax Act, 1958 (hereinafter referred to as the Act) for a direction to the Board of Revenue for referring the matter to the High Court. The aforesaid case was registered as M.C.C. No.234/1992 and by an order dated 8.1.1998 the Division Bench of this Court dismissed the application. The order dated 8.1.1998 reads thus:-

*"Shri R. S. Jha, Dy. A.G. for revenue.*
*Shri Sapre Adv. For assessee.*

*Heard learned counsel.*

*This is an application u/s. 44 (2) of M.P. General Sales Tax Act, 1958 at the instance of Revenue for calling statement of the case. Since the application for reference was rejected by the Tribunal as not maintainable having been moved by Additional Commissioner Sales Tax, the Tribunal has not decided the case on merits whether a question of law arises or not. Hence, no application under Sec.44 (2) of the Act is maintainable. This order could have been challenged by the State by way of writ petition and not by way of reference. Consequently, this application u/s. 44 (2) of the Act is rejected."*

3. After rejection of the application, filed by the petitioner under Section 44 (2) of the Act, the petitioner herein has filed this writ petition for setting aside the aforesaid orders.

4. So far as order Annexure P-3, by which an appeal preferred by the respondent/assessee was allowed in terms of the directions issued in paragraph 33 of the order, is concerned, against such an order remedy of reference was available to the petitioner and the petitioner had invoked jurisdiction of Board of Revenue for referring the matter under Section 44 (2) of the Act, but vide Annexure P-4 it has been rejected.

5. In view of the aforesaid circumstances, it would be appropriate if firstly the validity of the order Annexure P-4 is examined.

6. Learned counsel appearing for the petitioner submits that the Board of Revenue had erred in rejecting the application filed by the petitioner only on technical ground that it was filed by the Additional Commissioner who was not competent to file it. It was submitted, by Shri Kaurav, learned Additional Advocate General, that though the application was filed by the Additional Commissioner, but in view of Section 3 (3) of the Act the Additional Commissioner was empowered to file an application seeking reference from the Board. The Board had wrongly rejected the application on the ground that only the Commissioner was empowered to seek reference under Section 44 of the Act.

7. To appreciate the aforesaid contention it would be appropriate that relevant provisions as contained in Section 44 (1), (2), (3) and Section 3 (3)

of the Act are referred.

***"Section 44 - Statement of case to High Court.-*** *(1) Within sixty days from the date of communication by the Tribunal of any order to a dealer or to the Commissioner under sub-section (2) of Section 38 or sub-section (3) or sub-section (5) of Section 39 [or Section 45] the dealer or the Commissioner may, by application in writing accompanied, where the application is made by a dealer, by a fee of one hundred rupees, require the Tribunal to refer to the High Court any question of law arising out of such order, and where the Tribunal decides to make a reference to the High Court, it shall draw up a statement of the case and refer it accordingly.*

*(2) If for reasons to be recorded in writing, the Tribunal refuses to make a reference, the applicant may within sixty days from the date of communication of such refusal -*

*(a) withdraw his application and if he does so, the fee paid shall be refunded; or*

*(b) apply to the High Court to require the Tribunal to make a reference.*

*(3) If upon the receipt of an application under clause (b) of sub-section (2) the High Court is not satisfied, that the refusal was justified, it may require the Tribunal to state the case and refer it, and on receipt of such requisition, the Tribunal shall act accordingly.*

*(4) If the High Court is not satisfied that the case stated is sufficient to enable it to determine the question raised, it may call upon the Tribunal to make such additions or alterations therein as the Court may direct in that behalf.*

*(5) The High Court upon the hearing of a reference under this section shall decide the question of law raised thereby and shall deliver judgment thereon containing the grounds of decision and shall send to the Tribunal a copy*

*of the judgment under the seal of the Court and the signature of the Registrar, and the Tribunal shall dispose of the case accordingly.*

*(5-A) Where an appeal against the judgment of the High Court under sub-section (5) is entertained by the Supreme Court, the Tribunal shall dispose of the case in accordance with the judgment delivered by the Supreme Court and for this purpose a copy of the judgment of the Supreme Court shall be sent to the Tribunal by the High Court under its seal and the signature of the Registrar.*

*(6) The costs of a reference under this section, including the disposal of the fee referred to in sub-section (1), shall be in discretion of the Court.*

*(7) The tax ordered by the Tribunal to be paid by an order in respect of which an application has been made under sub-section (1) shall, notwithstanding the making of such application or any reference in consequence thereof, be payable upon the making of the order.*

*(8) Where as the result of a reference under this section the tax due from any dealer is reduced below the amount paid by him under sub-section (7), the difference shall be refunded to him in accordance with the provisions of Section 24.*

*Section 3 (3) - The Commissioner of Sales Tax and the Additional Commissioner of Sales Tax shall exercise all the powers and perform all the duties conferred or imposed on the Commissioner by or under this Act, throughout the State and for this purpose any reference to the Commissioner in this Act shall be deemed to include a reference to the Additional Commissioner of Sales Tax."*

8. From the perusal of Section 44 it is apparent that the statute provides that the Commissioner may, by application in writing can seek a reference under Section 44 (1) or (2) of the Act. Sub Section 3 of Section 3 specifically provides that the Additional Commissioner of the Sales Tax shall exercise all the powers and perform all the duties conferred or

imposed on the Commissioner by or under this Act, throughout the State and for this purpose any reference to the Commissioner in this Act shall be deemed to include a reference to the Additional Commissioner of Sales Tax. The aforesaid provision specifically provides that wherever a reference of Commissioner is made in the Act, it shall include the Additional Commissioner.

9. The definition of Commissioner as provided in Section 2 (c) also defines the Commissioner that "the Commissioner means the Commissioner of Sales Tax appointed under Section 3".

10. On analogous reading of definition and Section 3 (3) there is no iota of doubt that for all the purposes wherever there is a reference to the Commissioner in the Act, it shall include a reference to the Additional Commissioner of Sales Tax.

11. The Board of Revenue while dealing with the application filed by the petitioner under Section 44 of the Act, rejected the application only on the ground that the application was filed by Shri R. K. Sharma, Additional Commissioner, Gwalior, who was vested with the powers of Additional Commissioner as per his appointment order, but was not empowered to perform the duties of the Commissioner and the application for reference under Section 44 of the Act could have been filed by the Commissioner.

12. From the perusal of the aforesaid provisions as referred herein above it appears that the Board of Revenue without considering the aforesaid provisions have wrongly rejected the application, while the application filed by the Additional Commissioner on behalf of the Commissioner, Sales Tax was maintainable and the Board of Revenue ought to have considered the application preferred by the petitioner under Section 44 of the Act on merits.

13. In the light of the aforesaid discussion the impugned order Annexure P-4 dated 10.9.1991 is not sustainable in law and is hereby set aside. The matter is remitted back to the Board of Revenue who after restoring the Reference No.41-PBR/90 to its number and after issuance of notice to the other side shall hear and decide the matter preferably within a period of 90 days from the date of communication of this order.

14. Considering the facts of the case there shall be no order as to costs.

*Order accordingly.*

**I.L.R. [2014] M.P., 36**
**WRIT PETITION**
***Before Mr. Justice U.C. Maheshwari & Mr. Justice B.D. Rathi***
W.P. No. 4283/2013 (Gwalior) decided on 4 July, 2013

MADHYA PRADESH MADHYA KSHETRA VIDYUT VITARAN COMPANY LTD. ...Petitioner
Vs.
THE APPELLATE AUTHORITY & ors. ... Respondents

***Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), Section 13(3), Constitution - Article 227* - Appeal dismissed in default - Appeal filed by petitioner before AAIFR against the order of BIFR which was dismissed in default - Petition against dismissal of appeal in default is not maintainable as provisions provide for applicability of Civil Procedure Code to the cases pending before BIFR and its appellate authority - The forum for restoration of appeal is available before the same appellate authority - Held - In such premises of availability of appropriate forum, petition under this article cannot be entertained. (Paras 7 & 8)**

*रुग्ण औद्योगिक कम्पनी (विशेष उपबंध) अधिनियम, 1985 (1986 का 1), धारा 13(3), संविधान – अनुच्छेद 227 – व्यतिक्रम से अपील खारिज* – याची द्वारा बीआईएफआर के आदेश के विरुद्ध एएआईएफआर के समक्ष प्रस्तुत अपील, जिसे व्यतिक्रम के कारण खारिज किया गया – व्यतिक्रम के कारण अपील की खारिजी के विरुद्ध याचिका पोषणीय नहीं जैसा कि उपबंध बीआईएफआर तथा उसके अपीली प्राधिकारी के समक्ष लंबित प्रकरणों में सिविल प्रक्रिया संहिता को लागू करने के लिए उपबंधित करते हैं – अपील को पुनःस्थापित करने का मंच, समान अपीली प्राधिकारी के समक्ष उपलब्ध है – अभिनिर्धारित – उक्त समुचित न्यायालय की उपलब्धता को देखते हुए, इस अनुच्छेद के अंतर्गत याचिका को ग्रहण नहीं किया जा सकता।

*Vivek Jain*, for the petitioner.

**ORDER**

The Order of the court was delivered by :
**B.D. Rathi, J.:-** In brief, facts of the petition are that the petitioner is a electricity distribution company owned by the Government of Madhya Pradesh having distribution license in terms of Section 2 (17) of the Electricity Act, 2003. Petitioner is doing the business of electricity distribution in a part of the State of Madhya Pradesh. Respondent No. 3 M/s Malanpur Steels Limited

intended to establish and then established a steel processing plant at Malanpur ,District Bhind, (M.P.). For this purpose, it entered into two separate HT. agreements with M.P. Electricity Board in December, 1989. These were mini steel plants and rolling mill. The connection were charged and supply started to the respondent No. 3, in April, 1992. After sometime, respondent No. 3, started facing problems. A major. fire accident occurred in factory premises' on 15/10/1998. Since, 20/11/1998, both the connections were temporarily disconnected, thereafter, in April, 1999, the connections were permanently disconnected and billing was stopped. But for the period of temporary disconnection, the. meter rent and surcharge were billed on 31/03/1999. On 31/03/1999, an amount of Rs. 57.31 crores towards the mini steel plant and amount of Rs. 2.24 crores were dues towards roiling mill units. Certain attempts were made by the petitioner to recover the dues, but shortly thereafter, the respondent No. 2 moved before the Board for industrial and financial reconstruction (in short "BIFR") for rehabilitation and case No. 158/01 was registered and in that case, Punjab National Bank was appointed as operating agency for framing the draft rehabilitation scheme; however, by virtue of Section 22 (1) of Sick Industrial Companies (Special Provisions)Act, 1985 (for short "SIC Act, 1985"), the recoveries of bills could not be materialized, as automatic immunity was granted to the respondent No. 3 from all recoveries. Thereafter, the petitioner appeared before the BIFR and intimated its dues to BIFR. A committee was constituted by CGM (GR) for finalizing the dues and after reconciliation, a net amount Rs. 55.686 crores was found dues on both the units after deducting security deposits. BIFR circulated the draft schemes. Petitioner appeared before the BIFR and submitted its specific objection. The BIFR, without giving a word of consideration on the objections of the petitioner, sanctioned the final scheme dated 4/09/2012, the petitioner did not receive the certified copy of the order from the BIFR, though it is the rule of procedure in BIFR to send the order by post free of costs to the parties. However, when the copy was not received for a long time, the petitioner filed an appeal before the appellate authority of BIFR on 2/03/2013 alongwith photocopy of the order. 'The AAIFR, sent a notice directing the counsel to remove the defects which could not be removed unless certified copy is received from the BIFR. Matter was listed before the AAIFR, on 31/05/2013 and then on 10/06/2013. Ultimately, the certified copy was received from the BIFR, only on 10/06/2013 i.e. Annexure P/12. On 10/06/2013, the matter was listed in default. On that date, appeal has been rejected on the ground of defects without going into the merits of the case.

2. Therefore, this petition has been filed by the petitioner on 24/06/2013 under Article 226/227 of the Constitution of India being aggrieved from the order 10/06/2013 (Annexure P/1) passed by appellate authority (AAIFR) in DY. No.666/13 and order dated 04/09/2012, passed by BIFR in case No. 158/01, Copy Annexure P/2 for issuing appropriate writ, either in the nature of mandamus and/or certiorari against the respondent for the following reliefs:-

> i) That the impugned order annexure P/1 and para 15.6 of order Annexure P/2 may kindly be quashed.
>
> ii) appropriate directions be issued as per law in place of directions issued by the BIFR in para 15.6 of order annexure P/2.
>
> iii) any other relief deemed fit in the facts and circumstances of the case doing justice in the matter including costs be also awarded.

3. After perusal of record, we have also gone through the relevant provisions of "the SIC Act, 1985" and BIFR Regulation 1987.

4. Regulation No.3 (a) and Regulation No.10 of the BIFR Regulation1987 and Sub Section 3 of Section 13, of the SIC Act, 1985 provide for applicability of the provisions of Code of Civil Procedure to the cases pending before BIFR and its appellate authority.

5. In BIFR Regulations, 1987, in which, Regulation No.3(A) and Regulation No. 10 are as under:-

> **3. Definition-** In these regulations, unless the context otherwise requires-.
>
> (a) "Act means the Sick Industrial Companies (Special Provisions) Act; 1985 (1 of 1986).
>
> Regulation 10 Which is as follows:-
>
> **"10. Ex parte proceedings-** Where on the day fixed for hearing; any of the parties does not appear, the proceedings, unless adjourned by the Board, shall continue in the absence of the party not so appearing."

6. Similarly in SIC Act, 1985, Sub Section 3 of Section 13 read as under:-

"13. (3) The Board or the Appellate Authority shall, for the purpose of any inquiry or for any other purpose under this Act, have the same powers. as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying suits in respect of the following matters, namely:-

(a) the summoning and enforcing the attendance of any witness and examining him on oath;

(b) the discovery and production of document or other material object producible as evidence;

(c) the reception of evidence on affidavit;

(d) the requisitioning of any public record from Any court or office;.

(e) the issuing of any commission for the examination of witnesses;

(f) any other matter which may be prescribed."

7. Bare perusal of above-mentioned provisions, it is Clear that these provisions provide for applicability of Code of Civil Procedure to the cases pending before the BIFR and its appellate authority.

8. In view of the applicability of the abovesaid provisions of the procedural law, when query was made from the counsel about the provisions of Order XLI Rule 19 read with Section 151 of the C.P.C., the forum for restoration of the aforesaid appeal, which has been dismissed for want of prosecution and also on account of non-curing the default, is available before the same appellate authority then, how this petition under the superintendent jurisdiction of this Court could be entertained and agitated.

9. On which, the counsel seeks permission to withdraw this petition with liberty to file the appropriate application for restoration of the impugned appeal before the appellate authority under the above mentioned provisions alongwith the prayer to consider this appeal in the light of Regulation No.10 of the BIFR Regulation, 1987 read with Section 151 of C.P.C.

10. Considering the aforesaid, without expressing any opinion on the merits of the matter, this petition is hereby dismissed as withdrawn and not pressed

by extending the liberty to file the restoration application within 30 days from today i.e. 04/07/2013 under the aforesaid provision before the appellate authority and pursuant to it such authority is directed that on filing such application, the same be considered and decided on its own merits. It is further directed that appeal be not dismissed only on the ground of limitation or default. And if there is any default, then the opportunity to cure the same be provided to the petitioner.

11. Accordingly, the W. P. is disposed of. No order as to costs.

Certified copy as per rules.

*Petition disposed of.*

**I.L.R. [2014] M.P., 40**
**WRIT PETITION**
***Before Mr. Justice Sanjay Yadav***
W.P. No.11023/2013 (Jabalpur) decided on 5 July, 2013

PRAVEEN RULE ...Petitioner
Vs.
CENTRAL BOARD OF SECONDARY EDUCATION & ors. ...Respondents

***Education - Admission*** **- Petitioner has filed petition seeking direction to respondent No. 2 to grant admission to his son in class 11th, subject mathematics - Held - Petitioner having failed to commend regulation by CBSE to the effect that the student to be given the stream of his choice irrespective of his performance, it cannot be said that the respondents/school have faulted in discharging his public duties - Petition dismissed.** **(Para 5)**

*शिक्षा – प्रवेश* – याची ने अपने पुत्र को कक्षा 11वीं में, विषय मेथेमेटिक्स में प्रवेश दिये जाने के लिए प्रत्यर्थी क्रं. 2 को निदेश चाहते हुए याचिका प्रस्तुत की – अभिनिर्धारित – सी.बी.एस.ई. के इस आशय के विनियमन की संस्तुति करने में याची असफल रहा कि छात्र को उसके प्रदर्शन का विचार किये बिना उसके पसंद की शाखा (स्ट्रीम) दिया जानी चाहिए. यह नहीं कहा जा सकता कि प्रत्यर्थी/शाला ने अपने लोक कर्तव्यों के निर्वहन में त्रुटि की है – याचिका खारिज।

**Cases referred :**

AIR 1989 SC 1607, 2000(3) MPLJ 207, 2013 (3) MPHT 32, (1997) 3 SCC 571, C.A. 8783/3784 of 2003 decided on 19.07.2007.

*S. Soni,* for the petitioner.

**ORDER**

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

1. On the strength of decisions in *Shri Anandi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust v. V. R. Rudani* AIR 1989 SC 1607, *Rajendra Rathor v. M.P. Stock Exchange, Indore* 2000(3) MPLJ 207 and *Anand Kumar Dubey v. Jabalpur Co-operative Milk Producers Union Ltd.* 2013(3) M.P.H.T. 32 and the contention that the private education institution, respondent no.2, owe a public duty to grant admission and allot choice subject in Class 11th, the petitioner has filed this petition seeking direction to respondent no.2 to grant admission to his son in Class 11th Mathematics.

2. In *K. Krishnamacharyulu v. Sri Venkateswara Hindu College of Engineering,* (1997) 3 SCC 571, it has been held as under -

> "when there is an interest created by Government in an institution to impart education, which is a fundamental right of the citizens, the teachers who impart the education, get an element of public interest in the performance of their duties. The element of public interest requires to regulate conditions of service of those employees at par with government employees. Such employees are entitled to parity of pay scales as per executive instructions of Government. State has obligation to provide facilities and opportunities to people to avail of right to education. Private institutions cater to the needs of educational private institutions. A teacher duly appointed to a post in a private institution is entitled to seek enforcement of orders issued by Government. When an element of public interest is created and the institution is catering to that element, the teacher, the arm of the institution is also entitled to avail of remedy provided under Article 226; the jurisdiction part is very wide. It would be a different position if the remedy is a private law remedy. They cannot be denied the same benefit which is available to others. It is therefore held that writ petition is maintainable. Appellants are entitled to equal pay on a par with government employees under Article 39(d) of the

Constitution."

3. Thus, element of public interest must exist before a writ petition under Article 226 of the Constitution of India directed against the action of private school is being filed. In the case at hand, the petitioner having failed to establish an element of public interest in a student claiming admission in particular stream when he does not qualify for the same by the standard laid by the said institution.

4. In *S.K. Varshney vs. Principal, Our Lady of Fatima H.S.S* (Civil Appeal No.8783/3784 of 2003 decided on 19.7.2007), it has been held that-

> "Both the petitions were dismissed by the learned single Judge on the ground that no writ would lie against unaided private institutions and the writ petitions were not maintainable.
>
> Aggrieved thereby, writ appeals have been filed before the Division Bench without any result. The Division Bench held that the writ petitions are not maintainable against a private institute. Aggrieved thereby, these appeals have been filed.
>
> Counsel for the appellant relied on a decision rendered by this Court in *K. Krishnamacharyulu and others vs. Sri Venkateswara Hindu College of Engineering and another* 1997(3) SCC 571. He particularly relied on the observation made by this Court in paragraph 4 of the order that when an element of public interest is created and the institution is catering to that element, the teacher, being arm of the institution, is also entitled to avail of the remedy provided under Article 226.
>
> This Court in *Sushmita Basu and others vs. Ballygunge Siksha Samity and ors.,* (2006) 7 SCC 680 in which one of us (Sema, J.) is a party, after considering the aforesaid judgment has distinguished the ratio by holding that the writ under Article 226 of the Constitution against a private educational institute would be justified only if a public law element is involved and if it is only a private law remedy no writ petition would lie. In the present cases, there is no question of public law element involved inasmuch as the grievance of the appellants are of personal nature. We, accordingly, hold that writ petitions are not maintainable against the private

institute. There is no infirmity in the order passed by the learned single Judge and affirmed by the Division Bench. These appeals are devoid of merit and are, accordingly, dismissed. No costs".

5. In the case at hand, the petitioner having failed to commend regulation by Central Board of Secondary Education (CBSE) to the effect that the student to be given the stream of his choice irrespective of his performance, it cannot be said that the respondents-School have faulted in discharging his public duties.

6. In view whereof, even if the contention that imparting an education is a public duty is given the credence, the petitioner fails to establish that giving an admission in a particular stream/subject would also be a public duty.

7. The decisions relied on by the petitioner are applicable and operates in respective spheres and issues raised therein.

8. In view whereof, no relief can be granted to the petitioner.

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

*Petition dismissed.*

**I.L.R. [2014] M.P., 43**
**WRIT PETITION**
***Before Mr. Justice Sanjay Yadav***
W.P. No. 22109/2012 (Jabalpur) decided on 16 July, 2013

MUNICIPAL COUNCIL ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***A. Constitution - Article 226 - Disciplinary Action - Locus Standi* - Show Cause Notice issued to the officers of the petitioner as to why disciplinary action may not be taken against them - Municipal Council has no locus standi to challenge the said show cause notice.** **(Para 9)**

*क. संविधान – अनुच्छेद 226 – अनुशासनिक कार्यवाही – सुने जाने का अधिकार* – याची के अधिकारियों को कारण बताओ नोटिस जारी किया गया कि क्यों न उनके विरुद्ध अनुशासनिक कार्यवाही की जाए – उक्त कारण बताओ नोटिस को चुनौती देने के लिए नगरपालिका परिषद को, सुने जाने का अधिकार नहीं है।

*B. Municipalities Act, M.P. (37 of 1961), Section 167(4)(d)(e) - Recovery* - **Municipal Council seized immovable property and attached and locked the administrative building of the Company - Procedure as prescribed u/s 167(4)(d)(e) of Act, 1961 nowhere provides for attaching the building by putting lock over it - A mode which is not provided in the Statute cannot be invented by the Authority which is created by the very said statute. (Paras 13 & 14)**

*ख. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 167 (4)(डी)(ई) – वसूली* – नगरपालिका परिषद ने कंपनी की अचल सम्पत्ति जब्त कर कुर्क की और प्रशासनिक भवन को तालाबंद किया – प्रक्रिया, जैसा कि अधिनियम 1961 की धारा 167 (4)(डी)(ई) के अंतर्गत विहित है, कहीं भी भवन को तालाबंद करके कुर्क करने के लिये उपबंधित नहीं करती – ऐसी पद्धति जो कानून में उपबंधित नहीं है उसे ऐसे प्राधिकारी द्वारा अविष्कृत नहीं किया जा सकता जो उक्त कानून द्वारा सृजित है।

*C. Municipalities Act, M.P. (37 of 1961), Section 323* - **Petitioner seized and locked the immovable property of Company and attached and locked the administrative building - Lock was broke open after the intervention of the local administration and the possession of the building was given to the Company - In view of Section 323 of Act, 1961, it cannot be said that Divisional Commissioner, Collector did any illegality in correcting the illegal action by the petitioner. (Paras 14 & 15)**

*ग. नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 323* – याची ने कंपनी की अचल सम्पत्ति को जब्त किया और तालाबंद किया तथा प्रशासनिक भवन को कुर्क एवं तालाबंद किया – स्थानीय प्रशासन के हस्तक्षेप के बाद ताला तोड़कर खोला गया और कंपनी को भवन का कब्जा दिया गया – अधिनियम 1961 की धारा 323 को दृष्टिगत रखते हुए, यह नहीं कहा जा सकता कि संभागीय आयुक्त, कलेक्टर ने याची की अवैध कार्यवाही का सुधार करने में कोई अवैधता कारित की।

*D. Constitution - Article 226 - Municipalities Act, M.P. (37 of 1961), Section 312 - Maintainability of Writ Petition* - **Writ Petition filed through President of Municipal Council is not maintainable - This defect is also not curable. (Para 16)**

*घ. संविधान – अनुच्छेद 226 – नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 312 – रिट याचिका की पोषणीयता* – नगरपालिका परिषद के अध्यक्ष के माध्यम से प्रस्तुत की गयी रिट याचिका पोषणीय नहीं – यह त्रुटि भी सुधार योग्य

नहीं है।

**Cases referred :**

AIR 1960 SC 576. (1996) 6 SCC 660.

*Kishore Shrivastava* with *C.V. Rao*, for the petitioner.
*S.S. Bisen*, G.A. for the respondents No. 1 to 9 & 13.
*Satish Bagadia* with *R.K. Sanghi*, for the respondent No.10.

**ORDER**

SANJAY YADAV, J.:- Heard.

1. Controversy raised in this writ petition revolves round the action taken by the functionaries of the State of Madhya Pradesh in allegedly preventing the petitioner, a Municipal Council, in taking steps for recovery of dues towards terminal tax from respondent no.10.

2. It is a matter of record that the petitioner is a Municipal Council constituted under Section 5 of the M.P. Municipalities Act, 1961. Being so is, endowed with all the duties, functions and powers under the Act. One such power is to impose terminal tax on goods or animals exported from the limits of the Council. This power is conferred vide clause (n) of sub-section (6) of Section 127 and the Rules framed by the State Government. These rules are the Terminal Tax (Assessment and Collection) On The Good Exported From Madhya Pradesh Municipal Limits Rules, 1996.

3. That, respondent no.10 Hindustan Copper Limited is a Company incorporated under the Companies Act, 1956 and is engaged in the business of mining of Copper and its purification, sell and export.

4. That there has been a dispute in respect of extent of liability to pay terminal tax between the petitioner and respondent no.10.

5. In the past, for the period April, 2000 to March 2006, the respondent no.10 was subjected to the levy of terminal tax and the penalty thereon; where-against Writ Petition No.950/2007 was filed by respondent no.10. However, in view of provisions contained under Section 172 of 1961 Act, the respondent no.10 was directed to avail remedy of appeal. The appeal preferred was, however, dismissed on 12.5.2009 by the Civil Court for non-deposit as required under Section 172(2) of 1961 Act. In revision, the order of trial Court was set aside. Later on, restored vide decision dated 20.1.2011 passed

in W.P. No.7284/2010; where-against respondent no.10 preferred SLP(Civil) No.9697/2011, wherein they were directed to deposit an additional amount of Rs.10 crores with the petitioner herein with a further direction that on such deposit, the appeal dismissed by Civil Judge Class I, Baihar on 14.5.2009 shall stand revived for being disposed of on merits. It is informed that the appeal is pending consideration.

6. That for the period 1.4.2006 to 31.3.2012 petitioner raised the demand of Rs.1,77,57,70,395/- vide notice dated 16.10.2012 under Section 164(3) of 1961 Act. The demand was reiterated on 31.10.2012 and 16.11.2012. The demand being not satisfied petitioner took recourse to measures under Section 167 of 1961 Act. A request letter on 23.11.2012 was sent to In-charge, Police Station Malanjkhand for providing necessary force. Simultaneously, the respondent no.10 was called upon to deposit an amount of Rs.1,88,67,56,075/- due towards terminal tax for 2006-07 to 2011-12 by the Recovery Officer. On 26.11.2012, Recovery Officer seized immovable property as per list (Annexure P/16). That the administrative building was also attached and locked in presence of Tehsildar.

7. That the action of locking the administrative building was objected at by the officers of respondent no.10 as the same could not have been under Section 167 of 1961 Act. The authorities of respondent no.10 entered into, correspondence with the State functionaries including the Collector, Balaghat and the Divisional Commissioner. As apparent from the correspondence entered into by the Collector, Balaghat that a law and order situation having arisen, the State Administration intervened, the locks were broke open and possession of administrative building was given to respondent no.10.

8. In the background of these facts, present writ petition has been filed (a) to restrain respondents, Collector Balaghat, Sub-Divisional Magistrate, Baihar, Sub-Divisional Officer (Police), Baihar from interfering in the recovering proceedings (b) for direction to take action against these respondents (c) for registration of case against Sub-Divisional Magistrate and Sub-Divisional Officer (Police) and (d) for quashing the notice-dated 19.12.2012.

9. So far as the relief of quashment of show-cause notices dated 19.12.2012; apparent it is therefrom that thereby the then in-charge Chief Municipal Officer and the then Executive Engineer have been called upon as to why a disciplinary action be not taken against them. These two officers

have not joined the petitioner when the quashment of these two notices are sought by way of amendment. In a petition by the Municipal Council it has no *locus standi* to call in question the show cause notice issued to respective officers for taking disciplinary action. It is for the respective officer to question these notices which are issued under Rule 16 of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966. Even otherwise, petitioner has failed to show that Commissioner, Jabalpur Division, Jabalpur lacks jurisdiction in issuing notice for minor penalty. In view whereof, no interference is caused.

10. Regarding other reliefs as to prohibition and the restoration of possession, the same has to be examined in the context of the provisions contained under Section 167 of 1961 Act.

Sub-section (1) of Section 167 stipulates -

> 167. In what cases warrant may issue. - (1) If a person on whom a notice of demand has been served under sub-section (3) of Section 164 does not, within 15 days from the service of such notice pay the sum demanded in the notice, such sum with all cost of recovery may be recovered under a warrant in the form prescribed by rules or to the like effect signed by the Chief Municipal Officer -
>
> (i) by distress and sale of movable property belonging to such person; or
>
> (ii) by attachment and sale of the immovable property belonging to him:
>
> Provided that, where any precautionary or other measures in respect of any such property have been taken by the State Government for the recovery of any sum claimed by it, no proceedings shall be taken or continued under this chapter, in respect of such property until the State Government's claim has been paid off.

11. As to distress and sale of movable property the procedure prescribed under sub-section (3) and (4)(a)(b) and (c) are that -

> (3) Power of entry under special order. - The Madhya Pradesh Municipalities Act, 1961 It shall be lawful for any officer to

whom a warrant issued under sub-section (1) is addressed if the warrant contains a special order authorising him in this behalf, but not otherwise, to break open at any time between sunrise and sunset, any outer or inner door or a window of the building in order to make the distress directed in the warrant, if he has a reasonable ground for believing that such building contains property which is liable to seizure under the warrant, and if after notifying his authority and purpose and duly demanding admittance, he cannot otherwise obtain admittance:

Provided that such officer shall not enter or break open the door of any apartment appropriated to the use of woman until he has given not less than three hours' notice of his intention and had given such woman an opportunity to withdraw.

(4) Warrant how to be executed.--It shall also be lawful for such officer to distrain, wherever it may be found, any movable property or attach any immovable property of the person therein named as defaulter subject to the following conditions, exceptions and exemptions, namely:-

(a) the following property shall not be distrained :-

(i) the necessary wearing apparel and bedding of the defaulter, his wife and children, and utensils used for cooking and drinking;

(ii) the tools of artisans;

(iii) when the defaulter is an agriculturist, his implements of husbandry, seed-grain, and such cattle as may be necessary to enable him to earn his livelihood;

(iv) book of account;

(v) religious books and idols of worship;

(b) the distress shall not be excessive, that is to say, the property distrained shall be as nearly as possible equal in value to the amount recoverable under the warrant, and if any articles have been distrained which, in the opinion of the Chief Municipal Officer or of the persons to whom the warrant was

addressed should not have been so distrained, they shall forthwith be returned to the person from whom it was distrained;

(c) the officer shall on distraining or attaching the property forthwith make an inventory thereof, and give to the person in possession thereof at the time of distress or attachment, a written notice in the form prescribed by rules that the said property will be sold as shall be specified in such notice;

12. Regarding immovable property, the procedure is prescribed under clause (d) and (e) of sub-section (4) of Section 167 stipulating -

(d) when the property is immovable :-

(i) the attachment shall be made by an order prohibiting the defaulter from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge;

(ii) the order shall be proclaimed at some place on or adjacent to the property by beat of drum or other customary mode, and a copy of the order shall be fixed on a conspicuous part of the property and upon a conspicuous part of the Municipal office and also when the property is land paying revenue to the State Government, in the office of the Tahsildar of the tahsil in which the land is situate;

(e) any transfer of, charge on, the property attached or of any interest therein made without the written permission of the Council shall be void as against all claim of the Council enforceable under the attachment.

13. Combined reading of sub-section (3) and (4) makes it ample clear that though for the purpose of seizure under special order it is lawful for a warrant officer to break open at any time between sunrise and sunset any outer or inner door or a window of the building in order to make the distress directed in the warrant whereas in respect of immovable property, the procedure as prescribed under clause (d) and (e) of sub-section (4) of Section 167 which nowhere provides for by attaching the building by putting lock over it. A mode which is not provided in the statute cannot be invented by the

Authority which is created by the very said statute and it also does not lie in the mouth of such authority, as contended that, the aggrieved person could take recourse to law for prohibiting such an act.

14. Regarding powers of Divisional Commissioner, Collector or any other officer authorized by the State Government, reference can be had of the provisions contained under Section 323 of 1961 Act which provides that -

> 323. Power to suspend execution of orders, etc., of Council - (1) If in the opinion of the Divisional Commissioner, the Collector, or any other officer authorized by the State Government in this behalf, the execution of any order or resolution of a Council, or of any of its Committee or any other authority or officer subordinate thereto, or the doing of any act which is about to be done or is being done by or on behalf of the Council, is not in conformity with law or with the rules or bye-laws made there under and is detrimental to the interests of the Council or the public or is causing or is likely to cause injury or annoyance to public or any class or body of persons or is likely to lead to a breach of the peace, he may, by order or prohibit the doing of any such act.
>
> (2) When any order under sub-section (1) is passed the authority making the order, shall forthwith forward to the State Government and to the Council affected thereby a copy of the order with a statement of reasons for making it; and it shall be in the discretion of the State Government to rescind the order, or to direct that it shall continue in force with or without modification, permanently or for such period as it thinks fit:
>
> Provided that the order shall not be revised, modified or confirmed by the State Government without giving the Council reasonable opportunity of showing cause against the order.

15. Having thus considered this Court is of the view that the respondents no.9, 11 and 12 did not commit any illegality in correcting the illegal action by the petitioner in locking the administrative building of respondent no.10. Therefore, no interference is caused.

16. Even otherwise, this petition by the Municipal Council through its President is not tenable as the same is not in consonance with the provisions

of Section 312 of 1961 Act which stipules -

> 312. Power to institute legal proceedings and obtain legal advice. - With the previous sanction of the Council, the Chief Municipal Officer, or such other officer, as may be authorized by the Council in this behalf, may on behalf of the Council -
>
> (a) institute, defend or withdraw from legal proceedings under this Act, or under any rule or bye -law made thereunder, or under any other enactment for the time being in force;
>
> (b) admit, compromise or withdraw any claim made under this Act or under any rule or bye-law made thereunder, or under any other enactment for the time being in force; and
>
> (c) obtain such legal advice and assistance as he may, from time to time, think it necessary or expedient to obtain for any purpose referred to in the foregoing clauses of this section, or for securing the lawful exercise or discharge of any power or duty vesting in or imposed upon the Council, any of its committees or any municipal officer or servant.

17. Though it is contended that the provisions that the institution of legal proceedings by the Chief Municipal Officer or such other officers as may be authorized by the Council with a previous sanction is directory and not mandatory and the filing of writ petition by the President is a curable defect, though sound attractive, but when examined on the touchstone of the provisions contained under Section 312 of 1961 Act, it losses its attractiveness and the tenacity.

18. While dwelling on a similar provision regarding institution of legal proceedings, it has been held by their Lordships (majority view) in *Ballabhdas Agarwala v. J. C. Chakravary* AIR 1960 SC 576 : -

> 18. Whether as an ordinary citizen he could file the complaint takes us to the next question-are the provisions of S. 537 merely enabling or are they obligatory in the sense that no legal proceedings under the Calcutta Municipal Act, 1923 as in force in the Municipality of Howrah, can be instituted except in accordance with the provisions of that Act? It is necessary to read at this stage S. 537. It is in these terms:

"The Commissioners may-

(a) institute, defend, or withdraw from legal proceedings under the Calcutta Municipal Act, 1923, as in force in the Municipality of Howrah or under any rule or bye-law made thereunder;

(b) compound any offence against the Calcutta Municipal Act, 1923, as in force in the Municipality of Howrah or against any rule or bye-law made thereunder which, under any enactment for the time being in force, may lawfully be compounded;

(c) admit, compromise or withdrawn any claim made under the Calcutta Municipal Act, 1923, as in force in the Municipality of Howrah or under any rule or bye-law made thereunder; and

(d) obtain such legal advice and assistance as they may from time to time think it necessary or expedient to obtain for any of the purposes referred to in the foregoing clauses of this section, or for securing the lawful exercise of discharge of any power or duty vesting in or imposed upon the Commissioners or any Municipal officer or servant."

19. On behalf of the appellant it has been urged before us that the provisions of S. 537 are obligatory, and the principle invoked in aid of this construction is that adopted' by the Privy Council in *Nazir Ahmad v. King Emperor,* 63 Ind app 372 at p. 381: (AIR 1936 PC 253 (2) at p. 257), viz, that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. In other words, the argument of learned counsel for the appellant is not that the word 'must' must necessarily be read for the word 'may' in S. 537, but that if a legal proceeding is to be instituted under the Municipal Act in question, it must be done in accordance with the provisions of the Act and not otherwise. On behalf of the respondent, however, the contention is that S. 537 is merely enabling in nature, as the use of the word 'may' shows, and the general principle embodied in the Code of Criminal Procedure of taking cognisance of an offence on an complaint by even a private person is not in any way affected by S. 537.

20. These are the rival contentions which fall for consideration and we are of the view that the construction put on the section on behalf of the appellant is the sounder and more acceptable construction.

21. The section talks of various acts which the Commissioner may do and these acts have been put in four categories under clauses (a), (b), (c) and (d). We are primarily concerned with clause (a), which talks of three things- "institute, defend, or withdraw from legal proceedings under the Calcutta Municipal Act, 1923." It can hardly be doubted that the section does not compel the Commissioners to institute, defend or withdraw from legal proceedings; for example, clause (d) says "obtain such legal advice and assistance as they may from time to time think it necessary or expedient to obtain etc." This obviously shows that the Commissioners are not compelled to obtain legal advice. In the context, the use of the word 'may' is therefore appropriate. But the question still remains-if the Commissioners wish to do any of the acts mentioned in S. 537, must they do so in accordance with the provisions of the Act? We think that they must; otherwise S. 537 becomes clearly otiose. What is the necessity of S. 537 if the Commissioners can do the acts mentioned therein independent of and in a manner other than what is laid down therein? Learned counsel for the respondent suggested that S. 537 was enacted by way of abundant caution to enable the Municipality, a body corporate, to spend money on the institution of legal proceedings etc. We are not impressed by this argument. Like all other Municipal Acts, the Calcutta Municipal Act, 1923 has a section (section 5) which constitutes the Municipality into a body corporate and there are detailed provisions about Finance. Loans, Accounts, Taxation etc. Section 84 of the Calcutta Municipal Act, 1923 lays down:

"84 (1) The moneys from time to time credited to the Municipality shall be applied in payment of all sums, charges and costs necessary for carrying out the purposes of this Act, or of which the payment is duly directed or sanctioned by or under any of the provisions of this Act.

2. Such moneys shall likewise be applied in payment of all sums payable out of the Municipal Fund under any other enactment for the time being in force."

Obviously, therefore, no other separate provision for expenditure of money in connection with the acts mentioned in S. 537 was necessary by way of abundant caution. We are, therefore, unable to accept as correct the reason given by learned counsel for the respondent for the insertion of S. 537.

22. There are other provisions of the Act which also throw some light on the question. Section 531 provides for the appointment of Municipal Magistrates for the trial of offences under the Act and the rules or bye-laws made thereunder. Section 532 provides for cognisance of offence by Municipal Magistrate having jurisdiction in Calcutta; section 533 gives power to hear a case in the absence of the accused person; section 534 prescribed a period of limitation for prosecution and section 535 says who can make a complaint of the existence of any nuisance. Under S. 535 the complaint can be made either by the Municipality or any person who resides or owns property in Calcutta. The above provisions are followed by Ss. 537, 538 and 539. Section 537 gives power to the Municipality to institute legal proceedings etc.; S. 538 deals with suits against the Municipality and S. 539 provides the usual indemnity clause.

23. An examination of the aforesaid provisions shows that the Calcutta Municipal Act, 1923 provides inter alia for a machinery for proceedings before Magistrates and other legal proceedings. All these provisions can have one meaning only, viz. that the machinery provided in the Act must be followed in enforcing these provisions. It would, we think, be against the tenor and scheme of the Municipal Act to hold that S. 537 is merely enabling in nature, and that any private person may institute a legal proceeding under the Municipal Act independent and irrespective of the provisions of the Act.

19. The decision in *United Bank of India v. Naresh Kumar* (1996) 6 SCC 660 relied by the petitioner turns on its own facts and is of no assistance

to the petitioner in the present set of facts and statute.

20. In view whereof, taking into consideration the mandatory provision under Section 312 of 1961 Act, the petition since is not filed by Chief Municipal Officer or any other officer, as may be authorized by the Council, is not tenable at the instance of Council's President, who is not shown to be an officer of the Council.

21. In the result, the petition fails and is dismissed. However, no costs.

*Petition dismissed.*

**I.L.R. [2014] M.P., 55**
**WRIT PETITION**
***Before Mr. Justice S.C. Sharma***
W.P. No. 3134/2012 (Indore) decided on 6 August, 2013

GOKUL PRASAD AJAMERIYA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Service Law - Appointment - Preference* - Petitioner applied under in-service candidate of reserved category and had given preference to the post of Subedar, Sub-Inspector of Police, Special Branch and Platoon Commander respectively - Petitioner was selected and was given appointment to the post of Platoon Commander - Subsequent to preparation of main list certain vacancies were available on account of non-availability of eligible ex-service candidate - Respondents who were less meritorious were given appointment on the post of Sub-Inspector and petitioner was not offered the said post as he was already undergoing training for Platoon Commander - Held - Preference of the person higher in select list will be seen first and appointment has to be given accordingly - In absence of any statutory provision action of allocating higher post to less meritorious candidate is certainly contrary to law - Respondents should have revised the merit list and persons higher in merit should have been offered higher post as per preference submitted by them - Petition allowed.(Para 12)**

*सेवा विधि – नियुक्ति – प्राथमिकता* – याची ने सेवारत अभ्यर्थी के रुप में आरक्षित श्रेणी के अंतर्गत आवेदन किया और सूबेदार, पुलिस उप निरीक्षक, विशेष शाखा एवं प्लाटून कमान्डर के पद हेतु क्रमशः प्राथमिकता दर्शायी थी – याची का

चयन किया गया और प्लाटून कमान्डर के पद पर नियुक्ति दी गई – मुख्य सूची तैयार किये जाने के पश्चात, भूतपूर्व सैनिक अभ्यर्थी की अनुपलब्धता के कारण कतिपय रिक्तियां उपलब्ध थी – प्रत्यर्थीगण जो कम उत्कृष्ट थे उन्हें उप निरीक्षक के पद पर नियुक्त किया गया और याची को उक्त पद प्रस्तावित नहीं किया क्योंकि वह पहले से प्लाटून कमान्डर का प्रशिक्षण ले रहा था – अभिनिर्धारित – चयन सूची में व्यक्ति की उच्चतर प्राथमिकता को पहले देखा जायेगा और तद्नुसार नियुक्ति दी जानी चाहिए – किसी कानूनी उपबंध की अनुपस्थिति में, कम उत्कृष्ट अभ्यर्थी को उच्च पद आवंटित करने की कार्यवाही, विधि विरुद्ध है – प्रत्यर्थीगण को मेरिट सूची को पुनरीक्षित करना चाहिए था और मेरिट में उच्चतर व्यक्तियों को उनके द्वारा प्रस्तुत प्राथमिकता के अनुसार उच्चतर पद प्रस्तावित किया जाना चाहिए था – याचिका मंजूर।

**Case referred :**

(2005) 9 SCC 742.

## ORDER

**S.C. SHARMA, J.:-** Regard being had to the similitude in the controversy involved in the matter, the above mentioned cases were heard analogously together and a common order is being passed. The facts of W.P. No. 3134/2012 are being narrated as under :

2. The petitioner before this Court, a member of Schedule Caste, at present serving as Platoon Commander, has filed this present writ petition claiming appointment on the post of Sub – Inspector – Subedar, in the services of the State of Madhya Pradesh under Home Department (Police).

3. The contention of the petitioner is that an advertisement was issued by the M.P. Professional Examination Board inviting applications for 515 vacancies and reservation was also provided for women candidates, for ex-Serviceman, for Schedule Caste, Schedule Tribes and Other Backward Castes. Petitioner has further stated that being a member of Schedule Caste, he applied under the reserved category that too as an inservice candidate as he was working on the post of Constable. Petitioner has also enclosed his admission card (Annexure P/2) and the same establishes that the petitioner has given first preference to the post of Subedar, second preference to Sub – Inspector of Police, third preference to Special Branch, and fourth preference to the Platoon Commander. The examination took place on 25/9/2011 and the petitioner was called for physical test. The petitioner, based upon his performance in the written examination as well as in the interview, secured 202 marks out of 300

marks. The petitioner on account of his performance was allocated the post of Platoon Commander. The contention of the petitioner is that 49 vacancies were reserved for ex-Serviceman and out of 49 vacancies, 45 were meant for non technical personnels and 4 were meant for technical personnels. It has also been brought to the notice of this Court that out of 45 non technical posts, 3 were kept vacant on account of some interim order passed in a Writ Petition and finally 14 vacancies were available as ex-Serviceman were not found fit for appointment / selection. The contention of the petitioner is that these 14 unfilled vacancies which were available with the Department have been filled up by persons who are less meritorious than the petitioner. It has been categorically stated that respondents No.4 and 5 have received 199 marks and, therefore, in all fairness, the respondent – State once additional vacancies were available, should have given an option to the petitioner whether he is interested in joining the higher post of Subedar / Sub – Inspector or not. The contention of the petitioner is that the State Government in a most arbitrary manner has issued appointment order in respect of respondent No.4 on the post of Subedar / Sub – Inspector even though both of them are less meritorious than the petitioner. Learned counsel for the petitioner has placed reliance upon a judgment delivered by the apex court in the case of *Anurag Patel Vs. U P Public Service Commission and others* reported in (2005) 9 SCC 742 and his contention is that based upon the aforesaid judgment delivered by the apex court, the State Government cannot be permitted to appoint a person on a higher post who is lower in merit list by virtue of his performance in the examination conducted by the respondents. Petitioner has prayed for quashing of the revised select list dated 3/2/12, appointment order issued in favour of respondents No.4 and 5 and has further prayed for appointment on the post of Sub – Inspector / Subedar as per the preference given by the petitioner while filling the examination form, with all consequential benefits.

4. A reply has been filed on behalf of respondents No.1 to 3. There is no reply on behalf of respondents No.4 and 5. This Court on 30/3/12 has issued hamdust notices in respect of respondent No.4 and 5. However, hamdust notices were not served to respondent No. 4 and 5 and on 25/2/13, this Court has directed the petitioner to pay fresh process for service of notice to respondent Nos. 4 and 5 through the Director General of Police, Police Headquarters, Bhopal. Notices were issued in the matter and as notices were not being served through the DPG, once again the order was passed to serve the respondents by hamdust notice and finally an affidavit was filed in the matter that respondent Nos. 4 and 5

have refused to accept hamdust notice. This court has finally on 16/4/13 granted liberty to the petitioner to take appropriate steps for publishing notices in the local daily newspaper published from Indore as the respondent Nos. 4 and 5 were undergoing training at Indore at the relevant point of time and notices were published in daily newspaper "Patrika" on 23/4/13. The affidavit has also been brought on record in respect of publication of notice. Inspite of this, there is no appearance on behalf of respondent Nos. 4 and 5.

5. Learned counsel for the respondent – State has admitted the advertisement issued by the Professional Examination. It has been stated that the recruitment is done on the post of Subedar, Sub – Inspector and Platoon Commander, keeping in view the M.P. Police Executive (Non Gazetted Service Recruitment) Rules, 1997. The respondents have also admitted that the petitioner has received 202 marks out of 300 marks on account of his overall performance in the process of selection. The respondents have stated that the Selection Committee included 7 senior IPS Officers and no irregularity of any kind has taken place in the matter of selection. The respondents No.1 to 3 in their reply have admitted that 14 posts reserved for ex-Serviceman became available later on and by that time the petitioner was appointed on the post of Platoon Commander. It has been stated that subsequently as 14 vacancies were available with the Department, the persons who were available with the Department even though they were lower in merit were appointed on the post of Subedar and Sub – Inspector. Respondents have also stated in their return that the petitioner who is a member of Schedule Caste and who is also employed in the Police Department has received 202 marks out of 300 and got selected against clear vacancies reserved for Schedule Caste candidate in the main list declared on 30/12/2011 and after his selection against the clear vacancies, 14 vacancies became available later on and as the petitioner was already selected for the post of Platoon Commander earlier was not considered for appointment to the post of Subedar / Sub – Inspector. The respondents have prayed for dismissal of the Writ Petition.

6. Heard learned counsel for the parties at length and perused the record. The matter is being disposed of at the admission stage itself with the consent of the parties.

7. The petitioner before this Court an employee serving the Home Department (Police) of State of Madhya Pradesh has filed this present Writ Petition for issuance of an appropriate writ, order or direction directing the

respondent - State to issue an appointment order in respect of the petitioner for the post of Subedar / Sub – Inspector of Police. The petitioner has also prayed for quashing of the revised select list dated 30/2/12 (Annexure P/5) and the consequential appointment order issued in respect of respondent Nos. 4 and 5 on the post of Sub – Inspector of Police.

8. In the present case, it is an undisputed fact that an advertisement was issued inviting applications for the post of Subedar in the pay scale of 9300 – 34800, Sub – Inspector Cadre pay scale of 9300 – 34800, Platoon Commander in the pay scale of 5200 – 20200. It is also an admitted fact that the petitioner belongs to reserved category (Schedule Caste) and is an in-service candidate, meaning thereby, he was serving at the relevant point of time on the post of Constable under the Home Department (Police). Respondent Nos. 4 and 5 are again members of reserved category – Schedule Caste – and they are also at the relevant point of time in service candidates serving on the post of Constable. This Court has carefully gone through the advertisement and the same provides for reservation under various heads. The advertisement also provided for submitting a preference in respect of the aforesaid post and it is not in dispute that the petitioner has given his preference to join various posts as under :

| | | |
|---|---|---|
| First preference | : | Subedar, |
| Second Preference | : | Sub – Inspector of Police |
| Third preference | : | SIB |
| Fourth preference | : | Platoon Commander |

9. It is also an admitted fact that the petitioner has received 202 marks out of 300 marks and the respondent Nos. 4 and 5 have received 199 marks out of 300 marks, meaning thereby, the petitioner has received more marks than respondents No.4 and 5. It is also not in dispute that out of total 515 posts, 84 posts were reserved for candidates belonging to Schedule Caste. The petitioner on account of his performance in the examination was selected for the post of Platoon Commander in the main list which was declared on 30/12/2011. It is pertinent to note that after declaration of the main list, certain vacancies were available on account of non availability of eligible ex-service candidates and the respondents have submitted a chart in the additional return showing details of the vacancies available on account of non availability of eligible ex-service candidates, the admission on the part of the respondents in respect of available vacancies after declaration of the main list is as under :

| Sl. No. | Name of Post | Number of posts reserved for ex-servicemen candidates | | | | | Number of selected ex-servicemen candidates | | | | | Number of posts remained vacant due to non availability of eligible candidates | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | UR | ST | SC | OBC | Total | UR | ST | SC | OBC | Total | UR | ST | SC | OBC | Total |
| 1 | Subedar | 2 | 1 | - | - | 3 | 1 | - | - | - | 1 | - | 1 | - | - | 1 |
| 2 | Sub Inspector (DEF) | 14 | 6 | 5 | 4 | 30 | 14 | - | 3 | 4 | 21 | - | 6 | 2 | - | 8 |
| 3 | Sub Inspector (SB) | 1 | 1 | - | - | 2 | 1 | - | - | - | 1 | - | 1 | - | - | 1 |
| 4 | Platoon Commander | 5 | 2 | 2 | 1 | 10 | 4 | - | - | 1 | 5 | - | 2 | 2 | - | 4 |
| | Total | 22 | 10 | 07 | 5 | 44 | 20 | - | 3 | 5 | 28 | - | 10 | 4 | - | 14 |

10. Contention of the respondent State, as stated in the return is that as vacancies were available, they have issued a revised list on 3/2/12 (Annexure P/5) and respondent Nos. 4 and 5 even though they are less meritorious, have been selected and sent for training to the post of Sub – Inspector of Police. The only justification offered in the return for appointing less meritorious candidates on a higher post is that the petitioner was selected in the main list of 30/12/2011 and as they were already selected, their case was not considered against the vacancies which were available on account of non availability of ex-servicemen candidates. Respondent have stated that as the petitioner was already undergoing training on the post of Platoon Commander, he was not offered on the post of Sub – Inspector of Police and the respondents as they were not selected for any post even though less meritorious have been offered higher post of Sub – Inspector of police.

11. This Court has carefully gone through the judgment delivered by the apex court in the case of *Anurag Patel* (supra), and the apex court in paragraphs 5 to 7 has held as under :

> 5. In the matter of admission to the medical college, the same difficulty was experienced and this Court held in *Ritesh R. Sah v. Dr. Y.L. Yamul and Ors.* in paragraph 17 of the judgment at page 261 as follows:
>
> ".....In view of the legal position enunciated by this Court in

the aforesaid cases the conclusion is irresistible that a student who is entitled to be admitted on the basis of merit though belonging to a reserved category cannot be considered to be admitted against seats reserved for reserved category. But at the same time the provisions should be so made that it will not work out to the disadvantage of such candidate and he may not be placed at a more disadvantageous position than the other less meritorious reserved category candidates. The aforesaid objective can be achieved if after finding out the candidates from amongst the reserved category who would otherwise come in the open merit list and then asking their option for admission into the different colleges which have been kept reserved category candidates should be considered and they be allotted seats in whichever colleges the seats should be available. In other words, while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission in the colleges where a specified number of seats have been kept reserved for reserved category, but while computing the percentage of reservation he will be deemed to have been admitted as an open category candidate and not as a reserved category candidate."

The same question was considered by this Court in *State of Bihar and Ors. v. M. Neethi Chandra and Ors.*, , wherein it was held in paragraph 13 as follows:

".....However, to the extent the meritorious among them are denied the choice of college and subject which they could secure under the rule of reservation, the circular cannot be sustained. The circular, therefore, can be given effect only if the reserved category candidate qualifying on merit with general candidates consents to being considered as a general candidate on merit-cum-choice basis for allotment of college/institution and subject."

In the instant case, as noticed earlier, out of 8 petitioners in writ petition No. 22753/93, to of them who had secured ranks 13 and 14 in the merit list, were appointed as Sales Tax Officer-II, whereas the persons who secured rank Nos. 38, 72 and 97, ranks lower to them, got appointment as Deputy Collectors

and the Division Bench of the High Court held that it is a clear injustice to the persons who are more meritorious and directed that a list of all selected backward class candidates shall be prepared separately including those candidates selected in the general category and their appointments to the posts shall be made strictly in accordance with merit as per the select list and preference of a person higher in the select list will be seen first and appointment given accordingly, while preference of a person lower in the list will be seen only later. We do not think any error or illegality in the direction issued by the Division Bench of the High Court.

6. Mr. R.N. Trivedi, learned senior counsel appearing for the Commission submitted that in case any rearrangement is made, the same persons who had already been appointed are likely to loose their posts. Going by the counter statement filed by the State in the writ petition No. 22753/93 it appears that altogether 358 candidates were appointed and 47 candidates belonging to backward classes were filled up by posts earmarked for backward classes. Amongst the 358 candidates those who secured higher marks than the cut-off mark for the general category also must have got selection in the general category even though they belong to the backward classes. If these candidates who got selection in the general category are allowed to exercise preference and then appointed accordingly the candidates who were appointed in the reserved categories had to be pushed down in their posts and the vacancies thus left by the general category candidates belonging to backward classes could be filled up by the persons who are really appointed against the quota reserved for backward classes. There will not be any change in the total number of posts filled up either by the general category candidates or by the reserved category candidates.

7. Learned senior counsel for the Commission further pointed out that all these officers have been working against the posts since the last 11 years and that many of these affected parties were not made parties to the writ petition and if any reallocation of posts is made at this distance of time it will cause injustice

to the affected parties. It is also pointed out by the respondent's counsel that in the writ petition filed by one Amrendra Pratap Singh i.e. writ petition No. 32346 before the Allahabad High Court, an interim order was passed in favour of the petitioner therein and the Division Bench directed that the appointment would be subject to the result of the writ petition and this order continued for some period and all the candidates were informed that their appointments would be subject to the result of the writ petition. Although that writ petition under review was dismissed, the candidates who were appointed were aware of the proceedings pending before the High Court. By the impugned order the High Court only directed reallocation of the posts according to the merit prepared in the select list. The decision rendered in writ petition No. 46029 of 1993 dated 15th April, 1998 was followed in the decision in writ petition No. 22753 of 1993.

8. In the circumstances, we do not find any merit in these appeals. The appeals are dismissed accordingly. However, the State is directed to carry out the exercise of reallocation within a period of three months. The effected officers shall be given reasonable opportunity of being heard and to the extent possible the State shall give accommodation to such officers.

12. The apex court in the aforesaid case has held that appointment to a post has to be done strictly in accordance with the merit as per the select list and preference of a person higher in the select list will be seen first and appointment has to be given accordingly while preference of a person lower in the list will be seen only later. This Court is of the considered opinion that in absence of any statutory provision of law, the action of the respondents in allocating a higher post to a less meritorious candidate is certainly contrary to the law laid down by the apex court in the case of *Anurag Patel* (supra). Once vacancies were available after declaration of the main list on 30/12/2011 ie., 14 vacancies of ex-servicemen category, the respondents should have in all fairness, revised the entire merit list and persons higher in merit should have been offered higher post as per the preference submitted by them while submitting the application form. The same has not been done and the net result is that less meritorious persons have been offered higher posts in higher pay scale by the respondents. The action of the respondents in absence

of any statutory provision is certainly bad in law and liable to be quashed.

13. Resultantly, the revised select list dt. 3/2/12 is accordingly quashed and the consequential appointment order of respondents No.4 and 5 are also quashed.

14. It is noteworthy to mention that this Court while issuing notices on 30/3/2012 has passed the following order :

Writ Petition No . 3134 / 2012

30/3/2012

Petitioner by Mr. Piyush Mathur, senior advocate with Mr. MS. Dwivedi, advocate.

Respondent Nos. 1 to 3 by Mrs. Vinita Phaye, GA on advance notice.

Heard on admission.

Upon payment of PF hamdust notices be given to the counsel for the petitioner for the services of respondent Nos. 4 & 5 for appearance on 10/04/12. Counsel for the respondent Nos. 1 to 3 is directed to seek instruction and file t he reply of interim prayer. In the meantime respondents are restrained to give effect of consolidated select list of 14 candidates dated 03/02/12 (non Ex-serviceman) selected against vacant post reserved for Ex-serviceman (non technical).

C.C. As per rules.

15. It was categorically observed by this court on 30/3/2012 that the persons who are less meritorious will not be sent for training by the State Government and in fact, the respondent – State was restrained to give effect to the consolidated select list of 14 candidates. It is really unfortunate that inspite of there being a categoric direction restraining the respondents to send persons to training with a defiant attitude the State Government has appointed and sent respondent Nos. 4 and 5 for training. Not only this, later on, this Court has observed that the training of respondent No. 4 and 5 shall be subject to the final outcome of the Writ Petition and, therefore, keeping in view the interim orders, this Court is of the considered opinion that the entire selection list deserves to be reviewed to the extent stated above and the State Government deserves a command to reallocate the post as per the merit list

prepared by them, meaning thereby, to be more specific, a person higher in merit has to be placed above than the person lower in merit and the higher post carrying higher pay scale has to be offered to a person who is more meritorious than the persons who is less meritorious based upon the preference submitted by them. The Writ Petition is allowed with the following directions:

(A) The revised select (Annexure P/5) is quashed.

(B) The appointment order of respondent No.4 and 5 appointing them to the post of Sub – Inspector of Police are hereby quashed.

(C) The respondents are directed to carry out the exercise of reallocation of post based upon the merit list meaning thereby, exclusively on merit within a period of 60 days from the date of receipt of Certified Copy of this order.

(D) the respondents are also directed to grant the benefit of notional seniority to the petitioner on the post of Sub – Inspector of Police and he shall be entitled for all consequential benefits except backwages. Similarly, in case respondents No.4 and 5 are found eligible for some lower post, they shall also be entitled for all consequential benefits on reallocation except backwages.

(E) The aforesaid exercise be concluded within a period of 60 days from the date of receipt of Certified Copy of this order.

16. In Writ Petition No. 3135 / 2012 which is also being disposed of by this common order, the only difference is that the petitioners are members of Schedule Tribes and they are also claiming appointment on the post of Sub – Inspector / Subedar (Police) by virtue of their performance in the examination and they are certainly more meritorious than respondent Nos. 4 to 10. The respondent Nos. 1 to 3 in the present case also shall carry out the exercise of reallocation as stated in the preceding paragraphs within the same period as stated above.

17. The petitioners in the present case are having 195, 195, 194, 194, 193 marks respectively, whereas, the respondents No.4 to 10 are having 190, 189, 188 and 188 etc., marks, respectively, meaning thereby that the respondents are less meritorious than the petitioners and, therefore, the Writ Petition No. 3135 / 2012 also stands allowed with similar relief to the petitioners.

*Petition allowed.*

**I.L.R. [2014] M.P., 66**
**WRIT PETITION**
***Before Mr. Justice Subhash Kakade***
W.P. No. 3946/2010 (Jabalpur) decided on 10 October, 2013

KASHI PRASAD KACHHI & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

***Service Law - Daily Wage Employees - Regularization* - Petitioners for grant of regularization/regular pay scale and other benefits have been considered by the respondents - Petitioners are not entitled for the same as per the law laid down by the Apex Court in case of Uma Devi - Held - Daily wage employees are only entitled to grant of minimum of the scale of the post which they are holding.**
**(Paras 1, 3 & 9)**

*सेवा विधि – दैनिक वेतन कर्मचारी – नियमितीकरण* – याचीगण को नियमितीकरण/नियमित वेतनमान एवं अन्य लाभ प्रदान किये जाने हेतु प्रत्यर्थीगण द्वारा विचार किया गया – उमा देवी के प्रकरण में सर्वोच्च न्यायालय द्वारा प्रतिपादित विधि के अनुसार याचीगण इसके हकदार नहीं – अभिनिर्धारित – दैनिक वेतन कर्मचारी, उनके द्वारा धारित पद का केवल न्यूनतम वेतनमान प्रदान किये जाने के लिये हकदार है।

**Cases referred :**

(2006) Vol. 4 SCC 1, W.P. No. 419/2007 decided on 02.05.2007.

*Harish Agnihotri,* for the petitioners.
*Rajesh Tiwari,* G.A. for the respondent/State.

**ORDER**

**Subhash Kakade, J.:-** The petitioners were engaged as daily wage employees under the Ban Sagar Devlond Project, District Shahdol, prior to 31.12.1988. The cases of the petitioners for grant of regularization/regular pay scale and other benefits have been considered by the respondents in compliance of orders passed by this Court. The petitioners were regularized on the post of Timekeeper in the pay scale of Rs.2750-Rs.4400/- under the work charged establishment as per Order Annexure P/1. The respondents have granted the similar benefit of regularization to other similarly situated persons, namely, Sarvshree Ramsushil Tripathi, Tulsidas, Ramlal Pandey and

Ramniwas Pandey. Later on vide Order dated 04.09.2008 (Annexure P/3) and order dated 24.10.2008, the respondents have granted benefit of regularization to above named persons with effect from 26.01.1989 while no orders in favour of the petitioners has been passed. Although, these Timekeepers were not only similarly situated with the petitioners, but even were juniors to them as daily wager. In the above situation, the petitioners made representation (Annexure P/4) before the respondents for grant of regular pay scale to them similarly to the other time keepers, but same has not been granted nor representation has been decided. The respondents are paying fixed pay of Rs.2750/- to the petitioners while junior time keepers were getting first annual increment on 26.01.1990 which is highly discriminatory, unjust and illegal.

02. Hence, prayed for following reliefs:-

(i) To issue direction for grant of regular pay scale w.e.f. 26.01.1989.

(ii) To grant the annual increment w.e.f. 26.01.1990 onwards.

(iii) To pay the entire increments along with the interest.

(iv) To grant any other relief deemed fit in the circumstances of present case.

03. By filing reply, respondents justified the fact of not granting annual increment to the petitioners because they are not entitled for the same as per the law laid down by the Apex Court in case of Secretary, *State of Karnataka vs. Umadevi* (2006) Vol.4 SCC 1, and in case of *M.P. Urja Vikas Nigam Ltd. and others vs. Rudra Prasad Mishra,* W.P. No.419/2007 on 02.05.2007 decided by a Division Bench of this Court. On the strength of decision of *Umadevi* (supra), it is submitted that employees who are working as daily rated employees granted regular pay scales are only entitled to get the minimum of scale, nothing more. Therefore, the petition being bereft of merit, deserves to be dismissed.

04. Shri Harish Agnihotri, learned counsel for the petitioners submitted that the petitioners are working in the establishment of the respondents for more than last 24 years. The cases of the appellants were placed before Departmental Screening Committee and thereafter, in accordance with the

recommendation of the committee, the respondents have passed an order of regularization of the appellants, whereby the benefit of minimum pay scale was given to the appellants, but not given any benefit with regard to any other emoluments.

05. Shri Rajesh Tiwari, learned Government Advocate for the respondent while opposing the submissions made by learned counsel for the petitioners submitted that the petitioners are entitled for relief in respect of lowest in the time pay scale only, not for any other allowances. In support of his submissions he relied on the cases of *Umadevi* (supra) and *Urja Vikas Nigam* (supra).

06. Considered the submissions made by learned counsel for the parties and perused available record.

07. It is not in dispute that the petitioners are working in the Water Resources Department and are posted in Ban Sagar Devlond Project under the administrative control of respondent No.3 Chief Engineer Ban Sagar Project.

08. The office order (Annexure P/1) dated 30th June 2004 as such is reproduced hereunder:-

"कार्यालय मुख्य अभियंता, बाणसागर परियोजना, रीवा (म.प्र.)

कार्यालय आदेश

आदेश क.2046/3/1/111 रीवा. दिनॉक: 30/06/2004

माननीय उच्च न्यायालय, मध्य प्रदेश द्वारा प्रकरण कमांक डबलू. पी. 21999/2003 पर दिनॉक 18.11.2003 को पारित आदेश एवं मध्य प्रदेश शासन, जल संसाधन विभाग के पत्र कमांक 544/2002/पी–2/31 दिनॉक 20.03.2002 की कंडिका 6 तथा एफ 14–2/04/पी–2/xxx1 दिनॉक 20.02.2004 तथा सम संख्या दिनॉक 24.02.2004 तथा 28.02.2004 एवं प्रमुख अभियंता, म0 प्र0 शासन जल संसाधन विभाग के पत्र कमांक 121/एल सी/वि0 प्र0/2004 दिनाँक 12.05.2004 एवं गठित छानबीन समिति के परीक्षण के परिपेक्ष्य में निम्नलिखित दैनिक वेतन भोगी सुपरवाइजरों को कार्यभारित स्थापना में समयपाल के पद पर वेतनमान 2750–70–3800–75–4400/– एवं समय समय पर शासन द्वारा घोषित महंगाई भत्ते पर निम्न शर्तानुसार नियमित किया जाकर उनके नाम के सामने दर्शित स्थान पर पदस्थ किया जाता है।"

09. Plain reading of office order (Annexure P/1) goes to show that in compliance of earlier order passed by this Court, a Departmental Screening Committee considered cases for regularization of the appellants. On the basis of recommendation of the Committee, minimum time scale of pay were granted to the petitioners vide office order (Annexure P/1) as given in the case of *M.P.*

*Urja Vikas Nigam* (supra). In case of *Secretary, State of Karnataka and others vs. Umadevi and others,* (supra), the Supreme Court has clearly held that daily-wage employees are only entitled to grant of minimum of the scale of the post which they are holding.

10. It was not intended by the Committee to give any other pecuniary benefit to the petitioners. Thus, the petitioners are not entitled to get any other benefit which under whatever conditions given to the other employees vide office order dated 04.09.2008 (Annexure P/3) and order dated 24.10.2008.

11. With the aforesaid, the petition filed by the petitioners, stands disposed of.

*Petition disposed of.*

**I.L.R. [2014] M.P., 69**
**WRIT PETITION**

***Before Mr. Justice Ajit Singh & Mr. Justice Alok Aradhe***

W.P. No. 5151/2012 (Jabalpur) decided on 19 November, 2013

S.K. JAIN (M/S) ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

***Constitution - Article 19 - Cancellation of registration as contractor*** **- Respondents has not only cancelled the registration of petitioner as contractor but also black listed it for all times to come - Held - Petitioner has a fundamental right to do business - It is a common knowledge that contractors do engage sub-contractors for carrying out the work by reposing trust - And if the sub-contractor taking advantage of the trust reposed, plays fraud with the contractor as in the present case, the latter cannot be prohibited to do business forever - That action taken by the respondents against the petitioner is wholly disproportionate for the lapse on its part. (Paras 3, 7 & 8)**

*संविधान – अनुच्छेद 19 – ठेकेदार के रुप में पंजीयन का निरस्तीकरण* – प्रत्यर्थीगण ने न केवल याची का ठेकेदार के रुप में पंजीयन निरस्त किया बल्कि भविष्य में सदा के लिये उसे काली सूची में डाला – अभिनिर्धारित – याची को कारोबार करने का मूलभूत अधिकार है – यह साधारण ज्ञान की बात है कि ठेकेदार कार्य को पूरा करने के लिये उप–ठेकेदारों पर भरोसा करके उन्हें नियुक्त करते हैं – और यदि उप–ठेकेदार किये गये भरोसे का लाभ उठाते हुए ठेकेदार से कपट करते हैं, जैसा कि वर्तमान प्रकरण में, तब ठेकेदार को सदा के लिये कारोबार करने

से प्रतिषिद्ध नहीं किया जा सकता – प्रत्यर्थीगण द्वारा याची के विरुद्ध की गई कार्यवाही, उसकी ओर से की गई गलती के लिए पूर्णतः अनुपातहीन है।

*Sankalp Kochar* with *Shivendra Pandey*, for the petitioner.
*K.S. Wadhwa*, Addl. A.G. for the respondents.

**ORDER**

The Order of the court was delivered by :
**AJIT SINGH, J.:-** By this petition filed under Article 226 of the Constitution, the petitioner has prayed for quashing of orders dated 29.12.2009 (Annexure P/9) and 7.12.2011 (Annexure P/13) passed by respondent no.2.

2. The petitioner is a partnership firm and is registered as A-5 contractor with the respondents Public Works Department of the State Government. The petitioner submits that it has the experience of more than 20 years and during this period it has successfully executed different contract works of the State of Madhya Pradesh worth Rs.500 crore.

3. The respondents had invited tenders for execution of various works in the districts of Chhattarpur, Satna, Dewas, Narsinghpur and Mandla. A tender was also invited for the construction of Gada Sarai Bajaag Road 16.40 kms. According to the petitioner it submitted 12 tenders for these works on the same date i.e. 30.11.2009 which included a tender regarding construction of Gada Sarai Bajaag Road. For all these tenders the petitioner was required to furnish fixed deposit receipts. Out of 12 tenders submitted by the petitioner, the fixed deposit receipts with 11 of them were found to be genuine. But the three fixed deposit receipts submitted for one contract work i.e. regarding Gada Sarai Bajaag Road were found to be fake and for this reason the respondents by order dated 29.12.2009, Annexure P9, has not only cancelled the registration of petitioner as contractor but also black listed it for all times to come. Aggrieved, the petitioner filed a revision but it too has been dismissed vide order dated 7.12.2011, Annexure P13, passed by respondent no.2. It is in this background the petitioner has filed the present petition.

4. It is argued on behalf of the petitioner that for the work of Gada Sarai Bajaag Road it was the sub-contractor Manoj Ahuja who had on his own fraudulently prepared the fake fixed deposit receipts and submitted the same for his wrongful gain without informing the petitioner. It has also been argued that when the fraud was revealed, the petitioner had immediately lodged the first information report at Police Station M.P. Nagar, Bhopal and the police

after investigation have filed a charge sheet against Manoj Ahuja, Ashish Bhatia and Preetam Das Ahuja for offences under sections 406, 420, 467, 468 and 471 of the Indian Penal Code. The petitioner has even filed a copy of the inquiry report of the City Superintendent of Police, M.P. Nagar, Bhopal dated 15.10.2010, Annexure-A, addressed to the Superintendent of Police, Bhopal, wherein it is stated that sub-contractor Manoj Ahuja and his elder brother Preetam Das Ahuja in fact committed fraud with the petitioner in preparing and using the fake fixed deposit receipts for their wrongful gain. The police have not proposed any criminal action against the petitioner. On these facts submission is made that the fundamental right of the petitioner to do business has been violated by cancelling its registration and black listing it for all times to come. According to the learned counsel for petitioner by applying the principle of proportionality the action taken by the respondents is wholly disproportionate for the alleged lapse on the part of petitioner. The respondents in reply have justified the action taken against the petitioner.

5. The question which calls for consideration is whether the action taken by the respondents against the petitioner is disproportionate for the alleged lapse on its part.

6. A statutory discretion or power, whether it be administrative or quasi-judicial, although conferred in wide terms is subject to certain implied conditions or limitations. A violation of these conditions or limitations even though there be no violation of any express condition can give rise to judicial review. The implied limitations arise for Parliament is presumed not to legislate contrary to the rule of law which enforces "minimum standard of fairness both substantive and procedural" so that the exercise of statutory discretion conforms to the "principles of good administration". The implied conditions or limitations are : The person on whom the power is conferred must exercise it in good faith for furtherance of the object of the statute; he must not proceed upon a misconstruction of the statute; he must take into account matters relevant for exercise of the power; he must not be influenced by irrelevant matters; he must not act unreasonably, i.e. irrationally or perversely; he must not fetter his discretion in advance by adopting a rigid rule of policy, and in matters affecting fundamental rights he must follow the principle of proportionality. Also the principle of proportionality requires the court to apply a three stage test: (1) whether the objective sought to be achieved is relevant and sufficiently important to justify limiting the fundamental rights; (2) whether the means chosen to limit that right are rational fair and not arbitrary, and (3) whether the means used impair the

right as minimally as reasonably possible. (See Principles of Statutory Interpretation by Justice G. P. Singh 13th Edition, 2012 pp. 440 to 448).

7. As already seen above that on 13.11.2009 the petitioner had submitted 12 tenders for different works in response to the notice inviting tenders published by the respondents. It is not disputed by the respondents that out of 12 tenders submitted by the petitioner the fixed deposit receipts with 11 of them were found to be genuine. Admittedly all the tenders were submitted on the same date i.e. 30.11.2009. With regard to one tender i.e. regarding construction of Gada Sarai Bajaag Road the petitioner reposed trust on his sub-contractor Manoj Ahuja who along with his brother Preetam Das Ahuja played fraud with the petitioner and deposited fake fixed deposit receipts by enhancing the amounts in the previously prepared fixed deposit receipts. It is to be noted that when the petitioner came to know about the fraud played by Manoj Ahuja, the first information report was lodged immediately by it. The police also after investigation have charge sheeted Manoj Ahuja his brother Preetam Das Ahuja and Ashish Bhatia. Not only this even the inquiry report dated 15.10.2010 prepared by City Superintendent of Police, M.P. Nagar, Bhopal, Annexure-A, clearly reveals that Manoj Ahuja and his brother Preetam Das Ahuja had played fraud with the petitioner in preparing the fake fixed deposit receipts and depositing the same with the respondents. The petitioner has a fundamental right to do business. It is a common knowledge that contractors do engage sub-contractors for carrying out the work by reposing trust. And if the sub-contractor taking advantage of the trust reposed, plays fraud with the contractor as in the present case, in our considered view the latter cannot be prohibited to do business forever.

8. We, therefore, by applying principle of proportionality hold that action taken by the respondents against the petitioner is wholly disproportionate for the lapse on its part. The petitioner's registration as contractor has remained cancelled with its black listing for more than 3 ½ years, which we find to be a reasonable period for the lapse and not being vigilant. We accordingly quash the orders dated 29.12.2009 (Annexure P/9) and 7.12.2011 (Annexure P/13) passed by the respondents of cancelling the registration of petitioner as contractor and black listing it for all times to come and instead reduce the period of cancellation of registration and black listing till today.

9. The petition is allowed to the extent above.

*Petition allowed.*

**I.L.R. [2014] M.P., 73**
**WRIT PETITION**
***Before Mr. Justice Sheel Nagu***
W.P. No. 7939/2013 (Gwalior) decided on 3 December, 2013

NARENDRA KUMAR HARIYANI ...Petitioner
Vs.
SANJAY GOYAL ...Respondent

***Civil Procedure Code (5 of 1908), Order 32 - Appointment of Next Friend*** **- Held - Enquiry is required to ascertain the unsoundness of mind before deciding application - Further held that, Presiding Officer of trial court is not equipped with the knowledge or experience in the medical field therefore it was not proper for the trial court to step into the shoes of medical expert to assess the unsoundness of mind of the defendant. (Para 9)**

*सिविल प्रक्रिया संहिता (1908 का 5), आदेश 32 – अनन्य हितैषी की नियुक्ति* – अभिनिर्धारित – आवेदन का विनिश्चय करने से पूर्व चित्त विकृति को निश्चित करने के लिए जांच आवश्यक है – आगे अभिनिर्धारित कि, विचारण न्यायालय के पीठासीन अधिकारी, चिकित्सीय क्षेत्र में ज्ञान एवं अनुभव से सुसज्जित नहीं इसलिए यह विचारण न्यायालय के लिये उचित नहीं कि वह प्रतिवादी की चित्त विकृति को निर्धारण करने के लिए चिकित्सीय विशेषज्ञ की जगह ले।

**Cases referred :**

AIR 2011 P&H 38, AIR 2006 Madras 347, AIR 2007 Madras 231.

*S.K. Shrivastava*, for the petitioner.
*Anand Bharadwaj*, for the respondent.

**ORDER**

**SHEEL NAGU, J.:-** Heard.

2. This petition under Article 227 of the Constitution of India assails the impugned order dated 09.10.2013 (Annexure P/1) passed in Civil Suit No.19-A/2012 by Civil Judge Class-II, Shivpuri, by which the application under Order 32 of the Code of Civil Procedure ("Code" for brevity) for appointment of next friend of the defendant for reason of the defendant being of unsound mind has been rejected.

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

admission and final disposal.

4. Learned counsel for petitioner inviting attention of this Court to the provisions of Order 32, Rule 15 of the Code submits that the trial Court as per the second part of the said provision is obliged under the law to conduct an enquiry in regard to a person who has not been adjudged to be of unsound mind and to be incapable for reason of mental infirmity to protect his interest in the litigation. Reliance is placed on the judgments rendered by the Punjab & Haryana and Madras High Courts in the cases of *Dilbagh Singh v. Sawinder Kaur* : AIR 2011 P & H 38 (Para 8); *C.S. Navamani v. C.K. Sivasubramanian* :AIR 2006 Madras 347; and *G.V. Lakshminarayanan v. G.V. Nagammal* : AIR 2007 Madras 231.

5. *Per contra*, the learned counsel for respondent/landlord contends that the impugned order has rightly been passed on the basis of lack of material particulars and sufficient documents to demonstrate unsoundness of mind.

6. A perusal of the impugned order indicates that the sole ground, on which the trial Court dismissed the application under Order 32 of the Code, is that the medical documents produced for vouching ailment of unsoundness of mind of the petitioner were found not sufficient to indicate that the petitioner has been rendered so incapable due to unsoundness of mind that he is not able to prosecute his case.

7. A perusal of the provisions of Order 32 Rule 15 of the Code, which has been interpreted by the abovesaid decisions of the High Courts, makes it clear that trial Court has to conduct an enquiry under Order 32 Rule 15 of the Code in respect of a person who has not been adjudged to be of unsound mind. The term "enquiry" has been explained by the aforesaid decisions of the High Courts of Punjab & Haryana and Madras to mean and to comprise of two essential ingredients which are as follows :-

(1) questioning a lunatic by the Judge himself in open Court or in chambers, in order to see whether he is really a lunatic or of unsound mind;

(2) as the court is normally presided over only by a layman to send the alleged lunatic to a Doctor for report about his mental condition, after keeping him under observation for some days.

8. Madras High Court held that this real enquiry is required to be held to ascertain the unsoundness of mind before deciding the application under Order

32 of the Code for appointment of next friend.

9. Scrutiny of the impugned order does not indicate that any enquiry in its real sense as per the provisions of Order 32 of the Code has been conducted by the trial Court. The trial Court in fact has assumed upon itself the responsibility of deciding the mental condition of the defendant. The presiding officer of a Court is not equipped with the knowledge or experience in medical field and, therefore it was not proper for the trial Court to step into the shoes of a Medical Expert to assess the unsoundness of mind of the defendant.

10. Consequently, the trial Court has failed to exercise the jurisdiction vested into under Order 32 of the Code impelling this Court to step into exercise supervisory jurisdiction under Article 227 of the Constitution of India.

11. Accordingly, this petition under Article 227 of the Constitution of India is allowed. The impugned order so far as it relates to rejection of the application under Order 32 of the Code is set aside with a direction to the trial Court to reconsider the application of the defendant under Order 32 of the Code in accordance with law as expeditiously as possible after affording due and sufficient opportunity to the rival parties.

*Petition allowed.*

**I.L.R. [2014] M.P., 75**
**WRIT PETITION**
***Before Mr. Justice Rajendra Menon***
W.P. No. 18709/2013 (Jabalpur) decided on 5 December, 2013

A.K. DUBEY (DR.) ...Petitioner
Vs.
INDIAN MEDICAL ASSOCIATION & ors. ...Respondents

***Constitution - Articles 12, 226 & 227 - State* - Petitioner has raised a dispute before the Election Tribunal and calls in question the elections held to the M.P. Branch of the Indian Medical Association on the ground of irregularities and illegalities - Now petitioner sought a direction to the Election Tribunal to decide the election dispute raised by him in accordance with the by-laws of the association - Held - Indian Medical Association is not a state or other authority within the meaning of Article 12 of the Constitution - Therefore, it is not amenable to the writ jurisdiction of this Court - Election Tribunal constituted under the**

**Article and Memorandum of the Association is neither a statutory Tribunal nor a quasi judicial authority discharging any functions which can be controlled by this Court - It is nothing but a creation of certain individuals for the purpose of deciding their interse dispute.**

**(Paras 26 & 36)**

*संविधान – अनुच्छेद 12, 226 व 227 – राज्य* – याची ने निर्वाचन अधिकरण के समक्ष विवाद उठाया और इंडियन मेडिकल ऐशोसियेशन की म.प्र. शाखा के लिए आयोजित किये गये चुनावों पर अनियमितता एवं अवैधता के आधार पर प्रश्न उठाया – अब, याची ने उसके द्वारा उठाये गये विवाद का निपटारा, एशोसियेशन के उपविधियों के अनुसार करने के लिए, निर्वाचन अधिकरण को निदेश चाहा है – अभिनिर्धारित – इंडियन मेडिकल एशोसियेशन, संविधान के अनुच्छेद 12 के अर्थान्तर्गत राज्य अथवा अन्य प्राधिकारी नहीं है – अतः इस न्यायालय की रिट अधिकारिता के अध्याधीन नहीं – अनुच्छेद तथा संगम ज्ञापन के अंतर्गत गठित निर्वाचन अधिकरण न तो कानूनी अधिकरण है और न ही अर्द्ध न्यायिक प्राधिकारी है जिसके कार्यों को इस न्यायालय द्वारा नियंत्रित किया जा सके – यह कुछ नहीं बल्कि कतिपय व्यक्तियों द्वारा अपने आपसी विवाद का निपटारा करने के प्रयोजन हेतु जिसका निर्माण किया गया है।

**Cases referred :**

(2005) 1 SCC 149, (2009) 5 SCC 577, (2009) 15 SCC 221, (2002) 5 SCC 111, (1981) 1 SCC 722, AIR 1992 SC 76, 2005 (1) ESC 342, 1965 AIR 1595, AIR 1954 SC 520, 1977 (4) SCC 161, AIR 1959 SC 188.

*Sankalp Kochar,* for the petitioner.
*R.K. Sanghi,* for the respondents No. 1 to 4.
*Sanjay K. Agrawal,* for the respondent No.5.

**ORDER**

**RAJENDRA MENON, J.:-** Petitioner a practicing orthopedic surgeon from Gwalior has filed this writ petition purportedly under Article 227 of the Constitution and calls in question the elections held to the M. P. Branch of the Indian Medical Association. It is said that the election held is illegal as certain irregularities and illegalities have been committed, matter came to this Court at the instance of certain parties including the petitioner in W. P. No. 10181/13 and, thereafter, in W. A. No. 568/13. The Writ Court and the writ appellate Court took note of various aspects of the matter and finally as a remedy of raising the election dispute before the Election Tribunal by way of an election petition was available under Clause 35 (C ) (3) and in terms of the Article of

Association and the Memorandum, Rules and Bylaws of the Indian Medical Association, M. P. State Branch, the petitions and the writ appeals were disposed of relegating the parties to take recourse to the remedy available of approaching the Tribunal.

2. It is stated that petitioner has raised the dispute before the Election Tribunal and now the grievance of the petitioner seems to be that the Election Tribunal is not proceeding in the matter and is insisting upon the petitioner to deposit Rs. 1,00,000/- towards expenses for travelling and other expenses for the members of the Tribunal conducting the proceedings. Seeking a direction to the Election Tribunal to decide the election dispute raised by the petitioner in accordance with the bye-laws of the association at an earlier date, petitioner has approached this Court.

3. On notice being issued, respondents have filed the return and apart from raising various objections and questions with regard to the right of the petitioner to invoke the jurisdiction of this Court, respondents have stated that petitioner has not complied with certain directions issued by the Tribunal and, therefore, the petition be dismissed.

4. During the course of hearing of this writ petition on 11/11/13, a question with regard to jurisdiction of this Court to interfere in a writ petition under Article 226/227 of the Constitution was raised. It was submitted by Shri R. K. Sanghi, learned counsel for the respondents association and Shri Sanjay K. Agrawal that the Indian Medical Association and the M. P. State Branch of the Indian Medical Association is nothing but an association of private individuals and doctors. It is not an authority or a State within the meaning of Article 12 of the Constitution. It does not perform any public duties or Governmental activities and, therefore, it was argued that it is neither a State nor an authority amenable to the writ jurisdiction of this Court.

5. Per contra Shri Sankalp Kochar submitted that this is a petition under Article 227 of the Constitution and petitioner is seeking a certiorari to the Election Tribunal to conduct its proceedings in accordance with the provisions of bye-laws and, therefore, for issuing a direction to the Tribunal, the power of certiorari available to this Court in a petition under Article 227 of the Constitution can be exercised.

6. Shri Sankalp Kochar invited my attention to the bye-laws and the objects of the memorandum formulated by the Indian Medical Association

M. P. State Branch and tried to emphasize that if these objects are taken note of, it would be seen that the association is acting towards promotion of health in the State of M. P. and, therefore, it discharges public/Government functions and is amenable to the writ jurisdiction of this Court.

7. That apart, it is submitted by him that when an Election Tribunal is created, the Tribunal has to discharge its functions in accordance to law and if that is not done, then the jurisdiction available to this Court under Article 227 of the Constitution can be exercised. He invites my attention to the following judgment in support of his contentions *Virendra Kumar Shrivastava Vs. U. P. Rajya Karmachari Kalyan Nigam and another,* (2005) 1 SCC 149 to say that in this case, the U. P. Rajya Karmachari Kalyan Nigam a society registered under the Society Registration Adhiniyam was treated to be a State or other authority within the meaning of Article 12 of the Constitution and, therefore, the present association also, a society registered under the Societies Registration Act can be construed to be a State or other authority. He also invited my attention to a judgment rendered in the case of *State of Uttār Pradesh and another Vs. Radhey Shyam Rai,* (2009) 5 SCC 577 wherein it was held that the U. P. Ganna Kishan Sansthan a society registered under the Society Registration Act, was construed to be a State or other authority within the meaning of Article 12 of the Constitution and finally, a judgment rendered in the case of *Madhya Pradesh State Corperative Dairy Federation Ltd. and another Vs. Rajnesh Kumar Jamindar and others,* (2009) 15 SCC 221 wherein the Dairy Federation Corporation a society registered under the M. P. Co-operative Societies Act was held to be a State or other authority.

8. It is emphasized by Shri Sankalp Kochar that in the present case apart from the fact that the Indian Medical Association is discharging public duties for improving the health and medical facility for the citizens of the state, it is an association registered under the Society Registration Act and is amenable to the writ jurisdiction of this Court. It is further emphasized by him that when an Election Tribunal is created and the Tribunal has to function in accordance with the rules and regulations, a certiorari can be issued to the Tribunal to discharge its functions properly.

9. Respondents have refuted the aforesaid and Shri R. K. Sanghi argued that the Indian Medical Association is a private association of practicing doctors and it carries various private activities for advancing the cause of the medical professionals by holding conferences, seminars, lectures etc. It is not controlled

or financed by the State Govt. or Central Govt. The Government does not exercise any administrative or financial control. It is purely a body of individuals carrying out activities in accordance with the requirement of its bye-law. The Tribunal is also a non-statutory Tribunal. It is established under the bye-laws and is not a permanent Tribunal. The Tribunal is constituted as and when required. The Association nominates its members who are elected office bearers and, therefore, submitting that neither the Indian Medical Association is a State within the meaning of Article 12 of the Constitution nor does it come within the purview of any society, the objection is raised.

10. Shri Sanjay K. Agrawal, learned counsel appearing for respondent no. 5 apart from advancing arguments as submitted by Shri R. K. Sanghi brings to the notice of this Court a judgment in the case of *Pradeep Kumar Biswas Vs. Indian Institute of Chemical Biology and others,* (2002) 5 SCC 111 and points out that if the facts laid down in the aforesaid case are applied to the present case, it would be clear that neither the Indian Medical Association is a State or any other authority as contemplated under Article 12 of the Constitution nor is the Tribunal deciding the election dispute under the supervisory control of this Court under Article 227 of the Constitution.

11. I have heard learned counsel for the parties at length and perused the record. Two questions arise for consideration in this writ petition. The first question is as to whether the Indian Medical Association can be termed as a State or any other authority or person to come within the jurisdiction of this Court under Article 226 of the Constitution. The second question would be that even if the Indian Medical Association is not a State, whether the Tribunal constituted under the Article and Memorandum of the association can be said to be under the supervisory jurisdiction of this Court under Article 227 of the Constitution and a writ of certiorari for correcting any error committed by the Tribunal can be issued.

12. As far as the question of the Indian Medical Association and its M. P. State Branch under the State or other authority is concerned, the objects of the association available in the memorandum of association in part-II to contemplate that the association shall act in furtherance of any medical health service and improve the medical education, there is nothing available in the memorandum of association or bye-laws to say that the association discharges any function which is normally discharged by the State or any other authority under the control of the State. Neither any administrative control or financial

aid is granted by the State Govt. nor is anything available on record to say that any Government or statutory authority exercises any control in the day-to-day functioning of the Indian Medical Association. In the case of *Pradeep Kumar Biswas* (supra), the question as to whether the Council of Scientific and Industrial Research, a society registered under the Society Registration Act is a State or not was under consideration. The majority judgment in the aforesaid goes to show that it took note of the test laid down by the Supreme Court in the case of *Ajay Hasia Vs. Khalid Mujib Sehravardi,* (1981) 1 SCC 722 and came to the conclusion that no rigid separate principles can be laid down to say if a body falls within the ambit of a State or other authority. The question in each case has to be decided in the light of the cumulative facts available with regard to establishment of the body, its financial and administrative function and the control if any exercised by the Government or any statutory authority.

13. It has been held in para 40 of the aforesaid judgment as under:

> **40.** The picture that ultimately emerges is that the tests formulated in *Ajay Hasia* (supra) are not a rigid set of principles so that if a body falls within any one of them it must, ex-hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be – whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.

14. Thereafter, based on the aforesaid, it has been held that the Council is not a state within the meaning Article 12 of the Constitution. The majority judgment in the case of *Pradeep Kumar Biswas* (supra) has summed up its conclusion and in para 98, it is said that simply because a body holds a legal entity, it would not be a instrumental or agency of the state. It is held that to be an authority or an entity, the body should be created by a statute or under the statute and its functioning and liability should be an obligation to the public at large and the public interest tests fulfilled. The law is laid down in the

aforesaid case to say that a body or an association can be termed as instrumentality of the State or any authority based on financial control, administrative control and the public function obligates discharged by the body, these are the determining factors. It is held that the Council for Indian Scientific Research does not discharge any Government function nor is it vested with any power to discharge the duties of a State. It was found that the Government does not exercise any administrative control nor is it having any control over the council. On such an evaluation, it is held that the council for Scientific and Indian Research is not a state or other authority.

15. If the aforesaid principle is applied into the facts and circumstances of the present case, it would be seen that the Indian Medical Association is nothing but an association of Doctors practicing throughout the country and in different state, a separate state unit/Branch has been created. The main functioning of the association as is made out from the documents available on record goes to show that it is an association to conduct research and by holding conferences, work-shops etc. conducts research in the field of medicine and allied sciences. It does not discharge any function which is primarily undertaken by the State. No control of the State is exercised upon the association nor is any statutory obligation discharged by the association. It does not discharge any statutory function nor does any Government or any statutory authority exercises any control over the functioning of the association. The entire functions of the association and the management of the association is done by the elected private individuals who are members of the association and no financial aid or support is given by the Government. Infact, the Government or any other authority of the State does not exercises any control on the day-to-day functioning of the association.

16. On the contrary, the association has its own bye-laws which are non-statutory in nature and the entire functioning of the association is done on the basis of these by-laws and the management of the association is done by the elected office bearers of the association who are none other then the practicing doctors i.e. members of the association. There is no delegate or nominee of the State or any statutory authority participating in the administrative activities of the association.

17. That being so, if the test laid down by the Supreme Court in the case of *Ajay Hasia* (supra) and *Pradeep Kumar Biswas* (supra) is applied to the functioning of the Indian Medical Association, I have no hesitation to hold

that the association does not fulfil the requirement as laid down to say that it is a statutory authority, a State or an authority discharging its duties within the meaning of the Article 12 of the Constitution.

18. As far as the judgment relied upon by Shri Sankalp Kochar is concerned, in each case, the factual scenario is different. In all the three cases relied upon by Shri Sankalp Kochar, the association or the body which was held to be amenable to the writ jurisdiction was functioning under the direct control of the State Govt. or under the control of some statutory authority.

19. In the case of *Radhey Shyam Rai* (supra), the body was the U. P. Ganna Kishan Sansthan. The functions which are being performed by Sansthan were used to be performed by Government directly. The main purpose of this Sansthan was to provide scientific advice for sugar-cane cultivation in the State of U. P. The entire function was earlier undertaken by a Government department. Thereafter, the Government itself formed the U. P. Ganna Kishan Sansthan and the entire infrastructure of the Government including its functioning were transferred to this Sansthan and the Cane Commissioner was made incharge to look after the affairs of the Sansthan and its day-to-day activities.

20. Apart from the Cane Commissioner, various other officers of the Government were carrying out the day-to-day functioning of the sansthan and the entire administrative control of the sansthan was by these officers. The accounts officer and certain officials were Government servants on deputation. The funds to the Sansthan was provided by the Government, under such circumstances this Sansthan is held to be a State within the meaning of Article 12 of the Constitution as it was controlled by the U. P. Government financially and administratively. This case does not help the petitioner. In the case of *U. P. Rajya Karmachari Kalyan Nigam* (supra) also, identical situation was existing. The Nigam, a society registered under the Society Registration Act was a corporation consisting of executive officers representing various departments in the State of U. P. The officers were sent on deputation to work in this Nigam and the entire financial control of this Corporation is vested with the State of U. P. The overwhelming material was produced in this case to say that Nigam was nothing but an instrumentality of the State functioning through the officers of the State and funds and aid was granted by the State. That was the reason why the said Nigam was held to be a state or authority within the meaning of Article 12 of the Constitution.

21. In the case of *Madhya Pradesh State Cooperative Dairy Federation*

*Ltd.* (supra), even though the federation was a society registered under the Society Registration Act but the entire financial and administrative control of the State Govt. was available and the Managing Director and other officers of the Government were sent on deputation to the federation. The federation was being provided financial aid by the State Govt. from time to time and as the functioning of the federation was controlled by the Government, the society was held to be an instrumentality of the State

22. In the present case, the entire scenario is different. Neither any material is available to show that any Government control is exercised nor any Government officers are associated with the day-to-day activities of the Indian Medical Association nor is any financial aid or grant made available to the Indian Medical Association in the matter of discharge of its day to day functioning.

23. Apart from the aforesaid cases there are various other judgments of the Supreme Court wherein the question with regard to an establishment being a 'State' or other authority within the meaning of Article 12 of the Constitution has been considered and a decision taken. In the case of *Chander Mohan Khanna Vs. National Council of Educational Research & Training and Others* AIR 1992 SC 76, the National Council for Educational Research and Training was held not to be a State on the ground that it is not subjected to any administrative or financial control of the Government or any statutory authority.

24. Similar views have been taken in the case of *Army School Vs. Smt. Shilpi Paul* 2005 (1) ESC 342, an educational institute established by the army authorities was held not amenable to the writ jurisdiction on the ground that the administration of the school by the personnels working in the appropriate army regiment and the functions performed by the army officials for managing the affairs of the institute did not form part of their officials and statutory duties accordingly, it was held that it is not 'State'.

25. A catena of judgments are available with regard to various establishments wherein the same principle, as indicated hereinabove, have been followed.

26. That being so, the first question as formulated is answered by holding that the Indian Medical Association is not a state or other authority within the meaning of Article 12 of the Constitution and, therefore, it is not amenable to the writ jurisdiction of this Court.

27. Having held so, the second question as to whether the Election Tribunal

where the dispute is said to have been raised by the petitioner is under the administrative or supervisory jurisdiction of this Court as envisaged under Article 227 of the Constitution.

28. Under Article 227 of the Constitution, it is stipulated that every High Court shall have the power of superintendence over the courts and Tribunals functioning within its territorial jurisdiction. The Courts and the Tribunal referred to in Article 227 of the Constitution will have to be interpreted to mean such statutory Tribunals or authorities which are vested with Quasi-Judicial power by whatever name they are called and are creation of a statute.

29. If an association of individuals create an independent body consisting of certain members of the association for the purpose of resolution of some dispute interse between the members and if the bodies so created for resolution of the dispute is termed as a Court or a Tribunal, the mere terming or calling of the dispute resolution mechanism as a Court or a Tribunal will not by itself make the tribunal amenable to the supervisory jurisdiction under Article 227. To make it so, the body termed as a Court or a Tribunal should not only discharge the statutory duties but the duties and the procedure to be followed by the Tribunal should be of a quasi-judicial in nature and it must be the creation under the statute.

30. A private dispute redressal mechanism created by certain individuals cannot be subjected to the supervisory jurisdiction of this Court. If the memorandum of association and the bye-laws of the Indian Medical Association are perused, it would be seen that under bye-law 35 under the Chapter election and other disputes, it is contemplated that all disputes pertaining to the said branch of the association shall be decided by a Tribunal which shall comprise of the National President of the Indian Medical Association and two immediate Past National Presidents of the association. Various eventualities are contemplated therein and it is indicated that the Tribunal shall function and the parties to the dispute will have to bear the expenses which would be made by the members of the Tribunal for discharging their duties including expenses for travel from one place to another.

31. It is therefore clear that a Dispute Redressal Mechanism proved in the bye-law indicates that a mechanism has been created in the form of a Tribunal and this Tribunal is not creation of a statute nor any statutory duties or functions are performed by it. In fact, even though, termed as a Tribunal, it is nothing but a body of private arbitrators for resolution of a election dispute. The Tribunal so created for resolution of the election dispute is not a creation of

any statute. It is only a mechanism created by private individuals who are members of the association, as per their bye-laws for resolution of the interse dispute between them, the Tribunal before whom the dispute pertaining to present election is pending does not have the tappings or the quasi-judicial authority as are necessary to hold it to be a Court or a Tribunal within the meaning of Article 12 of the Constitution.

32. A dispute redressal mechanism created by certain private individuals cannot be termed as a Court or a Tribunal to be brought within the supervisory jurisdiction of this Court in a petition under Article 227 of the Constitution.

33. As far as the question of adjudicating mechanism being a 'Tribunal' or not within the meaning of Article 136 and 227 of the Constitution is concerned, the question was considered by the Supreme Court in the case of *Associated Cement Companies Ltd. Vs. P. N. Sharma and Another* 1965 AIR 1595. In the said case it has been held by the Supreme Court that while considering the question as to whether a body or authority is a tribunal the consideration about presence of all or some of the trappings of Court is not decisive, the meaning and basic test is whether any adjudicative power which a particular authority is empowered to exercise has been confirmed by a statute and further it can be described as a part of state inherent power exercised in the discharge of its judicial function.

34. In various other cases also this question has been considered and reference may be made to the following cases :

*Durga Shankar Mehta Vs. Raghuraj Singh AIR 1954 SC 520,*

*All Party Hill Leaders Conference, Shillong Vs. Captain W.A. Sangma 1977 (4) Scc 161,*

*Bharat Bank Ltd. Vs. Employees of Bharat Bank Ltd AIR 1959 SC 188.*

35. A complete reading of all these judgments goes to show that to be a tribunal amenable to the supervisory jurisdiction of this Court under Article 227 of the Constitution the body or authority should not only exercise quasi-judicial function, but it should be a creation of statute and should be discharging judicial functions which is normally to be discharged by the state or its instrumentality. If the aforesaid principles are applied to the election tribunal

in question it is clear that it is neither a creation of the statute nor does it perform any judicial function which is inherent to be performed by the State Government nor are the members of the so called election tribunal clothed with any statutory powers or functions.

36. Accordingly, I am of the considered view that even a writ of certiorari cannot be issued to this Tribunal as it is neither a statutory Tribunal nor a quasi-judicial authority discharging any functions which can be controlled by this Court. It is nothing but a creation of certain individuals for the purpose of deciding their interse dispute.

37. Under such circumstances, I am of the considered view that in the facts and circumstances of the case, a writ petition is not maintainable. If the petitioner has any grievance in the matter, he has to take recourse to the common law remedy available.

38. Even though, on two previous occasions, certain directions have been issued by this Court but on a perusal of the orders passed, it is seen that the question of jurisdiction was not considered or decided under the apprehension that the matter can be interfered in a petition under Article 227 of the Constitution and the matter was disposed of without adverting to consider all these questions.

39. Accordingly, having found the petition itself not maintainable, relegating the petitioner to take recourse to the common law remedy available, this petition stands dismissed.

*Petition dismissed.*

**I.L.R. [2014] M.P., 86**
**WRIT PETITION**

***Before Mr. Justice Krishn Kumar Lahoti & Mr. Justice Subhash Kakade***

W.P. No. 7229/2013 (PIL) (Jabalpur) decided on 13 December, 2013

SATISH KUMAR VERMA ...Petitioner

Vs.

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

***Constitution - Article 226 - Environment - Construction near Narmada River*** **- Master Plan of Jabalpur shall be given effect strictly - Detailed survey is to be made in respect of structures which are permissible under the master plan - Any construction raised after 01.10.2008 shall be dealt with strictly in accordance with master plan**

**and any illegal constructions should be dealt with strictly in accordance with law after giving due opportunity of hearing to the parties before removing the structure - All measures for prevention of water pollution in river Narmada by merging sewage or drainage water shall continue by respondents. (Para 12)**

*संविधान – अनुच्छेद 226 – पर्यावरण – नर्मदा नदी के पास निर्माण* – जबलपुर के मास्टर प्लान को कड़ाई से प्रभावी बनाया जाना चाहिए – इमारतों के संबंध में विस्तृत सर्वेक्षण किया जाना चाहिए, जो मास्टर प्लान के अंतर्गत अनुज्ञेय है – 01.10.2008 के पश्चात खड़े किये गये किसी भी निर्माण पर कड़ाई से मास्टर प्लान के अनुसार कार्यवाही की जानी चाहिए और किसी अवैध निर्माण पर, निर्माण हटाने से पहले पक्षकारों को सुनवाई का सम्यक अवसर दिये जाने के पश्चात विधिनुसार कठोर कार्यवाही की जानी चाहिए – नर्मदा नदी में मल या गंदा पानी मिलाकर किये जा रहे जल प्रदूषण के निवारण हेतु सभी उपाय प्रत्यर्थीगण द्वारा जारी रहेंगे।

*Satish Kumar Verma*, petitioner present in person.
*P.K. Kaurav*, Addl. A.G. for the respondents No. 1,2,3,4, 6 &7.
*Anshuman Singh*, for the respondent No.5.
*V.S. Shroti* with *Vikram Johri*, for the respondent No. 8.
*Rajendra Tiwari, R.N. Singh, B.P. Sharma, Raviranjan, Mahendra Pateria, Manish Tiwari, Siddharth Gupta & Brajesh Choubey*, for the intervenors.

**ORDER**

The Order of the court was delivered by :
**K.K. Lahoti, J.:-** The petitioner, in this petition, has sought for following reliefs:-

"(i) That, the Hon'ble Court be pleased to issue a writ in the nature of mandamus or any other appropriate writ, order or directions to all respondents, to promptly conduct a survey of NARMADA RIVER beds/Banks, surroundings of river, and other natural sites of Jabalpur district and to ascertain the places of illegal constructions and encroachments.

(ii) That, the Hon'ble Court be pleased to issue a writ in the nature of mandamus or any other appropriate writ, order or directions to Collector/District Magistrate

Jabalpur to demolish all illegal and unauthorized constructions/encroachments and stop all destructive activities on Narmada Riverbeds/Banks, surrounding hillocks and other natural sites, the same are great hardship for nature, environment and common public at large.

(iii) That, the Hon'ble Court be pleased to issue a writ in the nature of mandamus or any other appropriate writ, order or directions to the respondents to take appropriate legal action against person indulged in illegal constructions/encroachers of such land in accordance with law, and to ensure that no further illegal constructions/encroachments and other destructive activities takes place on Narmada River belt and Natural properties at Jabalpur District.

(iv) Any other order or direction deemed just and proper in the facts and circumstances of the case in public interest may also be passed with cost."

2. In this case, various issues relating to environment have also been raised by the petitioner but those issues relate within the jurisdiction of the National Green Tribunal, so it is not necessary for this Court to examine those issues.

So far as the issues relating to issuance of the directions to respondents to demolish all illegal and unauthorized constructions/ encroachments and to stop all destructive activities on Narmada Riverbeds/banks and surroundings hillocks and other natural sites are concerned, the emphasis of the petitioner is that in view of the Master Plan, 2008 which is filed as Annexure P-6 on page no.30 and 31, be implemented by the respondents strictly.

3. From the perusal of the Master Plan, it is apparent that the Master Plan for the Jabalpur township has been approved by the State of Madhya Pradesh under Section 19 of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973. The aforesaid Master Plan has been given effect to w.e.f. 01.10.2008, the Master Plan provides various provisions for the Township of Jabalpur. It specifically provides that on both the banks of river Narmada, 100 metres area shall be kept for plantation and all the developments within this area including any religious structure, Ashram/development of the Ghats

which shall be with the permission of the competent authority. It further provides that on the northern bank of River all the developments shall be permissible after leaving 300 meters area. For ready reference the relevant part of the Master Plan which has been sought to be implemented reads thus:-

"संस्कारधानी नगर जबलपुर, प्रदेश की हृदयस्थली पर अवस्थित होकर विकास की अपार संभावनायें धारण किये हुए है । कृषि उत्पादन की अत्यधिक क्षमता वाले इस अंचल में व्यवसायिक, प्रतिरक्षा, औद्योगिक, प्रशासनिक एवं शैक्षणिक केन्द्र के रूप में अग्रसर इस नगर के विकास के लिए प्रगतिशील एवं सतत प्रयासों की आवश्यकता है । जबलपुर नगर की अपनी एक अलग विशेषता है । यहां भेड़ाघाट जैसे प्राकृतिक सौंदर्य से परिपूर्ण स्थल एवं अन्य भू–दृश्यीकरण की दृष्टि से सम्पन्न सीानों पर गर्व किया जा सकता है । जनसंख्या के आधार पर यह नगर प्रदेश में तीसरे कम का नगर है ।

नगर के नियोजित विकास हेतु पूर्व में भी प्रयास हुए हैं । वर्ष 1979 में जबलपुर विकास योजना 1991 तैयार कर प्रभावशील की गई थी, जिसका पुनर्विलोकन एवं मूल्यांकन करने के उपरांत विकास योजना 2005 वर्ष 1998 से प्रभावशील की गई थी , उक्त योजना अवधि में हुए विकास के फलस्वरूप विकास योजना का पुनर्विलोकन कर विकास योजना 2021 प्रभावशील की गई।

विकास योजना 2021 में प्रक्षेपित जनसंख्या 16.80 लाख को दृष्टिगत रखते हुए भूमि के युक्तिसंगत उपयोग, यातायात संरचना का उन्नयन, ऐतिहासिक एवं प्राकृतिक महत्व के स्थलों का संरक्षण एवं संवर्धन के साथ ही अधोसंरचना विकास के प्रस्तव भी दिए गए हैं । जबलपुर विकास योजना 2021 म.प्र. शासन, आवास एवं पर्यावरण विभाग की अधिसूचना क्रमांक एफ–3– 12/32/2007 दिनांक 1.10.2008 के द्वारा म.प्र. नगर तथा ग्राम निवेश अधिनियम, 1973 की धारा 19 में अंतर्गत अनुमोदित होकर दिनांक 1.10.2008 से प्रभावशील है ।

मुझे विश्वास है कि विकास योजना के प्रस्तावों के अनुरूप क्रियान्वयन से नगर की गरिमा बढ़ेगी तथा जबलपुर वासियों के लिए अपने गौरव को संजोकर रखना संभव हो सकेगा । इस विकास योजना के क्रियान्वयन हेतु नागरिकों एवं समस्त क्रियान्वयन हेतु नागरिकों एवं समस्त क्रियान्वयन संस्थाओं का योगदान महत्वपूर्ण होगा ।

| जबलपुर विकास योजना | संचालनालय नगर तथा ग्राम निवेश, मध्यप्रदेश |
|---|---|

50 मीटर तक क्षेत्र खुला रखा जावेगा हालांकि पहुंच पथ एवं आमोद प्रमोद अधोसरंचना संबधित विकास ही स्वीकार्य होगा । यह प्रतिबंध निम्नांकित जलाशय क्षेत्रों में प्रभावशील होगा –

| | |
|---|---|
| 1. जबलपुर तालाब | तटीय क्षेत्र से 30 मीटर तक निर्माण निषेध |
| 2. संग्राम सागर ताल | तटीय क्षेत्र से 30 मीटर तक निर्माण निषेध |
| 3. बाल सागर | तटीय क्षेत्र से 30 मीटर तक निर्माण निषेध |
| 4. अधारताल | तटीय क्षेत्र से 30 मीटर तक निर्माण निषेध |
| 5. माढ़ोताल | तटीय क्षेत्र से 30 मीटर तक निर्माण निषेध |
| 6. अमखेरा ताल | तटीय क्षेत्र से 30 मीटर तक निर्माण निषेध |
| 7. गंगासागर ताल | तटीय क्षेत्र से 30 मीटर तक निर्माण निषेध |
| 8. सूपाताल | तटीय क्षेत्र से 30 मीटर तक निर्माण निषेध |
| 9. देवताल | तटीय क्षेत्र से 30 मीटर तक निर्माण निषेध |
| 10.हनुमान ताल | तटीय क्षेत्र से 30 मीटर तक निर्माण निषेध |
| 11.खंदारी तालाब | तटीय क्षेत्र से 30 मीटर तक निर्माण निषेध |

(ब–1) नर्मदा नदी एवं परियट नदी के तटीय क्षेत्र के दोनों ओर 100 मीटर को क्षेत्र खुला रखा जावेगा एवं उसमे सामाजिक वानिकी एवं वृक्षारोपण किया जावेगा । नदी के तटीय क्षेत्र मे जलकीड़ा संबंधी विकास, आश्रम, देवालय एवं घाट का विकास सक्षम प्राधिकारी से स्वीकृति उपरांत किया जा सकेगा ।

(ब–2)

1. नर्मदा नदी के उत्तर दिशा में नदी के तट से 300 मीटर छोड़कर तथा प्रस्तावित बायपास के दक्षिण में प्रस्तावित नगर उद्यान के अंतर्गत रीवर फ्रंट (नदी के अग्रभाग का क्षेत्र) में विकास में निजी भागीदारी एवं पर्यटन को प्रोत्साहित करने हेतु निम्नलिखित गतिविधियां अनुज्ञेय होगी जिसका विवरण एवं मापदण्ड निम्नानुसार रखा जा सकता है ।

2. उपरोक्त आमेद–प्रमोद क्षेत्रों में खुले क्षेत्र एवं निर्मित क्षेत्र का अनुपात कमशः 90:10 अनुज्ञेय होगा । उपरोक्त अनुपात अंतर्गत पार्क, नर्सरी, योगा केन्द्र, धर्मशाला, हेल्थ क्लब, पर्यटन से संबंधित एम्पोरियम, संग्रहालय, रेस्टोरेंट, आमोद–प्रमोद परिसर की अनुशांगिक आवासीय इकाईयां, फूल उद्यान, वाणिज्यिक वनीकरण, सेरीकल्चर, आश्रम, धर्मशाला, गतिविधियों स्वीकार्य होंगी जिसके मापदण्ड निम्नानुसार मान्य होंगे –

अ. स्वीकार्य उपयोग क्षमता क्षेत्र पर आधारित होगा एवं संरचना घटक

न्यूनतम क्षितिजीय फैलाव एवं आयतन के अनुरूप होना चाहिए ।

ब. क्षेत्रों का प्रमुख भाग वृक्ष समूहों से व्याप्त हो ।

स. मल निकास व्यवस्था के भौतिक सत्यापन पश्चात् ही ऐसे विकास स्वीकार्य होगें ।"

4. In this petition, on 10.07.2013 this Court directed thus:

"In view of the aforesaid contention, we direct respondent nos.5 & 7 to immediately stop all the construction activities which are going on, on the bank of river Narmada, contrary to the master plan dated 1.10.2008 and to submit a detailed report in respect of all the constructions made after 1.10.2008. The Municipal Corporation and Nagar Panchayat, Bhedaghat shall submit action taken by them in respect of those constructions which took place after 1.10.2008. A detailed report and affidavit be filed before this Court alongwith the reply."

5. On 24.07.2013, this Court after hearing both the parties issued following directions:-

"Considering the grievance raised in the petition which is mainly in respect of non-compliance of the master plan of 2008 by which it is alleged by the petitioner that various constructions have been raised after 1.10.2008 which are contrary to the master plan. On earlier occasion we have directed the Municipal Corporation, Jabalpur and Nagar Panchayat, Bhedaghat to ascertain all the constructions which are made after 1.10.2008. It is submitted by Shri Kaurav and Shri Anshuman Singh that they have submitted a detailed report in this regard.

Considering the controversy in the matter, we also direct the M.P. Pollution Control Board to ascertain by a survey at Gwarighat and also at Bhedaghat that any construction which is made after 1.10.2008 is creating any pollution to Narmada river. The M.P. Pollution Control Board shall point out the constructions which are having their discharge of drainage or sewage etc. towards river Narmada and to submit their report

before the next date of hearing. For this purpose we allow M.P. Pollution Control Board a period of two weeks to ascertain the aforesaid position."

6. On 12.08.2013 two reports were filed one by the Municipal Corporation, Jabalpur and another by the M.P. Pollution Control Board. The respondent No.7 has filed compliance report which reads as under:-

"In respect of finding of MP Pollution Control Board in its report in clause (1) Un treated sewage water of Bheraghat Township, Adarsh Hotel, Hotel River, Hotel Marble Palace, Rock Palace, Dharmshala is thrown into Gadghara Nala which meets directly with Narmada River at Panchwati Ghat. The Board found that solid municipal waste is dumped into trenching ground of Bheraghat.

In regard to this finding give in Clause (1) (2) & (3) it is respectfully submitted that Nagar Panchayat, Bheraghat has decided to construct Sewage Treatment Plant near Panchwati Ghat where the sewage of aforesaid hotels and township etc. shall be intercepted and treated and treated water of the said Treatment Plant shall be used in the irrigation of Gardens namely Panchwati Garden and Paryatak Park. For this purpose Technical sanction has been granted for inviting tenders for Preparation of Detailed Project Report, and the tenders are to be issued very soon. It is submitted that after fixing the agency of preparation of DPR and after preparation of DPR necessary steps for construction of Sewage Treatment Plant shall be taken. In all these process about two or three years time will be consumed. Therefore, as an interim measure answering respondent no.7 Bheraghat Nagar Panchayat is taking necessary steps for construction of Soak Pits and simultaneously also directing all the Hotel Owners and residents of the Town Ship to prepare Soaking Pits at their respective places. It is submitted that in this regard notices were issued to all the above hotel owners and they have also given an undertaking in writing that they shall construct soak pits at their respective places within 15 days. That apart answering respondents have also issued notice for the public in general

residing within the territorial jurisdiction of Nagar Parishad Bhedaghat and published the same in local news paper Haribhoomi, Lokhit, Nai Duniya on 17/8/2013 and 19/8/2013 that in future no permission for any type of construction shall be granted until and unless soak pit is constructed at the relevant site. Copy of the resolution of Nagar Parishad, Bhedaghat dtd. 23/3/2013 regarding construction of Sewage Treatment Plant, notices served on Hotel Owners, and the undertakings given by the hotel owners are enclosed herewith as Annexures R-7/4, R-7/5 and R-7/6.

In clause (4) of the report MP Pollution Control Board has given findings about Plaza Market at Dhuadhar where 300 shops situate and a Sulabh Complex is constructed overflow of which goes into a Septic Tank and sewage is drained in small drainages which dry before joining the Narmada river, while solid waste thrown in the Panchayat containers.

At clauses (5), (6), (7), (8), (9), (10), (11), (12) and (13) about Gopalpur Road Pollution Board has given its findings in respect of Omkar Medication Centre, Narendra Agrawal, Ranjit Jain, Sachin Yadav, Dr. Pawan Sthapak, Harsh Patel Farm House, Ayur Harbal, Nitin Barsaiya and Kalyanika Ashram that in all these places though constructions are made but no sewage discharge is found by the Pollution Board. Similar findings have been arrived at Clause No.(14) and (15) by the MP Pollution Control Board in respect of Gopalpur Village and Devebappa Ashram.

So far as findings arrived at by the MP Pollution Control Board at Clause (17) regarding discharge of the sewage of about 20 houses of Lameta Village goes into a Nalla which meets the River Narmada in this regard it is respectfully submitted that answering respondent no.7 Nagar Panchayat, Bheraghat is taking similar steps for constructing a Sewage Treatment Plant and by way of interim measuring till the aforesaid treatment plant is constructed answering respondent has decided to construct Soaking Pits in the village so that drainage water of the village may not go into the river Narmada.

Findings arrived at by the Pollution Control Board at clauses (17 to 28) are not concerned with the answering respondent no.7 as the said places are not within the territorial jurisdiction of answering respondent. Therefore, answering respondent no.7 has nothing to do about the same.

That, from the above submissions it would become clear that answering respondent no.7 has already initiated necessary steps in respect of the remedies advised by MP Pollution Control Board in its report so that River Narmada is saved from pollution."

7. The Municipal Corporation has also filed a copy of the master plan as Annexure R-5/1 and has reiterated the contention that the Municipal Corporation is giving effect to the master plan and after implementation of the master plan dated 01.10.2008 it has not granted any building permissions for construction of residential or commercial buildings within 100 meters of the banks of river Narmada. The respondent No.7 has also filed compliance report on 24.07.2013 which reads thus:-

"3. That answering respondent no.7, i.e. Municipal Council, Bheraghat respectfully submits that under section 187 of MP Municipalities Act, 1961 prior permission of the Municipal Council is required for the purposes of any construction. The answering respondent respectfully submit that after the directions issued by this Hon'ble Court between 13/7/2013 to 16/7/2013 the demarcation of various constructions near river Narmada, were made and a Panchnama in this regard has been prepared. It has been found that following 7 constructions have already been made after 1/10/2008:

| S.No. | Name | Nature of construction |
|---|---|---|
| 1. | Shri Rajendra Agrawal | House |
| 2. | Shri Narendra Agrawal | Two farm houses |
| 3. | Dr. Akhilesh Gumastha | 1 Hall (Mediation) |

| | | |
|---|---|---|
| 4. | Dr. Pawan Sthapak | 1 Room and Boundary Wall under construction |
| 5. | Shri Vasudeo Khatri | Kalyanika Ashram |
| 6. | Shri Nitin Barsaiyan | House |
| 7. | Shri Sandip Jadav | Ashram, Devbappa Farsi Wale Baba. |

It has also been found that following constructions have been made which are coming within 300 meters from River Narmada but are found 200 meters away from Narmada river.

| S.No. | Name | Nature of construction |
|---|---|---|
| 1. | Shri Balaji Builders and Promoters | 6 Farm Houses |
| 2. | Shri Harsh Patel S/o Shri Shravan Patel | 4 farm houses, 3 farm houses are still under construction. |

It is submitted that Shri Balaji Builders and Promoters NOC was granted on 10/8/2013 and for Shri Harsh Patel NOC was granted on 6/6/2007.

4. That, it is respectfully submitted that despite the constructions are within 300 meters still same are going on at five places which are given as under:

| S.No. | Name | Nature of construction |
|---|---|---|
| 1. | Shri Harsh Patel | Restaurant |
| 2. | Shri Rajnish Jain | Pathway (Park) |
| 3. | Dr. Pawan Sthapak | Boundary Wall under construction. |
| 4. | Ayur Harbal Farm | Houses Two Rooms |

Copy of the list of the aforesaid three categories, Panchnama dated 16/7/2013 are enclosed herewith and

marked as Annexure R7/1 and R7/2 respectively. It is submitted that notices served on the following persons:

Dr. Pawan Sthapak

Shri Sandip Jadhav

Dr. Akhilesh Gumashta

Shri Vasudev Khatri

Shri Nitin Barsaiya

Shri Rajendra Agrawal; and

Shri Narendra Agrawal

Copies of notices are being filed and marked as Annexure R7/3.

5. That, it is respectfully submitted that on 23/7/2013 notices to five persons have already been issued who are still raising constructions asking them to stop constructions."

8. From the perusal of the aforesaid, it appears that the master plan dated 01.10.2008 has not been given effect to in letter and spirit by the respondents, who are bound to give effect to. The respondents are under an obligation to implement the aforesaid master plan. The State has filed separate return in which it has pleaded thus:-

"That, it is respectfully submitted that petitioner has not pointed out any particular construction. However, the Municipal Corporation has been directed to submit report in this regard. The Nagar Panchayat, Bhedaghat has already submitted its report regarding unauthorized constructions, but it is submitted that Development Plan of Behdaghat Planning Area within which Nagar Panchayat, Bhedaghat falls is not yet approved. The same is yet to be finalized. According to proposed Draft Development Plan of Bhedaghat the construction activities within 300 meters from River Narmada are prohibited and in accordance with Rule 14(5) of MP Bhumi Vikas Rules, no development permission under Section 16 can be granted if the land is situated in such area where activity

proposed in the application is not proposed in the Draft Development Plan. It is submitted that Nagar Panchayat, Bhedaghat has not granted any permission for raising construction within 300 meters area from River Narmada. All other adverse allegations made in this para are denied. Clause 5.8 of Bhedaghat Development Scheme 2021, puts restriction that up to 300 meters area from river has to be reserved as Green Belt. An extract copy of the same is being filed herewith as Annexure R/1. An extract copy of Rule 14(5) of the MP Bhumi Vikas Rules is being filed herewith as Annexure R/2.

However, it is seen that petitioner has not specifically pointed out any specific construction so as to enable the answering respondents to take appropriate steps in this regard. It is submitted that in Municipal Corporation Area no permission within 100 meters from River Narmada is granted for construction by the Town and Country Planning. So far as Nagar Panchayat, Bhedaghat is concerned, separate status report regarding construction has already been filed before this Hon'ble Court. In view of the averments made in above paragraphs no further comments are required.

It is submitted that the Department of Town and Country Planning has not granted any permission for construction of any structure within 100 meters of Municipal Corporation Area in Jabalpur City Development Plan Area. So far as Development Plan of Nagar Panchayat, Bhedaghat is concerned, the same is under preparation but it has also not granted any permission for construction within 300 meters. However, it is submitted that the Town and Country Planning Deptt. has granted permission to Gopala Restaurant which is issued prior to draft Master Plan of Bhedaghat. Copy of the permission granted to Gopala Restaurant is enclosed and marked as Annexure R/3. In view of this petitioner has failed to make out any ground for interference of this Hon'ble Court.

That, on 8/2/2013 Collector, Jabalpur has appointed Shri Toshan Kumar Badiye, Project Officer, Distt. Urban Development Agency, Jabalpur as Officer-in-charge of the case

for the purposes of filing of return, accordingly present return is being filed by the duly appointed OIC of the case. Copy of the appointment letter of OIC is enclosed herewith a Annexure R/4."

9. In this case, various institutions and persons have filed their application seeking intervention in the matter. The main contention of these are that there are various religious structures which are in existence much prior to the implementation of the master plan dated 1.10.2008. It is also stated that on the banks of Narmada river there are various temples, Ashrams, Dharmshala, Sarai etc. which are holy places and are for the use of the persons visiting holy river Narmada. It is also stated that there is religious tradition of Narmada Parikrama and these have been constructed to facilitate these persons. That a detailed enquiry is required in the matter and the construction raised prior to 01.10.2008 and even permitted under the master plan should not be disturbed. That neither any construction is contrary to the provisions of Madhya Pradesh Municipal Corporation Act nor of M.P. Municipalities Act or M.P. Panchayat Raj Evam Gram Swaraj Adhiniyam. There are no pollution by these religious constructions and if anything is pointed out, they are ready to rectify it. It is also submitted that this factual position deserves to be ascertained by the authorities and the constructions, which are in existence prior to 01.10.2008 and are covered by the master plan, should not be disturbed. It is also submitted by them that in case it is pointed out that if there is any irregularity required to be rectified they are ready to approach the Corporation or concerned authority for rectification of such or for compounding, in accordance with law.

10. Learned counsel appearing for the Municipal Corporation also submitted that a survey has already been conducted in respect of the structures which are covered by the master plan. It is also submitted that only structures raised after 01.10.2008 or any encroachment shall be dealt with strictly in accordance with the master plan. In aforesaid circumstances, a detailed survey deserves to be made by the respondents to ascertain that which structure was in existence prior to 01.10.2008 and any construction in existence which is covered under the master plan Annexure P-6 i.e. park, nursery, Yoga Kendra, Dharmshala, Health Club, any emporium relates to tourist, restaurant, commercial forestry, sericulture, Ashram and Temple shall be certified by the respondents. There are many ancient or old temples on the bank of river Narmada. Respondents No.5 and 7 shall prepare a list and shall also take photographs and prepare a video film of the aforesaid so that no further

construction may be raised there, without seeking prior permission of the authorities. During survey, if it is found that construction of any of the aforesaid categories raised after 01.10.2008 is not in accordance with the Master Plan and rules and regulations then they shall intimate to the concerned person, institution etc in this regard and to proceed in the matter in accordance with law. If the matter can be sorted out then the matters covered by the Master Plan be sorted out, but as per the Master Plan only, as various religious structures, Dharmshala, Ashram etc are situated on the bank of River are permissible under the Master Plan. The structures made/constructed prior to 1st October, 2008 deserves to be given a different look as some of them are covered and some of them are not covered by the master plan. After due verification, a detailed list shall be prepared in this regard and it shall be maintained by the respondents. However, any construction raised after 01.10.2008 which is not covered under para 2 of the aforesaid maser plan, shall be dealt with by the respondents strictly in accordance with law.

11. In so far as encroachments are concerned the respondents are empowered to remove all the encroachments after following due procedure of law. In this regard the respondents are directed to take continuous action for removal of the encroachment. So far as the relief no.1 is concerned as this question has not been considered and it relates to environment, however in compliance of our orders dated 10.7.2013 and 24.7.2013 the respondents have initiated action in this regard. They shall continue with their effort to see that the Master plan in this regard be adhered to and all the measures to prevent pollution by merging sewage water in the river Narmada be continued. However this direction shall be subject to any direction which may be issued by the National Green Tribunal in this regard, if any.

12. In view of the aforesaid, this petition is allowed with following directions:-

(i) The respondents shall give effect to the master plan strictly in accordance with the provisions as contained in master plan.

(ii) So far as the structures which are permissible under para 2 of the master plan a detailed survey be made by the respondents and a permanent record with photographs and video recording be prepared in that regard.

(iii) Any construction raised after 01.10.2008 be dealt with strictly in

accordance with the Master Plan and the provisions as contained in the Municipal corporation Act, Municipalities Act, M.P. Panchayat Raj Evam Gram Swaraj Adhiniyam and M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 and be dealt with accordingly.

(iv) Any illegal construction raised after 01.10.2008 or any encroachment made be dealt with strictly in accordance with law. Affected party should be given an opportunity of hearing by the concerned authority before the aforesaid construction is to be removed.

(v) All the measures for prevention of water pollution in the river Narmada by merging sewage or drainage water shall continue by the respondents. However this shall be subject to any further direction by the National Greens Tribunal, if any.

(vi) The aforesaid order be given effect to within a period of three months from today and a compliance report be filed in the Registry of this Court.

With the aforesaid directions, this petition is finally disposed of.

*Petition disposed of.*

**I.L.R. [2014] M.P., 100**
**WRIT PETITION**
***Before Mr. Justice Sujoy Paul***
W.P. No. 6342/2013 (Gwalior) decided on 15 January, 2014

SAGAR SINGH YADAV ...Petitioner
Vs.
SUDAMA SINGH YADAV & ors. ...Respondents

***Civil Procedure Code (5 of 1908), Order 18 Rule 4 - Recording of Evidence*** **- Discretion of court to record evidence by way of affidavit or by way of examination-in-chief is limited to the cases where summons have been issued under Order 16 Rule 1 of the Code - Further held, the conjoint reading of Order 16 Rule 1-A and Order 18 Rule 4(1) makes it mandatory for the court below to record examination-in-chief in the form of affidavit and it need not be recorded in the shape of examination-in-chief by directing the witness to enter the witness box.**

**(Paras 9, 10 & 11)**

*सिविल प्रक्रिया संहिता (1908 का 5), आदेश 18 नियम 4 – साक्ष्य अभिलिखित की जाना* – शपथ पत्र के जरिए या मुख्य परीक्षण के जरिए साक्ष्य अभिलिखित्त करने के लिए न्यायालय का विवेकाधिकार उन प्रकरणों तक सीमित है जहां संहिता के आदेश 16 नियम 1 के अंतर्गत समन जारी किये गये हैं – आगे अभिनिर्धारित किया गया कि आदेश 16 नियम 1–ए व आदेश 18 नियम 4(1) को एक साथ पढ़ने से निचले न्यायालय के लिये यह आज्ञापक हो जाता है कि शपथ पत्र के रुप में मुख्य परीक्षण अभिलिखित करें और इसे साक्षी को कठघरे में प्रवेश करने के लिये निदेशित करते हुए मुख्य परीक्षण अभिलिखित किये जाने के रुप में होना आवश्यक नहीं।

**Case referred :**

AIR 2003 SC 189.

*Rohit Jagwani,* for the petitioner.
*D.D. Bansal,* for the respondent No.1.
*Nidhi Patankar,* G.A. for the respondent No.4/State.

**ORDER**

**SUJOY PAUL, J.:-** By invoking jurisdiction of this Court under Article 227 of the Constitution, the petitioner/plaintiff has called in question the legality, validity, correctness and propriety of the order dated 7.8.2013, whereby the court below has directed the petitioner to depose the statement by way of examination in chief in the court and the affidavit filed under Order 18 Rule 4 of the Code of Civil Procedure (CPC) is discarded.

2. The petitioner filed a suit for declaration and permanent injunction. The said suit was registered as Case No. 10A/2013 before the Fourth Additional District Judge, Bhind. In the proceedings of the said suit, the petitioner filed affidavit of its witness Keral Singh Yadav under Order 18 Rule 4 CPC. Plaintiff also filed his own affidavit under Order 18 Rule 4 CPC. The court below by examining this affidavit opined that affidavit is running in seven pages. *Prima facie* affidavit appears to have been prepared by somebody else or by an Advocate. In this view of the matter, the court below opined that in the interest of justice the plaintiff be directed to enter the witness box and his statement will be recorded in the court. Aggrieved by this order, the present petition is filed.

3. Shri Rohit Jagwani, learned counsel for the petitioner submits that after the amendment in the CPC, it is obligatory on the part of the court

below to record the statement of the witnesses by way of accepting affidavits under Order 18 Rule 4 CPC and court below has erred in rejecting the same.

4. Prayer is opposed by Shri D.D.Bansal, learned counsel for the respondent No.1. Shri Bansal relied on para 18 of the judgment, reported in AIR 2003 SC 189 (*Salem Advocate Bar Association vs. Union of India*). He further submits that there is no legal error in the order passed by the court below and, therefore, no interference is required.

5. I have bestowed my anxious consideration on the rival contentions.

6. Before dealing with the contentions, it is apt to quote the relevant provisions which are relevant in this matter.

7. Order 16 Rule 1 and Rule 1-A of CPC read as under:-

> ***"1. List of witnesses and summons to witnesses.--*** *(1) On or before such date as the Court may appoint, and not later than fifteen days after the date on which the issues are settled, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summonses to such persons for their attendance in Court.*
>
> *(2) A party desirous of obtaining any summons for the attendance of any person shall file in Court an application stating therein the purpose for which the witness is proposed to be summoned.*
>
> *(3) The Court may, for reasons to be recorded, permit a party to call, whether by summoning through Court or otherwise, any witness, other than those whose names appear in the list referred to in sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list.*
>
> *(4) Subject to the provisions of sub-rule (2), summonses referred to in this rule may be obtained by the parties on an application to the Court or to such officer as may be appointed by the Court in this behalf within five days of presenting the list of witnesses under sub-rule (1).*

> ***1A. Production of witnesses without summons.--*** *Subject to the provisions of sub-rule (3) of rule 1, any party to the suit may, without applying for summons under rule 1, bring any witness to give evidence or to produce documents."*

Order 18 Rule 4(1) of CPC reads as under :-

> ***"4. Recording of evidence.--*** *(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence.*
>
> *Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court."*

8. Interestingly, in *Salem Advocate Bar Association* (supra), the Apex Court has dealt with this aspect. In para 17, the Apex Court opined that reading the provisions of Orders 16 and 18 CPC together, it is clear that Order 18 Rule 4(1) will necessarily apply to a case contemplated by Order 16 Rule 1-A CPC. It is opined that as per Order 16 Rule 1-A, if any party to a suit without applying for summoning under Rule 1 brings any witness to give evidence, in that case, examination-in-chief must be recorded in the form of an affidavit and it not to be recorded in the Court. The said portion reads as under:-

> *"Reading the provisions of Order 16 and Order 18 together, it appears to us that Order 18 Rule 4(1) will necessarily apply to a case contemplated by Order 16 Rule 1A, i.e., where any party to a suit, without applying for summoning under Rule 1 brings any witness to give evidence or produce any document. In such a case, examination-in-chief is not to be recorded in court but shall be in the form of an affidavit."*

In para 18 of the same judgment, the Apex Court dealt with the situation whether summons have been issued under Order 16 Rule 1 and in that case opined that the stringent provision of Order 18 Rule 4 may not apply. In other words, it was held that where summons are issued, the court may give an option to the witness summoned either to file an affidavit by way

of examination-in-chief or to remain present in the court for examination. The relevant portion reads as under:-

> *"In cases where the summons have to be issued under Order 16 Rule 1 the stringent provision of Order 18 Rule 4 may not apply. When summons are issued, the court can give an option to the witness summoned either to file an affidavit by way of examination-in-chief or to be present in court for his examination. In appropriate cases, the court can direct the summoned witness to file an affidavit by way of examination-in-chief. In other words, with regard to the summoned witnesses the principle incorporated in Order 18 Rule 4 can be waived. Whether a witness shall be directed to file affidavit or be required to be present in court for recording of his evidence is a matter to be decided by the court in its discretion having regard to the facts of each case."*.
>
> *(Emphasis Supplied)*

9. In the present case, admittedly the plaintiff filed his own affidavit and intended to appear as a witness on his own. No summons were issued to the petitioner or his witnesses under Order 16 Rule 1 CPC. In this factual backdrop, in the considered opinion of this Court, para 17 of the judgment of *Salem Advocate Bar Association* (supra) will apply. As per the aforesaid, it is clear that the conjoint reading of Order 16 Rule 1-A and Order 18 Rule 4(1) CPC makes it mandatory for the court below to record examination-in-chief in the form of an affidavit and it need not be recorded in the shape of examination-in-chief by directing the witness to enter the witness box. Thus, as per para 17 of the said judgment, in my opinion, the court below has erred in discarding the affidavit and directing the plaintiff to enter the witness box to depose his statement. The order of the court below runs contrary to the mandatory provision as per Order 16 Rule 1-A read with Order 18 Rule 4(1) of CPC. It also runs contrary to the judgment of Supreme Court in this regard.

10. The contention of Shri Bansal based on para 18 of the judgment needs rejection. At the costs of repetition, it is clear that discretion of the court to record evidence by way of affidavit or by way of examination-inchief is limited to the cases where summons have been issued under Order 16 Rule 1 CPC. In the present case, no summons were issued and plaintiff and witnesses

appeared on their own and intended to file affidavit.

11. On the basis of aforesaid analysis, the court below has clearly erred in passing the order dated 7.8.2013 rejecting the affidavit of the petitioner. Resultantly, the said order is set aside. The court below is directed to accept the said affidavit of the petitioner and proceed therefrom in accordance with law.

12. Petition is allowed to the extent indicated above. No costs.

*Petition allowed.*

**I.L.R. [2014] M.P., 105**
**WRIT PETITION**
***Before Mr. Justice Sujoy Paul***
W.P. No. 3360/2013 (Gwalior) decided on 22 January, 2014

SAMIKSHA GUPTA ...Petitioner
Vs.
BOARD OF SECONDARY EDUCATION, M.P. ...Respondent

***Constitution - Article 226 - Writ for Exemplary Cost & Compensation*** **- The basic question is whether for every infraction of public duty by public officer, the respondents are bound to give compensation ? - Held - It would not be correct to assume that every minor infraction of public duty by public officer would commend the court to grant the compensation - Further before exemplary damages can be awarded, it must be shown that some fundamental right under Article 21 has been infringed by arbitrary or capricious action on the part of public authorities/functionaries - The present petitioner has not established the aforesaid aspect and has filed this petition after three years - Not entitled to compensation & cost. (Paras 5, 6, 7 & 9)**

*संविधान – अनुच्छेद 226 – अनुकरणीय व्यय व प्रतिकर हेतु रिट* – मूल प्रश्न है कि क्या लोक अधिकारी द्वारा लोक कर्तव्य के प्रत्येक व्यतिक्रम हेतु, प्रतिकर देने के लिये प्रत्यर्थीगण बाध्य है ? – अभिनिर्धारित – यह धारणा करना सही नहीं होगा कि लोक अधिकारी द्वारा लोक कर्तव्य का प्रत्येक गौण व्यतिक्रम, न्यायालय को प्रतिकर प्रदान करने के लिये प्रेरित करेगा – इसके अतिरिक्त, अनुकरणीय क्षतिपूर्ति अवार्ड करने से पूर्व यह दर्शाया जाना चाहिए कि लोक प्राधिकारियों/कृत्यकारियों की ओर से मनमानी या अनुचित कार्यवाही द्वारा अनुच्छेद 21 के अंतर्गत मूलभूत अधिकार का उल्लंघन किया गया है – वर्तमान याची ने उपरोक्त पहलू को स्थापित

नहीं किया और तीन वर्ष पश्चात यह याचिका प्रस्तुत की है – प्रतिकर व व्यय का हकदार नहीं।

**Cases referred :**

(2002) 7 SCC 478, (1993) 2 SCC 746, 2007(3) SLR 310.

*Shyam Sharma,* for the petitioner.
*Nidhi Patankar*, G.A. for the respondent/State.

**ORDER**

**SUJOY PAUL, J.:-** The petitioner, a student has invoked the jurisdiction of this Court under Article 226 of the Constitution. The grievance of the petitioner is that she appeared in the High School Certificate Examination (10+2) held in the year 2010. In the main examination (Annexure P-1), she was given 14 marks in Science (theory). The aforesaid marks given were less than the performance and expectation of the petitioner. Thus, the petitioner preferred an application for re-totaling. Since re-totaling took time, she appeared in the supplementary examination in the subject of Science. In the result of supplementary examination, the petitioner secured 40 marks in the Science subject. Thereafter, the petitioner received copy of the Science subject of the main examination (Annexure P-5). By placing reliance on this copy, it is contended that the petitioner in fact secured 54 marks in the main examination in the subject of Science but she was erroneously given only 14 marks. On the strength of aforesaid, it is contended that the petitioner be given compensation. Reliance is placed on the order passed by this Court in W.P.No. 7035/2012 (*Ku. Pooja Agrawal Vs. Board of Secondary Education, MP*) (Annexure P-7)

2. Shri Shyam Sharma, learned counsel for the petitioner submits that because of the negligence of the respondent-Board, the petitioner had to appear in the supplementary examination and, therefore, exemplary cost/ compensation be provided to the petitioner.

3. Per contra, Mrs. Patankar for the Board submits that no prejudice is caused to the petitioner and in absence of showing suffering or prejudice, no interference is warranted. She relied on certain paragraphs of the return.

4. The mark sheet (Annexure P-1) of main exam shows that it was issued on 29.6.2010. The supplementary examination's result was declared on 9.8.2010. Thus, within a short span of time the result of supplementary

examination was declared. The petitioner has contended that because of improper totaling of marks the petitioner has suffered mentally and her valuable months/year have been lapsed in preparation of supplementary examination (ground of W.P.6(b). The petitioner has made a bald averment. Once result of supplementary examination is declared in August, 2010, it is not established as to how petitioner suffered an year's loss. The petitioner has not established that she suffered in terms of getting admission in further studies in the same academic session. In other words, the prejudice and the nature of suffering is not established by the petitioner.

5. No doubt, in *Pooja Agrawal* (supra), this Court has granted compensation to the tune of Rs.75,000/-. However, in the said case, the petitioner was given 10 marks out of 100 and on revaluation she secured 100/100 for mathematics. She approached the Court in quite promptitude and established the prejudice. In this factual backdrop, the Court granted exemplary compensation to the petitioner therein. In the present case, the petitioner has approached the Court after almost three years. Nothing has been pointed out as to how petitioner has suffered. The basic question is whether for every infraction of public duty by public officer the respondents are bound to give compensation. This point is no more res-integra.

6. In (2002) 7 SCC 478 (*Rabindra Noth Ghosal Vs. University of Calcutta and others*), the Apex Court was examining the validity of a Division Bench judgment of Kolkatta High Court. The petitioner Rabindranath appeared in the examination but his result was not declared along with the result of other students. He requested the authorities to declare the result. Result was belatedly declared. He filed a petition before the Single Bench of the High Court. The Single Bench allowed the petition by commanding the University to pay Rs.60,000/- as monetary compensation and damages with further action to take appropriate steps against the negligent officials. The Division Bench set aside the said order, which was tested in (2002) 7 SCC 478. The Apex Court considered the case of *Nilâbati Behera Vs. State of Orissa,* (1993) 2 SCC 746. It is opined that it would not be correct to assume that every minor infraction of public duty by every public officer would commend the court to grant compensation in a petition under Articles 226 and 32 by applying the principle of public law proceeding. Before exemplary damages can be awarded, it must be shown that some fundamental right under Article 21 has been infringed by arbitrary or capricious action on the part of the public functionaries and that the sufferer was a helpless victim of that act. (para 9).

7. The Supreme Court further held that the High Court rightly held that in the present case it was not shown what problem the appellant faced and to what extent he suffered prejudice. It was not established that because of non-disclosure of results, the appellant was prevented from undertaking further studies. In the present case also the petitioner has not established the aforesaid aspect. Thus, no damages can be provided to the petitioner in the present case. The present petitioner also filed this petition after three years.

8. Before parting with the matter, this Court would like to observe that while dealing with the young students like the petitioner, the Board should be more careful because such mistake may spoil the career prospects of the students. No one knows better than the board that in every year a few students taking its examination take their lives on getting unexpected results. The board must take immediate steps for sensitizing all concerned so that a foolproof system may be brought into operation for obviating undesirable situations like the present one. It must take deterrent action against any person found guilty of dereliction of duty. Similar view is taken by Kolkatta High Court in the case reported in 2007(3) SLR 310 (*Ketaki Dewasi Vs. State of West Bengal and others*). It is expected that the respondents will take appropriate steps in accordance with law against the person who is responsible for improper grant of marks to the petitioner as per Annexure P-5, the answer sheet provided to the petitioner under the RTI Act, 2005.

9. As analyzed above, the petitioner is not entitled for compensation in the facts and circumstances of the case. Petition is disposed of. No cost.

*Petition disposed of.*

**I.L.R. [2014] M.P., 108**
**WRIT PETITION**
***Before Mr. Justice Sujoy Paul***
W.P. No. 7262/2013 (Gwalior) decided on 29 January, 2014

JITENDRA SHARMA ...Petitioner
Vs.
BHARAT PETROLEUM CORPORATION LTD. & ors. ...Respondents

***Constitution - Article 226 - Allotment of LPG Distributorship - Rejection - Opportunity of hearing*** **- Held - Misstatement/ misrepresentation by the candidate with regard to his marital status in the application form - No right is created - Hence, no question of**

**opportunity of hearing arises to reject the candidature - Further held the candidature and the eligibility of the petitioner is to be tested on the anvil of the eligibility conditions laid down in the brochure.**

**(Paras 9/11)**

*संविधान – अनुच्छेद 226 – एलपीजी वितरक का आवंटन – खारिजी – सुनवाई का अवसर* – अभिनिर्धारित – आवेदन पत्र में अपनी वैवाहिक स्थिति के संबंध में अभ्यर्थी द्वारा मिथ्या कथन/दुर्व्यपदेशन – कोई अधिकार सृजित नहीं होता – अतः, अभ्यर्थिता को अस्वीकार करने के लिए सुनवाई का अवसर प्रदान करने का प्रश्न उत्पन्न नहीं होता – आगे अभिनिर्धारित किया गया कि विवरणिका में वर्णित अर्हता शर्तों की कसोटी पर याची की अभ्यर्थिता एवं योग्यता का परीक्षण होगा।

**Cases referred :**

ILR (2013) MP 837, AIR 1994 SC 988, 2013(3) MPLJ 466, (2007) 4 SCC 410.

*Yogesh Chaturvedi,* for the petitioner.
*Sweta Bothra,* for the respondents.

**ORDER**

**SUJOY PAUL, J.:-** The petitioner, by filing this petition under Article 226 of the Constitution, has impugned the order dated 9.9.2013 passed by the Bharat Petroleum Corporation Ltd. (Corporation). The petitioner's candidature is rejected by this order.

2. The admitted facts between the parties are that the petitioner preferred candidature/application for proposed Rajiv Gandhi Gramin LPG Vitrak Yojna (RGGLV) at Dinara, District Shivpuri. The said candidature was submitted by pursuant to advertisement Annexure P-2. By brochure (Annexure P-3), the respondents Corporation has prescribed the eligibility criteria and other relevant considerations. Admittedly, the petitioner at the time of submission of initial application stated that he is not married and he is "single". However, at the time of spot inspection, the petitioner submitted a representation, Annexure P-10. By this representation, he informed the Corporation that his marriage was solemnized on 13.6.2011 but incorrectly he mentioned his marital status as "single". It is prayed in this representation that his aforesaid status be corrected.

3. The respondents, in turn, passed the impugned order and rejected the

candidature of the petitioner on the ground that he suppressed the material fact in his original application. In other words, it is held that the petitioner has misrepresented the fact about his marriage in his initial application for RGGLV and secondly, he does not meet the eligibility criteria for land as the land shown by the petitioner is in the name of his father. As per the definition mentioned in the brochure, petitioner is not eligible.

4. Shri Yogesh Chaturvedi, learned counsel for the petitioner, by criticizing the said reasons contended that the petitioner did not have command in English. He filled up the initial form of candidature in English with the help of a friend, who knows English. Because of the error of his friend, his marital status was incorrectly shown as "single" and, therefore, it cannot be said that the petitioner has misrepresented any fact. He further submits that the affidavit of father, Annexure P-11 and the will in favour of the petitioner, Annexure P-13 makes it clear that the petitioner will be the owner of the property/land. He submits that the said property has to be treated as ancestral co-parcener property on which petitioner has a legal right and, therefore, the definition relied upon is irrational. He further submits that before canceling the candidature of the petitioner, no opportunity of hearing is provided which runs contrary to the principles of natural justice and the judgments reported in ILR (2013) MP 837 (*Central Homeopathic & Biochemic Association, Gwalior & Ors. Vs. State of M.P. & Ors.*). He also relied on certain provisions of the Contract Act to submit that if anything is incorrectly mentioned in the contract that will not make the contract as a void one. By placing reliance on AIR 1994 SC 988 (*Union of India and others Vs. Hindustan Development Corpn. and others*), it is contended that a Government Organization cannot put improper restrictions nor can prescribe arbitrary or unjustifiable reservations in the policy or principles.

5. *Per contra*, Ms. Sweta Bothra, learned counsel for the Corporation, supported the order. By taking this Court to various paragraphs of the return, it is contended that there is no legal error in the order impugned which warrant interference by this Court.

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

7. The advertisement, Annexure P-2 prescribes general conditions. As per condition 14(a) read with (f), the right was reserved by the Corporation to reject the candidature, if any information is found to be false or incorrect. Such condition is also mentioned in the brochure in clause 16. It is mentioned

that if any information given by the applicant is found to be incorrect, the allotment shall be cancelled. Even if allotment order is issued, it will be cancelled.

8. In the present case, the advertisement was published on 19.5.2012. Admittedly, petitioner's marriage took place on 13.6.2011. Whether or not it is deliberate, it is admitted that the initial information given by the petitioner about his marital status was incorrect. The petitioner furnished this information by Annexure P-10 only when a spot inspection was carried out. The respondents have rejected the candidature on yet another ground. Apart from furnishing incorrect information about marital status, it is opined that as per the requirement of the brochure, the petitioner is not eligible. As per the brochure, the ownership is defined as under:-

> "Own means having clear ownership title of the property in the name of applicant/family member of the 'Family Unit' as defined in multiple dealership/distributorship norm. In case of ownership/co-ownership, by family member consent letter from the family member will be required."
>
> Clause 4(e) defines family unit as under:-
>
> "'Family Unit' in case of married person/applicant shall consist of individual concerned his/her Spouse and their unmarried son(s)/daughter(s). In case of unmarried person/applicant, 'family Unit' shall consist of individual concerned, his/her parents unmarried brother(s) and unmarried sister(s). In case of divorce 'Family Unit' shall consist of individual concerned, unmarried son(s)/unmarried daughter(s) whose custody is given to him/her. In case of widow/widower, 'Family Unit' shall consist of individual concerned, unmarried son(s) unmarried daughter(s)."

9. Although Shri Yogesh Chaturvedi has taken pains to submit that definition of 'family unit' is irrational, arbitrary and unjustifiable, I am not impressed with this argument. It is said to be arbitrary by taking assistance of certain provisions of Contract Act and Succession Act. In the considered opinion of this Court, the candidature and eligibility of the petitioner is to be tested on the anvil of the eligibility conditions laid down in the brochure. In other words, if petitioner fulfills the eligibility conditions mentioned in the

brochure, then alone he can be said to be an eligible candidate. To decide petitioner's eligibility, no assistance can be sought from the Contract Act or from the Succession Act. More-so, when petitioner has not chosen to challenge the validity of the brochure/ criteria for selection. Thus, in absence of any such challenge, this Court is not obliged to examine the validity of eligible conditions. As per the definition of family unit, in case of a married person, it is clear that it includes the said person/candidate, his/her spouse and their unmarried children. Thus, it is crystal clear that for a married person, father is not part of the family unit. Admittedly, petitioner is a married person and his father's land cannot be taken into account to decide the eligibility of the petitioner.

10. In the considered opinion of this Court, the petitioner needs to establish that he has fulfilled common eligible criteria mentioned in Clause 4 of the brochure. In the considered opinion of this Court, the respondents have rightly stated that on the date of application the petitioner was a married person and accordingly, the land shown in the name of his father cannot be considered as petitioner's own land. On the basis of the provisions of the brochure, no fault can be found in the action of the respondents.

11. In the facts and circumstances of the case, the judgment cited by Shri Yogesh Chaturvedi are of no assistance. No right is created in favour of the petitioner and, therefore, there was no question to provide him opportunity before rejecting his candidature. In *Pankaj Mantri Vs. Indian Oil Corporation, Bhopal and another* (2013(3) M.P.L.J. 466), the Indore Bench has considered the impact of misrepresentation by candidate in the application form. At the cost of repetition, it is relevant to mention that in the advertisement and in the brochure it was made clear that any misrepresentation or wrong information will lead to rejection of the candidature.

12. The Apex Court in (2007) 4 SCC 410 (*Shiv Kant Yadav Vs. Indian Oil Corpn. and others*) held that misstatement/misrepresentation may lead to cancellation by the Indian Oil Corporation. The same view is taken in *Pankaj Mantri* (supra). The twin reasons assigned by the respondents are in consonance with the legal position. In the considered opinion of this Court, there is no legal infirmity which warrants interference by this Court in the impugned order.

13. Petition is merit-less and is hereby dismissed.

*Petition dismissed.*

**I.L.R. [2014] M.P., 113**
**ELECTION PETITION**
***Before Mr. Justice R.C. Mishra***
Election Petition No. 9/2009 (Jabalpur) decided on 3 May, 2013

SHRINIWAS TIWARI ....Petitioner
Vs.
RAJKUMAR URMALIA & anr. ...Respondents

*A. Conduct of Election Rules, 1961 - Rule 54-A - Counting of Postal Votes* - **305 votes were declared invalid on the ground of non-attestation or improper attestation of votes and due to non-availability of declaration - Counting agents were also apprised of the reasons and no objections were raised by them - Rejection of votes was in accordance with Rule 54-A(4) of Rules 1961. (Para 18)**

*क. निर्वाचन का संचालन नियम, 1961 – नियम 54–ए – डाक मतपत्रों की गणना* – 305 मत, अनुप्रमाणित नहीं होने या अनुचित रुप से अनुप्रमाणित होने के आधार पर तथा घोषणा की अनुपलब्धता के कारण अवैध घोषित किये गये – गणना एजेंटों को भी कारणों से अवगत कराया गया और उनके द्वारा कोई आक्षेप नहीं उठाया गया – मतों की अस्वीकृति नियम 1961 के नियम 54–ए(4) के अनुसार की गई।

*B. Evidence Act (1 of 1872), Section 81 - News paper report* - **No presumption is attached to the genuineness of newspaper reports - Assertion of petitioner relating to number of votes actually cast does not assume any significance as it was primarily based on newspaper reports. (Para 22)**

*ख. साक्ष्य अधिनियम (1872 का 1), धारा 81 – समाचार पत्र रिपोर्ट* – समाचार पत्रों की रिपोर्ट की प्रमाणिकता के साथ कोई उपधारणा नहीं जुड़ी है – वास्तविक मतों की संख्या के संबंध में याची का प्राक्कथन कोई महत्व नहीं रखता क्योंकि वह मूल रुप से समाचार पत्र की रिपोर्ट पर आधारित था।

*C. Conduct of Election Rules, 1961 - Section 56-A - Counting and Recounting of Votes* - **Election Petitioner was defeated by a margin of 309 votes - Even if the 305 votes who according to petitioners were not included in counting were cast in favor of petitioner, the result of election would remain unaffected - Further none of the respondents has come forward to file recrimination - It is not permissible to Court to permit a party to seek a roving inquiry - Party must plead material facts and adduce**

**evidence to substantiate the same - Petitioner must not only give the figures of the votes which according to him were improperly accepted or rejected, but the basis of allegation must be disclosed - Serial number of ballot papers must be set out, names of counting agent, number of counting tables, names of counting supervisor, round number, details of objection, if any, made to the counting staff, details of notes, if any kept by counting agent and basis of information must be disclosed - No averment that counting agent ever challenged the correctness of contents of Part II of form 17-C before returning officer - Allegations appear to be false and baseless.**

**(Paras 31 to 35)**

*ग. निर्वाचन का संचालन नियम, 1961 – नियम 56–ए – मतों की गणना एवं पुनर्गणना* – निर्वाचन याची, 309 मतों के अंतर से पराभूत हुआ – 305 मत जिन्हें, याची के अनुसार गणना में शामिल नहीं किया गया था, यदि याची को मिले है तब भी निर्वाचन का परिणाम अप्रभावित रहेगा – इसके अतिरिक्त, कोई प्रत्यर्थी, प्रत्यारोप प्रस्तुत करने के लिये आगे नहीं आया – किसी पक्षकार को दिशाहीन जांच चाहने की अनुमति देना न्यायालय के लिये अनुज्ञेय नहीं – उक्त को सिद्ध करने के लिये पक्षकार को सारवान तथ्यों का अभिवाक् करना चाहिए और साक्ष्य प्रस्तुत करना चाहिए – याची को केवल मतों की संख्या नहीं देनी चाहिए जो उसके अनुसार अनुचित रुप से स्वीकार अथवा अस्वीकार किये गये थे, बल्कि अभिकथन के आधार को भी प्रकट करना चाहिए – मतपत्रों का अनुक्रमांक प्रदर्शित करना चाहिए, मतगणना एजेंट के नाम, मतगणना टेबिल की संख्या, मतगणना पर्यवेक्षक के नाम, चक्र क्रमांक, मतगणना स्टॉफ को किये गये आक्षेपों का विवरण यदि कोई हो, मतगणना एजेंट द्वारा रखे नोटों का विवरण, यदि कोई हो और सूचना का आधार प्रकट करना चाहिए – कोई प्रकथन नहीं कि मतगणना एजेंट ने निर्वाचन अधिकारी के समक्ष कभी फार्म 17–सी के भाग–II की अंतर्वस्तु की प्रमाणिकता को चुनौती दी – अभिकथन, मिथ्या एवं निराधार प्रतीत होते हैं।

***D. Representation of the People Act (43 of 1951), Section 100 (1) (d) - Election Petition - Re-inspection of votes*** **- Material facts such as serial numbers of postal ballot papers not opened and precise objection with regard to each of such ballot papers if any raised by counting agent have not been stated - In absence of such information any inspection of ballot paper would amount to a roving and fishing inquiry which is not permissible.**

**(Paras 36 & 37)**

*घ. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 100 (1) (d) – निर्वाचन याचिका – मतों का पुनः निरीक्षण* – सारवान तथ्य, जैसे कि डाक मतपत्रों के अनुक्रमांक जिन्हें खोला नहीं गया तथा ऐसे प्रत्येक मतपत्र के संबंध में कोई

सुस्पष्ट आक्षेप यदि मतगणना एजेंट द्वारा उठाये गये हों, को कथित नहीं किया गया है – उक्त जानकारी के अभाव में, मतपत्र का कोई निरीक्षण, दिशाहीन एवं अनिश्चित जांच की कोटि में आयेगा जो कि अनुज्ञेय नहीं है।

**Cases referred :**

AIR 1988 SC 1274, (1993) 3 SCC 151, AIR 1999 SC 3571, AIR 1975 SC 403, AIR 1958 SC 698, (2003) 5 SCC 650, AIR 1964 SC 1200, (2011) 11 SCC 786, AIR 1980 SC 206, AIR 1964 SC 1249, AIR 1975 SC 2117, AIR 2009 SC 2247, AIR 2010 SC 24.

*Susheel Kumar Tiwari & Sanjay K. Agrawal*, for the petitioner.
*Dileep Pandey*, for the respondent No.1.
*Neeraj Singh*, for the respondent No.2.
None for the respondent Nos. 3 to 25 though served.

**JUDGMENT**

**R.C.MISHRA J. :-** In this petition, election of the returned candidate viz. the respondent no.1 from M.P. Legislative Assembly Constituency Sirmour No.68 (for short 'the Constituency') has been called in question on the grounds mentioned in sub-clauses (iii) and (iv) of Section 100(1)(d) of the Representation of People Act, 1951 (hereinafter referred to as 'the Act'). The petitioner has further sought –

(i) an order for re-inspection/re-count of the votes polled in the constituency and on the basis of such re-inspection/ re-count of votes, a declaration that the election of respondent no.1 is void.

(ii) a declaration that he himself has been duly elected from the Constituency.

2. Following facts are not in dispute –

The petitioner had contested the election as a candidate sponsored by Indian National Congress whereas the respondent no.1 was set up as a candidate of Bahujan Samaj Party and the other 24 respondents including respondent no.2, the official candidate of Bhartiya Janta Party, the then ruling party in the State, were also in the fray. As per the calendar of events, notified by Election Commission of India, on 08.12.2008, counting of votes was done in the premises of

Govt. Engineering College, Rewa. The respondent no.1 was declared elected, defeating his nearest rival, the petitioner here, by a margin of 309 votes.

3. According to the petitioner, upon conclusion of the counting of votes, he had won the election by securing the highest votes and, accordingly, the official website of Election Commission of India namely www.ceomadhyapradesh.nic.in also displayed that as the official candidate of Indian National Congress, he had secured 456 votes more than his nearest rival viz. the respondent no.1, who represented Bahujan Samaj Party. Similar result was broadcast on the National Channel of Doordarshan as well as in the regional news on Bhopal Doordarshan between 7.30 to 7.35 p.m. The release by Press Trust of India and the corresponding result uploaded on the official website of Web Duniya viz. http://hindi.webdunia.com/election08result/ElectionInfo.htm also contained the same information. However, at about 9 p.m., to his utter dismay, the Returning Officer informed that he had lost election to respondent no.1 by a margin of 309 votes. Verification revealed that (a) there was a considerable difference of 16 in the number of votes polled including tender votes but excluding postal ballots & the number of votes counted and (b) there was a difference of 947 votes between the final result sheet prepared originally in Form No.20 and return of election in Form No.21-E. Suspecting that the relevant records had been manipulated, he made complaints to the Chief Electoral Officer, Madhya Pradesh, Bhopal and also informed the Chief Election Commissioner of India, New Delhi on 9.12.08 and 13.12.2008 respectively but no action was taken.

4. In the light of these pleadings, the petitioner has asserted that the result of the election, in so far as it concerned the respondent no.1, was materially affected –

(i) by the improper reception, refusal or rejection of votes and

(ii) by non-compliance with Rule 54A and 56A of Conduct of Election Rules, 1961 (for brevity 'the Election Rules').

5. The respondent no.1, while denying the allegations as to illegalities in the counting of ballot papers, has submitted that the petition is based on forged and fabricated documents as well as on apparently wrong information said to have been disseminated through Website or Television or Radio. As further averred by him, even if it is assumed that the petitioner was precluded from

making representation in view of a wrong declaration of result on the website or on the television, he was required to offer an explanation as to why the facts pertaining to improper acceptance or rejection of votes or any manipulation in counting as pleaded were not brought to the notice of the Election Commission of India immediately after official/formal declaration of the result. Attention has also been invited to the fact that no prayer for recounting or re-inspection of votes was made by the petitioner or his counting agent before the Returning Officer as contemplated under Rule 63(2) of the Election Rules or in any of the complaints referred to in the petition.

6. The respondent no.2 has not preferred to file a written statement.

7. On these pleadings, the following issues have been framed. Respective finding is noted against each one of them -

| No. | Issues | Finding |
|---|---|---|
| 1 | Whether the records pertaining to the election were manipulated ? | No |
| 2 | Whether any votes have been improperly cast in favour of the respondent no.1 ? | No |
| 3 | Whether result of the election, in so far as it concerns the respondent no.1, was materially affected by the improper reception, refusal or rejection of any vote or the reception of any vote which is void ? | No |
| 4 | Whether result of the election, in so far as it concerns the respondent no.1 was materially affected due to non-compliance with the provisions of the Constitution or of the Representation of the People Act, 1951 or if any rules or orders made under the Act ? | No |
| 5 | Whether the election of the respondent no.1 to the constituency deserves to be set aside ? | No |
| 6 | Whether the petitioner was declared as elected – | |
| | (i) on the official website Election Commission of India. | Yes, but it had no |

| | | |
|---|---|---|
| | (ii) in the news Broadcasted on the National Channel of Doordarshan.<br>(iii) in the release by Press Trust of India and<br>(iv) in the corresponding result uploaded on the official website of Web Dunia.<br>If so the effect ? | effect on the actual result of the election |
| 7 | Whether the petitioner is entitled to get the votes decoded and recounted ? | No |
| 8 | Whether the petitioner is entitled to be declared as elected ? | No |
| 9 | Whether the petition is based on forged, fabricated and unauthenticated documents ? | Only (Ex.P/14-A and P/18-C) are such documents |
| 10 | Relief and Costs ? | Petition dismissed with no order as to costs. |

## REASONS FOR THE FINDINGS

**ISSUE Nos.6(i) (ii) (iii) and (iv) and 9**

8. In support of his assertion that on the website of Election Commission of India and in the corresponding news telecast on Television as well as in the Press Release, he was declared elected by securing a lead of 456 votes over his nearest rival, petitioner Shriniwas Tiwari (PW1) not only examined himself but also produced –

(a) Nagendra Mishra (PW5), a Computer Teacher, who has claimed to have downloaded the information from the Websites of 'Election Commission of India' and 'Chief Election Officer' of the State and handed over the printout (Ex.P-4) to the petitioner, while congratulating him on his success.

(b) Umesh Dixit (PW2), the Editor and Publisher of Daily Newspaper 'Dainik Kirti Kranti', who came forward to say that he

had also taken Printout (Ex.P-8) from Website of 'Web Duniya'.

9. In his chief-examination, the petitioner has also made reference to the contents of letters (Ex.P-5 to Ex.P-7), respectively authored by D. Prasad Rao, Director of Doordarshan Kendra, Bhopal, Sunil Kumar Tiwari, the News Editor and A.K. Sharma, In-charge of the Local Office of Press Trust of India at Bhopal, indicating that the news as to his win in the election was broadcast on the basis of the information disseminated by the Election Commission of India on its Website. Nothing could be elicited in his cross-examination so as to render his evidence unworthy of credence or to make any of the aforesaid documents spurious. Incidentally, the respondent no.1 Rajkumar Urmalia (DW1) has only pleaded ignorance about the information regarding petitioner's win on the website. Avadh Bihari Singh (DW8), the District Information Officer deputed by the National Informatics Centre to upload Results of each round of counting from the counting centre directly to the website of Election Commission of India, has also admitted that the website created temporarily did not remain in existence after declaration of the election results. He has further pointed out that every information in the form of Progressive Flash Report uploaded by him was subject to disclaimer.

10. No dispute was raised as to assertion made by respondent no.1 Rajkumar Urmalia (DW1) that Progressive Flash Report (Ex.P-4) also contained wrong information regarding results of the election to Teonthar and Semariya constituencies of Distt. Rewa as- **(i)** the candidate sponsored by Indian National Congress was declared elected from Teonthar constituency whereas the successful candidate belonged to Bahujan Samaj Party and **(ii)** margin of defeat in respect of Semariya constituency was shown as 167 votes as against the actual difference of more than 5000 votes. Further, as rightly pointed out by learned counsel for the respondent no.1, the misleading information as to win of the petitioner by a margin of 456 votes appears to be based on the results of last i.e. 12th round of counting, wherein the margin of votes secured by the petitioner (1681) and polled by the next highest candidate viz. respondent no.2 (1225) was 456 only. It is pertinent to note that in the Progressive Flash Report (Ex.P/4), petitioner was shown to have won the election by defeating his nearest rival, the authorized candidate of Bhartiya Janta Party (not of Bahujan Samaj Party) by 456 votes. Thus, viewed from any angle, it is not possible to say that the Progressive Flash Report (Ex.P-4) was a forged and fabricated document.

11. Coming to the other documents relied on by the petitioner, it may be observed that only genuineness of copies of the result-sheet (Ex.P-14-A and Ex.P-18-C) said to have been made available to him by Rajendra Tiwari (PW3), Sub-Editor of 'Satyaganga', a daily newspaper published from Sidhi and Sanjeev Mohan Gupta (DW2), the Local Editor of Dainik Jagran, Rewa, has been called in question. Returning Officer Mohd. Fatahulla Khan (DW6) has been emphatic in stating that none of these documents was prepared or signed by him while Horilal Choudhary (DW7), the then Deputy Director, Department of Public Relations, has clearly refuted the suggestion that the documents were made available by the Department to the correspondents of various newspapers. His reply (Ex.D-2) to the corresponding query made by respondent no.1 vide letter-dated 24.10.2009 (Ex.D-1) has also been brought on record. However, he has clearly admitted that the return of election containing relevant data in form (Ex.P/21-E) was forwarded by him to the correspondents of various news papers along with the letter (Ex.P/18-E), amended draft of which (Ex.D/18-D) was retained in the Office.

12. In view of all this evidence, it can easily be concluded that the information regarding win of the petitioner by a margin of 456 votes over his nearest rival, who was wrongly shown as the candidate belonging to Bhartiya Janta Party, was displayed on the official website of Election Commission of India as well as on Web Dunia and was flashed through news channel of Doordarshan and Press Trust of India, a news agency. Still, it had no effect whatsoever on the actual result of the election. Further, amongst the documents produced by the petitioner in support of his allegations as to the illegalities in the counting process, only copies of the so-called result-sheets (Ex.P/14-A and P/18-C) are apparently not genuine documents. The issues are answered accordingly.

**ISSUE Nos.1, 2, 3 and 4**

13. As per statement of the petitioner Shrinivas Tiwari (PW1), a number of illegalities were committed and records pertaining to the counting of votes were tampered with at the instance of party in power. In support of the allegations, he has highlighted the following facts -

(i) In the subsequent notification issued on 12.12.2008 by the Publication Department and published in various local news papers, it was admitted that the data reflected in the earlier notification issued on 10.12.2008, were found to be incorrect.

(ii) Returning Officer had opened only 60 postal ballot papers and noticing that 30 were given to him, did not proceed to open the remaining 305 postal ballots. Moreover, initially, all the 30 votes were shown in the account of respondent no.1.

(iii) In the 9th round of counting, as many as 1000 votes, which were polled in his favour, were credited to the account of respondent no.2.

14. For the sake of convenience, these allegations may be discussed under the following heads -

**COUNTING OF POSTAL BALLOTS**

15. Rule 54-A of the Conduct of Election Rules, 1961 (for short 'the Rules'), that prescribes the procedure for counting of postal ballots, reads as under:-

> ***54-A.- Counting of votes received by post.-****(1) The returning officer shall first deal with the postal ballot papers in the manner hereinafter provided.*
>
> *(2) No cover in Form 13C received by the returning officer after the expiry of the time fixed in that behalf shall be opened and no vote contained in any such cover shall be counted.*
>
> *(3) The other covers shall be opened one after another and as each cover is opened, the returning officer shall first scrutinise the declaration in Form 13A contained therein.*
>
> *(4) If the said declaration is not found, or has not been duly signed and attested, or is otherwise substantially defective, or if the serial number of the ballot paper as entered in it differs from the serial number endorsed on the cover in Form 13B, that cover shall not be opened, and after making an appropriate endorsement thereon, the returning officer shall reject the ballot paper therein contained.*
>
> *(5) Each cover so endorsed and the declaration received*

*with it shall be replaced in the cover in Form 13C and all such covers in Form 13C shall be kept in a separate packet which shall be sealed and on which shall be recorded the name of the constituency, the date of counting and a brief description of its content.*

*(6) The returning officer shall then place all the declarations in Form 13A which he has found to be in order in a separate packet which shall be sealed before any cover in Form 13B is opened and on which shall be recorded the particulars referred to in sub-rule (5).*

*(7) The covers in Form 13B not already dealt with under the foregoing provisions of this rule shall then be opened one after another and the returning officer shall scrutinise each ballot paper and decide the validity of the vote record thereon.*

*(8) A postal ballot paper shall be rejected-*

*(a) if it bears any mark (other than mark to record the vote) or writing by which the elector can be identified; or*

*(aa) if no vote is recorded thereon; or*

*(b) if noted are given on it in favour of more candidates than one;*

*or*

*(c) if it is a spurious ballot paper; or*

*(d) if it is so damaged or mutilated that its identity as a genuine ballot paper cannot be established; or*

*(e) if it is not returned in the cover sent along with it to the elector by the returning officer.*

*(9) A vote recorded on a postal ballot paper shall be rejected if the mark indicating the vote is placed on the ballot paper in such manner as to make it doubtful to which candidate the vote has been given.*

*(10) A vote recorded on a postal ballot paper shall not be*

*rejected merely on the ground that the mark indicating the vote is indistinct or made more than once, if the intention that the vote shall be for a particular candidate clearly appears from the way the paper is marked.*

*(11) The returning officer shall count all the valid votes given by postal ballot in favour of each candidate, record the total thereof in the result sheet in Form 20 and announce the same.*

*(12) Thereafter, all the valid ballot papers and all the rejected ballot papers shall be separately bundled and kept together in a packet which shall be sealed with the seals of the returning officer and of such of the candidates, their election agents or counting agents as may desire to affix their seals thereon and on the packet so sealed shall be recorded the name of the constituency, the date of counting and a brief description of its contents.*

*(Emphasis supplied)*

16. Admittedly, petitioner Shriniwas Tiwari (PW1) did not remain present during the entire process of counting and had appointed as many as 13 counting agents including Ramashankar Mishra, examined as PW6. It is relevant to note that the petitioner has not preferred to summon the Returning Officer to prove the corresponding pleadings in Paragraphs 15 to 17 of the petition or to summon relevant account of votes recorded by the counting supervisor in Part II of Form 17-C, which is required to be signed by the candidates or their representatives. As such, the case of the petitioner hinges on testimony of Ramashankar Mishra and relevant contents of complaints made to the Chief Electoral Officer, Madhya Pradesh, Bhopal and Election Commission of India (Ex.P-9 and Ex.P-10 respectively).

17. Ramashankar Mishra (PW6) has candidly admitted that –

(a) First of all, the postal ballots, 365 in number, were taken up for counting at the Returning Officer's table.

(b) He did not raise any objection as to non-inclusion of 305 postal ballots.

(c) He had not moved any application for recounting of

the postal ballots.

18. Thus, Ramashankar Mishra, the petitioner's key witness, has not been able to highlight violation of any Rule or Guideline relating to counting of postal ballots. On the contrary, Mohd. Fahatulla Khan (DW6), the Returning Officer, has also categorically stated that all the 365 postal ballots were opened and were scrutinized in presence of the counting agents and the observers deputed by the Election Commission and as many as 305 postal ballots were declared invalid for these reasons –

(i) Absence of signature and attestation by any Gazetted Officer on the voter's declaration available on the envelope.

(ii) Attestation of such a declaration by an officer, who was not competent to do so.

(iii) Non-availability of the declaration.

Apparently, the reasons were valid in view of sub-rule (4) of Rule 54-A, as highlighted above. Moreover, Mohd. Fahatullah Khan (DW6) has been emphatic in deposing that at the relevant point of time, all the election agents were duly apprised of the reasons for rejecting 305 postal ballots. He has been cross-examined at length but nothing has turned out to establish that any postal ballot was discarded without any basis. He also denied the suggestion that initially, the number of postal ballots cast in favour of the petitioner was shown as zero. Thus, in absence of any objection raised by the counting agent, it was not possible to accept the allegation that 305 postal ballots were not even opened for counting.

**MANIPULATION OF RECORDS**

19. Assertion made by petitioner Shriniwas Tiwari (PW1) that in the ninth round of counting, 1000 votes were added to the value of votes polled by the respondent no.2, did not find place in the complaints (Ex.P-9 and Ex.P-10). It also did not gather support from evidence of counting agent Ramashankar Mishra (PW6). Similarly, he did not prefer to substantiate the pleadings to the effect that in all 947 votes had remained unaccounted for. This apart, the complaint (Ex.P-9) made by the petitioner to the Chief Electoral Officer, Madhya Pradesh contained the grievance that 887 votes were excluded from counting whereas in the complaint (Ex.P-10) made to Election Commission of India, it was alleged that in all 887 missing votes were added to the account of

BJP candidate i.e. respondent no.2. However, the allegation concerning the missing votes has not been corroborated by Ramashankar Mishra.

20. Further, as admitted by Ramashankar Mishra, -

(a) He had not preserved the plain paper whereon round-wise statement of the votes secured by the petitioner and rival candidates was recorded by (Ex.P/14-A him only.

(b) He had not raised any objection as to counting of votes in the ninth round.

21. Petitioner Shriniwas Tiwari has clearly acknowledged that the information that in all 89335 voters had exercised their franchise is based on the newspaper report (Ex.P-12) published in Dainik Kirti Kranti. Horilal Choudhary (DW7), the then Deputy Director, Department of Public Relations, has candidly acknowledged the fact that he had forwarded the final data to the representatives of various newspapers along with the notification (Ex.P-18E). As revealed by Rajendra Tiwari (PW3), the Sub-Editor of 'Satyaganga', the Press Note (Ex.P-16), which corresponds to the notification (Ex.P-18E) as well as the earlier Press Note (Ex.P-15), was received by him on 10.12.2008. The news item (Ex.P-13) published in the newspaper 'Dainik Kirti Kranti' on 11.12.2008 is apparently based on the notification (Ex.P-18E). Sanjeev Mohan Gupta (DW2), the Editor of 'Dainik Jagran', Rewa, has also substantiated the fact that a news item (Ex.P-19) with the heading that "the Election Commission had requisitioned the original data relating to the results of the election", was published in the newspaper on 11.12.2008 whereas Jitendra Mishra (PW4), the Managing Editor of 'Vindhya Bharat', has also acknowledged that news captioned "During counting, how 887 votes were found reduced from Sirmour" published in the newspaper (Ex.P-17) on 12.12.2008, was based on the analysis of data supplied by the Department of Public Relations on 10.12.2008 only. In the light of these facts, the assertion made by the petitioner that the final data could be issued on 12.12.2008, is not acceptable.

22. As explained by the Supreme Court in *Laxmi Raj Shetty v. State of Tamil Nadu* AIR 1988 SC 1274 and re-affirmed in *S.A. Khan v. Ch. Bhajan Lal* (1993) 3 SCC 151 and *Ravinder Kumar Sharma v. State of Assam* AIR 1999 SC 3571, no presumption, under Section 81 of the Indian Evidence Act, is attached to genuineness of the newspaper reports. Accordingly, petitioner's statement as to inconsistency in the data relating to the number of

votes actually cast, does not assume any significance as it was primarily based on newspaper reports.

23. Counting of votes is regulated by Rule 56A, which may be extracted below -

***Rules 56A. Counting of votes.-***

*(1) The ballot papers taken out of each ballot box shall be arranged in convenient bundles and scrutinised.*

*(2) The returning officer shall reject a ballot paper-*

*(a) if it bears any mark or writing by which the elector can be identified, or*

*(b) if it is a spurious ballot paper, or*

*(c) if it is so damaged or mutilated that its identity as a genuine ballot paper cannot be established, or*

*(d) if it bears a serial number, or is of design, different from the serial numbers or, as the case may be, design, of the ballot papers authorised for use at the particular polling station; or*

*(e) if it does not bear both the mark and the signature which it should have borne under the provisions of sub-rule (1) of rule 38:*

*Provided that where the returning officer is satisfied that any such defect as is mentioned in clause (d) or clause (e) has been caused by any mistake or failure on the part of a presiding officer or polling officer, the ballot paper shall not be rejected merely on the ground of such defect.*

*(3) Before rejecting any ballot paper under sub-rule (2), the returning officer shall allow the counting agents present a reasonable opportunity to inspect the ballot paper but shall not allow them to handle it or any other ballot paper.*

*(4) The returning officer shall record on every ballot paper which he rejects the letter 'R' and the rounds of*

*rejection in abbreviated form either in his own hand or by means of a rubber stamp.*

*(5) All ballot papers taken out of any one ballot box and rejected under this rule shall be made into a separate bundle.*

*(6) Every ballot paper which is not rejected under this rule shall be counted as one valid vote:*

*Provided that no cover containing tendered ballot papers shall be opened and no such ballot paper shall be counted.*

*(7) After the counting of all ballot papers contained in all the ballot boxes used at a polling station has been completed,-*

*(a) the counting supervisor shall fill in and sign Part II- Result of Counting in 4[Form 16 which shall also be signed by the returning officer; and*

*(b) the returning officer shall make the entries in a result sheet in Form 20 and announce the particulars.*

24. Returning Officer Mohd. Fahatulla Khan (DW6), while making reference to return of election in Form 21-E (Ex.P-3), has pointed out that total number of votes polled including 365 postal ballots was 89697 and apparently, there was no discrepancy between the data as reflected in the return and the final result-sheet (Ex.P-2).

25. As concluded already, the copies of the result-sheet (Ex.P-14-A) and (Ex.P-18-C) said to have been made available to him by Rajendra Tiwari (PW3) and Sanjeev Mohan Gupta (DW2) are false documents.

26. Mohd. Fahatulla Khan (DW6) has vividly described the entire process of counting of votes. As per his statement, -

(a) In the counting area, 14 counting tables excluding his table were placed and the counting was done in as many as 12 rounds.

(b) After completion of each round of counting, the result was announced on the mike only after its verification by the counting supervisor on the basis of the record available in Part

II of Form 17-C and thereafter, satisfaction certificate was obtained from each one of the counting agents.

(c) None of the counting agents had raised any objection as to counting process in any round of counting.

(d) The last round of counting was concluded on 8.12.2008 between 4.30 to 4.45 PM and the observer Shri Pramod Saxena, while expressing satisfaction regarding veracity of the counting process, had issued a certificate and had authorized the Returning Officer to declare the result.

(e) On 8.12.2008 at about 5.20 P.M., the election result was declared and respondent no.1 was declared elected by a margin of 309 votes.

27. While refuting the charge that she was instrumental in tampering with the result of the election under political influence, Dr. M. Geeta (DW5), the then Collector and District Election Officer, has stated that the procedure prescribed for counting of votes and guidelines laid by the Election Commission of India in this regard were scrupulously followed. According to her, after issuance of verification report by the observers deputed by the Commission to supervise the counting process, no altercation in the number of votes obtained by a particular candidate was possible.

28. Evidence of Dr. M. Geeta (DW5) and Mohd. Fahatulla Khan (DW6) reflected a completely dispassionate attitude towards the counting process. The relevant rules provide an elaborate procedure for counting of votes and it contains so many effective safeguards against trickery, mistakes and fraud in counting. Indisputably, petitioner's counting agent Ramashankar Mishra, who had not only recorded the figures of round-wise counting but had also appended his signature on Part-II of Form 17-C, did not make any demand for re-totaling or re-counting of votes.

29. For these reasons, it is held that neither there was any manipulation in the records pertaining to the election nor any vote was improperly included in the account of respondent no.1. All the aforesaid issues deserve to be answered in favour of respondent no.1.

**ISSUE No.7**

30. Learned counsel has contended that the instances highlighted by the

petitioner are sufficient to justify an order of recount/re-inspection of the votes particularly in view of the fact that the margin of defeat was confined to 309 votes. For this, he has made reference to the following observations made by the Apex Court in *Chanda Singh v. Shiv Ram Varma* AIR 1975 SC 403 -

> *"If the lead is relatively little and/or other legal infirmities or factual flaws hover around recount is proper, not otherwise. In short, where the difference is microscopic, the stage is set for a recount given some plus point of clear suspicion or legal lacuna militating against the regularity, accuracy, impartiality or objectivity bearing on the original counting. Of course, even if the difference be more than microscopic, if there is a serious flaw or travesty of the rules or gross interference a liberal repeat or recount exercise, to check on possible mistake is a fair exercise of power"*

However, as explained further –

> *"Rule 63 of the Conduct of Elections Rules 1961 obligates the candidate to state 'the grounds on which he demands such recount'. It is plain that a mere doubt or small lead or unspecified blemish in the manner of the counting falls short of the needs of the said rule. Under the rule the demand for recount may be rejected if it appears to the Returning Officer to be frivolous or unreasonable. What is not reasonably grounded or seriously supported is unreasonable or frivolous. Suspicions of possible mischief in the process or likely errors in counting always linger in the mind of the defeated candidate when he is shocked by an unexpected result".*
>
> ...
>
> *"On all hands, it is now agreed that the importance of the secrecy of the ballot must not be lost sight of, material facts to back the prayer for inspection must be bona fide, clear and cogent and must be supported by good evidence. We would only like to stress that in the whole process the secrecy is sacrosanct and inviolable except where strong*

*prima facie circumstances to suspect the purity, propriety and legality in the counting is made out by definite factual averments credible probative material and good faith in the very prayer".*

31. Adverting to the facts of the instant case, it may be observed that even if it is assumed that all the 305 postal ballots, not included in the counting, were cast in favour of the petitioner, the result of election would remain unaffected as the margin of win was that of 309 votes.

32. Besides this, none of the respondents has come forward to file recrimination. Needless to say that the right to file a recrimination accrues to the returned candidate or any other party to the petition the moment an election petition is presented containing a claim for a further declaration that the petitioner himself or any other candidate has been duly elected (*Inamati Mallappa Basappa v. Desai Basavaraj Ayyappa* AIR 1958 SC 698 referred to).

33. In *T.A. Ahammed Kabeer v. A.A. Azez* (2003) 5 SCC 650, a two-Judge Bench, speaking through R.C. Lahoti, J. (as His Lordship then was), while analyzing the majority view on the point of recount, as taken by a Constitution Bench in *Jabar Singh v. Genda Lal* AIR 1964 SC 1200, proceeded to explain and elucidate the legal position in the following terms -

*(1) In an election petition wherein the limited relief sought for is the declaration that the election of the returned candidate is void on the ground under Section 100(1)(d)(iii) of the Act, the scope of enquiry shall remain confined to two questions: (a) finding out any votes having been improperly cast in favour of the returned candidate, and (b) any votes having been improperly refused or rejected in regard to any other candidate. In such a case an enquiry cannot be held into and the election petition decided on the finding (a) that any votes have been improperly cast in favour of a candidate other than the returned candidate, or (b) any votes were improperly refused or rejected in regard to the returned candidate.*

*(2) A recrimination by the returned candidate or any other party can be filed under Section 97(1) in a case where*

*in an election petition an additional declaration is claimed that any candidate other than the returned candidate has been duly elected.*

*(3) For the purpose of enabling an enquiry that any votes have been improperly cast in favour of any candidate other than the returned candidate or any votes have been improperly refused or rejected in regard to the returned candidate the Election Court shall acquire jurisdiction to do so only on two conditions being satisfied: (i) the election petition seeks a declaration that any candidate other than the returned candidate has been duly elected over and above the declaration that the election of the returned candidate is void; and (ii) a recrimination petition under Section 97(1) is filed.*

*(4) A recrimination petition must satisfy the same requirements as that of an election petition in the matter of pleadings, signing and verification as an election petition is required to fulfil within the meaning of Section 83 of the Act and must be accompanied by the security or the further security referred to in Sections 117 and 118 of the Act.*

*(5) The bar on enquiry enacted by Section 97 read with Section 100(1)(d)(iii) of the Act is attracted when the validity of the votes is to be gone into and adjudged or in other words the question of improper reception, refusal or rejection of any vote or reception of any vote which is void is to be gone into. The bar is not attracted to a case where it is merely a question of correct counting of the votes without entering into adjudication as to propriety, impropriety or validity of acceptance, rejection or reception of any vote. In other words, where on a recount the Election Judge finds the result of re-count to be different from the one arrived at by the Returning Officer or when the Election Judge finds that there was an error of counting the bar is not attracted because the court in a pure and simple counting carried out by it or under its directions is*

*not adjudicating upon any issue as to improper reception, refusal or rejection of any vote or the reception of any vote which is void but is performing mechanical process of counting or re-counting by placing the vote at the place where it ought to have been placed. A case of error in counting would fall within the purview of sub-clause ( iv ) , and not sub clause ( ii i ) of clause ( d ) of sub-section (1) of Section 100 of the Act"*

*[ Emphasis supplied ]*

34. In an election trial, it is not permissible to Court to permit a party to seek a roving inquiry and therefore, a party must plead material facts and adduce evidence to substantiate the same so that the Court may proceed to adjudicate upon that issue (See. *Kalyan Singh Chouhan v. C.P. Joshi* (2011) 11 SCC 786). The petitioner must not only give the figures of the votes which, according to him, were improperly accepted or rejected, but the basis of the allegation must be disclosed, the serial number of ballot papers must be set out, names of the counting agent, number of counting tables, names of the counting supervisor, round number, details of objection, if any, made to the counting staff, details of the notes, if any, kept by the counting agent and the basis of information must be disclosed (*N. Narayanan v. S. Semmalai* AIR 1980 SC 206 relied on).

35. However, in the present case, there is not even an averment that the petitioner's counting agent has challenged correctness of contents of Part II of Form 17-C before the Returning Officer. Further, upon appreciation of the evidence led by the petitioner, allegations made by him as regards irregularities and illegalities during the counting process of votes have been found to be totally baseless and frivolous. In such a situation, even a *prima facie* case for ordering recount of votes is not made out.

36. Turning to the prayer of re-inspection of votes, it may be pointed out that in paragraphs 15 to 17 of the petition wherein averments pertaining to so-called improper rejection of 305 postal ballot papers have been made, material facts such as serial numbers of the postal ballot papers not opened and the precise objection with regard to each of such ballot papers, if any, raised by the counting agent, have not been stated. In absence of such an information, which the petitioner alone should have known or should be deemed to know, any inspection of the ballot paper would amount to a roving and fishing inquiry.

For this, reference may be made to the guidelines laid down by a Constitution Bench in *Ram Sewak Yadav v. Hussain Kamil Kidwai* AIR 1964 SC 1249. Accordingly, -

> *"an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not substantiated by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with precision supported by averments of material facts. To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection".*

37. In *Bhabhi v. Sheo Govind* AIR 1975 SC 2117, it was laid down that before the Court can order inspection of ballot papers, in an election petition, the following conditions are imperative -

> *(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;*
>
> *(2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts :*
>
> *(3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;*
>
> *(4) That the court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;*
>
> *(5) That the discretion conferred on the Court should not be exercised in such away so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and*

*(6) That on the special facts of a given case sample inspection maybe ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials.*

*If all these circumstances enter into the mind of the Judge and he is satisfied that these conditions are fulfilled in a given case, the exercise of the discretion would undoubtedly be proper.*

38. Again in *Fulena Singh v. Vijay Kumar Sinha* AIR 2009 SC 2247, it has been re-affirmed that inspection of election papers mentioned in detail in Rule 93 (a) to (e) is also not a matter of course. Inspection of those papers cannot be ordered and parties cannot be permitted to inspect the same for the purposes of making a roving enquiry in order to fish out the materials and to derive support to one's own case. A clear case is, therefore, required to be made out for ordering the production and inspection of election papers by the parties.

39. To sum up, an order either for inspection or re-count of the votes affects the secrecy of ballot, which is, undoubtedly, sacrosanct and inviolable except where strong *prima facie* case is made out. (*Kattinokkula Murali Krishna v. Veeramalla Koteswara Rao* AIR 2010 SC 24 referred to)

40. Taking into consideration the factual aspects of the matter as brought on record and the well settled position of law on the subject, as discussed above, the petitioner is not entitled to get the votes decoded or recounted. Accordingly, issue no.7 is answered in the negative.

**ISSUE Nos.5 and 8**

41. In view of the adverse findings of issue nos.1 to 4 and 7, no interference is called for with the result of the election in question. The issues are, therefore, decided in favour of the respondent no.1.

**ISSUE No.10**

42. For the foregoing reasons, none of the grounds questioning the validity of the election stands established and therefore, the petition, being devoid of merit, deserves to be dismissed.

43. Accordingly, the election petition is hereby dismissed. There shall be no order as to costs.

44. A copy of this judgment be forwarded to the Election Commission as well as to the Speaker of the State Legislature.

*Petition dismissed.*

**I.L.R. [2014] M.P., 135**
**APPELLATE CIVIL**
***Before Mr. Justice U.C. Maheshwari***
F.A. No. 554/2006 (Jabalpur) decided on 24 July, 2012

JUNIOR ENGINEER MPSEB & anr. ... Appellants
Vs.
KISHANLAL & anr. ... Respondents

***Civil Procedure Code (5 of 1908), Section 96 - Suit for compensation/damages*** **- Deceased came into contact of live electric wire lying on the road - Held - Appellant/Electricity Board did not take appropriate steps to remove such live electric wire from the place of incident from the mid-night up to the time of incident i.e. 5.30 in the morning - Even if it is deemed that all precautionary measures were taken by the Board and inspite that due to some technical fault, on account of vis-major or act of God or the natural calamity, the alleged incident had happened, but on account of principle of "Strict Liability", appellant is liable to pay the compensation. (Paras 10, 11 & 12)**

*सिविल प्रक्रिया संहिता (1908 का 5), धारा 96 – प्रतिकर/क्षतिपूर्ति हेतु वाद* – मृतक, सड़क पर पड़े जीवित विद्युत तार के संपर्क में आया – अभिनिर्धारित – अपीलार्थी/विद्युत बोर्ड ने उक्त जीवित तार को घटना के स्थान से आधी रात से लेकर घटना के समय अर्थात सुबह 5.30 बजे तक हटाने के लिए समुचित कदम नहीं उठाये – यदि यह माना भी जाए कि बोर्ड द्वारा सभी एहतियाती उपाय किये गये थे और इसके बावजूद किसी तकनीकी त्रुटि के कारण, दैवकृत या दैवी घटना अथवा नैसर्गिक आपदा के कारण अभिकथित घटना घटित हुई थी, परंतु "कठोर दायित्व" के सिद्धांत के कारण, अपीलार्थी प्रतिकर अदा करने के लिये दायी है।

**Case referred :**

2002(2) MPHT 324 (SC).

*Sameer Seth*, for the appellants.
*Sanjay Jain*, for the respondents.

## JUDGMENT

**U.C. MAHESHWARI, J. :-** The appellants/ defendants have directed this appeal under Section 96 of the CPC being aggrieved by the judgment and decree dated 31.3.2006 passed by II Addl. District Judge, Waraseoni, District Balaghat in Civil Original Suit No.14-A/2005 decreeing the suit of the respondents filed for compensation/damages regarding death of their son Roshanlal on account of electrocution due to negligence of the appellants/ department. Such suit has been decreed for the sum of Rs.1,35,000/- with interest @ 6% P.A from the date of filing the suit i.e 3.9.2005 so also the cost of the litigation.

2. The facts giving rise to this appeal in short are that the respondents No.1 and 2 herein filed a suit against the appellants contending that on dated 14.6.04 at about 5.30 in the morning their son Roshanlal accompanied with his sister-in-law Hemlata, was going towards the field to collect the Gulli (Mahua). On the way near Daitbarra Bus-Stop, some live electric wire of the appellants/department was lying on the road as the same was broken. It being early morning, there was some darkness so deceased Roshanlal could not see the aforesaid electricity wire lying on the road and consequently he came into the contact of the same resultantly he sustained the electric shock and died on the spot. As per further averments such electricity line was not properly looked-after and maintained by the officials of the appellants/department and, in the lack of proper repairing, such wire was broken and laid on the road and thereby the appellants/department has committed grave negligence on the part of their duties. Roshanlal was aged 21 years on the date of the incident and was working as Mason @ Rs.150/- per day. In such premises, he was earning Rs.54000/- per year and he was the only person to lookafter his parents respondents No.1 and 2 in their old age. If Roshanlal had not died in the alleged incident, he would have lived upto the age of 70 years and, in such premises, he could have helped respondent No.1 and 2. Besides this, respondent No.1 and 2 also suffered the mental and physical agony due to death of their son. They also spent some amount in performing his last rites. With these pleadings, the suit for compensation/ damages or Rs.5,00,000/- was filed against the appellants.

3. In the written statement of the appellants, by denying the averments of the plaint it is stated that the alleged incident was not happened because of the negligence of any official of the appellants/ department but the same was happened because of natural calamity and act of God. On the date of the

incident there was heavy rain-fall and lightening and due to which the installed insulator of such place got burnt and fell down on the 11 KV line consequently such line was broken and laid on the road. On account of act of God or natural calamity, the incident was happened and, therefore, no liability of the alleged compensation could be saddled against the appellants or its officials and prayer for dismissal of the suit is made.

4. Respondent No.3 was impleaded as formal defendant in the matter. Inspite of service of the notice to such respondent, no written statement was filed on its behalf and ultimately the case proceeded ex-parte against it.

5. In view of the pleadings of the parties as many as six issues were framed and evidence was recorded, on appreciation of the same, by holding that the alleged incident in which Roshanlal died was the cause and consequence of negligence of the officials of the appellants/department, after assessing the compensation, the suit was decreed in part for the sum of Rs.1,35,000/- and interest on it as stated above. Being dissatisfied with such judgment and decree, the appellants have come to this court with this appeal.

6. Shri Sameer Seth, learned appearing counsel for the appellants after taking me through the record including the evidence led by the parties argued that on proper appreciation, the impugned suit of the respondents No.1 and 2 ought to have been dismissed by the trial court. In addition, he said that the alleged incident was happened due to the natural calamity and the act of God and not by any negligent act on the part of any official of the appellants so under the law of tort, the appellants could not be held to be responsible to compensate respondent No.1 and 2 regarding death of their son. Besides this, he also argued that the sum decreed by the trial court, in the available factual matrix, is very higher side and, in any case, if the findings of the trial court holding the liability of the alleged incident against the appellants is affirmed in this appeal then such sum requires some reduction and prayed for dismissal of the suit of the respondents by allowing this appeal.

7. Shri Sanjay Jain, learned appearing counsel of the respondents, responding the aforesaid arguments said that the findings and the approach of the trial court being based on proper appreciation of the evidence, does not require any interference at this stage. In continuation, he said that in view of the principle of "strict liability", the appellants cannot escape from the liability to pay the compensation. In support of such contention, he placed his reliance on a decision of the Apex Court in the matter of *M.P.Electricity Board Vs.*

*Shail Kumar and others*-2002(2) MPHT 324 (SC) and prayed for dismissal of this appeal.

8. Having heard the counsel keeping in view their arguments, I have carefully gone through the record of the trial court. After perusing the pleadings as well as the evidence led by the parties, I have not found any infirmity in appreciation of the evidence in the impugned judgment.

9. In order to prove the case on behalf of respondent No.1 and 2/plaintiff as many as four witnesses have been examined. On recording the deposition of respondent No.1 Kishanlal (PW 1), he categorically supported the aforesaid incident along with the factual circumstance in which his son Roshanlal had sustained the electric shock from the live electric wire which was lying on the road. He also deposed that his son, at the time of death, was working as mason and was earning Rs.150/- per day from such profession. On going through his cross-examination, I have not found any material thing destroying the version of this witness stated by him in his in-chief. The eye-witness of the incident who was accompanied with the deceased at the time of the incident, namely, Hemlata (PW 2), on recording her deposition has categorically stated that on the aforesaid date and time she and her brother-in-law Roshanlal were going to collect Gully (Mahua) towards some filed. On the way near Daitbarra Bus-stop, the live electricity wire was lying on the way and due to darkness of early morning, his brother-in-law could not observe such wire and unfortunately he came into the contact of the same resultantly after sustaining the shock of electricity, he sustained the burn injuries on his person and died on the spot. In her cross-examination, I have not found any material thing destroying the version stated by her in her in-chief. The averments regarding earning of the deceased Rs.150/- per day has been proved by Shivaji (PW 3) who was working with the deceased as labourer. In his cross-examination also I have not found any material thing destroying the version stated by him in his inchief. Roshanlal had died due to electrocution has also been proved by Dr. Ravindra Tathod (PW 4) who carried-out the autopsy of the deceased and prepared the postmortem report (Ex.P/1). He categorically stated that the deceased died due to electric shock/ electrocution.

10. On behalf of the appellants, in rebuttal, the witness P.K.Sahu (D.W.1) the Assit. Engineer, in his deposition has proved the panchnama dated 14.6.04 (Ex.D/1) stating that due to lightening from the sky, the pin insulator got burnt, consequently the electric wire was broken and fell down on the way and due

to this natural calamity, the alleged incident was happened. Some statements of the witnesses, namely, P.K.Sahu, Chetanlal Katare, and Ganesh Prasad recorded by officials of the electricity board and the spot map prepared by the electricity board are exhibited on record from Ex.D/2 to D/6. The witness Chetanlal Katare (DW 2) the Line-man was also examined by the appellants. In his deposition he stated the same thing regarding the alleged incident as stated by the aforesaid witnesses. Besides this, one witness Ganesh Prasad (DW 3) is also examined by the appellants. He also stated that Roshanlal died due to electrocution because he came into the contact of live electric wire which was lying on the road. He also stated that before the incident there was heavy rainfall and lightening. On going through the depositions of all the aforesaid witnesses of the appellants, I have found that each of them has stated that Roshanlal died due to electrocution because he came into the contact of live electric wire laid on the way. On going through the deposition of the witnesses, I have not found anything showing that in the mid-night owning to heavy rainfall and lightening when insulator was burnt and the line was broken and fell on the way then what immediate action was taken by the appellants/ electricity board and its officials from the midnight upto the time of the incident i.e 5.30 in the morning. As such, as per record, no such action was taken by the appellants. It is well known that various persons like Line-man, helper, Asst. Engineers etc. are deployed in the department of the appellants to lookafter and maintain the electric line round O' clock, and inspite that such officials of the appellants had not taken appropriate steps to remove such live electric wire from the place of incident. So, in such premises, there was apparent negligence on the part of the officials of the appellants towards their duties. It is not expected from every citizen especially from the uneducated and illiterate villagers like the deceased that early in the morning before rising the sun, while walking on the way, he could identify the live electric wire laid on the road and, therefore, it could not be said that the deceased himself was responsible for the alleged incident.

11. The electricity board cannot escape from its liability on the ground that the alleged incident was happened because of vis-measure or the act of God or due to natural calamity and, in such premises, the approach of the trial court saddling the liability against the appellants to pay the compensation by the impugned decree could not be said to be contrary to the law.

12. For the sake of arguments, if it is deemed that all precautionary measures were taken by the appellants/department and inspite that due to

some technical fault, on account of vis-measure or the act of God or the natural calamity, the alleged incident was happened due to fall of live electric line on the way even then, on account of principle of "strict liability", the appellants/ department is liable to pay the compensation.

13. My aforesaid view is fully fortified by the decision of the Apex Court in the matter of *M.P.Electricity Board Vs. Shail Kumar and others*-2002(2) MPHT 324 (SC) in which it was held as under :-

> "7. It is an admitted fact that the responsibility to supply electric energy in the particular locality was statutorily conferred on the Board. If the energy so transmitted causes injury or death of a human being, who gets unknowingly trapped into it the primary liability to compensate the sufferer is that of the supplier of the electric energy. So long as the voltage of electricity transmitted through the wires is potentially of dangerous dimension. The managers of its supply have the added duty to take all safety measures to prevent escape of such energy or to see that the wire snapped would not remain live on the road as users of such road would be under peril. It is no defence on the part of the management of the Board that some body committed mischief by siphoning such energy of his private property and that the electrocution was from such diverted line. It is the look out of the managers of the supply system to prevent such pilferage by installing necessary devices. At any rate, if any live wire got snapped and fell on the public road the electric current thereon should automatically have been disrupted. Authorities manning such dangerous commodities have extra duty to chalk out measures to prevent such mishaps.
>
> 8. Even assuming that all such measures have been adopted, a person undertaking an activity involving hazardous or risky exposure to human life, is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The liability cast on such person is known, in law, as "strict liability". It differs from the liability which arises on account of

the negligence or fault in this way i.e the concept of negligence comprehends that the foreseeable harm could be avoided by taking reasonable precautions. If the defendant did all that which could be done for avoiding the harm he cannot be held liable when the action is based on any negligence attributed. But such consideration is not relevant in cases of strict liability where the defendant is held liable irrespective of whether he could have avoided the particular harm by taking precautions."

14. So far the quantum of decreed sum is concerned, in view of the available unrebutted evidence regarding income of the deceased Rs.150/- per day as he was working as mason and, in any case, he was earning Rs.2000/- per month, the trial court, on appreciation of the available evidence, has not committed any error or infirmity in passing the decree for compensation of Rs.,1,35,000/-., In the available circumstances, the same appears to be very reasonable and does not require any interference at this stage of the appeal.

15. In view of the aforesaid discussion, I have not found any error, infirmity, illegality or irregularity in the judgment impugned. Consequently, this appeal being devoid of any merits, by affirming the impugned judgment and decree, is hereby dismissed. There shall be no order as to the costs.

*Appeal dismissed.*

**I.L.R. [2014] M.P., 141**
**APPELLATE CIVIL**
***Before Mr. Justice N.K. Mody***
M.A. No. 2701/2010 (Indore) decided on 6 November, 2012

GANPAT @ NARAYAN & anr. ...Appellants
Vs.
RUMAL SING & ors. ...Respondents

***Motor Vehicles Act (59 of 1988), Section 173 - Enhancement* - One half towards personal expenses to be deducted as the deceased was Bachelor - Since there is no proof of age of the appellants, multiplier of 15 appears to be just and proper - Appeal dismissed. (Para 6)**

*मोटर यान अधिनियम (1988 का 59), धारा 173 – वृद्धि* – व्यक्तिगत खर्चों की ओर आधा घटाया जाना चाहिए क्योंकि मृतक अविवाहित था – चूंकि अपीलार्थियों

की आयु का प्रमाण नहीं, 15 का गुणक न्याय संगत एवं उचित प्रतीत होता है – अपील खारिज।

**Case referred :**

MACD 2009 (SC) 353.

*Sanjay Patwa*, for the appellants.
*S.V. Dandwate,* for the respondent/Insurance Company.

**ORDER**

**N.K. Modv, J.:-** This is an appeal filed by the claimants under Section 173 of the Motor Vehicles Act against an award dated 23/04/10 passed by MACT, Alirajpur in claim case No.104/09. By impugned award, the Claims Tribunal has awarded a total sum of Rs.3,64,500/-with interest to the claimants for the death of one Manish, who died in vehicle accident. According to claimants, the compensation awarded is on lower side and hence, need to be enhanced. It is for the enhancement in the compensation awarded by the Tribunal, the claimants have filed this appeal. So the question that arises for consideration is whether any case for enhancement in compensation awarded by the Tribunal on facts / evidence adduced is made out in the compensation awarded and if so to what extent?

2. It is not necessary to narrate the entire facts in detail, such as how the accident occurred, who was negligent in driving the offending vehicle, who is liable for paying compensation etc. It is for the reason that firstly all these findings are recorded in favour of claimants by the Tribunal. Secondly, none of these findings though recorded in claimants' favour are under challenge at the instance of any of the respondent such as owner/driver or insurance company either by way of cross appeal or cross objection. In this view of the matter, there is no justification to burden the judgment by detailing facts on all these issues.

3. As observed supra, it is a death case. On 28/02/09 Manish aged 20 years, met with a motor accident and died, giving rise to filing of claim petition by legal representatives (appellants herein) out of which this appeal arises seeking compensation for his death. The case was contested by the respondents. Parties adduced evidence. The Claims Tribunal by impugned award partly allowed the claim petition filed by claimants and as stated supra, awarded a sum of Rs.3,64,500/-, breakup of which is as under :-

| | |
|---|---|
| Rs.3,60,000/- | Towards loss of dependency. |
| Rs.2,000/- | Towards funeral expenses. |
| Rs.2,500/- | Towards loss of estate. |

4. Learned counsel for the appellants submits that the learned tribunal assessed the income of the deceased @ Rs.4,000/-per month and after deducting one half towards personal expenses applied the multiplier of 15. It is submitted that the income of the deceased is assessed on lower side as the accident is of the year 2009. It is submitted. that keeping in view the age of appellants multiplier of 16 ought to have been applied and deduction of one half is also on higher side, which ought to have been 1/3rd keeping in view the law laid down in the matter of *Bilkish Vs. United India Insurance Co Ltd.* wherein Hon'ble Apex Court held that income of the deceased bachelor can be deducted towards his personal expenses while computing compensation to his parents as his 2/3rd income assessed as contribution to his family and 1/3rd as his personal expenses. It is submitted that the income was proved by adducing cogent evidence and on weekly holidays the deceased was going extra work, which was not taken into consideration. It is submitted that on other heads also amount awarded is on lower side. It is submitted that the appeal filed by the appellants be allowed and the amount of compensation be enhanced.

5. Learned counsel for Insurance Company submits that the amount awarded by the learned Tribunal is already on higher side. It is submitted that no account of employer has been produced, as the deceased was working in a backward District. It is submitted that deduction of one half is just and proper keeping in view the law laid down in the matter of *Sarla Verma Vs. Delhi Transport Corporation,* MACD 2009 (SQ 353). It is submitted that the appeal be dismissed.

6. I have gone through the evidence adduced by the claimants. From perusal of the record it is evident that the employer who is running the shop in the name and style M/s Sheetal Colllection was discarded by the learned Tribunal as it was alleged that a sum of Rs.5,000/- was being paid to the deceased as salary. In the matter of *Sarla Verma Vs. Delhi Transport Corporation.,* MACD 2009 (SC) 353 which lays, down that the deduction ought to have been one half in the matters of bachelors, case should be followed as thumb rule. Hence, this Court is of the view that the learned Tribunal has rightly deducted one half towards personal expenses. There is no proof of

age of the appellants, therefore, multiplier of 15 applied by the learned Tribunal appears to be just and proper. It is true that on account of funeral expenses and loss of estate amount awarded is on lower side and on account of loss of love and affection no amount has been awarded, but keeping in view the fact that income has been assessed on higher side, this Court is of the view that no case for interference is made out. Hence, appeal filed by the appellants has no merits and the same stands dismissed.

*Appeal dismissed.*

**I.L.R. [2014] M.P., 144**
**APPELLATE CIVIL**
***Before Mr. Justice N.K. Mody***
M.A. No. 1356/2011 (Indore) decided on 6 November, 2012

SHABBIR ...Appellant
Vs.
SAMSU BHAI KALIYA BHAI DANGI & ors. ...Respondents

***Motor Vehicles Act (59 of 1988), Section 166, Workmen's Compensation Act (8 of 1923), Section 3*** **- Claim petition filed by appellant was dismissed by Tribunal - Appeal is in continuation of the proceedings initiated before the Court below, therefore, it can safely be said that the award has not attained finality - Appeal is dismissed as withdrawn with a liberty to the appellant to file a claim petition under the provisions of Workmen's Compensation Act, 1923.** **(Para 6)**

*मोटर यान अधिनियम (1988 का 59), धारा 166, कर्मकार प्रतिकर अधिनियम, (1923 का 8), धारा 3* – अपीलार्थी द्वारा प्रस्तुत की गई दावा याचिका को अधिकरण द्वारा खारिज किया गया – अपील, निचले न्यायालय के समक्ष आरंभ की गई कार्यवाही के सिलसिले में है, इसलिए, यह सुरक्षित रुप से कहा जा सकता है कि अवार्ड ने अंतिमता प्राप्त नहीं की है – वापस लिये जाने से अपील खारिज, अपीलार्थी को कर्मकार प्रतिकर अधिनियम 1923 के उपबंधों के अंतर्गत दावा याचिका प्रस्तुत करने की स्वतंत्रता के साथ।

**Case referred :**

1989 ACJ 291.

*Rishi Agrawal,* for the appellant.
*Anil Goyal,* for the respondent No. 3.
*S.V. Dandwate,* for the respondent No. 6.

**ORDER**

**N.K. Mody, J.:-** Being aggrieved by the award dated 11/04/11 passed by IV MACT, Ratlam in Claim Case No.1/09, whereby claim petition filed by the appellant on account of injuries sustained in a motor accident, which took place on 26/01/08 was dismissed, present appeal has been filed.

2. Short facts of the case are that the appellant filed a claim petition alleging that the appellant is a truck driver. On 26/01/08 the truck bearing registration No.MP/43-G/0360 owned by respondent Nos. 4 & 5 was being driven by appellant, which was met with an accident with another truck bearing registration No.GJ/17-G/9087, driven by respondent No.2 rashly and negligently, with the result appellant sustained grievous injuries. It was prayed that the claim petition be allowed. After framing of issues and recording of evidence learned Tribunal dismissed the claim petition, against which present appeal has been filed.

3 Learned counsel for the appellant frankly submits that the claim petition has wrongly been filed under the provisions of Motor Vehicles, which ought to have been filed under the provisions of Workmen's Compensation Act. It is submitted that the appellant be permitted to withdraw the claim petition with a liberty to file the claim petition under the provisions of Workmen's Compensation Act.

4. Learned counsels for respondent Nos. 3 & 6 submit that after availing remedy under the provisions of Motor Vehicles Act appellant cannot be permitted to avail the remedy under the provisions of Workmen's Compensation Act. For this contention reliance is placed upon Section 167 of Motor Vehicles Act and Section 3(5) of Workmen's Compensation Act, 1923. It is submitted that hence the appeal filed by the appellant has no merits and the same be dismissed.

Section 167 of Motor Vehicles Act lays down as under:-

> ***167. Option regarding claims for compensation in certain cases.*** *Notwithstanding anything contained in the Workmen's Compensation Act 1923 where the death of, or bodily injury to, any person gives rise to a claim for compensation under this Act and also under the Workmen's Compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions of*

*Chapter X claim such compensation under either of those Acts but not under both.*

5. Section 3 of Workmen's Compensation Act deals Employer's liability for compensation. Sub-section 5 of Section 3 of Workmen's Compensation Act reads as under:-

> (5) Nothing herein contained shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted in a Civil Court a suit for damages in respect of the injury against the employer or any other person; and no suit for damages shall be maintainable by a workman in any court of law in respect of any injury-
>
> (a) if he has instituted a claim to compensation in respect of the injury before a Commissioner; or
>
> (b) if an agreement has been come to between the workman and his employer providing for the payment of compensation in respect of the injury in accordance with the provisions of this Act.

6. In the matter of *Sheikh Imam Bai Vs. Oriental Fire and General Insurance Co.,*. 1989 ACJ 291 Andhra Pradesh High Court has held that once option was exercised and award was passed under Workmen's Compensation Act, 1923, it is not open to the claimants to avail remedy under the Motor Vehicles Act. In the present case no remedy has been availed by the appellant under the provisions of Workmen's Compensation Act. It is true that remedy availed by the appellant under the provisions of Motor Vehicles Act failed as claim filed by appellant was dismissed by the learned Tribunal, but that award has also not attained finality as appeal is still pending. If after dismissal of award instead of filing of appeal appellant would have approach directly to the Commissioner for Workmen's Compensation under the provisions of Workmen's Compensation Act, 1923, then that petition could have been dismissed on the ground that appellant has already exercised option under the provisions of Motor Vehicles Act, therefore, appellant is not entitled to file claim petition under the provisions of Workmen's Compensation Act. But in the present case situation is quite different. After dismissal of claim petition appellant has filed the appeal. Since the appeal is in continuation of the proceedings initiated before the Court below, therefore, it can safely be

said that the award has not attained the finality. In view of this, appeal filed by the appellant is disposed of and the claim petition filed by appellant is dismissed as withdrawn with a liberty to the appellant to file a claim petition under the provisions of Workmen's Compensation Act, 1923. If such a proceedings are initiated by the appellant, then learned Court below shall decide the same on merits and shall not dismiss the same on the ground that appellant has already availed the remedy under the provisions of Motor Vehicles Act. While deciding the claim petition Commissioner shall take into consideration the evidence adduced by the parties and shall not influence in any manner by the observations, if any, made in the impugned award.

7. With the aforesaid observations, appeal stands disposed of.

No order as to costs.

*Appeal disposed of.*

**I.L.R. [2014] M.P., 147**
**APPELLATE CIVIL**
***Before Mr. Justice J.K. Maheshwari***
M.A.No. 2595/2008 (Jabalpur) decided on 13 December, 2012

ORIENTAL INSURANCE CO. LTD. ...Appellant
Vs.
RAVI SHANKAR & ors. ...Respondents

*A. Motor Vehicles Act (59 of 1988), Section 173 & Central Motor Vehicles Rules 1989, Rule 9(3)* - **Whether the drivers are required to possess educational qualification as specified in Rule 9 and its endorsement ought to be made as per sub-rule (3) - Held -That there was no fundamental or basic breach of the terms and conditions of the policy, which could have been sufficient to hold that the Insurance Co. would not be liable to pay compensation. (Para 9)**

*क. मोटर यान अधिनियम (1988 का 59), धारा 173 व केन्द्रीय मोटर यान नियम 1989, नियम 9(3)* – क्या वाहन चालकों को शैक्षणिक अर्हता प्राप्त करना अपेक्षित है जैसा कि नियम 9 में विनिर्दिष्टित है और उसका पृष्ठाकंन, उप नियम (3) के अनुसार किया जाना चाहिए – अभिनिर्धारित – पॉलिसी के निबंधन एवं शर्तों का मूलभूत अथवा मौलिक भंग नहीं किया गया, जो यह अभिनिर्धारित करने के लिए पर्याप्त हो सकता था कि बीमा कम्पनी, प्रतिकर का भुगतान करने के लिए दायी नहीं होगी।

***B. Motor Vehicles Act (59 of 1988), Section 173 - Enhancement of award* - Looking to the age of the deceased, accepting his earning Rs. 3,000/- pm, after deducting 1/2 and applying multiplier of 15 - As per the age of the father and mother by adding Rs. 25,000/-, award is enhanced by Rs. 30,000/-. (Para 10)**

*ख. मोटर यान अधिनियम (1988 का 59), धारा 173 – अवार्ड को बढ़ाया जाना* – मृतक की आयु को देखते हुए, उसकी आय रु. 3,000/– प्रति माह स्वीकार करते हुए, 1/2 घटाने के पश्चात और 15 का गुणक लागू करते हुए – पिता व माता की आयु के अनुसार रु. 25,000/– जोड़कर अवार्ड रु. 30,000/– से बढ़ाया गया।

**Case referred :**

2006(5) MPHT 83 (DB).

*Sanjay Agrawal & P.K. Sahu,* for the appellant.
*K.K. Kushwaha,* for the respondents No. 1 to 4.
None appears on behalf of the owner though served.

**ORDER**

**J.K. MAHESHWARI, J.:-** This order shall govern the disposal of M.A.No. 2595/2008 and M.A. No. 2884/2008.

2. M.A. No. 2595/2008 has been filed by the insurance company while M.A. No. 2884/2008 has been filed by the claimants. Both these appeals arise out of the award dated 10th March, 2008 passed by the Motor Accident Claims Tribunal, Jabalpur in M.V.C. No. 95/2006.

3. The case of the claimants is that Indra Kumar, since deceased, was employed as conductor/cleaner in the gas tanker, bearing registration no. M.P.08-F-2077. On 30/12/2005 at about 11.00 p.m., he was going to Vijaypur Raghavgarh, by the gas tanker being driven rashly and negligently, it dashed against a stationed truck no. M.P.-09-KB-5941 The conductor, Indra Kumar, sustained severe injuries on the hands, legs, head and other parts of the body. He was immediately taken to Medical Hospital, Jabalpur. Report of the incident was lodged with Police Station, Bhedaghat on which offences under relevant Sections of the IPC were registered against the driver of the gas tanker, non-applicant no. 1, Nathulal. Thus claim petition under section 166 of the Motor Vehicles Act seeking compensation to the tune of Rs.20,30,000/- was filed.

4. The insurance company has not denied the insurance policy but has specifically pleaded that the non-applicant No.1 was not holding valid and effective driving license at the relevant time which is a breach of condition of the insurance policy. Further, the accident occurred due to sole negligence of the driver of the truck no. M.P.-09-KB-5941. The driver, owner and insurer of this truck have not been joined as party. Therefore, the claim petition is liable to be dismissed for non-joinder of necessary parties. It has further claimed that the amount of compensation is excessive and exorbitant. So, the non-applicant no. 3 is not liable to be saddled with any liability.

5. Learned Claims Tribunal after recording the evidence, in para 16 found that the driver was possessing a valid driving license to drive heavy goods vehicle, therefore, insurance company cannot be exonerated from its liability.

6. Learned counsel appearing on behalf of the insurance company referring Rule 9 (3) of the Central Motor Vehicles Rules, 1989 contended that the drivers of goods carriages carrying dangerous or hazardous goods are required to possess educational qualification as specified in Rule 9 and its endorsement ought to be made as per sub-rule (3) of the said rule on the driving license. In absence thereof, as appears in this case, the driver cannot be said to have possessed valid driving license.

7. Per contra, learned counsel appearing on behalf of the claimants contends that requirement of Rule 9(3) does not constitute violation of the policy in view of the Division Bench judgment of this Court in the case of *Baghelkhand Filling Station and another v. Brijbhan Prasad and others* reported in 2006 (5) M.P.H.T. 83 (DB). However, it is urged that the aforesaid contention is devoid of any substance. In addition to the aforesaid, compensation of Rs.2,65,000/- so awarded by the Tribunal for the death of a young boy of 20 years is inadequate which may reasonably be enhanced.

8. On the point of enhancement learned counsel appearing on behalf of the insurance company contend that the compensation has rightly been awarded by the Tribunal and there is no scope of interference, however, appeal filed by the claimants (M.A. No.2884/2008) may be dismissed.

9. After hearing learned counsel appearing on behalf of the parties the issue regarding endorsement of the educational qualification on a driving license driving and carrying dangerous and hazardous goods, in the light of Rule 9 (3) of the Central Motor Vehicles Rules, 1989 has been duly considered by the

Division Bench of this Court and it is held that there was no fundamental or basic breach of the terms and conditions of the Policy, which could have been sufficient to hold that insurance company would not be liable to pay the compensation. In that view of the matter, contention so advanced by the Shri Agrawal is hereby repelled.

10. Now coming to the point of enhancement, looking to the age of the deceased, accepting his earning Rs.3,000/- per month, after deducting ½ and applying the multiplier of 15, as per the age of the father and mother and by adding Rs.25,000/-, the sum comes to Rs.2,95,000/-. On reducing the amount so awarded by the Claims Tribunal i.e. Rs.2,65,000/-, the net enhanced amount comes to Rs.30,000/-.

11. Accordingly, M.A. No.2595/2008 file by the insurance company is hereby dismissed while M.A. No.2884/2008 filed by the claimants is allowed in part. Enhancement of Rs. 30,000/- is directed. Enhanced amount shall carry interest@7.5% per annum from the date of filing of the claim petition till its realization.

*Appeal dismissed.*

**I.L.R. [2014] M.P., 150**
**APPELLATE CIVIL**
***Before Mr. Justice S.K. Seth***
F.A. No. 117/1999 (Indore) decided on 31 January, 2013

PURSHOTAM & anr. ...Appellants
Vs.
STATE OF M.P. & ors. ...Respondents

*A. Civil Procedure Code (5 of 1908), Order 39, Rule 2 & Order 7, Rule 3* - **Appellants/Plaintiffs filed suit for declaration and permanent injunction - Trial Court found that the sale-deed was valid but found that plaintiffs were unable to prove their possession over the suit property and also could not prove its location as claimed by them - Material on record, in all probability, tends to support defendant's contention that the suit property is a Government land and plaintiffs were trying to grab it under the cover of the alleged sale-deed - Judgment and decree passed by the lower court affirmed.**

**(Paras 4, 8 & 9)**

*क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39, नियम 2 व आदेश 7 नियम 3* – अपीलार्थीगण/वादीगण ने घोषणा एवं स्थायी व्यादेश हेतु वाद प्रस्तुत किया – विचारण न्यायालय ने पाया कि विक्रय विलेख वैध था परन्तु पाया कि वादीगण, वाद सम्पत्ति पर अपना कब्जा साबित करने में विफल रहे और उसका स्थान भी साबित नहीं कर सके, जैसा कि उनके द्वारा दावा किया गया था – सभी संभाव्यताओं में अभिलेख की सामग्री प्रतिवादी के तर्क का समर्थन करती है कि वाद सम्पत्ति, सरकारी भूमि है और वादीगण उसे अभिकथित विक्रय विलेख की आड़ में हथियाने का प्रयास कर रहे थे – निचले न्यायालय द्वारा पारित किया गया निर्णय एवं डिक्री की पुष्टि की गयी।

***B.*** ***Administration of Justice*** **- Sobriety is always the hallmark of judicial temperament - Harsh language used by the trial court in some places in the judgment deprecated. (Para 8)**

*ख. न्याय प्रशासन* – संयम, सदैव न्यायिक स्वभाव की विशेषता है – विचारण न्यायालय द्वारा निर्णय में कुछ स्थानों पर कठोर भाषा का उपयोग निन्दनीय है।

***C.*** ***Administration of Justice*** **- Bald allegations of malafides against respondents - For a Court to accept and act on those allegations, there has to be clear and clinching evidence of unblemished character - Mere ipse dixit of plaintiffs in this regard is insufficient. (Para 8)**

*ग. न्याय प्रशासन* – प्रत्यर्थीगण के विरुद्ध, कदाशय के कोरे अभिकथन – उन अभिकथनों को न्यायालय ने स्वीकार कर, कार्यवाही करने के लिये बेदाग प्रकृति का स्पष्ट एवं निश्चित साक्ष्य होना चाहिए – इस संबंध में वादी का मात्र उसका अपना कथन अपर्याप्त है।

## JUDGMENT

**S.K. Seth, J. :-** This is plaintiffs' first appeal against the judgment and decree passed by the Additional District Judge Khachrod District Ujjain in Civil Suit No. 14-A/96.

(2) Shorn of verbiage, facts which are relevant and necessary for deciding this appeal may be stated as under. Plaintiffs filed a suit for declaration and permanent injunction. The suit property is Survey No. 486/2 situated in village Khachrod. The suit is based on a sale-deed said to have been executed by collaterals of Gafoor Khan in favour of plaintiffs. Since then, plaintiffs claim to be in possession of suit property. It was

alleged that initially suit property was agriculture land but after its diversion plaintiffs carved out and sold certain plots to others. Plaintiffs claimed that the suit property is situated to the south of their other lands. It was further alleged that respondent No. 5 and 6 acting hand-inglove, foisted false revenue cases against appellants casting clouds on their title. They sought declarations that various orders passed against them in false revenue cases were non-est and it be declared that the suit property is situated on the southern side. They also claimed permanent injunction restraining the defendants from interfering with their possession. It seems that their efforts to get the suit property demarcated were all in vain therefore, plaintiffs' came out with the suit for declaration and permanent injunction after giving notice under Sec. 80 C. P. C. to have a shot at the litigation.

(3) In their joint written statement, respondent No. 1 to 4 and 6 denied all the material allegations in the plaint. It was denied that collateral had any right to effect the sale or that the sale-deed was valid. According to defendants, Survey No. 486/2 is recorded in revenue records as Government Land and the sale-deed conferred no right, title or interest to plaintiffs. Plaintiffs' possession was denied and it was further stated that in the garb of alleged sale-deed, plaintiffs were trying not only to grab the government land but to avoid lawful action against them. Respondent No. 5 also filed his written statement denying all allegations. All personal allegations of mala-fides made against respondent No. 5 and 6 (who were impleaded by name) were also specifically and categorically denied. It was submitted that plaintiffs were not entitled to any relief and the suit was liable to be dismissed with costs.

(4) On the material on record learned trial Court found that the sale-deed was valid but found that plaintiffs were unable to prove their possession over the suit property. It was also found that plaintiffs could not prove the location of the suit property as claimed by them in the plaint. On issue No. 3-A to 3-C, trial Court found against the plaintiffs. With these findings trial Court partly decreed the suit by the impugned judgment and decree.

(5) Dissatisfied with the decision, the plaintiffs have come up in appeal, as stated above.

(6) The only point for consideration is whether the findings of the trial Court regarding plaintiffs' possession and location of the suit property are

unsustainable ?

(7) We have heard learned counsel at length. He has very assiduously taken us through the entire pleadings as well as and evidence adduced by the parties at the trial.

(8) After having heard the counsel and going through the material on record, we find no merit and substance in this appeal. No doubt, plaintiffs examined five witnesses and adduced plethora of documentary evidence but in our considered opinion none of it is of any avail to the plaintiffs. The most vulnerable part of the plaintiffs' case is about their possession and location of the suit property and there is the least evidence in support thereof. Material on record, in all probability, tends to support defendants' contention that the suit property is a government land and plaintiffs were trying to grab it under the cover of the alleged sale-deed. We are not impressed with the bald and sweeping allegations of malafides made against respondent No. 4 and 6 which are bereft of necessary details in pleadings and evidence. It is very easy to level allegations of personal malafides, but for a Court to accept and act on those allegations there has to be clear and clinching evidence of unblemished character. Mere *ipse-dixit* of plaintiffs in this regard of is insufficient. In our considered opinion, plaintiffs having failed to meet the challenge squarely cannot be permitted to skirt around to get the location of the suit property fixed as desired and claimed by them. But we are anguished to note undue and harsh language used by the Court below in some places in the judgment. Court should remember that sobriety is always the hallmark of judicial temperament. Be that as it may, in view of foregoing discussion, we see no justification to upset the findings recorded by the trial Court. We now come to the application (I.A.No. 581/2013) under Order 41 Rule 27 CPC filed yesterday. After careful scrutiny we find no ground to entertain the application. We are not at all satisfied with the reasons assigned in the application for such belated attempt to fill up the lacuna in case. Hence the application deserves dismissal and is hereby dismissed.

(9) In the result the appeal fails and is hereby dismissed. The judgment and decree passed by the lower Court are hereby affirmed, with the modification as indicated above. Plaintiffs to bear costs throughout.

*Appeal dismissed.*

**I.L.R. [2014] M.P., 154**
**APPELLATE CIVIL**

***Before Mr. Justice Shantanu Kemkar & Mr. Justice J.K. Maheshwari***
F.A. No. 459/2011 (Indore) decided on 11 March, 2013

RAJENDRA SINGH ...Appellant
Vs.
GARIMA ...Respondent

***Hindu Marriage Act (25 of 1955), Sections 26 & 13-B - Decree of divorce by mutual consent*** **- Respondent/Wife granted custody of the children - Appellant/husband was granted visiting rights and appellant/husband filed application for custody of children after one year - Application was dismissed as not maintainable after decree of divorce - Held - Even after the decree, the court is empowered to make order in regard to the custody, maintenance and education and is empowered from time to time to revoke, suspend or vary any such orders - Matter remanded to trial Court to decide case afresh.**

**(Paras 2, 3, 8, & 9)**

*हिन्दू विवाह अधिनियम (1955 का 25), धाराऐं 26 व 13–बी – आपसी सहमति से विवाह विच्छेद की डिक्री* – प्रत्यर्थी/पत्नी को बच्चों की अभिरक्षा दी गयी – अपीलार्थी/पति को मिलने का अधिकार प्रदान किया गया और अपीलार्थी/पति ने बच्चों की अभिरक्षा हेतु आवेदन एक वर्ष पश्चात प्रस्तुत किया – आवेदन को, विवाह विच्छेद की डिक्री के पश्चात पोषणीय नहीं होने के आधार पर खारिज किया गया – अभिनिर्धारित – डिक्री के पश्चात भी, अभिरक्षा, भरण–पोषण एवं शिक्षा के संबंध में आदेशित करने के लिये न्यायालय सक्षम है और समय–समय पर उक्त आदेशों को वापिस ले सकता है, निलंबित रख सकता है या बदलाव कर सकता है – प्रकरण को नये सिरे से निर्णित करने के लिये, विचारण न्यायालय को मामला प्रतिप्रेषित किया गया।

Appellant present in person.
None for the respondent, though served.

**ORDER**

The Order of the court was delivered by :
**SHANTANU KEMKAR, J.:-** This is an appeal under section 28 of the Hindu Marriage Act, 1955 (for short, the Act of 1955) against the order dated 16.11.2010 passed by 1st Additional Principal Judge, Family Court, Indore in Miscellaneous Case No. 175/2010.

2. Briefly stated, the appellant and respondent were married on 2.05.1993. Out of their Wedlock they have two daughters., However, on account of differences between the appellant and the respondent, they started living separately and submitted an applicaiton under section 13B of the Act of 1955 seeking divorce by mutual consent. The1st Additional Principal Judge, Family Court, Indorevide judgment and decree dated 24.02.2009 passed in Hindu Marriage Case No. 55/2008 allowed the joint prayer made by the appellant and respondent and granted a decree of divorce by mutual consent. As regards the children, while passing the decree, the court below made following arrangement about the custody and the visitation rights :-

5. उभयपक्ष की साक्ष्य से यह स्पष्ट है कि दोनों पति–पत्नि आपसी वैचारिक मतभेद के कारण जून 2006 से पृथक–पृथक निवास कर रहे हैं। दोनों पुत्रियां, सन्निधी तथा सुरम्या, प्रार्थी क्र.1 श्रीमति गरिमा के साथ निवास करेंगी। वर्ष में एक बार यथासंभव गर्मी की छुट्टियों में पांच दिवस के लिये प्रार्थी क्रं.2 राजेन्द्र सिंग अपनी दोनों पुत्रियों के साथ अपने निवास स्थान पर अन्य परिवारजन के साथ समय बिताने का अधिकारी रहेगा। उक्त पांच दिवस में आने–जाने का दिन भी सम्मिलित होगा। इसके अलावा यदि प्रार्थी क्र.1 भविष्य में स्थान परिवर्तन करती है, तो प्रार्थी क्र.2 को इस बात की लिखित में जानकारी देगी। प्रार्थी क्र.1 ने पुत्रियों के भरण–पोषण के लिये प्रत्येक के एक लाख पचास हजार रूपये एवं तीन लाख सत्रह हजार रूपये जो उसके नाम से थे, प्रार्थी क्र.2 से प्राप्त कर लिये है। उक्त छः लाख सत्रह हजार रूपये में से पांच लाख दस हजार रूपये नगद प्रार्थी क्र. 1 ने प्राप्त कर लिये है और शेष एक लाख दस हजार रूपये के संबंध में पोस्ट ऑफिस की रसीद प्राप्त कर ली है। प्रार्थी क्र.1 को उसका समस्त स्त्रीधन भी प्राप्त हो चुका है। अब उभयपक्ष का कोई लेना–देना बाकी नहीं है। प्रार्थी क्र.1 भविष्य में प्रार्थी क्र.2 से किसी भी प्रकार के लेन–देन की मांग नहीं करेगी। उनके मध्य कोई प्रकरण लंबित नहीं है। उभयपक्ष के मध्य भरण–पोषण, स्त्रीधन या अन्य किसी बिंदु पर कोई विवाद शेष नहीं रह गया है। अतः धारा 13–बी हिंदू विवाह अधिनियम के अंतर्गत वांछित सहायता प्रदान करने में कोई वैधानिक बाधा नहीं है।

6. परिणामस्वरूप प्रार्थीगण की याचिका स्वीकार की जाती हैं और निम्नलिखित जयपत्र पारित किया जाता है :–

(1) प्रार्थी क्र.1 श्रीमति गरिमा एवं प्रार्थी क्र.2 राजेन्द्रसिंग के मध्य दिनांक 02/05/1993 को अनुष्ठापित विवाह, इस जयपत्र द्वारा, विच्छेदित (विघटित) घोषित किया जाता है:–

(2) उभयपक्ष अपना–अपना वाद–व्यय स्वयं वहन करें।

(3) अभिभाषक शुल्क प्रमाणित होने पर नियमानुसार देय होगा।

(4) तदनुसार जयपत्र आकारा जावे।

3- When the matter stood thus, after about an year the appellant-husband submitted an application by invoking the provisions of section 26 of the Act of 1955 seeking custody of the children. The said application was dismissed by the trial court vide order dated 16.11.2010 holding it to be not maintainable. The Review Petition filed by the appellant also suffered dismissal vide order dated 20.05.2011. Feeling aggrieved, the appellant has filed this appeal.

4. Having gone through the order dated 16.11.2010 passed by the trial court, we find that the trial court was of the view that the provisions contained in section 26 of the Act of 1955 having been once invoked by the parties and a decree of divorce making arrangement for the custody of children having been passed on 24.02.2009 the subsequent application under section 26 of the Act of 1955 filed by the appellant after passing of the decree will not be maintainable.

5. We find ourselves unable to agree with the view taken by the trial court.

6. Section 26 of the Act of 1955 deals with custody of children. It reads thus:-

> **"Section 26. Custody of children-** In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time of time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

7. On a plain reading of the aforesaid provision, it is clear that the court in any proceeding under this Act is empowered to pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education

of such children as might have been made such decree or interim orders in case the proceedings for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

8. In the circumstances, it is clear that even after the decree the court is empowered upon application to make the order in regard to the custody, maintenance and education and is empowered from time to time to revoke, suspend or vary any such orders.

9. Having regard to the aforesaid clear provision contained in section 26 of the Act, 1955 in our considered view, the trial court has committed error in rejecting the appellant's applicaiton filed under section 26 of the Act of 1955 holding it to be not maintainable. The impugned order runs contrary to the provisions contained in section 26 of the Act of 1955 and as such the impugned order dated 16.11.2010 passed by the trial court and also the order dated 20.05.2011 passed in review petition deserve to be and are hereby set aside. The matter is remanded back to the trial court for deciding it afresh in accordance with law as expeditiously as possible. The appellant to appear before the trial court on 18.03.2013.

C. c. by tomorrow,

*Order accordingly.*

**I.L.R. [2014] M.P., 157**
**APPELLATE CIVIL**
***Before Mr. Justice M.C. Garg***
M.A. No. 803/2013 (Jabalpur) decided on 18 March, 2013

NATIONAL INSURANCE COMPANY LTD. ...Appellant
Vs.
BADI BAHU @ HARIBAI & ors. ...Respondents

***Motor Vehicles Act (59 of 1988), Sections 168 & 173 - Compensation -Determination*** **- Deceased was 39 years old - As per the postmortem report, his age was taken as 40 years - Addition of annual income for loss of future prospects - Annual income of deceased, assessed to Rs. 36,000/- p.a. - Addition of income @ 30% for future prospects is fully justified and is in accordance with law laid down by the Hon'ble Apex Court.** **(Para 6)**

*मोटर यान अधिनियम (1988 का 59), धाराऐं 168 व 173 – प्रतिकर – निर्धारण* – मृतक की आयु 39 वर्ष थी – शव चिकित्सा प्रतिवेदन के अनुसार उसकी उम्र 40 वर्ष ली गयी – भविष्य की संभावनाओं की हानि के लिये वार्षिक आय जोड़ा जाना – मृतक की वार्षिक आय रु. 36,000/– प्रतिवर्ष निर्धारित की गयी – भविष्य की संभावनाओं के लिये 30 प्रतिशत की दर से आय जोड़ा जाना पूर्णतः न्यायोचित है और माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित विधि के अनुसरण में है।

**Cases referred :**

2009 ACJ 1298, 1994 ACJ 1 (SC).

*Gulab Sohane,* for the appellant.
*Sharad Gupta,* for the respondents No. 1 to 8.

**ORDER**

**M.C. GARG, J.:-** At the consent of learned counsel for the parties they are heard finally.

1. This appeal has been filed by the Insurance Company against the award dated 4/12/2012 passed by Motor Accident Claims Tribunal, Jabalpur in Claim Case No.212/2012 only on the ground that future prospects have been considered by the learned Accident Claims Tribunal by adding 30% annual income of the deceased.

2. It is submitted that in a death case the Claims Tribunal while considering the future prospects, has added 30% annual income of the deceased who was aged more than 30 years, however, such increase was not justified as there is no provision under the Motor Vehicles Act to consider such enhancement on the ground of future prospects. Para16 is relevant which reads thus :

> "बडी बहू (आ0सा01) का कहाना है कि उसे पति राजमिस्ती का काम कर 6 हजार रूपये मासिक आय अर्जित करते थे । लेकिन राजमिस्ती का कार्य करके 6 हजार रूपये मासिक आय होन के संबंध में आवेदक की ओर से सारवान साक्ष्य पेश नहीं की गई है किन्तु इसके प्रतिपरीक्षण की कंडिका –7 के कथन से यह प्रकट होता है कि इसका पति लखन सिंह मजदूरी का कार्य करता था और मजदूरी के कार्य के आधार पर तीन हजार रूपये मासिक की आय अर्जित करना अनुमानित किया जाना अनुचित नहीं है । इस आधार पर मतक लखन सिंह की वार्षिक आय 36000 रूपये हो जाती है ।

3. This argument on behalf of the learned counsel for the appellant has been opposed by learned counsel for respondents 1 to 8 who accepts the notice of the appeal as having filed caveat petition.

4. I have heard learned counsel for both the parties.

5. My attention has been drawn to a judgment of Hon'ble Apex Court in the case of *Sarla Verma and others Vs. Delhi Transport Corporation and another,* reported in 2009 ACJ 1298 wherein question of addition of annual income for future prospects was discussed in para10 while relying upon the judgment in the case of *Kerala State Road Transport Corporation Vs. Susamma Thomas,* 1994 ACJ 1 (SC) wherein the question of additional income for future prospects was discussed in para10 of the said judgment. In the aforesaid judgment it has been held that formally it was followed by the Apex Court in *Susamma Thomas* (supra) that a case should be complied with slide modification. Para 10 and 11 are relevant which read as under :

> "Question (i) addition to income for future prospects :
>
> 10. Generally, the actual income of the deceased less income tax should be the starting point for calculating the compensation. The question is whether actual income at the time of death should be taken as the income or whether any addition should be made by taking note of future prospects ? In *Susamma Thomas,* 1994 ACJ 1 (SC), this Court held that the future prospects of advancement in life and career should also be sounded in terms of money to augment the multiplicand (annual contribution to the dependants); and that where the deceased had a stable job, the court can take note of the prospects of the future and it will be unreasonable to estimate the loss of dependency on the actual income of the deceased at the time of death. In that case, the salary of the deceased, aged 39 years at the time of death, was Rs.1032/- per month. Having regard to the evidence in regard to future prospects, this Court was of the view that the higher estimate of monthly income could be made at Rs.2000/- as gross income before deducting the personal living expenses. The decision in *Susamma Thomas* was followed in *Sarla Dixit v. Balwant Yadav* [1996 ACJ 581 (SC)], where the deceased was getting a gross salary of Rs.1543/- per month. Having regard to the future prospects of promotions and increases, this Court assumed that by the time he retired, his earning would have nearly doubled, say Rs.3000/-. This court took the average of the actual income at the time of death and the projected income if he had lived a normal

life period, and determined the income as Rs.2200/- per month. In *Arati Bezbaruah v. Dy. Director General, Geological Survey of India* [2003 ACJ 680 (SC)], as against the actual salary income of Rs.42,000/- per annum, (Rs.3500/- per month) at the time of accident, this court assumed the income as Rs.45,000/- per annum, having regard to the future prospects and career advancement of the deceased who was 40 years of age.

11. In *Susamma Thomas*,1994 ACJ 1 (SC), this Court increased the income by nearly 100%, in *Sarla Dixit,* 1996 ACJ 581 (SC), the income was increased only by 50% and in *Arati Bezbaruah,* 2003 ACJ 680 SC, the income was increased by a mere 7%. In view of imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. [Where the annual income is in the taxable range, the words `actual salary' should be read as `actual salary less tax']. The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardize the addition to avoid different yardsticks being applied or different methods of calculations being adopted. Where the deceased was self employed or was on a fixed salary (without provision for annual increments etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances."

6. In the present case, the age of the deceased was only 39 years, however, as per the postmortem report it was taken as 40 years. In these circumstances, addition of income @ 30% for future prospects is fully justified and is in accordance with law laid down by the Hon'ble Apex Court.

7. I do not find any infirmity in the award passed by the Claims Tribunal. The appeal is dismissed at the admission itself.

*Appeal dismissed.*

**I.L.R. [2014] M.P., 161**
**APPELLATE CIVIL**
***Before Mr. Justice U.C. Maheshwari***
M.A. No. 2209/2006 (Jabalpur) decided on 4 April, 2013

BADRI SINGH ...Appellant
Vs.
M/S GAUTAM TRAVELS ...Respondent

***Motor Vehicles Act (59 of 1988), Section 173*** **- Claim was dismissed on the ground that appellant is not the same person whose name was stated in the F.I.R. and due to lack of any M.L.C. report and medical papers of the appellant with the charge sheet - Further because of lack of deposition of any doctor in support of documents - Held - OPD ticket was prepared immediately after the incident by the duty doctor of Govt. Hospital - By which appellant was advised for x-ray of knee and spine and x-ray of cervical and C.T. scan of head and back - Held - That appellant sustained injuries in the alleged accident - Impugned award set aside - Claimant is awarded the sum of Rs. 10,000/- with the interest @ 6% p.a. (Paras 7, 8, 9 &12)**

*मोटर यान अधिनियम (1988 का 59), धारा 173* – दावा इस आधार पर खारिज किया गया कि अपीलार्थी वही व्यक्ति नहीं है जिसका नाम प्रथम सूचना रिपोर्ट में अंकित है और आरोप पत्र के साथ अपीलार्थी के किसी एम.एल.सी. रिपोर्ट एवं चिकित्सीय दस्तावेजों के अभाव के कारण – इसके अतिरिक्त दस्तावेजों के समर्थन में किसी चिकित्सक के कथन के अभाव के कारण – अभिनिर्धारित – सरकारी चिकित्सालय के ड्यूटी पर के चिकित्सक द्वारा घटना के तुरंत बाद ओपीडी टिकट तैयार किया गया – जिसके द्वारा अपीलार्थी के घुटने एवं रीड़ का एक्स–रे, सरवाईकल का एक्स–रे तथा सिर एवं पीठ के सी.टी. स्केन हेतु सलाह दी गई – अभिनिर्धारित – अपीलार्थी ने अभिकथित दुर्घटना में क्षतियां सहन की – आक्षेपित अवार्ड अपास्त – दावाकर्ता को 6 प्रतिशत प्रतिवर्ष ब्याज के साथ रु. 10,000/– की राशि अवार्ड की गई।

*Umesh Trivedi*, for the appellant.
*D.N. Shukla & Brajesh Mishra*, for the respondent.

**ORDER**

**U.C. MAHESHWARI, J.:-**The appellant/ claimant has filed this appeal under Section 173 of Motor Vehicle Act, 1988 being aggrieved by the award dated 20.2.2006 passed by 6th Motor Accident Claims Tribunal, Rewa in Claim Case

No.30/2005 whereby the claim of the appellant has been dismissed in toto.

2. The facts giving rise to this appeal in short are that the appellant being a practicing lawyer, aged about 54 years was travelling in the bus bearing registration No. M. P. 17-A/4680 on 13.3.2004 from Churhat to Rewa. The same was driven by respondent No.2 in rash and negligent manner, resultantly on the way the same was turned turtle, consequently, in such incident he sustained the injuries on his head, neck, ear and chest. Immediately after the incident on receiving the information in this regard a crime was registered at P. S. Gurh. After holding investigation the respondent No.2 was charge sheeted for the concerning offence. After sustaining the injuries in the alleged accident the appellant went to GMH hospital, Rewa for treatment, where on OPD ticket number 5880 the preliminary treatment was given to him by the duty doctor. MLC report (Ex. P.1) was also prepared, according to which he sustained three abrasions and one tenderness on different part of his person. On such day he was also advised for for x-ray of his knee and spine and was referred to CMO to do the needful. Subsequently, in continuation of his treatment his further OPD ticket No.3446 was prepared on dated 19.6.2004, according to which he was also advised to carry out C. T. Scan of head, back and cervical. Thereafter on the OPD ticket No.2400 dated 25.3.2004 he was again examined by the doctor and some report was prepared, according to which he was again advised for x-ray and C. T. Scan. The same was carried out. As per further averments of the claim petition due to aforesaid alleged injuries the appellant has sustained permanent disability in one of the ear. On account of aforesaid injuries he suffered the physical and mental agony. On the date of the incident the aforesaid bus driven by respondent No.2 was registered in the name of respondent No.1 while the same was duly insured with respondent No.3. With these pleadings the appellant has preferred his claim for compensation of Rs.10,00,000/-.

3. As per record of the Tribunal inspite service of notice on the respondents none of them was either appeared or filed their written statement, on which the case was proceeded ex-parte against them.

4. After recording the ex-parte evidence of the appellant on appreciation of the same by holding that the appellant Badri Singh is not the same person whose name was mentioned in the FIR and he has also not filed any reliable MLC report and other medical papers showing that he sustained the alleged injuries in the impugned accident his claim was dismissed by the Tribunal in

toto, on which the appellant has come to this Court with this appeal.

5. After taking me through the record of the Tribunal along with the exhibited papers and deposition of the appellant so also the impugned order the appellant's counsel argued that in view of the aforesaid OPD tickets (Ex. P.1 to Ex. P.3), prepared by the duty doctor of the government hospital and proved by the appellant himself before the Tribunal, there was no occasion with the Tribunal to hold that appellant has not sustained the alleged injuries in the alleged accident specifically when in the aforesaid first OPD ticket (Ex. P. 1) in the history of the incident it was mentioned the alleged injuries were sustained by the appellant in the road accident. The description of such injuries was also mentioned in the same. The place of incident is also stated in the OPD ticket. In continuation of such first OPD the appellant was further examined by the OPD ticket No. 3446 and 2400 (Ex. P.2 and Ex.P.3) and in view of advice of the doctor he went to the concerning clinic for his x-ray and C. T. Scan where the same were taken out. He also taken the treatment of various hospitals including Jamdar hospital at Jabalpur. He further said that in order to prove that he was travelling in the alleged bus he also filed and proved the ticket of such bus. He fairly conceded that along with the charge sheet neither MLC report nor any papers of the treatment of the appellant were submitted by the police but mere in the lack of such document his claim could not be thrown away by the Tribunal because as per the settled proposition of law the civil case should be decided by the Court on the basis of it's own recorded evidence of such case. He also said that on behalf of the appellant no doctor has been examined to prove the permanent disability sustained by the appellant but it is apparent from the papers and evidence available on the record that the appellant has sustained the grievous injuries in the alleged accident and due to such injury he also sustained the permanent disability in one of the ear but same have not been appreciated by the Tribunal with proper approach and his claim was dismissed under the wrong premises and prayed to set aside the impugned order and award his claim for the sum mentioned in the same by allowing this appeal.

6. Responding the aforesaid arguments on behalf of the respondent No.3/ Insurance Company Shri D. N. Shukla and Brajesh Mishra by justifying the impugned order said that the same being based on proper appreciation of the evidence the same do not require any consideration. In continuation he said that in the lack of deposition of doctor in support of said medical papers relating to the injuries of the appellant in the alleged incident such findings do

not require and interference at this stage. However, he fairly conceded that no reply or written statement was filed on behalf of respondent No.3 before the Tribunal but still in view of available record no case is made out in favour of the appellant to pass any award in his favour. In response of some query of the Court he fairly submitted that whatsoever evidence adduced by the appellant was unrebutted before the Tribunal because no evidence was adduced by any of the respondents. With these submissions he prayed for dismissal of the appeal.

7. Having heard the counsel at length, keeping in view their arguments after perusing the record of the Tribunal along with the papers available in the record and the impugned order, I am of the considered view that the Tribunal has committed grave error in dismissing the entire claim of the appellant. In the available circumstances the Tribunal has committed grave error in holding that the appellant is not the same person whose name was stated in the FIR registered with respect of the alleged accident. In such premises Tribunal also committed further error in holding that in the lack of any MLC report and medical papers of the appellant with the charge sheet filed against the respondent No.2 in the criminal case, it could not be deemed that the appellant has sustained any injury in the alleged accident. As such in the available circumstance aforesaid Ex. P.1 to Ex. P.3 are the sufficient document whereby it has been established on the record that the appellant sustained the alleged injuries in the impugned vehicular accident which was the consequence of rash and negligent driving of the aforesaid bus by the respondent No.2 but such documents have been ignored or the same have not been considered by the Tribunal with proper approach to award the claim of the appellant.

8. Mere perusal of Ex. P. 1, OPD ticket of the appellant prepared immediately after the incident by the duty doctor of the government hospital, in the head of the history of incident in such document Ex.P.1 it is stated that the appellant sustained the alleged injuries in the road accident, as in the head of history of the incident the place of the incident is also mentioned in the same. As per further averments of this OPD the doctor found three abrasions on the person of the appellant out of which one was on his chick another one on the frontal region of his skull and third abrasion with tenderness was found in the left leg, in addition to it on the back of the neck the tenderness was found. Except these injuries no other injuries were found on his person by the doctor. It is apparent from such OPD that appellant was advised for x-ray of knee and spine. Subsequently the appellant was again examined by the

doctor of such hospital on 19.3.2004 for which OPD ticket (Ex. P.2) was prepared, according to which again he was advised for x-ray of cervical and C. T. Scan of head and back and again on 25.3.2004 he was examined by the duty doctor of the same hospital and again he was advised for the same x-ray and C. T. Scan. In such premises it could be deemed that appellant has sustained such injuries in the alleged accident and not in any other incident.

9. It is true that on carrying out the C. T. Scan, according to its report no cervical problem was found in the spine. So far the treatment of the cervical, taken by the appellant from Jamdar Hospital, Jabalpur is concerned, it could be deemed that looking to the age of the person such problem has taken place in the neck of the appellant due to his profession in the age between 55 to 60 years because he is a practicing lawyer. In any case his cervical problem could not be connected with the impugned accident in the lack of deposition of any doctor stating that the appellant has suffered such problem because of injuries sustained in the alleged accident. In such premises in the lack of deposition of any medical expert in support of any of the documents available in the record, it could not be deemed that appellant has sustained permanent disability in one of the ear or any other part of his person. In such premises it is held that the appellant has sustained three abrasion and one tenderness on his person, accordingly he sustained the injuries simple in nature and not the grievous.

10. After holding that appellant has sustained aforesaid simple injuries in the alleged accident, I proceeded to consider the appropriate, just and proper compensation to pass the award in the matter.

11. In view of the injuries sustained by the appellant in the alleged accident, although after holding investigation of such injuries through C. T. Scan and x-ray it was revealed that he has not sustained any such injuries caused and created any permanent disability in his person but to clarify such position he has spent some amount in such examination then the Court is bound to consider such aspect to pass the award. So far the bills of the medicine are concerned, I am of the considered view that whatsoever medicine bill submitted by the appellant in the absence of the prescription of doctor are not relevant for the alleged injuries of three abrasion and one tenderness . So, in such premises, I deem fit to pass the award keeping in view the nature of the aforesaid injuries sustained by the appellant which are simple in nature so also the expenses of C. T. Scan and x-ray. Thus taking into consideration the over all circumstances of the case, I deem fit to award Rs.10,000/- to the appellant in all the head

including physical mental agony, C. T. Scan, x-ray treatment so also special diet for some days and for loss of income for the period in which he could not perform his professional work. So far saddling the liability of the sum of the award is concerned, it has been proved that the offending bus was driven by respondent No.2 in rash and negligent manner under the employment of respondent No.1, the registered owner, which was duly insured with respondent No.3. In such premises, all the respondents are liable to pay the awarded sum of compensation to the appellant jointly and severally.

12. In view of the aforesaid by allowing this appeal in part the impugned order of the Tribunal is hereby set aside and the claim of the appellant is awarded for the sum of Rs.10,000/- as stated above along with the interest @ 6% p. a. from the date of filing the claim petition before the Tribunal and the liability to pay the awarded sum is saddled against the respondents jointly and severally. It is made clear that if such sum is not deposited by the respondents within three months from today in the Tribunal then they shall be liable to pay the aforesaid interest @ 9% p. a.

13. There shall be no order as to costs.

14. The appeal is allowed in part as indicated above.

*Appeal partly allowed.*

**I.L.R. [2014] M.P., 166**
**APPELLATE CIVIL**
***Before Mr. Justice G.D. Saxena***
M.A. No. 73/2006 (Gwalior) decided on 19 June, 2013

OM PRAKASH ...Appellant
Vs.
GULAB SINGH & ors. ...Respondents

*A. Motor Vehicles Act (59 of 1988), Section 173 - Permanent Disability* - **Percentage is determined on the basis of the disability certificate issued by the Medical Board - Permanent Disability results in functional disability by which loss of earning capacity can be determined.** **(Para 7)**

*क. मोटर यान अधिनियम (1988 का 59), धारा 173 – स्थाई निःशक्तता* – प्रतिशत का निर्धारण, चिकित्सीय बोर्ड द्वारा जारी किये गये निःशक्तता प्रमाण पत्र के आधार पर किया जाता है – स्थाई निःशक्तता के फलस्वरुप, कार्य करने की

निःशक्तता हो जाती है जिसके द्वारा अर्जन क्षमता की हानि का निर्धारण किया जा सकता है।

***B. Motor Vehicles Act (59 of 1988), Section 173 - Compensation* - Money cannot renew a physical frame that has been battered and shattered - The court is to award sums which must be regarded as giving reasonable compensation so as to secure some uniformity in the general method of approach. (Para 9)**

*ख. मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर* – रुपया क्षतिग्रस्त एवं छिन्न–भिन्न शारीरिक ढांचे को नव निर्मित नहीं कर सकता – न्यायालय को ऐसी रकम अवार्ड करनी चाहिए जिसे युक्तियुक्त प्रतिकर दिया जाना समझा जाये, जिससे कि दृष्टिकोण अपनाने के सामान्य ढंग में कुछ समानता सुनिश्चित की जा सके।

**Case referred :**

(2011) 1 SCC 343.

*S.K. Shrivastava,* for the appellant.
*R.V. Sharma,* for the respondent No. 3/Insurance Company.

**ORDER**

**G.D. SAXENA, J.:-** This is an appeal by the claimant/appellant under Section 173 (1) of the Motor Vehicles Act 1988 against an Award dated 26th September, 2005 passed by the Motor Accidents Claims Tribunal, Chachoda, District Guna (M.P.) in Claim Case No.79/2004.

(2) By the impugned award, the learned Claims Tribunal has awarded a total sum of Rs.62,000/- (Rs. Sixty Two Thousand Only) for the injuries suffered by the claimant/injured in an motor accident.

(3) It is admitted fact that the alleged offending Truck No.DLIL/B-0651 was owned by respondent No.2 which was being driven at the time of incident by respondent No.1. It is alleged that on 21.12.2003 at around 4 O'clock in the evening, the said truck hit the jeep bearing number MP08/D-599 which was carrying claimants Ramswaroop, Omprakash (Present appellant) and Premnarayan. Said jeep was being driven by Brijesh who filed separate claim petition alongwith other claimants. When the passengers/claimants, namely, Ramswaroop, Omprakash (Present appellant) and Premnarayan were likely to get down from the jeep on being stopped the vehicle, the aforesaid truck

dashed the jeep. The driver of the jeep also received injuries. Other passengers travelling in the jeep received permanent disabilities and one of them died on the spot. The matter was reported to the Police. The case was registered against the driver and the owner of the offending vehicle for the offence under Section 279, 337, 338 and 304A of IPC. The truck was seized and the driver was arrested. Injured persons were sent to the hospital for treatment. After investigation, challan was submitted before the court competent. It is also not disputed that the said truck was insured with respondent No.3/Insurance Company. By the common impugned award all claim petitions were decided by the Tribunal.

(4) It is discernible from the evidence on record that injured Omprakash has received 20% permanent disability. It is submitted by the counsel appearing for him that he is the only bread earner in the family who used to assist the family by his monthly income @ Rs. 7,000/- and due to said accident he is unable to earn as much as he used to earn or could have earned. According to the counsel, the learned Claims Tribunal ought to have assessed proper income of the injured and awarded proper compensation. It is, thus, submitted that compensation awarded is on lower side and same needs to be enhanced in view of the facts and circumstances brought on record.

(5) Learned counsel for respondent No.3, on the other hand, submitted that there is no error and keeping in view all the facts into consideration, the learned claims tribunal has rightly assessed the income of the injured, therefore, the Award so passed does not require to be interfered with and the appeal is liable to dismissal.

(6) Heard the learned counsel for the parties and also perused the record of the case.

(7) In case of a permanent disability, percentage of permanent disability is determined on the basis of the disability certificate issued by the Medical Board constituted by the competent authority. The permanent disability also results in functional disability and the loss of earning capacity is determined on the basis of the loss of functional disability. If the tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the tribunal ascertains the actual extent of permanent disability of the claimant based upon the medical evidence, it has to determine and judge whether

such permanent disability has affected or will affect his earning capacity.

(8) As per medical certificate, the permanent disability of the limb of the claimant as a consequence of injury was 20%. Therefore, the learned tribunal should adopt the said percentage for determination of compensation and after assessing the loss of earning capacity in terms of percentage of the income, it has to be quantified in terms of the money to arrive at the future loss of earnings by applying the standard multiplier method used to determine loss of dependency.

(9) Now, what compensation should be awarded to a claimant who has become paraplegic on account of injuries received in an accident is a question for consideration. In such matters, it is really difficult to assess the exact amount of compensation which would be equivalent to the pain, suffering and the loss suffered by the claimant. It is true that money cannot renew a physical frame that has been battered and shattered. Therefore, the court is to award sums which must be regarded as giving reasonable compensation so as to secure some uniformity in the general method of approach. In the present case, the evidence on record shows that the claimant Omprakash is only a person who used to earn and assist the family and due to such an accident and receiving injury, he has lost capacity to earn and the family has suffered financial loss. The learned tribunal therefore should have calculated the amount so as to make good a financial loss suffered by the claimant and his family. In the case of *Raj Kumar Vs. Ajay Kumar* (2011) 1 SCC 343, the Hon. Apex court has laid down the following general principles for computation of compensation in injury cases:-

> "5. The provision of the Motor Vehicles Act, 1988 ("the Act", for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also

for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. [See *C.K. Subramania Iyer v. T. Kunhikuttan Nair, R.D. Hattangadi v. Pest Control (India) (P) Ltd. and Baker v. Willoughby*]

6. The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life.

> 7. Assessment of pecuniary damages under Item (i) and under Item (ii)(a) do not pose much difficulty as they involve reimbursement of actuals and are easily ascertainable from the evidence. Award under the head of future medical expenses—Item (iii)—depends upon specific medical evidence regarding need for further treatment and cost thereof. Assessment of non-pecuniary damages—Items (iv), (v) and (vi)— involves determination of lump sum amounts with reference to circumstances such as age, nature of injury/deprivation/disability suffered by the claimant and the effect thereof on the future life of the claimant. Decisions of this Court and the High Courts contain necessary guidelines for award under these heads, if necessary. What usually poses some difficulty is the assessment of the loss of future earnings on account of permanent disability—Item (ii)(a). We are concerned with that assessment in this case."

(10) So, after considering the evidence and keeping in view the law laid down by the Hon. Apex Court in the case of *Raj Kumar* (supra), calculation of compensation will be as follows:-

> (a) The monthly income of the claimant due to functional disability is assessed at Rs. 2500/-, (Annually comes to Rs. 30,000/-).
>
> (b) The loss of future earning per annum (20% of the aforesaid annual income) comes to Rs. 6,000/-.
>
> (c) Multiplier with reference to the age : 17.
>
> (d) Loss of future earning: (6,000 x 17) = 1,02,000/-.

(11) Apart from aforesaid, an additional sum of Rs.60,000/- is awarded under the Heads: (i) "expenses relating to treatment, hospitalization, medicines, transportation, nourishing food and miscellaneous expenditure" and (ii) "future medical expenses" beings Heads (i) and (iii) as laid down in the case of *Raj Kumar Case* (supra). Hence, now claimant/appellant is held entitled to receive an amount of compensation of Rs.1,62,000/- (Rs. One lac Sixty Two thousand only) in total, instead of Rs. 62,000/-, as directed under the impugned Award by the tribunal. This amount shall be paid within a period of three months from today by the respondents alongwith interest @ 7% p.a. from the date of

filing of claim petition.

(12) With the aforesaid modification in the award, the appeal stands disposed of. No order as to costs.

*Appeal disposed of.*

**I.L.R. [2014] M.P., 172**
**APPELLATE CIVIL**
***Before Mr. Justice G.D. Saxena***
M.A. No. 794/2002 (Gwalior) decided on 27 June, 2013

SHUKH DEVI (SMT.) & ors. ...Appellants
Vs.
DEVENDRA KUMAR & ors. ...Respondents

*A. Motor Vehicles Act (59 of 1988), Section 166 - Dependent* **- Includes mother and wife of the deceased. (Para 6)**

*क. मोटर यान अधिनियम (1988 का 59), धारा 166 – आश्रित* – मृतक की माता एवं पत्नी समाविष्ट हैं।

*B. Evidence Act (1 of 1872), Sections 56 & 57 - Judicial Notice* **- In absence of documentary evidence, the Claims Tribunal may take judicial notice of the increase in minimum wages due to inflation and rise in price index and compute accordingly the income of the deceased. (Para 6)**

*ख. साक्ष्य अधिनियम (1872 का 1), धाराऐं 56 व 57 – न्यायिक प्रज्ञान* – दस्तावेजी साक्ष्य की अनुपस्थिति में, दावा अधिकरण, मुद्रास्फीति के कारण न्यूनतम वेतन में बढोत्तरी और मूल्य सूचकांक में चढ़ाव का न्यायिक प्रज्ञान ले सकता है और तद्नुसार, मृतक की आय की गणना कर सकता है।

**Cases referred :**

2008 ACJ 2182, (2008) III ACC 134, (2009) 6 SCC 121.

*B.B. Shukla,* for the appellants.
*R.V. Sharma,* for the respondent No. 3/Insurance Company.

**ORDER**

**G.D. SAXENA, J.:-** Feeling dissatisfied with the amount of compensation determined by the learned Claims Tribunal Lahar, district Bhind (M.P.) in Claim

Case No.9/99, the claimants/appellants have preferred this appeal.

(2) In this case, one Ravindra met with an accident with Jeep No.MP06/6561. Appellant No.1-Smt. Shukh Devi and appellant No.2-Dwarika Prasad are the parents of the deceased while appellant No.3-Umakant and appellant No.4-Saguna are respectively brother and grandmother of the deceased. The wife of the deceased has been arrayed as respondent No.4. Other respondents, i.e., No.1,2 and 3 are owner, driver of the bus and New India Insurance Company, hereinafter referred to as the "Insurance Company". Before the claims tribunal, respondents No.1 and 2 were served with notices but they did not appear and hence proceeded *ex-parte*. The respondent No.3-Insurance Company appeared and filed the written statement denying the averments of the claim-petition. On the basis of the pleadings of the parties, the learned tribunal framed the issues. After appreciating the oral evidence and analysis of documentary evidence, the learned tribunal passed the impugned Award, awarding compensation overall to the sum of Rs. 2,48,000/- in favour of only claimant-appellant No.1 and respondent No.4, mother and wife of the deceased in the ratio of 20-80 of the award. Being aggrieved, the appellants have challenged the same by filing the present appeal, as mentioned above.

(3) Learned counsel for the appellants contended that the deceased was earning member in the family. He was employed privately and earning monthly Rs.3,000/-. After death of her husband, the respondent no.5-wife has suffered loss of love and affection. After his death, there was nobody to look after the family, hence, claiming to be dependents on the deceased, claim petition was filed before the learned tribunal under Section 166 of the Motor Vehicles Act, 1988 (for short 'the Act') for award of compensation but the tribunal has overlooked all these facts and passed the award in the manner indicated above, which is liable to be set aside. It is, therefore, prayed that the appeal may be allowed and appropriate directions may be issued for compensation in favour of the appellants.

(4) On the other hand, learned counsel appearing for the respondent No.3/Insurance Company opposed the prayer of the appellants and prayed for dismissal of the appeal as according to him, just and fair compensation has been awarded, which does not require to be interfered with or enhanced.

(5) Considered the respective arguments and perused the record.

(6) Admittedly, subject to the evidence to the contrary considered as

dependents, father, brother and sisters will not be dependents and therefore, the learned tribunal has not committed any illegality in holding mother and wife of the deceased as dependents of the deceased. As per the evidence brought on record, at the time of accident, the deceased was aged 22 years and by doing private job, he was earning money but for want of documentary evidence, the income of the deceased has not been properly assessed by the learned tribunal. It is settled law that where the legal representatives of the deceased victim do not have documentary evidence of the income of the deceased, the claims tribunal should take judicial note of the increase in minimum wages due to inflation and rise in the price index and compute accordingly the income of the deceased by taking the average of the minimum wages and its double. In this respect, reference may be made to the decisions in the cases of *Kanwar Devi Vs. Bansal Roadways* (2008 ACJ 2182) and *National Insurance Company Limited Vs. Renu Devi* (2008) III ACC 134. In that view of the matter and the peculiar facts that the family was being maintained by the deceased for computing the compensation, his annual income is assessed at Rs. 36,000/-. In this sum, applying ordinary rule of deduction of one-third towards personal and living expenses of the deceased, loss of dependency is held to be two-third of the income of the deceased and after deducting this percentage towards personal and living expenses of the deceased, the contribution to the family will be Rs.24,000/-. As the deceased was aged 22 years, hence, on the basis of the decision in *Sarla Verma (Smt) and others Vs. Delhi Transport Corporation and another* reported in (2009) 6 SCC 121, after applying the multiplier of 17, the amount will come to Rs.4,08,000/-. Besides, this amount, the mother and wife of the deceased are also held entitled to get Rs. 5,000/- on account of funeral and ritual expenses, Rs.10,000/- towards loss of consortium, Rs. 10,000/- for love and affection, and Rs. 10,000/- for loss of estate. In this manner, the mother and wife of the deceased (appellant No.1 and respondent No.4) are entitled to receive in the same ratio fixed by the tribunal as sum of Rs.4,38,000/- (Rs. Four Lac thirty eight thousand only) instead of the amount of Rs.2,48,000/-, awarded by the claims tribunal alongwith interest @ 8% on the enhanced amount from the date of filing of claim petition till realisation of the same.

(7) With the aforesaid modification in the award, the appeal stands disposed of.

No order as to costs.

*Appeal disposed of.*

**I.L.R. [2014] M.P., 175**
**APPELLATE CIVIL**

***Before Mr. Justice U.C. Maheshwari & Mr. Justice B.D. Rathi***
F.A. No. 87/2013 (Gwalior) decided on 3 July, 2013

SHANTI DEVI (SMT.) & anr. ...Appellants
Vs.
BALCHAND & anr. ... Respondents

*A.* ***Civil Procedure Code (5 of 1908), Order 14 Rule 1 & 2*** **- Issues, framed under Order 14 Rule 1 & 2 or any of them could not be decided on merits unless the evidence of the parties is necessary and needed, then such issue could neither be treated to be a preliminary issue nor could be decided in such manner. (Para 9)**

*क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 14 नियम 1 व 2* – विवाद्यक, जो आदेश 14 नियम 1 व 2 या इनमें से किसी एक के अंतर्गत विरचित किये गये हो, उन्हें गुणदोषों पर निर्णित नहीं किया जा सकता जब तक कि पक्षकारों का साक्ष्य आवश्यक एवं उपयुक्त न हो, तब उक्त विवाद्यक को न तो प्रारंभिक विवाद्यक समझा जा सकता है और न ही उक्त ढंग से निर्णित किया जा सकता है।

*B.* ***Civil Procedure Code (5 of 1908), Order 7 Rule 11 - Opportunity to amend plaint*** **- Held - Suit could not have been dismissed by the trial court unless the opportunity was extended to the appellants to amend their suit if necessary and to pay the court fees on proper valuation. (Para 10)**

*ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – वाद पत्र में संशोधन के लिए अवसर* – अभिनिर्धारित – विचारण न्यायालय द्वारा वाद खारिज नहीं किया जा सकता था जब तक कि अपीलार्थीगण को अपने वाद में संशोधन यदि आवश्यक हो, करने के लिए और समुचित मूल्यांकन करके न्यायालय शुल्क अदा करने के लिए अवसर नहीं दिया जाता।

*C.* ***Civil Procedure Code (5 of 1908), Order 7 Rule 11 - Grounds on which the suit may be dismissed*** **- Held - Could not have been decided by the trial court at the preliminary stage before the settlement of issues and recording of the evidence. (Para 12)**

*ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11* – आधार, *जिन पर वाद खारिज किया जा सकता है* – अभिनिर्धारित – विवाद्यकों का निपटारा

और साक्ष्य अभिलिखित किये जाने से पहले, प्रारंभिक प्रक्रम पर, विचारण न्यायालय द्वारा निर्णित नहीं किया जा सकता था।

**Case referred :**

AIR 1958 SC 245.

*N.K. Gupta,* for the appellants.
*A.S. Rathore,* for the respondents.

**ORDER**

The Order of the court was delivered by : **U.C. MAHESHWARI, J.:-** The appellants/plaintiffs have filed this appeal under Section 96 of C.P.C. being aggrieved by the order dated 9.4.2013 passed by Second Additional District Judge, Shivpuri in Civil Suit No.1-A/2013, whereby allowing the application of the respondent filed under Order VII Rule 11 of C.P.C. the Suit of the appellants has been dismissed at the initial stage.

2. The facts giving rise to this appeal, in short, are that appellants herein filed a suit for declaration and perpetual injunction against the respondents with respect of the house No.134 situated in Ward No.6, Court Road, Shivpuri. After receiving the summons of such Suit on behalf of the respondents' joint written statement filed. In which by challenging the averments of the plaint various other objections were also taken in the special pleadings.

3. Before framing the issues in the matter on behalf of the respondents herein an application under Order VII Rule 11 of C.P.C. was filed for dismissal of the Suit on various grounds:-

(i) The Suit has not been filed for the entire property of the Joint Hindu family.

(ii) The Suit has not been filed for the partition of the entire Joint Hindu Family property.

(iii) The Suit has not been filed with proper valuation and Court fees accordingly.

(iv) The suit deserves to be dismissed on account of nonjoinder of the necessary parties.

4. The averment of the aforesaid application of Order VII Rule 11 of C.P.C. were disputed on behalf of the appellants in their reply.

5. On consideration, the trial Court has allowed such application and dismissed the appellants' Suit in which the appellants have come to this Court.

6. Having heard the counsel at length, keeping in view his argument after going through the impugned order, we are of the considered view that what so ever grounds were taken by the respondents in the application under Order VII Rule 11 of the C.P.C could not have been decided by the trial Court at preliminary stage before framing the issues and recording the evidence. In any case, some of the question raised in the application could be decided by the trial Court only after framing the issues as preliminary issues under Order XIV Rule 2 of the C.P.C. if the evidence is not required to decide the same.

7. So far the objection relating to the deficit valuation of the Suit and the Court fees is concerned, the Court is bound to decide such questions on the basis of the averments of the plaint, without influencing by any of the objection taken by the defendants/respondents either in their written statement or in the aforesaid application. In such premises, on perusing the averments of the plaint, it is apparent that the Suit has been filed by the appellants for declaration to declare his right over the property on the basis of the adverse possession and pursuant to it, the prayer for perpetual injunction is also made and accordingly the suit was valued and Court fees has been affixed but the trial Court has decided such issue by influencing the averments stated by the respondent in their aforesaid application.

8. So such approach of the trial Court is not sustainable. Our aforesaid view is fully fortified by the judgment of the Apex Court in the matter of *S.Rm. Ar. S. Sp. Sathappa Chettiar Vs. S. Rm. Ar. Rm. Ramanathan Chettiar*, reported in AIR 1958 S.C. 245, in which it has been held as under:-

> "The question of court-fees must be considered in the light of the allegations made in the plaint and its decision cannot be influenced either by the pleas in the written statement or by the final decision of the suit on the merits".

9. Apart the aforesaid, it is settled preposition of law that whenever the issues framed under Order XIV, Rule 1, 2 of the C.P.C. or any of them could not be decided on merits unless the evidence of the parties is necessary and needed then such issue could neither be treated to be a preliminary issues nor could be decided in such manner. In view of this principle the questions relating to the disputed property whether the same is joint family property or not, or

the impugned suit in the absence of the prayer of partition of the property or even in the absence of necessary parties is maintainable or not, could not be decided unless the issues are framed and the evidence is recorded.

10. Apart the aforesaid, suit could not have been dismissed by the trial Court unless the opportunity was extended to the appellants to amend their suit if necessary and to pay the necessary Court fees on proper valuation.

11. In view of the aforesaid discussion, the impugned order of the Trial Court being perverse, irregular and against the proprietary of the law is not sustainable and deserves to be set-aside.

12. Consequently, by allowing this appeal, the impugned order dated 9/4/2013 is hereby set-aside and the case is remitted back to the Trial Court with a direction to frame the issues and decide afresh on merits in accordance with the procedure prescribed under the law pursuant to it the aforesaid application of respondents filed under Order VII Rule 11 of C.P.C. is dismissed by extending the liberty to the respondents to raise such question at appropriate stage of trial. There shall be no order as to cost. Decree be drawn up accordingly.

13. At the request of the parties, they are directed to appear before the Trial Court firstly on 05.08.2013.

14. Office is directed to send the record of the trial Court alongwith a copy of this order within 15 days.

*Appeal allowed.*

**I.L.R. [2014] M.P., 178**
**APPELLATE CIVIL**
***Before Mr. Justice G.D. Saxena***
M.A. No. 1009/2004 (Gwalior) decided on 1 August, 2013

PUJA (KU.) ...Appellant
Vs.
M.P.S.R.T.C. & ors. ...Respondents

***Motor Vehicles Act (59 of 1988), Section 173 - Amount of Compensation - Enhancement* - When one is considering the case of a gravely injured child who is going to live for many years into adult life, very different considerations apply - There are compelling social**

**reasons why a sum of money should be awarded for his future loss of earnings - Damages awarded for her future loss of earnings will in the future be available to provide a home for her and to feed her and provide for such extra comforts as she can appreciate - It can not be assumed that her parents will remain able to house, feed and care for her throughout the rest of her life - Further held, that, if of course, damages have been awarded on the basis of the full cost of residential care so that they include the cost of roof and board, any award for future loss of earning will be small because there will be a very large overlap between the two heads of damage. (Para 7)**

*मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर की रकम – बढ़ाया जाना* – जब कोई किसी गंभीर रुप से आहत बालक जो वयस्क जीवन के कई वर्षों तक जीवित रहने वाला है, के प्रकरण पर विचार करता है तब, बहुत भिन्न विचारण लागू होगा – बाध्यकारी सामाजिक कारण है कि क्यों उसके भविष्य अर्जन की हानि के लिए राशि अवार्ड की जाये – उसके भविष्य के अर्जन की हानि हेतु अवार्ड की गई क्षतिपूर्ति उसे भविष्य में अपने घर की व्यवस्था करने के लिये और स्वयं का पोषण करने तथा ऐसे अतिरिक्त सुविधाओं की व्यवस्था करने के लिये उपलब्ध हो जिसे वह पर्याप्त समझ सके – यह धारणा नहीं की जा सकती कि उसके माता–पिता उसे आद्योपांत उसके शेष जीवन भर घर में रखने, पोषण करने और देखभाल करने में सक्षम बने रहेंगे – आगे अभिनिर्धारित किया गया कि निश्चित रुप से यदि निवासी देखभाल के पूर्ण व्यय के आधार पर क्षतिपूर्ति अवार्ड की गई जिसमें रहने और खाने का व्यय समाविष्ट होगा, भविष्य के अर्जन की हानि के लिये कोई भी अवार्ड कम ही होगा क्योंकि क्षतिपूर्ति के दोनों मद के बीच में बहुत अधिक अतिव्यापन होगा।

**Case referred :**

(2012) 10 SCC 177.

*Kripal Singh*, for the appellant.
*Amit Bansal*, for the respondents No. 1 to 3.

**ORDER**

**G.D. SAXENA, J.:-** This appeal under Section 173 of the Motor Vehicles Act 1988 has been preferred by the claimant/appellant against an Award dated 7th August 2004 in a Claim Case No. 43/2002 by the First Additional Member of the Motor Accident Claims Tribunal Morena (M.P.), seeking enhancement of the compensation amount.

(2) The facts, in short, relevant for decision of this appeal are that on 2nd April 2002 at about 3-30 p.m., injured Miss Puja, aged 4 years alongwith her grandfather was standing on the road side. At that time, suddenly a Mini Bus bearing No. MP07/F 806, owned by the M.P. State Transport Corporation and driven by respondent No.4 came and hit the child. A wheel of the bus run over the legs of injured causing severe injuries to her body. An F.I.R. was lodged against the accused-driver of the bus on which a crime for offence under sections 279 and 338 of I.P.C. was registered and after investigation, the charge sheet was filed before the Criminal Court. The injured got treatment in various specialized hospitals under supervision of eminent Surgeons and Physicians. Huge money was spent on her treatment. Lastly, her right leg was amputated. A claim petition seeking an award of Rs. Rs. 5,20,000/- was filed. However, the learned tribunal after considering the entire evidence passed an award of Rs. 1,50,000/- with interest @ 9% p.a. from the date of petition till full and final realisation of the amount.

(3) The submissions on behalf of the claimant/appellant are that the learned tribunal without considering the evidence on record and without considering the law in this regard passed the award which is on lower side. It is submitted that the tribunal did not appreciate the evidence properly while awarding compensation and overlooked the factual position that the appellant has become paraplegic on account of injuries received in an accident throughout of her life and her bright future is totally diminished. Virtually, she has suffered a painful life after such an accident. It is submitted that the claimant even after completion of treatment and amputation of leg has become totally dependent on the calipers. The accident was proved to be direct result of rash and negligent driving of the employed driver of the State Transport Corporation. Under these circumstances, it is prayed that the amount of award as passed by the tribunal may be enhanced up to the extent of Rs. 5,00,000/- with interest as awarded by the learned tribunal including the cost of the present appeal.

(4) The respondents have not filed any cross-objection assailing the impugned Award but simply denied the averments of the petition as well as the accident on the part of their employed driver with a prayer to set aside the Award.

(5) Heard the learned counsel for the parties. Also perused the record of the case and the relevant law.

(6) Before proceeding to determine as to what should be just amount of

compensation in the light of the nature of injuries received by the appellant, this court may deal with one of the questions raised, namely, whether it will be permissible to make an award in excess of the amount as claimed in the petition.

(7) When one is considering the case of a gravely injured child who is going to live for many years into adult life, very different considerations apply. There are compelling social reasons why a sum of money should be awarded for his future loss of earnings. The money will be required to care for him. Take the present case. It is not a case where damages have been awarded which will provide a sufficient sum for her and be cared for at all times. Damages awarded for her future loss of earnings will in the future be available to provide a home for her and to feed her and provide for such extra comforts as she can appreciate. It cannot be assumed that her parents will remain able to house, feed and care for her throughout the rest of her life. If, of course, damages have been awarded on the basis of the full cost of residential care so that they include the cost of roof and board, any award for future loss of earnings will be small because there will be a very large overlap between the two heads of damage.

(8) In *Subulaxmi Vs. T.N. State Transport Corpn.*, (2012) 10 SCC 177, at page 181: the Hon. Apex Court observed as follows :-

> ".....this Court expressed the view that compensation can be granted towards permanent disability as well as loss of future earnings, for one head relates to the impairment of person's capacity and the other relates to the sphere of pain and suffering and loss of enjoyment of life by the person himself. The Bench also relied upon *Laxman v. Oriental Insurance Co. Ltd.*, wherein it has been laid down thus: (SCC p. 762, para 15)
>
> "15. The ratio of the abovenoted judgments is that if the victim of an accident suffers permanent or temporary disability, then efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the pain, suffering and trauma caused due to the accident, loss of earning and the victim's inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident."

Thus, the view expressed by the High Court on this score is not sustainable.

6. Be it noted, the High Court has granted Rs 20,000 for pain and suffering and Rs 10,000 for loss of amenities. In this context, we may profitably refer to *Govind Yadav v. New India Insurance Co. Ltd.* wherein this Court after referring to the pronouncements in *R.D. Hattangadi v. Pest Control (India) (P) Ltd. Nizam's Institute of Medical Sciences v. Prasanth S. Dhananka Reshma Kumari v. Madan Mohan Arvind Kumar Mishra v. New India Assurance Co. Ltd.and Raj Kumar v. Ajay Kumarhas* laid down as under: (*Govind Yadav* case, SCC p. 693, para 18)

"18. In our view, the principles laid down in A*rvind Kumar Mishra v. New India Assurance Co. Ltd.and Raj Kumar v. Ajay Kumarmust* be followed by all the Tribunals and the High Courts in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily. If the victim of the accident suffers permanent disability, then efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and his inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident."

Thereafter, the Bench proceeded to state whether in the said case, the compensation awarded to the claimant victim was just and reasonable or was he entitled to enhanced compensation under certain heads, namely: (*Govind Yadav* case, SCC p. 693, para 19)

(i) Loss of earning and other gains due to the amputation of leg;

(ii) Loss of future earnings on account of permanent disability;

(iii) Future medical expenses;

(iv) Compensation for pain, suffering and trauma caused due to the amputation of leg;

(v) Loss of amenities including loss of the prospects of marriage; and

(vi) Loss of expectation of life."

(9) Now, looking to the statements of the claimants, it clearly indicates that on 2nd April 2002 at about 3-30 p.m., at Porsa Gormi State Road in village Nand Ka Pura under jurisdiction of P.S., Porsa, due to rash and negligent driving by respondent No.4 of Bus No. MP07/F 806 of the State Road Transport Corporation, the girl child aged 4 years who was present with her grandfather on the road side was made subject to the accident causing serious injuries to her person. The injuries were serious in nature. The crime under Sections 279 and 338 of I.P.C. was registered against the driver of bus involved in accident. The injuries were primarily cured in local hospitals. Since her father was in army, so thereafter her treatment was done in a Military Hospitals having specialist, physicians and surgeons. It is also proved that during treatment for crush injury, ultimately for saving her life, her right leg below knee was amputated.

(10) In the light of the above evidence and keeping in view the principles as laid down by Hon. Apex Court in the case of *Subulaxmi* (supra) in the opinion of this court, the learned tribunal took a totally erroneous view of the matter and also failed to apply the correct principles in making assessment of the amount of compensation, which ought to have been applied in the instant case. The amount awarded is not the just amount of compensation. So, in view of above, the compensation for injuries is assessed as follows :-

(i) Loss of earning and other gains due to the amputation of leg- Rs. 1,00,000/-.

(ii) Loss of future earnings on account of permanent disability - Rs. 1,00,000/-.

(iii) Future medical expenses- Rs. 50,000/-

(iv) Compensation for pain, suffering and trauma caused due to the amputation of leg- Rs. 50,000/-

(v) Loss of amenities including loss of the prospects of

| | | |
|---|---|---|
| | marriage- Rs.1,00,000/-. | |
| (vi) | Loss of expectation of life-Rs.1,00,000/- | |
| | **Total** | **Rs. 5,00,000/-** |

(11) Thus, the appellant-claimant shall be entitled to receive total sum of *Rs. 5,00,000/- (Rs. Five Lac only)* instead of Rs. 1,50,000/-. The enhanced amount of Rs. 3,50,000/- shall carry interest @ 9 % per annum from the date of the petition. The entire amount shall be deposited within a period of three months from the date of this order. The disbursement of total award will be subject to the terms of the award passed by the learned tribunal.

(12) Accordingly, the appeal stands allowed in the manner aforesaid.

*Appeal allowed.*

**I.L.R. [2014] M.P., 184**
**APPELLATE CIVIL**
***Before Mr. Justice Alok Aradhe***
S.A. No. 14/2001 (Jabalpur) decided on 13 August, 2013

RAMDEVI BAI (SMT.) (DEAD THROUGH LRs.) & anr. ...Appellants
Vs.
KANAK SINGH (DEAD THROUGH LRs.) & ors. ...Respondents

***Civil Procedure Code (5 of 1908), Section 100, Order 12 Rule 2 - Second Appeal - Admission of documents is admission of contents of documents*** **- Sale deeds (Exhibits P/1 & P/2) are registered documents - Defendant No. 1 has admitted her thumb impression on the sale deeds - The sale deeds also contain recital with regard to payment of consideration - Thus, the execution of the sale deeds is established beyond any iota of doubt. (Para 9)**

*सिविल प्रक्रिया संहिता (1908 का 5), धारा 100, आदेश 12 नियम 2 – द्वितीय अपील – दस्तावेजों की स्वीकृति ही, दस्तावेजों की विषयवस्तु की स्वीकृति है* – विक्रय विलेख (प्रदर्श पी/1 व पी/2) पंजीकृत दस्तावेज है – प्रतिवादी क्र. 1 ने विक्रय विलेख पर अपनी अंगूठा निशानी स्वीकार की है – विक्रय विलेखों में प्रतिफल के भुगतान संबंधी उपकथन भी समाविष्ट है – अतः विक्रय विलेखों का

निष्पादन, कण मात्र संदेह से भी परे स्थापित होता है।

**Cases referred :**

1994 (2) MPWN SN 187, (2001) 2 MPLJ 339, AIR 1960 SC 100, AIR 1966 SC 1697, AIR 1924 Nagpur 146, AIR 1960 MPLJ 1326, ILR 29 All. 184 (PC), 1970 MPLJ 50.

*Imtiyaz Hussain,* for the appellants.
*Vishal Dhagat,* for the respondents.

**JUDGMENT**

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

> "1. Whether the finding of the first appellate Court reversing the finding of the trial Court that registered sale-deeds dated 20.2.1986 (Ex. P-1 and P-2) were obtained by fraud by the plaintiffs, is highly perverse and unreasonable ?
>
> 2. Whether the two registered sale deeds mentioned above were obtained by the plaintiffs from Smt. Ramdevi Bai by exercising undue influence and fruad and these were sham and bogus documents ?"

2. The facts, giving rise to filing of the appeal, briefly stated, are that the plaintiffs who are related to each other as husband and wife, filed the suit inter alia on the ground that the defendants are the members of their family. However, the partition had taken place amongst them about forty to forty-five years ago. It was further pleaded that the defendant No.1 vide registered sale deeds dated 20.2.1986 (Exhibits P-1 and P-2) sold the suit lands for consideration of Rs.10,000/- and Rs.30,000/-respectively to the plaintiffs and handed over the possession of the suit lands. On the basis of the aforesaid sale deeds, the names of the plaintiffs were recorded in the revenue record by Tahsildar vide order dated 19.7.1988. However, on 13.6.1993, the defendants threatened the plaintiffs with dispossession. Accordingly, the plaintiffs filed a suit seeking injunction. However, after dismissal of the application for grant of temporary injunction, the defendants forcibly took over the possession of the suit lands. Thereafter by way of amendment, the plaintiffs incorporated the relief of declaration of title, possession and mesne profit.

3. The defendants filed the written statement in which execution of the sale deeds dated 20.2.1986 was denied and it was pointed out that the defendant No.1 had leased out the land in the year 1984-85 to the plaintiff No.2. However, the plaintiff No.2 fraudulently got the thumb impression of the defendant No.1 on the sale deeds on the pretext that the documents pertain to lease. It was further pleaded that the sale deeds (Exhibits P-1 and P-2) are forged documents and the order of mutation in favour of the plaintiffs has been set aside by the Sub-Divisional Officer and the defendant No.1 is in possession of the suit lands as owner thereof.

4. The trial Court vide judgment and decree dated 20.1.2000 inter alia held that though the defendant No.1 has admitted her thumb impression on the documents (Exhibits P-1 and P-2) yet she had stated in her evidence that she put her thumb impression on the documents under impression that the said documents pertain to lease. It was further held that the burden was on the plaintiffs to prove the execution of the sale deeds i.e. Exhibits P-1 and P-2 however, the plaintiffs failed to discharge the same. The trial Court also held that the witnesses to the sale deeds, namely, Genda Lal and Nand Kishore were not examined as they are sons of the plaintiffs and since the documents (Exhibits P-1 and P-2) are *ab initio void* therefore it is not necessary for the defendant No.1 to seek cancellation of the same. It was also found that the defendants were in possession of the suit lands since 1987 and, therefore, no injunction can be granted in favour of the plaintiffs. Accordingly, the suit filed by the plaintiffs was dismissed.

5. The lower appellate Court vide judgment and decree dated 7.12.2000 inter alia, held that the sale deeds (Exhibits P-1 and P-2) are registered documents. The defendant No.1 admitted her thumb impression on the aforesaid documents and the burden to prove the plea of fraud is on the person who pleads the same. It was further held that though the defendant No.1 had initially filed the suit seeking cancellation of the documents (Exhibits P-1 and P-2) however, the aforesaid suit was dismissed by the trial Court on the ground that the reliefs claimed in the suit are beyond pecuniary jurisdiction of the trial Court. Thereafter the defendant No.1 did not initiate any proceeding for cancellation of the sale deeds. It was also held that the documents (Exhibits P-1 and P-2) are in existence and, therefore, they cannot be treated as null and void and on the strength of the sale deeds the plaintiffs are the owners of the suit lands. The lower appellate Court further found that the land admeasuring 2.5 acres of khasra number 165 was acquired and, therefore, no injunction in

respect of the same can be granted. It was further held that the defendant No.1 was placed in possession of the suit lands sometime in September, 1993. Accordingly, the claim of the plaintiffs for declaration in respect of lands admeasuring 4.77 hectares, 1.80 hectare, 0.05 hectare and 0.06 hectare bearing khasra numbers 112/1, 112/1, 113 and 189 respectively situate at village -Cheech, tahsil- Harsud, district- Khandwa was decreed and the defendants were directed to pay the mesne profit at the rate of Rs.3,000/- per annum from the date of institution of the suit till delivery of possession.

6. Learned counsel for the appellants submitted that the lower appellate Court grossly erred in reversing the well reasoned judgment and decree passed by the trial Court. It is further submitted that the lower appellate Court reversed the findings recorded by the trial Court only on the ground that the defendant No.1 has admitted her thumb impression on the documents (Exhibits P-1 and P-2) and the documents in question are registered documents. It is also submitted that the plaintiff No.2 was enjoying the good faith and confidence of the defendant No.1 and, therefore, the burden was on the plaintiffs to prove due execution of the documents (Exhibits P-1 and P-2) which they failed to discharge. It was further urged that the sale consideration was not paid before the Registrar which renders the payment of sale consideration doubtful. It is also contended that neither any attesting witness nor the scribe to the documents (Exhibits P-1 and P-2) was examined. In support of his submissions, learned counsel for the appellants has placed reliance on the decisions in *Padam Singh v. MIs. Nemichand Khemchand,* 1994 (2) MPWN SN 187 and *Sirmul v. Smt. Annapurna Devi Ravi KumarAwasthy,* (2001) 2 MPLJ 339.

7. On the other hand, learned counsel for the respondents submitted that the defendant No.1 had previously filed the suit for cancellation of the sale deeds (Exhibits P-1 and P-2). However, the same was dismissed on the ground that the trial Court had no pecuniary jurisdiction. Thereafter neither any action for cancellation of the sale deeds in question was taken by the defendant No.1 nor any counter claim was filed. It is further submitted that the defendant No.1 is a literate woman and, therefore, it cannot be inferred that she signed the document without even reading the same. It was also urged that the lower appellate court has assigned valid and cogent reasons for setting aside the findings recorded by the trial Court and in fact the burden was on the defendant No.1 to prove that the sale deeds (Exhibits P-1 and P-2) were got executed fraudulently.

8. I have considered the submissions made by learned counsel for the parties and have perused the records. Before proceeding to answer the substantial questions of law it is appropriate to notice relevant legal principles which are necessary to be reiterated for enabling this Court to answer substantial questions of law involved in the appeal. An admission is the best piece of evidence that a party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. [See: *Narayan Bhagwant Gosavi Balajiwale v. Gopal Vinayak Gosavi and Others*, AIR 1960 SC 100] It is equally well settled legal proposition that an admission of a document is admission of the facts contained in the document [See: *Sitaram Motilal Kalal V. Santanuprasad Jaishanker Bhatt,* AIR 1966 SC 1697] In *Hemraj Marwari v. Trimbak Kunbi,* AIR 1924 Nagpur 146 it has been held that it is the intention of the parties which has to be looked into to decide whether the sale deed operates as a transfer of interest from the vendor to the vendee and burden of proving that it was not so intended is on the party who asserts this fact. Similar view has been expressed by a Division Bench of this Court in *Sukaloo Basari Satnami and Another v. Punau Bodhan Satnami,* AIR 1960 MPLJ 1326. In *Chandra Kumar v. Narpat Singh,* ILR 29 All. 184 (PC) it has been held that where vendor receives full consideration under the sale deed and subsequently, denies the receipt of full consideration, the burden lies heavily on him to explain his admission and to prove non-receipt of consideration. Similar view has been taken in *Pandit Ramjiial Tiwari v. Vijai Kumar and Others,* 1970 MPLJ 50.

9. After having noticed the relevant legal propositions, the question that survives for consideration is whether the defendant No.1 has been able to discharge the burden that there was no intention to transfer the suit lands to the plaintiffs. The sale deeds (Exhibits P-1 and P-2) are registered documents. The defendant No.1 has admitted her thumb impression on the sale deeds. The sale deeds also contain recital with regard to payment of consideration. Thus, the execution of the sale deeds is established beyond any iota of doubt. The defendant No.1 who has been examined DW-1 in her evidence in paragraph 5 stated that she signs a document and does not put the thumb impression. In paragraph 7 of her evidence she has further admitted that no threat was given by the plaintiffs when she put the thumb impression on the documents (Exhibits P-1 and P-2). However, she has merely stated that the plaintiffs had played fraud on her. In paragraph 12 she stated that previously she had filed the suit to set aside the sale deeds which was dismissed. It is

pertinent to mention here that though the defendant No.1 had previously filed the suit seeking cancellation of the sale deeds (Exhibits P-1 and P-2) however, even after dismissal of the same on the ground that the trial Court has no pecuniary jurisdiction to try the claim of the defendant No.1, she did not initiate any action for cancellation of the sale deeds. From close scrutiny of the statement of defendant witness No.1, it is pertinent to mention here that in her evidence, the defendant No.1 had nowhere stated that the plaintiffs got her thumb impression on the sale deeds on the pretext that the documents in question, namely, Exhibits P-1 and P-2 pertain to lease. Thus, from the narration of the facts, it is graphically clear that the defendant No.1 failed to discharge the burden to prove that by execution of Exhibits P-1 and P-2, she did not intend to convey the suit lands to the plaintiffs.

10. For the aforementioned reasons, the substantial questions of law framed by this Court are answered in the negative and against the appellants. In the result, the appeal fails and is hereby dismissed. However, there shall be no order as to costs.

*Appeal dismissed.*

**I.L.R. [2014] M.P., 189**
**APPELLATE CIVIL**
***Before Mr. Justice Alok Aradhe***
S.A. No. 72/2001 (Jabalpur) decided on 2 September, 2013

COLLECTOR, JABALPUR & ors. ...Appellants
Vs.
SMT. CHANDRAWATI SARAF ...Respondent

*A. Specific Relief Act (47 of 1963), Section 5 - Suit for possession* - **Plaintiff's name recorded as owner of suit property and adjoining plot recorded in name of State Government - Both plots have separate existence - Plaintiff had acquired title in respect to suit plot by registered sale deed - Respondents failed to file any documentary evidence either to prove their possession or title in respect to suit plot - No material on record to prove that suit plot was recorded in revenue record in name of State Government - Trial Court holding plaintiff to be owner and in possession of suit plot and same does not belong to State Government. (Para 9)**

*क. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 5 — कब्जे के*

*लिए वाद* – वाद सम्पत्ति के स्वामी के रुप में वादी का नाम दर्ज था और लगा हुआ प्लाट, राज्य सरकार के नाम से दर्ज था – दोनों प्लाट का पृथक अस्तित्व है – वादी ने वाद प्लाट के संबंध में, पंजीकृत विक्रय विलेख द्वारा हक अर्जित किया – प्रत्यर्थीगण, वाद प्लाट के संबंध में अपना कब्जा या हक साबित करने के लिए किसी दस्तावेजी साक्ष्य को प्रस्तुत करने में असफल रहे – अभिलेख पर कोई सामग्री नहीं यह साबित करने के लिए कि वाद प्लाट, राजस्व अभिलेख में राज्य सरकार के नाम पर दर्ज था – विचारण न्यायालय ने वादी को वाद प्लाट का स्वामी एवं कब्जाधारी होना और वह राज्य सरकार का नहीं होना अभिनिर्धारित किया।

***B.*** ***Limitation Act (36 of 1963), Section 3 & Article 65, Civil Procedure Code (5 of 1908), Order 39, Rule 1 & 2 - Suit for declaration and permanent injunction*** **- Cause of action accrued on 05.06.1990, when Town Inspector did not permit demarcation of suit plot - Suit filed on 09.07.1990 - Suit not barred by limitation. (Para 11)**

*ख. परिसीमा अधिनियम (1963 का 36), धारा 3 व अनुच्छेद 65, सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39, नियम 1 व 2 – घोषणा एवं स्थायी व्यादेश हेतु वाद* – वाद कारण 05.06.1990 को उत्पन्न हुआ जब टाउन इन्स्पेक्टर ने वाद प्लाट के सीमांकन की अनुमति नहीं दी – वाद 09.07.1990 को प्रस्तुत किया गया – वाद परिसीमा द्वारा वर्जित नहीं है।

***C.*** ***Civil Procedure Code (5 of 1908), Section 100 - Finding of fact*** **- Court cannot interfere with findings of fact until or unless same is perverse or contrary to material on record - In exercise of power u/s 100, High Court cannot re-appreciate evidence. (Para 8)**

*ग. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – तथ्य का निष्कर्ष* – तथ्य के निष्कर्ष में न्यायालय तब तक हस्तक्षेप नहीं कर सकता जब तक कि वह अनुचित या अभिलेख की सामग्री के विरुद्ध नहीं है – धारा 100 के अंतर्गत शक्ति का प्रयोग करते हुए उच्च न्यायालय साक्ष्य का पुनः मूल्यांकन नहीं कर सकता।

***D.*** ***Civil Procedure Code (5 of 1908), Sections 11 & 100 - Res judicata - Applicability*** **- If validity of an order passed during proceeding in the suit is agitated by a party in a higher forum, then the order passed by the higher forum operates as res judicata when the matter again comes before the High Court by way of Second Appeal. (Para 10)**

*घ. सिविल प्रक्रिया संहिता (1908 का 5), धाराएं 11 व 100 – पूर्व न्याय – लागू किया जाना* – यदि एक पक्षकार द्वारा वाद की कार्यवाही के दौरान पारित किसी आदेश की विधि मान्यता को उच्चतर न्यायालय में चुनौती दी जाती है, तब

उच्चतर न्यायालय द्वारा पारित आदेश पूर्व न्याय के रुप में प्रवर्तित होगा जब द्वितीय अपील के रुप में मामला पुनः उच्च न्यायालय के समक्ष आता है।

**Cases referred :**

(2010) 6 SCC 427, AIR 1967 MP 120, AIR 1968 SC 111, (2012) 8 SCC 148, (1990) 2 SCC 42, (1996) 6 SCC 229, AIR 1985 SC 931, AIR 1979 Patna 18, AIR 1975 Punjab 39, 1964 MPLJ 502, LPA NO. 13/1992 order dt. 18.11.1997, 1979 JLJ 714, AIR 1961 SC 808, (2010) 2 SCC 194, (2009) 5 SCC 264, (2011) 7 SCC 189, (2011) 1 SCC 158, (2012) 7 SCC 288, (1998) 4 SCC 361, AIR 1914 PC 72, AIR 1930 PC 270.

*R.D. Jain,* A.G. & *R.P. Tiwari,* G.A. for the appellants.
*Ravish Agrawal* with *Sankalp Kochar*, for the respondent.

**JUDGMENT**

**ALOK ARADHE, J. :-** This appeal is by the defendants which was initially admitted by a Bench of this Court on the following substantial questions of law :-

> "1. Whether the finding of the two Courts below that the land in dispute is part of Khasra No. 431/8 belonging to the plaintiff, is perverse ?
>
> 2. Whether the land in dispute is of the ownership of the Police Department of State of Madhya Pradesh ?"

Thereafter vide order dated 29.08.2013 following additional substantial questions of law were framed :

> "3. Whether suit suffers from the defect of non-joinder of necessary party as the State Government was not impleaded as defendant in the suit ?
>
> 4. Whether the suit is not maintainable, under Order 23 Rule 4 of the Code of Civil Procedure as the previous suit was withdrawn without seeking leave to file a fresh suit ?
>
> 5. Whether the suit is barred by limitation?"

2. This appeal arises from a suit for declaration and Permanent Injunction instituted by respondent plaintiff. The claim in the suit is based on the ground that Mrs. Lalita James was the owner of Sub-Plots No. 16 and 18 which

form part of Plots No. 431 and 432, sheet No. 273 admeasuring 3587 sq. ft. situate adjacent to Police Station Gorakhpur. The plaintiff purchased the suit plot vide registered sale deed dated 20.8.1982 from aforesaid Lalita James and she was placed in possession. The plaintiff got her name mutated in revenue records. On 20.3.1985 the plaintiff went to suit plot along with labourers to fence the suit plot, however Town Inspector of the police Station, Gorakhpur restrained the plaintiff from doing so and informed her that the suit plot belongs to police department. The plaintiff thereupon initiated proceeding for demarcation of the plot. The notices were issued to the defendants to remain present on 28.4.1985. However, none appeared on behalf of the defendants. The Sub-Engineer of Public Works Department was present on behalf of the defendant No.6 who was satisfied with the demarcation. The plot No.430 as well as the suit plot was demarcated. The demarcation report dated 11.5.1985 was submitted by the Revenue Inspector. However, defendants kept on interfering with the possession of the plaintiff over the suit plot.

3. The plaintiff thereafter filed civil suit, namely, C.S. No.3-A/1986 seeking the relief of declaration of title and permanent injunction. However, on the assurance of Deputy Inspector General of Police the suit was withdrawn on 18.11.1987. However, once again the police officials started interring with plaintiff's possession over the suit plot. The plaintiff filed M.P. No.3414/1989 which was decided by the Division Bench vide order dated 6.7.1989, with the liberty to the plaintiff to file an action in the civil court and obtain proper relief as she may feel entitled to. The plaintiff once again filed an application before the Tahsildar for demarcation of plots. The Revenue Inspector on 5.6.1990 submitted report to Tahsildar that Town Inspector, Gorakhpur did not permit to demarcate the suit plot. The Tahsildar in order sheet dated 10.6.1990 recorded the fact that officers of the police department are interfering with the possession of the plaintiff over the suit plot. Accordingly, the plaintiff filed the suit seeking the relief of declaration of title and permanent injunction restraining defendants from interfering with the plaintiff's possession over the suit plot. The plaintiff also claimed damages to the tune of Rs.2000/-.

4. The defendants filed the written statement in which inter alia, it was pleaded that the suit is barred under Order 23 Rule 4 of the Code of Civil Procedure as previous civil suit was withdrawn without seeking the leave to institute a fresh suit. It was further pleaded that the suit suffers from the vice of non-joinder of necessary party, namely, the State Government and the suit is barred by limitation as the suit plot is in possession of the police department

since 1927. It was pointed out that vide notification dated 21.12.1910 an area admeasuring 30,815 square feet was acquired of khasra number 719, plot No.90/340 of sheet No.273 for construction of Gorakhpur police post and quarters of constables. However, later on police department took possession of extra adjacent land admeasuring 33,800/-square feet. It was pleaded that the suit plot is a part of extra land of which possession was taken by the State Government in 1927. It has also been averred that extra land forms part of old khasra number 430 and 431/2. In paragraph 9 of the written statement it is again reiterated that defendants are in possession of the plot No. 430 and extra land of plot No.431/2 since 1927. The title, if any of the owner, has been extinguished.

5. The trial Court vide judgment and decree dated 29.10.1999 inter alia, held that the suit plot is not included in the land admeasuring 0.78 acres, which is in possession of police department and the plaintiff is the owner and in possession of the suit plot. It was further held that in the knowledge of defendants, the plaintiff's name was recorded in the revenue records and the suit filed by the plaintiff is within limitation. The aforesaid decree was affirmed in appeal by the lower appellate Court.

6. Learned Advocate General for the appellants submitted that from perusal of the sale deed (Exhibit P-1) it is evident that the plaintiff has purchased the sub- plots 16 and 18 which form the part of plot No.439 of sheet No.283 and in the demarcation proceeding held on 17.5.1985 (Exhibit P-8) it was disclosed that the suit plot bears number 431/8 therefore a correction deed dated 11.7.1985 (Exhibit P-9) was executed subsequently, which shows that the plaintiff had no knowledge about the property which she had purchased. It was further submitted that as per map (Exhibit P-2) the suit plot is shown to be in two different parts but in the sale deed it was not so described. The attention of this Court has been invited to paragraph 1 of evidence of plaintiff witness No.1 and it has been contended that plaintiff witness No.1 does not claim to have purchased portion marked with letters 'ka', 'kha' and 'ga' and in paragraph 11 he has stated that there is construction on the suit plot whereas suit plot is open land. Therefore the finding recorded by the courts below that the plaintiff is owner of the suit plot, namely, 431/8, is perverse. It is also urged that since the State Government was not impleaded as party therefore the suit suffers from vice of non-joinder of necessary party in view of Section 79 of the Code of Civil Procedure and the suit is barred by limitation. Lastly it is urged that the suit is non maintainable in view of Order 23 Rule 4 of the

Code of Civil Procedure. In support of the aforesaid submissions, reliance has been placed in *Collector v. Bagathi Krishna Rao,* (2010) 6 SCC 427, *Kishorsingh Anarsingh v. Tej Singh Dhyansingh,* AIR 1967 M P 120, *M/s Hulas Rai Baij Nath v. Firm K.B. Bass and Co.,* AIR 1968 SC 111 and *Union of India v. Ibrahim Uddin and Another,* (2012) 8 SCC 148.

7. On the other hand, learned senior counsel for the respondent submitted that from proceeding before Deputy Commissioner (Exhibit P-8) it is apparent that one Prita Bai Moris i.e. the mother of the vendor of the plaintiff was the owner of the suit plot. The vendor of the plaintiff, namely, Lalita James acquired suit plot under a Will dated 23.1.1945 and in subsequent partition dated 20.2.1955 effected between Lalita James and her younger sister. It was also urged that the house of Lalita James was recorded in revenue records (Exhibits P-5) and demarcation reports (Exhibits P-7 and P-8) reveal that the land of the plaintiff bears plot number 431/8 whereas the land of police department bears plot number 430. The plaintiff has acquired title in respect of the suit plot vide sale deed dated 20.8.1982 (Exhibit P-1) and correction deed dated 11.7.1985 (Exhibit P-9) and no documentary evidence was adduced by the defendants either to prove their title or possession. It is pointed out that on 18.8.1993, an application for impleadment of the State Government as defendant No.7 was made which was allowed on 13.9.1994. However, correction was not carried out in cause title, therefore, the suit does not suffer from vice of non-joinder of necessary party and it is a mere case of mis-description. In support of the aforesaid submissions, reference has been made to the decisions in the cases of *Patasibai and Others v. Ratanlal,* (1990) 2 SCC 42, *Secretary, Ministry of Works and Housing, Government of India and Others v. Mohinder Singh Jagdev and Others,* (1996) 6 SCC 229, *Murari Mohan Deb v. Secretary to the Government of India and Others,* AIR 1985 SC 931, *Union of India v. M/sHarpal Dass Madhyani,* AIR 1979 Patna 18 and *M/s Frick India Ltd. v. The Executive Engineer, Project Public Health Division, Chandigarh and Another,* AIR 1975 Punjab 39.It is also pointed out that in view of objections raised in the written statement with regard to maintainability of the suit, on the ground that the same suffers from vice of non-joinder of necessary party, and it is barred under Order 23 Rule 4 of the Code of Civil Procedure, preliminary issues were framed which were answered in favour of the plaintiff vide order dated 20.10.1993 by the trial Court. The aforesaid order was upheld in C.R. No. 157/1993 vide order dated 26.2.1994 by the Additional District Judge. Therefore, the order passed

in civil revision operates as res judicata. In this connection reliance has been placed on *Shyamcharan Raghubar Prasad v. Sheojee Bhai Jairam Chhatri,* 1964 MPLJ 502 and order dated 18.11.1997 passed in LPA No.13/1992. It is also submitted that every threat or injury to the plaintiff furnishes a fresh cause of action and, therefore, the suit is within limitation. In this regard reference has been made to decision in *Mohan Lal v. State of M.P. and Others,* 1979 JLJ 714. Alternatively it is submitted that in the facts of the case declaration of title is an ancillary relief and injunction is the substantive relief and therefore the suit is within limitation. For the aforesaid proposition, reliance has been placed reliance on the decisions of the Supreme Court in *C. Mohammad Yunus v. Syed Unnissa and Others,* AIR 1961 SC 808 and *Daya Singh and Another V. Gurdev Singh,* (2010) 2 SCC 194.

8. I have considered the rival submissions advanced at the Bar and have perused the record. Before proceeding to answer the substantial questions of law, the scope of Section 100 of the Code of Civil Procedure which is well defined by the catena of decision of the Supreme Court may be noticed. The jurisdiction of this Court to interfere with the findings of fact under Section 100 of the Code of Civil Procedure is limited to the cases where the finding is either perverse or based on no evidence. This Court cannot interfere with the finding of fact until or unless the same is perverse or contrary to material on record. It is equally well settled that this court in exercise of power under Section 100 of the Code of Civil Procedure this Court cannot reappreciate the evidence. [See: *Narayan Rajendran and Anr. v. Lekshmy Sarojini and Others,* (2009) 5 ACC 264, *Hafazat Hussain v. Abdul Majeed and others,* (2011) 7 SCC 189, *Union of India v. Ibrahim Uddin and Another,* (2012) 8 SCC 148, *D.R. Rathna Murthy v. Ramappa,* (2011) 1 SCC 158 and *Vishwanath Agrawal V. Sarla Vishnath Agrawal,* (2012) 7 SCC 288]

9. In Exhibit P-5 i.e. khasra of years 1979-80 to 1981-82 the name of vendor of plaintiff, namely, Lalita James was recorded as the owner in respect of the plot bearing khasra number 431/1 admeasuring 54,754 square feet. In the order dated 10.6.1990 passed by the Tahsildar (Exhibit P-6) it is recorded that plot bearing No.431/8 admeasuring 3587 square feet situate adjoining to the police station, Gorakhpur is recorded in the name of the plaintiff. From demarcation report dated 11.5.1985 (Exhibit P-7) submitted by the revenue inspector it is evident that demarcation of plot number 430 and 431/1 was carried out and sub-engineer of Public Works Department who was present at the time of demarcation was satisfied with the demarcation. Similarly

demarcation report (Exhibit P-8) shows that the land bearing plot No.430 which admeasures 30185 square feet is recorded in the name of the State Government and plot number 431/8 admeasuring 3587 square feet is recorded in the name of the plaintiff. Thus, both the plots have separate existence. The plaintiff has acquired title in respect of the suit plot by registered sale deed dated 20.8.1982 and correction deed dated 11.7.1985. It is noteworthy that in the written statement defendants have pleaded that the suit plot forms part of khasra number 430 and 431/2. It is pertinent to mention here that defendants have not filed any documentary evidence either to prove their possession or title in respect of the suit plot. There is no material on record to indicate that suit plot was recorded in the revenue records in the name of the State Government and the same is not included in the lands described in the ordersheet (Exhibit P-8). The courts below on meticulous appreciation of the evidence on record have held that the plaintiff is owner and is in possession of the suit plot and the same does not belong to police department. The aforesaid findings of fact which are concurrent in nature by no stretch of imagination can be said to be either perverse or based on no evidence. This Court in exercise of power under Section 100 of the Code of Civil Procedure, cannot re-appreciate the evidence, even if another view is possible. Accordingly, the substantial questions of law numbers (i) and (ii) are answered in the negative and against the appellants.

10. An application under Order 1 Rule 10 of the Code of Civil Procedure was filed by the plaintiff on 18.8.1993 for impleadment of State of M.P. which was allowed by the trial court vide order dated 13.9.1994. However, in compliance of aforesaid order, the cause title was not corrected. In *Patasibai* (supra) it has been held that if an application for correction of cause title is allowed and the correction was not incorporated in the plaint and the parties were not misled in any manner it would be a case of mere mis-description in the cause title. Similar view has been taken in the cases of *Secretary Ministry of Works and Housing, Government of India and others* as well as *Maria Mohan* (supra). The objections that suit was barred under order 23 Rule 4 CPC and is not maintainable on account of non-impleadment of State Government was rejected by the trial court vide order dated 20.10.1993, which was upheld in revision vide order dated 26.2.1994 by. the Additional District Judge. The aforesaid order admittedly has attained finality. It is well settled in law that if validity of an order passed during proceeding in the suit is agitated by a party in a higher forum, then the order passed by the higher

forum operates as res judicata when the matter again comes before the High Court by way of Second Appeal [See: *Ashok Kumar Shrivastava V. National Insurance Company Ltd. and Others,* (1998) 4 SCC 361. For the aforementioned reasons, third and forth substantial questions of law are answered in the negative and against the appellants.

11. In *Jalandhar Thakur v. Jhamla Das*, AIR 1914 PC 72 it has been held that where there are successive infringements of an existing right, each infirngement gives right to a fresh cause of action. A full Bench of this Court in the case of *Mohan Lal v. State of M.P.* 1979 JLJ 714 has held that each infringement of right shall give rise to fresh cause of action. In *Bolo v. Koklan,* AIR 1930 PC 270 it has been held that right to sue does not accrue unless accrual of right is asserted in the suit and there is clear threat of infringement of right. In paragraph 15 of the plaint, the plaintiff has stated that cause of action accrued on 5.6.1990 as on 5.6.1990, the town inspector did not permit demarcation of the suit plot and the suit has been filed on 9.7.1990, which is within limitation. Accordingly, the fifth substantial question of law is also answered in the negative and against the appellants.

12. In the result, the appeal fails and is hereby dismissed with costs.

*Appeal dismissed.*

**I.L.R. [2014] M.P., 197**
**APPELLATE CIVIL**
***Before Mr. Justice Alok Aradhe***
S.A. No. 668/1997 (Jabalpur) decided on 16 September, 2013

SAROJ LALWANI (SMT.) ...Appellant
Vs.
SHRI KISHAN LAL ...Respondent

*A. Accommodation Control Act, M.P. (41 of 1961), Sections 13(1) & 12(1)(a), (3) - Arrears of rent* - **Suit was filed on the ground that defendant is in arrears of rent for the period from April-May, 1980 - Notice (Exhibit P/16) was served on defendant on 14.08.1980 - Suit filed for eviction on 04.03.1985 and summons were served on the defendant on 03.04.1985 - No material on record to show that defendant within two months from the date of receipt of summons deposited the arrears of rent - Defendant has also not complied with provisions of Section 13(1) of the Act, he is not entitled to the benefit of Section**

**12(3) of the Act.** **(Para 11)**

*क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराऐं 13(1) व 12 (1)(ए),(3) – माड़े का बकाया* – इस आधार पर वाद प्रस्तुत किया गया कि प्रतिवादी से अप्रेल–मई, 1980 की अवधि से भाड़ा बकाया है – प्रतिवादी को नोटिस (प्रदर्श पी/16), 14.08.1980 को तामील किया गया – बेदखली के लिए वाद, 04.03.1985 को प्रस्तुत किया गया और प्रतिवादी पर समन, 03.04.1985 को तामील किया गया – अभिलेख पर कोई सामग्री नहीं, यह दर्शाने के लिए कि प्रतिवादी ने समन प्राप्ति से दो माह के भीतर भाड़े का बकाया जमा किया – प्रतिवादी ने अधिनियम की धारा 13(1) के उपबंधों का भी पालन नहीं किया, वह अधिनियम की धारा 12(3) के लाभ का हकदार नहीं।

***B. Words and Phrases - "Waiver" - Meaning* - Waiver is voluntary relinquishment or abandonment, express or implied, of a legal right or advantage - Party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it.** **(Para 9)**

*ख. शब्द और वाक्यांश – "अधित्यजन" – अर्थ* – अधित्यजन, किसी विधिक अधिकार अथवा लाभ का, अभिव्यक्त अथवा विवक्षित, स्वैच्छिक त्यजन या परित्याग है – अधिकार का अभिकथित रुप से अधित्यजन करने वाले पक्षकार को विद्यमान अधिकार का ज्ञान तथा उसे छोड़ने का आशय, दोनों होना चाहिए।

**Cases referred :**

AIR 1959 SC 689, AIR 1965 SC 101, AIR 2006 SC 1734, (2004) 11 SC 569, 1980 JLJ 423, AIR 1968 SC 133, AIR 1992 SC 184, AIR 1992 AP 130, AIR 2008 NOC 1832, (2000) 4 SCC 380, (2005) 1 SCC 31.

*Rahul Choubey,* for the appellant.
*Mrigendra Singh & Amit Khatri,* for the respondent.

**JUDGMENT**

**ALOK ARADHE, J. :-** This appeal is by the plaintiff which was admitted by a Bench of this Court on the following substantial question of law:-

> *"Whether the lower appellate Court committed an error of law in dismissing the plaintiff's suit without reversing the finding of the trial Court on issues No.2 and 2B"*

2. Facts giving rise to filing of the appeal, briefly stated, are that the plaintiff filed a suit, *inter alia,* on the ground that he is the owner of the building

situate in Sarafa Bazar, Bhopal. The suit shop situate on the ground floor which was let out to the defendant on a monthly rent of Rs.31.87P. It was further pleaded that plaintiff required the same bonafide for the purpose of re-construction and the defendant is in arrears of rent for the months of April-May, 1980. Accordingly, the decree for eviction under section 12(1)(a) & (h) of the M.P. Accommodation Control Act, 1961 was sought.

3. The defendant filed written statement in which, *inter alia,* the need of the plaintiff for re-construction was denied. It was further denied that the defendant is in arrears of rent. It was also pointed out that defendant had sent the rent by money order, however, the plaintiff refused to accept the same.

4. The trial Court by judgment and decree dated 30.11.1993, *inter alia,* found that the plaintiff has failed to prove the ground under section 12(1)(h) of the Act. However, the Court held that despite notice (Exhibit-P-16) to the defendant, he failed to tender the rent for the months of April-May, 1980. Accordingly, the decree for eviction under section 12(1)(a) of the Act was granted. The lower appellate Court, *inter alia*, held that summons of the suit were served on the defendant on 03.4.1985 and on 22.4.1985 the defendant had deposited a sum of Rs.1848.50P. Thus, the defendant had deposited the entire arrears of rent within a month from the date of service of summons. On the basis of list furnished by the defendant, the lower appellate Court further recorded a finding that the defendant has complied with the provisions of Section 13(1) of the Act. Accordingly, the decree passed by the trial Court was reversed.

5. Learned counsel for the appellant submitted that the lower appellate Court grossly erred in reversing the judgment and decree passed by the trial Court. It is further submitted that the lower appellate Court ought to have appreciated that the defendant during the pendency of the suit committed default in making payment of rent for the months of May & June, 1994, May 1995 and February, 1996 in accordance with the provisions of Section 13(1) of the Act and, therefore, the decree under Section 12(1)(a) ought to have been granted. It is also urged that there is no evidence on record to show that entire arrears of rent were deposited by the appellant within a period of two months from the date of service of notice and Section 13(1) of the Act casts a statutory duty on the tenant to deposit the rent, therefore, mere withdrawal of rent does not amount to waiver. While referring to decision of Supreme Court in the case of *Waman Shriniwas Kini vs. Ratilal Bhagwandas and*

*Co.,* AIR 1959 SC 689, it was submitted that when a statute prescribes a mode of doing particular thing in particular manner, that thing has to be done in that manner alone. In support of his submissions learned counsel for the appellant has placed reliance on the decisions in the cases of *Waman Shriniwas Kini* (supra), *Mangilal vs. Sugan Chand Rathi* (deceased after him his heirs and legal representatives and another) AIR 1965 SC 101, *Sarup Singh Gupta vs. Jagdish Singh and others,* AIR 2006 SC 1734, *Voltas Ltd. vs. State of A.P.*, (2004) 11 SC 569 *Mohd. Ishak and others vs. Hafiz Ibrahim and others,* 1980 JLJ 423,.

6. On the other hand, learned counsel for the respondent submitted that on receipt of summons within a period of one month the entire arrears of rent was deposited, therefore, the lower appellate Court has rightly reversed the finding with regard to ground under section 12(1)(a) of the Act. It is also submitted that by withdrawing the amount of rent the appellant waived the right to contend that respondent is not entitled to benefit of section 12(3) of the Act. It is submitted that a right can be waived even by conduct. It is also submitted that the instant case is not a case of wilful default. In support of his submissions learned counsel has placed reliance on the decisions in the cases of *Pyarelal vs. New Delhi Municipal Committee and another,* AIR 1968 SC 133, *D.C.Oswal vs. V.K.Subbiah and others*, AIR 1992 SC 184 and *RF (Rasat and Farhat) Charitable Trust, Hyderabad vs. Special Deputy Collector* (General) *Land Acquisition, Hyderabad and others,* AIR 1992 AP 130 and *Mrs.Henriqueta Maria Julieta vs. State of Goa and others*, AIR 2008 NOC 1832.

7. I have considered the submissions made by learned counsel for the parties and have perused the record. Section 12(1)(a) of the Act requires the tenant to make payment of arrears legally recovered from him within two months from the date of notice of demand of arrears of rent served on the him in the prescribed manner. Section 13(1) of the Act provides that 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 any other proceeding by a tenant against any decree or order for his eviction, the tenant shall within one month of the service of 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 tenant, as the case may be, or within such further time as the Court may on an application made to it allow in this behalf, deposit in the Court or pay to the landlord, an amount calculated at the rate of rent at which it was paid, for the

period for which the tenant may have 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.

8. From close scrutiny of Section 13(1) of the Act it is evident that said provision casts a statutory obligation on tenant to deposit the rent per month by 15th of each succeeding month, in case he wants to avail the benefit of Section 12(3) of the Act which, *inter alia,* provides that no order for the eviction of a tenant shall be made on the ground specified in clause (a) of sub-section (1), if the tenant makes payment or deposit as required under Section 13 of the Act. It is no doubt true that a statutory provision enacted for the benefit of an individual can be waived. In *Jamnalal and others Vs. Radheshyam* (2000) 4 SCC 380, the Supreme Court has held that scheme of Section 13 of the Act suggests that the provisions thereof are intended for the benefit of both the tenant as well as the landlord. While Section 13 affords protection to a defaulting tenant, willing to abide by the obligation to pay the rent regularly, against eviction on the ground of default in payment of rent, it also ensures payment of rent to the landlord, which he is entitled to receive for both the pre-litigation period as well as during the pendency of the litigation. Section 13(1) of the Act which casts a statutory obligation on the tenant to deposit the rent, cannot be waived in the absence of an express opinion. See: *Voltas Ltd.* (supra).

9. For yet another reason plea of waiver taken by the respondent can not be accepted. The waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. [See: *Para 1471 of Halsbury's Laws Of England, Fourth Edition*]. The waiver is voluntary relinquishment or abandonment, express or implied, of a legal right or advantage. The party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it. [See: *Black's Law of Dictionary 8th Edition*]. The waiver is a question of conduct and must necessarily be determined on the facts of each case. In *Joginder Singh Sodhi vs. Amar Kaur,* (2005) 1 SCC 31 the Supreme Court has held

that waiver is a question of fact which must be expressly pleaded and clearly proved. The waiver is an intentional relinquishment of a known right. There could be no waiver unless the person against whom waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights.

10. In the instant case, no plea of waiver has been taken in the written statement. In order to succeed on the strength of plea of waiver by mere withdrawal of amount deposited as rent by the plaintiff, the defendant was required to prove that plaintiff is withdrawing the amount which includes the amount of rent not deposited within time. In any case, in the absence of such plea in the written statement, the same cannot be gone into, at this stage. Therefore, it cannot be said that the plaintiff has waived the right by his conduct.

11. In the instant case, admittedly the plaintiff had filed the suit on the ground that defendant is in arrears of rent for the period from April-May, 1980. Notice Exhibit-P-16 was served on the defendant on 14.8.1980. Thereafter, the plaintiff filed the suit for eviction on 04.3.1985. The summons were served on the defendant on 3.4.1985. The defendant was required to pay a sum of Rs.1912/- i.e. the rent for the period April,1980 to 03.4.1985. However, a sum of Rs.1848.50P only was paid. Thereafter, the plaintiff has made default in making payment of rent for the months of May & June, 1994; May, 1995 and February, 1996 in accordance with section 13(1) of the Act, as is evident from the Chart. However, the lower appellate Court without assigning any reason has recorded a finding that defendant is making payment of rent in accordance with section 13(1) of the Act. The aforesaid finding is factually incorrect. There is no material on record to show that the defendant within two months from the date of receipt of summons has deposited the arrears of rent. He has also not complied with provisions of Section 13(1) of the Act, therefore, he is not entitled to the benefit of Section 12(3) of the Act.

12. For the aforementioned reasons, the substantial question of law framed by this Court is answered in the affirmative and in favour of the appellant. Accordingly, the judgment passed by the lower appellate Court is set aside and that of the trial Court is restored. In the result the appeal is allowed with costs.

*Appeal allowed.*

**I.L.R. [2014] M.P., 203**
**APPELLATE CIVIL**
***Before Smt. Justice S.R. Waghmare***
M.A. No. 2364/2006 (Indore) decided on 4 October, 2013

NEW INDIA ASSURANCE COMPANY LTD. ...Appellant
Vs.
DOMENIC TAHIR & ors. ...Respondents

***Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurance Company*** **- Driver/deceased himself was negligent in causing accident - Insurance Policy was an Act Policy and did not cover the owner and driver - Driver/deceased stepped into shoes of owner and not third party and risk cannot be covered under Act Policy - Insurance Company not liable. (Paras 5 & 6)**

*मोटर यान अधिनियम (1988 का 59), धारा 147 – बीमा कम्पनी का दायित्व* – दुर्घटना कारित करने में वाहन चालक/मृतक स्वयं उपेक्षावान था – बीमा पॉलिसी एक एक्ट पॉलिसी थी और स्वामी एवं वाहन चालक को सुरक्षित नहीं करती थी – वाहन चालक/मृतक ने स्वामी का स्थान लिया और न कि तृतीय पक्षकार का और एक्ट पॉलिसी के अंतर्गत जोखिम आच्छादित नहीं किया जा सकता – बीमा कम्पनी उत्तरदायी नहीं।

**Cases referred :**

2009 ACJ 998, 2012 ACJ 1441, 2013 ACJ 321, 2013 ACJ 199, 2003 (4) MPLJ 546, 1998 ACJ 531.

*C.P. Singh,* for the appellant/Insurance Company.
*K.K. Kaushal,* for the respondents No. 1 to 4.

**JUDGMENT**

**MRS. S.R. WAGHMARE, J. :-** This is the appeal filed by appellant/ Insurance Company under Section 173 of the Motor Vehicles Act, 1988 being aggrieved by the award dated 16.03.2006 passed by 21st Additional M.A.C.T., Indore in claim case No.130/2005 awarding the compensation for a sum of Rs.1,88,000/- to the claimants.

02. Brief facts of the case are that on 24.05.2002 at about 6:00 in the morning Vikas @ Vicky was driving the scooter belonging to non-applicant No.1 bearing Registration No. MP-09- JA-1061 with his friend Shafique

Khan as pillion rider, when on reaching Kinetic Honda Factory at Pithampur an unknown vehicle dashed against them, as a result of which Vicky died on the spot and Shafique Khan died during treatment at the hospital. The police report was filed to this effect at police station Pithampur. On behalf of the deceased Vicky, it was stated that he had passed B. Com Examination and he had bright chance in future and he was working and his family was dependent upon him. Moreover the scooter was also being driven with the permission of non-applicant No.1 owner and it was insured with non-applicant No.2 Insurance Company and whereas the defence taken up by non-applicant No.1 owner of the vehicle was that the accident did not take place by the alleged vehicle and the vehicle was insured with non-applicant No.2 insurance company. Non applicant No.2 insurance company took up the defence that the policy did not cover the accident and the claim has been filed u/s.163 of the Motor Vehicle Act and the insurance company was not liable. Moreover it was denied that the accident took place by the alleged vehicle. The Tribunal on considering the evidence, however, found that the accident took place due to the rash and negligence of the driver and the insurance company was liable to pay the compensation of Rs.1,88,000/- to legal representative of deceased Vicky Being aggrieved the insurance company has filed the present appeal.

03. Counsel for the appellant has vehemently urged the fact that the policy did not cover the risk of the driver and owner and the company was not liable to pay the compensation, besides the accident did not occur as alleged, in fact deceased driver himself was negligent in causing the accident and risk was, therefore, not covered under the policy. Counsel relied on the matter of *New India Assurance Co. Ltd. V. Sadanand Mukhi and others* 2009 ACJ 998 to state that the Apex Court had held that when the death of the son of the owner had occurred in the accident while driving the motorcycle and when a stray dog came in front of the vehicle, the insurance company disputed its liability on the ground that deceased was not a third party and would step into the shoes of the owner. The Apex Court had held that the insurance company was not liable since the person becomes victim of the accident, arising out of use of vehicle and would not come within the purview of the term 'a person' under Section 147 of the Act. The same principle has been held in the matter of *Oriental Insurance Co. Ltd. V. Joseph and others* by High Court of Kerala 2012 ACJ 1441, however, in the said case the Tribunal had exonerated the insurance company yet directed to pay and recover and held that the question of pay and recover arises when victim of the accident is covered

under the policy but there are violations of the terms of the policy. He further relied on the judgment of this Court *National Insurance Company Vs. Bharat Singh and others,* in the Miscellaneous Appeal No.115/2006, whereby this Court had held that insurance company was not liable since it was not doling out largesse and the risk was not covered under the policy: as, in the case also, the deceased himself was driving the motorcycle belonging to his friend.

He further urged that in the matter of *Oriental Insurance Co. Ltd. V. Surendra Nath Loomba and others* 2013 ACJ 321, a car dashed against a tree and the case of a passenger was being considered this Court held that the insurance company is liable under comprehensive/package policy but not under Act policy; and in the present case Counsel submitted that the insurance company was under the Act policy and risk of the driver was not covered. In the matter of *New India Assurance Company Ltd. V. Rambabu and others* in the Miscellaneous Appeal No.1399/2006 this Court held and also considered the fact the that claim against owner is not maintainable under Section 163-A of the Motor Vehicle Act. Counsel relied on the matter of *National Insurance Co. Ltd. V. Balakrishan and another,* 2013 ACJ 199, whereby the Apex Court had held that risk of the passenger in private car is covered under the comprehensive/package policy and insurance company is liable but the third party risk of an occupant of a private car is not covered under the Act policy. Counsel submitted that risk of the third party was being covered but since the injury had occurred to the driver himself, the insurance company was not to be liable. Counsel prayed that the award of the M.A.C.T. be set aside and the claim be dismissed.

04. Counsel for the respondents/claimant has vehemently urged the fact that the deceased Vicky would be a third party in the present case and risk would be covered under the policy and even the premium paid is for one plus one, according to the document Ex.D/1 which is the insurance policy, Counsel contended that deceased Vicky had taken Kinetic Honda Scooter from the respondent No.5/Anurag Saxena, who is the owner of the alleged vehicle and was travelling with one Shafique Khan as the pillion rider when the accident occurred. Counsel relied on two judgments of this Court to state that the terms of third party have been interpreted in a judgment of Full Bench of this Court in the matter of *Jugal Kishore and another Vs. Ramlesh Devi and others* 2003(4) M.P.L.J. 546, whereby this Court held that third party will be a party other than insurer and insured and it includes the passengers in the vehicles not travelling for hire or reward. Moreover when the accident of

insured vehicle driven in breach of condition of policy took place, the insurance company was liable to pay the compensation and indemnify the victim; however the insurance company would be entitled to recover the amount from the insured for breach of condition of policy. In the said case, the accident had taken place with the owner, who was himself driving along with other person in the vehicle. This Court held that it will be proper to narrow the scope and ambit of the word 'third party' and exclude the passengers from the operation and purview which would not only defeat the very purpose of taking out the insurance policy, but the very object of the Motor Vehicles Act, which makes it mandatory requirement of law that all vehicles/owners of the vehicles must be compulsorily insured against third party risk. Counsel also relied in the matter of *Amrit Lal Sood and another Vs. Kaushalya Devi Thapar and others* 1998 ACJ 531 to state that the term 'any person' was similarly translated by the Apex Court, whereby the Apex Court held that expression 'any person' would include an occupant of car who is gratuitously travelling in the car. [1975 ACJ 95 (AP), AIR 1975 Gujarat 138 and 1975 ACJ 355 (Orissa) affirmed: 1977 ACJ 343 (SC) distinguished; 1994 ACJ 12 (HP) reserved.

Counsel also urged that there are no cross objection filed in the present case and Counsel has not raised any objection regarding the amount of compensation paid to the legal heirs of deceased Vicky. Counsel vehemently urged that the judgment of the Trial Court was in accordance with provisions of law and he prayed for dismissal of the appeal.

05. Considering the above submissions, the impugned award and the record, I find that the sole question that arises for determination in this appeal by the insurance company is whether insurance company would be liable to pay compensation in the present case when the deceased himself was driving the alleged vehicle belonging to respondent No.5 Anurag Saxena would the step into shoes of the owner or would be classified as third party. Considering the matter of Full Bench of this Court in the matter of *Jugal Kishore* (supra) and in the matter of the Apex Court decision in the matter of *Amrit Lal Sood* (supra), I find that these are comparatively old judgments and much water is flown under the bridge. According to the latest decision in the matter of *National Insurance Co. Ltd. V. Balakrishan and another* 2013 ACJ 199, the Apex Court has categorically held that it is the nature of the policy, which would decide whether the insurance company was liable to pay the compensation to the claimant's or not. The Apex Court held thus :

**In view of the aforesaid factual position, there is no scintilla of doubt that a 'comprehensive/package policy' would cover the liability of 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) 7 SCC 148 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 Delhi High Court and we have also reproduced the same.**

06. Similarly in the matter of *Oriental Insurance Co. Ltd. Vs. Surendra Nath Loomba and others* 2013 ACJ 321, the Apex Court held that it is the nature of the policy which has to be decided first and remanded the matter back. The Apex Court had categorically stated that comprehensive/package policy would cover the liability of the insurance company for payment of compensation an occupant of the car but under the **Act policy** the insurer would **not** be liable and it does not cover third party risk of the occupant vehicle. Therefore, in this regard it would be profitable to consider the testimony of insurance Agent Harish Phansalkar witness No.1, who had categorically stated that the policy was an Act policy in the name of respondent No.5 Anurag Saxena as owner and the owner and driver of the vehicle was not covered under the same and the liability could not be passed on to the insurance company. In the impugned para No.3 of his deposition, he has categorically stated that vehicle owner and driver could not be termed as third party, although under the insurance

policy Ex-D/1 additional premium had been taken to cover the third party risk. He however, candidly admitted that the policy did not specify the different heads under which the premium was taken; it is stated that to extent Rs.375/- taken as third party damage and Rs.19/- toward premium. I have also perused the policy and under the title person or class entitled to drive it is mentioned any person- a) insurer- b) any other person, who is driving, on the insured's order or with his permission provided that the person driving the vehicle had a valid driving licence anduse was also mentioned. Besides the policy did not cover the use for hire or reward etc. of the vehicle. And in the instant case, if is Ex-D/1 is perused, it is an Act policy. Undoubtedly, if the accident had occurred at the hand of the deceased and if some other persons have been injured the insurer appellant/insurance company would have been liable to pay the compensation; however in the present case, I find that he would step into shoes of the owner and not into the shoes of a "third party" and the risk cannot be covered under the Act policy. Therefore, placing reliance of judgment of this Court in the matter of *National Insurance Company Vs. Bharat Singh* (supra), whereby this Court held that when the deceased himself driving the motorcycle belonging to owner Sandeep under similar circumstance, the insurance company was not held to be liable to pay compensation. Moreover this Court had held that under the contract of Insurance no extra premium was paid to cover the risk of a person who himself was driving the motorcycle. And in the present case also the insurance agent Harish Phansalkar witness No.1 has himself stated that no such extra premium has been paid and, therefore, in the instant case placing reliance in the matter *National Insurance Co. Ltd. V. Balakrishan* (supra) it is held that the insurance policy was an Act policy and being statutory policy no additional premium has been paid and the appellant insurance company cannot therefore, be held liable to pay the compensation.

07. In view of the above law laid down by the Apex Court; the award of the M.A.C.T. cannot be sustained. The appeal of the Insurance Company is, therefore, allowed and the impugned award is set aside. The amount, if is deposited by the appellant insurance company shall be returned to the appellant insurance Company.

08. With the aforesaid observations, the appeal is allowed to the extent herein above indicated.

*Appeal allowed.*

**I.L.R. [2014] M.P., 209**
**APPELLATE CRIMINAL**
***Before Mr. Justice M.C. Garg***
Cr. A. No. 1159/2008 (Indore) decided on 27 November, 2012

RAJU @ JITENDRA ...Appellant
Vs.
STATE OF M.P. ...Respondent

***Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 52-A*** **- Three packets containing 12 Kg of brown sugar were seized - Held - No evidence has been placed on record that goods were destroyed under the orders of the Court - No certificate of such destruction has been placed on record - Respondent is not in a position to justify as to why the material was not produced before the Court - Section 52-A of the Act being mandatory accused entitled to acquittal- Conviction of the appellant is set aside. (Paras 3, 9, 10 & 11)**

*स्वापक औषधि और मन:प्रभावी पदार्थ अधिनियम (1985 का 61), धारा 52–ए* – 12 किग्रा. ब्राउन सुगर के तीन पैकेट जब्त किये गये – अभिनिर्धारित – अभिलेख पर कोई साक्ष्य प्रस्तुत नहीं किया गया कि माल को न्यायालय के आदेशान्तर्गत नष्ट किया गया – ऐसे नष्टीकरण का कोई प्रमाणपत्र अभिलेख पर पेश नहीं किया गया – प्रत्यर्थी इसका न्यायोचित्य देने की स्थिति में नहीं कि सामग्री को न्यायालय के समक्ष प्रस्तुत क्यों नहीं किया गया – अधिनियम की धारा 52–ए आज्ञापक होने के कारण, अभियुक्त दोषमुक्ति का हकदार – अपीलार्थी की दोषसिद्धि अपास्त।

**Cases referred :**

2009 Cr.LR (MP) 667, 2008 Cr.LR (SC) 655.

*Abhay Saraswat*, for the appellant.
*Mamta Shandilya*, P.L. for the respondent/State.

**JUDGMENT**

**M.C. GARG, J. :-** This appeal arises out of the judgment dated 11.09.2008 passed by the Special Judge, Mandsaur in S.T.No.18/2004, wherein the appellant has been convicted for offence under Section 8/21(C) of the N.D.P.S.Act and sentenced to undergo R.I. for 10 years with fine of Rs.1,00,000/- and in default of payment of fine to further undergo R.I. for one year.

2. In short the case of the prosecution reads as under:-

"कि आर.पी. शुक्ला ए.एस.आई. शहर कोतवाली मंदसौर को दिनांक 28–4–2004 को निरीक्षक अनिल सिंह राठौर ने बताया कि मुखबिर सूचना मिली है कि राजू उर्फ जितेन्द्र पिता गजानंद मराठा निवासी जगतपुरा मंदसौर अपने ट्रक क्रमांक एम.पी.14सी/2131 से अवैध मादक पदार्थ ब्राउन शुगर मंदसौर से रतलाम की तरफ ले जाकर किसी बाहरी तस्कर को देने वाला है। मुखबिर सूचना की कार्यवाही एवं धारा 42 की कार्यवाही उन्हीं के द्वारा संपादित कर दी गयी थी और उक्त सूचना को तस्दीक एवं कार्यवाही हेतु उसे बताया गया था। इस पर ए.एस.आई. आर.पी. शुक्ला अपने साथ रतनसिंह, आर कैलाश को लेकर शासकीय जीप से मय अनुसंधान सामग्री के सर्किट हाउस के आगे पहुंचकर सूचना की तस्दीक हेतु नाकाबंदी की। राहगीर पंचान ओमप्रकाश एवं मोहम्मद उमर को रोककर उन्हें मुखबिर सूचना से अवगत कराकर कार्यवाही में सहयोग प्रदान करने के लिए कहा गया तो वे तैयार हो गये। नाकाबंदी के दौरान मुखबिर सूचना मुताबिक ट्रक क्रमांक एम.पी.14सी/2131 मंदसौर तरफ से आता दिखायी दिया। ट्रक को रोककर ड्राईवर को नीचे उतारा गया एवं नाम पता पूछने पर उसने अपना नाम राजू उर्फ जितेन्द्र पिता गजानंद मराठा निवासी जगतपुरा प्रतापगढ़ पुलिया के पास मंदसौर का होना बताया। इसके पश्चात उसे धारा 50 एन.डी.पी.एस. एक्ट के तहत बताया गया कि मुखबिर सूचना मिली है कि आप अपने ट्रक में अवैध मादक पदार्थ ब्राउन शुगर लेकर आ रहे हो। सूचना के मुताबिक आपकी एवं आपके ट्रक की तलाशी लेना है। यदि आप चाहे तो उक्त तलाशी निकटतम मजिस्ट्रेट या राजपत्रित अधिकारी या मुझे दे सकते हो। इस पर वह ए.एस.आई. शुक्ला को तलाशी देने के लिये सहमत हुआ। इस पर उसे धारा 50 एन.डी.पी.एस. एक्ट का नोटिस दिया गया था जो प्रदर्श पी/2 है। इसके पश्चात् राजू उर्फ जितेन्द्र द्वारा दी गई सहमति का पंचनामा प्रदर्श पी/3 का बनाया गया था। आरोपी द्वारा स्वयं लिखित सहमति दी गई। इसके पश्चात् राजू उर्फ जितेन्द्र को हमराही फोर्स एवं पंचों की जामा तलाशी दी गई तो कोई आपत्ति जनक वस्तु नहीं मिली जिसका पंचनामा तलाशी फोर्स प्रदर्श पी/4 का बनाया गया।

3. After personal search of Raju and from the truck also, three packets containing 12 Kg of brown sugar was seized, each packet containing 4Kg of brown sugar. After obtaining the report from FSL and recording the evidence of prosecution witness, the Special Judge held the appellant guilty of the commission of offence under Section 18/21(c) of the N.D.P.S.Act and sentenced him as above.

4. It is against this judgment, the present appeal has been filed. According to the learned counsel for the appellant, the appellant has been in judicial

custody for about 8 years out of the sentence awarded to him for 10 years. It is submitted that the conviction of the appellant is unsustainable for the reason that seized material was not produced before the Court as per requirement of Section 52-A of the Act. Thus, there was a violation of the said provision which is mandatory in nature.

5. Reference has been made to para 11 of the impugned judgment which reads as under:-

> "11/ प्रतापसिंह (अ.सा.–5) का कथन है कि दिनांक 28–4–2004 को वह थाना शहर मंदसौर में एचसी.ए म. के पद पर कार्यरत था। थाना शहर कोतवाली मंदसौर के अपराध कमांक 278/04 धारा 8/21 एन.डीपी.ए स. एक्ट में जप्तशुदा माल टी.आई. अनिल सिंह राठौर द्वारा उसे दिनांक 28–4–2004 को प्राप्त हुआ था। जप्ती माल तीन पैकेट थाना शहर मंदसौर की सील से सीलबंद प्राप्त हुए थे जो आर्टिकल ए, बी एवं सी से चिन्हित थे। प्रत्येक आर्टिकल में 3.980 किलोग्राम अलग–अलग ब्राउन शुगर थी। छह सेंपल आर्टिकल ए–1, ए–2, बी–1, बी–2 एवं सी–1, सी–2 प्रत्येक पैकेट में 10 ग्राम ब्राउन शुगर थी तथा प्रत्येक पैकेट थाना शहर कोतवाली मंदसौर की सील से सीलबंद तथा दो सील नमूना थाना सिटी कोतवाली मंदसौर के तथा एक ट्रक क्रमांक एमपी. 14सी/2131 पुराना इस्तेमाली था और उक्त ट्रक में 215 बोरे मुर्गीदाना के भरे हुए थे तथा एक टाट का बोरा एवं 13,640=50 पैसे नगदी उसे प्राप्त हुए थे जिनको उसने थाना शहर कोतवाली मंदसौर के जप्ती माल रजिस्टर कमांक 102 पर दर्ज कर जप्ती माल सुरक्षित मालखाने में रखा था। दिनांक 30–4–04 को सेंपल आर्टिकल ए–1, बी–1, सी–1 मय ड्राप्ट व सीलनमूना के आरक्षक रामस्वरूप के साथ एफ.एस.एल. इंदौर जांच कराने हेतु भेजे थे। आरक्षक रामस्वरूप उक्त माल जमा करके दिनांक 3–5–04 को वापस थाना आया था व एफ.एस.एल. की रसीद उसे दी थी जो उसने जप्ती माल में इंद्राज कर डायरी में संलग्न करने हेतु थाना प्रभारी को दे दी थी। माल रजिस्टर की मूल प्रविष्टि प्रदर्श पी/19 है जिसकी छायाप्रति प्रदर्श पी/19 सी है। एफ.एस.एल. से जांच शुदा आर्टिकल ए–1, बी–1, सी–1 तथा आर्टिकल ए–2, बी–2 एवं सी–2 तथा धारा 52 (ए) एन.डी.पी.एस. एक्ट की कार्यवाही के दौरान निकाले गये कुल 6 सेंपल एवं नगदी 13,640=50 पैसे तथा एक टाट का बोरा उसके द्वारा मुद्देमाल नंबर 74/2004 पर जमा किये थे जो न्यायालय की नाजरत में जमा किए गए थे जिसका इंद्राज प्रदर्श पी/19 के मालखाना रजिस्टर में किया गया है। इस साक्षी का विस्तृत प्रतिपरीक्षण किया गया है किन्तु साक्षी के प्रतिपरीक्षण में ऐसे कोई तथ्य नहीं आए हैं जिसके कारण से इस साक्षी के कथनों पर अविश्वास किया जाए। इस साक्षी के कथनों का समर्थन रामस्वरूप (अ.सा.–1) द्वारा किया गया है।"

6. It is submitted that except that seized samples, the remaining material has not been produced on record. Learned counsel for the appellant submits that in view of the non-production of the seized material except for the samples drawn, there is violation of Section 52-A of the Act. The effect of such violation is that the conviction of the appellant cannot be sustained. Reference has been made to a judgment of this Court in the case of *Laxminarayan Vs. State of M.P.2009* Cr.L.R. (M.P.) 667. Paragraphs 26 to 29 are relevant which are reproduced hereunder:-

> "26. From the observations made by the Supreme Court, it appears that notice of an application under Section 52-A of the Act is required to be made. It is also to be seen from the judgment in *Noor Agra*(Supra) that the physical evidence relating to three samples taken from the bulk amount of heroin were also not produced in the Court. The Supreme Court observed that if the argument that the bulk quantity was destroyed is accepted, the samples were essential for production as primary evidenced for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act. In the present matter, neither the bulk quantity has been produced in the Court nor the samples which were drawn (A3 and A4) were produced before the Court.
>
> 27.It would be trite to say that when the personal liberty of a man is at stake then the mandatory provisions of law take sacrosanct nature and their observation become mandatory. It at any time it is held that the provisions are mandatory in nature then the Court would find no hesitation in acquitting the accused if it finds that the provisions of mandatory nature have been violated.
>
> 28. From the above referred judgment of the Supreme Court and the language of Section 52-A of the Act, it clearly appears that the prosecution agency is entitled to destruct/destroy the particular contraband bulk quantity so seized from the accused but the fact is required to be proved. If it is not proved in the Court that the bulk quantity was destroyed then the prosecution would be obliged to produce the bulk quantity or in case the prosecution successfully proves that the seized bulk quantity was destroyed then the prosecution would be obliged to

produce the additional samples drawn from the bulk quantity before its destruction.

29. In the present matter, the prosecution has failed in producing the articles, which were seized from the possession of the accused persons; they have also failed in producing the additional samples drawn in presence of the Executive Magistrate-cum-Tehsildar; they have also failed in proving the contents of the application filed under Section 52-A of the Act."

7. It is observed here that there is no evidence available on record that the seized material was destroyed and it was for that reason that it was not produced.

8. To the same effect is the judgment delivered by Hon'ble Supreme Court in the case of *Noor Agra Vs. State of Punjab and another* 2008 Cr.L.R.(SC) 655. Relevant paragraph is reproduced hereunder:-

"103. Physical evidence of a case of this nature being the property of the Court should have been treated to be sacrosanct. Non-production thereof would warrant drawing of a negative inference within the meaning of Section 114(g) of the Evidence Act. While there are such a large number of discrepancies, if a cumulative effect thereto is taken into consideration on the basis whereof the permissive inference would be that serious doubts are created with respect of the prosecution's endeavour to prove the fact of possession of contraband from the appellant."

9. Learned counsel for the appellant submits that in this case no evidence has been placed on record that goods were destroyed under the orders of the Court. No certificate of such destruction has been placed on record. It is submitted that provision of Section 52-A of the Act being mandatory, requires the conviction of the appellant to be set aside.

10. Learned counsel for the respondent is not in a position to justify as to why the material was not produced before the Court.

11. In view of the aforesaid, the conviction of the appellant is set aside. In case he is not wanted in any other case, he be released on bail.

C.C.as per rules.

*Order accordingly.*

**I.L.R. [2014] M.P., 214**
**CIVIL REVISION**

***Before Mr. Justice Rajendra Menon & Smt. Justice Vimla Jain***
Civil Rev. No. 579/2003 (Jabalpur) decided on 20 September, 2013

MAHALINGA SHETTY (M/S) & COMPANY ...Applicant
Vs.
MADHYA PRADESH ELECTRICITY BOARD ...Non-applicant

*A. Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Sections 2(d), 7-A, 7-B & Sub-Sections (1)(a),(1)(b) & (2) of Section 7-B - Counter Claim - Maintainability* - **References were made to M.P. State Arbitration Tribunal - Non-applicant Board appeared and filed their written statement on 04.11.87 and also raised counter claim on 30.06.1989 - Held - Without raising a demand with the applicant company, the counter claim made directly in the pending reference, was not maintainable - Requirement of Section 7-A and Section 7-B in the matter of raising counter claim becomes applicable as the same was raised on 18.09.2000 - Counter claim without referring to the final authority is not maintainable as the statutory requirement of Section 7-B was not complied with. (Para 15)**

*क. माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धाराऐं 2(डी), 7–ए, 7–बी व धारा 7–बी की उपधारा (1)(ए),(1)(बी) एवं (2) – प्रतिदावा – पोषणीयता* – म.प्र.राज्य माध्यस्थम अधिकरण के समक्ष निर्देश प्रस्तुत किये गये – अनावेदक बोर्ड उपस्थित हुआ और अपना लिखित कथन 04.11.87 को प्रस्तुत किया तथा 30.06.1989 को प्रतिदावा भी किया – अभिनिर्धारित – आवेदक कम्पनी से मांग किये बिना, सीधे तौर पर लंबित निर्देश में किया गया प्रतिदावा पोषणीय नहीं – प्रतिदावा खड़ा करने के मामले में धारा 7–ए व धारा 7–बी की अपेक्षा लागू होती है जैसा कि उक्त को 18.09.2000 को उठाया गया था – अंतिम प्राधिकारी को निर्देशित किये बिना प्रतिदावा पोषणीय नहीं क्योंकि धारा 7–बी की कानूनी अपेक्षा का अनुपालन नहीं किया गया।

*B. Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Sections 7-A, 7-B & Sub-Sections (1)(a),1(b) & (2) of Section 7-B- Condonation of delay* - **Action of Tribunal in condoning inordinate unexplained delay only by mentioning public interest, was an error of jurisdiction committed by the Tribunal. (Para 18)**

*ख. माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धाराऐं 7–ए,*

*7–बी व धारा 7–बी की उपधारा (1)(ए),(1)(बी) व (2) – विलम्ब के लिए माफी* – केवल लोक हित का उल्लेख करते हुए, असाधारण एवं स्पष्टीकरण विहीन विलम्ब को माफ करने की अधिकरण की कार्यवाही, अधिकरण द्वारा कारित अधिकारिता की भूल थी।

**Cases referred :**

AIR 1973 MP 261, AIR 1993 MP 107, 1997 ATLR 1, 2006 (2) MPLJ 299, AIR 1998 Kerala 99, AIR 2011 SC 3814, 2000 Arb. WLJ 290.

*V.R. Rao* with *Shravan Rao*, for the applicant.
*M.L. Jaiswal* with *K.K. Gautam,* for the non-applicant.

**ORDER**

The Order of the court was delivered by : RAJENDRA MENON, J.:- As common questions of law and fact are involved in all these three revisions, which have been filed under section 19 of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam 1983; and, as challenge is made to an order identical in nature passed on 3.2.2003, the three revision petitions are being decided by this common order. For the sake of convenience, documents and material available in the record of Civil Revision No: 579/ 2003 is being referred to in this order.

2- Applicant M/s Mahalinga Shetty & Company claims to be a Company registered under the Companies Act with its office in New Delhi. The Company claims to be Engineers, Contractors and carry out various building, construction and engineering activities. Certain contract was granted to the applicant Company by the Madhya Pradesh Electricity Board (hereinafter referred to as 'MPEB'), in the matter of providing RCC Lining in bed and slide slopes of Power Channel and various other works in the matter of excavation of certain work pertaining to Tons Hydro Electric Project. For the present, the particulars of the contract and work are not relevant. Suffice it to say that the applicant Company filed three reference cases under section 7 of the MP Madhyastham Adhikaran Adhiniyam, 1983 (hereinafter referred to as 'Adhiniyam of 1983'). The references were made to the MP State Arbitration Tribunal, a statutory Tribunal created under the Adhiniyam of 1983; and, in all the three reference cases certain claims were made, which were 'disputes' as contemplated under section 2(d) of the Adhiniyam of 1983. All the petitions seeking the reference were made on 9.2.1987; and, the non-applicant Board appeared in all the cases and filed their written statement/reply on 4.11.1987. At that point of

time, no counter claim was raised by the non-applicant/Board. However, for the first time a counter-claim was raised on 30.6.1989. When this counter-claim was filed, it is seen that certain interlocutory proceedings were taking place and on 8.3.1996, a preliminary objection was raised by the applicant/ Company with regard to maintainability of the counter claim.

3- The preliminary objection raised by the applicant Company was on three grounds. The first ground was that as the counter claim is being filed directly in the reference proceedings without raising a demand with the applicant Company, it cannot be termed as a 'dispute' within the meaning of section 2(d) and in the absence of a demand being made, a arbitral dispute will not come into existence, therefore, the counter claim was not maintainable. The second ground canvassed was that the counter claim is barred by time, as it is filed beyond the period of limitation. The third ground canvassed was that as required under section 7-B of the Adhiniyam of 1983, the counter claim raised without first referring it to the final authority as contemplated under the agreement, was not maintainable.

4- When these objections were filed, the matter was kept pending and finally on 18.9.2000 vide Document No.19, the non-applicant Board issued a notice of demand to the applicant Company and made a claim with regard to the assertion made in the counter-claim and in paragraph 7 of this notice dated 18.9.2000 - Document No.19, the non-applicant Board made an averment to the effect that 'as various judgments of the High Court and the Arbitration Tribunal contemplate that before lodging a counter-claim by the department, a notice of demand has to be made to the other party, the notice is being issued to cure the legal deficiency in raising the counter-claim'. When this notice was given, applicant Company submitted its reply vide Document No.20 on 23.10.2000, and denied the claim made and pressed its objection with regard to the counter-claim. Finally, by the impugned order, when the objections raised by the applicant Company are rejected and the counter-claim is held to be maintainable, all these civil revisions have been filed. As far as the dates and others facts, as is narrated hereinabove, are concerned, there is no dispute and the parties accept the same.

5- Shri V.R. Rao, learned Senior Advocate, appearing for the applicant Company, raised **three grounds** in support of his contentions. The **first ground** canvassed by the learned Senior Advocate was to the effect that to constitute a 'dispute' within the meaning of section 2(d) of the Adhiniyam of 1983, and

for the purpose of making a reference under section 7, a demand has to be raised and it is only when the demand made is refused or is not acceded to, that an arbitral dispute arises, which gives the cause for seeking a reference. It was submitted by the learned Senior Advocate that in the present case, no such demand was made, on the contrary the counter-claim was directly filed on 30.6.1989, without raising any demand by the Board with the Company and, therefore, as no 'dispute' as contemplated under this statute is made out, the counter claim as was presented on 30.6.1989, was not permissible. In support of this contention, learned Senior Advocate places reliance on two judgments rendered by Division Benches of this Court:: *Dilip Construction Company Baroda Vs. Hindustan Steel Limited, Ranchi,* AIR 1973 MP 261; and, *P.C. Rajput Vs. State Government of Madhya Pradesh and others,* AIR 1993 MP 107. It was argued by the learned Senior Advocate that in both these cases the law laid down is that without raising a demand, no 'dispute' comes into existence, which could be referred for arbitration under the Adhiniyam of 1983.

6- The **second ground** canvassed by the learned Senior Advocate was that the written statement was filed by the non-applicant Board in reply to the reference made on 4.11.1987 and even though they raised a counter-claim on 30.6.1989, but as the counter claim was filed without raising any demand, it was for the first time that notice raising the demand was submitted on 18.9.2000 vide Document No.19 and when then this was denied on 23.10.2000 by the applicant Company, the counter-claim became a claim in accordance with law only on 18.9.2000. It is argued by learned Senior Advocate that for all practical purposes and for admissibility of the counter-claim, the counter-claim was submitted in accordance to law on 18.9.2000 i.e.... after a period of more than 11 years and 3 months of filing of the reference and as this delay of 11 years and 3 months is not explained, it is said that the counter-claim was barred by time and should have been rejected.

7- Finally, it was argued by learned Senior Advocate that in view of section 7-A read with section 7-Bof the Adhiniyam of 1983, a counter claim made without referring the matter to the competent final authority for a decision in terms of the work contract, was not maintainable. Referring to the provisions of the agreement in question i.e... Clause 26 of the Agreement - Ex.D/5, learned Senior Advocate argued that reference of the claim to the competent/ final authority as contemplated under this clause is a requirement of law, a condition precedent for maintainability of a reference, which includes a counter-

claim, and as this statutory requirement is not complied with, it was argued that the counter-claim was not maintainable. In support of the aforesaid contention, learned Senior Advocate places reliance on a judgment rendered by a Division Bench of this Court in the case of *M/s Jaiswal Construction Vs. State of Madhya Pradesh*, 1997 ATLR 1; and a Full Bench judgment of this Court in the case of *Ravi Kant Bansal Vs. MP Audyogik Kendra Vikas Nigam* (Gwalior) Limited, 2006 (2) MPLJ 299, to say that even for raising a counter claim referring the matter to the final authority in terms of the work contract is a requirement of law and if this requirement is not fulfilled, the claim is not maintainable.

8- Shri V.R. Rao, learned Senior Advocate, on the basis of the aforesaid three contentions argued that the learned arbitration Tribunal in a very casual manner, even after it accepted the contentions with regard to delay, held that in public interest the delay in raising the counter claim has to be ignored and only on public interest proceeded to interfere in the matter, even though it held that under law the counter claim was not maintainable. Accordingly, it was emphasized by learned Senior Advocate that the claim made by the non-applicant in the counter claim was not maintainable and he seeks for interference.

9- Shri M.L. Jaiswal, learned Senior Advocate for the non-applicant, refuted the aforesaid contentions and submitted that as far as raising a demand before filing the counter-claim is concerned, once the reference was pending before the arbitration Tribunal, making a demand was not at all necessary for the purpose of maintainability of the counter-claim. It was emphasized by him that this procedure is not at all required when an arbitration dispute at the instance of one of the parties, was already pending. In support of the aforesaid contentions, learned Senior Advocate places reliance on two judgments: one rendered by a Division Bench of the Kerala High Court, in the case of *Joseph Vilangadan Vs. Fertilizers and Chemicals Travancore Limited and another,* AIR 1998 KERALA 99; and, another judgment of the Supreme Court in the case of *State of Goa Vs. Praveen Enterprises,* AIR 2011 SC 3814. Referring to these judgments, it was submitted that raising of a demand with the other party in the facts and circumstances when the reference was already pending is not called for.

10- As far as the question of limitation in raising the claim is concerned, learned Senior Advocate invites our attention to paragraph 9 of the order

impugned passed by the Tribunal and submitted that the cause of action for raising the counter-claim arose on 12.8.1987, when the agency which was inducted in place of the applicant, concluded the work and when quantification of claim on an ascertained amount became possible. Thereafter, as the counter claim was filed within three years on 30.6.1989, it is argued that the counter claim was maintainable; and, the second ground canvassed by Shri V.R. Rao is said to be unsustainable. Learned Senior Advocate thereafter invited our attention to a judgment rendered by another Division Bench of this Court in the case of *P.K. Pande Vs. State of MP and others*, 2000 Arb. WLJ 290, to say that in the matter of raising a counter claim, demand or reference to the final authority as per the works contract is not required. Learned Senior Advocate submitted that when the reference was already pending, a counter claim could be raised by one of the parties without referring the matter to the final authority as is required under section 7-B of the Adhiniyam of 1983.

11- We have heard learned counsel for the parties at length and perused the record. Having considered the rival contentions, we propose to deal with each of the three questions as were canvassed before us.

12- The first question canvassed by Shri V.R. Rao, learned Senior Advocate, was to the effect that without raising a demand with the applicant Company the counter claim presented on 30.6.1989 was not maintainable. To consider this question, we may take note of the definition of 'dispute' as is envisaged in section 2(d) of the Adhiniyam of 1983. 'Dispute' under this provision is defined to mean 'a claim of ascertained money valued at Rupees 50,000/- or more relating to any difference arising out of the execution or non-execution of a works contract or part thereof'.

13- Before dealing with the same and other questions that arise for consideration, we may take note of the fact that in this case the arbitration proceedings are being held in accordance to a statutory procedure by a statutory Tribunal constituted under the Adhiniyam of 1983; and, in the Adhiniyam of 1983 in the matter of raising a dispute and for adjudication of the same, a detailed procedure is contemplated. As far as the question of raising the claim without a demand being made is concerned, the question was considered by a Division Bench of this Court, in the case of *P.C. Rajput* (supra). After taking note of the definition of the word 'dispute', as is indicated hereinabove, the learned Division Bench in paragraph 19 has indicated that what is required to be seen by the Court is whether there has been any assertion

of a claim and denial of the same by the other party. In paragraph 19, the matter is so dealt with:

> "19. In the instant case, what is required to be seen is, that, whether there has been any assertion of a claim and denial of the same by the other side. It is the assertion of the claim and denial by the other side that gives rise to the dispute. The definition of the work dispute in Section 2(d) is a claim of ascertained money valued at Rs.50,000/- or more relating to a difference arising out of the execution or non-execution. Word difference arising out of must receive the meaning as understood in Arbitration Jurisprudence under Section 2(2) of the Act."
>
> ***(Emphasis supplied)***

Thereafter, various provisions of the agreement are taken note of and the law laid down in the case of *Jaiswal Construction* (supra), relied upon by Shri V.R. Rao, is considered and in paragraph 25, it has been held that a dispute as contemplated under section 2(d) arises only when there is assertion and denial as understood under the arbitration jurisprudence. Absence of denial when an approach is made should be presumed to give rise to a dispute entertainable by the arbitration Tribunal. Finally, reference is made to the judgment in the case of *Dilip Construction Company* (supra), and the final conclusion is derived at in paragraph 28, is that under the Scheme of the Act, namely the Adhiniyam of 1983, it is clear that a dispute has to be raised under the Scheme of the contract agreement; and, it is held that without raising a dispute no cause for arbitration accrues, it is held in paragraph 30 that the view taken by the Court gets statutory sanction by incorporation of section 7-A and 7-B.

14- In the case of *Dilip Construction Company* (supra) also, the principle has been laid down and in paragraph 12, after taking note of various judgments, the following three principles have been crystallized as under:

> "(i) The existence of a difference or dispute is an essential condition for the arbitrator's jurisdiction to act under an arbitration clause in an agreement;
>
> (ii) The jurisdiction of an arbitrator depends not upon the existence of a claim or the accrual of a cause of action, but upon the existence of a dispute. A dispute implies an assertion

of a right by one party and repudiation thereof by another; and,

(iii) A failure to pay is not a difference and the mere fact that a party could not or would not pay does not in itself amount to a dispute unless the party who chooses not to pay raises a point of controversy regarding, for instance, the basis of payment or the time or manner of payment."

***(Emphasis supplied)***

It is this principle which has been again upheld by the subsequent Division Bench, in the case of *P.C. Rajput* (supra). The aforesaid judgment in the case of *P.C. Rajput* (supra) has been followed by another Division Bench, in the case of *Jaiswal Construction* (supra).

15- Even though Shri M.L. Jaiswal, learned Senior Advocate for the non-applicant, by placing reliance on the Kerala High Court judgment in the case of *Joseph Vilangadan* (supra) and the Supreme Court case of *State of Goa* (supra), tried to refute this contention, but we are of the considered view that the judgments relied upon by Shri Jaiswal pertains to the provisions of the Arbitration Act of 1940 and the Arbitration and Conciliation Act, 1986, wherein there is no specific definition of the word 'dispute' and the requirement of law as is contemplated under the Adhiniyam of 1983. In the case of *State of Goa* (supra), the question was considered in the light of the matter being agitated with reference to section 11 of the Arbitration and Conciliation Act, 1996; in a proceeding held before the Chief Justice or his designate, and it was held by the Supreme Court that for invoking the jurisdiction under section 11, raising of a demand was not necessary. Both these cases are distinguishable and are based on the requirement of law as was applicable in those cases whereas in the present case a different process is specially laid in the Adhiniyam of 1983. In view of the above, we are of the considered view that without raising a demand with the applicant Company, the counter claim made directly in the pending reference under the Adhiniyam 1983 was not maintainable. Accordingly, the first question is answered in favour of the applicant/Company.

16- The second question pertains to the question of limitation. For the purpose of considering this question, at the very outset we may take note of certain observations made by the Tribunal in the impugned order. In **paragraph 12,** the Tribunal has recorded a finding that the counter claim is not maintainable

and the counter claim cannot be turned into a dispute unless a demand is made and has referred to the meaning of the word 'dispute' as contemplated under section 2(1)(d), however, on the ground that a demand was made on 18.9.2000 and in various other cases, the Tribunal has permitted raising of a demand when the matter was pending, the dispute is said to be maintainable. If that be so, then even if for a moment, we come to the conclusion that the Tribunal was right in holding so due to the procedure being followed by the Tribunal in various other cases then also a counter-claim, complete in all respects in accordance to law, and entertainable by the Tribunal came into existence only when the demand note was raised vide Document No.19 on 18.9.2000 and not before that. If this is the position, then this will have a great bearing on the question of limitation. Accordingly, after taking note of this aspect of the matter, we would now proceed to consider the second question of limitation.

17- In paragraph 9 of the impugned judgment, the Tribunal has held that the cause of action for raising the counter claim accrued to the non-applicant on 12.8.1987 and finding that the counter claim was raised on 30.6.1989 it is held that the counter claim, which is filed within three years, is within the period of limitation. We are unable to accept this contention. What was submitted on 30.6.1989 was not a counter claim, which was entertainable under law. If the law laid down by the Division Bench of this Court in the cases of *P.C. Rajput* (supra), *Jaiswal Construction* (supra) and *Dilip Construction Company* (supra) are taken note of and if the findings recorded by the Tribunal in paragraphs 6 and 7 is considered, the Tribunal itself admits that a counter-claim without a demand being raised in not maintainable; existence of a dispute is a pre-condition for maintainability of the counter-claim, but then goes to hold that as the demand notice was raised on 18.9.2000, the legal deficiency which is technical in nature is cured and, therefore, the counter claim is maintainable. This is not correct, what was filed on 30.6.1989 was not a counter claim, which could be entertained under law, the counter claim in accordance to the requirement of law came into existence only on 18.9.2000. Even in the notice issued, Document No.19 dated 18.9.2000, non-applicant in paragraph 7 say that by various judgments of the High Court of MP and the MP Arbitration Tribunal, it has become a must that before lodging a counter-claim by the department a notice showing the recoverable debatable amount must be got served upon the contractor. It is stated in this paragraph that in this case a notice has not been served and, therefore, there is a legal deficiency and only for curing this legal deficiency the notice is being

sent. If that be the position and if the Tribunal itself admits that the legal deficiency in raising the counter claim is cured, because the notice for demand was submitted on 18.9.2000, then the counter-claim in the eye of law, which was maintainable, was only filed on 18.9.2000 and, therefore, under law the date of filing of the counter claim would be 18.9.2000 and not 30.6.1989, as held by the Tribunal. What was submitted on 30.6.1989 by way of a counter claim was not a counter claim maintainable under law, it became a legally acceptable counter claim only on 18.9.2000 and it is only from this date that the counter claim can be said to have been raised, that being the position, the delay of more than 11 years and 3 months in raising the counter claim remains unexplained and the Tribunal in paragraph 13, after taking note of all these factors, admits that the counter claim is barred by time, but the delay is condoned only by saying that in public interest Government claim should not be rejected on the technical ground of delay. This is not permissible. When law contemplates doing of a particular thing within a particular time and when inaction on the part of the non-applicant in taking action in time has resulted in accrual of a legally enforceable right to the applicant, the same could not be taken away in the manner done.

18- In the present case, the delay of more than 11 years has not been properly explained. The claim was made by the applicant Company before the Tribunal on 9.2.1987 and even though written statement was filed by the non-applicant on 4.11.1987, they raised the counter claim only on 30.6.1989 even though cause of action arose to them on 12.8.1987. Counter claim, complete in all respect, came into existence on 18.9.2000, the period of delay i.e... 11 years and 3 months, in raising the counter-claim, is not at all explained. That apart, on 8.3.1996, the applicant Company raised an objection with regard to maintainability of the counter-claim and also pointed out that there is delay in raising the counter-claim. Even then the non-applicant kept quiet again for four years and it was only on 18.9.2000 that remedial action for bringing the counter-claim in accordance to the requirement of law was initiated. That being so, it was a case where there was an inordinate unexplained delay on the part of the non-applicant and, therefore, in condoning the delay and permitting the counter claim to be raised after such an long period of time, the learned Tribunal has committed grave error. Accordingly, we see no reason to condone the delay and hold that the action of the Tribunal in condoning the delay, only by mentioning public interest, was an error of jurisdiction committed by the Tribunal which warrants interference.

19- Finally, the last question warranting consideration is as to whether the counter-claim was maintainable without referring the matter to the final authority for adjudication. If the agreement in question is taken note of, it would be seen that the agreement contemplates a detailed procedure which includes referring the matter for adjudication to the Superintending Engineer and then to the Chief Engineer, before a claim should be raised. Section 7-A and 7-B of the Adhiniyam of 1983 was incorporated by MP Amending Act No.9 of 1990 with effect from 24.4.1990. Both these provisions contemplate a procedure for making reference and counting limitation. Sub-section (1)(a) of Section 7-B and sub-section (1)(b) contemplate that the Tribunal shall not admit a reference petition unless the dispute is first referred for decision of the final authority under the terms of the works contract, and the petition to the Tribunal is made within one year from the date of communication of the decision of the final authority. Thereafter, a proviso to this section contemplates that if the final authority fails to decide the dispute within a period of six months from the date of reference then the reference petition shall be filed in the Tribunal within a period of one year from the date of expiry of the period of six months. Thereafter, sub-section (2) of Section 7 contemplates as under:

> "(2) Notwithstanding anything contained in sub-section (1), where no proceeding has been commenced at all before any Court preceding the date of commencement of this Act or after such commencement but before the commencement of the Madhya Pradesh Madhyastham Adhikaran (Sanshodhan) Adhiniyam, 1990, a reference petition shall be entertained within one year of the date of commencement of Madhya Pradesh Madhyastham Adhikaran (Sanshodhan) Adhiniyam, 1990 irrespective of the fact whether a decision has or has not been made by the final authority under the agreement."

20- Both the provisions of section 7-A and 7-B and the requirement of making a reference to the final authority before raising a counter claim has been the subject matter of consideration by the Full Bench of this Court, in the case of *Ravi Kant Bansal* (supra). The question framed for reference to the Full Bench, in the case of *Ravi Kant Bansal* (supra) by a Division Bench of this Court on 22.2.2006, was made after taking note of the observations made by the Division Bench in the case of *P.K. Pande* (supra), relied upon by Shri M.L. Jaiswal, Senior Advocate, and the question made in reference to the

Full Bench reads as under:

> "Whether under the Scheme of Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 a counter-claim can be entertained without referring the dispute to the final authority under the works contract?"

Finally, the reference is answered by holding that the Tribunal cannot entertain or admit a counter-claim if the dispute raised in the counter-claim filed by the opposite party has not been referred to the final authority in terms of the works contract; and, when the matter is referred to the final authority if the counter-claim has not been filed before the Tribunal within the period of limitation as provided in Clause (b) or (a) of sub-section 1 of Section 7-B. If that was the law laid down by the Full Bench, then in this case also we cannot accept the contention of Shri M.L. Jaiswal based on the case of *P.K. Pande* (supra). The case of *P.K. Pande* (supra) has been considered by the Full Bench and the Full Bench lays down the law after such consideration to say that the Tribunal cannot entertain or admit a counter-claim if it has not been referred to the final authority. In this case, admittedly as per the requirement of the works contract before raising the counter-claim the matter was never referred to the final authority.

21- Even though parties did not make any submission with regard to applicability of the provisions of Section 7-A and 7-B, in this case we cannot lose sight of the fact that Section 7-A and 7-B of the Adhiniyam of 1983 was introduced by Amending Act No.9 of 1990 and came into force with effect from 24.4.1990. That being so, the question would be as to whether the said Amending Act will apply in the present case where the reference was made on 9.2.1987 and according to the respondent, they filed their written statement on 14.11.1989 and the so-called counter claim on 30.6.1989. To consider this question we may take note of the findings recorded hereinabove, wherein after evaluating the legal provisions, we have already come to the conclusion that a counter-claim is also in the nature of a reference and all the principles and procedure governing making of a reference are applicable in the case of a counter-claim also.

22- Admittedly, Amending Act No.9 of 1990 came into force on 24.4.1990, and based on a detailed analysis of the legal principles, we have come to the conclusion that a counter-claim in accordance to the requirement of law was raised on 18.9.2000. That being so, in this particular case even

though the reference was pending from 1987, the counter-claim - complete in all respects and in accordance to law, was raised only on 18.9.2000, when the provisions of Amending Act No.9 of 1990 came into force. That being so, in this case the requirement of Sections 7-A and 7-B, in the matter of raising the counter-claim becomes applicable and as the Full Bench in the case of *Ravi Kant Bansal* (supra) has clearly laid that a counter-claim without referring to the final authority is not maintainable, we have no hesitation in holding that the counter-claim in the present was not maintainable when it was presented on 18.9.2000, as the statutory requirement of Section 7-B was not complied with on 18.9.2000 before raising the counter-claim.

23- That apart, if sub-section (2) of Section 7-B is taken note of, it clearly contemplates that notwithstanding anything contained in sub-section (1), if no proceeding has commenced before any Court or if such proceedings have commenced before Act No.9 of 1990 came into force, then within a period of one year necessary compliance has to be made and the period of limitation in a pending matter is fixed at 1 year from the date of commencement of the amended provision i.e.... 24.4.1990. That being so, the counter-claim complete in all respects in the pending proceeding was to be raised within one year from the date of commencement of the Amending Act of 1990, and as the counter claim in question was raised only on 18.9.2000 in accordance to the requirement of law i.e... beyond the period of one year from 24.4.1990, on this count also the counter-claim was not maintainable.

24- Accordingly, considering the question from all angles, we are of the considered view that in rejecting the objection raised by the applicant, the learned Tribunal has committed grave error of law, has acted in excess of jurisdiction and contrary to the jurisdiction vested in it and as the counter-claim was not maintainable, it has to be dismissed.

25- Accordingly, these petitions are allowed. Orders-impugned dated 3.2.2003, passed in Reference Cases Nos.20/1987, 21/1987 and 22/1987 by the MP State Arbitration Tribunal, impugned in these petitions, are quashed and the counter claim filed by the respondent, in all the three cases are dismissed. All the three petitions are allowed and disposed of. No order as to costs.

*Petition allowed.*

**I.L.R. [2014] M.P., 227**
**CRIMINAL REVISION**
***Before Mr. Justice Brij Kishore Dube***
Cr. Rev. No. 211/2013 (Gwalior) decided on 8 April, 2013

GAYATRI (SMT.) & ors. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

*A. Criminal Procedure Code, 1973 (2 of 1974), Sections 227/228 - Framing of Charges* - **It is for the trial court to consider the material available on record with the object that if it is not rebutted, then whether the accused can be convicted or not - If there is strong suspicion which leads the Court to think that there is ground for presuming that accused has committed an offence charge can be framed. (Paras 19 & 22)**

*क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 227/228 – आरोप विरचित करना* – अभिलेख पर उपलब्ध सामग्री को विचारण न्यायालय इस उद्देश्य के साथ विचार में लेगा कि यदि वह खंडित नहीं है तब क्या अभियुक्त को दोषसिद्ध किया जा सकता है अथवा नहीं – यदि प्रबल संदेह है जो न्यायालय को इस सोच की ओर ले जाता है कि यह उपधारणा करने के लिये आधार है कि अभियुक्त ने अपराध कारित किया है, आरोप विरचित किया जा सकता है।

*B. Penal Code (45 of 1860), Section 107 - Abetment* - **Means and includes, instigation, Engagement in conspiracy and Intentional aiding - Held - To constitute instigation, a person who instigates another has to provoke, incite, urge or encourage doing of an act by "goading "or "urging forward" i.e. a thing that stimulates someone into action, provoke to action or reaction - Presence of Mens-Rea is the necessary concomitant of instigation. (Paras 12, 19 & 22)**

*ख. दण्ड संहिता (1860 का 45), धारा 107 – दुष्प्रेरण* – का अर्थ और इसमें समाविष्ट है, उकसाहट, षडयंत्र में आलिप्ति व साशय सहायता –अभिनिर्धारित – उकसाहट गठित होने के लिये, एक व्यक्ति द्वारा किसी दूसरे को कोई कृत्य करने के लिए "प्रेरित करके" या "आगे बढ़ने का आग्रह करके" अर्थात ऐसा करके जो किसी को कोई कार्य करने के लिये उत्तेजित करे, क्रिया या प्रतिक्रिया करने के लिए उत्तेजित करे, उस अन्य व्यक्ति को प्रकोपित, उद्दीप्त, आग्रह या प्रोत्साहित किया जाना चाहिए – आपराधिक मनःस्थिति की उपस्थिति, उकसाहट का आवश्यक आनुषांगिक गुण है।

**Cases referred :**

1995 SCC (Cr.) 1157, 2008 (1) CAR (SC) 492, 2002 SCC (Cr.) 1088, (2009) 16 SCC 605, AIR 1980 SC 52, 1990 SC 1962, 2012 AIR SCW 5139.

*V.K. Saxena* with *Jagdish Singh,* for the applicants.
*Prabal Solanki,* P.P. for the non-applicant/State.

**ORDER**

**BRIJ KISHORE DUBE, J.:-** The petitioners herein/accused have filed this petition under Section 397 of Cr.P.C. challenging the order dated 01.03.2013 passed by VII Additional Sessions Judge, Gwalior in Sessions Trial No.126/13, whereby charge under Section 306 of IPC has been framed against them.

2. The relevant facts for adjudication of the matter are that on receiving an information to the effect that one dead body was lying on railway track, a merg at Crime No.40/2012 under Section 174 of Cr.P.C. was registered at Police Station Maharajpura, District Gwalior. The merg was inquired into and after preliminary inquiry, an offence under Section 306 of IPC vide Crime No.343/12 was registered at Police Station Maharajpura, Gwalior against five accused persons. After completion of investigation, a charge-sheet was filed against the present petitioners as well as one Jaisingh Jatav before the Committal Court, which on its turn, committed the case to the Court of Sessions from where it was received by the Trial Court for the trial.

3. Learned Trial Judge on the basis of the material placed on record framed charge punishable under Section 306 of IPC against the present petitioners as well as co-accused, Jaisingh Jatav. The petitioners denied the charge and claimed to be tried.

4. Learned senior counsel for the petitioners submits that Jitendra Singh (the deceased) committed suicide and left one suicide note in which he stated that his wife, Rajni Chourasiya had illicit relationship with one Jaisingh Julaniya and he saw them in compromise position. Thereafter, his wife and family members of his wife threatened to kill him and his family members and also demanded money, therefore, he has committed suicide. If the entire suicide note and other evidence collected by the prosecution during the investigation is accepted in toto, no case is made out against the petitioners for framing

charge under Section 306 of IPC. On these grounds, learned senior counsel prays that the petitioners may be discharged from the aforesaid charge. Learned senior counsel has placed reliance on the following decisions:-

(i) *Mahendra Singh Vs. State of M.P.*, 1995 SCC (Cr.) 1157;

(ii) *Sohan Raj Sharma Vs. State of Haryana*, 2008(1) CAR 492; and

(iii) *Ramesh Kumar Vs. State of Chhatisgarh*, 2002 SCC (Cr.) 1088;

5. On the contrary, learned Public Prosecutor argued in support of the impugned order and submitted that there is *prima-facie* case made out for proceeding against the petitioners under Section 306 of IPC.

6. I have considered the rival contentions of the learned counsel for the parties and perused the record.

7. Section 306 of the IPC reads as under:

**"306. Abetment of suicide -**

If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

From a bare reading of the aforesaid provision, it is clear that to constitute an offence under Section 306 IPC, the prosecution has to establish: (i) that, a person committed suicide, and (ii) such suicide was abetted by the accused. In other words, an offence under Section 306 would stand only if there is an "abetment"; for the commission of the crime.

8. The parameters of "abetment" have been stated in Section 107 of the IPC, which defines abetment of a thing as follows:

**"107. Abetment of a thing**

A person abets the doing of a thing, who - First- Instigates any person to do that thing; or Secondly- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in

pursuance of that conspiracy, and in order to the doing of that thing; or Thirdly- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1- A person who by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing."

9. As per the Section, a person can be said to have abetted in doing a thing, if he, firstly, instigates any person to do that thing; or secondly, engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or thirdly, intentionally aids, by any act or illegal omission, the doing of that thing. Explanation to Section 107 states that any wilful misrepresentation or wilful concealment of material fact which he is bound to disclose, may also come within the contours of "abetment";. It is manifest that under all the three situations, direct involvement of the person or persons concerned in the commission of offence of suicide is essential to bring home the offence under Section 306 of the IPC.

10. Therefore, the question for consideration is whether the allegations levelled against the petitioners in the FIR and the material collected during the course of investigation would attract any one of the ingredients of Section 107 IPC?

11. As per the said Section, firstly; a person can be said to have abetted in doing of a thing, who "instigates"; any person to do that thing. The word "instigate"; is not defined in the IPC. The meaning of the said word was considered by the Apex Court in *Ramesh Kumar Vs. State of Chhattisgarh* (supra), Speaking for the three-Judge Bench, R.C. Lahoti, J. (as His Lordship then was) said that instigation is to goad, urge forward, provoke, incite or encourage to do "an act";. To satisfy the requirement of "instigation", though it is not necessary that actual words must be used to that effect or what constitutes "instigation" must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. Where the accused had, by his acts or omission or by a continued course of conduct, created such circumstances that the deceased was left with no other option except to commit suicide, in which case, an

"instigation" may have to be inferred. A word uttered in a fit of anger or emotion without intending the consequences to actually follow, cannot be said to be instigation.

12. Thus, to constitute "instigation", a person who instigates another has to provoke, incite, urge or encourage doing of an act by the other by "goading" or "urging forward". The dictionary meaning of the word "goad" is "a thing that stimulates someone into action: provoke to action or reaction" (See: Concise Oxford English Dictionary); "to keep irritating or annoying somebody until he reacts" (See: Oxford Advanced Learner's Dictionary - 7th Edition). Similarly, "urge" means to advise or try hard to persuade somebody to do something or to make a person to move more quickly and or in a particular direction, especially by pushing or forcing such person. Therefore, a person who instigates another has to "goad"; or "urge forward" the latter with intention to provoke, incite or encourage the doing of an act by the latter. As observed by the Apex Court in *Ramesh Kumar's case* (supra), where the accused by his acts or by a continued course of conduct creates such circumstances that the deceased was left with no other option except to commit suicide, an "instigation" may be inferred. In other words, in order to prove that the accused abetted commission of suicide by a person, it has to be established that: (i) the accused kept on irritating or annoying the deceased by words, deeds or wilful omission or conduct which may even be a wilful silence until the deceased reacted or pushed or forced the deceased by his deeds, words or wilful omission or conduct to make the deceased move forward more quickly in a forward direction; and (ii) that the accused had the intention to provoke, urge or encourage the deceased to commit suicide while acting in the manner noted above. Undoubtedly, presence of mens rea is the necessary concomitant of instigation.

13. The Apex Court in *Sohan Raj Sharma v. State of Haryana,* 2008 (1) CAR (Criminal Appeal Reporter) (SC) 492, by interpreting the provision of Section 306 of IPC held as under:-

> "8. Abetment involves a mental process of instigating a person or intentionally aiding that person in doing of a thing. In cases of conspiracy also it would involve that mental process of entering into conspiracy for the doing of that thing. More active role which can be described as instigating or aiding the doing of a thing it required before a person can be said to be abetting

the commission of offence under Section 306 of IPC.

9. .....

10. Section 107 IPC defines abetment of a thing. The offence of abetment is a separate and distinct offence provided in the Act as an offence. A person, abets the doing of a thing when (1) he instigates any person to do that thing; or (2) engages with one or more other persons in any conspiracy for the doing of that thing; or (3) intentionally aids, by act or illegal omission, the doing of that thing. These things are essential to complete abetment as a crime. The word "instigate" literally means to provoke, incite, urge on or bring about by persuasion to do any thing. The abetment may be by instigation, conspiracy or intentional aid, as provided in the three clauses of Section 107, Section 109 provides that if the act abetted is committed in consequence of abetment and there is no provision for the punishment of such abetment, then the offender is to be punished with the punishment provided for the original offence. 'Abetted' in Section 109 means the specific offence abetted. Therefore, the offence for the abetment of which a person is charged with the abetment is normally linked with the proved offence.

11. In cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. The mere fact that the husband treated the deceased-wife with cruelty is not enough. [See *Mahinder Singh v. State of M.P.* (1995 AIR SCW 4570)]."

14. The Hon'ble Apex Court in the case of *Chitresh Kumar Chopra v. State (Government of NCT of Delhi),* (2009) 16 SCC 605, observed that the question as to what is the cause of a suicide has no easy answers because suicidal ideation and behaviours in human beings are complex and multifaceted. Different individuals in the same situation react and behave differently because of the personal meaning they add to each event, thus accounting for individual vulnerability to suicide. Each individual's suicidability pattern depends on his inner subjective experience of mental pain, fear and loss of self-respect. Each of these factors are crucial and exacerbating contributor to an individual's vulnerability to end his own life, which may either be an attempt for self-protection or an escapism from intolerable self.

15. Admittedly, the deceased was married with Rajni, petitioner No.2 (wrongly mentioned as Kumari) in the year 2006. The petitioner No.3, Janved Singh is the father of Rajni, while petitioner No.1, Smt. Gayatri is her sister and petitioner No.4 is husband of her sister. It is also admitted fact that Jitendra Singh committed suicide in the intervening night of 27-28.08.12 and left a suicide note, which reads as under:-

"प्रमाण–पत्र

मैं जितेन्द्र सिंह बरैया पुत्र हरीलाल बरेया यह प्रमाण करता हूँ कि मेरे प्रति जो भी कार्यवाही कानूनी है वह गलत है अतः मैं अपनी बीबी रजनी चौरसिया से बहुत प्यार करता हूँ परन्तु रजनी किसी और नाम जय सिंह जुलानिया से ग्राम चिनकूपुरा पास्ट गोहद जिला भिण्ड का मास्टर का लडका वह मैने खुद अपनी आखो से रजनी को देखा है शारीरिक संम्बध है और रखता है। मैरे देखने पर मेरी बीबी रजनी ओर उसके माता पिता एवं भाई पप्पी हरनारायण राजेश साडू विजेन्द्र बंसल शेरपुर वाले पंचशील नगर मुकेश दिनांक 09 अगस्त को में सुसराल पक्ष के इन लोगो ने जान से मारने एवम् मेरा परिवार के लोगो को भी धमकी दी एवं यदि में अनको दो लाख रूपये नहीं दिये वह मेरे मॉ बाप को भी मार डालेगे। मेरी पत्नी गलत है मेरी मौत के पीछे इन सभी का हाथ है। रजनी जनवेदसिंह चोरसिया साडू विजेन्द्र बसंल, पप्पी उर्फ हरनारायण गंगा देवी, गायत्री, राजेश का साला मुकेश।

अतः मै इस पत्र के माध्यम से यह सूचित करता हूँ कि मेरी मोत एवं वर्वादी परिवार की में इन सभी लोगो का हाथ है।

प्रार्थी

जितेन्द्र सिंह बरैया

पानी की टंकी के पास जनता मांटेसरी

स्कूल के सामने पोरसा जिला मुरैना।

मेरी मौत का कारण मेरे ससुराल वाले है

अतः में अपने लडके को अपने माता पिता के साथ रखना चाहता हूँ। रजनी अपने आशिक के साथ रहे। इस किया में मेरे मॉ पापा का कोई कारण नही है इसके लिये मेरे ससुराल वाले ही जिम्मेदार है।

मेरा केश पडाव थाना महिला में है।

9713635417 मम्मी"

16. In the present case, charge against the petitioners is that they mentally

tortured Jitendra Singh, the deceased, and abetted him to commit suicide by the said act of mental torture.

17. Punno Bai, who is mother of the deceased stated in her statement recorded under-Section 161 of Cr.P.C. that her son, Jitendra was married to Rajni, the daughter of Janved Chourasiya, resident of Vivek Nagar, Thatipur, Gwalior as per Hindu rites in the year 2006. There was a quarrel between the husband and wife as her daughter-in-law, Rajni was not having good character and having illicit relationship with Jai Singh S/o Purshottam Jatav, resident of Chankupura, Police Station Gohad. On this, there was a dispute between them. Jaisingh used to talk with Rajni on phone. Her daughter-in-law, Rajni does not want to reside at her (Rajni) in-laws house at Vijaypur, hence, a report to this effect was lodged at Police Station, Vijaypur by her son, Jitendra. Her daughter-in-law, Rajni and her (Rajni) father Janved Chourasiya lodged a false report against her son, the deceased and her (Punno Bai) and family members at Police Station, Padav, District Gwalior regarding harassment and demand of dowry, therefore, on 27.08.2012 she and other persons were called by the police for conciliation at Mahila Paramarsh Kendra, Padav, District Gwalior. She, her son and other persons went there and conciliation took place. Thereafter, she alongwith her husband returned back to Vijaypur and her son, Jitendra was left at the house of his (Jitendra) in-laws at Gwalior. In the night, Rajni Chourasiya, Gayatri Chourasiya, Janved, Brijendra Jatav and Jai Singh have caused marpeet with her son, Jitendra and they abetted her son to commit suicide. In the night of 27.08.2012 at about 10-11 pm, she received a call on her mobile of her son, Jitendra who stated that above five persons have committed marpeet with him on account of torture, annoyance and instigation her son committed suicide. Similar statement has been given by the father of the deceased, Harilal.

18. In the present case, apart from the suicide note, extracted above, statements recorded by the police during the course of investigation, tend to show that on account of mental torture, the deceased was put under tremendous pressure to do something which he was perhaps not willing to do, therefore, it appears that the conduct of the accused persons was such that the deceased was left with no other option except to end his life and, therefore, clause Firstly of Section 107 IPC was attracted.

19. According to the provisions of Sections 227 and 228 of Cr.P.C., it is for the Trial Court to consider the material available on record with the object

that if it is not rebutted, then whether the accused can be convicted for a particular offence or not? By considering such material, if the accused is convicted for that offence, then charge for that offence shall be framed.

20. In *Supdt. & Remembrancer of Legal Affairs, West Bengal, v. Kumar Bhunja and others,* AIR 1980 SC 52, a three Judge Bench of the Supreme Court held as under:

> "18 It may be remembered that the case was at the stage of framing charges; the prosecution evidence had not yet commenced. The Magistrate had, therefore, to consider the above question on a general consideration of the materials placed before him by the investigating police officer. At this stage, as was pointed out by this Court in *State of Bihar Vs. Ramesh Singh,* AIR 1977 SC 2018, the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure, 1973. At this stage, even a very strong suspicion found upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged; may justify the framing of charge against the accused in respect of the commission of that offence."
>
> (Emphasis supplied)

21. The Apex Court in the case of *Niranjan Singh Karam Singh Punjabi v. Jitendr Bhimraj Bijja and others*, AIR 1990 SC 1962, held as under:

> "It seems well settled that as the Ss.227-228 stage i.e.,stage of framing the charge, the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the

case."

22. In the case of *Central Bureau of Investigation, Hyderabad Vs. K. Narayana Rao,* 2012 AIR SCW 5139, the Apex Court considered its earlier authorities about the scope of Sections 227 and 228 of Cr.P.C., and held that for framing of charge, a roving enquiry in pros and cons of matter and weighing of evidence as is done in trial is not permissible at this stage. The charge has to be framed if Court feels that there is strong suspicion that accused has committed offence. Thus, even if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence, a charge can be framed.

23. Resultantly, In the facts and circumstances of the case, the settled legal position and for the reasons given hereinabove, I do not find any infirmity and illegality in the impugned order that may call for any interference in exercise of the revisional jurisdiction under Section 397 of Cr. P.C., This revision petition is devoid of merit and is therefore, dismissed.

*Revision dismissed.*

**I.L.R. [2014] M.P., 236**
**CRIMINAL REVISION**
***Before Mr. Justice Subhash Kakade***
Cr. Rev. No. 607/2013 (Jabalpur) decided on 3 September, 2013

SUNDER SINGH ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Penal Code (45 of 1860), Section 376 - Rape* - Prosecutrix alleged that applicant committed rape while she was travelling in train - Journey ticket not produced - F.I.R. made after more than three years - Accused not named in F.I.R. - No identification parade held - Evidence of the prosecution cannot show that the accused committed the offence - Accused discharged. (Paras 17, 19, 20, 41 & 43)**

*दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार* – अभियोक्त्री ने अभिकथन किया कि आवेदक ने बलात्कार कारित किया जब वह रेलगाड़ी में यात्रा कर रही थी – यात्रा टिकट प्रस्तुत नहीं – तीन वर्षों से अधिक अवधि पश्चात प्रथम सूचना रिपोर्ट की गई – प्रथम सूचना रिपोर्ट में अभियुक्त नामित नहीं – पहचान परेड नहीं कराई गई – अभियोजन का साक्ष्य नहीं दर्शा सका कि अभियुक्त ने

अपराध कारित किया – अभियुक्त आरोप मुक्त।

**Cases referred :**

(1979) 3 SCC 4, 2005 (5) SCC 413, AIR 2009 SC 1010=2009 AIR SCW 105, 2010 (4) CrLJ 4283 (SC), AIR 1995 SC 2472=1995 AIR SCW 3644, AIR 1996 SC 1393=1996 AIR SCW 998, AIR 1973 SC 1=1973 CRLJ 185, AIR 1974 SC 2118, 1974 CRLJ 1393, AIR 1972 SC 116=1972 CRLJ 29, AIR 1973 SC 760= 1973 CRLJ 599=(1973) 1 SCC 202=1973 SCC (Cr.) 307, AIR 1974 SC 606=1974 CRLJ 479, 2007 CRLJ 4709 (SC), (2000) 3 SCC 454=2000 CRLJ 1718, AIR 1980 SC 1780, 1980 CRLJ 1271=AIR 1977 SC 2018=1977 CRLJ 1606, (1979) 3 SCC 4=1979 CRLJ 154, (1996) 9 SCC 766=(1996) 3 Crimes 85 (SC), (1996) 4 SCC 659.

*Mukesh Pandey,* for the applicant.
*Akhilesh Shukla,* Dy. G.A. for the respondent/State.

**ORDER**

**Subhash Kakade, J.:-** This revision petition have been preferred by applicant under Section 397 and 401 of Criminal Procedure Code, 1973, here-in-after in short "the Code" against the impugned order dated 20.03.2013 passed by the First Additional Sessions Judge Khurai, District Sagar in Sessions Trial No.40/2013 by which learned trial Court framed charge against applicant punishable under Section 376 of the Indian Penal Code.

02. Facts and circumstances giving rise to this case are that the prosecutrix lodged the report on dated 05.05.2011 that the accused has committed rape on her on dated March 15, 2009 while she was traveling by train about three years ago. The explanation for the delay was given that the accused had given her threat to kill. Offence registered under Section 376, 420 and 506 of IPC, after due investigation, challan was filed.

03. Since the case was exclusively triable by the Court of Sessions, therefore, after committal the case to the Court of Sessions Judge, from where it was received in the learned trial Court for the trial. Learned trial Court, after taking into consideration the challan papers, framed charge against applicant under Section 376 of IPC, which is denied. Against this order, the instant revision petition has been filed.

04. Shri Mukesh Pandey, learned counsel for the applicant has submitted

that the learned trial Court has not considered this aspect that the prosecutrix while traveling by train accused met her and after introduction she was subjected to sexual intercourse, such allegation themselves are showing that she had made totally false allegations. He further submitted that the learned trial Court did not consider this aspect that there is no evidence to show that the accused was traveling in the train. Coming to the star argument that 27 years aged prosecutrix has filed First Information Report after more than three years against the married employee of the railway department that too, only on presumption, applicant is impleaded in this false and baseless case therefore, impugned order is liable to be set aside.

05. Shri Akhilesh Shukla, learned Panel Lawyer for the State has opposed the revision vehemently contending that the applicant has rightly been charged, thus, the revision is liable to be dismissed.

06. Considering the rival submissions made by learned counsel for the parties and perused the record available, I am of the opinion that this revision petition deserves to be accepted.

**The scope of Section 227 of the Code**

07. In *Union of India vs. Pafulla Kumar Samal* (1979) 3 SCC 4, the scope of section 227 of the Code was considered and after adverting to various decisions, the Apex Court enumerated the following principles:

> (1) That the Judge while considering the question of framing the charges under section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:
>
> (2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified in framing a charge and proceeding with the trial.
>
> (3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some

suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

**The prosecutrix consenting party**

08. Together reading the definition of rape under Section 375 and provisions of Section 90 of the I.P.C. it is crystal clear that consent given under fear or misconception of fact that "for determining whether consent given by the prosecutrix was voluntary or under a misconception of fact," there is no straitjacket formula and each case has to be decided, considering the evidence and surrounding circumstances of that case.

09. The prosecution came with the case that the prosecutrix boarded the train leaving for Bilaspur by Utkal Express in Coach No.S-5, at Agra Station. Two persons including accused came to her and asked to vacate the berth No.7, which she was occupying. When she introduced herself that her father late Shri Virender Kumar Dhakija was Senior Ticket Checker at Bilaspur Railway Station so accused seated near to her. During conversation accused portrayed himself unmarried and promise to marry with her. She ignored all this non-sense. During night the prosecutrix went for sleeping on Berth No.7. At that time accused who named as Jay came to her and repeated the promise of marriage and laying with her by side. At that time the train was stationed at Bena Station. During running train accused committed rape on her.

10. Therefore, the case of prosecution rests on sole testimony of unmarried prosecutrix. It transpires that the culprit gained intimacy with the prosecutrix and on the false promise to marry committed rape on her.

11. 'S' Coach in every train denotes the sleeper class having 72 berth for passengers. Berth No.7 will be in group of 8 berths. In this situation without

evaluating any pros and cons of this peace of evidence it is highly improbable that rape can be performed on berth of running train.

12. In written First Information Report version of prosecutrix was that accused had committed rape on her on Berth No.7 of sleeper coach. But, in her police statement recorded under Section 161 of the Code prosecutrix willfully exaggerated her version stating that rape was committed with her in toilet also to rule out this improbability, but of no use.

13. If the prosecutrix was not willing her natural conduct would have been to raise alarm. It is evident from contains of F.I.R. that the prosecutrix did not raise cry for help nor complaint about the incident to fellow passengers nor competent railway officer the Ticket Traveling Examiner ( T.T.E.). If the prosecutrix would not have been a consenting party, her normal conduct would have been to complain to fellow passengers or the T.T.E. who was attending the Coach S-5.

14. Whether accused had obtained the consent of the prosecutrix by misrepresentation? To observe it that accused had obtained the consent of the prosecutrix by misrepresentation which is no consent under the law nothing is on record. The accused had induced prosecutrix to have sexual intercourse with promise to marry her but subsequently refused to marry her is also not on record. Therefore, on the strength of evidence which is produced by the prosecution accepting to be true, even then no offence of sexual assault is proved as cohabitation had taken place with the consent of the prosecutrix.

15. The prosecutrix (aged 27 years on the date of occurrence) had sufficient intelligence to understand the significance and moral quality of the act she was facing. In case the prosecutrix had not been the consenting party on the date of incident she would not have allowed the accused to have sexual intercourse with her in running train, that too on berth of sleeper coach. That is the strongest 'probability factor' to show that her consent was not lacking. It appears that she was fully a consenting party to the act of sexual intercourse and that explains her being tight-lipped for more than 03 years. The suppression is indicative of her being in 'flagrant-delicto'.

16. After careful examining of prosecution evidence proposes to adduce to prove the guilt of the accused even if fully accepted, to ascertain whether it was a case of passive submission on the face of psychological pressure or allurement made by the accused or it was a conscious decision of the

prosecutrix knowing fully the nature and consequences of the act she participated in very easily conclusion will be that it was with consent of major prosecutrix on any angle. Please see: *State of M.P. V Babbu Barkare* (2005)5, SCC 413.

**Journey ticket not produced**

17. The burden to prove this fact beyond doubt that accused was traveling on the date of incident by the Utkal Express is heavily rest upon the prosecution. The prosecution totally failed to shift this burden because, neither required journey ticket were recovered from the accused nor reservation chart is produced by the prosecution. On the other hand, Chief Enquiry-cum-Reservation Supervisor, Hazarrat Nizamuddin Railway Station issued certificate to the effect that reservation chart is not available for Utkal Express for journey date 15.03.2009.

18. Prosecution did not collected required journey ticket from the prosecutrix also then, question arises how it will be proved by the prosecution that the prosecutrix was traveling in Utkal Express?

**Need of test Identification Parade in sexual offence**

19. Where in a rape case from the evidence of prosecution on record, it was clear that the culprit was not named clearly and accurately in the F.I.R. and he was living at a place miles away from the house of the prosecutrix. In such a fact situation T.I. Parade is needed to fix the identify of the culprit.

20. The culprit was not known to the prosecutrix, therefore, she mentioned his name as Jai in FIR that too, after more than three years. No identification parade held.

21. One unknown person committed rape on a 27 years old unmarried woman when she was travelling in a train but, no T.I. Parade was held and given cell phone number found third person's. Now she will recognize the stranger culprit in trial Court while she will be examined after lapse of more than four years, on the basis of this dock identification the culprit could not be convicted.

22. Mentioning of Cell Phone No.09752114264 in written First Information Report is also at all not evidence hence, not of any use. It is pertinent to mention here that the owner of this sim card number is a third person Suresh Kumar so, it is also improbable that how accused will be connected on the

basis of this cell phone number with the crime?

**Delayed F.I.R. in sexual offences**

23. The incident were happened on 15.03.2009 in train Utkal Express and matter was reported after delay of more than 3 years on dated 15.05.2012 by the prosecutrix at Police Station GRP Bena, District Sagar.

24. In *State of Himachal Pradesh vs. Prem Singh*, AIR 2009 SC 1010 = 2009 AIR SCW 105, the Supreme Court considered the issue and observed as under:

> "So far as the delay in lodging the FIR is concerned, the delay in a case of sexual assault cannot be equated with the case in evolving other offence."

Please also see, *Satpal Singh vs. State of Haryana*, 2010 (4) CriLJ 4283 (SC).

25. In a rape case the prosecutrix remains worried about her future. She remains in traumatic State of mind. The family of the victim generally shows reluctance to go to the police station because of society's attitude to words such a woman. It casts doubts and shame upon her rather than comfort and sympathies with her. Family remains concern about its honour and reputation of the prosecutrix. After only having a cool thought it is possible for the family to lodge a complaint in sexual offence. Vide *Karnel Sing vs. State of M.P.*, AIR 1995 SC 2472 = 1995 AIR SCW 3644; and *State of Punjab vs. Gurmeet Singh & Ors.*, AIR 1996 SC 1393 = 1996 AIR SCW 998.

26. Any unmarried girl on account of her bashfulness and the circumstance that not only her own honour but that of her family was at stake, would have been extremely reluctant and loath to disclose to the police, her traumatic experience of being raped. It is only after efflux of time, when she is able to get over a part of her trauma, will she think of lodging the F.I.R. Therefore, no mathematical time limit in lodging an F.I.R. can be fixed in Cases of rape. Courts in such Cases should adapt a realistic approach rather than one which is unimaginative and theoretical.

27. The FIR is not a be-all and end-all of the matter, though it is undoubtedly, a very important document. F.I.R. in criminal Case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial.

28. It is well settled by the Supreme Court that a mere delay itself cannot be a ground to disbelieve the entire case of the prosecution. It is only in such of those cases where the delay is enormous and the same remains unexplained and that there are also circumstances to suspect the genuineness of the contents of the FIR, the Court can doubt the case of the prosecution and then discard the case of the prosecution.

29. Mere delay in thus not fatal to the prosecution. The effect of delay is to be understood in the light of the plausibility of the explanation forthcoming and must depend for consideration on all the facts and circumstances of a given Case. *Apren Joseph v. State of Kerala,* AIR 1973 SC 1: 1973 CrLJ 185.

30. When the explanation for delay in giving the F.I.R. is satisfactory the delay is not significante. *Lalai v. State of U.P.* AIR 1974 SC 2118 : 1974 CrLJ 1393; *Jadunath Singh v. State of U.P.*, AIR 1972 SC 116 : 1972 CrLJ 29.

31. When delay in lodging F.I.R. is not deliberate, it is of no consequence. *Saktu v. State of U.P.,* AIR 1973 SC 760 : 1973 CrLJ 599 : (1973) 1 SCC 202 : 1973 SCC (Cr) 307.

32. No duration of time in the abstract can be fixed as reasonable for giving information, the question of reasonable time being a matter for determination by the Court in each Case. *Ram v. State of U.P.*, AIR 1974 SC 606 : 1974 CrLJ 479.

33. The delay of one or two days in lodging the FIR may be bonafide, reasonable and justified. This is naturally in view of the social conditions prevailing in India where a victim of rape case has to think seriously before giving the information to the Police for fear of onslaught of social stigma that may haunt her for life. But, the delay for more than three years in lodging the F.I.R. in any case cannot be bonafide, reasonable and justified, on the other hand this delay is fatal for the prosecution.

34. The Supreme Court in case of *Dilawar Singh vs. State of Delhi,* 2007 CriLJ 4709 (SC) held that - in criminal trial one of the cardinal principles for the Court is to look for plausible explanation for the delay in lodging the report. Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even make fabrications. Delay defeats the chance of the unsoiled and untarnished version

of the case to be presented before the Court at the earliest instance. That is why if there is delay in either coming before the police or before the Court, the Courts always view the allegations with suspicion and look for satisfactory explanation. If no such satisfaction is formed, the delay is treated as fatal to the prosecution case.

**Medical evidence**

35. Prosecutrix was medically examined on 15.05.2012 at District Hospital Sagar by Dr. Yogmaya. What will be the evidentarory value of this evidence when the prosecution medically examined prosecutrix after lapse of more than 3 years, in case of rape? it can be very well presumed by any prudent person. Resultantly, Doctor written the answer in her report that she did not find any injury either external or internal of the person of the prosecutrix, therefore, no definite opinion can be given regarding resent rape on the prosecutrix.

36. Applicant also medically examined by Dr. O.P. Rai on 06.12.2012 at District Hospital Sagar, which is a sheer formality rather, waste product of valuable powers of investigation agency.

37. Statements of Smt. B. Karmakar, Smt. Ushabai were recorded by the Investigation Officer, during which these railway employees nothing stated against the applicant. On the other hand, they have supported by narrating this fact that railway employee applicant is saying that he is being involved by unknown lady in false case of rape.

**Heinous offence vs false and frivolous cases**

38. The Supreme Court in case of *Rang Bahadur Singh v State of U.P.* (2000) 3 SCC 454 : 2000 CrLJ 1718, has observed that there is no doubt about it that the rape is a heinous offence not only against the entire society. **While remembering such point, the court must also guard against false and frivolous cases. A criminal court cannot afford to deprive liberty of a person, perhaps life only liberty, without having at least a reasonable level of certainty that the accused was the real culprit.**

(Emphasis given)

**When accused should be discharged**

39. Section 227 of the Code provides that 'the Judge shall discharge when he considers that there is no sufficient ground for proceeding against the

accused'. The word 'ground' in the context is not a ground for conviction, but a ground for putting the accused on trial. At this stage, he is not to see as to whether the trial will end in conviction or not. The broad test to be applied is whether the materials on record, if unrebutted, make a conviction reasonably possible.

40. The Supreme Court has observed that Section 227 of the Code has made a beneficent provision to save the accused from prolonged harassment which is necessary concomitant of a protracted criminal trial. Please see : *Kewal Krishan v. Suraj Bhan and another,* AIR 1980 SC 1780: 1980 CrLJ 1271; *State v. Ramesh* AIR 1977 SC 2018:1977 CrLJ 1606.

41. If the evidence of the prosecution cannot show that the accused committed the offence, the accused should be discharged. Please see *Ramesh Singh case* (supra) and also see : *Union of India v. Prafulla Kumar Samal* (1979) 3 SCC 4 : 1979 CrLJ 154 and *Satish Mehra v Delhi Adminstration* (1996) 9 SCC 766: (1996) 3 Crimes 85 (SC).

42. The prosecution, having regard to the right of an accused to have a fair investigation, fair inquiry and fair trial as adumbrated under Art.21 of the Constitution of India, cannot at any stage be deprived of taking advantage of the materials which the prosecution itself have placed on record. If upon perusal of the entire materials on record, the court arrives at an opinion that two views are possible, charges can be framed, but if only one and one view is possible to be taken favouring the accused, the court shall not put the accused to harassment by asking him to face a trial. Please see : *State of Maharashtra v. Som Nath* (1996) 4 SCC 659. In the case at hand, if the Court allowed to asking applicant face the trial on above discussed evidence, definitely it will amount to put the applicant for harassment.

43. Legal position that emerges from above discussed judicial pronouncements of the Apex Court, there can not be any doubt that the charge can be quashed if the evidence which the prosecutor proposes to adduce to prove the guilt of applicant, even if fully accepted before, it is challenged by cross examination or rebutted by defence evidence, if any, cannot show that applicant committed the offence for which he is charged.

44. After examining the documentary as well as the oral evidence which the prosecutor proposes to adduce to prove the guilt of applicant, even if fully accepted before, it is challenged by cross examination or rebutted by defence

evidence, if any, is not showing that applicant committed the offence punishable under Section 376 of the I.P.C. for which he is charged, because, (i) it is highly improbable that rape can be performed on berth of running train, (ii) on the other hand, no offence of sexual assault is proved as cohabitation had taken with the consent of the prosecutrix, (iii) required journey tickets not produced, (iv) there test identification parade was must, but not held, (v) evidentory value of medical evidence is zero and top of these (vi) F.I.R. lodged after delay of more than three years, that too, without explaining bonafide and reasonable justification which is fatal for the prosecution case.

45. In view of above, the learned trial Court committed a mistake of law in framing charge against applicant therefore, this revision petition succeeds and impugned order dated 20.03.2013 passed by learned First Additional Sessions Judge Khurai, District Sagar framing charge punishable under Section 376 of the Indian Penal Code against applicant Sunder Singh is quashed.

*Revision allowed.*

**I.L.R. [2014] M.P., 246**
**CRIMINAL REVISION**
***Before Mr. Justice Subhash Kakade***
Cr. Rev. No. 961/2013 (Jabalpur) decided on 12 September, 2013

PRAKASH & ors. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Section 311* - Application for recalling of three prosecution witnesses for cross-examination - Held - Denial of an opportunity to recall the witnesses for cross-examination would amount to condemning the appellant without giving him the opportunity to challenge the correctness of the version and the credibility of the witnesses - Denial of an opportunity to do so will result in a serious miscarriage of justice. (Paras 4 & 13)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 – प्रतिपरीक्षण हेतु तीन अभियोजन साक्षियों को पुनः बुलाने के लिये आवेदन – अभिनिर्धारित – प्रतिपरीक्षण हेतु साक्षियों को पुनः बुलाने का अवसर अस्वीकार किया जाना, अपीलार्थी को साक्षियों के कथन की सत्यता और उनकी विश्वसनीयता को चुनौती का अवसर दिये बिना दोषसिद्ध किये जाने की कोटि में आयेगा – ऐसा करने का अवसर देने से इंकार करने के परिणामस्वरुप घोर न्यायहानि होगी।

**Cases referred :**

(2008)15 SCC 652, (2000)10 SCC 430, 1991 Supp.(1) 271, 2012(3) SCALE 550.

*Sanjay Sharma*, for the applicants.
*Akhilesh Shukla*, Dy. G.A. for the non-applicant/State.

**ORDER**

**SUBHASH KAKADE, J.:-** Being aggrieved by impugned order dated 10.04.2013 passed by the learned First Additional Sessions Judges, Balaghat in Sessions Trial No.137/2012 (*State of M.P. through P.S. Kotwali Balaghat Vs Prakash and 4 and others*), the accused/petitioners has filed this petition under section 397/401 of the Code of Criminal Procedure,1973 here-in-after in short "the Code".

02. The learned trial Court by the impugned order rejected the application dated 10.04.2012 under Section 311 of the Code for recalling the witnesses Ku. Savitri Parteti (PW/1), Dr. Dhanendra Gajbhiye (PW/2) and Smt. Mamta Songade (PW/3) for their cross examination.

03. The case of the prosecution has portrayed on the paper that complainant Smt. Mamta Songade made a written complaint on 19.03.2012 alleging that since the date of marriage 11.05.2006 till date, the applicants, her in-laws are harassing her to fulfill demand of dowry. The prosecution came with the case that applicants poured on her kerosene oil and were trying to committed her murder by set her on fire, but she managed to save herself. The charges punishable under Section 307, 323, 506, 498A/34 of IPC and Section 3/4 of Dowry Prohibition Act, 1961 were framed against the applicants who abjured their guilt therefore set for the trial. During trial statement of these 3 witnesses were recorded and application for recalling them for further cross-examination were rejected, hence, this revision.

04. Shri Sanjay Sharma, learned counsel for the applicants submitted that the order of rejecting application for recalling of witnesses for further cross examination amounts to denial of fair trial and will cause irreparable loss to the applicants. The recalling of these witnesses is just, reasonable and necessary to bring the entire facts and truth before the court so that applicants can get fair justice.

05 On the other hand, Shri Akhilesh Shukla, Dy. Government Advocate

for the respondent/State submitted that the learned trial Court has rightly rejected the application for cross-examinations of the prosecution witnesses, therefore, revision petition deserves to be dismissed.

06. I have gone through the submissions made by learned counsel for the parties and also perused the impugned order and the material records placed before me.

07. Before dealing with merits, demerits of this revision petition, it would be appropriate to state the nature and extent of the power vested in the Courts under Section 311 Cr.P.C. to recall witnesses. The Apex Court in case of *Hanuman Ram vs. The State of Rajasthan and another* (2008) 15 SCC 652 held that the object underlying Section 311 was to prevent failure of justice on account of a mistake of either party to bring on record valuable evidence or leaving an ambiguity in the statements of the witnesses. The Apex Court observed:

> "7....'26...This is a supplementary provision enabling, and in certain circumstances imposing on the Court, the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts."

08 The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence

supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquires and trials under the Code and empowers the Courts to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 of the Code the significant expression that occurs is at any stage of inquiry or trial or other proceeding under this Code. It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."

09. In this respect, it will be worthwhile to deal with some of the importance earlier decisions of the Supreme Court where the legal principles related to Section 311 of the Code have been dealt with and the principles of law laid down therein. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed by the Supreme Court in *Hoffman Andreas v. Inspector of Customs, Amritsar* (2000) 10 SCC 430. The following passage is in this regard apposite:

> "6...In such circumstances, if the new Counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible."

10. The extent and the scope of the power of the Court to recall witnesses was examined by the Supreme Court in *Mohanlal Shamji Soni v. Union of India & Anr.* 1991 Supp (1) 271, where the Apex Court observed:

> "27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair-play and good sense appear to be the only safe guides and that only the requirements of justice command and examination of any person which would depend on the facts and circumstances of each case."

11. Discovery of the truth is the essential purpose of any trial or enquiry, observed a three-Judge Bench of the Supreme Court in *Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria through LRs.* 2012 (3) SCALE 550. A timely reminder of that solemn duty was given, in the following words:

> "35. What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice."

12. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.

13. Denial of an opportunity to recall the witnesses for cross-examination would amount to condemning the appellant without giving him the opportunity to challenge the correctness of the version and the credibility of the witnesses. It is trite that the credibility of witnesses whether in a civil or criminal case can be tested only when the testimony is put through the fire of cross-examination. Denial of an opportunity to do so will result in a serious miscarriage of justice.

14. After examining averments of application of defence as well as deposition sheets of these three prosecution witnesses, it is clear that:-

> (A) Ku. Savitri Parteti (PW/1) was examined firstly, therefore, it was not possible for defence, that what questions should be asked to this witness. As per practice, the prosecution was duty bound to examine victim first, therefore, the defence is entitled to recall Ku. Savitri Parteti (PW/1) for cross-examination;
>
> (B) Dr. Dhanendra Gajbhiye (PW/2) examined as second witness and few questions put forth before him related to this defence. It can very well be presumed that this expert witness cannot help the defence to fill up any lacuna.
>
> (C) The charge under Section 307 of the IPC has been framed on the basis of the allegation that the applicants

attempted by pouring kerosene oil on the body and cloths of complainant to set her ablaze for her murder. In these facts and circumstances, it is submitted by the learned counsel for the applicants that cross-examination is required on the question of pouring kerosene oil on cloths of the complainant Smt. Mamta (PW/3) in the interest of justice. This reason is also made ground that on date of recording of evidence of Smt. Mamta (PW/3), the defence counsel was suffering from illness also.

15. Merely because a mistake was committed, should not result in the accused suffering a penalty totally disproportionate to the gravity of the error committed by his lawyer.

16. In the result, I allow this revision petition, set aside the impugned order passed by the learned Trial Court and direct that the above named three prosecution witnesses shall be recalled by the learned Trial Court and an opportunity to cross-examine the said witnesses afforded to the applicants. In fairness on the part of applicant, it must be recorded that given this opportunity to examine the witnesses the needful shall be done on three dates of hearing, one each for every witness without causing any un-necessary delay or procrastination. The learned Trial Court shall endeavour to conclude the examination of these three witnesses expeditiously and without unnecessary delay. The parties shall appear before the learned Trial Court on 26th September, 2013.

*Revision Petition allowed.*

**I.L.R. [2014] M.P., 251**
**CRIMINAL REVISION**
***Before Mr. Justice N.K. Gupta***
Cr. Rev. No. 1581/2012 (Jabalpur) decided on 24 January, 2014

NARESH KUMAR SURYAVANSHI & anr. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Section 319 - Additional Accused*** **- Victim alleged that he was assaulted by the applicants however, in his statement u/s 164 of Cr.P.C. victim did not state anything against applicants - Victim again submitted an affidavit**

**stating that due to illness he had named the applicants - Victim also did not inform the Doctor about the names of the assailants - Although victim in his Court evidence stated against the applicants but all other eye witnesses have also not supported the victim - Trial Court committed an error in admitting the applicants as an accused - Revision allowed. (Paras 5, 6 & 7)**

*दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – अतिरिक्त अभियुक्त* – पीड़ित का अभिकथन कि आवेदकगण द्वारा उस पर हमला किया गया, किन्तु दं. प्र.सं. की धारा 164 के अंतर्गत अपने कथन में पीड़ित ने आवेदकगण के विरुद्ध कुछ नहीं कहा – पीड़ित ने पुनः शपथ पत्र प्रस्तुत किया, इस कथन के साथ कि अस्वस्थ्यता के कारण उसने आवेदकगण के नाम दिये – पीड़ित ने चिकित्सक को भी हमलावरों के नाम के बारे में जानकारी नहीं दी – यद्यपि पीड़ित ने अपने न्यायालयीन साक्ष्य में आवेदकगण के विरुद्ध कथन दिया है परंतु अन्य सभी प्रत्यक्षदर्शी साक्षियों ने भी पीड़ित का समर्थन नहीं किया – विचारण न्यायालय ने आवेदकगण को अभियुक्त के रुप में स्वीकार करने में त्रुटि कारित की – पुनरीक्षण मंजूर।

**Case referred :**

(2010) 11 SCC 520.

*Manish Datt* with *Nishant Datt*, for the applicants.
*Akshay Namdeo*, P.L. for the non-applicant/State.

**ORDER**

**N.K. Gupta, J.:-** The applicants have preferred the present revision against the order dated 3.5.2012 passed by the learned 3rd Additional Sessions Judge, Khandwa in S.T. No.142/11, whereby an application under Section 319 of the Cr.P.C. was accepted and the applicants were added as accused in the trial.

2. The facts of the case, in short are that, the complainant Sajan Singh (PW-1) had lodged an FIR on 20.6.2009, which was written in Roznamcha that a quarrel took place between the accused Durga and Sajan Singh, in which he was assaulted in the abdomen and therefore, he complained about the pain in the abdomen. On the report registered in the Roznamcha, an FIR of Section 155 of the Cr.P.C. relating to the non-cognizable offence was registered and the victim was sent for his medico legal examination. He was complaining about vomiting and therefore, he was referred to the District

Hospital, Khandwa and thereafter, he was admitted in the Suyash Hospital, Indore. A surgery took place and it was found that some intestines were found damaged therefore, Dr. Arvind Ghanghoriya (PW-3) concluded that the injury caused to the victim was fatal in nature. After sometime, the victim and the witnesses have stated that the victim was beaten by the Head Constables Hamid Khan and Nana More therefore, they were also made the accused in the case. The victim Sajan Singh had stated against the applicants before the various forums and thereafter, gave an affidavit that he has never been assaulted by the applicants, whereas he gave his previous statement due to some confusion. Again, he has stated before the trial Court against the applicants and therefore, the trial Court allowed the application under Section 319 of the Cr.P.C. and added the applicants as the accused in the case.

3. I have heard the learned counsel for the parties.

4. After considering the submissions made by the learned counsel for the parties and looking to the facts and circumstances of the case, it is to be considered as to whether the applicants could be added as the accused in the case under Section 319 of the Cr.P.C. or not. For consideration of the application under Section 319 of the Cr.P.C., it is for the trial Court to consider the evidence adduced before the Court and to examine as to whether it is a cogent evidence against the proposed accused or not. The learned senior counsel for the applicants has invited attention of this Court to the judgment passed by the Hon'ble Apex Court in the case of *"Harinarayan G. Bajaj Vs. State of Maharashtra and others"* [(2010) 11 SCC 520] in which, it is held by the Hon'ble Apex Court that where the Court proceeds under Section 319(1) of the Cr.P.C. against any person, who was not an accused initially, it was commenced de-novo proceedings qua such person from the stage of Section 244 of the Cr.P.C. and after witnesses are reheard, allow such accused person to cross-examine them before framing of the charge. Newly, joined accused person has a right of cross-examination of witnesses before framing of the charge against him. In the light of the aforesaid judgment, it would be apparent that if a person is added as an accused under Section 319 of the Cr.P.C. then, there must be some cogent evidence against him and he can be permitted to get a cross-examination of the witnesses previously examined. If after the cross-examination, it is found that no charge can be framed then, such added accused should be discharged. Under such circumstances, it is the duty of the trial Court to examine the evidence as to whether the proposed accused can be added in the trial under Section 319 of the Cr.P.C. or not.

5. In the present case, the learned Additional Sessions Judge did not apply his mind while accepting the application under Section 319 of the Cr.P.C. In the present case, Sajan Singh (PW-1) has stated that he was being assaulted by the applicants sustaining the injuries in his abdomen. However, other eyewitnesses and related witnesses have turned hostile. His wife Kshama Bai (PW-4) has also turned hostile. Similarly, Babulal (PW-5), Sabal Singh (PW-7) and Gopal (PW-8) did not support the victim Sajan Singh and therefore, when other eyewitnesses did not support the victim Sajan Singh on this count then, the testimony of the victim Sajan Singh could not be believed. The conduct of Sajan Singh was to be considered before believing him, when he was examined under Section 164 of the Cr.P.C. He alleged against the Head Constable Hamid Khan and Nana More but he did not allege anything against the applicants. He had given his statement against the applicants for once but soon after that, he executed an affidavit dated 19.10.2009 that due to illness, he had stated against the applicants, whereas he has never been assaulted by the applicants. He did not inform as to why he did not give the statement against the applicants, when he was examined before the Magistrate under Section 164 of the Cr.P.C.

6. In this context, the evidence given by Dr. Arvind Ghanghoriya (PW-3) is also important. Dr. Ghanghoriya was working in Suyash Hospital and he informed the Court that the victim sustained a fatal injury, but in the cross-examination of paras 5 & 7, he has stated about the history of injury that the victim Sajan Singh told him that he was assaulted by an unknown person, whereas he could have given the name of the applicants to the treating doctor even and therefore, the statement given by the victim before the trial Court appears to be an afterthought, which is nowhere corroborated by any of the eyewitnesses and his wife, who was informed about the incident by the witness Gopal (PW-8). Also the victim Sajan Singh has stated that at Police Station, he was beaten by the applicants and other policemen by sticks, kicks and fists but the Doctor who examined him found no external injury. Under such circumstances, the medical evidence proves him disbelievable.

7. If the applicants have an opportunity of cross-examination to the witnesses and thereafter, considering the evidence adduced by the prosecution then, the applicants are to be discharged on the basis of the fact that the testimony of the victim Sajan Singh cannot be believed hence, there is no point in adding the applicants as accused in the case and thereafter, discharge them, when the evidence on record is not so convincing that the applicants

assaulted the victim then, the application under Section 319 of the Cr.P.C. should not have been allowed without any cogent reason. It appears that the learned Additional Sessions Judge did not apply his mind and he simply added the applicants as the accused because, they were the police personnel.

8. Also the learned Additional Sessions Judge has committed an error of fact that according to the provision of Section 319 of the Cr.P.C., any accused can be added, if he was the accused of the same crime. In this connection, the provision of Section 319(1) of the Cr.P.C. may be read as under:-

> "Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed."

By perusal of that provision, it would be apparent that an additional accused may be added in the case, if he can be tried in the same case alongwith other accused persons. In this case, if the allegations made by the victim Sajan Singh are considered then, it would be apparent that, initially at about 5:00 p.m. a quarrel took place between Sajan Singh and the accused Durga. Thereafter, the accused Hamid Khan and Nana More alongwith the Head Constable Babulal went to take the victim at Bharadi Phate and thereafter, they took him to the police station and all the three assaulted the victim on their way. The second assault was caused at a different place at about 8:00-8:30 p.m. Thereafter, as alleged by the victim that at the police station, the applicants and T.I. Suryavanshi alongwith other police personnel assaulted the victim by sticks, kicks and fists therefore, his intestines were ruptured.

9. Under such circumstances, three incidents took place with the victim. The first incident took place with the accused Durga at about 5:00 p.m. in the evening at Bharadi Phate and the second incident took place at about 8:30 p.m. in the evening on the way from Bharadi Phate to the police station and third incident took place at Police Station, Harsud. Since the victim was taken to the Police Station by the various police personnel therefore, the incident that took place on the way and the incident that took place in the police station may be considered, because the instance was in continuation, whereas the incident which took place between the victim and the accused Durga was a separate instance and,

it cannot be said that the assault caused by the police personnel was in continuation to the crime committed by the accused Durga. The entire trial was tried by the learned Additional Sessions Judge on the basis of FIR, which was lodged by the victim against the accused Durga for the instance caused at Bharadi Phate at about 5:00 p.m. in the evening and therefore, it could not be said that the applicants were the guilty of the crime, which was committed at Bharadi Phate at about 5:00 p.m. on that day and therefore, the applicants as alleged by the victim himself were not the participants in that crime, for which the trial was going on before the learned Additional Sessions Judge and therefore, the accused of the second crime could not be added in the trial, as they were not present at the time of first crime. It was for the victim to lodge a second FIR for the crime committed by the applicants and therefore, the applicants could not be added as accused in the matter, under Section 319 of the Cr.P.C., because the trial was going on for the different crime and amongst different people. The trial Court has committed an error in admitting the applicants as accused in the same crime, whereas it was a different crime committed at Police Station, Harsood for which either a separate trial is to be initiated or the complainant was required to lodge a private complaint, if he had not filed any FIR about the second crime.

10. On the basis of aforesaid discussion, the learned Additional Sessions Judge has committed an error of law in passing the order under Section 319 of the Cr.P.C. against the applicants. The applicants could not be added as the accused in the present case because neither any offence was made out against them nor they could be added in the case in which a trial was going on for the crime committed at about 5:00-5:30 p.m. at Bharadi Phate, where the applicants were not present at that time, when alleged offence was committed by the accused Durga. It is a fit case in which the revision filed by the applicants can be accepted. Hence, it is hereby accepted. The impugned order passed by the learned Additional Sessions Judge is hereby set aside. The learned 3rd Additional Sessions Judge is directed to drop the proceedings against the applicants and to proceed with the case against the remaining accused persons

11. A copy of this order be sent to the trial Court for information and compliance.

*Order accordingly.*

**I.L.R. [2014] M.P., 257**
**MISCELLANEOUS CRIMINAL CASE**
***Before Mr. Justice M.C. Garg***
M.Cr.C. No. 1939/2010 (Indore) decided on 31 August, 2012

PRAKASH SAHU & anr. ...Applicants
Vs.
KAVITA ...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Section 482*** - **Respondent wife filed a complaint u/s 406 of I.P.C. on account of non-return of streedhan on 29th August 2008 - Petitioner moved an application u/s 468 of Cr.P.C. alleging that the complaint was beyond limitation - Held - No stage prior to filing of the complaint before JMFC, Indore, the respondent ever made demand for the returning of dowry articles - In the FIR lodged in the year 2004, streedhan was not demanded - Even if the date of divorce decree dated 6th May 2007 is taken into consideration, filing of complaint before the Indore Court was within limitation, which was dismissed on the ground of jurisdiction - Present proceeding filed before JMFC, Dewas would provide limitation to the respondent u/s 470 & 473 of Cr.P.C. and would itself save the limitation u/s 468 of Cr.P.C. (Paras 4 & 21)**

*दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482* – प्रत्यर्थी पत्नी ने 29 अगस्त, 2008 को स्त्रीधन वापस नहीं किये जाने के कारण धारा 406 भा.द.सं. के अंतर्गत शिकायत प्रस्तुत की – याची ने द.प्र.सं. की धारा 468 के अंतर्गत आवेदन पेश करते हुए अभिकथन किया कि शिकायत, परिसीमा अवधि से परे थी – अभिनिर्धारित – जे.एम.एफ.सी., इन्दौर के समक्ष शिकायत प्रस्तुत करने से पूर्व किसी प्रक्रम पर प्रत्यर्थी ने दहेज वस्तुओं की वापसी की मांग कभी नहीं की – सन् 2004 में दर्ज प्रथम सूचना रिपोर्ट में स्त्रीधन की मांग नहीं की गई थी – यदि विवाह विच्छेद दि. 6 मई 2007 की तिथि को विचार में लिया भी जाता है तब भी इन्दौर न्यायालय के समक्ष शिकायत प्रस्तुत करना परिसीमा के भीतर था, जिसे अधिकारिता के आधार पर खारिज किया गया – जे.एम.एफ.सी., देवास के समक्ष प्रस्तुत की गई वर्तमान कार्यवाही, प्रत्यर्थी को द.प्र.सं. की धाराऐं 470 व 473 के अंतर्गत परिसीमा उपलब्ध करेंगी और स्वमेव द.प्र.सं. की धारा 468 के अंतर्गत परिसीमा का रक्षण करेगी।

**Cases referred :**

2002 CRLJ 426, 1994 CRLJ 422,1993 (2) CRIMES 275 SC.

*Subodh Abhyankar,* for the applicants.
*Vivek Patwa,* for the non-applicant.

**ORDER**

**M.C.GARG, J.:-** This is a petition filed by the petitioner husband under section 482 of Cr.P.C aggrieved by the order dated 15th of February, 2010 passed in Criminal Revision no. 168/2009 by the second Additional Sessions Judge, Dewas whereby the second Additional Sessions Judge confirmed the order dated 04th of November, 2009 passed in Criminal Case no. 3349/ 2008 arising out of an application under section 468 of Cr.P.C. Vide the impugned judgment, the Additional Sessions Judge upheld the view taken by the Court of Metropolitan Magistrate that the complaint filed by the respondent against the petitioner under section 406 of IPC was within limitation and was not barred by limitation as was pleaded by the petitioner by moving an application under section 468 of Cr.P.C.

2. Brief facts giving rise to the filing of this petition are that the petitioner was married with respondent Kavita according to Hindu Rites on 08th of July, 2003. On account of dispute which arose between the parties, they decided to take divorce which was granted on 06th of April, 2007. Respondent / wife also filed a complaint against the petitioner under section 498-A of IPC wherein the petitioner was convicted, but later on, after making payment of Rs.50,000/- to the respondent as lumpsum amount before the Hon'ble High Court, proceedings under section 498-A of IPC were quashed without disturbing the other pending proceedings which included the complaint filed by the respondent under section 406 of IPC.

3. Respondent / wife had filed a separate complaint under section 406 of IPC alleging criminal breach of trust against the petitioner on account of non-return of Streedhan given to her at the time of marriage. Complaint was filed on 29th of August, 2008 at Dewas. It may be observed here that prior to that, the respondent had also filed a similar complaint in the court at Indore on 10th of September, 2007 and the said complaint vide order dated 22nd January, 2008 was dismissed holding that cause of action arose at Dewas. Against the said order, criminal revision was also preferred by the respondent which was dismissed and finally a petition under section 482 of Cr.P.C was filed before this Court which was also dismissed confirming the order of the Trial Court.

4. It is thereafter, the respondent filed second complaint as aforesaid

before the Court of JMFC at Dewas which was registered on 04th of November, 2008. After appearance of the parties, the petitioner filed an application under section 468 of Cr.P.C alleging that the said complaint filed under section 406 of IPC was beyond limitation. It is submitted that cause of action, if any, for filing complaint under section 406 of IPC arose in favour of the petitioner on 23rd of March, 2004, when by filing criminal complaint against the petitioner under section 498-A of IPC, the respondent also stated that even her Streedhan was not returned by the petitioner. As such, it is submitted that the said second complaint was beyond limitation and thus liable to be dismissed.

5. A reply was filed by the respondent to the aforesaid application, besides filing applications under sections 470, 472 and 473 of Cr.P.C seeking set off of the period spent by the respondent in prosecuting other remedies. The Trial Court dismissed the application of the petitioner under section 468 of IPC. The petitioner then preferred a criminal revision before the 2nd Additional Sessions Judge, Dewas, but the same was also dismissed vide the impugned order dated 15th of February, 2010. It is aggrieved by the aforesaid order passed in revision under section 397 of Cr.P.C, the petitioner has filed the present petition under section 482 of Cr.P.C.

6. The petitioner submits that in her complaint filed in the year 2004, the respondent made mention about return of dowry articles in the following words

> "Mere pitha ko B.P. ka problem hai, is karan report likhne ke douran prakash ke kahne par ki ham alag-alag ho jayenge, dahej ka saman bhi louta dega, jisme 60 hajar upraya sahit dahej me liye gaye saman ka ullekh kiya gaya".

7. It is submitted that this assertion in the complaint filed on 28th of March, 2004 gave cause of action in favour of the respondent under section 406 of IPC, hence it can be said that content of the FIR does not disclose the cause of action. It is further submitted that this written complaint was lodged in police station on 23rd of March, 2004, on the basis of of which, FIR was registered on 28th of March, 2004. It is therefore submitted that cause of action under section 406 of IPC if any, arose prior to 23rd of March, 2004 or at best on 23rd of March, 2004. The limitation for filing complaint for commission of offence under section 406 of IPC, therefore expired on 23rd March, 2007. Admittedly, the respondent filed her first complaint under section 406 of IPC only on 18th of May, 2007, even the said complaint was not

within limitation.

Petitioner submits that the factum of filing of FIR wherein allegation regarding return of dowry articles was also made a mention, has been referred to by Revisional Court in paragraph-15 of the impugned order. The said Court has wrongly held that those allegations made by the respondent claiming her Streedhan and merely because a list of articles of Streedhan was given to the police station, it was not a proof of demand of the same from the petitioner.

8. It is also submitted that it has also been wrongly held by the Sessions Judge that since the case arising out of the FIR made earlier was disposed of on 21st of October, 2008 and before that present complaint was filed by the respondent on 29th of August, 2008 before the Court at Dewas, the complaint was within limitation. It is submitted that this observation of the Revisional Court is not in accordance with law, in as much as, the Court failed to consider that once mention was made in the FIR regarding return of dowry articles sometime in the year 2004, the limitation which had expired in the month of March, would not have been extended merely because the previous complaint was pending since 21st October, 2008 for the simple reason that the said complaint itself was not maintainable.

9. Learned counsel for the petitioner therefore submits that in the present case, the order passed by the trial Judge in having dismissed the application of the petitioner under section 468 of Cr.P.C holding that the complaint filed under section 406 of IPC was within limitation and the order passed by the Revisional Court upholding the aforesaid order of the trial Judge was contrary to law and in fact continuation of the proceedings against the petitioner under section 406 of IPC by the second complaint by the respondent / wife amounts to abuse of process of Court. It is thus submitted that this Court is competent to entertain the present petition under section 482 of Cr.P.C.

10. On the other hand, learned counsel appearing for the respondent wife submitted that present petition was barred under section 397(2) of Cr.P.C in as much as present petition was nothing else, but second revision.

11. Both sides also relies upon the various judgments, in as much the petitioner has cited the judgments reported in 2002 Cr.L.J 426 (on the aspect of second revision) & 1994 Cr.L.J. 422 ( alleging that there is no continuous cause of action under section 406 of IPC ).

12. At the outset, I may take note of allegations made by the respondent

in her FIR which was lodged by her on 28th of March, 2004 whereby the case was registered under section 498-A of IPC. On perusal of the FIR, it seems that in addition to allegation of cruelty made by the petitioner, she also made mention which reads as under :

> "मेरे पिता को B.P. की प्राबलम है इस कारण रिपोर्ट लिखवाने के दौरान प्रकाश के कहने पर कि हम अलग 2 हो जाएंगे, दहेज का सामान भी लौटा देंगे जिसमें 60 हजार रू. सहित दहेज में लिए गये सामान का उल्लेख किया गया, मेरा ससुराल पक्ष विश्वास योग्य नहीं है पूर्व में भी मेरे साथ कई बार झूठ बोला गया है और मेरी अनुपस्थिति में भी ये लोग मेरा विरोध करते रहे हैं जिसकी जानकारी जब में आफिस से घर आती तो मिलती रही है, मैं अब किसी भी सूरत में यहां रहना नहीं चाहती हूं क्योंकि मैं यहां रही तो ये लोग मुझे जान से मार डालेंगे क्योंकि मेरे पति रात में तीन बार मेरा गला दबा चुके हैं। मेरा निवेदन है कि जिस तरह प्रकाश के कोतवाली थाना देवास में रिपोर्ट लिखवाने के पूर्व बात कही है और जो कमीटमेन्ट किया है उसे उसको पूरा करना चाहिए। प्रकाश मेरे साथ रहना चाहता है लेकिन उसमें मेरे परिजनों से मुझे जान का खतरा है मेरी जानमाल की रक्षा करने के लिए मैंने आपसे यह निवेदन किया है। मैंने पूरे होसो हवास में बिना किसी दबाव के जो लिख दिया उसे सही माना जाए, यही निवेदन है। प्रार्थीनी – कविता W/o. प्रकाश"

13. Perusal of this FIR goes to show that while there is mention about returning of dowry articles by the petitioner, the same is with a rider that the dowry articles can be returned only if the parties decided to live separately. However, it is also clear that by this FIR, the respondent only wanted an action to be taken against the petitioner under section 498-A of IPC and not under section 406 of IPC.

14. It is also submitted that the offence under section 406 of IPC is a continuing offence since the petitioner had not returned the dowry articles. Cause of action continued when the second complaint was filled. The second complaint was also saved on account of provision contained under sections 470, 472, 473 of Cr.P.C.

15. From the aforesaid, it is apparent that there was no demand made by the respondent regarding dowry articles, mention of the petitioner having agreed to pay the sum was subject to the parties living separately. The respondent, thereafter, filed a complaint under section 406 of IPC before the Court of JMFC, Indore, wherein specific demand was made for returning of the dowry articles and the said complaint was dismissed on 04th of November, 2009. Obviously, this was first time to call upon the respondent to return the dowry

articles. Since this complaint was dismissed on the ground of jurisdiction, she filed second complaint at Dewas Court subject matter of the said proceedings.

16. The said complaint by the Court of Indore was dismissed on 22nd of August, 2008 and before dismissal of the complaint, the application before the Dewas Court was moved by the petitioner. It is submitted that on account of section 470 & 473 of Cr.P.C, application for taking action against the petitioner under section 406 of IPC was within limitation. The aforesaid provision is quoted for the sake of reference which reads as under :

> **"470. Exclusion of time in certain cases.** (1) In computing the period of limitation, the time during which any person has been prosecuting with due diligence another prosecution, whether in a court of first instance or in a court of appeal or revision, against the offender, shall be excluded:
>
> Provided that no such exclusion shall be made unless the prosecution relates to the same facts and is prosecuted in good faith in a court which from defect of jurisdiction or other cause of a like nature, is unable to entertain it.
>
> (2) Where the institution of the prosecution in respect of an offence has been stayed by an injunction or order, then, in computing the period of limitation, the period of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.
>
> (3) Where notice of prosecution for an offence has been given, or where, under any law for the time being in force, the previous consent or sanction of the Government or any other authority is required for the institution of any prosecution for an offence, than, in computing the period of limitation, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded.
>
> Explanation. In computing the time required for obtaining the consent or sanction of the Government or any other authority, the date on which the application was made for obtaining the consent or sanction and the date of receipt of the order of the Government or other authority shall both be excluded.

(4) In computing the period of limitation, the time during which the offender- (a) Has been absent from the India or from any territory outside India which is under the administration of the Central Government, or

(b) Has avoided arrest by absconding or concealing himself, shall be excluded.

**473. Extension of period of limitation in certain cases.** Notwithstanding any thing contained in the foregoing provisions of this Chapter, any court may make cognizance of an offence after the expiry of the period of limitations, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice."

17. The Sessions Court has upheld the order of Judicial Magistrate First Class while dismissing the revision petition filed by the petitioner. It will be relevant to take note of paragraph -12 of the impugned order:

"12– मूल अभिलेख के अवलोकन अनुसार परिवादिया द्वारा जो परिवाद पेश की गई, अनुसार दिनांक 8.7.2003 को परिवादिया का विवाह प्रकाश साहू के साथ हुआ एवं परिवाद पत्र तथा दस्तावेज अनुसार परिवादिया द्वारा दहेज प्रताड़ना की रिपोर्ट पुलिस थाना कोतवाली देवास में 23.3.2004 को की गई जिस पर पुलिस थाना कोतवाली देवास द्वारा धारा 498ए भा.द.वि. एवं धारा 3/4 दहेज प्रतिषेध अधिनियम का प्रकरण पंजीबद्ध किया गया, जिसमें पुनरीक्षणकर्ता संध्या को दोष मुक्त किया गया एवं प्रकाश साहू को एक वर्ष के सश्रम कारावास एवं 1000 रूपये के अर्थ दण्ड से दण्डित किया गया। इस मामले का निर्णय मुख्य न्यायिक मजिस्ट्रेट देवास के न्यायालय के प्रकरण क्रमांक 768/2004 अनुसार दिनांक 18.8.2006 को हुआ। इस आपराधिक प्रकरण का अंतिम निराकरण दिनांक 21.10.2008 को माननीय म.प्र. उच्च न्यायालय, खण्डपीठ इन्दौर के आपराधिक पुनरीक्षण क्रमांक 602/2007 में पारित आदेश अनुसार हुई जिसमें माननीय न्यायालय द्वारा पक्षकारों के राजीनामें के आधार पर तलाक के तथ्य तथा स्त्रीधन वापसी की याचिका अलग से लंबित होने एवं परिवादी को पुनरीक्षणकर्ता प्रकाश द्वारा रूपये 50,000 दो माह के अंदर दिये जाने की शर्त पर कारावास की सजा माफ की गई है।"

On the basis of the aforesaid observations, the Sessions Court found the application under section 406 of IPC within time.

18. It will be also relevant to take note that compromise reached between

the parties when the petition came before this Court. With the respect to conviction of the petitioner under section 498-A of the IPC which matter was settled between the parties amicably. Following order was passed in criminal revision no. 602/2007 by Hon'ble Mr. Justice N.K. Mody on 21st of October, 2004. The said order reads as under :

> "Heard on the application which has been filed for compromise.
>
> Learned counsel for both the parties submit that decree of divorce has already been passed in favour of complainant by Civil Court vide judgment and decree dated 22/09/2005. It is submitted that a separate petition has been filed for recovery of Istri-Dhan and also the amount which has been spent in marriage. It is submitted that so far as offence under Section 498-A of IPC is concerned, the matter has been settled between the parties and petitioner is paying a sum of Rs.50,000/- to the complainant.
>
> In the facts and circumstances of the case, application is allowed. Petitioner shall pay a sum of Rs.50,000/- to the complainant within a period of 2 months, failing which petitioner shall be liable to suffer the jail sentence as awarded by the Courts below. It is made clear that decision of this case will not affect the other cases which are pending before the other Courts pending between the parties."

19. It was therefore, apparent that even at the time of compromise, the parties were fully aware of the other proceedings which were going on within parties under section 406 of IPC. In any case, the limitation was also served under the provisions of Section 470 and 473 of Cr.P.C., as the complainant was prosecuting the remedy in accordance with law.

20. Now, coming to the judgment cited by the parties with respect to law of limitation, the only judgment cited on behalf of the petitioner was of Calcutta High Court, wherein it has been held that the offence of dishonest misappropriation and criminal breach of trust is not a continuing offence. However, Hon'ble Supreme Court has also dealt with the issue of limitation with respect to matrimonial offence in the following manner in the case of *Vanka Radhamanohari (smt) Vs. Vanka Venkata Reddy and others*, 1993

(2) Crimes 275 SC.

"7. It is true that the object of introducing Section 468 was to put a bar of limitation on prosecutions and to prevent the parties from filing cases after a long time, as it was though proper that after a long lapse of time, launching of prosecution may be vexatious, because by that time even the evidence may disappear. This aspect has been mentioned in the statement and object, for introducing a period of limitation, as well as by this Court in the case of *State of Punjab v. Sarwan Singh*. But, that consideration cannot be extended to matrimonial offences, where the allegations are of cruelty, torture and assault by the husband or other members of the family to the complainant. It is a matter of common experience that victim is subjected to such cruelty repeatedly and it is more or less like a continuing offence. It is only as a last resort that a wife openly comes before a Court to unfold and relate the day-to-day torture and cruelty faced by her, inside the house, which many of such victims do not like to be made public. As such, Courts while considering the question of limitation for an offence under Section 498A i.e. subjecting a woman to cruelty by her husband or the relative of her husband, should judge that question, in the light of Section 473 of the Code, which requires the Court, not only to examine as to whether the delay has been properly explained, but as to whether "it is necessary to do so in the interest of justice".

8. In the case of *Bhagirath Kanoria v. State of M.P.,* this Court even after having held that non-payment of the employer's contribution to the Provident Fund before the due date, was a continuing offence, and such the period of limitation prescribed by Section 468 was not applicable, still referred to Section 473 of the Code. In respect of Section 473 it was said:

That section is in the nature of an overriding provision according to which, notwithstanding anything contained in the provisions of Chapter XXXVI of the Code, any Court may take cognizance of an offence after the expiry of the period of limitation if, inter alia, it is satisfied that it is

necessary to do so in the interest of justice. The hairsplitting argument as to whether the offence alleged against the appellants is of a continuing or non-continuing nature, could have been averted by holding that, considering the object and purpose of the Act, the learned Magistrate ought to take cognizance of the offence after the expiry of the period of limitation, if any such period is applicable, because the interest of justice so requires. We believe that in cases of this nature, Courts which are confronted with provisions which lay down a rule of limitation governing prosecutions, will give due weight an consideration to the provisions contained in Section 473 of the Code."

21. In view of the aforesaid judgment and also in the facts of this case, I find that at no stage, prior to filing of the complaint before the Court of JMFC, Indore, the respondent ever made demand for the returning of dowry articles. Infact mention of return of dowry articles in the FIR in the year 2004 is not a demand. It is only a mention of fact of the state of mind of the petitioner, who wanted to return the dowry articles, once the parties started living separately. In these circumstances, even if the date of the divorce decree dated March 6, 2007 is taken into consideration as the law, such date of providing a cause of action then also, filing of complaint before the Indore Court was within limitation. Since thereafter the said complaint was dismissed on the ground of jurisdiction on January 22, 2008, the present proceedings filed before the Court of Judicial Magistrate First Class, Dewas soon before the dismissal of the first complaint would provide limitation to the respondent under Section 470 and 473 of Cr.P.C. and would itself save the limitation of the complaint under Section 468 of Cr.P.C.

22. Taking all these facts into consideration, I find no infirmity in the approach of the Additional Sessions Judge in having upholding the order of the trial Judge. The petition filed by the petitioner is therefore dismissed.

23. Parties shall appear before the Court concerned on the date already fixed or if no date is fixed, then on October 9, 2012. A copy of this order be sent to the trial Court alongwith the record.

C.C.as per rules.

*Petition dismissed.*

**I.L.R. [2014] M.P., 267**
**MISCELLANEOUS CRIMINAL CASE**
***Before Mr. Justice Brij Kishore Dube***
M.Cr.C. No. 2590/2013 (Gwalior) decided on 17 April, 2013

MOHAN LAL AGARWAL ...Applicant
Vs.
G.C.M. CONSTRUCTION PVT. LTD. ...Non-applicant

***Negotiable Instruments Act (26 of 1881), Sections 142 & 145 - Cognizance and Evidence on Affidavit*** - **Held - Cognizance taken by the Magistrate on complaint supported by an affidavit of the complainant cannot be held illegal or without jurisdiction - Section 145 includes the proceedings of the complaint case at the pre-summoning stage, therefore affidavit could be filed and relied upon - This section allows that the evidence of the complainant has to be given on affidavit. (Paras 10, 15 & 16)**

*परक्राम्य लिखत अधिनियम (1881 का 26), धाराऐं 142 व 145 – शपथ पत्र पर संज्ञान व साक्ष्य* – अभिनिर्धारित – शिकायतकर्ता की शपथ पत्र के साथ की गई शिकायत पर मजिस्ट्रेट द्वारा संज्ञान लिये जाने को अवैध अथवा बिना अधिकारिता के होना, अभिनिर्धारित नहीं किया जा सकता – धारा 145 में, समन पूर्व प्रक्रम पर शिकायत प्रकरण की कार्यवाहियां समाविष्ट हैं, अतः शपथ पत्र प्रस्तुत किया जा सकता है और विश्वास किया जा सकता है – यह धारा अनुमति देती है कि शिकायतकर्ता के साक्ष्य को शपथ पत्र पर दिया जाये।

**Cases referred :**

2007 CRI.L.J. 2007 (Bombay), 2009 (2) MPHT 1 (SC), 2012 (2) MPHT 12 (CG), (2010) 3 SCC 83, 2011 (1) MPHT 191, 2012 CRI.L.J. 577 (Allahabd), 2005 (2) MPLJ 419, ILR (2009) MP 1836, 2010 (II) MPJR 159.

*R.S. Bansal*, for the applicant.
*Rajmani Bansal*, for the non-applicant.

**ORDER**

**BRIJ KISHORE DUBE, J.:-** This petition under Section 482 of Cr.P.C. has been filed by the petitioner for quashing the order dated 6.11.2007 passed by Special Judicial Magistrate, Gwalior in Criminal Case No.13141/2007 (complaint) whereby on the basis of complaint filed by the respondent herein,

cognizance has been taken against the petitioner herein under Section 138 of Negotiable Instrument Act (for short "the Act") and directed to issue summon for his appearance before it.

(2) The relevant facts for adjudication of the matter are that the respondent herein/complainant filed a complaint before the Trial Court through its Director, Ashish Mittal and the power of attorney holder, Mukesh Kumar Mittal against the petitioner herein/accused for an offence punishable under Section 138 of the Act alleging that the petitioner herein/accused has taken loan of Rs.3,00,000/- on 23.6.2003 from the complainant. The petitioner has issued four cheques dated 13.8.2007 bearing Nos.364961, 364962, 364963 and 364964 of Rs.50,000/- each in favour of the complainant towards discharge of his liability. When the aforesaid cheques were presented by the complainant in the Bank for payment, the same were dishonoured and as the amount was not paid by the petitioner in spite of notice of demand, therefore, the complainant filed a complaint under Section 138 of the Act on 8:10.2007. The learned Special Magistrate took cognizance of the offence by the impugned order which reads as under"

> "..... परिवादी द्वारा प्रस्तुत परिवाद पत्र, समर्थन में शपथ पत्र एवं दस्तावेजों के अवलोकन से आरोपी के द्वारा परक्राम्य लिखित अधिनियम 1881 की धारा 138 के प्रावधान के अंतर्गत दण्डनीय अपराध कारित करने हेतु पर्याप्त आधार होने से अपराध का संज्ञान लिया जाता है।.....

Being aggrieved thereof, this petition under Section 482 of Cr.P.C. preferred by the petitioner herein/accused.

(3) Shri R.S. Bansal, learned counsel appearing on behalf of the petitioner submits that since no statement of the respondent/complainant was recorded under Sections 200 or 202 of Cr.P.C., therefore, taking cognizance and summoning the accused is bad in law, thus, the impugned order passed by the Trial Court is illegal and deserves to be set aside. Learned counsel has placed reliance on the following decisions:

> (1) *Maharaja Developers and another Vs. Udaysingh Pratapsinghrao Bhonsle & another*, 2007 CRI.L.J. 2007 (Bombay);
>
> (2) *National Small Industries Corporation Ltd. Vs. State (NCT of Delhi) and others,* 2009 (2) M.P.H.T. 1 (SC) and

(3) *National Highways Authority of India and others Vs. Ramesh Kumar Suryawanshi and another,* 2012 (2) M.P.H.T. 12 (CG).

(4) In response, Shri Rajmani Bansal, learned counsel appearing on behalf of respondent herein/complainant submitted that in view of the Sections 142 and 145 of the Act, taking cognizance on the basis of the complaint supported by an affidavit, the learned Trial Court has not committed any illegality, therefore, prayed for dismissal of the petition. In support of his contention, he placed reliance on the following decisions:

(1) Mandvi Cooperative Bank Limtied Vs. Nimesh B. Thakore, (2010) 3 SCC 83;

(2) M/s. Amita Gas Service and another Vs. Raman Gupta, 2011 (1) M.P.H.T. 191 and

(3) Sachin Agarwal Vs. State of Uttar Pradesh and others, 2012 CRI.L.J.577 (Allahabad).

(5) I have considered the rival contentions of the learned counsel for the parties and perused the record.

(6) Admittedly, the learned Trial Court has taken cognizance against the petitioner under Section 138 of the Act on the basis of complaint and affidavit of complainant, Ashish Mittal as well as other documents produced by the complainant in support of the averments made in the complaint.

(7) The core question for consideration is that whether the learned Trial Court erred in law by taking cognizance against the petitioner under Section 138 of the Act on the basis of affidavit sworn by complainant without recording his statement and statement of his witnesses under Sections 200 and 202 of Cr.P.C.?

(8) Section 200 of Cr.P.C. which deals with the cognizance of the offence reads as under:

**"200. Examination of complainant** – A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint,; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them."

(9) Section 142 of the Act deals with cognizance of offence under the Act and Section 145 of the Act deals with the evidence on affidavit. Sections 142 and 145 of the Act reads as under:

**"142. Cognizance of offences** – Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:

[Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.]

(c) no court inferior to that of a metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138.]"

**"145. Evidence on affidavit** – (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of

1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein."

(10) The effect of non-examination of the complainant on oath before taking cognizance in a case for commission of offence under Section 138 of the Act has been considered by this Court in the case of *Mahendra Kumar Vs. Armstrong and another,* 2005 (2) M.P.L.J. 419, wherein it has been held that by non-examination of the complainant under Section 200 of Cr.P.C., the cognizance taken by the Magistrate under Section 138 of the Act cannot be held illegal or without jurisdiction. In *Abhilasha Agnihotri Vs. Dilip,* I.L.R. (2009) M.P. 1836, this Court also considered the matter and held that no illegality has been committed by the Court in taking cognizance against the applicant on the ground that the statement of complainant was not recorded under Sections 200 or 202 of Cr.P.C. This Court in the case of *Jitendra Singh Kushwaha Vs. Bhajan Lal Rai*, 2010 (II) MPJR 159 again reiterated that it is not incumbent on the Magistrate to record a statement of the complainant on oath. Cognizance can be taken on the basis of affidavit in support of the complainant. In *M/s Amita Gas Service and another* (supra) this Court considered the issue and held that where the Trial Court took cognizance against the petitioners under Section 138 of the Act on the basis of affidavit sworn by complainant and without recording the statement of complainant and his witnesses under Sections 200 and 202 of Cr.P.C., the Magistrate has not committed any illegality or irregularity.

(11) The High Court of Allahabad in the case of *Sachin Agarwal* (supra) held that the plea that the Magistrate was required to observe the provisions contained in Sections 200 and 202 Cr.P.C. does not appear to have any substance especially when Section 145 (1) of the Act contemplates taking of the complainant's evidence on affidavit not only in the trial but also in any inquiry or other proceedings.

(12) In the case of *Maharaja Developers* (supra) the complainant filed a complaint in writing on 21.4.2006 against the accused, Maharaja Developers and Vijay Tulsiramji Dangre under Section 138 of the Act on account of

dishonour of cheques issued by the accused in favour of the complainant and his sister. The said complaint contains a solemn affirmation by the complainant at the foot of it. The complainant also filed certain documents along with the complaint. On perusal of the complaint and the documents filed with it, the learned Magistrate has taken cognizance under Section 138 of the Act. A Division Bench of the Bombay High Court after considering the relevant provisions of the N.I. Act and Criminal Procedure Code held that the non-obstante clause in Section 142 or 145 of the N.I. Act does not override the provisions of Section 200 of Cr.P.C. and it is mandatory for the Magistrate to examine the complainant who has filed the same under Section 138 of the N.I. Act though with an affirmation as regards truthfulness of the contents of the complaint. It, therefore, follows that the Magistrate is obliged and duty bound to examine upon oath the complainant and his witnesses before issuance of process under Section 204 of Cr.P.C. though there is a solemn affirmation at the foot of the complaint by the complainant. In the aforesaid case, the complainant has not filed a separate affidavit.

(13) In *National Small Industries Corporation Ltd.* (supra), the Apex Court held that where an incorporeal body is the payee and the employee who represents such incorporeal body in the complaint is a public servant, he being the de facto complainant, clause (a) of the proviso to Section 200 of the Code will be attracted and consequently, the Magistrate need not examine the complainant and the witnesses.

(14) In the case of *National Highways Authority of India and others* (supra) the respondents filed a complaint in the Court of Judicial Magistrate Ist Class, Raipur alleging commission of offence under Section 138 of the Act of 1881 against the petitioners. The learned Magistrate after taking into consideration the contents of the complaint, took cognizance of the offence and issued process, against which, the petition under Section 482 was preferred. A Single Bench of Chhattisgarh High Court held that requirement of examination of complainant on oath even in cases of complaint alleging commission of offence under Section 138 of the Act is mandatory, and therefore, the order taking cognizance is set aside. In the case in hand, the complainant has filed an affidavit in support of the complaint, which was not filed in the aforesaid case.

(15) Section 145 of the Act has excluded the provisions of Criminal Procedure Code with regard to the manner in which evidence of complainant

is to be taken. Section 145 (1) of the Act provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any inquiry, trial or other proceedings under the said Act. However, the Court has power in certain circumstances to examine the person giving evidence on affidavit either on the application of the prosecution or the accused and this provision is contained in sub-section (2) of Section 145 of the Act. Therefore, according to the provisions of Section 145 of the Act, the Magistrate was not legally required to examine the complainant and his witnesses as provided in section 200 of the Code of Criminal Procedure. The expressions "inquiry" and "other proceeding" used in section 145 (1) of the Act very well includes the proceedings of the complaint case at the pre summoning stage, therefore, the affidavit could be filed and relied upon by the Magistrate in taking the cognizance.

(16) In the case of *M/s Mandvi Cooperative Bank Ltd.* (supra) the Hon'ble Supreme Court very specifically held that provisions of Sections 143, 144, 145 and 147 of the Act have overriding effect on the Code of Criminal Procedure. Section 145 of the Act allows that the evidence of the complainant has to be given on affidavit.

(17) In view of the aforementioned factual and legal discussions, this Court does not find any substance in the petition worth for invoking inherent powers enshrined under Section 482 of Criminal Procedure Code, therefore, the petition is hereby dismissed.

*Petition dismissed.*

**I.L.R. [2014] M.P., 273**

**MISCELLANEOUS CRIMINAL CASE**

***Before Mr. Justice G.S. Solanki***

M.Cr.C. No. 10287/2012 (Jabalpur) decided on 16 July, 2013

ARUNLATA DERIA (SMT.) ...Applicant

Vs.

STATE OF M.P. & anr. ...Non-applicants

***Criminal Procedure Code, 1973 (2 of 1974), Section 482 & Cooperative Societies Act, M.P. 1960 (17 of 1961), Sections 64 & 51-B - Quashing F.I.R.* - Allegation against applicant and other co-accused that they were involved in preparing the forged**

**document and they made loss to the Co-operative Society - Held - Offence committed in relation to administration of Co-operative Societies, there is no bar under the Co-operative Societies Act for resort to provisions of general criminal law - No case is made out for exercising the extraordinary jurisdiction u/s 482 of Cr.P.C.**
**(Paras 2,3,4 & 7)**

*दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 व सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धाराऐं 64 व 51बी* – प्रथम सूचना प्रतिवेदन को अभिखंडित किया जाना – आवेदक और अन्य सह–अभियुक्त के विरुद्ध अभिकथन कि वे कूटरचित दस्तावेज बनाने में सम्मिलित थे और उन्होंने सहकारी सोसाइटी को हानि पहुंचाई – अभिनिर्धारित – सहकारी सोसाइटी के प्रशासन से संबंधित अपराध कारित किया गया, सामान्य दण्ड विधि का अवलंब लेने के लिए सहकारी सोसाइटी अधिनियम के अंतर्गत कोई वर्जन नहीं – द.प्र.सं. की धारा 482 के अंतर्गत असाधारण अधिकारिता का प्रयोग करने का प्रकरण नहीं बनता।

**Cases referred :**

ILR (2010) MP, SN 30, (2009) 11 SCC 424, (2009) 5 SCC 199.

*G.S. Ahluwalia,* for the applicant.
*A.P. Singh* with *Vivek Shukla*, for the non-applicant No.2.
*Akshay Namdeo,* P.L. for the non-applicant/ State.

**ORDER**

**G.S. SOLANKI J.:-** Applicant invoked the extraordinary jurisdiction of this Court u/s 482 of Cr.P.C for quashment of First Information Report and investigation of crime no. 218/2012 registered at police station Babai, District Hoshangabad.

2. The facts, in short, giving rise to this petition are that complainant/ respondent no.2 Anil Kumar, Deputy Commissioner, Co-operative Society Hoshangabad has lodged the FIR (Exhibit P-15) through written application dated 27/07/2012 wherein it is alleged against this applicant and other co-accused that they were involved in preparing the forged document and thereby they made loss to the tune of Rs. 8,38,638/- to the Co-operative Society. It is further alleged that the report is lodged on the basis of audit made in the year 2009-2010 to 2011-2012. Audit report is Annnexure P-14 wherein applicant and co-accused Sandhya

Sharma had supplied 59.02 quintals of less wheat contrary to the purchase policy and made loss to the tune of Rs. 66,692/- to the society. It is also found that applicant and co-accused were involved in misappropriation of amount of Rs. 1,69,370/- in the name of prasangik expenses. It is found in the audit report that in the year 2010-2011, 75 quintals of less wheat was supplied by them and thereby made loss of Rs. 90,000/- to the society. Further they have made loss of Rs. 3,48,655/- in the name of prasangik expenses. It is also found that 79 empty bags were not returned as per the audit report of 2009-2010 and 2010-2011 respectively and caused heavy loss to the society. It is further alleged that there was no office of the society however, an amount of Rs. 1,41,000/- have been paid by way of rent. On the basis of aforesaid allegation made in the written application, respondent no.1 SHO, Police Station Babai has registered the FIR against the applicant and co-accused persons u/s 420, 467, 468/34 of IPC. Hence, this petition.

3. Learned counsel appearing on behalf of the applicant submits that respondent no.2 lodged the First Information Report against the applicant with malafide intention because during the inquiry conducted by respondent no.2/complainant in compliance of order of this Court passed in W.P. No. 16284/2011 filed by one Murarilal Patel wherein respondent no.2/ complainant has demanded Rs. Two lacs from the husband of applicant to give the report in favour of society. When such demand was not fulfilled, respondent no.2 gave a report against the society and thereafter, lodged a false report against her. It is further submitted that applicant already raised the dispute u/s 64 of Co-operative Societies Act against the District Manager of M.P. State Co-operative Limited, Hoshangabad for showing the less supply of wheat to them by the society and same is pending. It is further submitted that wheat were purchased in the year 2009-2010 and 2010-2011 (Annexure P-12) under due authorization letter of the Collector. In the year 2011-2012, the transporter authorized by the State Govt. lifted the wheat from the society but did not deliver the same to its destination. In this regard, report (Annexure P-13) is lodged by the society. It is further submitted that in view of provision of section 51 -B of M.P. Co-operative Societies Act amount can be recovered after giving the notice and opportunity of hearing to the purchaser and applicant. It is submitted that when specific provision has been made under the Statute then the remedy lies in the said procedure.

In these circumstances, FIR lodged by respondent no.2 is bad in law and liable to be quashed therefore, prays for quashment of FIR against the applicant. Learned counsel has placed reliance on ILR (2010) MP, SN 30 *Meena Rathore (Smt.) Vs. CBI, ACB Bhopal.*

4. Learned counsel appearing on behalf of State and respondent no.2 opposes the contention raised on behalf of applicant and submit that for offence committed in relation to administration of cooperative societies, there is no bar under the Cooperative Societies Act for taking resort to provisions of general criminal law. They placed reliance on (2009) 11 SCC 424 *State of Madhya Pradesh Vs. Rameshwar and others,* (2009) 5 SCC 199 *K. Ashoka Vs. N.L. Chandrashekar and others.*

5. I have perused the First Information Report alongwith annexures filed by respective parties.

6. it is true that some dispute has been raised by society u/s 64 of the Co-operative Societies Act in connection with objection raised in the audit report. One of the rent note in regard to the office is also produced on record by the applicant. Some allegations are also made in regard to demand of Rs. Two lacs from the husband of applicant by respondent no.2 but on the basis of aforesaid facts, the material found in the inquiry report,conducted by respondent no.2 alongwith audit reports of 2009-2010, 2011-2012 cannot be brushed aside easily. The rent note and other objection made before the Authority may be a good defence during the trial but at this stage same cannot be considered meticulously. At present there is huge material on record showing the prima facie commission of offence u/s 420, 467, 468/34 of IPC and same cannot be easily brushed aside in the garb of dispute raised u/s 64 of the Cooperative Societies Act. In these circumstances, case of this case is totally different to the case of *Meena Rathore* (supra) cited on behalf of applicant.

7. Since there is no bar in the Cooperative Societies Act for taking resort to provisions of general criminal law as observed and held in the case of *Rameshwar and others* (supra), I am of the view that no case is made out for exercising the extraordinary jurisdiction u/s 482 of Cr.P.C.

8. The petition fails and liable to be dismissed and is hereby dismissed.

*Petition dismissed.*

**I.L.R. [2014] M.P., 277**

**MISCELLANEOUS CRIMINAL CASE**

***Before Mr. Justice B.D. Rathi***

M.Cr.C. No. 4179/2013 (Gwalior) decided on 8 January, 2014

MANOJ JAIN ...Applicant

Vs.

STATE OF M.P. & anr. ...Non-applicants

***Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Inherent Powers*** - **Entire dispute seems to be civil in nature and do not prima facie constitute any offence and trial court has not assigned any reason that on what basis an order under section 156 (3) was being passed - Held - Such an order of trial court/Magistrate and the FIR registered liable to be quashed. (Paras 9,10, 11 & 13)**

*दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अंतर्निहित शक्तियां* – संपूर्ण विवाद, सिविल स्वरुप का प्रतीत होता है तथा प्रथम दृष्ट्या किसी अपराध को गठित नहीं करता और विचारण न्यायालय ने कोई कारण नहीं दिया है कि किस आधार पर धारा 156(3) के अंतर्गत आदेश पारित किया गया – अभिनिर्धारित – विचारण न्यायालय/मजिस्ट्रेट का उक्त आदेश एवं पंजीबद्ध की गई प्रथम सूचना रिपोर्ट अभिखंडित किये जाने योग्य।

**Cases referred :**

(2013) 6 SCC 798, (2008) 5 SCC 668, 2010(2) MPJL 621, 2005(10) SCC 228, 1992 Supp.(1) SCC 335, (2005) 3 SCC 670, (2002) 4 SCC 72, (2011) 7 SCC 59, 2005 (13) SCC 540, 2012(11) SCC 252.

*Arvind Dudawat,* for the applicant.

*R.K. Awasty,* P.P. for the non-applicant No. 1/State.

*Devendra Sharma,* for the non-applicant No.2.

**O R D E R**

**B.D. Rathi, J.:-** Petitioner has filed this petition by invoking the powers of this Court under Section 482 of the Code of Criminal Procedure, 1973 (for short 'the Code) for seeking a relief that the impugned order dated 13/05/2013 (Annexure P/1) passed by the Judicial Magistrate, First Class Gwalior under Section 156(3) of the Code be quashed and the FIR registered in compliance of the above mentioned order as Crime No.118/2013 at Police Station Vishwavidayalaya, Gwalior for the offence punishable under Sections

420 and 406 of IPC (Annexure P/2) also be quashed.

2. The facts in brief are that as per the allegations made in the private complaint filed by the respondent No.2, an agreement of sale was executed by the petitioner in favour of the respondent No.2 and in pursuance of it, a sum of Rs.2,00,000/- was paid as a token of advance of the sale consideration and a receipt for the same was also issued but neither the sale deed was executed nor the advance money was returned back,therefore, the private compliant was submitted by alleging that the petitioner has committed the offence of criminal breach of trust.

3. Having regard to the arguments advanced by the learned counsel for the parties, the entire matter has been perused.

4. It is submitted by learned counsel appearing on behalf of the petitioner that from a bare perusal of the impugned order dated 13/05/2013 (Annexure P/1), it is clear that it was passed mechanically and without application of mind. Learned Magistrate failed to see that the complaint filed before him was disclosing any ground in regard to cognizable offence or not. By passing the above mentioned order, it was also directed by the learned Magistrate that a case be registered against the petitioner but such an order could not have been passed under Section 156(3) of the Code.

5. It was also submitted by the learned counsel for the petitioner that on perusal of the complaint filed by the respondent No.2 dated 17/05/2013 it reflects that the entire matter was in regard to civil dispute in nature and no ingredients of criminal nature were there, therefore, FIR registered against the petitioner may be quashed.

6. In support of his contention, he has placed reliance on the following cases:

(i) (2013) 6 SCC 798, *Majjal Vs. State of Haryana.*

(ii) (2008)5 SCC 668,*Maksud Saiyed Vs. State of Gujarat and others*

(iii) 2010(2) MPJL 621, *Arun Kumar Jain Vs. Dinesh Tripathi and others*

(iv) 2005(10) SCC 228, *Anil Mahajan Vs. Bhor Industries Ltd., and another,*

(v) 1992 Supp (1) SCC 335, *State of Haryana and others Vs. Bhajanlal and others*

(vi) (2005) 3 SCC 670, *Suresh Vs. Mahadevapra Shivappa Danannava and another*

(vii) (2002) 4 SCC 72, *Rishi Anand and another Vs. Govt. of NCT of Delhi and others and*

(viii) (2011) 7 SCC 59, *Joseph Salvaraj A Vs. State of Gujarat and others.*

7. On the contrary, petition has been opposed by the learned counsel Shri Sharma appearing on behalf of the respondent No.2 on the ground that in passing the impugned order some irregularity may be occurred but only on that basis the entire proceedings cannot be said to be vitiated. It was also urged by the learned counsel that a case has already been registered against the petitioner and the matter is under investigation, therefore, no interference can be made by this Court by invoking the powers under Section 482 of the Code. In support of his contention, he has placed reliance on the decisions reported in 2005(13) SCC 540, *State of Orissa Vs. Saro Kumar Sahoo and* 2012 (11) SCC 252, *Om Kr. Dhankar Vs. State of Haryana and another.*

8. After taking into consideration of the entire arguments advanced by learned counsel for the parties and perusal of the entire material available on record, in the considered opinion of this Court, this petition deserves to be allowed.

9. So far as the first objection raised by the learned counsel for the petitioner is concerned, certainly on perusal of the impugned order dated 13/05/2013 passed by the learned Magistrate, it appears that he has not applied the mind simply because he has allowed the application filed under Section 156(3) of the Code and forwarded the complaint to the concerned Police Station to register and investigate the case but in doing so, he has not assigned any reason that on what basis such an order was being passed. If the facts alleged in the complaint were thoughtfully considered then certainly, the impugned order could not have been passed by the learned Magistrate. But, only on this sole ground, the entire FIR cannot be quashed.

10. So far as the second ground is concerned, it is settled law and the Hon'ble Apex Court in the case of *State of Haryana and others* (supra) held that the powers under Section 482 of the Code can be invoked for quashment of FIR, where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

11. In this case, on perusal of the entire complaint, which was forwarded by the learned Magistrate for registration and in compliance of that Crime No.118/2013 at Police Station Vishwavidayalaya, Gwalior for the offence punishable under Sections 420 and 406 of IPC, was registered against the petitioner, Manoj Jain, seems that the entire dispute was civil in nature. At best, the respondent No.2 may file a civil suit for specific performance of contract or for recovery of Amount. Ingredients for criminal offence are prima facie not made out.

12. In view of the above, the judgments relied upon by the learned counsel for the respondent No.2 are not helpful.

13. Resultantly, this petition succeeds and is allowed. The impugned order dated 13/05/2013 (Annexure P/1) passed by the Judicial Magistrate, First Class Gwalior and the FIR registered in compliance of the above mentioned order as Crime No.118/2013 at Police Station Vishwavidayalaya, Gwalior for the offence punishable under Sections 420 and 406 of IPC (Annexure P/2) are hereby quashed.

*Petition allowed.*

**I.L.R. [2014] M.P., 280**

**MISCELLANEOUS CRIMINAL CASE**

***Before Mr. Justice N.K. Gupta***

M.Cr.C. No. 1830/2012 (Jabalpur) decided on 21 January, 2014

AMITESH TYAGI & ors. ...Applicants

Vs.

STATE OF M.P. & anr. ...Non-applicants

***A. Penal Code (45 of 1860), Section 498-A, Criminal Procedure Code, 1973 (2 of 1974), Section 468 - Limitation*** **- Offence u/s 498-A is not an offence of continuous in nature - Respondent went to USA in 2006 and F.I.R. was lodged on 23.01.2010 - Any crime committed prior to 23.01.2007 was barred by limitation - Nothing on record to show that the respondent was beaten at Ohio on 02.09.2006 - Allegations made for offence committed at Ohio cannot be considered as such - Further Divorce was granted by order dated 17.04.2009 - As the respondent did not remain the wife, therefore, if any harassment done by applicants thereafter, then, it cannot be alleged to be an offence u/s 498-A of I.P.C. as that offence is prescribed only to help the wife and not divorced wife. (Paras 6-8)**

*क. दण्ड संहिता (1860 का 45), धारा 498–ए, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 468 – परिसीमा* – धारा 498ए के अंतर्गत अपराध, अविरत स्वरुप का अपराध नहीं – प्रत्यर्थी, सन् 2006 में यू.एस.ए.गयी और एफ.आई.आर., 23.01.2010 को दर्ज की गई – 23.01.2007 के पूर्व कारित कोई अपराध, परिसीमा द्वारा वर्जित था – अभिलेख पर यह दर्शाने के लिये कुछ नहीं कि प्रत्यर्थी को ओहियो में 02.09.2006 को पीटा गया – ओहियो में कारित अपराध के लिये किये गये अभिकथनों का विचार नहीं किया जा सकता – इसके अतिरिक्त आदेश दि. 17.04.2009 द्वारा विवाह विच्छेद किया गया था – चूंकि प्रत्यर्थी, पत्नी नहीं रही इसलिए उसके पश्चात यदि आवेदकगण द्वारा कोई उत्पीड़न किया जाता है तब उसे मा.द.सं. की धारा 498ए के अंतर्गत अपराध होने का अभिकथन नहीं किया जा सकता क्योंकि वह अपराध केवल पत्नी की सहायता के लिये विहित है और न कि तलाकशुदा पत्नी के लिये।

***B. Penal Code (45 of 1860), Section 498-A, Criminal Procedure Code, 1973 (2 of 1974), Section 177* - No offence was committed at Bhopal - Court at Bhopal has no jurisdiction.**

**(Paras 11-12)**

*ख. दण्ड संहिता (1860 का 45), धारा 498–ए, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 177* – भोपाल में कोई अपराध कारित नहीं किया गया – भोपाल के न्यायालय को क्षेत्राधिकार नहीं।

**Cases referred :**

(2004) 8 SCC 100, (2008) 11 SCC 103.

*Anil Khare* with *Priyankush Jain*, for the applicants.
*Yogesh Dhande*, P.P. for the State/non-applicant No.1.
*Aditya Ahiwasi*, for the non-applicant No.2.

**ORDER**

**N.K. Gupta, J.:-** The applicants have preferred the present petition under section 482 of the Cr.P.C. against the registration of crime No.9/2010 registered at Police Station Mahila Thana, Bhopal on the FIR lodged by the respondent No.2 for offence punishable under sections 498-A, 506/34 of IPC.

2. The prosecution's case, in short, is that, the complainant Shweta Sharma was married to Amitesh Tyagi on 11.11.2005 at Delhi. 4 days prior to the date of marriage, the applicants and Amitesh demanded a sum of Rs.7 Lacs to purchase a car. Kailash Narayan Sharma, father of the complainant transferred a sum of Rs.3,50,000/- in the account of the applicant Varinder Tyagi. 15 days after the marriage, Amitesh Tyagi went to USA to prosecute

his job and thereafter, Shweta resided with the applicants No.2 and 3. The applicants were harassing her for demand of dowry specifically for the price of a car, which could not be given by her father. Before the marriage, Shweta was working at Bangalore in some bank. She transferred a sum of Rs.2,85,000/- from her account to the account of the applicant Varinder Tyagi at Gudgaon. In the year 2006, Shweta went to USA to reside with her husband. Amitesh Tyagi assaulted Shweta at USA also and therefore, she was admitted in Columbus hospital. She was being tortured by the applicants. In September, 2008, Shweta went to the house of her parents but, still the applicants demanded for dowry etc. to purchase a car and therefore, the complainant Shweta Sharma had lodged an FIR on 23.1.2010 at Police Station Mahila Thana, Bhopal.

3. I have heard the learned counsel for the parties.

4. The learned counsel for the applicants has submitted that there was no demand of dowry from the complainant. As per her own allegation, a sum of Rs.3,50,000/- was transferred by her father in the account of the applicant No.2 and thereafter, the complainant transferred a sum of Rs.2,85,000/- from her account to the account of the applicant No.2 then, in that amount, a car could be purchased and the complainant could not be tortured further for demand of dowry. He has further submitted that the FIR lodged by the complainant is not within the limitation for the offence committed prior to 23.1.2007 being barred by limitation and a divorce took place between the parties vide order dated 17.4.2009 before the concerned Magistrate at Ohio, USA and therefore, there was no possibility of any contact of the applicants with the complainant thereafter. She did not make a specific allegation as and when she resided with the applicants at Delhi thereafter and therefore, the Police Station Mahila Thana, Bhopal has no jurisdiction to register the case. The learned counsel for the applicants has placed his reliance upon the judgment passed by Hon'ble the Apex Court in case of *"Y.Abraham Ajith and others Vs. Inspector of Police, Chennai and another"* [(2004) 8 SCC 100]. It is further submitted by the learned counsel for the applicants that offence under section 498-A of IPC is not of a continuous nature. It is also laid by Hon'ble the Apex Court in case of *Y.Abraham* (supra) that offence was not of continuous nature. Similarly, the learned counsel for the applicants has placed his reliance upon the judgment passed by Hon'ble the Apex Court in case of *"Bhura Ram and others VS. State of Rajasthan and another"*, [(2008) 11 SCC 103] to show that the Police Station Mahila Thana, Bhopal had no jurisdiction

in the case and therefore, it is prayed that the entire crime registered against the applicants may be quashed.

5. On the other hand, the learned counsel for the respondent No.2 has challenged the submissions made by the learned counsel for the applicants and submitted that the applicants tortured the complainant at Bhopal by phone and therefore, Police station Mahila Thana, Bhopal had jurisdiction in the case.

6. After considering the submissions made by the learned counsel for the parties and looking to the facts and circumstances of the case, it is apparent that soon after the marriage of the complainant Shweta Sharma, she resided for few days at Delhi and thereafter, she went to USA. It is mentioned in the statements of Smt. Sunita Sharma that Shweta went to USA in the year 2006. FIR was lodged on 23.1.2010 and sentence prescribed for the offence punishable under section 498-A of IPC is of 3 years Rigorous Imprisonment and therefore, by the provisions of section 468 of the Cr.P.C. only limitation of 3 years is prescribed for the offence, which is punishable by 3 years imprisonment. It is well established by Hon'ble the Apex Court in case of *Y.Abraham* (supra) that offence under section 498-A of IPC is not an offence of continuous nature and therefore, offence done by the applicants prior to the visit of the complainant to USA, offence done at Ohio and offence done after return of the complainant shall be treated separately.

7. So far as the offence done prior to her visit to USA is concerned, it is admittedly time barred because she went to USA in the year 2006, whereas the FIR was lodged on 23.1.2010 and therefore, by virtue of the provisions under section 468 of the Cr.P.C., FIR relating to crime prior to 23.1.2007 was barred by limitation. The offence done at Ohio is alleged against the applicant No.1 only but, not against the remaining applicants. Nothing is told by the complainant in detail in the FIR lodged at Police station Mahila Thana, Bhopal about the offence committed by the applicant No.1 at Ohio. If the complainant was beaten by the applicant No.1 and she was badly injured on 2.9.2006 then, papers relating to her treatment could be produced to show that she was beaten. Neither any FIR, nor any medical evidence is produced alongwith the FIR to show that the applicant No.1 treated the complainant with cruelty at Ohio. Under such circumstances, the allegations made by the complainant for the offence committed at Ohio cannot be considered as it is.

8. So far as the harassment done after her return from USA is concerned, it

was for the complainant to allege as to when she visited the house of the applicants at Delhi and she was harassed or assaulted by the applicants or the applicants No.2 and 3. The complainant did not give any particulars about the date of harassment done by the applicants No.2 and 3 at Delhi. It would be apparent that vide order dated 17.4.2009, the divorce passed by the Court of Magistrate having jurisdiction at Ohio, divorce was granted to the applicant No.1 and therefore, the complainant did not remain the wife of the applicant No.1 and therefore, if any harassment was done by the applicants thereafter then, it cannot be alleged to be an offence under section 498-A of IPC because that offence is prescribed only to help the wife and not the divorced wife. It is clear from the order passed by the concerned Magistrate that the complainant was represented in the matter and therefore, it was for her to show that when she returned from USA and after her return as and when she was tortured by the applicants at Delhi in the period from the date of her return upto 17.4.2009,. In the FIR as well as in the statements of various witnesses, it is no where specifically established that the complainant went to Delhi after her return from USA and therefore, no harassment done by the applicants is established prima facie after return of the complainant from USA.

9. As alleged by the learned counsel for the respondent No.2 that the applicants gave threatening to the complainant on phone and also demanded dowry from the complainant. They rang her up from Delhi to Bhopal. However, if the entire investigation is considered then, no telephone number is given by the complainant or any witness by which the applicants gave any threat to the complainant on phone. It was for the investigation officer to collect the call details of various phones by which the applicants demanded dowry from the complainant after her return from USA. Since no such call details could be collected, therefore, prima facie, it cannot be accepted that the applicants made any telephone call to the complainant after her return from USA for any purpose including the dowry demand or harassment and therefore, prima facie no offence punishable under section 498-A of IPC or section 506 of IPC is made out against the applicants on the basis of the evidence collected by the investigation officer.

10. As discussed above, after coming from USA, the complainant never resided at Delhi. It is not at all established that any telephone call was done by the applicants from Delhi to Bhopal after her return. On the contrary, it would be apparent that a litigation for divorce was going on between the complainant and her husband and therefore, there was no possibility from the side of the applicants to demand any amount etc. from the complainant during

the pendency of the divorce application or thereafter. The complainant had lodged a vague FIR in that respect. The complainant could not establish that any telephone call was done by the applicants after her return from USA and she made vague allegations relating to those calls. However, by such vague allegations, it cannot be accepted that the applicants made telephone calls regarding dowry demand or threatening. As discussed above, there was no possibility of such calls to the complainant because when she came back, a litigation of divorce was pending at Ohio and it was in the knowledge of the applicants as well as the complainant. Under such circumstances, the complainant could not establish the harassment done by the applicants on the basis of dowry demand or otherwise done with her after her return from Ohio and therefore, prima facie no offence punishable under section 498-A or 506 of IPC is made out against the applicants either directly or with the help of section 34 of IPC. Similarly, no offence under section 3/4 of Dowry Prohibition Act is made out against the applicants for the period when the complainant came back from Delhi till she lodged the FIR.

11. As discussed above, the complainant neither resided at Delhi after coming from USA, she did not visit her in-laws at Delhi during her stay at Ohio, USA and therefore, no alleged harassment has been done at Delhi. It is no where alleged that the applicants went to Bhopal to harass her and therefore, the cause of action, if any could arise then, it would have arose at Delhi but, not at Bhopal. Initially, the Police Station Mahila Thana, Bhopal registered the case and thereafter, transferred it to Deputy Police Commissioner, South-west District, Sector No.19 but, it was remanded back to the Police Station Mahila Thana, Bhopal. One deputy director prosecution gave his opinion vide letter dated 26.11.2009 that Police Station Mahila Thana, Bhopal had jurisdiction to entertain the case. However, an amendment in the Cr.P.C. was made in the year 1983 and section 198 of the Cr.P.C. was added that any person on behalf of the aggrieved can lodge FIR but, for the place of trial, the provisions under section 177 of the Cr.P.C. would remain in force. Provisions of section 182 (2) was modified that the wife can make a complaint against her husband and others at her place of residence after the crime for offence under sections 494 and 495 of IPC but, no such provision is available for offence under section 498-A of IPC. Ordinarily enquiry or trial can be done before the Court in whose local jurisdiction crime was committed. It appears that the learned Deputy Director Prosecution, dealt with the case that before commencement of the marriage, the complainant alleged little harassment from the side of the applicants at Bhopal and therefore, he might

have given such an opinion.

12. As discussed above, the alleged harassment done prior to 23.1.2007 is barred by limitation and offence is not of continuous nature and therefore, by the harassment done by the applicants at Bhopal, Police Station Mahila Thana, Bhopal does not get any jurisdiction to enquire the matter for the incidents, which never took place at Bhopal. In this connection, by the judgments passed by Hon'ble the Apex Court in case of *Y.Abraham* (supra) *and Bhura Ram* (supra), it would be apparent that after return of the complainant to Bhopal, no crime was committed at Bhopal. Neither, the Police Station Mahila Thana, Bhopal had any jurisdiction to investigate the matter, nor the concerned Magistrate has any jurisdiction to try the case and therefore, the contention advanced by the learned counsel for the applicants is acceptable that the trial Court has no jurisdiction to try the case for the offence which did not take place at Bhopal.

13. On the basis of the aforesaid discussion, it would be apparent that the allegations made by the complainant prior to her visit to USA are barred by limitation. There is no cognate evidence that the applicant No.1 dealt the complainant with cruelty at Ohio and it is no where established that after return of the complainant to Bhopal, the applicants harassed her for dowry demand etc. and therefore, FIR is nothing but, a counter blast to the proceedings lodged by the applicant No.1 to get divorce from the complainant at Ohio. Prima facie no offence is made out against the applicants. Also, the police station Mahila Thana, Bhopal as well as the Magisterial Court at Bhopal has no jurisdiction to try the case for want of territorial jurisdiction and therefore, it is a good case in which inherent powers of this Court can be exercised and registration of crime may be quashed.

14. On the basis of the aforesaid discussion, the petition under section 482 of the Cr.P.C. filed by the applicants Amitesh Tyagi, Varinder Tyagi and Suchitra Tyagi is hereby allowed. The registration of crime No.9/2010 at Police Station Mahila Thana, Bhopal is hereby quashed. Consequently, the learned Judicial Magistrate cannot try the present case if charge-sheet is filed. If any case is pending then, the proceedings of that case is also quashed.

15. A copy of the order be sent to the learned Chief Judicial Magistrate, Bhopal so that it may be provided to the concerned magistrate who has the jurisdiction of Police Station Mahila Thana, Bhopal in the year 2010.

*Petition allowed.*