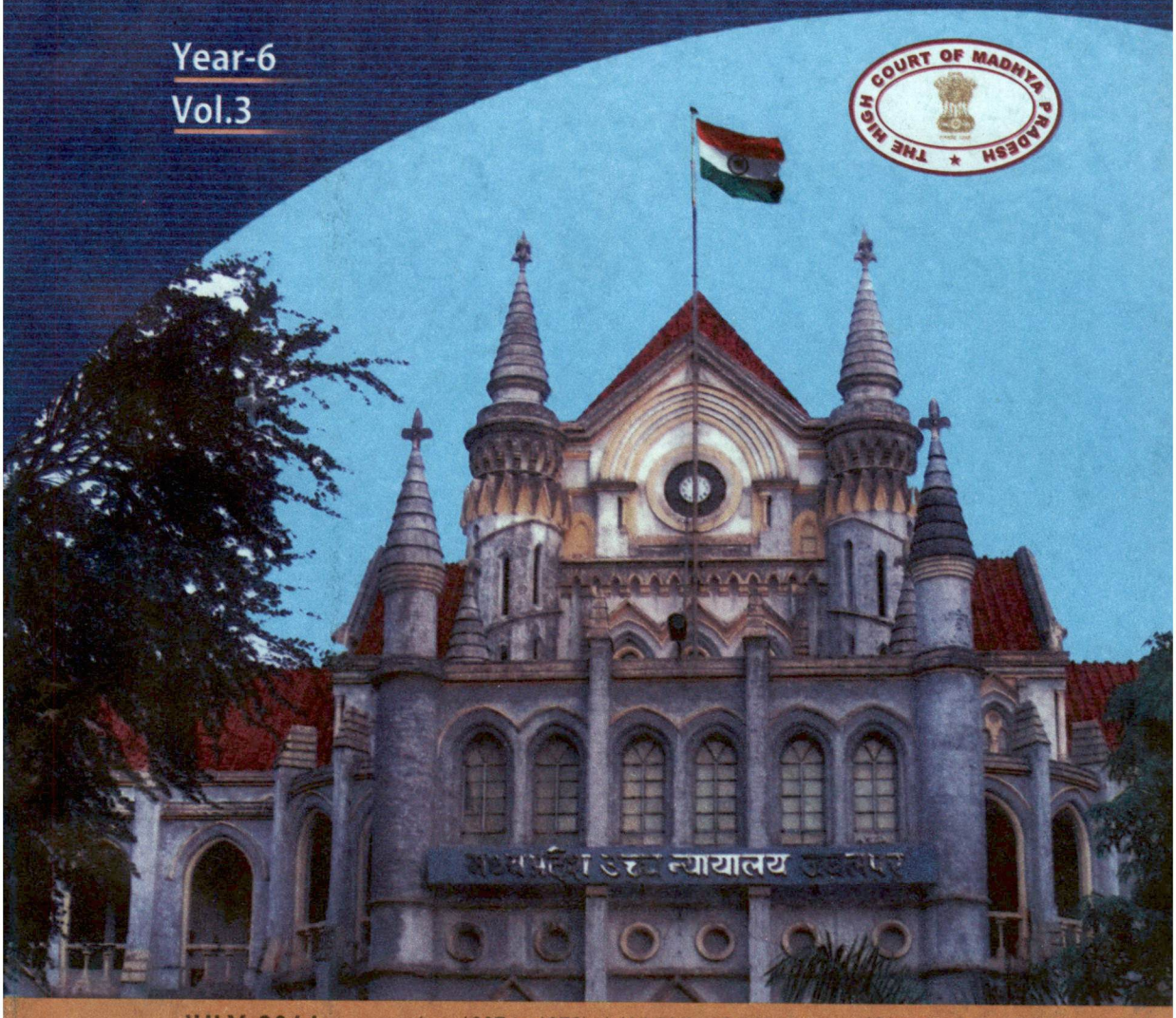
THE INDIAN LAW REPORTS

M.P. SERIES

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

Year-6
Vol.3



JULY 2014 (pp. 1687 to 1978) (Single Copy ₹40)

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JOURNAL SECTION

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

CONSUMER PROTECTION (PROCEDURE FOR REGULATION OF ALLOWING APPEARANCE OF AGENTS OR REPRESENTATIVES OR NON-ADVOCATES OR VOLUNTARY ORGANISATIONS BEFORE THE CONSUMER FORUM), REGULATIONS, 2014.

(National Consumer Disputes Redressal Commission Notification No. G.S.R. 89(E.) dated 13th February, 2014, published in the Gazette of India (Extraordinary) PART II Section 3 (i) dated 17-02-2014 pages 8-13)

In exercise of the powers conferred by Section 30A of the Consumer Protection Act, 1986 (68 of 1986), the National Consumer Disputes Redressal Commission with the previous approval of the Central Government, hereby makes the following regulations, namely:-

CHAPTER I

1. Short title and commencement.-(1) These regulations may be called the 'Consumer Protection (Procedure for regulation of allowing appearance of Agents or representatives or Non-Advocates or Voluntary Organisations before the Consumer Forum), Regulations, 2014'.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. Definitions.-In these regulations unless the context otherwise requires,-

(a) "Act" means the Consumer Protection Act, 1986 (68 of 1986);

(b) "Consumer Forum" means a District Forum, a State Consumer Disputes Redressal Commission or the National Consumer Disputes Redressal Commission;

(c) "Registrar" means the head of the ministerial establishment of the

Consumer Forum and exercising such powers and functions as are conferred upon him by the President of the Consumer Forum;

(d) "Agent" means a person accredited as such under these regulations and duly authorized by a party to present any complaint, appeal,revision or to file written version or to file any written submissions and address or plead, as the case may be, for and on behalf of such a party before the Consumer Forum;

(e) "representative" means any person who is accredited as such under these regulations and who represents a group of complainants or a group of opposite parties in any complaint, appeal or revision before the Consumer Forum and is duly authorised by that group to appear and act on behalf of the group for filing of the complaint, appeal or revision petition or the written version or any written submissions or like pleadings, as the case may be, for and on behalf of such a group of the complainants or the opposite parties;

(f) "non-advocate" means a person who is not registered as an advocate under the Advocates Act, 1961 and has been duly accredited to appear before the Consumer Forum in order to practice as representative, having been granted such licence or accreditation by the competent authority to appear as "non-advocate" before the Consumer Forum on regular basis in a particular category of the cases as may be specified under the procedure of accreditation.

(g) "social organisation" means a voluntary consumer organisation duly recognised by the Consumer Forum and is duly registered as a Charitable Society under any State's law dealing with the registration of Charitable Institutions.

(h) words and expressions used in these regulations and not defined herein but defined either in the Act or in the rules shall have the same meaning assigned to them either in the Act or rules, as the case may be.

3. Appearance by agent, non-advocate, representative or social organisations:-

(1) A party may authorise an Agent or non-advocate or representative or social organisations to represent him before the Consumer Forum in an individual complaint case / appeal or revision, subject to production of duly authenticated authorisation made by the party in favour of

such Agent or non-advocate or representative or social organisation, subject to the conditions that he, -

(a) is appearing on an individual case basis;

(b) has a pre-existing relationship with the complainant (such as: a relative, neighbour, business associate or personal friend);

(c) is not receiving any form of, direct or indirect, remuneration for appearing before the Consumer Forum and files a written declaration to that effect;

(d) demonstrates to the presiding officer of the Consumer Forum that he is competent to represent the party.

(2) Every Agent or non-advocate or representative or social organisation shall adhere to the Code of Conduct specified in schedule-I to these Regulations.

4. The Consumer Forum may within its discretion disallow Agent or non-advocate or representative or social organisation to appear before it in any case, for reasons to be recorded in writing, on account of breach of the terms of the undertaking or misconduct or failure in providing proper assistance to the Consumer Forum.

5. Claim for fees -

(a) Any Agent or non-advocate or representative or social organization who seek to receive fee from the concerned party to whom he represents before the Consumer Forum shall file a written request in this behalf before the Forum.

(b) The President shall decide the amount of fee, if any, an Agent or non-advocate or representative may be allowed to charge or receive from a party engaged him.

(c) While evaluating such a request for fee, the presiding officer may consider the following factors, namely:-

(i) the extent and type of services the Agent or non-advocate or representative or social organization had performed;

(ii) the complexity of the case;

(iii) the level of skill and competence required by such Agent or non-advocate or representative in giving the services;

(iv) the amount of time the Agent or non-advocate or representative spent on the case; and

(v) the ability of the party to pay the fee;

(d) If a party is seeking monetary damages, its Agent or non-advocate or representative shall not seek fee of more than twenty percent of the damages awarded.

Chapter II

6. Accreditation of Agent or non-advocates or representative -

(1) Any person who is not registered as an Advocate under the Advocates Act, 1961(25 of 1961) and is not debarred from practicing by way of penalty, may apply for accreditation as an Agent or non-advocate or representative to practice as an Agent or non-advocate or representative before the Consumer Forum.

(2) Any application by an Agent or non-advocate or representative shall be presented to the President of the concerned Consumer Forum before which the appearance is sought on regular basis to practice as an Agent or non-advocate or representative in Form "A" of Schedule - II.

(3) Any Agent or non-advocate or representative seeking accreditation shall specify in the application in which case or classes of cases or group of cases the accreditation is sought along with due credentials to be furnished in order to demonstrate due expertise or adequate knowledge in the particular type of cases or the matters involving the relevant issues in which such Agent or non-advocate or representative is well versed or expertised or may apply for accreditation in general as such for all kinds of consumer cases.

(4) An application seeking accreditation shall be submitted only between 1st July to 31st August of the relevant year, duly completed in all respects and accompanied by a demand draft of hundred rupees drawn in the name of Registrar of the Consumer Forum.

(5) The Registrar shall carry out the scrutiny of such applications and short list eligible applicants in accordance with the

guidelines issued by the President under practice directions issued under regulation 24 of the Consumer Protection Regulation, 2005.

(6) The Registrar of the Consumer Forum concerned shall after scrutinising the applications and short listing the eligible applicants, along with a list, forward the applications to the Committee referred to in sub-regulation (8) on or before 1st January of the relevant year.

Explanation - The expression 'relevant year' for the purpose of the accreditation procedure shall mean the year commencing from 1st April of the calendar year which will end on 31st March of the next calendar year.

(7) The accreditation process shall be conducted by a Committee duly constituted by the National Consumer Protection Council for such accreditation of Agent or non-advocate or representative to appear before the National Consumer Disputes Redressal Commission and by the State Consumer Protection Council if the accreditation is sought for appearance before the Consumer Forum in the State. A duly constituted Committee of the said Council may hold written test to ascertain knowledge of applicant./Agent or non-advocate or representative who seeks such accreditation, in order to ascertain his ability to make legal presentations, submissions and arguments.

(8) The National Consumer Protection Council in case of accreditation sought by such applicants to appear before the National Consumer Disputes Redressal Commission and the State Protection Council in case of accreditation sought by such applicants to appear before the Consumer Forum in that State shall constitute an 'Accreditation Committee' which shall consist of the President of the Consumer Forum or his nominee as a member and an expert member besides the President of the Consumer Protection Council or his nominee. The President of the Consumer Protection Council may also appoint any other member as may be deemed proper but not more than two at a time. The Consumer Council may however appoint different

expert members for such purpose, depending upon nature of the purpose/subject in which the accreditation is being sought for.

(9) The Consumer Protection Council may with the help of Center for Consumer Studies or the Public Service Commission hold written test preferably in the first or second week of March of each calendar year.

(10) The written test shall carry 100 marks and those who will secure more than 45% of the total marks will be eligible to appear for oral interview to be conducted by the Accreditation Committee.

(11) The Accreditation Committee may call the eligible candidates to appear for an oral interview which shall be conducted within two weeks after the results of the written test are declared and shall carry 50 marks and may prepare a select list of Agent or non-advocate or representative for the purpose of granting accreditation in case the aggregate marks secured by such Agent or non-advocate or representative is over and above 60% of the total marks of written test and the oral interviews.

(12) The Consumer Protection Council may call for information from the Police Department concerned about criminal antecedents of the Agent or a non-advocate or representative who has sought accreditation and, if such antecedents are found to be satisfactory then the President of the Consumer Forum after satisfying himself about the eligibility report and recommendation of the duly constituted Selection Committee, may issue letter of accreditation in favour of such applicant to authorise him to plead and act as an Agent or non-advocate or representative on regular basis:

- Provided that the President may within his discretion, grant accreditation to an Agent or non-advocate or representative to appear only in a particular type of cases. For example, an accreditation may be granted only to appear in medical negligence cases, or only in insurance cases or only in cases involving financial transactions, as per the expertise or field of knowledge of such Agent or non-advocate or representative.

7. The syllabus for written test may be drawn by the Consumer Protection Council and may consist of the following subjects:

(a) The writing and communication skill;

(b) Knowledge of the particular provisions in the relevant laws or subjects in which the accreditation is sought as well as knowledge of the Consumer Protection Act and the rules or regulations made thereunder;

Illustrations:

(i) For accreditation to appear in medical negligence cases, the knowledge of surgery procedures, precautions to be taken for proper diagnosis, precautions needed for prescribing of medicines, pre-operative care and post-operative care that is needed, and like aspects.

(ii) For accreditation to appear in insurance cases, the Insurance Act and rules or regulations, non-standard settlement procedure and like subjects.

(iii) For accreditation to appear in construction cases and contracts of developers, contracts and consumers, the provision of the Contract Act, the architectural specifications and like subjects.

(iv) For accreditation to appear in cases of deficiency like in automobile engines or other items of engineering or electronic goods, the technical knowledge of mechanical engineering.

Note: These are illustrations which are not exhaustive and test paper may be set up in respect of specialized subjects through reliable Government Agency or Department, to the extent of such specific subject or field of knowledge

(c) The basic knowledge of the provisions of the Evidence Act;

(d) The knowledge of basic principles of interpretation of statutes; and

(e) Basic principles of pleadings and important provisions of Civil Procedure Code, 1908 (5 of 1908) relating to the pleadings, brining of legal representatives on record, attachment before judgment, temporary injunction and appointment of Court Commissioner.

Chapter III

Parties to be bound by the Act of Agent or non-advocate or representative or social organisation:

8.(1) Any party appearing through an Agent or non-advocate or representative or social organisation, shall be bound by the acts or omissions of such Agent or non-advocate or representative or social organisation:

- Provided, that such an Agent or non-advocate or representative or social organisation shall not be permitted to withdraw any complaint or claim or any part thereof on behalf of the party without producing written consent from the party allowing him for withdrawal of the compliant (sic:complaint) or claim or part thereof.

(2) A party shall not be bound by an act of any Agent or non-advocate or representative or social organization where it is shown to the satisfaction of the Consumer Forum that the Agent or non-advocate or representative or social organisation committed any act of fraud which adversely affected interest of the party concerned.

Chapter IV

Disciplinary powers of the President of the Consumer Forum:

9. (1) The President of the Consumer Forum shall ensure the strict adherence to the Code of Conduct laid down in Schedule - I by the Agents, non-advocates, representatives or social organisations appearing before it.

(2) The President of the Consumer Forum shall have the power to summarily suspend any Agent or non-advocate or representative or social organization to appear before the Consumer Forum for any duration upto a period of six months.

(3) During the pendency of any enquiry, the President of the Consumer Forum may cause suspension of an accreditation granted to an Agent or non-advocate or representative , as the case may be, if he is satisfied that there is a prima facie proof of his mis-conduct.

Explanation -For the purpose of this sub-regulation, the word 'mis-

conduct' shall have the same meaning assigned to it in section 35 of the Advocates Act, 1961.

(4) The President of the Consumer Forum may either on his own motion or reference made by a member of the Forum or on application made to him by any aggrieved party, direct preliminary enquiry to be made against an Agent or non-advocate or representative or social organisation for alleged mis-conduct, by a Member of the Commission or the Registrar or his nominee, as he may direct.

(5) The President of the Consumer Forum, after giving the concerned Agent or non-advocate or representative or social organisation an opportunity of being heard, may make any of the following orders, namely;-

(i) pass an order to debar such Agent or non-advocate or representative or social organization from appearing before any Consumer Forum for such period or permanently, as it may deem fit;

(ii) remove the name of Agent or non-advocate or representative or social organization from the roll of Agent or non-advocate or representative or social organisation;

(iii) to censure or reprimand the Agent or non-advocate or representative or social organisation;

(iv) impose a monetary fine not exceeding five thousand rupees on Agent or non-advocate or representative or social organisation, which may be recovered in the manner provided under section 25 or section 27 of the Consumer Protection Act.

(6) Where an Agent or non-advocate or representative or social organisation is debarred from appearing before the Consumer Forum or his name is removed from the roll of the Agent or non-advocate or representative or social organisation of the District Consumer Forum, such Agent or non-advocate or representative or social organisation may prefer an appeal to the President of the State Commission.

(7) Where an Agent or non-advocate or representative is debarred from appearing before the State Commission or his name is

removed from the role of Agent or non-advocate or representative on the State Commission, such Agent or non-advocate or representative or social organisation may prefer an appeal to the President of the National Consumer Disputes Redressal Commission.

(8) The disciplinary proceedings before the Consumer Forum shall be of summary nature and shall be concluded within a period of six months from the date of the receipt of the complaint or the date of suo moto initiation thereof, as the case may be.

(9) In case of any difficulty arising in the implementation of these regulations, the matter may be referred for the decision of the President of the National Consumer Disputes Redressal Commission and the decision of the President shall be final.

SCHEDULE-II [See regulation 6(2)]

Form "A"

(Application for accreditation by Agent or non-advocate or representative)

Space for photograph duly signed by candidate

1. Name in Full (in Capital letters)

   Surname Middle Name First Name

2. Date of birth (in Christian era):

3. Father's name :

4. Postal Address

5. Educational Qualifications:

Qualifications/Experience (in chronological order):

Name of University/ Equivalent Institution	Degree	Year of passing	Division %age of marks obtained	Academic Distinction	Subject/ Specialization

(Attested copy of the relevant certificate to be attached)

6. Experience with specific reference to eligibility conditions in the particular category of cases in which accreditation as an Agent or non-advocate or representative is being sought.

7. Whether you are presently in employment? If yes, details of the employment in chronological order, as follows:

Name and address of the employer	Designation whether regular/deputation/ ad hoc	Scale of pay	Period of service From__To___	Nature of work/ experience

8. Whether involved in any criminal case or convicted by any Criminal Court in the past? If yes, give the details.

9. Contact No. (Off.): _____
(Res.): _____
(Mob.):_____
(E-mail)_____
(Fax No.):_____

10. Address for communication:

J/12

DECLARATION

I certify that the foregoing information is correct and complete to the best of my knowledge and belief and nothing has been concealed or distorted. If at any time, I am found to have concealed or distorted any material information, my appointment shall be liable to be summarily terminated without notice.

(Signature of the candidate & Address)

Date:_____

Place_____

Schedule - I

{See regulation 3(2) and 9(1)}

Code of Conduct:

(i) An Agent or non-advocate or representative shall not indulge in doubtism.

(ii) An Agent or non-advocate or representative shall appear before the Consumer Forum in moderate dress and shall make submissions in such a manner so as to maintain proper decorum of the Commission.

(iii) An Agent or non-advocate or representative shall not charge any excessive fee from the party.

(iv) An Agent or non-advocate or representative shall not directly accept any amount for and on behalf of the party from the opponent without due written authority made by the party on behalf of such Agent or non-advocate or representative appearing.

(v) An Agent or non-advocate or representative shall not make any attempt to fabricate any document or make any false statement of fact on behalf of the concerned party.

(vi) An Agent or non-advocate or representative shall not act contrary to the interest of the party to whom he represents.

(vii) Separate register of accreditation for Agents, non-advocates and representatives shall be maintained by the Consumer Forum.

[No. A-1(RGL)/NCDRC/2011]

H.D. NAUTIYAL, Registrar

I.L.R. [2014] M.P., 1687
SUPREME COURT OF INDIA
Before Mr. P. Sathasivam, Chief Justice of India &
Mr. Justice Ranjan Gogoi
Cr. A. No. 2049/2013 decided on 6 December, 2013

STATE OF M.P. ...Appellant
Vs.
PRADEEP SHARMA ...Respondent

(and Cr.A. No. 2050/2013)

Criminal Procedure Code, 1973 (2 of 1974), Section 438 - Appeal against grant of anticipatory bail by High Court **- Arrest warrants issued to accused returned unserved - They were not traceable - Therefore, proclamation u/s 82 of Cr.P.C. was issued against them - Held - Since, the accused are facing prosecution u/s 302 and 120-B r/w Section 34 who have been declared as absconders and have not cooperated with the investigation, they should not be granted anticipatory bail - Order passed by High Court and subsequent order of C.J.M. are set aside. (Para 3(h), 12)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – उच्च न्यायालय द्वारा अग्रिम जमानत प्रदान किये जाने के विरुद्ध अपील – अभियुक्त को जारी किये गये गिरफ्तारी वारंट बिना तामीली वापस – उन्हें खोजा नहीं जा सका – इसलिए, उनके विरुद्ध द.प्र.सं. की धारा 82 के अंतर्गत उद्घोषणा जारी की गयी – अभिनिर्धारित – चूंकि अभियुक्त, धारा 302 एवं 120बी सहपठित धारा 34 के अंतर्गत अभियोजन का सामना कर रहे हैं, उन्हें फरार घोषित किया गया है और उन्होंने अन्वेषण में सहयोग नहीं किया है, उन्हें अग्रिम जमानत प्रदान नहीं की जानी चाहिए – उच्च न्यायालय द्वारा पारित आदेश एवं सी.जे.एम. का पश्चातवर्ती आदेश अपास्त।

Cases referred :

(2005) 4 SCC 303, (2012) 8 SCC 730.

JUDGMENT

The Judgment of the Court was delivered by : **P. SATHASIVAM, CJI. :-** Leave granted.

2. These appeals are filed against the orders dated 10.01.2013 and 17.01.2013 passed by the High Court of Madhya Pradesh Principal Seat at

Jabalpur in Misc. Criminal Case Nos. 9996 of 2012 and 15283 of 2012 respectively whereby the High Court granted anticipatory bail to the respondents herein.

3. **Brief facts:**

a) The case of the prosecution is that Rajesh Singh Thakur (the deceased), resident of village Gopalpur, Tehsil Chaurai, District Chhindwara, Madhya Pradesh and Pradeep Sharma (respondent herein), resident of the same village, were having enmity with each other on account of election to the post of Sarpanch.

b) On 10.09.2011, Pradeep Sharma (respondent herein), in order to get rid of Rajesh Singh Thakur (the deceased), conspired along with other accused persons and managed to call him to the Pawar Tea House, Chhindwara on the pretext of setting up of a tower in a field where they offered him poisoned milk rabri (sweet dish).

c) After consuming the same, when he left the place to meet his sister, his condition started getting deteriorated because of vomiting and diarrhea. Immediately, the father of the deceased took him to the District Hospital, Chhindwara wherefrom he was referred to the Government Hospital, Chhindwara.

d) Since there was no improvement in his condition, on 11.09.2011, he was shifted to the Care Hospital, Nagpur where he took his last breath. The hospital certified the cause of death to be poisoning. On the very same day, after sending the information to the Police Station, Sitabardi, Nagpur, the body was sent for the post mortem.

e) Inder Singh Thakur-father of the deceased submitted a written complaint to the Police Station Kotwali, Chhindwara on 13.09.2011 suspecting the role of the respondents herein. After investigation, a First Information Report (in short 'the FIR') being No. 1034/2011 dated 18.10.2011 was registered under Sections 302 read with 34 of the Indian Penal Code, 1860 (in short 'the IPC').

f) On 01.08.2012, Pradeep Sharma (respondent herein) moved an application for anticipatory bail by filing Misc. Criminal Case No. 7093 of 2012 before the High Court which got rejected vide order dated 01.08.2012 on the ground that custodial interrogation is necessary in the case.

g) On 26.08.2012, a charge sheet was filed in the court of Chief Judicial Magistrate, Chhindwara against Sanjay Namdev, Rahul Borkar, Ravi Paradkar and Vijay @ Monu Brahambhatt whereas the investigation in respect of Pradeep Sharma, Sudhir Sharma and Gudda @ Naresh Raghuvanshi (respondents herein), absconding accused, continued since the very date of the incident.

h) On 21.11.2012, arrest warrants were issued against Pradeep Sharma, Sudhir Sharma and Gudda @ Naresh Raghuvanshi but the same were returned to the Court without service. Since the accused persons were not traceable, on 29.11.2012, a proclamation under Section 82 of the Code of Criminal Procedure, 1973 (in short 'the Code') was issued against them for their appearance to answer the complaint.

i) Instead of appealing the order dated 01.08.2012, Pradeep Sharma (respondent herein) filed another application for anticipatory bail being Misc. Criminal Case No. 9996 of 2012 before the High Court. Vide order dated 10.01.2013, the High Court granted anticipatory bail to Pradeep Sharma (respondent herein). Similarly, another accused-Gudda @ Naresh Raghuvanshi was granted anticipatory bail by the High Court vide order dated 17.01.2013 in Misc. Criminal Case No. 15283 of 2012.

j) Being aggrieved by the orders dated 10.01.2013 and 17.01.2013, State of Madhya Pradesh has filed the above appeals before this Court.

k) In the meantime, the respondents herein approached the Court of Chief Judicial Magistrate, Chhindwara for the grant of regular bail. Vide order dated 20.02.2013, the accused persons were enlarged on bail.

4. Heard Ms. Vibha Datta Makhija, learned senior counsel for the appellant-State and Mr. Niraj Sharma, learned counsel for the respondents.

5. The only question for consideration in these appeals is whether the High Court is justified in granting anticipatory bail under Section 438 of the Code to the respondents/accused when the investigation is pending, particularly, when both the accused had been absconding all along and not cooperating with the investigation.

6. Ms. Vibha Datta Makhija, learned senior counsel for the appellant-State, by drawing our attention to the charge sheet, submitted that the charges

filed against the respondents/accused relate to Sections 302, 120B and 34 of the IPC which are all serious offences and also of the fact that both of them being absconders from the very date of the incident, the High Court is not justified in granting anticipatory bail that too without proper analysis and discussion.

7. On the other hand, Mr. Niraj Sharma, learned counsel for the respondents in both the appeals supported the order passed by the High Court and prayed for dismissal of the appeals filed by the State.

8. We have carefully perused the relevant materials and considered the rival contentions.

9. In order to answer the above question, it is desirable to refer Section 438 of the Code which reads as under:-

> **"438. Direction for grant of bail to person apprehending arrest.**—(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely—
>
> (i) the nature and gravity of the accusation;
>
> (ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
>
> (iii) the possibility of the applicant to flee from justice; and
>
> (iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,
>
> either reject the application forthwith or issue an interim order for the grant of anticipatory bail:
>
> Provided that, where the High Court or, as the case may be,

the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

Xxx xxx xxx"

10. The above provision makes it clear that the power exercisable under Section 438 of the Code is somewhat extraordinary in character and it is to be exercised only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty.

11. In *Adri Dharan Das vs. State of W.B.*, (2005) 4 SCC 303, this Court considered the scope of Section 438 of the Code as under:-

"**16.** Section 438 is a procedural provision which is concerned with the personal liberty of an individual who is entitled to plead innocence, since he is not on the date of application for exercise of power under Section 438 of the Code convicted for the offence in respect of which he seeks bail. The applicant must show that he has "reason to believe" that he may be arrested in a non-bailable offence. Use of the expression "reason to believe" shows that the belief that the applicant may be arrested must be founded on reasonable grounds. Mere "fear" is not "belief" for which reason it is not enough for the applicant to show that he has some sort of vague apprehension that someone is going to make an accusation against him in pursuance of which he may be arrested. Grounds on which the belief of the applicant is based that he may be arrested in non-bailable offence must be capable of being examined. If an application is made to the High Court or the Court of Session, it is for the court concerned to decide whether a case has been made out for granting of the relief sought. The provisions cannot be invoked after arrest of the accused. A blanket order should not be generally passed. It flows from the very language of the section which requires the applicant

> to show that he has reason to believe that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. Normally a direction should not issue to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". Such "blanket order" should not be passed as it would serve as a blanket to cover or protect any and every kind of allegedly unlawful activity. An order under Section 438 is a device to secure the individual's liberty, it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely. On the facts of the case, considered in the background of the legal position set out above, this does not prima facie appear to be a case where any order in terms of Section 438 of the Code can be passed."

12. Recently, in *Lavesh vs. State (NCT of Delhi),* (2012) 8 SCC 730, this Court, (of which both of us were parties) considered the scope of granting relief under Section 438 vis-à-vis to a person who was declared as an absconder or proclaimed offender in terms of Section 82 of the Code. In para 12, this Court held as under:

> **"12.** From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and was declared as "absconder". Normally, when the accused is "absconding" and declared as a "proclaimed offender", there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail."

It is clear from the above decision that if anyone is declared as an absconder/ proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail. In the case on hand, a perusal of the materials i.e., confessional statements of Sanjay Namdev, Pawan Kumar @ Ravi and

Vijay @ Monu Brahambhatt reveals that the respondents administered poisonous substance to the deceased. Further, the statements of witnesses that were recorded and the report of the Department of Forensic Medicine & Toxicology Government Medical College & Hospital, Nagpur dated 21.03.2012 have confirmed the existence of poison in milk rabri. Further, it is brought to our notice that warrants were issued on 21.11.2012 for the arrest of the respondents herein. Since they were not available/traceable, a proclamation under Section 82 of the Code was issued on 29.11.2012. The documents (Annexure- P13) produced by the State clearly show that the CJM, Chhindwara, M.P. issued a proclamation requiring the appearance of both the respondents/accused under Section 82 of the Code to answer the complaint on 29.12.2012. All these materials were neither adverted to nor considered by the High Court while granting anticipatory bail and the High Court, without indicating any reason except stating "facts and circumstances of the case", granted an order of anticipatory bail to both the accused. It is relevant to point out that both the accused are facing prosecution for offences punishable under Sections 302 and 120B read with Section 34 of IPC. In such serious offences, particularly, the respondents/accused being proclaimed offenders, we are unable to sustain the impugned orders of granting anticipatory bail. The High Court failed to appreciate that it is a settled position of law that where the accused has been declared as an absconder and has not cooperated with the investigation, he should not be granted anticipatory bail.

13. In the light of what is stated above, the impugned orders of the High Court dated 10.01.2013 and 17.01.2013 in Misc. Criminal Case Nos. 9996 of 2012 and 15283 of 2012 respectively are set aside. Consequently, the subsequent order of the CJM dated 20.02.2013 in Crime No. 1034 of 2011 releasing the accused on bail after taking them into custody in compliance with the impugned order of the High Court is also set aside.

14. In view of the same, both the respondents/accused are directed to surrender before the court concerned within a period of two weeks failing which the trial Court is directed to take them into custody and send them to jail.

15. Both the appeals are allowed on the above terms.

Appeal allowed.

I.L.R. [2014] M.P., 1694
SUPREME COURT OF INDIA
Before Mr. Justice T.S. Thakur & Mr. Justice Vikramajit Sen
Cr. A. No. 2087/2013 decided on 13 December, 2013

SHERISH HARDENIA & ors. ...Appellants
Vs.
STATE OF M.P. & anr. ...Respondents

(and Cr.A. No. 2088/2013)

Criminal Procedure Code, 1973 (2 of 1974), Section 397 & Penal Code (45 of 1860), Sections 498-A, 306 - Revisional Jurisdiction of High Court **- Order discharging the In-laws except Sister-in-law was set aside by High Court - In discharging the accused the Session Judge is necessarily to have come to conclusion that on a perusal of the material before the court there was no likelihood of a conviction and not even a prima facie case had been disclosed - There can be no gainsaying that no case possibly be made out u/s 306, 498-A, after the marriage has crossed the 7 years period - Merely a presumption is removed. (Paras 3 & 4)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 व दण्ड संहिता (1860 का 45), धाराऐं 498–ए, 306 – उच्च न्यायालय की पुनरीक्षण अधिकारिता – उच्च न्यायालय द्वारा मृतिका के ससुरालवालों को आरोप मुक्त करने का आदेश, देवरानी छोड़कर, अपास्त किया गया – अभियुक्त को आरोपमुक्त करने में सेशन न्यायाधीश को आवश्यक रुप से इस निष्कर्ष पर पहुंचना चाहिये कि न्यायालय के समक्ष उपलब्ध सामग्री का परिशीलन करने पर दोषसिद्धि की कोई संभावना नहीं थी, यहां तक कि प्रथम दृष्टया प्रकरण भी प्रकट नहीं किया गया – इसे नकारा नहीं जा सकता कि विवाह के 7 वर्षों की अवधि बीत जाने के बाद, धाराऐं 306, 498–ए के अंतर्गत प्रकरण यथासंभव गठित नहीं होता – मात्र उपधारणा हटायी गयी।

Cases referred :

AIR 1996 SC 1744 = (1996) 4 SCC 659 ; AIR 1977 SC 2013 = (1977) 4 SCC 39 ; (1979) 3 SCC 4, (1989) 1 SCC 715, (1992) Supp. 1335, (2000) 3 SCC 262, (2010) 1 SCC 250 = AIR 2010 SC 518, AIR 1938 Nagpur 394, AIR 1972 SC 545 = (1972) 3 SCC 282, AIR 1977 SC 1489 = (1977) 2 SCC 699.

JUDGMENT

The Judgment of the Court was delivered by : VIKRAMAJIT SEN, J. :- Leave granted. These appeals assail the Judgment of the learned Single Judge of the High Court of Madhya Pradesh at Jabalpur delivered in Crl. Revision Nos.1400 and 1445 of 2004 passed on 6.5.2008. The learned Single Judge was called upon to decide two Revision Petitions against the Order dated 26.08.2004 passed by the First Additional Sessions Judge, Bhopal in Sessions Trial No.83 of 2004. Amrish Hardenia, the Petitioner in Cr.R.No.1445/2004 stood charged with offences punishable under Sections 498-A and 306 of the Indian Penal Code (IPC). Four other accused namely, his parents, Shri Lajja Shankar and Smt. Meera, as also his brother and sister-in-law Shri Sherish Hardenia and Smt. Sangeeta have been similarly charged by the prosecution. The First Additional Sessions Judge, however, favoured the view that no case worthy of trial had been made out against the latter four persons, and therefore had discharged them. Proceedings against Amrish Hardenia, husband of late Archana Hardenia had been ordered to continue. In these circumstances, the father of the deceased, Dr. R.K. Sharma had approached the High Court in Criminal Revision No.1400 of 2004 challenging the legal propriety of the said Order of the Sessions Judge discharging his deceased daughter's parents-in-law and borther-in-law and his wife. Amrish Hardenia, widower of the deceased Archana who was the daughter of Dr. R.K. Sharma, had filed Cr.R. No.1445 of 2004 asserting in essence that no case worthy of trial had been disclosed against him either. We must recognise, at the threshold, that the impugned Order manifests a comprehensive marshalling of the facts and of the law applicable to the controversy.

2. Amrish and Archana were married to each other on 19.11.1995, and immediately turmoil in the marriage appears to have started, allegedly owing to dowry demands, the evidence of which is founded on contemporaneous letters written by her to her parents. In those instances where the assertion is that dowry demands had been made as early as within one year of marriage, it would be sanguine and far too optimistic to surmise that such demands would not be reiterated, rearticulated and repeated during the marriage. Of course, a change in the mindset of the husband is theoretically possible and we expect that evidence in this regard would be led to dispel the veracity of the initial demand which has been reduced to an epistolary document and/or its recurrence thereafter. Although it is not an inflexible rule, a demand for dowry made by a husband will invariably be prompted and encouraged by

the thinking of his parents. In making these observations we should not be misunderstood to indicate that we have formed an unfavourable opinion as to the culpability of Amrish, his parents Shri Lajja Shanker and Smt. Meera and his brother Sherish. However, Judges cannot be blind to the disgraceful and distressing reality vis-à-vis dowry, which prevails in some sections of our society. What we find extremely disconcerting is that this social malaise is spreading amongst all religious communities. The demand of dowry is a social anathema, which must be dealt with firmly.

3. So far as the prosecution is concerned it was of the opinion that a triable case had been established against Amrish, the husband, both his parents, his brother. The prosecution had made out a case even against his brother's wife who came into the family five years after the performance of the hapless marriage and approximately two years before the tragic suicide of late Archana. At this stage therefore, in discharging all four persons other than the husband/ widower Amrish, the Sessions Judge had necessarily to have come to the conclusion that on a perusal of the material before the Court there was no likelihood of a conviction being returned, nay, that not even a prima facie case against them had been disclosed. We need not travel beyond the decisions rendered by this Court in *State of Maharashtra v. Somnath Thapa* AIR 1996 SC 1744 = (1996) 4 SCC 659; *State of Bihar v. Ramesh Singh* AIR 1977 SC 2013 = (1977) 4 SCC 39; *Union of India v. Prafulla Kumar Samal* (1979) 3 SCC 4 and *Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia* (1989) 1 SCC 715. We also think that the line of decisions including *State of Haryana v. Bhajan Lal* (1992) Supp. 1 335 as well as *Michael Machado v. CBI* (2000) 3 SCC 262 and *Suman v. State of Rajasthan* (2010) 1 SCC 250 = AIR 2010 SC 518 are also apposite in the context of Section 319 of the CrPC. Whether it is quashing of an FIR or a Charge-Sheet, or summoning a party under Section 319, CrPC, this Court has repeatedly opined that the approach of the Judge must be to consider whether the collected material and evidence is indicative of existence of merely a prima facie case. It is only where there is absence of even a prima facie case that the Judge would be justified in cancelling the FIR, or quashing the Charge-Sheet, or declining the summoning of a third person under Section 319, CrPC. The learned Single Judge, as we have already noticed above, comprehensively and correctly analyzed the case law and appreciated the evidence to come to the conclusion that there was enough material available even at that stage for maintaining the trial, i.e. reversing the view of the Sessions Judge on this score.

The Single Judge was correct in maintaining that there was inadequate material in regard to Sangeeta as had been held by the Sessions Judge.

4. An argument has been continuously raised vis-à-vis the passage of seven years before the subject marriage ended with the suicide of Archana. This has rightly been found not to vitiate the trial against any of the persons (except Sangeeta). There can be no gainsaying that no case can possibly be made out under Section 306 read with Section 498-A, IPC after a marriage has crossed the seven years' period; it is only the statutory presumption that stands removed, thereby also shifting the onerous burden from the shoulders of the accused to that of the prosecution.

5. It would be idle and in fact illogical to contend that law expects that on the first demand of dowry, prosecution under Section 498-A has to be commenced. In the Indian idiom, where it is oftspoken that on her marriage a daughter ceases to be a member of her parents' family and may return to it only as a corpse, the reality is that only when it is obvious that the marriage has become unredeemably unworkable that the wife and her family would initiate proceedings under Section 498- A, IPC. Before that stage is arrived at, the bride endures the ill treatment and taunts knowing that the marriage would be undermined and jeopardized by running to the police station. We must hasten to add that a malpractice is now widely manifesting itself in that lawyers invariably advise immediate commencement of Section 498-A proceedings employing them as a weapon of harassment. Courts however, are aware and alive to this abuse of otherwise salutary statutory provision. Therefore, pleas founded on limitation have to be viewed with great circumspection. In this regard the statement of Ms. Sheetal Bhandari pertaining to conversations held by the deceased Archana in August, 2003 will indubitably be cogitated upon by the Trial Court.

6. In the impugned Order the learned Single Judge has kept in perspective the time endured decision in *Sheoprasad Ramjas Agrawal v. Emperor* AIR 1938 Nagpur 394 and of this Court in *Century Spinning & Manufacturing Co. Ltd. v. State of Maharashtra* AIR 1972 SC 545 = (1972) 3 SCC 282 and *State of Karnataka v. L. Muniswamy* AIR 1977 SC 1489 = (1977) 2 SCC 699 to be satisfied that the material and evidence on record sufficiently support the trial against Amrish, Shri Lajja Shankar, Smt. Meera and Sherish.

7. The learned Single Judge has also rightly supported the decision of the Sessions Judge in holding that the material on record was insufficient to

even prima facie indicate the complicity of Sangeeta in the alleged offences of cruelty and abetment of suicide. We entirely agree with the conclusion arrived in the impugned Order to the effect that a prima facie case justifying the trial of the Lajja Shankar, Meera and Sherish have been established and that the Sessions Judge erred in discharging these three persons.

8. Accordingly, the appeals fail and are dismissed being devoid of merits. We would have imposed exemplary costs on the Appellants in these proceedings but for the fact that the impugned Order reverses the order passed by the Sessions Court. In other words if we had been confronted with concurrent findings punitive costs would have followed.

Appeal dismissed.

I.L.R. [2014] M.P., 1698
FULL BENCH
Before Mr. Justice Ajit Singh, Mr. Justice Alok Aradhe & Mr. Justice K.K. Trivedi
R.P. No. 172/2009 (Jabalpur) decided on 24 October, 2013

M.P. ELECTRICITY BOARD, JABALPUR & ors. ...Petitioners
Vs.
S.K. DUBEY ...Respondent

A. Service Law - Time Bound Promotion - Effect - **Junior Engineer promoted to the post of Assistant Engineer under the Time Bound Promotion Scheme cannot be treated at par with the Assistant Engineer Promoted on regular basis. (Para 7)**

क. सेवा विधि – समयबद्ध पदोन्नति – प्रभाव – समयबद्ध पदोन्नति योजना के अंतर्गत सहायक अभियंता के पद पर पदोन्नत किये गये कनिष्ठ अभियंता को नियमित आधार पर पदोन्नत किये गये सहायक अभियंता के समकक्ष नहीं माना जा सकता।

B. Interpretation of Statutes - **If a provision is made to deal with specific situation, the same would prevail over the general situation. (Para 8)**

ख. कानून का निर्वचन – यदि विनिर्दिष्ट स्थिति के निपटारे के लिये उपबंध बनाया गया है, तब वह सामान्य स्थिति पर अभिभावी होगा।

C. Service Law - Disciplinary Authority - **Superintending**

Engineer is the Disciplinary Authority to take action against the Assistant Engineer who has been promoted under the Time Bond Promotion Scheme in view of the order dated 07.05.1999. (Para 8)

ग. सेवा विधि – अनुशासनिक प्राधिकारी – आदेश दि. 07.05.1999 को दृष्टिगत रखते हुए, समयबद्ध पदोन्नति योजना के अंतर्गत पदोन्नत किये गये सहायक अभियंता के विरुद्ध कार्यवाही करने के लिये अधीक्षक अभियंता अनुशासनिक प्राधिकारी है।

Cases referred :

(1999) 2 SCC 119, 1994 Supp.(2) SCC 250, (2011) 6 SCC 605, (2010) 4 SCC 498.

Anoop Nair, for the petitioners.
B.K. Pandey, for the respondent.
P.R. Bhave with *K.N. Pethia,* for the intervener.

ORDER

The Order of the Court was delivered by : **ALOK ARADHE, J. :-** By an order dated 12.4.2013 passed in Review Petition, learned singal Judge has referred the following questions for consideration by a larger Bench:

> "(1) Whether a Junior Engineer promoted to the post of Assistant Engineer under the Time Bound Promotion Scheme, till his absorption, can be treated as Assistant Engineer for all purposes ?
>
> (2) Whether against such an Assistant Engineer promoted under Time Bound Promotion Scheme, the disciplinary action could have been taken only by the Board/Chief Engineer in view of the notification dated 2.9.2003 (sic.5.10.1991) ?"

2. The background facts, leading to reference, briefly stated, are that the respondent was initially appointed on the post of Junior Engineer and later on promoted to the post of Assistant Engineer under the Time Bound Promotion Scheme. A show-cause notice was issued to him on 31.7.2008 by the Superintending Engineer for misconduct. Vide order dated 20.10.2008, the Superintending Engineer imposed the punishment of stoppage of two annual increments without cumulative effect. The aforesaid order was challenged by the respondent in Writ Petition No.15123/2008 (S) inter alia on the ground that the Superintending Engineer was not competent to impose punishment as the

competent authority under the order dated 2.9.2003 issued by M.P. Poorv Kshetra Vidyut Vitaran Co. Ltd. is the Executive Director/Chief Engineer. Learned single Judge in view of the concession given by the counsel for the review petitioners, by order dated 19.1.2009 allowed the writ petition and quashed the order of punishment dated 20.10.2008 and granted liberty to them to pass a fresh order.

3. The petitioners, thereafter filed the Review Petition No.172/2009 seeking review of the order dated 19.1.2009 inter alia, on the ground that in view of the order dated 7.5.1999 issued by erstwhile M.P. Electricity Board, the competent authority to impose the punishment on the Assistant Engineer who is promoted under the Time Bound Promotion Scheme till his absorption against the regular vacancy, is Superintending Engineer. Learned single Judge, during course of hearing of the review petition, by order dated 12.4.2013 referred the questions, stated supra, for consideration by a larger Bench.

4. Learned counsel for the petitioners submitted that though a Junior Engineer is granted the benefit of promotion under the Time Bound Promotion Scheme yet he carries out the duties and functions of the post of Junior Engineer. It is further submitted that once a Junior Engineer is absorbed against regular vacancy of Assistant Engineer, he would only then have power and functions of Assistant Engineer. While inviting the attention of this Court to the order dated 7.5.1999, it was submitted that the Superintending Engineer continues to be disciplinary authority in respect of Junior Engineers till the Junior Engineers promoted to the post of Assistant Engineer under the Time Bound Promotion Scheme are absorbed against the regular vacancy of Assistant Engineer. It is also urged that in order to remove frustration, the employees are given a higher grade in terms of emoluments while retaining them in the same category. In support of his submissions, learned counsel for the appellants has placed reliance on the decision in *Dwijen Chandra Sarkar and Another v. Union of India and Others,* (1999) 2 SCC 119.

5. On the other hand, learned counsel for the respondent submitted that the order dated 7.5.1999 provides that a junior engineer shall be class II officer and, therefore, the disciplinary authority in respect of such an Assistant Engineer to impose punishment is Chief Engineer in view of the order dated 2.9.2003. Learned senior counsel for the intervener has submitted that promotion to the post of Assistant Engineer under the Time Bound Promotion Scheme is not automatic and it is subject to selection and in view of the order dated 2.9.2003, the Executive Director/Chief Engineer is the competent authority to impose punishment on the Assistant Engineers who have been

promoted under the Time Bound Promotion Scheme.

6. We have considered the respective submissions made by learned counsel for the parties. The Supreme Court in *Patna University and Others v. Awadh Kishore Pd. Yadav and Others,* 1994 Supp (2) 5CC 250 has held that the provision relating to promotion under the Time Bound Promotion Scheme is generally adopted to mitigate the hardship of stagnation in service e.g. when the opportunities of getting promotion to the higher grades are not likely to be available for years for various reasons including lack of adequate posts in the higher grades compared to the proliferation of posts in the feeder categories. However, such promotions are not at par with promotion from a lower post to a higher post. In *Dwijen Chandra Sarkar* (supra) similar view has been expressed and it has been held that employees are given Time Bound Promotion in order to remove frustration and in terms of emoluments while retaining them in the same category. However, the promotion under the Time Bound Promotion Scheme cannot be equated with the promotion made on regular basis. Similar view has been taken in the case of *Director General, Indian Council for Agricultural Research and Others v. D. Sundara Raju,* (2011) 6 SCC 605.

7. From perusal of the order dated 7.5.1999 it is evident that the aforesaid order has been issued taking into account the delay in promotion of the Junior Engineers to the post of Assistant Engineer. The aforesaid order clearly provides that the Junior Engineer promoted to the post of Assistant Engineer shall carry out the same duties and functions as he was doing earlier and such a Junior Engineer will continue to work on the same place with the duties and functions of Junior Engineer. The aforesaid order also provides that once such Junior Engineer is absorbed in the regular vacancy, he would have the power and functions of the Assistant Engineer. The promotion under Time Bound Promotion Scheme has been granted with a view to avoid frustration amongst the Junior Engineers. By the aforesaid promotion, higher grade in terms of emoluments has been awarded to a Junior Engineer without any change in post. Such Junior Engineer continues to hold his substantive post and to perform functions of the post of Junior Engineer. Therefore, Junior Engineer promoted under the Time Bound Promotion Scheme to the post of Assistant Engineer cannot be treated at par with the Assistant Engineer promoted on regular basis. Accordingly, the first question is answered.

8. It is trite law that if a provision is made to deal with specific situation, the same would prevail over the general provision. [See: *Maya Mathew v. State of Kerala and Others,* (2010) 4 SCC 498] At this stage, it is appropriate to notice

the order dated 2.9.2003 which deals with the revised delegation of power. Under the aforesaid delegation of power, the Executive Director/ Chief Engineer has been granted powers to punish and impose minor penalty for class I officers of the rank of Executive Engineer and equivalent and has been given full power in respect of officers below the rank of Executive Engineers and equivalent. The order dated 2.9.2003 issued by the M.P. Poorv Kshetra Vidyut Vitaran Co. Ltd. as well as the order dated 7.5.1999 issued by the erstwhile M.P. Electricity Board, operate in different fields. The order dated 2.9.2003 pertains to Assistant Engineers promoted on regular vacancy and does not apply to the Assistant Engineers who are promoted under the Time Bound Promotion Scheme as in respect of such Assistant Engineer specific provision is made in the order dated 7.5.1999 which provides that the Superintending Engineer would be disciplinary authority against such a Junior Engineer till his absorption on the post of Assistant Engineer against the regular vacancy. Even otherwise, specific provision made with reference to Assistant Engineers promoted under the Time Bound Promotion Scheme would prevail over the order dated 2.9.2003 which contains general provisions. Thus, it is apparent that Superintending Engineer is the disciplinary authority to take action against the Assistant Engineer who has been promoted under the Time Bound Promotion Scheme in view of the order dated 7.5.1999. Accordingly, the second question is answered.

9. Let the matter be placed before the learned singal Judge.

Order accordingly.

I.L.R. [2014] M.P., 1702
WRIT APPEAL
Before Mr. Justice Shantanu Kemkar &
Mr. Justice Mool Chand Garg
W.A. No. 515/2011 (Indore) decided on 23 July, 2013

NIRMAL DUBEY (SMT.) & anr. ...Appellants
Vs.
PUNJAB NATIONAL BANK & ors. ...Respondents

***Service Law - Compassionate appointment - Basis of - Refusal to grant* - Appellant's husband died in harness - Appellant applied for compassionate appointment - The application rejected by respondents Bank - Held - Main criteria for appointment on compassionate basis should be the financial condition of the family of the deceased person -**

Unless the financial condition is entirely penury, such appointment cannot be made. (Paras 2 & 6)

सेवा विधि – अनुकम्पा नियुक्ति – का आधार – प्रदान करने से इंकार किया जाना – सेवा के दौरान अपीलार्थी के पति की मृत्यु – अपीलार्थी ने अनुकम्पा नियुक्ति के लिये आवेदन किया – प्रत्यर्थी बैंक द्वारा आवेदन अस्वीकार किया गया – अभिनिर्धारित – अनुकम्पा आधार पर नियुक्ति हेतु मुख्य मापदंड, मृतक के परिवार की आर्थिक स्थिति होना चाहिए – जब तक कि आर्थिक स्थिति पूर्णतः गरीबी की न हो, उक्त नियुक्ति नहीं दी जा सकती।

Cases referred :

2009 (4) MPLJ 526, (2007) 9 SCC 571.

V.P. Saraf, for the appellants.
H.Y. Mehta, for the respondents/Bank.

ORDER

The Order of the Court was delivered by : SHANTANU KEMKAR, J. :- This intra court appeal under Section 2 (1) of the Madhya Pradesh Uchcha Nyalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 is directed against the order dated 09.08.2011 passed by the learned Single Judge of this Court in Writ Petition No.364/2009 (s).

2. Dilip Dubey, husband of appellant No.1 and father of appellant No.2, was working with the respondent – Punjab National Bank on the post of Cashier. He died in harness on 18.04.2000. An application was submitted by appellant No.1 before the Bank for making appointment of appellant No.2, on compassionate basis. The application was rejected on 14.08.2001. The said order passed by the Bank rejecting the prayer for compassionate appointment was set aside by this Court vide order dated 06.05.2008 passed in Writ Petition No.19/2001 and directed the Bank to reconsider the appellant's / writ petitioner's prayer for compassionate appointment and pass a speaking order.

3. In terms of the said directions issued by this Court, the Bank reconsidered the application for compassionate appointment and rejected the same vide order dated 04.08.2008. Feeling aggrieved, the appellants filed the aforesaid writ petition. Learned Single Judge, after considering the contentions made by the parties, placing reliance on a judgment passed by

this Court in the case of *Sushma w/o Late Dinesh Kumar Yadav v. State Bank of Indore & another* 2009 (4) MPLJ 526, dismissed the writ petition. Aggrieved, the appellants have filed this intra court appeal.

4. It has been contended by Shri V.P. Saraf, learned counsel for the appellants that the order dated 04.08.2008 passed by the Bank is discriminatory in nature. According to him, various other applicants for compassionate appointment namely Manjula Pandya, Rajesh Mishra, Geetali Tanksali and Renu Thawani have been offered compassionate appointment, though their financial condition was better than that of the appellants.

5. Shri H.Y. Mehta, learned counsel appearing for the Bank has supported the order passed by the Bank, as also the order passed by the writ Court, dismissing the writ petition. He submitted that keeping in view the loan liabilities on the other applicants, as detailed in the reply submitted before this Court in terms of the order dated 18.07.2012; they were found to be financially weak as compared to the appellants. According to him, the criteria fixed for grant of compassionate appointment, which includes family pension, gratuity amount received, employee's / employer's contribution to provident fund, any compensation paid by the Bank or its welfare fund, proceeds of LIC Policy and other investments of the deceased employee, income for family from other sources, employment of other family members and size of the family and liabilities, if any, has to be considered, while deciding such application. He submitted that there cannot be two similar cases where there appear exactly similar features, financial data and family backgrounds.

6. It has now been well settled and there cannot be any dispute that compassionate appointment is exception to the general rule of making appointment in public services on the basis of open invitation of application and merit. Exception has been carved out to support the dependents of the employee died in harness and living his/her family in penury, without any means of livelihood. In the case of *State Bank of India & others v. Jaspal Kaur* (2007) 9 SCC 571, the Supreme Court has held that the main criteria for appointment on compassionate basis should be the financial condition of the family of the deceased person. Unless the financial condition is entirely penury, such appointment cannot be made. The scheme of the Bank (Annexure P/8) regarding compassionate appointment also provides that compassionate appointment is to be made, keeping in view the financial condition of the family left behind by the deceased employee.-

7. Taking into consideration the legal position and the scheme framed by the Bank, we have examined the order dated 04.08.2008 passed by the General Manager of the Bank rejecting the application of the appellants for compassionate appointment. The relevant portion of which reads thus:

> "5. I have carefully examined the aforesaid submissions made by Smt. Nirmal Dubey and Shri Gaurav Dubey in their representation dated Nil. I find from the records that the family had received a sum of Rs.2,16,463/- by way of terminal dues etc. after the unfortunate death of Shri Dilip Dubey. As Shri Dubey had opted for pension, the family was also in receipt of family pension of Rs.3606/- p.m. I also observe that the gross salary of Late Shri Dilip Dubey was Rs.10927.70 p.m. and the net carry home salary was Rs.7698.70 p.m. at the time of death. Having regard to these facts and also having regard to the fact that the family was living in its ancestral home, I am of the view that the condition of the family was not indigent warranting appointment of Shri Gaurav Dubey in the Bank on compassionate grounds in terms of the then prevailing scheme in the Bank. It is also important to note that the object of the then prevailing scheme was to consider compassionate appointment to the dependent of an employee dying in harness leaving his family without any means of livelihood. It cannot be said that the family of the deceased employee in the present case, had no means of livelihood.
>
> As regards the submission of Smt. Nirmal Dubey and Shri Gaurav Dubey that their financial condition is not such as to lead a convenient life according to the status to which they were accustomed, I may state that as per the object of the prevailing scheme under PD Cir. letter No.6/97, compassionate employment to the dependent of an employee dying in harness, is to be considered where the family is without any means of livelihood. Mere death of an employee in harness does not entitle his dependents to such employment."

8. In the case of *Sushma* (supra) after taking into consideration the law laid down by the Supreme Court in the case of *State Bank of India and others v. Jaspal Kaur* (supra), this Court has held that the Court should not

normally interfere with the decision of the Competent Authority in regard to the fact as to whether the deceased employee left his family in penury and without any means of livelihood. It is the job of the specially constituted authorities since they are better equipped to decide the facts of the case and their objective findings arrived on appreciation of full facts should not be interferred into by the Courts.

9. On going through the reply submitted by the Bank, we find that the details about the loan liabilities of other persons, who had been granted compassionate appointment was considered for giving them appointment whereas the appellants did not furnish any cogent material which could be relied upon to record satisfaction about their loan liability. The said statement about loan liability has not even been countered by the appellants. In the circumstances, no fault can be found in the order passed by the writ Court.

10. In the present case, the findings of the Bank, as extracted above, makes it clear that the appellants' case has been objectively considered and a conclusion has been arrived at negativing their claim.

11. Keeping in view the aforesaid, we find no infirmity in the order passed by the respondent – Bank, which has been upheld by the learned Single Judge. Therefore, the writ appeal deserves to be and is hereby dismissed with no order as to costs.

Appeal dismissed.

I.L.R. [2014] M.P., 1706
WRIT PETITION
Before Mr. Justice A.K. Shrivastava &
Mr. Justice Brij Kishore Dube
W.P. No. 1340/2011 (Gwalior) decided on 30 July, 2012

SHAKUNTALA BHADOURIA ...Petitioner
Vs.
M.P. GRIHA NIRMAN MANDAL & ors. ... Respondents

Constitution - Article 21 - Meaningful living - House **- M.P. Housing Board did not construct the house in accordance with specifications and also did not affix the fixtures as per specifications - Housing Board directed to pay compensation of Rs. 5,00,000/-, Rs. 25,000/- by way of cost and Rs. 5,000/- towards counsel fee. (Paras 17 & 18)**

संविधान – अनुच्छेद 21 – सार्थक जीवनयापन – मकान – म.प्र. गृह निर्माण मंडल ने मकान का निर्माण कार्य, विनिर्दिष्टियों के अनुसार नहीं किया है और फिक्सचर भी विनिर्दिष्टियों के अनुसार नहीं लगाये गये हैं – प्रतिकर रु. 5,00,000/–, व्यय के माध्यम से रु. 25,000/– और अधिवक्ता फीस की ओर रु. 5,000/– का भुगतान करने के लिए गृह निर्माण मंडल को निदेशित किया गया।

Sudha Dwivedi, for the petitioner.
Nidhi Patankar, for the respondents.

ORDER

The Order of the Court was delivered by : **A.K. SHRIVASTAVA, J. :-** By this petition under Article 226 of the Constitution of India the petitioner is seeking following reliefs:

(i) To hand over the possession of the house immediately and to allow the petitioner to record the true condition of the house at the time of delivery. If required, a Court Commissioner be appointed to assess the actual condition of the house at the time of handling (sic.handing)over of possession. The Board authorities be restrained from coercing the petitioner into falsely recording satisfaction.

(ii) To provide the exact calculation for the price that has been charged from her for the house FA/H-37.

(iii) To return to the petitioner the extra amount charged by the respondent Board with interest at Bank rates till payment.

(iv) To change the fittings and finishings that the sub-standard and not in accordance with the specifications. For the fittings and finishing that cannot be changed, the Respondent Board be directed to make appropriate deduction in the price of the house.

(v) to rectify within a fixed reasonable time the structural defects like sinking of the floor, cracks in the walls, sub-standard finishing etc. and to issue a warranty in their regard.

(vi) To provide the petitioner the No Dues Certificate without delay.

(vii) To pay the petitioner the costs and compensation for

the harassment caused by the Board.

(viii) To pay the petitioner the costs of litigation.

(ix) Any other relief that may be found proper.

2. The admitted facts necessary for the disposal of this petition are as under:

(a) The respondent no.4 published an advertisement in the newspaper dated 28.10.2007 seeking proposals for registration of houses in Sector F and G of Deendayal Nagar, Gwalior under the Self Finance Scheme;

(b) according to the advertisement, the estimated price of a house under the 32 HIG (A) Delux Sector F Scheme was Rs. 13.80 lacs, the registration amount was Rs. 1.40 lacs and the amount payable before possession was Rs. 12.40 lacs;

(c) the petitioner applied for a house under the said Scheme and deposited required registration amount;

(d) the fourth respondent informed the petitioner vide its letter dated 24.12.2007 that petitioner has been registered temporarily for allotment and there is a possibility of more than 10% increase in the price of the house;

(e) the fourth respondent thereafter issued impugned letter dated. 6.8.2008 informing the petitioner that due to escalation in the cost of building material, the selling price of the house would be approximately Rs. 18.52 lacs and the actual selling price will be communicated on completion of construction;

(f) the petitioner did not give her consent and raised verbal objections;

(g) it was informed to the petitioner that construction work of her house had commenced on 9.9.2008 and she was advised to pay installments according to the schedule laid out in the letter; and

(h) the petitioner deposited all the installments and the registration amount Rs. 18.52 lacs; vide letter dated 13.11.2009 of fourth respondent petitioner was informed that she has been allotted House no. FA/H-37.

3. On inspecting the allotted house by the petitioner, she found several latent and patent defects in the construction and complained about the same to 2nd 3rd and 5 th respondent. The petitioner also sent e-mails on 23.11.2009 and 24.11.2009 to these respondents. The Dy. Housing Commissioner issued official website asking for information and complained about the pricing and quality of the construction and requested for correction of the defects and lacuna.

4. Further the case of the petitioner is that vide letter dated 10.12.2009, the fifth respondent-Assistant Engineer of the Housing Board informed the petitioner that the house is still under construction and any shortcomings pointed out by her during a joint inspection will be rectified during the process of finishing the work done. Despite petitioner telephonically requested fifth respondent to have joint inspection, her request was not accepted by him. The said respondent again informed the petitioner vide letter dated 29.12.2009 that the construction work is about to complete and, therefore, she should fix up a joint inspection to point out the defects in construction so that they can be rectified by the Contractor before and during finishing. In pursuant to said letter, the petitioner sent a letter on 8.1.2010 to the fifth respondent informing that she will be able to come in the month of February, 2010. The petitioner further requested the fourth respondent-Estate Officer of the Board at Gwalior to provide her approved specifications of the house; the basis of formulation of these specifications; the approved lay out; planned estimate and drawing of the house; the basis of calculation of the cost of the house and reasons for escalation from initial cost; date of purchase of land; the report of material used in the construction etc. etc.

5. The respondents did not provide the details which were asked by the petitioner but fourth respondent sent a letter to the petitioner dated 26.3.2010 informing her that there has been an escalation in building material and some items have been changed to improve the house and as per the requirement of the site. She was also informed that Collector's guidelines have been made applicable and the Chief Architect, Housing Board, Bhopal has made some

alternation (sic:alteration) /additions to the drawing, design and specifications of the house and , therefore, the estimated present price of the house would be Rs. 24,69,000/-. Vide E-mail dated 4.4.2010 the petitioner asked for item-wise rates, quantity of items used in her house, details of Collector's guidelines, specifications and improvements but no information was given to her.

6. It is also an admitted position that fourth respondent-Estate Manager issued the impugned allotment order no. 904 dated 8.4.2010 directing the petitioner to deposit the balance amount of Rs. 8,87,289/- (taking total cost to Rs. 27,39,289/-) within 15 days of receipt of the order otherwise the allotment would be deemed to have been cancelled. It was also informed that if there is any complaint in regard to construction, fifth respondent should be contacted so that the faults may be rectified within 30 days. It was also informed that the house should be inspected thoroughly and it should be entered in the register of the concerned Deputy Engineer that the house has been taken into possession in good condition otherwise no complaint in regard to construction shall be entertained. Although the petitioner objected for escalation of the price and also made correspondence in that regard but it was not decided. The petitioner vide letter dated 29.4.2010 addressed to respondent no.4 to provide necessary information which she has sought but no information was ever given to her. Her letter dated 29.4.2010 was followed by E-mail dated 6.5.2010. At that juncture fourth respondent replied vide letter dated 20.5.2010 that petitioner should collect information from and get the defects rectified by fifth respondent. She was also directed to get the sale deed registered and to take possession of the house after rectification of defects. These facts are also not in dispute.

7. According to the petitioner, the fifth respondent failed to get the defects carried out and the documents were also not provided to the petitioner. Thereafter in order to meet out the unanticipated additional demand for the escalated price, the petitioner had to liquidate all her savings and investments and also had to apply for additional loan. The petitioner also sent respondent no.4 an E-mail on 24.5.2010 requesting to provide information.

8. Thereafter, the petitioner paid all the dues in full on 21.6.2010 (total amount of Rs, 27,39,289/-). This fact is also not disputed. Thereafter, vide letter dated 30.6.2010 the fourth respondent informed the petitioner that the estimated price of the sale deed would be Rs. 2.90 lacs. This fact is also not disputed

9. The petitioner thereafter wrote a letter to the fourth respondent on 5.7.2010 that full payment has been made by her subject to legal remedies to be availed later and, inter-alia asked for the information sought under RTI Act, registration of sale deed at the earliest and for possession. According to the petitioner, vide letter dated 7.7.2010 the information was supplied to her but it was vague and the documents were either illegible or incomplete. Eventually, she filed an appeal and it was disposed of on 14.9.2010 by the Appellate Authority directing respondent Board to provide petitioner all the documents and information on or before 24.9.2010.

10. It is also admitted that the sale deed was registered on 13.7.2010 and on 15.7.2010 the Estate Manager issued the possession order. The petitioner asked for No Dues Certificate but it was not provided to her for which she made written requests on 15.7.2010 but No Dues Certificate has not yet been given to her. On being inspected the impugned house several defects were found but it was not cured although it was repeatedly asked by the petitioner to the authorities to cure them. Hence, this petition has been filed.

11. By inviting our attention to the order dated 14.3.2011 passed by this Court learned counsel for the petitioner submits that the possession of the house in question was delivered to the petitioner in pursuant to the interim order passed by this Court by way of interim relief.

12. Return has been filed by the respondents but the denial is vague and is not specific. The petitioner has filed several photographs of the house along with the petition which speaks for itself and exposes how and in what manner by carrying out inferior quality work the construction of the house in question has been made. In pursuant to the interim order of this Court dated 14.3.2011, the possession of the disputed house was given to the petitioner and after taking possession of the disputed house it was noticed by the petitioner that the house which has been built up has not been built up as per the required specifications. Instead of mentioning each and every minute details of those conditions of each and every item and article, the photographs which are filed along with the memorandum of writ petition Annexure P/43 to P/53 they shall be deemed to be the part of this order. The house in question has been purchased by the petitioner from her hard and meager earnings since she is not enjoying a post of IAS or IPS Officer or even Class I Officer. She is simply a teacher in an Army School.

13. Immediately after two days of taking the possession in pursuant to the

order of this Court on 16.3.2011 a videography was done by the petitioner and several other coloured photographs were taken out and they all have been annexed and filed collectively as Annexure P/57. The two CDs are also filed. These photographs are self speaking and indicates that how and in what manner very poor and inferior quality of work has been done. We do not find any merit in the contention of learned counsel for the respondents that after taking possession respondents are not at all responsible and the inferior quality of work and the cracks etc. which are pointed out through photographs and videography must have been done by the petitioner so as to grab the money from the respondents. This argument we cannot accept for the simple reason that after investing her hard money, the petitioner herself will never cause serious damage to her own house in which she will live for her entire life along with her family members.

14. This Court by an interim measure and on the prayer made by the petitioner on 29.11.2011 appointed Shri Alok Sharma, Head, Department of Civil Engineering and Architecture, MITS, Gwalior and Shri Arun Katare who is a practicing lawyer of this Court as Court Commissioner to find out the actual position at the site. The aforesaid Court Commissioner inspected the house in question in presence of counsel for the parties. The petitioner was also present during inspection and on behalf of the respondents Executive Engineer and Sub-Engineer were present. The Court Commissioner found disparity and how disorderly the house was constructed. It would be condign to quote the relevant portion of the report which reads thus:-

> "Point 6.15 of the Writ Petition:
>
> A. On site lower reference point may vary as the ground level reference may vary after the *mooram* or earth filing according to the topography (levels) of the land. In this condition with reference to the earth filled ground level the plinth area is not 0.6 m on site, wherein mass housing it may be a average value for height and estimate also as well as earth filling around constructed house may be an on site decision of the engineers.
>
> B. Mooram/earth filling around house and within plot boundary is there on the site and has faced rainy season and settled down at some places, due to compaction which happen normally and may be reduced initially through proper working

specifications. It required maintenance. Presently, it is giving an comparative impression, that the building is sinking but the structure of the house is not sinking.

C. The vertical cracks are observed in the boundary wall of the house and required to be repaid.

D. Structural frame of the building is sound and safe and architectural parts require repair and maintenance as per the specific requirements and expectations of the owner and the commitments of the construction agency.

E. Electrical fittings are in working conditions & make should be referred/compared with the specification offered initially to the petitioner by the construction agency.

F. The wiring in the house has been provide concealed in the house, but some of the places it is exposed as pointed out by the petitioner.

G Switches are in working condition in the house and some of the switches have been provided of different colours in the same switch board which indicates that M.P. Housing Board were cautions about to fulfill the functional requirements of various buildings services but performed poor in aesthetic senses required to use and to select the material, fittings, fixture and their colours etc.

H. There were interlocking tiles in porch on site and not of Endura make, a compacted mooram approach road has been made from main road to porch.

I. The putty work on the house walls does not completing its purpose and require to be redone to get smooth surface finish.

Again it can be concluded herewith the comment that as M.P. Housing Board works at community level and involve in solving housing problem in M.P. but here the M.P. Housing Board the construction agency were conscious about to give a sound and safe structure and just to fulfill the architectural and functional requirements of the building. Here in the building

under consideration the construction agency has performed poor in achieving aesthetical requirements to select and proper use of the material fittings, fixture etc.

In the house the cleaning, polishing and painting work are requried to be upgraded or redone. The floor under sink require to be repaired. The specifications of the fittings and buildings services are required to be compared with the initial commitments and offers of the construction agency if differs required to be upgraded accordingly.

Submitting the site technical report prepared by myself Dr. Alok Sharma Professor, Architecture Department to fulfill the purpose required, to the Hon'ble High Court through Shri Arun Katare Ji, Court Commissioner appointed for this matter. Report is submitted before the Hon'ble Court."

15. Indeed, the case of the petitioner is further strengthen from the report of the Commissioner. Right from the very beginning the petitioner is complaining again and again to the respondents that the work which is being carried out is of inferior quality and the material which has been used for constructing the house and the equipments which are fixed do not tally with the specifications. It is further relevant to mention here that as an interim measure when this Court directed the writ petitioner to take possession on 14.3.2011, a videography was done and a CD has been placed on record along with several other photographs which shall be deemed to be the part of this order. These photographs speaks for themselves and no argument is required in this regard. No where it is stated by the respondents that the photographs etc. are not of the house in question. Therefore, according to us, the respondents are legally required to pay compensation to the petitioner.

16. We are deliberately not passing any order directing respondents to carry out the necessary repairs etc. and to fix the fixtures and equipments according to the specifications because we are afraid that again inferior quality of work would be done and again the petitioner would be forced to come to this Court. Even otherwise also, one can understand that in order to carry out the necessary repairs and to change the equipments etc. according to the specifications, the respondents would harass the petitioner and the petitioner would require to go again and again to the office of the respondents and she will be made pendulum and inspite of teaching the students, she would be forced to go to the office of the respondents

daily. In order to save all these agonies, it would be appropriate to direct the respondents to pay a sum of Rs. 5 lacs (Rupees Five lacs only) to the petitioner so that the house in question which has been purchased by her from hard earnings, can be brought to in order so that she can live along with her family like a human being and not like a wild animal.

17. Since the respondents have not constructed the house in question according to the specifications as well as the fixtures were not affixed which were in the specifications, they are liable to pay exemplary costs Rs. 25,000/- (Rupees Twenty Five Thousand only). The petitioner is also entitled for the costs of this petition because instead of requesting and bowing her head to the feet of the respondents, as a vigilant citizen of India she has invoked the jurisdiction of this Court under Article 226 of the Constitution. Since right to life includes meaningful living which is a fundamental right as enshrined under Article 21 of the Constitution of India and to maintain the human dignity, the citizen should be permitted to live like a human being, therefore, the respondents are also liable to pay costs.

18. This petition is accordingly allowed with costs. Counsel fee Rs. 5000/- (Rupees Five thousand only). Let compensation Rs. 5 lacs (Rupees Five lacs), exemplary cost Rs. 25,000/- (Rupees Twenty Five Thousand) and cost of this petition including counsel fee Rs.5,000/- (Rupees Five thousand) be paid to the petitioner on or before 30.09.2012, failing which from 1St October, 2012, the petitioner shall be entitled to the interest @ 6% per annum.

Petition allowed.

I.L.R. [2014] M.P., 1715
WRIT PETITION

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

W.P. No. 1231/2004 (Indore) decided on 26 February, 2013

HINDUSTAN LEVER LTD. (M/S) ...Petitioner
Vs.
ASSISTANT COMMISSIONER, COMMERCIAL TAX & ors. ...Respondents

Commercial Tax Act, M.P. 1994 (5 of 1995), Section 69(3) - Penalty **- Petitioner filed his return and calculated the tax but paid less than 80% of the tax - Non-deposit of tax made him defaulter within the definition of Section 69, so as to call the return filed by him as a false return - Section 26 & 69 deals with different situations - However,**

penalty is reduced from 5 times to 3 times. (Paras 17 & 22)

वाणिज्यिक कर अधिनियम, म.प्र. 1994 (1995 का 5), धारा 69(3) – शास्ति – याची ने कर की गणना कर अपनी विवरणी दाखिल की किन्तु कर का 80 प्रतिशत से कम का भुगतान किया – धारा 69 की परिभाषा में कर जमा न करने के कारण उसे व्यतिक्रमी बना दिया जिससे कि उसके द्वारा दाखिल की गई विवरणी को मिथ्या विवरणी कहा जायेगा – धारा 26 व 69 भिन्न परिस्थितियों में लागू होती हैं – अतः शास्ति 5 गुना से घटाकर 3 गुना की गई।

Cases referred :

45 STC 197, 25 STC 211, 29 VKN 185, (2011) 43 VST 450 (MP), (2012) 3 SCC 784.

P.M. Choudhari, for the petitioner.
Mini Ravindran, Dy. G.A. for the respondents.

ORDER

The Order of the Court was delivered by :

M.C. GARG, J. :- The short point involved in this writ petition is as to whether "non-payment of less than 80% of the tax alongwith return amounts to filing of a false return so as to attract the penalty under Section 69(3) of the M.P. Commercial Tax Act, 1994" (hereinafter referred to as MPCT Act). The said provision reads as under:-

> **"Sec. 69 : Power of Commissioner or appellate or revisional authority to impose penalty in certain circumstances.**
>
> 1.....
>
> 2.....
>
> (3) If the total tax shown as payable according to the return or returns and paid by a dealer for any period or part thereof is less than eighty per cent of the total tax assessed under Section 27 such dealer shall be deemed to have concealed his turnover or aggregate of his purchase prices or to have furnished false particulars of his sales or purchases in his return or returns or to have furnished a false return or returns for the purpose of sub-section (1) unless he proves to the satisfaction of the Commissioner or the appellate or the revisional authority, as

the case may be, that the concealment of the said turnover or the aggregate of purchase prices or furnishing of particulars of sales or purchases or furnishing of the false return or returns was not due to any fraud or gross negligence on his part."

2. According to the petitioner, once the return has been filed correctly and the tax has also been calculated in the return correctly, mere non-payment of the tax alongwith return would not attract the penalty under section 69(3) of the Act. It is submitted that in such circumstances, at the most provision of section 26 of the Act may be attracted which reads as under:-

26 : Returns- [(1) (i) Every such dealer as may be required so to do by the Commissioner by notice served in the prescribed manner; and

(ii) Every registered dealer; and

(iii) Every dealer whose registration certificate has been cancelled under clause (d) or (e) of sub-section (9) of Section 22,

shall furnish return in such form, in such manner, for such period, by such dates and to such authority as may be prescribed :

Provided that the Commissioner may, subject to such terms and conditions as may be prescribed, exempt any such dealer from furnishing such returns or permit any such dealer to furnish them for such different period, in such other form and to such other authority, as he may direct.]

[(2) Every dealer required to file return under sub-section (1) shall pay the full amount of tax payable according to the return as required by sub-section (2) of Section 32 or the difference of the amount of tax payable according to the revised return as required by sub-section (3) of the said Section and the full amount of interest, if any, payable under clause (a) or clause (b) of sub-section (4) and shall furnish the proof of such payment along with the return under sub-section (1) or the revised return under sub-section (3).]

3. On behalf of the respondents it is submitted that section 69(3) and section

26 deals with different situations. In the first case, if return has been filed but without payment of less than 80% of the tax with proviso under section 69(3) of the Act is attracted and the Assessing Officer is entitled to impose the penalty. Whereas, in the case of the delayed payment of the tax alongwith returns, section 26 is attracted where the assessee alongwith return and deposit of tax can also pay the penalty as per the provision of section 26(2).

4. Briefly stating the facts giving rise to the filing of this writ petition are that the petitioner who is an entry tax assessee for the year 1997-98 filed his return. After disclosing his turn over and the amount of taxable income, tendered tax which was less than 80% of the amount due. The matter went to the Assessing Officer. However, the Assessing Officer also initiated proceedings for imposition of penalty under Section 69 of the MPCT Act on the ground of short deposit of entry tax to the tune of Rs.72,874/- alongwith the return. A show cause notice was given to the petitioner, who preferred to file a reply. The crux of the reply is in para 2 of the reply placed on record as Annexure P-2 which is reproduced hereunder for the sake of reference:-

> "2. As regards facts relating to entry tax assessment, the assessee had inter alia explained during the proceedings of assessment that they were under bona fide impression and belief that entry tax is payable during the relevant time only upon the realisation of sale proceeds of the goods brought into the State of M.P. However, the assessee had maintained necessary books of account depicting the entry and receipt of various goods and the extract of entry of goods effected into the State of M.P., was produced during the assessment process and the same was accepted without any demur.
>
> 3. It is therefore clear from the fact that the Assessee did not conceal any transactions in their books of account during the relevant period especially in the light of the fact that the figures relating to entry of various goods as extracted from the books of account was accepted for the purpose of assessment. Thus, the bona fides of the assessee are proved and established beyond the doubt that the books of account reflect true position and it is the figure that was extracted from the books of account is adopted and considered by the assessing authority for the purpose of assessment."

5. However, the Assessing Officer did not agree with the contentions of the petitioner and passed an order against the petitioner, who stopped appearing during the course of proceedings. Penalty was imposed upon the petitioner on the ground of deemed concealment due to deposit of tax less than 80% of the tax payable. The assessment order so passed is Annexure P-3.

6. The petitioner aggrieved of the order of Assessing Officer filed a revision petition before the revisional authority vide Annexure P-4. The revisional authority finding that assessment though was made on the basis of books of accounts of the petitioner after observing that the petitioner has not concealed his turnover, confirmed the imposition of penalty on the ground of short deposit of tax. Non-deposit of full tax was treated as negligence on the part of the petitioner. According to the revisional authority, the petitioner ought to have filed revised return and deposited the tax.

7. A perusal of the aforesaid order of the revisional authority shows that the order passed by the Assessing Officer was based upon non-deposit of the relevant amount of tax despite knowing its liability. Non-deposit of tax despite knowing its liability was found to be a good ground for imposition of penalty under Section 69(3) of M.P.CT Act. It is against the aforesaid order, petitioner has come to this Court. The present writ petition has been filed by the petitioner aggrieved of the order of the revisional authority which order for the sake of reference is reproduced hereunder:-

—:: आ दे श ::—

पारित दिनांक 27.4.2004

आवेदक की ओर से उनके कर सलाहकार श्री डी.जे दवे, सी.ए. एवं श्री पी.एम. चौधरी एडवोकेट उपस्थित हुए तथा लिखित एवं मौखिक रूप से अपना पक्ष रखा। व्यवसाई मुख्यतः कॉस्मेटिक का व्यवसाय करते हैं। व्यवसाई के प्रकरण में मूल कर निर्धारण आदेश दिनांक 11.12.2000 को पारित किया गया था। कर निर्धारक अधिकारी ने कर निर्धारण के समय पाया कि कुल कर योग्य राशि रूपये 2,14,08,616/— है, जिस पर 1 प्रतिशत से प्रवेशकर रूपये 2,14,086/— देय होता है, किन्तु व्यवसाई द्वारा विवरण पत्र के साथ 1,41,212/— जमा किये गये हैं अर्थात् रूपये 72,874/— कम जमा किये गये हैं। अतः मध्यप्रदेश स्थानीय क्षेत्र में माल के प्रवेश पर कर अधिनियम, 1976 की धारा 13 सहपठित मध्यप्रदेश वाणिज्यिक कर अधिनियम, 1994 की धारा 69 (3) के अनुसार विवरण पत्रों में 80 प्रतिशत के कम कर धन जमा होने के कारण उन पर धारा 69 में शास्ति आकृष्ट होती है।

कर निर्धारण आदेश में पाये गये उपरोक्त तथ्य के प्रकाश में सहायक आयुक्त द्वारा शास्ति हेतु सूचना पत्र जारी किया गया तथा सुनवाई का अवसर दिया गया। शास्ति आदेश में उल्लेख है कि व्यवसाई को कई बार समय दिया गया, किन्तु विवरण पत्रों में कर कम जमा करने का कोई समाधानकारक कारण न बताये जाने पर एवं प्रकरण में समयसीमा समाप्त होने के कारण और अधिक समय दिया जाना संभव न होने पर सहायक आयुक्त द्वारा आदेश पारित करते हुए कर निर्धारण आदेश में कम जमा राशि के प्रकाश में धारा 69 (2) के प्रावधानों के अनुसार 5 गुना शास्ति आरोपित की गई।

आरोपित शास्ति के विरूद्ध व्यवसाई द्वारा निगरानी पेश की गई थी, किन्तु निगरानी सुनवाई के समय पुनः दिये गये दिनांक को किसी के उपस्थित न होने पर निगरानी एकतरफा आदेश द्वारा खारिज की गई, जिसके विरूद्ध व्यवसाई द्वारा पुनः संस्थापन आवेदन पेश किया गया। न्यायहित में उक्त आवेदन मान्य किया जाकर व्यवसाई को पुनः सुनवाई का अवसर दिया गया।

पुनः सनुवाई के समय व्यवसाई की ओर से लिखित और मौखिक रूप से अपना पक्ष रखा गया। अपने कथन में व्यवसाई द्वारा मुख्य रूप से इस बात पर बल दिया गया कि उनके द्वारा कोई क्रय–विक्रय छुपाया नहीं गया है, अतः कोई कर अपवंचन नहीं किया गया है। इसलिए मध्यप्रदेश स्थानीय क्षेत्र में माल के प्रवेश पर कर अधिनियम, 1976 की धारा 13 सहपठित मध्यप्रदेश वाणिज्यिक कर अधिनियम, 1994 की धारा 69 में कोई शास्ति आकृष्ट नहीं होती। उनके द्वारा यह भी बहस की गई कि शास्ति आदेश में गुण–दोष पर विवेचना नहीं की गई है तथा केवल कम जमा राशि के प्रकाश में मैकेनिकल रूप से शास्ति आरोपित की गई है, जो गलत है। अपने लिखित कथन में उनके द्वारा जिन प्रकरणों का हवाला दिया गया है, उनमें से कोई भी प्रकरण वर्तमान प्रावधान वाणिज्यिक कर अधिनियम की धारा 69 (3) में पारित आदेश नहीं है। इस संबंध में उनके द्वारा यह कहा गया है कि पूर्व में मध्यप्रदेश सामान्य विकयकर अधिनियम के अन्तर्गत धारा 43 के प्रावधान भी समान थे। किन्तु उनका कथन स्वीकार योग्य नहीं है एवं जहां मध्यप्रदेश स्थानीय क्षेत्र में माल के प्रवेशकर पर कर अधिनियम, 1976 की धारा 13 सहपठित मध्यप्रदेश वाणिज्यिक कर अधिनियम, 1994 की धारा 43 में दूषित मन एवं कर अपवंचन सिद्ध होना आवश्यक था, अब मध्यप्रदेश स्थानीय क्षेत्र में माल के प्रवेशकर पर कर अधिनियम, 1976 की धारा 13 सहपठित मध्यप्रदेश वाणिज्यिक कर अधिनियम, 1994 की धारा 69 (3) में कर अपवंचन की परिकल्पना की गई है।

व्यवसाई द्वारा उल्लेखित निर्णय मेसर्स गजरा गियर्स देवा में (1996) 29–वी.के.एन. 185 माननीय उच्च न्यायालय मध्यप्रदेश के समक्ष विचार का बिन्दु विवरण पत्र एवं लेखा पुस्तकों में प्रदर्शित राशियों में अन्तर था। प्रस्तुत विवरण में धारा 69 (3) के प्रावधान के अनुसार कार्यवाही की गई है। धारा 69 (3) में विवरण पत्र में देय कर धन का 80 प्रतिशत से कम जमा होने पर व्यवसाई द्वारा कर

अपवंचन किया गया है, यह परिकल्पना की गई है। व्यवसाई द्वारा उल्लेखित अन्य प्रकरण माननीय मुंबई उच्च न्यायालय (1996) 11–एस.टी.सी. 612 (मोहम्मद तैयुब दारूवाला) का लाभ भी व्यवसाई को प्राप्त नहीं है, क्योंकि धारा 69 (3) के प्रावधानों के अनुसार व्यवसाई द्वारा इस बात का कोई कारण नहीं बताया गया है कि कर जमा नहीं होने का क्या कारण है। केवल यह कहा जाना कि दिनांक 1.10.97 से विधान में परिवर्तन के कारण यह त्रुटि हुई है, पर्याप्त नहीं है। व्यवसाई द्वारा कर तो जमा किया गया है, किन्तु कम जमा किया गया है तथा अपने दिये गये स्पष्टीकरण में (कर निर्धारण के समय एवं निगरानी सुनवाई के समय) कहीं भी यह स्पष्ट नहीं किया गया कि कर कम जमा करने का क्या कारण है ? साथ ही विधान का ज्ञान न होना विधान के उल्लंघन का समाधानकारक कारण नहीं माना जा सकता। यह भी विचारणीय है कि व्यवसाई एक बहुत बड़ी लिमिटेड कंपनी है, जिसे श्रेष्ठ विशेषज्ञों की सहायता उपलब्ध है। अतः कानून की अज्ञानता को समाधानकारक कारण मानकर उदार रख नहीं अपनाया जा सकता।

अपने लिखित कथन में व्यवसाई द्वारा मेसर्स ओमप्रकाश–राजेन्द्रकुमार विरूद्ध के.के. ओपल के प्रकरण में पारित आदेश (1967) 19–एस.टी.सी. 153 का निम्न उद्धरण दिया गया है–

"The use of words 'false' 'suppressing' or 'concealed' etc., in Section 10(7) clearly shows that penalty is not intended to be imposed under the sub-section for honest mistakes of clerical errors or omissions, but only for deliberate false entries or false evidence involving something like Mens-rea".

दिये गये उद्धरण से स्पष्ट है कि माननीय उच्च न्यायालय द्वारा गलत या छुपाई गई राशि के संबंध में यह माना गया है कि शास्ति जान–बूझकर गलत प्रविष्टि या गलत साक्ष्य के आधार पर ही आरोपित की जाना चाहिए। उक्त उद्धरण संबंधित विधार की धारा 10 (7) के प्रकाश में है, जबकि 69 (3) किसी गलत राशि के आधार पर शास्ति के संबंध में नहीं है, अपितु इस धारा में यह अवधारणा की गई है कि कम कर जमा होने पर यह माना जायेगा कि गलत विवरण दिया गया है, जब तक कि व्यवसाई समाधानकारक तरीके से यह सिद्ध न कर दे कि दी गई जानकारी किसी धोखे या ग्रास–नेगलीजेंस की वजह से नहीं थी। स्पष्ट है कि धारा 69 (3) के प्रावधान अनुसार शास्ति के लिए जान–बूझकर गलत प्रविष्टि दी जाना आवश्यक नहीं है। व्यवसाई की ओर से गलत जानकारी पेश किये जाने का कोई सदाशयपूर्ण कारण प्रकट नहीं है। अतः व्यवसाई का यह कृत्य स्पष्ट रूप से लापरवाही (नेगलीजेंस) पूर्ण है। यह भी महत्वपूर्ण है कि निरूपित कर के विरूद्ध व्यवसाई द्वारा कोई अपील अथवा निगरानी पेश न करते हुए कर निर्धारण के बाद कर धन जमा किया गया है अर्थात् निरूपित कर विधान के अनुरूप होना एवं उचित होना व्यवसाई द्वारा स्वीकार किया गया है, किन्तु उक्त करदेयता स्वीकार होने के

बावजूद कर निर्धारण के पूर्व कर जमा नहीं किया गया है।

व्यवसाई द्वारा उल्लेखित अन्य निर्णय माननीय सर्वोच्च न्यायालय *स्टेट आफ मद्रास विरूद्ध एस.जी. जयराज नादर एण्ड संस* (1971) 28–एस.टी.सी.–700 के तथ्य भी व्यवसाई के प्रकरण के तथ्यों से पृथक हैं। व्यवसाई द्वारा *मेसर्स हिन्दुस्तान स्टील लिमिटेड विरूद्ध स्टेट आफ उड़ीसा* (1990) 25–एस.टीसी.– 211 के दिये गये उद्धरण से प्रकट होता है कि शास्ति विधान के जान–बूझकर किये गये उल्लंघन पर ही आकृष्ट होनी चाहिए। प्रकरण के तथ्यों से स्पष्ट है कि कर निर्धारक अधिकारी द्वारा केवल उसी राशि पर करारोपण किया गया है जो व्यवसाई द्वारा लेखा पुस्तकों से प्रदर्शित की गई है। अतः स्पष्ट है कि व्यवसाई द्वारा कोई राशि छुपाई नहीं गई, किन्तु ज्ञान होने पर भी कर जमा नहीं किया गया। यदि राशि छुपाई नहीं गई, किन्तु ज्ञान होने पर भी कर जमा नहीं किया गया। यदि व्यवसाई कर नहीं बचाना चाहते थे अथवा देरी नहीं करना चाहते थे तो विवरण पत्र देते समय ज्ञान न होने के बावजूद भी बाद में विधान का ज्ञान होते ही पुनरीक्षित विवरण पत्र दे सकते थे अथवा कर निर्धारण के समय स्थिति स्पष्ट होने पर तुरन्त कर धन मय ब्याज जमा कर सकते थे, किन्तु व्यवसाई द्वारा ऐसा न किया जाना निश्चित रूप से लापरवाही का स्पष्ट प्रमाण है। मध्यप्रदेश स्थानीय क्षेत्र में माल के प्रवेशकर पर कर अधिनियम, 1976 की धारा 13 सहपठित मध्यप्रदेश वाणिज्यिक कर अधिनियम, 1994 की धारा 69(3) के अनुसार लापरवाही के कारण कम जमा कर शास्ति के योग्य है।

अतः आरोपित शास्ति उचित है। निगरानी पूर्णतः अमान्य की जाती है। तदानुसार आदेश पारित।

डॉ. मंजुला दशोत्तर

अपर आयुक्त, वाणिज्यिक कर,

इन्दौर

8. It is the contention of the petitioner that they having filed a return showing the actual turnover and the tax payable and as such, had no mens-rea or any intention to avoid payment of tax and therefore, they are not liable to be proceed ahead under Section 69(3) of the Act thus it has been submitted that the penalty imposed against them is liable to be set aside.

9. It has been submitted by the petitioner:-

I) That the proceedings for penalty u/s 69 may be initiated if the dealer has

a) Concealed his turnover, or the aggregate amount of purchase prices in respect of any goods, or

b) Has furnished false particulars of his sales or purchases in his return or returns for any year or part thereof, or

c) Has furnished a false return or returns for such period

Thus the condition precedent for initiation of proceedings for imposition of penalty is concealment of turnover or furnishing false particulars of sales or purchases or filing of false returns. Nonpayment or short payment of tax is not punishable u/s 69.

II. That sub section (3) of section 69 which shifts the burden of proof upon the dealer if total shown as payable according to the return or returns and paid by the dealer for any period or part thereof is less than 80% of the total tax assessed is only a rule of evidence and creates a rebuttable presumption about deemed concealment by the dealer. However, the presumption can be rebutted by dealer by showing that the concealment or furnishing of particulars of sales etc or furnishing of the false returns etc was not due to any fraud or gross negligence on his part.

III. That thus even in rebuttal the dealer is required to prove that the concealment or furnishing of inaccurate particulars or filing of false returns was not due to any fraud or gross negligence.

IV. That the amount of penalty calculated under sub section (2) is also relatable to the amount of tax evaded. Hence if there is no concealment of turnover or furnishing of inaccurate particulars of sales or purchases or there is no filing of false returns, no proceedings u/s 69 can be initiated.

V. That so far as the non payment or short payment of tax is concerned the Act provides for levy of penal interest u/s26(4)(a).

VI. That in the instant case the revisional authority has recorded a specific finding that the AO has assessed the turnover as per petitioner's books of accounts, as such, it is clear that the dealer has not concealed any turnover. However,

the revisional authority confirmed the imposition of penalty only on the ground of non deposit of tax. It may further be relevant to not that the AO has already levied interest u/s 26(4) (a) of the Act in his order dated 11/12/2000 but initiated proceedings u/s 69 by invoking section 69(3) and ultimately imposed penalty for short deposit of tax by Annexure P/3.

VII. That the provisions of section 43 of MPGST Act which are in parimateria with section 69(3) of the MPCT Act have been interpreted by Division Bench of this Hon'ble court in Case of *Food Corporation of India Vs. CST* reported in 81 STC 219- (Copy of judgment already provided during last hearing). According to their Lordships', the dealer shall be deemed to have concealed his turnover if the tax returned is less than 80% of the tax assessed does not have effect of altering the substantive law on the subject of penalty for concealment. It only introduces a special rule of evidence applicable to the case coming within a particular penalty bracket.

It is, therefore, being prayed that the petition be allowed and the impugned order be quashed.

10. On the other hand, learned counsel for the State/Revenue Authority has submitted that the very fact that the tax therefore calculated at Rs.2,15,361/-, but tax actually paid was Rs.-1,41,212/-, i.e. less than 80% of the tax payable and therefore the case was covered under Section 69(3) of the Act and therefore the order of assessing officer and confirmed by the appellate authority and revisional authority cannot be set aside.

11. We have heard the submissions of both the learned counsel for the parties and also considered the judgments relied upon by the petitioner. The first judgment delivered by Hon'ble the Supreme Court in the case of *Cement Marketing Company of India Ltd Vs. Assistant Commissioner of Sales Tax* reported in 45 STC 197. In that case it was held that while interpreting Section 43 of the M.P.S.T.Act, which is parimateria to the provisions contained under Section 69(3) of the M.P.C.T Act, it was held as under:-

"A return cannot be said to be false within the meaning of section 43 unless there is an element of deliberateness in it. It

> is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of the assessee and there is no reasonable explanation forthcoming from the assessee for such want of care the Court may in a given case infer deliberateness and the return may be liable to be branded as a false return. But where the assessee does not include a particular item in the taxable turnover under a bonafide belief that he is not liable so to include it, it would not be right to condemn the return as a false return inviting imposition of penalty."

12. In so far as the observations made in that case is concerned they have no application to the facts of this case inasmuch as in the present case, it is not a case that the return filed by the petitioner was a return filed in inadvertence or based upon wrong calculation.

13. Another judgment relied upon by the petitioner is the decision of the Apex Court delivered in the case of *Hindustan Steel Limited Vs. State of Orissa* reported in 25 STC 211. In that case it was held as under:-

> "An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute."

14. In the present case, the petitioner was fully aware of its liability inasmuch as they knew the amount in terms of return, tax payable yet they have not deposited the tax. They deposited less than 80% of the due amount. This

provision makes Section 69(3) of M.P.C.T.Act applicable in this case. The very fact that the petitioner knew as to what was its liability, non-payment of the said amount certainly amounted to negligence.

15. Another judgment relied upon by the petitioner is the judgment of this Court in the case of *CST Vs. Gajra Gears* reported in 29 VKN 185, wherein it has been held as under:-

> "Imposition of penalty is a discretionary matter and the discretion is required to be exercised on sound judicial principles. The discretion cannot be arbitrary or capricious. The conduct of the non-applicant was not accompanied by a guilt mind; there was no case of mens rea.
>
> There was no mens rea and the bonafide error yielded bonafide conduct and thus assured immunity from the rigorous of section 43 of the Act."

16. Thus, the proposition as aforesaid are also not applicable to the present case for the reason that the provisions of Section 69(3)of M.P.C.T.Act as quoted above basically creates a presumption that when tax deposited is less than 80% of the tax due, there is no question of M.P.C.T. Act or any guilt intention. The very fact that the tax has not been deposited as per the tax calculated, a presumption would arise provided that the tax deposited is less than 80% of the amount due. In the present case, the aforesaid judgment is of no consequence for the simple reason that the penalty which can be levied has to be five times of the tax evaded, the question of discretion does not arise.

17. We have also gone through the other judgments cited on behalf of the petitioner. We are of the considered view that the judgments cited does not come to rescue the petitioner. Here it was not a case of concealment of the turnover or any mistake committed on behalf of the petitioner in calculating the tax. Here it was a case where the petitioner was fully aware of its liability yet decided not to deposit the tax which made it a defaulter within the definition of Section 69 of M.P.C.T.Act so as to call the return filed by him as false return.

18. Learned counsel for the petitioner is also relied upon the judgment of the Division Bench of this Court delivered in the case of *IND Exports Limited Vs. Assistant Commissioner of Commercial Tax and others* reported in (2011) 43 VST 450 (MP).

In that case, Division Bench of this Court set aside the imposition of penalty imposed under MP Commercial Tax Act, 1994 as also the entry tax and on the basis of return filed by the assessee wherein, it was claimed that the entire turn over of sales of items including edible oil was duly disclosed but mistakenly the rate of tax on edible oil was shown as 2% in place of 4%. The assessment was completed on the basis of the disclosures made in the return raising an additional demand on account of variance in the rate of edible oil from 2% to 4%.

19. In that case, Division Bench of this Court has opined that in in the peculiar facts of that case it could not have been said that assessee concealed his turn over or filed a false return. In that case, petitioners have been shown rate of tax to be paid 2% in place of 4% in its return was not taken as will full in non filing of the due return and it was opined that in that case there was no deliberate or dis-honest disclosure of the turn over correctly and therefore, it was held that in that case it was not the case of filing false return within the meaning of Section 69 in invoking the penalty clause of imposition of penalty. The relevant discussion in that case reproduced here as under:-

> "11. On a plain reading of the section 69 of the Act of 1994 it is clear that the imposition of penalty is attracted if the Commissioner or the appellate or the Revisional Authority is satisfied that the dealer has concealed his turnover or the aggregate amount of purchase prices in respect of any goods or has furnished false particulars of his sale or purchases, as the case may be, in his return or returns for any year or part thereof, or has furnished a false return or returns for such period. Thus, it has to be seen that whether the petitioner has concealed his turnover or has furnished false particulars of his sale or purchases in his return or has furnished a false return.
>
> 12. Undoubtedly, there is no allegation or findings that the petitioner has concealed his turnover or has furnished false particulars of sale or purchases in the return. On the other hand the petitioner's turnover as was disclosed in the return was duly accepted. So far as the wrong mention of rate of tax the petitioner has stated that it was a bonafide mistake and it was occurred due to lack of knowledge to the petitioner about the increase in the rate of tax from 2% to 4% w.e.f. 1.05.1999.

It is not in dispute that though the petitioner recovered and paid the tax at the rate of 2% but when the additional demand of Rs.10,48,301/- was raised, the same was been deposited.

13. It is now well settled that the order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceedings, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. To make the assessee liable for penalty fallacy should be in the disclosure of the facts required to be stated in the return. When the facts are fully disclosed in a return and are not misstated, the raising of a legal plea of exemption cannot make the return a false return within the meaning of section 69 unless there is an element of deliberateness in it. Where the assessee does not include a particular item in the taxable turnover under a bonafide belief that he is not liable so to include it, it would not be right to condemn the return as a "false" return inviting imposition of penalty. The concealment of turnover and furnishing of a false return, to fall within the ambit of this section must be accompanied with mens rea. If the assessee had a bona fide doubt whether the particular item is taxable or not and for the reason if he did not show the purchases in the return, it cannot be said that there was any mens rea. The expressions "concealment of turnover", "furnished false particulars of sales or purchase" and "furnished false returns" used in Section 69 (1) clearly shows that the element of mens rea is a necessary component. In order to expose the assessee to penalty, unless the case is strictly covered under the provision of penalty, the same can not be invoked. [See *Hindustan Steel Ltd. vs. The State of Orissa* (25 STC 211), *Dadabhoy's New Chirimiri Ponri Hill Colliery Company Private Ltd. vs. Commissioner of Sales Tax, M.P.* (44 STC 100), *The Cement Marketing Co. of India Ltd. vs. The Assistant Commissioner of Sales Tax, Indore and others* (45 STC 197), *Govindram Chatramal vs. Commissioner of Sales Tax, Madhya Pradesh* (55 STC 350), *Commissioner of Sales*

Tax, M.P. vs. Shivandas Tekchand (67 STC 174), *Jayshree Chemicals Ltd. vs. Additional Commissioner of Sales Tax, Orissa* (87 STC 359) and *Commissioner of Income-Tax vs. Reliance Petroproducts Pvt. Ltd.* [2010] 322 ITR 158 (SC)].

14. In the light of the aforesaid pronouncement of the Supreme Court and this Court and keeping in view the language of section 69, and the expressions used for making liable for imposition of penalty and the explanation offered by the petitioner in our considered view, it cannot be held that the petitioner deliberately or dishonestly shown rate of tax to be 2% in its return. It is also not a case that the petitioner had recovered the tax at the rate of 4% and deposited it with the department at the rate of 2%. On the other hand, it has recovered and deposited the tax at the rate of 2%.

15. Having regard to the aforesaid, we are of the view that no case under Section 69 of the Act of 1994 for imposition of penalty is made out, as according to us there was no deliberate action on the part of the petitioner, therefore, in the absence of mens rea, the provision of penalty could not have been invoked against the petitioner."

20. It was in the peculiar facts of that case as discussed above where there was a confusion in the mind of the assessee as to whether the tax was payable @2% or it was payable @4%. The Division Bench considered that it was a case where there was a mistake in deposit of tax due for the aforesaid reasons and that it was not a case of negligence.

21. Now coming to the argument of the learned counsel for the petitioner that in the present case even if there was deficiency in payment of tax determined, then also the case would have attracted the penalty in accordance with provision contained under section 26 of the Act and not the one as provided for under section 69 of the Act.

22. However, on perusal of the provisions of Section 69 and 26 of the M.P.C.T.Act it is clear that in Section 69, the liability for imposition of penalty arises on account of less payment of tax that also below 80%, when it was known fully well that it was their liability to pay full tax, whereas in the case of Section 26, the liability to pay penalty at the time of filing of the return and

payment of tax, at that time of filing of the return, when tax is paid simultaneously. Both these situations are different and deals with the different situation. However, even otherwise fiscal statutes are to be construed strictly and on their plain reading reference can be made to a judgment of Hon'ble Supreme Court delivered in the case of *Catholic Syrian Bank Limited Vs. Commissioner of Income Tax, Thrissur* reported in (2012) 3 SCC 784.

In these circumstances, while answering the issue framed above against the petitioner, we find no infirmity in the order of the revisional authority. However, in the facts and circumstances of the case, we find appropriate to reduce the penalty from 5 times to 3 times. The petitioner would therefore be liable to pay penalty three times of the tax. If the tax un-paid and in case, he has already paid the penalty, as imposed by the assessing authority they would be entitled for refund of the balance.

With these observations, we dispose of the petition filed by the petitioner with on orders as to costs.

C.C.as per rules.

Petition disposed of.

I.L.R. [2014] M.P., 1730
WRIT PETITION

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

W.P. No. 10825/2012 (Indore) decided on 20 March, 2013

BHAIYA @ BHAIYALAL @ ARVIND ...Petitioner
Vs.
STATE OF MADHYA PRADESH ...Respondent

A. National Security Act (65 of 1980), Sections 8 & 14, Constitution - Article 22(5) - Order of detention - **Representation was decided by State after a delay of about four months but was not communicated to petitioner - Representations made to Detaining Authority was not decided - The detention order is therefore, liable to be quashed. (Paras 6 & 8)**

क. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धाराऐं 8 व 14, संविधान – अनुच्छेद 22(5) – निरोध आदेश – राज्य द्वारा याची के अभ्यावेदन को करीब चार माह के विलम्ब के पश्चात निराकृत किया गया परन्तु याची को संसूचित नहीं किया गया – निरोध प्राधिकारी को दिया गया अभ्यावेदन को निराकृत नहीं किया गया –

निरोध आदेश इसलिए अभिखंडित किये जाने योग्य।

***B. National Security Act (65 of 1980), Proviso to Section 3(3) and 3(5)* - Order passed by the Detaining Authority or by the State Govt. was not communicated to the Central Government at all - No document showing compliance of Section 3(5) of the Act - Order quashed. (Para 10)**

ख. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(3) व 3(5) के परन्तुक – निरोध प्राधिकारी या राज्य सरकार द्वारा पारित किये गये आदेश की संसूचना केन्द्रीय सरकार को बिल्कुल नहीं दी गयी – अधिनियम की धारा 3(5) का अनुपालन दर्शाता कोई दस्तावेज नहीं – आदेश अभिखंडित।

Cases referred :

W.P. 9689/2012 deided on 13.02.2013, 2007(2) MPLJ 99, 1990 MPLJ 631, (1995) 4 SCC 51, AIR 1996 SC 2998, (2011) 5 SCC 244.

Ajay Bagadia, for the petitioner.
M.S. Dwivedi, P.L. for the respondents.

ORDER

The Order of the Court was delivered by :
J.K. MAHESHWARI, J. :- Assailing the order dated 28.07.2012, Annexure P-3 passed by respondent no.2 and the order dated 21.09.2010, Annexure P-7, passed by respondent no.1 confirming the order of detention, this petition has been filed under Article 226 of the Constitution of India.

2. It is the contention of the petitioner that on 24.07.2012, a first information report was lodged against him upon which an offence under Section 294, 323, 506 and 34 of IPC was registered at about 22.50 hours. On the next date, i.e., 25.07.2012, five other reports of petty offences were registered in between 11.15 hours and 15 hours in one day. The Superintendent of Police relying upon F.I.Rs submitted a report before the District Magistrate on 27.07.2012. Thereupon the order of detention was passed on 28.07.2012 directing to keep the petitioner into custody in Central Jail, Rewa. The petitioner has submitted two representations through his mother. The first representation dated 08.08.2012 has been submitted to the detaining authority i.e. District Magistrate and another representation was submitted to State Government on 9.8.2012. The representation submitted to the State Government was decided on 2.1.2013 without its communication, while the

representation submitted to the District Magistrate remain undecided, though he is duty bound to decide such representation. In such circumstances, the right to approach the petitioner under Article 22(5) of the Constitution of India as well as Section 14 of the National Security Act, 1980 (hereinafter referred to as Act) has violated by not deciding the same as expeditiously as possible with promptitude by the detaining authority as well as by the appropriate authority. However, this petition has been filed seeking quashment of the said orders.

3. The State Government has filed their reply on 08.02.2013, after availing three opportunities, wherein it is contended that various FIR in two days have been registered against the petitioner on account of his anti social activities of terrorizing the general public. It is denied that the said FIRs have been registered under the political pressure. The petitioner is an anti social activist who indulged in gundaism, loot, causes attempt to murder, theft in houses using dangerous weapons. However, the peoples of the locality were in terror by such act, therefore the officer competent, in exercise of the powers under sub section (2) of Section 3 of the Act has rightly passed the order of detention on 28.07.2012, considering the memorandum of the Superintendent of Police submitted on 27.07.2012. It is submitted that the grounds of detention has been communicated vide Annexure R-2, intimation has been furnished to the Home Department, as per the document Annexure R-3, and immediately he was taken into custody on 28.07.2012. It is also submitted that as per the notification issued on 10th July, 2012, the District Magistrate, Indore is empowered to exercise the powers under sub section (2) of Section 3 of the Act. It is also submitted that the department of Home has sent the approval on 13.08.2012 which was done on 08.08.2012, as per Annexure R-7. It was confirmed vide letter dated 21.09.2012 Annexure R-10, however, clarified that the period of detention of the petitioner shall be of 12 months upto 27.07.2013. It is also submitted that the representation of the petitioner was rejected vide order Annexure R-9 on 02.01.2013. In such circumstances, strict compliance of the provisions of the Act has been done by the State Government while passing the order, therefore, interference in this petition is not called for.

4. Learned counsel appearing on behalf of the petitioner placed reliance on a judgment of this Court passed in W.P.No.9689/2012 *Golu alias Anand Vs. State of Madhya Pradesh and others* decided on 13.02.2013. This Court has held that not deciding the representation expeditiously is fatal and

on the said ground, the order of detention was quashed. It is submitted that the petitioner of the said case Golu @ Anand is an accused in the FIRs lodged against the petitioner. The order of his detention and of the petitioner have been passed on the same date by the same authority. In the case of Golu @ Anand, the representation was submitted on 1.10.2012 which was decided on 4.12.2012 and communicated on 24.01.2013. However, by filing the said writ petition, this Court held that there is unexplained delay which is fatal therefore, the order of detention was quashed. In the case of the petitioner, after passing the order of detention on 28.07.2012, the representation has been submitted to the State Government on 9.8.2012, which was rejected on 02.01.2013. The copy of the same was filed alongwith the reply in the Court on 8.2.2013 without supplying the rejection order to the petitioner. However, the case of the petitioner is on better footing than the case of the Golu @ Anand therefore, on this ground, the order of detention of the petitioner may be set aside. It is submitted that not deciding the representation with promptitude by the authorities is not in consonance to law laid down by Hon'ble the Apex Court in the case of *Gazi Khan alias Chotia Vs. State of Rajasthan* AIR 1990 SC 1361. Reliance has also been placed on two Division Bench judgments of this Court in the case of *Nirmaljeet Kaur Vs. State of M.P.* reported in 2007 (2) MPLJ 99 and *Alok Pratap Singh Vs. State of M.P.* reported in 1990 MPLJ 631. However, it is urged that the order of detention passed by the competent authority, the order of approval and confirmation passed by the State Government is not in conformity to law.

5. Per contra, learned Government Advocate appearing on behalf of the respondent/State referring the document Annexure R-2 contended that the grounds of detention were communicated on 28.07.2012 to the petitioner and the intimation of the order of detention was sent to the Principal Secretary, Home Department, Government of Madhya Pradesh, Vallabh Bhawan, Bhopal. The representation submitted by the petitioner has also been rejected by the State Government as per Annexure R-9 on 2.01.2013 and by passing the order Annexure R-10, the State Government in exercise of the powers under sub section 1 of Section 12 of the Act has confirmed the detention order after recommendation of the advisory Board, on 21.09.2012, directing the detention of the petitioner for a period of one year upto 27.07.2013, therefore in such circumstances, the procedure as prescribed has been strictly observed, therefore, the order of detention, its approval and confirmation has rightly been passed which do not warrant any interference in this petition.

Hence, prayed for dismissal of this petition.

6. After having heard the learned counsel appearing on behalf of the parties, it is seen that the order of detention has been passed on 28.07.2012, in exercise of powers conferred under sub section (2) of Section 3 of the Act by District Magistrate, Indore. In the said order, the period of detention has not been specified. The representation, Annexure P-5 has been submitted by the petitioner on 09.08.2012 to the Principal Secretary, Home Department, Government of Madhya Pradesh, Vallabh Bhawan, Bhopal-respondent no.1 and the representation, Annexure P-6 has also been submitted to the detaining authority i.e. District Magistrate on 08.08.2012. It is not in dispute that the representation submitted to respondent no.1 was rejected on 2.1.2013 after about four months and the copy of the said rejection order has not been communicated to the petitioner, which would reveal from the document itself, by which it is clear, that it was sent to the District Magistrate, Indore and not to the petitioner. In the reply filed by the respondent, reasons of such delay has not been explained. It further appears that the representation submitted to the detaining authority has not been decided. As per Section 8 of the Act, it is clear that on receiving the grounds of detention, an opportunity shall be afforded to the detenue with earliest opportunities of making representation against such order to the appropriate Government. As per Section 14(1) of the Act, it is clear that the detention order passed may at any time be revoked or modified by the State Government, if the order is passed by its subordinate officer, the similar power has also been conferred to the Central Government. As per Article 22(5) of the Constitution of India, it is clear that if an order of preventive detention has been made against a person then the authority concerned shall as soon as possible may communicate it to such person, the grounds on which order has been passed and shall afford an opportunity at the earliest to make a representation against the order. In view of the foregoing, furnishing an earliest opportunity to represent and to decide it is a sine qua non in the matter of detention.

7. Hon'ble the Apex Court in the case of *Kamlesh Kumar Ishwardas Patel Vs. Union of India and others* (1995) 4 SCC 51, the aforesaid issue has been discussed in detail. It has been held that a person detained has right to make representation against the order of detention to the Advisory Board and also to the detaining authority, who has passed the order or to the State Government who is required to exercise the powers of approval as per sub section (3) of Section 3 and Section 12 of the Act. It has been observed that

the authority competent for revoking or modifying the order may give immediate relief to the detenue. It has been clarified that if such representation has been submitted, then it is the corresponding duty of the detaining authority as well as the State Government to consider and decide it at the earliest. In the case of *Kundanbhai Dulabhai Vs. District Magistrate, Ahmedabad and others* AIR 1996 SC 2998 Hon'ble the Supreme Court has held that to submit a representation against the order of detention is a Constitutional right as well as the statutory right of detenue. As per the provisions of the Act as well as Constitution, it is clear that earliest opportunity to make a representation is required to be afforded. However, it is implicit and corresponding duty of the authority to whom the representation is made to dispose of the said representation at the earliest or else the Constitutional and statutory obligation of affording earliest opportunity of making representation would loose its purpose and meaning. In such circumstances, it was directed by Hon'ble the Apex Court that the representation has to be disposed of at the earliest. If there is a delay in such disposal, reasons should be specifically explaining such delay, otherwise, it is fatal and affect the right of detenue.

8. In the said context, in view of the factual aspect discussed hereinabove, it is clear that the representation submitted to the detaining Authority on 8.8.2012 has not been decided and representation submitted to the State Government on 09.08.2012 has been decided on 02.01.2013, and copy of rejection order is filed alongwith the return on 8.2.2013 without intimation to the petitioner. The aforesaid delay has not been explained in the return. Thus, the case of the petitioner is on better footing than the case of *Golu @ Anand* (supra) referred hereinabove, wherein the order of detention has been quashed on the same ground. In such circumstances, in the considered opinion of this Court, the delay has not been satisfactorily explained which is fatal and on the said ground, the order of detention is liable to be quashed.

9. In addition to the aforesaid, it is seen that in the order of detention of the District Magistrate dated 28.07.2012, the period of detention has not been specified. In the order of approval by the State Government also the period of detention has also not been specified. The period of detention of one year at the first time mentioned in the order of confirmation passed on 21.09.2012, Annexure P-7. In the said context, the provisions of sub section (2), (3) and (5) of Section 3, as well as Section 12 of the Act is relevant which are reproduced hereunder:-

"3. Power to make orders detaining certain persons

(1).....

(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of Public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

Explanation.- For the purposes of this subsection, "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" does not include "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" as defined in the Explanation to sub-section (1) of section 3 of the Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980, and accordingly, no order of detention shall be made under this Act on any ground on which an order of detention may be made under that Act.

(3) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the powers conferred by the said sub-section:

Provided that the period specified in an order made by the State Government under this sub-section shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time.

(5) When any order is made or approved by the State

Government under this section, the State Government shall, within seven days, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as, in the opinion of the State Government, have a bearing on the necessity for the order.

12. Action upon the report of the Advisory Board

(1) In any case where the Advisory Board has reported that there is, in its opinion, sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit.

(2) In any case where the Advisory Board has reported that there is, in its opinion, no sufficient cause for the detention of a person, the appropriate Government shall revoke the detention order and cause the person concerned to be released forthwith".

10. Bare reading of the aforesaid, it is apparent that the order of detention in writing can be passed within the local limits by the District Magistrate directing that the detenue for the specified period shall remain in detention. The said order shall be passed in exercise of the powers under sub section (2) of Section 3 of the Act. The proviso makes it clear that the period specified in an order made by the State Government under this sub section shall not in the first instance exceed three months, but on having satisfied that detention is necessary then by extending it for the period from time to time by passing an order of three months may be extended at any one time. In the said context, as per order of the detaining authority dated 28.07.2012 and the order of approval communicated on 13.08.2012, Annexure R-7, it is clear that the approval is granted on 8.8.2012 and in both these orders, the period of detention has not been specified. The period of detention is only specified in the order of confirmation passed in exercise of the power as conferred under Section 12 (1) of the Act, therefore, also at initial stage, when the petitioner was taken into custody, he was unaware regarding the period of his detention, therefore, compliance of sub section (3) of Section 3 and its proviso has not been made by the detaining authority or by the State Government. As per reading of the proviso of sub section (3), it is made clear that initial period of detention shall be three months, which may be extended, but in case where the period of detention has not been specified in the order of detention, it would amount to non-compliance

of the said provision. It is further seen from the record that the order passed by the detaining authority or by the State Government has not been communicated to the Central Government. Either in the order of detention or approval or confirmation of the petitioner, the copy has not been sent to the Central Government. No document showing compliance of Section 3(5) of the Act has been filed. Though to show compliance it is the duty of the State Government to send the order of detention and the ground of detention to the Central Government within 7 days. In absence thereto, non-compliance of sub section (5) of Section 3 also appears on the face of record.

11. In this regard, guidance may be taken from a judgment of the Apex Court in the case of *Rekha Vs. State of Tamilnadu and another* (2011) 5 SCC 244 wherein it has been observed that the law of detention should be strictly construed and confined to narrow limits in rare and exceptional cases and meticulous compliance and procedural safeguards should be made mandatory. It has been held that personal liberty protected under Article 21 is sacrosanct and so high in scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law. The procedural safeguards are required to be zealously watched and enforced by the Court and their rigour cannot be allowed or diluted on the basis of the nature of the alleged activities of the detenue.

12. In view of the discussion made hereinabove the respondent has decided the representation by inordinate delay without taking action with promptitude. It is further clear that the compliance of the provisions of sub section (3) due to not specifying the period of detention and (5) of Section 3 of the Act has not been made, though it is mandatory, therefore, considering the cumulative effect of the aforesaid, in our considered opinion, the order of detention passed by the detaining authority dated 28.07.2012, the order of approval dated 08.08.2012 and its communication dated 13.08.2012 and the order of confirmation dated 21.09.2012 are hereby quashed.

13. As a result, the petition succeeds and is hereby allowed. It is directed that the petitioner be set at liberty, if not required in any other case. In the facts, parties to bear their own costs.

C.C.as per rules.

Petition allowed.

I.L.R. [2014] M.P., 1739
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 17884/2012 (Jabalpur) decided on 7 May, 2013

S.P. PATEL ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

(and W.P. Nos. 22089/2012, 18152/2012, 20409/2012, 20435/2012)

Jawaharlal Nehru Krishi Vishwavidyalaya Act, 1963 (12 of 1963), Section 27 **- Petitioner appointed as a daily wages labour who worked for a considerable time - He was then appointed on the time scale post with the salary in that scale - Order by Vishwavidyalaya that he is to retire on attaining the age of superannuation as he is completing 60 years of age - Posts were created by the University against which post the benefit was extended to the petitioner - Therefore, it cannot be said that the petitioner was not entitled to the similar age enhancement as was granted to class-IV employees - Petitioner held entitled to enhancement of age of superannuation as was made available to the work charged employees of the Government Departments. (Paras 5 to 10)**

जवाहरलाल नेहरु कृषि विश्वविद्यालय अधिनियम, 1963 (1963 का 12), धारा 27 – याची को दैनिक वेतन श्रमिक के रुप में नियुक्त किया गया, जिसने काफी समय तक कार्य किया – उसे तब समय वेतनमान के पद पर, उस वेतनमान में वेतन के साथ नियुक्त किया गया – विश्वविद्यालय का आदेश कि वह अधिवर्षिकी वय प्राप्त करने पर निवृत्त होगा क्योंकि वह 60 वर्ष की आयु पूर्ण कर रहा है – जिस पद का लाभ याची को दिया गया था, वह पद विश्वविद्यालय द्वारा सृजित किये गये थे – इसलिए, यह नहीं कहा जा सकता कि याची सामानांतर वय वृद्धि जो श्रेणी–IV कर्मचारियों को प्रदान की गयी थी, का हकदार नहीं – याची को अधिवार्षिकी वय वृद्धि का हकदार माना गया जैसा कि सरकारी विभागों के निर्धारित कर्म कर्मचारियों को उपलब्ध कराया गया था।

Ajay Pratap Singh, for the petitioner.
S.P. Rai, P.L. for the respondent No.1.
Praveen Dubey, for the respondents No. 2 & 3.

ORDER

K.K. Trivedi, J. :- This order will also govern disposal of W.P. No.22089/2012, W.P. No.18152/2012, W.P. No.20409/2012 & W.P.

No.20435/2012. However, for convenience, facts are taken from W.P. No.17884/2012.

2. The petitioner, who is an employee working in the time scale pay and post, has approached this Court ventilating his grievance against the order dated 26.09.2012 issued by the Jawahar Lal Nehru Krishi Vishwavidyalaya (herein after referred to as 'University'), by which he is communicated that he is to retire on attaining the age of superannuation on 31.10.2012, as he is completing 60 years of age. It is contended that the age of superannuation of Class-IV employees working in work charged contingency and otherwise, has been enhanced from 60 to 62 years by the State Government. The said enhanced age is made applicable even for the Gangmen of the Public Works Department, has been adopted by the Veterinary University and, therefore, the petitioner could not be retired at the age of 60 years. It is contended that all the benefits of a Class-IV employee were made available to the petitioner after granting him time scale pay of Class-IV post and, therefore, he has to be treated as a Class-IV employee of the University and is entitled to continue on the post up to the age of 62 years. It is contended that since such sanctioned posts were created by the University, the petitioner was granted the benefit of appointment on the said post, action of the respondents, retiring him at the age of 60 years is not justified.

3. The respondents by filing the return have contended that the petitioner was never appointed on any Class-IV post. It is their stand that Class-IV posts are specifically sanctioned in terms of the Statute. The petitioner has never been given any posting on such Class-IV post. He being merely a daily wager, is not entitled to any benefit of enhancement in age and as such the relief claimed by the petitioner cannot be granted in the present petition. The facts have been brought to the notice of the persons like petitioner that they cannot be treated at par with the Class-IV employees as when the age of superannuation of Class-IV employees was enhanced to 62 years, correspondence was done with the State Government asking guidance whether the said benefit of enhancement of the age up to 62 years was to be granted to the time scale pay labours or not. It was informed by the State Government that no amendment was made in the age of superannuation of the time scale pay labours and, therefore, the petitioner was not to be granted the said benefit. It is, thus, contended that entire petition is based on misconceived and misleading facts and deserves to be dismissed.

4. By filing a rejoinder as also an application for taking additional documents on record, the petitioner has pointed out that in fact vide order dated 13.03.1990 the posts were already created by the University against which post the benefit was extended to the petitioner and, therefore, it cannot be said that the petitioner was not entitled to the similar age enhancement as was granted to Class-IV employees. An additional submission is made by the respondents annexing with it relevant documents to show that no such post was ever created by the respondents. In fact such posts were not to be created by the respondents against the statutory provisions. It is contended that the definitions of posts have been given in the Regulations titled Jawahar Lal Nehru Krishi Vishwavidyalaya Services (General Conditions of Service) Regulations, 1969. The post of time scale labour is not classified as a post in the said Regulations and, therefore, the appointment of the petitioner cannot be said to be made on a Class-IV post entitling him to enhanced age of superannuation. It is, thus, contended that on this count also the petitioner is not entitled to any relief.

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

6. First of all it has to be seen whether there was any order issued on 13.03.1990 creating any post in time scale pay or not. The order is placed on record as Annexure P-8 which specifically says that in view of the letter of Government of Madhya Pradesh in Agriculture Department dated 5th March, 1990, for the purposes of regularization of the daily wages employees working in the University, 625 posts in time scale of Rs.725- 900 are created. This order is said to be issued in terms of the order of the Vice Chancellor of the University. This order nowhere indicates that the pay as sanctioned for the said post was to be drawn from the contingency funds. Nothing was indicated in this respect. If this was the order issued by the University, the same was issued for the purposes of giving benefit of Class-IV employees or not was again not clarified anywhere. The extract of the Regulations, which has been placed on record as Annexure R-5, nowhere indicates that particular post sanctioned in the time scale was not to be treated as a post sanctioned in the establishment of the University. In absence of any such provision, if no posts were to be created, the order dated 13.03.1990 was required to be recalled. Again there is nothing placed on record to show that such an order was ever recalled by the respondents. Though after 10 years of issuance of said order, some correspondence was started on 20th June, 2000 by the University but

again whether the Chancellor of the University had accepted such a proposal made by the University or not and whether such order was ever recalled or not, has not been stated by the respondents in their return.

7. As against the aforesaid, initially the petitioner was appointed as a daily wager labour and he worked for a considerable time. In the year 1990, i.e. after issuance of the order dated 13.03.1990, an order was issued on 12.04.1990 appointing the petitioner on the time scale post and giving direction to make payment of salary to the petitioner in that scale. The said order was again issued in terms of the order of the Vice Chancellor by the Registrar of the University. Even after making correspondence with the State Government as is indicated in the additional return of the respondents, an order was issued on 28.07.2000 extending the benefit of earned leave of 20 days in place of 15 days to the persons like petitioner. Therefore, the circular dated 20.01.2000 was to be made applicable in case of the petitioner. Similar is the situation available in respect of the employees serving in the Veterinary University, which was earlier a part of the respondent University. If the said University has accepted the circular of the State Government, there was no good reason available to the respondent University to deny such a benefit to the persons like petitioner.

8. After going through the entire Statute and the Regulations, nothing is found entitling the respondents to say that the petitioner would not be entitled to enhancement of age of superannuation as was made available to the work charged employees of the Government departments. The time scale posts were sanctioned only for the purposes of keeping the persons like petitioner in the employment. Other benefits were extended to them by the respondent University and, therefore, at this stage to say that enhancement in the age of superannuation as was made available to Class-IV employees, would not be applicable in the case of petitioner, that too without any justified reason, is not acceptable.

9. Consequently, the writ petition is allowed. The notice of superannuation of the petitioner so issued, is hereby quashed. The petitioner would be entitled to continue in the employment up to the age of 62 years with all the consequential benefits. The petitioner in this case was granted an interim stay, therefore, he will get all the benefits of service. Those, who were not granted benefit of interim stay by this Court, would be reinstated in service and would also be entitled to benefits of service for the period they were not working.

10. The writ petitions are allowed to the extent indicated herein above. However, there shall be no order as to costs.

Petition allowed.

I.L.R. [2014] M.P., 1743
WRIT PETITION
Before Mr. Justice N.K. Mody
W.P. No. 4479/2009 (Indore) decided on 24 June, 2013

NIRMALA SONWANE (Mrs.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Service Law - Recovery of House Rent Allowance **- Petitioner lives with her husband who is receiving the House Rent Allowance, therefore, House Rent Allowance received by the petitioner, was directed to refund it with effect from 09.04.1981 - Held - There was no misrepresentation on the part of the petitioner - House Rent Allowance is paid to the petitioner for years together on account of no fault on her part - After 28 years there was no justification on the part of the respondent to initiate recovery proceedings as no Govt. accommodation allotted to the petitioner.** **(Para 6)**

सेवा विधि – गृह भाड़ा भत्ता की वसूली – याची अपने पति के साथ रहती है, जो गृह भाड़ा भत्ता प्राप्त कर रहा है, इसलिए, याची द्वारा 09.04.1981 से प्रभावी रुप से प्राप्त किया गया गृह भाड़ा भत्ता, वापस करने के लिये निदेशित किया गया – अभिनिर्धारित – याची की ओर से कोई व्यपदेशन नहीं था – याची को इतने वर्षों तक गृह भाड़ा भत्ता उसकी ओर से कोई भूल नां होते हुए अदा किया गया है – प्रत्यर्थी की ओर से 28 वर्ष पश्चात वसूली की कार्यवाही आरंभ करने का कोई न्यायोचित्य नहीं था, क्योंकि याची को सरकारी निवास आवंटित नहीं था।

L.C. Patne, for the petitioner.
Vinita Phaye, G.A. for the respondents.

ORDER

N.K. Mody, J. :- The prayer in the petition is for quashment of order Annexure P/6 dated 01/06/09 and also order Annexure P/7 dated 29/06/09. Vide Annexure P/6 dated 01/06/09 petitioner was informed that since she lives with her husband who is receiving the House Rent Allowance, therefore, the House Rent Allowance received by the petitioner is recoverable.

Vide Annexure P/7 petitioner was directed to refund the House Rent Allowance with effect from 09/04/81.

2. Short facts of the case are that petitioner was appointed on the post of LDC. Vide order dated 06/04/81 she was promoted on the post of UDC in the year 2003 and was further promoted on the post of Assistant Grade-I. Husband of the petitioner was working as Driver-cum-Mechanic in the Bank Note Press, Dewas and retired with effect from 30/09/08 on completing the age of superannuation. Petetioner was granted House Rent Allowance as per Govt. Rules with effect from 09/04/81 i.e. from the date of initial appointment. Vide order dated 14/11/08 an explanation was called from the petitioner as to why the amount paid to the petitioner should not be recovered. Reply was submitted. Vide order dated 01/06/09, the order of recovery was passed, against which the present petition has been filed.

3. Learned counsel for the petitioner submits that the impugned order passed by the competent authority is illegal and deserves to be quashed. It is submitted that undisputedly husband of the petitioner was in job. It is submitted that as per Rule 8 of Swami's compilation, if the husband and wife both are in job of Central Govt. then both are entitled to draw House Rent Allowance, even if they work in the same station and live together but not provided with Govt. accommodation. It is submitted that no Govt. accommodation was allotted to the petitioner or her husband. It is submitted that since petitioner is in the job of State Govt. and husband of the petitioner was in the job of Central Govt., therefore, both of them are entitled for the House Rent Allowance. Learned counsel further submits that even if it is assumed that petitioner was not entitled for House Rent Allowance and it was paid to the petitioner right from inception of service till 2008 i.e. more than 28 years, the House Rent Allowance was paid to the petitioner and there was no misrepresentation on the part of the petitioner, therefore; there was no justification on the part of respondents to direct the petitioner for recovery of amount paid to the petitioner. It is submitted that petition be allowed and the impugned order be set aside.

4. Learned counsel for the respondents submits that it is true that House Rent Allowance was paid to the petitioner right from 1981 and no recovery was made from the petitioner because it was not in the knowledge of the respondents that the husband of the petitioner is in the service of Bank Note Press, Dewas and is drawing the House Rent Allowance from the Central

Govt. and also the petitioner is living with her husband in the same house. It is submitted that petitioner played fraud and was illegality drawing House Rent Allowance from the State Govt. without disclosing the fact that her husband is also drawing the House Rent Allowance from the Bank Note Press, Dewas. It is submitted that since the respondent was not aware and the petitioner illegally took the benefit of House Rent Allowance by playing fraud, therefore, the respondent is having right to recover the amount which is illegally been paid. Learned counsel placed reliance of clause 10 (3) of allowances other than pay which reads as under :-

(10) परिवार के एक से अधिक सदस्य होने की स्थिति में :–

(1) .....

(2) .....

(3) एक ही परिवार के सदस्य जो एक साथ एक ही मकान मे रहते है, उनमें से कोई एक शासकीय सेवक हो तथा दूसरा कोई शासकीय संस्था/संघ/निगम/मंडल/बैंक कर्मचारी हैं तो उनमें से किसी एक को ही भत्ते की पात्रता होगी।

5. It is submitted that petition has no merits and the same be dismissed.

6. Undisputedly, husband of the petitioner was in the job with the Central Govt. and was retired with effect from 30/09/2008. The House Rent Allowance was paid to the petitioner right from 1981. When the husband of the petitioner joined the services and what type of fraud played by the petitioner is not on record. No payment was made to the petitioner upon misrepresentation. Since the basic purpose to provide House Rent Allowance is to provide shelter to an employee and the husband of the petitioner was also in job of the Central Govt. and both of them are not in the job of Central Govt., therefore, both were not entitled for separate House Rent Allowance which is otherwise payable to the employees of Central Govt. as per rule quoted by the petitioner and mentioned hereinabove. However, since there was no misrepresentation on the part of the petitioner and if the House Rent Allowance is paid to the petitioner for years together on account of no fault on the part of petitioner, therefore, after 28 years there was no justification on the part of respondent to initiate recovery proceedings as no Govt. accommodation was allotted to the petitioner.

7. In the facts and circumstances of the case, petition filed by the petitioner

is allowed and the impugned order whereby recovery has been initiated stands quashed. Since the husband of the petitioner has already retired with effect from 30/09/08, therefore, the petitioner shall be at liberty to claim House Rent Allowance which will be considered by the competent authority in accordance with rules within 8 weeks from the date of submission of representation.

8. With the aforesaid, petition stands disposed of.

Petition disposed of.

I.L.R. [2014] M.P., 1746
WRIT PETITION
Before Mr. Justice N.K. Mody
W.P. No. 2235/2013 (Indore) decided on 1 July, 2013

DINESH PANDEY ...Petitioner
Vs.
SHRI BHARAT MATHURAWALA & ors. ...Respondents

***Municipal Corporation Act, M.P. (23 of 1956), Section 441(4)(a)* - Validity of election of petitioner as Corporater was challenged by respondent - After recording evidence of respondent No. 1 petitioner filed an application u/s 441(4)(a) of the Act praying that respondent No.1 be directed to implead all the candidates as party which was dismissed hence present petition has been filed - Held - All the returned candidates are required to be impleaded in case the validity of election of all the returned candidates is challenged - In the present case the validity of election of petitioner is under challenge - Therefore, all the elected Corporaters are neither necessary nor proper party - Same is required if the validity of a particular election is challenged. (Paras 6 & 8)**

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 441(4)(ए) – पार्षद के रुप में याची के निर्वाचन की वैधता को प्रत्यर्थी द्वारा चुनौती – प्रत्यर्थी क्र. 1 का साक्ष्य अभिलिखित किये जाने के पश्चात, याची ने अधिनियम की धारा 441(4)(ए) के अंतर्गत आवेदन इस निवेदन के साथ प्रस्तुत किया कि सभी प्रत्याशियों को पक्षकार के रुप में आलिप्त करने के लिये प्रत्यर्थी क्र. 1 को निदेशित किया जाये, जिसे खारिज किया गया, अतः वर्तमान याचिका प्रस्तुत की गयी है – अभिनिर्धारित – सभी निर्वाचित प्रत्याशियों के निर्वाचन की वैधता को चुनौती के प्रकरण में सभी निर्वाचित प्रत्याशियों को आलिप्त किया जाना अपेक्षित है – वर्तमान प्रकरण में याची के निर्वाचन की वैधता को चुनौती दी गयी है – इसलिए, सभी निर्वाचित पार्षद, न तो

आवश्यक और न ही उचित पक्षकार हैं – उक्त की अपेक्षा तब होती यदि किसी विशिष्ट निर्वाचन की वैधता को चुनौती दी जाती।

Case referred :

(2007) 1 SCC 770.

A.K. Sethi with *Rahul Sethi,* for the petitioner.
Piyush Mathur with *Madhusudan Dwivedi*, for the respondent No. 1.
Sudarshan Joshi, G.A. for the respondents No. 2 & 3.

ORDER

N.K. Mody, J. :- This is a petition for quashment of the order dated 10/01/2013 passed by IX ADJ, Indore in Election Petition No.04/2010 whereby the application filed by the petitioner under Section 441 (4) (a) of the Municipal Corporation Act, 1956 (which shall be referred herein after as "Act") was dismissed, present petition has been filed.

2. Short facts of the case are that notification was issued by the State Government for the Election of Corporater, Mayor etc. of the Municipal Corporation, Indore. In compliance of that nominations were required to be filled-in. Last date for filing the nomination was 26/11/2009. Petitioner and respondent No.1 also submitted their nomination for contesting the election of Corporater from Ward No.15. Objections were submitted by the respondent No.1 on 27/11/2009 which were rejected vide order dated 01/11/2009. Thereafter, election took place and 'petitioner was declared as elected (Corporater) on 15/12/2009. Notification was issued in this regard on 29/12/2009. Thereafter Election Petition was filed by the respondent No. 1 on 20/01/2010 wherein validity of the election of petitioner as Corporater was challenged. The Election Petition was contested by the petitioner. After framing of issues and also after recording of evidence of respondent No.1 petitioner filed an application under Section 441 (4) (a) of the Act wherein it was prayed that respondent No.1 be directed to implead all the candidates as party to the petition. The application was opposed by the respondent No.1. After hearing the parties learned Court below dismissed the application against which the present petition has been filed.

3. Mr. AK. Sethi, learned senior counsel appearing on behalf of petitioner submits that the impugned order passed by the learned Court below is illegal, incorrect and deserves to be set-aside. It is submitted that since the prayer is

in the petition that election of petitioner as Corporater be set-aside and respondent No.1 be declared as Corporater, therefore, all the contesting candidates were necessary party and required to be impleaded as party. Learned counsel draws the attention of this Court on Section 441 (4) (a) of the Act which reads as under :-

> ***441. Election Petitions.....***
>
> *(4) A petitioner shall join as respondents to his petition-*
>
> *(a) where the petitioner, in addition to claiming a declaration that the election or [nomination], as the case may be, of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected or [nominated], all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates.*

4. Learned counsel submits that the impugned order is not in proper prospective. It is submitted that learned Court below in its order has obsedrved that respondent No.1 has not prayed that respondent No.1 be declared as Corporater which is against the record. It is submitted that even if it is assumed that respondent No.1 has not prayed that he be declared as Corporater, then too, without impleading all the returning candidates the election petition itself is not maintainable and deserves to be dismissed. It is submitted that the petition be allowed and impugned order passed by the learned Court below be set aside.

5. Mr.Piyush Mathur, learned senior advocate appearing on behalf of respondent No.1 submits that the application was filed by the petitioner at the stage of evidence of the petitioner. It is submitted that no illegality has been committed by the learned Court below in dismissing the application. It is submitted that the election petition filed by the respondent No.1 can only be dismissed if there is non-compliance of sub-section 3 of Section 441 of the Act. It is submitted that the petition filed by the petitioner has no merits and the same be dismissed.

6. From perusal of the record and also after hearing counsel for the parties at length this Court finds that learned Court below was not justified in holding that the respondent No.1 has not prayed that he be declared as elected Corporater. In fact the prayer in the election petition filed by respondent No.1 before the learned Court below is to the effect that the election of the petitioner

as corporater be declared void and respondent No.1 be declared as elected corporater. However, inspite of that the petition has no merits and deserves to be dismissed on the following grounds:-

i. The ground which has been raised by the petitioner that since all the returned candidates have not been impleaded by the respondent No.1 in the election petition, therefore, the petition deserves to be dismissed, was not raised by the petitioner in the application filed before the learned Court below. Thus the prayer made before this Court is without foundation.

ii. As per Sub-section 3 of Section 441 of the Act the election petition presented under Sub-Section 2 of Section 441 of the Act shall not be admitted unless it is presented within 30 days from the date on which the result of such election was notified in the Gazette and it is accompanied by a Government Treasury receipt showing a deposit of two hundred and fifty rupees. Since it is not the grievance of the petitioner that there is non-compliance of sub-section 3 of Section 441 of the Act, therefore, election petition filed by respondent No.1 cannot be dismissed.

iii. Once the election petition is admitted, then the same can be disposed of by the Court as per Section 441 -D of the Act, which lays down that at the conclusion of the trial of an election petition, the Court shall either dismiss the election petition or declare the election of all or any of the returned candidates to be void and the petitioner and any other candidate to have been duly elected.

iv. Since respondent No.1 has not impleaded all the contesting candidates as party to the petition, therefore, respondent No.1 may not be entitled for a declaration that respondent No.1 has been duly elected corporater, but that aspect of the case cannot be examined at this stage and also petition cannot be dismissed at this stage on that ground.

v. The language of Sub-clause (a) of Sub-section 4 of Section 441 of the Act is borrowed from Section 82 of Representation of the People Act, 1951, according to which all the returned candidates has to be impleaded as party. It is true that in Clause (a) of Sub-section 4 of Section 441 of the Act it is laid down that in case where the petitioner in addition to claiming a declaration that the election of returned candidates is void, claims a further declaration that he be declared

duly elected, all the contesting candidates are required to be impleaded. As per Sub-clause (a) of Sub-section 4 of Section 441 of the Act all the returned candidates are to be impleaded in case where the respondent No.1 is praying for no further declaration. From bare reading of this provision it is evident that all the returned candidates are required to be impleaded in case the validity of election of all the returned candidates is challenged. Since in the present case the validity of election of petitioner as corporater is under challenge, therefore, all the elected corporaters are neither necessary party nor the proper Party.

7. Section 82 of Representation of the People Act, 1951 reads as under:-

***82. Parties to the petition** - A petitioner shall join as respondents to his petition-*

(a) where the petitioner, in addition to claimimg declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates otherthan the petitioner, and where no such further declaration is claimed, all the returned candidates; and

(b) any other candidate against whom allegation of any corrupt practice are made in the petition.

8. From bare perusal of Section 82 of the Representation of the People Act, 1951 it is evident that it deals with the situation where the returned candidates are more than one and in that situation if the validity of a particular election is challenged, then all the returned candidates are required to be impleaded because it may affect their election. This position has been taken into consideration by the Hon'ble Apex Court in the matter of *Youaraj Rai Vs. Chander Bahadur Karki* (2007) I SCC 770.

9. In view of this; petition filed by the petitioner has no merits and the same stands dismissed.

Petition dismissed.

I.L.R. [2014] M.P., 1751
WRIT PETITION
Before Mr. Justice N.K. Mody
W.P. No. 585/2011 (Indore) decided on 11 July, 2013

ASHOK RANGSHAHI ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Civil Services - Promotion **- Petitioner was appointed on the post of Sub-Inspector in general category - Later on, petitioner came to know that "Chhattri" caste is in Scheduled Tribe - Since the petitioner is under the category of Schedule Tribe, the benefit for which a candidate of Schedule Tribe is entitled, be given to the petitioner at the time of promotion - Held - Respondents were directed that if found that the petitioner is entitled for the benefit on the basis of a candidate of Schedule Tribe, then the same be given to the petitioner as well. (Para 2)**

सिविल सेवा – पदोन्नति – याची को उप–निरीक्षक के पद पर सामान्य श्रेणी में नियुक्त किया गया – बाद में, याची को पता चला कि "छत्तरी" जाति, अनुसूचित जनजाति में आती है – चूंकि याची अनुसूचित जनजाति की श्रेणी के अंतर्गत आता है, याची को पदोन्नति के समय लाभ दिया जाना चाहिए जिसके लिये अनुसूचित जनजाति का अभ्यर्थी हकदार है – अभिनिर्धारित – प्रत्यर्थीगण को निदेशित किया गया कि यदि यह पाया जाता है कि याची अनुसूचित जनजाति का अभ्यर्थी होने के आधार पर लाभ का हकदार है, तब उक्त लाभ याची को भी दिया जाये।

Case referred :

2010 (5) SCALE 193.

Ajay Mishra, for the petitioner.
Vinita Phaye, G.A. for the respondents/State.

O R D E R

N.K. Mody, J. :- The prayer in the petition is to direct the respondents to grant the benefit to the petitioner as petitioner is 'Chhattri' by caste which is under the category of Schedule Tribe right from 1977.

2. Learned counsel for the petitioner submits that the petitioner applied for the post of Sub Inspector in General category in January, 1997. It is

submitted that the petitioner was appointed vide appointment order dated 01/04/78 on the post of Sub Inspector in General category. Lateron, petitioner came to know that 'Chhattri' caste is in Scheduled Tribe. Learned counsel submits that since the petitioner is under the category of Schedule Tribe, therefore, the benefit for which a candidate of Schedule Tribe is entitled, be given to the petitioner at the time of promotion. Learned counsel placed reliance on a decision in the matter of *Union of India Vs. Ramesh Ram & Ors,* 2010 (5) SCALE 193 wherein Hon'ble Apex Court has observed that a candidate belonging to reserved category, who get recommended against general/ unreserved vacancies on account of his merit (without benefit of any relaxation/ concession) can opt for a higher choice of service earmarked for Reserved Category and thereby migrate to reservation category. It is submitted that the petition filed by the petitioner be allowed and necessary direction be issued.

3. Learned counsel for respondents submits that at the time when the petitioner applied, the 'Chhattri' caste was not included in the Schedule Tribe. It is true that notification came into force on 01/07/77 which the petitioner was appointed on 01/4/78 at that time also case of the petitioner was not considered as petitioner was in the Schedule Tribe, but he was considered in General Category. It is submitted that in the facts and circumstances of the case, at this juncture the case of the petitioner cannot be considered for promotion as candidate from the Schedule Tribe. It is submitted that the petition has no force and the same be dismissed.

4. Undisputedly petitioner was appointed as Sub-Inspector in General Category. At that time the category which the petitioner belongs was not taken as Schedule Tribe. At present petitioner is posted as Assistant Superintendent of Police, Hosangabad. In the petition rejoinders were submitted from time to time wherein it is alleged that Yogendra Rangsai who happens to be cousin brother of petitioner is kept in the promotion list at serial No.97 of Annx.P/7 on the basis of candidate of Schedule Tribe. It is further submitted that Smt. Yogita Somavad who is the cousin sister of petitioner being daughter of maternal uncle has been directed to give the benefit of schedule tribe category vide order dated 26/06/12 passed in WP. No.14147/11.

5. Keeping in view the aforesaid position of law and the view taken by this Court in WP. No.14147/11 and the fact that number of representations filed by the petitioner are pending before the respondents, the petition filed by the petitioner is disposed of with a short direction that upon production of

copy of the order passed by this Court today and copy of order dated 26/06/12 passed in WP. No.14147/11 and also copy of order passed by the Hon'ble Apex Court the competent Authority shall decide the representation filed by petitioner by passing a reasoned order in accordance with law after giving an opportunity of hearing to the petitioner. Needful be done within a period of three months from the date of receipt of copy of orders and if found that the petitioner is entitled for the benefit on the basis of a candidate of schedule tribe, then the same be given to the petitioner as well.

6. With the aforesaid direction, petition stands disposed of.

Petition disposed of.

I.L.R. [2014] M.P., 1753
WRIT PETITION
Before Mr. Justice Shantanu Kemkar &
Mr. Justice Mool Chand Garg
W.P. No. 5193/2009 (Indore) decided on 23 July, 2013

OM PRAKASH VERMA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

(W.P. Nos. 5816/2009, 5837/2009, 11977/2012, 12001/2012)

***Prevention of Corruption Act (49 of 1988), Section 19, Criminal Procedure Code, 1973 (2 of 1974), Section 197 - Sanction* - Law & Legislative Affairs Department is empowered under the Rules, to grant sanction and refusal to grant sanction by the parent department is of no consequence - Opinion of the parent department is not binding on the Law Department, while considering the case for grant of sanction - Order of sanction is self contained speaking order - No infirmity or any jurisdictional error in the sanction order - Petitions dismissed. (Paras 5, 6 & 9)**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 19, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 197 – मंजूरी – नियमों के अंतर्गत विधि और विधायी कार्य विभाग मंजूरी प्रदान करने के लिए सशक्त है और मूल विभाग द्वारा मंजूरी प्रदान करने से मना करने का कोई परिणाम नहीं – मंजूरी प्रदान करने के लिए मामले का विचार करते समय विधि विभाग पर मूल विभाग का अभिमत बंधनकारक नहीं – मंजूरी का आदेश स्वतः पूर्ण सकारण आदेश है – मंजूरी आदेश में कोई

कमी या किसी अधिकारिता की त्रुटि नहीं – याचिकायें खारिज।

Amit Agrawal, for the petitioner.

Manoj Dwivedi, Addl. A.G. with *C.S. Ujjainiya,* P.L. for the respondent/State.

Arvind Gokhale, for the respondent/Lokayukta.

ORDER

SHANTANU KEMKAR, J. :- This order shall govern disposal of Writ Petitions No.5193, 5816 and 5837 of 2009, Writ Petitions No.11977 and 12001 of 2012, as the question of law involved in the aforesaid five petitions is identical.

2. The petitioners of WPs No.5193, 5816 and 5837 of 2009 are aggrieved by the order passed by the Secretary, Law & Legislative Affairs Department, Government of Madhya Pradesh, Bhopal granting sanction for prosecution against them under Section 19 (1) (b) (c) of the Prevention of Corruption Act, 1988 and under Section 197 of the Code of Criminal Procedure for prosecuting them under Sections 13 (1) (d) and 13 (2) of the Prevention of Corruption Act, 1988 and under Sections 120-B, 420, 465, 467, 468 and 471 of the Indian Penal Code and also under Sections 14, 15, 20 and 21 of the Madhya Pradesh Vinirdishta Bhrashta Acharan Nivaran Adhiniyam, 1982. The petitioners of WP No.11977/2012 and WP No.12001/2012 are aggrieved by the order passed by the Secretary, Law & Legislative Affairs Department, Government of Madhya Pradesh, Bhopal granting sanction for prosecution against them under Section 19 (1) (b) (c) of the Prevention of Corruption Act, 1988 and under Section 197 of the Code of Criminal Procedure for prosecuting them under Sections 13 (1) (d) and 13 (2) of the Prevention of Corruption Act, 1988 and under Sections 120-B, 420, 467, 468 and 471 of the Indian Penal Code.

3. The questions, which have been raised by the petitioners in these petitions are that (i) when their parent department has refused to grant sanction, the Law & Legislative Affairs Department could not have accorded sanction for prosecution; (ii) while granting the sanction, the Law & Legislative Affairs Department has not paid any heed to the grounds on which the parent department of the petitioners had refused the sanction; and (iii) there was no material available with the Law & Legislative Affairs Department so as to implicate the petitioners for the offence for which the sanction was sought. In the circumstances, according to them, the impugned order granting sanction is vitiated. To buttress their contention, learned

counsel appearing for the petitioners had taken us through the orders passed by their parent department refusing to grant sanction, the nature of allegations levelled against the petitioners and the nature of duties and the responsibilities of the petitioners for discharging their official work.

4. Having heard learned counsel for the parties and going through the impugned orders and the annexures, we find that the Law & Legislative Affairs Department while granting the impugned sanction for prosecution, exercised its powers under the Madhya Pradesh Government Business Allocation Rules, as would be clear from paragraph 2 of the order dated 16.07.2009 filed as Annexure P/7 in Writ Petition No.5193/2009: -

> "2. आरोपीगण के विरूद्ध अभियोजन की स्वीकृति प्रदान करने मे मध्यप्रदेश शासन सक्षम है एवं भारत के संविधान के अनुच्छेद 166 के खण्ड (2) तथा (3) द्वारा प्रदत्त शक्तियों का प्रयोग करते हुए, राज्यपाल द्वारा बनाये गये म.प्र. शासन कार्य नियमों के नियम.13 के अधीन अनुपूरक भाग पांच के अनुदेश क्रमांक.–2 (क) के प्रावधानों एवं म.प्र. शासन कार्य आबंटन नियम की अनुसूची–21 के भाग–अ. में, अनुक्रमांक–4 के खण्ड (1) व (2) के अनुसार प्रमुख सचिव /सचिव / अतिरिक्त सचिव, (विधि) शासकीय सेवकों के अभियोजन की स्वीकृति से संबंधित मामलो का निपटारा करने के लिए राज्य शासन की अधिकारिता के प्रयोग में सक्षम हैं ।"

Part-A Sub Clause 4 of the MP Government Business Allocation Rules as amended till 01.01.2009, is as under: -

> भाग अ –विधि परामर्श शाखा
>
> 4. (एक) दण्ड प्रकिया , जिसमें भारतीय दण्ड संहिता, 1860 (1860 का सं. 45)की धारा 153–क, 153 ख तथा 295–क के अधीन अभियोजन के लिए धारा 196 के अधीन पूर्व मजंूरी तथा अपराधियों की परिवीक्षा को छोडकर दण्ड प्रक्रिया संहिता, 1973 के अन्तर्गत आनें वाले समस्त विषय सम्मिलित हैं, और
>
> (दो) भ्रष्टाचार निवारण अधिनियम, 1988, की धारा 19 के अधीन अभियोजन की मंजूरी.
>
> (तीन) पासपोर्ट, अधिनियम, 1967 (1967 का सं. 15) की धारा 15 की धारा 15 के अधीन अभियोजन की मंजूरी.
>
> (चार) विधि–विरूद्ध कियाकलाप (निवारण) अधिनियम अधिनियम, 1967 (1967 का सं. 37) की धारा 17 के अधीन अभियोजन की मंजूरी.

5. Thus, when the Law & Legislative Affairs Department is empowered under the Rules, as aforesaid, to grant sanction, the refusal to grant sanction by the parent department is of no consequence. The Competent Authority for

granting sanction being the Law & Legislative Affairs Department, the opinion of the parent department is not binding on the Law Department while considering the case for grant of sanction. Our this view finds support from the order passed by a Division Bench of this Court at Jabalpur on 18.03.2013 in Criminal Revision No.1856/2012.

6. We find that the order of sanction is self-contained speaking order, which has been passed after due application of mind on the basis of material collected and brought before the Sanctioning Authority. There is no infirmity or any jurisdictional error in the impugned sanction order.

7. Needless to say that this Court cannot sit over the said findings recorded by the Sanctioning Authority as an appellate Court, and therefore, we refrain from going into the minute details of the allegations and from commenting upon the merits of the allegations levelled against the petitioners. If the petitioners feel that they have good case on merits, it is open for the petitioners to raise all contentions as may be available to them before the appropriate forum at appropriate stage.

8. In the circumstances, no case for interference in the impugned order of sanction for prosecution is made out.

9. The petitions fail and are hereby dismissed.

No orders as to costs.

Petition dismissed.

I.L.R. [2014] M.P., 1756
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 7151/2011 (Jabalpur) decided on 24 July, 2013

ADITYA MISHRA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Civil Services (Pension) Rules, M.P. 1976, Rule 9(6) - Interest on retiral dues - Entitlement* - Delay in making payment of retiral dues - Lodging of complaint against the petitioner in the office of the Lokayukt - Case against petitioner was closed - Mere recording of a complaint against the petitioner and starting an investigation by the Economic Offences Bureau or Lokayukta was not constitution of a**

criminal proceedings against the petitioner in terms of the definition of judicial proceedings indicated in Rule 9(6) of the Rules aforesaid - There was unauthorized delay in making the payment of retiral dues to the petitioner - Petitioner entitled to interest @ 8% on amount of retiral dues. (Paras 5 & 6)

सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 9(6) – सेवानिवृत्ति अवशेषों पर ब्याज – हकदारी – सेवा निवृत्ति अवशेषों के भुगतान में विलम्ब – लोकायुक्त कार्यालय में याची के विरुद्ध शिकायत दर्ज – याची के विरुद्ध प्रकरण बंद किया गया – याची के विरुद्ध मात्र शिकायत को अभिलिखित किया जाना और आर्थिक अपराध ब्यूरो या लोकायुक्त द्वारा अन्वेषण आरंभ किया जाना, उपरोक्त नियम के नियम 9(6) में अंकित न्यायिक कार्यवाही की परिभाषा के अंतर्गत, याची के विरुद्ध दाण्डिक कार्यवाही का गठन नहीं था – याची के सेवा निवृत्ति अवशेषों के भुगतान में अनाधिकृत विलम्ब था – याची सेवा निवृत्ति अवशेषों की रकम पर 8 प्रतिशत की दर से ब्याज का हकदार।

Anshuman Singh, for the petitioner.
Mahendra Pateriya, for the respondents.

ORDER

K.K. Trivedi, J. :- The petitioner has claimed interest on his retiral dues, which according to the petitioner, were illegally withheld by the respondents on false pretext that the petitioner was facing an investigation for economic offence and, therefore, was not liable to be paid the retiral dues, though the petitioner had attained the age of superannuation and has retired on 31.01.2010. It is contended by the petitioner that while working on the post of Superintending Engineer in the establishment of respondents No.1 and 2, he stood superannuated on 31.01.2010. All pensionary claims, retiral dues of the petitioner were required to be settled by the respondents expeditiously under the provisions of Madhya Pradesh Civil Services (Pension) Rules, 1976 (herein after referred to as 'Rules'). However, such retiral dues of the petitioner were illegally withheld without any justified reason. In fact the respondent No.3 was harbouring personal animosity against the petitioner and he being the nodal officer to process the retiral claim of the petitioner, made every efforts to ensure that the petitioner is denied his retiral dues. There was nothing against the petitioner as a no dues certificate was issued in his favour on 02.02.2010 and, thus, under the requirement of the Rules, the claim of the petitioner was to be settled expeditiously. However, since the petitioner was on deputation working in the Madhya Pradesh State Agriculture

Marketing Board, certain complaints were made against the petitioner for financial irregularity. On such complaint, some sort of enquiry was conducted by the investigating agency and ultimately the petitioner was exonerated as nothing was found in his respect. However, only on the basis of such pending investigation, the right of the petitioner to receive the pension and retiral dues was not to be withheld. Ultimately all the claims of the petitioner amoutning to Rs.15,28016/- were paid by cheque dated 3rd March, 2011. This being so, the petitioner would be entitled to interest on the amount illegally withheld.

2. Upon issuance of the notices of the writ petition, the respondents have filed a return. Though the respondent No.3 is made a party by name but he has not filed his independent return denying any allegation made against him. On the other hand, the Counsel for the respondents No.1 and 2 has represented him also before this Court. In the return it is contended that a complaint Investigation Case No.119/2008 was registered against the petitioner in the Lokayukt. Some sort of investigation was going on. It was the reason on account of which the payment of retiral dues of the petitioner was not released. Ultimately when a report was submitted and the case against the petitioner was closed, which fact was intimated by the Lokayukt establishment to the respondents on 11.02.2011, expeditiously all the claims of the petitioner were worked out and paid to him. This being so, it is contended that there is no willful delay caused in making payment of the retiral dues and as such the petitioner would not be entitled to grant of any interest on the alleged delayed payment of retiral dues. The petition is said to be misconceived and sought to be dismissed. The respondents have further placed their reliance on the Rules and have contended that since there is no provision for making payment of interest on the retiral dues, such a claim is misconceived.

3. After hearing learned Counsel for the parties at length and after perusing the provisions of the Rules, it is clear that there was no justified reason for withholding the payment of retiral dues of the petitioner. In fact under the scheme of the Rules which has been adopted in toto by the respondents, the preparation of the pension case has to be started by the Head of Office well in advance. In Chapter- VIII of the Rules, specific provisions are made for application and sanction of pension. Rule 49 prescribes that a list of officers and employees is to be prepared well in advance, who are to retire within a period of six months. This list is to be prepared on every 1st January and every 1st July of each year. The purpose of preparing the list is to not only inform the officer or employee who is going to retire but also to

start the procedure for preparing the pension papers. Rule 57 of the Rules specifically prescribes that every Head of Office shall undertake the work of preparing pension papers two years before the date on which the Government servant is due to retire on superannuation or on the date on which he proceeds on leave preparatory to retirement, whichever is earlier. This is all to be done in advance why because an employee or officer, who receive the salary every month, would have no means of livelihood after the date of retirement and such an officer or employee is not to put to the financial hardship on account of retirement. Otherwise the very purpose of grant of pension is frustrated. Rule 59 of the Rules further prescribes that before 13 months from the date of retirement, the Head of Office shall take up the actual work of preparation of pension and get it completed within the time the officer or employee is to retire.

4. There is another specific provision made under Rule 64 of the Rules where the provisional pension is to be granted in case a retiring employee or officer is facing any departmental or judicial proceeding. It is categorically provided in the aforesaid Rule that in respect of Government servants referred to in sub-rule (4) of Rule 9 of the Rules, the Head of Office shall authorize the payment of provisional pension not exceeding the maximum pension and 50% of gratuity taking into consideration the gravity of charges levelled against such Government servant or officer, who is to retire. For the purposes of the departmental enquiry or judicial proceedings, though nothing is said in the definition contained in Rule 3 of the Rules but the same is prescribed in Rule 9 of the Rules. It is categorically provided in Rule 9(6) of the Rules that the departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from an earlier date on such date and the judicial proceedings shall be deemed to be instituted in case of a criminal proceedings, on the date on which the complaint or report of a police officer, of which the Magistrate takes cognizance, is made and in the case of civil proceedings, on the date the plaint is presented in the Court.

5. Thus, it is to be seen that the departmental proceedings shall be deemed to be instituted on the date the charge-sheet is issued to the employee concerned, whether before his retirement or after the retirement. Similarly, the judicial proceedings shall be deemed to be instituted in the case of criminal proceedings on the date when the challan is filed in the Court in the shape of

a final report of the police officer. In none of the other cases, pension can be withheld or stopped. Under the aforesaid Rule, there is no provision made for withholding of the pension or delaying the payment of pension to a retired officer. In view of this, justification shown by the respondents in their return for not releasing the pension and retiral dues to the petitioner on the date when he retired or soon thereafter or even granting him the provisional pension and gratuity, that a complaint was being enquired into against him, cannot be accepted. Since mere recording of a complaint against the petitioner and starting an investigation by the Economic Offences Bureau or Lokayukt was not constitution of a criminal proceeding against the petitioner in terms of the definition of judicial proceedings indicated in Rule 9(6) of the Rules aforesaid, no right was available to the respondents to delay the payment of retiral dues of the petitioner. Apparently this was done only because of lodging of complaint against the petitioner in the office of the Lokayukt where a complaint case was registered against him. As soon as the same was closed, information was given to the respondents, the payment of retiral dues of the petitioner was made.

6. That being so, the stand taken by the respondents cannot be accepted and it has to be held that there was unauthorized delay in making the payment of retiral dues to the petitioner. Now the question would be, to what extent the petitioner would be entitled for grant of interest. Though in the writ petition interest has been claimed at the rate of 12% per annum for all the delay caused in making the payment of retiral dues but looking to the facts and circumstances and the delay caused in making the payment, it is directed that the petitioner would be entitled to 8% interest on the amount of retiral dues paid to him belatedly from the date the same was due, i.e. w.e.f. 01.02.2010 till the date the payment was made to him, as claimed by the petitioner. The amount and the due dates have been mentioned by the petitioner in paragraph 5.14 of the petition, which he would inform to the respondents by making an application in this respect along with copy of this order. Let the aforesaid interest be calculated and be paid to the petitioner within a month from the date of receipt of such application.

7. The writ petition is allowed to the extent indicated herein above. There shall be no order as to costs.

Petition allowed.

I.L.R. [2014] M.P., 1761
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 15/2011 (Jabalpur) decided on 24 July, 2013

DHANRAJ SINGH PUSAM ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Service Law - Writ of Quo Warranto - **The Writ of Quo Warranto can be issued only if it is found that a person has been appointed on a public post dehors the Rule or in violation of statutory provisions of law - Since nothing is spelt out as to how the appointment of respondent No. 5 is dehors the Rules or against the statutory provisions - No case is made out to invoke power by this court to grant a writ of quo warranto. (Para 9)**

क. सेवा विधि – अधिकार .पृच्छा की रिट – अधिकार.पृच्छा की रिट केवल तब जारी की जा सकती है जब यह पाया जाये कि लोक पद पर व्यक्ति की नियुक्ति, नियम से असंबद्ध है या विधि के कानूनी उपबंधों के उल्लंघन में है – चूंकि कुछ भी प्रकट नहीं किया गया कि कैसे प्रत्यर्थी क्र. 5 की नियुक्ति नियम से असंबद्ध है या कानूनी उपबंधों के विपरीत है – अधिकार.पृच्छा की रिट प्रदान करने के लिये इस न्यायालय की शक्ति का अवलम्ब लेने के लिये प्रकरण नहीं बनता।

B. Service Law - Caste Certificate - **No employer can take an action of removal of an employee only on the allegation that the same is invalid - Such action can only be taken after getting the Caste or Tribe verified from the High Power Screening Committee. (Para 11)**

ख. सेवा विधि – जाति प्रमाण पत्र – केवल इसके अवैध होने के अभिकथन पर, कोई नियोक्ता किसी कर्मचारी को हटाये जाने की कार्यवाही नहीं कर सकता – उक्त कार्यवाही, केवल जाति या जनजाति को उच्च स्तरीय छानबीन समिति से सत्यापित कराये जाने के पश्चात ही की जा सकती है।

C. Constitution -Article 342 - Majhi - **In view of the provision of Article 342 of the Constitution of India 'Majhi' is now declared to be Scheduled Tribe within the whole of the State. (Para 12)**

ग. संविधान – अनुच्छेद 342 – माझी – भारत के संविधान के अनुच्छेद 342 को दृष्टिगत रखते हुये, "माझी" को अब संपूर्ण राज्य के भीतर अनुसूचित जनजाति घोषित किया गया है।

Cases referred :

(2010) 9 SCC 655, 1991 MPLJ 264, AIR 1994 SC 94, 2002 (3) MPLJ 417, 2012 (1) MPHT 37, 2013 (1) MPLJ 428.

Ajay S. Raizada, for the petitioner.
Puneet Shroti, P.L. for the respondents No. 1, 3, 4 & 6.
Kishore Shrivastava with *Sanjay Ram Tamrakar*, for the respondent No.5.

ORDER

K.K. TRIVEDI, J. :- This petition under Article 226 of the Constitution of India is said to have been filed for grant of a writ of quo warranto directing removal of respondent No.5 from the post on various allegations. It is contended by the petitioner that he is a social worker and a member of Gondwana Gantantra Party and an office bearer of the said party being Media Incharge. The respondent No.5 was born at Gwalior, has obtained his education without claiming any benefit of reservation, took part in the selection for appointment on the post of Assistant Engineer, was appointed as such in General category, but by manipulating the record on the strength of some sort of caste certificate, got the benefit of reservation and accelerated promotion in the service as a result, he got himself appointed by promotion on the post of Chief Engineer in the Water Resources Department. This being so, various complaints were made, but none of the complaints were looked into. Ultimately, a Public Interest Litigation was brought before this Court, but the Division Bench of this Court permitted the petitioner to withdraw the said writ petition with liberty to resort to the remedy available under the law. Since the complaints are not being looked into by the authorities despite approach, this writ petition was required to be filed. On the basis of these allegations, the petitioner has claimed the following reliefs :-

> "7-A. To call for the entire record including the service book from the respondents.
>
> B. To direct enquiry by C.B.I. into the misdeeds of Shri Batham.
>
> C. To direct the Respondents to take action against Shri Batham by initiating criminal prosecution and also to proceed departmentally against Shri Batham.
>
> D. To restrain the Respondent Shri Batham from

functioning as Chief Engineer.

E. To quash the order dated 21.5.2009.

F. To pass any other writ/writs, order/orders, direction/ directions, which the Hon'ble Court feels just and proper in the facts and circumstances of the case.

G To award cost of the petition."

2. Highlighting the allegations made in the petition, it is contended that the well settled law is that 'Majhi' is a Scheduled Tribe in certain districts like Datia, Tikamgarh, Chhindwara, Panna, Satna, Rewa, Sidhi and Shahdol, but admittedly the petitioner, who belongs to Gwalior could not be treated as Scheduled Tribe and was not to be given the benefit of reservation. These facts the petitioner has brought to the notice of this Court while filing the rejoinder to the return filed in the earlier Public Interest Litigation and the Notification issued by the President in this respect, was produced. The Division Bench decisions have been placed on record to show that the respondent No.5 could not be treated as a Scheduled Tribe person and, therefore, correction in the gradation seniority list with respect to the description of the caste of the respondent No.5 is sought to be challenged. It is contended that all this was done by the respondents playing hand in gloves with the respondent No.5 to favour him and, as such, the respondent No.5 was liable to be removed from the post. It is further contended that the general instructions were issued in respect of those employees whose caste certificates were under investigation, therefore, the case of respondent No.5 was to be deferred from consideration for promotion. However, instead of following the said instructions so issued by the respondents, since accelerated promotions have been granted to the respondent No.5, it is contended that such actions were bad in law and the matter was required to be investigated by the Central Bureau of Investigation and action was required to be taken against the respondent No.5.

3. On being noticed, the respondents have filed their return. The respondents No. 1 to 4 and 6 have opposed the claim made by the petitioner and have contended that right from day one, the respondent No.5 was treated to be a member of Scheduled Tribe and his appointment was made as such. There were certain errors committed in the gradation seniority list with respect to giving the description of the reservation category of respondent No.5 and when these facts were brought to the notice of the authorities, the same were

corrected. It is contended that the presidential notification of Scheduled Caste and Scheduled Tribe Order as amended by Act of 1976 published on 1st July 1977 in the Gazette described that 'Majhi' is the Scheduled Tribe within the whole of the State. It is not declared to particular district, as has been done in cases of certain other Scheduled Tribes.. Thus, it is contended that if the respondent No.5 was treated to a Scheduled Tribe and was given promotion and a direction was issued for correction in his description in the gradation list, no wrong is committed. It is, thus, contended that the caste certificate issued in respect of respondent No.5 has not been challenged in any manner. Had a proper challenge been made, the caste certificate issued in respect of respondent No.5 would have been enquired into. For any other irregularities, facts were brought to the notice of the respondents and they have enquired into the same.. Nothing wrong was found with respect to working of the respondent No.5 and he has rightly been granted the promotion in accordance to the reservation strictly in accordance to the provisions made in the Rules. Thus, it is contended that the petition being wholly misconceived deserves to be dismissed.

4. The respondent No.5 has filed a return independently categorically denying all the allegations and stating that the petitioner has no locus to challenge appointment or promotion of the respondent No.5, or to seek any writ of quo warranto against him. It is categorically contended that in fact a camouflage petition has been filed in the garb of this writ petition for grant of writ of quo warranto otherwise the petitioner has no locus to challenge such promotion of the petitioner. It is pointed out that in the public interest litigation, these objections were raised and when the same were examined by the Court, the very same petitioner has sought permission to withdraw the writ petition with liberty to raise grievance before the appropriate forum. It is contended that no such permission to file a writ petition for grant of writ of quo warranto was granted by the Division Bench of this Court and in view of this, the writ petition is not maintainable. It is reiterated that the respondent No.5 belongs to the reserved community of Scheduled Tribe and he was rightly promoted, giving him the benefit of reservation. It is further contended that the enquiry with respect to the validity of caste certificate is to be conducted only and only by High Power Screening Committee and this Court or any other investigating agency is not required to make a probe in the said issue. Nothing has been found, uptill now by the High Power Screening Committee where an enquiry is pending, in respect of certificate of Scheduled Tribe issued in favour of the

respondent No.5 and, therefore, such a relief claimed in the writ petition is misconceived. As far as the maintainability of the petition itself is concerned, it is contended that there is virtually no claim of grant of writ of quo warranto. All such relief which the petitioner has claimed relates to the conducting of an enquiry with respect to the correctness of the certificate of Tribe issued in favour of the respondent No.5 which is not to be conducted by any other authority except the High Power Screening Committee as per the law laid down by the Apex Court. Therefore, the entire petition being misconceived, deserves to be dismissed.

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

6. It has to be examined whether this writ petition is maintainable before this Court or not. Undisputedly, the petitioner has filed a Public Interest Litigation on the very same subject claiming the very same relief. The order passed in the aforesaid writ petition is placed on record as Annx.P/17. Copy of the writ petition itself is placed on record as Annx.P/16. The relief claimed in the said writ petition, if compared, to the relief claimed in the present petition indicate that the reliefs claimed in the present petition barring for the relief 7(E) are verbatim, the same. Only because some order was passed during pendency of the said writ petition on 21.5.2009, the said order is also included in the present writ petition in the relief clause and its quashment has been sought. It is also clear from perusal of the order sheets of the aforesaid writ petition as has been placed on record that the said writ petition was entertained, notices were earlier issued to the respondents and they have filed their return. On 9.8.2010, after hearing learned counsel for the parties at length, the order was passed by the Division Bench in the following manner :-

> "In this writ petition which has been filed as public interest litigation, grievance of the petitioner is that State Government is giving undue shelter to respondent No.8 and he is continuing as Chief Engineer in Water Resource Department. It is alleged that respondent No.8 has occupied the post by mis-representation and fraud and cannot be permitted to continue in office.
>
> Learned counsel for the respondents have raised an objection with regard to maintainability of the instant writ petition as public interest litigation.

Learned counsel for the petitioner submitted that he be permitted to withdraw the instant writ petition with liberty to the petitioner to avail such other remedy as may be available to the petitioner in law. Learned counsel for the petitioner submits that in the facts and circumstances of the case, the appropriate remedy for the petitioner is to seek writ of quo warranto. In support of his submission, he has placed reliance on the decision of Supreme Court in *Gulam Qadir Vs. Special Tribunal and others,* (2002) 1 SCC 33.

As prayed by learned counsel for the petitioner, the petition is dismissed as withdrawn with liberty as aforesaid."

7. From this order, it is clear that learned counsel for the petitioner has made a prayer for withdrawal of the Public Interest Litigation (PIL) with liberty to the petitioner to avail such other remedy as may be available to him under the law. The subsequent part was his submission only with respect to availability of a remedy of a writ of quo warranto, but this liberty was not specifically granted by the Division Bench. That being so, it cannot be said that the liberty was granted to the petitioner to file a writ petition seeking writ of quo warranto. Had it been so, the Division Bench would have said in the order itself while granting liberty to withdraw with permission to avail other remedies, to file a writ petition for grant of writ of quo warranto. That being so, prima facie it is clear that no liberty was granted to the petitioner to file a writ afresh seeking a writ of quo warranto against the respondent No.5.

8. Apart from the aforesaid, as has been contended by the petitioner, the selection of respondent No.5 was done and an order of appointment was issued in his respect where his surname was shown to be 'Kashyap'. However, such a list produced by the petitioner in the writ petition as Annx.P/4 has been seriously disputed by the respondent No.5 and it has been contended that the right list has not been produced by the petitioner. In fact, in the list, manipulation was done in the description of respondent No.5. Though his surname was shown as 'Kashyap', but there were other descriptions such as " अ.ज.जा.& ए, but these words were deliberately omitted from the list produced by the petitioner with the writ petition. The select list has been obtained under Right to Information Act and has been placed on record as Annx.R5/1 by the respondent No.5. It is the allegation made by the respondent No.5 in the return that a manipulated document was filed by the petitioner to show as if

the respondent No.5 was initially selected as a General category candidate and not that of a Scheduled Tribe candidate only with an object to cause prejudice against the respondent No.5. Though detailed return has been filed and served on the petitioner, yet no rejoinder to such an allegation has been filed by the petitioner. These are the specific allegations made in paragraph 5 of the return of respondent No.5 which for the purposes of convenience are reproduced as under :-

> "The petition deserves to be dismissed on the ground that the petitioner has filed tempered copy of Annexure-P/4. In Annexure P-4, against the name of the answering respondent at Sr. No.69, the caste of the answering respondent has been intentionally suppressed in the photocopy. The answering respondent has obtained copy of Annexure-P/4 under Right to Information Act and from the said copy it is clear that against Sr. No.69 A. Ja. Ja. (ST) was also mentioned which was intentionally tempered in Annexure P-2. Copy of the Annexure P-4 received by the answering respondent under Right to Information is filed herewith as Annexure R-5/1. On this count alone, the present petition deserves to be dismissed with heavy cost."

It is the settled law that if something is alleged by one party and is not replied suitably by other side, the same is deemed to be admitted. This being so, there is no doubt left that the petitioner has tried to mislead this Court by placing reliance on a tampered document. If something is alleged in writing, a specific reply denying such allegation is to be submitted. That being so, it has to be held that document Annx.P/4 was a tampered document.

9. Now coming to the fact whether any of the relief claimed by the petitioner will constitute issuance of a writ of quo warranto. The first relief which the petitioner has claimed is nothing but production of the service record of the respondent No.5. The second relief claimed by the petitioner is direction to the Central Bureau of Investigation to conduct an enquiry with respect to the misdeeds of respondent No.5. The third relief claimed by the petitioner is for seeking a direction to the official respondents to take action against the respondent No.5 by initiating criminal prosecution and also to proceed departmentally against him. The fourth relief is a prohibitary order against the respondent No.5 from functioning as Chief Engineer. The fifth relief is for

quashment of the order dated 21.5.2009 and the sixth relief is any other relief, order or direction as this Court feels proper. From these reliefs and in the entire allegations made in the petition, no case is made out to invoke power by this Court, to grant a writ of quo warranto against the respondent No.5. The writ of quo warranto can be issued only if it is found that a person has been appointed on a public post dehors the Rules or in violation of statutory provisions of law, as has been held by the Apex Court in the case of *Hari Bansh Lal Vs. Sahodar Prasad Mehto and others* [(2010) 9 SCC 655]. Nothing is spelt out as to how the appointment of the respondent No.5 is dehors the Rules or against the statutory provisions of any of the law. In such circumstances, this Court would not exercise its extraordinary power of issuing a writ of quo warranto for removal of the respondent No.5 from the post.

10. Now coming to the question whether any direction could be issued by this Court for conducting any enquiry in the matter of certificate of Tribe issued in respect of petitioner. Much is said by learned counsel for the petitioner and heavy reliance is placed on two decisions of this Court. It is contended that the Division Bench of this Court has taken note of the provisions made in the Scheduled Tribe Order and has passed the detailed order holding inter alia that such persons who have been declared as Tribes and specifically mentioned in the Scheduled Tribe Order issued by the President of India alone are to be treated as Scheduled Tribe within the area notified. However, on complete examination of the law laid down by the Division Bench in *Radhaballabh Choudhary Vs. Union of India and others* (1991 MPLJ 264], it is clear that the Division Bench was not dealing with whether 'Majhi' was the Scheduled Tribe within the whole of the State or not. 'Majhi' community was declared to be Scheduled Tribe in the Scheduled Tribe Order 1950 only in few districts of Madhya Pradesh. The case of *Radhaballash Choudhary* (supra) was considered in the light of the fact that whether any other sub-caste such as Kewat, Mallah, Dheemar, Nishad, Bhoi, Kahar, etc are to be treated as 'Majhi' or not. It was categorically held by the Division Bench of this Court that since these sub-castes were not written within the bracket after the Tribe 'Majhi' in the Scheduled Tribe Orderr (sic: order,) 1950, they were not to be treated as Scheduled Tribe like 'Majhi'. The Division Bench was not dealing with the amendment made in the Scheduled Tribe Order 1950. It is seen from the Gazette Notification issued by the respondent-State that an amendment was made in the Scheduled Caste and Scheduled Tribe Order 1950 by passing an Act No.108 of 1976 and the said Act was published in the Gazette. 'Majhi'

which was earlier treated to be Scheduled Tribe within few districts of the State of Madhya Pradesh was treated as Scheduled Tribe in whole of the State of M.P. as no districts were mentioned against the entry of Tribe 'Majhi' made in the amended order. Therefore, to say that respondent No.5, who was belonging to Gwalior district would not be entitled to claim benefit of reservation as Tribe in view of the unamended provisions of Scheduled Tribe Order of 1950, is wholly misconceived. The law as amended in respect of reservation of the caste was to be looked into on the date when the certificate was issued in respect of respondent No.5.

11. That apart, now the question would be whether this Court can look into such a claim made by the petitioner and can direct an enquiry by any other authority or agency. Again the law is well settled in this respect. The Apex Court in the case of *Ku. Madhuri Patil and another Vs. Additional Commissioner, Tribal Development & others*(AIR 1994 SC 94) has categorically prescribed that a Caste or Tribe certificate issued under the aforesaid order has to be examined by a High Power Screening Committee. Only such Committee would be empowered to look into the correctness of the issuance of such a certificate. This Court in the case of *Vikas Jagdish Shipuriya and another Vs. State of Madhya Pradesh* [2002 (3) MPLJ 417] has categorically held that such a power is not available to any authority of the police or even the Court except after the enquiry conducted by the High Power Screening Committee, in terms of the decisions of Apex Court in the case of *Ku. Madhuri Patil* (supra). It is again to be seen that persons like petitioner cannot be said to have locus standi to call in question the certificate of Tribe issued to the respondent No.5 by way of filing such a writ petition before this Court, as has been held by this Court in the case of *Sarvesh Patel Vs. State of M.P. and others* [2012 (1) MPHT 37]. Thus, the stand taken by the petitioner cannot be accepted at all. No employer can take an action of removal of an employee only on the allegation that the certificate of Caste or Tribe issued in his or her favour is invalid. If such an action is taken without getting the Caste or Tribe verified from the Higher Power Screening Committee, again it would be an illegality as it would be in violation of the directives issued by the Apex Court in the case of *Ku. Madhuri Patil* (supra) as held by this Court in the case of *Jitu Prasad Vs. Industrial Development Bank and another* [2013 (1) MPLJ 428].

12. Lastly, it is contended by learned counsel for the petitioner that in view of the law laid down by the Division Bench of this Court in the case of

Radhaballabh Choudhary (supra), this Court would have no option but to issue a direction for taking an action against the respondent No.5 as admittedly, the Tribe certificate issued to the respondent No.5 is invalid. It is contended that the law laid down by the Division Bench is binding on this Court and, therefore, such a direction is necessary. The reason has already been assigned as to why the law laid down by the Division Bench of this Court in the case of *Radhaballabh Choudhary* (supra) would not be attracted in the present case. Here the issue is whether the respondent No.5, who belongs to Gwalior would be a member of 'Majhi' Tribe or not. The issue involved in the case of *Radhaballabh Choudhary* (supra) was whether the other sub-castes are also to be treated as 'Majhi' or not. As has been explained herein above, the Scheduled Tribe Order 1950 was amended in the year 1976 and was published in the Gazette in the year 1977. The districts which were earlier mentioned in the Scheduled Tribe Order 1950 have been omitted, therefore, in view of the provisions of Article 342 of the Constitution of India 'Majhi' is now declared to be the Scheduled Tribe within the whole of the State. It is trite that the law is to be amended in the same manner as the law is made. The Parliament has passed the Amending Act No.108 of 1976 and the same has been published in the Gazette after the ascent of the President of India. Therefore, the Schedule of Tribes has been amended and certain districts which were earlier mentioned in the entry 'Majhi' Tribe have been deleted, meaning thereby now the 'Majhi' has become a Scheduled Tribe for whole of the State. This being so, since there is a distinction in the claims made in the petition one which was decided by the Division Bench and one which is being decided by this order, it cannot be said that the law laid down by the Division Bench is violated in a case it is held that 'Majhi' is Tribe for whole of the State. In fact, this was never the issue before the Division Bench nor it has been dealt with or decided in context of Amending Act. The claim made in this respect by the learned counsel for the petitioner is wholly misconceived.

13. In view of the discussions made herein above, there is no force in the writ petition, which deserves to be and is hereby dismissed. Normally this Court would not have awarded costs of this litigation, but in view of the finding recorded in para 8 of this order, the petitioner would pay costs of Rs.25,000/- which would be recovered as arrears of land revenue from him and would be credited in the Legal Aid Society of this Court to provide free legal aid to the real poor and needy litigants.

Petition dismissed.

I.L.R. [2014] M.P., 1771
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 3741/2001 (Jabalpur) decided on 24 July, 2013

MADHUMATI JOSHI (SMT.) ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

Service Law - Seniority **- Petitioner originally appointed as Lower Division Clerk in Small Savings and State Lotteries Department - Deputation of petitioner to Pension and Employees Welfare Department - Re-transfer of petitioner back to Small Savings and State Lotteries Department - Petitioner's seniority would be counted from her day of appointment in her parent department not from day of re-transfer back to her parent department. (Paras 4, 7 to 9)**

सेवा विधि – वरिष्ठता – याची को मूलतः निम्न श्रेणी लिपिक के रुप में अल्प बचत एवं राज्य लॉटरी विभाग में नियुक्त किया गया था – पेंशन और कर्मचारी कल्याण विभाग में याची की प्रतिनियुक्ति – अल्प बचत एवं राज्य लॉटरी विभाग में याची को वापस पुनः अंतरित किया गया – याची की वरिष्ठता की गणना मूल विभाग में उसकी नियुक्ति की तिथि से होगी और न कि मूल विभाग में उसके पुनः अंतरण की तिथि से।

D.K. Dixit, for the petitioner.
Amit Kumar Sharma, P.L. for the respondents.

ORDER

K.K. TRIVEDI, J. :- By this petition under Article 226 of the Constitution of India, the petitioner has called in question the number of orders by which the gradation list was issued to the petitioner, namely, the order dated 12.11.1997, 19.8.1998, 25.9.1999, 9.11.2000 and 20.10.2000, and lastly the order by which the petitioner is called upon to file an appeal against the rejection of her representation. It is contended by the petitioner that she was initially appointed in the year 1979 in the work charged establishment and was subsequently appointed on the post of Lower Division Clerk vide order dated 1.6.1985. The petitioner was confirmed on the said post with effect from 1.4.1993 vide order dated 30.4.1993. A Directorate of Pension and Employees Welfare was started by the State Government. Some persons were needed to be posted in the said directorate. On demand, the petitioner was asked to give her consent for deputation

posting in the Directorate of Pension and Employees Welfare. Since such a consent was given by the petitioner, she was posted in the Directorate of Pension and Employees Welfare and was relieved vide letter dated 1.10.1988. In fact, the petitioner never gave consent for her permanent transfer in the Directorate of Pension and Employees Welfare and that is why she was asked to be relieved to be posted on deputation for one year. In the letter of relieving, it was categorically said that the petitioner will get the similar benefits of pay and allowances as she was getting in her parent department. Pursuance to such a letter, the petitioner was relieved on 13.10.1988 and she gave her joining in the Directorate of Pension and Employees Welfare. However, since the lien of the petitioner was not suspended in her parent directorate, the same was to be maintained. When a gradation list was issued in the year 1990, the name of the petitioner was included in the said gradation list at appropriate place at Serial No.2 of the temporary persons because at that time, the confirmation order was not issued. The fact remains that seniority of the petitioner was to be maintained in her parent department.

2. Subsequently, the respondents issued a gradation list in the year 1997 showing the position of the employees of the Directorate of Small Savings and State Lotteries and the seniority of the petitioner was disturbed. Instead of showing her at the appropriate place, she was shown junior to many persons who were earlier shown junior to her in the gradation list of 1990. When the petitioner came to know about such a gradation list, she made a representation, but nothing was communicated to her. Instead of correcting the mistake committed, the same mistake was repeated in the year 1998, 1999 and 2000. When the petitioner lastly submitted the representation, it was informed to her that since she has gone to work in the Directorate of Pension and Employees Welfare and since after closure of the said directorate, she came back in the Directorate of Small Savings and State Lotteries and was absorbed from the date of joining in the said directorate, therefore, she will get the seniority only from the date she came back in the directorate. Ultimately, it was also informed to her that in case she is aggrieved by any decision so taken by the Directorate of Small Savings and State Lotteries, she can file an appeal before the State Government. She made the representation to this effect, but nothing was done, therefore, the writ petition was required to be filed.

3. This Court has entertained, the writ petition, admitted the same on 18.8.2001. The notices were issued to the respondents. It was categorically directed by this Court that any promotion made on the basis of impugned

seniority list shall be subject to the final outcome of this writ petition. However, despite grant of opportunities, the return has not been filed by the respondents. When the case was listed on 18.11.2011, this Court directed to list the petition for final hearing. When the matter was listed for final hearing, an attempt was again made to obtain time to file return by the respondents. On 5.1.2012, again the time was allowed for the said purpose, but no return whatsoever has been filed. A prayer is again made for grant of time, but looking to such conduct of the respondents, it is not justified to extend any further opportunities to file the return specially keeping in mind the pendency of the present petition in this Court for a long period of 12 years.

4. It is clear from the order passed by the respondents themselves that the petitioner was working as a work charged employee and on 1.6.1985, she was appointed on a substantive vacant post of Lower Division Clerk in the Directorate of Small Savings and State Lotteries. Such an order was issued by a competent authority i.e. the Director of Small Savings and State Lotteries. The petitioner joined on the said post and continued to work. Since a new Directorate of Pension and Employees Welfare was established by the State Government, some correspondence was done by the Director of Pension with the Directorate of Small Savings and State Lotteries asking for providing ministerial employees to work in the new Directorate of Pension and Employees Welfare. From perusal of the memo dated 1.10.1988, it is clear that a proposal of transfer of service was made with the consent of the employee concerned and if the employee was not willing to go on transfer to the new directorate, he/she be posted on deputation in the new directorate, reserving his right available in his parent department. The letter dated 1.10.1988 is relevant which is quoted herein below :-

"/सं0पे0क0/3 प्रशा/1 स्था/39/88/2745 भोपाल 1–10–88

प्रति

संचालक,
अल्पबचत एवं राज्य लाटरीज
भोपाल (म0प्र0)

विषय : कुमारी मधुमती जोशी, निम्न श्रेणी लिपिक (हिन्दी मुद्रलेखक) की सेवायें प्रतिनियुक्ति पर लिये जाने बाबत्

संदर्भ : आपका पत्र क्रमांक 3666/सं.रा.ला./स्था/88 दिनांक 26.9.88

.....

उपरोक्त विषय में लेख है कि आपके कार्यालय में कार्यरत निम्न श्रेणी लिपिक (हिन्दी मुद्रलेखक) कुमारी मधुमती जोशी की सेवायें उनके कार्यभार ग्रहण के दिनांक से एक वर्ष के लिए इस संचालनालय में निम्न श्रेणी लिपिक के पद पर प्रतिनियुक्ति पर सोंपने बाबद् शीघ्र आदेश प्रशारित कर इन्हें कार्यमुक्त करने की कृपा करें। प्रतिनियुक्ति अवधि में इन्हैं वही वेतन एवं भत्ते प्राप्त होंगे जो इन्हें पैतृक विभाग में रहने पर प्राप्त होते।

संयुक्त संचालक (पेंशन)"

5. Pursuance to this correspondence, it appears that the petitioner was asked to give her consent for transfer. She was to be relieved for joining in the Directorate of Pension and Employees Welfare on deputation. This relieving was not properly done. There was some mistake in relieving and it appears that the petitioner was relieved to join for appointment in the Directorate of Pension and Employees Welfare as is indicated in the order of relieving dated 13.10.1988. The said order of relieving is reproduced below :-

" संचालनालय अल्प बचत एवं लटरीज

मध्य प्रदेश

क्रमांक/ /संराला/स्था/88 भोपाल, दिनांक .....

कार्यालय आदेश

कु0 मधुमती जोशी, निम्न श्रेणी लिपिक, की सेवायें संचालक, पेंशन तथा कर्मचारी कल्याण संचालनालय को निम्न श्रेणी लिपिक के पद पर नियुक्ति हेतु सौंपे जाने से उन्हें आज दिनांक 13–10–88 को पूर्वान्ह में भारमुक्त किया जाता है।

संचालक
अल्पबचत एवं राज्य लाटरीज
भोपाल (म0प्र0)

पृष्ठांकन क्रमांक/3895/संराला/स्था/88 भोपाल, दिनांक 13.10.88

प्रतिलिपि :–

1. कुमारी मधुमति जोशी, निम्न श्रेणी लिपिक को सूचनार्थ।
2. संचालक, पेंशन तथा कर्मचारी कल्याण संचालनालय को सूचनार्थ।
3. लेखा शाखा को आवश्यक कार्यवाही हेतु अग्रषित।

संचालक
अल्पबचत एवं राज्य लाटरीज
भोपाल (म0प्र0)"

6. This particular finding is recorded only because the lien of the petitioner was never suspended in the Directorate of Small Savings and State Lotteries as is reflected in the gradation seniority list showing the position as on 1.4.1990. It was categorically recorded in the said gradation list that the petitioner was on deputation. Had it not been so, such a fact would not have been recorded in the said gradation list. Secondly, there is no rebuttal of the allegations made by the petitioner that her lien was not suspended in the Directorate of Small Savings and State Lotteries. That being so, the petitioner was to remain in the gradation list of Directorate of Small Savings and State Lotteries and was required to be considered for confirmation as per the availability of the vacancies. However, the petitioner has not placed on record any such document to show that any confirmation had taken place in the Directorate of Small Savings and State Lotteries. On the other hand, she has placed an order issued by the Directorate of Pension and Employees Welfare relating to confirmation of petitioner. It is not known as to how such an order could be issued if the petitioner has not substantially been appointed in the Directorate of Pension and Employees Welfare. The respondents have not placed on record any such order of the said directorate which was subsequently abolished in the year 1995. If the said Directorate of Pension and Employees Welfare was abolished, naturally those who have come in the services of the said directorate were to be sent back to the parent department where they were initially appointed and they were to be given the placement in their parent department on the substantive post held by them. This fact for the first time was recorded in the gradation seniority list issued in the year 1997, where the petitioner was shown below many of the persons serving in the Directorate of Small Savings and State Lotteries, that the petitioner has become surplus employee of Directorate of Pension and Employees Welfare and was being absorbed in the Directorate of Small Savings and State Lotteries. How such an entry was made in the gradation list, was not explained. How the petitioner would become surplus, if she was on deputation in the Directorate of Pension and Employees Welfare after the closure of the said directorate, has not been stated by the respondents. Only this much is inferred from the subsequent seniority list that the petitioner was being treated as surplus employee of Directorate of Pension and Employees Welfare.

7. From the document placed on record as Annx.P/10, a memo issued by the Directorate of Small Savings and State Lotteries, it appears that the

petitioner has made an application for her appointment in the Directorate of Pension and Employees Welfare, therefore, it was not to be treated that the petitioner had continued in the employment of respondent No.2 any longer. Such a fact is not right as the petitioner was sent on deputation to work in the Directorate of Pension and Employees Welfare as is indicated in the gradation list circulated by the respondent No.2. That being so, in fact there was no objective decision on the claim made by the petitioner. Had it not been so that the petitioner was on deputation, she would not have been taken back in the services of the Directorate of Small Savings and State Lotteries on closure of the Directorate of Pension and Employees Welfare nor her joining would have been accepted on 21.11.1995 if there was no post available to accommodate the petitioner in the said directorate. This being so, the reason assigned to reject the claim of the petitioner is not proper.

8. Normally, if an employee seeks recruitment in another services, he or she has to make an application and the said application is required to be considered, and, the recruitment is required to be done in terms of the Rules made by the State Government. If there was no recruitment made by the Directorate of Pension and Employees Welfare, only the employees working in other directorate were asked to give their services in the said directorate, it was to be treated that the petitioner was on deputation in the Directorate of Pension and Employees Welfare. She was not to be denied the seniority in her parent department i.e. in the Directorate of Small Savings and State Lotteries. That being so, the rejection of the claim of the petitioner is not sustainable.

9. Accordingly, the writ petition is allowed. The respondents are directed to assign the seniority to the petitioner on the post of Lower Division Clerk in appropriate manner, keeping in mind the initial date of appointment of petitioner in the Directorate of Small Savings and State Lotteries as was made vide order dated 1.6.1985 and to grant all privileges of such seniority to the petitioner including confirmation on the post and consideration of claim for promotion on the next higher post in case it is found that any junior to the petitioner is promoted on the said post. Let the aforesaid exercise be completed within a period of four months from the date of receipt of certified copy of the order passed today.

10. The writ petition is allowed to the extent indicated herein above. There shall be no order as to costs.

Petition allowed.

I.L.R. [2014] M.P., 1777
WRIT PETITION

Before Mr. Justice P.K. Jaiswal & Mrs. Justice S.R. Waghmare
W.P. No. 6202/2013 (Indore) decided on 27 August, 2013

ANAND CHOUKSEY ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Constitution - Articles 226, 14 - Contractual matter - Tender - **While disposing of public property State must give equal opportunity to all concerned and endeavour to fetch the best available price in public interest. (Para 39)**

संविधान – अनुच्छेद 226, 14 – संविदा प्रकरण – निविदा – लोक सम्पत्ति का निपटारा करते समय राज्य को सभी संबंधितों को समान अवसर देना चाहिए और लोक हित में, सर्वोत्तम उपलब्ध कीमत निकालने का प्रयास करना चाहिए।

Case referred :

2012 (8) SCC 216,

R.S. Chhabra, for the petitioner.
Mini Ravindran, Dy. G.A. for the respondent No.1.
A. Nimgaonkar, for the respondents No. 2 & 3.
Piyush Mathur with *A. Shrivastava,* for the intervener.

ORDER

The Order of the Court was delivered by :
P.K. JAISWAL, J. :- By this writ petition under Article 226 of the Constitution of India, the petitioner is praying for the following relief :-

(1) By issuing appropriate Writ, Direction or Order, the respondents be directed to accept the application form and bid of the petitioner and also to allow him for participating in the auction process.

2. Costs of this petition be awarded,

3. Any other appropriate relief, which this Hon'ble court may deem fit, be awarded to the petitioner.

2. The respondent No.2 is a registered co-operative society registered under the M.P. Co-operative Societies Act, 1960. The business of the society is of producing fish and managing fishing activities in the large reservoirs of the State. An advertisement was published inviting E-Tenders for the sale of fish caught from the Indirasagar Reservoir, situated in Khandwa, Harda and Dewas districts of Madhya Pradesh. Tender No.16 was for sale of fish caught from Indirasagar Reservoir which was released on-line on 22.04.2013 on portal http://mpfishfed.mpeprocurement.gov.in by the respondent no.2. As per on line schedule prepared by the department last date of on line purchase and down-load of tender document was 2.5.13 up-to 17:00 Hrs and submit Bid Hash on line was up-to 8.5.13 17:00 Hrs. Department activity of close for bidding-Generation of Super Hash was from 8.5.13 17.01 Hrs. to 23.00 Hrs.

3. That as per NIT bidding for the sale of fish caught from the Indirasagar Reservoir could only be made on-line and there was no procedure for submitting the offline / hard copy of the application forms and documents directly at the office of the respondents. Initially the last date for submitting application forms and bidding was 3.5.13 and it was later rescheduled to 7.5.13 and then again to 8.5.13. The tender is to be opened on 13.5.13.

4. On 29.4.13, petitioner purchased the application form by depositing the tender document fees and down loaded the soft copy of the documents, which were available to him after depositing such fees.

5. On 7.5.13 petitioner filled up the application form that was available on the portal by respondent no.2 and uploaded all the documents except for the bank statement and decided to continue the process on 8.5.13, which was the last date for submitting application forms along with all the documents. The petitioner had uploaded nearly all the documents on 7.5.13 including the demand draft of earnest money amounting to Rs.53,00,000/-. On 8.5.13, petitioner tried to upload the remaining document viz. bank statement and submit his application form but he failed to submit his bid on account of the technical difficulties posed by the portal of the respondent no.2. Petitioner tried again and again to log into the portal of the respondent no.2 but every time he logged in to it, he was forced to log out of the portal for no fault of his own. While doing so, at one or two times, even after successfully logging into the portal of the respondent no.2, he could not submit his application form (bid) and upload the bank statement due to non responsive website of the respondent no.2. He tried for the entire day for completing the process of

submitting application form and bidding but on the account of the problems associated with the website, he was unable to do so. As the time for the closure of the bids which was 05.00 PM approached, and petitioner realized that he would be debarred from bidding on account of technical problems associated with the portal, he telephonically informed the respondents regarding the problems but it yielded no results as the time passed and the petitioner could not submit his application form and bid for the sale of the fish caught from the Indirasagar Reservoir.

6. As the petitioner failed to submit his application form and bid till 5.00 PM, which was the time of closure of making bids for the same, he immediately sent a email to the email address of the respondents, requesting his login trial (number of times he was logged in and logged out along with the time of each attempt) on the portal of the respondent no.2. While replying to the said email of the petitioner, respondents sent the login trial of the petitioner through email on the same day (Annexure P/6).

7. On account of the non response website and casual attitude of the respondents in maintaining their website, petitioner has been restrained from submitting his application form and bid for the sale of fish caught from the Indirasagar Reservior.

8. Due to failure of the web site of the respondent no.2, the petitioner has lost his legitimate and constitutional right of participating in process of auction for sale of fish caught from the Indirasagar Reservior. The act of the respondents has deprived the petitioner till the last minute of the closure of the bid.

9. The petitioner on 10.5.12 filed this writ petition for issuance of writ of mandamus directing the respondents to accept the application form and bid of the petitioner and also to allow him for participation in auction process. As per terms and conditions of the tender 13.5.13 was the date when the financial bid was to be opened. On 10.5.13 itself the writ petition was listed before the Court. The learned Division Bench by order dated 10.5.13 issued notices to the respondents no.2 and 3 and also directed the petitioner to serve Humdast notices on respondents no.2 and 3 and by way of interim relief, it is directed that acceptance of the tender in question, if any, by the respondents, shall be subject to the result of writ petition.

10. As per affidavit filed by the petitioner regarding service of Humdast notice, the notices were duly served to the respondents no.2 and 3 on 15.5.13.

11. On 16.5.13, an application for intervention has been filed on behalf of **Simran Fisheries Pvt. Ltd.**, wherein, it is stated that on 13.5.13 financial bids were opened and intervener was found to be highest bidder with the tender value of Rs.62.42 Crores. On opening of financial bid on 13.5.13, the intervener Simran Fisheries Pvt. Ltd., was found as highest bidder. After completing other formalities of the terms and conditions of the tender, the respondent no.2 hand over the possession of the dam on 16.6.13 to the intervener, ie., after a period of one month from the date of filing of the writ petition. This shows that intervener knowing well that the matter is sub judice and the contract, which has been awarded to him is subject to the result of the writ petition.

12. Shri Ashutosh Nimgaonkar, Advocate has filed his vakalatnma (sic:vakalatnama) on behalf of the respondent no.2 – Society, but made a statement at bar that he is also appearing on behalf of respondent no.3. The web site of the respondent no.2 is maintained by the respondent no.3. The respondent no.3 is nodal agency promoting of information and technology for E-Tendering in the State of M.P.

13. The respondent no.2 raised a preliminary objection regarding maintainability of writ petition on the ground that the petitioner had the alternative remedy to raise the dispute "under Section 64 (1) (c) of the M.P. Cooperative Society Act, 1960" before the Registrar.

14. On merits the society denied the allegation regarding debarring the petitioner from making a bid. It is submitted that the web site of the answering respondent no.2 controlled by respondent no.3 was properly functioning and all the three bidders have accessed the said site on 8.5.13 for submitting their bid along with all other documents and have successfully participated in the bid, therefore, the allegation made by the petitioners regarding technical problems on the web site are not correct. It is also submitted that when the petitioner has filled up the application form on 7.5.13 then why he did not submit his bank statement as well as his bid on the same day and why he waited till 8.5.13. It is not disputed by the respondent no.2 that the petitioner tried to upload the remaining document, ie., bank statement on 8.5.13. He failed to submit the bid on the said date, but it is denied that the petitioner failed to submit the same on the account of technical difficulties posed by the portal of the respondent no.2.

15. The respondent no.2 in his reply admitted that the petitioner tried again

and again to log into the portal, but they denied that after logging in, he was forcibly logged out of the portal for no fault of his own. They submitted that the web site of the petitioner did not associate with any problem regarding non response or any other failure. The respondent no.2 society also admitted that the petitioner telephonically informed them regarding the problems but since upon verification the website was found absolutely in order, nothing was expected to be done at the instance of the respondent no.2. They also admitted that the society has hired the services of respondent no.3 for maintaining its website and is, therefore, not directly involved in the maintenance of its response. It is also submitted that upon receipt of complaint from the petitioner, the respondent no.2 have called the details of the access of the website made by the various bidders on 8.5.13 and accordingly the respondent no.3 have informed the answering respondent that all other bidders have accessed the website on 8.5.13 for the whole day on asmany as, 1413 times and have been successfully logged in and uploaded all the documents required for such bid. From the aforesaid, it is stand of the respondent No.2 that the website was properly functioning and was responding to users of such website with immediate effect as a result of which all other bidders have successfully submitted their bids and documents on 8.5.13 during the same span of time which is being reported by the petitioner to be slow in response. The respondent no.2 in their return also stated that the machine used by the bidder for submission was not getting properly connected to the server for which there may be many reasons such as problems in the machine hardware, Internet connection etc.

16. It is not in dispute that the process of submitting of application is only a process of 10-15 minutes.

17. The allegation made by the petitioner that the website of the respondent no.2 was not properly responding, therefore, he could not submit his application. The respondent no.2 in their reply denied the allegation made in and submit that the petitioner has failed to submit his bid on account of his own failure or problems in his own system and not due to any technical problems or non response of the website. Annexure R/1 is the letter dated 4th June, 2013, written by the respondent no.3 to M/s. Wipro Ltd. and Nextenders – the implementation-partner of the e-Procurement project in the Madhya Pradesh. By the said letter respondent no.3 asked their view and clarification on the matter on the following :-

a. Uptime/Downtime/Breakdown report from the servers as on 8.5.13.

b. Server response time of the application as on 8.5.13.

c. This particular user's login details of 8.5.13 along with other bidders of this tender.

d. Tender History of this NIT as to how many bidders have participated, when they have submitted their bids with log details, history of bidders when they have submitted the bids.

e. A detailed write up as your representation on this case.

f. Any other information which you may feel necessary is required for the case.

18. The reply of the nextender is dated 5.6.13 Annexure R/3. As per their reply their were three bidders who completed submit Bid Hash Online activity on 8.5.13 up-to 17.00 Hrs. As per reply other three bidders did submit their Bid Hash Online activity during 14.00 Hrs to 17.00 Hrs. The agency opined that there may be possibility the machine, which was used by bidder for submission was not getting properly connected to the server and for this there may be many reasons, problems in machine hardware, internet connection etc. Annexure B which is part of the Annexure R/3 is the log in details of the petitioner, which reads as under :-

	anandchoukse	05/08/2013 17.24	LOGGED-OUT	User logged Out
mpfishfed. mpeprocurement.gov.	anandchoukse	05/08/2013 17.18	LOGIN_INITIATED	User Initiated login
	anandchoukse	05/08/2013 17.16	LOGGED-OUT	User logged Out
mpeprocurement.gov.in	anandchoukse	05/08/2013 17.05	LOGGED-IN	User Logged-in-successfully
mpeprocurement.gov.in	anandchoukse	05/08/2013 17.03	LOGIN_INITIATED	User Initiated login
	anandchoukse	05/08/2013 16.46	LOGGED-OUT	User logged Out
mpeprocurement.gov.in	anandchoukse	05/08/2013 16.23	LOGIN_INITIATED	User Initiated login
	anandchoukse	05/08/2013 16.16	LOGGED-OUT	User logged Out
mpeprocurement.gov.in	anandchoukse	05/08/2013 16.11	LOGGED-IN	User Logged-in-successfully

mpeprocurement.gov.in	anandchoukse	05/05/2013 16.11	LOGIN_INITIATED	User Initiated login
	anandchoukse	05/08/2013 16.10	LOGGED-OUT	User logged Out
mpeprocurement.gov.in	anandchoukse	05/08/2013 16.02	LOGIN_INITIATED	User Initiated login
	anandchoukse	05/08/2013 16.02	LOGGED-OUT	Login Failed (wrong user input / interml error
mpeprocurement.gov.in	anandchoukse	05/08/2013 16.02	LOGGED-IN	User Logged-in-successfully
mpeprocurement.gov.in	anandchoukse	05/08/2013 16.00	LOGIN_INITIATED	User Initiated login
mpeprocurement.gov.in	anandchoukse	05/08/2013 15.58	LOGGED-IN	User Logged-in-successfully
	anandchoukse	05/08/2013 15.58	LOGGED-OUT	Login Failed (wrong user input / interml error
mpeprocurement.gov.in	anandchoukse	05/08/2013 15.56	LOGIN_INITIATED	User Initiated login
mpeprocurement.gov.in	anandchoukse	05/08/2013 15.36	LOGIN_INITIATED	User Initiated login
	anandchoukse	05/08/2013 15.05	LOGGED-OUT	User logged Out
mpeprocurement.gov.in	anandchoukse	05/08/2013 14.49	LOGGED-IN	User Logged-in-successfully
mpeprocurement.gov.in	anandchoukse	05/08/2013 14.49	LOGIN_INITIATED	User Initiated login
	anandchoukse	05/08/2013 14.48	LOGGED-OUT	User logged Out
mpeprocurement.gov.in	anandchoukse	05/08/2013 14.34	LOGGED-IN	User Logged-in-successfully
mpeprocurement.gov.in	anandchoukse	05/08/2013 14.30	LOGIN_INITIATED	User Initiated login
	anandchoukse	05/08/2013 14.29	LOGGED-OUT	User logged Out
mpeprocurement.gov.in	anandchoukse	05/08/2013 13.51	LOGGED-IN	User Logged-in-successfully
mpeprocurement.gov.in	anandchoukse	05/08/2013 13.51	LOGIN_INITIATED	User Initiated login

19. The intervener also raised the preliminary objection regarding maintainability of the writ petition on the ground that bid of intervener was being highest was accepted and thereafter, he completed certain formalities and on 16.6.13 the respondent no.2 handed over the possession of the dam and thereafter they made huge investment on vehicle, installing ice factory, labour, boats etc and the writ petition if allowed it would result into serious financial loss not only to the answering respondents but also to the State. In respect of allegation regarding technical problems on the website the intervener denied the same and stated that the petitioner had deliberately not upload the

documents and was never interested in participating the tender process as he had no financial assistance as the reserve price of the Indira Sagar Reservoir was Rs.29.28 Crore.

20. The petitioner submitted the rejoinder to the return filed by the respondent no.4 and intervener.

21. In respect of preliminary objection, it is stated that the dispute could be referred to the Registrar under Section 64 (1) (c) of M.P. Co-operative Societies Act, 1960, only if it is between society on one hand and any person (other than a member of the society) who had been granted loan by the society or he had or has business transaction with the society on the other hand. The present "lis" does not arise from any past or existing business transaction between the respondent no.2 and the due to arbitrary, capricious and unfair action of the respondents no.1 to 3 the petitioner was debarred from submitting his bid which resulted in to violation of his fundamental rights, which could only be redressed under the plenary powers of Article 226 of the Constitution of India.

22. As per the Annexure R/3, it is clear that even successful bidder viz Simran Fisheries Pvt. Ltd., initiated its bid by logging in at 2.22 PM on 8.5.13 and was able to make this bid only at about 4.08 PM on 8.5.13. In other words, the intervener took around 106 minutes to complete the process of submitting bidhash online. The other bidder Mr. Manjeet Singh Bhatia initiated login at 12:04 AM on 8.5.13 and completed bid at 4.39 PM on 8.5.13 and thus, took 16 hours and 35 minutes to complete the bidding process.

23. From the aforesaid, it can be safely inferred that the website of respondent no.2 was not functioning effectively and it took sufficiently long time for the bidders to make their bid. In respect of other three bidders who have successfully submitted their bids to on line, it is submitted that they were lucky to have effected their bids and not on account of "response" of the website. The petitioner was not lucky enough to complete his bid solely due to improper functioning of the website of respondent no.3.

24. From the reply of the respondent no.2 it is not in dispute that the petitioner tried to upload only the remaining document ie, bank statement on 8.5.13 and his bid, but he failed to submit the same on the said date. The respondent no.2 also admitted that the petitioner had telephonically informed

the respondent no.3 regarding the problems being faced by him in uploading the documents. It is also not in dispute that the last attempt was made by the petitioner for uploading the bank statement and his bid-hash on line from the office of the Nextenders situated at Tilanga, Bhopal – the implementation-partner of the respondent no.3 and the co-host of the website of the respondent no.2 along with the respondent no.3. Since the petitioner realized that he would not be able to submit his bid on time on account of the problems associated with the website, he teleponically informed the respondents regarding the issue of non responsive and at the same time rushed to the nearby office of the Nextenders situated at Tilanga, Bhopal and tried to make a final attempt from the office of Nextenders. The last login of the petitioner which lasted for 23 minutes was made from the office computer of the Nextenders between 4:23 PM to 4:46 PM. This shows that the petitioner was trying to upload the only remaining document ie., bank statement from the computer and internet connection of Nextenders. His attempt turned out to be unsuccessful and he could not submit his bid hash online.

25. The petitioner had demanded the details of IP addresses of the computers from where he had made attempts to submit bid hash online through email dated 29.6.13 from the respondents but the said details had not been supplied to him by the respondents. The application was also filed by the petitioner seeking directions to the respondents no.2 and 3 for producing the said details vide IA.No.4072/2013. No reply has been filed to the same nor any comments has been made by the respondent no.2 in respect of the aforesaid averment made by the petitioner in the writ petition. The petitioner asserts that there was no defect deficiency or shortcoming in the computer or internet connection of the petitioner through which he was trying to file E-Tender. If there had been any defect, deficiency or shortcoming in the system or internet connection of the petitioner, it would not have been possible for him to even "log in" the website of the respondent no.2.

26. The petitioner had uploaded all the necessary documents on 7.5.13 including the demand draft for Rs.53,00,000/- and, therefore, it cannot be said that he was not serious in submitting his bid. The last date and attempt for submitting of bid was 8.5.13 till 17:00 Hrs and therefore, he can complete formalities and submit his bid till 8.5.13.

27. In respect of availability of the funds, the petitioner in his rejoinder

has stated that he is still ready to purchase the tender for the amount over and above for which the tender has been opened. He had shown his seriousness in the NIT by uploading of the demand draft of Rs.53,00,000/- which has still not been cancelled by the petitioner.

28. The Bank is ready and willing to offer credit facility to the petitioner in case allotment of the tender in question to him. He also submitted that in case of re-tender there shall be no financial lost to the State Government on the contrary State is going to be benefited. As in case of re-tendering, petitioner shall make his bid for an amount of Rs.62.42 Crore at which the contract has been awarded to the intervener. In respect of investment made by the intervener, he submitted that the interim protection was granted by the High Court and the entire tender process shall remain subject to the final out come of the petition. The intervener knowing well that interim order has been passed by the Court on 10.5.13 and notice was duly served to him on 15.5.13 and he was well acquainted with the interim order passed by this Court and he made expenditures at his own risk. With the aforesaid, the writ petitioner prays that this writ petition be allowed.

29. We have heard the leaned counsel for the parties and perused the record of the case.

30. From the return of the respondents and intervener, there is no dispute that without any inspection by Nextender the respondent no.2 in their return stated that the machine used by the bidder for submission was not getting properly connected to the server for which there may be many reasons such as problems in the machine hardware, internet connection etc. When petitioner failed to submit his bid from there, he rushed to the office of the Nextender situated at Tilanga, Bhopal, but he could not succeeded from there also for uploading bank statement and submitting his bid Hash online. Thereafter, he teleponically informed the respondents regarding the issue of non responsive web site. This shows that petitioner tried at his level best to make a final attempt from the office of Nextender between 4:23 PM to 4:46 PM, but his attempt turned out to be unsuccessful and he could not submit his bid Hash on-line.

31. In respect of preliminary objection regarding alternative remedy availabile to the petitioner by raising a dispute under Section 64 (1) (c) of M.P. Cooperative Society Act, 1960. The present dispute does not come

within the purview of the said provision even otherwise the Rule which requires exhaustion of alternative remedies is of Rule of convenience and discretion is self-imposed restraint on the Court, rather than a rule of law. It does not oust the jurisdiction of the Court. Thus, the writ petition of the petitioner which has been filed under Article 226 of the Constitution of India cannot be rejected on the ground that the present dispute can be raised before the Registrar of the society under the provisions of M.P. Co-operative Societies Act, 1960.

32. In the present case the only grievance of the petitioner that due to some technical faults, improper functioning and non response behaviour of the web site of respondent no.2, which is maintained by the respondent no.3, the petitioner could not upload the bank statement and submit his bid – Hash on-line. From the aforesaid conclusion, it is clear that the petitioner was serious in submitting the bid and, therefore, he uploaded all the documents on 7.5.13 and when he tried to upload the only remaining document ie., bank statement he could be unsuccessful due to fault on the system of respondent no.2. There is no report nor any record regarding shortcoming in the computer or internet connection of the petitioner, has been filed by the respondent no.3 nor same has been examined by the respondent no.3 to show that there was difficulty or deficiency or shortcoming in the computer or internet connection of the petitioner through which he was trying to file E-Tender. Record also reveals that petitioner also tried to submit his bid documents from the office of Nextender but his attempt turned out to be unsuccessful and he could not submit his bid on line. He immediately thereafter filed a writ petition on 10.5.13 and on the same day this Court passed an interim order and directed that acceptance of the tender in question shall be subject to the result of the writ petition. Thus there was not delay on the part of the petitioner in approaching to the Court.

33. It is well settled that every action of the State or its instrumentalities should not only be fair, legitimate and above-board but should be without any affection or aversion. It should neither be suggestive of discrimination nor even give an impression of bias, favouritism and nepotism. Procedural fairness is an implied mandatory requirement to protect against arbitrary action.

34. In the present case, the petitioner was prevented to submit his bid due to fault on the system of the respondent no.2, which has been maintained by the respondent no.3. The respondent no.2 was well informed by the petitioner

telephonically and this fact has not been disputed and he also tried to submit his tender through the office of Nextender but not succeeded and thus, it can be inferred that the petitioner was prevented to submit his offer. The petitioner was serious in submitting his offer and, therefore, he submitted demand draft of Rs.55,17,513/- and all other documents. The petitioner also made a statement at bar that he will submit his offer over and above the bid price of the intervener, which has been accepted by the respondent No.2 and thus, if re-tender is made, the respondent nos.1 & 2 are not going to loose anything. On the contrary they will be benefited. The respondent no.2 is under an obligation to secure best grand price available in a market economy, so that larger revenue coming into the coffer of the State administration would serve public purpose.

35. If the action of the State or instrumentality of the State even, in the matter of entering or not entering into contracts, fails to satisfy the test of reasoned ableness, the same would be unreasonable.

36. The Apex Curt in the case of *Michigan Rubber (India) Ltd., V/s. State of Karnataka & Ors,* 2012 (8) SCC 216 held that, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; OR Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached" and

(ii) Whether public interest is affected.

37. If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

38. The petitioner is interested in this contract and has a right under the laws of State to receive the same treatment and be given the same chance as anybody else. The petitioner made all efforts and attempt to submit his on-line

bid. He prepared a draft of Rs.53 lakhs and submitted the same alongwith documents on 7.5.13, on the last date of submission of tender, ie., 8.5.2013, but due to fault on the part of the respondents no.2 and 3, he could not participate in the on-line auction. If he had done so it is evident that the petitioner would have submitted his own bid. Thus, we are of the view that the petitioner was prevented to submit his bid due to fault on the system of respondent No.2.

39. It is also well settled that while disposing of public property State must give equal opportunity to all concerned and endeavour to fetch the best available price in public interest.

40. The intervener M/s. Simran Fisheries Pvt. Ltd well aware about the filing of the writ petition and passing of interim order dated 10.5.13. the learned cuonsel for the intervener gave appearance on 16.5.13 and thereafter, when his bid was accepted, he during pendency of writ petition completed all the formalities within a month thereafter, as per the terms and conditions of the contract and started fishing activities w.e.f. 16.6.13.

41. From the aforesaid facts and circumstances, it is clear that the petitioner was prevented from submitting his bid and thus, we are of the view that the respondent no.2 has not acted reasonably in allotting the tender contract to the intervener because the petitioner was prevented from submitting his bid and thus, we quash the impugned contract and issue a writ of mandamus directing the respondent no.2 to invite fresh bid after taking the written offer from the petitioner that his bid will be over and above the bid of intervener, which has been accepted and finalized on 16.6.13 and after inviting the offer from all, the same may be decided in accordance with law within a period of two months from the date of filing of certified copy of this order, as per the terms and conditions of the NIT and till then intervener shall continue with the work as awarded by the respondent no.2 and intervener and all other interested persons shall participate in the said tender process and thereafter, respondent no.2 shall finalize the bid in accordance with law.

42. In the result, the writ petition is allowed, but without any orders as to costs.

Petition allowed.

I.L.R. [2014] M.P., 1790
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No. 21624/2012 (Jabalpur) decided on 2 September, 2013

APARNA (SMT.) ...Petitioner
Vs.
P. DURGA PRASAD ...Respondent

***Hindu Marriage Act (25 of 1955), Section 24 - Interim alimony* - Salary of the husband is around Rs. 52,885.68 P. per month, after necessary deduction, he is getting in hand Rs. 34,660/- P.M. - Wife did not have any source of income and also not involved in any service or the profession and besides herself, she is also looking after and maintaining two minor daughters - Held - Keeping in view the price index of food stuff and other things in the market and the income of the respondent/husband, the sum of the interim alimony awarded by the trial court is hereby enhanced from Rs. 8,000/- P.M. to Rs. 12,000/- P.M. (Paras 2 & 12)**

हिन्दू विवाह अधिनियम (1955 का 25), धारा 24 – अंतरिम निर्वाह भत्ता – पति का वेतन लगभग रु. 52,885.68 पैसे प्रतिमाह, आवश्यक कटौत्री पश्चात वह रु. 34,660/– प्रतिमाह प्राप्त कर रहा है – पत्नी के पास आय का कोई स्त्रोत नहीं और वह किसी सेवा या व्यवसाय में भी शामिल नहीं तथा स्वयं के अतिरिक्त वह दो अवयस्क पुत्रियों की भी देखमाल और पालन–पोषण कर रही है – अभिनिर्धारित – खाद्य पदार्थ और बाजार की अन्य वस्तुओं का मूल्य दर और प्रत्यर्थी/पति की आय दृष्टिगत रखते हुए, विचारण न्यायालय द्वारा प्रदान की गयी अंतरिम निर्वाह भत्ता की राशि को एतद् द्वारा, रु. 8,000/– प्रतिमाह से बढ़ाकर रु. 12,000/– प्रतिमाह किया गया।

Case referred :

2006 (4) MPLJ 302.

S.K. Rao with *V.K. Pandey* for the petitioner.
Amit Verma, for the respondent.
Respondent *P. Durga Prasad* present in person.

ORDER

U.C. MAHESHWARI, J. :- The petitioner/defendant/wife has filed this petition under Article 227 of the Constitution of India being aggrieved by the order dated 14.9.2010, (Ann. P-1) passed by Additional Principal Judge, Family Court, Jabalpur in Case No. 512-A/2011, whereby her application

filed under Section 24 of the Hindu Marriage Act, in short "The Act", was allowed only in part and respondent was directed to pay Rs.8000/- per month as interim alimony for herself and minor daughter till disposal of the case, on which the petitioner has come for further enhancement in such alimony.

2. The petitioner's counsel after taking me through the papers placed on record alongwith the impugned order said that it is undisputed fact that the respondent's salary is of Rs.52,885.68p. per month, out of which after necessary deduction, he is getting in hand Rs.34,660/-. In continuation, he said that the petitioner did not have any source of income and also not involved in any service or the profession and besides herself, she is also looking after and maintaining two minor daughters, who are studying in the school and looking to the current price index of the market nowadays and the expenses of the education of said daughters, Rs.8000/- per month is very meagre amount. The same requires to be enhanced upto minimum Rs.15,000/- per month. In support of such contention, he also argued that the petitioner as well as her daughters are entitled to move their lives according to the status of the respondent. He also said that on taking into consideration the facts stated by the respondent that he has liability to look after her old parents also even then in view of aforesaid, sum of Rs.34,660/- which actually the respondent is receiving from his service, he may and is bound to pay Rs.15,000/- per month for the petitioner and aforesaid two daughters.

3. He also argued that the trial court has committed error in awarding such monthly sum from the date of passing the impugned order while the same ought to have been awarded from the date of filing the present petition by the respondent and prayed for modification of impugned order by enhancing the monthly sum of alimony awarded by the trial court by admitting and allowing this petition.

4. He also placed his reliance on the decided case of this court in the matter of *Manju Raghuvanshi Vs. Dilip Singh Raghuvanshi* reported in 2006, (4) M.P.L.J., 302.

5. On the other hand, Shri Amit Verma, learned appearing counsel for the respondent by justifying the impugned order said that the same being based on proper appreciation of the available factual matrix including the income of the respondent does not require any interference at this stage for further enhancement. He further said that even in the present scenario of the market, person like the petitioner alongwith two minor daughters may move their lives

very conveniently on the sum of Rs.8,000/- per month.

6. He also said that besides the payment of Rs.8000/- per month, the respondent is also depositing instalments of insurance Child Plan with respect of aforesaid minor daughters and also depositing the EMI to the bank in connection of loan by which some house property was purchased in the name of the petitioner. In such all three heads, he is paying nearly Rs.2000/- per month for the daughters and petitioner. He further said that in any case, if the court comes to conclusion that the impugned order requires any interference for further enhancement of the interim alimony, then taking into consideration all aforesaid aspects as argued by him instead to give any direction to the respondent to pay any enhanced sum in cash, he be directed to pay the sum in kind/part, which is necessary for the human being to live the life conveniently and prayed to decide the matter accordingly.

7. Having heard the counsel at length, keeping in view the arguments advance, I have carefully gone through the papers placed on record.

8. It is apparent fact on record that the petitioner is residing alongwith two minor daughters of the parties. It is also undisputed fact that the two minor daughters are studying in some schools. Nowadays, eduction of children requires a lot of expenses, not only in head of school fee and tuition fee but for stationery, uniform and conveyance charges to go and attend the school, if the same is far away from the residence. Nowadays, it is a normal thing that children use to go to school through bus, auto, van or some other available conveyance. Same requires expenses. Apart from this, various other things like clothes, food substance, medicines etc. are also required to move their regular life. Besides this, some other expenses are also required for their growth. Keeping in view all such heads, in the light of aforesaid monthly income of respondent and his status, on examining the case at hand, I am of the considered view that amount of Rs.8000/- per month being lesser side is meagre and in such amount the needs of the petitioner and her daughters could not be fulfilled. Therefore, the same requires further enhancement.

9. It appears from the papers available on record that the respondent besides payment of aforesaid Rs.8,000/- per month to the petitioner as interim alimony is also depositing Rs.10,000/- p.a. as premium for each of the daughters in some insurance plan. Besides this, he is also paying Rs.500/- per month as EMI in connection of the loan of the house which was purchased in the name of petitioner. Such fact has been disputed by the learned Senior Counsel of

the petitioner saying that there no any such property in the name of the petitioner which was purchased by the respondent in her name. Even such aspect is taken into consideration, then I am of the considered view that on that basis the respondent could not escape from his liability to pay the monthly maintenance to the petitioner and her daughters because the maintenance or the interim alimony is granted to fulfil necessities of the regular life. So, if the aforesaid payment is made by the respondent to the Insurance Company or the bank even then, he is bound to pay such sum to the petitioner which could satisfy the requirements and necessities of the petitioner and her daughters.

10. Although learned Senior Counsel for the petitioner has placed his reliance on aforesaid cited case of this court in the matter of *Manju Raghuvanshi,* (supra), on perusing the same, I have found that the same has distinguishable facts from the case at hand as such the cited case is related to some businessman. In this cited case whether the liability to look after the parents was on the concerning respondent , the same is not clear, while in the case at hand, the liability of the parents are also on the shoulders of respondent. So in such situation, the cited case is not helping to the petitioner to enhance the monthly alimony from Rs.8000/- to Rs.15000/- per month.

11. The petitioner's counsel by referring some decisions of this court and other court said that the monthly alimony ought to have been allowed by trial court from the date of filing the present petition. In the present scenario, such submission has not appealed me because relief is always granted to the parties as per settled proposition. In normal course, the interim alimony is always granted from the date of passing such order and not from the date of filing the petition unless some special circumstances are available in the matter. In the case at hand, it appears that before filing the present petition under Section 24 of the Act, probably the petitioner was not in need of the sum and that is why the application was filed at later stage. So in such premises, I am not inclined to grant interim alimony from the date of filing the petition. So in such premises, it is held that the trial court has not committed any error granting the interim alimony with a direction to the respondent to pay the same from the date of passing the impugned order.

12. In view of the aforesaid discussion, so also keeping in view the price index of food stuff and other things in the market and the income of the respondent, as stated above, the sum of the interim alimony awarded by the trial court is hereby enhanced from Rs.8000/- per month to Rs.12000/- per

month from the date of the impugned order of the trial court.

13. In view of the aforesaid, this petition is allowed in part and interim alimony awarded by the trial court is enhanced from Rs.8000/- to Rs.12,000/- per month from the date of the impugned order. The respondent is further directed to deposit the entire arrears @ Rs.4,000/- per month from the date of impugned order till 31st of August 2013 within six months from today with the trial court and the trial court is directed that instead to disburse such sum of the difference to the petitioner or her daughters, the same be kept in the names of both the minor daughters by mentioning the name of the petitioner as guardian of such daughters with some nationalized bank under some fixed deposit scheme with stipulation of its periodical revival till getting the maturity by such daughters with further stipulation to pay its monthly interest to the petitioner to look after such daughters and herself. If such amount is not paid by the respondent within six months from today, then the petitioner shall be at liberty to recover the sum in accordance with the procedure prescribed under the law. Besides this, the respondent shall also pay the remaining sum of alimony @ Rs.12,000/- per month in between 1st to 10th of every Gregorian calender month. Such amount be deposited in the bank account of the petitioner. There shall be no order as to cost.

Petition partly allowed.

I.L.R. [2014] M.P., 1794
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No. 3079/2012 (Jabalpur) decided on 2 September, 2013

DHARAM DAS RAI ... Petitioner
Vs.
CHIEF MUNICIPAL OFFICER & anr. ...Respondents

Civil Procedure Code (5 of 1908), Order 26 Rule 9 - Appointment of Commissioner - **Application for appointment of Commissioner was rejected by trial court - Another application was filed before Appellate Court hearing appeal against the judgment and decree - Held - Appellate Court ought to have heard the appeal first on merits and thereafter on the application and then decide the application first and subject to out come of such application, the judgment on merits be delivered by the Appellate Court but such process has not been adopted by the Appellate**

Court - Impugned order being perverse is not sustainable and deserves to be set aside. (Paras 3 & 9)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 26 नियम 9 – आयुक्त की नियुक्ति – आयुक्त की नियुक्ति किये जाने हेतु आवेदन को विचारण न्यायालय द्वारा अस्वीकार किया गया – निर्णय और डिक्री के विरुद्ध अपील सुनने वाले अपीली न्यायालय के समक्ष फिर एक आवेदन प्रस्तुत किया गया – अभिनिर्धारित – अपीली न्यायालय को पहले गुणदोषों पर अपील सुननी चाहिए थी और तत्पश्चात आवेदन पर और तब आवेदन का पहले निपटारा करना चाहिये था और उक्त आवेदन के परिणाम के अधीन, अपीली न्यायालय को गुणदोषों पर निर्णय घोषित करना चाहिए किन्तु अपीली न्यायालय द्वारा उक्त प्रक्रिया का अवलंब नहीं लिया गया – आक्षेपित आदेश विपर्यस्त होने के नाते पोषणीय नहीं और अपास्त किये जाने योग्य है।

Umesh Trivedi, for the petitioner.
Vandana Shroti, for the respondents.

ORDER

U.C. MAHESHWARI, J. :- Instead to hear this petition on the question of admission, with the consent of the parties the same is heard finally.

2. Petitioner/appellant/ plaintiff has filed this petition under Article 227 of the Constitution of India being aggrieved by the order dated 13.1.2012, passed by 1st Additional District Judge, Tikamgarh (M.P.) in Regular Civil Appeal No.120-A/2010, whereby his application filed under Order 26 Rule 9 of CPC to call the Commissioner's report regarding disputed place has been dismissed at the interlocutory stage of such appeal.

3. It is undisputed fact between the parties that in pendency of the impugned suit before the trial Court an application for appointment of Commissioner was also filed by the petitioner and on consideration vide order dated 16.4.2010 the trial Court has dismissed the same and at that time such interim order was not challenged on behalf of the petitioner/ plaintiff before any superior Court but subsequently on dismissing his suit he filed the impugned appeal before the appellate Court and in pendency of such appeal he has filed impugned application for appointment of Commissioner to call the report of the disputed place and on dismissing the same the petitioner has come to this Court with this petition.

4. The petitioner's counsel after taking me through the averments of the petition along with the papers placed on record and the impugned order argued

that the alleged dispute of the parties could not be adjudicated effectively unless the Commissioner's report with respect of the disputed property is called and firstly prayed for allowing his application by admitting and allowing this petition. In alternate he said that in view of settled proposition such IA could not have been adjudicated by the appellate Court at the interlocutory stage of the appeal but same could have been considered by such Court while hearing the appeal on merits, on deciding such application at interlocutory stage the right of the petitioner/ appellant to raise the question regarding dismissal of his application in the trial Court has been prejudice and he has been deprived to raise such question at the time of final hearing while as per provision of Section 105 of CPC, the petitioner has a right to challenge any interim order of the trial Court after deciding the case by the trial Court in duly constituted appeal. So, in such premises the approach of the appellate Court holding that such interlocutory order of the trial Court on such application being not challenged at the interlocutory stage, in the light of such earlier order of the trial Court this application could not be considered and allowed is not sustainable and prayed for appropriate direction to the appellate Court to consider and decide the aforesaid question afresh at the time of final hearing of the impugned appeal.

5. On the other hand responding the aforesaid arguments Smt. Vandana Shroti, learned appearing counsel of the respondent by justifying the impugned order said that the same being based on proper appreciation of the factual matrix of the matter is in conformity with law, it does not require any interference and prayed for dismissal of this petition.

6. Having heard the counsel keeping in view their arguments, I have carefully gone through averments of the petition along with the papers placed on record and the impugned order. It is settled proposition of law that every interlocutory application filed by the parties at the appellate stage should be considered and decided by such Court at the time of final hearing of appeal and not at the interlocutory stage except the applications of interim nature filed for grant of interim relief like interim injunction, appointment of Receiver or substitution of the legal representatives etc. The present application filed by the appellant at the appellate stage for appointment of Commissioner, ought to have been considered and decided by the appellate Court at the stage of final hearing of such appeal, such issue could not have been decided in part before hearing the appeal on merits, specially when such question against the findings of the trial Court is also pending for adjudication on final hearing of

the appeal.

7. Keeping in view the aforesaid legal position if the case at hand is examined then it is apparent that in pendency of the suit the petitioner/ plaintiff has filed an application for calling the commissioner report before the trial Court, the same was dismissed on 16.4.2010 against that neither any revision nor writ petition was filed, so in such premises the right to challenge the findings of such interlocutory order of the trial Court did not go away but in view of the provision of Section 105 of CPC the petitioner has a right to challenge such interlocutory order, dismissing his application by the trial Court before the appellate Court. As per existing legal position such question could be considered by the appellate Court at the stage of final hearing of the appeal and not prior to that. In such premises, I am of the considered view that the appellate Court has committed grave error in deciding the impugned application on merits at the interlocutory stage, specially when the such question is also involved in the appeal and the same is to be considered and decided at the time of final hearing of appeal.

8. The approach of the appellate Court holding that impugned application of the petitioner/ appellant could not be entertained because of the aforesaid interlocutory order dated 16.4.2010 passed by the trial Court, dismissing such application was not challenged at that stage before the superior Court is also not correct, as such after passing the final judgment and decree on filing the appeal the party has a right to challenge any interlocutory order of the trial Court in such appeal. So, in such premises also the approach of the appellate Court is not sustainable.

9. In view of the aforesaid, I am of the considered view that appellate Court ought to have heard the appeal first on merits and thereafter on the impugned application and then decide the application first and subject to out come of such application the judgment on merits be delivered by the appellate Court but such process has not been adopted by the appellate Court. In such premises the impugned order being perverse is not sustainable and deserves to be and is hereby set aside. However, it is made clear that setting aside the impugned order does not mean that the impugned application of the petitioner is being allowed by this Court. In fact by setting aside the impugned order, the appellate Court is directed to hear the appeal first on merits and then on the aforesaid application of the petitioner/ appellant and decide the impugned application and the appeal on merits respectively. So, in such premises the

appellate Court shall be in a position to consider the arguments of the parties which may be raised by them in response of the aforesaid interlocutory order of the trial Court dated 16.4.2010.

10. In view of the aforesaid by allowing this petition in part, the impugned order is set aside and the appellate Court is directed to hear the appeal first on merits and then on the impugned application filed under Order 26 Rule 9 of CPC by the petitioner/ appellant and decide the impugned application first and subject to out come of the same decide the appeal on merits.

11. Petition is allowed in part as indicated above. There shall be no order as to costs.

Petition partly allowed.

I.L.R. [2014] M.P., 1798
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 14667/2006 (Jabalpur) decided on 12 September, 2013

ANSAL WELFARE ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

(and W.P. No. 7599/2007)

A. Society Registrikaran Adhiniyam, M.P. (44 of 1973), Section 2, Prakoshtha Swamitva Adhiniyam, M.P. 2000 (15 of 2001), Sections 22 & 43(2) - Registration of Society - **Where association of persons constitutes the society and get it registered under 1973 Adhiniyam to achieve the objects, the same cannot be questioned - Merely because the said society has taken up work of management and maintenance of apartments for the purpose of Act of 2000 and merely because as alleged one association of apartment owners can look after management and maintenance of the apartment ipso facto will not render the registration of Ansal Welfare Society illegal.**
(Paras 15 & 16)

क. सोसायटी रजिस्ट्रीकरण अधिनियम, म.प्र. (1973 का 44), धारा 2, प्रकोष्ठ स्वामित्व अधिनियम, म.प्र., 2000 (2001 का 15), धाराऐं 22 व 43(2) – सोसायटी का रजिस्ट्रीकरण – जब व्यक्तियों का सहयोजन, सोसायटी गठित करता है और उसे 1973 के अधिनियम के अंतर्गत उद्देश्यों की प्राप्ति के लिये रजिस्ट्रीकृत कराया जाता

है, उक्त पर प्रश्न नहीं उठाया जा सकता – मात्र इसलिये कि उक्त सोसायटी ने अधिनियम 2000 के प्रयोजन हेतु भवनों का प्रबंधन एवं रखरखाव का कार्य ले लिया है और मात्र इसलिये कि जैसा कि अभिकथित किया गया कि भवन स्वामियों का एक संगम भवन के प्रबंधन और रखरखाव को देख सकता है, स्वयंमेव ही अंसल वेलफेयर सोसायटी के रजिस्ट्रीकरण को अवैध नहीं बना सकेगा।

B. Society Registrikaran Adhiniyam, M.P. (44 of 1973), Section 2, Prakoshtha Swamitva Adhiniyam, M.P. 2000 (15 of 2001), Sections 22 & 43(2) -Management & Maintenance by Society - **Provisions contained under Section 22 of 2000 Act aims at having that the management and maintenance of Apartments vests with a single association and not with various association - Various groups of association may exist, but if they have not formed a Federal Association as provided under Section 22 of 2000 Act, they cannot claim separate management and maintenance of the apartment - Therefore, same has rightly been vested with Lake View Enclave Apartment Owners Welfare Association. (Paras 33 & 34)**

ख. सोसायटी रजिस्ट्रीकरण अधिनियम, म.प्र. (1973 का 44), धारा 2, प्रकोष्ठ स्वामित्व अधिनियम, म.प्र., 2000 (2001 का 15), धाराऐं 22 व 43(2) – सोसायटी द्वारा प्रबंधन एवं रखरखाव – अधिनियम 2000 की धारा 22 के अंतर्गत उपबंधित प्रावधानों का उद्देश्य यह है कि भवनों का प्रबंधन और रखरखाव एकल संगम में निहित करना है और न कि विभिन्न संगमों में – संगम के विभिन्न गुट विद्यमान हो सकते हैं किन्तु यदि उन्होंने परिसंघीय संगम नहीं बनाया है जैसा कि अधिनियम, 2000 की धारा 22 के अंतर्गत उपबंधित किया गया है, तब वे भवन के पृथक प्रबंधन एवं रखरखाव का दावा नहीं कर सकते – अतः उक्त को उचित रुप से लेक व्यू एनक्लेव अपार्टमेंट ओनर्स वेलफेयर एशोसियेशन में निहित किया गया है।

Pushpendra Yadav, for the petitioner.
Ajay Mishra with *P. Tripathi,* for the respondent No.3.

ORDER

SANJAY YADAV, J. :- Heard.

1. Order dated 21.9.2006 passed by the State of Madhya Pradesh in an appeal under Section 40 of the Madhya Pradesh Society Registrikaran Adhiniyan, (sic:Adhiniyam) 1973 (for short '1973 Adhiniyan'(sic:Adhiniyam) is being assailed vide these two writ petitions. Accordingly, these petitions are analogously heard and a common order is being passed.

2. Respective petitioners (i.e. petitioner in W.P. No. 14667/2006 and W.P. No.7599/2007) are the Societies registered under 1973 Adhiniyam and are Owners Association for Lake View Ansal Apartment, under Madhya Pradesh Prakoshtha Swamitva Adhiniyam 1976, presently, the Madhya Pradesh Prakoshtha Swamitva Adhiniyam, 2000.

3. Brief facts leading to controversy are that M/s Ansal Housing Construction Limited (hereafter referred to as promoter) had developed multi-storeyed group housing project named Ansal Enclave at Shymla Hills, Bhopal, consisting of blocks of multistoreyed residential apartments and some duplex row houses. The project lay on land of survey Nos.67, 68, 69 and 72/1/1. There are 180 apartments in Ansal Enclave of which 45 are on ground floor, 135 on the first, second and third floor.

4. The developer, promoter and builder had raised construction after taking due permission and by adhering to the norms laid down in the Madhya Pradesh Prakoshtha Swamitva Adhiniyam, 1976. It is not in dispute that the stipulation laid down under Sections 4, 5 and 6 of Adhiniyam, 1976 has been adhered to. That a declaration required under Section 11 was tendered on 2.2.94.

5. That an association of apartment owners was formed named Lake View Enclave Apartment Welfare Association, Shymla Hills, Bhopal on 23.4.1997 and was registered with the Registrar under 1973 Adhiniyam. The bye-laws were approved on same date. The association was formed to discharge the statutory obligations of proper maintenance, management and upkeep of common areas and facilities. That with the formation of owners association, the builder, vide public notice-dated 4.9.1998, relinquished the management and maintenance in favour of Lake View Enclave Apartment Welfare Association.

6. When the matter stood thus, Adhiniyam 1976 was substituted by new Act, viz., the Madhya Pradesh Prakoshtha Swamitva Adhiniyam, 2000 w.e.f. 9.5.2001. That with coming into force of Act 2000, Act of 1976 came to be repealed vide sub-section (1) of Section 43; however, by saving clause contained under sub-section (2) of Section 43, anything done or any action taken or purported to have been done or taken under or in pursuance of the repealed Act if not inconsistent with the provision of 2000 Act was saved.

7. That, the formation of Association viz., Lake View Enclave Apartment,

Owners Welfare Association being not inconsistent with the provision of 2000 Act got saved.

8. That in 2003 some dispute arose amongst the occupants of the apartment in question over construction of boundary walls, toilet, dining rooms and bathrooms by those living on the ground floor which led Municipal Corporation to initiate action prompting the ground floor apartment owners to file Civil Suit for injunction vide C.S. No.42-A/2005 before the Civil Judge Class I, Bhopal, wherein on 5.9.2005 an injunction application was dismissed. An appeal preferred thereagainst under Order 43(1)(r) CPC vide MCA No.18/2005 was also dismissed on 9.1.2006. The order rejecting the interim injunction was finally affirmed in Writ Petition No. 959/2006 which was dismissed on 16.5.2006.

9. That, on 13.3.2006, an Ansal Welfare Society (Petitioner in W.P. No.14667/2006) came to be registered under Adhiniyam 1973. This registration came to be challenged by the petitioner (in W.P. No.7599/2007) before Registrar, Firms and Societies. The appeal was decided on 28.6.2006 in the following terms :-

> "अपीलार्थी एवं प्रतिप्रार्थी के उपरोक्त तथ्य एवं अधिनियम के प्रावधानों के अनुसार यह स्पष्ट है कि अपीलार्थी एवं प्रतिप्रार्थी दोनों की संस्थाएं, मध्यप्रदेश सोसायटी रजिस्ट्रीकरण अधिनियम, 1973 के अधीन पंजीकृत संस्था है तथा उक्त दोनों संस्थाओं पर मध्यप्रदेश सोसायटी रजिस्ट्रीकरण अधिनियम, 1973 के समस्त प्रावधान लागू होते हैं तथा दोनों ही संस्थाओं का पंजीयन अधिनियम के प्रावधानों के तहत ही किया गया है । अपीलार्थी संस्था वर्तमान में संबंधित परिसर का कार्य एवं व्यवस्था अपने उद्देश्यों के तहत कर रही है । चूंकि दोनों संस्थाएं अलग अलग पंजीकृत है, इसलिये वे अपना अपना कार्य करने के लिए स्वतंत्र है । दोनों संस्थाओं को अपने अपने क्षेत्राधिकार में रहकर कार्य करना चाहिए तथा एक दूसरे के कार्य में हस्तक्षेप नहीं करना चाहिए । उपरोक्त के प्रकाश में पूर्व में दिये गये स्थगन को समाप्त करते हुए प्रस्तुत अपील अस्वीकार की जाती है ।"

10. Aggrieved, the petitioner (in W.P. No.7599/2007) preferred an appeal before the State Government. The appeal came to be decided on 21.9.2006. Whereon, while upholding the registration of Ansal Welfare Society (Petitioner in W.P. No.14667/2006) directed that the management of the apartment in question would in accordance with the declaration given by the builder and the agreement arrived at between the builder and the purchasers on 6.8.1997 wherein Lake View Enclave Apartment Owners Association was recognized as association of apartment owners. The Appellate Order by the State is in

the following terms :-

> प्रकरण में प्रस्तुत किये गये तथ्यों के आधार पर यह स्पष्ट होता है कि अपीलार्थी संस्था वर्ष – 1997 के बाद से विषयांकित परिसर के रखरखाव, पानी, स्ट्रीट लाईट, लिफ्ट आदि की व्यवस्था कर रही थी । यह भी स्पष्ट होता है कि नयी संस्था के गठन के उपरान्त एक ही परिसर में एक ही कार्य हेतु दो संस्थायें होने के कारण परिसर की व्यवस्थायें अव्यवस्थित हो गई है । जिससे वहां के रहवासियों को अनेक कठिनाईयां होना स्वाभाविक है । अपीलार्थी संस्था द्वारा प्रतिप्रार्थी संस्था के गठन का मूल कारण भूतल के निवासियों के कुछ निजी हित बताये है जिसका व्याख्यात्मक रूप से कोई प्रतिवाद प्रतिप्रार्थी संस्था द्वारा नहीं किया गया । यह विचारणीय है कि बहुमंजिला इमारतों में अलग–अलग मंजिलों के फ्लेटस् में उपरोक्त सुविधाओं का रखरखाव एक से अधिक संस्था द्वारा किस प्रकार संभव है वह भी तब जब कि इन सुविधाओं का निर्माण इस दृष्टिकोण से नहीं किया गया था कि भविष्य में इनका रखरखाव एक से अधिक संस्थायें करेंगी । उदाहरण स्वरूप अलग–अलग फ्लेट्स/मंजिल पर अलग–अलग फ्लेटस् को सुरक्षा नियुक्त किये गये चौकीदार द्वारा किस प्रकार की जायेगी या सफाई कर्मचारी द्वारा कहॉ की सफाई कर कहां की नहीं की जायेगी इत्यादि । अपीलार्थी संस्था द्वारा उपलब्ध कराये बिल्डर एवं एक फ्लेट क्रय कर्ता के मध्य अनुबन्धित शर्तो की छायाप्रति के अनुसार (कंडिका क्रमांक–18) परिसर का रखरखाव बिल्डर या इसके नामिनि द्वारा करने का उल्लेख है । तथा दिनांक 6/8/97 को अपीलार्थी एवं असंल हाउसिंग कंस्ट्रक्शन लि. की बैठक के कार्यविवरण की उपलब्ध कराई गई छायाप्रति में यह सहमति हुई कि उक्त कार्य अपीलार्थी संस्था द्वारा किये जावेगें । रजिस्ट्रार, फर्म्स एवं संस्थायें, म.प्र. भोपाल द्वारा दिये गये आदेश यद्यपि सोसायटी रजिस्ट्रीकरण अधिनियम 1973 के अनुरूप है तथापि उनके द्वारा उपरोक्त बिन्दुओं पर विचार नहीं करने की त्रुटि की गयी है । अतः रजिस्ट्रार, फर्म्स एवं संस्थायें, म.प्र. भोपाल के आदेश को यथावत रखते हुए यह व्यवस्था दी जाती है कि परिसर के सभी फ्लेट्स की सुरक्षा तथा परिसर में पार्क, लिफ्ट, पानी बिजली तथा सफाई संबंधी समस्त कार्यो को करने का दायित्व बिल्डर एवं क्रेता के मध्य हुए अनुबन्ध के शर्तो अनुसार व दिनांक 6/8/97 को सम्पन्न बैठक में हुई सहमति अनुसार अपीलार्थी संस्था को ही है अतः अधिनियम की धारा–11 के तहत रजिस्ट्रार इसका पालन सुनिश्चित करायें ।

11. Copy of minutes of meeting-dated 6.8.1997 which finds mention in the appellate order is brought on record as Annexure R-3/8 by respondent No.3 in W.P. No. 14667/2006. The meeting was held between the members of Lake View Enclave Welfare Association and the Vice President (Adm. and Land Purchase) of Ansal's Housing Construction Ltd., New Delhi at Ansal's local office at Shymla Hills. It was resolved therein :-

After detailed discussions on the above points the Vice-President *AHCL*, promised to instruct his staff at Bhopal to take corrective action and rectify the various problems and replace fittings and fixtures and do the desired rectifications immediately:.

[a] To look into the up-keep of the campus by regular cleaning by the malies (Gardener).

[b] To strengthen the security staff.

[c] To stop picknikers and sight-seeing stray visitors and tresspassers to the colony, putting up various instruction on notice boards and road signs.

[d] To arrange for street lights from Jahanuma onwards, up to LVE.

[e] To undertake immediately the construction of Boundary wall which is essential for such group housing complex. This can be easily done from the stones which are excavated under construction of sewage lines.

[f] No land would now (from 08-08-1997) be leased/sold to ground floor owners or prospective owners.

[g] *AHCL* would supply all the information asked, for preparation of fresh draft agreement.

[h] Vice-President promised removal and suitable action against senior staff AHCL Bhopal office and towards appointing minimum (only) staff which is needed/useful for maintenance purpose and bringing out attitudinal changes in their behaviour with the flat owners.

It is further requested that suitable corrective action be kindly taken on priority to enable the Association to take over the Lake View Apartment Complex.

It was also brought to the notice of Vice-President *AHCL* that as per the agreement between the Builder & *AHCL*, the builder (M/S Dilip Builders, Bhopal) has agreed in writing to maintain the Flat/Building for a period of 3 years where as it is seen

that the flat owners are being charged Maintenance charges from day-one, the day flat is taken over by owner's and exorbitant bills are being given & recoveries made from the flat owners. This is illegal and amounts to breach of trust. In view of the agreement the flat owners are not duty bound to pay maintenance charges to *AHCL* except for water & other essential services.

Vice-president showed his ignorance about the said agreement and promised to look into it and to do needful accordingly.

The above points in greater details have been discussed with *Mr. S.C. Wadhwa and Mr. Khanna.*

Lastly, all the members of LVE owners Association who attended the meeting, wish to place on records our deep sense of appreciation and extend our special thanks to the Top Management of AHCI (sic:AHCL) for sending Mr. S.C. Wadhwa to Bhopal and under standing our difficulties. We hope corrective action & rectification is carried out immediately.

12. On these facts, two questions crop up for consideration. Whether the State Government is justified in upholding the registration of Ansal Welfare Society under the 1973 Adhiniyam? And, in confining the management and maintenance work of the apartment in question with Lake View Enclave Apartment Owners Welfare Association ?

13. In respect of the registration of Ansal Welfare Society under the Adhiniyam, 1973, learned counsel appearing for Lake View Enclave Apartment Owners Welfare Association is unable to show any provision either in 1973 Adhiniyam or Act of 2000 that association of persons cannot get themselves registered under the Adhiniyam, 1973.

14. 1973 Adhiniyam was enacted to consolidate and amend the law relating to registration of literacy, scientific, education, religious, charitable or other societies, in Madhya Pradesh. As per Section 2 of Adhiniyam, 1973, it applies to Societies formed for all or any of the following purposes, namely, promotion of science, education, literature of fine arts; diffusion of useful knowledge; diffusion of political education; foundation or maintenance of libraries or reading rooms for general use among the members or upon to the public; establishment and maintenance of galleries of paintings and other works of art; establishment

and maintenance of public museums; collection of natural history, mechanical and philosophical inventions, instructions or designs; promotion of social welfare; promotion of religious or chartable purpose including establishment of funds for welfare of military orphans welfare of political suffers and welfare of the like; promotion of gymnastics; promotion and implementation of different schemes sponsored by the State Government or the Central Government; promotion of Commerce, Industries and Khadi.

15. Thus, where association of persons constitutes the society and get it registered under 1973 Adhiniyam to achieve the object as stipulated under Section 2 of 1973 Adhiniyam, the same cannot be questioned merely because the said society has taken up work of management and maintenance of apartments for the purpose of Act of 2000 is governed by the said Adhiniyam and merely because as alleged one association of apartment owner can look after management and maintenance of the apartment *ipso facto* will not render the registration of Ansal Welfare Society illegal.

16. Therefore, challenge putforth by the petitioner Lake View Enclave Apartment Owners Welfare Association (Writ Petition No.7599/2007) as to affirmation of Ansal Welfare Society as a Society under the Adhiniyam, 1973 by the State Government cannot be upheld and therefore negatived.

17. The next question which crops up for consideration is as to whether the State Government is justified in confining the management and maintenance of the apartment in question with Lake View Enclave Apartment Owners Welfare Association ?

18. It is not in dispute that when the apartments were constructed, Madhya Pradesh Prakoshtha Swamitva Adhiniyam, 1976 was in vogue. The 1976 Adhiniyam provided for the ownership of an individual apartment in a building and to make such apartment heritable and transferable property. That, Adhiniyam 2000 has been enacted to replace 1976 Adhiniyam w.e.f. 9.5.2001.

19. Section 2 of Adhiniyam 2000 stipulates that it shall apply to every apartment in any building constructed or converted into apartment by a promoter before or after the commencement of the Act, on free hold land or land held on lease.

20. Clause (b) of Section 2 defines 'apartment' and clause (d) of Section 3 defines 'apartment owner' which means the person owning an apartment and an undivided interest in the common areas and facilities appurtenant to

such apartment in the percentage specified in the deed of apartment.

(Emphasis supplied)

21. Clause (e) of Section 3 defines 'Association' in the following terms -

> (e) "Association" means an association consisting of all the apartment owners in a building acting as a group in accordance with the bye-laws, if two or more buildings are grouped together by the promoter in the deeds of apartments, a single association shall be formed for all the apartments, in the buildings so grouped. Membership will be extended to allottees under a hire purchase agreement. Associate membership will be extended to the promoter and to person in occupation, whether under a tenancy, lease, licence from the owner or otherwise, but they will not be entitled to become a member of the board or to have any voting rights in matters concerning ownership of apartments or disposition of property.

22. Furthermore, clause (j) of Section 3 defines "Common expenses" to mean -

> (i) all sums lawfully assessed against the apartment owners by the association for meeting the expanses of administration, maintenance, repair or replacement of the common areas and facilities;
>
> (ii) expenses, declared by the provisions of this Act or by the bye-laws or agreed upon by the association, as common expanses;
>
> (iii) Government and municipal taxes including ground rent and property tax, which is not assessed separately for each apartment.

23. That Section 4 deals with the Ownership Apartments; sub-section (3) whereof stipulates that "the apartment owners shall own in common the common areas and facilities. Neither the promoter nor the association shall have any ownership right in the common areas and facilities. The association shall be vested with the management and maintenance of the common areas and facilities."

24. Furthermore, sub-section (3) of Section 5 of Adhiniyam, 2000 aims at that "The association shall have the irrevocable right to be exercised by the board to have access to each apartment from time to time during reasonable hours for the maintenance, repairs or replacement of any of the common areas of facilities therein or accessible therefrom or for making emergency repairs therein necessary to prevent damage to the common areas and facilities or to any other apartment or apartments."

25. Section 8 of the Adhiniyam, 2000 mandates that "an apartment owner shall comply strictly with this Act the rules and the bye-laws and with the covenants, conditions and restrictions set forth in the deem of apartment and failure to comply with any of them shall be a ground for action to recover sums due for damages, or for injunctive relief, or both by the board on behalf of the association, or in proper case, by an aggrieved apartment owner, before the competent authority.

26. That Section 14 of the Adhiniyam, 2000 deals with deed of apartment and its registration and its specifically prescribes that at the time of allotment or sale or other transfer of an apartment made by promoter to the allottee, a deed shall be executed witnessing such transfer/allotment within three months and which would contain compulsorily the information detailed in Section 14(1)(a) to (k) of Adhiniyam, 2000. Section 14(5) clearly prescribes that execution of the deed of apartment would vest the apartment owner with the exclusive ownership and possession of the apartment together with the percentage of undivided interest in the common areas and facilities related to such apartment as heritable and transferable property. Section 14(5) further prescribes that on execution of a document transferring management of the property and the common areas and facilities to the association, the same shall be vested in the association though the association will not be the owner of the property or building of the common area and facilities.

27. That, Chapter IV of Adhiniyam, 2000 is related to association and regulation of its affairs. Section 18 prescribes for formation of association. Sub-section (1) whereof prescribes that after obtaining certificate for the building and within three months of 1/3rd of the apartments being allotted, sold or otherwise transferred the promoter shall make an application to the competent authority for the registration of association, with the persons who have taken the apartment as members. Sub-section (1) further prescribes that if promoter fails to make such application, the apartment purchasers can

make such application and there shall be an association, with the apartment owners as its members for the administration of the affairs in relation to the apartments and the property and for management, maintenance and upkeep of the property, the common areas and facilities and common services.

28. Section 11 of Adhiniyam, 2000 stipulates that "no apartment owners shall do any work which would be prejudicial to the soundness or safety of the property or reduce the value thereof or impair any easement or hereditament or shall or shall add any material structure or excavate any additional basement or cellar, without first obtaining the consent of all the other apartment owners.

29. Section 20 confers powers and functions of an association, formed under Section 18, these are -

(a) under Section 5, right of access to apartment;

(b) under Section 18, responsibility for the administration and management of the property and maintenance and upkeep of the common areas and facilities and common services;

(c) under Section 22, right to become member of a federal association;

(d) under Section 23, power to repair, reconstruction or rebuilding of the property which is damaged or destroyed;

(e) under Section 24, power to take action relating to the common areas and facilities or on behalf of two or more apartment owners;

(f) under Section 26, responsibility for assessment of the share in the common expenses chargeable to each apartment;

(g) under Section 30, liability for any breach of law in respect of the common areas and facilities;

(h) under Section 31, power to recover amounts from apartment owner or other persons and right to apply to Collector for recovery of unpaid amount as an arrear

of land revenue;

(i) under Section 32, the duty to collect Government and municipal taxes from the apartment owners for remittance to Government or local authority;

(j) under Section 33, the duty to arrange for insurance.

30. That Section 21 provides for bye-laws governing the administration of the affairs to the association and management of the property.

31. That, though vide sub-section (1) of Section 43 of the Adhiniyam, 2000, 1976 Adhiniyam has been repealed; however, by virtue of sub-section (2) of Section 43, anything done or any action taken or purported to have been done or taken under or in pursuance of the repealed Act i.e. Adhiniyam 1976 and not inconsistent with the provisions of Adhiniyam, 2000 have been saved.

32. Thus, the combined reading of various provisions indicates for one association having collective responsibility towards management and maintenance. Even if there are group of association, Section 22 aims at formation of Federal association. It stipulates that any group of associations which so desire may form a federal association. Such federal association will be deemed to be a Federal Co-operative Society under the Madhya Pradesh Co-operative Societies Act, 1960.

33. Subject to the provisions contained under Section 22, the statute aims at having that the management and maintenance of the apartments vests with a single association and not with various associations. Various groups of association may exist for the apartments but if they have not formed a federal association as provided under Section 22, they cannot, contrary to the arrangements made at the inception, claim for separate maintenance and management of the apartment.

34. In the case at hand, apparently the constitution of association of owners in the year 1997 having been saved by virtue of sub-section (2) of Section 43 of Adhiniyam 2000, the petitioner in Writ Petition No.14667/2006 i.e. Ansal Welfare Society cannot claim a separate right of maintenance and management of Ansal Apartment, which is rightly being adjudged by the State Government of having vested in Lake View Enclave Apartment Owners Welfare Association.

35. In view whereof, the order passed by the State Government on 21.9.2006 is upheld. The respective challenge to the said order vide these writ petitions is negatived. They, accordingly, fail and are hereby dismissed. Parties to bear their respective costs.

Petition dismissed.

I.L.R. [2014] M.P., 1810
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 17028/2013 (Jabalpur) decided on 4 October, 2013

RAJESH KUMAR SONI & ors. ...Petitioners
Vs.
STATE OF M.P. & anr. ...Respondents

***Education Service (School Branch) Recruitment and Promotion Rules, M.P. 1982* - Rejection of petitioner's candidature for appointment of Area Education Officer on the ground that he does not possess 5 years teaching experience as Teacher/U.D.T./Head Master/Adhyapak of local bodies - Experience gained by him as Assistant Teacher, cannot be counted - Held -Unless the incumbent fulfills all the three elements, he is not entitled to be appointed as Area Education Officer - Experience gained by the petitioner prior to his promotion to the post of Upper Division Teacher cannot be taken into consideration - Experience gained on the feeder cadre can only be taken into consideration. (Paras 2, 8 & 9)**

शैक्षणिक सेवा (शालेय शाखा) भर्ती और पदोन्नति नियम, म.प्र., 1982 – क्षेत्रीय शिक्षा अधिकारी की नियुक्ति हेतु याची की अभ्यर्थिता को इस आधार पर अस्वीकार किया गया कि स्थानीय निकाय के शिक्षक/उच्च श्रेणी शिक्षक/प्रधान अध्यापक/अध्यापक के रुप में उसके पास 5 वर्ष सिखाने का अनुभव नहीं – सहायक शिक्षक के रुप में उसके द्वारा प्राप्त किये गये अनुभव को नहीं गिना जा सकता – अभिनिर्धारित – जब तक कि पदधारी सभी तीन तत्वों की पूर्तता नहीं करता, वह क्षेत्रीय शिक्षा अधिकारी के रुप में नियुक्त किये जाने का हकदार नहीं – याची द्वारा उच्च श्रेणी शिक्षक के पद पर उसकी पदोन्नति से पूर्व प्राप्त किये गये अनुभव को विचार में नहीं लिया जा सकता – केवल फीडर कैडर में प्राप्त अनुभव को विचार में लिया जा सकता है।

Cases referred :

(2001) 8 SCC 119, (1995) Supp. (2) SCC 607, (2001) 4 SCC 309.

P.N. Dubey, for the petitioners
Vivek Sharma, P.L. for the respondents.

ORDER

SANJAY YADAV, J. :- Heard.

1. Rejection of candidature for appointment of Area Education Officer on the ground that the petitioners do not possess requisite year of teaching experience is cause for present writ petition.

2. That the cadre of Area Education Officer came to be created by causing amendment in the Madhya Pradesh Education Service (School Branch) Recruitment and Promotion Rules, 1982. The posts are to be filled up through a limited Departmental Examination from amongst Teachers (Upper Division Teachers) Head Masters of Middle School/Adhyapak of Local Bodies.

3. The minimum educational qualifications and other requisitions as per amendments in Rule 1982 published in Madhya Pradesh Gazette (Extraordinary) dated 22.08.2013 are "Graduate Degree from recognized University and B.Ed. which should be recognized by the National Council for Teachers Education and Teachers (Upper Division Teachers) Head Masters of Middle Schools/Adhyapak of Local Bodies cadre who has five years minimum teaching experience."

4. The petitioners though Upper Division Teachers promoted in the year 2012 were allowed to participate in the limited examination held on 08.09.2013; however, at the stage of verification of original testimonials, the petitioner's candidature has been cancelled.

5. Petitioners blame the issuance of letter dated 16.09.2013 being the cause for rejection. The letter is in the following terms:

मध्य प्रदेश शासन
स्कूल शिक्षा विभाग
मंत्रालय, वल्लभ भवन

कमांक एफ13–24/2013/20–1/1012 भोपाल, दिनांक 16/09/2013

प्रति,

1. समस्त संभागीय संयुक्त संचालक,
लोक शिक्षण मध्यप्रदेश

2. समस्त जिला शिक्षा अधिकारी,
मध्यप्रदेश

3. समस्त सहायक आयुक्त,
आदिवासी विकास विभाग,
मध्यप्रदेश

विषयः– ए.ई.ओ. के पद के लिए सूचीबद्ध आवेदकों के अभिलेखों का परीक्षण करने के संबंध में।

सन्दर्भः–इस विभाग का समसंख्यक पत्र दिनांक 12.09.2013.

कृपया सन्दर्भित पत्र का अवलोकन करें। ए.ई.ओ. पद के लिए सूचीबद्ध आवेदकों के कार्य अनुभव के संबंध में अभिलेखों के परीक्षण करने के संबंध में निम्नानुसार कार्यवाही की जाए :–

1. अध्यापक संवर्ग में कार्य अनुभव के वर्षों की गणना अभ्यर्थी के अध्यापक संवर्ग में वास्तविक नियोजन की तिथि से की जाए। चूँकि अध्यापक संवर्ग का गठन दिनांक 01.04.2007 से हुआ है। ऐसी स्थिति में इस तिथि के पूर्व के कार्य अनुभव की गणना न की जाए।

2/ ऐसे अध्यापक जो जनशिक्षक/बीआरसी/बीएसी के पदों पर कार्य कर रहे हैं, उनकी सेवा अवधि कार्य अनुभव की गणना के लिए मान्य की जाएगी।

3/ शिक्षक/प्रधान अध्यापक के पद पर कार्य अनुभव शिक्षक के पद पर वास्तविक रूप से नियुक्त होने के दिनांक से मान्य किया जाए।

(आर.के. चौकसे)
उप सचिव
म.प्र. शासन, स्कूल शिक्षा विभाग

6. It is urged that it is because of the issuance of above letter which has led the respondents not to take into consideration the experience gained by each of them as Assistant Teachers. It is contended that the stipulation in the letter dated 16.09.2013 laying down that Upper Division Teacher and Head Master must possess experience of five years to be eligible for appointment as Area Education Officer, is contrary to the Rules, therefore, deserves to be quashed and the petitioners be declared eligible for appointment as Area

Education Officer.

7. Considered the submissions.

8. The eligibility criteria for appointment to the post of Area Education Officer as brought in vogue by way of amendment at the cost of repetition is:

"4	Area Education Officer (AEO)	-	-	Graduate Degree from recognized University and B.Ed. which should be recognised by National Council for Teachers Education and Teachers (Upper Division Teachers) Head Masters of Middle School/Adhyapak of local bodies cadre who has 5 years minimum teaching experience.	Selection by limited Examination from the post of Head Masters, Middle School, and Teachers (Upper Division Teachers) and Adhyapak of Local Bodies Cadre."

9. Thus, the feeder cadre, educational qualification and the teaching experience has been clubbed. Thus, unless the incumbent fulfills all the three elements, he is not entitled to be appointed as Area Education Officer. The suggestion that the experience gained by the petitioner prior to their promotion to the post of Upper Division Teacher should be taken into consideration cannot be accepted because minimum qualification being Upper Division Teacher/Head Master/Adhyapak in Local Bodies, the experience gained after the appointment on the feeder cadre can only be taken into consideration. In this context, reference can be had of the decision in *Nilangshu Bhusan Basu v. Deb K. Sinha and others* (2001) 8 SCC 119 wherein it has been held:

> "15. Learned counsel for the petitioner failed to substantiate the submission that experience on a "responsible post" would mean experience on the just below post. He referred to a Circular dated 1-4-1992 issued by the Municipal Corporation

(Personnel Department) . It relates to recruitment to 'A' Category post like that of Medical Officer, Assistant Engineer and Deputy Assessor Collector, Deputy Treasurer etc. It has been provided that experience on supervisory post would mean the post immediately below the post to which promotion is to be made, for example experience on the post of Assistant Assessor/ Assistant Collector/ Assistant Treasurer etc. would be experience on a supervisory post for promotion to the post of Deputy Assessor, Deputy Collector, Deputy Treasurer etc. We hardly find that this Circular would be applicable in the case in hand. It is specific about 'A' category posts and not for all categories and ranks. Another Circular dated 21.6.1988 has been referred to which relates to recruitment on the post of Deputy Chief Engineer (Civil), Deputy Chief Engineer (Mechanical) etc. By means of the said circular experience on the post of Executive Engineer or on any similar post was required. It firstly relates to the recruitment to the post of Deputy Chief Engineer. It cannot be applied for recruitment to the post of Chief Municipal Engineer (Civil). Such a condition is not contained in terms of required qualification for the post of Chief Municipal Engineer (Civil). Wherever experience on a post just below is needed, such a provision is specifically contained. On this basis it cannot be generally held that for every post in any rank or category the "responsible post" must necessarily mean the post next below the post for which recruitment is to be made."

10. That the letter dated 16.09.2013 when adjudged on above analysis does not support the contention of the petitioners that it supplants the statutory Rules, rather it only clarifies. And supplementing of a Rule by executive fiat is permissible under law [for an authority see : *Union of India & others v. Raj Kumar Gupta and others* (1995) Supp (2) SCC 607 and *Union of India & others v. Rakesh Kumar* (2001) 4 SCC 309]. Careful reading of the letter in question would reveal that it neither restrict the scope of the statutory provision, nor does it widens it.

11. In view whereof, there being no substance in the petition, it fails and is dismissed. No costs.

Petition dismissed.

I.L.R. [2014] M.P., 1815
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 1925/1998 (Jabalpur) decided on 10 October, 2013

SUNIL DATT ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Service Law - Promotion **- Petition against withdrawal of promotion order on the ground that right has accrued in favour of the petitioner with the issuance of promotion - Same could not have been withdrawn without affording an opportunity of hearing - Held - Promotion was issued assuming that the promotional post is lying vacant - In fact there was no vacant post on the date when recommendation for promotion was made - Mistakes are mistakes and they can always be corrected - State was justified in withdrawing the sanction for promotion. (Paras 8 & 11)**

सेवा विधि – पदोन्नति – पदोन्नति आदेश वापिस लिये जाने के विरुद्ध याचिका इस आधार पर कि पदोन्नति जारी होने के साथ, याची के पक्ष में अधिकार प्रोद्भूत हुआ है – सुनवाई का अवसर प्रदान किये बिना उसे वापिस नहीं लिया जा सकता था – अभिनिर्धारित – पदोन्नति इस धारणा के साथ दी गयी थी कि पदोन्नति का पद रिक्त है – वास्तव में, जिस तिथि को पदोन्नति हेतु अनुशंसा की गयी थी उस तिथि को पद रिक्त नहीं था – गलतियां, गलतियां होती हैं उन्हें सदैव सुधारा जा सकता है – पदोन्नति हेतु मंजूरी वापिस लेना राज्य के लिये न्यायोचित था।

Cases referred :

AIR 1992 SC 1806, (2008) 2 SCC 750.

None for the petitioner.
S.P. Rai, P.L. for the respondent/State.
R.K. Tiwari, for the respondents No. 2 & 3.

R D E R

Sanjay Yadav, J. :- The matter is of the year 1998. That the matter is being adjourned at the instance of the counsel for the petitioner since 28.07.2010, 10.10.2010, 21.02.2011, 01.10.2013. That on 08.10.2013 at the request of learned counsel for petitioner, the matter was directed to be posted on 10.10.2013. When the petition is taken up for hearing no one appears. Therefore, record perused and the respondents were heard.

2. Grievance raised is against the order dated 17.04.1998 whereby the promotion given to the petitioner as Executive Engineer, Municipal Corporation, Rewa was withdrawn.

3. The promotion order was issued on 05.08.1997 by the State Government on the recommendation of the Municipal Corporation, Rewa and was addressed to the Commissioner,Municipal Corporation, Rewa in the following terms :

> "विषयांतर्गत प्रकरण में आपको प्रस्तावनानुसार श्री एस0डी0शुक्ला सहायक यंत्री को नगर विकास प्रकोष्ठ नगर पालिका निगम रीवा में कार्यपालन यंत्री के रिक्त पद पर पदोन्नति की अनुमति राज्य शासन द्वारा प्रदान की जाती है।"

4. Thus, the sanction granted by the State Government was a conditional sanction of promotion on vacant post of Executive Engineer. On 08.08.1997, the petitioner was promoted as Executive Engineer in Grade Rs.3000-100-3500-125-4500 on a probation of one year.

5. Later on it was found that there were no vacant post of Executive Engineer and the vacancy was wrongly assumed. This led to withdrawal of the sanction dated 05.08.1997 by impugned order.

6. The State Government in its return have justified their action. It is stated that :

> "4. It is most respectfully submitted that prior to the establishment of Municipal Corporation Rewa, there was Rewa Improvement Trust. There were two sanctioned post of executive Engineer. Against one post one Shri S.P.Singh was promoted and his promotion was duly approved by the order dt. 14/07/88. Against other posts one Shri S.K.Dwivedi was given adhoc promotion to the post of Executive Engineer by the Rewa Town Improvement Trust and his adhoc promotion is yet under consideration before the State Government for approval. Thus there are only two sanctioned post in Rewa Town Improvement Trust. After desolution of Rewa Improvement Trust in 1994, it was merged in Municipal Corporation, Rewa. In Municipal Corporation, Rewa there is only one sanctioned post of Executive Engineer. Against the said post one Harbhajan Singh has been promoted and his promotion has been duly approved by the State Government.

At present he is on deputation in B.D.A., Bhopal. The posts which have been received after merger from T.I.T they have been marked as posts of Executive Engineer in the 'development cell'. Thus there are total three posts of Executive Engineer in Municipal Corporation, Rewa. All these three posts inclusive of 2 posts of development cell are occupied and there is no vacancy. The details of the sanctioned posts and the persons who are working against these posts are mentioned in a chart, copy of which is annexed herewith as Annexure R-II.

5. It is submitted that on S.K.Dwivedi who was senior to the present petitioner on the post of Asstt. Engineer was working in the Town Improvement Trust, Rewa w.e.f. 23.03.1986. Then Town Improvement Trust, Rewa had passed a resolution on 10.12.1993 for promotion of Shri Dwivedi to the post of Executive Engineer. As per the resolution, the Trust had passed an order of promotion of Shri Dwivedi as adhoc Executive Engineer by order dt.10/12/93. Copy of the order dt.10/12/93 adhoc promotion of Shri Dwivedi is annexed herewith as Annexure R-III.

6. That the Trust vide his letter dt.27/5/94 sought approval of that promotion by Housing and Environment Department. It is relevant to mention here that at that time the Trust was under the Housing Environment Department. After merger in Municipal Corporation, it is under Urban Administration & Development Department (old name Local Self Government). There is no approval of adhoc promotiion of Shri Dwivedi by Housing and Environment Department. A petition was filed by petitioner Shri S.D.Shukla before this Hon'ble Court and the same was registered as W.P.No.5136/93 challenging the adhoc promotion of Shri Dwivedi on the ground that the promotion is illegal and contrary to the provisions of law. The Division Bench of this Hon'ble Court has dismissed the said petition by order dt. 31/1/94. Copy of the order dt. 31/1/94 passed in W.P.No.5136/93 is annexed herewith as Annexure R-IV. This Hon'ble Court made an observation that Shri

Dwivedi is senior to the petitioner.

7. In August 1994 the Rewa Improvement Trust was merged in Municipal corporation, Rewa. Immediately Municipal Corporation, Rewa vide his letter dt.10/10/95 sought approval of adhoc promotion of Shri Dwivedi. The State Government vide its order dt. 22/1/96 had asked the Commissioner, Municipal Corporation, Rewa to send gradation list/C.Rs and the resolution of the standing committee. Copy of the letter dt. 22/1/96 is annexed herewith as Annexure R-V. No reply was received from the Corporation. Shri Dwivedi submitted a representation dt. 2/2/98. Shri Dwivedi was transferred and was posted in Municipal Corporation, Drug (sic:Durg) and one Harbhajan Singh is posted on deputation in B.D.A. treating the post of Executive Engineer as vacant because of the transfers, then convened a D.P.C. for promotion in which the petitioner was recommended and the approval was sought on the pretext that there is a vacancy. Though Shri Dwivedi is also not regularly promoted and his case for approval is yet pending. The Corporation ignored the fact that by transfer, the lien of the person who is promoted against the post of that local body does not terminate under the Provisions of Section 58. The lien of that promoted person remained on that very post. Thus by transfer the post did not vacant. However the Full Bench of this Hon'ble Court also made such observation in M.P.No.1801/89 *Indore Nagar Nigam Karmchari Congress and another Vs. State of M.P.& others* that the lien of the incumbent remains in the parent Corporation. The observation made in para-II of the said Judgment is reproduced as hereunder :-

> "In this back ground, we are of the view that Section 58(5) and (6) of the Act are not ultra virus and it is valid. But this power should be exercised with great caution and while transferring the employee from one Corporation to another, there should be a valid reason. Since the lien of incumbent is kept in the parent Corporation, therefore, tenure of the period of lien

should be specified and it should not be for all time to come. The State Government should also exercise this power very sparingly in exceptional case as observed by their Lordships of the Supreme Court in *State of M.P. Vs. Shankerlal* (supra) as quoted above."

The State Government has recently also issued instructions to the Nagar Panchayat/Municipal Council that by transfer of the post shall not be treated as vacant. Copy of the instructions of the State Government dt. 9/4/99 are filed herewith as Annexure R-VI."

7. The factual stand by the State Government is not contradicted by the petitioner as no rejoinder has been filed.

8. In view whereof, since there were no vacant post on the date when recommendation was made in favour of the petitioner. The State Government was justified in withdrawing the sanction for promotion. The stand of the petitioner that since the right has accrued in favour of the petitioner with the issuance of promotion, the same could not have been withdrawn without affording an opportunity of hearing, is of no avail in the given facts that the promotion was wrongly given to the petitioner. It was within the powers of the State Government to have corrected such wrong.

9. Trite it is that recruitment is an administrative function (see *National Institute of Mental Health and Neurosciences v. Dr. K. Kalyan Raman and Ors.* (AIR 1992 SC 1806 Paragraph 7). There exist the possibility of committing of administrative mistake. If there is a mistake the same has to be corrected (A quasi-judicial or a judicial error also could be rectified by exercising the power of review).

10. Question is whether such a mistake would create a vested right in favour of the person/persons who are benefited by such mistake. In the considered opinion of this Court, if due to mistake some benefit is extended in favour of person/persons not eligible for such benefit there is no accrual of right.

11. *In Union of India and another v. Narendra Singh* (2008) 2 SCC 750 it is observed : "32. It is true that the mistake was of the Department and the respondent was promoted though he was not eligible and qualified. But,

we cannot countenance the submission of the respondent that the mistake cannot be corrected. Mistakes are mistakes and they can always be corrected by following due process of law."

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

13. In the result petition fails and is dismissed. No costs.

Petition dismissed.

I.L.R. [2014] M.P., 1820
WRIT PETITION
Before Mr. Justice Prakash Shrivastava
W.P. No. 7742/2012 (Indore) decided on 11 October, 2013

MADHYA PRADESH CRICKET ASSOCIATION ... Petitioner
Vs.
SHRI B.S. SOLANKI & ors. ...Respondents

(and W.P. Nos. 7723/2012, 7727/2012, 7728/2012, 7729/2012, 7736/2012, 7743/2012, 7744/2012, 7745/2012, 7746/2012, 7751/2012, 7754/2012, 7755/2012, 7756/2012, 7757/2012, 7769/2012, 7770/2012, 7771/2012, 7772/2012, 7969/2012, 7970/2012)

A. Constitution - Article 226 - Writ Petition - Alternate Remedy - **The bar of alternative remedy is a self imposed restriction and it is not a fit case to direct the writ petitioners to avail the alternate remedy, specially when they have raised jurisdictional issues, alleged violation of principles of natural justice and have also given reasons as to why the alternate remedy is not effective and efficacious. (Para 12)**

क. संविधान – अनुच्छेद 226 – रिट याचिका – वैकल्पिक उपचार – वैकल्पिक उपचार का वर्जन स्वयं अधिरोपित निर्बन्धन है और रिट याचीगण को वैकल्पिक उपचार का अवलंब लेने के लिये निदेशित करने के लिये यह उचित प्रकरण नहीं है. विशेष रुप से तब जब उन्होंने क्षेत्राधिकार के विवाद्यक उठाये हैं, नैसर्गिक न्याय के सिद्धांतों का उल्लंघन अभिकथित किया है और वैकल्पिक उपचार क्यों प्रभावी एवं प्रभावकारी नहीं है, इसके कारण भी दिये हैं।

B. Society Registrikaran Adhiniyam, M.P. (44 of 1973), Section 32(2) - **Membership granted by the M.P. Cricket Association to its new members between the period 2008-09 to 2011-12 was held to be void by the impugned order - Assistant Registrar initiated inquiry on the complaint**

of single member - Held - Section 32(2) of the Act, requires the application together with an affidavit in support of its contents by a majority of the members of the governing body of the Society - Not less than 1/3 of the total number of members of the Society - Complaint did not satisfy the requirement of Section 32(2) of the Act - Impugned order cannot be sustained, hence quashed. (Paras 20-21)

ख. सोसायटी रजिस्ट्रीकरण अधिनियम, म.प्र. (1973 का 44), धारा 32(2) – आक्षेपित आदेश द्वारा 2008–09 से 2011–12 की अवधि के बीच म.प्र. क्रिकेट एशोसियेशन द्वारा अपने नये सदस्यों को प्रदान की गयी सदस्यता शून्य अभिनिर्धारित की गयी – सहायक पंजीयक ने एक सदस्य की शिकायत पर जांच आरंभ की – अभिनिर्धारित – अधिनियम की धारा 32(2) के अनुसार आवेदन के साथ सोसायटी के शासन निकाय (गवर्निंग बॉडी) के सदस्यों के बहुमत द्वारा उसकी अंतर्वस्तु के समर्थन में शपथपत्र अपेक्षित है – सोसायटी के कुल सदस्यों के 1/3 से कम न हो – शिकायत, अधिनियम की धारा 32(2) की अपेक्षा को संतुष्ट नहीं करती – आक्षेपित आदेश कायम नहीं रखा जा सकता, अतः अभिखंडित।

Cases referred :

AIR 1958 SC 86, 2008 (12) SCALE 451, 1998 (8) SCC 1, AIR 1952 SC 16, 1978(1) SCC 405, (2000) 10 SCC 23, (2004) 2 SCC 65, AIR 1936 Privy Council 253, (1976) 2 SCC 128, (2004) 2 SCC 759, AIR 1991 SC 309, 2000(3) MPLJ 351.

A.K. Chitale with *Sumit Samvatsar,* for the petitioner.
G.M. Chaphekar, S.C. Bagadia with *Vandana Kasrekar, D.K. Chhabra, Ajay Bagadia,* for the petitioner in connected petitions.
Deepak Rawal, for the respondent/State.
A.K. Sethi with *Harish Joshi,* for the complainant/respondent No.3.

ORDER

PRAKASH SHRIVASTAVA, J. :- This order will also govern the disposal of W.P. Nos. 7723/2012, 7727/2012, 7728/2012, 7729/2012, 7736/2012, 7742/2012, 7743/2012, 7744/2012, 7745/2012, 7746/2012, 7751/2012, 7754/2012, 7755/2012, 7756/2012, 7757/2012, 7769/2012, 7770/2012, 7771/2012, 7772/2012, 7969/2012 and 7970/2012, since it is stated by learned counsel for both the parties that all these writ petitions involve the same issue on the similar fact situation.

2. These writ petitions have been filed against the order of the Assistant

Registrar dated 27.7.2012, by which the Assistant Registrar has held that the membership granted by the Petitioner M.P. Cricket Association (MPCA) to its new members between the period 2008-09 to 2011-12 was contrary to its registered bylaws and was void. W.P. No.7742/2012 is at the instance of MPCA whereas the other connected writ petitions are at the instance of aggrieved members of MPCA.

3. For convenience, facts have been noted from W.P. No.7742/2012 filed by the MPCA.

4. The petitioner is a society registered under the M.P. Society Registrikaran Adhiniyam, 1973 (Act No.44 of 1973) (for short "the Act"). It had inducted certain members between the period 2008-09 to 2011-12. The respondent No.3 Dr. Leeladhar Paliwal on 23.2.2012 had made a complaint to the Assistant Registrar, Firms and Societies (for short "Assistant Registrar") objecting to the induction of 16 new members in the MPCA. The Registrar on 27.2.2012 had issued notice, which was replied by the MPCA. Thereafter, notice dated 5.5.2012 was again issued by the Assistant Registrar to MPCA which was replied on 15.5.2012 followed by another reply dated 5.6.2011. The Assistant Registrar, vide communication dated 11.6.2012, had sought certain information from MPCA which was replied on 21.6.2012 followed by another communication from the side of the MPCA dated 17.7.2012. The Assistant Registrar thereafter had passed the impugned order dated 27.7.2012 holding that the members were inducted between the year 2008-09 to 2011-12 in the MPCA contrary to its bylaws and their membership, was void.

5. Shri A.K. Chitale, learned counsel appearing for the petitioner-MPCA in W.P. No.7742/2012 has submitted that the Registrar has illegally assumed the jurisdiction under Section 32 of the Act, because neither the complaint was made as per the requirement of the section nor the Registrar had exercised suo motu power. He has submitted that when Registrar was given power to do certain thing in a certain manner, he was required to exercise the power in the manner prescribed. He has also submitted that while passing the impugned order, proper opportunity of hearing was not given and the petitioner was only required to submit certain information, and on that basis alone the impugned order has been passed. He has further submitted that the action of the respondents suffer from malafides, since the entire action is at the instance of the Minister of Commerce Industries and Employment, under whom the Registrar of Societies is working and that the concerned Minister is a person

interested in the MPCA.

6. Shri G.M. Chaphekar, learned senior counsel in W.P. No.7723/2012 has referred to the documents on record and submitted that the impugned order has been passed on the basis of the complaint made by Dr. Leeladhar Paliwal, therefore, it is an order passed in purported exercise of power under Section 32(2) of the Act but the conditions mentioned therein are not satisfied. He has further submitted that the stand of the Assistant Registrar that the impugned order was passed in exercise of the suo motu power, is not correct because the contents of statutory order can not be supplemented by subsequent pleading. He has also submitted that when two alternate modes are available, the authority/court can select only one and not both, therefore, having passed the order on complaint of Dr. Leeladhar Paliwal, the Registrar can not take the stand that the order was passed in exercise of suo motu power. He has further submitted that since the impugned order has been passed in violation of the principles of natural justice without giving any opportunity of hearing to the petitioner, therefore, the alternate remedy will not act as a bar in exercise of writ jurisdiction by this Court.

7. Shri S.C. Bagadia, learned senior counsel in W.P. No.7727/2012 and connected writ petitions has submitted that in the impugned order the Assistant Registrar has only recorded prima facie finding, therefore, it can at best form the basis for initiating enquiry under Section 32 of the Act, but can not be treated as final order. He has further submitted that the proceedings were initiated by the Assistant Registrar under Section 32(2) of the Act but the pre-conditions mentioned in that section are not satisfied. He has also submitted that the impugned order has been passed in violation of the principles of natural justice and that under bylaw 55 of the bylaws of the Society, the Assistant Registrar can not exercise the power dehors Section 32 because Assistant Registrar being a statutory authority can exercise the power under the statute only. He has also submitted that bylaw 11 has been wrongly interpreted by the Assistant Registrar and since the issue of jurisdiction and natural justice is involved, therefore, alternate remedy will not act as a Bar. He has also submitted that the letter of the MPCA terminating the membership has subsequently been withdrawn on 2.8.2012.

8. Shri Ajay Bagadia, learned counsel appearing in W.P. No.7754/2012 and W.P. No.7746/2012 has submitted that before passing the impugned order, no opportunity of hearing was given to the petitioners though their induction

as member has been held to be illegal. He has further submitted that bylaw 11 and 12 of MPCA have been wrongly interpreted by the Assistant Registrar.

9. Learned counsel for the State appearing for respondent no.2 has submitted that the impugned order has been passed by the Assistant Registrar in the suo motu exercise of power under Section 32. He has further submitted that opportunity of hearing to newly inducted members of MPCA was not necessary, because the order passed by the Registrar is binding on all parties under Section 32(4) of the Act. He has further submitted that opportunity of hearing was given to MPCA before passing the impugned order. He has also submitted that under bylaw 40 the Registrar has power to interpret the bylaws and exercising the said power, bylaw 11-b of the MPCA has rightly been interpreted by the Registrar.

10. Shri A.K. Sethi, learned senior counsel appearing for the complainant Dr. Leeladhar Paliwal has submitted that the information was given to the Assistant Registrar by way of complaint but the Assistant Registrar has exercised the suo motu power under Section 32. He has further submitted that the Assistant Registrar was empowered to interpret the bylaw, therefore, he has rightly interpreted bylaw 11-b. He has further submitted that there is no violation of the principles of natural justice because notice was given to the MPCA which had produced the record and since the resolution of the MPCA was challenged, therefore, only MPCA was required to be heard. He has further submitted that by the impugned order only prima facie findings have been recorded under Section 32(4) of the Act and no order of terminating the membership of newly inducted members has been passed. He has further submitted that against the impugned order appeal lies to the Registrar under Section 40(2) of the Act, and to the State under Section 40(1) of the Act and, therefore, the writ petition is liable to be dismissed on the ground of availability of alternate remedy.

11. I have heard the learned counsel for the parties and perused the record. The original record of the Assistant Registrar produced by the counsel for the State has also been perused.

12. The first objection of the respondents is about availability of alternate remedy of appeal under Section 40 of the Act. Since in the present matter order passed by the Assistant Registrar has been challenged on the grounds that he has wrongly assumed the jurisdiction under Section 32 of the Act and that there is violation of principles of natural justice and allegation has also

been made that the minister of commerce industries and employment controlling the concerned department of Registrar of Firms and Societies is personally interested in the matter (See Para 5.16 to 5.21 & 6.25 to 6.27 of W.P. No.7742/2012), therefore, I do not think it proper to dismiss the writ petition on ground of availability of alternate remedy. The bar of alternative remedy is a self imposed restriction and it is not a fit case to direct the writ petitioners to avail the alternate remedy, specially when they have raised jurisdictional issue, alleged violation of principles of natural justice and have also given reasons as to why the alternate remedy is not effective and efficacious. [See: *State of U.P. Vs. Mohammad Nooh* AIR 1958 SC 86, *Mariamma Roy Vs. Indian Bank and others* 2008(12) SCALE 451 and *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others* 1998(8) SCC Page 1].

13. In view the above, the objection relating to the availability of the alternate remedy is rejected.

14. Petitioners have questioned the impugned order of the Registrar mainly on the ground that the Registrar had wrongly assumed the jurisdiction under Section 32 of the Act on the complaint of a single member, though the pre-conditions mentioned in the Section for exercise of the jurisdiction are not satisfied. Section 32 of the Act reads as under :-

> **"Section 32 - Enquiry and settlement of disputes.-** (1) The Registrar may, on his own motion or on an application made under sub-section (2) either by himself or by a person authorised by him, by order in writing, hold an enquiry into the constitution, working and financial conditions of a society.
>
> (2) An enquiry of the nature referred to in sub-section (1) shall be held on the application together with an affidavit in support of its contents of -
>
> (a) a majority of the members of the governing body of the society; or
>
> (b) not less than one-third of the total number of members of the society.
>
> (3) The Registrar or the person authorised by him under sub-section (1) shall for the purpose of an enquiry under this section have the following powers, namely:-

(a) he shall at all times have free access to the books, accounts, documents, securities, cash and other properties belonging to, or in the custody of, the society and may summon any person in possession, or responsible for the custody of any such books, accounts documents, securities, cash or other properties to produce the same, if they relate to the head office of the society at any place at the headquarter thereof and if they relate to any branch of the society, at any place in the town wherein such branch thereof is located or in his own office;

(b) he may summon any person who he has reason to believe has knowledge of any of the affairs of the society to appear before him at any place at the headquarters of the society or any branch thereof or in his own office and may examine such person on oath; and

(c) (i) he may notwithstanding any regulation or byelaw specifying the period of notice for a general meeting of the society, require the officers of the society to call a general meeting of the society at such time at the head office of the society or at any other place at the headquarter of the society and to determine such matters as may be directed by him and where the officers of the society refuse or fail to call such a meeting, he shall have power to call it himself;

(ii) any meeting called under sub-clause (i) shall have all the powers of a general meeting called under the regulations or byelaws of the society and its proceedings shall be regulated by such byelaws.

(4) when an enquiry is made under this section the Registrar shall communicate the result of the enquiry to the society and may issue appropriate directions to the society, which shall be binding on all parties concerned."

15. Under the definition clause Section 3(c) of the Act, term "Registrar" includes Additional Registrar when exercising or performing any of the powers of duties of Registrar.

16. Under section 32(1) of the Act two modes have been prescribed for the Registrar to initiate an enquiry into the constitution working and financial conditions of the society i.e. on his own motion or on an application made in accordance with Section 32(2). For initiating enquiry on an application, the conditions mentioned in Section 32(2) need to be satisfied.

17. In the present case, the submission of the petitioners is that the Assistant Registrar has passed the impugned order on the basis of the complaint/application of Dr. Leeladhar Paliwal which did not satisfy the requirement of Section 32(2), therefore, Assistant Registrar had no jurisdiction to conduct the enquiry on such an application. As against this, the stand of the respondents is that the Assistant Registrar has exercised suo motu power under Section 32(1) of the Act. Hence, in this regard following two questions arise for consideration in the matter :-

(1) Whether the Assistant Registrar while passing the impugned order had exercised suo motu power under Section 32(1) of the Act?

(2) If not, whether the Assistant Registrar could assume jurisdiction under Section 32(1) and pass the impugned order on the complaint by the single member Dr. Leeladhar Paliwal?

18. So far as the first question is concerned, no material has been produced by the respondents before this Court to show that the Assistant Registrar had initiated the enquiry in the matter in exercise of the suo motu power. The original record of the proceedings conducted by the Assistant Registrar, also does not reveal that Assistant Registrar had initiated the enquiry in the matter on his own motion. On the contrary the record reveals that the proceedings were initiated by the Assistant Registrar on the basis of the complaint dated 23.2.2012 made by the respondent no.3 Dr. Leeladhar Paliwal (one of the

life member of the MPCA) alleging illegality in inducting 16 life members in the MPCA. The Registrar had sought explanation from MPCA vide communication dated 27.2.2012, 5.5.2012 and 11.6.2012 referring to the complaint received from Dr. Leeladhar Paliwal, which also reveals that the enquiry was conducted by him to decide the complaint of Dr. Leeladhar Paliwal. The MPCA in its reply dated 15.5.2012 and 21.6.2012 had raised the objection before the Assistant Registrar that the enquiry initiated at the instance of a single member of the society was not well founded in law, but the said objection was ignored by the Assistant Registrar. The opening paragraph of the impugned order itself indicates that the enquiry was initiated on the complaint. In the order it has been mentioned that the notice was issued to MPCA on the basis of the complaint and even in the concluding paragraph of the order it has been mentioned that the complaint made by Dr. Leeladhar Paliwal was found to be prima facie correct and a copy of the impugned order has also been endorsed to complainant Dr. Leeladhar Paliwal. By this order the Assistant Registrar has decided the complaint of Dr. Leeladhar Paliwal. This conclusively establishes that the Assistant Registrar had not initiated the enquiry on his own motion but he had initiated the enquiry on the complaint of Dr. Leeladhar Paliwal, and had enquired the said complaint resulting into passing of the impugned order.

19. A reply has been filed by the respondent no.1, who had passed the impugned order before this Court, but even in that reply he has not stated that he had exercised the suo motu power while passing the impugned order but he has only mentioned that he was empowered under Section 32 of the Act to exercise suo motu power. Even otherwise, it is the settled position in law that when a statutory functionary passes an order based on certain grounds, its validity must be judged by the reasons so mentioned and it can not be supplemented by fresh reasons in the shape of affidavit or otherwise. [See: *Commissioner of Police, Bombay Vs. Gordhandas Bhanji,* AIR 1952 SC 16 and *Mohinder Singh Gill and another Vs. The Chief Election Commissioner, New Delhi and others,* 1978(1) SCC 405]. The Assistant Registrar having conducted an enquiry on the basis of the complaint of Dr. Leeladhar Paliwal and having passed an order on the basis of said complaint, now can not contend before this Court that the order was passed in suo motu exercise of power. [See: *Vivekananda Nidhi and others Vs. Asheema Goswami,* (2000) 10 SCC 23]. It is also well settled that if any decision is taken by the statutory authority at the behest or on the suggestion of a person

who has no statutory role to play, the same would be ultra vires. [See: *Bahadursinh Lakhubhai Gohil Vs. Jagdishbhai M. Kamalia and others,* (2004) 2 SCC 65] Thus, the contention of the respondents that the Assistant Registrar had passed the impugned order on the basis of the suo motu enquiry, has no merit and is accordingly rejected.

20. The next question is if Assistant Registrar could assume jurisdiction and pass the impugned order on the complaint made by Dr. Leeladhar Paliwal? The issue is if the complaint of Dr. Leeladhar Paliwal was in accordance with Section 32(2) of the Act, which requires the application together with an affidavit in support of its contents by a majority of the members of the governing body of the society or not less than one-third of the total number of members of the society.

21. The complaint dated 23.2.2012, on the basis of which the enquiry was initiated, was a complaint made by the single member Dr. Leeladhar Paliwal. The complaint was not filed together with an affidavit in support of its contents of a majority of members of the governing body of the society or not less than one-third of the total number of members of the society. The complaint of the single member Dr. Leeladhar Paliwal did not satisfy the conditions mentioned in Section 32(2) of the Act, therefore, the Assistant Registrar was not competent to initiate an enquiry on such a complaint which did not fulfill the requirement of Section 32(2) of the Act. It is the settled position in law that where a power is required to be exercised by an authority in a certain way, it should be exercised in that manner or not at all, and all other modes of performance are necessarily forbidden. [See: *Nazir Ahmad Vs. King Emperor,* AIR 1936 Privy Council 253, *Hukam Chand Shyam Lal Vs. Union of India and others,* (1976) 2 SCC 128 and *Ram Phal Kundu Vs. Kamal Sharma,* (2004) 2 SCC 759.] Once the manner of assuming the jurisdiction for conducting an enquiry on the basis of the application satisfying certain conditions has been prescribed under Section 32(2) of the Act, then it was not open to the Assistant Registrar to deviate from it and conduct an enquiry on the basis of an application/complaint which did not satisfy those requirements. Thus, it is held that the complaint made by Dr. Leeladhar Paliwal, the single member of the MPCA, did not satisfy the requirements of Section 32(2) of the Act and the Assistant Registrar could not have conducted enquiry under Section 32 of the Act on the basis of that complaint.

22. An issue has also been raised before this Court by the respondents that

the Assistant Registrar had exercised the power under bylaw 55 of the MPCA independent of any statutory power conferred under the Act. Such a submission can not be accepted because the Assistant Registrar is a statutory authority which can exercise the power only within the four corners of the statute. Even otherwise, under bylaw 55 the Registrar or any other officer authorized by him can take action, whereas in the present case the impugned order is neither by the Registrar nor any material has been filed before this Court showing that the Assistant Registrar was authorized by the Registrar to take action under Regulation 55.

23. The aforesaid analysis makes it clear that the Assistant Registrar has passed the impugned order in violation of the provisions contained under Section 32 of the Act and he had wrongly assumed the jurisdiction to conduct the enquiry on the basis of the complaint of a single member, which did not satisfy the pre-condition mentioned in Section 32(2).

24. The impugned order has also been challenged on the ground of violation of the principles of natural justice. It has not been disputed before this Court that none of the 20 members inducted between the period 2008-09 to 2011-12 whose membership have been held to be void by the impugned order, was given any show cause notice or given any opportunity of hearing by the Assistant Registrar. Record shows that even the MPCA was not given proper opportunity of hearing. Only notices were issued to the MPCA, which were responded by the MPCA. The original record reveals that the Assistant Registrar has not conducted proper enquiry, which he was required to do under Section 32(1). The grievance of petitioners that no enquiry as required by this Section was conducted nor any proper opportunity of hearing was given, is found to be correct.

25. Under Section 32(3) of the Act wide powers have been given to the Assistant Registrar to conduct the enquiry but the Registrar has not exercised the said power. The Assistant Registrar was expected to act in a fair and transparent manner and comply with principles of natural justice while conducting the enquiry under Section 32 of the Act, which he has failed to do in the present matter. [See *Shrawan Kumar Jha Vs. State of Bihar, Ram Sewak Sharma* AIR 1991 SC 309 and *Hari Narayan Sakya Vs. State of M.P. and others* 2000(3) MPLJ 351].

26. The contention of the counsel for the State that under Section 32(4) of the Act the direction issued by the Registrar is binding on all parties concerned, therefore, no opportunity of hearing is required to be given, has no merit because mere binding nature of the order does not take away the requirement of compliance

of principles of natural justice and acting in fair and transparent manner.

27. In view of the above analysis, the impugned order dated 27.7.2012 passed by the Assistant Registrar can not be sustained and is hereby set aside. Needless to say that the Registrar will be at liberty to initiate fresh action in accordance with law, if the need so arises.

28. The writ petitions are allowed to the extent indicated above.

No costs.

Petition allowed.

I.L.R. [2014] M.P., 1831
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 18023/2013 (Jabalpur) decided on 23 October, 2013

SUNITA THAKRE (DR.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Civil Services (Special Provision for Appointment of Women), M.P. Rules, 1997 Rule 3 & Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, M.P. (21 of 1994), Section 4(4) **- Grievance of the petitioner is that, instead of accommodating the petitioner (though O.B.C.) in General Category, the candidates below the rank of petitioner and receiving less marks than the petitioner are being selected in General Category - Held - Out of 564 posts of Homeopathy Medical Officer, 265 posts are reserved for women candidates of all categories i.e. horizontal reservation - Therefore, candidates of one category even if obtain higher marks than that of General Category cannot seek migration to General Category posts - Respondents cannot be directed to adjust the petitioner against General Category seat. (Paras 9, 18 & 19)**

सिविल सेवा (महिलाओं की नियुक्ति के लिये विशेष उपबंध), म.प्र., नियम 1997 नियम 3 व लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिये आरक्षण) अधिनियम, म.प्र., (1994 का 21), धारा 4(4) – याची की शिकायत है कि याची को सामान्य श्रेणी में (अ.पि.व. होते हुये भी) स्थान दिये जाने की बजाय, याची से निम्न क्रम के एवं याची से कम अंक प्राप्त करने वाले अभ्यर्थियों का चयन सामान्य श्रेणी में किया गया – अभिनिर्धारित – होमियोपैथी चिकित्सा अधिकारी के 564 पदों में

से 265 पद, सभी श्रेणियों की महिलाओं के लिये आरक्षित है अर्थात क्षैतिज आरक्षण – अतः एक श्रेणी के अभ्यर्थीगण, भले ही सामान्य श्रेणी वाले अभ्यर्थियों से अधिक अंक प्राप्त करते हैं, वह सामान्य श्रेणी के पदों पर प्रव्रजन नहीं मांग सकते – सामान्य श्रेणी के पद पर याची को समायोजित करने के लिए प्रत्यर्थीगण को निदेशित नहीं किया जा सकता।

Cases referred :

(2006) 4 SCC 278, 1992 (Supp) (3) SCC 217, AIR 2007 SC 3127.

Ashish Trivedi, for the petitioner.
S.S. Bisen, G.A. for the respondent/State.

ORDER

SANJAY YADAV, J. :- Heard.

1. Public Health and Family Department, Government of Madhya Pradesh invited applications for recruitment of 1252 contract posts of Ayush Medical Officers under National Rural Health Mission. Of these, 626 posts were earmarked in favour of female candidates. These 1252 posts were further earmarked for Ayurved Medical Officer (45% = 564 posts), Homeopathy Medical Officer (45% = 564 posts) and Unani Medical Officer (10% = 124 posts). As per roster, posts of Homeopathy Medical Officer (presently we are concerned with the Homeopathy Medical Officer) was reserved as under-

Homeopathy Medical Officer : Total posts 564

Sl. No.	Category	Male	Female	Physically handicapped (Orthopedic)		Total
				Male	Female	
1	Unreserved (General)	132	132	09	09	282
2	Scheduled Castes	42	42	03	03	90
3	Scheduled Tribes	53	53	03	03	112
4	OBCs	38	38	02	02	80
Total No. of posts		265	265	17	17	564

2. Petitioner applied against the post earmarked for Other Backward Class.

3. Examination was held on 4.8.2013. Results whereof were declared on 19.9.2013.

4. Petitioner obtained 2222 rank with score of 49.

5. That, category wise cut off list was published with open rank and close rank. For OBC female nil class candidates, the open and close rank were 1057 and 2202. The district cut off for Balaghat for female candidate was 52 and 8766 open and close rank respectively.

6. That, category wise marks cut off was also declared with maximum marks and minimum marks for OBC female unreserved as 60 and 49 respectively and the corresponding cut off marks of District Balaghat in the petitioner's category was 82 (maximum) and 27 (minimum).

7. The category wise cut off list and category wise marks cut-off for female OBC nil class is depicted hereunder -

Category wise cut off Homeopathic

	Open Rank	Close Rank
OBC x F	1057	2202

District-wise cut off (Balaghat) - Female

Open Rank	Close Rank
52	8766

Category wise marks cut off

	Max. Marks	Min. Marks
OBC x F	60	49

District-wise marks cut off - Female

Max. Marks	Minimum Marks
82	27

8. That, category wise cut off and category wise cut off marks for unreserved female were 563 (open rank) and 2702 (close rank) and 68 (maximum marks) and 47 (minimum marks).

9. Petitioner with 2222 rank with score of 49 raised the grievance that instead of accommodating the petitioner (though OBC) in General Category, the candidates below the rank of petitioner and receiving less marks than the petitioner are being selected in General Category.

10. Contention on behalf of petitioner is that as per Rule 3 of Madhya Pradesh Civil Services (Special Provisions for Appointment of Women) Rules, 1997, thirty per cent of the total post in service is to be reserved in favour of women and the said reservation is horizontal and compartment wise. That being so, it is contended that since marks obtained by the female candidates are higher than those belonging to General Category, incumbent it was upon the respondents to have considered such OBC Female Candidates obtaining more marks than the last female candidate of General Class for appointment in General Category.

11. The Rules of 1997 which are being referred to are framed in exercise of the power conferred by the proviso to Article 309 of the Constitution of India. Rule 2 whereof stipulates that "without prejudice to the generality of the provisions contained in any service rules, these rules shall apply to all persons to public service and posts in connection with the affairs of the State. Meaning thereby that the provisions of 1997 Rules will not affect the operation of other Rules (See *Standard Chartered Bank v. Director of Enforcement* (2006) 4 SCC 278 Paragraphs 21 and 22). In other words, the mechanism for implementing the reservation clause has to be in consistent with the provisions of the M.P. Lok Seva (Anusuchit Jatiyon, Anusuchit Jan-Jatiyon Aur Annya Picchade Vargon Ke Liye Arakshan) Adhiniyam, 1994, which is an Act to provide for the reservation of vacancies in public services and posts in favour of the persons belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens and for matters connected therewith or incidental thereto.

12. Sub-section (2) of Section 4 of Adiniyam, 1994 stipulates the percentage of posts reserved in service in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and other Backward Classes.

13. Sub-section (4) of S.4 of Adiniyam, 1994 stipulates that :-

> (4) If a person belonging to any of the categories mentioned in sub-section (2) gets selected on the basis of merit in an open competition with General Candidates, he shall not

be adjusted against the vacancies reserved for such category under sub-section (2).

14. What does it mean? Whether a candidate who opts to take up a competitive examination not as a General Category but as a reserved category candidate belonging to SC/ST/OBC, as the case may be, thus competing amongst the candidates of his category, if obtain marks higher than obtained by the candidates of a General Category can be permitted to incurs in the General Category. In other words, whether a candidate having opted to participate in a competitive examination as a reserved category candidate can be permitted to migrate to General Category?

15. In *Indra Swahney vs. Union of India* 1992 Supp (3) SCC 217 (Paragraph 812), it has been observed -

> "812. .....: all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under Clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations that is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to Clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C. category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure.
>
> (Emphasis supplied)

16. Thus, when a reservation is horizontal, then the candidate selected on the basis of reservation in any category has to be fixed in said category and cannot be allowed to migrate to other category. The concept of migrating from one category to another on the basis of merit may hold good in vertical reservation but in horizontal reservation the same is not applicable.

17. In *Rajesh Kumar Daria v. Rajasthan Public Service Commission* AIR 2007 SC 3127, it has been held -

> "7-8. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Art. 16(4) are 'vertical reservations.' Special reservations in favour of physically handicapped, women etc., under Art. 16(1) or 15(3) are 'horizontal reservations.' Where a vertical reservation is made in favour of a backward class under Art. 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. (Vide *Indira Sawhney* (supra); *R. K. Sabharwal v. State of Punjab* (1995 (2) SCC 745); *Union of India v. Virpal Singh Chauvan* (1995 (6) SCC 684) and *Ritesh R. Sah v. Dr. Y. L. Yamul* (1996 (3) SCC 253)]. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women.' If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for

further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example :

If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC women candidates, then there is no need to disturb the list by including any further SC women candidate. On the other hand, if the list of 19 SC candidates contains only two women candidates, then the next two SC woman candidates in accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four women SC candidates. (But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidate on the ground that 'SC women' have been selected in excess of the prescribed internal quota of four.)"

18 In the case at hand, out of 564 posts of Homeopathy Medical Officers, 265 posts are reserved for women candidates of all categories i.e. horizontal reservation. Therefore, candidates of one category even if obtain higher marks than that of General Category cannot seek migration to General Category posts.

19. In view whereof, the mandamus sought for that the respondents be directed to adjust the petitioner against General Category seat cannot be granted.

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

Petition dismissed.

I.L.R. [2014] M.P., 1838
WRIT PETITION
Before Mr. Justice Alok Aradhe
W.P. No. 8646/2011(s) (Jabalpur) decided on 17 December, 2013

K.G. CHOUBEY (DR.) ...Petitioner
Vs.
JAWAHARLAL NEHRU KRISHI VISHWA VIDYALAYA & ors. ...Respondents

(and W.P. Nos. 5523/2010 (s), 6950/2010(s), 9758/2011, 12108/2011, 14144/2011, 606/2012, 2421/2012, 6369/2012, 6962/2012, 11742/2012, 12985/2012, 16381/2012, 17716/2012, 17992/2012, 20882/2012, 802/2012, 6974/2013)

Service Law - **Central Government formulated a scheme dated 31.12.2008 which provided that Central Assistance for implementing the scheme is also subject to the condition that the entire scheme of revision of pay scales together with all the conditions be adopted without any modification - State Government by order dt. 09.04.2010 took a decision to accord benefit of the same after approval from General Administration Department as well Finance Department - However, State issued other orders on 22.04.2010 and 22.04.2013 fixing cut off date for availing benefit of enhanced age of superannuation - Held - After having availed the financial assistance from the Central Government for implementation of the scheme and after accepting the recommendations vide order dated 09.04.2010, the State Government had no authority to pass order dated 22.04.2010 modifying the order dated 09.04.2010 - Order dated 22.04.2010 is quashed - Petitioner shall be entitled to the benefit of recommendation of VIth Pay Commission as well as the age of superannuation as directed by the State vide order dated 22.04.2013. (Paras 13,14 & 15)**

सेवा विधि – केन्द्र सरकार ने स्कीम दि. 31.12.2008 बनायी जो यह उपबंधित करती है कि स्कीम के कार्यान्वयन हेतु केन्द्रीय सहायता इस शर्त के भी अधीन है कि वेतनमानों के पुनरीक्षण की संपूर्ण स्कीम को सभी शर्तों के साथ बिना किसी परिवर्तन के अंगीकृत की जायेगी – राज्य सरकार ने आदेश दि.09.04.2010 द्वारा निर्णय लिया कि उक्त का लाभ, सामान्य प्रशासन विभाग और साथ ही वित्त विभाग के अनुमोदन पश्चात दिया जाये – अपितु, राज्य ने आदेश दि. 22.04.2010 व 22.04.2013 द्वारा बढ़ायी गयी अधिवार्षिकी आयु का लाभ प्राप्त करने हेतु अंतिम तिथि नियत करते हुये जारी किये –

अभिनिर्धारित – स्कीम के कार्यान्वयन हेतु केन्द्र सरकार से वित्तीय सहायता प्राप्त करने के पश्चात तथा आदेश दि. 09.04.2010 द्वारा अनुशंसाओं को स्वीकार करने के पश्चात राज्य सरकार को आदेश दि. 09.04.2010 को परिवर्तित करने का आदेश दि. 22.04.2010 पारित करने का कोई प्राधिकार नहीं – आदेश दि. 22.04.2010 अभिखंडित किया गया – याची, छठवें वेतन आयोग की अनुशंसा का लाभ और साथ ही अधिवार्षिकी आयु के लाभ का हकदार होगा जैसा कि राज्य द्वारा आदेश दि. 22.04.2013 द्वारा निदेशित किया गया है।

Cases referred :

AIR 1983 SC 130, (2013) 8 SCC 633, W.P.(s) No. 363/2010 decided on 10.01.2011, W.P. No. 52/2010 decided on 08.12.2011, C.W.J.C. No. 13450/2010 decided on 15.09.2011, (2008) 14 SCC 702, (1993) Suppl. 4 SCC 46, AIR 2004 SC 230, AIR 1998 SC 68.

Rajendra Tiwari, Shobha Menon with *P.N. Pathak, A.S. Raizada, Sanjay K. Agrwal, T.K. Khadka, C.A. Thomas & Ghanshyam Barman*, for the petitioner.

Vikram Singh, Sharda Dubey, P.L., *Dharmendra Sharma & Praveen Dubey,* for the respondent.

ORDER

ALOK ARADHE, J. :- In this bunch of writ petitions, since similar issue arises for consideration, therefore, the same was heard analogously and is being decided by this common order. For the facility of reference, facts from Writ Petition No.8646/2011(S) *[Dr.K.G.Choubey vs. Jawaharlal Nehru Krishsi (sic:krishi) Vishwa Vidyalaya and others]* are being referred to.

2. In this writ petition, the petitioner, inter-alia, seeks quashment of order dated 22.4.2010 (Annexure P/5) as well as order dated 22.4.2013 (Annexure P/11). The petitioner has also prayed for a direction to the respondents to implement the scheme dated 31.12.2008 in case of Agriculture Universities as well, without any modification and to permit the petitioner to continue in service till the age of 65 years. In order to appreciate the petitioner's grievance, relevant facts need mention, which are stated infra.

3. The petitioner is a Professor in the Department of Agriculture, Economics & Farm Management and is posted in the College of Agriculture which functions under the Jawaharlal Nehru Krishi Vishwa Vidyalaya, Jabalpur, (hereinafter referred to as 'the University'), which has been constituted under

the Jawaharlal Nehru Krishi Vishwa Vidyalaya Adhiniyam, 1963. The University Grants Commission (hereinafter referred to as 'the Commission') is a body established under the University Grants Commission Act, 1956, which is responsible for the maintenance of standard and coordination of higher education in the country. On the recommendations made by the Commission, the Ministry of Human Resources Development, Department of Higher Education formulated a scheme dated 31.12.2008 for revision of pay of teachers and equivalent cadres in the Universities and Colleges on the basis of recommendations of the Sixth Pay Commission. Clause 8(f) of the Scheme provides that in order to meet the situation arising out of shortage of teachers in Universities and other teaching institutions as also the consequent vacant positions therein, a decision has been taken by the Department of Higher Education vide order dated 23.3.2007 to enhance the age of superannuation of the teachers in Central Educational Institutions upto 65 years. Clause 8(p) deals with applicability of the Scheme. Clause 8(p)(i) reads as under:-

> *"8(p)(i) This Scheme shall be applicable to teachers and other equivalent cadres of Library and Physical Education in all the Central Universities and Colleges thereunder and the institutions deemed to be Universities whose maintenance expenditure is met by the UGC. The implementation of the revised scales shall be subject to the acceptance of all the conditions mentioned in this letter as well as Regulations to be framed by the UGC in this behalf. Universities implementing this Scheme shall be advised by the UGC to amend their relevant statutes and ordinances in line with the UGC Regulations within three months from the date of issue of this letter."*

Clause 8(p)(v) of the Scheme reads as under:-

> *"8(p)(v) This Scheme may be extended to Universities, Colleges and other higher educational institutions coming under the purview of State Legislatures, provided State Governments wish to adopt and implement the Scheme subject to the following terms and conditions:-*
>
> > *(a) Financial assistance from the Central Government to State Governments opting to revise pay scale of teachers and others equivalent cadre*

covered under the Scheme shall be limited to that extent of 80% (eighty per cent) of the additional expenditure involved in the implementation of the revision.

(b) The State Government opting for revision of pay shall meet the remaining 20% (twenty per cent) of the additional expenditure from its own sources.

(c) Financial assistance referred to in sub-clause (a) above shall be provided for the period from 1.1.2006 to 31.3.2010.

(d) The entire liability on account of revision of pay-scales etc., of University and College teachers shall be taken over by the State Government opting for revision of pay-scale with effect from 1.4.2010.

(e) Financial assistance from the Central Government shall be restricted to revision of pay-scales in respect of only those posts which were in existence and had been filled up as on 1.1.2006.

(f) State Governments, taking into consideration other local conditions, may also decide in their discretion to introduce scales of pay higher than those mentioned in this Scheme, and may give effect to the revised bands/scales of pay from a date on or after 1.1.2006; however, in such cases, the details of modifications proposed shall be furnished to the Central Government and central assistance shall be restricted to the Pay Bands as approved by the Central Government and not to any higher scale of pay fixed by the State Government(s).

(g) Payment of Central assistance for implementing this Scheme is also subject to the condition that the entire Scheme of revision of pay-

scales, together with all the conditions to be laid down by the UGC by way of Regulations and other guidelines shall be implemented by the State Government and Universities and Colleges coming under their jurisdiction as a composite Scheme without any modification except in regard to the date of implementation and scales of pay mentioned herein above."

4. The Department of Agricultural Research and Education, Ministry of Agriculture, Government of India, by a communication dated 13th March, 2009, informed the State Governments that they may take a decision to adopt the Scheme in respect of State Agricultural Universities in accordance with the letter of the Commission dated 28.2.2009. The petitioner by a communication dated 19.3.2010 was informed that he would retire on attaining the superannuation i.e 62 years on 31.5.2011.

5. A meeting of Council of Ministers was held on 6.4.2010 to consider the implementation of the provisions of the Scheme dated 31.12.2008. The Council of Ministers decided to accord the benefit of revision of pay-scale to the employees of Government colleges and the teachers/officers of the University w.e.f. 1.1.2006 and to enhance the age of superannuation of the teachers engaged in class-room teaching, from 62 to 65 years. The Farmer Welfare and Agricultural Development Department of Government of Madhya Pradesh by an order dated 9.4.2010 directed that Scheme dated 31.12.2008 be made applicable to the employees of agricultural universities as well, so that the grant-in-aid to be paid by the Central Government, may be received by the State Government. The Higher Education Department of Government of Madhya Pradesh by an order dated 16.4.2010 accorded the benefit of revised pay-scale as well as the benefit of enhanced age of superannuation to the teaching staff employed in class-room of the Government colleges and the Universities.

6. However, the Farmer Welfare and Agricultural Development Department of the Government of Madhya Pradesh by an order dated 22.4.2010 issued a clarification in respect of order dated 9.4.2010 and it was clarified that by order dated 9.4.2010, only the benefit of revision of pay-scale as per recommendations of Sixth Pay Commission has been extended and other benefits have not been extended to the teachers. The State Government thereafter issued an order dated 22.4.2013 by which the age of

superannuation of teachers in Agricultural Universities has been enhanced from 62 to 65 years w.e.f. 1.5.2013. In the aforesaid factual background, the petitioner has approached this Court.

7. Learned senior counsel for the petitioner as well as counsel for petitioners in other writ petitions submitted that Council of Ministers in its meeting held on 6.4.2010 had taken a conscious decision to enhance the age of superannuation of the teaching staff in respect of the Universities from 62 to 65 years. Thereafter, the Farmer Welfare and Agricultural Development Department of Government of Madhya Pradesh by an order dated 9.4.2010 had also directed that the Scheme framed by the Commission should be implemented without any modification in respect of agricultural universities as well. It is further submitted that the State Government had no authority to pass the order dated 22.4.2010 as the Scheme was already adopted in entirety. It was further submitted that the Scheme in question is a composite Scheme which, infact, was adopted by the State Government without any modification w.e.f. 1.1.2006, therefore, now it is not open to the State Government to contend that the Scheme of the Commission does not apply to the agricultural universities of the State of Madhya Pradesh. It is further submitted that in exercise of power under Section 26 of the University Grants Commission Act, the Regulations, namely University Grants Commission (Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and other measures for the maintenance of standards in Higher Education) Regulations, 2010 (hereinafter referred to as 'the Regulations') have been framed and the Scheme dated 31.12.2008 has become a part of the Regulations as Appendix I. Therefore, the Scheme has attained statutory flavour and has become inviolable. It is also submitted that there is no provision in the Madhya Pradesh Acts under which the Universities have been constituted, that prescribes the age of superannuation of the teaching staff. It is also urged that in case of any repugnancy, in view of provisions of Article 245(2) of the Constitution, the Regulations framed by the University Grants Commission shall prevail. Attention of this Court has also been invited to note-sheet of the minutes of meeting in which the matter relating to adoption of the Scheme framed by the State Government has been deliberated. In the return, the respondents have not pointed out that order dated 6.4.2010, at any point of time, has been withdrawn. It is further urged that paragraph 3 of the order dated 22.4.2013 has been incorporated unauthorisedly and fixation of cut-off date in the order dated 22.4.2013 is arbitrary as no reason has

been assigned for fixation of the aforesaid cut-off date. In support of their submissions, reliance has been placed on decisions of Supreme Court in *D.S. Nakara and others Vs. Union of India,* A.I.R. 1983 SC 130, and *Jagdish Prasad Sharma and others Vs. State of Bihar and others,* (2013) 8 SCC 633, decision of High Court of Jharkhand at Ranchi in WP(s) No.363/2010 and analogous cases decided on 10.1.2011 *(Dr. Maheshwar Tiwary and others Vs. The State of Jharkhand and others)*, decision of High Court of Uttarkhand at Nainital in WP No.52/2010 dated 8.12.2011 *(Pant University Teachers Association, Pant Nagar Vs. Chancellor, Govind Ballabh Pant University of Agriculture & Technology, Pant Nagar and others)* as well as a decision of High Court of Judicature at Patna in CWJC No.13450/2010 and analogous case decided on 15.9.2011 *(Dr. Nawal Kishore Choudhary Vs. Rajendra Agricultural University, Bihar, Pusa (Samastipur) and others).*

8. On the other hand, learned counsel for Union of India as well as University Grants Commission have invited the attention of this Court to Clause 8(p) of the Scheme and have submitted that in order to get the central assistance for implementation of the Scheme, the State Government has to adopt the Scheme as a whole without any modification. However, the State Governments have been given the discretion with regard to date of implementation of the Scheme. Learned counsel for the University has submitted that in exercise of power under Section 36 of the Jawaharlal Nehru Krishi Vishwa Vidyalaya Act, 1963, statutes have been framed and Statute No.11(4)(d) of the Statutes prescribes the age of superannuation of the teaching staff to be 62 years. It is further submitted that the Scheme enables the State Government to prescribe the date for its implementation and a policy decision has been taken in this regard. It is also urged that there is no provision either under the Act or the Statutes framed under the Act for continuance of teaching staff beyond the age of 62 years.

9. On the other hand, learned Panel Lawyer for the State submitted that Agricultural Universities situate in the State of Madhya Pradesh, which have been constituted under the Act framed by the State Legislature, do not receive any grant-in-aid from the University Grants Commission and the State Government is entitled to decide the cut-off date of superannuation of the employees working in the Agricultural Universities. It is further submitted that the petitioner is not entitled to benefit of terms and conditions contained in the

Scheme dated 31.12.2008. It is also urged that fixation of cut-off date of superannuation of the employees is an executive fiat/function and even if no reason is assigned for fixation of a particular date, it should not be interfered with by the Court, unless the cut-off is blatantly capricious. In support of her submissions, learned Panel Lawyer has placed reliance on a decision in the case of *Government of Andhra Pradesh and others Vs. N.Subbarayudu and others*, (2008) 14 SCC 702.

10. I have considered the submissions made on both sides. From perusal of the Scheme dated 31.12.2008 it is evident that discretion has been conferred on the State Government with regard to adoption of the scheme. The scheme provides that in case the State Government opts to revise the pay scale of Teachers and other equivalent cadres covered under the Scheme, the financial assistance from the Central Government to the State Government would be provided to the extent of 80% of the additional expenditure involved for the implementation of the scheme and the State Government would have to meet the remaining 20% of the additional expenditure from its own sources. However, such financial assistance would be provided for a period from 01.1.2006 to 31.3.2010 and thereafter the entire liability on account of revision of pay scales of the teachers of the University and College, would be borne by the State Government with effect from 01.4.2010. Clause8(p) of the Scheme provides that payment of central assistance for implementing the scheme is subject to the condition that entire scheme of revision of pay scales together with all the conditions laid down by the UGC, by way of regulations and other guidelines, shall be implemented by the State Government and the Universities and the Colleges coming under their jurisdiction as composite scheme without any modification except with regard to date of implementation of scale of pay mentioned hereinabove. Thus, it is evident that if the State Government takes a decision to implement the scheme, it has to implement the same as a whole.

11. It appears that the State Government by order dated 06.4.2010 took a decision to implement the scheme in respect of Government Colleges and Universities in the State of Madhya Pradesh under M.P. Vishwa Vidyalaya Adhiniyam, 1973. Thereafter, the State Government by order dated 09.4.2010 issued in accordance with Article 166 of the Constitution of India in the name of and on behalf of the Governor, took a decision to accord benefit of recommendations of VIth Pay Commission to the Vice Chancellors, Registrars, Teachers, Scientists, Librarians and Sports Officers with effect from 01.1.2006. From perusal of the order it is evident that the State Government after taking into

account the fact that in order to avail the financial assistance under the scheme it is necessary to adopt the same without any modification, directed its adoption as such without any modification in respect of other recommendations, namely, with regard to age of superannuation, etc. in its entirety. The order further states that it has been issued after obtaining the approval from the Finance Department vide order dated 05.4.2010. From perusal of note-sheet filed as Annexure-P-9 in the writ petition it is evident that after due deliberation and after consultation with the Finance Department as well as concerned Agriculture Universities, namely, Jawaharlal Nehru Krishi Vishwa Vidyalaya, Jabalpur and Rajmata Vijya Raje Scindia Krishi Vishwavidyalaya, Gwalior, a conscious decision was taken, inter alia, on the following terms:-

> *(i) After approval from the General Adminstration Department as well Finance Department an order dated 09.4.2010 was issued by which the benefit of recommendations of VIth Pay Commission was given to the Teachers and the age of superannuation was enhanced from 62 to 65 years. However, the aforesaid order was withdrawn without seeking the approval of the General Administraton Department and Finance Department.*
>
> *(ii) In case the age of superannuation of the Teachers of Agricultural Universsity is enhanced from 62 years to 65 years the State Government would not incur any extra financial burden and the benefit of experience of Senior Teachers would be available to the Universities.*

12. From perusal of note-sheet (Annexure-P-9) it is also evident that the issue with regard to financial burden has also been considered consciously and it has been found that for implementing the recommendations of VIth Pay Commission for the period from 01.1.2006 to 31.3.2010 in respect of employees of JNKVV the State Government will have to incur additional financial expenditure of Rs.52.52 crores, out of which Rs.41.72 crores shall be paid by the Indian Council of Agricultural Research and Rs.10.48 crores shall be paid by the State Government. Similarly, in respect of Rajmata Vijya Raje Scindia Krishi Vishwavidyalaya, Gwalior the State Government would incur the financial burden of Rs.40.42 crores out of which Rs.32.65 crores shall be paid by the Indian Council of Agricultural Research whereas the remaining Rs.8.16 crores shall be paid by the State Government. Thus, in respect of both the Universities the State Government shall be required to

pay 20% of the amount of additional expenditure for the period 01.1.2006 to 31.3.2010 to the tune of Rs.18.59 crores whereas Indian Council of Agricultural Research shall make available 80% of the said amount i.e. Rs.74.37 crores. It is pertinent to mention here that there is neither rebuttal of averments made in the writ petition referred to supra in the return filed on behalf of the State Government nor any stand has been taken by the State Government that order dated 09/04/2010 does not bind it. It is well settled in law that if an allegation of fact is not denied the same is taken to be accepted. [See:*Naseem Bano (Smt.) vs. State of U.P. & others,* (1993) Suppl. 4 SCC 46 and *Sushil Kumar Vs. Rakesh Kumar,* AIR 2004 SC 230] and an executive action may be exercised not only through Council of Ministers but also through an individual Minister. See : *State of Karnataka Vs. Union of India,* AIR 1998 SC 68.

13. However, thereafter, once again by order dated 22.4.2013 the State Government directed for enhancement of age of superannuation of the employees in Agriculture Universities from 62 years to 65 years with effect from 01.5.2013. The said order has been made subject to the order which may be passed by this Court in this bunch of writ petitions. It was further directed that the Agriculture Universities shall take requisite steps for amendment of the statutes. Therefore, in the facts of the case, this Court need not adjudicate the issue with regard to effect of prescription of age of superannuation in the statutes framed by the Universities and the effect of prescription of age of teaching staff in the regulations of University Grants Commission as well as the issue of repugnancy as the State Government itself by order dated 22.4.2013 had directed the Universities to amend the statutes accordingly.

14. From the facts narrated in the preceding paragraphs, it is evident that the State Government took a conscious decision to accord benefit of recommendations of VIth Pay Commission and to enhance the age of superannuation to the Teachers of Agriculture Universities by order dated 09.4.2010. The aforesaid order was passed after taking into account the provisions of clause 8(p)(v) of the Scheme which provides that in order to avail the financial assistance from the State Government the entire scheme has to be adopted as a whole without any modification. There is no material on record to show that the State Government has not availed any financial assistance from the Central Government after implementation of the Scheme. In other words after having availed the financial assistance from the Central Government for implementation of the scheme and after accepting the recommendations vide order dated 09.4.2010, the State Government had no

authority to pass orders dated 22.4.2010 and 22.4.2013 modifying the order dated 09.4.2010. Since the State Government has taken a decision to adopt the scheme on 09.4.2010, therefore, the consequences envisaged in the scheme itself would automatically follow as has been held by the Supreme Court in case of *Jagdish Prasad Sharma* (supra).]

15. Accordingly, the order dated 22.4.2010 is quashed. The order dated 22.4.2013 in so far as it fixes the cut off date as 01.5.2013 for availing the benefit of enhancement of age of superannuation from 62 years to 65 years in respect of petitioners is also quashed. The petitioners shall be entitled to the benefit of recommendations of VIth Pay Commission as well as the age of superannuation as directed by the State Government vide order dated 09.4.2010. Needless to state, the concerned Universities, namely, Jawaharlal Nehru Krishi Vishwavidyalayay, Jabalpur and Rajmata Vijya Raje Scindia Krishi Vishwavidyalaya, Gwalior shall take necessary steps for amendment in the statute for enhancement of age of superannuation in respect of age of teachers as directed by the State Government vide order dated 22.4.2013.

16. Accordingly, the writ petitions are allowed to the extent indicated above. However, There shall be no order as to costs.

Petition allowed.

I.L.R. [2014] M.P., 1848
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No. 8098/2011 (Jabalpur) decided on 3 January, 2014

KRIPA TORI & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

***A. Land Revenue Code, M.P. (20 of 1959), Sections 51 & 165(7) - Period of limitation - Suo-motu review* - Although no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period - Reasonable time must be determined by the facts of the case and the nature of the order which is being revised - Review petition initiated after more than 3 years was not sustainable - Impugned order is set aside. (Paras 20 to 27)**

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धाराऐं 51 व 165(7) –

परिसीमा की अवधि – स्वप्रेरणा से पुनर्विलोकन – यद्यपि परिसीमा की अवधि विहित नहीं है, कानूनी प्राधिकारी को अपनी अधिकारिता का प्रयोग युक्तियुक्त अवधि के भीतर करना चाहिए – प्रकरण के तथ्य एवं आदेश जिसे पुनर्विलोकित किया जा रहा है, के स्वरुप से युक्तियुक्त समय का निर्धारण किया जाना चाहिये – पुनर्विलोकन याचिका जिसे 3 वर्ष से अधिक अवधि के पश्चात आरंभ किया गया था, पोषणीय नहीं थी – आक्षेपित आदेश अपास्त।

***B. Land Revenue Code, M.P. (20 of 1959), Section 165(7)(b) - Lease* - Lease was granted to original lessee in the year 1923 - Possession was also delivered to lessee - As Govt. was not in possession of land therefore, no permission for sale from State Govt. was required as per circular introduced in the year 1947. (Paras 31 to 35)**

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 165(7)(बी) – पट्टा – मूल पट्टाधारी को वर्ष 1923 में पट्टा प्रदान किया गया था – पट्टाधारी को कब्जा भी हस्तांतरित किया गया था – चूंकि सरकार के पास भूमि का कब्जा नहीं था इसलिए वर्ष 1947 में समाविष्ट किये गये परिपत्र के अनुसार, विक्रय हेतु राज्य सरकार की अनुमति अपेक्षित नहीं।

***C. Land Revenue Code, M.P. (20 of 1959), Section 51 - Review* - Authority has to issue show cause notice disclosing grounds on which it intends to review the order - After hearing the parties, if the authority is satisfied that there is error apparent on record, should set aside the earlier order and should hear the matter afresh on merits. (Para 33)**

ग. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 51 – पुनर्विलोकन – प्राधिकारी को कारण बताओ नोटिस जारी कर, उन आधारों को प्रकट करना चाहिए जिन पर वह आदेश का पुनर्विलोकन करना चाहता है – पक्षकारों को सुने जाने के पश्चात, यदि प्राधिकारी संतुष्ट है कि अभिलेख देखने से ही भूल प्रकट होती है, उसे पूर्ववर्ती आदेश अपास्त करना चाहिए और नये सिरे से गुणदोषों पर मामले की सुनवाई करनी चाहिए।

Cases referred :

2010 (5) MPHT 137, (2007) 11 SCC 363, (2009) 9 SCC 352, 2009 Revenue Nirnaya Page 1.

B.M. Dwivedi, for the petitioners.
Sheetal Dubey, G.A. for the respondents No. 1 to 3.
Kamlesh Lakhera, for the respondents No. 4 & 5.
Shanshank Verma, for the respondent No.6.

ORDER

U.C. MAHESHWARI, J. :- The petitioners have filed this petition under Article 226/227 of Constitution of India being aggrieved by the order dated 15.3.2011 (Ann. P.5) passed by the respondent No.3/ Board of Revenue Gwalior in suo motu review case No. 618/PBR/2010 registered under Section 51 of M. P. Land Revenue Code (In short "the Code") to review the earlier order dated 16.4.2007 (Ann. P.2) passed in appeal No.412/PBR/2006, whereby allowing such suo-motu review the aforesaid earlier order dated 16.4.2007 (Ann.P.2), affirming the order dated 17.11.2005 passed by the Additional Commissioner in Appeal No.39/Appeal/2004-05 affirming the order dated 9.8.2004 (Ann. P.1) passed by the Collector in suo motu initiated Revenue Revision No.4-A/6/95-96 declaring the concerned document of title of the petitioners to be illegal and ab-initiated void and setting aside the mutation order dated 22.7.1995 passed by the Nazul Officer/ S. D. O. directing the mutation of the petitioners and respondent No.4 to 6 on the respective part of the land in the revenue record has been recalled and set aside and pursuant to it by deciding the said appeal afresh the aforesaid order of Additional Commissioner and Collector, setting aside the aforesaid mutation order of Nazul Officer dated 22.7.1995 have been affirmed and by declaring the aforesaid land to be the Government land the Revenue Authorities have been directed to amend and modify the revenue record accordingly.

2. The petitioners have filed this petition contending that the land of Nazul Sheet No.20 Plot No.14/2, area measuring 3,15,265 sq. ft (7.42 acres), situated in Pachmarhi initially belonged to Mr. Hanary John Hands, who on his turn sold the same to Cosmo & Antio Justiniano Rodriguez in the year 1945. Thereafter the same was purchased by Mr. Denish Tori from Victor Rodriguez through registered sale deed dated 7.11.1977.

3. Besides this, the other land situated at Pachmarhi bearing Sheet No.23, Plot No.1/2 (although this is not the subject matter of this petition), was initially belonged to W. Liversay, who on his turn sold the same to his highness Maharaja Sir Brijnath Singh vide registered sale deed dated 11.11.1949. Thereafter, in the year 1970 Denish Tori had purchased such property from her highness Rajmata (Junior) Tejkumar and her son Rajkumar Narayan Singh through sale deed dated 7.10.1970.

4. The land purchased by Mr. Denish Tori was mutated in his name in the revenue record by virtue of order dated 6.7.1978 passed by the Nazul Officer/

SDO Sohagpur. Thereafter, Mr. Denish Tori on his turn sold some part out of his land purchased through aforesaid sale deed dated 7.10.1970 to the Governor of the Madhya Pradesh through director of M. P. Tourism Corporation, Bhopal by registered sale deed 18.3.1977. At the time of mutation of such part of land in the name of M. P. Tourism Corporation the Revenue authorities had not raised any objection regarding such transfer and the sale deed.

5. Aforesaid described land of sheet No.20 Plot No.14/2 on the strength of sale deed dated 7.11.1977 was mutated in the revenue record in the name of Denish Tori, on that occasion the revenue authorities had not taken any objection. After demise of Denish Tori on 7.3.1994 on the strength of his Will executed by him on 6.5.1989 his son Kripa Tori, petitioner No.1 and daughter Smt. Bina D'souza respondent No.6 had filed their respective applications under Section 109 and 110 of the Code for mutation. On consideration vide order dated 22.7.1995 the same were allowed by the Nazul Officer/ S. D. O., according to which the land measuring 67002 sq. ft. was recorded in the name of Kripa Tori while the land measuring 67002 sq. ft was recorded in the name of Smt. Bina D'souza, the respondent No.6. The aforesaid disputed land of sheet No.20, Plot No.14/2 measuring 3,15,265 sq ft was remained with Kripa Tori, petitioner No.1.

6. On the basis of the sale performed by the above mentioned land owners of the land in question after obtaining the requisite permission of the State of Madhya Pradesh dated 1.5.1991 the name of the petitioner No.2, 3 and respondent No.4 & 5 were mutated on the respective part of such land purchased by them in the revenue record vide orders dated 22.7.1995 passed by the Nazul Officer/SDO Sohagpur in Revenue Case No.2-A/06, 3-A/06, 4-A/06, 5-A/06 and 6-A/06 of the year 1992-93. Subsequent to aforesaid order of mutation in the revenue record the Collector Hoshangabad has initiated a suo motu revision bearing No.4-A/6/1995-96, without mentioning any sufficient reasons only by stating that such mutation order were passed in violation of the terms and conditions of the lease deed and issued the show cause notice dated 24.1.2004 to revise the aforesaid mutation orders dated 22.7.1995 and thereafter on consideration by allowing such suo motu revision set aside the aforesaid mutation orders dated 22.7.1995. Being dissatisfied with such order the petitioners and respondent No.4 and 6 had filed the appeal before the Commissioner Hoshangabad. On consideration such appeal was dismissed vide order dated 17.11.2005, against dismissal of such appeal the

petitioners and respondent No. 4 to 6 had approached the respondent No.3, Board of Revenue through appeal No.412/PBR/06. After hearing the parties on consideration such appeal was allowed vide order dated 16.4.2007 (Ann. P.2) and by setting aside aforesaid order of Commissioner as well as of Collector the mutation order dated 22.7.1995 passed by the Revenue Officer/ S.D. O. mutating the names of the petitioners and respondent No.4 to 6 was restored.

7. Subsequent to passing the aforesaid order after more than three years the petitioners had received a show cause notice dated 5.5.2010 (Ann. P.3) from the office of the secretary of Board of Revenue, Gwalior asking them why the aforesaid order dated 16.4.2007 passed by the Board of Revenue in appeal No.412-PBR/2006, setting aside the order dated 17.11.2005 passed by the Commissioner Hoshangabad in Case No.39/Appeal/2004-05, be not recalled and cancelled by exercising the suo motu power of Section 51 of the Code. In such show cause notice the reasons for review of the order dated 16.4.2007 was assigned that respondent No.3/ Board of Revenue on earlier occasion while passing the order did not take cognizance of facts and legal aspects and did not appreciate the terms of the lease granted with respect of the disputed land in favour of the predecessor in title of the petitioners, which was further renewed on 16.4.1955 and the land in question i. e. plot No.14/2 being the land of Revenue Department of the government the lease holder had no authority to dispose of the same without prior permission of the competent authority, therefore, the sale deed dated 7.11.1977 executed in favour of late Shri Denish Tori with respect of the land in question had not conferred any legal right and title over the property to such Denish Tori and in such premises the subsequent sale made in favour of the petitioner No.2 & 3 and respondent No.4 & 5 with respect of different parts did not confer the title to such petitioners and respondent No.4 and 5. On earlier occasion such aspects were not taken into consideration thereby Board of Revenue had committed error on the face of the record in setting aside the order of the Collector and Commissioner.

8. According to the petition the above mentioned reasons could not be a ground to review the order passed by the Board of Revenue on earlier occasion. Hence, aforesaid show cause notice issued by the Board of Revenue being without jurisdiction and contrary to the provisions of Section 51 of the Code was not sustainable. In such premises by justifying the order dated 16.4.2007 the petitioners had raised the following questions before the Board

of Revenue in their reply to quash the show cause notice and the initiated suo motu review petition:

Whether in the present circumstances the power provided under Section 51 of the Code can be exercised by the Board of Revenue or not ?

a. Whether the reasons shows in the show cause notice for exercising the power of review of the order dated 16.4.2007 can be a ground of review enumerated under the provision of Order 47 Rule 1 of the Code ?

b. Whether order dated 16.4.2007 could be reviewed by the Board of Revenue after passing such a long time and beyond the period of limitation prescribed under the Provision of Section 51(1)(iii) of the Code ? Whether authority exercised the power of suo motu review within the limitation as determined by Full Bench of this Court in the matter of *Ranveer Singh and others Vs. State of M.P. and others* reported in 2010 (5) MPHT 137 ?

c. Whether power of review can be exercised without giving any opportunity to be heard to the interested party before reviewing the previous order ?

9. In further averments it is stated that in the order dated 16.4.2007, the Board of Revenue had observed that provision of Section 165 (7) (b) was not violated by the Victor Rodriguez when he sold the property to Dennis Tori because of such provision were neither enacted nor came into force the same has come into force w.e.f. 24.10.1980 and the alleged sale in favour of Denish Tori was carried out on 7.11.1977. So, in such premises to sale out the land vide sale deed dated 7.11.1977 the permission from the State authority was neither necessary nor was obtained. In such earlier order the Board of revenue had also observed that sale made in the year 1990 by Mr. Dennis Tori in favour of the petitioner No.2 & 3 and respondent No.4 & 5 were carried out after obtaining the requisite permission from the State Government. In such premises there was no infirmity in the original order dated 16.4.2007 (Ann. P.2) and the same was passed on sound and cogent legal foundation, and in such premises prima facie no grounds were available before the Board of Revenue to review such earlier order. Said show cause notice was also challenged on the ground that the Board of Revenue has not issued the same stating that why the earlier order should not be reviewed under the provision

of Section 51 of the Code but the notice was issued stating that why the order dated 16.4.2007(Ann. P.2) should not be cancelled. So, in such premises the procedure prescribed to initiate suo motu review was not adopted and in such premises it is apparent that such show cause notice was given with intention to cancel the mutation order and ultimately vide impugned order (Ann.P.5) such earlier order dated 16.4.2007 (Ann. P.2) was set aside and the order of the Commissioner dated 17.11.2005 and Collector dated 9.5.2004 was affirmed. The Board of Revenue also declared the land in question is Government land and issued direction to the Commissioner and Collector, Hoshangabad for correction of entries in the revenue record immediately.

10. So far the question relating to the period of limitation to initiate or entertain suo motu review petition raised by the petitioner has been answered by the Board of Revenue stating that no limitation is prescribed for such review because the alleged dispute is not between the private parties. However, such observation is not only misconceived but also contrary to the decision of the Full Bench of this court in the matter of *Ranveer Singh* (Supra). The Board of Revenue has not answered the question regarding sustainability of the sale deed executed by the Denish Tori in favour of the M. P. Tourism Corporation in the name of Governor, such sale deed was not only recognized by the revenue authorities to carry out the mutation of such corporation over the land but subsequently also at any point of time such mutation and transaction was not questioned by the authorities. While such land was also situated in Pachmarhi and thereby discriminatory process was adopted by the authorities in passing the impugned order in suo motu review petition and contrary to the interest of the petitioners the earlier order was cancelled. The Board of Revenue has also passed the order taking into consideration the provision of Section 181 and 182 of the Code while such provisions was not applicable to the case of the petitioners because the predecessor of the petitioners the original lease holder accrued the right in pursuant to lease deed executed in the year 1923, as stated in Annexure P.7 the revenue lease deed and such dead does not contain any restriction against transfer of the disputed land and therefore in such circumstance the land in dispute could not/ would not be governed with the provisions of Section 181 and 182 of the Code. It was also stated that the sale deed was executed in favour of the petitioner No.2 and 3, after obtaining prior permission of the authority vide dated 1.5.1991 (Ann. P.6) in compliance of the provisions of Section 165 (7) (b) of the Code, as such provisions came in to force in the year 1980. Besides this it was also stated

that aforesaid lease (Ann. P.7) was again renewed by the authorities vide renewal lease deed dated 28.4.1990 (Ann. P.8) up to the period of 31.3.2017.

11. It is further stated that concerning clause 16 Part-IV of chapter 1 of Revenue Book Circular enacted in respect of the land situated in Pachmarhi, is not applicable to the lease already executed. The land in dispute for which the lease had already executed shall be governed solely by the lease deed executed in favour of Victor Rodriguez, the predecessor of the petitioners. Such lease deed was renewed in the year 1955 up to the 1987, but said lease deed does not contain any clause for obtaining prior permission from the competent authority to sell the property. On such premises there was no restriction to sale the land by Victor Rodriguez to the Denish Tori through registered sale deed in the year 1977. So the grounds raised by the Board of Revenue that the earlier order was passed without taking into consideration the terms of the lease is absolutely misconceived and has no legal foundation. Copy of the then concerning Clause of RBC along with the terms is also annexed as Ann. P.9. With these averments the prayer for quashment of the impugned order dated 15.3.2011 (Ann. P.5) is made.

12. In return of the respondent No.1/ State of Madhya Pradesh by justifying the impugned order all the aforesaid objections raised by the petitioner have been denied. In addition to it, it is stated that mere perusal of Section 51 of the Code it is clear that the period of limitation to entertain the review application is prescribed for private affected person while in the case at hand the dispute is between Government and private person and the State Government is claiming the land on the ground that originally the same was belonging to it, therefore the objection of the limitation to initiate suo muto review petition at belated stage is not tenable. In fact for exercising the power of suo motu review with respect of the impugned land no limitation is prescribed in clause (iii) of Section 51 of the Code.

13. So far the aforesaid cited case in the matter of *Ranveer Singh* (Supra) is concerned, it is stated that in view of the provision of Section 51 of the Code the cited case being based on Section 50 of the Code is distinguishable on facts therefore, the same is neither applicable nor helping to the petitioner.

14. So far the objection of the petitioners that lease deed of the aforesaid land executed in the year 1923 does not contain any restriction against the lessee transferring the land and therefore alleged transfer could not be held to be illegal is concerned, it is stated that such contention has no force of law

because every person holding a land by virtue of lease granted by the State Government would be governed with the provision of Section 181 and his rights and liabilities are also defined under the provisions of Section 182 of the Code because the every grant of the State Government would be treated to be a grant under the Government Grants Act 1895. Thus, the petitioner contentions that the provisions of Section 181 and 182 the code are not applicable, is misconceived. The Board of Revenue in paragragh 7.5 of the impugned order categorically dealt with this issue and has observed that every government lessee holding the land of Government and as per the Revenue Book Circular the land situated in Pachmarhi cannot be sold out without permission of the government. It is also observed by the board of Revenue, although there is no restriction in the transfer of land in the lease deed but the condition No.6 containing vesting of land in the State makes it clear that the land can only be transferred with the permission of the State Government. In absence of such sanction it can be considered to be a violation of terms and condition of lease and accordingly such lease deserves to be terminated. In fact original lease holder C. A. J. Rodriguez without obtaining any permission sold the land in favour of Denish Tori who later on executed sale- deeds in favour of different persons. The original sale in favour of Denish Tori was itself illegal, therefore, the Board of Revenue has rightly observed that subsequent sales are also illegal as the seller Denish Tori did not acquire any right or title by virtue of sale made without obtaining permission of the State Government. Denish tori purchased the property in the year 1977 and the provision of RBC were in force. The Clause 16 (1) of Chapter-IV of RBC very categorically provides the restriction over the sale of land situated over Pachmarhi, therefore, the said sale made in favour of Denish Tori was void and subsequent sales thereon are automatically held to be illegal.

15. So far the contention of the petitioners that the grounds for review of earlier order as per requirement of the provision of Order 47 Rule 1 of CPC were not available to the Board of Revenue is concerned, it is stated that in view of para 7.8 of the impugned order the Board of Revenue has categorically stated that on earlier occasion the orders of the Collector and Commissioner were set aside only on the ground that the provision of Section 165 (7) (b) of the Code being implemented only on 24.10.1980 was not applicable to the present case but said notion of the Board of Revenue was absolutely misconstrued as the reasons assigned by the Board of Revenue in its impugned order in para 8.2. to 8.6 have not been looked in to and totally ignored,

therefore, order dated 16.4.2007 was fit to be recalled by exercising the power of review, on such grounds available under Order 47 Rule 1 of CPC.

16. It is further stated that in compliance of the impugned order of Board of Revenue the State authorities have already corrected the revenue record before granting the order of status-quo by this court. With these averments the prayer for dismissal of the petition is made.

17. Shri B. M. Dwivedi, learned counsel for the petitioners after taking me through the averments of the petition and the documents placed on record argued that in the available circumstances the earlier order dated 16.4.2007 (Ann. P.2) passed by the Board of Revenue being passed on proper appreciation of available factual matrix and of existing legal position was in inconformity with law, the same could not have been interfered under the suo motu review petition by the Board of Revenue. In any case after more than three years from the date of passing the order (Ann. P.2) the suu (sic:suo) motu review could not be initiated against such order. He also said that in the aforesaid earlier order (under review) no apparent error on the face of the record was occurred for which the review was required. Inspite that by initiating the review petition vide impugned order (Ann. P.5) the aforesaid earlier order (Ann. P.2) was set aside and the order of Commissioner and Collector were affirmed under the wrong premises, the same is not sustainable and by placing his reliance on the decision of the Full Bench of this court in the matter of *Ranveer Singh* (Supra) has prayed to set aside the impugned order and restore the earlier order of the Board of Revenue affirming the order of mutation passed by the Nazul Officer/ S. D. O. by allowing this petition.

18. On the other hand responding the aforesaid arguments Smt. Sheetal Dubey learned G. A. by justifying the impugned order said that same being passed on proper appreciation of available factual matrix and considering the provision of clause 16 of Chapter IV-1 of RBC and Section 181 and 182 of the Code and other related legal provisions along with the terms and conditions of the impugned lease deed, which were not considered in passing the earlier order dated 16.4.2007 (Ann. P.2), does not require any interference at this stage. The Board of Revenue had authority to initiate suo motu review petition on availability of sufficient grounds according to her the apparent error on the face of the record was occurred in the aforesaid earlier order (Ann. P.2) of Board of Revenue that is why the suo motu review petition was initiated and allowed and prayed for dismissal of this petition.

19. Having heard the counsel keeping in view the arguments advanced by the parties, I have carefully gone through the papers placed on record.

20. Before examining the matter on merits, I would like to consider first the question relating to the period of limitation to initiate suuo (sic:suo) motu review petition by the Board of Revenue as raised by the petitioners' counsel. Under Section 51 of the Code for initiating suo-motu-review of any order no fix period of limitation has been prescribed but according to such provision if any application to review the earlier order is filed by the party then the period of limitation ninety days is provided. Apart this under the law to file the application of review under Order 47 Rule 1 of CPC also the limitation of thirty days is prescribed. In the case at hand the review application was not filed by any of the private parties or on behalf of the State Government but the same was initiated suo motu by the Board of Revenue itself. It is settled proposition of law if the limitation to register any proceedings either suo motu or on own motion of the authorities have not been prescribed under the law even then the concerning Court/ Tribunal/ Authority did not have ample or extra ordinary power to initiate such suo motu proceeding after passing years together from the date of passing such earlier order under review.

21. Such question was considered and answered by the Apex Court in the matter of *State Of Punjab & Ors vs Bhatinda District Coop. Milk Producers Union Ltd.* reported in (2007) 11 SCC 363, in which it was held as under :

> "18. It is trite that if no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What, however, shall be the reasonable period would depend upon the nature of the statute, rights and liabilities thereunder and other relevant factors."

22. Such question was again answered by the Apex Court in the matter of *Santosh Kumar Shivgonda Patil and ors. Vs. Balasaheb Tukaram Shevale and others,* reported in (2009) 9 SCC 352 in which it was held as under :

> "11. The question arises whether the Commissioner can revise an order made under Section 65 at any time. It is true that there is no period of limitation prescribed under Section 211, but it seems to us plain that this power must be exercised

in reasonable time and the length of the reasonable time must determined by the facts of the case and the nature of the order which is being revised."

23. Taking into consideration the provisions of Section 51 of the Code relating to review by the Apex Court in the matter of *M. P. Housing Board Vs. Shiv Shankar Mandil and others* reported in 2009 Revenue Nirnaya Page 1, it was held as under:

14. The subsequent stance for reviewing the diversion order is slightly intriguing. The Collector wanted to review his own order under Section 51 of the Code and for that purpose, needed the sanction of the Board of Revenue under sub-Section 1(1) of Section 51 of the Code. Section 51 runs as under:-

51. Review of orders:- (1) The Board and every Revenue Officer may, either on its/his own motion or on the application of any party interested, review any order passed by itself/ himself or by any of its/his predecessors in office and pass such order in reference thereto as it/he thinks fit:

Provided that-

(i) if the Commissioner, Settlement Commissioner, Collector of Settlement Officer thinks it necessary to review any order which he has not himself passed, he shall first obtain the sanction of the Board, and if an Officer subordinate to a Collector or Settlement Officer proposes to review any order, whether passed by himself or by any predecessor, he shall first obtain the sanction in writing of the authority to whom he is immediately subordinates."

It will be clear from the language that it is a review power and such review power would have to be exercised within a reasonable time. We agree with the Learned Single Judge that in this case, it took more than three years for the State Government to move to the Board of Revenue for reviewing the orders. The Learned Counsel appearing on behalf of appellants tried to suggest that at that time, there was status

> quo order pending, passed by the High Court on the first Writ petition filed by the respondents herein. We have examined the record carefully and we find nothing in the record suggesting that the State Government could not have exercised the power under Section 51 of the Code. In AIR 1969 SC 1297 *State of Gujarat Vs. Raghav,* this Court held that the review power should be used in reasonable time. We accept the finding of the Learned Single Judge as confirmed by the Division Bench of the High Court that the power of review has to be exercised within a reasonable time and that in this case, three years of time, without any explanation, could not be viewed as a reasonable time in view of the fact that the petitioner had obtained possession, paid premium, spent money for obtaining the Registered Sale Deed and have also made the initial expenditure for preparing the land for raising structures. The said Government could not have allowed the petitioner to do all these things and then chosen to review its own powers.

24. On arising the occasion such question in the light of the Section 50 of the Code the relating to the revision was referred to the Full Bench of this Court in the matter of *Ranveer Singh and others Vs. State of M.P. and others* reported in 2010 (5) MPHT 137 in the following manner :

> "Whether in the case wherein an individual is not put to suffer any irreparable loss, exercise of suo motu powers after any length of period is justifiable in law, more so, for protection of Govt. land or public interest ?"

25. In the cited case the Full Bench of this Court has answered the aforesaid question as under:

> 11. We do not have any scintilla of doubt that the Revisional Authority mentioned in Section 50 of the Code may exercise suo motu power of revision at any time in order to satisfy itself about the legality or propriety of any order passed by any Revenue Officer subordinate to it or as to the regularity of the proceedings of any such officer and while exercising such powers the Revisional Authority may pass such order as it thinks fit. True, the Legislature has not fixed any upper limit of the period when this power should be exercise and section is

total silent in this regard, although period of limitation has been fixed by the Legislature when a revision application is filed by a party concerned. According to clause (ii) of sub-section (1) of Section 50 of the Code, an aggrieved party can file revision application within sixty days before the Commissioner or/ the Settlement Commissioner or the Collector or Settlement Officer or within Ninety days to the board of Revenue excluding the requisites time for obtaining copy of the order against which revision is filed. But merely because the Legislature has not fixed an upper limit for exercising suo moltu (sic:motu) powers by the Revisional Authority, according to us, it will not confer unfettered right to the Revisional Authority to exercise this power at any moment of time according to his whims because it would amount to give a sword having no scabbard. Indeed, after having an order in favour of a litigant he must be permitted to leave in peace with an understanding that since the order passed in his favour has not been challenged for a considerable long period, now it cannot be challenged. His right, whatever he enjoys, may be on account of some illegal order in his favour should attain some finality so that his faith in the judicial system may not be ruined that although an order is in my favour, but it can be set aside at any moment of time even after passing the several years.

33. Coming to the point in question "what should be the reasonable period." We have at a glance demonstrate different type of periods of limitation in order to achieve the aim and object of a particular chapter. Hence, according to us, in respect to Section 50 of the Code which comes under Chapter V of the Code what should be the reasonable period for exercising suo motu powers, one should be guided with the aims and object of the provisions prevailing in those chapters. Hence, the prescribed periods of limitation of thirty years, ten year, five years, three years, two years or even one year prescribed in different chapters and the provisions enacted in that chapter cannot be made applicable for the purpose of achieving the aim and object of this Chapter V in which Section 50 has been enacted which speaks about the exercise of suo

motu powers of revision also. The chapter V of the Code contains Sections 44 to 56 and the maximum period of limitation in this chapter is ninety days. Hence, according to us, the maximum period which has been envisaged in any of the provision of any other chapter of the Code cannot be made applicable for the purpose of this chapter because that particular period of limitation has been enacted by the Legislature to achieve the aim and object of that particular chapter and its provisions only. The maximum period of limitation of ninety days has been enacted for filing the revision, but since this restriction is not for exercising suo motu powers and to serve the purpose, the aim and object for which this provision has been enacted, according to us, within a period of one eighty days the Revisional Authority should exercise suo motu powers from the date of coming into the knowledge to it that any particular illegality, impropriety or irregularity of the proceeding has been exercised by any officer subordinate to it.

35. It is the trite law that in no period of limitation has been prescribed, the Statutory Authority must exercise its jurisdiction within a reasonable period. What should be the reasonable period should be judged from this angle also that what is the nature of the statute itself, rights and liabilities thereunder and other relevant factors. The Supre Court in *Bhatina District Cooperative Milk Producers Union Ltd* (Supra) in Para 19 has held that the reasonable period of limitation may be borne out from the statutory scheme of the Act. The Supreme Court while considering the various provisions of Punjab General Sales Tax Act, 1948 in Para 19 has held that looking to the scheme of the said Act the maximum period of limitation provided in sub-Section (6) of Section 11 of the Act is five years and, therefore, in those circumstances the Supreme Court has held that as per the scheme of the Court, the reasonable period should be three years. Since in the presence case as we have noticed hereinabove, different type of periods of limitation which are prescribed for exercising particular right and liability under different chapters, looking to the aim object

and the purpose of enacting the provisions of suo motu powers 180 days of the period of limitation would be the reasonable period to exercise suo motu powers by the Revisional Authority from the date of coming into the knowledge of illegality, impropriety and irregularity of the proceeding having been done by the authority subordinate to it.

"38. Ab judicatio for the reasons stated hereinabove we hereby answer the question referred to us as under :

> "The suo motu powers can be exercise by the Revisional Authority envisaged under Section 50 of the Code within a period of 180 days from the date of the knowledge of illegality, impropriety and irregularity of the proceedings committed by any Revenue Officer subordinate to it even if the immovable property is Government land or having some public interest. What should be the irreparable loss, it should be considered on the facts and circumstances of each case as no definite yardstick in that regard can be drawn."

52. (13). In view of the aforesaid discussion, I concur with Brother Shrivastava, J., that what should be an irreparable loss is to be considered in the facts and circumstances of each case because no definite yardstick in that regard can be applied. I further concur with him in the manner that in such cases a period of 180 days from the date of detection of illegality, impropriety and/ or irregularity of the order/ proceedings committed by Revenue Authority subordinate to Revisional Authority would be a reasonable period for exercise of suo motu powers despite involvement of Government land or public interest. I may further hasten to add that this would be upper-ceiling of limitation for exercise of such powers and the person suffering an irreparable loss would be within his rights to show that such power ought to have been exercised in lesser period in view of the attending facts and circumstances of the case, causing irreparable loss prior to such exercise."

26. The aforesaid cited case was decided by the Full Bench of this court taking into consideration the provision of suo motu revision enumerated under

Section 50 of the Code, the language of procedure to initiate suo motu revision under Section 50 of the Code till some extend is identical to the procedure provided to initiate suo motu review under Section 51 of the Code. The concerning provisions are read as under :

> Section 50. Revision (1). The Board or the Commissioner or the (Settlement Commissioner or the Collector or the Settlement Officer) may at any time on its/his motion or on the application made by any party for the purpose of satisfying itself/ himself as to legality or propriety of any order passed by or as to the regularity of the proceedings of any Revenue Officer subordinate to it/ him call for, and examine the record of any case pending before or disposed of by such officer, and may pass such order in reference thereto as it/ he thinks fit:
>
> Provided that-
>
> (i) . . . . . .
>
> (a) . . . . . .
>
> (b) . . . . . .
>
> (ii) no such application shall be entertained unless presented within sixty days to the Commissioner or the (Settlement Commissioner or the Collector or the Settlement Officer), as the case may be, or within ninety days to the board of Revenue from the date of the order and in computing the period aforesaid, time requisite for obtaining a copy of the said order shall be excluded.
>
> Section 51. Review of orders -(1) The Board and every Revenue Officer may either on its/ his own motion or on the application of any party interested review any order passed by itself/ himself or by any of its/ his predecessors in office and pass such order in reference thereto as it/ he thinks fit;
>
> Provided that -
>
> (i) . . . . . .
>
> (i-a) . . . . . .

(ii) . . . . . .

(iii) no order affecting any question of right between private persons shall be reviewed except on the application of a party to the proceedings, and no application for the review of such order shall be entertained unless it is made within ninety days from the passing of the order.

27. In view of aforesaid, it is held that the impugned suo motu revision petition registered by the Board of Revenue being initiated after more than three years from the order dated 16.4.2007 (Ann. P.2), was not sustainable and only on this ground the impugned order dated 15.3.2011 (Ann. P.5) deserves to be set aside.

28. Apart the aforesaid even on examining the case on merits, then It is apparent from the record that the land in dispute was initially given by the then State authorities on lease of 30 years for building purpose to one Mr. Hanary John Hands, vide lease deed dated 27.4.1923, as stated in Annexure P.7 and since then under such lease the possession of the same was remained with Mr. Hanary John Hands, and on his term he had transferred/sold the same to Cosmo & Antio Justiniano Rodriguez in the year 1945 and said earlier lease was renewed vide the renewal deed dated 16.4.1955 (Ann. P.7), in favour of said Rodriguez on the terms and conditions enumerated in the same, accordingly till this date of renewal the land was remained in possession of such Rodriguez. Thereafter, said C. A. J. Rodriguez on his term had sold such land with possession to Denish Tori the father of the petitioner No.1 vide registered sale deed dated 7.11.1977. Mere perusal of clause 6 of aforesaid lease deed dated 16.4.1955 (Ann. P.7), it is apparent that lessee was given the right to carry out further assignment or any part of such land. So, it is apparent that by virtue of such term the aforesaid Mr. Hanary John Hands had a right to transfer/ sale the property to other person. In such premises Mr Hanary as well as said Rodriguez had not violated the terms of such lease deed. It is also undisputed fact that at the time of aforesaid sale deed dated 7.11.1977 the provisions of Section 165 (7) (b) of the Code were neither enacted nor inserted in the Code and in such premises the same were not in force, so even if it is assumed that it was a land given by the State then the permission to transfer the same under the aforesaid provision was not necessary as held by the Board of Revenue also. I would like to mention here that such provision was enacted, inserted in the Code and enforced on 24.10.1980

with prospective effect and not with retrospective effect.

29. Before proceeding further to examine the matter in the light of clause 16 of Chapter -IV part 1 of RBC, I would like to reproduce such provision for ready reference. The same is read as under:

> 16. पचमढ़ी स्थिति भूमि की बिक्री –
>
> पचमढ़ी की कोई भी नजूल भूमि राज्य शासन के आदेशों के बिना पट्टे पर नहीं दी जावेगी और न अन्य प्रकार से बेची जावेगी, और ऐसे सभी प्रस्ताव मंजूरी के लिए राज्य शासन को पूरे ब्यौरे सहित भेजे जाने चाहिए ।

29. In this regard the petitioners have stated that prior to aforesaid clause in the year 1947 the then erstwhile State of C. P. and Barar issued and introduced a circular (Ann. P.9) with respect of the land of Pachmarhi. In such circular the para-materia provision like clause 16 of Chapter -IV part 1 of RBC along with some other terms had been stated. Copy of the same with the signature of the counsel of the petitioner has been annexed with the petition as Ann. P.9. The relevant part of such circular is reproduced herein for ready reference,the same is read as under:

> "Any Nazul Land in Pachmarhi shall not be given on lease without the orders of the State Government, nor shall the same be sold in any other manner. All such proposal should be sent for sanction to the State Government with full particulars"
>
> "In the above Circular, the land referred to is NAZUL LAND, i. e. land still in possession of the State Government and not yet covenanted to any person in any manner. This is in accordance with the provisions of the Revenue Manual and is peculiar to Pachmarhi. In the whole of Madhya Pradesh, any Nazul land can be covenanted by the Collector of the District concerned, but Nazul land in Pachmarhi can be covenanted only by sanction of the State Government.
>
> The above circular is not applicable to leases already executed between the State Government and other parties, i. e. the lessees. In this case the disposal of such leased and covenanted land shall be governed solely by the respective lease deed and covenants."

30. In view of aforesaid the then erstwhile provision of the lease, if the case at hand is examined then it is apparent that the impugned lease of land was initially granted by the then erstwhile State of C. P. and Barar to Mr.

Hanary John Hands on 27.4.1923 and subsequent to that near about in the year 1947 the aforesaid circular was introduced in C. P. Barar Manual and came into force and meanwhile the land was transferred as per terms of lease by the then lessee to aforesaid C.A.J. Rodriguez in the year 1945 and subsequently on reorganization of the State in the year1956 the aforesaid Clause 16 was kept in the RBC. True it is that in view of Clause 16 Chapter IV Part-I of the RBC the nazul land of the Pachmarhi could neither be given on lease nor sold in any other manner without order of the State Government and all the proposal in this regard with all particulars should be sent to the State Government but in the case at hand in the available circumstances the Court has to consider the aforesaid Clause 16 Chapter IV Part -I along with the other terms and the provision of aforesaid circular (Ann. P.9) introduced and effected in the year 1947, the same was published in C. P. and Barar mannual.

31. Mere perusal of aforesaid clause 16 along with aforesaid earlier circular (Ann. P.9), as per manual came in to force in 1947, it is apparent that such earlier part of circular is applicable to such Nazul land which is still in possession of the State Government and not yet covenanted to any person in any manner regarding such land the scheme is provided, on which the State Government has placed its scheme but in para three of aforesaid circular (Ann. P.9) as quoted above, it is categorically stated that above circular is not applicable to leases already executed between the State Government and other parties, i. e. the lessees. In such premises in the available factual matrix, if the case at hand is examined then it is apparent that initially the lease of the impugned land was granted in favour of Mr. Hanary John Hands the predecessor in title of petitioners and respondent No.4 to 6. from 27.4.1923, for thirty years, as stated in Annexure P.7, prior to coming into force the circular (Ann.P.9), and subsequently the same was renewed only in the name of C. A. J. Rodriguez successor/ assignee of the aforesaid predecessor on the same terms and conditions by executing the renewal lease deed dated 27.4.1955 (Ann. P.7). It is apparent from the record that in the light of aforesaid circular (Ann. P.9) such renewal/ transaction without taking any objection was recognized by the State of Madhya Pradesh. In such premises it is apparent that the aforesaid lease of disputed land was renewed in the name of C. A. J. Rodriguez on 27.4.1977 (Ann. P.7) and possession of the land was remained with such lessee and not with the State Government then in view of averments of third para of the circular (Ann.P.9), no sanction of the State

Government was required to sale the impugned property by the then lessee C. A. J. Rodriguez to Denish Tori through sale deed dated 7.11.1977. So, in such premises such transaction of the sale dated 7.11.1977, could not be said to be contrary to the terms of the lease or to be ab-initio void by the Board of Revenue. In such premises it could not have been assumed by the Board of Revenue that such sale transaction of dated 7.11.1977 had taken place contrary to any terms of the lease deed or existing provision of RBC or the code. So, I am of the considered view that the Board of Revenue has committed grave error in initiating suo motu review of it's earlier order (Ann. P.2) on the ground that the transaction of sale of 1977 between C. A. J. Rodriguez and Denish Tori was contrary to the terms of lease deed or any provision of the RBC.

32. In view of aforesaid discussion, there was no apparent error on the face of the record. So, firstly on this count the impugned show cause notice (Ann. P.3) given by the Board of Revenue to review the earlier order was neither proper nor was in accordance with law, as such the same was issued contrary to the aforesaid provision and in such premises review carried out by the Board of Revenue and its entire proceeding including the impugned order is not sustainable and deserves to be quashed.

33. Apart the aforesaid, it is settled proposition that if any authority wants to review its earlier order suo motu then such authority is bound to supply the reasons and grounds, on which such review is necessary to the affected parties and show cause notice should be issued in such a fashion asking why the earlier order on such grounds should not be reviewed and not in a fashion that why earlier order should not be cancelled. Subsequent to such notice on appearance of such parties and filing the reply/ objection of such show cause notice, the authority has to hear the matter first on the grounds supplied in the notice for review and if such authority is satisfied that there is apparent error on the face of the record or other grounds as per requirements of Section 51 of the Code and of order 47 Rule 1 of of the Civil Procedure are existing for such review then after setting aside the earlier order under review the party should be extended the opportunity of hearing on merits again and thereafter should pass the fresh order on merits of the matter. Accordingly, it requires two different proceedings. It is apparent from the impugned order that no such procedure has been followed by the Board of Revenue, on the contrary mere perusal of show cause notice (Ann. P.3), it is apparent that such show cause notice was issued intimating the petitioner why such earlier order (Ann.

P.2) should not be cancelled. So, on this technical ground alone, the impugned order (Ann. P.5) being not passed in accordance with the settled procedure is not sustainable.

34. So far the arguments of the State counsel that while passing the earlier order under review (Ann. P.2) the provision of Section 181 and 182 of the Code were not taken into consideration by the Board of Revenue with proper approach, so on such ground also the review of earlier order was necessary and in such premises the Board of Revenue has not committed any error in passing the impugned order is concerned, such argument is not helping to the State because of on earlier occasion the impugned proceeding was neither initiated under such provision of the code nor the impugned notice was issued on the basis of the proceedings of such provisions. Besides this it is \undisputed fact on record that the aforesaid lease of land under dispute was initially granted in the year 1923 for building purpose and according to the terms of the lease the same was granted for permanent structure initially for thirty years subsequently the same was renewed taking into consideration the earlier lease, in the year 1955 and the same was again renewed on 28.4.1990 in favour of Denish Tori for the period 1.4.1987 to 31.3.2017 (Ann. P.8). In such premise, the alleged lease is still in existence in favour of the petitioners and respondent No.4 to 6, the successor in title of said original lessee. It is not the case of the State Government that the land had been used by the petitioners or their above mentioned predecessor in title contrary to the terms of the lease deed as the same was granted for building purpose. In such premises, the aforesaid transaction of sale being carried out with the terms and conditions of lease deed (Ann. P.7 and P.8) in favour of the petitioners and their predecessor in title Denish Tori is in accordance with the spirit of the provision of Clause 16 of the RBC read with the terms stated by the then erstwhile State of C. P. and Barar before 1947 in the above mentioned circular (Ann. P.9), the provision of Section 181 and 182 of the Code could neither be invoked nor applicable to the present case and in such premises the earlier order (Ann. P.2) could not be reviewed. In fact such grounds were not available to the Board of Revenue to review such earlier order. As such the same could not have been treated to be apparent error on the face of the record to review the earlier order (Ann. P.2). Therefore, it is held that the Board of Revenue has committed grave error in setting aside the earlier order (Ann. P.2) by allowing the suo motu review and passing the impugned order (Ann. P.5), afresh contrary to the merits of the case. My aforesaid approach till some extent is based on a decision of the Apex court in the matter of *M.P. Housing Board Vs. Shiv Shanker Mandil and others*

reported in 2009 Revenue Nirnaya Page 1, in which it was held as under :

> 15. That apart, even if the earlier order dt. 27.7.1991 was reviewed, it could not be set at naught the Lease Deed which was validly created. It could not have cancelled the lease only for the reasons stated in Section 182(2) of the Code, which reasons were obviously absent in the case. . . . . .

35. In view of aforesaid discussion and the findings, I would like to examine the matter with respect of the subsequent transactions carried out by Denish Tori and/or his successor petitioner No.1 in favour of the petitioner No.2 and 3 and respondent No.4 and 5. As per averments of the petition, which have not been disputed with specific particular by the State that the property in dispute was sold by the then predecessor in title vide registered sale deed dated 7.11.1977, to Denish Tori and since then such land was remained in possession of him and on the strength of such transaction his name was also mutated in revenue record. Subsequently he executed the Will in his life time on 16.5.1989 and according to it's terms bequeathed his property to his son petitioner No.1 and daughter respondent No.6, so also sold the different part of such property to the petitioner No.2 & 3 and respondent No.4 & 5 respectively by registered sale deeds. It is undisputed position on record that such transactions of sale had carried out after obtaining due permission from the authorities as per requirement of the Section 165 (7) (b) of the Code because subsequent to transaction in favour of Denish Tori in the year 1977, in the year 1980 such provision of Section 165 (7) (b) was enacted in the Code and came in to force. Therefore, after execution of the sale deed in favour of the petitioner No.2 and 3 and respondent No.4 and 5, they acquisitioned the lease title respectively on the respective part of land and thereafter on the strength of such validly executed sale deed the petitioners and respondent No. 4 and 5 respectively filed their application for mutation and on the strength of the aforesaid Will of testator Denish Tori after his death on 7.3.1994 his son petitioner No.1 and respondent No.6 filed their application for mutation and on consideration the Nazul Officer/ SDO inconformity of provision of the Code by allowing the same vide order dated 22.7.1995 in different cases mutated their names on the concerning part of the land in revenue record. Accordingly, mutation order was rightly passed.

36. So, subsequent to passing the aforesaid orders dated 22.2.1995 there was no occasions with the Collector to initiate suo motu revision to revise such orders of mutation, therefore, the order dated 9.8.2004 (Ann.P.1), passed

by the Collector in suo motu initiated revision canceling said mutation order being contrary to available factual matrix and the existing legal position is not sustainable under the law. As such the aforesaid sale deed executed in favour of Denish tori in the year 1977 could neither be held nor be declared to be ab-initio void by the Collector. In such premises, it is held that Collector had committed grave error in setting asdie (sic:aside) the aforesaid mutation order dated 22.2.1995 under the wrong premises. On filing the appeal before the Commissioner by the petitioners and respondent No.4 to 6 to challenge the aforesaid order of the Collector on consideration the same was also dismissed by the Commissioner vide dated 17.11.2005 without taking into consideration the aforesaid factual and legal position, so such order of the Commissioner was also not sustainable and thereafter on filing the appeal against such order of Commissioner by the petitioners and respondent No.4 to 6 before the Board of Revenue, initially taking into consideration the correct legal position vide order under review dated 16.4.2007 (Ann. P.2) such appeal was rightly allowed and by setting aside the aforesaid order of the Commissioner as well as of the Collector passed in suo motu revision the mutation order passed by the Revenue Officer / SDO was rightly restored. But after passing such correct order in the lack of any sufficient ground or in the lack of any apparent error on the face of the record in such order under review (Ann. P.2), the Board of Revenue had initiated the review petition, contrary to the provisions of Section 51 of the Code r/w Order 47 Rule 1 of C. P.C.

37. In the aforesaid premises the initiation of suo motu review petition of earlier order (Ann. P.2) by the Board of Revenue was neither sustainable nor entertainable, therefore, on such ground as well as in view of aforesaid discussion on merits the impugned order 15.3.2011. (Ann.P.5) is not sustainable. Hence, by allowing this petition the impugned order dated 15.3.2011, (Ann. P.5) is hereby set aside and by restoring the aforesaid earlier order of the Board of Revenue dated 16.4.2007 (Ann.P.2), the orders of mutation passed by the Nazul Officer/ S. D. O. vide dated 22.7.1995 in all connected revenue cases are hereby restored with direction to the concerning revenue authorities to correct the revenue record accordingly in accordance with such mutation orders of Nazul Officer/ S. D. O dated 22.7.1995.

38. Petition is allowed, as indicated above. However, in the available circumstance there shall be no order as to costs.

Petition allowed.

I.L.R. [2014] M.P., 1872
APPELLATE CIVIL
Before Mr. Justice S.K. Seth
F.A. No.1/1999 (Indore) decided on 19 June, 2013

M.P. ELECTRICITY BOARD, JABALPUR & anr. ...Appellants
Vs.
LAXMAN & ors. ...Respondents

Tort - Death due to electrocution **- Death of two minor children due to electrocution - Trial court rightly assessed the amount of compensation to the tune of Rs. 1,10,000/-. (Para 6)**

अपकृत्य – विद्युत आघात से मृत्यु – विद्युत आघात से दो अल्पवयस्क बच्चों की मृत्यु–विचारण न्यायालय ने रु. 1,10,000/– प्रतिकर का उचित रुप में निधारण किया।

Case referred :

(1866) L.R. 1 Ex. 265,

J U D G M E N T

S.K. Setii, J. :- This appeal is by the defendant No. 1 and 2. They are challenging JUDGMENT and DECREE passed by the trial Court whereby the suit was partly decreed in favour of Laxman to the extent of Rs. 1,00,000/- which he is entitled to get from appellants as compensation for the death of his two minor sons due to electrocution.

2. Briefly stated, relevant facts culled out from the pleadings are these.

3. Laxman had two sons, viz. Gordhan and Shantu (since deceased). Both were minors and that on 18.3.1992 they died due to electrocution as a result of live electricity wire came in contact with a flowing river. Laxman claimed that children were unaware of the electric current in the river water and on the bank where the cattle were grazing. He stated in para 6 and 7 of the plaint :

"6. यह कि वादी के दो लडके गोरधन और शांन्तु जो क्रमशः 12 व 10 साल के थे, जिनकी आकस्मिक मौत नदी के पानी में विद्युत करण्ट का प्रवाह हो जाने से जिसकी जानकारी के अभाव में बच्चों के नदी के किनारे ढौर चराने के लिए गए होने से विद्युत करण्ट लग जाने से हो गई वह विद्युत प्रवाह– प्रतिवादी गण की लापरवाही से विद्युत वायर खुले पानी में छोडने से हुवा।

7. यह कि प्रतिवादी नंबर 1 व 2 विद्युत विभाग है जिनका काम विद्युत सप्लाय करना,

विद्युत के नये कनेक्शन देना, कुछ अस्थाई भी दिये जाते हैं तथा इनका यह भी काम है कि कोई उपभोक्ता विद्युत की चोरी नहीं करे या गलत तरीके से उसका उपयोग नहीं करे व इन सब बातों के लिये प्रतिवादी नंबर 1 व 2 के कर्मचारी लाईनमैन, सुपरवाईजर व इन्जीनियर ही विशेष देखरेख करते हैं एवं चोरी बिजली कनेक्शन लेने वालों पर कार्यवाही करते है .....

4. It was accepted that a temporaty connection for three months was given to Respondent No. 2 but it was duly disconnected after expiry of three months and much before the date of the accident, therefore, appellants No. 1 and 2 are not responsible and liable to pay any compensation, Respondent No. 2 in his written statement submitted that after the temporary connection expired he had left the motors, wires etc. in the field and taking advantage of his temporary absence from the village, respondent No. 3 illegally abstracted electricity from the main supply lines, therefore this respondent was not at all liable. Respondent No. 3 denied these allegations and submitted that children died due to current in the river water, for which he had nothing to do and therefore, he was also not responsible to compensate the appellant.

5. With these pleading parties went to trial and adduced evidence.

6. Learned trial Court on due consideration of evidence reached the conclusion that the children died accidently due to electrocution because the current had spread over the river water and the bank. That the children were unaware of this when they came in contact with the current and accidently died. There was negligence on the part of appellants as no steps were taken to prevent the illegal abstraction of energy from the supply lines. In view of these findings learned trial Court awarded Rs. 1,00,000/- to Laxman against appellants as compensation and Rs. 10,000 against Bhima. Thus, in all, Court awarded a sum of Rs. 1,10,000/- as compensation for death of two sons due to electrocution.

7. We heard arguments at length. Perused the record of the trial Court. Learned counsel has taken us through the entire pleadings and evidence in support of his argument that liability was wrongly fastened on the appellants. He submitted that when, after a temporary connection is duly disconnected and then somebody does mischief or theft resulting in accident, under these circumstances MPEB cannot be held responsible. He further submitted that "Principle of strict liability" is inapplicable to the facts of the case. Lastly he submitted that apportionment is arbitrary, illegal and as such is unsustainable in law.

8. On a careful scrutiny of the evidence on record, we find that the Court below has properly appreciated the evidence and recorded correct findings

of fact. These findings cannot be categorised as perverse, arbitrary or worthless. They are based on proper analysis and the inferences drawn are not preposterous. Facts established in the case fully attract the well accepted principle of "strict/absolute liability" laid down by *Blackburn J. in Ryland vs. Fletcher* (1866) L.R.1 Ex. 265. It is now well established that the:

> "Neighbour who has brought something on his own property which was not naturally there, harmless to others so long as remained confined to his own property, but which he known to be mischievous if it gets on his neighbour's, should be obliged to make good the damages which ensues if does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have occurred, and it seems but just that he should at his peril keep it there so that no mischief may accrue or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stench....." (Quoted from Salmonds & Heuston on Law of Torts, Eighteenth Edition p. 299)

9. In view of the settled position of law and the finding of facts recorded by the Court below on the evidence adduced by the parties during trial, in the considered view of this Court there is no merit and substance in the appeal.

10. Before parting with the case we must deal with another point. Court below found that no evidence was adduced by the appellants to show what steps were taken to prevent the theft of electricity. It is a matter of common knowledge that there is wide and gaping gulf between the demand and supply and distribution of energy. In these circumstances nefarious activities gain prominence and people indulge in illegal and unauthorised use of energy and despite prophylactic measures, so far the appellants have not been able to eradicate or curb theses tendencies. It was therefore, all the more necessary for appellants to exercise better vigilance and proper care to prevent the theft or unauthorised theft of electricity to prevent such type of mishaps. Having failed to do so, appellants cannot turn around and say that they are not liable. We find no fault with the apportionment of liability. Accordingly the appeal fails and is hereby dismissed with costs throughout.

Appeal dismissed.

I.L.R. [2014] M.P., 1875
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
M.A.No. 2747/2009 (Indore) decided on 19 June, 2013

SHYAMLAL & anr. ...Appellants
Vs.
GHANSHYAM & ors. ...Respondents

A. Motor Vehicles Act (59 of 1988), Section 173(1) - For Enhancement - **Accident is of the year 2006, learned Tribunal was not justified in awarding Rs. 2,37,979/- as compensation - The income is assessed @ 3,000/- p.m. - After deducting 1/2 as the deceased was bachelor and after applying the multiplier of 15, total compensation comes to Rs. 3,15,000/-. (Para 7)**

क. मोटर यान अधिनियम (1988 का 59), धारा 173(1) – बढ़ाये जाने हेतु – दुर्घटना वर्ष 2006 में घटी थी, विद्वान अधिकरण द्वारा प्रतिकर के रुप में रु. 2,37,979/– का अवार्ड करना न्यायोचित नहीं था – आय का निर्धारण 3,000/– प्रतिमाह की दर से किया गया – क्योंकि मृतक अविवाहित था, 1/2 के कटौत्रा पश्चात और 15 का गुणक लागू करने के बाद, कुल प्रतिकर रु. 3,15,000/– बनता है।

B. Motor Vehicles Act (59 of 1988), Section 173(1) - Exoneration of Insurance Company - **It was expected from the Insurance Company to examine a reasonable officer to explain that how the Insurance Company is not liable to pay compensation inspite of charging of extra premium - Impugned award, modified by enhancing from Rs. 2,37,979/- to Rs. 3,15,000/- with interest @ 8% from the date of application - Insurance Company shall be liable to pay Rs. 1.00 lac alongwith proportionate interest and balance amount shall be paid by respondent Nos. 1 & 2. (Para 8)**

ख. मोटर यान अधिनियम (1988 का 59), धारा 173(1) – बीमा कम्पनी को उत्तरदायित्व से मुक्त किया जाना – बीमा कम्पनी से यह अपेक्षित था कि वह युक्तियुक्त अधिकारी का परीक्षण करे, यह स्पष्ट करने के लिये कि कैसे अतिरिक्त प्रीमियम भारित करने के बावजूद, बीमा कम्पनी प्रतिकर अदा करने के लिये दायी नहीं है – आक्षेपित अवार्ड को रु. 2,37,979/– से बढ़ाकर रु. 3,15,000/–, 8 प्रतिशत की ब्याज दर के साथ, उपांतरित किया गया – बीमा कम्पनी, अनुपातिक ब्याज के साथ रु. 1.00 लाख अदा करने के लिये दायी होगी और बकाया रकम प्रत्यर्थी क्र. 1 व 2 द्वारा अदा की जायेगी।

Cases referred :

2008 (1) MPLJ 54, 2009 ACJ 2020, 2010 ACJ 280.

R.S. Namdeo, for the appellants.
Abhay Jain, for the respondent No.4.

JUDGMENT

N.K. Mody, J. :- Being aggrieved by the award dated 31/07/2009 passed by II MACT, Rajgarh in claim case No.41/2009 whereby the claim petition filed by the appellants for compensation was allowed holding the respondent Nos.1 and 2 liable for payment of compensation and respondent Nos.3 and 4 were exonerated, present appeal has been filed.

2. Short facts of the case are that appellants filed a claim petition alleging that Nandkishore was their son aged 22 years. On 17.01.2006, deceased Nandkishore was going from Indore to Bioara on motorbike, at that time, one Maruti Van dashed the motorbike of the deceased, with the result Nandkishore sustained injuries and was hospitalized at District Hospital Shajapur from where he was referred to Gokuldas Hospital, Indore where he passed away on 20.01.2006. It was alleged that Maruti Van bearing registration No.MPO9-H-4985 was owned by respondent No.1 and driven by respondent No.2 rashly and negligently. While the motorbike was owned by respondent No.3 and insured with respondent No.4. It was prayed that claim petition be allowed and compensation be awarded. The claim petition was contested by respondent No.4 on various grounds including on the ground that the accident occurred because of rash and negligent driving of respondent No.2, therefore, respondent No.4 is not liable for compensation. It was prayed that claim petition be dismissed. On the basis of the pleadings of the parties, learned Tribunal framed the issues, recorded the evidence and allowed the claim petition and exonerated respondent Nos.3 and 4 against which the present appeal has been filed.

3. Learned counsel for the appellants submit that impugned award is illegal, incorrect and deserves to be set-aside. It is submitted that extra premium of Rs.50/- was charged by the respondent No.4 which goes to show that respondent No.4 covered the risk of owner and driver of the motorbike. It is submitted that since deceased was driver and respondent No.3 who was owner of offending vehicle which was insured with the respondent No.4 and extra premium was paid, therefore, learned tribunal was not justified in dismissing the claim petition filed by the appellants. It is submitted that since the risk of the deceased was covered upto the amount of Rs.1,00,000/-, therefore, learned tribunal ought to have been

awarded a sum of Rs.1,00,000/- at least. Learned counsel placed reliance on a decision in the matter of *Kunti Ahirwar Vs. State of M.P.* .2007 (1) MPLJ 396 wherein in a case of personal insurance policy taken by owner of the vehicle to cover his own risk, Division Bench of this Court held that claim by legal representatives of the deceased is maintainable before the Accident Claims Tribunal. Reliance is also placed on a decision in the matter of *Sunita Lokhandhe Vs New India Assurance Co. Ltd* 2008(1) MPLJ 54 wherein Full Bench of this Court held that owner cannot claim compensation in respect of injury or death suffered by him in a motor accident unless additional premium in respect of such personal injury or death has been paid by way of special insurance contract. It is submitted that this aspect of the case was not at all considered by the learned tribunal. It is submitted that learned tribunal was not justified in directing the appellants to avail the appropriate forum for claiming compensation for which extra premium was paid. It is submitted that appeal filed by the appellants be allowed, adequate compensation be awarded and impugned award passed by the learned tribunal be set-aside holding that appellants are entitled for compensation and respondent No.4 is liable to pay the compensation to that extent.

4. Learned counsel for the respondent No.4 supports the award and submits that learned tribunal has rightly dismissed the claim petition filed by the appellants. It is submitted that in the policy Ex.P/4 it is specifically mentioned that a sum of Rs.50/- has been charged on account of personal insurance. It is submitted that this extra premium was charged for covering the risk of owner and not of the driver. Learned counsel placed reliance on Section 41 (3) of Motor Vehicles Act, 1988 which reads as under:-

> 41 **Registration, how to be made**
>
> (1) **********
>
> (2) **********
>
> (3) The registering authority shall issue to the owner of a motor vehicle registered by it a certificate of registration in such form and containing such particulars and information and in such manner as may be prescribed by the Central Government.

5. Learned counsel placed reliance on a decision in the matter of *Ningamma Vs. United India Insurance* 2009 ACJ 2020 wherein Motor Cycle dashed against a bullock cart proceeding ahead resulting in death of motorcyclist and deceased

had borrowed the motor cycle from its owner, Hon'ble Apex Court held that claim was not maintainable as there was no tortfeasor involved. It was also held that legal representatives of a person driving a vehicle after borrowing it from the owner meets with accident without involving any other vehicle would not be entitled to claim compensation under Section 163-A of the MV Act as borrower steps into the shoes of the owner and owner cannot himself be a recipient of compensation as liability to pay the same is on him. Further reliance is placed on a decision in the matter of *United Indian Insurance Co. Ltd. Vs. Vijayarajan* 2010 ACJ 280 wherein Ernakulam Bench of High Court of Kerala held that borrower of motor cycle or his legal representatives are not entited to benefit under the policy as the deceased neither registered owner of the vehicle nor was he the insured named in the policy. On the strength of aforesaid position of law learned counsel submits that appeal filed by the appellants has no merits and the same be dismissed.

6. From perusal of record, it appears that to prove the case appellants have examined Shyamlal AW/1, Jagdish Chandra Dubey AW/2 while no evidence was adduced by the respondents No.1 and 2.

7. Apart from this, appellants have filed the documents Exhibit P-1 to P-31 out of which P-1 to P-12 are the documents relating to the criminal case. P-1 is the FIR. As per the FIR, the accident occurred because of rash and negligent driving of the offending Maruti Van. Respondent No.1 and 2 remained ex-parte before the learned Tribunal and also respondent No.2 did not appear in the court to explain in what circumstances, the accident occurred. Respondent No.4 also not bothered to produce respondent No.2. Since respondent No.1 and 2 were equally liable for the compensation, therefore, this Court finds that learned Tribunal was not justified in awarding Rs.2,37,979/- as compensation. Since the accident is of the year 2006, therefore the income is assessed @ Rs. 3000/-p.m. and after deducting ½, as the deceased was bachelor and after applying the multiplier of 15, the appellants are entitled for the following amount of compensation:

Towards loss of dependency	Rs.	270000.00
Towards funeral expenses	Rs.	5000.00
Towards loss of estate	Rs.	5000.00
Towards love and affection	Rs.	10000.00
Towards pecuniary losses	Rs.	25000.00
Total	Rs.	315000.00

8. So far as the liability of respondent No.4 is concerned, Exhibit D-1 is the policy in which a sum of Rs.50/- was also charged on account of personal accident. It is only the policy which is on record as Exhibit D-1. The policy was admitted by the Insurance Company. Since the policy was admitted and liability was availed on the ground that is only the risk of the owner, which was covered under the policy and not of the deceased, therefore, atleast it was expected from the Insurance Company to examine a responsible officer of the company to explain that how the respondent No4 is not liable for Payment of compensation inspite of charging of extra premium. In absence of any evidence, learned Tribunal was not Justified in dismissing the claim petition. Since the appeallants also agrees that the liability of respondent No.4 was to the extent of Rs.1.00 lac, therefore, appeal filed by the appellants stands allowed and the impugned award passed by learned Tribunal stands modified by enhancing the awarded amount from Rs.2,37,979/- to Rs.3,15,000/-. Enhanced amount shall carry interest @ 8% p.a. from the date of application. Out of the awarded amount, respondent No.4 shall be liable to pay a sum of Rs.1.00 lac alongwith proportionate interest and for the balance amount, respondent Nos.1 and 2 shall be liable.

9. With the aforesaid, appeal stands disposed of. No order as to costs.

Appeal disposed of.

I.L.R. [2014] M.P., 1879
APPELLATE CIVIL
Before Mr. Justice Alok Aradhe
S.A. No. 672/1997 (Jabalpur) decided on 11 October, 2013

VIJAY BAHADUR SINGH ...Appellant
Vs.
RAMESHWAR & ors. ...Respondents
(and S.A. No. 676/1997)

A. Civil Procedure Code (5 of 1908), Section 100, Specific Relief Act (47 of 1963), Section 34 - Declaration - **Defendants had purchased the suit lands from the mother of the plaintiff - Therefore, they are bound by the act and representation of the guardian of the plaintiff and they are estopped from contending that the plaintiff has no right, title and interest in respect of the suit lands. (Para 8)**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100, विनिर्दिष्ट अनुतोष

अधिनियम (1963 का 47), धारा 34 – घोषणा – प्रतिवादियों ने वादी की माताजी से वाद भूमियों का क्रय किया था – इसलिए, वे वादी के संरक्षक की कार्यवाही और अभ्यावेदन द्वारा बाध्य है और वह यह तर्क करने से विबंधित है कि वाद भूमियों के संबंध में वादी का कोई अधिकार, हक एवं हित नहीं है।

B. ***Evidence Act (1 of 1872), Section 115 - Estoppel*** **- Since the defendants were estopped from questioning the title of the plaintiff - Therefore, it is not necessary for courts below to examine the plaintiff's title. (Para 9)**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 115– विबन्ध – चूंकि वादी के हक पर प्रश्न करने से प्रतिवादीगण को विबन्धित किया गया इसलिये, वादी के हक का परीक्षण करना अधीनस्थ न्यायालयों के लिये आवश्यक नहीं।

C. ***Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Amendment at Appellate Stage*** **- Application for amendment was filed after 28 years from the date of institution of the suit with a view to fill up the lacunae - Same is impermissible in law - Possession claimed in the suit is barred by Limitation. (Para 10)**

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – अपीली प्रक्रम पर संशोधन – वाद संस्थित करने की तिथि से 28 वर्ष पश्चात, कमियों को पूरा करने के उद्देश्य से संशोधन का आवेदन प्रस्तुत किया गया – यह विधि में अननुज्ञेय है – वाद में किया गया कब्जे का दावा परिसीमा द्वारा वर्जित है।

D. ***Specific Relief Act (47 of 1963), Section 34*** **- The suit filed by plaintiff is hit by proviso to Section 34 of Specific Relief Act - Appeals are dismissed. (Para 10)**

घ. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 34 – विनिर्दिष्ट अनुतोष अधिनियम की धारा 34 के परंतुक द्वारा वादी द्वारा प्रस्तुत वाद प्रभावित होता है – अपीलें खारिज।

Cases referred :

AIR 1950 Pepsu 59 (FB), AIR 2002 SC 215, 1971 MPLJ SN 29, 1974 MPLJ Note 86, 2007 (2) MPLJ 121, (2004) 12 SCC 58, AIR 1997 SC 2719, AIR 1997 SC 2181, AIR 1994 SC 1653, (2012) 8 SCC 148, 2012 (1) MPLJ 114, (2010) 14 SCC 596, (2012) 2 SCC 300, AIR 1957 SC 912, (2008) 14 SCC 632.

Ravish Agrawal with *Abhishekh Singh,* for the appellant.
Divesh Jain, for the respondents.

JUDGMENT

ALOK ARADHE, J. :- In both the aforesaid appeals filed by the plaintiff, common questions of law and fact arises therefore, they were heard analogously and are being decided by this common judgment. Second Appeal No.672/1997 was admitted on the following substantial questions of law:

> "Whether defendants purchasers under sale dated 21.12.1968 from the plaintiff were estopped from denying his title ?
>
> (b) Whether the courts below fell into apparent illegality in entering upon and examining the plaintiff's title ?"

Second Appeal No.676/1997 was admitted on the following substantial questions of law:

> "(i) Whether defendant No.1 a purchaser under sale 25.10.1971 from plaintiff was estopped from denying his title?
>
> (ii) Whether the courts below fell into apparent illegality in entering upon and examining the plaintiff's title ?"

Today, during course of hearing the following additional substantial question of law has been framed:

> "Whether the application for amendment filed by the plaintiff seeking the relief of possession dated 18.8.2011 deserves to be allowed and consequently the bar contained in proviso to Section 34 of the Specific Relief Act, 1963 does not apply to the claim of the pantiff ?"

2. The facts, giving rise to filing of the appeals, briefly stated, are that the plaintiff claimed to be the owner of the lands bearing khasra numbers 599, 1609 and 1761 admeasuring 14.377 hectares and lands bearing khasra numbers 586/1 and 588/1 admeasuring 5.074 hectares situate at village- Bakal, Tahsil- Sihora, district- Jabalpur. As per the case set forth in the plaint, the aforesaid lands devolved on the plaintiff from his father, namely, Ujiyar Singh. It was further pleaded that the plaintiff's name was recorded as bhumiswami in the revenue record in respect of the aforesaid lands. The plaintiff born on 11.8.1962 and attained the majority on 11.8.1980. During his minority, the mother of the plaintiff unauthorisedly and in contravention of provision of Section 8 read with Section 11 of the Hindu Minority and Guardianship Act,

1956 (in short 'the Act') executed the sale deed in respect of the land admeasuring 1.618 hectare bearing khasra number 599 in favour of the respondents in Second Appeal No.676/1997 on 25.11.1971. Similarly, the lands admeasuring 3.256 hectares bearing khasra numbers 586/1 and 588/1 were sold by registered sale deed dated 21.12.1968 to the respondents in Second Appeal No.672/1997. The plaintiff on or about 8.3.1993 filed the civil suit No.641-A/1994 against the respondents in Second Appeal No.676/1997 and Civil Suit No.643-A/1994 against the respondents in Second Appeal No.672/1997 seeking the relief of declaration that he is the owner and in possession of the suit lands and the sale deeds dated 21.12.1968 and 25.11.1971 executed in favour of the defendants are null and void.

3. The defendants in the aforesaid civil suits filed the written statements in which inter alia it was denied that the plaintiff is the owner of the lands in question. It was further pleaded that the mother of the plaintiff was owner of the lands which were sold to the defendants and, therefore, there was no need to obtain permission under Section 8 of the Act. It was also pleaded that the suit seeking the relief of declaration is simpliciter not maintainable without seeking the consequential relief of possession. It was pointed that the father of the plaintiff is an attesting witness to the transactions in question.

4. The trial Court vide judgment and decree dated 12.5.1995 inter alia held that the plaintiff has not been able to prove the plea that the lands devolved on him by succession. It was further held that the plaintiff's mother sold the lands in question in the year 1971 and till 1980 the plaintiff's father was alive who did not raise any objection and, therefore, inference has to be drawn that the plaintiff's father authorised the mother of the plaintiff to sell the suit lands. It was also held that the plaintiff's mother is the owner of the suit lands. Accordingly, the suit filed by the plaintiff was dismissed. The judgments and decrees passed by the trial Court were affirmed in appeals by the lower appellate Court vide judgments and decrees dated 26.4. 1997.

5. Learned senior counsel for the appellants submitted that since the defendants are purchasers from the plaintiff, they were estopped from taking a plea that the plaintiff is not the owner of the suit lands. It was further submitted that the sale deeds in question were executed in violation of provision of Section 8 of the Act therefore, the same are ab initio void. Learned senior counsel for the appellant submitted that application for amendment filed by the plaintiff deserves to be allowed in the facts of the case. It was also submitted that due

to passage of time on account of pendency of the suit, the defendants do not acquire any title by adverse possession. In support of his submissions, learned senior counsel has placed reliance on the decisions in *Chajja Singh v. Pritam Singh,* AIR 1950 Pepsu 59 (Full Bench), *Madhegowda v. Ankedowda and Others,* AIR 2002 SC 215, 1971 MPLJ SN 29 and 1974 MPLJ Note 86.

6. On the other hand, learned counsel for the respondents submitted that since the plaintiff had filed the suits for declaration of title therefore, the courts below have rightly examined the title of the plaintiff. It was further submitted that the plaintiff had filed the suits merely on the basis of entries made in the revenue records without any document of title and, therefore, the courts below have rightly dismissed the suits filed by the plaintiff seeking the relief of declaration of title. It was also urged that the revenue entries do not create any title. It was urged that the mother of the plaintiff had sold the suit lands for the need of the plaintiff and the father of the plaintiff was attesting witness to sale deeds. It is also submitted that application for amendment is highly belated and is barred by limitation, therefore, the same deserves to be rejected. In support of his submissions, learned counsel for the respondents has placed reliance on the decisions in *Shantibai and Others v. Bhoolibai and Others,*2007 (2) MPLJ 121, *Suman Verma v. Union of India and Others,* (2004) 12 SCC 58, *Balwant Singh another v. Daulat Singh and Others,* AIR 1997 SC 2719, *State of Himachal Pradesh v. Keshav Ram and Others,* AIR 1997 SC 2181, AIR *Jattu Ram v. Hakam Singh and Others,* 1994 SC 1653 (2012) 8 SCC 148, 2012 (1) MPLJ 114, (2010) 14 SCC 596 and *J. Samuel and Others v. Gattu Mahesh and Others,* (2012) 2 SCC 300.

7. I have considered the respective submissions made by learned counsel for the parties and have perused the record. In 'Law of Evidence' by Woodroffe and Amir Ali, 19th Edition the following passages occur at pages 4419 and 4421 respectively:

> "The basic principle of estoppel is that a person, who by some statement or representation of fact, causes another to act to his detriment in reliance on the truth of it, is not allowed to deny it later, even though it is wrong. Here justice prevails over truth. Estoppel is often described as a rule of evidence but more correctly it is a principle of law. Estoppel can be described as a rule creating or defeating rights. [*Canada and*

Dominion Sugar Co Ltd. v. Canadian National (West Indies) Steamships Ltd. [1947] AC 46, 56, *K Ram Mohan Rao v Endowments Commr, Bangalore* AIR 1989 Kant 192 and *HR. Basavaraj v. Canara Bank* (2010) 12 5CC 458]

....

In dealing with this and the following sections, it is to be remembered, first, that they are not exhaustive of the law of estoppel, since all rules of estoppel are not also rules of evidence, as estoppel may have the effect of creating substantive rights as against the person estopped; Secondly, that neither this section, nor the following section, enacts law in India anything different from the law of England on the subject of estoppel. Cases of estoppel may, threfore, arise which are not within the purview of these sections at all, and those which, though they are within such purview, will (in the absence of an authoritative ruling of the courts of this country) be determinable upon the principles which regulate the English courts, and which are to be found embodied in English decisions."

8. In the instant case, from perusal of Exhibit D-1 filed in Civil Suit No.643-A/1994 out of which Second Appeal No.672/1997 arises, it appears that the sale deed dated 21.12.1968 was executed on behalf of the plaintiff who was minor by his mother acting as his guardian. From perusal of Exhibit P-4 filed along with Civil Suit No.641-A/1994 out of which Second Appeal No.676/1997 arises, it is evident that the aforesaid document is a Chakbandi Patta wherein the name of grandfather of the plaintiff has been described as owner of the lands bearing khasra numbers 599, 1609 and 1769. The plaintiff's name has been described as minor through his guardian, namely, grandfather, namely, Narayan Singh. It is also not in dispute that the defendants purchased the suit lands during minority of the plaintiff and the sale deeds in question have been executed by the mother of the plaintiff. In the facts of the case, since the defendants had purchased the suit lands from the mother of the plaintiff who derived right, title and interest from the plaintiff therefore, the defendants are bound by the act and representation of the guardian of the plaintiff and they are estopped from contending that the plaintiff has no right, title and interest in respect of the suit lands. In *Chajja Singh* -(supra,), the Full Bench has held that such case may not strictly fall within the scope of

Section 115 of the Indian Evidence Act, 1872 but neither that section nor the sections that immediately follow it are exhaustive of the rule of estoppel. Principle of estoppel is based on equity and good conscience and the object is to prevent fraud and secure justice between parties by promotion of honesty and good faith and by preventing them from approbating and reprobating at the same time. In view of the aforesaid analysis, the first substantial question of law framed by a Bench of this Court in both the appeals are answered in the affirmative.

9. From perusal of Exhibit P-4 filed along with Civil Suit No.641-A/1994 out of which Second Appeal No.676/1997, it is evident that the plaintiff's name has been recorded as owner in respect of the lands bearing khasra numbers 599, 1609 and 1769. For this reason also there is material on record to show that the plaintiff is the owner of the lands in question. Since the defendants were estopped from questioning the title of the plaintiff. Therefore, it is not necessary for courts below to examine the plaintiff's title and the claim of the plaintiff ought to have been examined in proper perspective, namely, whether the sale deeds 25.11.1971 and 21.12.1968 executed in favour of the defendants were ab initio void on account of non-compliance of the Act. Accordingly, the second substantial question of law framed in both the appeals is also answered in the affirmative and in favour of the appellant.

10. Now, I may advert to the additional substantial question of law framed by this Court. It is well settled in law that application for amendment cannot be filed to fill up the lacunae.[See: *State of U.P. vs. Manbodhan Lal Srivastava,* AIR 1957 SC 912] *In South Konkan Distilleries and Another v. Prabhakar Gajanan Naik and Others,* (2008) 14 SCC 632 it has been held that if the claim in the application for amendment is barred by limitation, such an application has to be rejected. In the instant case, the plaintiff filed the suit seeking the relief of declaration that he is the owner and in possession of the suit lands and sale deeds executed in favour of the defendants are null and void on 8.3.1983. In the written statement which was filed on 4.8.1986, in paragraph 5 the defendants took a specific objection with regard to maintainability of the suit on the ground that relief of possession has not been sought. The trial Court vide judgment and decree dated 12.5.1995 recorded specific finding on issue numbers 6 and 7 and held that the plaintiff is not in possession of the suit lands and, therefore, the suit filed by the plaintiff is not maintainable. The aforesaid finding was affirmed in appeal by the lower appellate Court vide judgment and decree dated 26.4.1997. The second

appeal was filed in the year 1997. The application for amendment has been filed on 18.8.2011 i.e. after a period of fourteen years after institution of the second appeal. Thus, the prayer for amendment has been made nearly after a period of twenty-eight 'years from the date of institution of the suit. The amendment is sought with the view to fill up the lacunae which is impermissible in law. Besides that the relief of possession claimed in the suit is barred by limitation. Therefore, the application filed by the appellant deserves to be rejected. Thus, the suit filed by the plaintiff is hit by proviso to Section 34 of the Specific Relief Act, 1963. Accordingly, the additional substantial question of law framed by this Court is answered against the appellant.

11. In view of the preceding analysis, I do not find any merit in the appeals. The same fail and are hereby dismissed with costs.

Appeal dismissed.

I.L.R. [2014] M.P., 1886
APPELLATE CRIMINAL
Before Mr. Justice M.C. Garg
Cr.A. No. 319/2004 (Indore) decided on 2 November, 2012

GOPAL SINGH & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8/15(c) & 29 **- Witnesses relied upon by the prosecution have not supported the prosecution case - There was violation of Section 42 & 57 - Evidence adduced is wholly insufficient to conclude that what was seized from the appellants alone was sent to chemical examination - Seized 'Doda Chura' was not produced before trial court - Lapse are not explained properly - Held - Benefit of doubt extended in favour of appellants - Conviction of appellant is set aside - Appeal allowed. (Paras 24 -25)**

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराऐं 8/15(सी) व 29 – अभियोजन ने जिन गवाहों पर विश्वास किया उन्होंने अभियोजन प्रकरण का समर्थन नहीं किया – धारा 42 एवं 57 का उल्लंघन किया गया – उपस्थित साक्ष्य यह निष्कर्ष निकालने के लिए पूर्णतः अपर्याप्त है कि अपीलार्थीगण से जो जप्ती हुई, उसी को रासायनिक परीक्षण के लिये भेजा गया था – जप्त 'डोडा चूरा' विचारण न्यायालय के समक्ष प्रस्तुत नहीं किया गया – चूक को उचित रुप से नहीं समझाया गया – अभिनिर्धारित – संदेह का लाभ अपीलार्थीगण के पक्ष में दिया

गया – अपीलार्थी की दोषसिद्धि अपास्त – अपील मंजूर।

Cases referred :

1994 CR.L.J., 2004 SCC (Cri) 2028, (2011) 2 SCC (Cri) 547, AIR 1994 SC 1872(1).

Ashish Vyasi, for the appellants.
Yashpal Rathore, P.L. for the respondent/State.

JUDGMENT

M.C. Garg, J. :- This appeal has been filed by the appellants Gopalsingh, Pappoo Verma and Nareshnath for assailing the judgment of conviction and order of sentence passed against them by the Court of Special Judge (under NDPS Act), Mandsaur convicting them under sections 8/15 (c) read with section 29 of the Narcotic Drugs and Psychotropic Substances Act (in short " NDPS Act ") and sentencing them to rigorous imprisonment of ten years each, besides directing them to pay fine of Rs. 1,00,000/- each; in default of payment of fine, to further undergo rigorous imprisonment of two years each.

2. During pendency of the appeal, all the three appellants were granted benefit of suspension of sentence, but on account of non-compliance of condition of depositing the fine, appellant no. 3 Naresh Nath could not avail the benefit of order suspending the sentence, therefore he is still in jail.

3. As per the order sheet dated 06th September, 2012, it has been noticed that appellant Naresh Nath suffered police custody from 16/02/1997 to 24/02/1997 and thereafter, remained in judicial custody upto 15/01/1998 and since the date of the impugned judgment i.e. 19/02/2004, he is still in judicial custody and as such, he has suffered more than nine years and six months in judicial custody.

4. In short, it is a case of prosecution that Pawan Singhal PW-6 received secret information at about 4.30 am on 15th of February, 1997 that one Mangilal S/o Bherulal R/o Malkheda and Arjunsingh R/o Malkheda shall be going in truck bearing registration no. CIF-1677 and another truck bearing registration no. G.R.X – 5899 carrying doda chura illegally therein from village – Hatai towards Rajasthan guarded by a Jeep bearing registration no. R.J.-17-C-0414 wherein some persons shall be sitting armed with deadly weapons. According to Pawan Singhal PW-6, he recorded this information and finding

there there was no possibility of obtaining search warrants, informed the factual situation to his superior for sending note to his senior officer through constable. Therefore, once he saw the jeep bearing registration no. R.J.-17-C-0414 from the side of Chandwasa following by the trucks in question including truck no. GRX- 5899, he along with members of raiding party which was situated, stopped the truck no GRX-5899, The said truck was driven by Arjunsingh who is absconder. After informing Arjunsing about his right to be searched before Executive Magistrate as per provision of section 50 of the NDPS Act, Arjunsingh having denied that opportunity, he searched Arjunsingh, but found nothing. IN the cabin of the truck, he also found the appellants and one Abdul Razak who was minor was also sitting therein. Search of the truck revealed that it contained 130 sacks, each containing 40 kg doda chura, in total, 52 quintal and recovered the same. Due to recovery of doda chura, two samples of 1 kg from each sack were taken out. Samples were deposited in Malkhana and were later on sent to FSL for its testing. After completing investigation, challan was filed against three appellants as prosecution could not have been launched against Abdul Razak who was minor and also against one Arjun Singh, who became absconder, under section 8/15 read with section 29 of the NDPS Act. The appellants denied the charges as framed against them and claimed trial.

5. According to learned counsel for the appellants, there are various lacunae on the part of police / investigating agency and even the witnesses relied upon by the prosecution have not supported the case of the prosecution, in as much as two independent punch witnesses of seizure Kaluram PW-2 and Manoharsingh PW-3 have turned hostile and have not supported the case of the prosecution. Similarly, PW-4 Pooransingh has also not supported the case of the prosecution.

6. It is also the case of the defence that mandatory provisions of NDPS Act were not complied with, in as much as, even though, the alleged seizure was taken on 15th of February, 1997. The seized articles and samples were kept in suspicious circumstances, in as much as even though samples ere (sic:were) taken on 15th of February, 1997, they have been first taken to Indore Laboratory on 18th of February, 1997. As the samples were not accepted by that laboratory, they were brought back and again taken to Sagar Laboratory on 21st of February, 1997 and the deposit slip was brought on 24th of February, 1997. It has been submitted that after the samples were

taken out from Malkhana and they were deposited in Sagar laboratory on 21st of February, 1997, there is no record as to how the samples were dealt with and as to whether they were re-sealed by the concerned SHO, when they were brought back from Indore Laboratory and were taken to Sagar Laboratory and that seal was intact on the sample when the FSL examination was done. It is submitted that in this regard, testimony of PW-5 Nandlal is relevant. In para nos 4 & 5 of his testimony, he deposed as under :

> 4. जो माल सेंपल एफ.एस.एल. इंदौर में माल जमा नहीं होने पर 19 तारीख को ही जवान वापस ले आया था। फिर 19 तारीख को माल आने की प्रविष्ठी रजिस्टर में नहीं की गयी 19 तारीख को माल आने पर माल जमा कर दिया था तथा 21 तारीख को माल एफ.एस.एल. सागर जमा करने हेतु भेजा गया। सागर से माल जमा करने के बाद आरक्षक रसीद लेकर आया उसकी प्रविष्ठी की गयी। मालखाने से माल दिनांक 18 तारीख को इंदौर भेजने से लेकर सागर भेजने तक की प्रविष्ठी मालखाना रजिस्टर में नहीं की गयी। स्वतः कहा रोजनामचे में की गयी थी। माल भेजने की प्रविष्ठी 24.02.97 को की थी। जो भेजा था उसका इन्द्राज मैंने प्र.पी.–20 में कर दिया था।
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> 5. अनुसंधान के दौरान मैंने बयान जे.पी. तिवारी टी.आई गरोठ ने लिये थे। मैंने रोजनामचा रजिस्टर की प्रमाणित प्रतिलिपि अनुसंधान अधिकारी को नहीं दी थी। 130 पैकेट जो दिये थे वह बोरे में बंद थे। बोरे में रखकर ही दिया था। पैकेट सीलबंद थे बिना सील के बोरा दिया था। यह कहना गलत है कि मैंने सागर कोई माल नहीं भेजा। यह कहना गलत है कि माल भेजने में देरी होने से मैनें झूठा बयान दिया है। यह बात सही है कि कोई भी माल मालखाने से निकालते हैं तो उसका इन्द्राज होता है। इस प्रकरण का मुद्देमाल दिनांक 18 को इंदौर भेजने के संबंध में व दिनांक 21 को सागर भेजने के संबंध में प्रविष्ठी रजिस्टर में नहीं की गयी क्योंकि इंदौर में माल जमा नहीं किया। इंदौर माल भेजने के पूर्व मुझे इस बात की जानकारी नहीं थी कि इंदौर वाले माल जमा नहीं करेंगे। यह कहना गलत है कि मैंने जानबूझकर मैंने इंदौर का नाम लिया। यह कहना गलत है इंदौर माल भेजा ही नहीं गया था।

7. It is submitted that statement of this witness establishes that there was non-compliance of section 52 of the NDPS Act, which reads as under :

> **Disposal of persons arrested and articles seized** – (1) Any officer arresting a person under section 41, section 42, section 43 or section 44 shall, as soon as may be, inform him of the grounds of such arrest.

(2) Every person arrested and article seized under warrant issued under sub-section (1) of section 41 shall be forwarded without unnecessary delay to the magistrate by whom the warrant was issued.

(3) Every person arrested and article seized under sub-section (2) of section 41,section 42, section 43 or section 44 shall be forwarded without unnecessary delay to

(a) the officer-in-charge of the nearest police station, or

(b) the officer empowered under section 53.

(4) The authority or officer to whom any person or article is forwarded under sub-section (2) or sub-section (3) shall, with all convenient dispatch, take such measures as may be necessary for the disposal according to law of such person or article.

8. It is also submitted that perusal of the impugned judgment and the testimony of PW-6 Pawan Singhal establish that the seized articles were bearing crime number even before their reaching the police station and registration of crime. The seals and slips were adjusted on the sacks of seized articles in such manner, that if one of them is taken out, the other is not affected at all. It is submitted that this fact has been admitted by PW-6 Pawan Singhal in para 11 of his testimony. The said statement of Pawan Singhal reads as under :

11. थाने से दस किलोमीटर दूर घटनास्थल था, सभी सेम्पल व थैले घटनास्थल पर ही सिले थे, हमारे थाने पर कोई सिलाई मशीन नहीं है, तथा मालखाने से सिलाई मशीन नहीं ले गये थे। यह बात सही है ये थैलियां मशीन से सिली हुई हैं लेकिन एक मुंह हाथ से सिला हुआ है। यह बात सही है कि प्रत्येक थैली पेकबन्द है और एक किलो वजन के नाप की बनी हुई है। मेरे द्वारा जो सेम्पलों पर सील लगाई गई है वह थाने की सील से सीलबंद है। सेम्पलों पर मौके पर लगाई गई सील है सेम्पलो पर मौक पर लगाई गई सील ही लगाई गई है पुनः थाने पर लाकर सील नहीं लगाई गई, थाने की सील मालखाने में रहती है। उस समय मालखाना इन्चार्ज का नाम मुझे मालूम नहीं है, यह कहना गलत है जब भी आवश्यकता होती है तब सील को एच.सी.एम. निकालता है और लगाता है। हेड मोहरीर थाना प्रभारी के परमिशन के बिना सील का उपयोग नहीं कर सकता है। सील मालखाना से निकालने का पृथक से कोई इन्द्राज नहीं किया जाता है। यह कहना गलत है कि हम हमारी सील

जब जाहे तब हम बदल सकते हैं यह बात सही है कि सेम्पलों की चिट पर चपड़ी की सील नहीं लगी हुई है, स्वतः कहा कि धागे से सिले मुंह पर चपड़ी की सील लगी है, यह कहना गलत है कि चपड़ी की सील नहीं लगी होने के कारण चिट बदली जा सकती है। मौके के लिखापढ़ी में मैंने फोर्स के अन्य सदस्यों की भी मदद ली थी, लिखापढ़ी मेरे अतिरिक्त खलीलुलरहमान और अन्य आरक्षक ने की थी मुझे आज नाम याद नहीं है, सेम्पलों पर चस्पा चिट मेरे हाथ की लिखी हुई भी है। दो सौ साठ पर्चियां बनाने में कितना समय लगा यह मुझे आज नहीं मालूम है। यह कहना गलत है कि एक चिट लिखने में पांच मिनिट लगते हैं। मौके पर कार्यवाही करने में चिट चिपकाने में मैं, हेड कांस्टेबल खलीलुलरहमान तथा गवाह थे, वे ही गवाह थे जिनको मुखबिर सूचना के दौरान थाने पर बुलाया था। यह बात सही है कि सेम्पलों पर से यदि चिट को हटाया जाए तो सील प्रभावित नहीं होगी यह बात भी सही है कि सेम्पल पर लगी चपड़ी की सील तोड़ी जाये तो उस पर लगी चस्पा चिट प्रभावित नहीं होगी।

9. It is also submitted that there was also non-compliance of section 42 of NDPS Act, in as much as, even though as per Pawan Singhal PW-6, information about raid was given to the senior officer on the same date vide Ex.-P/1. Perusal of Ex.-P/1 goes to show that it does not bear any seal of senior officer nor it was given to the senior officer himself, neither any document nor any inward register of SHO has been cited. It is thus submitted that the prosecution has not complied with mandatory section 42 of NDPS Act.

10. Learned counsel for the appellants also relied upon the judgments delivered in the case of *Valsala Vs. State of Kerala* reported in 1994 CR.L.J; *Jitendra and another Vs. State of M.P.* reported in 2004 SCC (Cri) 2028 and *Ashok alias Dangra Jaiswal Vs. State of M.P.* reported in (2011) 2 SCC (Cri) 547.

11. In the case of *Valsala* (supra), the Hon'ble Supreme Court reversed the judgment of High Court by making following observations.

> *4. We have seen the report of the Chemical Examiner and there no doubt it is mentioned that one sealed parcel was received containing a powder and it was analysed to be Brown Sugar. But from the records it is clear and it is also noted by both the courts below that the seized article was produced in the court only on 14-1-88 i.e. after a period of more than three months and there is no evidence whatsoever at all to show with whom the seized article*

was lying and even assuming that it was in the custody of PW 6, the Officer-in-charge of the Police Station who seized it, there is again nothing to show whether it was sealed and kept there. The learned counsel for the State no doubt argued that the provisions of Section 55 of the Act are not mandatory but only directory. We need not go into this legal question in this case. Suffice it to say that the article seized appears to have been not kept in proper custody and proper form so that the court can be sure that what was seized only was sent to the Chemical Examiner. There is a big gap and an important missing link. In the mahazar Ex. P. 2 which is immediately said to have been prepared, there is nothing mentioned as to under whose custody it was kept after seizure. Unfortunately for the prosecution even PW 6 does not say that he continued to keep it in his custody under seal till it was produced in the court on 14-1-88. The evidence given by PW6 Police Sub- Inspector, who seized the article is absolutely silent as to what he did with the seized article till it was produced in the court, As a matter of fact he did not produce it in the court. PW 3. A.S.I. is supposed to have produced the same in the court. But PW 3 does not say anything about this. It is only PW 7 the Circle Inspector who comes into the picture at a later date, who admitted in the cross-examination that the seized article was sent by PW 3 (A.S.I.) to the court and P.W. 7 in his cross-examination further admitted that he did not even see if the recovered material object was sealed but still he claims that he made the necessary application for sending the material object for chemical examination and it is only through P.W. 7 that the Chemical Examiner's Report is marked. PW. 7 further admitted that he did not even know when it reached the court. We are constrained to say that the investigation in this case has been perfunctory and on important aspects the evidence of the concerned officers is highly discrepant and unconvincing and does not throw much light. Therefore the evidence adduced is wholly insufficient to conclude that what was seized from the

appellant alone was sent to the Chemical Examiner. Though this is purely a question of fact but this is an important link. Both the courts below have not examined this aspect in a proper perspective. No doubt the trafficking in narcotic drugs is a menace to the society but in the absence of satisfactory proof the courts cannot convict.

5. In the result the judgment of the learned Sessions Judge as affirmed by the High Court is set aside and the convictions and sentences passed against the appellant are also set aside. If the appellant is in jail, she shall be set at liberty forthwith. The appeal is accordingly allowed. Appeal allowed.

12. On the strength of the aforesaid judgment, it is submitted that the manner, in which the samples were sent to FSL for examination and the manner in which they were returned by Indore Laboratory and then again bringing back from Indore Laboratory and sending it to Sagar Laboratory casts serious doubt in the story of the prosecution in having sent the samples in proper custody after complying with the provision of 51 of NDPS Act.

13. It is also the submission of the appellants that samples including seized doda chura were not brought to the Court. Such non-compliance also affects the case of the prosecution. In this regard, reference has been made to the judgment delivered in the case of *Jitendra and another* (supra). In the aforesaid judgment taking note of non-production of the seized material and punch witnesses having turned hostile, the Hon'ble Supreme Court made the following observations :

5. The evidence to prove that charas and ganja were recovered from the possession of accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW7), Angadsingh (PW8) and sub-Inspector D.J. Rai (PW6), there is no independent witness as to the recovery of the drugs from the possession of accused. The charas and ganja alleged to have been seized from the possession of the accused were not even produced before the trial court, so as to connect it with the samples sent to the

Forensic Science Laboratory. There is no material produced in the trial, apart from the interested testimony of police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the Forensic Science Laboratory were taken from the drugs seized from the possession of the accused. Although, the High Court noticed the fact that the charas and ganja alleged to have been seized from the custody of the accused had neither been produced in the court, nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the Chemical Examiner in a properly sealed condition and those were found to be charas and ganja. The High Court observed, "non-production of these commodities before the court is not fatal to the prosecution. The defence also did not insist during the trial that these commodities should be produced." The High Court relied on Section 465 of the Cr. C.P. to hold that non production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.

6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the prossession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchanama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchanama is nothing but a document written by the concerned police officer. The suggestion made by the

defence in cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the Investigating Officer was also not examined. Against this background, to say that, despite the pancha witnesses having turned hostile, the non-examination of the Investigating Officer and non- production of the seized drugs, the conviction under the NDPS, Act can still be sustained, is far fatched.

14. Same is the position with respect to judgment delivered by the Apex Court in the case of *Ashok alias Dangra Jaiswal* (supra). IN this case, following observations made by the Apex Court are fully applicable in the case in hand :

10. The seizure of the alleged narcotic substance is shown to have been made on March 8, 2005, at 11:45 in the evening. The samples taken from the seized substance were sent to FSL on March 10, 2005, along with the draft, Exhibit P.31. The samples sent for forensic examination were, however, not deposited at the FSL on that date but those came back to the police station on March 12, 2005 due to some mistake in the draft or with some query in respect of the draft. The samples were sent back to the FSL on March 14, 2005, after necessary corrections in the draft and/or giving reply to the query and on that date the samples were accepted at the FSL. From the time of the seizure in the late evening of March 8, 2005, till their deposit in the FSL on March 14, 2005, it is not clear where the samples were laid or were handled by how many people and in what ways.

11. The FSL report came on March 21, 2005, and on that basis the police submitted charge-sheet against the accused on March 31, 2005, but the alleged narcotic substance that was seized from the accused, including the appellant was deposited in the Malkhana about two months later on May 28, 2005. There is no explanation

where the seized substance was kept in the meanwhile.

12. Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused.

15. At this juncture, it will be appropriate to take not (sic:note)of the impugned judgment which the learned counsel for the respondent / State has tried to support on the basis of records. Dealing with the case of defence regarding non-compliance of statutory provisions of the NDPS Act, the Court has dealt with the argument by making following observations :

26. बचाव पक्ष का तर्क है कि सेम्पलों को थाने पर पुनः सीलबंद नहीं किया गया है, फिर भी उन पर अपराध क्रमांक अंकित है। सेम्पल लेकर आरक्षक नसीम गया है, जबकि एफ.एस.एल. की रसीद के अनुसार चंदरसिंह द्वारा जमा करवाये जाने का उल्लेख है। जिससे यही प्रमाणित होता है कि सेम्पल मौके पर सीलबंद न किये जाकर थाने पर सीलबंद किये गये हैं। जिससे प्रकरण की सारी कार्यवाही फर्जी हो जाती है। जिसका लाभ अभियुक्तगण को दिया जाए।

27. जप्तीकर्ता पवन सिंघल (अ.सा.6) की अभिसाक्ष्य अनुसार मौके पर पाये गये पदार्थ को सूंघने पर एवं चखने पर उसे अफीम के डोडे का पिसा हुआ पावडर पाया था। ट्रक में 130 बोरे थे। जिसमें प्रत्येक में 40–40 कि.ग्रा. डोडा चूरा पाया गया था। जिसमें से एक–एक किलोग्राम के सेम्पल निकालते हुए सीलबंद एवं चिटबंद किये थे। साक्षी के उक्त कथन का समर्थन खीलुर्रहमान (अ.सा.7) ने किया है। जिसकी पुष्टि प्रदर्श पी–8 लगायत 11 के दस्तावेजों से होती है।

28. जप्तीकर्ता सिंघल (अ.सा.6) द्वारा थाने पर आकर आरोपीगण के विरूद्ध अपराध की कायमी करने के पश्चात् मालखाना प्रभारी नन्दसिंह (अ.सा. 5) को जप्त माल एवं सेम्पल जमा करवाये गये। चूंकि उक्त सेम्पल को पुनः सीलबंद नहीं किया गया है, इसलिये उसी सेम्पल की थैली पर अपराध क्रमांक डाला गया है। उसी दिन अपराध क्रमांक 38/97 एवं 39/97 का माल भी जमा हुआ था, इस कारण सेम्पलों की आपस में भिन्नता करने के कारण उन पर अपराध क्रमांक डाल देने से एवं सेम्पलों का पुनः सीलबंद नहीं करने से अभियोजन के मामले पर कोई विपरीत प्रभाव नहीं पड़ता है। तीनों ही प्रकरणों के सेम्पल आरक्षक नसीम अहमद एवं नन्दसिंह व आरक्षक रामकरण के हस्ते

भिजवाये गये हैं। अतः माल जमा करने की रसीद प्रदर्श पी–21 पर आरक्षक चन्दनसिंह का नाम अंकित होने से यह नहीं माना जा सकता कि इस प्रकरण के सेम्पल जमा ही नहीं करवाये गये। साक्षियों के कथन की पुष्टि एफ.एस. एल. सागर से प्राप्त जांच रिपोर्ट प्रदर्श पी 23 के तथ्यों से भी होती है। जिसमें भी ए–1 से ए–130 तक सेम्पल जांच होने का उल्लेख है, उसी की जांच की गई है। अतः साक्षियों के कथन एवं प्रस्तुत दस्तावेजों से यह प्रमाणित है कि मौके पर जिस अवस्था में सेम्पल सीलबंद किये गये, उसी अवस्था में मालखाना में जमा किये गये व वहां से जांच हेतु एफ.एस.एल. सागर भिजवाये गये। इसलिये बचाव पक्ष की ओर से किया गया तर्क सारहीन पाया जाता है।

16. Perusal of these paragraphs shows that the Court has simply ignored serious violation in sending the samples to FSL immediately and ensuring that seal on those samples were properly affixed and that the seized article whose samples were entrusted for taking to Sagar Laboratory were the same samples and the possibility of changing of samples which was writ large, when the samples were sent from the police station firstly to FSL, Indore and then to Sagar Laboratory. Thus, there was violation of section 52 of the NDPS Act.

17. It is also submitted that the provisions of section 42 of the NDPS Act were not complied with, even though the search was made after sun set and before sun rise, despite information available with the prosecution ensuing hours, still no such warrant was obtained.

18. PW-6 Pawan Singhal has not recorded any ground for his belief that it was not possible for him to obtain such warrant at the relevant time. Thus, it is submitted that it is violation of mandatory provisions. Copy of the Rojnamcha was not also sent to senior officer by the raiding officer, in as much as, there is no evidence led on behalf of the prosecution to prove that the information was sent to higher officers immediately. It is already noticed that independent punch witnesses have not supported the case of the prosecution. The samples which were deposited in Malkhana were not sealed again with his seal by the SHO. Possibility of tampering of the samples, therefore, cannot be rulled out.

19. I may notice the statement of PW-1 Ramashankar Shukla, who relies upon Ex.-P/1 as the document by which information has been allegedly sent to higher authority, but it does not bear seal of the concerned police station. Para–3 of his deposition also shows that even the report under section 57 of the NDPS Act was not given to senior officers, but was given to his reader.

20. PW-2 Kaluram is the punch witness, but he has not supported the case of the prosecution, in as much as he has stated that he was called by police officials of Shyamgarh Police Station who was made to sign on 5 to 10 places of the document. He has denied that any seizure has taken place in his presence. Same is the position of PW-3 Manohar Singh and PW-4 Pooransingh.

21. I have dealt with the statement of PW-5 Nandsingh and have taken note of the manner, he dealt with the samples while taking it to Indore Laboratory and bringing back and then taking it to Sagar Laboratory with proper sealing.

22. Various issues which arose for consideration on the basis of the defence submission made by the defence were noticed by the trial Court in para – 10 of the impugned judgment, which reads as under :

> 10. अब विचारणीय प्रश्न यह है कि :–
>
> (अ) क्या दिनांक 15.02.97 को 9.30 बजे या इसी दिन सुबह 5.45 बजे से लेकर दोपहर 11.00 बजे के बीच मेलखेड़ा चौपाटी के पास ट्रक क्र. –जी आर एक्स–5899 में 130 थैलों में 52 क्विंटल डोडा चूरा अवैध परिवहन करते हुए आरोपीगण के आधिपत्य से एन.डी.पी.एस. एक्ट के प्रावधानों का पालन करते हुए जप्त किये गये ?
>
> (ब) क्या अभियुक्तगण ने आपस में प्रश्नाधीन पदार्थ के क्रय–विक्रय एवं परिवहन के लिये आपराधिक षणयंत्र या अपराध के दुष्प्रेरण के क्रियान्वयन में सहयोग किया ?
>
> (स) क्या प्रश्नाधीन पदार्थ अफीम का डोडा चूरा है ?

These issues have been discussed and decided by the trial Court in para nos.26, 27, 28 of the impugned judgment as quoted above in para 15 of the present judgment

23. Aforesaid view of the learned Special Judge is not in accordance with law, in as much in the case of *State of Punjab Vs. Balbir Singh* reported in AIR 1994 S.C. 1872(1), it has been observed if mandatory provisions are not complied with which includes section 42, 51, 52 of the NDPS Act, benefit goes to the accused persons. The issue as to whether provision contained under the NDPS Act starting from sections 41 till 57 have come up for consideration before Hon'ble Court for the purpose of ascertaining as to whether compliance of those provisions is mandatory or not ? and as to what

shall be the effect of the non-compliance of the mandatory provisions ?. Discussion in this regard stand mentioned in para 26th of the impugned judgment in the following words :

> *26. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:*
>
> *(1) If a police officer without any prior information as contemplated under the Provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offence as provided under the provisions of Cr. P.C. and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance (of) recovery of any narcotic drug or psycotrophic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage .onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.*
>
> *(2A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc., when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorised officers as enumerated in Ss. 41(2) and 42(l) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by any one other than such officers, the same would be illegal.*

(2B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention that would affect the prosecution case and vitiate the conviction.

(2C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of Cr.P.C. fails to strictly comply with the provisions of Sections 100 and 165, Cr.P.C. including the requirement to record reasons, such failure would only amount to an irregularity.

(4B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of Cr.P.C. namely Sections 100 and 165, Cr.P.C. and if there is no strict compliance with the provisions of Cr.P.C. then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information, the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a gazetted officer or a magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the gazetted officer or the magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc., then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.

24. Perusal of this judgment therefore, goes to show that compliance of sections 41 & 42 of NDPS Act is mandatory and the condition of selling would affect the case of the prosecution and initiate the trial. Further, if the information which is required to forward to empowered officer is not sent

immediately, but there is no delay in sending the information, which is undue and if it is not explained, would also affect the trial, but this would be the question of fact in this case. Non-compliance of section 100 & 160 of Cr.P.C may not make search illegally, but it may have affect on the trial of the case in the facts of each case. However, non-compliance of some of the provisions, if the lapse are not explained properly, may also affect the case of the prosecution. It is in the light of aforesaid fact, now it would be appropriate to take note of the short-comings in the case of the prosecution.

25. Considering the aforesaid violation of the provisions of the NDPS Act, I have no hesitation to grant benefit of doubt to them. Consequently, present appeal is allowed and the conviction of the appellants is set aside. Those who are on bail; their bail bonds stand discharged. However, third one Naresh Nath who is in judicial custody shall be released, in case he is not wanted in any other case.

Appeal allowed.

I.L.R. [2014] M.P., 1902
APPELLATE CRIMINAL
Before Mr. Justice B.D. Rathi
Cr.A. No. 530/1998 (Jabalpur) decided on 26 July, 2013

PREMLAL ALIAS DADU & anr. ...Appellants
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 306 - Abetment to commit suicide **- Appellants are said to have filthily abused and humiliated deceased Sonelal to such an extent that he could not tolerate and committed suicide - Held - Act of the appellants not amounted to abetment - It did not fall within the definition as they did not in any manner instigate, conspire or aid in the doing of that thing - Hence, they did not abet commission of suicide by Sonelal - Conviction and consequent sentence are hereby set aside. (Paras 2, 10 &11)**

दण्ड संहिता (1860 का 45), धारा 306 – आत्महत्या का दुष्प्रेरण – अपीलार्थीगण ने कथित रुप से मृतक सोनेलाल को इस सीमा तक अश्लील गालीगलौच एवं अपमानित किया कि वह सहन नहीं कर पाया और आत्महत्या कारित की – अभिनिर्धारित – अपीलार्थीगण का कृत्य दुष्प्रेरण की कोटि में नहीं आता – वह परिभाषा के भीतर नहीं आता क्योंकि उन्होंने किसी प्रकार से उस बात के लिये न तो उकसाया, न ही षडयंत्र किया और ना उसे करने में सहायता की – अतः उन्होंने सोनेलाल को आत्महत्या कारित करने के लिये

दुष्प्रेरित नहीं किया है – दोषसिद्धि और परिणामिक दण्डादेश एतद् द्वारा अपास्त।

Surendra Singh with *R.K. Shukla,* for the appellants.
Amit Pandey, P.L. for the respondent.

JUDGMENT

B.D. RATHI, J. :- The appellants have been convicted under Section 306 of the IPC and sentenced to undergo R.I. for 5 years with fine stipulation, though they were acquitted of the offence under Section 302 of the Indian Penal Code (for short "IPC"). The impugned judgment dated 27/2/1998 was passed by VIII Additional Sessions Judge, Jabalpur, in Sessions Trial No.444/96. Appellants are respectively brother and relative of Sonelal (since deceased).

2. According to the prosecution case, on 20/02/1996 at about 10.45 Sonelal committed suicide by jumping into the Well. The appellants are said to have filthily abused and humiliated Sonelal to such an extent that he could not tolerate and committed suicide. After investigation, Crime No.109/96 was registered for the offence punishable under Section 306 read with 34 of the IPC. After completion of investigation, charge-sheet was filed in respect of the offence under Section 306/34 of the IPC and thereafter impugned judgment was passed.

3. Charges under Section 302 and 306 of the IPC were framed. Appellant pleaded false implication and not guilty.

4. Learned Senior counsel argued that the impugned judgment was passed without proper appreciation of evidence on record. The appellants have denied these allegations totally and have submitted that Sonelal had fixed marriage of his son at Village Babatola, which was not acceptable to his wife. Sonelal, therefore, felt that he had lost his honour in the society and consequently committed suicide. He further submitted that even if the case of the prosecution was accepted at its face value, no offence would be made out against the appellants, as they had not abetted commission of suicide by the deceased.

5. In response, learned Government Advocate, while making reference to the incriminating pieces of evidence on record, submitted that the conviction was well merited and the impugned judgment does not deserve to be interfered with.

6. Having regard to the arguments advanced by the parties, record of

the trial Court was perused.

7. In paragraph 55 and 56 of the impugned judgment, it was held by the trial Court that though Sarla Choudhary (PW3) and Roshni Bai (PW4) had deposed in their respective evidence that her father Sonelal was murdered by the appellants by beating and pushing him into the Well, yet the same did not inspire confidence in view of the prevailing enmity between the parties and, accordingly, the trial Court acquitted the respondent of the offence under Section 302 of the IPC. However, these findings and acquittal of appellants under Section 302 of the IPC, has not been challenged by the State.

8. In paragraph 59 of the impugned judgment, it was held by the trial Court that on 20/2/1996 at 10.45 a.m. at Polipathar Lalkua, appellants had cruelly treated Sonelal and filthily abused him and, thereby, abetted commission of suicide by him.

9. Now only question before the Court is whether the act of quarreling and abusing the deceased by the appellants, comes within the ambit of abetment to suicide ?

10. The definition of abetment of a thing, contained in Section 107 of the IPC will show that a person abets the doing of that thing, if he (i) instigates (ii) conspires or (iii) aids in the doing of that thing. On perusal of the evidence on record, it is clear that at the relevant point of time, Sonelal was beaten and abused by the appellants near the Well and, thereafter, he had jumped into the Well and died. Therefore, in the opinion of this Court, this might have been reason for committing suicide, but it cannot be said that the act of the appellants amounted to abetment as it did not fall within the definition indicated above.

11. Accordingly, it is held that merely giving beating to the deceased or humiliating or harassing him in the course of beating and abusing him would not amount to an offence within the meaning of Section 306 of the IPC as the appellants did not abet commission of suicide by Sonelal.

12. In the result, the appeal stands allowed. Impugned conviction and consequent sentence are hereby set aside. Bail bonds of the appellants stand discharged. Fine amount, if deposited, be refunded. Copy of this judgment be sent to the trial Court for compliance.

Appeal allowed.

I.L.R. [2014] M.P., 1905
APPELLATE CRIMINAL
Before Mr. Justice B.D. Rathi
Cr.A. No. 2233/1996 (Jabalpur) decided on 16 August, 2013

RAJOLA YADAV ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. Penal Code (45 of 1860), Section 376 & Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xi) **-Incident took place on 14.05.1995 and F.I.R. lodged on 09.06.1995 - Sufficient cause not shown for delay - Prosecutrix, admitted that as her uncle-in-law came on the spot, the appellant fled, she had not informed the police about rape - They were taken by one Gopika for giving report to S.P. - Conviction set aside. (Paras 7 to 10)**

क. दण्ड संहिता (1860 का 45), धारा 376 व अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xi)– दिनांक 14.05.1995 को घटना घटी और प्रथम सूचना रिपोर्ट 09.06.1995 को दर्ज की गई – विलम्ब का पर्याप्त कारण नहीं दर्शाया गया – अभियोक्त्री ने यह स्वीकार किया कि उसके चाचा ससुर घटना स्थल पर पहुंचे, अपीलार्थी भाग गया, उसने पुलिस को बलात्कार के संबंध में सूचना नहीं दी – पुलिस अधीक्षक से रिपोर्ट करने के लिये उन्हें गोपिका द्वारा ले जाया गया था – दोषसिद्धि अपास्त।

B. Penal Code (45 of 1860), Section 376 & Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xi) - Caste **- Caste certificate not produced - Statement of prosecutrix itself is not sufficient to establish that she belongs to Scheduled Tribe community - As per Rule 7 of the Rules 1995 investigation should have been made by a police officer not below the rank of Dy.S.P. - Whereas investigation was done by Inspector - Appeal allowed. (Paras 7 to 10)**

ख. दण्ड संहिता (1860 का 45), धारा 376 व अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xi) – जाति – जाति प्रमाण पत्र प्रस्तुत नहीं – अभियोक्त्री का स्वयं का कथन अपने आप में यह स्थापित करने के लिये पर्याप्त नहीं कि वह अनुसूचित जनजाति समुदाय की है – नियम 1995 के नियम 7 के अनुसार उप पुलिस अधीक्षक से निम्न श्रेणी के पुलिस

अधिकारी द्वारा अन्वेषण नहीं किया जाना चाहिए था – जबकि निरीक्षक द्वारा अन्वेषण किया गया था – अपील मंजूर।

Sharad Verma, for the appellant.
Amit Sharma, P.L. for the respondent.

JUDGMENT

B.D. Ratiii, J. :- The appellant has been convicted under Section 376 of the IPC and Section 3 (1)(xi) of the Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989 (for short "the Act") and sentenced to undergo R.I. for 7 years and 1 year respectively. The impugned judgment dated 2.12.1996 was passed by Special Judge (under the Act) at Satna in Sessions Trial No.91/1995.

2. According to the prosecution case, on 14.5.1995 at 8 p.m., while the prosecutrix, a Gond Adivasi by caste, was going to the house of one Chunku Singh, appellant met her in the way and forcibly took her to a nearby field of one Motilal and after gagging her with a cloth, subjected her to rape. At that time, Bhura Singh (PW4) passed from near the spot and hearing the sound, the appellant fled. Prosecutrix intimated about the incident to her husband after reaching Hirondi Village. Next day, they went to Lallu, Chowkidar of the Village, who did not allow them to lodge report and insisted for compromise. Thereafter, on 9/6/1995, a report about the incident was lodged by husband of the prosecutrix, but as the Police did not take any action, a written report was given by the prosecutrix to Superintendent of Police, Satna, on the basis of which investigation was done and the appellant was arrested.

3. Charge under Section 376 of the IPC and 3(1)(xi) of the Act were framed. Appellant denied the charges and pleaded false implication.

4. Learned counsel for the appellant argued that the impugned judgment was passed without proper appreciation of evidence on record. He submitted that the appellant was falsely implicated by the prosecutrix who was a consenting party.

5. In response, learned Government Advocate, while making reference to the incriminating pieces of evidence on record, submitted that the conviction was well merited and the impugned judgment does not deserve to be interfered with.

6. Having regard to the arguments advanced by the parties, record of the trial Court was perused.

7. In this case, date of incident was 14/5/95 and FIR was lodged on 9/6/95 and sufficient cause has not been shown for the delay. Prosecutrix (PW3), aged about 25 years, who was a married woman, admitted in para 2 of her evidence, that as her uncle-in-law Bhura Singh (PW4) came on the spot, the appellant fled. In para 12 she admitted that she had not informed the Police about rape but had only told that appellant had caught her hands. Prosecutrix and her husband Rajesh (PW5) have admitted that they were taken by one Gopika for giving the report to Superintendent of Police, who had also got Rs.10,000/- for them from the Welfare Department. Premvati (DW3) deposed in para 7 that in the Panchayat when the prosecutrix was saying that Bhura had caught her hands, Gopika had told her that if she wanted money from the Welfare Department, she should give the name of a person of some other caste.

8. Prosecutrix testified in her evidence that she belongs to "gond" caste but she has not stated that her cast falls within the category of scheduled caste or scheduled tribe. Caste certificate of prosecutrix was also not produced. Therefore, the statement of prosecutrix itself is not sufficient to establish that she belong to scheduled tribe community.

9. Admittedly, investigation of the case was done by Inspector K.N.Sharma (PW.7) whereas according to rule 7 of the Rules 1995 framed under the Act 1989, the investigation should have been made by a Police Officer not below the rank of Deputy Superintendent of Police.

10. In the aforesaid premises, the findings recorded by the trial Court, appear to be perverse and illegal and the impugned judgment cannot be sustained.

11. In the result, the appeal is allowed. Impugned convictions and sentences are set aside. Appellant is acquitted of the offences. He is on bail. His bail bonds stand discharged.

12. Copy of the judgment be sent to the trial Court for information and compliance.

Appeal allowed.

I.L.R. [2014] M.P., 1908
APPELLATE CRIMINAL
Before Mr. Justice B.D. Rathi
Cr.A. No. 67/1998 (Jabalpur) decided on 16 August, 2013

TAJ MOHAMMAD ...Appellant
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Sections 366 & 376 - Rape - Age of prosecutrix **- Prosecutrix was between 16 and 19 years of age looking to the development of secondary sexual characters on her body - It is clear that on the date of incident, she was a major - Prosecutrix was a consenting party - Accused cannot be convicted. (Paras 9 & 10)**

दण्ड संहिता (1860 का 45), धाराऐं 366 व 376 – बलात्कार – अभियोक्त्री की आयु – अभियोक्त्री के शरीर पर द्वितीयक यौन लक्षणों का विकास देखते हुए उसकी आयु 16 और 19 वर्ष के बीच थी – यह स्पष्ट है कि घटना दिनांक को वह बालिग थी – अभियोक्त्री सहमत पक्षकार थी – अभियुक्त को दोषसिद्ध नहीं किया जा सकता।

D.S. Chouhan with *A.K. Singh,* for the appellant.
Amit Kumar Sharma, P.L. for the respondent/State.

JUDGMENT

B.D. RATHI, J. :- This appeal has been preferred under Section 374 of Code of Criminal Procedure, (hereinafter referred to as "the Code") being aggrieved with the judgment dated 05/01/1998 passed by Session Judge, Rewa, in Sessions Trial No.281/1994 whereby appellant has been convicted under Sections 366 and 376 of the Indian Penal Code ("IPC" for short) and sentenced to undergo rigorous imprisonment for three and five years with fine stipulation respectively.

2. Prosecution case, in brief, is that on 02/06/1994 missing person report (Ex. P/15) was lodged regarding the prosecutrix by her father Sahabuddin (PW.2) at Police Station Laur, District- Rewa. Thereafter on 10/06/1994, the prosecutrix (PW. 1) lodged a report (Ex. P/1) at the same police station to the effect that on 1/6/1994, appellant, who used to tuite Quaran Sharif to her, induced her to accompany him and took her to various places viz.Khiri, Rewa, Satna, Delhi, Ajmer and Agra and in Delhi and Agra, subjected her to sexual

intercourse. Thereafter, on 8/6/94, he took her to his house at Chandramuhali and leaving her behind, fled, but got her sent to her cousin's house at Bicharhata through an unknown person, from where she was brought by her brother-in-law at Hadhar. On the aforesaid report, offence was registered against the appellant and after investigation, charge-sheet was filed.

3. Learned counsel for the appellant submitted that the trial Court had erred in appreciating the evidence on record and the convictions of the appellant deserved to be set aside.

4. In response, learned Government Advocate, while making reference to the incriminating pieces of evidence on record, submitted that the impugned judgment was well merited did not warrant any interference.

5. Having regard to the arguments advanced by the parties, record of the trial Court was perused.

6. After taking into consideration the evidence of prosecutrix (PW1), her father Shahabuddin (PW2), Chohri (PW3), Mohd. Shakeel (PW4), V.P. Mishra (PW5), Mohd. Asiq (PW6), Jamaluddin (PW7), Constable Kiran (PW8), Mohd. Rafiq (PW9), Abdul Hakim (PW10), Mubarakdeen (PW11), Dr. Smt. Satya Bharti (PW12), Sub Inspector O.S.Shukla (PWI3), Head Constable Ramsanjeevan (PW14) and material available on record, trial Court found that prosecutrix was a consenting party, but as she was minor on the date of incident, therefore, appellant was liable for conviction. This finding of the trial Court has not been challenged by the State.

7. Therefore, in this appeal, only the question as to whether the prosecutrix was minor or major on. the date of incident, is to be considered. As per the ossification test report (Ex.D/10), age of prosecutrix on the date of incident was between 16 to 20 years. This report was prepared at the instance of prosecution, but, same was, not produced in evidence by the prosecution, therefore, it was produced in evidence by defence. This report was disbelieved by the trial Court by saying that it was not a conclusive proof of age in view of the Marksheet (Ex.P/4) produced by Shahbuddin wherein date of birth was mentioned as 10th of October 1983, as well as, register of births and deaths (Ex.P/6) produced by Jamaluddin (PW7), Chowkidar of the Village, in which, date of birth was mentioned as 6/12/1980.

8. In the opinion of this Court, the aforesaid finding of the trial Court was illegal and perverse because date of birth mentioned in Ex.P/4 and Ex.P/6 was not reliable in view of the fact that prosecution had failed to prove that by whom and on what basis entry regarding date of birth was made in the said documents. It is also doubtful whether in the Register of Births and Deaths (Ex.P/6), date of birth of the prosecutrix was entered correctly or not as it is mentioned in Column No.21 therein that information was given by Chhotan Baksh and father of prosecutrix Shahbuddin (PW2) admitted in para 2 of his cross-examination that he was not known as "Chhotan Baksh". Therefore, evidence of other witnesses to the effect that this nickname i.e. "Chhotan Baksh" was of Shahbuddin (PW2) is not trustworthy. That apart, Chhotan Baksh has not been examined. Moreover, as indicated above, date of birth of the prosecutrix, as mentioned in Ex.P/4 and Ex.P/6, is not the same.

9. In the aforesaid premises, the only evidence before the Court for ascertaining the age of prosecutrix was the ossification test report, according to which, on the date of incident, the prosecutrix was between 16 to 20 years. On the advice of Dr. Smt. Satya Bharti, the ossification test was conducted and report was prepared on 13/6/1994 and prior to that MLC of prosecutrix was conducted by Dr. Bharti on 11/6/1994. In that report also, it has been mentioned by the doctor that prosecutrix was between 16 to 19 years of age looking to the development of secondary sexual characters on her body.

10. Therefore, in the facts and circumstances of the case and taking into consideration the evidence and material available on record, it is held that the trial Court had rightly found that the prosecutrix was a consenting party. Moreover, in view of the aforesaid, it is clear that on the date of incident, she was a major.

11. The appeal is, accordingly, allowed. Impugned convictions and consequent sentences are set aside. Appellant is acquitted of the offences. Appellant is on bail. His bail bonds stand discharged. Fine amount, if deposited, be refunded.

12. Copy of the judgment be sent to the trial Court for information and compliance.

Appeal allowed.

I.L.R. [2014] M.P., 1911
APPELLATE CRIMINAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice Mool Chand Garg
Cr.A. No.166/2002 (Indore) decided on 6 September, 2013

RUM SINGH ...Appellant
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Sections 302, 304-II - Murder - Conviction and Sentence - Appeal - **Eye witness turned hostile - Trial Court, treating the F.I.R. lodged by the deceased as dying declaration - Acquitted the other two accused persons, but convicted the appellant - Held - It is a case of the single blow, which landed on the stomach of the deceased, the accused persons were three in number, but they did not cause further injuries - No intention to kill - Set aside the conviction of the appellant u/s 302 of I.P.C. and the sentence of life imprisonment awarded to appellant and instead, convict appellant u/s 304 Part -II of the I.P.C. and impose upon appellant the sentence of 10 years rigorous imprisonment. (Paras 3, 6 & 7)**

दण्ड संहिता (1860 का 45), धाराऐं 302, 304–II – हत्या – दोषसिद्धि एवं दण्डादेश – अपील – चक्षुदर्शी साक्षी पक्षद्रोही हो गया – विचारण न्यायालय ने मृतक द्वारा दर्ज कराये गये प्रथम सूचना प्रतिवेदन को मृत्युकालिक कथन माना – अन्य दो अभियुक्तगणों को दोषमुक्त किया गया, किन्तु अपीलार्थी को दोषसिद्ध – अभिनिर्धारित – यह प्रकरण एक वार का है, जो मृतक के पेट में लगा, अभियुक्तगण संख्या में तीन थे, किन्तु उन्होंने कोई अतिरिक्त चोट कारित नहीं की – हत्या का आशय नहीं – भा. द.सं. की धारा 302 के अंतर्गत अपीलार्थी की दोषसिद्धि एवं अपीलार्थी को दी गई आजीवन कारावास की सजा अपास्त और इसके स्थान पर अपीलार्थी को भा.द.सं. की धारा 304 भाग–दो के अंतर्गत दोषसिद्ध किया गया एवं अपीलार्थी के ऊपर 10 वर्ष के कठोर कारावास का दण्डादेश अधिरोपित किया गया।

M.I. Khan, for the appellant.
Amit Vyas, P.L. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by : **Shantanu Kemkar, J. :-** This appeal under Section 374 of the Code of Criminal Procedure, 1973 is directed against the judgment dated 24.12.2001 passed by the 2nd Additional Sessions Judge, Barwani in Sessions Trial No.37/2001, whereby convicting the appellant for the offence under Section 302 of

the Indian Penal Code and sentencing him for life imprisonment.

2. Briefly stated, the prosecution case is that on 26.10.2000 at 08.00 PM, deceased Jhabar Singh while returning from the house of his elder brother Gul Singh, the appellant Rum Singh, Jaimal and Bishan obstructed him on his way and started abusing him for the demand made by him for giving half of the field and said that they would teach a lesson to him. Having said so, the appellant Rum Singh shot an arrow blow on him, which landed on his stomach. On account of this, blood started oozing out and Jhabar Singh fell down. On this, the appellant and two acquitted accused persons, while walking away threatened him that today he is being spared, but on some other day, he will be killed by them. The incident was seen by Gopal (PW-1). In the injured state Jhabar Singh returned to his village and narrated the incident to Bhuvan and Gildar (PW- 5). Report of the incident was lodged next day i.e. on 27.10.2000 at Police Chowki, Ojhar. MLC of his injuries was conducted by Dr. M.L. Pawar (PW-6). Thereafter, on 28.10.2000, Jhabar Singh succumbed to the injuries at District Hospital, Barwani. On his death, postmortem of the dead body was performed; report of which is Ex.P/19. After completion of the investigation, challan was submitted. The accused persons abjured their guilt and pleaded innocence.

3. Before the trial Court the eye witness Gopal (PW-1) turned hostile. The trial Court, treating the first information report lodged by the deceased as dying declaration and taking into consideration the evidence of other witnesses, acquitted the other two accused persons, but convicted the appellant and sentenced him, as aforesaid. Aggrieved, the appellant has filed this appeal.

4. Shri M.I. Khan, learned counsel for the appellant has argued that even from the dying declaration of the deceased and the evidence available on record, it is clear that after inflicting single arrow blow, which landed on the stomach of the deceased, he fell down, however, instead of causing further injuries, the appellant along with other two accused persons left the deceased in the injured state and went away by saying that today they are sparing him, but on some other day, he would be killed by them. He, therefore, argued that in view of the aforesaid prosecution case itself, the appellant's conviction under Section 302 of the Indian Penal Code is not well founded and instead, it deserves to be converted into Section 304 Part-II of the Indian Penal Code, as though the act was done by the appellant with the knowledge that it is likely to cause death, but was without any intention to cause death.

5. We have considered the aforesaid submission.

6. In our considered view, the prosecution story is well founded and fully proved to hold that the appellant was the perpetrator of crime. However, even accepting the prosecution story in totality, it cannot be said that the appellant had the intention to murder Jhabar Singh. Admittedly, it is a case of single blow, which landed on the stomach of the deceased; the accused persons were three in number, but they did not cause further injuries, but left the spot saying that they are sparing him today but on some other day, he will be killed. Thus, even though the appellant had opportunity to cause death of Jhabar Singh, no further injuries were caused by him and he left the place of incident along with other accused persons. In the circumstances, we are unable to agree that the appellant had intention to cause death of Jhabar Singh. It, however, can be safely held that he had knowledge that by causing injury the deceased would die.

7. As a result, we set aside the conviction of the appellant under Section 302 of the Indian Penal Code and the sentence of life imprisonment awarded to him and instead, convict him under Section 304 Part-II of the Indian Penal Code and impose upon him the sentence of 10 (ten) years rigorous imprisonment. The appellant is in jail. He be released, if he has undergone the sentence and is not wanted in any other case.

8. The appeal is partly allowed.

Appeal partly allowed.

I.L.R. [2014] M.P., 1913
APPELLATE CRIMINAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice M.C. Garg
Cr. A. No. 360/2002 (Indore) decided on 11 September, 2013

MANOHAR ...Appellant
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 302 - Murder **- Conviction and Sentence - Appeal - Death by burn injuries - 71% burn injuries in the incident - Alleged previous animosity between the parties - Cannot be a ground for false implication - Conviction affirmed. (Paras 7, 8 & 10)**

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – दोषसिद्धि एवं दण्डादेश – अपील – जलने की क्षतियों से मृत्यु – घटना में 71 प्रतिशत जलने की क्षतियां

– पक्षों के मध्य पुरानी वैमनस्यता अभिकथित – मिथ्या आलिप्त करने का आधार नहीं – दोषसिद्धि अभिपुष्ट।

Case referred :

1994 CR.L.R. (M.P.) 1.

Sonali Gupta, for the appellant.
Amit Vyas, P.L. for the respondent.

ORDER

The Order of the Court was delivered by : SHANTANU KEMKAR, J. :- The appellant feeling aggrieved by his conviction under Section 302 of the Indian Penal Code and the sentence of life imprisonment awarded to him vide judgment dated 19.02.2002 passed by the 6th Additional Sessions Judge, Indore in Sessions Case No.614/95, has filed this appeal under Section 374 of Criminal Procedure Code.

2. The prosecution case in brief needs to be stated as under. On 24.06.1995, Ratnabai was admitted in the M.Y. Hospital, Indore in a burnt condition. As per the MLC, she was burnt by pouring kerosene on her body by her neighbour-Manohar and his wife Kamlabai on account of an enmity due to non-vacating of the hut by her. During her treatment, on 24.06.1995 a dying declaration Ex.P-16 was recorded by Dr. Sameer Kumar (PW-13) and her statement Ex.P-12 under Section 161 was recorded by Sub-Inspector of Police, Indrajeet Mishra (PW-8). In both of which, the deceased alleged that she was burnt by her neighbours-the appellant and his wife. On 25.06.1995, Ratnabai succumbed to the injuries. After conducting the postmortem of her dead body and after further investigation, the police submitted challan against the appellant and his wife-Kamlabai. The appellants abjured their guilt and took plea of alibi.

3. In order to prove the charges, the prosecution examined as many as 14 witnesses and in defence, the accused persons examined 3 witnesses. The trial court after appreciation of the evidence led by the parties acquitted the co-accused Kamlabai whereas convicted the appellant Manohar as aforesaid. Feeling aggrieved, the appellant-Manohar has filed this appeal.

4. Ms. Sonali Gupta, learned counsel for the appellant argued that the trial court has committed error in convicting the appellant without there being any clinching evidence for the same. In the alternative, she has argued that in

view of the law laid down by the Division Bench of this Court in the case of *Prakash S/o Ragghu Ladia & Anr. Vs. State of M.P.,* 1994 Cr.L.R. (M.P.) 1, the conviction of the appellant deserves to be converted from Section 302 to Section 304 Part II of the Indian Penal Code.

5. Shri Amit Vyas, learned Panel Lawyer, on the other hand, supported the impugned judgment of conviction and has argued that in view of the medico legal report Ex.P-15 proved by the Dr. Indra Nagar (PW-12) and the two dying declarations (Ex.P-12 and Ex. P-16) duly proved by Dr. Sameer Kumar (PW-13) and Indrajeet Mishra (PW-8), the trial court has rightly convicted the appellant.

6. We have considered the submissions made by the learned counsel for the parties, perused the evidence available on record and also the impugned judgment.

7. Deceased-Ratnabai was brought in M.Y. Hospital in the burnt condition to the extent of 71% for being treated. While giving the history as to how she was burnt she categorically stated that she was burnt by her neighbour-Manohar (the appellant). Dr. Indra Nagar (PW-12) in her deposition stated that on 24.06.1995, she was working as Chief Medical Officer in M.Y. Hospital on the date the deceased-Ratnabai was brought at about 3 p.m. by her sister-in-law (Kamini). Ratnabai on being asked stated that she was burnt by her neighbors and she named Manohar for the act for pouring kerosene and burning her. She further deposed that the deceased was fully conscious though she was burnt upto 71%. The MLC report Ex.P-15 corroborates her version. Likewise the dying declaration Ex.P-12 was recorded by the Dr. Sameer Singh (PW-13), who in his deposition has proved the dying declaration in which the deceased on being put a question as to how she was burnt had answered that her neighbor-Manohar and Kamlabai have burnt her by pouring kerosene for getting her house vacated. Mr. Indrajeet Mishra (PW-8) recorded the statement of deceasedRatnabai under Section 161 of the Cr.P.C., which is Exp.-12, which on her death has rightly been treated by the trial court as her dying. The dying declaration Ex.P-12 also implicate the appellant for alleged offence of murder of the deceased by pouring kerosene on her body and litting match stick.

8. In view of the aforesaid clinching evidence against the appellant, we are of the view that the trial court has not committed any error in convicting the appellant for committing offence of murder of his neighbor-Ratnabai on account of enmity for not giving the accommodation in his possession by

vacating it.

9. As regard to the appellant's reliance on the judgment passed by the Division Bench of this court in the case of *Prakash S/o Ragghu Ladia & Anr. Vs. State of M.P.* (supra), we find that the facts of that case are different. In that case, for converting the sentence from Section 302 to Section 304 Part-II of the Indian Penal Code, the mitigating circumstance was that, after having been set the deceased on fire, the appellant had poured water and had also covered her with Chadar to put out the fire and only after that they had run away. Whereas, the facts of the present case are entirely different. Here, it is not the case of the appellant that in any way he tried to save the deceased from burning after setting her on fire. In the circumstances, we are of the view that the facts of this case are not such that the appellant's conviction can be converted from Section 302 to Section 304 Part-II of the Indian Penal Code.

10. Having regard to the aforesaid, we are of the view that no case is made out to interfere in the impugned judgment of conviction passed by the trial court. As a result the appeal fails and is hereby dismissed.

Appeal dismissed.

I.L.R. [2014] M.P., 1916
APPELLATE CRIMINAL

Before Mr. Justice A.K. Shrivastava & Mr. Justice G.S. Solanki
Cr. A. No. 1919/1996 (Jabalpur) decided on 17 September, 2013

DILIP KUMAR & ors. ...Appellants
Vs.
STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Section 302/34, Evidence Act (1 of 1872), Section 3 - Circumstantial evidence **- Evidence of last seen together not reliable because of material contradiction - All circumstances should unite to form a complete chain pointing towards the guilt of accused - In absence of it accused cannot be convicted. (Paras 19 & 20)**

दण्ड संहिता (1860 का 45), धारा 302/34, साक्ष्य अधिनियम (1872 का 1), धारा 3 – परिस्थितिजन्य साक्ष्य – तात्विक विरोधाभास के कारण, अंतिम बार साथ देखे जाने का साक्ष्य विश्वसनीय नहीं – सभी परिस्थितियों को एक साथ होकर एक संपूर्ण श्रृंखला निर्मित करनी चाहिये जो अभियुक्त की दोषिता प्रकट करती हो – इसके अभाव मे अभियुक्त को दोषसिद्ध नहीं किया जा सकता।

Cases referred :

AIR 1984 SC 1622, (2001) 9 SCC 277, (2002) 7 SCC 317, 1993 Supp. (3) SCC 681, (2007) 7 SCC 502.

B.K. Khare, for the appellant No.1.
B.R. Koshta, for the appellants No. 3 & 4.
C.K. Mishra, P.P. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : **A.K. SHRIVASTAVA, J. :-** Feeling aggrieved by the judgment of conviction and order of sentence dated 18.10.1996 passed by learned Second Additional Sessions Judge, Seoni in Sessions Trial No.94/1995 convicting the appellants under Section 302 IPC and thereby sentencing them to suffer life imprisonment and fine of Rs.500/- each; in default of payment of fine additional S.I. of one month, the appellants have taken the shelter of this Court by preferring this appeal under Section 374(2) of the Code of Criminal Procedure, 1973.

2. During pendency of this appeal, appellant No.2 Rajkumar s/o Jethu Gond died and eventually, his name was deleted from the cause title since the appeal has abated against him.

3. In brief, the case of the prosecution is that deceased, namely, Bajari (hereinafter referred to as "the deceased") had gone to the market to consume liquor and when he was coming back to home after consuming liquor, on the way, nearby temple of Hanumanji the accused persons who were four in number were sitting and they restrained the deceased to pass through the public path. On this point, the accused persons caused marpeet to the deceased and thereafter stone bolder was thrown upon him as a result of which he died. On 28.5.1995 Ramsingh (PW-12) found the dead body of the deceased upon which the stone bolder was also lying as a result of which this witness lodged the report against unknown persons.

4. A marg was registered and investigating agency arrived at the spot. The dead body of the deceased was sent for postmortem. After collecting the evidence, investigating agency found that since the appellants had quarrelled with the deceased earlier to the incident, they have committed the offence and arrested them.

5. After the investigation was over, a charge-sheet was submitted in the committal Court which on its turn committed the case to the Court of Session

where the appellants were tried.

6. Learned Trial Judge on the basis of the averments made in the charge-sheet, framed the charge punishable under Sections 302 IPC against all the accused persons, which they denied and requested for the trial.

7. In order to bring home the charges the prosecution examined as many as 13 witnesses and also placed Ex.P-1 to P-18, the documents on record. The defence of the accused persons is of false implication and same defence they set forth in their statement recorded under Section 313 Cr.P.C and in support they examined one Shyamlal (DW-1), who has deposed that the deceased was quarrelling with one Sukrat and at that juncture the accused persons were not there.

8. Learned Trial Judge on the basis of the evidence placed on record found that the charge under Section 302 IPC has been proved against all the accused persons and eventually convicted the appellants and passed the sentence which I have mentioned herein-above.

9. In this manner, this appeal has been filed by the appellants assailing the judgment of their conviction and order of sentence.

10. The contention of learned counsel for the appellants is that in the present case there is no direct evidence against the accused persons and case of the prosecution is based upon circumstantial evidence. It has also been put forth that if the case rests upon the circumstantial evidence, the prosecution is obliged to collect all relevant piece of evidence so as to form a complete chain unerringly pointing out the guilt towards the accused persons leaving behind no hypothesis. According to them, the only circumstance which has been collected against the appellants is that they were seen last along with the deceased in drunken condition and they were hurling abuses to each other. Learned counsel further submits that this could hardly be a ground unerringly pointing out the guilt towards the accused persons holding them to be guilty of the offence punishable under Section 302 IPC. It has also been put forth by learned counsel that motive part is also lacking in the case of the prosecution and therefore, on the basis of conjectures and surmises the accused persons cannot be convicted. Hence, it has been prayed that by allowing this appeal the appellants be acquitted from the charge punishable under Section 302 IPC.

11. On the other hand, Shri C.K. Mishra, learned Public Prosecutor argued

in support of the impugned judgment and submitted that cogent reasons have been assigned by learned Trial Court convicting the appellants for the offence punishable under Section 302 IPC and passing the impugned sentence. Hence, it has been prayed that this appeal be dismissed.

12. Having heard learned counsel for the parties, we are of the view that this appeal deserves to be allowed.

13. The Supreme Court in *Sharad Birdhichand Sarda v. State of Maharashtra*, AIR 1984 SC 1622 has laid down the principles to convict an accused if the case rests upon the circumstantial evidence and we think it apposite to quote those circumstances, they are:-

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

To us, the case based upon circumstantial evidence can be said to be proved only when there is certain and explicit evidence and no person can be convicted on moral conviction. The same principle has been enumerated in another decision of the Supreme Court, *K.V. Chacko alias Kunju vs. State of Kerala,* (2001) 9 SCC 277 wherein, the Apex Court in para-5 of its judgment has laid down the same principles and we think it germane to quote the principles

which are laid down, thus:-

> "(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (2) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must also be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consisted with the guilt of the accused but should be inconsistent with his innocence."

The Supreme Court in a later decision *Ashish Batham vs. State of M.P.*, (2002) (7) SCC 317 has also laid down the same principles.

14. On the basis of the principles laid down by the Apex Court in the aforesaid decisions, we shall now examine the evidence of the prosecution on the touchstone and anvil of the aforesaid tests. The prosecution has examined two witnesses of last seen and they are Banshilal (PW-8) and Dheersingh (PW-9). Banshilal (PW-8) has stated that he is acquainted with two accused persons only; they are Dilip and Rajkumar. According to him, on the fateful day in the evening he came to the place of occurrence because his Ox was missing and he was in search of his Ox. When he came nearby Hanumanji Ki Madia he found Dilip, Rajkumar and deceased at that place. According to him, what they were saying to each other, he cannot say, although he has stated that all these three persons were found in drunken state. He is further stating that some altercation was taking place between these three persons. In the present case, there are two accused persons; first appellant Dilip is the son of Buddhulal while fourth appellant Dilip is the son of Sunderlal Gond. In these facts and circumstances, according to us, it was for the prosecution to prove that which Dilip was present when this witness arrived. At the most the only conclusion which could be arrived at on the basis of the evidence of this witness is that two persons, namely, Dilip and Rajkumar were present but what about other two co-accused persons whether they were present or not, this witness is not stating anything. If the statement of this witness is stretched

to the last extent, at the most it can be inferred that some altercation was taking place between the deceased and two accused, namely, Dilip and Rajkumar and nothing more. According to us, this could hardly be a circumstance to hold that the appellants had committed the offence under Section 302 IPC. Nowhere this witness has stated that altercation was taking place upto the extent that the appellants were giving threat to kill the deceased.

15. True, the other witness Dheersingh (PW-9) who has also been examined on the point of last seen by the prosecution has deposed that all the four accused persons were present there and all of them were hurling abuses to the deceased. This witness also says that appellants as well as the deceased were in drunken state. According to this witness, the accused persons were adamant to beat the deceased. However, if the testimony of this witness is marshalled and considered upon the touchstone and anvil of the earlier eyewitness Banshilal (PW-8), according to us, it is not certain that which of the two accused persons were present at the spot because Banshilal (PW-8) states that only two accused persons were there while this witness says that in all there were four accused persons.

16. The evidence of both the witnesses of last seen cannot be relied for another reason that it has come in the testimony of Dheersingh (PW-9) that he and Banshilal were together and they saw the deceased and accused persons hurling abuses to each other. Even if the statement of these witnesses is stretched upto the last extent it would be inferred that some altercation was taking place between the deceased and some of the accused persons but who were actual those accused persons, there is absolutely no definite evidence in this regard. Thus, it is difficult to place reliance upon the testimony of these two eyewitnesses that they had seen the accused persons last in the company of the deceased.

17. We do not find any substance in the submission of learned Public Prosecutor that Dheersingh (PW-9) is reliable because when after seeing the accused persons hurling abuses to the deceased he went to a restaurant where he was enjoying the sip of tea, at that juncture, all the four accused persons arrived there but the deceased was not there. Since there is absolutely no evidence that the deceased and accused persons had gone together and therefore, even if this piece of evidence is found to be true, it was not possible for the deceased to accompany the accused persons to the restaurant because as per prosecution's own case, all of them were quarrelling with each other

and if that is the position, certainly deceased and accused will never go jointly to enjoy the tea. There is absolutely no evidence of this witness that after seeing the accused persons alone in the restaurant he again went to the spot to find out what had happened to the deceased. Therefore, according to us, the complete chain of evidence has not been formed unerringly pointing out the guilt towards the appellants.

18. In the present case, there is no motive to kill the deceased. According to us, if the case rests upon the direct evidence, the motive part is totally insignificant. However, it is having some significance if the case rests upon the circumstantial evidence. In this context, I may profitably place reliance upon the decision of the Apex Court, *Surinder Pal Jain v. Delhi Administration,* 1993 Supp (3) SCC 681 wherein the Apex Court in para-11 has held as under:-

> "..... In a case based on circumstantial evidence, motive assumes, pertinent significance as existence of the motive is an enlightening factor in a process of presumptive reasoning in such a case. The absence of motive, however, puts the court on its guard to scrutinise the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof."

This point was again considered by the Apex Court in *Sukhram v. State of Maharashtra,* (2007) 7 SCC 502. We think it apt to quote para-20 of the said decision, which reads thus:-

> "In the present case, indubitably there is no eyewitness and the prosecution had sought to establish the case against the appellants from circumstantial evidence. It is trite to say that in a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but all the circumstances so established should be of conclusive nature and consistent with the hypothesis of the guilt of the accused. Moreover, all the established circumstances should be complete and there should be no gap in the chain of evidence. Therefore, the evidence has to be carefully scrutinized and each circumstance should be dealt with carefully to find out whether the chain of the established circumstances is complete or not. (See: *Dhananjoy Chatterjee Vs. State of W.B.* (1994) 2 SCC 220). It also needs to be emphasized at this stage itself that in a case based on circumstantial evidence motive assumes great

significance inasmuch as its existence is an enlightening factor in a process of presumptive reasoning.

In the present case, since the motive part is lacking in the testimony of any witness, we do not have any scintilla of doubt that it is not proved.

19. For the reasons stated hereinabove, even by accepting the sole circumstance of alleged last seen and by extending it to the last point it would not form a complete chain unerringly pointing out the guilt against the appellants so as to hold that they have committed the culpable homicide amounting to murder. Thus, we do not have any option except to allow this appeal by extending our benefit of doubt to them.

20. Ex consequenti, this appeal succeeds and is hereby allowed. The impugned judgment of conviction and order of sentence is hereby set aside and the appellants are acquitted from the charge punishable under Section 302 IPC. The appellants are on bail. However, first appellant Dilip s/o Buddhulal jumped the bail and he was taken into custody. He be released forthwith, if not required in any other case. The bail bonds of the appellants shall stand discharged. At the cost of repetition, we may further say that second appellant Rajkumar died during pendency of the appeal and appeal has already abated against him.

Appeal allowed.

I.L.R. [2014] M.P., 1923
APPELLATE CRIMINAL

Before Mr. Justice A.K. Shrivastava & Mr. Justice G.S. Solanki
Cr. A. No. 1993/2005 (Jabalpur) decided on 20 September, 2013

GARIBDAS @ PAPPU CHOUDHARI ...Appellant

Vs.

STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Section 302, Evidence Act (1 of 1872), Section 32 - Death by burn injuries - Dying declaration **- No mention that dying declaration was read over to deceased - Benefit will go to accused - Hands were totally burnt but thumb impression with ridges and curves was taken on dying declaration - No ink impression was found on thumb of victim - Cannot be relied on - Accused acquitted. (Paras 16 & 18)**

दण्ड संहिता (1860 का 45), धारा 302 व साक्ष्य अधिनियम (1872 का 1), धारा 32 – जलने की क्षतियों से मृत्यु – मृत्युकालिक कथन – मृत्युकालिक कथन को मृतिका को पढ़कर सुनाये जाने का कोई उल्लेख नहीं – अभियुक्त को लाभ मिलेगा – हाथ पूरी तरह से जल गये थे, किन्तु मृत्युकालिक कथन पर किनारे और मोड़ के साथ अंगूठा निशानी ली गयी थी – मृतिका के अंगूठे पर स्याही का निशान नहीं पाया गया – विश्वसनीय नहीं – अभियुक्त दोषमुक्त।

Cases referred :

(2007) 11 SCC 269, AIR 1998 SC 2809, 2009 (3) JLJ 374.

Ramakant Tiwari, for the appellant.
Sudesh Verma, P.P. for the State.

JUDGMENT

The Judgment of the Court was delivered by : **A.K. SHRIVASTAVA, J. :-** Feeling aggrieved by the judgment of conviction and order of sentence dated 7.9.2005 passed by learned Fourth Additional Sessions Judge, Jabalpur in S.T. No. 88/2004 convicting the appellant under Section 302 of the IPC and thereby sentencing him to suffer Life Imprisonment and fine of ₹5000/-; in default further R.I. for 5 months, the appellant has knocked the door of this Court by preferring this appeal under Section 374(2) of the Cr.P.C.

2. In brief, the case of the prosecution is that on 12.11.2003 in the afternoon at about 2.00 PM, an information was received in the Police Station Bhedaghat that one lady Ranta Bai (hereinafter to be referred to as 'the deceased') has been brought in burning condition. The said information was reduced in Roznamcha No. 473. Thereafter, D.K. Mishra (PW-10), ASI, P.S. Bhedaghat recorded *Dehati Nalishi* on 12.11.2003 at 19.45 hours according to which the deceased got married to her husband namely Garibdas @ Pappu (the appellant). On 3.11.2003, the father of deceased brought the deceased from her nuptial home to his own residence at Bhedaghat. It is further case of the prosecution that appellant had gone to his nuptial home at Bhedaghat, where deceased was residing with her parents, to bring her with him. The parents of the deceased told that after lunch, he may carry the deceased with him. On 12.11.2003, when the father of deceased had gone to discharge labour work and her mother had gone to take bath at *Talaiya* and the deceased was alone in the house along with two small daughters of her younger sister, at that juncture, it was told by the appellant that deceased is

having some illicit relations with her brother-in-law (sister's husband), therefore, he will not take her back to his home but will kill her. Despite, the deceased told that she is not having any illicit relations with her brother-in-law, the appellant did not agree and brought a can of Kerosene and poured it upon the deceased and thereafter lit the fire with intention to kill her. On receiving the burn injuries, the deceased started screaming and came out of her house in the burning condition. On seeing the deceased in that condition, her mother Narmad Bai (PW-4), sisters Anita (PW-5) and Sunita (PW-6) rushed towards her and extinguished the fire. The appellant after setting up the fire fled away from the place of occurrence. The mother of the deceased brought her to the Medical College at Jabalpur, where she was treated.

3. Upon *dehati nalishi,* the investigation was made by the investigating agency. The dying declaration of the deceased and statement of witnesses were recorded. The deceased died after 3 days on 15.11.2003, as a result of which, initially the case which was registered under Section 307, was altered to Section 302 of the IPC.

4. After investigation was over, a charge sheet was submitted in the committal Court, who committed the case to the Court of Session and from where it was received by the trial Court for trial.

5. The learned trial Judge, on the basis of allegations made against the appellant, framed the charge under Section 302 of the IPC against appellant. Needless to say that the appellant has denied the charge and requested for trial fresh.

6. In order to bring home the charges, the prosecution examined as many as 24 witnesses (PW-1 to PW-24) and also proved the documents [Ex.P1 to P28(B)]. The defence of the appellant is of maladroit implication and the same defence he set forth in his statement recorded under Section 313 of the Criminal Procedure Code, however, he did not examine any witness in support of his defence.

7. The learned trial Judge, on the basis of evidence adduced on record, came to the conclusion that the charge under Sections 302 of the IPC has been proved against the appellant and eventually, convicted him under Section 302 of the IPC by sentencing him to suffer Life Imprisonment and fine of ₹ 5000/-, with default stipulation.

8. In this manner, this appeal has been filed by the appellant assailing the judgment of conviction and order of sentence. The contention of the learned counsel for the appellant is that there is no eye-witness to the incident and the entire case of prosecution rests upon the dying declarations of the deceased, which are not worth reliable. The possibility of tutoring the deceased to say against the appellant, cannot be ruled out because he was creating certain doubts about the character of the deceased with an understanding that she is having illicit relations with her brother-in-law.

9. On the other hand, learned Public Prosecutor appearing on behalf of the State has supported the impugned judgment of conviction and order of sentence passed by the learned trial Court and submitted that there are unimpeachable dying declarations on record, therefore, this appeal *sans* substance and it be dismissed.

10. Having heard the learned counsel for the parties at length, we are of the considered view that this appeal deserves to be allowed.

11. In the present case, there is no eye-witness to the incident. Although Shyama Bai (PW-7), who is the daughter of the sister of the deceased and a child witness, was examined but she was declared hostile. Not only this, all the witness who are the family members of the deceased were declared hostile and did not at all support the case of the prosecution. Thus, the entire case, rests upon the dying declarations of the deceased.

12. The prosecution's case itself is that the mother of the deceased brought the deceased to Medical College at Jabalpur. It is further the case of the prosecution that because the appellant was creating certain doubts about character of the deceased with an understanding that she was having some illicit relations with her brother-in-law, therefore, she was subjected to fire.

13. On going through a very material document, *dehati nalishi* (Ex.P-15), which was recorded by D.K. Mishra (PW-10), ASI, P.S. Bhedaghat on 12.11.2003 at 19.45 hours, it is gathered that the deceased told that after pouring Kerosene over her, the appellant lit the fire. This document (Ex.P-15) bears a clear thumb impression having clear curves and ridges of the deceased. Dying declaration (Ex.P-5), said to have been given by deceased, was recorded by same ASI, D.K. Mishra (PW-10). On this dying declaration also there is a very clear thumb impression of the deceased having very clear curves and ridges. One glaring fact appears in the dying declaration is that although

the law of recording the dying declaration is that while recording the dying declaration, except the Doctor and the person, who is recording the dying declaration, no other person should remain present, but in the present case the parents of the deceased were also present because this document (Ex. P-5) bears signatures of Mohan Lal (PW-3), the father of the deceased and thumb impression of Narmad Bai, mother of the deceased. Thus, the possibility of tutoring the deceased cannot be ruled out. In the present case, because the genesis of the occurrence of the case is that appellant was creating doubts upon the character of the deceased with an understanding that she is having illicit relations with her brother-in-law, which was denied by the deceased, therefore, it is probable that in order to implicate the appellant falsely, he has been made accused.

14. There is one more dying declaration of the deceased (Ex.P-17), which is said to have been recorded by the Executive Magistrate Vivek Tripathi (PW-11). In this dying declaration also very clear thumb impression of deceased having ridges and curves was obtained. If these dying declarations as well as *dehati nalishi* are kept in juxtaposition with the evidence of Dr. Suresh Kumar (PW-8), we find that he has specifically admitted in his cross-examination that both the hands of the deceased were totally burnt and in further cross-examination he has stated in very specific terms that all the fingers including thumbs of the deceased were burnt. The evidence of this Doctor is corroborated by autopsy surgeon Dr. Nirpat Singh Kukrele (PW-24) also. This autopsy surgeon has also found that the deceased sustained 70% burn injuries and her hands were totally burnt. In Para-5 of his cross-examination, the autopsy surgeon has deposed in specific words that he did not find any mark of ink upon the fingers and thumb of the deceased while conducting the autopsy. He has further stated that if there would have been any mark upon the thumb, this fact would have been mentioned by him in the Post Mortem report. The question now, thus, arises as to when both the hands of the deceased were totally burnt including the fingers and thumbs, how thumb impression containing very clear curves and ridges could be obtained on the documents. We would like to further observe that if a thumb is soaked with the ink of the ink-pad and a thumb impression is obtained on some paper, a very dark mark remains on the entire thumb, which does not easily disappear, even if the hand is washed with a soap. In these facts and circumstances, when the deceased was having burn injuries and she was not able to take bath because she was swinging between life and death, if her thumb impression was obtained on the aforesaid dying declarations, how ink mark disappeared from her thumb.

15. We do not find any merit in the contention of learned Public Prosecutor that while undergoing the treatment, ink must have been disappeared from thumb because several ointments must have been applied on the burnt areas of the body including the thumb. At the first blush, this argument appears to be quite attractive, but on deeper scrutiny the same is found to be devoid of substance for the simple reason that until and unless there is specific evidence of Doctor that mark of the ink disappeared during the course of treatment and by providing medicines to the deceased, it cannot be inferred that the dark mark of the ink was vanished. It was incumbent upon the prosecution to prove that the mark of ink was vanished on account of applying the medicines, ointment etc., because the burden lies upon the prosecution to prove this fact. Since the prosecution evidence is totally lacking on this material point, the said argument of learned Public Prosecutor cannot be accepted.

16. That apart, on perusal of the dying declaration (Ex.P-17) dated 13.11.2003 recorded by Vivek Tripathi, (Executive Magistrate) no where this Court finds that there is endorsement that after recording the dying declaration, it was read over and explained to the deceased and after hearing the contents thereof, she accepted the same. Similarly in the dying declaration recorded by D.K. Mishra, ASI also, this fact is not mentioned. The Supreme Court in *Shaikh Bakshu and others Vs. State of Maharashtra* – (2007) 11 SCC 269 in Para-13 has categorically held that if there is no mention in the dying declaration that it was read over and explained to the deceased, the same cannot be accepted. In that case, the trial Court as well as the High Court held that even if it was not stated by the deceased, it will be presumed that it was read over and explained to the deceased. In that case also, the dying declaration was recorded in presence of the Doctor, but even in that situation, the same was not accepted by the Apex Court. We would like to quote the relevant part of Para-13 of the said decision, which reads thus :-

> "There was no mention in the dying declaration that it was read over and explained to the deceased. The trial court and the High Court concluded that even though it is not so stated, it has to be presumed that it was read over and explained. The view is clearly unacceptable."

If the aforesaid dictum laid down by the Apex Court is considered upon the touchstone and anvil of the aforesaid dying declarations of the present case, we are of the view that because in the aforesaid dying declarations also

this fact has not at all been mentioned, the said decision is squarely applicable in the present factual scenario and, therefore, it cannot be presumed that the dying declarations were read over and explained to the deceased and she accepted the same.

17. The Supreme Court in *State of Punjab Vs. Gian Kaur and another* – AIR 1998 SC 2809 has held that the thumb mark appearing on the dying declaration having clear ridges and curves of the deceased and the evidence of the Doctor, who conducted the post mortem, found that both thumbs of the deceased were burnt, the Apex Court by affirming the judgment of the High Court has held that this amounts to very suspicious circumstance to hold that the dying declaration was genuine. The said decision is fully applicable in the present case also. The aforesaid decision of the Apex Court was relied upon by a Division Bench of this Court in *Naresh and another Vs. State of M.P.* 2009(3) JLJ 374.

18. Thus, by extending the benefit of doubt to the appellant, this appeal succeeds and is hereby allowed. The impugned judgment of conviction and order of sentence is hereby set aside. The appellant is acquitted to the charge under Section 302 of the IPC. He is in jail. He be released immediately from the jail, if not required in any other offence.

Appeal allowed.

I.L.R. [2014] M.P., 1929
APPELLATE CRIMINAL

Before Mr. Justice P.K. Jaiswal & Mr. Justice J.K. Maheshwari

Cr. A. No. 1199/2007 (Indore) decided on 6 January, 2014

ANSAR KHAN SHERANI ...Appellant
Vs.
STATE OF M.P. ...Respondent

***Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/18, Penal Code (45 of 1860), Sections 63 to 70 - Reduction of Sentence* - As the appellant is the first offender, the sentence of 15 years is reduced to the minimum sentence of 10 years - Reduction of default sentence in lieu of fine - Provisions of Penal Code makes it clear that the amount of fine should not be harsh or excessive - Where a substantial term of imprisonment is inflicted, an excessive fine should not be imposed except in exceptional cases - R.I. of 6 months in lieu of**

fine is upheld. **(Paras 5, 15 & 16)**

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8/18, दण्ड संहिता (1860 का 45), धाराएं 63 से 70 – दण्डादेश को घटाया जाना – चूंकि अपीलार्थी प्रथम अपराधी है, 15 वर्ष के दण्डादेश को घटाकर 10 वर्ष का न्यूनतम दण्डादेश किया गया – अर्थदण्ड के बदले व्यतिक्रम दण्डादेश घटाना – दण्ड संहिता के उपबंध स्पष्ट करते हैं कि अर्थदण्ड की राशि कठोर या अत्याधिक नहीं होनी चाहिए – जहां कारावास की पर्याप्त अवधि अधिरोपित की गयी हो, तब आपवादिक प्रकरणों को छोड़कर अत्याधिक अर्थदण्ड अधिरोपित नहीं किया जाना चाहिये – अर्थदण्ड के बदले 6 माह का सश्रम कारावास अभिपुष्ट किया गया।

Cases referred :

2005 (4) SCC 146; (2013) 1 SCC 570, AIR 1941 ALL. 3110, AIR (39) 1952 SC 14, AIR 1956 Bom. 711, (1977) 2 SCC 634, (2007) 11 SCC 243, 2009 (1) EFR 570.

A.K. Saraswat & Sudha Shrivastava, for the appellant.
B.L. Yadav, Dy. G.A. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by :
J.K. MAHESHWARI, J. :- Being aggrieved by the judgment dated 22.09.2007 passed by the Special Judge (NDPS), Ratlam, in Special Sessions Trial No.12/2004 convicting the appellant for the charges under section 8/18(b) of the NDPS Act (hereinafter it be referred to as the Act) and sentenced to undergo 15 years' RI and fine of Rs.1,00,000/-, in default of fine RI for six months; this appeal has been preferred by the appellant under section 374 of Cr.P.C..

2. The prosecution story in brief is that, on 13.02.2004, Superintendent of Police, Ratlam received information to the effect that at Nagra Route near Village Sanawad in a house situated in the field of Dr. Ansar and his brother Ashiq Sherani, illegal extraction of Opium is going on. After recording such intimation, a Panchnama was prepared thereafter permission under section 42 of the Act was sought from the DIG, Ujjain. Immediately SHO, Ratlam was directed to act upon the said information. On receiving the information by the SHO and after completing the formalities, raid was conducted. On the spot when the accused persons found them, surrounded by police, the appellant caught hold on the spot, but the co-accused Ashiq Sherani escaped. In a personal search, nothing was found but in the search of the house situated in a

field, three bags of the Opium were recovered. After completion of investigation, challan was filed in the Court. The appellant is in custody since beginning. The accused, in his defence, pleaded false implication on account of having quarrel with one police personnel i.e. Upadhyaya, Town Inspector against whom a complaint was made by him. After framing the charge, the evidence was recorded and the trial Court convicted the appellant for the charge under section 8/18(b) of the Act and directed to undergo the sentence of 15 years' RI with fine of Rs.1,00,000/- and in default, to further undergo RI for six months.

3. Learned Counsel Shri AK Saraswat and Smt. Sudha Shrivastava appearing on behalf of the appellant have made an attempt to satisfy the Court that the provisions of Sections 42, 50, 55 and 57 of the Act are mandatory which have not been complied with. However, the conviction of the appellant is based on the wrong interpretation of law, therefore, such finding may be set aside. After arguing for some time, it is contended by them that the appellant has already underwent the sentence of 9 years and 7 months for the said charge to which minimum sentence of 10 years has been prescribed, however, maintaining the minimum sentence of 10 years and reducing the sentence in lieu of fine i.e. six months to four months, the sentence may be modified maintaining the conviction. In support of such contention, reliance has been placed on a judgment of Hon'ble the Apex Court in the case of *Balwinder Singh v. Commissioner of Customs & Central Excise* reported in 2005 (4) SCC 146. The reliance has also been placed on a judgment of *Shahfjad Khan Mahebub Khan Pathan Vs. State of Gujarat* reported in (2013) 1 SCC 570. It is submitted that on completion of minimum sentence by reducing the sentence to 10 years and sentence in lieu of fine after completion of the said period, the appellant may be set at liberty.4

4. Per contra, learned Government Advocate submits that though the appellant is a first offender, but looking to the bulk quantity of the Opium, the sentence as awarded of 15 years' RI should not be reduced to the minimum sentence of 10 years and in addition thereto looking to the quantity of the contraband, the sentence in lieu of fine amount should not be reduced and appeal may be dismissed.

5. After hearing learned counsel appearing on behalf of the parties, as learned counsel appearing on behalf of the appellant has opted only to argue on the point of sentence, however, looking to the finding as recorded by the trial Court, the

conviction of appellant for the said charge is hereby maintained. On the point of reducing the sentence, the judgment of *Balvinder Singh* (supra) is relevant wherein, Hon'ble the Apex Court has reduced the sentence from 14 years to 10 years because the accused was the first offender. In the said case, quantity was more than the quantity seized in this case. Simultaneously, in the case of *Shahfjad Khan* (supra) relying upon the judgment of *Balvinder Singh* (supra) while confirming the conviction for the charge under NDPS Act, the sentence of 14 years was reduced to 10 years. Considering the law laid down by Hon'ble the Apex Court in the said two judgments, in the facts of this case as the appellant is a first offender, the sentence of 15 years is hereby reduced to the minimum sentence of 10 years.

6. Now coming to the next argument of the appellant regarding default sentence in lieu of fine, it is seen that the trial Court has imposed the fine of Rs.1,00,000/- which is minimum prescribed and in default, six months' sentence has been directed.

7. The general principle regarding imposition of the fine has been specified from section 63 to 70 of IPC whereby, it is clear that the amount of fine should not be harsh or excessive but it should be rational to the pecuniary position looking to the magnitude and its character. The Author Ratanlal and Dhirajlal in Law of Crimes 26th edition observed as under :-

> ***"Death, imprisonment, transportation, banishment, solitude, compelled labour, are not, indeed, equally disagreeable to all men. But they are so disagreeable to all men that the legislature, in assigning these punishments to offences, may safely neglect the differences produced by temper and situation. With fine, the case is different. In imposing a fine, it is always necessary to have character and regard to the pecuniary circumstances of the offender as to the character and magnitude of the offence.' The mulct which is ruinous to a labourer is easily borne by a tradesman, and is absolutely unfelt by a rich Zamindar. It is impossible to fix any limit to the amount of a fine which will not either be so high as to be ruinous to the poor, or so low as to be no object of terror to the rich."***

The Author while describing the measures to be adopted in non-payment of fine has observed as under:-

"The authors of the Code observe: "The next question which it became our duty to consider was this: when a fine has been imposed, what measures shall be adopted in default of payment ? And here two modes of proceeding, with both of which we were familiar, naturally occurred to us. The offender may be imprisoned till the fine is paid, or he may be imprisoned for a certain term, such imprisonment being considered as standing in place of the fine. In the former case, the imprisonment is used in order to compel him to part with his money; in the latter case, the imprisonment is a punishment substituted for another punishment. Both modes of proceeding appear to us to be open to strong objections. To keep an offender in imprisonment till his fine is paid is, if the fine be beyond his means, to keep him in imprisonment all his life; and it is impossible for the best Judge to be certain that he may not sometimes impose a fine which shall be beyond the means of an offender. Nothing could make such a system tolerable except the constant interference of some authority empowered to remit sentences; and such constant interference we should consider as in itself an evil. On the other hand, to sentence an offender to fine and to a certain fixed term of imprisonment in default of payment, and then to leave it to himself to determine whether he will part with his money or lie in goal, appears to us to be a very objectionable course."

"We are far from thinking that the course which we propose is unexceptionable; but it appears to us to be less open to exception than any other which has occurred to us. We propose that, at the time of imposing a fine, the Court shall also fix a certain term of imprisonment which the offender shall undergo in default of payment. In fixing this term, the Court will in no case be suffered to exceed a certain maximum, which will vary according to the nature of the offence. If the offence be done which is punishable with imprisonment as well as fine, the term

of imprisonment in default of payment will not exceed one-fourth of the longest term of imprisonment fixed by the Code for the offence. If the offence be one which by the Code is punishable only with fine, the term of imprisonment for default of payment will in no case exceed seven days."

8. The said issue regarding imposition of sentence in lieu of fine came up for consideration in some of the cases. In the case of *Empror vs. Mendi Ali* reported in AIR 1941 All. 3110, it was found that the accused was charged for an offence of murder of his wife. The facts were that the husband has seen his wife by his own eyes committing adultery, however, in a grave and sudden provocation he has killed his wife losing the power of self control. The Sessions Court imposed the maximum imprisonment of 10 years found him guilty under section 304 part 1 and also imposed fine of Rs.100/- and in default directed to undergo RI for one year. The High Court in a *suo motu* revision observed that the Sessions Court awarded maximum terms of sentence to the accused for the offence for he was found guilty and added to it a fine (which there could surely have been little prospect of his paying). The result was that he was, in effect, sentenced to eleven years' rigorous imprisonment. Justice Braund J. in this respect observed as under :-

"So far as the fine is concerned, I cannot think it is proper, in the case of a poor peasant, to add to a very long term of substantive imprisonment a fine which there is no reasonable prospect of the accused man paying and for default in paying which he will have to undergo a yet further term of imprisonment. And, in my judgment, without venturing to say whether it is a course which is strictly in accordance with the law or not, I cannot help thinking that it becomes all the more undesirable to impose such a fine where the term of imprisonment to be undergone in default will bring the aggregate sentence of imprisonment to more than the maximum term of imprisonment sanctioned by the particular section under which he is convicted. I venture to think that Judges should exercise a careful discretion in the matter of superimposing fines upon long substantive terms of

imprisonment. For these reasons I shall, in any case in revision, relieve the accused of his sentence to a fine."

9. In the case of *Adamji Umar Dalal v. The State of Bombay* reported in AIR (39) 1952 SC 14, Mahajan J., speaking for the Bench in para 5 observed as under :-

> **"The determination of the right measure of punishment is often a point of great difficulty and no hard and fast rule can be laid down, it being a matter of discretion which is to be guided by a variety of considerations, but the Court has always to bear in mind the necessity of proportion between an offence and the penalty. In imposing a fine it is necessary to have as much regard to the pecuniary circumstances of the accused persons as to the character and magnitude of the offence, and where a substantial term of imprisonment is inflicted, an excessive fine should not accompany it except in exceptional cases. It seems to us that due regard has not been paid to these considerations in these cases and the zeal to crush the evil of blackmarketing and free the common man from this plague has perturbed the judicial mind in the determination of the measure of punishment"**

Though, the said case relates to the economic offence but Hon'ble the Apex Court has reduced the amount of fine to 10% applying the principle of governing the imposition of a sentence of fine.

10. The Bombay High Court relying upon the said judgment in the case of *State v. Pandurang Tatyasaheb Shinde* reported in AIR 1956 Bom. 711 observed that before imposing the sentence of fine, particularly a heavy fine, along with the sentence of death or life imprisonment, one must pause to consider whether the sentence of fine is at all called for and if so, what is a proper or adequate fine to impose in the circumstances of the case.

11. Hon'ble the Supreme Court in the case of *Palaniappa Gounder v. State of T.N.* Reported in (1977) 2 SCC 634 in para 9 relying upon the said judgment held as under :-

"But legitimacy is not to be confused with propriety and the fact that the Court possesses a certain power does not mean that it must always exercise it. Though, therefore, the High Court had, the power to impose on the appellant a sentence of fine alongwith the sentence of life imprisonment the question still arises whether a sentence of fine of Rs. 20,000/- is justified in the circumstances of the case. Economic offences are generally visited with heavy fines because an offender who has enriched himself unconscionably or unjustifiably by violating economic laws can be assumed legitimately to possess the means to pay that fine. He must disgorge his ill-gotten wealth. But quite different considerations would, in the generality of cases, apply to matters of the present kind. Thought there is power to combine a sentence of death with a sentence of fine that power in sparingly exercised because the sentence of death is an extreme penalty to impose and adding to that grave penalty a sentence of fine is hardly calculated to serve any social purpose. In fact the common trend of sentencing is that even a sentence of life imprisonment is seldom combined with a heavy sentence of fine. We cannot, of course, go so far as to express approval of the unqualified view taken in some of the cases that a sentence of fine for an offence of murder is wholly "inapposite" (See, for example, State v. Pandurang Shinde, but before imposing the sentence of fine, particularly a heavy fine, alongwith the sentence of death or life imprisonment, one must pause to consider whether the sentence of fine is at all called for and if so, what is a proper or adequate fine to impose in the circumstances of the case. As observed by this Court in *Adam Ii Umar Dalal v. The State of Bombay,* (2) determination of the right measure of punishment is often a point of great difficulty and no hard and fast rule can' be laid down, it being a matter of discretion which is to be guided by a variety of considerations but the court must always bear in mind the necessity of maintaining a proportion between the offence and the penalty proposed for it. Speaking for the Court Mahajan J. observed in that case

that: "in imposing a fine it is necessary to have as much regard to the pecuniary circumstances of the accused persons as to the character and magnitude of the offence, and where a substantial term of imprisonment is inflicted, an excessive fine should not accompany it except in exceptional cases" (p. 177). Though that case related to an economic offence, this Court reduced the sentence of fine from Rs. 42,300/- to Rs 4,000/- on the ground that due regard was not paid by the lower Court to the principles governing the imposition of a sentence of fine."

12. Thereafter in the case of *Shantilal vs. State of M.P.* reported in (2007) 11 SCC 243 while dealing with the issue under N.D.P.S. Act, Justice C.K. Thakkar, after considering the provisions of sections 63 to 70 of IPC, section 30 of Cr.P.C. and relying upon various precedents of Hon'ble the Apex Court and High Courts and also referring the commentary of Ratanlal and Dhirajlal observed in para 39 as under :-

"We are mindful and conscious that the present case is under the NDPS Act. Section 18 quoted above provides penalty for certain offences in relation to opium poppy and opium. Minimum fine contemplated by the said provision is rupees one lakh ("fine which shall not be less than one lakh rupees"). It is also true that the appellant has been ordered to undergo substantive sentence of rigorous imprisonment for ten years which is minimum. It is equally true that maximum sentence imposable on the appellant is twenty years. The learned counsel for the State again is right in submitting that Clause (b) of sub-section (1) of Section 30 CrPC authorises the court to award imprisonment in default of payment of fine up to one-fourth term of imprisonment which the court is competent to inflict as punishment for the offence. But considering the circumstances placed before us on behalf of the appellant accused that he is very poor; he is merely a carrier; he has to maintain his family; it was his first offence; because of his poverty, he could not pay the heavy amount of fine (rupees one lakh) and if he is ordered to remain in jail even after the period of substantive sentence is over only because

of his inability to pay fine, serious prejudice will be caused not only to him, but also to his family members who are innocent. We are, therefore, of the view that though an amount of payment of fine of rupees one lakh which is minimum as specified in Section 18 of the Act cannot be reduced in view of the legislative mandate, ends of justice would be met if we retain that part of the direction, but order that in default of payment of fine of rupees one lakh, the appellant shall undergo rigorous imprisonment for six months instead of three years as ordered by the trial court and confirmed by the High Court."

13. The time again Supreme Court in the recent pronouncement of *Shahjad Khan* (supra) reiterated the same view, relying upon the aforesaid judgment, Justice Sathasivam speaking for the Bench held as under :-

"12. It is clear and reiterated that the term of imprisonment in default of payment of fine is not a sentence. To put it clear, it is a penalty which a person incurs on account of non-payment of fine. On the other hand, if sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in the judicial proceedings. However, the imprisonment ordered in default of payment of fine stands on a different footing. When such default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. Accordingly, he can always avoid to undergo imprisonment in default of payment of fine by paying such an amount. In such circumstance, we are of the view that it is the duty of the court to keep in view the nature of offence, circumstances in which it was committed, the position of the offender and other relevant considerations such as pecuniary circumstances of the accused person as to character and magnitude of the offence before ordering the offender to suffer imprisonment in default of payment of fine. The provisions of Sections 63 to 70 IPC make it clear that an

amount of fine should not be harsh or excessive. We also reiterate that where a substantial term of imprisonment is inflicted, an excessive fine should not be imposed except in exceptional cases.

13. While taking note of the above principles, we are conscious of the fact that the present case is under the NDPS Act and for certain offences, the statute has provided minimum sentence as well as minimum fine amount. In the earlier part of our judgment, taking note of the fact that the appellants being the firsttime offenders, we imposed the minimum sentence i.e. 10 years instead of 15 years as ordered by the trial court. In other words, the appellants have been ordered to undergo substantive sentence of RI for 10 years which is minimum.

15. It is clear that clause (b) of sub-section (1) of Section 30 of the Code authorises the court to award imprisonment in default of fine up to one-fourth of the term of imprisonment which the court is competent to inflict as punishment for the offence. However, considering the circumstances placed before us on behalf of the appellantaccused viz. they are very poor and have to maintain their family, it was their first offence and if they fail to pay the amount of fine as per the order of the Additional Sessions Judge, they have to remain in jail for a period of 3 years in addition to the period of substantive sentence because of their inability to pay the fine, we are of the view that serious prejudice will be caused not only to them but also to their family members who are innocent. We are, therefore, of the view that ends of justice would be met if we order that in default of payment of fine of Rs 1.5 lakhs, the appellants shall undergo RI for 6 months instead of 3 years as ordered by the Additional Sessions Judge and confirmed by the High Court."

14. Learned counsel appearing on behalf of the appellant has placed reliance

on a three judges' Bench judgment in the case of *Abbas Khan vs. Central Bureau of Narcotics* reported in [2009 (1) EFR 570] and submits that in the said case, the amount of fine has been waived of by Hon'ble the Apex Court on serving the substantive part of sentence of 10 years. But in the considered opinion of this Court, looking to the language of section 18-b of the Act, it is clear that where the contraband involves commercial quantity then accused may be punished with RI for a term which shall not be less than 10 years but may be extended to 20 years and shall also be liable to fine which shall not be less than Rs.1,00,000/- and may be extended to Rs.2,00,000/-. In the said case Hon'ble the Apex Court has not considered the observations made in the case of *Shantilal* (supra) with respect to amount of fine which is specified as minimum by legislative mandate. In any case, the waiving of the fine by the Supreme Court in the case of *Abbas Khan* (supra) appears to be in exercise of the powers under Article 141 of the Constitution of India, for the reason that while waiving the amount of fine, the Court observed that sentence already undergone by the appellant is sufficient to meet the ends of justice and directed to release the accused forthwith. But, this Court do not confer such powers to waive the legislative mandate however, we are unable to accept the said contention, hence, it is repelled.

15. In view of the aforesaid principles of the law laid down by Hon'ble the Apex Court even in the cases of N.D.P.S. Act the sentence in default of payment of fine is not similar to main sentence. It is a penalty which a person incurs on account of non payment of fine. If the sentence is imposed against an offender he must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision or in other appropriate judicial proceedings. Thus, imprisonment ordered in default of payment of fine stands on a different footing. When such default sentenced is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. Accordingly, he can always avoid to undergo imprisonment in default of payment of fine by paying such amount. Therefore, it is the duty of the court to keep in view the nature of offence, circumstances under which the offence was committed, the financial status of the offender and other relevant considerations such as pecuniary circumstances before ordering the offender to suffer imprisonment in default of payment of fine. The provisions of the Indian Penal Code makes it clear that the amount of fine should not be harsh or excessive. The court has also observed that where a substantial term of imprisonment is inflicted, an excessive fine should not be imposed except in exceptional cases.

16. In view of the foregoing, appeal filed by the appellant is hereby allowed in

part. The conviction recorded by the trial court is hereby confirmed. The sentence imposed upon the appellant to undergo RI of 15 years is reduced to 10 years. The order of payment of fine of Rs.1,00,000/- and in default, the appellant shall undergo RI of 6 months is hereby upheld. Meaning thereby, the appellant has to serve 10 years' RI and to pay fine of Rs.1,00,000/- otherwise he has to serve 6 months' RI more. Thereafter, he shall be set at liberty forthwith, if not required in any other case.

Appeal partly allowed.

I.L.R. [2014] M.P., 1941
ARBITRATION APPEAL
Before Mr. Justice Shantanu Kemkar &
Mr. Justice Prakash Shrivastava
Arb. Appeal No. 15/2010 (Indore) decided on 15 March, 2013

BRITISH MARINE PLC. LONDON ...Appellant
Vs.
AGRAWAL COAL CORPORATION PVT. LTD. & anr. ...Respondents

A. ***Arbitration and Conciliation Act (26 of 1996), Sections 44, 45 & 50 -*** **Reference of subject matter of suit filed by respondent No. 1 to arbitration - Held - Before referring the dispute for arbitration u/s 45 of the Act, the judicial authority must examine the existence of arbitration agreement between the parties - Section 45 can be invoked only if it is found that such an arbitration agreement is not null and void, inoperative and incapable of being performed. (Para 22)**

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराऐं 44, 45 व 50 – प्रत्यर्थी क्र. 1 द्वारा प्रस्तुत वाद की विषयवस्तु को माध्यस्थम को निर्दिष्ट किया जाना – अभिनिर्धारित – अधिनियम की धारा 45 के अंतर्गत माध्यस्थम हेतु विवाद निर्दिष्ट करने से पूर्व न्यायिक प्राधिकारी को पक्षकारों के मध्य माध्यस्थम करार के अस्तित्व का परीक्षण करना चाहिये – धारा 45 का अवलम्ब केवल तब लिया जा सकता है यदि यह पाया जाता है कि उक्त माध्यस्थम करार शून्य व अकृत, अप्रवर्तनीय एवं पूरा करने के लिये अक्षम नहीं है।

B. ***Arbitration and Conciliation Act (26 of 1996), Sections 44, 45 - Binding Contract -*** **For a binding contract written agreement is not necessary but from the contemporaneous correspondence exchanged between the parties "consensus ad idem" should be clearly spelt out, it cannot be said that an agreement had come in existence -**

The correspondence between the parties also indicate that till 22.09.2008 the parties were at the negotiation stage and final terms were not arrived at between them. (Paras 27 & 28)

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराऐं 44, 45 – बाध्यकारी करार – बाध्यकारी करार के लिये लिखित करार आवश्यक नहीं किन्तु पक्षकारों के मध्य किये गये समकालीन पत्राचार से "एक ही अर्थ में मतैक्य" स्पष्ट रुप से निकलना चाहिये, यह नहीं कहा जा सकता कि करार अस्तित्व में आ गया है – पक्षकारों के मध्य पत्राचार यह भी दर्शाता है कि 22.09.2008 तक पक्षकार बातचीत के प्रक्रम पर थे और उनके बीच अंतिम शर्तें तय नहीं की गयी थी।

***C. Arbitration and Conciliation Act (26 of 1996), Sections 44, 45 - Collusion* - It is not enough to state in general term that there was "collusion" - Said allegation made by the appellant lacks in material pleading to substantiate the plea of "collusion" - It cannot be held that the respondent No. 2 has colluded with the respondent No. 1. (Para 36)**

ग. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराऐं 44, 45 –"दुस्संधी" – सामान्य तौर पर यह कथन करना पर्याप्त नहीं कि "दुस्संधी" थी – अपीलार्थी द्वारा किये गये उक्त अभिकथन में दुस्संधी के अभिवाक् की पुष्टि के लिये तात्विक अभिवचन का अभाव है – यह धारणा नहीं की जा सकती कि प्रत्यर्थी क्र. 2 की प्रत्यर्थी क्र. 1 से दुस्संधी हो गई थी।

***D. Civil Procedure Code (5 of 1908), Section 9 - Jurisdiction* - Since the correspondence has been done from Indore where registered office is located - Part of action has arisen at Indore - Therefore, Civil Court, Indore has jurisdiction. (Para 38)**

घ. सिविल प्रक्रिया संहिता (1908 का 5), धारा 9 – क्षेत्राधिकार – चूंकि इंदौर से पत्राचार हुआ जहां पंजीकृत कार्यालय स्थित है – कार्यवाही का भाग इंदौर में उत्पन्न हुआ है – अतः, इंदौर सिविल न्यायालय का क्षेत्राधिकार है।

***E. Civil Procedure Code (5 of 1908), Order 39 Rules 1 &2* - The plea raised by the appellant that anti suit injunction cannot be granted and reliance has been placed upon 2003(4) SCC 341, wherein Supreme Court has culled out the principles but nothing has been pointed out to show that said principles are violated. (Paras 39)**

ङ. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अपीलार्थी द्वारा अभिवाक् उठाया गया कि वाद निरोधक व्यादेश प्रदान नहीं किया जा सकता और 2003 (4) SCC 341 पर विश्वास किया गया जिसमें उच्चतम न्यायालय

ने सिद्धांतों को एकत्रित किया था परंतु यह दर्शाने के लिये कुछ भी प्रकट नहीं किया गया है कि उक्त सिद्धांतों का उल्लंघन हुआ है।

Cases referred :

2006(1) SCC 751, 1984(6) SCC 679, AIR 1999 SC 565, 2005 (7) SCC 234, 2005(8) SCC 618, 2012(2) SCC 144, AIR 2010 SC 1793, 2012(1) SCC 361, (2013) 1 SCC 641, 2009(2) SCC 134, 2010(3) SCC 1, 2005(6) SCC 404, 2012(7) SCC 462, AIR 2009 SC 628, AIR 2002 SC 1432, 1999(1) SCC 1, 2008(3) MPLJ 161, AIR 2010 SC 2671, AIR 1972 SC 1242, 2012(2) SCC 144, AIR 1956 SC 593, AIR 1977 SC 615, AIR 1989 SC 1239, 2003(4) SCC 341.

A.S. Garg with *Ajay Assudani & Siddharth Sethi,* for the appellant.

A.M. Mathur with *N.K. Dave & Abhinav Dhanodkar*, for the respondent No.1.

B.L. Pavecha with *Yogesh Mittal,* for the respondent No.2.

J U D G M E N T

The Judgment of the Court was delivered by : PRAKASH SHRIVASTAVA, J. :- This judgment will govern the disposal of Arbitration Appeal No. 15/2010 and M.A. No. 2904/2010

1. The Arbitration Appeal No.15/2010 under Section 50 of the Arbitration and Conciliation Act, 1996 (for short "the Act") is directed against the order dated 25.1.2010 passed by the learned District Judge, dismissing the application under Section 45 of the Act filed by the appellant. Since by the same order learned District Judge has granted temporary injunction in favour of the respondent no.1, therefore, M.A. No.2904/2010 has been filed challenging the said order.

2. The respondent no.1 (plaintiff) has filed a suit for declaration and permanent injunction pleading that on 16.4.2008 an email was sent by the respondent no.2 on behalf of the appellant to the respondent no.1 containing the terms and conditions of the proposed agreement for supply of ships for shipment of coal. The respondent no.1 was to approve the terms and conditions contained in the said letter by 4:00 P.M. on 17.4.2008, and thereafter the Board of Directors of the appellant was to confirm it in five weekly days after acceptance by the respondent no.1 and after receipt of balance-sheets of the respondent no.1, if the same were found to be

satisfactory by the appellant. The respondent no.1 had approved the terms on 17.4.2008. On 24.4.2008 the respondent no.1 had sent to the appellant, through respondent no.2, desired scanned copies of its balance-sheets. On 12.6.2008 the respondent no.2 had sent an email to the respondent no.1 demanding confirmation that the final audited balance-sheets of group companies for financial year 2007-08 will be forwarded to the appellant latest by 5.7.2008. On the same day the respondent no.1 had given the confirmation to respondent no.2 mentioning that audited balance-sheets of other group companies will be ready in the month of August 2008. Prior to 12.6.2008, the provisional balance-sheets of other group companies were already sent to the appellant, through respondent no.2, by respondent no.1. On 13.6.2008 respondent no.2 had sent an email to the respondent no.1 demanding confirmation of the contents of the letter dated 12.6.2008 and stating that other group companies of the respondent no.1 will give guarantee for the due performance of the contract by respondent no.1. According to the respondent no.1, it was a new condition which did not find place in the letter dated 16.4.2008. On 13.6.2008 respondent no.2 had sent an email to the respondent no.1 demanding final audited balance-sheets for financial year 2007-08, and on 13.6.2008 the respondent no.1 had once again confirmed the contents of the letter dated 12.6.2008, as required, and stated that the final audited balance-sheets of the group Companies of respondent no.1 for financial year 2007-08 will be forwarded to the appellant latest by August 2008. On 23.9.2008 the respondent no.2 had emailed to the respondent no.1 and the appellant, the Contract of Affreightment (COA) dated 22.9.2008 for being accepted and confirmed by them. According to respondent no.1 the COA dated 22.9.2008 was only a draft agreement which was never accepted and confirmed by the parties and thereafter no correspondence between the parties took place. On 12.2.2009 the respondent no.1 had sent an email to the appellant that apart from the earlier contract dated 19.12.2006, no other contract exist between the parties. On 7.7.2009 the respondent no.1 had received a letter of the Advocate on behalf of the appellant stating that as per clause 5 of the contract of affreightment, the appellant had appointed Mr. Bruce Harris as Arbitrator on behalf of the appellant in respect of the dispute arisen under the contract of affreightment dated 22.9.2008, and calling upon the respondent no.1 to appoint its arbitrator within 14 days, in accordance with agreement and the English Arbitration Act, 1996. Since according to respondent no.1 no concluded contract had taken place between the parties

on 22.9.2008, therefore, the respondent no.1 had filed the present suit with a prayer to declare that no concluded contract of affreightment dated 22.9.2008 legally exist between the parties, and to restrain the appellant from proceeding with the arbitration against the respondent no.1 on the basis of alleged clause 5 regarding arbitration said to be contained in the COA dated 22.9.2008.

3. The respondent no.1 had also filed an application under Order 39 Rule 1 & 2 CPC with a prayer to restrain the appellant from proceeding with the arbitration on the basis of the alleged arbitration clause of the COA dated 22.9.2008.

4. The appellant had filed an application under Section 45 of the Act in the pending suit seeking reference of the subject matter of the suit to arbitration, pleading that the Civil Court in question had no jurisdiction (territorial or otherwise) over appellant and/or the Arbitral Tribunal at London and it cannot consider the validity and enforceability of agreement. It was stated in the said application that there was a contract of affreightment with respondent no.1 dated 19.12.2006 providing for 6 shipments each calendar year from 1.1.2007 till December 2009, entered into by Ocean Bulk Carriers Limited, London as owners and it was subsequently novated to the appellant. Clause 5 of this COA provides for arbitration at London in accordance with English Law. The negotiations commenced for another contract of affreightment through respondent no.2 on 16.4.2008 between the appellant and respondent no.1, which continued up to 22.9.2008 and resulted into binding and enforceable CAO dated 22.9.2008 and that the dispute is arbitrable in terms of Clause 5 of earlier COA.

5. The respondent no.1 had filed reply to the application under Section 45 of the Act raising an objection that the provisions of Section 44 and 45 of the Act are not applicable in the case, since there is no agreement in writing and further raising the plea that there does not legally exist any arbitration agreement between the parties since no concluded contract was arrived at, and COA dated 22.9.2008 was only a draft recap and it did not represent agreed and binding agreement between the parties and that the respondent no.1 had appointed Mr. Bruce Bachan as its nominee arbitrator on 8.9.2009 without prejudiced to the objection that there is no concluded contract, and reserving the right in respect of the jurisdiction of the tribunal.

6. The respondent no.2 had also filed the affidavit stating that in the

negotiations between the appellant and respondent no.2, it had acted as sole broker and that the draft recap was circulated to both the parties on 22.9.2008 inviting their comments, which was inadvertently termed as "Clean Fixed" but it did not represent an agreed and binding agreement and no reply was received from either appellant or respondent no.1 to the terms contained in the draft recap sent out on 22.9.2008, therefore, it was understood by the respondent no.2 that the parties could not agree on the outstanding point and that the deal was dead. According to the respondent no.2 there were number of vital outstanding issues, therefore, the negotiations were not complete and the parties had not concluded a binding COA at any stage.

7. The appellant had filed rejoinder alleging that the respondent no.1 and the respondent no.2 were acting in collusion with each other to defeat the rights of the appellant. The respondent no.2 had filed affidavit in response to the rejoinder denying the allegation of collusion and reiterating that no COA was entered between the parties on 22.9.2008, or at any point of time thereafter and neither of the parties had confirmed and signed any COA on 22.9.2008 or thereafter, though such COA are normally signed to avoid any unnecessary dispute between the parties. The appellant had also filed reply to the application under Order 39 Rule 1 & 2 CPC, and the respondent no.1 had also filed rejoinder to the application under Order 39 Rule 1 & 2 CPC. The respondent no.1 had also filed the affidavit pointing out the circumstances leading to the appointment of Mr. Bruce Bachan as arbitrator on behalf of the respondent no.1.

8. The parties had filed the documents in support of their respective claims and no oral evidence was led before the trial Court.

9. The trial Court vide order dated 25.1.2010 has rejected the appellant's application under Section 45 of the Act holding that the Board of Director/ owners of the appellant had not granted approval since the beginning i.e. from the date of issuance of the first letter dated 16.4.2008, the freights from China, Australia and South Africa were not finalized, the respondent no.1 had not supplied the audited balance-sheets of group companies as per the condition of the agreement, and as per the said agreement the logical alterations/ amendments were remaining and the time for giving the audited balance-sheets of the group Companies of the respondent no.1 had expired in August 2008, and that as per the respondent no.2 the agreement was at the draft stage and such agreements were normally written agreements signed by both the parties.

The trial Court accordingly, had rejected the application under Section 45 of the Act filed by the appellant *prima facie* holding that no final agreement was executed between the parties on 22.9.2008. The trial Court also considered the application of the respondent no.1 under Order 39 Rule 1 & 2 CPC and found that there was *prima facie* case and balance of convenience in favour of respondent no.1, and the respondent no.1 will suffer irreparable injury if the arbitration proceedings are allowed to continue. The trial Court also found that it had jurisdiction since the correspondence was done from Indore, and accordingly granted temporary injunction in favour of the respondent no.1 restraining the appellant from conducting the arbitration proceedings till the disposal of the suit.

10. Learned counsel appearing for the appellant submits that there was a concluded contract between the parties, and even otherwise this issue is to be decided by the arbitration tribunal in terms of Section 16 of the Act. He has further submitted that the agreement need not be written agreement and referring to Section 7(4)(b) of the Act, he has submitted that the agreement is treated to be in writing if it is contained in exchange of letters etc. He has further submitted that both the parties have appointed their respective arbitrator, therefore, the arbitral proceeding should be allowed to continue. He has also submitted that there is collusion between the respondent no.1 and respondent no.2 to defeat the claim of the appellant. He has also submitted that Section 45 of the Act is mandatory and in the facts of the case, the trial Court ought to have referred the matter to arbitration by allowing the petitioner's application.

11. Learned counsel appearing for the respondent no.1 has supported the impugned order and has submitted that no concluded contract was arrived at between the parties, and that the agreement dated 22.9.2008 was only a draft agreement since various terms contained therein were not settled and the said agreement was not accepted by both the parties. He has further submitted that under Section 44 of the Act written agreement is necessary, and has referred to the stand of the respondent no.2 that no concluded contract was arrived at between the parties. He has submitted that the earlier COA dated 19.12.2006 was a written, signed and sealed contract. He has also referred to the admissions made by the appellant in his reply before the trial Court. He has also submitted that there is no arbitration clause in the agreement dated 22.9.2008. He has denied the allegation of collusion between the

respondent no.1 and 2 and has submitted that there is no scope for interference in the order of the trial Court.

12. Learned counsel appearing for the respondent no.2 has submitted that the necessary pleadings, which are required in law relating to collusion, are missing and the respondent no.2 had not colluded with the respondent no.1 and that no concluded contract was arrived at between the parties.

13. We have heard the learned counsel for the parties and perused the record.

14. Part II of the Act deals with enforcement of certain foreign awards and Chapter 1 thereof is in respect of New York Convention Awards. Section 44 falling in Chapter 1 defines the Foreign Award and Section 45 deals with power of judicial authority to refer parties to arbitration. Section 45 starts with a non obstante clause and provides for making a reference to arbitration. Section 44 and 45 of the Act read as under :

> **44. Definition-** In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960–
>
> a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
>
> (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette declare to be territories to which the said Convention applies.
>
> **45. Power of judicial authority to refer parties to arbitration** - Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void,

inoperative or incapable of being performed.

15. The first issue which arises for consideration is whether it is for the judicial authority seized of the matter to examine existence of a valid arbitration agreement or it is mandatory to refer the matter for arbitration under Section 45 of the Act, as soon as an application is filed with such a prayer, leaving it to the arbitrator to decide about the existence of the arbitration agreement?

16. A bare reading of Section 45 shows that though it is mandatory to the judicial authority seized of an action in question to refer the parties to arbitration, but such a reference can be denied if it is found that the arbitration agreement is null and void, inoperative or incapable of being performed.

17. Learned counsel appearing for the respondent no.1 has relied upon the judgment of the Supreme Court in the matter of *Dresser Rand S.A. Vs. Bindal Agro Chem Limited and Another* reported in 2006(1) SCC 751 and in the matter of *Renusagar Power Co. Ltd. Vs. General Electric Company and Another* reported in 1984(6) SCC 679, wherein considering the similar issue under the provisions of Arbitration Act, 1940 the Supreme Court has held that the challenge to the existence of the arbitration agreement is maintainable when the matter comes up before the Court under Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961, but these judgments may not be relevant after coming into force of Act of 1996, since the Supreme Court in the matter of *M/s. Sundaram Finance Vs. NEPC India* reported in AIR 1999 SC 565 has held that the 1996 Act is different from Arbitration Act, 1940 and the provisions of 1996 Act have to be interpreted and construed independently, and a reference to 1940 Act may lead to misconstruction meaning thereby the provisions of 1996 Act have to be interpreted without being influenced by principles underlying the 1940 Act.

18. The Supreme Court in the matter of *ShinEtsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd and Another* reported in 2005(7) SCC 234 by the majority judgment has held that before deciding application under Section 45 of 1996 Act the trial Court has to be prima facie satisfied about existence of arbitral agreement which does not suffer from the defect of being null and void, inoperative or incapable of being performed. The Supreme Court has held that :-

> "107. For all these reasons, I respectfully differ from the judgment of my esteemed Brother Sabharwal, J. I am of

the view that the present matter needs to be remitted to the trial Court, but not for a full trial as directed by the impugned judgment of the High court. The application under Section 45 would have to be determined by the trial Court after arriving at the prima facie satisfaction that there exists an arbitral agreement, which is "not null and void, inoperative or incapable of being performed". If the trial court finds thus, the parties shall be referred to arbitration."

19. The Supreme Court in the matter of *SBP & Co. Vs. Patel Engineering Ltd. and Another* reported in 2005(8) SCC 618, in the matter of *Bharat Rasiklal Ashra Vs. Gautam Rasiklal Ashra and Another* reported in 2012(2) SCC 144, in the matter of *Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another* reported in AIR 2010 SC 1793, and in the matter of *Powertech World Wide Ltd. Vs. Delvin International* reported in 2012(1) SCC 361 while considering the issue of appointment of arbitrator under Section 11 of the Act has held that the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether in fact there is in existence a valid arbitration agreement and whether the disputed that is sought to be raised before it, is covered by the arbitration clause. It has been held that existence and validity of arbitration agreement can be decided by the authorities concerned under Section 8, 9 & 11 and Arbitral Tribunal does not have exclusive jurisdiction to decide the same. In the matter of *Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. and others* reported in (2013) 1 SCC 641 the three judges Bench of the Supreme Court has held that an application for appointment of arbitrator under Section 45 of the Act would also be governed by the provisions of Section 11(6) of the Act.

20. Learned counsel for the appellant referring to the judgment of the Supreme Court in the matter of *Shakti Bhog Foods Limited Vs. Kola Shipping Limited* reported in 2009(2) SCC 134 and in the matter of *Trimex International FZE Limited, Dubai Vs. Vedanta Aluminium Limited, India* reported in 2010(3) SCC 1 has submitted that the dispute relating to the existence of the valid agreement is required to be referred to the arbitrator since arbitrator under Section 30 of the English Arbitration Act, 1996 has power to rule on his own jurisdiction. Even in the case of *Shakti Bhog Foods Ltd.* (supra), which has been relied by counsel for the appellant, the trial Court had allowed the application under Section 45 of the Act which was affirmed

by the High Court, and the Supreme Court on independent examination of the material had found from the record that the appellant therein had not denied that it had signed the first page of the charter party agreement, and the Supreme Court had concluded about existence of charter party agreement between the parties to the suit from the correspondence between the parties as also from the fixture note and the bill of lading signed by the parties, and had further found that the agreement could not be termed as null and void, inoperative or incapable of being performed. After reaching such a conclusion, the Supreme Court had additionally observed that this issue could also be raised before the Arbitral Tribunal. It is not the ratio of this judgment that the said issue can not be raised before the Court while considering the application under Section 45 of the Act. Counsel for the respondent no.1 has also submitted that the said observation of the Supreme Court in paragraph 32 of the judgment in the matter of *Shakti Bhog Foods Ltd.* (supra) is only an obiter and is not a precedent in terms of the judgment of the Supreme Court in the matter of of *ICICI Bank and Another Vs. Municipal Corporation of Greater Bombay and others* reported in 2005(6) SCC 404, in the matter of *Purbanchal Cables and Conductors Private Limited Vs. Assam State Electricity Board and Another* reported in 2012(7) SCC 462 and in the matter of *Deepak Bajaj Vs. State of Maharashtra & Another* reported in AIR 2009 SC 628, but we need not go into the said aspect since even from the judgment in the matter of *Shakti Bhog Foods Ltd.* (supra) it is apparent that the Court before making a reference under Section 45 of the Act, is required to examine if the agreement is null and void, inoperative or incapable of being performed and for that purpose the Court is required to see if any arbitral agreement was, at all, arrived at between the parties. So far as the judgment in the matter of *Trimex International FZE Limited* (supra) is concerned, in this judgment also the Supreme Court after examining the correspondence exchanged between the parties, had found that the charter party agreement was finally entered into a contract by the parties.

21. The above controversy has been put to rest by the Supreme Court in the recent judgment in the matter of *Chloro Controls India Pvt. Ltd.* (supra) by holding that following aspects can be considered by the Court while dealing with application under Section 45 of the Act:"

> 63.....When the court is seized with a challenge to the validity of an arbitration agreement, it would be desirable to examine the following aspects:

"1. Does the arbitration agreement fall under the scope of the Convention ?

2. Is the arbitration agreement evidenced in writing ?

3. Does the arbitration agreement exist and is it substantively valid ?

4. Is there a dispute, does it arise out of a defined legal relationship, whether contractual or not, and did the parties intend to have this particular disputer settled by arbitration ?

5. Is the arbitration agreement binding on the parties to the dispute that is before the court ?

6. Is this dispute arbitrable?"

According to the Guide, if these questions are answered in the affirmative, then the parties must be referred to arbitration. Of course, in addition to the above, the court will have to adjudicate any plea, if taken by a non-applicant that the arbitration agreement is null and void, inoperative or incapable of being performed. in these three situations, if the court answers such plea in favour of the non-applicant, the question of making a reference to arbitration would not arise and that would put the matter at rest".

It has further been held by the Supreme Court that one can claim reference only upon satisfaction of prerequisites stated in Section 44, 45 and Schedule I of the Act.

The Supreme Court has emphasized for deciding such issue at the threshold of judicial proceeding by holding:-

"131.Another very significant aspect of adjudicating the matters initiated with reference to Section 45 of the 1996 Act, at the threshold of judicial proceedings, is that the finality of the decision in regard to the fundamental issues stated under Section 45 would further the cause of justice and interest of the parties as well:

131.1. To illustratively demonstrate it, we may give an

example. Where Part A is seeking reference to arbitration and Party B raises objections going to the very root of the matter that the arbitration agreement is null and void, inoperative and incapable of being performed, such objections, if left open and not decided finally at the threshold itself may result in not only parties being compelled to pursue arbitration proceedings by spending time, money and efforts but even the Arbitral Tribunal would have to spend valuable time in adjudicating the complex issues relating to the dispute between the parties, that may finally prove to be in vain and futile. Such adjudication by the Arbitral Tribunal may be rendered ineffective or even a nullity in the event the courts upon filing of an award and at execution stage hold that the agreement between the parties was null and void inoperative and incapable of being performed. The Court may also hold that the Arbitral Tribunal had no jurisdiction to entertain and decide the issues between the parties.

131.2 The issue of jurisdiction normally is a mixed question of law and facts. Occasionally, it may also be a question of law alone. It will be approprite to decide such questions at the beginning of the proceedings itself and they should have finality.

131.3 Even when the arbitration law in India contained the provision like Section 34 of the 1940 Act which was somewhat similar to Section 4 of the English Arbitration Act, 1889, this Court in Anderson Wright Ltd. took the view that while dealing with the question of grant or refusal of stay as contemplated under Section 34 of the 1940 Act, it would be incumbent upon the court to decide first of all whether there is a binding agreement for arbitration between the parties to the suit or not.

131.4 Applying the analogy thereof will fortify the view that determination of fundamental issues as contemplated under Section 45 of the 1996 Act at the very first instance by the judicial forum is not only appropriate but is also the legislative intent. Even the language of Section 45 of the 1996 Act suggests

that unless the court finds that an agreement is null and void, inoperative and incapable of being performed, it shall refer the parties to arbitration."

22. Thus from the above judgments and also from the language of Section 45 of the Act, it is clear that before referring the dispute for arbitration under Section 45 of the Act, the judicial authority must examine the existence of arbitration agreement between the parties and Section 45 can be invoked only if it is found that such an arbitration agreement is not null and void, inoperative and incapable of being performed.

23. The next issue is whether a written agreement is necessary for a concluded contract and if in the present case a concluded contract exists between the parties even in the absence of written agreement signed by the parties?

24. Section 44 requires an agreement in writing. In the present matter no written agreement signed by both the parties exists. Though Section 7 of the Act falling in Part I of the Act defines the arbitration agreement, which include an agreement arrived at by exchange of letters, telex, telegram or other means of tele communication which provide a record of the agreement, but an argument has been advanced before this Court that in respect of the Foreign Award and the matters covered by Part II of the Act, the applicability of Part I of the Act is excluded. Such an argument is required to be rejected at the outset, since three judges Bench of the Supreme Court in the matter of *Bhatia International Vs. Bulk Trading S.A. and Another* reported in AIR 2002 SC 1432 has settled that in case of arbitration held in India, the provisions of Part I would apply and in case of international commercial arbitration held out of India, provisions of Part I would apply unless the parties by agreement, expressed or implied, exclude all or any of its provisions. Even otherwise in terms of Clause 2 of Article II of Schedule I of the Act, term "agreement in writing" includes an arbitrral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegramme. The Supreme Court in the matter of *Trimex International FZE Limited* (supra) while dealing with the issue of existence of a charter party agreement arising in international commercial petition filed under Section 11(6) has held that in the absence of signed agreement between the parties, it would be possible to infer the agreement from various documents duly

approved and signed by the parties in the form of exchange of letters, telex, telegrams and other means of telecommunication. In the matter of *Shakti Bhog Foods Limited* (supra) also the similar view has been taken by the Supreme Court.

25. In the matter of *Indowind Energy Ltd.* (supra) it has been held that an arbitration agreement can come into existence only in the manner contemplated under Section 7 of the Act. The Supreme Court in the matter of *Rickmers Verwaltung GMBH Vs. Indian Oil Corporation Limited* reported in 1999(1) SCC 1 has held that even if the agreement is not signed by the parties, *consensus ad idem* can be spelt out from contemporaneous correspondence exchanged between the parties, but the Court cannot make out a contract by going beyond the clear language used in the correspondence. In that case the Supreme Court has held that there was no binding contract and it was at negotiation stage, since the formats of standby letter of credit and performance guarantee could not be settled between the parties and the agreement was not signed by the parties.

26. The Supreme Court in the matter of *Dresser Rand S.A.* (supra) has held that agreement upon terms which will govern a purchase when purchase order is placed, is not the same as placing purchase order, and that a prelude to a contract should not be confused with a contract itself. Agreement upon terms is not the same as entering into the contract itself. The Division Bench of this Court in the matter of *M.P. Power Generating Co. Ltd., Jabalpur Vs. Flow More Pvt. Ltd.* reported in 2008(3) MPLJ 161 has held that unless from the correspondence between the parties it can unequivocally and clearly emerge that the parties were "ad idem" to the term, it cannot be said that the agreement had come into existence between them through correspondence. It has been held that when parties were only negotiating and did not reach *"consensus ad idem"*, no concluded and binding contract came into existence. The Supreme Court in the matter of *BSNL Vs. Telephone Cables Limited* reported in AIR 2010 SC 2671 has taken the view that the parties agreeing upon the terms subject to which a contract will be governed, when made, is not the same as entering into the contract itself, and that it is not sufficient to show that there was an arbitration agreement in regard to some contract between the parties. In the matter of *Haridwar Singh Vs. Bagun Sumbrui and others* reported in AIR 1972 SC 1242 while dealing with the question of concluded contract in reference to the auction sale, the Supreme Court held that there was no concluded contract between the Government and the highest

bidder as there was no confirmation of the acceptance of bid to take the coup in settlement for highest amount of bid.

27. Thus from the above judgments and provisions of law, it emerges that for a binding contract written agreement is not necessary but from the contemporaneous correspondence exchanged between the parties *"consensus ad idem"* should be clearly spelt out. Unless from the correspondence it can unequivocally and clearly emerge that the parties were *ad idem* to the terms, it cannot be said that an agreement had come into existence between them through the correspondence. The Court is required to examine the correspondence exchanged between the parties and the conduct of the parties and to infer from that whether the intention of the parties, as expressed in the correspondence, was to bring into existence a mutual binding contract. The intention of the parties is to be inferred from the nature of the correspondence and the meaning it conveys, and if it is found that there had been meeting of mind between the parties and the parties had actually reached to an agreement upon all material terms, then a binding contract can be spelt out from the correspondence.

28. In the present matter, the correspondence between the parties reveals that the Board of Directors of the appellant had not given the approval as required by the communication dated 16.4.2008. The trial Court has rightly noted that the freights in respect of China, Australia and South Africa were not finally settled between the parties and in terms of the correspondence, the respondent no.1 had not provided the audited balance-sheets of other group companies. The correspondence between the parties also indicate that till 22.9.2008 the parties were at the negotiation stage and final terms were not arrived at between them. The email dated 30.3.2009 sent by the appellant to the respondent no.2 shows that till that time the finality to the different clauses of the agreement were not given, since by that email the appellant had required the respondent no.2 to incorporate additional paragraph in respect of the guarantee of performance of respondent no.1 by the group companies.

29. It is also worth mentioning that the following clauses of the agreement dated 22.9.2008 also reflect that the said agreement was not final :-

> (a) "Under this CAO charters need option to load from China/ Australia/South Africa for which owners/charters mutually agree to freights that some time – charter return as per this Contract, which to be mutually agreed."

It shows that the option about loading from China/Australia/ South Africa and the freights for the same were not settled till then.

(b) "The final audited balance-sheets of above group companies for financial year 2007-08 will be forwarded to owners latest by August 2008."

Whereas August 2008 had already passed and the time had lapsed.

(c) "After carrying out logical alterations/amendments to the base C/P, MV British Marine/Agrawal Coal Corporation C/P 19/DEC/2006.EXCEPT."

It shows that the logical alterations and amendments were yet to be carried out.

30. The fact that no concluded contract was entered into by the parties on 22.9.2008 also becomes clear from the subsequent email dated 31.3.2009 which was sent by the respondent no.2 to the appellant stating that :-

" British marine Plc tbn, Agarwal Coal

We had prepared the recap on 22nd September 2008 in accordance with our notes which was sent to owners and charterers both.

However we never received confirmation or acknowledgment or any response on the recap so prepared by us, from either of the parties.

Kindly be guided accordingly."

31. The contract was negotiated by appellant and the respondent no.1 through the respondent no.2, and the respondent no.2 has taken the stand before the trial Court that the draft recap dated 22.9.2008 was circulated between the parties, which did not represent an agreed and binding agreement. The reasons assigned by the respondent no.2 in its affidavit before the trial Court are reproduced as under :

i "ACCPL had not provided the audited group accounts that BM required be provided by August, 2008;

ii. BM had not therefore had lifted their subjects (and indeed have not done so to date).

iii. There was no agreement between the parties on the details of the COA, in particular there was no agreement on the following items:

- freight rates for load ports other than Indonesia which were to be mutually agreed.
- ACCPL's option to load from China/Australia/S.Africa had not yet been agreed by BM (and obviously the freight rates that were to apply for those areas had not been agreed).
- No reply was received from either BM or ACCPL to the terms contained in the draft recap sent out on 22nd September 2008."

32. According to the respondent no.2, the important vital issues which were outstanding on 23.9.2008 between the parties, were that ACCPL had yet to provide their group accounts, BM had yet to confirm that they had obtained their Board's approval and lifted their subjects, the freight rates had yet to be mutually agreed, BM had yet to confirm their agreement to charters option to load from other ports including China, Australia and South Africa and freight rates for this option had yet to be discussed and agreed. Even otherwise, the stand of the respondent no.2 is that generally such contract, which are in the nature of long term contract, are reduced in writing and signed by the parties and for this he has referred to the earlier contract between the parties dated 19.12.2006 whereas the contract in dispute dated 22.9.2008 is not signed by the parties. The stand of respondent no.2 can not be lightly brushed aside since the parties were negotiating the contract through respondent no.2.

33. Counsel for the respondent no.1 has also referred to the paragraph (vi) of the reply of the appellant filed in response to the application for temporary injunction filed by the respondent no.1 to show that appellant himself has referred to the COA dated 22.9.2008 as proforma agreement.

34. The aforesaid analysis clearly indicates that no concluded binding contract had arrived at between the parties and the alleged agreement dated 22.9.2008 was only a draft agreement, which had never attained finality.

35. Even otherwise the so called agreement dated 22.9.2008 does not

contain any arbitration clause. The argument of the counsel for the appellant that the arbitration clause contained in the earlier agreement dated 19.12.2006 is required to be read into the alleged agreement dated 22.9.2008, cannot be accepted since nothing material has been pointed out to this Court that the agreement dated 22.9.2008 is in continuation of the earlier agreement dated 19.12.2006. On the contrary the appellant himself in his application under Section 45 of the Act [Paragraph 13 (I & II)] has stated that the earlier contract was dated 19.12.2006 and in the first quarter of 2008, the negotiations had commenced for another contract through respondent no.2 showing that the contract in question was to be arrived at as independent contract. The Supreme Court in the matter of *Bharat Rasiklal Ashra* (supra) reported in 2012(2) SCC 144 has held that the arbitrator can be appointed only if there is an arbitration agreement in regard to the contract in question, and the dispute relating to one contract cannot be referred to arbitration on the ground that another contract had an arbitration clause.

36. The next issue is in respect of the allegation of the appellant that the respondent no.2 has colluded with the respondent no.1. In this regard counsel for the respondent no.2 has referred to the judgment of the Supreme Court in the matter of *Nagubai Ammal and others Vs. B. Shama Rao and others* reported in AIR 1956 SC 593, wherein it is held that collusion in judicial proceedings is a secret arrangement between two persons that the one should institute suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose. In such a proceeding, the claim put forward is fictitious, the contest over it is unreal and the decree passed therein is a mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties. In the matter of *Varanasaya Sanskrit Vishwavidyalaya and Another Vs. Dr. Rajkishore Tripathi and Another* reported in AIR 1977 SC 615 the Supreme Court has held that it is not enough to state in general term that there was "collusion" without more particulars. In the present matter, the appellant has merely made a bold allegation that the respondent no.2 has colluded with the respondent no.1 but the said allegation lacks in material pleading to substantiate the plea of collusion. That apart respondent no.2 has filed the affidavit dated 11.5.2012 along with I.A. No. 5254/2012 & I.A. No.7415/2012 (In M.A. No.2904/2010) and I.A. No.5255/2012 & I.A. No.7414/2012 (In Arbitration Appeal No.15/2010) with a prayer for considering the said affidavit, and this Court vide order dated 8.11.2012 had directed that the applications and the affidavit will be considered at the time of final disposal of the matter. The

applications and the affidavit have not been opposed by the counsel for the appellant. Accordingly the applications are allowed. The affidavit filed by the respondent no.2 discloses that subsequently also the appellant has entered into COA with different parties through respondent no.2, which shows that the appellant still has trust on the respondent no.2, which belies the plea of collusion. Thus we find that on the basis of the material on record, it cannot be held that the respondent no.2 has colluded with the respondent no.1.

37. The appellant has also questioned the territorial jurisdiction of the trial Court at Indore to entertain the suit filed by the respondent no.1.

38. The Supreme Court in the matter of *A.B.C. Eminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem* reported in AIR 1989 SC 1239 has held that the jurisdiction of the Court in matter of a contract depends on the citus of the contract and the cause of action arise through connecting factors and that the making of a contract is part of the cause of action. The suit can be filed where a part of the cause of action arises. In the present matter the correspondence has been done from Indore by the respondent no.1 whose registered office is located in Indore, therefore, part of action has arisen at Indore. Therefore, Civil Court Indore has jurisdiction to entertain the suit.

39. The appellant has also raised the plea that anti suit injunction cannot be granted against the arbitration tribunal and in this regard he has placed reliance upon the judgment of the Supreme Court in the matter of *Modi Entertainment network and Another Vs. W.S.G. Cricket Pte. Ltd.* reported in 2003(4) SCC 341, wherein the Supreme Court has culled out the principles relating to the grant of anti suit injunctions but nothing has been pointed out to show that the said principles are violated while passing the impugned order by the trial Court.

40. The trial Court while granting temporary injunction in favour of the respondent no.1 has rightly examined the issue of prima facie case, balance of convenience and irreparable injury, and has not committed any error in granting the temporary injunction in favour of the respondent no.1 keeping in view the circumstances of the case, which have been noted above.

41. In view of the aforesaid analysis, we do not find any error in the order of the trial Court. The Arbitration Appeal No.15/2010 and Misc. Appeal No.2904/2010 are accordingly dismissed.

Appeal dismissed.

I.L.R. [2014] M.P., 1961
ARBITRATION CASE
Before Mr. Justice Alok Aradhe
Arb. Case No. 53/2012 (Jabalpur) decided on 12 February, 2014

DHARMENDRA SINGH (M/S) ...Appellant
Vs.
BHARAT SANCHAR NIGAM LTD. ...Respondent

Arbitration and Conciliation Act (26 of 1996), Section 11(6) - Appointment of Arbitrator **- Applicant's application to release the amount due to it denied on the ground that he has not resorted to the specified procedure of conciliation, hence are not admissible - Request made by the applicant to appoint an Arbitrator failed to evoke any response - Hence, this application - Held - From perusal of clause 25 of the agreement, recourse to conciliation is not mandatory - Contention of non-applicant that the dispute between the party has not arisen, cannot be accepted - As per clause 25(vi), dispute between the party shall be referred for adjudication through the arbitrator to be appointed by the Chief Engineer - Application allowed - Chief Engineer, B.S.N.L. is directed to appoint an Arbitrator within 30 days. (Paras 2, 5 & 8)**

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) – मध्यस्थ की नियुक्ति – आवेदक द्वारा उसे देय रकम मुक्त किये जाने हेतु आवेदन इस आधार पर अस्वीकार किया गया कि उसने सुलह की विनिर्दिष्ट प्रक्रिया का अवलंब नहीं लिया, अतः ग्राह्य नहीं – मध्यस्थ को नियुक्त किये जाने हेतु आवेदक के निवेदन का कोई जबाव नहीं दिया गया – इस कारण यह आवेदन – अभिनिर्धारित – करार के खंड 25 का परिशीलन करने पर, सुलह का अवलंब लेना आज्ञापक नहीं – अनावेदक का तर्क कि पक्षकार के बीच विवाद उत्पन्न नहीं हुआ है, स्वीकार नहीं किया जा सकता – खंड 25(vi) के अनुसार पक्षकार के मध्य विवाद को मुख्य अभियंता द्वारा नियुक्त मध्यस्थ के द्वारा न्यायनिर्णित किये जाने हेतु निर्देशित किया जायेगा – आवेदन मंजूर – मुख्य अभियंता, बी.एस.एन.एल. को 30 दिनों के भीतर मध्यस्थ नियुक्त करने के लिये निदेशित किया गया।

Cases referred :

(2012) 5 SCC 152, (2013) 4 SCC 35, Civil Appeal No. 4596/2013 order passed on 10.05.2013, Arb. Case No. 17/2010 order passed on 23.09.2010, (2006) 2 SCC 638, (2007) 7 SCC 684, (2007) 5 SCC 304, (2009) 2 SCC 337.

Shobha Menon with *Rahul Choubey,* for the appellant.

S.P. Singh, for the respondent.

ORDER

ALOK ARADHE, J. :- With consent of the parties, the matter is heard finally.

2. By means of this application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'), the applicant seeks appointment of an Arbitrator to arbitrate the dispute between the parties.

3. Facts giving rise to filing of the application briefly stated are that a notice inviting tender was issued on 28.1.2009 for operation and comprehensive maintenance of Electo-mechanical services for USOF sites under Cluster No.35 in Districts Dindori, Katni and Mandla. The bid submitted by the applicant was accepted and agreement was executed on 20.3.2009. On completion of the work, the applicant by a communication dated 20.4.2012 requested the non-applicants to release the amount which according to the applicant was due to it. However, the applicant vide letter dated 21.5.2012 was apprised that it has not resorted to the specified procedure of conciliation and has put forward some claims which are not admissible. The applicant submitted detailed statement of claim along with letter dated 22.8.2012 by which the applicant made a request to the non-applicants to appoint an Arbitrator. However, the communication sent by the applicant failed to evoke any response from the non-applicants. In the aforesaid factual background, the applicant has approached this Court.

4. Learned senior counsel for the applicant submits that from perusal of Clause 25 of the agreement, it is evident that resort to the conciliation is not mandatory and since despite receipt of communication dated 22.8.2012, the non-applicants have failed to appoint the Arbitrator, therefore, they have forfeited the right to appoint an Arbitrator. In support of aforesaid submission, learned senior counsel for the applicant has placed reliance on decisions of Supreme Court reported in *Dakshin Shelters Private Limited Vs. Geeta S. Johari,* (2012) 5 SCC 152 and *Deep Trading Company Vs. Indian Oil Corporation and others,* (2013) 4 SCC 35. It is also urged that at the time of deciding the application under Section 11(6) of the Act, the merits of the claim cannot be looked into. In this connection, reference has been made to order of the Supreme Court in the case of *Today Homes & Infrastructure Pvt. Ltd., Vs. Ludhiana Improvement Trust & Another,* passed in Civil

Appeal No.4596/2013 dated 10.5.2013 and in the case of *ITI Limited Vs. State of M.P.*, passed by the learned Single Judge of this Court in Arbitration Case No.17/2010 dated 23.9.2010.

5. On the other hand, learned counsel for the non-applicants has vehemently opposed the prayer for appointment of the Arbitrator on the ground that the applicant has not resorted to the procedure prescribed under clause 25 of the agreement and, therefore, the application is premature. It is further submitted that details of dispute have not been furnished by the applicant and infact, the dispute between the parties has not arisen and, therefore, the question of appointing an Arbitrator in the facts and circumstances of the case does not arise.

6. I have considered the respective submissions made by learned counsel for the parties. In the case of *Punj Lloyd Ltd., Vs. Petronet MHB Ltd.*, (2006) 2 SCC 638, the Supreme Court has held that if a party who has a right to appoint an Arbitrator, fails to do so, it loses the right to appoint arbitrator after the expiry of the period prescribed in the notice. Similar view has been taken in the case of *Union of India Vs. Bharat Battery Manufacturing Co. (P) Ltd.*, (2007) 7 SCC 684 and in *Deep Trading Company* (supra). In *ACE Pipeline Contracts (P) Ltd., Vs. Bharat Petroleum Corpn., Ltd.*, (2007) 5 SCC 304, the Supreme Court has held that on failure of the authority to appoint an Arbitrator, the Court should normally adhere to the terms of the arbitration clause. A deviation can be made in exceptional cases or where both the parties agree for a common name. Similar view has been taken in *Bharat Sanchar Nigam Limited and another Vs. Motorola India Private Ltd.*, (2009) 2 SCC 337. It is equally well settled in law that at the time of deciding an application under Section 11(6) of the Act, the Court cannot consider the merits of the claim set-up by a party.

7. In the backdrop of aforesaid well settled legal position, I may advert to the facts of the case. The relevant extract of Clause 25 of the agreement reads as under:-

> *"(i) It the contractor considers that he is entitled to any extra payment or compensation in respect of the works over and above the amounts admitted as payable by the BSNL or in case the contractor wants to dispute the validity of any deductions or recoveries made or proposed to be made from the contract, the contractor shall forthwith give notice in writing of his claim, in this behalf to the Engineer-in-Charge*

within 30 days from the date of disallowance thereof for which the contractor claims such additional payment or compensation or disputes the validity of any deduction or recovery. The said notice shall give full particulars of the claim, grounds on which it is based and detailed calculations shall not be entitled to raise any claim nor shall the BSNL be in any way liable in respect of any claim by the contractor unless notice of such claim shall have been given by the contractor to the Engineer-in-Charge in the manner and within the time as aforesaid. The contractor shall be deemed to have waived and extinguished all his rights in respect of any claims not notified to the Engineer-in-Charge in writing in the manner and within the time aforesaid.

(ii) The Engineer-in-Charge shall give his decision in writing on the claims notified by the contractor within 30 days of the receipt of the notice thereof. If the contractor is not satisfied with the decision of the Engineer-in-Charge, the contractor may within 15 days of the receipt of the decision of the Engineer-in-Charge submit his claims to the conciliating authority named in Schedule "F" for conciliation along with all details and copies of correspondence exchanged between him and the Engineer-in-Chief."

8. From perusal of Clause 25 of the agreement, it is evident that recourse to conciliation is not mandatory. So far as the contention raised by learned counsel for non-applicants that the dispute between the parties has not arisen, cannot be accepted, as from the communication dated 21.5.2013, it is evident that the certain claims set-up by the applicant have been rejected by the non-applicants as not admissible. The applicant thereafter had made a request for appointment of an Arbitrator which has failed to evoke any response. No exceptional circumstances have been pointed out by the parties nor any common name has been suggested by parties to enable this Court to deviate from the procedure agreed by parties for appointment of Arbitrator. Clause 25 (vi) of the agreement provides that the dispute between the parties shall be referred for adjudication through the Arbitrator by the sole Arbitrator to be appointed by the Chief Engineer, Bharat Sanchar Nigam Limited. In view of aforesaid clause as well as in view of law laid *down in Pipeline Contracts (P) Ltd.* (supra) and I deem it appropriate to direct the

Chief Engineer, Bharat Sanchar Nigam Limited to appoint an Arbitrator within a period of 30 days from the date of receipt of certified copy of the order passed today.

Accordingly, the application is allowed.

C.C. as per rules.

Application allowed.

I.L.R. [2014] M.P., 1965
CIVIL REVISION
Before Mr. Justice U.C. Maheshwari
Civil Rev. No. 306/2013 (Jabalpur) decided on 27 August, 2013

MOIN AKHTAR ...Applicant
Vs.
MUTAWALLI, COMMITTEE
CHANDAL BHATA MASJID & anr. ...Non-applicants

***Wakf Act (43 of 1995), Section 83(a) - Revision* - On the date of filing of the suit, it was alleged that the Committee was not having any locus standi to file the suit because the tenure of the Committee was already over on 23.07.2012 and the same was renewed vide order of the respondent No.2 dated 06.02.2013 - Held - The Committee which was functioning during its tenure in the absence of Constitution of new Committee shall be deemed to be continued for such property. (Para 11)**

वक्फ अधिनियम (1995 का 43), धारा 83(ए) – पुनरीक्षण – वाद प्रस्तुत करने की तिथि को यह अभिकथन किया गया था कि समिति को वाद प्रस्तुत करने के लिये सुने जाने का कोई अधिकार नहीं क्योंकि समिति का कार्यकाल पहले ही 23.07.2012 को समाप्त हो चुका है और प्रत्यर्थी क्र. 2 के आदेश दि. 06.02.2013 द्वारा उक्त का नवीनीकरण किया गया है – अभिनिर्धारित – वह समिति जो नयी समिति के गठन की अनुपस्थिति में अपने कार्यकाल के दौरान कार्यरत थी, उसे उक्त सम्पत्ति हेतु, बनी रहना समझा जायेगा।

Cases referred :
AIR 1973 SC 76, ILR (2012) MP 1170.

U.N. Singh, for the applicant.
Mukhtar Ahmed, for the non-applicant No. 1.

ORDER

U.C. MAHESHWARI, J. :- The applicant/defendant has filed this revision under sub-Section (9) of Section 83 of the Wakf Act, 1995 (in Short 'the Act'), being aggrieved by order dated 09.07.2013, passed by Wakf Tribunal, Bhopal in case No.5/2013, whereby applicant's application filed under Section 10 read with Section 151 of the C.P.C. for staying the entire proceedings of the aforesaid case till disposal of mutation proceedings filed on behalf of respondent No.1 before the revenue Court and his another application filed under Order 7 Rule 11 of the C.P.C. for dismissal of the impugned suit of the respondent No.1, filed for declaring the disputed property to be the Wakf property and for possession of the same alongwith the prayer for mesne profit, on the ground that respondent No.1 has no locus standi to file such suit have been dismissed.

2. Facts giving rise to this revision in short are that the respondent No.1 herein as President of Mutawali Committee of Chandal Bhata Masjid constituted by the respondent No.2 under Section 63 of the Act has filed the impugned suit against the applicant before the Wakf Tribunal for declaration to declare the disputed land and other stated property to be the Wakf property and for possession of the same alongwith the mesne profit.

3. In response of the aforesaid suit on behalf of the applicant, by filing the written statement, the appointment of the Mutawali Committee of the respondent No.1 was challenged and in such premises, the entire factual matrix pleaded by respondent No.1 in the plaint have been denied. In addition to it, it is stated that the period of the Mutawali Committee of the respondent No.1 fixed by the Wakf Board has come to an end long before on 18.01.2013 and in such premises, on the date of filing of this impugned suit the committee of the respondent No. 1 did not have any authority or locus stand (sic:standi) to file the impugned suit and accordingly the maintainability of the suit is challenged. Besides this, it is also stated that in view of pendency of the revenue proceedings at the instance of respondent No.1, before the Tahsildar, by virtue of Section 10 read with section 151 of the C.P.C., the impugned civil suit cannot be proceeded further and in such premises the prayer to stay the proceedings of the suit and disposal of the revenue case was also made.

4. I have also apprised by the respondent No.1's counsel that on the basis of pleadings, the issues were framed on all the disputed questions and the same is to be decided by the Tribunal in accordance with the spirit of the provisions under Order 14 Rule 2 of C.P.C., such position has not been disputed by the learned counsel for the applicant.

5. In pendency of aforesaid matter before the Tribunal, both the impugned applications were filed on behalf of the applicant. The averments of the applications were denied and disputed on behalf of respondent No.1 in reply. After extending the opportunity of hearing to both the parties, on consideration, both the applications have been dismissed by the Tribunal.

6. The first application filed under Section 10 read with Section 151 of C.P.C. was dismissed by the Tribunal holding that the mutation proceedings pending before the revenue court could not be treated to be a suit and besides this the revenue proceedings being filed subsequent to the impugned suit, Section 10 of C.P.C. is not applicable to the present matter.

7. So far as the application under Order 7 Rule 11 of the C.P.C. is concerned, the same was dismissed by the Tribunal holding that in view of the pleadings of the parties in this regard, a specific issue has been framed and the same could not be adjudicated as a preilminary issue, taking into consideration the legal position but the same could be decided only after recording the evidence of the parties and on appreciation of the same. So, in such premises, such question was remained open by the Tribunal to consider on merits after recording the evidence, on which the applicant has come to this court in this revision.

8. Having heard the counsel at length, I have carefully gone through the averments of the revision memo and the papers placed on the record. It is an undisputed fact on record that the impugned suit was filed by the respondent No.1 as President of the Mutawali Committee with respect of the property in dispute before filing the mutation proceedings in the revenue court. So in such premises, I am of the considered view that the Tribunal has not committed any error in dismissing the application of Section 10 read with Section 151 of the C.P.C. because in view of the provisions of Section 10, defined the principle of Res subjudice., the Tribunal did not have any authority to stay the proceedings proceedings of the impugned suit till disposal of the mutation proceedings by the revenue court, filed earlier to the suit.

9. It is also apparent from the impugned order that mutation proceedings was not considered by the Tribunal as suit, stating that in view of some decision of other High Court, the mutation proceedings of the revenue court could not be treated to be a suit and in such premises, Section 10 of C.P.C. could not be invoked in the matter. In the available circumstances, the impugned order, dismissing the application of Section 10 read with Section 151 of the C.P.C. does not require any interference at this stage. However, the observation of the Tribunal in the impugned order that

the mutation proceedings could not be treated to be a civil suit is not sustainable, because in the circumstances of the case at hand, such question on filing the appropriate application by the applicant before the revenue court under Section 10 read with Section 141 and 151 of the C.P.C. read with Section 43 of the MPLRC could be considered by the revenue Court, by which the mutation proceedings is pending. As such, it was not a business of the Tribunal, when the subsequent proceeding was pending before the Revenue Court, so till this extent the impugned order is set aside and modified. Pursuant to it, the applicant shall be at liberty to file appropriate application before the Revenue court for staying the further proceedings of the aforesaid revenue case till disposal of the civil suit and simultaneously, such revenue court is directed that on filing such an application, the same be considered in accordance with the procedure prescribed under the law and without influencing from any observations or findings given by the Tribunal in the impugned order or by this Court in the present order in this regard.

10. So far as the part of the impugned order, dismissing the application of the applicant filed under Order 7 Rule 11 of the C.P.C. is concerned, it is apparent that said part has not been decided finally by the Tribunal, the same is kept open with a direction that issue on the question has been framed and the same shall be decided after recording the evidence in accordance with the procedure prescribed under the law. So firstly in such premises, such order being passed under the discretionary jurisdiction of the Tribunal could not be interfered by this Court in view of the principle laid down by the Apex Court in the matter of *The Managing Director (MIG) Hindustan Aeronautics Ltd. Balanagar and another Vs. Ajit Prasad Tarway, Manger (Purchase and Stores) Hindustan Aeronautics Ltd. Balanagar* AIR 1973 SC 76. Besides this, if for the sake of the arguments, the question raised by the applicant is examined on merits, even then, there is no scope in the matter to interfere in that regard, as such, question has not been decided by the Tribunal on merits.

11. Apart from the aforesaid, the applicant's counsel mainly argued the case on the point that on the date of filing of the suit on 16.01 .2013, the committee of respondent No.1 was not having any locus standi to file the impugned suit because the tenure of his committee was already over on 23.07.2012 and the same was renewed vide order of the respondent No.2 dated 06.02.2013. But the fact remains that even after expiry of the tenure of the committee of respondent No.1 on 23.07.2012, such committee was remained in function to look after the affairs of the disputed alleged Wakf property and even on the date of filing of such suit, the committee was functioning and subsequently the same committee was renewed.

In such premises, in view of the law laid by this court in the matter of *Managing Committee Dargah Sharif and anr Vs. M.P. Wakf Board and others* reported in ILR (2012) MP 1170 holding that the committee which was functioning during its tenure in the absence of constitution of new Committee shall be deemed to be continued for such property, I am not inclined to interfere in the impugned order. However, it is observed that after recording the evidence, the Tribunal shall be at liberty to consider such question on the issue framed in this regard, in accordance with law, without influencing from any observations or findings made by the Tribunal in the impugned order or by this Court in the present order.

12. In view of the aforesaid, subject to aforesaid modification on the question of Section 10 of C.P.C., 1 have not found any other perversity, irregularity, illegality or anything against the propriety of law in the order impugned for setting aside the same. Hence, revision petition being devoid of any merits is hereby dismissed but with aforesaid observations, liberty and directions.

There shall be no order as to costs

Revision dismissed.

I.L.R. [2014] M.P., 1969

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice M. C. Garg

M.Cr.C. No. 10633/2011 (Jabalpur) decided on 7 March, 2013

TULSI RAM YADAV ...Applicant

Vs.

SMT. PHOOLWATI ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Inherent jurisdiction **- Petition for quashing prosecution u/s 138 of Negotiable Instruments Act and u/s 420 of I.P.C. on the ground that petitioner is not the signatory of the cheque which has been dishonoured - Held - Since the petitioner is not the signatory of the cheque which has been dishonoured, no case against him u/s 138 of the Act is made out - But since allegation of cheating is there complaint may proceed against him for the offence u/s 420 of I.P.C. (Para 3)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अंतर्निहित अधिकारिता – परक्राम्य लिखत अधिनियम की धारा 138 के अंतर्गत एवं भा.द.सं. की धारा 420 के अंतर्गत

अभियोजन अभिखंडित करने हेतु याचिका इस आधार पर कि जो धनादेश अनादृत हुआ उसका हस्ताक्षरकर्ता याची नहीं था – अभिनिर्धारित – चूंकि जो धनादेश अनादृत हुआ उसका हस्ताक्षरकर्ता याची नहीं था, अधिनियम की धारा 138 के अंतर्गत उसके विरुद्ध कोई प्रकरण नहीं बनता – किन्तु चूंकि शिकायत में छल का आरोप है भा.द.सं. की धारा 420 के अंतर्गत अपराध के लिये उसके विरुद्ध कार्यवाही जारी रखी जा सकती है।

Devendra Gangrade, for the applicant.
J. Aiyer, for the non-applicant.

ORDER

M.C. GARG, J. :- A short point involved in this matter is as to whether the second respondent who has not signed the cheque which was dishonoured for that a complaint under Section 138 of Negotiable Instruments Act was filed against the signatory of the cheque i.e. second respondent in the complaint could have proceeded against the second respondent i.e. the petitioner also.

2. As far as respondent is concerned, learned counsel submits that in this case there are two allegations i.e. dishonoured of cheque as also of cheating. It is submitted that right from para-2 and in para-6 allegations have been made of cheating against the petitioner and his son ss (sic:as) such even if it is admitted that no case under Section 138 of Negotiable Instruments Act is made out against the second respondent, offence under Section 420 of IPC may be made out against him.

3. Having heard learned counsel for the parties and considering the ingredients of Section 138 of Negotiable Instruments Act, I am satisfied that so far as the petitioner is concerned who is not the signatory of the cheque which has been dishonoured, no case against him under Section 138 of Negotiable Instruments Act is made out but in so far as other allegation i.e. of cheating, he is also a party of cheating along with his son. The Court can certainly examined those allegations.

4. With these observations, the petition filed by the petitioner is allowed to the extent that the petitioner shall not be prosecuted under Section 138 of Negotiable Instruments Act on the basis of present complaint, however, complaint may proceed against him for the offence under Section 420 of IPC. Interim order passed earlier by this Court is vacated. The trial Court may proceed against Devi Singh who is first respondent in the complaint case.

Petition allowed.

I.L.R. [2014] M.P., 1971

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice M.C. Garg

M.Cr.C. No. 8019/2012 (Indore) decided on 18 April, 2013

JYOTI (SMT.) & anr. ...Applicants

Vs.

STATE OF M.P. & ors. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Penal Code (45 of 1860), Section 316 - Quashment of proceedings **- Inherent jurisdiction - No evidence available on record which may establish that abortion took place on account of injuries sustained by the injured who as per the medical evidence was carrying pregnancy of 2-3 months - Order set-aside - Remit back the case to the Magistrate to pass appropriate order regarding framing of other charges except u/s 316 of I.P.C.**

(Paras 4 & 5)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, दण्ड संहिता (1860 का 45), धारा 316 – कार्यवाहियों का अभिखंडन – अंतर्निहित अधिकारिता – अभिलेख पर कोई साक्ष्य उपलब्ध नहीं जिससे यह स्थापित हो सके कि आहत, जो कि चिकित्सीय साक्ष्य के अनुसार 2–3 माह की गर्भवती थी, द्वारा सहन की गई चोटों के कारण गर्भपात हुआ है – आदेश अपास्त – भा.द.सं. की धारा 316 को छोड़कर अन्य आरोप विरचित किये जाने के संबंध में समुचित आदेश पारित करने के लिये प्रकरण मजिस्ट्रेट को प्रतिप्रेषित।

M.A. Bohra, for the applicants.

Manish Joshi, P.L. for the non-applicant/State.

A.S. Rathore, for the non-applicants No. 2 & 3.

ORDER

M.C. GARG, J. :- Section 316 of IPC reads as under:-

> **"316. Causing death of quick unborn child by act amounting to culpable homicide.-** Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

2. In this case, according to the petitioners, there was no evidence

available on record which may establish that an offence under Section 316 of IPC has been made out yet the Committal Court suggested framing of charge under Section 316 of IPC and therefore committed the case to the Sessions.

3. The Sessions Court then framed charges against the petitioner including a charge under Section 316 IPC vide order dated 09.10.2012. The order passed by the Sessions Court reads as under:-

> शासन द्वारा श्री बागोरा अधिवक्ता।
>
> आरोपी रमेश सहित श्री तिवारी अधिवक्ता। आरोपी ज्योति अनुपस्थित उसकी ओर से हाजरी माफी आवेदन पेश बाद विचार स्वीकार किया गया।
>
> प्रकरण आरोप तर्क हेतु नियत है। आरोपी अधिवक्ता ने लिखित तर्क प्रस्तुत कर इस आशय का उल्लेख किया है कि फरियादी के चिकित्सकीय दस्तावेज नहीं हैं। गर्भपात की कोई रिपोर्ट नहीं है इसलिये धारा 316 के अपराध के प्रथम दृष्टया आधार नहीं हैं। पूर्व में कहीं पर इस बात का उल्लेख नहीं है इसलिये प्रथम दृष्टया उक्त धारा के आरोप निर्मित नहीं किये जा सकते हैं। उन्हें उन्मोचित किया जावे।
>
> प्रकरण में संलग्न एम.एल.सी. से यह स्पष्ट है कि घटना के समय शीला को ढ़ाई से तीन माह का गर्भ था। उसके बेडहेड टिकिट में एलएमपी 30.01.07 लिखी है और एम.एल.सी. दिनांक 18.04.07 की है इन परिस्थितियों में उसके गर्भपात होने के तथ्य हैं। उस घटना के कारण गर्भपात हुआ या नहीं यह साक्ष्य का विषय है। फरियादी के कथन, अभियोग पत्र और उसमें संलग्न दस्तावेजों को देखते हुये प्रथम दृष्टया आरोपी के विरूद्ध धारा 294, 323, 316 भाद. वि. के अपराध के आधार पाये जाने से उक्त धाराओं में आरोप निर्मित किये गये।
>
> आरोप पत्र पढ़कर सुनाये समझाये जाने पर अपराध करना अस्वीकार किया। आरोपी की प्ली रिकार्ड की गई।
>
> आरोपी की ओर से अभियोजन के प्रस्तुत दस्तावेजों की अर्न्तवस्तु को अस्वीकार किया उनका अभिवाक लेखबद्ध किया गया।
>
> प्रकरण विचारण कार्यक्रम हेतु दिनांक को पेश हो।

4. This order itself shows that there was no evidence available on record which may establish that in this case abortion took place on account of injuries sustained by the injured who as per the medical evidence was carrying pregnancy of 2-3 months. However, the evidence is not there that pregnancy was terminated as quoted above. Section 316 of IPC requires causing death of quick unborn child by act amounting to culpable homicide. This means that if actual abortion took place then only a charge can be framed.

5. In view of the aforesaid, the order dated 9.10.2012 passed by the learned Additional Sessions Judge, Indore cannot be sustained. The same is set aside. The Sessions Court will now remit back the case to the Magistrate to pass appropriate order regarding framing of other charges except under Section 316 of IPC.

6. Parties to appear before the Sessions Court on 17.06.2013.

7. A copy of this order be sent to the Sessions Court alongwith the record.

C.C.as per rules.

Order accordingly.

I.L.R. [2014] M.P., 1973

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Ajit Singh & Mr. Justice B.D. Rathi

M.Cr.C. No. 7954/2013 (Jabalpur) decided on 16 August, 2013

HARIKISHAN TUTEJA ...Applicant

Vs.

STATE OF M.P. ...Non-applicant

Prevention of Corruption Act (49 of 1988), Section 13(1)(d) - Legal opinion **- Merely because the legal opinion of a lawyer may not be acceptable, he cannot be fastened with criminal liability in absence of tangible evidence that he had aided or abetted other conspirators - No documents were produced to prove that report submitted by petitioner was false and the opinion was based on the documents supplied by bank itself - Proceedings quashed. (Paras 8, 9 & 11)**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – विधिक राय – मात्र इसलिए कि वकील की विधिक राय स्वीकार करने योग्य नहीं, उसके द्वारा अन्य षडयंत्रकारियों को सहायता या दुष्प्रेरित करने की मूर्त साक्ष्य के अभाव में उस पर आपराधिक उत्तरदायित्व नहीं डाला जा सकता – यह साबित करने के लिये कोई दस्तावेज प्रस्तुत नहीं किये गये, कि याची द्वारा प्रस्तुत किया गया प्रतिवेदन मिथ्या था और बैंक द्वारा उपलब्ध कराये गये दस्तावेजों पर ही राय आधारित थी – कार्यवाही अभिखंडित।

Case referred :

(2012) 9 SCC 512.

T.S. Ruprah with *U.S. Tiwari,* for the applicant.

Pankaj Dubey, for the non-applicant.

ORDER

The Order of the Court was delivered by:
B.D. RATHI, J. :- This petition has been preferred under Section 482 of the Code of Criminal Procedure (for short "the Code") for quashing the proceedings in Special Case No.3/2012 pending before Special Judge (under the Prevention of Corruption Act, 1988) (for short "the Act") at Narsinghpur.

2. Allegations against the petitioner are that he, being an Advocate empanelled with State Bank of India, Narsinghpur, in collusion with co-accused Field Officer Deepak Diwan and Santosh Patel, recommended the title documents for loan in, as many as 18 cases, which later on were found to be manipulated and, consequently, substantial loss was caused to the Bank.

3. Learned counsel for the petitioner submitted that in the First Information Report, as well as, in the statement of Shri Manoj Rastogi, Regional Manager dated 13/9/2010 and report of the enquiry conducted by Shri P. K. Verma, Chief Manager, on 7/5/2010 allegations have not been leveled against the petitioner but only against Deepak Diwan, Santosh Patel and Somnath Singh Nazir who had issued certified copies of the documents. According to him, the petitioner had given his legal opinion on the basis of the documents supplied to him, and, his report and the accompanying documents of title were subsequently manipulated. He further submitted that the Economic Offences Wing had no jurisdiction to investigate the matter against a private person.

4. In response, learned Standing Counsel submitted that charges have already been framed by the trial Court. While making reference to the charge-sheet, he submitted that the petitioner had issued 18 search reports verifying the availability of land in favour of the beneficiaries, who were actually not the owners or in possession of the property and the search report is contrary to the revenue records. Inviting attention to the statements of Hargovind Dharve, Patwari Halkan No.74, Khoob Chand, Patwari Halka Nos.56 & 57, Revaram, Patwari Halka No.62, Vineet Sahu, Patwari Halka No.47, Vikas, Patwari Halka No.77, Ku. Preeti and Patwari Halka No.44, he submitted that all of them have deposed that the lands verified by the petitioner were not located in their respective Halka Numbers. He, accordingly, submitted that petitioner was not entitled to any relief.

5. Having regard to the arguments advanced by the parties, we have perused the documents available on record.

6. On 14/6/2006, new guideline was issued by the Bank, to all the Panel Lawyers for search and verification of title deeds/documents and circulated

vide Circular Letter No. CCFO/ADV/88/06-07. As per this guideline, the Panel Advocates were expected to investigate and conduct a search in the Revenue Department for a minimum period of 13 or maximum of 30 years to ascertain the genuineness of the documents provided by the Bank vide Annexure-A and submit their detailed opinion in Annexure-B so as to enable the Bank to create mortgage. Nowhere, it has been prescribed in the guidelines that Panel Lawyer will visit the spot for the purposes of verification.

7. The only way available to Panel Lawyer to investigate the genuineness of the documents is by comparing them with those available in the records of Revenue Department. For initiating prosecution, there should be *prima facie* anomaly between the two.

8. After perusal of the entire Challan Papers, we find that prosecution has not produced the original revenue documents for tallying the report (Annexure-B) given by the petitioner on the basis of documents supplied by the Bank itself vide Annexure-A. Therefore, inference cannot be drawn that the report submitted by the petitioner for the said 18 beneficiaries, was concocted or contrary to the record and was submitted intentionally for causing wrongful loss to the Bank and for acquiring wrongful gain for himself.

9. It is well settled that although a lawyer owes an unremitting loyalty to client's interests, however, merely because his legal opinion may not be acceptable, he cannot be fastened with criminal prosecution in absence of tangible evidence that he had aided or abetted other conspirators and at the most he may be liable for gross negligence or professional misconduct if established by evidence. (See *Central Bureau of Investigation, Hyderabad Vs. K. Narayana Rao* (2012)19 5CC 512). In the instant case, there is no evidence on record to establish abetting or aiding of conspiracy by the petitioner to defraud the Bank.

10. In view of the aforesaid, we are of the considered opinion that sufficient cause is made out for setting aside the impugned proceedings by invoking the inherent powers.

11. Petition is, accordingly, allowed with no order as to costs. Proceedings in Special Case No.3/12 (Supra) relating to the petitioner are hereby quashed and he is discharged of the offences charged with.

Copy of the order be sent to the trial Court for information and compliance.

Petition allowed.

I.L.R. [2014] M.P., 1976
MISCELLANEOUS CRIMINAL CASE
Before Smt. Justice S.R. Waghmare
M.Cr.C. No. 1122/2014 (Indore) decided on 25 April, 2014

SHIVA & anr. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 439 - Grant of bail - Second Application **- On the ground that the offence is not made out against the present applicants - Prosecution witnesses have turned hostile and a compromise had been worked out between the parties - Held - The allegation and the offence involved are very grave in nature - It is a crime against society and is not a matter to be left for the parties to compromise and settle - Application is dismissed. (Para 4)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 – जमानत की मंजूरी – द्वितीय आवेदन – इस आधार पर कि वर्तमान आवेदकगण के विरुद्ध अपराध नहीं बनता – अभियोजन साक्षी पक्ष द्रोही हो गये एवं पक्षकारों के मध्य समझौते की बातचीत हो गयी है – अभिनिर्धारित – आरोप एवं सम्मिलित अपराध अत्याधिक गंभीर प्रकृति के हैं – यह समाज के विरुद्ध अपराध है और ऐसा विषय नहीं है जिसे पक्षकारों पर समझौता और निपटारा हेतु छोड़ा जावे – आवेदन खारिज।

Cases referred :

Shimbhu & anr. Vs. State of Haryana (Criminal Appeal No. 1278-1279/2013 (arising out of S.L.P. (Cri.) Nos. 1011-1012/2012).

Rishi Agrawal, for the applicants.
Suraj Sharma, for the non-applicant/State.

ORDER

SMT. S.R. WAGHMARE, J. :- By this application filed u/s 439 of the Cr.P.C., the applicants Shiva and Raghu have moved the application for grant of bail being implicated in criminal case No. 261/13 registered by police station Petlawad, Distt. Jhabua for offence under Sections 342, 366, 450, 376(gha), 506 of the IPC and S. 25-B of the Arms Act.

2. Counsel for the applicants has vehemently urged the fact that although this was second application moved on behalf of the applicants, the case was one of false implication and there had been a cross-case filed by the accused against the

complainant party and in fact the complainants had also raped woman belonging to the family of the accused and hence the dispute had arisen. In fact the complainant Mukesh was relative of the accused persons and both of them were married and having children. Counsel vehemently urged the fact that the offence would not be made out against these applicants since the offence of rape has been alleged only against the other co-accused. Moreover P.W.1 Shantibai, P.W.2 Nanibai, P.W.3 Savita, P.W.4 Bhagawati and P.W.5 Angurwala had also turned hostile and not supported the prosecution case. So also Counsel urged that a compromise had been worked out between the parties and in the cross-case the complainant party have already been granted bail. Counsel prayed that the application be allowed. More so since in the other case filed the accused/complainants have already been enlarged on bail.

3. Counsel for the respondent State, on the other hand, has opposed the submissions of the Counsel for the applicants and submitted that these facts were available before the trial Court. The trial Court has candidly observed that it was a case of gang rape and the way in which the offence is said to have been committed is not conducive to sympathy and the eyewitness account and the evidence of the prosecutrix was also reliable. Considering the effect that it would have on the society, the application has been rightly rejected. Counsel prayed that the application be dismissed.

4. On considering the above submissions, the impugned order and looking to the nature of allegations and materials collected in the case diary, I find that it is not a fit case for grant of bail to the applicants. The allegations and the offence involved are very grave in nature and as already observed by the learned Judge of the lower Court; it is a crime against society. Moreover I find that it would be proper to place reliance on *Shimbhu and another Vs. State of Haryana* [In the Supreme Court of India, Criminal Appellate Jurisdiction, I Criminal Appeal Nos.1278-1279 of 2013 (Arising out of S.L.P. (Cri.) Nos.1011-1012 of 2012], whereby the Apex Court has held thus:

> "22) Further, a compromise entered into between the parties cannot be construed as a leading factor based on which lesser punishment can be awarded. Rape is a non-compoundable offence and it is an offence against the society and is not a matter to be left for the parties to compromise and settle. Since the Court cannot always be assured that the consent given by the victim in compromising the case is a genuine consent, there is every chance

that she might have been pressurized by the convicts or the trauma undergone by her all the years might have compelled her to opt for a compromise. In fact, accepting this proposition will put an additional burden on the victim. The accused may use all his influence to pressurize her for a compromise. So, in the interest of justice and to avoid unnecessary pressure/harassment to the victim, it would not be safe in considering the compromise arrived at between the parties in rape cases to be a ground for the Court to exercise the discretionary power under the proviso of Section 376(2) of IPC.

23) It is imperative to mention that the legislature through the Criminal Law (Amendment) Act, 2013 has deleted this proviso in the wake of increasing crimes against women. Though, the said amendment will not come in the way of exercising discretion in this case, on perusal of the above legislative provision and catena of cases on the issue, we feel that the present case fails to fall within the ambit of exceptional case where the Court shall use its extraordinary discretion to reduce the period of sentence than the minimum prescribed.

24) This is yet another opportunity to inform the subordinate Courts and the High Courts that despite stringent provisions for rape under Section 376 of IPC, many Courts in the past have taken a softer view while awarding sentence for such a heinous crime. This Court has in the past noticed that few subordinate and High Courts have reduced the sentence of the accused to the period already undergone to suffice as the punishment, by taking aid of the proviso to Section 376(2) IPC. The above trend exhibits stark insensitivity to the need for proportionate punishments to be imposed in such cases.

25) In the light of the above discussion, we reject the request of learned counsel for the appellants for reduction of sentence, consequently, the appeals fail and the same are dismissed."

And in view of the above, the application for grant of bail is dismissed as being without merit.

Application dismissed.