THE INDIAN LAW REPORTS

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2014

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सेवा विधि – चयन सूची – एक बार अंतिम सूची को, उक्त सूची में कोई सुधार/निरस्त किये बिना प्रकाशित किये जाने पर, अपीलार्थी को पटवारी के प्रशिक्षण से वंचित नहीं रखा जा सकता – प्रत्यर्थी क्र. 5 जो अपेक्षित अर्हता धारक नहीं था, को पश्चातवर्ती आदेश द्वारा प्रशिक्षण के लिये भेजा गया, जिसके लिये कोई कारण बताओ नोटिस जारी नहीं किया गया और उसे सुनवाई का अवसर प्रदान नहीं किया गया, अपितु, प्रत्यर्थीगण द्वारा अपीलार्थी को पटवारी प्रशिक्षण के लिये नहीं भेजने की कार्यवाही और प्रत्यर्थी क्र. 5 को भेजने की कार्यवाही मनमानी एवं भेदभावपूर्ण है – अभिनिर्धारित – अपीलार्थी को कारण बताओ नोटिस देने के लिये प्रत्यर्थीगण को निदेश देना उचित है – यदि प्रत्यर्थीगण पाते हैं कि प्रत्यर्थी क्र. 5, अपीलार्थी से अधिक गुणवत्ताधारक है जिससे कि चयन सूची में स्थान पाने से अपीलार्थी वंचित होगा, उसे सुनने के पश्चात, इसके दो सप्ताह की अवधि के भीतर सकारण आदेश पारित करेगा, यह निर्णित करते हुए कि क्या अपीलार्थी अधिक गुणवत्ताधारक है अथवा प्रत्यर्थी क्र 5। (जगदीश चंद्रा वि. म.प्र. राज्य) (DB)...1226

***Stamp Act (2 of 1899), Section 2(14), Entry 1-A(e) - Instrument* - Agreement to sale - Term "instrument" is wide enough to cover a document by which any right or liability is either created or purported to be created, transferred, limited, extended, extinguished or recorded - It covers any "instrument" which is related to the sale of immovable property - Words "relating to the sale of immovable property" are very wide than "Agreement to sale" - Document would fall under entry 1-A(e) of the Act, 1899 and not under 1-A(g) - Court directed to impound the document and send it to Collector for adjudication - Petition allowed. [Rajendra Syal Vs. Hari Prasad Agrawal] ...1296**

स्टाम्प अधिनियम (1899 का 2), धारा 2 (14), प्रविष्टि 1–ए(इ) – लिखत – विक्रय करार – शब्द 'लिखत' इतना व्यापक है जिसमें कोई दस्तावेज, जिसके द्वारा किसी अधिकार या दायित्व का या तो सृजन होता है अथवा उसे सृजित, अंतरित, सीमित, विस्तारित, समाप्त या अभिलिखित किया जाना तात्पर्यित है, का समावेश

THE INDIAN LAW REPORTS M.P. SERIES, 2014

(VOL-2)

JOURNAL SECTION

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

THE LOKPAL AND LOKAYUKTAS ACT, 2013 (NO. 1 OF 2014)

(Received assent of the President on the 1st January, 2014, and came into force on 16th January, 2014)

Extracts of the Schedule appended thereto, which made amendments to the Prevention of Corruption Act, 1988 (49 of 1988) and the Code of Criminal Procedure, 1973 (2 of 1974)

PART III

Amendments to the Prevention of Corruption Act, 1988 (49 of 1988)

1. Amendment of Sections 7, 8, 9 and 12. - In Sections 7, 8, 9 and Section 12,-

(a) for the words "six months", the words "three years" shall respectively be substituted;

(b) for the words "five years", the words "seven years" shall respectively be substituted.

2. Amendment of Section 13. - In Section 13, in sub-section (2),-

(a) for the words "one year", the words "four years" shall be substituted;

(b) for the words "seven years", the words "ten years" shall be substituted.

3. Amendment of Section 14. - In Section 14,-

(a) for the words "two years", the words "five years" shall be substituted;

(b) for the words "seven years", the words "ten years" shall be substituted.

4. Amendment of Section 15. - In Section 15, for the words "which may extend to three years", the words "which shall not be less than two years but which may extend to five years" shall be substituted.

5. Amendment of Section 19. - In Section 19, after the words "except with the previous sanction", the words "save as otherwise provided in the Lokpal and Lokayuktas Act, 2013" shall be inserted.

PART IV
Amendment to the Code of Criminal Procedure, 1973 (2 of 1974)

Amendment of Section 197. - In Section 197, after the words "except with the previous sanction", the words "save as otherwise provided in the Lokpal and Lokayuktas Act, 2013" shall be inserted.

[Published in the Gazette of India, Extraordinary Part-II Section 3 Sub-section (ii), No. 114, dated 16th January, 2014 regarding enforcement of Lokpal and Lokayuktas Act, 2013 (1 of 2014)]

MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES AND PENSIONS
(Department of Personnel and Training)
NOTIFICATION

New Delhi, the 16th January, 2014

SO. I 19(E).-In exercise of the powers conferred by sub-section (4) of Section 1 of the Lokpal and Lokayuktas Act, 2013 (1 of 2014), the Central Government hereby appoints the 16th day of January, 2014, as the date on which the provisions of the said Act shall come into force.

[F. No. 407/4/2014-AVD-IV(B)]

DEEPTI UMASHANKAR, Jt. Secy.

THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES (AMENDMENT) ACT, 2014

Act No. 16 of 2014

(Received the assent of the President on the 7th March, 2014 and was Published in the Gazette of India, Extraordinary, Part II Section 1, No. 17 dated 10th March 2014)

An Act further to amend the Narcotic Drugs and Psychotropic Substances Act, 1985.

Be it enacted by Parliament in the Sixty-fifth Year of the Republic of India as follows:-

1. **Short title and commencement.** - *(1)* This Act may be called the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2014.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. **Amendment of Section 2.** - In Section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985 61 of 1985. (hereinafter referred to as the principal Act),-

(a) after clause *(iv)*, the following clause shall be inserted, namely:-

'(iva) "Central Government factories" means factories owned by the Central Government or factories owned by any company in which the Central Government holds at least fifty-one percent. of the paid-up share capital;';

(b) clause *(viiia)* shall be relettered as clause (viiib) and before, clause (viiib) as so relettered, the following clause shall be inserted, namely:-

'(viiia) "essential narcotic drug" means a narcotic drug notified by the Central Government for medical and scientific use;'.

3. **Amendment of Section 4.** - In Section 4 of the principal Act,-

(a) in sub-section *(1)*, after the words "the illicit traffic therein", the words "and for ensuring their medical and scientific use" shall be inserted;

(b) in sub-section *(2)*, after clause *(d)*, the following clause shall be inserted, namely:-

"*(da)* availability of narcotic drugs and psychotropic substances for medical and scientific use;".

4. **Amendment of Section 9.** - In Section 9 of the principal Act, -

(a) in sub-section (1), in clause (a),-

(i) after sub-clause *(iii)*, the following sub-clause shall be inserted, namely:- "*(iiia)* the possession, transport, import inter-State, export inter- State, warehousing, sale, purchase, consumption and use of poppy straw produced from plants from which no juice has been extracted through lancing;".

(ii) after sub-clause *(v)*, the following shall be inserted, namely:- *(va)* the manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption and use of essential narcotic drugs:

Provided that where, in respect of an essential narcotic drug, the State Government has granted licence or permit under the provisions of section 10 prior to the commencement of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2014, such licence or permit shall continue to be valid till the date of its expiry or for a period of twelve months from such commencement, whichever is earlier.";

(b) in sub-section *(2)*, after clause *(h)*, the following clause shall be inserted, namely:-

"*(ha)* prescribe the forms and conditions of licences or permits for the manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption or use of essential narcotic drugs, the authorities by which such licence or permit may be granted and the fees that may be charged therefor;".

5. **Amendment of Section 10.**- In Section 10 of the principal Act, in sub-section *(1)*, in clause *(a)*,-

(a) in sub-clause *(i)*, after the words "poppy straw", the words "except poppy straw produced from plants from which no juice has been extracted through lancing" shall be inserted;

(b) in sub-clause *(v)*, for the words "manufactured drugs other than prepared opium", the words and brackets "manufactured drugs (other than prepared opium and essential narcotic drugs)" shall be inserted.

6. Amendment of Section 15. - In Section 15 of the principal Act, in clause *(a)*, for the words "six months", the words "one year" shall be substituted.

7. Amendment of Section 17. - In Section 17 of the principal Act, in clause *(a)*, for the words "six months", the words "one year" shall be substituted.

8. Amendment of Section 18. - In Section 18 of the principal Act, in clause *(a)*, for the words "six months", the words "one year" shall be substituted.

9. Amendment of Section 20. - In Section 20 of the principal Act, in clause *(b)*, in sub-clause *(ii)*, in item *(A)*, for the words "six months", the words "one year" shall be substituted.

10. Amendment of Section 21. - In Section 21 of the principal Act, in clause *(a)*, for the words "six months", the words "one year" shall be substituted.

11. Amendment of Section 22. - In Section 22 of the principal Act, in clause *(a)*, for the words "six months", the words "one year" shall be substituted.

12. Amendment of Section 23. - In Section 23 of the principal Act, in clause *(a)*, for the words "six months", the words "one year" shall be substituted.

13. Insertion of new Section 27B. - After Section 27A of the principal Act, the following section shall be inserted, namely:-

"27B. Whoever contravenes the provision of section 8A shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to ten

years and shall also be liable to fine.".

14. Amendment of Section 31. - In Section 31 of the principal Act,-

(a) in sub-section *(1)*,-

(i) for the words "one-half of the maximum term", the words "one and onehalf times of the maximum term" shall be substituted;

(ii) for the words "one-half of the maximum amount", the words "one and one-half times of the maximum amount" shall be substituted;

(b) in sub-section *(2)*,-

(i) for the words "one-half of the minimum term", the words "one and onehalf times of the minimum term" shall be substituted;

(ii) for the words "one-half of the minimum amount", the words "one and one-half times of the minimum amount" shall be substituted.

15. Amendment of Section 31A. - In Section 31A of the principal Act, in sub-section *(1)*, for the words "shall be punishable with death", the words and figures "shall be punished with punishment which shall not be less than the punishment specified in section 31 or with death" shall be substituted.

16. Amendment of Section 42. - In Section 42 of the principal Act, in sub-section *(1)*, in the proviso, for the words "Provided that", the following shall be substituted, namely:-

"Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector: Provided further that".

17. Amendment of Section 52A. - In Section 52A of the principal Act,-

(a) for sub-section *(1)*, the following sub-section shall be substituted, namely:-

"*(1)* The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.";

(b) in sub-section *(2)*,-

(i) for the words "narcotic drug or psychotropic substance" and "narcotic drugs or psychotropic substances", wherever they occur, the words "narcotic drugs, psychotropic substances, controlled substances or conveyances" shall be substituted;

(ii) in clause *(b)*, for the words "such drugs or substances", the words "such drugs, substances or conveyances" shall be substituted;

(c) in sub-section *(4)*, for the words "narcotic drugs or psychotropic substances", the words "narcotic drugs, psychotropic substances, controlled substances or conveyances" shall be substituted.

18. Insertion of new Section 57A. - After Section 57 of the principal Act, the following section shall be inserted, namely:-

"57A. Whenever any officer notified under section 53 makes an arrest or seizure under this Act, and the provisions of Chapter VA apply to any person involved in the case of such arrest or seizure, the officer shall make a report of the illegally acquired properties of such person to the jurisdictional competent authority within ninety days of the arrest or seizure.".

19. Substitution of new heading for heading of Chapter VA.

- In Chapter VA of the principal Act, for the heading "FORFEITURE OF PROPERTY DERIVED FROM, OR USED IN ILLICIT TRAFFIC", the heading "FORFEITURE OF ILLEGALLY ACQUIRED PROPERTY" shall be substituted.

20. Amendment of Section 68B. - In Section 68B of the principal Act,- *(a)* in clause *(g)*,-

(i) in sub-clause *(i)*, for the words "of this Act; or", the words "of this Act or the equivalent value of such property; or" shall be substituted;

(ii) in sub-clause *(ii)*, for the words "such property,", the words "such property or the equivalent value of such property; or" shall be substituted;

(iii) after sub-clause *(ii)*, the following sub-clause shall be inserted, namely:-

"(iii) any property acquired by such person, whether before or after the commencement of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2014, wholly or partly out of or by means of any income, earnings or assets the source of which cannot be proved, or the equivalent value of such property;";

(b) for clause (h), the following clause shall be substituted, namely:-

'(h) "property" means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible, wherever located and includes deeds and instruments evidencing title to, or interest in, such property or assets;'.

21. Amendment of Section 68D. - In Section 68D of the principal Act, in sub-section (1), for the words "any Collector of Customs or Collector of Central Excise", the words "any Commissioner of Customs or Commissioner of Central Excise" shall be substituted.

22. Amendment of Section 68H. - In Section 68H of the principal Act, the following Explanation shall be inserted at the end, namely:-

"Explanation.-For the removal of doubts, it is hereby declared that in a case where the provisions of section 68J are applicable, no notice under this section shall be invalid merely on the ground that it fails to mention the evidence relied upon or it fails to establish a direct nexus between the property sought to be forfeited and any activity in contravention of the provisions of this Act.".

23. Amendment of Section 68-O. - In Section 68-O of the principal Act, in sub-section *(4)*, after the proviso, the following proviso shall be inserted, namely:-

"Provided further that if the office of the Chairman is vacant by reason of his death, resignation or otherwise, or if the Chairman is unable to discharge his duties owing to absence, illness or any other cause, the Central Government may, by order, nominate any member to act as the Chairman until a new Chairman is appointed and assumes charge or, as the case may be, resumes his duties.".

24. Amendment of Section 71. - In Section 71 of the principal Act, in sub-section (1), for the words "The Government may, in its discretion, establish, as many centres as it thinks fit for identification, treatment", the words "The Government may establish, recognise or approve as many centres as it thinks fit for identification, treatment, management" shall be substituted.

THE MADHYA PRADESH EXCISE (EXERCISE OF POWERS TO SEARCH WITHOUT A WARRANT) RULES, 2014

[Notification No. F-B-1-07-2014-2-V (13) published in Madhya Pradesh Gazette Extra-ordinary dated 17th February, 2014 page no. 168 (2)]

In exercise of the powers conferred by sub-section (1), clause (a) of sub-section (2) and proviso to sub-section (3) of Section 62 read with Section 54 of the Madhya Pradesh Excise Act, 1915 (No. II of 1915), the Government of Madhya Pradesh, hereby, makes the following rules, namely:-

RULES

1. Short title and commencement.--(1) These rules may be called the Madhya Pradesh Excise (Exercise of powers to search without a warrant) Rules, 2014.

(2) They shall come into force with effect from the date of their publication in the "Madhya Pradesh Gazette".

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

(a) "Act" means the Madhya Pradesh Excise Act, 1915 (No. II of 1915);

(b) Words and expressions used but not defined in these rules shall have the same meaning as assigned to them in the Act.

3. **Exercise of power to search without a warrant by Excise Officers.**-Every Officer empowered under section 54 of the Act for entering and searching any place without search warrant, shall before entering the place, record the grounds of his belief and satisfaction in Form-A that the offence under Section 34, 35, 36 36A, 36B, 36C, 37, 38, 38A, 39 or 40 has been, is being or is likely to be committed by the accused. He shall hand over a copy of this document to the accused, in whose custody the place is, before the search. This document shall be the part of his case diary.

4. **Report to the Collector.**-Every Officer shall submit a detailed report in Form-B of the result regarding such search carried out under section 54 of the Act, to the Collector as soon as possible.

5. **Monthly submission of Report**-Every Officer shall submit a monthly report in Form-C to the Collector about such searches and the results thereof.

6. **Savings.**- Any action taken under Section 54 of the Act shall, in so far as it is not inconsistent with the provisions of these rules, be deemed to have been taken under the corresponding provisions of these rules.

MADHYA PRADESH ACT
No. 3 OF 2013
THE COURT-FEES (MADHYA PRADESH AMENDMENT) ACT, 2012

(Received the assent of the Governor on the 8th January, 2013; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 9th January,2013)

An Act further to amend the Court-fees Act, 1870 in its application to the State of Madhya Pradesh.

Be it enacted by the Madhya Pradesh Legislature in the Sixty-third year of the Republic of India as follows:-

1. Short title.- This Act may be called the Court-fees (Madhya Pradesh Amendment) Act, 2012.

2. Amendment of Central Act No. VII of 1870 in its application to the State of Madhya Pradesh.- The Court fees Act, 1870 (No. VII of 1870) (herein after referred to as the principal Act), in its application to the State of Madhya Pradesh be amended in the manner hereinafter provided.

3. Amendment of Schedule II.- In Schedule II to the principal Act, in article 11, in clause (a), in sub-clause (i), in the column pertaining to proper fee, for the words "Ten percent of the enhanced amount claimed in appeal", the words "Two and one half percent of the enhanced amount claimed in appeal subject to a maximum of one lac rupees" shall be substituted.

MADHYA PRADESH ACT
No 4 OF 2013
THE MADHYA PRADESH ADHIVAKTA KALYAN NIDHI (SANSHODHAN) ADHINIYAM, 2012

(Received the assent of the Governor on the 8th January, 2013; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 9th January 2013)

An Act further to amend the Madhya Pradesh Adhivakta Kalyan Nidhi Adhiniyam, 1982.

Be it enacted by the Madhya Pradesh Legislature in the Sixty-third year of the Republic of India as follows:-

1. **Short title.-** This Act may be called Madhya Pradesh Adhivakta Kalyan Nidhi (Sanshodhan) Adhiniyam, 2012.

2. **Amendment of Section 18.-** In Section 18 of the Madhya Pradesh Adhivakta Kalyan Nidhi Adhiniyam, 1982 (No. 9 of 1982) (hereinafter referred to as the Principal Act), for sub-section (1), the following sub-section shall be substituted, namely:-

"(1) The State Government shall, on the requisition made by the Bar Council of Madhya Pradesh, print or cause to be printed in

such form and in such manner as may be prescribed in consultation with the Bar Council, Adhesive stamps bearing the words "Madhya Pradesh Adhivakta Kalyan Nidhi Stamp" of the value of twenty rupees and fifty rupees for being supplied to the Bar Council for distribution and sale on 10 percent commission basis.".

3. **Amendment of Section 19.-** In Section 19 of the Principal Act,-

(i) in sub-section (1), for the words "ten rupees", the words "twenty rupees" shall be substituted;

(ii) in sub-section (2), for the words "twenty rupees", the words "fifty rupees" shall be substituted;

AMENDMENTS IN THE HIGH COURT OF MADHYA PRADESH RULES, 2008

(Published in Madhya Pradesh Gazette Extra-ordinary dated 26th August, 2013 page no. 769)

उच्च न्यायालय, मध्यप्रदेश, जबलपुर

No. D-3773 Jabalpur, the 23rd August, 2013

NOTIFICATION NO. 1

In exercise of the powers conferred by articles 225 of the Constitution of India, Section 54 of the States Reorganisation Act, 1956, clauses 27 & 28 of the Letters Patent, the High Court of Madhya Pradesh makes following amendment in the High Court of Madhya Pradesh Rules, 2008, which shall come into force from the date of its publication in the Official Gazette

AMENDMENT

In the said Rules,-

In Chapter X, at the end of Rule 60, following amendment shall be inserted :-

"The applicant shall file certified copies of the order passed by the Supreme Court and copy of the last order passed by the High Court rejecting the application."

VED PRAKASH, Registrar General.

[Published in Madhya Pradesh Gazette Extra-ordinary dated 21st April, 2014 page no. 365, 366(2)]

विधि और विधायी कार्य विभाग

HIGH COURT OF MADHYA PRADESH JABALPUR, (M.P.)
MEMORANDUM

Endt. No. Q/2 Jabalpur, Dated the 2nd, 4th April 2014

NOTIFICATION NO. 1

In exercise of the powers conferred by Article 225 of the Constitution of India, Section 54 of the States Reorganisation Act, 1956, clauses 27 & 28 of the Letters Patent, the High Court of Madhya Pradesh makes following amendment in Rule 1(1) of Chapter-VII of the High Court of Madhya Pradesh Rules, 2008, which shall come into force from the date of its publication in the Madhya Pradesh Official Gazette (Extra-ordinary).

AMENDMENT

In Rule1(1) of Chapter-VII in second line figure '2:00' Shall be replaced by '2:30'.

NOTIFICATION NO. 2

In exercise of the powers conferred by Article 225 of the Constitution of India, Section 54 of the States Reorganisation Act, 1956, clauses 27 & 28 of the Letters Patent, the High Court of Madhya Pradesh makes following amendment in Form No.-3 of the High Court of M. P. Rules, 2008 (Chapter-X, Rule-1) regarding Computer-sheet. Computer-sheet shall be replaced by Appendix-I Computer-sheet which shall come into force from the date of its publication in the Madhya Pradesh Official Gazette (Extra-ordinary).

AMENDMENT

Form No. 3 of the High Court of M. P. Rules, 2008 (Chapter-X, Rule-I) regarding Computer-sheet shall be replaced by Form No. 3 (Appendix-I).

VED PRAKASH, Registrar General.

NOTIFICATION NO. 3

In exercise of the powers conferred by Article 225 of the Constitution of India, Section 54 of the States Reorganisation Act, 1956, clauses 27 & 28

of the Letters Patent, the High Court of Madhya Pradesh makes following amendment in Chapter-XVIII, Rule-5 of the High Court of M.P. Rules, 2008, which shall come into force from the date of notification in the Madhya Pradesh Official Gazette (Extra-ordinary)

AMENDMENT

After Sub-rule-11 of Rule-5 of Chapter-XVIII of the High Court of M.P. Rules, 2008 following Sub-rule 12 shall be inserted:-

(12). Application for certified copy shall be in the Certified Copy Form(Form No.39).

VED PRAKASH

REGISTRAR GENERAL

AMENDMENT IN THE ENTRY AT RULE 6 (22) OF THE RULES FOR DESIGNATION OF SENIOR ADVOCATES AS PER SECTION 16(2) OF THE ADVOCATES ACT, 1961

[Published in Madhya Pradesh Gazette Extra-ordinary dated 21st April, 2014 page no. 366(12)]

NOTIFICATION NO. 5

In exercise of the powers conferred by Article 225 of the Constitution of India, Section 54 of the States Reorganisation Act, 1956, clauses 27 & 28 of the Letters Patent, the High Court of Madhya Pradesh makes following amendment in the Entry at Rule 6(22) of the Rules for Designation of Senior Advocates as per Section 16 (2) of the Advocates Act, 1961, which shall come into force from the date of notification in the Madhya Pradesh Official Gazette (Extra-ordinary).

AMENDMENT

"6. Collection of information

(22) Other information/particulars, if any, including legal services and as legal aid counsel."-

VED PRAKASH

REGISTRAR GENERAL

I.L.R. [2014] M.P., 1199
SUPREME COURT OF INDIA
Before Mr. Justice A.K. Patnaik &
Mr. Justice Sudhansu Jyoti Mukhopadhaya
Cr. A. No. 982/2007 decided on 12 March, 2013

BHARAT BHUSHAN & anr. ...Appellants
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Sections 304B & 498A - Cruelty - **Appellants No. 2 and 4 did not come forward to participate in settlement of dispute with regard to dowry on the ground that they were from groom's side - Silence on their part does not amount to cruelty - Appellants No. 2 and 4 acquitted - Appeal allowed. (Para 8)**

दण्ड संहिता (1860 का 45), धाराऐं 304बी व 498ए – क्रूरता – अपीलार्थीगण क्र. 2 व 4, दहेज संबंधी विवाद के समझौते में सहभाग लेने के लिये आगे नहीं आये, इस आधार पर कि वे दुल्हे के पक्ष से थे – उनकी ओर से खामोशी, क्रूरता की कोटि में नहीं आती – अपीलार्थी क्र. 2 व 4 दोषमुक्त – अपील मंजूर।

JUDGMENT

The Judgment of the Court was delivered by : **A. K. PATNAIK, J. :-** This is an appeal against the judgment dated 7th April, 2006 of the Madhya Pradesh High Court, Jabalpur Bench in Criminal Appeal No. 1225 of 2004 by which the High Court has maintained the judgment of the XIIIth Additional Sessions Judge (Fast Track Court), Jabalpur in Sessions Trial No. 671 of 2003 convicting the appellants under Sections 304B and 498A of the Indian Penal Code.

2. On 12th February, 2007, this Court dismissed the petition for special leave to appeal qua petitioner Nos. 1 and 3 and issued notice confined to appellant nos. 2 and 4 and on 18th October, 2007, this Court had also granted bail to the said two appellants. Hence this appeal is confined to the appeal of appellant Nos. 2 and 4.

3. The facts very briefly are that Madhuri got married to appellant No. 1 at Jabalpur on 10th June, 2003 and she came to the house of her parents on 5th August, 2003. In the house of her parents, she committed suicide by hanging to the ceiling on 17th August, 2003. The father of the deceased lodged a

report with the Police on 17th August, 2003, saying that he had brought his daughter to the house on 5th August, 2003 and she was not sent back to her in-laws' house on account of the illness of his wife and she committed suicide. The Police investigated the case and filed a charge sheet against the appellants under Section 304B and 498A of the Indian Penal Code. The trial court convicted the appellants and the High Court has maintained the conviction.

4. We have heard learned counsel for the appellants and learned counsel for the State at length and we find that the trial court has held on the basis of the evidence led by the prosecution witnesses that appellant Nos. 2 and 4 along with appellant No.1 demanded colour TV, 50,000/- in cash and a Hero Honda Motor Cycle towards dowry at the time of marriage and just after one day of the marriage did not supply proper meal even to the deceased and, accordingly, held that this was an act of cruelty towards the newly married bride and the appellant Nos. 2 and 4 along with the appellant Nos. 1 and 3 were jointly and directly liable under Sections 304B and 498A IPC.

5. In the appeal before the High Court, it was contented on behalf of appellant nos. 2 and 4 that they were living separately and as such no act of cruelty or harassment towards the deceased could be attributed to them. The High Court, however, held that the deceased who was a newly wedded girl would certainly be in a mental agony when her parents were making efforts to call appellant Nos. 2 and 4 along with the other appellants to come and settle the dispute with regard to the dowry and yet the appellants refused to go and settle the matter merely on the ground that they were from the groom's side. The High Court further held that such conduct of the appellant Nos. 2 and 4 would certainly be an act of cruelty and would also result in mental distress to a newly married girl who was married just two months before committing suicide. The High Court was of the opinion that appellant Nos. 2 and 4 in keeping silence and in not coming to the rescue of the deceased committed cruelty even though they had not caused any physical cruelty to the deceased and were liable for the offences under Section 498A and 304B of the Indian Penal Code.

6. We are unable to agree with this opinion of the High Court that by keeping silence and by not coming forward to settle the dispute with regard to the dowry, the appellant Nos. 2 and 4 were are guilty of the offences under Sections 498A and 304B of the IPC. In the facts of this case, as found both by the trial court and by the High Court, the deceased got married to the appellant No. 1 on 10th June, 2003 and she went back to the house of the appellants on 5th August, 2003 and

committed suicide on 17th August, 2003 while she was in the house of her parents. True, there may have been a demand of dowry by the appellants at the time of marriage and it is quite possible that the demand of dowry may have persisted even after the marriage but unless it is established that the appellant Nos. 2 and 4 committed some act of cruelty or harassment towards a woman, they cannot be held guilty of the offences under Sections 304B and 498A IPC.

7. Section 304B IPC provides that where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband, or in connection with, any demand for dowry, such death shall be called 'dowry death' and such husband or relative shall be deemed to have caused her death. Hence the criminal liability under Section 304B IPC is attracted not just by the demand of dowry but by the act of cruelty or harassment by the husband or any relative of her husband in connection with such demand; thus, unless such an act of cruelty or harassment is proved to have been caused by the accused to the deceased soon before her death in connection with the demand of dowry, the accused cannot be held to be liable for the offence of dowry death under Section 304B IPC. Similarly, Section 498A IPC provides that the act of cruelty to a woman by her husband or his relative would be punishable and would be attracted only if the husband or his relative commits an act of cruelty within the meaning of clauses (a) and (b) in the Explanation to Section 498A IPC.

8. In this case, the finding of the High Court is that the appellant Nos. 2 and 4 did not come forward to participate in the settlement of the dowry on the ground that they belonged to the groom's family and remained silent. This act of remaining silent cannot be by any stretch of imagination construed to be an act of cruelty or harassment towards the deceased within the meaning of Section 304B IPC. The act of remaining silent with regard to the settlement of the dowry demand will also not amount to cruelty within the meaning of either clause (a) or clause (b) of the Explanation of Section 498A IPC.

9. In the result, we allow this appeal of appellant Nos. 2 and 4 and set aside the impugned judgment of the High Court as well as the judgment of the trial court and direct that the bail bonds furnished by appellant nos. 2 and 4 will stand discharged.

Appeal allowed.

I.L.R. [2014] M.P., 1202
SUPREME COURT OF INDIA
Before Mr. Justice Dr. B.S. Chauhan & Mr. Justice Fakkir Mohamed Ibrahim Kalifulla
Cr. A. No. 376/2010 decided on 10 April, 2013

SWAROOP SINGH. ...Appellant
Vs.
STATE OF M.P. ...Respondent

***Penal Code (45 of 1860), Section 376 - Rape* - Appellant was known to prosecutrix - She was forcibly taken to sugarcane bush at knife point and was subjected to sexual intercourse - Act was revealed by her to P.W. 5 - Prosecutrix admittedly washed herself in the well therefore, absence of sperm or blood not material - Doctor also stated that hymen of prosecutrix was torn and ruptured - Except simply denying the offence, no evidence was led by appellant - Conviction upheld - Appeal dismissed. (Paras 15 &16)**

दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – अपीलार्थी को अभियोक्त्री जानती थी – उसे चाकू की नोक पर गन्ने की झाड़ियों में बलपूर्वक ले जाया गया और लैंगिक समागम किया गया – कृत्य को उसके द्वारा अ.सा.5 को प्रकट किया गया – अभियोक्त्री ने स्वीकृत रुप से कुऐं पर स्वयं को साफ किया इसलिए, वीर्य या रक्त की अनुपस्थिति तात्विक नहीं – चिकित्सक ने भी कथन किया कि अभियोक्त्री का योनिच्छद फटा हुआ एवं क्षतिग्रस्त था – अपीलार्थी द्वारा साधारण रुप से अपराध अस्वीकार करने के अलावा किसी साक्ष्य को प्रस्तुत नहीं किया गया – दोषसिद्धि अभिपुष्ट – अपील खारिज।

Cases referred :
(1996) 2 SCC 384

ORDER

This appeal is directed against the judgment of High Court of Madhya Pradesh at Jabalpur dated 16.7.2008 in Criminal Appeal No.301/1994.

2. According to the prosecution on 28.9.19992 at 12.30 p.m., the prosecutrix P.W.2 was proceeding to the field for cutting grass. On the way, the appellant who was roasting Maize/Bhutta in the field of PyareLal, blocked P.W.2 and asked her to go alongwith him into the field of sugarcane. When P.W.2 refused, the appellant caught hold of her by hand and forcibly took her

to the sugarcane field, throw her down, gagged her mouth with the saree of P.W.2 and forcibly had intercourse with her by threatening her life at knife point. According to her by virtue of the said act of the appellant, white liquid started oozing out from her private parts, that she went to the boundary wall (Mound) where a well is situated and where Ram Singh Dada (P.W.4) was cutting grass. P.W.2 informed Ram Singh Dada as to what happened, who in turn passed on the information to her Kakaji Hari Prasad. Thereafter, her Kakaji Hari Prasad took P.W. 2 to home, where she narrated the whole incident. She stated to have informed her sister Chain Bai as well as her Kaki and Shanta Bai. She thereafter reported the matter to the Vilkis Ganj Police Station and after registering the report reached back home. She identified the report as Exhibit P2.

3. Subsequent to the registration of the case, the Police inspected the spot, seized the broken bangles and prepared a rough sketch. She was examined by the doctor who seized her peticoat and X-ray was also taken. The appellant was proceeded against in Criminal Case No.84/1992 for the offence punishable under Sections 376 and 506 Part II, IPC. The appellant having denied comission of the offence, witnesses were examined and in his statement under Section 313 Cr.P.C., the appellant pleaded total ignorance and that he was falsely implicated.

4. On the side of the prosecution P.W. 1 to 10 were examined. P.W.1 Dr. Manju Saxena, who examined the prosecutrix in her evidence stated that on internal examination of P.W.2, hymen was found to be torn in irregular manner and that two finger could easily be inserted in the vagina. She also stated that there was no flow of fresh blood. Two slides of vagina slabs prepared and sealed and were handed over to the police for forwarding the same for chemical examination alongwith the Peticoat of the prosecutrix on which spots were present.

5. In the course of cross examination, P.W.2 deposed that when the appellant threw her on the ground she did not sustain any injury; that she was not assaulted by way of fist blow, though the appellant threatened her not to raise any alarm by showing a knife. She further deposed that when white fluid was oozing out from her private parts, blood was also found and that she washed the stains with water when she reached the well from the place of occurrence and before she met Ram Singh. She also deposed that she had swelling in her private parts and was suffering from pain for 2-3 days. A

suggestion put to her as to why she did not object when the appellant pulled her hand to go, she categorically denied the said suggestion.

6. The trial court after detailed analysis of the evidence placed before it held that there was no reason to disbelieve the version of the prosecutrix, that since the appellant had sexual intercourse with the prosecutrix against her consent, the same would fell within the offence of rape under Section 376 IPC and such a gruesome offence was committed under the threat of knife point, the offence of criminal intimidation was also made out falling under Section 506 Part II, IPC.

7. The trial Court after convicting the appellant for the aforesaid offences imposed punishment for 7 years rigorous imprisonment alongwith fine of Rs.2000/, in default, sentence of 2 years rigorous imprisonment for the offence under Section 376(1) IPC and imprisonment of 2 years with fine of Rs.2,000/-, in default six months rigorous imprisonment for the offence under Section 506 Part II, IPC.

8. The trial court while reaching the above conclusion and while convicting the appellant has held that the version of the prosecutrix was fully supported by the other witnesses namely, Ram Singh (P.W.4), to whom she immediately informed, her Kakaji Hari Prasad (P.W.5), Bansi Lal (P.W.3) and Radhey Shyam (P.W.6). The trial court has found that those witnesses fully confirmed the version of the prosecutrix. The evidence of P.W.10 Dr. V.K. Chaudhary who examined the appellant on 17.9.1992 gave his opinion in Exhibit P6 that the appellant was capable of performing sexual intercourse..

9. The sole contention of the appellant before the trial court was that even as per the evidence of Dr. Manju Saxena (P.W.1), who examined the prosecutrix, it was clear that the prosecutrix was approximately 17 to 18 years of age, that since she was having frequent sexual intercourse no definite opinion of rape could be given and therefore, it cannot be held that the appellant had any forcible sexual intercourse against the wish of the prosecutrix in order to be convicted for the offence under Section 376 IPC read with Section 506 Part II, IPC.

10. The High Court having considered the judgment of the trial court in extenso found that there was no ground made out to interfere with the judgment and confirmed the conviction and sentence imposed on the appellant.

11. Heard Mr. Ranbir Singh Kundu, learned counsel appearing for the

appellant and Ms. Vibha Dutta Makhija, learned counsel appearing for the State. We also perused the judgment of the trial court as well as that of the High Court. In the course of submission, learned counsel for the appellant submitted except the version of P.W.2 prosecutrix there was nothing stated before the trial court to prove that the appellant committed the offence rape on her, that even going by the medical evidence as the prosecutrix was having frequent intercourse though not married, it cannot be a case of rape falling under Section 376 IPC. The learned counsel therefore, submitted that the conviction and sentence imposed on the appellant by the trial court as affirmed by the appellate court is liable to be interfered with.

12. As against the above submission, Ms. Makhija, learned counsel for the State contended that it is a case of offence of rape falling under Section 376 IPC, the question whether it was with the consent of the women alleged to have been raped has to be accepted based on her simple statement in the court and proceed on that basis. Learned counsel contended that when based on the evidence of P.W.2 prosecutrix, it was demonstrated before the court that the appellant had sexual intercourse with her against her consent, it was for the appellant to have proved beyond reasonable doubt that either there was no sexual intercourse or was there a consent existed in order to relieve the appellant of the offence alleged and found proved against him.

13. Therefore, the only question that remains for consideration in the case in hand is as to whether the sexual intercourse committed by the appellant on the prosecutrix P.W.2 was with her consent in order to hold that the appellant cannot be convicted under section 376 IPC. In that respect, when we examined the evidence let in, what is noted by us hereinbefore and as found by the trial court as well as by the High Court, the version of the prosecutrix P.W. 2 was unassailable. She was stated to be 17/18 years of age on the date of occurrence and she categorically stated that the appellant who was a known person, performed the act of forcible sexual intercourse against her wish at knife point. Except the mere denial of the offence alleged, there was no evidence let in on behalf of the appellant to counter the allegation levelled against him by the prosecutrix. In such circumstances, the trial court on a detailed consideration of the evidence placed before it concluded that the case of the prosecutrix was cogent and convincing and also supported by the evidence of other witnesses in so far as the commission of offence of forcible sexual intercourse at knife point.

14. In this context it will be worthwhile to refer to the principles laid down by this Court as to the manner in which the evidence of a rape victim should be evaluated to ascertain the truth. The said decision is reported in *State of Punjab Vs. Gurmit Singh* 1996(2) SCC 384. Para 8 and 21 are relevant which reads as under:-

> "8..... The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl of a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered

to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another persons's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable...."

"21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement

of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

15. Having heard learned counsel for the parties and having perused the judgment of the trial court as well as of the High Court, we are convinced that the judgment of the trial court does not call for interference. From what has been let in by way of evidence by the court below, the prosecutrix P.W.2 has spoken that she knew the appellant, that she was forcibly taken to the sugarcane bush at knife point and was subjected to sexual intercourse against her consent. She revealed the gruesome act committed by the appellant immediately after the occurrence to Ram Singh PW 5. When she was examined by the doctor, nothing could be traced about the presence of sperm or blood since admittedly before going to the Police Station, she washed herself in the well which was nearby the place of occurrence to which place she immediately went where she also reported the incident to Mr.Ram Singh Dada who was examined as P.W.5.

16. The doctor who examined the prosecutrix stated clearly that the hymen of the prosecutrix was torn and ruptured.

17. Except simply denying the offence alleged in the statement under section 313 Cr.P.C., the appellant did not let in any evidence to contradict the version of the prosecutrix. No motive was either alleged or proved as against the prosecutrix or any of the witnesses to disbelieve the version of the prosecution witnesses or to hold that the Appellant was falsely implicated. Broken bangles were also recovered from the place of occurrence at the instance of the prosecutrix. No previous grudge of the prosecutrix as against him in order to falsely implicating the appellant was also suggested.

18. A careful reading of the judgment of the trial court discloses that the

reasons adduced by it were cogent and convincing and there was no reason to disbelieve the same. The conclusion of the High Court is also equally well reasoned and we do not find any fault in the same in order to interfere with the same. We find no good ground to interfere with the well considered conclusion of the trial court as well as that of the High court. In the light of our above conclusion, we do not find any merit in this appeal and the same is dismissed.

Appeal dismissed.

I.L.R. [2014] M.P., 1209
SUPREME COURT OF INDIA
Before Mr. Justice Aftab Alam & Mr. Justice R.M. Lodha
Civil Appeal No. 3882/2013 decided on 16 April, 2013

TATA SKY LTD. (M/S) ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

(With Civil Appeal No. 3888/2013, Civil Appeal No. 3889/2013, Civil Appeal No. 3890/2013, Civil Appeal No. 3891/2013, Civil Appeal No. 3892/2013)

Entertainments Duty and Advertisements Tax Act, M.P. (30 of 1936), Sections 2(a),2(b),2(d), 3 & 4 **- No entertainment tax is payable on DTH broadcast for the period between the issuance of notification of 05.05.2008 and coming into force of the new Act on 01.04.2011 - The Act of 1936 is applicable only to place related entertainment.**

(Paras 35, 37 & 38)

मनोरंजन शुल्क एवं विज्ञापन कर अधिनियम, म.प्र. (1936 का 30), धाराऐं 2(ए), 2(बी), 2(डी), 3 व 4 – 05.05.2008 की अधिसूचना को जारी किये जाने और 01.04.2011 को नया अधिनियम प्रवर्तनीय होने के बीच की अवधि के लिये डीटीएच प्रसारण पर मनोरंजन कर देय नहीं – 1936 का अधिनियम केवल स्थान संबंधित मनोरंजन को लागू होता है।

JUDGMENT

The Judgment of the Court was delivered by : **AFTAB ALAM, J. :-** Leave granted in all the special leave petitions.

2. All these appeals relate to the demand of entertainment tax raised by the Government of Madhya Pradesh under the Madhya Pradesh Entertainment

Duty and Advertisements Tax Act, 1936 (hereinafter referred to as "the 1936 Act") on DTH (direct to home) broadcast provided by the appellants to their respective customers on payment of subscriptions. The appellants in all the appeals challenged the demand by the State Government by filing writ petitions before the Madhya Pradesh High Court. The High Court dismissed the writ petitions, upholding the demand by the State Government by the judgment and order dated August 20, 2010. That judgment was rendered in a batch of three writ petitions, taking Writ Petition No. 10148 of 2009, filed on behalf of *Tata Sky Limited* (appellant in the appeal arising from SLP (C) No.2752 of 2011) as the lead case. The rest of the writ petitions were dismissed following the judgment dated August 20, 2010.

3. For the sake of convenience, we too have taken the facts from civil appeal arising out of special leave petition (civil) No.27595 of 2010.

4. The appellant operates under a licence from the Government of India under section 4 of the Indian Telegraph Act, 1885 and the Indian Telegraphy Act, 1933. It is, however, the case of the appellant that DTH broadcast is a "service" and it is chargeable to service tax. As a matter of fact, one of the several grounds on which the demand of entertainment tax by the State Government on DTH broadcasting is challenged by the appellant is that DTH broadcasting is one of the notified services under the Finance Act, 1994 and is chargeable to service tax by the Central Government. In that regard, it is stated on behalf of the appellant, that in 1991 the Government of India appointed a Tax Reform Committee under the Chairmanship of Dr. Chelliah. The recommendations made by the Tax Reform Committee were accepted and the service tax was introduced in the budget for the year 1994-1995 through the Finance Act, 1994 under the residuary entry 97 of List 1 of the 7th Schedule of the Constitution of India. Under the Act, service tax is levied on the notified services provided or to be provided.

5. For the purpose of levy of service tax on broadcasting, the expression "broadcasting" has been defined specifically under section 65(15) of the Finance Act. The broadcasting services were brought within the purview of the service tax under section 65(105)(zk) of the Finance Act, 1994 as amended with effect from July 16, 2011. Later on, DTH service was brought within the purview of the service tax with effect from June 16, 2006.

6. Under section 67 of the Finance Act, the value of taxable service is the gross amount charged by the service provider for provision of service.

7. On March 24, 2006, the appellant got a licence from the Government of India under section 4 of the Indian Telegraph Act, 1885 and the Indian Telegraphy Act, 1933 to establish, maintain and operate DTH platform for a period of 10 years on the terms and conditions stipulated in the licence agreement. The appellant paid Rs.10 crores as licence fee and furnished a bank guarantee for the sum of Rs.40 crores that is to remain valid for the entire duration of the licence. In terms of the licence the appellant is further required to pay an annual fee equivalent to 10 percent of its gross revenue as reflected in the audited accounts of the company for every financial year within one month from the end of the financial year. The appellant is also required to pay, in addition to licence fee, royalty for spectrum use as prescribed by the Wireless Planning and Coordination Authority (WPC) under the Department of Telecommunications.

8. The licence granted by the Central Government is for the whole of India and the appellant is not obliged to take any permission or any other licence from any other authority for making DTH broadcast.

9. In August 2006, the appellant launched its operations all over India, including the State of Madhya Pradesh. The appellant is having a single broadcasting centre at Chhattarpur, Delhi. This centre downlinks the signals from satellite and then uplinks those signals to the designated transponders for their transmission in Ku band. These signals are received by the dish antenna installed at the subscribers' premises. The TV signals transmitted from the broadcasting centre at Chhattarpur, Delhi, are in encrypted format and those are decrypted/ decoded by the set top boxes and the viewing card inside the set top box supplied by the appellant to its subscribers. The subscribers are required to pay certain charges for viewing DTH broadcasts by the appellant on their TV sets.

10. The appellant does not use any infrastructure from the State for its DTH broadcasts.

11. On May 5, 2008, the State Government in exercise of powers conferred under section 3(1) of the 1936 Act, issued a gazette notification fixing 20 percent entertainment duty in respect of every payment made for admission to an entertainment other than cinemas, videos cassette recorders and cable service. As the aforesaid notification forms the basis of the demand raised by the State Government it is useful to reproduce it here in full:-

"No. (63) B-5-9-2006-2-V- In exercise of the powers

conferred by sub section (1) of Section 3 of the Madhya Pradesh Entertainment Duty and Advertisements Tax Act 1936 (No 30 of 1936) the State Government hereby prescribed the rate of Entertainment Duty at 20 percent in respect of every payment for admission to an Entertainment other than Cinema, Video Cassette Recorder and Cable service.

This notification shall come into force with effect from the date of publication.

By order and in the name of the Governor of Madhya Pradesh."

12. Following the notification dated May 5, 2008, a demand notice dated June 10, 2009 was issued by the Excise Commissioner Madhya Pradesh, Gwalior, to the appellant. The contents of the notice, insofar as relevant for the present, are as under:

"S.No.7-Ent./2009-10/173 Gwalior Date 10.06.2009

To,

Tata Sky,

.....

Sub: Levy of Entertainment Duty on Direct to Home Entertainment Service

You are providing entertainment in the State of Madhya Pradesh by Direct to Home (DTH) to registered consumers on monthly payment basis. Whereas:

(1.) Under section 3(1) of the Madhya Pradesh Entertainment Duty and advertisements Tax Act, 1936 except cinema hall, videos and cable in all entertainments including entertainment provided through registered consumers through DTH on monthly subscription basis is included. In the aforesaid payment by the consumers, entertainment duty @ 20% is liable to be paid in advance in the treasury of the Government.

..."

13. The appellant was directed to provide the information as asked for in

the notice failing which, the notice declared, an ex parte assessment would be made of the entertainment tax payable by it.

14. The appellant replied to the notice by its letter of July 22, 2009 stating that under the provisions of the 1936 Act, there is no specific entry with respect to DTH broadcasting and in absence of such an entry, the provisions of the Act are not applicable to DTH broadcasting and, therefore, the notice was illegal and without jurisdiction. The appellant also referred to a decision of the Uttarakhand High Court in a case relating to a similar demand raised by the Uttarakhand Government and the order of this Court in the special leave petition filed by the Uttrakhand Government against the judgment of the High Court.

15. On August 1, 2009, the State of Madhya Pradesh passed the Madhya Pradesh Entertainment Duty and Advertisements Tax (Amendment) Act, 2009. By the Amendment Act, the failure to produce accounts and documents as required by the Excise Commissioner or any officer authorized by the State Government was made a penal offence. The Amendment Act, however, did not introduce any provision in the Parent Act with respect to levy of entertainment duty on DTH broadcasting.

16. On August 18, 2009, the Excise Commissioner Madhya Pradesh wrote to the Deputy Commissioner Excise, Flying Squad, Gwalior Division, Gwalior, telling him that entertainment duty at the rate of 20 percent was payable on subscription amounts received by the DTH entertainment service provider and directing to ensure the realization of entertainment duty from DTH entertainment service providers. The direction of the Excise Commissioner was followed by a number of notices given to the appellant and on October 1, 2009, the Vice President (Operation) and Area Operation (Manager) of the appellant company were arrested and later released on bail for non-compliance with the provisions of section 5(E) of the 1936 Act.

17. On October 3, 2009, the appellant filed a writ petition, being Writ Petition No.10148 of 2009, challenging the demand and collection of entertainment duty at the rate of 20 percent under section 3(1) of the 1936 Act. The writ petition was eventually dismissed by the High Court by its judgment and order dated August 20, 2010 and the matter is now brought to this Court.

18. Before proceeding further, it needs to be stated that the controversy

in all the appeals relates to the demand and realization of entertainment tax under the 1936 Act, which means for the period between the commencement of operation by the appellant in the year 2006 and March 31, 2011, i.e., the day prior to the coming into force of the new Act, called the *Madhya Pradesh Vilasita, Manoranjan, Amod Evam Vigyapan Kar Adiniyam,* 2011. Further, in course of hearing of the appeals Mr. Dave learned counsel appearing for the State of Madhya Pradesh submitted that he proposed to defend the demand and realization of the impugned tax only for the period between May 5, 2008, the date of the notification issued under section 3(1) of the 1936 Act and the coming into force of the new Act on April 1, 2011. It is, therefore, made clear that this judgment deals with the question of levy of entertainment tax on DTH broadcast under the 1936 Act for the period between the issuance of the notification (May 5, 2008) and the coming into force of the new Act (April 1, 2011). The judgment is not concerned with the legal position arising after the new Act came into force.

19. We now propose to examine whether on the basis of the provisions of the 1936 Act, it is permissible or possible for the State of Madhya Pradesh to levy on what in the lexicon of broadcasting is called direct-to-home or in short DTH. Here it needs to be clearly understood that the issue in this case is not whether direct to home broadcast is "entertainment" in the broader sense. Entry 62 of List 2 of Schedule 7 to the constitution may indeed be wide enough to include DTH as yet another form of entertainment but that is not the issue rising for consideration. The issue under consideration is whether the provisions of the 1936 Act have the necessary expanse and flexibility to include DTH as an "entertainment" chargeable to tax and whether the notification dated May 5, 2008 in any manner extended the scope of chargeability under the 1936 Act.

20. The preamble to the 1936 Act reads as under:-

> "An Act to impose a duty in respect of **admission to entertainments** and a tax in respect of certain forms of advertisement exhibited at such entertainments in Madhya Pradesh."

21. Section 2 of the 1936 Act contains the definition clauses and clause (a) defines the expression "admission to an entertainment":

> "2(a) "admission to an entertainment" includes admission to

any place in which the entertainment is held;"

22. **Clause (aaaa) was inserted in the Act with effect from May 1, 1999** to define 'Cable Operator", "Cable Service", "Cable Television Network" and "Subscriber".

"2(aaaa) "Cable Operator", "Cable Service", "Cable Television Network" and "Subscriber" shall have the same meaning as assigned to them in the Cable Television Network (Regulation) Act, 1995 (No.7 of 1995)"

23. Clause (b) defines "entertainment":

"2(b) "Entertainment" includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment;"

24. Clause (c) defines "entertainment duty":

"2(c) "entertainments duty" means a duty levied under section 3;"

25. Clause (d) defines the expression "Payment for admission" as under:

"2(d) "Payment for admission" includes –

(i) any payment for seats or other accommodation in any form in a place of entertainment;

(ii) any payment for a programme or synopsis of an entertainment;

(iii) any payment made for the loan or use of any instrument or contrivance which enables a person to get a normal or better view or hearing or enjoyment of the entertainment, which without the aid of such instrument or contrivance such person would not get;

(iv) **any payment made by a person by way of contribution or subscription or installation and connection charges or any other charges, by whatever name called, for providing access to any entertainment, whether for a specified period or on a continuous basis;**

(v) any payment, by whatever name called for any purpose whatever, connected with an entertainment, which a person is, required to make in any form as a condition of attending, or continuing to attend the entertainment, either in addition to the payment, if any, for admission to the entertainment or without any such payment for admission;

(vi) any payment, made by a person, who having been admitted to one part of a place of entertainment is subsequently admitted to another part thereof, for admission to which a payment involving tax or more tax is required;

Explanation - I. – Any subscription raised or donation collected in connection with an entertainment in any form shall be deemed to be payment for admission;

[Explanation - II. – Where entertainment is provided as part of any service by any person, whether forming an integral part of such service or otherwise the charges received by such person for providing the service shall be deemed to include charges for providing entertainment or access to entertainment also];

26. Clause (f) defines "proprietor":

"2(f) "proprietor" in relation to any entertainment, includes any person responsible for or for the time being in-charge of the management thereof;"

27. "Video Cassette Recorder" and "Video Cassette Player" are defined in clauses (g) and (h) of section 2.

28. The charging provision is contained in Section 3 of the 1936 Act which, insofar as relevant for the present, is extracted hereunder:

"Entertainment Duty payable by proprietor of an entertainment - (1) Every proprietor of an entertainment other than proprietor of an entertainment by Video Cassette Recorder (hereinafter referred to as V.C.R.) or Video Cassette Player (hereinafter referred to as V.C.P.) or a Cable Operator, shall in respect of every payment for admission to the entertainment pay to the State Government a duty at the rate as prescribed by the State

Government not exceeding seventy five per centum thereof:

Provided ...

Provided further ...

Provided also ....

Explanation ...

(2) xxx

(3) Where the payment for admission to an entertainment is made by means of a lump sum paid as a subscription or contribution to any person, or for a season ticket or for the right of admission to a series of entertainments or to any entertainment during a certain period of time, or for any privilege, right, facility or thing combined with the right of admission without further payment or at a reduced charge, the entertainments duty shall be paid on the amount of such lump sum:

Provided that where the State Government is of opinion that the payment of a lump sum represents payment for other privileges, rights, or purposes besides the admission to an entertainment, or covers admission to the entertainment during any period for which the duty has not been in operation, the duty shall be charged on such an amount as appears to the State Government to represent the right of admission to entertainment in respect of which the entertainment duty is payable."

(4) xxx

(i) xxx

(ii) xxx"

29. Section 3-A deals with entertainment duty payable by proprietor of V.C.R. or V.C.P. and **this provision was inserted in the Act with effect from May 1, 1999.**

30. Section 3-B was inserted in the 1936 Act with effect from April 1, 2001. Sub-section (1) of section 3-B deals with entertainment duty payable

by cable operator and it makes a cable operator, providing access to entertainments through cable service to subscribers of such service, not being owner or occupants of rooms of hotel or lodging house, liable to pay duty at the rate of twenty rupees per month per subscriber in urban and cantonment areas. Sub-section (2) of section 3-B makes every proprietor of hotel or lodging house, providing access to entertainments in the rooms of a hotel or lodging house through the cable service of his own or obtained through any cable operator liable to pay a consolidated amount of duty per month determined on the basis of number of rooms.

31. Section 3-C deals with levy of Advertisement Tax.

32. The machinery for effectuating the charge created by section 3 is provided under section 4 of the 1936 Act which, insofar as relevant for the present, is quoted below:

> "4. Method of levy – (1) Save as otherwise provided by this Act, no person shall be admitted to any entertainment other than entertainment by V.C.R., **except with a ticket stamped with an impressed, embossed, engraved or adhesive stamp, (not before used) issued by the State Government, of nominal value equal to the duty payable under section 3.**
>
> (1A) Omitted.
>
> (2) The State Government may, on the application of a proprietor of any entertainment other than entertainment by V.C.R. in respect of which entertainments duty is payable under section 3, allow such proprietor to pay by one of the modes specified hereunder as it may think fit, in such manner and subject to such conditions as may be prescribed, the amount of the duty due, namely:-
>
> (a) by a consolidated payment of such percentage as determined by the State Government of the gross sum received by the proprietor on account of payments for admission to the entertainment and on account of the duty to be fixed by the State Government;
>
> (b) in accordance with returns of the payments for admission to the entertainment and on account of the duty;

(c) in accordance with the results recorded by any mechanical contrivance which automatically registers the number of persons admitted;

(d)xxx

(e) xxx

(f) xxx

(3) xxx

(4) xxx"

33. Section 4-B imposes restriction on admission without payment or at concession rates and provides as under:

"4-B Restriction on admission without payment or at concession rates. – No proprietor shall admit any person to an entertainment other than entertainment by V.C.R. without payment for admission thereto or at concession rates unless the entertainments duty payable in respect thereof or on the full value of the ticket for the class to which such person is admitted has been paid.

Provided that nothing in this section shall apply in respect of admission at concessional rates –

(i) to such class of persons; and

(ii) to such entertainment or class of entertainments;

As the State Government may, by notification, specify."

34. Section 4-C gives the power to impose penalty and section 5 deals with penalties. 5-A deals with composition of offences and section 5-B deals with suspension or revocation of licence for entertainment. Section 8 provides the rule making powers. Section 9 gives the power of entry and inspection and section 9-A makes production and inspection of accounts and documents obligatory. Section 10 deals with recovery of arrears of entertainment duty. Section 10 provides protection to persons acting in good faith and bars any suit or prosecution or other proceedings against officers and servant of the Government. Section 11 deals with delegation of powers and section 12 bars imposition of entertainment duty by any local authority.

35. On a careful examination of the 1936 Act as a whole, and more particularly on a conjoint reading of clauses (a) ["Admission to an entertainment"], (b) ["Entertainment"] and (d) ["Payment of admission"] along with section 3 creating the charge and section 4 providing the collection machinery, we find ourselves in agreement with the submission made on behalf of the appellants that the provisions of 1936 Act are applicable only to place-related entertainment. In other words, the provisions of the 1936 Act cover an entertainment which takes place in a specified physical location to which persons are admitted on payment of some charge as defined under clause (d) of section 2 of the 1936 Act. The legislative history and the amendments introduced in the 1936 Act also show that it was how the scheme of the 1936 Act was viewed by the State itself. It was earlier found that the provisions of the 1936 Act were inadequate to bring shows by video cassette recorder or video cassette and player cable T.V. operations within the taxing net and hence, the legislature considered it necessary to amend the 1936 Act and to insert section 3-A and section 3-B respectively with effect from May 1, 1999 and April 1, 2001. In this regard, it is also very important to note that both in the case of shows by video cassette recorder or video cassette and player, cable T.V. operations, the collection machinery is in-built and provided within the respective provisions of section 3-A and section 3-B. and in those two cases the collection of duty does not take place under section 4 of the 1936 Act.

36. On behalf of the State the imposition of levy on DTH was sought to be justified on the basis of sub-clause(4) of clause (d) of section 2 which reads as under:

> "(iv) any payment made by a person by way of contribution or subscription or installation and connection charges or any other charges, by whatever name called, for providing access to any entertainment, whether for a specified period or on a continuous basis;"

37. In our view, the submission is untenable for more reasons than one. First, section 2(d)(iv) is only the measure of tax and it does not create the charge which is created by section 3. The question of going to the measure of the tax would arise only if it is found that the charge of tax is attracted. Under section 3 read with section 2(d) and section 2(a), the charge or levy of tax is attracted only if an entertainment takes place in a specified place or locations and persons are admitted to the place on payment of a charge to the proprietor

providing the entertainment. In the present case, as DTH operation is not a place-related entertainment, it is not covered by the charging section 3 read with section 2(a) and 2(b) of the 1936 Act. Consequently, the question of going to section 2(d)(iv) does not arise. Moreover, even if section 2(d)(iv) is to be read as an extension of section 3 and, thus, as a part of the charge, it does not make any difference at all because section 2(d)(iv) refers to "entertainment" which takes us back to section 2(b) and finally to section 2(a).

38. We have held that DTH is not covered by the provisions of section 3 read with section 2(a), 2(b) and 2(d) of the 1936 Act. The issue gets further settled on reference being made to the mechanism of collection of the charge as provided under section 4 of the 1936 Act. Section 4(1) mandates that no person shall be admitted to any entertainment other than entertainment by V.C.R. except with a ticket stamped with an impressed, embossed, engraved or adhesive stamp issued by the State Government of nominal value equal to the duty payable under section 3; sub-section (2) of section 4 provides for different modes specified thereunder for payment of the amount of duty due on the entertainment. Neither the provision of section 4(1) nor any of the modes provided under section 4(2) can be made applicable for collection of duty on DTH operation. Further, it is noted above that section 8 provides rule making powers. In exercise of the powers under that provision the Madhya Pradesh Entertainment Duty and Advertisement Tax Rules 1942 were framed. A perusal of the Rules makes it absolutely clear that the collection mechanism under the 1936 Act is based on revenue stamps stuck to the tickets issued by the proprietor for entry to the specified place where entertainment is held.

39. The machinery for collection of duty provided under the 1936 Act has no application to DTH. It is well settled that if the collection machinery provided under the Act is such that it cannot be applied to an event, it follows that the event is beyond the charge created by the taxing statute. See: *Commissioner of Income Tax v. B.C. Srinivasa Setty,* (1981) 2 SCC 460, *Commissioner of Income-Tax Ernakulam, Kerala v. Official Liquidator, Palai Central Bank Ltd.*. (1985) 1 SCC 45 (pages 50-51), *PNB Finance Limited v. Commissioner of Income Tax I, New Delhi* (2008) 13 SCC 94 (paragraphs 21 and 24 pages 100 to 101).

40. In light of the discussions made above, we are clearly of the view that the 1936 Act cannot be extended to cover DTH operations being carried out by the appellants.

41. Coming now to the notification dated May 5, 2008, it is elementary that a notification issued in exercise of powers under the Act cannot amend the Act. Moreover, the notification merely prescribes the rate of entertainment duty at 20 percent in respect of every payment for admission to an entertainment other than cinema, video cassette recorder and cable service. The notification cannot enlarge either the charging section or amend the provision of collection under section 4 of the Act read with the 1942 Rules. It is, therefore, clear that the notification in no way improves the case of the State. If no duty could be levied on DTH operation under the 1936 Act prior to the issuance of the notification dated May 5, 2008 as fairly stated by Mr. Dave, we fail to see how duty can be levied under the 1936 Act after the issuance of the notification.

42. We have held that the 1936 Act does not cover DTH operations on an interpretation of the provisions of 1936 Act itself. We, therefore, see no need to refer to the cases relied upon by the appellants relating to demand of duty on DTH operations under the Uttar Pradesh Entertainments and Betting Tax Act, 1979 and under the Bihar Entertainment Tax Act.

43. Further, as we have held that the 1936 Act does not cover the DTH operations we need not go to the other submissions made on behalf of the appellants inter alia regarding the legislative competence of the statute legislature to impose tax on DTH operation as it was a notified service chargeable to service tax under the Finance Act, 1994.

44. In the result, the appeals are allowed but with no order as to costs.

Appeal allowed.

I.L.R. [2014] M.P.,1222
WRIT APPEAL
Before Mr. Justice Shantanu Kemkar & Mr. Justice M.C. Garg
W.A. No. 273/2007 (Indore) decided on 7 January, 2013

STATE OF M.P. & ors. ...Appellants
Vs.
MOTILAL & ors. ...Respondents

Work Charged and Contingency Paid Employees Pension Rules M.P. 1979, Rule 2(C) **- Proviso (As amended by notification dated 08.02.1980) - Benefit of the amendment could be availed by employees who were in service as on 01.04.1981 and had completed 10 years of service on or after 01.01.1974 - Respondent/employee having retired**

on 31.05.1974, is not entitled to the benefit of the amended Rule.

(Paras 14 & 15)

कार्य भारित व आकस्मिकता भोगी कर्मचारी पेंशन नियम म.प्र. 1979, नियम 2(सी) – परन्तुक (अधिसूचना दिनांक 08.02.1980 द्वारा यथा संशोधित) – संशोधन के लाभ का अवलम्ब वे कर्मचारी ले सकते जो 01.04.1981 को सेवा में थे और उन्होंने 01.01.1974 को या उसके पश्चात 10 वर्ष की सेवा पूर्ण की थी – प्रत्यर्थी/कर्मचारी, 31.05.1974 को सेवानिवृत्त हो जाने के कारण संशोधित नियम के लाभ का हकदार नहीं।

Mini Ravindran, Dy. G.A. for the appellants/State.
None for the respondent.

ORDER

The Order of the Court was delivered by :
M.C. GARG, J. :- This judgment shall dispose of writ appeal filed on behalf of the State of M.P., aggrieved by the order dated 23.11.2004 passed by the learned Single Judge in W.P.No.7660/2003 whereby the learned Single Judge allowed the writ petition filed by the respondent Motilal now deceased claiming pension.

2. The learned Judge vide the impugned judgment has taken note of an amendment which was brought into force on 08.02.1980, reducing the eligibility for pension i.e. qualifying service of work charged employee only to 10 years as on 01.01.1974 or thereafter to be entitled to pension.

3. This writ petition came to be disposed of by this Court after the M.P.State Administrative Tribunal ceased to exist, even though the Original Application claiming the relief as claimed in the writ petition was filed before the State Administrative Tribunal registered vide O.A.No.2241/2000.

5. It was the case of the respondent that the respondent was appointed as regular gardener on 01.05.1962 in PWD (B&R) Khargone. He retired on 31.05.1974 after reaching the age of superannuation at the age of 60 years. According to the him, he has completed more than 10 years of qualifying service for pension. He also claimed that as per M.P. Gazette notification dated 08.02.1980 (Annexure A-4) filed alongwith the application he became entitled to pension but he was not granted pension despite various correspondence exchanged by him. It was in these circumstances, he filed the application.

6. According to the respondent/applicant, he having completed more than 10 years of regular service w.e.f. 01.05.1962 to 31.05.1974 as gardener in PWD (B&R) Khargone was entitled to pension. It would be appropriate to take note of the notification referred to by the appellant.

7. This notification has been issued by the Finance Department of State of M.P. in the Gazette published on 08.02.1980 in part 4 (c) thereof under Article 309 of the Constitution of India by Hon'ble Governor of the State. In this notification, the permanent employee viz-a-viz the work charged employee has been interpreted in paragraph 2(c) thereof which reads as under:-

> **"2. Definitions.-** In these rules, unless the context otherwise requires.-
>
> (a).....
>
> (b).....
>
> (c) "permanent employee" means a contingency paid employee or a workcharged employee who has completed fifteen years of service or more on or after the 1st January, 1974: [Provided that in respect of a contingency paid employee or a work charged employee who has attained the age of superannuation on or after the First April 1981, permanent employee means an employee who has completed 10 years of service on or after the 1st January 1974.]

8. A bare perusal of the Rule thereof goes to show that proviso was applicable reducing the eligibility for pension to 10 years from 15 years which was available to the work charged employees who attained the age of superannuation on or after 01.04.1981. Despite the admitted fact that the respondent had retired from service as on 31.05.1974 and thus was not in service as on 01.04.1981, the learned Single Judge granted the benefit of this amendment to the respondent.

9. It is this order which has been assailed before us by the State of Madhya Pradesh by way of present writ appeal. No doubt the writ appeal was filed belatedly, but delay in filing the appeal was condoned vide order

passed by this Court on 04.08.2010.

10. Today, the case was listed for final hearing. Arguments were addressed on behalf of the State of Madhya Pradesh by Ms. Mini Ravindran, learned Dy Govt. Advocate.

11. The only contention on behalf of the appellant is that in the present case the eligibility for pension for work charged contingency paid employee as per the Madhya Pradesh (Work Charged and Contingency Paid Employees) Pension Rules, 1979 was 15 years of service or more on or after 01.01.1974. She also submitted that even though there was an amendment to the aforesaid Rule, reducing the qualifying service to 10 years on or after 01.01.1974, which could have been applicable in the case of the respondent provided he would have been in service either on 1.04.1981 or thereafter, which was not the case. As such, it has been submitted that in this case, the respondent admittedly being a work charged employee was eligible for pension as on the date of retirement only if he has completed 15 years of service on or after 01.01.1974. However, this was not the case inasmuch as the respondent/ employee retired from service on 31.05.1974.

12. In so far as the benefit of amendment is concerned, she contended that the said amendment was applicable only to an employee who was in service as on 01.04.1981 which was not the case.

13. Nobody has come forwarded to give counter view of the matter. Arguments have been addressed by Ms. Mini Ravindran, learned Dy. Government Advocate appearing for the State of Madhya Pradesh. Her submissions finds support from the Rules.

14. The proviso added to the Rule 2(c) makes it very clear that the amendment which reduces the qualifying service to 10 years for the purpose of pension in the case of (work charged and contingency paid employee) was applicable only in those cases where the employee was in service as on 01.04.1981 and had completed 10 years of service on or after 01.01.1974. The very fact that the respondent/employee retired on 31.05.1974, the benefit of the amended Rule was not available to him.

15. In view of the aforesaid, we find substance in the submissions made on behalf of the appellant that the order passed by the learned Single Judge is not in accordance with Rules. The interpretation of the amended Rule had come into force only w.e.f. 13.09.1982 and which was applicable only to

those employees who were in service either on 01.04.1981 or thereafter subject to the condition that they had completed 10 years or more on or after 01.01.1974 which was not the case in the case of the respondent.

16. Hence, we allow the writ appeal and set aside the order passed by the learned Single Judge dated 23.11.2004 in W.P.No.7660/2003 and consequently dismiss the writ petition with no order as to costs.

Appeal allowed.

I.L.R. [2014] M.P., 1226
WRIT APPEAL
Before Mr. Justice Shantanu Kemkar & Mr. Justice M.C. Garg
W.A. No.65/2008 (Indore) decided on 4 February, 2013

JAGDISH CHANDRA ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

***Service Law - Selection list* - Once a final selection list was published, without modification/cancellation of the said list, appellant cannot be deprived from the Patwari training - Respondent No. 5 who was not possessing the requisite qualification has been sent for training by subsequent orders to which no show cause was issued and no opportunity of hearing was furnished to him, however, the action of respondents not to send the appellant for Patwari training and to send respondent No. 5 in the Patwari training is arbitrary and discriminatory - Held - It is appropriate to direct the respondents to give a show cause notice to the appellant - In case respondents find that respondent No. 5 is more meritorious than the appellant, so as to deprive the appellant from the place in the selection list, after hearing him, will pass a speaking order within a period of two weeks thereafter, deciding as to whether the appellant or the respondent No. 5 is more meritorious.**
(Paras 3 & 8)

सेवा विधि – चयन सूची – एक बार अंतिम सूची को, उक्त सूची में कोई सुधार/निरस्त किये बिना प्रकाशित किये जाने पर, अपीलार्थी को पटवारी के प्रशिक्षण से वंचित नहीं रखा जा सकता – प्रत्यर्थी क्र. 5 जो अपेक्षित अर्हता धारक नहीं था, को पश्चातवर्ती आदेश द्वारा प्रशिक्षण के लिये भेजा गया, जिसके लिये कोई कारण बताओ नोटिस जारी नहीं किया गया और उसे सुनवाई का अवसर प्रदान नहीं किया गया, अपितु, प्रत्यर्थीगण द्वारा अपीलार्थी को पटवारी प्रशिक्षण के

लिये नहीं भेजने की कार्यवाही और प्रत्यर्थी क्र. 5 को भेजने की कार्यवाही मनमानी एवं भेदभावपूर्ण है – अभिनिर्धारित – अपीलार्थी को कारण बताओ नोटिस देने के लिये प्रत्यर्थीगण को निदेश देना उचित है – यदि प्रत्यर्थीगण पाते हैं कि प्रत्यर्थी क्र. 5, अपीलार्थी से अधिक गुणवत्ताधारक है जिससे कि चयन सूची में स्थान पाने से अपीलार्थी वंचित होगा, उसे सुनने के पश्चात, इसके दो सप्ताह की अवधि के भीतर सकारण आदेश पारित करेगा, यह निर्णित करते हुए कि क्या अपीलार्थी अधिक गुणवत्ताधारक है अथवा प्रत्यर्थी क्र 5।

A.K. Sethi with *Harish Joshi,* for the appellant.
Mini Ravindran, Dy. G.A. for the respondents No. 1 to 4.

ORDER

The Order of the Court was delivered by :

M.C. GARG, J. :- This writ appeal has arisen out of the judgment and order dated 20.11.2007, passed by the learned Single Judge of this Court in W.P.No.2241/2006(S) whereby the learned Single Judge while dismissing the writ petition directed the respondents to send respondent no.7 (respondent no.5 herein) to Patwari training despite the fact that the name of the said was not in the selection list, whereas the name of the appellant was very much in the selection list yet he was not send for Patwari training by the respondents which order was upheld in a writ petition filed by the petitioner by the learned Single Judge.

2. The brief facts of the case are that an advertisement Annexure P/1 was published to fill up the post of backlog of Patwari in Ratlam district. In the advertisement the qualification was prescribed as Higher Secondary/High School (10+2) along with diploma in computer course from the Government or from any Government recognized institution. Appellant was possessing the requisite educational qualification and diploma in Programming and Application from Electronics Computer and Technical Training Centre, Bhopal, however he applied under the OBC category. He was selected for Patwari training and found place at Sr.No.5 in waiting list of the provisional selection Annexure-P/3 dated 28.11.2005. After verification of the document a final selection list was published on 16.12.2005. Annexure-P/4 wherein he had found place at Sr. No.12. It is further his case that respondent No.5 was selected in the provisional selection list Annexure-P/3, and not found place in the final selection because he was not possessing the diploma in computer application course from the recognized institute. However, he was not empaneled in the final selection and found place in different list Annexure-P/4-A. Even after selection of appellant in the final selection list he was not sent for Patwari training in the

year 2005-2006 and by the subsequent order without modifying the final selection list respondent no.5 was sent for training.

3. Shri A.K.Sethi, learned senior counsel for the apellant submits that once a final selection list was published, without modification/cancellation of the said list, appellant cannot be deprived from the Patwari training. It is further his submission that respondent no.5 who was not possessing the requisite qualification has been sent for training by subsequent orders to which no show cause was issued and no opportunity of hearing was furnished to him, however, the action of respondents not to send the appellant for Patwari training and to send respondent no.5 in the Patwari training is arbitrary and discriminatory. Prayer is made to allow the appeal and set aside the impugned judgment and order of the learned Single Judge.

4. Submission of Shri A.K.Sethi, learned counsel for the appellant have been opposed on behalf of respondent no.1 to 4 inasmuch as that no body has appeared for respondent no.5 (respondent no.7 before the learned Single Judge). According to them the learned Single Judge was right inasmuch as respondent no.5 was more meritorious and by way of a representation he has also produced a certificate of diploma in Computer Application of Government recognized institution, and however after enquiry and on due consideration of the said document he has rightly been sent for Patwari training by the order Annexure P-13 dated 31.3.2006. It is also submitted on behalf of the respondents that as per the record, the last person who found place on merit has secured 126 marks, whereas appellant has only secured 124 marks and respondent no.5 secured 133 marks and therefore the said respondent is more meritorious than the appellant. It is true that the appellant was not included in the final selection list as the certificate produced by the appellant was not of Government recognized Institute, but later on, when the certificate was brought to the notice of the competent authority and after enquiry thereupon ordered to send him for training, rectifying the mistake occurred in the final selection list. It is therefore submitted that action for not sending the appellant for Patwari training and sending respondent no.5 for training was as per merit and therefore it is submitted that there was no infirmity in the order of the learned Single Judge. It has been argued that merely because the name of the appellant found place in selection list would not entitle him or would given him any weight to his case for sending him for Patwari training.

5. To appreciate the contentions of the parties, it would be appropriate

to take note of paragraphs 9,10 and 11 of the order of the learned Single Judge, which reads as under:-

> "9. After having heard learned counsel appearing for the parties and on perusal of the record of Patwari selection of District Ratlam, it is apparent that petitioner and respondent No.7 both have appeared in the examination held for selection to undergo the training for the post of Patwari. Petitioner has secured 124 marks and respondent No.7 has secured 133 marks in the said examination. It is also not in dispute that last candidate who was sent for training has secured 126 marks, thus it is clear that petitioner has secured less marks than the candidate last selected. The name of respondent no.7 was not included in the final selection list Annexure P/4 because he could not have submitted the diploma in computer course from the Government institution or Government recognized institution. It is also clear from the record that while issuing final selection list without including the name of respondent no.7, he was not noticed or allowed prior opportunity. However, on coming to the knowledge of document Annexure P/4-A, he had made the representation Annexure R/7-3 alongwith certificate Annexure-R/7-4 stating that he is also having the diploma from All India Society for Electronics and Computer Technology. The respondents have made a formal inquiry with respect to genuineness of such certificate and thereafter a committee has recommended his name for inclusion in the final selection list, as apparent from the order sheet dated 29.03.2007. Thereafter the authority competent by passing an order dated 31.3.2006 allowed him to undergo the Patwari training for the session 2006-2007. Thus it is clear that a candidate of merit, whose name may not be included in the final selection list, but included by subsequent orders dated 29.3.2006 and 31.3.2006 by rectifying the mistake.
>
> 10. It is also seen from the record that petitioner has secured less marks than the candidates, who was the last selectee of the selection list of Patwari training, his claim is rest upon the final selection list Annexure P/4 because he was impaneled

therein. The perusal of the record further indicates that none of the selectee, who has secured 124 marks was sent for Patwari training in the OBC category to which the claim of petitioner rest. It is not the case of petitioner that diploma in computer application certificate Annexure-R7/4 possessed by respondent no.7 is a fabricated or fake document, in such circumstances merely inclusion of his name in the final selection list does not confer any right to him to seek direction against the respondents to send him for Patwari training. In view of the above discussion, if the petitioner has not been sent for Patwari training, even on found place in the final selection list Annexure-P/4 and to send respondent no.7 to undergo the Patwari training cannot be said to be arbitrary.

11. Discussion as made herein above as well as the record of the selection indicates that the respondents have rectified their mistake, which is occurred while issuing final selection list. In the aforesaid factual background merely inclusion of name of petitioner does not confer him any right to seek direction in his favour to under go Patwari training and to seek any direction against the respondent no.7. In view of the aforesaid context the judgment of Apex Court in the case of *State of U.P.* (Supra) has held as under is relevant to refer:-

> "14. Selectees cannot claim the appointment as a matter of right. Mere inclusion of candidates' name in the list does not confer any right to be selected, even if some of the vacancies remained unfilled and the concerned candidates cannot claim that they have been given a hostile discrimination."

In the case of *State of Bihar* (Supra) the Hon'ble Apex Court has held as under:-

> "A person who is selected does not, on account of being empanelled alone, acquire any indefeasible right of appointment. Empanelment is at the best a condition of eligibility for purposes of appointment and by itself does not amount to selection or create a vested right to be appointed unless relevant service rule says to the

contrary."

In the case of *Union Territory of Chandigarh* (Supra) the Hon'ble Apex Court has held as under:-

> "If we have regard to the above enunciation that a candidate who finds a place in the select list as a candidate selected for appointment to a civil post, does not acquire an indefeasible right to be appointed in such posting the absence of any specific Rule entitling him for such appointment and he could be aggrieved by his non- appointment only when the Administration does so either arbitrarily or for no bona fide reasons, it follows as a necessary concomitant that such candidate even if has a legitimate expectation of being appointed in such posts due to his name finding a place in the select list of candidates, cannot claim to have a right to be heard before such select list is cancelled for bona fide and valid reasons and not arbitrarily: In the instant case, when the Chandigarh Administration which received the complaints about the unfair and injudicious manner in which select list of candidates for appointment as conductors in CTU was prepared by the Selection Board constituted for the purpose, found those complaints to be well founded on an enquiry got made in that regard, we are unable to find that the Chandigarh Administration had acted either arbitrarily or without bona fide and valid reasons in cancelling such 0dubious select list. Hence, the contentions of the learned counsel for the Respondents as to the sustainability of the Judgment of CAT under appeal on the ground of non-affording of an opportunity of hearing to the Respondents (candidates in the select list) is a misconceived one and is consequently rejected."

6. It is thus seen that the learned Single Judge in the writ petition has acted as a Selection Committee in upholding the order of the respondents, even though the name of respondent no.5 was not in the selection list. Learned senior counsel for the appellant submits that the certificate which was submitted

on behalf of 5th respondent was basically on the basis of the Interim Order passed in W.P.No.1364/2005 (S) dated 28.10.2005. Even if that was so, it is submitted that while considering the case of the 5th respondent, it was incumbent upon the authorities to give a show cause notice to the appellant to enable him to place his view/point before a final decision was taken. It is submitted that the order which has been passed by the learned Single Judge directing the authorities to sent respondent no.5 for Patwari training holding that he was more meritorious than the appellant was not an order passed by the appointing Authority, but by the Court which could not have been done.

7. We agree with the contention of the learned senior counsel for the appellant and we are of the view that once the name of the appellant was in the selection list and that of respondent no.5 was not there, merely because on the basis of a certificate later on produced by him, the authorities found that he was more meritorious and directed him to be sent for Patwari training, ignoring the claim of the appellant, who was the last selected candidate as upheld by the learned Single Judge was not correct, inasmuch as such order was passed by the authorities without giving an opportunity to the petitioner to explain his case.

8. We are of the considered view that in these circumstances, it is appropriate to direct the respondents to give a show cause notice to the appellant, within a period of three weeks from today. Appellant will be free to file his reply if any, within two weeks of service of show cause notice. In case respondents find that respondent no.5 is more meritorious than the appellant, so as to deprive the appellant from the place in the selection list, after hearing him, will pass a speaking order within a period of two weeks thereafter, deciding as to whether the appellant or the respondent no.5 is more meritorious.

9. Till such time, the final order is passed by the authorities, the interim order passed by this Court shall remain in force. In case the respondents find that the appellant also has a case to remain in the select list and is entitled to selection, then the post which is lying vacant in view of the directions of the interim order passed by this Court shall be given to the appellant.

With these observations the writ appeal is disposed of with no order as to costs.

Appeal disposed of.

I.L.R. [2014] M.P., 1233
WRIT APPEAL
Before Mr. Justice Rajendra Menon & Mr. Justice A.K. Sharma
W.A.No. 1068/2013 (Jabalpur) decided on 3 March, 2014

RAVI SHANKAR NAYAK ...Appellant
Vs.
RAJA BHAIYA PATEL & ors. ...Respondents

Minor Mineral Rules, M.P. 1996 - Environmental Clearance - Whether necessary **- Direction issued by the Supreme Court in Deepak Kumar's case cannot be restricted to mean that it applies only to fresh grant or renewal - In all cases where no mining activities are being carried out for any reason, environmental clearance is necessary before granting permission - Appeal dismissed. (Para 10)**

गौण खनिज नियम, म.प्र. 1996 – पर्यावरण अनापत्ति – क्या आवश्यक है – उच्चतम न्यायालय द्वारा दीपक कुमार के प्रकरण में जारी किये गये निदेशों को इस अर्थ तक सीमित नहीं किया जा सकता कि वह केवल पुनः प्रदान करने के लिये या नवीनीकरण के लिये लागू होते हैं – उन सभी मामलों में जहां किसी कारणवश खनन कार्यवाहियां नहीं की जा रही हैं, अनुमति प्रदान किये जाने से पूर्व पर्यावरण अनापत्ति आवश्यक है – अपील खारिज।

Cases referred :

(2001) 7 SCC 318, (2012) 4 SCC 629.

K.C. Ghildyal, for the appellant.
Anshuman Singh, for the respondent No.1.
Rajesh Tiwari, G.A. for the respondents No. 2 & 3.

ORDER

The Order of the Court was delivered by : **RAJENDRA MENON, J. :-** This is an appeal under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 calling in question certain observations and directions issued by the Writ Court in its order dated 5.8.2013 passed in W.P. No.8620/2013.

2. Facts in brief goes to show that the Mining Department in the State of Madhya Pradesh issued a auction notice for the purpose of quarrying of sand in an area measuring 14.5 hectares situated in village Paria, Tehsil Gaurihar,

District Chhatarpur. It is seen that the appellant herein and respondent No.1 participated in the auction proceedings that was held on 15.2.2008 and being a successful bidder, the bid was finalized in favour of the appellant. The appellant was granted the quarry lease for a period of two years from 19.2.2008 to 18.2.2010. The formalities for grant of lease was completed and a lease agreement was executed between the parties. However, in the meanwhile, a Public Interest Litigation was filed before this Court by one Shri Ajay Dubey which was registered as W.P. No.1578/2008. Before filing of this writ petition, the appellant operated the quarry in accordance to the lease agreement for about a period of one year. In the meanwhile, due to certain interim order passed in the Public Interest Litigation filed by Shri Ajay Dubey, working in the quarry lease was stopped. Finally, the Public Interest Litigation was disposed of. It is said that when the Public Interest Litigation was pending, due to an interim order passed by the Division Bench of this Court on 19.2.2009 the M.P. State Mining Corporation issued the Notification and from 28.2.2009 the appellant was prevented from carrying out the mining operation. It is said that they were directed to obtain "No Objection" or consent from the Pollution Control Board and when the area was tried to be auctioned again, the appellant challenged the same by filing a Writ Petition before this Court being W.P. No.15338/2010 and on 15.11.2010 the said writ petition was disposed of with a direction that the petitioner may submit a representation and the competent authority shall consider it sympathetically. The representation was rejected on 12.12.2011 and therefore, appellant again filed W.P. No.2187/2011 before this Court and vide order Annexure A/1 the said Writ petition was disposed of by a Division Bench of this Court, based on a judgment of the Supreme Court in the case of *Anil Rai Vs. State of Bihar* - (2001)7 SCC 318, the following directions were issued in the said writ petition :-

> "4. For these reasons, we quash the order dated 12.12.2011 passed by the Collector, Chhatarpur. We also direct that the petitioner shall be allowed to operate the sand quarry for a full period of two years subject to adjustment for the period for which he has already operated. Needless to mention that the petitioner shall remain liable to pay royalty and make other payments to the State Government in accordance with the terms of the quarry lease."

3. It is said that in pursuance to the order passed vide Annexure A/2 dated 15.4.2013, the Collector, Chhatarpur granted permission to the appellant

to carry out the mining operation for the period when the appellant was prevented from carrying out the mining operation and challenging this order, respondent No.1 filed the petition in question before the learned Single Judge. After hearing all concerned, the learned Single Judge by the order in question passed on 5.8.2013 found that the respondent No.1 had no locus standi to file the petition and therefore, held that the petition is liable to be dismissed. However, having held so, it is said in para 4 the matter was decided in the following manner :-

> "4. According to me, the present petitioner has no locus standi to file this petition because neither he was a party in the earlier petition nor the quarry lease for which the respondent no.3 has been allowed to carry out the work is of petitioner. However, according to me, the State Government is misconstruing the order passed by the Division Bench of this Court dated 23.11.2012. Nowhere in this order it has been so mentioned that environmental clearance under the Environment (Protection) Rules, 1986 is not required in pursuance to the notification dated 14.09.2006 (Annexure-P/13) issued by the Ministry of Environment and Forest. According to me, respondent no.3 shall be able to carry out mining excavation for the period he could not work in terms of order passed by the Division Bench in W.P. No.21897/2011 (Annexure-P/11) but only after obtaining environmental clearance."
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> (Emphasis Supplied)

4. Grievance of the appellant now is that once it is held by the learned Writ Court that respondent No.1 has no locus standi to file the writ petition, the direction issued for obtaining environmental clearance under the Environment (Protection) Rules, 1986 was wholly unwarranted and this direction by the learned Single Judge without hearing the appellant and without considering the facts and circumstances of the case was not proper.

5. Shri K. C. Ghildyal, learned counsel for the petitioner argued that as far as the appellant was concerned, the minor lease was granted to the appellant for a period of two years from 19.2.2008 to 18.2.2010 and because of the interim order passed by this Court in the Public Interest Litigation, W.P. No.1574/2008, the appellant was prevented from carrying out the mining

operation for certain period. The appellant having been held entitled to carry out mining operation vide order passed by the Division Bench on 23.11.2012 in W.P. No.21897/2011, it is a case where the notification and amendment to the rules brought into force after the judgment rendered by the Supreme Court in the case of *Deepak Kumar Vs. State of Haryana* - (2012)4 SCC Page 629 cannot be applied. Shri Ghildyal argued that the appellant's quarry lease having been granted much prior to issuance of the directions by the Supreme Court in the case of *Deepak Kumar* (supra) and the amendment to the rules which is prospective in nature, a quarry lease granted to the appellant cannot be adversely effected because of the subsequent development. It is said that without considering all these factors and without giving any opportunity to the appellant to give their say, the learned Writ Court made the aforesaid observation which is not warranted. By referring to the judgment in the case of *Deepak Kumar* (supra) Shri K. C. Ghildyal tried to emphasize that the judgment in the case of *Deepak Kumar* (supra) does not effect the appellant and as far as the appellant is concerned, it is not necessary for them to obtain any environmental clearance. Accordingly, he submits that the observations made are totally unwarranted and the same be quashed.

6. Shri Anshuman Singh, learned counsel even though said that he has not challenged the order passed questioning the locus standi of respondent No.1, but he tried to emphasize that once the law laid down by the Supreme Court in the case of *Deepak Kumar* (supra) warrants compliance with certain requirement of getting clearance from the environmental authorities, ignoring the same, appellant cannot be permitted to carry out the mining operation and therefore, the observations made needs no interference.

7. Learned counsel for the State Government have not come out with any specific stand but they only rely upon the return filed by them and the assertions contained in para 6 of the return filed in the original writ petition to say that in the light of the directions issued in the case of the present appellant in W.P. No.21897/2011 by a Division Bench of this Court on 23.11.2012, the State Government has issued the permission and as there was no specific order in the said case, no action was taken. That apart, in para 7 of the return filed in the original writ petition, it is said that in the present case as the State Government has neither sanctioned the quarry lease nor renewed the same but as extension has been granted in view of the order passed in W.P. No.2197/2011, it is said that the principles in the case of *Deepak Kumar* (supra) may not apply.

8. We have heard learned counsel for the parties at length and perused the record. The only question involved now in this writ appeal is as to whether the directions given by the learned Single Judge for getting clearance from the environmental authorities is an appropriate direction or not ? It is the contention of the appellant that the lease in question was granted to the appellant originally for a period from 19.2.2008 to 18.2.2010 and now when the appellant is permitted to carry out mining operation in pursuance to the lease already granted for the period when the lease was not operated, it is not a case of renewal of lease nor it is a case of fresh lease and therefore, environmental clearance is not required. The State Government in the writ petition only indicated that in the order passed by the High Court i.e. W.P. No.21897/ 2011 as there was no specific direction for getting environmental clearance, the Collector has granted the permission. Accordingly, the question now is as to whether in the light of law laid down by the Supreme Court in the case of *Deepak Kumar* (supra), appellant's contention can be accepted or not ? For deciding the aforesaid question, we are now required to consider the principles of law laid down by the Supreme Court in the case of *Deepak Kumar* (supra), the effect of the same and the mandate of the Supreme Court in the said case as far as it has to be applied to the present case.

9. If the entire judgment in the case of *Deepak Kumar* (supra) is read in its totality, it would be seen that in the aforesaid case Hon'ble Supreme Court had bestowed its anxious consideration to the environment effect of mining activities particularly sand mining and non implementation of various provisions for the purpose of environmental protection and pollution control. The Supreme Court has taken note of the recommendations made by the Core Group to which the matter was referred for consideration, the report submitted by the Core Group, the input received and the consideration made into the matter by the Ministry of Environment and Forest and in para 19 of the judgment the entire issues and recommendations made by the Ministry has been reproduced and thereafter, in para 20 the Supreme Court has held that the report submitted by the Core Group and the proposed action clearly shows that operation of mines even for minor mineral need to be subjected to strict regulatory parameters as that of major minerals and therefore, after observing the requirement of formulating a statutory rules for the same, the Government of India and various States were directed to look into the report of the Ministry of Environment and Forest, the recommendations made and based on the same to formulate statutory rules for carrying out the mining activities i.e. for

minor minerals. The Central Government was directed to take steps to enforce the statutory provisions strictly. Para 27 and 28 of the aforesaid judgment indicates the concern of the Supreme Court in the matter and finally in para 29, the Special Leave Petition was disposed of with the following directions :-

> "29. We, in the meanwhile, order that leases of minor mineral including their renewal for an area of less than five hectares be granted by the States/Union Territories only after getting environmental clearance from the MoEF. Ordered accordingly."

10. From the aforesaid direction, it is clear that even when disposing of the Special Leave Petition in the case of *Deepak Kumar* (supra), even though the Supreme Court granted time to the State Government and Union of India to formulate strict regulations, the direction of the Supreme Court was that even for minor minerals including their renewal for area which is less than 5 hectares, the State Government should not grant permission without obtaining environmental clearance from the Ministry of Environment and Forest. It is therefore, clear that with effect from the date this order was passed by the Supreme Court i.e. on 27th February 2012, for the purpose of carrying out the mining activities, even for minor minerals, where the area is less than five hectares, the mandate of Supreme Court was that environmental clearance should be obtained. Even though in para 29 words used are "renewal" and Shri K. C. Ghildyal wants us to construe it to mean for grant of fresh lease or renewal. We are of the considered view that the entire judgment reflects the concern of the Supreme Court with regard to impact of mining of minor minerals on Environment and Pollution and taking note of the same, the Supreme Court had directed that certain steps should be taken and even though the words used are "renewal" but the import of the judgment is that after the judgment of the Supreme Court for the purpose of permitting mining activities, environmental clearance is necessary. In the present case, from the facts that have come on record, it is clear that on the date when the aforesaid judgment and law was laid down by the Supreme Court i.e. on 27.2.2012, the appellant herein was not carrying out mining operation. From the material available on record, it is clear that after the orders were passed on 19.2.2009, mining activities in the area of more than 14 hectares was stopped and the right to carry out the mining operation again for the period when the lease was not operated accrued to the appellant when the writ petition was disposed of on 23.11.2012. That being so, for a period of about three years from 19.2.2009 to 23.11.2012, no mining activities were carried out, in the meanwhile on 18.2.2010 the lease

had expired and it is only after the judgment was rendered by this Court on 23.11.2012 on 12.12.2011 that the order was passed by the Collector on 16.4.2013 when permission was granted to carry out mining operation for the renewal period. Even though this is the permission granted in pursuance of already existing lease but if the contention of the appellant is accepted, it will amount to giving a too technical approach to the entire matter and permitting mining operation inconsistent to the rule/ law laid down by the Supreme Court. The fact remains that for about three years, no mining activities were carried out in the area and now when the mining activities were to start afresh, the question is as to whether the compliance with the direction of the Supreme Court is required ?

10. As the lease of the appellant had expired on 18.2.2010 and the cause of action for the appellant for filing the petition before the High Court accrued after fresh mining auction for grant of a fresh mining lease was in progress, then if the grant was made as per the proposed action which was challenged by the petitioner in W.P. No.2187/2011, then the law laid down in the case of *Deepak Kumar* (supra) would have to be strictly complied with for grant of mining lease after 27.2.2012. If that is the requirement of law, then we are of the considered view that by restricting the implementation of the Supreme Court judgment only to cases for renewal or fresh grant of lease, we would be laying down a precedent which would be contrary to the mandate of the Supreme Court. In this case, when the appellant was being permitted to carry out mining operation afresh on 15.4.2013, the law laid down by the Supreme Court mandating obtaining clearance from the Environment authorities has come into force and therefore, we are unable to accept the contentions advanced by Shri K. C. Ghildyal. That apart, when the mining operations were permitted to the appellant on 15.4.2013, records do indicate that in pursuance to the directions issued by the Supreme Court in the case of *Deepak Kumar* (supra), the statutory rules itself was amended and the amended provisions had come into force on 23rd March, 2013 when the M.P. Minor Mineral Rules, 1996 was amended as is evident from the Gazette Notification Annexure P/14. That being so, on 15.4.2013 even the statutory rules mandated obtaining environmental clearance and if the learned Single Judge taking note of all these provisions had directed for obtaining environmental clearance, then we see no error in the matter. If we approach the matter in a technical view as canvassed by Shri K. C. Ghildyal by saying that the law laid down by the Supreme Court and the statutory rules will only apply to cases where

fresh mining lease are being granted or where renewal is being obtained, we would be doing something which is not in accordance to the principles of law laid down by the Supreme Court in the case of *Deepak Kumar* (supra) and infact, we would be issuing a mandamus contrary to the mandate of the Supreme Court. The directions issued by the Supreme Court cannot be restricted to mean that it applies only to fresh grant or renewal. On the contrary it would mean that all cases where no mining activities are being carried out for any reason whatsoever and mining activities are proposed to be carried again and permission is to be granted by the statutory authority then before granting the permission, law laid down by the Supreme Court in the case of *Deepak Kumar* (supra) should be made applicable. Accordingly, we see no error in the directions issued by the learned Single Bench in the matter of seeking environmental clearance. We accordingly, held that there is no merit in the contentions advanced by Shri K. C. Ghildyal, therefore, we reject the same.

11. The appeal is therefore, dismissed.

Appeal dismissed.

I.L.R. [2014] M.P., 1240
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 8163/2007 (Jabalpur) decided on 5 April, 2013

BRAJESH SHARAN SHUKLA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Public Service (Promotion) Rules, M.P. 2002, Rule 7(9) - Service Law - Promotion **- Petitioner's ACRs were degraded by DPC after assigning reasons - He was put in select list according to marks obtained by him strictly in accordance with seniority - Promotion could not be granted due to non availability of vacancy - No junior was promoted - Fundamental right of consideration for promotion was not denied in arbitrary manner - Petition dismissed. (Para 14)**

लोक सेवा (पदोन्नति) नियम, म.प्र. 2002, नियम 7(9) – सेवा विधि – पदोन्नति – याची के वार्षिक गोपनीय प्रतिवेदनों को डी.पी.सी द्वारा कारण दर्शाने के पश्चात अवनत श्रेणीबद्ध किया गया – उसके द्वारा प्राप्त अंकों के अनुसार उसे चयन सूची में सम्यक रुप से वरिष्ठता के अनुसार रखा गया – रिक्ति की

अनुपलब्धता के कारण पदोन्नति प्रदान नहीं की जा सकी – किसी कनिष्ठ को पदोन्नत नहीं किया गया – पदोन्नति हेतु विचार में लिये जाने के मूलभूत अधिकार को मनमाने ढंग से वंचित नहीं किया गया था – याचिका खारिज।

Cases referred :

AIR 2000 SC 3243, AIR 1992 SC 1806, AIR 2007 SC 2296, AIR 2005 SC 2853.

Sanjay Agrawal, for the petitioner.
S.M. Lal, G.A. for the respondents No. 1, 2 & 4.
K.S. Wadhwa, for the respondent No.3.
Sanjay K. Agrawal, for the respondents No. 5, 6, 7, 10 &13.

ORDER

K.K. TRIVEDI, J. :- The grievance of the petitioner in this petition under Article 226 of the Constitution of India is that though he was considered for promotion on the post of Joint Registrar Cooperative Societies, but instead of promoting the petitioner, certain persons have been promoted and the claim of the petitioner is not considered properly. The representation made by the petitioner has been rejected, therefore, he is required to approach this Court by way of filing this writ petition.

2. Briefly stated facts are that the petitioner was appointed on the post of Assistant Registrar, Cooperative Societies on 29.4.1988. The petitioner joined the services on 2.6.1988. On account of meritorious services, the petitioner was considered for promotion timely and was promoted on the post of Deputy Registrar, Cooperative Societies vide order dated 30.10.1995. The services of the petitioner are governed by the Rules known as M.P. Sahkari Seva Bharti Niyam,1965 (hereinafter referred to as the Rules for short). According to the Schedule appended to the Rules, on completion of three years of minimum services as Deputy Registrar, Cooperative Societies, the petitioner became eligible to be considered for promotion on the post of joint Registrar, Cooperative Societies. Proper seniority of the petitioner was fixed and a gradation seniority list was circulated.

3. There were certain vacancies available on the post of Joint Registrar, Cooperative Societies and, therefore, the cases were to be considered for promotion. The post of Deputy Registrar, Cooperative Societies is Class-I post and the promotional post of Joint Registrar, Cooperative Societies is

also a Class-I post. Since at the time when the vacancy occurred on promotional post, Rules entitled M.P. Public Service (Promotion) Rules, 2002 (hereinafter referred to as the Promotion Rules for brevity) were promulgated, the claim of the petitioner was to be considered in accordance to the said Rules. It is contended that promotion on Class-I to Class-I post is based on merit-cum-seniority criteria and, therefore, the procedure as laid down under Rule 7 of the Promotion Rules was to be followed. However, though the petitioner has earned excellent remark in his confidential reports for the last 5 years from the date of Departmental Promotion Committee (hereinafter referred to as the DPC for short), which were to be taken into consideration, downgrading was done in the Annual Confidential Reports (hereinafter referred to as the ACRs for short) and the petitioner was categorized as very good officer and according to the criteria laid down under Rule7of the Promotion Rules, proper placement was not done on account of which though the petitioner was having excellent remark in his Annual Confidential Reports, he was not put in the category of outstanding officer and was thus not promoted. However, all seniors to the petitioner who were categorized as very good officers, were granted promotion. It is, thus, contended that because of the downgrading of the ACRs of the petitioner by the DPC, he was denied the promotion in arbitrary manner. According to the petitioner, such an act of the respondents was violative of not only the Promotion Rules, but also the specific instructions issued by the respondent-State in General Administration Department vide circular dated, 29.9.2004. Thus, the petitioner contends that he was to be promoted over and above the private respondents and, as such, the order issued in respect of private respondents is liable to be quashed.

4. Refuting the allegations made by the petitioner, the respondent-State has filed a return and has contended that the DPC meeting was rightly conducted strictly in terms of the Promotion Rules. Since the vacancies were available on the post of Joint Registrar, Cooperative Societies, a meeting of the DPC was held on 26.12.2005. The petitioner was also in the zone of consideration and, therefore, his name was included in the said list. The Committee evolved the criterias strictly in terms of the provisions of the Promotion Rules and after examining the cases of each and every officer, reached to the conclusion that none of the officers were to be put in the outstanding category as there was improper grading done in the ACRs of the officers. The official respondent has further contended that since unjustified gradings were done in the ACRs by the official concerned, the DPC took up

the matter modified the gradings in respect of all officers and strictly making the assessment on the basis of ACRs, prepared the list of suitable officers to be promoted on the post of Joint Registrar, Cooperative Societies. According to the seniority, since the name of the petitioner was not reached within the vacancies available, the order of promotion was not issued in his respect. However, only the seniors to the petitioner have been promoted and none of the junior has been promoted superseding the claim of the petitioner. In view of this, it is contended that the order impugned has rightly been issued, the representation of the petitioner has rightly been rejected and, therefore, no relief can be granted to the petitioner. The M.P. Public Service Commission, the respondent No.3, has also contended in the same manner and has said that the consideration was done in appropriate manner and no wrong was committed.

5. The private respondents by filing reply to the writ petition have contended that there was no illegality committed by the DPC in considering the cases of persons like petitioner. It is contended that since the name of the petitioner was in the zone of consideration, it was rightly considered. The unwarranted gradings done in the ACRs of each and every candidate was looked into and rightful assessment of merit was done by the DPC. Only because such a grading was done by the DPC, it was not to be alleged that any arbitrary action was taken by the DPC. It is contended that since the gradings in respect of all those who were put in the category of excellent officers, were examined minutely and with the reasons recorded in the proceedings, the DPC has re-graded the ACRs of such officers and has reached to the conclusion that none of the officers were to be put in the excellent or outstanding category, no wrong was committed by the DPC. It is further contended that since the petitioner is not superseded in the matter of promotion as none of his junior has been promoted, the claim made in the petition is misconceived.

In terms of the direction issued by this Court, the DPC proceedings have been produced before this Court for perusal.

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

7. To dwell upon the issue whether the act was rightly done by the DPC in re-grading the ACRs of all such candidates, it is necessary to examine the Promotion Rules. It is specifically provided in the Promotion Rules that the

said Rules would apply to promotion in public service of the State of Madhya Pradesh, notwithstanding contained in any **Service Rules.** The criteria for promotion, the determination of basis of promotion is prescribed in Rule 4 of the Promotion Rules, which categorically prescribes that promotion to Class-IV to Class-IV, Class-IV to Class-III, ClassIII to Class-III, Class-III to Class-II, Class-II to Class-II, Class-II to Class-I shall be made on the basis of seniority subject to fitness. It is further provided that promotion from Class-I to higher pay scale of Class-I post shall be made on the basis of merit-cum-seniority. Since admittedly, the post of Deputy Registrar, Cooperative Societies is a Class-I post from which the promotion is to be made on the post of Joint Registrar, Cooperative Societies, which too is a Class-I post, the criteria of merit-cum-seniority would be applicable. For the said purposes, the specific provisions are made in Rule 7 of the Promotion Rules, which reads thus:-

> "7. **Promotion on the basis of merit-cum-seniority.-** (1) Where promotions are to be made on the basis of merit-cum-seniority, the zone of consideration, that is the number of public servants to be considered for promotion out of those eligible public servants in the feeder cadre/part of the service/pay scale of post shall be as under :-
>
> The formula for the further calculation shall be that the "4" be added to the double the number of anticipated vacancies.
>
> (2) Where adequate number of public servants belonging to Scheduled Castes and Scheduled Tribes are not available within the zone of consideration as mentioned above, then the zone of consideration may be enlarged to seven times the number of vacancies and the names of only such public servants belonging to Scheduled Castes and Scheduled Tribes who are in the enlarged zone of consideration shall be considered for filling up the reserved posts.
>
> (3) The names of only such public servants shall be considered for promotion who have completed the requisite number of years of service in the feeder cadre/part of the service/pay scale of post according to the Recruitment Rules for promotion and who are within the zone of consideration. In addition to this, in view of inclusion, in the select list, the names of two public servants or 25 per cent of the number of

the public servants included in select list whichever is more, the names of the required number of the public servants who are in the zone of consideration shall be considered for each category to fill up the unforeseen vacancies occurring during the course of the aforesaid period.

Explanation. - Manner of computation for eligibility for promotion - Period of qualifying service on 1st January of the relevant year in which Departmental Promotion Committee/Screening Committee is convened shall be counted from the calendar year in which the public servant has joined the feeding cadre/part of the service/pay scale of the post and not from the date of joining of the cadre/part of the service/pay scale of post.

(4) The number of vacancies for promotion during the course of the year i.e. from 1st January to 31st December shall be worked out after taking into account the existing and anticipated vacancies on account of retirement and promotions to higher cadres/part of service/higher pay scale of posts. Vacancies arising out of deputation for periods exceeding one year shall also be taken into account. The number of vacancies to be reserved for public servants belonging to Scheduled Castes and Scheduled Tribes shall be worked out on the basis of the roster which is required to be maintained in accordance with the provisions of Rule 9 of these rules.

(5) The meeting of the Departmental Promotion / Screening Committee shall be held every year. It shall consider the suitability of the public servant for promotion separately with reference to the vacancies of each previous year starting with the earliest year onwards. The Departmental Promotion Committee/ Screening Committee shall consider, the suitability of the public servants for promotion to fill up the unfilled vacancies of the earlier year or years separately and prepare the select list for the relevant year accordingly. Thereafter, the Departmental Promotion Committee/Screening Committee shall consider the suitability of the public servants for promotion to fill up the existing and anticipated vacancies of the current year.

(6) The Departmental Promotion/ Screening Committee shall assess the suitability of the public servants for promotion on the basis of their service record and with particular reference to the Annual Confidential Reports (ACRs) for 5 preceding year. However, in cases where the required qualifying service is more than 5 years, the Departmental Promotion/Screening Committee shall see the record with particular reference to the ACRs for the years equal to the required qualifying service.

(7) When one or more ACRs are not available for any reason for the relevant period, the Departmental Promotion/ Screening Committee shall consider the ACRs of the years preceding the period in question.

(8) When the eligibility for promotion from Class I to. higher pay scale of Class-I posts, the benchmark grade shall be "Very Good."

(9) The Departmental Promotion / Screening Committee shall make a relative/comparative assessment of the merits of public servants who are within the zone of consideration and make an overall grading of the public servants' merit on the basis of their service records and place them in the categories as "Outstanding", "Very Good". "Good"; "Average" and "Poor", as the case may be. However, only those public servants who are graded as " Very-Good" and above will be included in the select list, by placing the public servants graded as "Outstanding" on top followed by those graded as "Very-Good", subject to availability of vacancies, with the public servants with the same grading maintaining the inter-se seniority in the feeder cadre/part of the service/pay scales of post.

(10) Separate select lists shall be prepared for the public servants of unreserved category, Scheduled Castes and Scheduled Tribes category in which the names of such number of public servants belonging to unreserved category, Scheduled Castes and Scheduled Tribes category shall be included which is equal to the number of posts reserved for each of these

categories. In addition to this, names of two public servants or twenty five per cent of the number of public servants included in the select list whichever is more, will also be included in the select list of each category as prescribed in sub-rule (3).

(11) The promotion to the higher cadre/part of the service/pay scale of post shall be made from these select lists according to the names appearing in the said select lists and according to the prescribed order shown in the roster. Reserved posts shall be filled up only by the public servants belonging to the same class for which the posts are reserved.

(12) In order to determine the inter-se seniority of the public servants belonging to the three categories in the cadre/ part of the service/pay scale of post to which the promotion is to be made, a combined select list of the above three categories of public servants shall be prepared according to the order of merit determined by the Departmental Promotion/Screening Committee.

(13) The names of public servants promoted on the basis of above combined select list shall be placed enblock below the name of last public servant promoted on the basis of the immediately preceding year's combined select list.

(14) Where sufficient number of public servants with the required benchmark grade are not available within the zone of consideration, public servants with the required benchmark will be placed on the panel and for the unfilled vacancies, the appointing authority, shall hold a fresh meeting of the Departmental Promotion/Screening Committee by considering the required number of public servants beyond the original zone of consideration.

(15) The reserved post which remains unfilled due to non-availability of suitable public servants of the category for which the post is reserved despite consideration of the names of all public servants eligible for consideration as per the Recruitment Rules, shall be carried forward, that is to say,

shall be kept vacant until the suitable public servant belonging to that reserved category is available. In no circumstances any vacancy of reserved category shall be filled-up by promotion from the public servant belonging to any other category.

(16) Wherever the reserved vacancies for Scheduled castes and Scheduled Tribes in all cases of promotion have remained unfilled in the earlier year of years, the backlog and/ or carried forward vacancies would be treated as a separate and distinct group and will not be considered together with the reserved vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year. In other words, the ceiling of fifty per cent on filling up of reserved vacancies would apply on the reserved vacancies which arise in the current year and the backlog/ carried forward reserved vacancies for Scheduled Castes or Scheduled Tribes of earlier year or years would be treated as a separate and distinct group and would not be subject to ceiling of fifty per cent:

Provided that Appointing Authority shall convene a special meeting of Departmental Promotion Committee/ Screening Committee within six months to fill up backlog vacancies and if such vacancies still remain unfilled, they shall not be de-reserved in any manner for filling up by the public servants not belonging to the category for whom the post or posts are reserved.

(17) When a public servant, whose name is included in the select list, wants to refuse promotion, he may make a written request that he may not be promoted. Such request shall be considered by the Appointing Authority taking relevant aspects into consideration. If the reasons adduced for refusal of promotion are acceptable to the Appointing Authority, the next public servant in the select list may be promoted. However, since it may not be administratively possible or desirable to offer appointment to the public servants who initially refused promoted, on every occasion on which a vacancy arises during the period of validity of the panel, no fresh offer of appointment

on promotion shall be made in such cases for a period of one year from the date of refusal of first promotion or till a next vacancy arises, whichever is later. On the eventual promotion to the higher cadre/part of the service/ pay scale of post, such public servant shall lose seniority vis-a-vis his juniors promoted in the preceding year to the higher cadre/ part of the service/ pay scale of post:

In cases where the reasons adduced by the public servant for his refusal for promotion are not acceptable to the Appointing Authority then he shall enforce the promotion on the public servant and in case the public servant still refuses to be promoted, then even disciplinary action may be taken against him for refusing to obey his order."

8. Sub-rule (9) of Rule 7 of the Promotion Rules, will make it clear that the DPC/Screening Committee was authorised by the Rules aforesaid to **make an overall grading of the public servant merit on the basis of their service record** and place them in the category of outstanding, Very Good, Good, Average and Poor as the case may be. The DPC itself is authorised to make grading of the public servant irrespective of the categorisation whatsoever done in the ACRs. However, a check is put on the DPC by issuance of the circular dated 29.9.2004 (Annx.P/6) in such a matter where it has been categorically said that the DPC/Screening Committee will make the assessment of the ACR only on the basis of remarks finally accepted by the authorities. An example is also quoted in the said circular, which for the purposes of convenience is reproduced hereunder :-

"(vi) विभागीय पदोन्नति/छानबीन समिति द्वारा विचाराधीन अवधि के गोपनीय प्रतिवेदनों के मूल्यांकन के आधार पर अंकों का निर्धारण "स्वीकृतकर्ता अधिकारी" द्वारा किये गये मूल्यांकन के आधार पर किया जावेगा। यदि समीति गोपनीय प्रतिवेदन में प्रतिवेदक अधिकारी तथा समीक्षक अधिकारी द्वारा किये गये मूल्यांकन के आधार पर स्वीकृतकर्ता अधिकारी के मूल्यांकन से सहमत नहीं है तो वह इसके लिए अपने कारण लिपिबद्ध करते हुए मूल्यांकन करेगी परन्तु समिति स्वीकृतकर्ता अधिकारी द्वारा किये गये मूल्यांकन के आधार पर प्राप्त अंक में केवल "एक" अंक बढ़ा सकेगी अथवा घटा सकेगी। उदाहरणार्थ किसी लोक सेवक के वर्ष 2000 के गोपनीय प्रतिवेदन में प्रतिवेदक अधिकारी एवं समीक्षक अधिकारी द्वारा मूल्यांकन "उत्कृष्ट" श्रेणी किया है जिसमें संबंधित लोकसेवक को 4 अंक प्राप्त होने चाहिये। पदोन्नति/छानबीन समिति

उसके द्वारा लिपिबद्ध किये गये कारणों से स्वीकृतकर्ता अधिकारी के उपरोक्त मूल्यांकन से सहमत नहीं हैं तो वह उक्त 4 अंको में केवल "एक" अंक तक ही कम कर सकेगी। इस स्थिति में संबधित लोकसेवक का वर्ष 2000 के गोपनीय प्रतिवेदन में पदोन्नति/छानबीन समिति द्वारा किये गये पुर्नमूल्यांकन के आधार पर 3 अंक प्राप्त होंगे।"

9. This further makes it clear that overall gradings of officers to be considered for promotion are not required to be changed except in exceptional circumstances. The DPC proceedings indicate that the ACRs of such officers were made available and in reference to the circular referred to hereinabove, the specific decision was taken by the DPC to the effect that where there was difference of opinion with respect to the final gradings made in the ACRs by the accepting officer or where the language of ACRs grading is not clear, the overall service record of the officer concerned would be considered and re-grading of the ACRs would be done. A further decision was taken by the DPC that in terms of the specific instructions issued by the General Administration Department of Government of M.P., an officer is to be graded as excellent only in specific circumstances if he has shown exceptional quality of performance of duties, therefore, the merit of those officers who have been graded as excellent officers in their ACRs by the departmental authorities was to be examined in appropriate manner and in case it is found that such excellent grading has been done without assigning any reasons, the said grading would be redone. Accordingly, after examining ACR of all those who were graded as excellent officers in their ACRs by the departmental authorities and finding that no exceptional performance was recorded in ACRs and no reasons were assigned to grade them excellent officers by departmental authorities, and such officers, were having no exceptional merits, the gradings of all such officers were reduced by one mark in terms of the provisions of the Promotion Rules. As has been referred to hereinabove, this was permissible in terms of the Promotion Rules. According to the said criteria, all those who were graded as excellent officers without any justified reasons in their ACRs, were re-graded. The petitioner was also one who was to be re-graded because of the said criteria adopted by the DPC. The petitioner too was graded excellent in all his ACRs for the last five years which were taken into consideration and after perusal of the ACRs since such excellent grading was done in respect of petitioner without recording any exceptional reason or performance of duties by the petitioner, by the departmental authorities, re-grading of the same was done by reducing one mark. The petitioner too was graded as very good officer.

10. It is, vehemently, contended by learned counsel for the petitioner that

this was beyond the jurisdiction of the DPC. Reading provisions of circular dated 29.9.2004 as has been quoted hereinabove, it is contended that the criteria adopted by the DPC was beyond its jurisdiction as this was not provided under the Promotion Rules. Something which was not provided under the Promotion Rules was not to be adopted as a criteria by the DPC. Further, it is contended that a perusal of the ACRs of the petitioner whichwere taken into consideration, it would be clear that there was no dispute or difference of opinion with respect to the grading done by initiating officer of the ACRs, reviewing officer or final accepting authority and, therefore, the DPC was not justified in re-grading the ACRs of the petitioner. It is contended that in fact, the petitioner was to be graded as excellent officer because of the gradings done in the ACRs of the petitioner and thus he was to topped the select list being the officer found in the excellent category. Had it been done in appropriate manner, the petitioner would have been selected on merits and would have been promoted when the private respondents were promoted. It is, thus, contended that it was an arbitrary act on the part of the respondents in reducing the gradings of the ACRs of the petitioner and denying him the promotion.

11. Per contra, it is contended by learned counsel appearing for the respondents that such a submission of the petitioner is to be rejected outrightiy. Not only it is provided under the Promotion Rules, but otherwise also the DPC is required to examine the merits of each and every candidates in objective manner. Merely because somebody has obtained excellent remarks in the ACRs, without performing any exceptional duties or quality of duties, he was not to be treated as excellent officer. If this is done, it would amount to favouring somebody and denying the benefit of promotion to the senior persons who may have the good service record to their credit. It is further contended that perusal of the ACRs of the petitioner would make it clear that there was no exceptional reasons indicated on account of which the petitioner could have been graded as excellent officer. There was no justified noting made by the accepting officer in all such ACRs of the petitioner. Only because the petitioner has remained working for considerable long time at the secretariat level, the ACR gradings were done and only because of this reason, he was not to be granted promotion superseding the claims of senior who were graded as very good officer. It is contended that if re-grading is properly done in respect of all such officers for assessment of their merit by the DPC, no wrong was committed and as such, the petitioner would not be entitled to any relief

in the writ petition. It is putforth that in various cases the Apex Court has held that judicial review of such action taken by DPC is not permissible. The reliance is placed by learned counsel for respondents in several case which are referred hereinafter.

12. After giving thoughtful consideration and after going through the law laid down by the Apex Court, it is a case in which this Court need not to interfere in the matter of selection of candidate for promotion. It is trite law that the DPC is the expert body to consider the claims for promotion. In case of *Badrinath Vs. Government of Tamil Nadu* and others (AIR 2000 SC 3243), the Apex Court has very categorically held that the assessment made by an expert body like DPC in regard to merit or fitness can be interfered with if it is proved that the assessment made by the said expert body is based on inadmissible or trivial material or without giving due weightage to the positive aspects of one's career or is based on arbitrary or malafide reasons. It would not be open to the Court to interfere in such assessment if it is not proved that there is any arbitrary or malafide reasons or the circumstances as referred to hereinabove are available, to interfere in the matter of such assessment by the Court of law in exercise of power of judicial review. The law laid down by the Apex Court in this respect in paragraphs 40 and 41 of the report is very clear which read thus :-

> "40. Unless there is a strong case for Applying the Wednesbury doctrine or there are mala fides, courts and Tribunal cannot interfere with assessments made by Departmental Promotion Committee in regard to merit or fitness for promotion. But, in rare cases, if the assessment is either proved to be malafide or is found based on inadmissible or irrelevant or insignificant and trivial material- and if an attitude of ignoring or not giving weight to the positive aspects of one's career is strongly displayed, or if the inferences drawn are such that no reasonable person can reach such conclusions, or if there is illegality attached to the decision,- then the powers of Judicial review under Article 226 of the Constitution are not foreclosed.
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> 41. While the Courts are to be extremely careful in exercising the power of judicial review in dealing with assessment made by Departmental Promotion Committees, the

executive is also to bear in mind that, in exceptional cases, the assessment of merit made by them is liable to the scrutinised by Courts, within the narrow Wednesbury principles or on the ground of malafide. The judicial power remains but its use is restricted to rare and exceptional situations. We are making these remarks so that Courts or tribunals may not be quoting this case as an easy precedent- interfere with assessment of merit in every case. Courts and Tribunals cannot sit as appellate authorities nor substitute their own views to the views of Departmental Promotion Committees. Undue interference by the Courts or Tribunals will result in paralysing recommendations of Departmental Committee and promotions. The case on hand can be a precedent only in rare case."

13. Though it is contended by learned counsel for respondents that it was not necessary for the Selection Committee or the DPC to record its reasons for doing so, but as is specifically provided under the Promotion Rules and under the administrative instructions which are part of the Rules being supplementary to the same, the reasons were required to be recorded by the DPC in making the re-grading of the ACRS. However, once the reasons are recorded, strictly in terms of the provisions of the Rules, the correctness of the said reasons are not to be reexamined only because it is said by the petitioner that such reasons were not justified. Only in exceptional cases such power is not required to be exercised by the DPC. As has been pointed out, sub-rule (9) of Rule7of the Promotion Rules gives power to the DPC to make its own assessment of the merit of individual while considering his/ her case for promotion. This makes it clear that if with certain reasons such a power is exercised, the allegation of malafide or arbitrariness are to be rejected, therefore, with great respect to the law laid down by the Apex Court in the case of *National Institute of Mental Health and Neuro Sciences Vs. Dr.K. Kalyana Raman* and others (AIR 1992 SC 1806), it is held that reasons were to be recorded in terms of the provisions of the Promotion Rules and that was done by the DPC, in the present case, therefore, merely on this count, the proceedings of DPC cannot be said to be vitiated. This finding further gets strength from the law laid down by the Apex Court in the case of *Union of India and others Vs. A.K. Narula* (AIR 2007 SC 2296), wherein the Apex Court has categorically held that in absence of allegation

of malafides against the DPC and absence of arbitrariness in assessment on the basis of entries in confidential reports, interference in the assessment of merit done by the DPC is not permissible. Another aspect is that there is no challenge to the provisions of Promotion rules which gives authority to the DPC to make the re-grading and assessment of merits of candidate concerned. The circular issued by the State Government has also not been called in question in the present writ petition. In absence of any such challenge, if a selection is made after re-grading of the ACRs, that too within the permissible limit as per Rules, the contentions raised by the learned counsal for the petitioner cannot be accepted and it cannot be said that there was any arbitrary exercise of power by the DPC. The law in this respect is very clear as laid down by the Apex Court in the case of *U.P.S.C. Vs. K. Rajaiah and others* (AIR. 2005 SC 2853) wherein it has been held that in absence to such a challenge, it would not be possible for the Courts of law to exercise power of judicial review in the matter of appreciation of merits of candidates by the expert body like DPC.

14. Herein the case in hand, it appears that the petitioner was graded excellent in his ACRs and those ACRs have been re-graded by the DPC. However, as a decision in common was taken by the DPC to re-grade the ACR within the power conferred on the DPC in terms of the provision of Rule 7(9) of the Promotion Rules, it cannot be said that such an exercise of power was bad in law or was a malafide or arbitrary act of the DPC. Challenge to such an action of the respondents, cannot be accepted in such a case. Even otherwise the petitioner was not the only candidate whose ACRs were re-graded by the DPC. He too was graded as 'Very Good' in overall consideration of his service record and was put in the select list according to marks received by him strictly in order of his seniority. Only reason of his non-promotion was non-availability of vacancy on promotional post. No junior to him was treated more meritorious to him nor any such junior was promoted superseding the petitioner. The fundamental right of consideration for promotion was not denied to the petitioner in any arbitrary manner. Thus, no case is made out to interfere in order of promotion so issued by the respondent-State.

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

Petition dismissed.

I.L.R. [2014] M.P., 1255
WRIT PETITION
Before Mr. Justice Ajit Singh
W.P. No. 3753/2013 (Jabalpur) decided on 16 April, 2013

SHRI JAGDISH MANDIR GANESH MANDIR PUBLIC TRUST, JABALPUR & anr. ... Petitioners
Vs.
STATE OF M.P. & anr. ...Respondents

Public Trusts Act, M.P. (30 of 1951), Section 14 **- Application filed by petitioner u/s 14 for modification or clarification of order - Application dismissed on the ground that respondent No. 2 has no powers u/s 14 of the Act to review an earlier order passed by him - Held - Respondent No. 2 is not correct in holding that he has no power to modify or review the condition earlier imposed by him - Section clearly states that only the conditions or restrictions, contained in the instrument of trust or in the order of any court cannot be modified by him - He only has to see whether sanction of transaction for which an application is made will be beneficial to the interests of the public trust - Impugned order quashed - Matter is remanded back to decide the petitioner's application afresh on merits. (Para 4)**

लोक न्यास अधिनियम, म.प्र. (1951 का 30), धारा 14 – याची द्वारा आदेश के आशोधन या स्पष्टीकरण हेतु धारा 14 के अंतर्गत आवेदन प्रस्तुत किया गया – आवेदन को इस आधार पर खारिज किया गया कि प्रत्यर्थी क्र. 2 को उसके द्वारा पूर्व में पारित किये गये आदेश का पुनर्विलोकन करने की अधिनियम की धारा 14 के अंतर्गत कोई शक्ति नहीं – अभिनिर्धारित – यह धारणा करने में प्रत्यर्थी क्र. 2 सही नहीं था कि उसके द्वारा पूर्व में अधिरोपित शर्त का आशोधन या पुनर्विलोकन करने की उसे शक्ति नहीं – धारा स्पष्ट रुप से उल्लिखित करती है कि केवल न्यास के लिखत में अथवा किसी न्यायालय के आदेश में अंतर्विष्ट शर्तें या निर्बन्धन को उसके द्वारा आशोधित नहीं किया जा सकता – उसे केवल यह देखना है कि संव्यवहार की मंजूरी, जिसके लियें आवेदन किया गया है, क्या लोक न्यास के हितों के लिये लाभदायक होगी – आक्षेपित आदेश अभिखंडित – याची का आवेदन गुणदोषों पर पुनः निर्णित किये जाने के लिये मामला प्रतिप्रेषित।

Akshay Sapre, for the petitioners.
Rahul Jain, Dy. A.G. for the respondents.

ORDER

AJIT SINGH, J. :- By this petition, the petitioners have prayed for quashing of order dated 23.7.2012, Annexure P4, passed by respondent no.2 Registrar, Public Trust and Sub-Divisional Officer, Jabalpur.

2. Petitioner no.1 is a public trust registered under the provisions of the Madhya Pradesh Public Trust Act, 1951 (in short, "the Act"). And petitioner no.2 is a company registered under the provisions of the Companies Act, 1956. A portion of land belonging to petitioner no.1 has been granted on lease to petitioner no.2 by a registered lease deed dated 9.4.1949. The lease is also being renewed from time to time. As per Clause 3(ii) of the lease deed, lessee is entitled to sub-let leased premises or a portion thereof. In the year 2008 an application under section 14 of the Act was filed for renewal of lease for a further period of 30 years. The application was allowed by respondent no.2 vide order dated 4.6.2010 on the ground that renewal would fetch revenue to the trust and was beneficial to it. Respondent no.2, however, imposed a condition no.4 that the premises shall not be further given on lease to any other party. Aggrieved with the said condition, the petitioner filed an application under section 14 of the Act for modification or clarification that they would be entitled to seek loan from bank on the basis of leased land or collaborate with other persons for business purposes. But respondent no.2 by the impugned order dated 23.7.2012 dismissed the application on the ground that he has no powers under section 14 of the Act to review an earlier order passed by him.

3. Section 14 of the Act reads as under:

> **14. Previous sanction of Registrar, in cases of sale, etc., of property belonging to a public trust.**-(1) Subject to the directions in the instrument of trust or any direction given under this or any other law by any court-
>
> (a) no sale, mortgage, exchange of gift of any immovable property; and
>
> (b) no lease for a period exceeding seven years in the case of agricultural land or for a period exceeding three years in the case of non-agricultural land or building;
>
> belonging to a public trust, shall be valid without the previous sanction of the Registrar.

(2) The Registrar shall not refuse his sanction in respect of any transaction specified in sub-section (1) unless such transaction will, in his opinion, be prejudicial to the interests of the public trust.

4. A bare reading of the above quoted section makes it clear that respondent no.2 is not correct in holding that he has no power to modify or review the condition earlier imposed by him, The section clearly states that only the conditions or restriction which are contained in the instrument of trust or order of any court cannot be modified by him. In other cases, respondent no.2 only has to see whether sanction of transaction for which an application is made will be beneficial to the interests of the public trust. I, therefore, quash the order dated 23.7.2012, Annexure P4, and remand the matter to respondent no.2 for deciding the petitioner's application afresh on merits.

5. The petition is allowed but without any order as to costs.

Petition allowed.

I.L.R. [2014] M.P., 1257
WRIT PETITION
Before Mr. Justice N.K. Mody
W.P. No. 8548/2012 (Indore) decided on 12 July, 2013

PREMKUMAR ...Petitioner
Vs.
SMT. SAROJ ...Respondent

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(b)(c)(f) & 12(4) - Eviction - **Petitioner became absolute owner on 01.12.2006 by virtue of relinquishment deed - Suit was filed on 16.06.2007 - As the period of 1 year was not expired after becoming owner - Therefore, suit is barred u/s 12(4) of the Act - Held - Suit property was undivided joint Hindu Family property and because of relinquishment deed dated 01.12.2006 petitioner has become absolute owner - It is not the case that the petitioner has purchased the suit property on 01.12.2006, Section 12(4) is not attracted - Impugned order is set aside - Suit be decided on merits after recording the evidence.**
(Paras 6 & 7)

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराऐं 12(1)(बी)(सी)(एफ)

व 12(4) – बेदखली – त्यजन विलेख के आधार पर 01.12.2006 को याची पूर्ण स्वामी बना – वाद 16.06.2007 को प्रस्तुत किया गया – क्योंकि स्वामी बनने के पश्चात 1 वर्ष की अवधि समाप्त नहीं हुई – इसलिये अधिनियम की धारा 12(4) के अंतर्गत वाद वर्जित है – अभिनिर्धारित – वाद सम्पत्ति अविभाजित संयुक्त हिन्दू कुटुम्ब की थी और त्यजन विलेख दि. 01.12.2006 के कारण, याची पूर्ण स्वामी बना – यह प्रकरण नहीं कि याची ने वाद सम्पत्ति को 01.12.2006 को क्रय किया, धारा 12(4) आकर्षित नहीं होती – आक्षेपित आदेश अपास्त – साक्ष्य अभिलिखित करने के पश्चात वाद को गुणदोषों पर न्यायनिर्णित किया जाये।

Cases referred :

AIR 1967 SC 1395, AIR 1916 PC 104, 1964 JLJ 544.

A.K. Sethi with *J.S. Polekar,* for the petitioner.
P.M. Bapna, for the respondent.

ORDER

N.K. Mody, J. :- Being aggrieved by the order dated 14/08/12 passed by XVII Civil Judge, Class-II, Indore in Civil Suit No.5-A/11 whereby issue Nos. 3, 4 & 7 were decided against the petitioner, present petition has been filed.

2. Short facts of the case are that the petitioner filed a suit for eviction on 18/06/07 against the respondent under Section 12(1)(b) (c)&(f) of M.P. Accommodation Control Act, 1961 (which shall be referred hereinafter as an "Act"). In the suit it was alleged that the petitioner has become absolute owner of the suit property on the basis of relinquishment deed dated 01/12/06. Apart from other facts stated in the plaint it was alleged that the petitioner requires the suit accommodation bonafidely as the petitioner is having no other alternative suitable accommodation of his own. The suit was contested by the respondent on various grounds including on the ground that the suit itself is not maintainable for eviction under Section 12(1)(f) of the Act as period of one year has not expired after acquiring of suit accommodation by the respondent before filing of the suit. It was prayed that the suit be dismissed. On the basis of pleadings of the parties learned Court below framed the issues. Issue Nos. 3, 4 & 7 were tried as preliminary issue as no evidence was required. After hearing the parties learned Court below found that since the petitioner became absolute owner of the suit accommodation on 01/12/06 and the suit was filed on 16/06/07 and period of one year was not expired after becoming owner of the suit accommodation, therefore, suit filed by the petitioner for eviction under Section 12(1)(f) of the Act is barred under Section

12(4) of the Act, against which present petition has been filed.

3. Learned counsel for the petitioner argued at length and submits that the impugned order passed by the learned Court below is illegal, incorrect and deserves to be set aside. It is submitted that the learned Court below was not justified in deciding the preliminary issues against the petitioner. It is submitted that since it is relinqushment deed which was executed in favour of petitioner on 01/12/06, therefore, it cannot be said that prior to it petitioner was owner of the suit accommodation. It is submitted that the petition be allowed and impugned order whereby issue nos. 3, 4 & 7 were decided against the petitioner, be quashed.

4. Learned counsel for the respondent supports the order and submits that the petition filed by the petitioner has no merits as the learned Court below has rightly decided the issues in favour of respondent. Reliance is placed on a decision in the matter of *Kuppuswami Chettiar Vs. A.S.P.A. Arumugam Chettiar,* AIR 1967 SC 1395 wherein Hon'ble Apex Court has observed that a registered instrument styled release deed releasing right, title and interest of releasor without consideration may operate as transfer by way of gift when document clearly shows intention to effect transfer and is signed by or on behalf of releasor and attested by at least two witnesses. It is submitted that the petition be dismissed.

Section 12(4) of the Act reads as under:-

Section 12- Restriction on eviction of tenants.-

> **(4)** Where a landlord has acquired any accommodation by transfer, no suit for the eviction of tenant shall be maintainable under sub-section (1) on the ground specified in clause (e) or clause (f) thereof, unless a period of one year has elapsed from the date of the acquisition.

5. From bare perusal of Section 12(4) of the Act itself it is evident that if a person acquires ownership of the suit accommodation on a particular date, then he is not entitled to file suit for eviction under Section 12(1)(e) or (f) of the Act unless the period of one year is expired. In the matter of *Girja Bai Vs. S. Dhudirai,* AIR 1916 PC 104 of which equivalent is 6 MPLC 172 the Privy Council held that when there is partition of joint Hindu family property, the members of the joint family do not acquire any right to any property which the family did not possess. It was further observed that partition only alters the form of enjoyment of joint

property by the coparceners. It is thus a division made between the coparceners of joint property, which belongs to them as coparceners, so that each becomes the sole owner of the part which is allotted to him.

6. Keeping in view the position of law in the matter of *Tribhuwandas Vs. Premchand,* 1964 JLJ 544 this Court held that allotment of house in partition of coparceners property is not acquisitioned by transfer and therefore, sub-section (4) of Section 12 of the Act is not attracted. In the present case also in the plaint it is alleged that the suit property was undivided joint Hindu family property and because of relinquishment deed dated 01/12/06 petitioner has become absolute owner of the suit property.

7. In the present case it is not the case of the petitioner that the petitioner has purchased the suit accommodation on 01/12/06. In fact registered deed dated 01/12/06 is relinquishment deed. In the facts and circumstances of the case this Court is of the view that the learned Court below was not justified in deciding the issues against the petitioner. In view of this, petition filed by the petitioner is allowed and impugned order is set aside holding that the learned Court below shall decide the suit after recording of evidence on merits and shall decide the issue Nos. 3 & 4 as well which relates to eviction of the respondent on the ground of bonafide requirement alongwith other issues.

With the aforesaid, petition stands disposed of.

Petition disposed of.

I.L.R. [2014] M.P., 1260
WRIT PETITION
Before Mr. Justice N.K. Mody
W.P. No. 6415/2011 (Indore) decided on 12 July, 2013

USHA PORWAL (DR.) ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

***Educational Service (Collegiate Branch) Recruitment Rules, M.P., 1990, Schedule III* - Guest Lecturer - Petitioner was held ineligible to participate in the process of selection for the post of Professor, on the ground that experience as Guest Lecturer cannot be taken into consideration - Held - Petitioner has worked for more than 10 years regularly in a aided institution - He also find place in the select list - Eligibility criteria is that the experience shall be counted if the candidate**

is working in a Government aided institution - It is not necessary that the aid should be received for the post on which the candidate is posted - Petition is allowed - Respondents were directed to consider the case of the petitioner. (Paras 8 & 9)

शैक्षणिक सेवा (महाविद्यालयीन शाखा) भर्ती नियम, म.प्र., 1990 – अनुसूची III – अतिथि व्याख्याता – याची को प्राध्यापक के पद हेतु चयन प्रक्रिया में हिस्सा लेने के लिये अपात्र ठहराया गया, इस आधार पर कि अतिथि व्याख्याता के रुप में प्राप्त अनुभव को विचार में नहीं लिया जा सकता – अभिनिर्धारित – याची ने नियमित रुप से सहायता प्राप्त संस्था में 10 वर्षों से अधिक कार्य किया – उसे चयन सूची में भी स्थान प्राप्त हुआ – पात्रता मानदंड यह है कि यदि अभ्यर्थी सरकारी सहायता प्राप्त संस्था में कार्यरत है, तब अनुभव की गणना की जायेगी – यह आवश्यक नहीं कि जिस पद पर अभ्यर्थी पदस्थ है, उस पद के लिये सहायता प्राप्त होनी चाहिए – याचिका मंजूर – याची के प्रकरण पर विचार करने के लिये प्रत्यर्थीगण को निर्देशित किया गया।

Cases referred :

W.P. No. 4369/2011 decided on 07.11.12.

A.K. Sethi with *Rahul Sethi,* for the petitioner.
Mukesh Parwal, G.A. for the respondent No. 1/State.
V.P. Khare, for the respondent No.2.

ORDER

N.K. Mody, J. :- The prayer in the petition is to quash the communication dated 25/02/11 (Annexure P/3) and 01/07/11 (Annexure P/9) issued by respondent No.2 and since the petitioner is having teaching experience of more than 10 years for teaching graduate and post-graduate commerce class as per the condition specified in the advertisement Annexure P/1 and statutory Rules Annexure P/2, therefore, petitioner may be treated to be qualified for the post of professor.

2. In the petition it is alleged that the respondent No.2 issued an advertisement on 19/01/09 for various posts of Professor in different subjects including professor in commerce as shown at Sr. No.20. The post was advertised for 37 posts, out of which 19 posts were shown to be from general category, six posts were shown for S.C. category, seven posts were shown for S.T. category and five posts were shown to be for O.B.C. category. It is alleged in the petition that the petitioner also applied for the same as the

petitioner was having experience of more than 10 years to teach the graduate and post graduate classes, but the petitioner was not allowed to appear in examination, hence this petition has been filed.

3. Learned counsel for the petitioner submits that the petitioner was having experience of teaching of 16 years as the petitioner was working as guest lecturer. Learned counsel placed reliance on Annexure P/11. Clause-B of Annexure P/11 which is circular issued by High Education Department of State of M.P. on 29/04/10 reads as under:-

> (ब) शासन के द्वारा मानदेय प्राप्त कर शासकीय महाविद्यालय में अध्यापन कार्य भारित संविदा, अतिथि विद्वान तथा पार्ट टाईम के अनुभव को मान्य करने के लिये सहमति लोक सेवा आयोग को भेजी जाए। अभिमत में यह स्पष्ट किया गया है कि शासकीय एवं अनुदान प्राप्त महाविद्यालयों / विश्वविद्यालयों में ही कार्यरत संविदा, अतिथि विद्वान तथा पार्ट टाइम के अनुभव को मान्य किया जाए, क्योंकि इनका अभिलेख संधारित होना है तथा इसका सत्यापन किया जा सकता है। अशासकीय संस्थाओं में अभिलेख के सत्यापन में अत्यधिक कठिनाई होगी। अतः अशासकीय संस्थाओं में कार्यरत संविदा अतिथि विद्वान तथा पार्ट टाइम के शिक्षकों को मान्य नही किया जाए।

4. Learned counsel further submits that in view of the aforesaid circular itself it is evident that experience of guest lecturer has to be taken into consideration. Learned counsel further placed reliance on Schedule III of M.P. Educational Service (Collegiate Branch) Recruitment Rules, 1990, wherein for the post of professor, additional qualification prescribed is 10 years teaching experience of graduate/post graduate classes. It is submitted that since the petitioner was having 10 years teaching experience of graduate/ post graduate classes, therefore, there was no justification on the part of respondents in not allowing the petitioner to appear in examination. It is submitted that the petition filed by the petitioner be allowed and act of respondents in issuing Annexure P/3 & Annexure P/9 be quashed.

5. Learned counsel for respondents submits that the services rendered by the petitioner as guest lecturer cannot be counted for the purpose of ascertaining the additional qualification, as the petitioner worked on payment of honorarium. For this contention reliance is placed on a decision in the matter of *Smt. Veena Choubey Vs. Madhya Pradesh Public Service Commission* decided on 07/11/12 in WP. No.4369/11 wherein after taking into consideration the notification dated 29/04/10 Annexure P/11, this Court found that the experience as guest lecturer cannot be taken into consideration while

counting the experience for the post of guest lecturer. Learned counsel further submits that it is also doubtful whether the petitioner is possessing 10 years experience as guest lecturer as is evident from Annexure R-2/7 which is the reply submitted by respondent No.1. It is submitted that the petition filed by the petitioner has no merits and the same be dismissed.

6. From perusal of the record it is evident that vide interim order dated 08/08/11 petitioner was permitted to appear in the process of interview for the post of Professor (Commerce) provisionally. It was further directed that respondent No.2 shall not declare the result of petitioner without leave of the Court and the interim order passed by this Court shall not create any equity in favour of the petitioner. In compliance of that order petitioner appeared in selection process. Vide order dated 02/03/12 the sealed cover was opened and result was perused and was kept in sealed cover again. By this letter it was informed that petitioner is finding place in the main selection list.

7. Vide order dated 07/11/12 passed in the matter of *Smt. Veena Choubey Vs. Madhya Pradesh Public Service Commission* in WP. No.4369/11 this Court has taken into consideration the notification dated 29/04/10 and has observed that the State Government as well as Public Service Commission in the matter of recruitment of professors was facing a very serious problem as different kind of teaching experience certificates were being enclosed by various candidates as the educational institutions while issuing the teaching experience certificates were certifying that the candidates have taught the students of their institution without receiving any honorarium. In the aforesaid decision it was also held that this Court does not find any reason to interfere with the decision of Public Service Commission, by which the petitioner was held ineligible to participate in the process of selection.

8. Vide annexure R-2/7 filed by respondent No.2 Shri Cloth Market Girls Commerce College, Indore vide its letter dated 02/04/11 has informed that their institution is Government aided institute, but no grant is being received by the institute on account of salary which is being paid to the petitioner. In the said letter it is also stated that in the appointment order issued by the institute the word "honorary", "adhock" and "guest" is issued which is synonym having same meaning because there is no rule of the Government and also no interference. It is further stated that petitioner is appointed as per college code. It is also stated that petitioner is working regularly of which the details are also given. It is also stated that post on which the petitioner is working is

neither approved nor aided. As per the chart given, petitioner is in teaching job since 1995 to 2007 and was appointed for educational session and therefore working regularly since 18/01/2007.

9. In the matter of *Smt. Veena Choubey* (Supra) she worked without any honorarium, which is not the case of the petitioner. Thus the law laid down in that case is quite distinguishable. In the present case the petitioner has worked for more than 10 years regularly in a aided institution and also find place in the select list. For bringing the case under consideration eligibility criteria is that the experience of the candidate shall be counted if the candidate is working in a Government aided institution. It is not necessary that the aid should be received by the institution for the post on which the candidate is posted. In the circumstances petition filed by the petitioner is allowed and annexure P/7 and P/9 stand quashed with a direction to the respondents to consider the case of the petitioner for the post of Professor (Commerce). Needful be done within four weeks.

With the aforesaid direction, petition stands disposed of.

Order accordingly.

I.L.R. [2014] M.P., 1264
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice M.C. Garg
W.P. No. 8734/2013 (Indore) decided on 24 July, 2013

B.S. BISORIA ...Petitioner
Vs.
STATE OF M.P. ...Respondent

Prevention of Corruption Act (49 of 1988), Section 19 - Sanction - Competent Authority - Law Department **- The power to sanction for prosecution has been given under the Business Allocation Rules to the Law and Legislative Department - Even if the sanction has been refused by the appointing/disciplinary authority i.e. Parent Department of the petitioner, the same is of no consequence - The opinion of the Parent Department, appointing and disciplinary authority is not binding on the Law and Legislative Department who is the competent authority for grant of sanction while considering the case for grant of sanction - Petition dismissed. (Paras 3 & 4)**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 19 – मंजूरी – सक्षम प्राधिकारी – विधि विभाग – कार्य आवंटन नियमों के अधीन विधि एवं विधायी कार्य विभाग को अभियोजन हेतु मंजूरी की शक्ति दी गयी है – यदि नियोक्ता/अनुशासनिक प्राधिकारी अर्थात याची के पैतृक विभाग द्वारा मंजूरी को अस्वीकार भी किया गया है तब भी इसका कोई परिणाम नहीं होगा – पैतृक विभाग, नियोक्ता एवं अनुशासनिक प्राधिकारी का मत, विधि एवं विधायी कार्य विभाग पर बंधनकारी नहीं, जो कि मंजूरी प्रदान करने के प्रकरण पर विचार करते समय मंजूरी प्रदान करने के लिये सक्षम प्राधिकारी है – याचिका खारिज।

A.K. Sethi with *Harish Joshi,* for the petitioner.

ORDER

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

2. By filing this petition under Article 226 of the Constitution of India, the petitioner has challenged the order dated 30.05.2013 (Annexure P-6) passed by first respondent-Secretary, Law and Legislative Department, Government of M.P., Bhopal granting sanction for prosecution against the petitioner for the offence under Sections 7, 12, 13 (1) (d) and Section 13 (2) of the Prevention of Corruption Act read with Section 120 B of the Indian Penal Code.

3. Shri A.K. Sethi, learned counsel for the petitioner argued that since the petitioner's appointing/disciplinary authority had refused to grant sanction vide order dated 02.05.2013 (Annexure P-4), the Law Department could not have granted sanction for his prosecution, even if the powers have been conferred upon the Law and Legislative Department for granting permission for prosecution as per the Rules of Business framed in exercise of powers conferred under Article 166 of the Constitution of India. He also argued that merely during investigation the co-accused – Mukesh Sharma disclosed that he had taken the bribe for the petitioner and, therefore, on that basis itself the petitioner could not have been implicated in the matter and as such the impugned order of sanction be quashed.

4. We have considered the submissions made by the learned Senior Counsel but, we find no merit in the same. The power to sanction for prosecution has been given under the Business Allocation Rules to the Law and Legislative Department. Therefore, even if the sanction has been refused by the appointing/disciplinary authority i.e. parent department of the petitioner,

the same is of no consequence. The opinion of the parent department, appointing and disciplinary authority is not binding on the Law and Legislative Department who is the competent authority for grant of sanction while considering the case for grant of sanction.

5. Having gone through the impugned order of sanction, we find that the same is a speaking order. It is clear that after due application of mind to the material collected and brought before the sanctioning authority, the order of sanction has been passed . The petitioner has been involved on the basis of a recorded tape in which it appears that co-accused has named the petitioner in regard to demand of bribe, apart from other material. Be that as it may. In the matter of grant of sanction, this Court cannot sit over the findings recorded by sanctioning authority as an appellate court. If the petitioner feels that he has good case on merits, it is open for the petitioner to raise all the contention as may be available before the appropriate forum at appropriate stage.

6. In the circumstances, no case for interference is made out. The petition fails and is hereby dismissed in limine.

Petition dismissed.

I.L.R. [2014] M.P., 1266
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 15218/2012 (Jabalpur) decided on 23 August, 2013

SUNIL KAPOOR (DR.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Income Tax Act (43 of 1961), Section 132 & Arms Act (54 of 1959), Section 45(b)(ii) - Search & Seizure **- Petitioner's licensed pistol and cartridges seized by the officials of Income Tax Department - Whether Authorized Officer and Assistant Commissioner of Income Tax can be prosecuted for violation of provisions of the Arms Act, 1959 - Held - No prosecution, suit or other proceeding shall lie against the Government or any officer of the Government for anything in good faith done or intended to be done under this Act, 1961 - Arms Act, 1959 also provides such immunity - It stipulates that nothing in the Act of 1959 shall apply to acquisition, possession or carrying, the manufacture, repair, conversion, test or proof, the sale or transfer or the import,**

export or transport of Arms or ammunition by a public servant in the course of his duty as such public servant - Petition dismissed. (Paras 1, 11, 12)

आयकर अधिनियम (1961 का 43), धारा 132 व आयुध अधिनियम (1959 का 54), धारा 45(बी)(ii) – *तलाशी एवं जब्ती* – याची की अनुज्ञप्ति प्राप्त पिस्टल और कारतूसों को आयकर विभाग के कर्मचारियों द्वारा जब्त किया गया – क्या आयकर के प्राधिकृत अधिकारी एवं सहायक आयुक्त को आयुध अधिनियम, 1959 के उपबंधों के उल्लंघन के लिये अभियोजित किया जा सकता है – अभिनिर्धारित – इस अधिनियम, 1961 के अंतर्गत की गई किसी सद्भाविक कार्यवाही या आशयित कार्यवाही के लिये सरकार या सरकार के किसी अधिकारी के विरुद्ध कोई अभियोजन, वाद या अन्य कार्यवाही नहीं होगी – आयुध अधिनियम, 1959 भी उक्त उन्मुक्ति उपबंधित करता है–यह अनुबंधित करता है कि लोक सेवक अपने उक्त लोक सेवक के कर्तव्यों के अनुक्रम में शस्त्र एवं गोला–बारुद के अर्जन, कब्जा या साथ रखने, उत्पादन, मरम्मत, परिवर्तन, परख या परिसिद्धि, विक्रय या हस्तांतरण या आयात–निर्यात अथवा परिवहन को अधिनियम, 1959 का कोई उपबंध लागू नहीं होगा–याचिका खारिज।

Mukesh Agarwal with *Vishal Dhagat,* for the petitioner.
S.S. Bisen, G.A. for the respondents.

ORDER

SANJAY YADAV, J. :- Heard

1. Petitioner seeks direction to respondents no.2 to 4 viz. Director General of Police, Madhya Pradesh, Superintendent of Police, Bhopal and City Superintendent of Police, M.P. Nagar, Bhopal to dwell upon the application preferred by him seeking forensic investigation of the petitioner's licensed pistol and cartridges seized by the officials of Income Tax Department and to take appropriate action against the officers for alleged illegal seizure and retention of the pistol and ammunition. Vide I.A. No.10199/2013, petitioner also seeks direction that Authorized Officer, Income Tax Department who conducted the search, Circle No.2(1), Bhopal and Assistant Commissioner of Income Tax, Bhopal, be prosecuted for violation of provisions of the Arms Act, 1959.

2. Genesis lies in the search operation conducted on 25.7.2009 in the premises of the petitioner. Locker No.39 in Shri Satya Sai Nagarik Sahakari Bank Maryadit, Bhopal in the name of petitioner and his wife was also searched in the process; wherefrom one pistol make & no.103542 made in Czechoslovakia and nine cartridges were seized.

3. The search and seizure operation was carried out by proposed

respondent no.6 on the orders from proposed respondent no.7, which in turn was in purported exercise of powers under Section 132 of the Income Tax Act, 1961 which makes provision regarding search and seizure.

4. Section 132(1)(c) read with clause (iii) of 1961 Act provides that (1) Where the Director General or Director or the Chief Commissioner or Commissioner or Additional Director or Additional Commissioner or Joint Director or Joint Commissioner in consequence of information in his possession, has reason to believe that -

> (c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been, or would not be, disclosed for the purposes of the Indian Income-tax Act, 1922 (11 of 1922), or this Act (hereinafter in this section referred to as the undisclosed income or property), then, -
>
> (iii) seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search:
>
> Provided that bullion, jewellery or other valuable article or thing, being stock-in-trade of the business, found as a result of such search shall not be seized but the authorized officer shall make a note or inventory of such stock-in-trade of the business;
>
> (Emphasis supplied)

5. The act of search and seizure by proposed respondents no.6 and 7, being under Section 132 of 1961 Act, was thus in official capacity and in discharge of official duty.

6. That, Writ Petition No.18809/2011 was filed by the petitioner for a direction to respondents to release the pistol and its cartridges and hand them over to Commissioner, Income Tax and the Director General of Police.

7. The Writ Petition was disposed of on 12.12.2011 wherein while observing "When any arm is found during the course of search and the Income Tax authority is of the view that such arm and ammunition requires seizure, he has to take assistance of the Police Officers, who are empowered to seize

under the provisions of Arms Act, but until and unless they are specifically empowered under the Income Tax Act or under the Arms Act, *prima facie* we are of the view that the authorities were not empowered to seize the arm, which was stated to be a licensed arm". Yet, not acceding to the relief sought by the petitioner for handing over the seized pistol and cartridges to the Commissioner, Income Tax and Director General of Police for their verification, the Division Bench only directed the Assistant Commissioner of Income Tax, Circle No.2(1), Bhopal to release the pistol and cartridges to the petitioner "on filing a supardnama in this regard before him".

8. That, vide communication dated 23.1.2012 and 24.2.2012 (Annexure P/4), the Assistant Commissioner of Income Tax, Circle No.2(1), Bhopal called on the petitioner to collect the pistol and cartridges as per direction in Writ Petition No.18809/2011. The petitioner instead, insisted upon the verification and forensic investigation of pistol and the cartridges before its being handed over, though no such direction was given by the Division Bench in Writ Petition.

9. In the sequence thereof, the petitioner has filed this petition seeking direction to respondents to dwell upon his application for forensic investigation of arm and ammunition in question and for prosecuting the Income Tax authorities for alleged violation of provisions of Arms Act, 1959.

10. Heard the learned counsel for the petitioner at length. No provision either under the Income Tax Act, 1961 or the Arms Act, 1959 has been commended at to bring home the contentions for initiation of action against the authorities of Income Tax Department, who conducted the search and seizure in purported exercise of their powers under Section 132 of 1961 Act, in the course of their official duties.

11. On the contrary, Section 293 of the 1961 Act provides for that no suit shall be brought in any civil court to set aside or modify any proceeding taken or order made under this Act and no prosecution, suit or other proceeding shall lie against the Government or any officer of the Government for anything in good faith done or intended to be done under this Act.

12. Furthermore, Section 45(b)(ii) of the Arms Act, 1959 also provides such immunity. It stipulates that nothing in the Act of 1959 shall apply to acquisition, possession or carrying, the manufacture, repair, conversion, test or proof, the sale or transfer or the import, export or transport of arms or

ammunition by a public servant in the course of his duty as such public servant.

13. In view whereof, since the proposed respondents no.6 and 7, being public servants, in discharge of their official duty under Section 132 of the 1961 Act, having seized the pistol and cartridges did not commit any offence as alleged as would warrant any action under the Arms Act, 1959.

14. In the result, the petition, being devoid of substance, deserves to be and is hereby dismissed. I.A. No.10198/2013 and I.A. No.10199/2013 are disposed of as no orders are warranted thereon, in view of dismissal of the petition. No costs.

Petition dismissed.

I.L.R. [2014] M.P., 1270
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 3408/2012 (Jabalpur) decided on 3 September, 2013

PRAGATI PETROL PUMP (M/S) & anr. ...Petitioners
Vs.
INDIAN OIL CORPORATION & ors. ...Respondents

Constitution - Article 226 - Writ Petition **- Petitioners sought relief by making false averments in the Writ Petition - Act of petitioner is not fair - Petitioner not coming with clean hands, are not entitled to any relief - Petition dismissed by imposing cost of Rs. 25,000/- - Writ petition dismissed. (Paras 16 & 19)**

संविधान – अनुच्छेद 226 – रिट याचिका – याचीगण ने रिट याचिका में मिथ्या प्रक्कथन देकर अनुतोष चाहा – याची का कृत्य उचित नहीं – याची स्वच्छ अंतःकरण से नहीं आया, किसी अनुतोष का हकदार नहीं – व्यय रु. 25,000/– अधिरोपित करते हुए याचिका खारिज – रिट याचिका खारिज।

Cases referred :

AIR 1963 SC 1558, (2010) 2 SCC 114, (2010) 14 SCC 38.

V.K. Shukla, for the petitioner.
Abhishek Gulatee, for the respondent No.1.
P.K. Kaurav, for the respondents No. 2 & 3.

ORDER

SANJAY YADAV, J. :- Inspite of repeated efforts to reconcile through mediation but with no positive result in the offing, the matter is being heard on merit.

2. Petitioner No.1, a registered partnership firm under the Indian Partnership Act, 1932 and petitioner No.2 its partner, holds a dealership for retail outlet at plot No.II-B, Zone-II, MP Nagar Scheme.

3. Plot in question admeasures 9639 square feet and is being owned by the Bhopal Development Authority given on lease to the Indian Oil Corporation which initially was on temporary lease on a yearly rent for the period from 01st January, 1977 to 31st December, 1981 vide lease deed dated 22/02/1977. The plot is earmarked for petrol pump.

4. The temporary lease has been extended from time to time. The last extension on was 21.12.2006 for a period from 01st January, 2007 to 31st December, 2011 on a yearly rent of Rs.75,756/-.

5. The petitioner operates as dealer of the respondent No.1 Indian Oil Corporation and holds no title in the land in question. The temporary lease dated 21.12.2006 does not acknowledge the petitioner even a sub-lessee.

6. That on 23.12.2011, Officer on Special Duty, Bhopal Development Authority entered into a correspondence with the respondent No.1 informing him about the lease expiring on 31.12.2011 and that the Development Authority has decided that since it is not economically viable to lease out the land/plot in question on temporary lease on annual rent asked the respondent No.1 to vacate the premises on the expiry of lease period vide said communication an offer was also tendered to respondent No.1 of their willingness to purchase the plot.

7. Various correspondence were entered into between the respondent No.1 and respondents No.2 and 3, with no concrete outcome, as the respondent No.1 did not show its willingness to purchase the plot on the terms by the Bhopal Development Authority which in turn being based on market forces.

8. When the matter stood thus, instead of respondent No.1, the petitioner who otherwise has no locus, qua, the Bhopal Development Authority filed this petition seeking quashment of communication dated 23.12.2011 and a

public notice dated 12.03.2012 whereby offer has been invited from the public in respect of the subject plot, by claiming himself to be a sub-lessee (in paragraph 6.6 of the petition, it is stated that the petitioner has been a sub-lessee of the said plot for about 35 years and he has acquired a right of claiming preference and priority for allotment and purchase of the said property).

9. Furthermore, in order to establish a locus to question the action of respondents No.2 and 3, the petitioner in paragraph 5.4 has made the following statement:

> "5.4 That, the petitioner firm had applied for dealership for retail outlet at Bhopal on the plot in question. The respondent No.1 selected the petitioner firm for allotment of retail outlet on the said plot and communicated vide letter dated 30.08.1976. Copy of letter dated 30.08.1976 is filed herewith as Annexure P-4. The Chariman of the Respondent No.2 had granted sanction to the Respondent No.1 to transfer his right for running a petrol pump on the said plot."

10. No such sanction however, is brought on record. On the contrary clause 10 of temporary lease executed on 22.02.1977, 30.06.2004 and 21.12.2006 which are on record clearly stipulates that:

> "10. The lessee shall not transfer in any manner whatsoever the said land on or any part thereof or any of his right under this lease without the previous sanction of the Chariman,Bhopal Development Authority."

11. Even the respondent No.1 in its return acknowledges the petitioner only as a dealer and not a sub-lessee. A copy of an offer of appointment as dealer for retail outlet is filed by respondent as Annexure R1/1 wherein it stipulated that the petitioner shall be appointed as dealer to operate the outlet on the standard and terms settled. There is no document with the reply of respondent No.1, indicating the petitioner as sub-lessee, merely because paragraph (7) of communication dated 30.08.1976 between respondent No.1 and the petitioner says that the respondent No.1 will sub-lease the land, ipso facto, will not automatically make the petitioner a sub-lessee.

12. The respondents No.2 and 3 have categorically raised an objection as to maintainability of the petition at the instance of the petitioner firm and its partner in the following terms:

"2. The answering respondents respectfully submit that the nature of relief which has been claimed by the petitioner is misconceived and the same cannot be granted. It is submitted that neither the quashment of the order dated 23.12.2011 nor the quashment of the public notice will confer any legal or vested right in favour of petitioner to continue in possession of the plot in question.

3. That, the petitioner has not brought on record the correct facts and has suppressed the material information and on account of aforesaid conduct of the petitioner, the said writ petition deserves to be dismissed.

4. The answering respondents submit that para 5.3 of the writ petition makes it clear that the lease of plot No.11-B, Zone-II, M.P.Nagar, Scheme Area 9639 sq.ft. Has expired on 31.12.2011 and the said lease was executed in favour of the Indian Oil Corporation. No lease has been executed in favour of petitioner by the answering respondent and , therefore, the petitioner does not have any right to claim the extension of the lease. The Indian Oil Corporation has not filed any petition and the communication dated 23.12.2011 was also made to the Deputy Manager of the Indian Oil Corporation and in absence of any cause of action, the petitioner does not have any right to file the instant writ petition against the answering respondents.

13. That, the answering respondent respectfully submit that there is no legal rights infavour of the petitioner to file the instant writ petition neither the petitioner was the party to the lease nor it had any transaction with the answering respondent and, therefore, the instant writ petition does not have any substance and the same deserves to be dismissed. It is therefore, respectfully submitted that when there is no lease existing as on today, the petitioner does not have any legal right to remain in possession of the land in question. The possession of the petitioner is illegal and improper and by interim order dated 29.02.2012 the petitioner enjoys the benefit of possession without any legal right."

There is no denial by the petitioners of these contention raised by respondents No.2 and 3.

13. Thus, clear it is from the material on record that the petitioners have sought indulgence under Article 226 of the constitution by projecting wrong fact that they are sub-lessee; whereas the fact is that the petitioner is only a dealer of respondent No.1 selling their products. On these incorrect facts the petitioner also sought an interim order on 29.02.2012 wherein the contention of learned counsel for the petitioners has been noted in following terms:

> "It is the contention of the petitioners that the land has been allotted on a lease to the petitioners for the purpose of establishing a petrol pump and for a long period, the petitioners are running the petrol pump on the said land. Now the respondent No.2 has taken a decision to convert the lease by transferring the land on ownership. In view of this, it is contended that there is every likelihood that the lease of the petitioner would be terminated."

14. Taking into consideration these submissions it was ordered that *"till the next date of listing, the lease of petitioners will not be treated as terminated and no proceedings for action of the said plot will be taken. The petitioners are permitted to continue their business on the said land."*

15. Apparently, on the premise of incorrect facts, the petitioners not only seeks indulgence but sought an interim injunction.

16. The act of petitioners is not fair. The petitioners have not come with clear hands as would entitle them for any relief. In this context reference can be had of the decision in *Hari Narain v. Badri Das* AIR 1963 SC 1558 it is held:

> "It is of utmost importance that in making material statements and setting forth grounds in applications for special leave, care must be taken not to make any statements which are inaccurate, untrue or misleading. In dealing with applications for special leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. Thus, if at the hearing of the appeal the Supreme Court is satisfied that

the material statements made by the appellant in his application for special leave are inaccurate and misleading, and the respondent is entitled to contend that the appellant may have obtained special leave from the Supreme Court on the strength of what he characterises as misrepresentations of facts contained in the petition for such a case special leave granted to the appellant ought to be revoked."

17. In *Dalip Singh V. State of Uttar Pradesh* and others (2010) 2 SCC 114 it is held:

"For many centuries Indian society cherished two basic values of life i.e. "Satya" (truth) and "asimsa" (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of justice delivery system which was in vogue in pre- independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system. The materialism has over-shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

18. In *Ramjas Foundation V. Union of India* (2010) 14 SCC 38 it is held:

"21. The principal that a person who does not come to the court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed

under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and judicial forums. The object underlying the principle is that every court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have a bearing on adjudication of the issue(s) arising in the case."

19. In view of the given facts of present case and the pronouncement of law, no relief can be granted to petitioners. The petition is dismissed with cost of rupees Twenty Five Thousand.

Petition dismissed.

I.L.R. [2014] M.P., 1276
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 4086/2011 (Jabalpur) decided on 26 September, 2013

ANKITA BOHARE (DR.)(SMT.) ...Petitioner
Vs.
M.P. PUBLIC SERVICE COMMISSION ...Respondent

Service Law - Educational Services (Collegiate Branch) Rules, M.P. 1990, Rule 8, Schedule III - Appointment - Qualification - **Experience in private institution - Teaching experience of 10 years has to be counted from the date on incumbent acquires Ph.D. and not from the date prior thereto - Since the petitioner did not had to her credit ten years teaching experience in graduate/post graduate class - She was rightly not found suitable for candidature for appointment as Professor - Experience gained in private institution is not recognized in view of Government letter dated 29.04.2010. (Paras 6, 19, 20 & 22)**

सेवा विधि – शैक्षणिक सेवा (महाविद्यालयीन शाखा), नियम, म.प्र. 1990, नियम 8, अनुसूची.III – नियुक्ति – अर्हता – प्राईवेट संस्था में अनुभव – पदधारी द्वारा पी.एच.डी. अर्जित करने की तिथि से 10 वर्षों के अध्यापन अनुभव की गणना की जानी चाहिए और न कि उसके पूर्व की तिथि से – चूंकि याची के पास स्नातक/स्नातकोत्तर कक्षा में दस वर्ष का अध्यापन अनुभव नहीं था – प्रोफेसर के रुप में नियुक्ति हेतु अभ्यर्थिता के लिये उसे योग्य नहीं पाया जाना सही था –

सरकारी पत्र दि. 29.04.2010 को दृष्टिगत रखते हुए, प्राईवेट संस्था में प्राप्त किये गये अनुभव को मान्यता नहीं है।

Cases referred :

(1994) 2 SCC 723, (1998) 8 SCC 399, (2003) 6 SCC 171, (1999) 1 SCC 453, (2002) 2 SCC 712, (2008) 14 SCC 306, 1992 (6) SLR 223, (2001) 2 SCC 362, (1997) 6 SCC 574.

R.N. Singh with *Arpan Pawar,* for the petitioner.
K.S. Wadhwa, for the respondent No.1.
S.S. Bisen, for the respondent No.2.
Ajay Pratap Singh, for the intervenor.

ORDER

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

2. Communication dated 27.01.2011 and 21.02.2011 are being questioned vide this writ petition.

3. By communication dated 27.01.2011, Madhya Pradesh Public Service Commission informed the petitioner of rejection of her application for appointment to the post of Professor, Zoology for the reason that she does not possess the requisite qualification as per advertisement.

4. Whereas by communication dated 21.02.2011, the teaching experience gained in Private College is declined to be taken into consideration.

5. Applications for appointment to the post of Professor in various discipline, including Zoology, were invited vide Employment Notice No.1/ p;u/2009 dated 19.01.2009 from candidates having requisite qualifications prescribed in the advertisement as under:

"(इ) अर्हता :— 1. यू.जी.सी. द्वारा समय–समय पद विहित शैक्षणिक अर्हताएं संबंधित विषय में पी.एच.डी. अनिवार्य अर्हता।

2. स्नातक/स्नातकोत्तर कक्षाओं में 10 वर्ष का अध्ययन अनुभव।

यू.जी.सी. मार्गदर्शन मार्च, 2003 :—

प्रख्यात विद्वान जिनका उच्च गुणवत्ता का प्रकाशित कार्य, हो जो अनुसंधान कार्य में सक्रिय रूप से लगा हो, साथ में स्नातकोत्तर कक्षाओं में अध्यापन का 10 वर्ष का अनुभव और या विश्वविद्यालय/राष्ट्रीय स्तर के संस्थानों में अनुसंधान कार्यों का गाईड के रूप में अनुभव सम्मिलित हो

या

एक उत्कृष्ठ विद्वान जिसका ज्ञान के क्षेत्र में महत्वपूर्ण योगदान करने का स्थापित प्रतिष्ठा हो।"

6. The qualification prescribed were in accordance with Rule 8 schedule III of Madhya Pradesh Educational Services (Collegiate Branch) Recruitment Rules, 1990.

7. Petitioner applied for the post of Professor, Zoology on the strength of her being an Assistant Professor in Mata Gujari Post Graduate Women's College, Jabalpur, a Private Institution, and the Doctorate Degree (Ph.D) awarded in the year 2003. As for the ten years experience of teaching, petitioner claimed it on the basis of her teaching in graduate and Post Graduate classes.

8. The petitioner's application was however rejected for the reasons assigned vide impugned communication that she does not possess requisite experience and the experience gained in private institution is not applicable.

9. The rejection of candidature is being assailed on the ground that the respondents have arbitrarily declined to recognize the teaching experience gained by the petitioner while teaching as Assistant Professor in Mata Gujari Post Graduate Women's College, wherein graduation course was recognized since 1998 vide University Grant Commission's letter No.MS/98/3100 dated 12/01/1998 and the Post Graduate degree since March 2003, vide UGC's letter No.F-8-19/96 (CPP-I) dated 28.03.2003. Petitioner has further relied on the experience certificate dated 01.03.2011 issued by the Principal, Mata Gujari Mahila Mahavidyalaya, certifying the petitioner having served in the institution since 01/07/1999. Petitioner has also relied on an undated certificate of experience issued by Professor Sureshwar Sharma, Commission Member, University Grant Commission. However, during course of hearing this certificate has not been pressed into service. In view whereof, the certificate of experience issued by Professor Sureshwar Sharma is not taken into consideration.

10. The respondent No.2 on its turn deny the contentions that on the date

of advertisement petitioner was having ten years teaching experience in Graduate and Post Graduate College. It is urged that till the last date of filling the form i.e. 20.02.2009 the petitioner was having the teaching experience of 09 years 06 months and 20 days. It is further contended that even the experience gained in Private Institution was not acceptable because of the clarification issued by the State Government on 09.04.2010.

11. The clarification issued by the State Government is in the following terms:

मध्य प्रदेश शासन
उच्च शिक्षा विभाग
मंत्रालय

कमांक एफ 1–23/2007/1–38 भोपाल, दिनांक 29 अप्रेल 2010

प्रति,

सचिव
मध्य प्रदेश लोक सेवा आयोग,
इंदौर

विषय :– सीधी भरती के प्राध्यापकों के पदों के चयन के संबंध में।

संदर्भ :– आपका अर्ध शा पत्र कमांक 97/निस/2010 दिनांक 25.03.2010

आपके उपरोक्त विषयांकित संदर्भित पत्र के संदर्भ में सीधी भरती के प्राध्यापका के चयन में संविदा अतिथि विद्वान तथा पार्ट टाईम के अनुभव को शामिल करने के संबंध में निम्नानुसार निर्णय लिया गया है :–

(अ) रिसर्च फैलो/रिसर्च एसोसियेट को अध्यापन कार्य का अनुभव मान्य नहीं किया जाए।

(ब) शासन के द्वारा मानदेय प्राप्त कर शासकीय महाविद्यालय में अध्ययपन कार्य में रत संविदा, अतिथि विद्वान तथा पार्ट टाईम के अनुभव को मान्य करने के लिये सहमति लोक सेवा आयोग को भेज जाए। अभिमत में यह स्पष्ट किया गया है कि शासकीय एवं अनुदान प्राप्त महाविद्यालयों/विश्वविद्यालयों में ही कार्यरत संविदा, अतिथि विद्वान तथा पार्ट टाईम के अनुभव को मान्य किया जाए, क्योंकि इनका अभिलेख संधारित होता है तथा इसका सत्यापन किया जा सकता है। अशासकीय संस्थाओं में अभिलेख संधारण के सत्यापन में अत्यधिक कठिनाई होगी। अतः अशासकीय संस्थाओं में कार्यरत संविदा अतिथि विद्वान तथा पार्ट टाईम के शिक्षकों को मान्य नहीं किया जाए।

उपरोक्तानुसार सीधी भरती के प्राध्यापकों के पदों के चयन के संबंध में आवश्यक कार्यवाही करने का कष्ट करें।

(प्रबल सिपाहा)
उप सचिव
म.प्र. शासन, उच्च शिक्षा विभाग

12. It is urged that the petitioner since was not having requisite qualification, her candidature was rejected.

13. Respondent No.1, the State Government has supported the stand taken by the Public Service Commission.

14. Considered the rival submissions.

15. Apparent it is from the advertisement inviting application for appointment as Professor in various discipline that imperative it is for the candidate to have ten years teaching experience. It is an essential qualification. The petitioner vide Additional affidavit filed on 29.09.2011 has admitted having 09 years, 06 months and 20 days of teaching experience in Mata Gujari College, Jabalpur. Thus on the cut off date i.e. 20.02.2009 she was not eligible to participate in selection. Need for having the requisite qualification on the last date of receiving the form came up for consideration before Supreme Court in *U.P.Public Service Commission v. Alpana* : (1994) 2 SCC 723 wherein it has been observed :

> "6. In the facts of the present case we fail to appreciate how the ratio of the said decision of this Court can be attracted. The facts of this case reveal that the respondent was not qualified to apply since the last date fixed for receipt of applications was August 20, 1988. No rule or practice is shown to have existed which permitted entertainment of her application. The Public Service Commission was, therefore, right in refusing to call her for interview. The High Court in Writ Petition No. 1898 of 1991 mandated the Public Service Commission to interview her but directed to withhold the result until further orders. In obedience to the directive of the High Court the Public Service Commission interviewed her but her result was kept in abeyance. Thereafter, the High Court while disposing of the matter finally directed the Public Service

Commission to declare her result and, if successful, to forward her name for appointment. The High Court even went to the length of ordering the creation of a supernumerary post to accommodate her. This approach of the High Court cannot be supported on any rule or prevalent practice nor can it be supported on equitable considerations. In fact there was no occasion for the High Court to interfere with the refusal of the Public Service Commission to interview her in the absence of any specific rule in that behalf. We find it difficult to give recognition to such an approach of the High Court as that would open up a flood of litigation. Many candidates superior to the respondent in merit may not have applied as the result of the examination was not declared before the last date for receipt of applications. If once such an approach is recognised there would be several applications received from such candidates not eligible to apply and that would not only increase avoidable work of the selecting authorities but would also increase the pressure on such authorities to withhold interviews till the results are declared, thereby causing avoidable administrative difficulties. This would also leave vacancies unfilled for long spells of time. We, therefore, find it difficult to uphold the view of the High Court impugned in this appeal."

16. In *State of Haryana and others v. Anurag Shrivastava* and another (1998) 8 SCC 399 it has been observed :

"4. Learned counsel for the 2nd respondent has relied upon two decisions of this Court in *Ashok Kumar Sharma v. Chander Shekhar and Rekha Chaturvedi v. University of Rajasthan.* Both these judgments hold that the qualifications which have to be considered are those possessed as on the last date of filing applications. The High Court has, therefore, rightly held that the 2nd respondent did not possess the requisite qualifications at the material time and was not entitled to be selected under the advertisement of 7-12-1980..The appeal is, therefore, dismissed. There will be no order as to costs."

17. In *Sunil Kumar Goyal v. Rajasthan Public Service Commission*

(2003) 6 SCC 171 it has been held :

> " 9. The petitioners herein admittedly did not complete the said period of three years of active practice at the Barr(sic. Bar). They joined services prior thereto. They might have been representing their department while in service before the Tribunal but we fail to understand as to how they could appear before the Court like lawyers. Be that as it may, representing the employer in a Court or Tribunal would not amount to practice at the Bar and as such the criteria laid down by this Court would not stand satisfied.
>
> 11. It may be true that pursuant to or in furtherance of said directions the petitioners had filed affidavits but evidently the impugned order has been passed by the respondent Public Service Commission being not satisfied as regard fulfillment of requirement of the statutory rules as then existed."

18. Contentions on behalf of the petitioner is that the experience gained during research ought to have been taken into consideration is of no help to the petitioner because there is no such stipulations in the qualification prescribed, nor any relaxation in the rules have been provided. In view whereof, the decisions in *Dr.Kumar Bar Das v. Utakl University and others (1999) 1 SCC 453, G.N.Nayak v. Goa University and others (2002) 2 SCC 712 and B.C.Mylarappa alias Dr.Chikkamylarappa v. Dr. R.Venkatasubbalah and others* (2008) 14 SCC 306 is of no assistance.

19. The petitioner since did not had to her credit ten years teaching experience in Graduate/Post Graduate classes was rightly not found suitable for candidature for appointment as Professor.

20. Moreover, the experience gained by the petitioner in the private institution since was not recognized by the State Government as evident from letter dated 29.04.2010, for that reason also the petitioner was rightly held not eligible for appointment as Professor. In this context reference can be head of the decision in *Dr.(Sushri) Rajni Bala Agrawal v. lalit Narain Mithila University* 1992 (6) SLR 223 wherein the Full Bench of Patna High Court while dwelling upon the question : as to whether for the purpose of computing teaching experience of a College teacher, whether the teaching experience said to have been acquired in a college which was not affiliated shall have to

be taken into consideration; answered in the following terms :

> "17. .....For all the reasons, it must be held that teaching experience in an unaffiliated college cannot be taken into consideration."

21. There is another aspect of the matter. Petitioner while appointed as Assistant Professor in Mata Gujari College on 01.07.1999 was not having Doctoral Degree to her credit, which was awarded to her in the year 2003, the requisite qualification for appointment of Professor as stipulated in the advertisement and the relevant Rule is :

> "(इ) अर्हता :– 1. यू.जी.सी. द्वारा समय–समय पद विहित शैक्षणिक अर्हताएं संबंधित विषय में पी.एच.डी. अनिवार्य अर्हता।
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> 2. स्नातक/स्नातकोत्तर कक्षाओं में 10 वर्ष का अध्ययन अनुभव।"
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> यू.जी.सी. मार्गदर्शन मार्च, 2003 :–
>
> प्रख्यात विद्वान जिनका उच्च गुणवत्ता का प्रकाशित कार्य, हो जो अनुसंधान कार्य में सक्रिय रूप से लगा हो, साथ में स्नातकोत्तर कक्षाओं में अध्यापन का 10 वर्ष का अनुभव और या विश्वविद्यालय/राष्ट्रीय स्तर के संस्थानों में अनुसंधान कार्यों का गाईड के रूप में अनुभव सम्मिलित हो
>
> या
>
> एक उत्कृष्ठ विद्वान जिसका ज्ञान के क्षेत्र में महत्वपूर्ण योगदान करने का स्थापित प्रतिष्ठा हो।"

22. Thus the teaching experience of ten years has to be counted from the date on incumbent acquires Ph.D and not from the date prior thereto.

23. In *Indian Airlines Ltd. and others v. S.Gopalakrishnan* (2001) 2 SCC 362, it has been held:

> "4. The respondent has obtained the ITI certificate in June 1994 and he had about five years of experience after obtaining the certificate and diploma in Mechanical Engineering was obtained in April 1996. In any event, it is clear that the experience obtained by him falls short of the requisite qualification. This Court in *N.Suresh Nathan v. Union of*

India, Gurdial Singh v. State of Punjab and Anil Kumar Gupta v. Municipal Corpn.of Dehli has explained the necessity to obtain experience after obtaining the requisite qualification.

5. When in addition to qualification, experience is prescribed, it would only mean acquiring experience after obtaining the necessary qualification and not before obtaining such qualification. In the case of the respondent, he obtained the ITI certificate in the year 1994 and, therefore, did not possess five years of experience as required under the relevant rule. If his qualification as a diploma holder in Mechanical Engineering is taken note of, he has not completed three years of experience as he got the same in April, 1996 and on relevant date he did not possess such qualification.Indeed in prescribing qualification and experience, it is also made clear in the general information instruction at Item No.6 that experience will be computed after the date of acquiring the necessary qualifications. Therefore, when this requirement was made very clear that he should have experience only after acquiring the qualification, the view taken by the High Court to the contrary either by the learned Single Judge or the Division Bench does not stand to reason."

24. In the case at hand the teaching experience gained by the petitioner of teaching Graduate and Post Graduate classes would from the year 2003 when she was awarded Doctoral Degree. Apparently, on 20.02.2009 (the last date of applying) the petitioner was not having ten years experience but only about six years experience. The petitioner thus was ineligible for appointment as Professor and her candidature, in the considered opinion of this Court was rightly rejected vide impugned communication.

25. It is next urged by learned Senior counsel that vide interim order, the petitioner has been provisionally permitted to appear and having found eligible she has been provisionally appointed, thus a right has accrued in her favour. The contention that with the provisional appointment there is an accrual of right has no force in the light of interim orders dated 04.03.2011 and 20.05.2011 wherein it was categorically mentioned that the provisional

acceptance of forms and provisional appointment would be subject to final outcome of the petition. There is no accrual of vested right in the petitioner. And since the action of the respondent commission in rejecting the petitioner's candidature has been upheld, the petitioner will have to give way to other eligible candidate.

26. In this context that whether with passing of interim order any right accrues in favour of petitioner reference can be had of the decision in *State of Rajasthan v. Hitendra Kumar Bhatt* (1997) 6 SCC 574 wherein it is held :

> "6. Looking to the clear terms of the advertisement which we have referred to above, the respondent was not eligible for consideration. It is submitted by the respondent before us that since he has been continued and has now been confirmed we should not disturb his appointment. He has requested that his case should be considered sympathetically. The fact, however, remains that the appellants have taken the correct stand right from the beginning. The respondent's application was not considered and he was not called for an interview. It was on account of interim orders which were obtained by the respondent that he was given appointment and continued. He was aware that his appointment was subject to the outcome of his petition. One cannot, therefore, take too sympathetic a view of the situation in which the respondent find himself. A cut-off date by which all the requirements relating to qualifications have to be met, cannot be ignored in an individual case. There may be other persons who would have applied had they known that the date of acquiring qualifications was flexible. They may not have applied because they did not possess the requisite qualification on the prescribed date. Relaxing the prescribed requirements in the case of one individual may, therefore, cause injustice to others."

27. Having thus considered, this Court does not find any substance in the petition. In the result the impugned communications are upheld. Petition fails and is dismissed. No costs.

Petition dismissed.

I.L.R. [2014] M.P., 1286
WRIT PETITION
Before Mr. Justice N.K. Mody
W.P. No. 8537/2013 (Indore) decided on 30 October, 2013

KUTUBUDDIN AGARBATTIWALA & ors. ...Petitioners
Vs.
SMT. AMEENA & ors. ...Respondents

Arbitration and Conciliation Act (26 of 1996), Section 8 & Civil Procedure Code (5 of 1908), Order 7 Rule 11 **- Suit was filed by respondents No. 1 & 2 alleging the validity of the agreement and prayed that the agreement be declared as null and void and not binding as the same has been obtained by playing the fraud - Application filed u/s 8 of the Act and under order 7 Rule 11 by the petitioner, praying dismissal of suit being barred under the provisions of Arbitration & Conciliation Act, was dismissed - Held - Since the declaration sought could only be granted by Civil Court and not by arbitrator, matter could not be referred to arbitrator. (Paras 2, 4, 8 & 9)**

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 8 व सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – करार की वैधता का अभिकथन करते हुए, प्रत्यर्थीगण क्र. 1 व 2 द्वारा वाद प्रस्तुत किया गया और प्रार्थना की गई कि करार को शून्य एवं अकृत तथा बंधनकारक नहीं होना घोषित किया जाए क्योंकि उक्त को कपट द्वारा अभिप्राप्त किया गया है – माध्यस्थम और सुलह अधिनियम के उपबंधों के अंतर्गत वाद को खारिज किये जाने की प्रार्थना के साथ अधिनियम की धारा 8 और आदेश 7 नियम 11 के अंतर्गत याची द्वारा प्रस्तुत किये गये आवेदन को खारिज किया गया – अभिनिर्धारित – चूंकि चाही गयी घोषणा को केवल सिविल न्यायालय द्वारा प्रदान किया जा सकता है और न कि माध्यस्थम द्वारा, मामला माध्यस्थम को निर्दिष्ट नहीं किया जा सकता।

Cases referred :

2012 AIR SCW 471, 2003(2) MPLJ 346, 2003(2) MPLJ 307, 2009(2) MPLJ 517, 2011(3) MPLJ 625, 2013(1) MPLJ 233, AIR 2008 SC 1016.

S.K. Shastri, for the petitioners.
P.V. Namjoshi & M.L. Pathak, for the respondents No. 1 & 2.
M.K. Jain, for the respondent No.3.
M.A. Bohra, for the respondent No.5.

ORDER

N.K. Modv, J. :- This order shall also govern the disposal of W.P.No.10723/2013 as in both the petitions the parties are one and same and the order under challenge is dated 18/6/2013 passed by II ADJ, Ujjain in civil suit No.53-A/2013 whereby the application filed by the petitioner u/s 8 of Arbitration & Conciliation Act, 1996 (which shall be referred hereinafter as 'the Act') was dismissed.

2. Facts of the case are that respondent Nos.1 and 2 filed a suit for declaration, partition and rendition of accounts and also for cancellation of agreement dated 28/12/2011 on the ground that document has been obtained by playing the fraud. After notice, an application was filed by the petitioners Kutubuddin and also by one Manabai who is petitioner in W.P.No.10723/2013 u/s 8 of the Act on the ground that alleged agreement dated 28/12/2011 is having a arbitration clause, therefore suit cannot proceed and matter be referred to the arbitrator. The application filed by the petitioner Manabai was also under Order VII Rule 11 CPC wherein it was prayed that suit be dismissed as suit is barred under the provisions of Arbitration & Conciliation Act. Both the applications were dismissed, hence these two petitions.

3. Learned counsel for petitioner submits that impugned order is illegal and deserves to be set aside. It is submitted that since there is an arbitration clause in the agreement itself, therefore if the respondent Nos.1 and 2 are having any grievance then they ought to have approached to the arbitrator instead of filing the suit. Learned counsel placed reliance on clause 6 of the agreement which reads as under:-

यह कि, उपरोक्त समझौता परिवार की मान सम्मान या किसी प्रकार का कोई मनमुटाव न हो इस कारण उक्त समझौता किया गया व उक्त लेख के अनुसार आर्बीट्रेटर नरेन्द्र कुमार छाजेड एडवोकेट व आशीष को नियुक्त किया जाता है तथा इस लेख के संबंध में किसी प्रकार का कोई विवाद होने पर उपरोक्त दोनों आर्बीट्रेटरों द्वारा दिया गया निर्णय अंतिम होगा।

4. Learned counsel also placed reliance on section 8 of the Act which reads as under :-

> 8. Power to refer parties to arbitration where there is an arbitration agreement -
>
> (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement

on the substance of the dispute, refer the parties to arbitration.

(2)The application referred to in sub-section(1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

5. Learned counsel submits that even if the respondent Nos.1 and 2 are having any grievance about the appointment of arbitrator or validity of the document which as per the respondent Nos.1 and 2 has been obtained by playing fraud, then grievance can be raised before the arbitrator who has to decide the same.

6. Learned counsel placed reliance on a decision in the matter of *M/s Reva Electric Car Co.P.Ltd. Vs. Green Mobil. 2012 AIR SCW 471* wherein the dispute was relating to existence/validity of the arbitral agreement and Hon. Apex Court observed that in arbitration clause, such dispute was to be referred to arbitrator, therefore u/s 16(1) of the Arbitration & Conciliation Act, dispute is liable to be sent for arbitration even after termination of the arbitration agreement. It is submitted that in view of this, petition be allowed and impugned order be set aside with a direction to learned court below to refer the matter to the arbitrator named in the agreement.

7. Learned counsel for respondent No.3 while supporting the submission made by Mr. S.K.Shastri, counsel for petitioner submits that after taking advantage of the agreement including the property which was gifted, the respondent No.1 sold the property vide registered sale deed dated 30/10/2012 and thereafter filed the suit. It is submitted that apart from this by the agreement, respondent Nos.1 and 2 also received a sum of Rs.1 Crore and thereafter they cannot turn round and say that agreement was based on fraud. It is submitted that agreement also came from the custody of respondent Nos.1 and 2. Learned counsel placed reliance on a decision in the matter of *M.P.Housing Board, Bhopal Vs. Satish Kumar Raizada,* 2003(2) MPLJ 346 wherein this court held that arbitral tribunal has power to rule on its own jurisdiction. Further reliance is placed on a decision in the matter of *Lahar Publicity Service Vs. Union of India,* 2003 (2) MPLJ 307 wherein the suit was for recovery of money, this court held that subject matter of the suit is covered by arbitral agreement and is mandatory for the parties to refer to

arbitrator. Further reliance is placed on a decision in the matter of *Yogi Vs. Inspiration Clothes,* 2009(2) MPLJ 517 wherein Hon. Apex Court has observed to constitute an arbitration agreement for the purpose of section 7 & 8, two conditions must be satisfied, Firstly it should be between the parties to the dispute and secondly, it should relate to or be applicable to the dispute. Learned counsel further submits that the agreement has been filed by respondent Nos.1 and 2 themselves along with the suit, therefore everything was within the notice of respondent Nos.1 and 2 Learned counsel submits that after filing the agreement along with the suit, respondent Nos.1 and 2 cannot go behind the agreement. It is submitted that petition filed by the respondent No.3 be allowed.

8. Mr. P.V.Namjoshi and Mr. M.L.Pathak, learned counsel for respondent Nos.1 and 2 submits that respondent Nos. 1 and 2 are the mother and daughter and respondent No.1 is the wife of deceased Saifuddin who was the brother of petitioner No.1. It is submitted that Saifuddin died on 26/2/2010. After his death forged documents were prepared by the petitioner No.1 on which the signature of respondent No.1 were obtained when the respondent No.1 was within the period of Iddat. It is submitted that as per the provison of Mohammedan Law, a widow of Vaoodi Bohara community has to abstain from meeting with the male from In-law's side and she is not allowed to move from her room. It is further submitted that the agreement is alleged to have been executed during the period of Iddat, therefore prima facie the genuineness of the document is in doubtful. Learned counsel submit that before constitution of partnership firm, M/s Malwa Grinding Mills, deceased Saifuddin and petitioner Kutubuddin and their mother Kulsum Bai were running the business in the name of M/s Hindustan Grinder. He further submits that after the death of Kulsum bai, M/s Malwa Grinder Mills was constituted as partnership firm by petitioner Kutubuddin and deceased Saifuddin and after the death of Saifuddin alleged agreement was executed in which only the members of family of petitioner No.1 have been included and the legal representatives of deceased Saifuddin have been excluded. Learned counsel further submits that the property of the firm is valuing more than Rs.20 Crores. Learned counsel submits that since document was not from the free will of respondent No.1; therefore in the suit the validity of said agreement is challenged by respondent Nos.1 and 2. Learned counsel submit that it is true that the agreement was filed by the respondent Nos.1 and 2 along with the suit. The same was supplied by

the petitioner No.1 on demand made by the respondent Nos.1 and 2 through Advocate. Learned counsel placed reliance on a decision in the matter of *B.A. & H.INC. Vs. SBI Home Finance Ltd.*, 2011(3) MPLJ 625 wherein the Apex court has held that generally all disputes relating to rights in personam are amenable to arbitration and all disputes relating to rights in rem are required to be adjudicated by Courts. It was further held that in a suit on mortgage is not a mere suit for money but for enforcement of a mortgage, being the enforcement of a right in rem will have to be decided by the courts of law and not by Arbitral Tribunals. Learned counsel further placed reliance on a decision in the matter of *Mukesh Singh Vs. Rakesh,* 2013(1) MPLJ Page 233, wherein this Court has held that while deciding the application filed under Order VII Rule 11 CPC pleadings have to be read in whole to ascertain its true import and not any particular plea has to be considered. Further reliance is placed on a decision in the matter of *Atul Singh Vs. Sunil Kumar Singh,* AIR 2008 SC 1016 wherein in a dispute relating to reconstituted partnership firm, Hon. Apex Court observed that in order to get reliefs, it was absolutely essential for plaintiffs to have partnership deed declared as illegal, void and inoperative, and such declaration could only be granted by civil court and not by arbitrator and matter could not be referred to arbitration. It is submitted that in the facts and circumstances of the case the petition filed by the petitioner and also petition filed by the respondent No.3 has no merits and deserves to be dismissed.

9. In the present case respondent Nos.1 and 2 are alleging that husband of respondent No.1 was never partner in the firm with the petitioner No.1. Further case of respondent Nos. 1 and 2 are that after his death when the respondent No.1 was in the period of Iddat, her signatures were obtained without her free will. Respondent Nos. 1 and 2 have made various allegations about the validity of the agreement and the prayer is that the agreement be declared as null and void and not binding. This type of relief can only be given by the civil court and not by the arbitrator keeping in view the law laid down by the Hon'ble Apex Court.

10. In view of this, petition filed by the petitioner and also petition filed by respondent No.3 has no merits and the same stand dismissed.

11. Copy of the order be placed in the record of connected case.

Petition dismissed.

I.L.R. [2014] M.P., 1291
WRIT PETITION
Before Mr. Justice S.K. Gangele & Mr. Justice B.D. Rathi
W.P. No. 3351/2013 (Gwalior) decided on 2 April, 2014

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

***Constitution - Public Interest Litigation - Basic Amenities* - Where the local authorities are not serious to provide basic amenities to the inhabitants of the locality, directions for taking immediate steps for providing basic amenities like Nala, Road, Electricity, Sewer line issued - Petition disposed off. (Para 5)**

संविधान – जनहित याचिका – मूलभूत सुविधाऐं – जब स्थानीय प्राधिकारी, परिक्षेत्र के रहवासियों को मूलभूत सुविधाऐं प्रदान करने के लिये गंभीर नहीं है, मूलभूत सुविधाऐं जैसे कि नाला, सड़क, बिजली, भूमिगत नाली उपलब्ध कराने के लिये तत्काल कदम उठाने के निदेश जारी किये गये – याचिका का निपटारा किया गया।

None for the petitioner.
Raghvendra Dixit, G.A. for the respondents No. 1 to 3.
Manoj Dwivedi, for the respondent No.5.

ORDER

The Order of the Court was delivered by :
B.D. RATHI, J. :- This writ petition in the nature of *pro bono publico* has been preferred by the petitioner with the grievance that in Transport Nagar Gwalior no road and sewer line have been constructed by the Gwalior Development Authority or Municipal Corporation, Gwalior even after taking sufficient amount of tax from the transporters. Specially in rainy season vehicles are not able to enter into Transport Nagar and the persons who have been doing business there, are being adversely affected, therefore, respondents be directed to provide the facilities having the characteristic of basic amenities.

2. It is submitted by Shri Dixit on behalf of Gwalior Development Authority that an amount of Rs.15 lakh has already been paid by Gwalior Development Authority to Municipal Corporation Gwalior for the purpose of construction of Nala from Motijheel to Bahodapur, therefore, three months time may be granted to complete the remaining work.

3. On previous date of hearing i.e. 18-09-2013, this Court has also directed Municipal Corporation, Gwalior to construct the Nala within a period of two months. Again vide order dated 11-11-2013 this Court has directed the Gwalior Development Authority to take necessary steps in order to complete the patch work and Municipal Corporation Gwalior was also directed to construct the Nala within a period of two weeks. This Court vide order dated 08-01-2014 has also directed the Gwalior Development Authority to make inspection to see whether street lights are working or not and if not then the same shall be replaced so proper street lighting may be provided in Transport Nagar and said exercise has been directed to be done within two weeks.

4. On 12th August, 2013 it was submitted on behalf of Gwalior Development Authority that the committee has been constituted by the collector consisting the following persons in relation to hand over of colony:

S.No.	Name of officer & designation	Designation in the society
01	Smt. Vidisha Mukharjee, ADM Gwalior	President
02	Shri Pradeep Kumar Chaturvedi, Superintending Engineer, PWD Deptt. Municipal Corporation, Gwalior	Member
03	Shri U.S. Mishra Superintending Engineer, GDA Gwalior	Member

Thereafter, it was directed by this Court that within a period of 7 days collector shall decide the question as to whether Municipal Corporation, Gwalior has to construct the roads and sewer lines at Transport Nagar, Gwalior or Gwalior Development Authority. On 18-09-2013 it was submitted by learned Additional Advocate General that the committee has decided that road shall be constructed by the Gwalior Development Authority and shall take proper steps in relation to construction of road and tender process shall be finalized as early as possible. In view of that, it was directed by this Court that tender process shall be finalized within a period of two months from today and the aforesaid committee shall supervise the construction of road and also finalize the process of tender. Municipal Corporation, Gwalior was also directed to take immediate steps for the purpose of construction of Nala and corporation shall ensure that it shall be constructed within a period of two months and also ensure that the construction shall be made within a stipulated period.

5. Looking to the drifts of events of this writ petition, it seems that respondents are not serious to provide the basic amenities to the inhabitants of Transport Nagar but looking to the progress and the promise made by learned counsel on behalf of respondents, this petition is disposed of with the following directions:

i- Since an amount of Rs.15,00,000/- (Rs. Fifteen Lakh only) has already been provided by Gwalior Development Authority to Municipal Corporation, Gwalior, therefore, Municipal Corporation Gwalior shall construct the road at the Transport Nagar with cooperation of Gwalior Development Authority.

ii- Both the authorities i.e. Gwalior Development Authority and Municipal Corporation Gwalior are directed to provide all the basic amenities at Transport Nagar, Gwalior as soon as possible, preferably prior to ensuing rainy season of 2014.

iii- The committee constituted by the collector is directed to monitor and supervise the entire work of providing basic amenities like road, electricity, Nala, sewer line etc. and shall ensure that the directions issued by this Court are being properly complied with.

Accordingly, the petition stands disposed of. No order as to costs.

Petition disposed of.

I.L.R. [2014] M.P., 1293
WRIT PETITION
Before Mr. Justice S.K. Gangele & Mr. Justice B.D. Rathi
W.P. No. 5839/2008 (Gwalior) decided on 2 April, 2014

SRINATH AWAS VIKAS PVT. LTD., GWALIOR ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Constitution - Article 226 - Writ Jurisdiction - Alternative remedy* - Objection can be sustained only when the impugned order/ notice was passed in accordance with the provisions of law - If any impugned order is not passed in accordance with the provisions of law, then it is not necessary for the party to avail the alternative efficacious**

remedy but he can very well approach this court under this Article.
(Para 10)

संविधान – अनुच्छेद 226 – रिट अधिकारिता – वैकल्पिक उपचार – आक्षेप केवल तब पोषणीय हो सकता है जब आक्षेपित आदेश/नोटिस को विधि के उपबंधों के अनुसार पारित किया गया था – यदि कोई आक्षेपित आदेश, विधि के उपबंधों के अनुसार पारित नहीं किया गया है, तब पक्षकार के लिये वैकल्पिक प्रभावकारी उपचार का अवलंब लेना आवश्यक नहीं किन्तु वह भलिभांति इस अनुच्छेद के अंतर्गत इस न्यायालय के समक्ष जा सकता है।

None for the petitioner.
Raghvendra Dixit, G.A. for the respondents No. 1 & 2.
S.S. Gautam, for the respondents No. 3 & 4.

JUDGMENT

The Judgment of the Court was delivered by :
B.D. Rathi, J. :- This writ petition has been preferred by the petitioner being aggrieved by the notice dated 18-12-2008 Annexure P/1 issued by respondent No.4 Commissioner Municipal Corporation Gwalior alleging that by making encroachment over the Government land petitioner has unauthorizedly raised the construction of boundary wall and one room over it and therefore, petitioner is required to remove the said encroachment within 24 hours else respondent No.3 shall remove the said encroachment in exercise of powers conferred under Section 318(2)(3) and 322(3) of the Municipal Corporation Act.

2. As per petitioner, it is a company registered under Indian Companies Act, 1956. The disputed property was purchased by the petitioner company from Ashok Kumar Shukla vide registered sale deed dated 29-01-1999 (Annexure P/4) and since then petitioner company is in possession of said property in the capacity of owner. The boundary wall and one room (as referred in the impugned notice) was already constructed by previous owner Ashok Kumar Shukla which is clear from the map enclosed with the sale deed (Annexure P/4) executed in favour of petitioner company by Ashok Kumar Shukla. Thus, the petitioner company is in lawful possession over the said property in the capacity of owner and petitioner has neither encroached nor any part of property is in question. It is also pleaded by the petitioner that without any enquiry and without ascertaining the actual position existing on the spot, respondent No.4 has issued illegal and arbitrary impugned notice

Annexure P/1 to the petitioner.

3. Petitioner further pleaded that the respondents have wrongly mentioned in the impugned notice that petitioner has encroached upon the said property and unauthorizedly erected the boundary wall and one room over it. The facts mentioned in the impugned notice Annexure P/1 are totally incorrect and it is absolutely illegal, arbitrary, without jurisdiction and it is contrary to the provisions of the Municipal Corporation Act, hence deserves to be quashed.

4. The instant petition has been filed by the petitioner seeking relief that respondents No.3 and 4 be restrained from dispossessing the petitioner company from the property of which it is registered owner.

5. By submitting reply to the petition, respondents No.1 and 2 averred that the notice Annexure P/1 has been legally issued to the petitioner and if petitioner is aggrieved from the said notice then he could have preferred an appeal before the appellate authority prescribed under the Municipal Corporation Act, hence petition entail dismissal.

6. Respondents No.3 and 4 by submitting their reply averred that Ashok Kumar Shukla had wrongly sold the property because he was not owner of the disputed property mentioned in the notice. The notice has been legally issued after making enquiry hence the petition preferred by the petitioner deserves to be dismissed.

7. Having regard to the arguments advanced by learned counsel for the respondents and after perusal of material record, it seems that the disputed room was already in existence on 28-01-1999 when the sale deed was executed by previous owner Ashok Kumar Shukla in favour of petitioner company much prior to the date of impugned notice dated 18-12-2008.

8. From perusal of record, it is also clear that prior to issuing notice Annexure P/1 opportunity of hearing was not afforded to the petitioner. By issuing impugned notice Annexure P/ 1 respondents have directed the petitioner to remove the alleged encroachment within 24 hours. Such kind of order/ notice could not be passed without affording opportunity of hearing to the party concerned and without ascertaining the fact whether property in dispute was really encroached by the party concerned or not.

9. It is settled law that opportunity of hearing should be afforded to the opposite party and without that no order can be passed otherwise such order

shall fall within the ambit and purview of illegality which deserves quashing.

10. So far as the objection of availability of alternative efficacious remedy is concerned, we are of considered view that this objection can be sustained only when the impugned order/notice was passed in accordance with the provisions of law. If it is not so, meaning thereby if any impugned order/notice is not passed in accordance with the provisions of law then it is not necessary for the party to avail the alternative efficacious remedy but he can very well approach this Court under Article 226 of Constitution. In this case impugned notice Annexure P/1 has not been issued in accordance with law as mentioned above.

11. In view of the aforesaid premises, we are of the considered view that the impugned notice Annexure P/1 has been issued without affording opportunity of hearing to the petitioner which is imperative, hence petition is allowed. Petitioner is directed to submit his reply with supporting evidence within fifteen days from today before respondents. In turn, respondents are directed to decide the same in accordance with law within three months from the date of receipt of reply of petitioner after affording proper opportunity of hearing. Further, it is directed that till decision on reply of petitioner by the respondents, no coercive action shall be taken by the respondents.

Petition allowed.

I.L.R. [2014] M.P., 1296
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 2771/2014 (Gwalior) decided on 16 May, 2014

RAJENDRA SYAL ...Petitioner
Vs.
HARI PRASAD AGRAWAL & ors. ...Respondents

Stamp Act (2 of 1899), Section 2(14), Entry 1-A(e) - Instrument **- Agreement to sale - Term instrument is wide enough to cover a document by which any right or liability is either created or purported to be created, transferred, limited, extended, extinguished or recorded - It covers any "instrument" which is related to the sale of immovable property - Words "relating to the sale of immovable property" are very wide than "Agreement to sale" - Document would fall under entry 1-A(e) of the Act, 1899 and not under 1-A(g) - Court directed to impound**

the document and send it to Collector for adjudication - Petition allowed. (Paras 11 & 13)

स्टाम्प अधिनियम (1899 का 2), धारा 2 (14), प्रविष्टि 1–ए(इ) – लिखत – विक्रय करार – शब्द 'लिखत' इतना व्यापक है जिसमें कोई दस्तावेज, जिसके द्वारा किसी अधिकार या दायित्व का या तो सृजन होता है अथवा उसे सृजित, अंतरित, सीमित, विस्तारित, समाप्त या अभिलिखित किया जाना तात्पर्यित है, का समावेश होता है – यह किसी भी "लिखत" को आच्छादित करता है जो अचल सम्पत्ति के विक्रय से संबंधित है – "अचल सम्पत्ति के विक्रय से संबंधित" शब्द, "विक्रय का करार" से बहुत ज्यादा व्यापक है – दस्तावेज, अधिनियम 1899 की प्रविष्टि 1–ए(इ) के अंतर्गत आयेगा और न कि 1–ए(जी) के अंतर्गत – न्यायालय ने दस्तावेज परिबद्ध करने और कलेक्टर को न्यायनिर्णित करने हेतु भेजने के लिये निदेशित किया – याचिका मंजूर।

Cases referred :

2008(2) MPLJ 416, 2010(2) MPLJ 140, AIR 2008 SC 1640, AIR 1969 SC 1238, 2014(1) SCC 618.

P.C. Chandil, for the petitioner.
Prashant Sharma, for the respondents No. 1 & 2.

ORDER

SUJOY PAUL, J. :- This petition filed under Article 227 of the Constitution challenges the order passed in Case No.7-A/13 on 30.4.2014, whereby the application of petitioners/defendant No.2 preferred under Sections 33,35 and 38 of Indian Stamp Act, 1899 is rejected by the Court below.

2. Shri P.C.Chandil, learned counsel for the petitioner, submits that the plaintiffs/respondents No. 1 & 2 filed a suit for specific performance of contract. In the said suit, the document Annexure P-3, i.e., 'agreement for sale' was filed. The petitioner preferred an application under Sections 33, 35 and 38 of the Indian Stamp Act, 1899 (Annexure P-4) and prayed that in the agreement of sale, the sale consideration is Rs.8 crores. The stamp duty on the said amount would be Rs.8 lakhs, whereas the plaintiffs have paid only Rs.100/- and, therefore, by invoking Section 33(1) and 35 of the Stamp Act, the said document be impounded and send to Collector of Stamp for proper adjudication.

3. The plaintiffs filed their reply Annexure P-5 and contended that the application is not tenable. Regarding the nature of agreement, the averments of written statement needs to be seen. They have relied on 2008 (2) M.P.L.J. 416 *(Laxminarayan and others Vs. Omprakash and others)* in their reply. Shri

P.C.Chandil, learned counsel for the petitioner submits that the plaintiffs have relied on an overruled judgment in their reply (Annexure P-5). This judgment is expressly overruled by Division Bench in the case reported in 2010 (2) M.P.L.J. 140 (*Man Singh (deceased) through Legal Representatives Smt. Sumranbai and others Vs.Rameshwar* and another).

4. Criticizing the impugned order, learned counsel submits that the Court below has given contradictory findings. In the first breath it is mentioned that the document Annexure P-3 infact is not an agreement for sale, whereas in the concluding paragraph the finding is given that it is an agreement for sale. By drawing attention of this Court on Schedule 1-A of Stamp Act [entry (e) (ii)], it is contended that this entry shall be applicable and, therefore, 1% of total consideration of the property set-forth in agreement or memorandum of agreement shall be the stamp duty. By taking assistance from Clause 5(d), it is contended that a minute reading of agreement for sale shows that it also falls within the ambit of Clause (d) aforesaid. Reverting back to Section (6) of the Stamp Act, it is urged that if one document is covered in two entries, then the stamp duty which is higher should be payable. Thus, he submits that 2% of the stamp duty is payable on the document in question. In support of his contention, he relied on AIR 2008 SC 1640 *(Government of Andhra Pradesh & Ors. Vs. Smt. P. Laxmi Devi).*

5. Per contra, Shri Prashant Sharma, learned counsel for the plaintiffs-respondents submits that for ascertaining nature of document only contents of the documents are to be seen and no assistance can be drawn from the pleadings of written statement. He submits that a careful reading of the document would show that it is not an 'agreement for sale' between the plaintiffs and the respondents. He submits that the findings of Court below is that it is not 'agreement for sale' between the parties, on the contrary it is an agreement of distribution of the sale proceeds which are over and above eight crores. He submits that since the plaintiffs and respondents are not purchasers and sellers, by no stretch of imagination, this document Annexure P-3 can be said to be an 'agreement for sale'. He submits that the document Annexure P-3 is covered under entry (g) of Clause 5 of Schedule 1-A. He submits that the Court below has not committed any jurisdictional error and, therefore, no interference is warranted in these proceedings under Article 227 of the Constitution. He relied on AIR 1969 SC 1238 *(Hindustan Steel Ltd. Vs. M/s Dilip Construction Co.).*

6. No other points are pressed by the parties.

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

8. The core issue is regarding the nature of the document Annexure P-3 and whether the Court below has rightly rejected the application of the petitioners. Before dealing with the rival contentions advanced, I deem it proper to quote Section 2(14) which defines "instrument". It reads as under:-

> "(14) "**Instrument**" includes every document by which any right or liability is, or purports to be, created, transferred, limited extended, extinguished or recorded;"

The relevant entries of Schedule 1-A relied by the parties read as under:-

"5.Agreement or memorandum of an agreement:-

(a) *******	
(b) *******	
(c) *******	
(d) If relating to the construction of a building on a land by a person other than the owner or lessee of such land and having a stipulation that after construction, such building shall be held jointly or severally by that other person and the owner or the lessee as the case may be, of such land, or that it shall be held jointly or severally by them and the remaining part thereof shall be sold jointly or severally by them.	Two percent of the market value of the land
(e) <u>If relating to sale of immovable property:-</u> (i) When possession of the property is delivered or is agreed to be delivered without executing the conveyance. (ii) When possession of the property is not given.	One percent of the total consideration of the property set forth in the agreement or memorandum of agreement.
(f) ********	
(fa) ********	
(g) If not otherwise proved for	One hundred rupees.

(Emphasis supplied)

9. It is settled in law that the recital in the document are decisive and conclusive on its admissibility. At the time of considering the document, it is recital/terms and conditions contained in the document which shall govern the issue of admissibility and shall also determine the nature of the document. (see (2014) 1 SCC 618 *(Om Prakash Vs. Laxminarayan and others)*. The caption of document Annexure P-3 is "agreement for sale". Certain relevant paragraphs reads as under:-

"यह कि, पक्षकार कमाक–1 द्वारा पक्षकार कमांक–2 के समक्ष उक्त भूखण्ड / सम्पत्ति को विकय करने के संबंध में प्रस्ताव रखा जो पक्षकार कमांक–2 द्वारा स्वीकार किया गया तथा उक्त भूखण्ड / सम्पत्ति के सम्बन्ध में इस विक्रय अनुबंध पत्र के माध्यम से निम्नलिखित शर्ते तय की गई है :–

6. यह कि, पक्षकार कमांक –1 एवं पक्षकार कमांक–2 के मध्य कुल 29617 वर्गफुट भूखण्ड / सम्पत्ति का कुल बिक्रीधन रूपये 80000000(रूपये आठ करोड़ मात्र) तय किया गया है। जिसका भुगतान निम्न प्रकार किया जावेगा :–

अ. रूपये 2000000 (रूपये बीस लाख मात्र) बतौर बयाना जिसमें से रूपये 51000 (रूपये इक्यावन हजार मात्र) नगद एवं रूपये 1949000/– (रूपये उन्नीस लाख उननचास हजार मात्र) का भुगतान निम्न चैको द्वारा किया जा रहा है:–

चैक क्र0 /दिनांक	बैक का नाम	धनराशि	पाने वालें का नाम
680644 /20.10.06	आई.डी.बी.आई	500000/–	श्री धरमपाल सिंह बाबा
086366 /24.10.06	बैंक ऑफ इण्डिया	449000/–	श्री धरमपाल सिंह बाबा
033581 /31.10.06	इलाहाबाद बैंक	500000/–	श्री धरमपाल सिंह बाबा
846786 /05.11.06	भारतीय स्टेट बैंक	500000/–	श्री धरमपाल सिंह बाबा
	टोटल	1949000/–	

उपरोक्त चैको में से चैक न. 680644 दिनांक 20.10.2006 रूपये 500000/– एवं चैक नं. 846786 दिनांक 05.11.06 रूपये 500000/– अजय बंसल एवं सन्स एवं किशोर सिंह कुशवाहा द्वारा पक्षकार कमांक 2 (अ) के वास्ते दिये गये है जिसकी सम्पूर्ण जवाबदारी एवं जिम्मेदारी पक्षकार क्रमाकं 2 (अ) की है।

8. यह कि उपरोक्त सम्पत्ति / भूखण्ड का किसी अन्य पार्टी से joint venture किया जाता है तो एसी दशा में पक्षकार क्रमांक –2 भी उस अनुबंध में भागीदार होगा। अन्य पार्टी / बिल्डर द्वारा जो निमार्ण किया जावेगा वह अनुपात में पक्षकार कमांक–1 को प्राप्त होगा, उस निर्माण की गई जगह को बेचने स जो धनराशि प्राप्त होगी उसमें से पहले रूपये 78000000/–(रूपये सात करोड अस्सी लाख मात्र)

पक्षकार क्रमाकं –1 प्राप्त करेगा एवं रूपये 2000000/–(बीस लाख रूपये मात्र) पक्षकार क्रमाकं –2 प्राप्त करेगा। रूपये 80000000/–(रूपये आठ करोड़ मात्र) से अधिक प्राप्त धनराशि को पक्षकार क्रमांक–1 एवं पक्षकार क्रमांक–2 के मध्य बराबर –बराबर बाटी जावेगी। उपरोक्त धनराशि का वितरण उपर दी गई शर्त कमाकं –7 के अनुसार ही किया जाएगा।"

10. The case of the plaintiffs is that there is no purchaser and seller as per the document Annexure P-3. It is only a document regarding distribution of sale proceeds which are over and above Rs. 8 crores. The Court below in impugned order agreed with the contention of the plaintiffs and opined that the status of the plaintiffs and defendants in the sale deed is not of a Purchaser and Seller and, therefore, the said document cannot be treated as 'agreement for sale'. However, in the concluding paragraph the Court below opined that the stamp duty as per Article 5(e) of Schedule 1-A is not payable. In this finding it is mentioned that it is an 'agreement for sale' of an immovable property.

11. In the opinion of this Court, the words "relating to sale of immovable property"' are very wide. These are wider than "agreement for sale". A conjoint reading of Section 2(14) which defines "instrument" with entry (e) aforesaid makes it clear that it is wide enough to cover a document by which any right or liability is either created or purported to be created, transferred, limited, extended, extinguished or recorded. As per the text and context, in which the words "instrument" in relation to sale of immovable property are used, in my judgment, same are very wide and covers any "instrument", which is relating to sale of immovable property. A microscopic reading of Annexure P-3 shows that it is relating to sale of immovable property. Entry (e) does not confine it only to the "instrument" in which the persons are in the capacity of Purchaser and Seller. Its horizon is much beyond it and covers any "instrument" which is relating to sale of immovable property. Thus, the view taken by the Court below is not in consonance with the relevant entries of Indian Stamp Act, 1899.

12. Putting it differently, by Annexure P-3 the right and liability have been created or purported to have been created. Thus, document in question comes within the meaning of "instrument" as defined in Stamp Act. Hence, the Court below has erred in rejecting the application of the petitioners by treating the document as not covered under entry (e) aforesaid of Schedule 1-A.

13. Since the document in question is covered under entry (e), entry (g) cannot be made applicable. A document may fall under entry (g) only when it

is not covered in any other entry. Thus, this contention of Shri Prashant Sharma fails. The judgment cited in the case of *Hindustan Steel Ltd* (supra) has no application in the facts and circumstances of this case. So far the contention of Shri Chandil regarding applicability of entry 5 (d) is concerned, in my opinion, the petitioner did not press that point before the Court below and, therefore, the Court below had no occasion to address on the aforesaid aspect. In view of this, I am not inclined to deal with this aspect while judging the correctness of order passed by the Court below. It will be open for the Collector of Stamp to adjudicate the matter in accordance with law.

14. In view of aforesaid analysis, the impugned order is erroneous and runs contrary to the mandate of Stamp Act. In the result, this order dated 30.4.2014 is set aside. The application of the petitioners (Annexure P-4) is allowed. The Court below is directed to impound the document and send it to the Collector of Stamp for adjudication.

15. Petition is allowed to the extent indicated above. No cost.

Petition allowed.

I.L.R. [2014] M.P., 1302
APPELLATE CIVIL
Before Mr. Justice Shantanu Kemkar & Mr. Justice M.C. Garg
F.A. No. 27/2013 (Indore) decided on 6 February, 2013

SHAILESH AGNIHOTRI & ors. ...Appellants
Vs.
INDORE DEVELOPMENT AUTHORITY & anr. ...Respondents

Civil Procedure Code (5 of 1908), Section 96, Land Acquisition Act (1 of 1894), Section 18 - Suit barred by limitation **- Suit filed after 9 years of the decision given by the A.D.J. in an application filed u/s 18 of the Land Acquisition Act in a case pertaining to the land acquisition - Held - It was not that the predecessor in interest were not aware of the proceedings, rather it goes to show that the mother of the claimants herself not only filed objections, but even filed a reference which was dismissed on June 27, 2001 - As such, the trial court did find that the suit which is now filed by the appellants, who claim themselves to be the legal heirs of owner were prevented from filing such suit again after 9 years and dismissed the suit on the point of limitation - Appeal dismissed. (Paras 1 & 5)**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 96, भूमि अर्जन अधिनियम (1894 का 1), धारा 18 – परिसीमा द्वारा वाद वर्जित – भू–अर्जन संबंधी प्रकरण में भूमि अर्जन अधिनियम की धारा 18 के अंतर्गत प्रस्तुत किये गये आवेदन में अति. जिला न्यायाधीश, द्वारा दिये गये निर्णय के 9 वर्ष पश्चात वाद प्रस्तुत किया गया – अभिनिर्धारित – यह बात नहीं थी कि हितपूर्ववर्ती कार्यवाही से अनभिज्ञ थे, बल्कि यह दर्शाया गया है कि दावाकर्ताओं की माता ने स्वयं न केवल आक्षेप प्रस्तुत किये बल्कि निर्देश भी प्रस्तुत किया था, जिसे जून 27, 2001 को खारिज किया गया – इस प्रकार विचारण न्यायालय का निष्कर्ष है कि अपीलार्थीगण द्वारा जो वाद अभी प्रस्तुत किया गया है और जो स्वयं को स्वामी के विधिक वारिस होने का दावा करते हैं, उन्हें 9 वर्ष पश्चात पुनः उक्त वाद प्रस्तुत करने से रोका गया और परिसीमा के बिन्दू पर वाद खारिज किया गया – अपील खारिज।

Anwar Khan, for the appellants.
Bhuwan Deshmukh, G.A. for the respondent No.2/State.

ORDER

The Order of the Court was delivered by : **M.C. Garg, J. :-** This judgment shall dispose of the first appeal preferred by the appellants aggrieved of the order passed by the learned Additional District Judge, Indore in a suit filed by the appellants being suit No.71-A/2010 decided by a judgment and decree dated 19.12.2012. The suit has been dismissed by the learned Additional District Judge on the ground of limitation inasmuch as the suit has been filed after nine years of the decision given by the learned Additional District Judge in a suit filed under Section 18 of the Land Acquisition Act in a case pertaining to the land acquisition.

2. Brief facts which have been reproduced by the learned Additional District Judge in the impugned judgment are as follows:-

> 3/ संक्षेप में वादीगण का दावा यह है कि वादीगण की माता श्रीमति विमलाबाई पति श्री मदनलाल जी अग्निहोत्री अपने जीवनकाल में ग्राम सिरपुर स्थित राजेन्द्र ऑटो सर्विस के नाम से धार रोड पर स्थित पेट्रोल पंप के समीप अग्निहोत्री कम्पाउण्ड में निर्मित अपने आवास गृह में निवास करते हुए जीवन लीला समाप्त की। मदनलाल जी अग्निहोत्री का देहान्त 04.01.1988 को तथा श्रीमति विमलाबाई अग्निहोत्री का देहान्त दिनांक 05.06.1998 को हुआ है, वादीगण उनके वारिस हैं। श्रीमति विमलाबाई ने अपने पति के मित्र श्री उजागरसिंह की पत्नी श्रीमति जसबीरकौर के सह–स्वामित्व में सुगनाबाई पति श्रीनिवास किरकिरे से दिनांक 04.01.1973 को ग्राम सिरपुर जिला इंदौर सर्वे नंबर 482/1 रकबा 2.71 एकड़ की भूमि रजिस्टर्ड विकय पत्र से प्राप्त किया और उक्त दिनांक को ही उसका कब्जा प्राप्त कर लिया तथा केतागण का

नामांतरण तहसीलदार इंदौर के कार्यालय में मौजूद नामांतरण रजिस्टर 1975–76 के अनुक्रमांक 18 पर अंकित किया गया। 1973 के अंतिम दिनों में दोनों केताओं ने आधी भूमि आपस में बांट ली, जिसमें 1.355 एकड़ भूमि पश्चिम तरफ की विमलाबाई के स्वत्व में प्राप्त हुई और उस पर विमलाबाई और उसके रिश्तेदारों द्वारा मकान निर्माण किये गये, जिसमें एक रिश्तेदार राजेश तिवारी भी है। दिनांक 12.07.2010 का ज्ञापन क्रमांक 4402 प्रतिवादी क्रमांक 1 की ओर से राजेश तिवारी पर निर्वाहित किया गया, जिसमें यह उल्लेख किया गया कि भमि सर्वे क्रमांक 482/1 रकबा 1.322 हेक्टेयर की भूमि प्रतिवादी क्रमांक 1 के स्वत्व की होर योजना क्रमांक 71 का भाग है और उक्त ज्ञापन द्वारा श्री राजेश तिवारी को निर्मित आवास स्थान अतिक्रामक दर्शाते हुए 7 दिन के अंदर हटाने का निर्देया दिया गया, अन्यथा अतिक्रमण हटाने की कार्यवाही प्राधिकरण द्वारा संपन्न किये जाने तथा व्यय वसूल किये जाने का उल्लेख किया गया। इस पर राजेश ने वादीगण के समक्ष उपस्थित होकर चर्चा की, इस पर वादी क्रमांक 2 ने प्रतिवादी क्रमांक 1 के कार्यालय में जाकर मुख्य कार्यपालन अधिकारी से चर्चा की, तो उनके द्वारा बताया गया कि वादग्रस्त भूमि प्रतिवादी क्रमांक 2 कलेक्टर इंदौर द्वारा अर्जित करके प्रतिवादी क्रमांक 1 को हस्तांरित कर दी गई होकर प्रतिवादी क्रमांक 1 की संपत्ति है, उन्हें दस्तावेज दिखाया गया, जिस पर उन्होंने पाया कि राजपत्र में दिनांक 12.01.79 को अधिसूचना प्रकाशित की गई तथा एक प्रकाशन 11.5.79 का राजपत्र में संकल्प का प्रकाशन है तथा इन्हीं में कलेक्टर महोदय द्वारा 26/27.5.1980 को पारित अवार्ड की प्रति होकर कब्जा पंचनामा एवं कब्जा रसीद है, जिसमें 25.08.80 तथा 27.08.1983 की कब्जा पंचनामा एवं रसीदें थीं।

4/ वादी ने आगे अभिवचनित किया गया है कि धारा 4 भू–अर्जन अधिनियम का प्रकाशन विधि अनुसार किया जाकर सीमांकन नहीं किया गया और न ही उन्हें अर्जन की कोई जानकारी दी गई। उन्हें सुनवायी का अवसर नहीं दिया गया, न ही उनकी भूमि के अर्जन का प्रस्ताव पारित किया गया। धारा 11 भू–अर्जन अधिनियम अनुसार अर्जित की जाने वाली भूमि के क्षतिपूर्ति के अवार्ड का प्रावधान मिलता है, जिसमें सुगनाबाई की भूमि अर्जित करने का प्रावधान है, परन्तु उनकी भूमि का कोई अधिग्रहण नहीं हुआ और उनकी भूमि रकबा 2.71 एकड़ का अर्जन नहीं किया गया। इसी तरह धारा 6 का प्रकाशन विधि अनुसार नहीं किया गया है, न ही भू–स्वामियों को अर्जन की कोई सूचना दी गई। दाविया भूमि पर वादीगण की माता के जीवनकाल में चौकीदार के निवास हेतु भवन निर्मित किया गया था। बाद में चौकीदार के स्थान पर श्रीमति चन्द्रकांताबाई को निवास के लिये स्थान सौंपा गया था और अन्य दो भवन निर्मित किये गये थे और बाद में भी भवन निर्मित किये गये और इस तरण दाविया स्थान पर 5 भवन निर्मित है और इसका उल्लेख दिनांक 27.8.21983 की कब्जा रसीद में मिलता है। परन्तु कब्जा धारियों का उल्लेख नहीं है और कब्जा रसीद में यह भी लिखा है कि प्रतिवादी क्रमांक 1 द्वारा 5 अवैध बने मकानों को छोड़कर कब्जा प्राप्त किया गया। कलेक्टर इंदौर द्वारा पूरी कार्यवाही में कहीं भी नहीं दर्शाया गया है कि इस भूमि के अर्जन की कार्यवाही की जा रही

है और वह उस स्थान पर 27–28 वर्षों से निवासरत है। नोटिस दिनांक 30.07.2010 से वादीगण को वाद कारण उत्पन्न होता है। अंत में निवेदन है कि वादीगण के हित में तथा प्रतिवादीगण के विरूद्ध इस आशय की घोषणा की जाये कि ग्राम सिरपुर तहसील व जिला इंदौर की सर्वे नंबर 482/1 की रकबा 2.71 एकड़ की भूमि का स्वामित्व श्रीमति विमलाबाई अग्निहोत्री और श्रीमति जसबीरकौर तथा उनके वैधानिक वारिसों को प्राप्त है तथा उक्त भूमि का अर्जन नहीं किया गया, साथ ही इस आशय की स्थायी निषेधाज्ञा जारी की जाये कि प्रतिवादीगण स्वयं या अपने प्रतिनिधि के माध्यम से कोई भी ऐसा कृत्य नहीं करें, जिससे वादीगणों की उल्लेखित संपत्ति के सुख उपभोग में कोई व्यवधान उत्पन्न हो।

3. According to the respondent who did file a written statement, it was their case that:

5/ प्रतिवादी क.1 इंदौर विकास प्राधिकरण द्वारा वादोत्तर पेश करते हुए कहा गया है कि इंदौर विकास प्राधिकरण मध्यप्रदेश नगर तथा ग्राम निवेश अधिनियम 1973 की धारा 38 के तहत् सीपित होकर 39 के तहत् निगमित निकाय है और दावा निगम के विरूद्ध न पेश कर अध्यक्ष के विरूद्ध पेश किया गया है। वादग्रस्त भूमि के संबंध में इंदौर सुधार न्यास तथा मध्यप्रदेश नगर सुधार न्यास 1960 की धारा 46 (1) के अंतर्गत विज्ञप्ति कमांक 3 दिनांक 16.05.75 को दैनिक समाचार पत्र स्वदेश अखबार दिनांक 22.05.75 को प्रकाशित की गई थी तथा इस सर्वे नंबर की भूमि का अधिग्रहण प्रतिवादी कमांक 1 की योजना कमांक 71 के लिये विधिवत अधिग्रहण किया जा चुका है और उक्त योजना में ग्राम सिरपुर की सर्वे नंबर 482/1 की भूमि भी सम्मिलित होने से रिकॉर्डेड भू–स्वामी श्रीमति सुगनाबाई पति श्रीनिवास को व्यक्तिगत सूचना अधिनियम की धारा 48 (1) में पत्र कमांक 2268 दिनांक 20.06.75 को तामील किया गया था और इंदौर सुधार न्यास के द्वारा विधान की धारा 51 (1) के अंतर्गत शासन की स्वीकृति हेतु अपर संचालक भोपाल को पत्र कमांक 5450–ए दिनांक 20.12.75 को प्रेषित किया गया तथा शासन द्वारा योजना की स्वीकृति प्रदान करते हुए राजपत्र भाग–3 (1) दिनांक 30.01.76 तथा राजपत्र दिनांक 06.08.1976 को विज्ञप्ति का प्रकाशन किया गया तथा आपत्तियों की सुनवायी पश्चात् न्यास द्वारा निर्णय लिया गया है कि योजना की भूमि संपादित की जाना है तथा धारा 69 के अंतर्गत पत्र दिनांक 17.01.77 द्वारा राज्य शासन से स्वीकृति चाही गई एवं मध्यप्रदेश नगर तथा ग्राम निवेश 1973 के प्रावधान के अंतर्गत मध्यप्रदेश शासन द्वारा इंदौर शहर के निवेश क्षेत्र के लिये 13.05.77 से इंदौर सुधार न्यास के स्थान पर इंदौर विकास प्राधिकारी की स्थापना की स्थापना की गई होने से योजना पर निवेश अधिनियम के प्रावधान लागू हो गये। प्राधिकारी की मध्यप्रदेश नगर तथा ग्राम निवेश अधिनियम के अंतर्गत धारा 50 (7) की विज्ञप्ति का प्रकाशन राजपत्र दिनांक 16.12.77 में किया गया। कलेक्टर इंदौर द्वारा मध्य प्रदेश शासन आवास एवं पर्यावरण विभाग को योजना के संबंध में पत्र दिनांक 26.04.78 प्रेषित किया गया था एवं योजना कमांक 71 की आवश्यक भूमि के

अधिग्रहण की कार्यवाही भू–अर्जन अधिनियम के अंतर्गत अधिनियम की धारा 4 (1) के अंतर्गत शासन द्वारा विज्ञप्ति का प्रकाशन राजपत्र दिनांक 12.01.79 भाग में पृष्ठ कमांक 22 पर हुआ, तत्पश्चात् भू–अर्जन अधिनियम की धारा 6 के अंतर्गत विज्ञप्ति राजपत्र भाग–1 दिनांक 11.05.79 को पृष्ठ कमांक 894–895 पर प्रकाशित की गई तथा भू–अर्जन अधिकारी द्वारा धारा 9 क्लॉज–3 भू –अधिनियम के अंतर्गत दिनांक 16.06.79 को सूचना पत्र प्रेषित किया गया। भू–अर्जन अधिकारी द्वारा दिनांक 26.05.1980 को अवार्ड घोषित किया गया, जिसमें सर्वे नंबर 482/1 भी सम्मिलित है तथा दिनांक 27.08.83 को भूमि का कब्जा प्राप्त कर लिया गया। प्रतिवादी द्वारा योजना कमांक 71 ग्राम सिरपुर की भूमि के भू–अर्जन की कार्यवाही के तहत् अधिग्रहित भूमि के संबंध में पारित अवार्ड अनुसार मुआवजा राशि यूनियन बैंक ऑफ इंडिया के चैक के माध्यम से दिनांक 29.07.80 को भू–अर्जन अधिकारी के यहां जमा कराई गई है एवं वादग्रस्त भूमि सहित योजना कमांक 71 की भूमि का अधिग्रहित भूमि की मालकी का व्यपवर्तन भी अनुविभागीय अधिकारी इंदौर द्वारा प्रकरण क्रमांक 24/अ–2/84–85 में पारित आदेश दिनांक 04.04.85 अनुसार किया गया है और दाविया स्थान के कुछ भाग पर एम.आर.–6 का निर्माण किया गया तथा शेष 1.322 हेक्टेअर भूमि पर तात्कालिक विकास योजना में रोटरी हेतु आरक्षित रखा गया था, किन्तु नवीन विकास योजना में रोटरी के स्थान को परिवर्तित कर आवासीय कर दिया गया है। वादीगण की माता द्वारा भू–अर्जन के समय कोई आपत्ति क्लेम पेश नहीं किया गया, न ही अवार्ड को माननीय उच्च न्यायालय में चुनौती दी गई और यदि भूमि अर्जित की गई है, तो विमलाबाई मात्र निर्धारित मुआवजा प्राप्त करने की अधिकारी हैं, जिसके लिये वह जिलाधीश इंदौर कार्यालय में कार्यवाही कर सकती हैं।

6/ आगे यह है कि योजना कमांक 71 सर्वे नंबर 482/1 के संबंध में एक वाद श्रीमति चन्द्रकांताबाई पति नारायणप्रसाद द्वारा विमलाबाई की ननंद होने का उल्लेख करते हुए दिनांक 07.02.86 को प्रस्तुत किया गया था, जिसका दीवानी मुकदमा नंबर 140–ए/2007 प्रथम व्यवहार न्यायाधीश, वर्ग–1, इंदौर द्वारा पारित निर्णय एवं डिकी दिनांक 17.10.2010 से निरस्त किया गया था और उसकी अपील कमांक 13/09, पन्द्रहवें अतिरिक्त जिला न्यायाधीश, इंदौर के समक्ष पेश की गई थी, जिसका निराकरण निर्णय दिनांक 13.03.2010 न्यायालय द्वारा किया जाकर अपील निरस्त की गई। इसके अलावा इसी भूमि के संबंध में श्रीमति अर्चना पति विजेन्द्र कुमार, रामगोपाल पिता भेरूलाल, मोतीलाल पिता जगन्नाथ द्वारा भी प्रकरण पेश किये गये थे, जो न्यायालय द्वारा पेश किये गये थे। वादीगण द्वारा राजेश पुरूषोत्तम तिवारी को प्रेषित पत्र का उल्लेख करते हुए वाद पेश किया गया है, किन्तु वादोक्त भूमि प्राधिकरण की योजना में अधिग्रहित की गई होकर भू–अर्जन अवार्ड पारित होने तथा कब्जा प्राप्ति के पश्चात से ही प्राधिकरण के स्वामित्व एवं स्वत्व की है और वादीगण का कोई स्वत्व एवं आधिपत्य नहीं है, वे मात्र अतिक्रामक हैं एवं राजेश तिवारी द्वारा कोई वाद प्रस्तुत नहीं किया गया और पूर्व में पेश वाद निरस्त किये जा चुके हैं और अर्जन की कार्यवाही तथा अधिसूचना को चुनौती नहीं

दी जा सकती है। वादीगण का वाद प्रथम दृष्टया क्षेत्राधिकार तथा अवधि बाह्य होकर निरस्त किये जाने योग्य है तथा दावे का चरणवार उत्तर देते हुए उसमें अभिकथित तथ्यों को अस्वीकार किया गया है एवं दावा खारिज किये जाने का निवेदन किया गया है। विशेष कथन में प्रारंभिक कथन में किये गये तथ्यों को दोहराते हुए दावा खारिज किये जाने का निवेदन किया गया है।

4. Considering all these facts and after framing the issues, the learned Additional District Judge dismissed the suit as filed by the appellants being barred by limitation.

5. The observations made by the learned Additional District Judge on the point is relevant inasmuch as it was not that the predecessor in interest were not aware of the proceedings, rather it goes to show that the mother of the claimants namely Smt. Vimla Bai herself not only filed objections, but even filed a reference being reference no.48/1999 which was dismissed on June 27, 2001. As such, the trial Court did find that the suit which is now filed by the appellants, who claim themselves to be the legal heirs of Smt. Vimla Bai were prevented from filing such suit again after 9 years and therefore dismissed the suit on the point of limitation. The observations made in para 27 are relevant which are reproduced hereunder:-

27/ इस संबंध में वादी द्वारा वाद कारण प्रतिवादी क्र.1 द्वारा भेजा गया नोटिस कमांक 4402 दिनांक 12.07.2010 को आधार बनाकर दिनांक 13.09.2010 को पेश किया गया है, परन्तु यहां उल्लेखनीय है कि इस मामले में राजेश की ओर से कोई दावा पेश नहीं किया गया है एवं वादी विशाल अग्निहोत्री ने इस तथ्य को प्रतिपरीक्षण में स्वीकार किया है। प्रतिपरीक्षण से यह भी स्पष्ट है कि उसकी बुआ चंद्रकांताबाई ने भी वादग्रस्त पर बने मकान के संबंध में दावा लगाया हो तो उसे जानकारी नहीं है। इसी तरह अन्य लोगों ने दावे लगाये हों तो उसे जानकारी नहीं है। इसी तरह इस साक्षी से पूछे जाने पर कि उसकी मां ने धारा 30 भू–अर्जन अधिनियम के तहत् प्रकरण प्रस्तुत किया था तो कहता है कि उस जानकारी नहीं है। इस दृष्टि से देखा जाये तो वादीगण ने स्वयं कहा है कि दाविया स्थान पर चंद्रकांताबाई को चौकीदार हटा देने के बाद निवास के लिये स्थान दिया गया था और प्र.डी.22 अनुसार इसी भूमि के संबंध में श्रीमति चंद्रकांताबाई द्वारा इन्हीं आधारों पर दावा लगाया गया था जो तत्कालीन प्रथम व्यवहार न्यायाधीश वर्ग–2 द्वारा निरस्त किया गया था एवं इस मामले में वादी साक्षी नेकराम नंदवाल के कथन देखे जायें तो उससे यह भी स्पष्ट होता है कि अवार्ड पारित होने के बाद विमलांबाई और जसवीर द्वारा आपत्ति पेश की गई थी और धारा 30 के तहत् भू–अर्जन अधिकारी द्वारा रिफरेंस कमांक 48/99 के रूप में अष्टम अपर जिला न्यायाधीश, इंदौर के समक्ष पेश होकर दिनांक 27.06.2001 को निरस्त हुई थी और इस तरह 27.06.2001 के पहले वादीगण के मां को जिसके आधार पर वादीगण स्वत्व

क्लेम कर रहे हैं, भू–अर्जन और भू–अर्जन के तहत् उसे क्षतिपूर्ति प्राप्त न होने की जानकारी थी और उसके द्वारा इस संबंध में रिफरेंस प्रकरण पेश किया गया था। इस तरह दावे का जो आधार नोटिस दिनांक 12.07.2010 को बनाया गया है वह बनावटी है और घोषणा के दावों के लिये वाद कारण उत्पन्न होने से तीन वर्ष के अंदर दावा पेश किया जाना चाहिये और यह दावा अगर पहली बार 2001 को भी आधार माना जाये तो उसके अनुसार रिफरेंस निरस्त होने के भी 9 वर्ष पश्चात् पेश किया गया है। इस तरह दावा स्पष्टतः अवधि बाधित है।

इस तरह इस वाद प्रश्न पर यह निष्कर्ष दिया जाता है कि दावा अवधि बाधित है।

6. This Court is competent to dispose of this appeal at the motion stage itself being barred by limitation. In this regard, it would be appropriate to take note of the provisions contained in Order 41 Rule 11 of Code of Civil Procedure which reads as under:-

> **"R.11.Power to dismiss appeal without sending notice to Lower Court.**-[(1) The Appellate Court after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day may dismiss the appeal.
>
> (2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.
>
> (3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.
>
> [(4) Where an Appellate Court, not being the High Court, dismisses an appeal under sub-rule (1), it shall deliver a judgment, recording in brief its grounds for doing so, and a decree shall be drawn up in accordance with the judgment.]

7. We have heard the learned counsel for the appellants and have considered the judgment passed by the learned Additional District Judge. We are of the view that this case does not call for issuance of notice to the respondents and consequently, in exercise of the powers conferred under Order 41 Rule 11 CPC, we dismiss the appeal at this stage itself with no order as to costs.

C.C.as per rules.

Appeal dismissed.

I.L.R. [2014] M.P., 1309
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
M. A. No. 2148/2003 (Jabalpur) decided on 4 April, 2013

NATIONAL INSURANCE COMPANY LTD. ...Appellant
Vs.
HALKAI & ors. ...Respondents

Motor Vehicles Act (59 of 1988), Section 173 - Liability of Insurance Company - Non-payment of Insurance Premium **- Insurance policy was issued subject to encashment of cheque given towards premium - Cheque was dishonored - Intimation of the same was given to the owner by the Insurance Company - Inspite of that premium of Insurance Policy was not paid by the owner till happening the accident or thereafter at any point of time - Held - Unless the premium is received by Insurance Company, it could not be deemed that any risk of the vehicle was covered under policy issued - Insurance Company is exonerated - Appeal allowed. (Paras 9,10 & 12)**

मोटर यान अधिनियम (1988 का 59), धारा 173 – बीमा कम्पनी का दायित्व – बीमा प्रीमियम का भुगतान नहीं किया जाना – प्रीमियम के लिये दिया गया चेक भुनाने की शर्त पर बीमा पॉलिसी जारी की गयी – चेक अनादृत – बीमा कम्पनी द्वारा इसकी सूचना स्वामी को दी गयी – इसके बावजूद स्वामी द्वारा दुर्घटना होने तक या उसके बाद किसी समय बीमा पॉलिसी के प्रीमियम का भुगतान नहीं किया गया – अभिनिर्धारित – जब तक कि बीमा कम्पनी को प्रीमियम प्राप्त नही होता, यह नहीं माना जा सकता कि जारी की गयी पॉलिसी के अंतर्गत वाहन का कोई जोखिम आच्छादित था – बीमा कम्पनी दायित्वमुक्त – अपील मंजूर।

Cases referred :

2012 ACJ 1307.

D.N. Shukla, for the appellant.
K.N. Agarwal & Saket Agarwal, for the respondents No. 1 & 2.
None although served for respondents No. 3 & 4.

ORDER

U.C. MAHESHWARI, J. :- The appellant/ insurer has filed this appeal under section 173 of the Motor Vehicle Act, 1988 (in short 'the Act') being aggrieved by the award dated 8.8.03 passed by the MACT, Chhatarpur in

MVC Case No.34/02 whereby the claim of respondents No.1 and 2 filed under section 166 of the Act regarding the vehicular death of their son Mathura Prasad aged 25 years, has been awarded against the appellant as well as respondents No.3 and 4 the registered owner and driver of the offending vehicle by saddling their joint and several liability for the sum of Rs.1,79,800/- along with interest on the same @ 9% per annum from the date of filing the claim petition and cost of the claim petition Rs.1000/-.

2. The facts giving rise to this appeal in short are that on 31.10.99 the above named Mathura Prasad, son of respondent No.1 and 2, was subjected to an accident by the Tata Jonga model vehicle bearing registration No.MKC-8192 registered in the name of respondent No.4 and driven by respondent No.3 in a rash and negligent manner near some restaurant at Sagar road, Chhatarpur resultantly he sustained the fatal injuries and succumbed to the same on the spot. On receiving the information, the marg intimation as well as the crime was registered against respondent No.3. The dead body was sent to the hospital where its postmortem was carried-out. After receiving such report, on holding the investigation, the respondent No.3 was charge sheeted for the alleged offence of section 304-A of the IPC. In further averments of the claim petition it is stated that deceased being aged 25 years, was earning Rs.200/- per day and his parents respondents No.1 and 2 were dependent on him and on account of his untimely death, they have been deprived of their dependency. Besides this, they have also suffered the mental agony. It is further stated that on the date of the accident, the aforesaid vehicle was registered in the name of respondent No.4 while the same was insured with the appellant/ company. In such premises the impugned claim was preferred by respondent No.1 and 2 for the sum of Rs.6,92,000/-.

3. In reply of respondent No.3 driver, the facts with respect of the accident stated in the claim petition, are denied. However it was admitted that the vehicle was registered in the name of respondent No.4 while the same was insured with the appellant. So, in such premises, if any liability is saddled against the respondent No.3 then in the light of insurance policy, the same be saddled against the appellant and, in such premises, prayer for exonerating this respondent is made.

4. In reply of the appellant/insurer, by denying the averments stated with respect of the alleged accident, it is further stated that the cheque which was given by respondent No.4 for issuing the insurance policy with respect of the

aforesaid vehicle, after issuing the policy (Ex.NA-3) the same was deposited on behalf of the appellant with its banker but the same was dishonored on account of insufficient fund in the account of respondent No.4. Pursuant to that, in the lack of payment of premium, the covering note as well as the insurance policy issued by the appellant with respect of the offending vehicle to the respondent No.4, , subject to payment of the premium in cash or through fresh cheque, canceled and intimation of the same was given to the respondent No.4 immediately through registered post soonafter receiving the information of dishonoring the cheque and before happening the alleged accident. In such premises, it could not be deemed that the risk of the vehicle with respect of any accident was covered by the appellant and, in such premises, prayer for exonerating the appellant/insurer from the liability of the impugned claim is made.

5. In view of the pleadings of the parties, after framing the issues, the evidence was recorded. On appreciation of the same, by holding that the deceased Mathura Prasad has died due to rash and negligent driving of the respondent No.3, the claim of respondents No.1 and 2 was awarded against the appellant as well as the respondent No.3 and 4 by saddling their joint and several liability to pay the above mentioned sum. Being dissatisfied with such award, the appellant/insurer has come to this court with this appeal.

6. Appellant's counsel after taking me through the record of the tribunal along with the impugned award as well as the papers exhibited on record argued that immediately after receiving the cheque of the premium from respondent No.4 for the amount of Rs.2934/-, subject to encashment of the cheque on dated 25.6.99, the cover note as well as the insurance policy with respect of the aforesaid vehicle covering the risk for the period 25.6.99 to 24.6.2000 was issued. But subsequently on depositing the cheque with the banker by the insurer, the same was not encashed. As such it was dishonored on account of insufficient fund in the account of respondent No.4. Consequently, the appellant/ insurer had canceled the policy and an intimation of such cancellation of the insurance policy and risk of the aforesaid vehicle is not covered by the insurer, was sent on dated 5.7.99 by Ex.NA-6 through registered post envelope Ex.NA-7 through post office by postal receipt Ex.NA-8. Such registered letter was sent on the same and correct address of respondent No.4 which was mentioned by him in the application form for issuing the insurance policy. But such envelope was returned back with the endorsement of the postal office that the respondent No.4 was not traced out

on the address mentioned on the envelope. In any case the intimation for cancellation of the policy and the insurance company is not covering the risk unless fresh payment in cash or through cheque is given to it, was sent to respondent No.4 before happening the accident and within sufficient time from the date of dishonoring the cheque and subsequently the sum of such premium was not deposited on behalf of respondent No.4. Consequently, the risk of the aforesaid vehicle was not covered on the date of incident and, in such premises, the tribunal has committed error in holding the joint and several liability to indemnify the claim against the appellant along with respondents No.3 and 4 and, in such premises, prayed to allow this appeal till the extent of the appellant and exonerating it to pay the sum of the impugned award to respondents No.1 and 2/ claimants by allowing this appeal. In support of his contention, he has also placed his reliance on a decision of the Apex Court in the matter of *United India Insurance Co.Ltd. Vs. Laxmamma* and others- 2012 ACJ 1307.

7. It is apparent fact on record as stated in the proceedings that the counsel of respondent No.1 and 2 has pleaded no instructions on their behalf while no one has appeared on behalf of respondents No.3 and 4 before this court to assist the court for final adjudication of this appeal.

8. Keeping in view the arguments advanced by the appellant's counsel, I have carefully gone through the record of the tribunal along with the aforesaid document referred by the counsel as well as the impugned award. True it is that on 25.6.99, after receiving the cheque of the sum of premium from respondent No.4, the insurance policy covering the risk of the above mentioned offending vehicle was issued by the appellant to respondent No.4 subject to encashment of the cheque and as per the document available on the record i.e bank's ledger (Ex.4-C), such cheque was not encashed on depositing the same by the insurer in its account for collection. As per available evidence, the same was dishonored on account of insufficient fund in the account of respondent No.4. After receiving such information of dishonoring the cheque by the appellant on its behalf, a notice Ex.NA-6 dated 5.7.99 intimating to respondent No.4 regarding cancellation of the policy on account of dishonoring the cheque with further intimation that the appellant is not under obligation to cover the risk unless the fresh payment either in cash or through cheque is given to it, was sent to respondent No.4 through envelope of registered post Ex.NA-7 by posting the same through postal receipt Ex.NA-8. However, such registered notice was returned unserved in the office of the appellant

with the endorsement that the respondent No.4 was not found at the address mentioned on it. It is also apparent fact on record that the appellant has also proved to sent such notice to respondent No.4 by producing the dispatch register Ex.NA-9 according to which such notice was sent on 6.7.99. The postal receipt is also evident for such date. A copy of dispatch register was taken on record as Ex.NA10.

9. On carefully examining the record, I have not found any evidence showing that subsequent to dishonoring the cheque till happening the accident or thereafter at any point of time, the premium of the aforesaid insurance policy was paid by respondent No.4 to the appellant. In such premises, it is apparent fact on record that initially the insurance policy Ex.NA-3 was issued, subject to encashment of the aforesaid cheque of the premium and when the same was dishonored then inspite intimation of the insurance company to the respondent No.4 regarding such dishonoring of the cheque and cancellation of the policy subject to paying the premium afresh, the premium was neither paid nor received at the end of the appellant/ insurer and, in view of the provision of section 64 (VB) of the Insurance Act unless the premium is deposited or received by the insurance company, it could not be deemed that any risk of the vehicle was covered under policy issued.

10. According to section 147 of the Act also in the lack of receiving the premium of the policy, it could not be deemed that the risk of the above mentioned vehicle was covered on the date of the incident. So, in such premises, I am of the considered view in the lack of the payment of the premium of the policy to the insurance company the liability of the impugned claim could not be saddled against it. In such premises, the tribunal has committed grave error in saddling the liability of the impugned award on the appellant/insurer along with respondent No.3 and 4 jointly and severally.

11. On arising the occasion before the Apex Court, this question was answered by the Apex Court in the matter of *"Laxmamma and others"* (supra) in which it was held as under :-

> "19. In our view, the legal position is this : where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premium and such cheque is returned dishonoured, the liability of authorized insurer to indemnify third parties in respect of the liability which that policy covered subsists and it has to satisfy award of

compensation by reason of the provisions of Sections 147(5) and 149(1) of the M.V. Act unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonored and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof."

12. In view of the aforesaid discussion as well as the dictum of the Apex Court, the tribunal has committed grave error in saddling the liability of the impugned claim jointly and severally against the appellant/insurer along with respondent No.3 and 4. In such premises, such approach of the Tribunal being perverse deserves to be set aside till the extent of the appellant/insurer. So far the other findings and the approach of the tribunal in the impugned award are concerned, the same are not requiring any interference at this stage. As such the same have not been challenged by any of the respondents before this court by way of any cross-objection or by filing the separate appeal.

13. In view of the aforesaid discussion, this appeal is allowed and the appellant/ insurance company is hereby exonerated to pay the sum of the impugned award. Till this extent, the impugned award is modified while the other findings of the same are hereby affirmed. However, considering the oral prayer of the appellant's counsel, it is observed and directed that if any payment of the impugned award is made on behalf of the insurance company to respondents No:1 and 2, then the insurance company shall be at liberty to recover the same by way of filing execution proceedings against respondent No.4 on the basis of this order and there shall be no requirement to file any fresh proceeding to recover the same from respondent No.4. There shall be no order as to the cost.

14. The appeal is allowed as indicated above.

Appeal allowed.

I.L.R. [2014] M.P., 1315
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
S.A. No. 649/2004 (Indore) decided on 5 April, 2013

STATE OF M.P. & ors. ...Appellants
Vs.
SHREE RANCHOR TEEKAM MANDIR ...Respondent

Civil Procedure Code (5 of 1908), Sections 9, 100 & Land Revenue Code, M.P. (20 of 1959), Section 115 - Second Appeal **- Suit for declaration that suit property is private property and the deity of the temple on the suit land is Bhumiswami of the agricultural land - Defence of State was that suit temple is a public temple and the name of the Collector has rightly been endorsed in revenue records as Vyavasthapak (Manager) - Held - No notice to the plaintiff nor any enquiry was made before endorsing the name of the Collector as Vyavasthapak - Recording the name of Collector as Vyavasthapak was bad in law - State's Second Appeal was dismissed.**

(Paras 3, 16 & 18)

सिविल प्रक्रिया संहिता (1908 का 5), धाराऐं 9, 100 व भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 115 – द्वितीय अपील – घोषणा के लिये वाद था कि वाद सम्पत्ति व्यक्तिगत सम्पत्ति है और वाद भूमि पर मंदिर का देवता, कृषि भूमि का भूमिस्वामी है – राज्य का बचाव था कि वाद मंदिर एक सार्वजनिक मंदिर है और व्यवस्थापक के रुप में कलेक्टर के नाम को उचित रुप से पृष्ठांकित किया गया है – अभिनिर्धारित – व्यवस्थापक के रुप में कलेक्टर का नाम पृष्ठांकित करने से पूर्व न तो वादी को कोई नोटिस दिया गया और न ही कोई जांच की गई – व्यवस्थापक के रुप में कलेक्टर का नाम अभिलिखित किया जाना विधि अंतर्गत अनुचित था – राज्य की द्वितीय अपील खारिज की गई।

Cases referred :

ILR 2008 MP 3200, 1927 Privi Council 230, 1975 JLJ 333, AIR 1999 SC 1441, 1960 JLJ 1016.

Sanjay Guha, P.L. for the appellants/State.
G.M. Chafekar with *D.S. Kale,* for the respondent.

JUDGMENT

A.K. Shrivastava, J. :- This second appeal has been filed at the

instance of defendants against the judgment and decree of reversal passed by learned Additional District Judge (Fast Track Court), Ujjain in Civil Appeal No. 24-A2003 whereby the judgment and decree dated 20.11.2003 passed by learned Civil Judge, Class I, Mahidpur in Civil Suit No. 162-A/1995 decreeing the suit of plaintiff partly, has been dismissed.

2. Today is the auspicious day because long drawn litigation which was filed near about 33 years ago on 9.7.1980 is being decided today.

3. No exhaustive statements of fact are required to be narrated for the purpose of disposal of this second appeal looking to the limited substantial question of law which has been framed and further the facts in detail are already mentioned in paras 2 to 6 of the impugned judgment. For ready reference, it would be condign to state that the disputed property is a temple as well as the agricultural land of temple. According to the plaintiff, the temple is a private temple and was established by the plaintiff's ancestors. Further it has been pleaded that the deity is the Bhumiswami and it is also so recorded in the revenue record. The State of M.P. issued notice to the plaintiff on 7.7.1980 to auction the land and hence the present suit has been filed by the plaintiff on 9.7.1980 for declaration and injunction praying the relief that the suit property be declared as a private temple and the deity is the Bhumiswami of the agricultural land, the description whereof is given in the plaint. A decree of injunction is also prayed that defendants may not interfere in the disputed property and they be not dispossessed.

4. The defendants filed written-statement and denied the plaint averments. The defendant no.5 Manohar is the real brother of Surendra through whom the suit has been filed. The stand of the State Government in its written-statement is that the suit temple is not a private temple and is a public temple. According to the order and directions of the State Government the name of Collector as *Vyavasthapak* (Manager) of the suit property has been endorsed in the revenue record. According to the defendants, the plaintiff has no case and the suit be dismissed.

5. The plaintiff examined Surendra Das (PW-1), Ratanlal (PW-2), Kanhaiyalal (PW-3) and Vivek Dattatreya (PW-4). The plaintiff filed documents Ex. P/1 to P/33 and mostly the documents are the revenue records. The defendants however did not examine any witness and did not file any document.

6. The learned trial Court on the basis of evidence placed on record dismissed the suit. The first appeal which was filed by the plaintiff has been partly allowed and suit of plaintiff has been partly decreed by passing the impugned judgment and decree.

7. In this manner, this second appeal has been filed by the defendants which was admitted by this Court on 1.2.2006 on the following substantial question of law:-

> "Whether lower appellate Court was justified in holding that the suit land and the agricultural land appertained thereto is the private property of respondents?"

8. The contention of Shri Guha, learned Panel Lawyer for the appellant/ State is that the disputed property is a temple and it has been so recorded in the revenue record and if that would be the position it would be deemed to be a public temple and, therefore, the name of Collector has been rightly endorsed in the revenue record as *Vyavasthapak* (Manager). In support of his contention, learned counsel has placed heavy reliance upon Single Bench decision of this Court *Gayaprasad and another Vs. State of M.P.* I.L.R. 2008 MP 3200 and submitted that learned First Appellate Court was not justified in holding that the agricultural land appertain to the temple is the private property of respondents.

9. On the other hand, Shri Chafekar, learned senior counsel argued in support of the impugned judgment and submitted that not even a single document has been filed and proved by the State Government in order to hold that the temple in question is a public temple and, therefore, learned First Appellate Court did not err in decreeing the suit of plaintiff for injunction. Learned senior counsel further submits that despite overwhelming evidence both documentary and oral, has been adduced by the plaintiff proving his case, the defendants did not adduce any evidence in rebuttal and did not dare to examine even a single witness in order to prove their pleadings raised in the written-statement. Hence, according to learned senior counsel, the evidence of plaintiff stands un-rebutted and if that would be the position, the learned First Appellate Court did not commit any error in decreeing the suit of plaintiff for injunction

10. Having heard learned counsel for the parties, I am of the view that this appeal deserves to be dismissed.

Regarding Substantial Question of Law framed:

11. There is specific pleading and evidence of plaintiff that the temple in question as well as the land appertained to it is private temple and deity is the Bhumiswami. Specifically Surendra Das (PW-1) has deposed that the temple was established by his ancestors and repairs etc. are being carried out by him and his family members and earlier by his ancestors. The puja etc. is offered by plaintiff. He has further deposed that land revenue was being regularly deposited by his ancestors and now is being deposited by him. The oral evidence of plaintiff is corroborated by the evidence of Kanhaiyalal (PW-3) and Vivek Dattatreya (PW-4).

12. Apart from oral evidence, umpteen revenue records i.e. khasra etc. has been filed by the plaintiff. Ex. P/1 is of the year 1971 -72 to 1973-74, Ex. P/2 is the khasra of the year 1973-74, Ex. P/3 is the Khasra of the year 1974-75, Ex. P/10 is the note prepared by the defendants in regard to the description of temples after the settlement year. In all these revenue records, no where the temple in question has been described to be a public temple. Had it been a public temple, certainly it would have been so recorded in the revenue record. Not only this, in all these revenue records, the deity has been shown to be the Bhumiswami.

13. Another important document is Ex. P/13 which is the list of government temples. At the top of such list, the name of Mahidpur, where the temple in question is situated has been mentioned and it has been specifically endorsed that there is no government temple in Mahidpur although in the same document at other places the description of government temple has been mentioned. The other corroborating documents are ample entries in the Municipality and the receipts etc. Looking to the overwhelming documentary as well as oral evidence on record pointing out that the disputed temple is a private temple and the deity Shri Ranchore Tikam Mandir is the Bhumiswami of the agricultural land appertained and specially when there is not even a single document in rebuttal in order to demonstrate that the suit temple is either public or government temple or the land in question is government land, I am of the view that learned First Appellate Court did not commit any error in holding that the temple in question is a private temple and the deity is the Bhumiswami. True, the learned Trial Court has held that the temple in question is a public

temple but the said finding is based upon no document and, therefore, it was rightly set aside by learned First Appellate Court. The Single Bench decision of this Court in *Gaya Prasad* (supra) placed reliance by learned panel lawyer for the appellants is not applicable in the present case for the simple reason that in the said decision the temple was found to be public temple. However, in the present case, when there is not even a single document in order to show that the temple in question is a public temple or the deity is not the Bhumiswami of the agricultural land, hence I am of the view that decision of *Gaya Prasad* (supra) is not applicable in the facts and circumstances of the present case.

14. One important fact which cannot be marginalized and blinked away is that when the State of M.P. and its functionaries who are defendants fought the case tooth and nail but why at the time of adducing evidence they turned back and did not examine even a single witness. The answer is very simple because they were quite aware that if any witness will be examined, he will face tight corner of cross examination which would be made by plaintiff specially when there is no basis to prove their stand that the land in question is a public temple and, therefore, not even a single witness was examined in the rebuttal. Hence, according to me, the evidence of plaintiff stands un-rebutted and unchallenged.

15. Near about century ago, the Privy Council in *Sardar Gurbaksh Singh Vs. Gurdial Singh and another,* 1927 Privy Council 230 has categorically held that the practice of not calling the party as witness with a view to force the other party to call him, and so suffer the discomfiture of having him treated as his, (the other party's) own witness is a bad and degrading practice. Same analogy has been adopted by the Division Bench of this Court in *Kasturchand v. Kapurchand* 1975 JLJ 333 wherein it has been specifically held that if a party personally knowing the facts and circumstances to give evidence on his own behalf and to submit to cross-examination and his non-appearance as a witness would be the strongest possible circumstance which will go to discredit the truth of the case. In this regard, I may also profitably place reliance upon the decision of Supreme Court *Vidhyadhar Vs. Mankikrao and another* AIR 1999 SC 1441. Hence, I am of the view that plaintiff has successfully proved his case by proving that temple in question is a private temple and the land appertained thereto is the Bhumiswami of the deity Shri Ranchordasji. The stand which has been taken by the defendants in their written-statement

that the temple in question is a public temple has not at all been proved in absence of any document on record.

16. I do not find any merit in the contention of learned counsel for the appellants/State that as per directions and order of the State Government, the name of Collector, Ujjain was added as *Vyavasthapak* (Manager) in the revenue record. The stand of defendants in the written-statement as well as the Courts below and so also in this Court is that according to the order of the State Government, the name of Collector was endorsed as *Vyavasthapak* of the temple in question. To me, the said action of the State Government runs *de hors* to Section 115 of M.P. Land Revenue Code, 1959 (for short, Code). According to this Section, if any Tahsildar finds that a wrong or incorrect entry has been made in the land records prepared under Section 114 by an officer subordinate to him, he shall direct necessary changes to be made therein in red ink after making such enquiry from the person concerned as he may deem fit after due written notice. According to me, the words embodied in this Section 'after due enquiry and written notice' are having definite meaning which include holding an enquiry after giving due notice to the person interested. It has been frankly admitted by learned Panel Lawyer that no notice was ever given to the plaintiff before endorsing the name of Collector as *Vyavasthapak* in the revenue record and similarly no enquiry was made. Hence, I am of the view that such an action runs contrary to Section 115 of the Code. There is a Division Bench of this Court *Shiv Narain Vs. Tahsildar, Gwalior* 1960 JLJ 1016 which is in respect of Section 50 of M.B. Land Revenue & Tenancy Act, 1950 which is equivalent to the provisions of Section 115 of the Code. In this Division Bench decision also the Division Bench has held that without holding an enquiry and giving notice to the person interested, there cannot be any change in the revenue record. There are several other decisions of this Court on this point.

17. The substantial question of law is thus answered that learned First Appellate Court was justified in holding that the agricultural land appertained to it is the private property of the respondent.

18. Resultantly, this appeal fails and is hereby dismissed with no order as to costs.

Appeal dismissed.

I.L.R. [2014] M.P., 1321
APPELLATE CIVIL
Before Mr. Justice Alok Aradhe
S.A.No. 785/2003 (Jabalpur) decided on 26 September, 2013

MAHESH PRASAD & ors. ...Appellants
Vs.
RAMBAHADUR & ors. ...Respondents

A. ***Civil Procedure Code (5 of 1908), Section 100, Land Revenue Code, M.P. (20 of 1959), Section 168 & Rewa Registration Act, 1917, Section 21 - Second Appeal*** - **Admittedly, the original plaintiff's father and defendants No. 1 and 2's grandfather were in joint cultivating possession - Plaintiff has not set-up the case that suit lands were leased-out to the defendants - Held - Since the co-owner did not belong to category specified in Section 168(2) of the Code, provisions of Section 168 of the Code, have no application. (Para 9)**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100, भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 168 व रीवा पंजीकरण अधिनियम, 1917, धारा 21 – द्वितीय अपील – स्वीकृत रुप से मूल वादी के पिता और प्रतिवादी क्र. 1 व 2 के दादा का संयुक्त कृषिकर्म कब्जा था – वादी ने ऐसा प्रकरण नहीं बनाया है कि वाद भूमि को प्रतिवादियों को पट्टे पर दी गई थी – अभिनिर्धारित – चूंकि सह–स्वामी, संहिता की धारा 168(2) में विनिर्दिष्टित श्रेणी का नहीं है, संहिता की धारा 168 के उपबंध प्रयोज्य नहीं।

B. ***Rewa Registration Act, 1917, Section 1 - Registration*** - **No material on record to show that the property in question was yielding income of Rs. 25/- per annum - Held - Document is not required to be registered - Document was executed in the year 1946 and the Registration Act, 1908 and Indian Stamp Act, 1899 were made applicable to Vindhya Pradesh Region w.e.f. 16.04.50 - The same neither required registration nor payment of Stamp duty. (Para 10)**

ख. रीवा पंजीकरण अधिनियम, 1917, धारा 1 – पंजीकरण – अभिलेख पर यह दर्शाने के लिये कोई सामग्री नहीं कि प्रश्नगत सम्पत्ति की रु. 25/– प्रतिवर्ष उपज से आय थी – अभिनिर्धारित – दस्तावेज का पंजीकरण अपेक्षित नहीं – दस्तावेज को वर्ष 1946 में निष्पादित किया गया है और पंजीकरण अधिनियम, 1908 व भारतीय स्टाम्प अधिनियम, 1899 को विंध्य प्रदेश क्षेत्र के लिये 16.04.50 से प्रभावी बनाया गया था – उक्त का न तो पंजीकरण अपेक्षित है और न ही स्टाम्प

शुल्क का भुगतान।

Cases referred :

AIR 1951 SC 177, AIR 1956 SC 548, (1976) 4 SCC 184, (2009) 10 SCC 223, (1977) 2 SCC 814, (2009) 15 SCC 747, (2004) 10 SCC 779, AIR (33) 1946 PC 51, 2013 (3) MPLJ 619, AIR 1987 SC 1242, AIR 1974 SC 471, AIR 1971 SC 1865, 1996 MPLJ 772.

Ravish Agrawal with *Abhishek Singh*, for the appellants.
R.P. Agrawal with *Anuj Agrawal,* for the respondents.

JUDGMENT

ALOK ARADHE, J. :- This appeal is by defendants No.1, 2 and 5, which was admitted on following substantial questions of law:-

> "1. Whether in view of the averments in para-9 of the plaint, the defendants were put in possession as Adhiyadar sharing crops till 1983, being in contravention of Section 168 of the M.P. Land Revenue Code, 1959, he (sic. the) appellants defendants have acquired the status of occupancy tenant and by operation of law the Bhumi Swami ?
>
> 2. Whether the approach of both the courts below with respect of Section 21 of the Rewa Registration Act is sustainable in view of the provision of Section 1 of the same Act ?"

2. Facts leading to filing of the appeal briefly stated are that the original plaintiff filed a suit on the ground that suit lands admeasuring 2.67 acres were allotted on lease to his father namely Bhura and defendant No.1's grandfather namely Babadeen some time in the year 1924-25, who had half share each in the suit lands. It was further pleaded that Bhura died 40 years ago and on his death, his interest in the suit land devolved on plaintiff namely Ramsajivan. On Babadeen's death his interest in the suit lands devolved on defendants No.1 and 2's father namely Bhagwatdeen and after his death, on defendants No.1 and 2. It was also pleaded that parties were in joint possession of the suit lands. However, in the year 1970, the original plaintiff suffered from leprosy and was unable to carry out the agricultural operations and, therefore, handed over the suit lands for cultivation to defendants in lieu of which defendants agreed to share the crop. However, defendants No.1 and 2 got prepared a forged sale deed and got their name mutated in the revenue records. In the

year 1983, the defendants No.1 and 2 refused to share the proceeds of the crop from the suit lands. The plaintiff therefore filed the suit seeking the relief of declaration that order of mutation in favour of defendants No.1 and 2 is null and void. The plaintiff also sought the relief of possession, damages and mesne-profits.

3. The defendants No.1 and 2 filed the written statement in which inter-alia it was pointed out that Ramsajivan in the year 1946 had sold his share in the suit land to Bhagwatdeen for a consideration of Rs.85/- vide Ex.D/1 and since then, Bhagwatdeen is in possession of the suit land as owner thereof. It was further pleaded that in the year 1966, defendants No.1 and 2 sold the land admeasuring 1.29 acres to one Rajkishore and the order of mutation dated 4.11.1970 has been passed with the consent of the plaintiff. Alternatively, the plea of acquisition of title by adverse possession was also taken in the written statement.

4. The trial Court vide judgment and decree dated 12.3.1998 inter-alia held that execution of sale deed Ex.D/1 has not been proved as neither the scribe nor any person conversant with the signature of the witnesses to the sale deed has been examined by defendants No.1 and 2. It was further held that since 1947 till 1985, the sale deed (Ex.D/1) did not see the light of the day and was produced for the first time in the year 1985. It was also held that if any document was executed in the year 1946 for a consideration of more than Rs.25/-, the same required registration in view of Rewa Registration Act, 1917 and since Ex.D/1 i.e. the sale deed is unregistered, therefore, the same was excluded from consideration. The trial Court further held that plaintiff and defendants No.1 and 2 were in joint cultivating possession, therefore, the plea of acquisition of title by adverse possession cannot be accepted. The aforesaid decree has been affirmed in appeal.

5. Learned senior counsel for the appellants while inviting the attention of this Court to para 9 of the plaint as well as Section 168 of the M.P. Land Revenue Code, 1959, submitted that the plaintiff and his son Rambahadur were co-owners and since Rambahadur did not suffer from any disability, therefore, the land in question were leased out to defendants No.1 and 2 in violation of Section 168 of the M.P. Land Revenue Code, 1959 and therefore, the defendants had become Bhumiswamis in respect of lands in question. Learned senior counsel for the appellants while referring to paragraph 224 of the Mullas Hindu Law 17th Edition, further submitted that under the Mitakshara

law each son upon his birth takes an interest equal to that of his father in ancestral property, whether it be movable or immovable. It was contended that the right which the son takes at his birth in the ancestral property is wholly independent of his father and he does not claim through his father and the Courts below wrongly excluded the document Ex.D/1 i.e. the sale deed for want of registration as there is no material on record to show that the usufruct in respect of the property in question is more than Rs.25/- per annum. It was pointed out that the document in question was executed in the year 1946 and the provisions of Transfer of Property Act were made applicable to Vindhya Pradesh region w.e.f. 16.4 1950. Therefore, registration of sale deed was not required. Lastly, it was urged that plaintiff may fall back upon the plea taken by defendants if no prejudice is caused to the defendants. In support of his submissions, learned senior counsel for the appellants has placed reliance on decisions of Supreme Court in *Sant Ram Sharma Vs. State of Rajasthan and others*, A.I.R. 1967 and *Firm Sriniwas Ram Kumar Vs. Mahabir Prasad and others*, AIR 1951 SC 177.

6. On the other hand, learned senior counsel for the respondents while inviting the attention of this Court to averments made in the plaint in paragraphs 3, 4, 7, 9, 10 and 11 and the averments contained in paragraphs 3, 4, 7, 9-A, 10 and 26 of the written statement submitted that the parties cannot be permitted to travel beyond the pleadings and set up a new case. It is submitted that in view of the pleadings of the parties and in the facts of the case, the provisions of Section 168 of the M.P. Land Revenue Code do not apply. It is further submitted that since defendants were in possession of the land as owners since 1946, therefore., the question of the plaintiff letting out the land to them on lease does not arise as per the version of the defendants themselves. It is also urged that in view of Section 25 of the Rewa Registration Act, 1917, the document Ex.D/1 required compulsory registration and therefore, the same was rightly excluded from consideration by the Courts below. It is also submitted that the Courts below have found the document Ex.D/1 to be suspicious and have held that same has not been proved. However, the aforesaid finding has not been assailed by the appellants. It was pointed out that the document Ex.D/1 is not properly stamped and, therefore, the same cannot be looked into even for colateral purposes and the plaintiff cannot be permitted to raise a new plea for the first time in the Second Appeal. In support of his submissions, learned senior counsel for the respondents have placed reliance on *Mohammad Bagar and others Vs. Maimun-Nisa Bibi and others,*

AIR 1956 SC 548, *Sri Ram Pasricha Vs. Jagannath and others*, (1976) 4 SCC 184, *FGP Ltd., Vs. Saleh Hooseini Doctor*, (2009) 10 SCC 223, *Kanta Goel Vs. B.P. Pathak and others*, (1977) 2 SCC 814, *Jai Singh and others Vs. Gurmej Singh*, (2009) 15 SCC 747, *Karnataka Board of Wakf Vs. Govt. of India*, (2004)10 SCC 779, *Ram Rattan Vs. Parma Nand*, AIR (33) 1946 PC 51 and *Jagdish Prasad Vs. Kanhaiyalal @Kandhai and others*, 2013(3) MPLJ 619/

7. I have considered the respective submissions made by learned senior counsel for the parties and have perused the records. It is well settled in law that the parties cannot be permitted to travel beyond the pleadings. It is trite law that in the absence of any pleading, no amount of evidence adduced by the parties can be looked into. See: *Ram Sarup Gupta Vs. Bishun Narain Inter College* and others, AIR 1987 SC 1242. In this context, the pleadings of the parties may be seen. In para 7 of the plaint, the plaintiff has averred that the plaintiff's father and defendant No.1 and 2's grandfather were in joint cultivating possession of the suit lands and after their death, the plaintiffs and Bhagwatdeen were in joint cultivating possession of the suit land. It has further been pleaded that suit lands have not been subjected to partition amongst the plaintiff and defendants No.1 and 2 till filing of the suit and the same continued to be in joint cultivating possession. The averments made in para 7 of the plaint have been admitted by the defendants No.1 and 2 in para 7 of the written statement. The admission in pleadings stand on a higher footing and are binding on the parties and constitute waiver of proof. See: *Nagindas Ramdas Vs. Dalpatram Iccharam alias Brijram* and others, AIR 1974 SC 471. In paragraph 9 of the plaint, it has been stated that plaintiff some time in the year 1967-68 suffered from leprosy and was unable to carry on the agricultural operations,' therefore, he handed over the suit land to the defendants for cultivation and agreed to take his share in the crops. In para 9-A of the written statement, the aforesaid averment has been denied and it has been pleaded that plaintiffs father in the year 1946 sold the suit land vide sale deed for a consideration of Rs.85/- and placed the defendants No.1 and 2 in possession. Thus, the fact that the suit lands were in joint cultivating possession of the parties till same were allegedly sold in the year 1946 to defendant No.1 and 2's father is admitted.

8. The relevant extract of Section 168 of the M.P. Land Revenue Code, 1959 reads as under:

"**168. Leases.-** (1) [Except in cases provided for in sub-section (2), no Bhumiswami shall lease any land comprised in his holding for more than one year during any consecutive period of the three years :]

[Provided that nothing in this sub-section shall apply to the lease of any land -

(i) made by Bhumiswami who is a member of a registered Co-operative Farming Society to such Society

(ii) held by a Bhumiswami for non-agricultural purposes.]

Explanation.- For the purposes of this section-

(a) "lease" means a transfer of a right to enjoy any land, made for a certain time, expressed or implied in consideration of a price paid or promised or of money or any other thing of value to be given periodically to the transferer by the transferee who accepts the transfer on such terms,

(b) any arrangement whereby a person cultivates any land of a Bhumiswami with bullocks belonging to or procured by such person (lessee) and on condition of this giving a specified-share of the produce of the land to the Bhumiswami shall be deemed to be a lease.

(c) the grant of a right merely to cut grass or to graze cattle or to grow 'Singhara' or to propagate or collect lac, pluck or collect tendu leaves shall not be deemed to be a lease of the land.

(2) A Bhurniswami who is -

(i) a widow ; or

(ii) an unmarried woman ; or

(iii) a married woman who has been deserted by her husband ; or

(iv) a minor ; or

(v) a person subject to physical or mental disability due to old

age or otherwise ; or

(vi) a person detained or imprisoned under any process of law ; or

(vii) a person in the service of Armed Forces of the Union ; or

(viii) a public, charitable or religious institution; or

(ix) a local authority or a Co-operative Society may lease the whole or any part of his holding

Provided that where a holding is held jointly by more than one person the provisions of this sub-section shall not be applicable unless all such persons belong to any one or more of the classes aforesaid:

Provided further that any lease made in pursuance of this sub-section shall cease to be in force after one year of the determination of the disability by death or otherwise".

9. In the instant case, admittedly, the original plaintiff's father and defendant No.1 and 2's grandfather were in joint cultivating possession of the land in question. From close scrutiny of averments made in paragraph 9 of the plaint, it is evident that the plaintiff has not set up the case that the suit lands were leased out to the defendants and since the co-owners did not belong to the category specified in Section 168(2) of the Code, therefore, the provisions of Section 168 of the Code have no application to the facts of the case. Accordingly, the first substantial question of law framed by this Court is answered in the negative and against the appellants.

10. The relevant extract of Section 1 of the Rewa Registration Act, 1917 reads as under:-

"1. Registry of the following writing will be compulsory.

(ka) Writing relating to immovable property valued Rs.25/- deriving yearly profit - ka

kha) Writing relating to movable property value Rs.50/- - Kha

Ga) Any sentence of part (ka) and (kha) of this section will not be applicable to the following writings. That is registry of

the following writings is not compulsory.

1. Writing for compromise

2. Any agreement through which right accrued to obtain any writing described in part (ka) of this section.

3. Decrees and order of the Court and Pancyati Faisla.

4. Sanad issued by Government in respect of giving immovable or movable property

5. Writing of partition of goods by officer

6. Any writing on the back of mortgage through which recovery of all or some amount of the mortgage may be accepted and another any receipt regarding recovery of mortgage or that of sale and any receipt acknowledging receipt of cash.

7. Auction certificate in the name of purchaser relating to any property auctioned by officer of goods or civil."

Section25 of the Act reads as under:-

"Registry will be of what type - Section 25 There will be two types of Registry one optional i.e. as of right and second compulsory i.e. necessary. Registry will be as of right up to Rs.50/- cash and Rs.25/- yearly profit i.e. what wishes the executor of the document may do so and if he does not wish then nothing is essential. Such document will not be understood illegal but which document is in respect of profit more than cash of Rs.50/- and more than land profit of Rs.25/- then its registry is necessary i.e. such document without registry will be understood illegal in Court - (ka)

Exemption - If without comment it is admitted as registered then it will be capable of solemn affirmation".

From a conjoint reading of Section 1 and Section 25 of the Act,It is evident that any document relating to immovable property which derives yearly profit of Rs.25/- is required to be compulsorily registered. If Section 25 is read to mean that a property of more than Rs.50/- in value requires compulsory registration, the same would be in conflict of Section 1 of the Act. It is the

duty of the courts to avoid "a head on clash" between two sections of the same Act and, "whenever it is possible to do so, to construe provisions which appear to conflict so that they harmonise". See: *Principles of Statutory Interpretation,* Justice G.P. Singh, 13th Edition. There is no material on record to show that the property in question was yielding income of Rs.25/- per annum, therefore, the document Ex.D/1 did not require compulsory registration. It is pertinent to mention here that provisions of the Registration Act, 1908 as well as the Indian Stamp Act, 1899 were made applicable to Vindhya Pradesh region by Section 3 of Part-C State (Laws) Act, 1950 w.e.f. 16.4.1950. The document Ex.D/1 has been executed in the year 1946, therefore, the same neither required registration nor required payment of stamp duty as per the provisions of Indian Stamp Act, 1899. For the aforementioned reasons, the second substantial question of law framed by this Court is answered in the negative and in favour of the appellants.

11. Though the second substantial question of law has been answered in favour of the appellants, yet the same is of no assistance to them, as mere marking of a document as an exhibit does not dispense with its proof. See: *Sait Tarajee Khimchand and others Vs. Yelamarti Satyam* and others, AIR 1971 SC 1865 and *Gwalior Ceramic And Potteries Pvt. Ltd., Vs. Karamchand Thapar and Bros. Coal Sales Ltd., Gwalior,* 1996 MPLJ 772. Both the courts below on meticulous appreciation of evidence on record have held that the defendants have failed to prove the execution of the document Ex.D/1, as neither the scribe nor the attesting witnesses have been examined. The defendants have also not examined any witnesses who were conversant with the handwriting of either the scribe or the attesting witnesses, in case the attesting witnesses to the sale deed had expired. The Courts below have also taken into account the evidence of DW-1 Mahesh Prasad who in paragraphs 12 and 13 of his evidence has admitted that he has not produced the sale deed (Ex.D/1) before the competent authority at any point of time. Thus, the document which was executed in the year 1946 saw the light of the day in the year 1985 i.e. nearly after a period 39 years.

12. For the aforementioned reasons, I do not find any merit in the appeal. The same fails and is hereby dismissed with costs.

Appeal dismissed.

I.L.R. [2014] M.P., 1330
APPELLATE CIVIL
Before Mr. Justice Alok Aradhe
S.A. No. 137/2010 (Jabalpur) decided on 26 September, 2013

PUSHPA BERRY (SMT.) ...Appellant
Vs.
SHRI MAHILA GRIH UDYOG LIJJAT PAPAD & anr. ...Respondents

Bombay Public Trusts Act (29 of 1950), Section 50 - Suit against Public Trust - Jurisdiction - **Suit against Public Trust can be filed in Court within local limits of whose jurisdiction the whole or the part of the subject matter of Trust is situate - Appeal allowed. (Para 10)**

बाम्बे लोक न्यास अधिनियम (1950 का 29), धारा 50 – लोक न्यास के विरुद्ध वाद – अधिकारिता – लोक न्यास के विरुद्ध वाद उस न्यायालय में प्रस्तुत किया जा सकता है जिसकी अधिकारिता की स्थानीय सीमा के भीतर न्यास की विषयवस्तु पूर्णतः या अंशतः स्थित है – अपील मंजूर।

Cases referred :

AIR 1930 PC 57, AIR 1958 MP 304, AIR 1956 Bhopal 16, AIR 1963 SC 853, AIR 2005 SC 2544, (2004) 3 SCC 137, (2010) 2 SCC 287, AIR 1968 SC 422, AIR 1969 SC 566, AIR 1991 Del 25, AIR 1994 Bombay 327, 1990(1) SCC 266, 1992 JLJ 315, 1989 MPWN 14, AIR 1980 SC 16, AIR 1980 SC 235, AIR 1970 Patna 163, AIR 1970 SC 564, 2000(1) MPLJ 380, AIR 1993 SC 1163, AIR 1975 SC 1935, AIR 1946 Bombay 516, AIR 1991 NOC 78, AIR 1980 P&H 306, AIR 1973 SC 2391, AIR 1951 SC 16, AIR 1977 SC 2421, AIR 1959 SC 1002.

J.P. Sanghi with Ajay *S.K. Shukla,* for the appellant.
Ashok Lalwani, for the respondents.

J U D G M E N T

Alok Aradhe, J. :- This appeal is by the plaintiff which was admitted by a Bench of this Court on the following substantial question of law:-

"Whether the First Appellate Court is justified in law in upsetting and reversing the findings wherein the trial court allowed the suit?"

2. Facts giving rise to filing of the appeal, briefly stated, are that the

plaintiff filed the suit, inter alia, on the ground that Shri Mahila Grih Udyog Lijjat Pappad (hereinafter referred to as the 'Society') is a society registered under the provisions of Societies Registration Act, 1860 (for short the '1860 Act') as well as under the Bombay Public Trust Act, 1950 (for brevity the '1950 Act'). The defendant no.1 opened its Branch at Jabalpur on 12.2.1975 and by order dated 10.8.1976 authorized the plaintiff to function as Manager of the Branch. It was further pleaded that whole assets and liabilities of Jabalpur Branch belong to the plaintiff and the defendants have not invested any amount. However, the defendant no.1, on the basis of charges levelled against the plaintiff, namely, that there has been deterioration in quality of 'Papad'; plaintiff has distributed pamphlets containing defamatory material against the society; and has furnished wrong information with regard to stock, passed a resolution dated 24.2.1978 by which it was decided to close down the Jabalpur Branch. The resolution was conveyed to the plaintiff vide letter dated 26.2.1978 and thereafter notice dated 28.2.1978 was also sent by the society through its counsel. The plaintiff thereupon filed a suit seeking relief of declaration that the resolution dated 24.2.1978 passed by the Managing Committee of the Society is illegal and is inoperative. The plaintiff also sought permanent prohibitory injunction restraining the defendants from taking any action against the plaintiff or its institution.

3. The defendants filed written statement in which, inter alia, it was pleaded that defendant No.1 is registered as a society under the 1860 Act as well as 1950 Act. It was further pleaded that trade mark, namely, "Lijjat" has been registered with the Registrar of Trade Mark on 28.4. 1967 in society's name. It was further pleaded that Memorandum of Association and Articles of Association have been framed in the year 1966 and were amended in the years 1973 and 1976, respectively. It was also pleaded that Branches of society are autonomous in all respects and assets and liabilities belong to the each of the Branch and they function independently subject to over all control and supervision of defendant No.1. It was also pointed out that none of the members of the Jabalpur Branch has, at any point of time, applied or has been granted membership of the society. In paragraph 6 of the written statement it was stated that defendant no.1 has not invested any amount in Jabalpur Branch and the entire assets and liabilities of Jabalpur Branch belong to the plaintiff. It was also pointed out that society has granted a gratuitous licence to Jabalpur Branch to use its trade mark which is determinable at its will and since the subject matter of the suit pertains to internal management of

the society, therefore, the Court has no jurisdiction to entertain the suit.

4. The trial Court vide judgment and decree dated 30.8.2006, inter alia, held that in view of Article 1(B) of Articles of Association, if a woman starts working for the society, she becomes a member thereof. It was further held, on the basis of Exhibits-P-6 and P-20, that plaintiff and other persons working in Jabalpur Branch were invited to attend the annual general meeting held on 26.9.1977. Accordingly, it was held that the plaintiff being the member of the society and Manager of Jabalpur Branch has the right to institute the suit. The trial Court further held that there is no express agreement between Jabalpur Branch and the Society to use the trade mark. But, since the Society has recognized the Jabalpur Branch as its Branch, therefore, Jabalpur Branch is using the trade mark of the society and use of trade mark shall be governed by the Articles of Association and, therefore, it cannot be said that licence has been given by the Society to its Jabalpur Branch to use the trade mark. It was also held that there is material on record to show that charges leveled against the plaintiff vide Exhibits-P-7 & 7A were either enquired into or found to be proved. On the basis of Auditor's report of 1976-77 (Exhibit-P- 10) the trial Court held that the accounts of Jabalpur Branch were being properly maintained. The burden to prove the fact that affairs of Jabalpur Branch were being mismanaged and it was being run contrary to the principles of the society was on defendant no. 1, which it has failed to discharge. Thus, it was held that resolution dated 24.2.1978 (Exhibit-p-11) has not been passed in accordance with Article 3(A)(e) of the Articles of Association and the Civil Court can examine the issue whether a resolution has been passed by the Society in accordance with the Articles of Association.

5. The trial Court further held that provisions of 1950 Act do not apply to the branches of the Trust which are situate outside the State of Maharashtra and Gujarat and in respect of causes of action which have arisen outside the aforesaid States. It was further held that society is also registered under 1960 Act and, therefore, in accordance with Articles of Association, the suit can be filed by or against the society by President and, therefore, it not necessary to implead all the Trustees. Accordingly, the suit was decreed.

6. The lower appellate Court, however, vide judgment and decree dated 27.1.2010, inter alia, held that society is a Trust and its main office is situate in Bombay and one of its branches is situate at Jabalpur and, therefore, the provisions of 1950 Act would apply. The plaintiff has neither obtained

permission from the Charity Commissioner nor has impleaded the Charity Commissioner and has also not raised any objection before the Charity Commissioner, before institution of the suit and, therefore, the suit is barred under sections 50, 51 and 80 of the 1950 Act. It was further held that under Article 1(B) of Articles of Association, the plaintiff is the member of the society and is a Manager and, therefore, is competent to file the suit. It was also held that no permission under Order 1 Rule 8 of the Code of Civil Procedure was required to be obtained as the plaintiff alone could have filed the suit with the permission of the Charity Commissioner. It was further held that name and trade mark is the property of the society and if recognition of Jabalpur Branch is withdrawn, the Branch has no authority to use the name and trade mark. Consequently, the same was dismissed.

6. Learned senior counsel for the appellant has submitted that no objection was raised in the written statement that the suit is not maintainable in view of provisions of 1950 Act and, therefore, the lower appellate Court grossly erred in holding the suit to be barred in view of provisions of 1950 Act. It was further submitted that no Trust Deed was filed to show that the property of the Trust was situated in State of Madhya Pradesh. It was also urged that no amount of evidence can be looked into if a plea in this regard has not been set up in the plaint and no party can be permitted to change the case pleaded by it. Lastly, it was urged that law of that State would apply, where the property of the Trust is situate. In support of aforesaid submissions, learned senior counsel for the appellant has placed reliance on the decisions in the cases of AIR 1930 PC 57, *Mulam Chand Chhoteylal Modi vs. Kanchhendilall Bhaiyalal and others*, AIR 1958 MP 304, *Nannu Lal Vs. Radha Kishan,* AIR 1956 Bhopal 16, *Anant Prasad Lakshminiwas Ganeriwal vs. State of Andhra Pradesh and others*, AIR 1963 SC 853 and *Church of North India vs. Lavajibhai Ratanjibhai and others* AIR 2005 SC 2544.

7. On the other hand, learned counsel for the respondents submits that the plaintiff had filed the suit in the representative capacity and since no permission under Order 1 Rule 8 of the Code of Civil Procedure was obtained, therefore, the suit was liable to be dismissed on this ground alone. It was further submitted that plaintiff had no locus to file the suit as no suit can be filed by an employee to challenge the resolution passed by the Society and that the suit was barred in view of provisions of Section 50, 51 and 80 of the 1950 Act. It was also urged that suit was bad on account of non-joinder of

necessary parties as all the trustees in the suit were not made parties. The society has the legal right to close down the Branch and the trade mark is its property. It was also pointed out that pure question of law can be raised at stage of the proceedings. In support of his submissions learned counsel has placed reliance on the decisions in (2004) 3 SCC 137, *Julien Educational Trust vs. Sourendra Kumar Roy and others* (2010) 2 SCC 287, *Anant Prasad Lakshminiwas Ganeriwal vs. State of And hra Pradesh and others,* AIR 1963 SC 853, *Ramswarup Guruu Chhote Balakdas vs. Motiram Khandu Patil and others,* AIR 1968 SC 422, *Charity Commissioner, Bombay vs. Administrator of the Shringeri Math and its properties,* AIR 1969 SC 566, *M/ s.Nibro Limited vs. National Insurance Co:Ltd.* AIR 1991 Del 25, *Yusuf Ajij Shaikh and others vs. Special Land Acquisition Officer and others,* AIR 1994 Bombay 327, *Kalyan Singh vs. Smt.Chhoti and others,* 1990 (1) SCC 266 and *Khasgi Trust Shri and another vs. Mahesh Kumar Naraindas Khandelwal,* 1992 JLJ 315, *Keshav Choubey vs. Sarvodaya Samiti,* 1989 MPWN 14, *Sitaram Kashiram Konda vs. Pigment Cakes and Chemicals Mfg.* AIR 1980 SC 16, *Commissioner of Income Tax Kerala vs. M/s.Alagappa Textile,* AIR 1980 SC 235, *K.C.Thomas vs. R.L.Gadrock and another,* AIR 1970 Patna 163, *R.C. Cooper Vs. Union of India,* AIR 1970 SC 564, *United Church of Northern India Trust Association vs. Shantilal and others,* 2000 (1) MPLJ 380, *Kanbi Manji Abji and others vs. Kanbi Vaghji Mavji and others,* AIR 1993 SC 1163, *Church of North India vs. Lavajibhai Ratanjibhai and others,* AIR 2005 SC 2544, *The Trustees of the Port of Madras vs. M/ s.Aminchand Pyarelal and others,* AIR 1975 SC 1935, *Satyavart Sidhandtalankar vs. Arya Samaj Bombay,* AIR 1946 Bombay 516, *P.C.Bohra and others vs. National Sports Club of India,* AIR 1991 NOC 78, *Haji Anwar Ahmed Khan vs. The Punjab Wakf Board and others,* AIR 1980 P&H 306, *Chandrika Misir and another vs. Bhaiyalal,* AIR 1973 SC 2391, *Yeshwant Deorao vs. Waichand Ramchand,* AIR 1951 SC 16 and *T.Arvandandam vs. T.V.Satyapal and another,* AIR 1977 SC 2421.

8. I have considered the respective submissions made by learned counsel for the parties and have perused the record. The 1950 Act has been enacted in exercise of powers under Entry 28 of List III of Seventh Schedule of the Constitution of India. Ordinarily there is a general presumption that legislation enacted by State Legislature will be applicable only within the territorial limits thereof as the Legislature does not intend to exceed its jurisdiction. The

Constitution Bench of Supreme Court in the case of *State of Bihar vs. Smt. Charusila Dasi,* AIR 1959 SC 1002 while dealing with the provisions of Bihar Hindu Religious Trust Act dealt with the question whether the State Legislature has power to affect the Trust property which may be situate outside Bihar, but which pertains to the Trust situate in Bihar. The Constitution Bench in paragraph 14 has held as under:

> *"14. ..... the question, therefore, narrows down to this: in so legislating, has it power to affect trust property which may be outside Bihar but which appertains to the trust situate in Bihar?. In our opinion, the answer to the question must be in the affirmative.....*
>
> *The Trust being situate in Bihar the State has legislative power over it and also over its trustees or their servant and agents who must be in Bihar to adminster the trust. Therefore, there is really no question of the Act having extra-territorial operation.....*
>
> *This Court has applied the doctrine of territorial connection or nexus to income tax legislation, sale tax legislation and also to legislation imposing a tax on gambling. In Tata Iron and Steel Co. Ltd. vs. State of Bihar, AIR 1958 SC 452at p. 461 the earlier cases were reviewed and it was pointed out that sufficiency of the territorial connection involved a consideration of two elements, namely, (a) the connection must be real and not illusory and (b) the liability sought to be imposed must be pertinent to that connecttón. It cannot be disputed that tf the religious endowment is itself situated in Bihar and the trustees function there, the connection between the religious institution and the property appertaining thereto is real and not illusory; indeed the religious insitution and the property appertaining thereto form one integrated whole and one cannot be dissociated from the order. If, therefore, any liability is imposed on the trustees, such liability must affect the trust property.....*

9. Similar view was taken by another Constitution Bench of Supreme Court in the case of *Anant Prasad Lakshminiwas Ganeriwal vs. State of*

Andhra Pradesh and others, AIR 1963 SC 853 while dealing with the provisions of Hyderabad Endowments Regulations, 1940. In the aforesaid case the Trust had properties in Hyderabad as well as in the State of Madhya Pradesh. The properties of the Trust in the State of Madhya pradesh were governed by M.P. Public Trust Act, 1951. The question which arose for consideration before the Supreme Court was whether the properties which are not situate within State of Andhra Pradesh would be governed by Hyderabad Endowments Regulations, 1940. In the aforesaid context, the Supreme Court held that Hyderabad Endowments Regulations, 1940 would apply to the properties of the temple and in such a case the question of extra territorial operation of the Act would not arise. In view of aforesaid enunciation of law by two Constitution Bench decisions of the Supreme Court it is graphically clear that law enacted by the State legislature in respect of trust situate in that State would apply to the properties of such trust, even if same are situate in another state.

10. In the light of aforesaid well settled legal position, the provisions of 1950 Act may be seen. The 1950 Act has been enacted by the State Legislature in public interest to safeguard the properties vested in the Trust as also to control the management thereof so that the Trust property may not be squandered or the object of purport for which public trust is created may not be defeated by the persons having control therover. Chapter VII of the Act deals with functioning and powers of Charity Commissioner. The relevant extract of Section 50 of the 1950 Act provides for suits relating to Public Trust which reads as under:

> *"1. Suit by or against or relating to public trusts or other. In any case, -*
>
> *(i) where is alleged that there is breach of a public trust, negligence, misapplication or misconduct on the part of the trustee or trustees,*
>
> *(ii) where a direction or decree is required to recover the possession of or to following property belonging or alleged to be belonging to a public trust or the proceeds thereof or for an account of such property or or proceeds from a trustee, ex-trustee, alienee, trespasser or any other person including a person holding adversely to the public trust but not a tenant or licensee.*

(iii) Where the direction of the Court is deemed necessary for the administration of any public trust, or

(iv) for any declaration or injunction in favour of or against a public trust or trustee or beneficiary thereof,

the Charity Commissioner after making such enquiry as he thinks necessary or two or more persons having an interest in case the suit is under sub-cluses (I) to (iii) or one or more such persons in case the suit is under sub-clause (iv) having obtained the consent in writing of the Charity Commissioner as provided in section 51 may institute a suit whether contentious or not in the Court within the local limits of whose jurisdiction the whole or part of the subject matter of the trust is situate, to obtain a decree for any of the following reliefs."

Thus, it is apparent that the suit against the Trust can be filed in the Court within the local limits of whose jurisdiction the whole or the part of the subject mater (sic. matter) of the Trust is situate. In other words the suit against the Trust can be filed even outside State of Maharashtra. In order to decide the question of applicability of 1950 Act to the facts of the case, it is necessary to examine whether the property of the society is situate in the State of Madhya Pradesh. In this context, the pleadings of the parties may be seen. In paragraph 11 (iii) of the plaint the plaintiff has stated that defendants have not established the Jabalpur Branch and have not invested any money in Jabalpur Branch. The defendants in paragraph 15(iii) of the written statement have stated that Society has not established the Jabalpur Branch or invested any money in Jabalpur Branch. It has also been pleaded that Society has accorded recognition to the Jabalpur Branch and has granted gratuitous licence to the Branch to use trade name and trade mark of the Society.

11. At this juncture, it is appropriate to deal with the submission made by learned counsel for the respondents that trade mark is a property of the defendants. Clause 21 of the scheme framed for better administration and management of the Trust under 50A(1) of 1950 Act, provides that the properties of the Trust shall consist of movable & immovable properties more particularly mentioned and stand recorded in the Public Trust Registration Office, Gr. Bombay Region in Sch-I-Register. All these properties and new accretions thereto acquisitions, donations and offerings in cash or kind received

hereafter shall be called Trust properties. It is pertinent to mention here that defendants have not produced any record in this regard. Undoubtedly, the trade mark is a property under the provisions of erstwhile Trade and Merchandise Act, 1958 and registered trade mark under Section 37 thereof may be assigned. However, Section 2(a) of aforesaid Act provides that "assignment" means an assignment in writing by act of the parties concerned. In the instant case, there is no document on record to show that the trade mark has been assigned to Jabalpur Branch of the Society. In the written statement it has been stated that gratuitous licence has been granted to Jabalpur Branch to use the trade mark. However, the aforesaid gratuitous licence has also not been produced by the Society. No material has been placed on record on behalf of the defendant to show that any property of the society is situate within State of Madhya Pradesh. Thus, the defendants have failed to prove that any property which belongs to the Trust is situate in the State of Madhya Pradesh. In view of preceding analysis, the provisions of 1950 Act do not apply to the suit filed by the plaintiff.

12. It is well settled in law that a plea of bar to jurisdiction of a civil court must be considered having regard to the contentions raised in the plaint. For the said purpose, the averments disclosing cause of action and the reliefs sought for therein must be considered in their entirety. The court may not be justified in determining the question, one way or the other, only having regard to the reliefs claimed dehors the factual averments made in the plaint. The court has to consider what, in substance, and not merely in form, is the nature of the claim made in the suit and the underlying object in seeking the real relief therein. An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply. [See: *Church of North India vs. Lavajibhai Ratanjibhai and others* AIR 2005 SC 2544]

13. Article 3-A(e) of the Articles of Association of the Society provides that Bombay Managing committee shall have power to close down any Branch if the Bombay Managing committee is of the opinion that Branch is not working as per the principles of the Institution or the working of the Branch is harmful to the reputation of the Institution. The trial court has held that no enquiry was held to ascertain whether the Jabalpur Branch is working as per the principles of the Institution or the work of the Branch is harmful to the reputation of the institution and, therefore, the resolution dated 24.2.1978 is not in accordance with Article 3-A(e) of Article of Association. No provision has been brought to the notice of this Court which either expressly or impliedly bars the jurisdiction

of the Court to examine the validity of the resolution. Thus, the trial Court can examine whether or not resolution is passed in accordance with Articles of Association. Both the courts have held that plaintiff being the member of the society in view of Article 1-B of the Articles of Association and as Manager of the Jabalpur Branch has the locus to file the suit. The trial Court has held that it was not necessary to implead the trustees as parties. The aforesaid findings have not been reversed by the lower appellate Court in appeal.

14. In view of preceding analysis, the substantial question of law framed by the Court is answered in the negative and in favour of the appellant. The judgment and decree passed by the lower appellate Court is set aside and that of the trial Court is restored. In the result, the appeal succeeds and is hereby allowed with costs.

Appeal allowed.

I.L.R. [2014] M.P., 1339
APPELLATE CIVIL
Before Mr. Justice K.K.Trivedi
S.A. No. 389/1997 (Jabalpur) decided on 5 December, 2013

CHANDRAMOUL SHUKLA & ors. ...Appellants
Vs.
RAMVISHWAS & ors. ...Respondents

A. Civil Procedure Code (5 of 1908), Section 100 - Second Appeal **- Since there was no proof of any agreement of lease with respondent No.2, Civil Court was not right in granting a decree against respondent No. 2 in favour of the appellant. (Para 9)**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील – चूंकि प्रत्यर्थी क्र. 2 के साथ पट्टे के किसी अनुबंध का सबूत नहीं था, सिविल न्यायालय को अपीलार्थी के पक्ष में, प्रत्यर्थी क्र. 2 के विरुद्ध डिक्री प्रदान करना उचित नहीं था।

B. Evidence Act (1 of 1872), Section 92, Proviso (4) **- If any agreement is executed in writing, any further agreement in furtherance thereof cannot be made orally and no oral evidence adduced in this respect is to be admitted - Held - Under the agreement liability was on respondent No.1 to pay the entire rental for the lease of the land taken by him to appellant - Accordingly, decree is modified decreeing the**

entire suit against respondent No.1. (Paras 9, 10, 11 & 12)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 92, परन्तुक (4) – यदि किसी अनुबंध को लिखित रुप से निष्पादित किया गया है, तब उसके अग्रसरण में उसके किसी अतिरिक्त अनुबंध को मौखिक रुप से नहीं किया जा सकता और इस संबंध में किसी मौखिक साक्ष्य को स्वीकार नहीं किया जाना चाहिए – अभिनिर्धारित – अनुबंध के अंतर्गत प्रत्यर्थी क्र. 1 को उसके द्वारा लिये गये भूमि के पट्टे हेतु संपूर्ण किराये का अपीलार्थी को भुगतान करने का दायित्व था – तद्नुसार, प्रत्यर्थी क्र. 1 के विरुद्ध संपूर्ण वाद डिक्रीत करते हुए, डिक्री उपांतरित।

Case referred :

AIR 1976 SC 2400.

Pranay Verma, for the appellants.
Shailendra Verma, for the respondent No.1.
None for the other respondents, though served and represented earlier.

JUDGMENT

K.K. TRIVEDI, J. :- This second appeal under Section 100 of the Code of Civil Procedure is by the plaintiffs against the judgment and decree dated 11.2.1997 passed in Civil Appeal No.21-A/1996 by the First Additional Judge to the Court of District Judge, Satna, by which reversing the judgment and decree dated 17.4.1996 passed in Civil Suit No.28-B/1995 by the Civil Judge Class I,Satna, the suit of the appellants/plaintiffs has been dismissed.

2. Since the claim was granted against the respondent No.2 only by the learned trial court and the claim made against the respondent No.1 was dismissed by the trial court, a cross appeal was filed by the appellants/plaintiffs before the lower appellate court, when the appeal was preferred by the respondent No.2 against the judgment and decree passed by the trial court aforesaid. Since that cross appeal was also dismissed, hence, this appeal. This Court has admitted the appeal on the following substantial questions of law:

> "1. Whether oral evidence was admissible in view of the Proviso (4) of Section 92 of the Evidence Act, 1872?
>
> 2. Whether defendant No.2 having harvested and appropriated the crops was liable to make over the crops and/or price thereof to the plaintiffs?"

3. Brief facts of the case are that the appellants were the landlords and owners of the land in dispute. The respondent No.1, accompanied with the respondent No.2, approached them for the purpose of granting lease of the land for the purposes of cultivation. Such a lease was written on a piece of paper by the respondent No.2 in his own handwriting on 12.11.1994 and on a revenue stamp of 20 paise such a lease was signed by the appellant No.3 as an agent of appellant No.1 and 2 and himself. It was agreed under the said lease that the land, commonly known as Bada Bandh, is given on lease for the purposes of cultivation to respondent No.1 on the terms that he will pay 150 bags of wheat to the appellants as their share out of the crops, which was to be sown and cultivated at his own expenses by the respondent No.1. For the purposes of irrigation, facility was to be taken from the Well of one Kedar Prasad Shukla by the respondent No.1. Two witnesses have signed the said document. It was alleged in the plaint that after cultivation certain crops were received by the respondents, but only 50 bags of wheat was given to the appellants and rest of the crops were not delivered nor any amount in cash was paid to the appellants. It was averred in the plaint that though the respondent No.2/defendant No.2 was also a partner in such lease with respondent No.1/defendant No.1, but he too has not given any crops to the appellants thereby a loss of Rs.40,000/- was caused to the appellants. Accordingly, with all expenses, an amount of Rs.41,000/- was claimed against the respondents/defendants.

4. The said suit was contested by the respondent No.1 by filing a written statement stating that the aforesaid agreement though was executed in the name of the respondent No.1, but, in fact, the respondent No.2 was also a partner in the said agreement. In fact, since the appellants/plaintiffs and the respondent No.2/defendant No.2 were relatives, deliberately, with malafide intention, the lease agreement was executed only in the name of respondent No.1. It was contended that the cost of the agriculture expenses was borne by the respondent No.1 only. When the crops were sown, the respondent No.2 had taken his share and did not pay anything to the appellants. On the other hand, the respondent No.1 had paid his share of lease charge to the appellants. Therefore, no decree was to be granted against him. The respondent No.2/defendant No.2 filed his written statement separately denying all the allegations and stating that at no point of time any agreement of lease was executed between him and the appellants. Only because he was known to the parties to the aforesaid lease agreement, he went with the respondent

No.1 to the appellant No.3 for the purposes of grant of lease of land and on his request such an agreement was reduced in writing and he signed the same as subscriber of the agreement. It was thus contended that no claim whatsoever was made out against the respondent No.2 and the suit so filed against him was liable to be dismissed. It was stated that the demand was made from the respondent No.2 by the appellants, but this fact was denied and despite that the suit has been filed. Therefore, the same was liable to be dismissed.

5. The trial court framed the issues, recorded the evidence and came to the conclusion that the document Ex. P-1 was an agreement of lease in between the appellants and the respondent No.1, but since the respondent No.2 was also a party to the said agreement, as was proved by the oral evidence, the respondent No.2 was also liable to pay the amount claimed by the appellants. It was held that since the respondent No.1 has already paid his share, no decree could be passed against him, as claimed by the appellants, but the suit of the appellants was to be decreed against the respondent No.2 only. The suit against the respondent No.1 was dismissed. Feeling aggrieved by the judgment and decree passed by the civil court, the respondent No.2 preferred an appeal against the said judgment and decree before the lower appellate court. Since the decree was not granted against the respondent No.1 herein; he too was impleaded as a respondent in that appeal as respondent No.4. It will not be out of place to mention here that there was no question of filing any appeal by the respondent No.1 against the judgment and decree since the suit against him was dismissed.

6. The appellants herein, who were respondents before the lower appellate court, preferred a cross appeal before the lower appellate court claiming that while dismissing the appeal of the respondent No.2 a decreed may also be granted against the respondent No.1. The said cross appeal was also considered by the lower appellate court while deciding the appeal. The learned lower appellate court, after hearing the parties, reached to the conclusion that the trial court has not assessed the evidence in appropriate manner. If there was an agreement in writing for grant of lease of land for the purpose of cultivation only in respect of one person, there cannot be any oral agreement substituting any clause of the said agreement, as was treated to be proved by the civil court. In view of this, it was held that no decree could be granted against the respondent No.2. However, taking it as if the entire amount of the crop agreed to be paid to the appellants by the respondent No.1, the cross appeal of the appellants was also treated to be dismissed. While allowing the

appeal of the respondent No.2, the judgment and decree passed by the civil court was set aside and the cross appeal of the appellants was dismissed. Hence, this appeal, which has been admitted on the aforesaid substantial questions of law.

7. It is vehemently contended by the learned counsel for the appellants that the findings recorded by the lower appellate court are contrary to the provisions of Section 92 Proviso (4) of the Indian Evidence Act, 1872. Reading the said provisions, it is contended that if an agreement independently was made for grant of lease of land to the respondent No.1 and subsequently a fresh condition was agreed by the parties, to treat the lease as granted in favour of the respondent No.2 as well, it could not be said that the oral evidence was to be completely excluded and such an oral agreement could not be proved. There was no modification in the terms and conditions agreed on the agreement Ex.P-1 executed between the appellants and the respondent No.1. In fact the agreement was independently made treating it as if the lease was granted to the respondent No.2 as well or that he became the partner to the said lease agreement and, therefore, the oral evidence adduced in this respect was to be read and believed in terms of the provisions of Section 92 Proviso-4 of the Indian Evidence Act. Relying in the case of *Niranjan Kumar and others v. Dhyan Singh* and another – AIR 1976 SC 2400 it is contended that the law is well settled and Section 91 of the Evidence Act is required to be read alongwith Section 92 to understand whether independent agreement orally could be made or not. Thus, it is contended that since this aspect is not considered by the lower appellate court and though evidence to this effect was produced by the appellants that the lease agreement was in fact with the respondent respondent No.2 also, wrongly the appeal of the respondent No.2 has been allowed. It is further contended by the learned counsel for the appellants that even if decree could not be granted against the respondent No.2, since the suit was filed jointly against the respondents No.1 and 2 and admittedly there was an agreement of lease with a condition that after the crops are sown, 150 bags of wheat would be given to the appellants by the respondent No.1, to that extent, the rejection of the suit of the appellants/plaintiffs by the trial court was bad in law. If the decree granted by the trial court was not to be affirmed inasmuch as respondent No.2 is concerned, at least the suit was to be decreed against the respondent No.1 as a whole and the amount, payable to the appellants was to be decreed against the respondent No.1.

8. Per contra, it is contended by learned counsel for the respondent No.1 that the suit could not have been decreed against the respondent No.1 inasmuch

as the entire evidence led by the parties indicate that there was an agreement jointly with respondents No.1 and 2 for taking the field of the appellant on lease. The lower appellate court has erroneously held that the respondent No.2 herein was not liable to pay any of amount to the appellants. Since it was found in the evidence that the wheat agreed to be given to the appellants by the respondent No.1, as a rent for the lease of the land, was already delivered to the appellants by the respondent No.1, no decree could be granted against the respondent No.1 at any rate even if the appeal of the respondent No.2 was to be allowed by the lower appellate court. No submissions have been made by the respondent No.2, though represented before this Court, earlier.

9. After hearing the learned counsel for the parties and after perusing the record, it has to be held that there was no proof of any such agreement of lease with the respondent No.2 and, therefore, the civil court was not right in granting a decree against the respondent No.2 in favour of the appellants. To that extent, the judgment and decree of the lower appellate court need not to be interfered with. Precisely, this finding is to be recorded in view of the fact that the provisions of Section 91 were not rightly examined by the lower appellate court. Though it is settled in law that there is no restriction put in any law that if any agreement is executed in writing, any further agreement in furtherance to any such written agreement cannot be made orally, in accordance to the provisions of Section 92 Proviso (4) of the Indian Evidence Act, and no oral evidence adduced in this respect is to be admitted. The fact remains that no such oral evidence to the extent proving an oral agreement in between the appellant and the defendant No.2/respondent No.2 was available in the record and therefore, the learned civil judge was not right in holding that there was an agreement in between the appellants and the respondent No.2 with respect to the lease of the land owned by the appellants. True it is that there was an admitted document (Ex.P-1), which was an agreement of lease executed by appellant No.3 as the agent for appellants No.1 and 2 and for himself in favour of the respondent No.1 herein. Though the averments were made in the plaint that there was an oral agreement, but, except the statement of plaintiff No.3 (appellant No.3 herein) as PW-1, there was no other evidence produced. The oral statements of other witnesses of the appellants/plaintiffs namely Dharamdas (PW-2), Gulab Prasad (PW-3) and Chandramoul Shukla (PW-3) nowhere specifically say that any oral agreement was made by the respondent No.2 for the purposes of taking the land of the appellants on lease. One of the

witnesses said that in fact the agreement was executed in between the two parties jointly with the respondents No.1 and 2, but a perusal of Ex.P-1 itself indicates that it was never executed in between the appellants and the respondent No.2 jointly with respondent No.1. Therefore, such an evidence was not enough. The respondent No.1, who was examined as DW-1, though has stated that agreement was executed jointly with the respondent No.2 for taking the lease of the land of appellants, but, again his statement could not be accepted in view of the written agreement (Ex.P-1). The respondent No.2 himself was a witness examined as DW-1 for defendant No.2, but he denied any such agreement. Therefore, such a fact could not be treated to be proved nor any decree could have been granted against the respondent No.2.

10. Now this left with the consideration whether on the basis of evidence available on record and keeping in view the written agreement (Ex.P-1) any decree was to be granted against the respondent No.1 or not. It is not in dispute that such an agreement was executed exclusively with respondent No.1. It was his responsibility to payback the rental in shape of crops to the appellants for the lease of the land taken by him. The appellants themselves have admitted that only 50 bags crops was given to the appellants by the respondent No.1. Precisely the claim was made only for 100 bags of the wheat, though it was said that the same was to be given to the appellants jointly by the respondent No.1 and 2. The decree itself was claimed in the suit against the defendants i.e. the respondents No.1 and 2 both jointly, as a prayer was made in this respect in the plaint. In view of this, if the fact was found proved that appellants were not delivered the crops in shape of rental for the lease of land granted to the respondent No.1, at least the decree was to be granted against the respondent No.1. There was no occasion for the civil court to decree the suit only against the respondent No.2. Therefore, this particular aspect was lost sight by the lower appellate court also while considering the cross appeal filed by the appellants. In fact the appeal of the respondent No.2 was to be allowed. The judgment and decree passed against him by the civil court was liable to be set aside, but while allowing the cross appeal, the judgment and decree was to be granted against the respondent No.1 by the lower appellate court. If at all there was any proof of the fact that the respondent No.2 has harvested and appropriated the crops sown by the respondent No.1, that was the responsibility of the respondent No.1 to claim such amount from respondent No.2 by the independent proceedings. No cross-objection was filed by the respondent No.1 before the civil court in this

respect. If the liability was on the respondent No.1 to pay the entire rental for the lease of the land taken by him, he was not to be absolved of the responsibility merely on saying that the crops was harvested by the respondent No.2 in any manner or under any agreement with him therefore he would not be liable to pay rental to the appellants.

11. In view of this, though the judgment and decree passed by the lower appellate court, in respect of reversing the judgment and decree of the trial court granted against the respondent No.2 is not to be interfered with, but the cross appeal of the appellants ought to have been allowed by the lower appellate court and the suit of the appellants should have been decreed against the respondent No.1.

12. Accordingly, this appeal is allowed in part. While affirming the judgment and decree of the learned lower appellate court in so far as reversal of the judgment and decree of the civil court granted against the respondent No.2 is concerned, the judgment and decree passed by the lower appellate court rejecting the cross appeal of the appellant is hereby set aside. The judgment and decree of the courts below is thus modified decreeing the entire suit of the appellants against the respondent No.1/defendant No.1 only. However, in view of the peculiar facts and circumstances of the case, parties to the appeal are directed to bear their own costs, in this appeal.

Appeal partly allowed.

I.L.R. [2014] M.P., 1346
APPELLATE CIVIL
Before Mr. Justice K.K. Trivedi
M. A. No. 432/2013 (Jabalpur) decided on 10 December, 2013

LOKENDRA JAIN ...Appellant
Vs.
BANDIVIYA SAMACHAR PATRA & ors. ...Respondents

A. ***Civil Procedure Code (5 of 1908), Order 43 Rule 1, Order 39 Rule 1 & 2 - Prima facie case*** **- Was in favour of respondent No. 1/ plaintiff as he was having the lease deed in his favour - Physical possession is materially important and undisputedly appellant/defendant is not in physical possession of the land in suit - Hence, unless a counter claim is made by the defendant, no prayer for grant of temporary injunction can be entertained. (Para 7)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 43 नियम 1, आदेश 39 नियम 1 व 2 – प्रथम दृष्ट्या प्रकरण – प्रत्यर्थी क्र. 1/वादी के पक्ष में था क्योंकि उसके पास उसके पक्ष में (पट्टा विलेख) था – वस्तुगत कब्जा तात्विक रुप से महत्वपूर्ण है और अविवादित रुप से अपीलार्थी/प्रतिवादी के वस्तुगत कब्जे में वाद भूमि नहीं – अतः, जब तक कि प्रतिवादी द्वारा प्रतिदावा नहीं किया जाता, अस्थाई व्यादेश प्रदान किये जाने का निवेदन ग्रहण नहीं किया जा सकता।

***B. Civil Procedure Code (5 of 1908), Order 43 Rule 1, Order 39 Rule 1 & 2 - Balance of convenience* - Merely construction is done by plaintiff in accordance with sanction, it cannot be said that the land is going to be destroyed and damaged - Hence, balance of convenience lies in favour of the plaintiff. (Para 7)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 43 नियम 1, आदेश 39 नियम 1 व 2 – सुविधा का संतुलन – वादी द्वारा मंजूरी के अनुसरण में मात्र निर्माण किया जाना, यह नहीं कहा जा सकता कि भूमि का नाश होगा या क्षतिग्रस्त होगी – अतएव, सुविधा का संतुलन वादी के पक्ष में जाता है।

***C. Civil Procedure Code (5 of 1908), Order 43 Rule 1, Order 39 Rule 1 & 2 - Irreparable loss* - Even if building is constructed, the appellant can be compensated in terms of money - No illegality committed by court below in granting temporary injunction - Appeal dismissed. (Paras 7 & 8)**

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 43 नियम 1, आदेश 39 नियम 1 व 2 – अपूर्णीय क्षति – यदि भवन का निर्माण किया जाता है तब भी अपीलार्थी की प्रतिपूर्ति रकम के तौर पर की जा सकती है – अस्थायी व्यादेश प्रदान करने में निचले न्यायालय ने कोई अवैधता कारित नहीं की – अपील खारिज।

Cases referred :

1982 MPLJ 499, 1973 JLJ-SN 114, (2004) 8 SCC 488.

Ashish Shroti, for the appellant.
Ravish Agrawal with *Pranay Verma,* for the respondents No.1 & 2.
Ajay Shukla, for the respondent No. 3.

ORDER

K.K. Trivedi, J. :- This appeal under Section 43 Rule 1 (r) of the Code of Civil Procedure is directed against the order dated 23.11.2012 passed in Civil Suit No. 444-A/2010 by the 14th Additional District Judge, Bhopal.

2. The respondent No.1/plaintiff filed a suit for declaration and permanent injunction contending inter alia that on the plot No.17 of M.P. Nagar Zone No. 1, Bhopal, a lease was granted in favour of respondent/plaintiff on 16.07.1986 by the Bhopal Development Authority. However, there was some dispute on account of which earlier holders of the newspaper have seized their authority. The possession of the said plot and room constructed thereon was delivered to the respondent/ plaintiff by the Bhopal Development Authority on 08.07.2010. After obtaining sanction from the Municipal Corporation, when the construction was started by the respondent/plaintiff obstruction was started by the appellant/defendant No.2, therefore, the suit was required to be filed. In the suit an application under Order 39 Rule 1 and 2 was filed by the respondent/plaintiff seeking temporary injunction against the appellant and other defendants. A reply to the said application was submitted by the appellant contending that the lease hold rights were given to the defendant No.1. After mutual partnership for construction of a residential-cum-commercial complex an agreement of Joint Venture was executed on 18.10.1995 by the appellant with the defendant/respondent No.2 herein. Pursuance to such agreement after receipt of the full consideration amount by the respondent No.2 herein the appellant became entitle to make construction. Illegally it was said that the respondent No.1/plaintiff has acquired the lease of the land in suit whereas mere change in the declaration made under the Press and Book Registration Act, no right is created in favour of the respondent/plaintiff, therefore, the application was liable to be dismissed. The other persons have also filed their reply.

3. The Civil Court considered the application of the respondent/plaintiff for grant of temporary injunction and came to the conclusion that prima facie case was in favour of the respondent/plaintiff, balance of convenience tilted in its favour and it would suffer irreparable loss in case the temporary injunction is not granted. After holding so, the Civil Court granted injunction in favour of the respondent/plaintiff by the impugned order hence, this appeal is filed.

4. At the outset, it is submitted by learned counsel for the appellant that while entertaining this appeal, an interim order was passed on 10.05.2013, and it was directed that till next date of hearing the respondents shall neither alienate the property in question nor shall alter its nature and in case this order is made absolute with a direction to decide the suit expeditiously, the purpose of filing appeal would be served. It is further contended by learned counsel for the appellant that the Court below has erred in holding that the balance of convenience was in favour of the respondent/plaintiff inasmuch as there were other dispute pending between the same parties and the suit plot is not exclusively belonging to the respondent/

plaintiff. It is contended that the respondent/plaintiff has obtained the plot by transfer even when the dispute was pending between the original holder of the plot and the appellant herein in the Civil Court and an injunction order was already issued by the Civil Court. Thus, in fact there was no question of granting temporary injunction in favour of the respondent/plaintiff.

5. Per contra, it is contended by learned Senior counsel for the respondents No. 1 and 2 that if the law is properly appreciated, the documentary evidence indicates that the respondent/plaintiff was in possession of the land and was authorized to use plot No.17 as a lease was executed in its favour by the Bhopal Development Authority. If the land was alloted in its favour on 16.07.1986 as claimed, such a right of use of land cannot be forfeited. As far as the right is available to the respondent/plaintiff, no restrain could be put on the respondent No.1/plaintiff, and no prayer can be made in this respect even by filing an application in a pending suit by the defendant like appellant herein and, therefore, there is no justification of passing order dated 10.05.2013 putting restrain on the respondent No.1/plaintiff. It is submitted that such a course is not open as the appellant herein is only a defendant and he otherwise cannot claim injunction against respondent No.1/ plaintiff without filing a counter claim in the suit seeking some relief for himself or without filing an independent suit against respondent No.1/plaintiff. It is thus contended that the order has rightly been passed by the Court below and the same is not required to be interfered with in this appeal.

6. After giving thoughtful consideration on such submissions of learned counsel for the parties, it seems that there is a dispute with respect to the ownership of the newspaper. Whatever the stand, the lease was granted by the Bhopal Development Authority in the name of Bandhviya Samachar and that being so, the lease cannot be said to be granted in favour of somebody, who was representing the said Bandhviya Samachar. Had it not been a case that the lease is not granted in the name of Bandhviya Samachar, the lease deed as placed on record with the plaint would not have been executed on 16.07.1986. This shows that prima facie case was in favour of the respondent No.1/plaintiff as it was having the lease deed in its favour.

7. Now, the question would be whether a restrain could be put to a plaintiff on an application made by the defendant in any manner. It is not in dispute that the appellant is not in physical possession of the land in suit. The physical possession of the land is with the respondent/ plaintiff. In view of

this, unless a counter claim is made seeking possession of the plot in question by the defendant, even if prima facie case or issue of title is involved, no prayer for grant of temporary injunction made by the defendant in such a suit can be entertained. Such a situation is clear from the law laid down by this Court in the case of *Chhitoo Hirajee and others Vs. Sakharam Umadia and others,* 1982 MPLJ 499. For the purposes of consideration of prima facie case, the factum of physical possession is materially important which undisputedly is tilted in favour of the respondent/plaintiff. Now, the balance of convenience is also to be examined in light of this. Unless there is a threat of destruction of the property, restrain cannot be put on a person holding prima facie title, in view of the law laid down by this Court in the case of *Mohd. Hafiz Khan vs. Smt. Naziban Bibi and another* 1973 JLJ-SN 114. What is to be seen is again there is any threat of alienation. Mere construction if done by the respondent/plaintiff in accordance to sanction, it cannot be said that the land of plot No.17 is going to be destroyed or damaged. That being so, again it cannot be said that the balance of convenience is not tilted in favour of the respondent/plaintiff.

8. Now, the only question is whether there would be any irreparable loss caused to any of the parties in suit if no restrain is put. Here the construction is being done by the respondent/plaintiff in accordance to the sanction granted by the competent authority of Municipal Corporation, Bhopal. Even if the building is constructed, the appellant herein would be compensated in terms of the money but in case the construction which is being done by the respondent/ plaintiff is stopped, not only the plan, sanctioned for the construction would expire, the work which is done would be destroyed and huge loss would be caused to the respondent/plaintiff in making construction as the process of construction has already been commenced. That being so, in the considered opinion of this Court, the law laid down by the Apex Court in the case *Maharwal Khewaji Trust (Regd.) vs. Baldev Dass*, (2004) 8 SCC 488, would not be attracted or applicable and, therefore, a restrain to respondent/ plaintiff to carry out the construction in terms of the sanction is not justified.

9. In view of the discussions made herein above, there is no illegality committed by the Court below in granting temporary injunction to the respondent/plaintiff. In view of this, the appeal fails and is hereby dismissed. However, there shall be no order as to costs.

Appeal dismissed.

I.L.R. [2014] M.P., 1351
APPELLATE CRIMINAL
Before Mr. Justice B.D. Rathi
Cr. A. No. 2574/1997 (Jabalpur) decided on 30 August, 2013

GANPAT ...Appellant
Vs.
STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Sections 104 & 105 **- Private defence - On the date of incident, land was under the actual possession of appellant - Complainant and his companions were criminal tresspassers - Injured had sustained two simple injuries and one spleenic tear - Probability of defence that the said injury was received due to fall, cannot be ruled out - Rupture of spleen even assuming to be caused by appellant has not resulted in his death - Held - Appellant was having right of private defence of property u/s 104 & 105 of the IPC - Appeal allowed. (Paras 12 & 13)**

दण्ड संहिता (1860 का 45), धाराऐं 104 व 105 – प्रायवेट प्रतिरक्षा – घटना दिनांक को भूमि, अपीलार्थी के वास्तविक कब्जे में थी – शिकायतकर्ता और उसके साथी, आपराधिक अतिचारी थे – आहत को दो साधारण चोटें आयीं और एक प्लीहा की क्षति – बचाव की संभाव्यता कि उक्त चोट गिरने से आयी थी, से इंकार नहीं किया जा सकता – प्लीहा क्षति यदि अपीलार्थी द्वारा कारित की जाने की धारणा की जाये तब भी उसकी मृत्यु का वह कारण नहीं था – अभिनिर्धारित – अपीलार्थी को भा.द.सं. की धारा 104 व 105 के अंतर्गत सम्पत्ति की प्राईवेट रक्षा का अधिकार था – अपील मंजूर।

Pranay Gupta, for the appellant.
C.K. Mishra, G.A. for the respondent.

JUDGMENT

B.D. Rathi, J. :- This appeal has been preferred under Section 374(2) of the Code of Criminal Procedure (for short "the Code") against the judgment dated 6.12.1997 passed by Sessions Judge, Balaghat in Sessions Trial No. 192/1996, whereby the appellant has been convicted under Section 307 of the Indian Penal Code and sentenced to undergo R.I. for 5 years, while co-accused Veer Singh and Narsu were acquitted of the offence charged with.

2. According to the prosecution case, on 2/7/96 at 10.40 a.m., Manglu (PW1) along with his father Phool Singh and one Sevakram lodged a report at Police Station Changotola, District Balaghat which was entered in Roznamcha Sanha No.50A (Ex.P/4) by Head Constable Fagan Singh (PW12) to the effect that while he was sowing paddy in his agricultural field with his father, uncle Deep Singh and other members of the family, appellant Ganpat Gond and acquitted co-accused Veer Singh and Narsulal came there and prohibited him from sowing and asked him to leave the field. On his objection, Ganpat gave a Lathi blow on his left hand and back and also gave a forceful blow by butt of Lathi on his abdomen. As Deepsingh and Imrat came forward to intervene, they were also assaulted by Veer Singh and Ganpat with Lathi. The incident was witnessed by Deepsingh, Sirpat and Basanti bai. On the basis of the said information, Crime No.24/96 leading to registration of FIR (Ex.P/17) was recorded and on completion of investigation, charge-sheet was filed.

3. Charge under Section 307 of the IPC was framed. Appellant denied the charge and pleaded false implication.

4. Learned counsel for the appellant submitted that the impugned judgment was passed without proper appreciation of evidence on record. According to him, the same set of evidence on which co-accused persons were acquitted, could not have formed the basis of conviction of the appellant. He further submitted that the disputed land was in the possession of the appellant and the complainant party was the aggressor and, therefore, trial Court ought to have given the benefit of right of private defence of property to the appellant. In alternative, he submitted that the injuries sustained by the complainant were simple in nature except injury no.3 that had resulted in rupture of spleen, but the same was not dealt with an intention to cause death of complainant.

5. In response, learned Government Advocate, while making reference to the incriminating pieces of evidence on record, submitted that the conviction is 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. After taking into consideration the evidence and material available on record, trial Court has held that it was not evident that complainant Manglu (PW1) had reached on the disputed land for sowing, without any right. It was also held that while Manglu was running from the field on the shout of appellants, he was assaulted by the appellant by Lathis and the injury inflicted was sufficient in the ordinary course of nature to cause his death as his spleen was ruptured and, therefore, the appellant was not entitled to right of private defence under Sections 104 and 105 of the IPC.

8. On perusal of evidence of the witnesses, it is clear that on the date and time of incident, disputed land was in the possession of appellant and other acquitted co-accused persons, as Manglu (PW1) had deposed in para 7 of his evidence that disputed land was purchased by Hiraman, his maternal grandfather, who had died 10-12 years prior to the incident and since then the land was being cultivated by the appellant party and thereafter this incident had occurred. In para 22, he further stated that since 3-4 years prior to the date of incident, land was being cultivated by the appellant. Although, he tried to say that in between land had again come in his possession, yet, evidence has not been produced to prove as to when the land had again come in his possession. Deep Singh (PW2) in para 8 deposed that the land was cultivated by appellant party as tenants. Ruplal (PW5) also deposed that land was cultivated by appellant party. Purantabai (PW4), Kotwar, also deposed that revenue of the land was continuously paid by the appellant party. Further, Manglu admitted that, the proceedings initiated by him for mutation of land, were objected to by the appellant party and the same were still pending.

9. In para 20, Manglu stated that, including him, they were about 10 people in the field for sowing paddy: In para 21 he deposed that the accused persons had chased all his associates away and he was left all alone in the field. In para 22 again, he deposed that, while being assaulted, he was alone in the field. Therefore, finding of the trial Court that Manglu was assaulted while he was running away from the field, is contrary to his deposition as indicated above. That apart, even in the light of prosecution version as reflected from the FIR (Ex.P/4) that when the appellant had objected to sowing of Paddy, the complainant, instead of leaving the field, insisted that the disputed land was in his possession and continued to sow, the aforesaid finding of the trial Court cannot be sustained.

10. It also transpires from the record that FIR (Ex.P/4) was lodged by Manglu, but Manglu, in para 17 of his evidence, has testified that the FIR was lodged by his father as he was unconscious, and this anomaly also renders credence to the defence version.

11. Accordingly, old possession of appellant is duly proved from the evidence on record and, therefore,in absence of evidence as to when the land again came in the possession of complainant, it will be presumed that appellant was continuing in possession of the land without any break.

12. Therefore, it is clear that since the death of Hiraman, owner of the land and also on the date of incident, land was under the actual possession of the appellant party. Complainant and his companions, as he has admitted in his evidence had reached on the land for sowing, were therefore criminal tresspassers.

13. As per the medical report (Ex.P/8A) prepared by Dr. Mukesh Shrivastava (PW6), Manglu had received two simple injuries and one spleenic tear due to hit over abodmen by some hard and blunt object. However, as per Modi's Medical Jurisprudence and Toxicology, Twenty-first Edition, Page No.332, on account of its situation, rupture of a normal spleen is very rare unless caused by considerable crushing and grinding force, such as passing of a carriage or motor car over the body, or by a crush in a railway accident, or by a fall from a very great height. Accordingly, the probality (sic. probability) of defence that the said injury was received due to fall, cannot be ruled out and even assuming that rupture of spleen was caused by appellant, then too the same has not resulted in his death. In the aforesaid premises, the trial Court ought to have accorded benefit of right of private defence of property to the appellant under Section 104 and 105 of the IPC.

14. The appeal is, therefore, allowed. Impugned conviction and consequent sentences are set aside. Appellant is acquitted of the offence. Appellant is on bail. His bail bonds stand discharged.

15. Copy of the judgment along with the record of the trial Court be sent to the trial Court for information and compliance.

Appeal allowed.

I.L.R. [2014] M.P., 1355
APPELLATE CRIMINAL
Before Mr. Justice N.K. Gupta
Cr. A. No. 1130/1996 (Jabalpur) decided on 6 May, 2014

RAMESH @ DABBU ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. ***Penal Code (45 of 1860), Section 376 - Rape*** **- Prosecutrix appears to be consenting party as she remained with appellant for about 6 days - Appellant was already acquitted by trial court for offences u/s 363, 366 of IPC - Prosecuting could have raised hue and cry while she was allegedly kept in a room by appellant - Prosecutrix also suppressed the story of her coming back to her mother house - As per medical documents, prosecutrix must be above 18 years of age - As prosecutrix was consenting party no offence was committed by appellant - Appeal allowed. (Para 12)**

क. दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – अभियोक्त्री सम्मत पक्षकार प्रतीत होती है क्योंकि वह अपीलार्थी के साथ करीब 6 दिनों तक रही – अपीलार्थी को विचारण न्यायालय द्वारा पहले ही भा.द.सं. की धारा 363, 366 के अंतर्गत अपराधों के लिये दोषमुक्त किया गया है – अभियोक्त्री शोर मचा सकती थी जब उसे अभिकथित रुप से अपीलार्थी द्वारा कमरे में रखा गया था – अभियोक्त्री ने अपनी मां के घर खुद के लौटने की कहानी का भी छिपाव किया है – चिकित्सीय दस्तावेजों के अनुसार अभियोक्त्री की वय 18 वर्ष से अधिक होना चाहिए – चूंकि अभियोक्त्री सम्मत पक्षकार थी, अपीलार्थी द्वारा कोई अपराध कारित नहीं किया गया – अपील मंजूर।

B. ***Evidence Act (1 of 1872), Section 64 - Proof of document*** **- Document produced by prosecution but not proved, cannot be read against accused but can be read in favour of accused. (Para 8)**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 64 – दस्तावेज का प्रमाण – अभियोजन द्वारा दस्तावेज पेश किया गया किन्तु साबित नहीं किया गया, अभियुक्त के विरुद्ध नहीं पढ़ा जा सकता बल्कि अभियुक्त के पक्ष में पढ़ा जा सकता है।

Cases referred :
ILR (2012) MP 1351.

A.K. Mishra, for the appellant.
Prakash Gupta, P.L. for the State/respondent.

JUDGMENT

N.K. GUPTA, J. :- The appellant has preferred the present appeal being aggrieved with the judgment dated 28.6.1996 passed by the learned First Additional Sessions Judge, Bhopal in S.T.No.445/1994, whereby the appellant was convicted for offence punishable under Section 376 of IPC and sentenced with 7 years rigorous imprisonment.

2. The prosecution's case, in short, is that, on 16.3.1994, Sadhna Bai (P.W.1) had lodged an FIR, Ex.P/4 in Rojnamacha at Police Station Jahagirabad, District Bhopal that her married daughter, the prosecutrix went to the school to drop her younger brother but, she did not come back. Thereafter, a search was initiated and the prosecutrix was recovered on 21.3.1994. She was produced before the Investigation Officer at Police Station Jahagirabad. The prosecutrix had informed that on 16.3.1994, when she was coming back after dropping his brother Kishan at Anand Vidya Mandir School, the appellant met her on the way and forced her into an auto-rickshaw and took her to a village of Vidisha District and kept her in the house of his relative. Also, he committed rape upon the prosecutrix. The prosecutrix was referred for her medico legal examination. Dr.Pratibha Dubey examined her at Katju Hospital, Bhopal and gave her report, in which no definite opinion could be given. The police had also collected mark-sheet of the prosecutrix to assess her date of birth. The appellant was also arrested and sent for his medico legal examination. After due investigation, the charge-sheet was filed before the Additional Chief Judicial Magistrate, Bhopal, who committed the case to the Sessions Court and ultimately, it was transferred to the learned First Additional Sessions Judge, Bhopal.

3. The appellant abjured his guilt. He took a plea that he was innocent and he was falsely implicated in the matter. No defence witness was examined. However, documents Ex.D/1 to Ex.D/5 were produced in defence.

4. The learned Additional Sessions Judge, Raisen after considering the prosecution's evidence, acquitted the appellant from the charges of offence under Sections 363 and 366 of IPC but, convicted and sentenced the appellant as mentioned above.

5. I have heard the learned counsel for the parties.

6. In the present case, there are only two questions which are to be decided. Firstly, that what was the age of the prosecutrix at the time of the

incident and secondly, whether a rape was committed upon her. In the present case, Sadhna Bai (P.W.1) and Bihari (P.W.2) have stated that the prosecutrix was 17 years old at the time of their depositions and the incident took place 2 years prior to their depositions. Bihari has given the transfer certificate of the prosecutrix from school, Ex.P/1 to the police. Similarly, a photo copy of the mark-sheet is also given to the police, which is marked as Ex.P/9. In both the documents, the date of birth of the prosecutrix is mentioned to be 3.5.1978. In those documents, name of the father of the prosecutrix was mentioned to be Biharilal, whereas the prosecutrix (P.W.4) has accepted in her cross-examination that Biharilal was not his biological father. Her biological father Chetan had expired and thereafter, her mother was living with Biharilal and therefore, Biharilal was the person, who maintained her mother and the prosecutrix. Under such circumstances, there was no basis shown by Biharilal or Sadhna Bai by which the date of birth of the prosecutrix was intimated to the school at the time of her admission. The mark-sheet, Ex.P/9 indicates that in the examination of primary school, the date of birth of the prosecutrix was shown to be 3.5.1978 and the transfer certificate, Ex.P/1 indicates that the prosecutrix was taken from the Government Girls Middle School, Jahagirabad and she was admitted in the school on 7.7.1992 but, it is no where established that the prosecutrix was admitted in the school for the first time in Government Girls Middle School, Jahagirabad or her date of birth was informed to the school with the help of any cognate document.

7. Unfortunately, no much questions could be asked from Sadhana Bai and Biharilal about the age of the prosecutrix, whereas Sadhna Bai has accepted that the prosecutrix was a married girl and her marriage took place prior to the incident. In this context, the prosecutrix was not examined on the question of her age. Neither in examination-in-chief, nor in cross-examination, she told about her age. Her age was mentioned to be 17 years on the basis of age assessed by the trial Court at the time of her deposition. It would be apparent that the appellant was acquitted from the charges of offence under Sections 363 of IPC and therefore, the assessment of age of the prosecutrix has to be done only for the purpose of offence punishable under Sections 376 of IPC.

8. In the present case, the document from the educational record of the prosecutrix has no basis, whereas no ossification test of the prosecutrix was performed. In medical examination report, concerned doctor found that the prosecutrix had 32 teeth in her mouth. That report of medical examination of

the prosecutrix was not proved because the concerned doctor was not examined but, a prosecution document, though it is not proved can be used in the evidence, if it is in favour of the accused. In this connection, the judgment passed by Division Bench of this Court in case of *"Vrijlal Ghosi and another Vs. State of Madhya Pradesh"*, [I.L.R. (2012) M.P., 1351] may be referred, in which it is laid as under:-

> *"It is a settled principle of law that document, which is not proved by the prosecution cannot be read against the accused, but since it is a prosecution document, then it can be read in favour of the accused."*

Hence, the MLC report of the prosecutrix though not proved but, it can be used in favour of the accused. The prosecution relied upon that report and it was filed alongwith the charge-sheet. A report is given on the back page of document Ex.P/7 and therefore, for referring the document, it is marked as Ex.P/7-A.

9. The doctor, who examined the prosecutrix after the incident had mentioned that 32 teeth were found in the mouth of the prosecutrix. In that respect if Modi's Medical Jurisprudence and Toxicology, Twenty-third Edition, LexixNexis-Butterworths at page 279 to 282 is perused then, it is mentioned that third molar or wisdom teeth erupt between the age of 17 to 25 years. The prosecutrix had all the third molars present in her mouth and therefore, she must be above 18 years of age at the time of the incident.

10. The prosecutrix has stated that the appellant committed rape upon her for two times on each day for at least 7-8 days. Her testimony cannot be disbelieved on this count that the appellant has committed intercourse upon the prosecutrix in such a manner. There is no enmity shown between the prosecutrix and the appellant. Hence, by statement of the prosecutrix, it can be said that the appellant committed so many intercourses when the prosecutrix was residing with him in his relative's house.

11. So far as the consent of the prosecutrix is concerned, her conduct may be assessed in this connection. The prosecutrix initially had stated before the police that she was taken by the appellant forcefully in an auto-rickshaw but, before the trial Court, she had stated in para 1 to 6 that she could not see the culprit, who took her in the auto-rickshaw. When she became conscious, she found herself in a room, in which the appellant was present. Hence, the

learned Additional Sessions Judge acquitted the appellant from the charges of offence under Sections 363, 366 of IPC. Various letters Ex.D/1 to Ex.D/5 were shown to the prosecutrix and she has admitted in para 5 of her statement that those letters were written by her but, she added that due to force of the appellant, she wrote such letters in the room, where she was kept and she appended various dates on those letters but, such an explanation was not given by the prosecutrix to the police. If such letters would have been written by her due to force of the appellant then, that fact must have been informed by her to the police. Also, if the documents Ex.D/1 to Ex.D/5 are examined then, looking to their description and format, papers and ink of writing, it appears that those letters were not prepared within 7 days but, those were written on different time and different dates and also with different dot pens. If text of those letters is perused then, certainly it would be apparent that the prosecutrix was in love with the appellant and thereafter, she was married with someone else forcefully.

12. The prosecutrix had alleged that the appellant committed rape for two times on each and every day and he kept her for 7-8 days. She did not tell about the name of the village, where she was kept. She did not give any reason as to why she did not try to leave the house. She was recovered by the police when she was produced by her mother at Police Station Jahagirabad and therefore, it was for her to explain as to how she escaped from the room and came to her house. On the contrary, the prosecutrix has stated in para 3 of her statement that the accused was caught by the police, after 6-7 days of the incident and father and mother of the appellant took her to another village and threatened her. Thereafter, mother of the appellant took her to the Police Station but, in recovery memo, Ex.P/6, it is no where mentioned that she was brought to the police station by the mother of the appellant. Under such circumstances, if the entire conduct of the prosecutrix is considered then, it would be apparent that the prosecutrix has suppressed the story of her coming back from the concerned room of the relative of the appellant to her mother's house and when she could leave the house on her own then, certainly she could make hue and cry, so that the citizens residing nearby that house could intervene and save her and also she could leave that house within a day or two. Hence, the prosecutrix appears to be a consenting party for sexual intercourse. Though she was already married to someone else. Also considering the entire conduct of the prosecutrix and specially by perusing her love letters, Ex.D/1 to Ex.D/5, it would be apparent that the prosecutrix

was a consenting party in the case.

13. Since the prosecutrix was above 18 years of age and she was a consenting party, no offence punishable under Section 376 of IPC was constituted against the appellant. The learned Additional Sessions Judge has committed an error of law and fact in convicting the appellant for the said offence. Under such circumstances, the conviction as well as the sentence cannot be upheld. The appeal filed by the appellant appears to be acceptable and consequently, it is hereby accepted. The conviction and sentence directed against the appellant for offence punishable under Section 376 of IPC are hereby set aside. The appellant is acquitted from all the charges appended against him.

14. At present, the appellant is on bail, his presence is no more required before this Court and therefore, it is directed that his bail bonds shall stand discharged.

15. A copy of the judgment be sent to the trial Court alongwith its record for information.

Appeal allowed.

I.L.R. [2014] M.P., 1360
CIVIL REVISION
Before Mr. Justice A.K. Shrivastava
Civil Rev. No. 111/2010 (Jabalpur) decided on 18 March, 2013

RAMESH CHANDRA JAIN ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Civil Procedure Code (5 of 1908), Order 9 Rule 13 & Limitation Act (36 of 1963), Section 5 - Setting aside ex-parte decree **- Application under Order 9 Rule 13 filed after 10 years and 6 months on the ground that the Collector was not served - Although the defendant was served and was also represented by Government Pleader - On various dates, he sought time to file reply to I.A. and written statement - No application u/s 5 of Limitation Act was filed - Held - Application filed under Order 9 Rule 13 was quite vague - Reason assigned is concocted and is ex facie false - Trial Court acted illegally with material, irregularity in exercise of its jurisdiction while allowing the application - Discretion**

should be exercised in favour of a party who comes with clean hands - Revision succeeds - Impugned order is set-aside. (Paras 14-15)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 13 व परिसीमा अधिनियम (1963 का 36), धारा 5 – एकपक्षीय डिक्री को अपास्त किया जाना – आदेश 9 नियम 13 के अंतर्गत आवेदन को 10 वर्ष और 6 माह पश्चात इस आधार पर पेश किया गया कि कलेक्टर को तामीली नहीं हुई – तथापि प्रतिवादी को तामीली हुई थी और सरकारी अधिवक्ता द्वारा प्रतिनिधित्व भी किया गया – विभिन्न तिथियों पर उसने अंतवर्ती आवेदन का जबाव और लिखित कथन प्रस्तुत करने के लिये समय चाहा – परिसीमा अधिनियम की धारा 5 के अंतर्गत कोई आवेदन प्रस्तुत नहीं – अभिनिर्धारित – आदेश 9 नियम 13 के अंतर्गत प्रस्तुत आवेदन अस्पष्ट है – दिया गया कारण, कूटरचित है और प्रत्यक्षतः मिथ्या है – विचारण न्यायालय ने आवेदन मंजूर करते हुए अपनी अधिकारिता का प्रयोग करने में तात्विक अनियमितता के साथ अवैध रुप से कार्यवाही की – विवेकाधिकार का प्रयोग उस पक्षकार के पक्ष में किया जाना चाहिए जो स्वच्छ अंतःकरण से आता है – पुनरीक्षण सफल – आक्षेपित आदेश अपास्त।

Cases referred :

(2012) 5 SCC 157, (2011) 4 SCC 363, (2005) 11 SCC 197.

R.K. Sanghi, for the applicant.
Santosh Yadav, P.L. for the non-applicant.

ORDER

A.K. SHRIVASTAVA, J. :- This revision application has been filed at the instance of plaintiff against the order dated 19.01.2010 passed by learned First Additional District Judge, Chhattarpur in MJC No. 41/2007 whereby application under Order IX Rule 13 CPC of defendant-respondent has been allowed thereby restoring the civil suit no. 70-A/1995 (*Ramesh Chandra Jain Vs. State of M.P.*) which was decreed in exparte on 26.9.1996.

2. No exhaustive statements of fact are required to be narrated for the purpose of disposal of this revision since the point in dispute in this revision lie in a narrow compass. Suffice it to say that a suit for declaration and injunction in respect of certain immovable property which is the subject matter of the suit and the description whereof is mentioned in the plaint was filed by the plaintiff-applicant in the trial Court. Despite the respondent-defendant was served and appearance was made on each and every date by the Additional Govt. Pleader on behalf of the State ultimately he did not appear and thus suit

was decreed in ex parte on 26.9.1996.

3. After more than 10 years and 6 months, an application under Order IX Rule 13 CPC was filed by the defendant to set aside the ex parte decree on 17.4.2007. The only reason which has been assigned in the application is that the Collector of the District Chhattarpur was not served. Hence, it was prayed that application to set aside the ex parte decree be allowed and the ex parte judgment and decree dated 26.9.1996 be set aside and the suit be restored to its original number.

4. This application was vigorously opposed by the plaintiff-applicant by filing reply. The evidence was also recorded. The learned Trial Court although found that sufficient reason has not been assigned by defendant-respondent in the application under Order IX Rule 13 CPC but in the interest of justice the application was allowed and the ex parte judgment and decree was set aside and the suit was restored to its original number holding that the officer incharge was negligent.

5. In this manner this revision has been filed by the plaintiff-applicant before this Court.

6. It has been put forth by Shri R.K. Sanghi, learned counsel for the applicant that the sole reason which has been assigned in the application under Order IX Rule 13 CPC is that Collector of the District Chhattarpur was not served but this ground was not found to be sufficient in the impugned order and, therefore, when sufficient ground was not found it was incumbent upon the Trial Court to dismiss the application. Learned counsel for the applicant has placed heavy reliance upon para 22 of the decision of Supreme Court *Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai* (2012) 5 SCC 157. Learned counsel further submits that despite the application under Order IX Rule 13 CPC was ex facie barred by time, no application under Section 5 of the Limitation Act was filed. Hence, it has been prayed that by allowing this revision application, the impugned order be set aside.

7. On the other hand Shri Sanotsh Yadav, Panel Lawyer for respondent-respondent argued in support of the impugned order and submitted that on account of fault of O.I.C. the delay occurred in filing the application under Order IX Rule 13 CPC and, therefore, since learned Court below in the interest of justice has allowed the application, the impugned order does not require any interference and, therefore, this revision deserves to be dismissed.

8. Having heard learned counsel for the parties, I am of the view that this revision application deserves to be allowed.

9. In order to appreciate the rival contentions of learned counsel for the parties, it would be appropriate to quote the application which has been filed under Order IX Rule 13 CPC in verbatim which reads thus:-

"न्यायालय श्रीमान् प्रथम उपर जिला न्यायाधीश महोदय,
श्री आर. के. श्रीवास्तव जी, छतरपुर (म.प्र.)
विविध आवेदन क्रमांक 41/2007 सत्र 2007

शासन म.प्र. द्वारा कलेक्टर छतरपुर (म.प्र.) .....आवेदक/प्रतिवादी

बनाम

श्री श्रमेश चंद जैन तनय श्री ठाकुर दास जैन
रिटायर्ड असिसटैंट रजिस्ट्रार, को–ऑपरेटिव सोसायटी
निवासी – बीहट हाउस,पिपरी, नौगांव तहसील नौगांव जिला छतरपुर (म.प्र.)
.....अनावेदक/वादी

आवेदन अंर्तगत आदेश – 9, नियम 13 जा.दी.

महोदय,

आवेदक/प्रतिवादी सादर निम्न लिखित विनय करता है :–

यह कि आवेदक को दिनांक 12.03.2007 को माननीय न्यायालय में लंबिल इजराय क्रमांक 70ए/95–06 का नोटिस प्राप्त होने पर उसे उक्त प्रकरण के संबंध मकें सर्वप्रथम जानकारी दी, कि अनावेदक द्वारा शासन के विरुद्ध कभी कोई वाद संस्थित किया गया था । इसके पूर्व उसे कोई जानकारी नहीं थी। जानकारी मिलने के उपरान्त कलेक्टर छतरपुर म.प्र. शासन प्रतिनिधि द्वारा मुझे प्रकारण में म.प्र. शासन का पक्ष रखने हेतु प्रभारी अधिकारी नियुक्त किया गया। माननीय न्यायालय में आवेदक ने उपस्थित होकन के व्यवहार वाद क्रमांक 70–ए/95 के संबंध में जानकारी एकत्र कर माननीय न्यायालय में नकल प्राप्त किये जाने हेतु दिनांक 12.03.2007 को आवेदन प्रकरण के आदेश की नकल एवं डिक्री प्राप्त करने हेतु प्रस्तु किया जिस पर दिनांक 02.04.2007 को उसे संबंधित वाद के निर्णय की नकल प्राप्त हुई।

यह कि मूल व्यवहार वाद 17–ए/95 में माननीय न्यायालय द्वारा दिनांक 31.07.96 को आवेदक म.प्र. शासन के विरुद्ध एक पक्षीय कार्यवाही की गई है, तथा दिनांक 26.09.96 को एक पक्षीय निर्णय अनावेदक/वादी के पक्ष में आवेदक/प्रतिवादी के विरुद्ध पारित कर डिक्री बनाई गई है।

यह कि म.प्र. शासन के जिले के प्रतिनिधि कलेक्टर छतरपुर के उपर प्रकरण में कोई भी व्यक्तिगत तामीली नहीं की गई है, और न ही इजराय का नोटिस

प्राप्त होने के पूर्व आवेदक/प्रतिवादी कलेक्टर छतरपुर, प्रतिनिधि म. प्र. शासन को उक्त वाद के संबंध में कोई जानकारी रही है। जिसके कारण वह प्रकरण में म.प्र. शासन का पक्ष नहीं रख पाया है।

यह कि विवादित भूमि जिसके संबंध में डिक्री प्रदान की गई है, वह आज भी म.प्र. शासन की आबादी के रूप में खसरा क्रमांक 1/36/2, रकवा 0.243 में दर्ज है और उक्त भूमि म.प्र. शासन के स्वत्व की भूमि है, जिसके संबंध में म.प्र. शासन का पक्ष भी सुना जाना न्यायहित में आवश्यक है, तथा पूर्व में बिना म.प्र. शासन का पक्ष सुने पारित एक पक्षीय निर्णय एवं डिक्री हस्तक्षेप कर निरस्त किये जाने योग्य है।

यह कि प्रकरण की प्रश्नाधीन भूमी नगर नोगांव की आबादी के मध्य की शासन (म.प्र.) के स्वत्व एवं स्वामित्व की महत्वपूर्ण मौके की मूल्यवान भूमि है। जिसके संबंध में न्याय की मंशा के अनुरूप सही निर्णय के लिए शासन म.प्र. के पक्ष को सुना जाना तथा दोनो पक्षों की सुनवाई का समुचित अवसर प्रदान कर गुण–दोषों के आधार पर निर्णय पारित किया जाना अति आवश्यक है। और उक्त संयोगों में शासन म.प्र. के विरूद्ध पारित एक पक्षीय निर्णय एवं डिक्री निरस्त किया जाना अति आवश्यक है।

अतः श्रीमान् जी से विनय है कि आवेदक प्रतिवादी के विरूद्ध दिनांक 26.06.96 को पारित एक पक्षीय निर्णय एवं डिक्री निरस्त कर प्रकरण पुनः बाजवा नंबर पर कायम कर आवेदक प्रतिवादी का पक्ष सुन निर्णय पारित करने की कृपा करें एवं आवेदक प्रतिवादी का आवेदन स्वीकार करने की कृपा करें।

दिनांक
स्थान :

आवेदक/प्रतिवादी
द्वारा
प्रभारी अधिकारी
तहसीलदार–नौगांव
जिला – छतरपुर
(म.प्र.)."

The purpose of quoting the application in its entirety is that, the only reason which has been assigned in the application is that Collector of the District Chhattarpur was not served and, therefore, defendant was not aware about passing of the impugned judgment and decree and it came into the knowledge of the defendant only when the notice of execution was received on 12.3.2007. Eventually on 6.4.2 007 the restoration application was filed. To me, the sole ground which has been raised is ex facie false and this Court do not expect such a false plea to be raised from the side of the Government. The applicant

has filed certified copy of the Vakalatnama filed in civil suit in which Mr. T.P. Bhatele, Additional Government Pleader was authorized to conduct the case on behalf of State of M.P. and the Officer Incharge of the case who is Sub Divisional Officer (Revenue), Chhattarpur had signed the said Vakalatnama. Hence, it cannot be said that the respondent-defendant was not served with the summons of the suit. Thus, the ground which has been assigned in the application has not been materialized. On the contrary, it is proved that under a false pretext a concocted ground has been averred in the application under Order IX Rule 13 CPC.

10. That, apart, it would be germane to quote gist of order-sheets of the civil suit no.70A/1995. The date 31.10.1995 was the first date in which learned Trial Court ordered to issue notice to the defendant-State Govt. On 20.11.1995 the Additional Government Pleader appeared on behalf of the defendant and filed memo of appearance and prayed time to submit reply of application of temporary injunction. The parties were directed to maintain status-quo. The learned Trial Court fixed the date 30.11.1995. On 30.11.1995 and on further dates time was sought throughout by the Additional Government Pleader to file reply of temporary injunction application as well as to file written-statement. However, despite the time was sought on 18.12.1995, 20.12.1995, 3.1.1996, 20.1.1996, 7.2.1996 and 8.3.1996 the written-statement was not filed and the matter was fixed for 26.3.1996. On 26.3.1996 also time was sought to file written-statement and reply of temporary injunction application. Thereafter, the matter was taken up for hearing on 12.4.1996 and on this date again time was sought by learned Additional Government Pleader to file written-statement on the ground that all the Executive Officers are busy in conducting the Lok Sabha elections, therefore, it was prayed that the case be fixed for some other date. This prayer was vigorously opposed by learned counsel for the plaintiff-applicant. Despite several opportunities were provided to the defendant-respondent even prior to the Lok Sabha elections could commence to file written-statement it was not filed. The learned Trial Court by adopting a lenient view gave further time to file written-statement and the case was fixed for 15.5.1996. On 15.5.1996 the matter was taken up for hearing and again time was sought by the defendant-respondent to file written-statement which was allowed on payment of cost of Rs. 30/- and the date of hearing 6.7.1996 was fixed. Again on 6.7.1996 the time was sought by defendant to file written-statement as well as to file reply of application under Order 39 Rules 1 and 2 CPC. Ultimately, the learned Trial Court directed and provided a last opportunity to the defendant-respondent to file written-

statement failing which the suit will proceed under Order 8 Rule 10 CPC and fixed the date of hearing 31.7.1996. On 31.7.1996 no instruction was pleaded by the Additional Government Pleader. Hence, the learned Trial Court proceeded ex parte and after recording the evidence of plaintiff decreed the suit in ex parte on 26.9.1996. Hence, for several dates continuously time was sought by learned Additional Government Pleader for filing written-statement and reply of temporary injunction application. The purpose of writing the gist of these order-sheets is that not only sufficient opportunity but more than sufficient opportunities were provided to the defendant to file written-statement. However, despite it was well in the knowledge of the defendant-respondent that the suit was decided in ex parte, no application to set aside the ex parte decree was filed well in time.

11. In order to substantiate the averments made in the application under Order IX Rule 13 CPC one Bhagwant Singh Tomar who is Tahsildar of Naugaon District Chhattarpur was examined. In para 20 he has categorically admitted that in the proceedings initiated under Section 248 of M.P. Land Revenue Code in Revenue Case No. 204A6/95-96 there is a reference of the order-sheet dated 12.4.1996 in which it has been mentioned by the then Tahsildar that photocopy of the plaint filed in Civil Suit No. 70-A/1995 has been filed and, therefore, the then Tahsildar stayed the proceedings of Section 248 of the Land Revenue Code of his Court. Further it has been admitted by the Tahsildar in his cross examination para 20 that again Tahsildar initiated proceedings to remove encroachment under Section 248 of the Land Revenue Code and on 28.9.2006 the plaintiff Ramesh Chandra Jain filed written-statement in those proceedings and also filed certified copy of the judgment and decree passed in ex parte against the State on 26.9.1996. Despite it, nothing was done on behalf of the State Government to file application under Order IX Rule 13 CPC. Hence,I am of the view that it was well in the knowledge of the State Government and even in the knowledge of the Collector that civil suit has been filed against the State and despite the State of M.P. was being represented through Additional Government Pleader, later on there was no appearance and the suit was decreed in ex parte long back on 26.9.1996. These are the other grounds in order to hold that the only reason which has been assigned in the application under Order IX Rule 13 CPC that defendant-State Government was not served through Collector, becomes ex facie false. Indeed this false ground ought not to have been taken by the State.

12. The defendant was served with the summon of the suit and was being

represented by Additional Government Pleader. The Vakalatnama was also filed on behalf of defendant in the suit. Hence, the prescribed period of limitation to file application under Order IX Rule 13 CPC was only 30 days under Article 123 of the Limitation Act. Admittedly, the application to set aside ex parte decree was not filed within 30 days from the date of passing of ex parte decree and was filed after more than 10 years and 6 months, therefore, the defendant-respondent was obliged to file application under Section 5 of the Limitation Act to condone the delay in filing the application under Order IX Rule 13 CPC. But, surprisingly despite there is delay of more than 10 years and 6 months, no application to condone the delay has been filed. This is an additional reason to reject the application of defendant-respondent to set aside the ex parte decree.

13. The Indian Limitation Act has been enacted on the phrase "Delay defeats equities" and the Maxim "Interest reipublicae up sit finis litium" (it is for the general welfare that a period be put to litigation) and also equity aids the vigilant and not the dormant. Thus, the law of limitation is founded on public policy. Hence, when the alleged sufficient ground which was assigned in the application was not substantiated and was not found to be proved by the learned Trial Court and further because no other ground has been taken in the application under Order IX Rule 13 CPC, I am of the view that merely by assigning reason (which is not even taken and averred in the application) that in the interest of justice or the O.I.C. was negligent application under Order IX Rule 13 CPC cannot be allowed by learned Trial Court. Hence, the learned Trial Court has acted illegally with material irregularity in exercise of its jurisdiction by allowing application of defendant-respondent under Order IX Rule 13 CPC.

14. The Supreme Court in *Lanka Venkateswarlu (Dead) by LRs Vs. State of Andhra Pradesh and Others* (2011) 4 SCC 363 has held that the Courts in this country, including the Supreme Court adopt a liberal approach in considering the application for condonation of delay on the ground of sufficient cause under Section 5 of the Limitation Act. However, the concepts such as "liberal approach", "justice oriented approach", "substantial justice" cannot be employed to jettison the substantial law of limitation. Especially, in cases where the court concludes that there is no justification for the delay. While considering application for condonation of delay under Section 5 of the Limitation Act, the courts do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be

exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections cannot and should not form the basis of exercising discretionary powers. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. In this decision, the Supreme Court reversed the decision of the High Court in which the application for condonation of delay in bringing on record the LRs after considerable long period of 883 days was condoned. Yet there is another decision of Supreme Court State of *Rajasthan Vs. Nav Bharat Construction Co.* (2005) 11 SCC 197 wherein it was held that the stand of the State praying to condone the delay was that there was a long strike of government employees but there was nothing on record in order to indicate when the strike was commenced and when it was called off. The Supreme Court found that since the application was quite vague therefore, the High Court did not commit any error in rejecting it. To me, in the present case, application under Order IX Rule 13 CPC is quite vague and the only reason which has been assigned is that Collector of the District was not served. The Court below as well as this Court has held that the said ground is concocted and is ex facie false. Thus, according to me, the learned trial Court has acted illegally with material irregularity in exercise of its jurisdiction while allowing the application under Order IX Rule 13 CPC.

15. To decide an application under Order IX Rule 13 CPC to set aside ex parte decree is a discretionary power and the judicial discretion should be exercised in favour of a party who comes with clean hands. Since under the false pretext on the ground that summon was not served upon the defendant application under Order IX Rule 13 CPC was filed and defendant-respondent tried to keep the Court in dark, therefore, I am of the view that in such a case the discretion cannot be exercised in favour of a party (defendant herein) who has not come with the clean hands.

16. For the reasons stated hereinabove, this revision succeeds and is hereby allowed. The impugned order is hereby set aside. No costs.

Revision allowed.

I.L.R. [2014] M.P., 1369
CIVIL REVISION
Before Mr. Justice K.K. Trivedi
Civil Rev. No. 309/2010 (Jabalpur) decided on 16 April, 2013

POONAM KUMAR DUGGAL ...Applicant
Vs.
INDRAJEET SINGH DUGGAL & ors. ...Non-applicants

(With Civil Rev. No. 312/2010 & Civil Rev. No. 350/2010)

A. Civil Procedure Code (5 of 1908), Order 9 Rule 9 & Accommodation Control Act, M.P. (41 of 1961), Section 23-A - **Restoration of application for eviction - Original non-applicant died during pendency and his legal heirs were brought on record - Defendants claimed that one of them namely Indrajeet is in possession of shop - Notice of application under Order 9 Rule 9 CPC to Indrajeet issued - Non-issuance of notice to other respondents is immaterial as no prejudice was going to cause to them - No need to grant any opportunity to other legal heirs. (Para 14)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 9 व स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23ए – बेदखली के लिए आवेदन का पुनःस्थापन – लंबन के दौरान मूल अनावेदक की मृत्यु हुई और उसके विधिक वारिसों को अभिलेख पर लाया गया – प्रतिवादियों ने दावा किया कि उनमें से एक, नामतः, इन्द्रजीत के कब्जे में दुकान है – आदेश 9 नियम 9 सि.प्र.सं. के अंतर्गत आवेदन की नोटिस, इन्द्रजीत को जारी की गई – अन्य प्रत्यर्थियों को नोटिस जारी नहीं किया जाना तत्वहीन है, क्योंकि उन्हें कोई प्रतिकूल प्रभाव कारित नहीं होने वाला था – अन्य विधिक वारिसों को कोई अवसर प्रदान करने की आवश्यकता नहीं।

B. Accommodation Control Act, M.P. (41 of 1961), Section 23-A - Bonafide requirement - **RCA reached to the conclusion that after giving due opportunity of hearing case was fully proved that the non-applicant No. 2 bonafidely required the demise premises - Medical certificate of handicapness was also duly proved by the doctor - It cannot be said that eviction decree was illegally passed. (Para 11)**

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23ए – वास्तविक आवश्यकता – आरसीए इस निष्कर्ष पर पहुंचा कि सुनवाई का सम्यक अवसर प्रदान करने के पश्चात, प्रकरण पूर्णतः साबित हुआ कि अनावेदक क्र. 2 को अंतरित परिसर की वास्तविक रुप से आवश्यकता है – शारीरिक असमर्थता के

चिकित्सीय प्रमाण पत्र को भी चिकित्सक द्वारा सम्यक् रुप से साबित किया गया – यह नहीं कहा जा सकता कि बेदखली की डिक्री को अवैध रुप से पारित किया गया।

C. Accommodation Control Act, M.P. (41 of 1961), Section 23-A - **If there is a joint tenancy of a family and only one member of family is impleaded as party in the eviction proceedings, the said proceeding cannot be said to be bad in law. (Para 13)**

ग. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23ए – यदि परिवार की संयुक्त किरायेदारी है और परिवार के केवल एक सदस्य को बेदखली की कार्यवाही में पक्षकार के रुप में आलिप्त किया गया है, उक्त कार्यवाही को विधि अंतर्गत अनुचित नहीं कहा जा सकता।

Cases referred :

AIR 1922 Oudh 160, AIR 1925 Oudh 105, AIR 1951 SC 16, AIR 2011 SC 1232, AIR 1959 Patna 225 (DB), AIR 1946 Madras 344, AIR 1957 Raj. 391, AIR 1988 Raj. 201, AIR 1963 Allahabad 374, AIR 1979 Gauhati 37, AIR 1963 SC 468, AIR 1982 SC 1249.

R.K. Sanghi & Shekhar Sharma, for the applicant.
Ravish Agrawal with *K.S. Jha,* for the non-applicant No.2.

ORDER

K.K. Trivedi, J. :- These three revisions have been filed by three persons, who were non-applicants in the eviction proceedings drawn by the non-applicant No.2 before the Rent Controlling Authority, Bhopal (herein after referred to as 'RCA'), against the order of eviction passed on 18.06.2010, therefore, all the three revisions were heard together and are being decided by this common order.

2. The non-applicant No.2 claiming himself to be the specified landlord, being a handicapped person and a Govt. servant, moved an application under Section 23-A of the M.P. Accommodation Control Act, 1961 (herein after referred to as 'Accommodation Act') seeking eviction of the applicant. Initially the application was filed against one Shri Lal Singh and Shri Kuldeep Singh. During the pendency of the application, which is in fact remained pending for enormous reasons as have been reflected in the order-sheet for a long time of 25 years, the original non-applicant No.1 therein, Lal Singh, died and the substitution of legal representatives was done and the other applicants in other revisions became party to the proceedings. The claim made by the non-

applicant No.2 was that he being the landlord of the demise non-residential accommodation, was required the same for the purposes of establishing his own hospital. A notice was issued to the applicants seeking vacation of the demise premises but since an evasive reply was given, the application was required to be filed. The application was contested and a written statement was filed saying that suit shop was in possession of one Indrajeet Singh Duggal, being son of Shri Lal Singh Duggal, who was running an electrical shop. The family being joint Hindu family, there was no question of sub-letting of the shop. There was no bonafide need available to the non-applicant No.2 to get an order of eviction. It was denied that the non-applicant No.2 was physically disabled. After prolong proceedings, the application for eviction of the tenants has been allowed, eviction order has been passed by the RCA against which these revisions are filed.

3. In fact the application filed by the non-applicant No.2 was dismissed for want of prosecution on 29.12.2006. Upon making an application for restoration of the said application under Order IX Rule 9 of the Code of Civil Procedure after issuing notice to one of the legal representative, the order was passed by the RCA restoring the eviction application. Against the said order, objection was filed by the applicant in Civil Revision No.309/2010. The said application was rejected. A civil revision was filed before this Court against the order of restoration of the eviction application being Civil Revision No.196/2010. However, before even passing any interim order in the said civil revision by this Court, since the final order was passed in the eviction case, ultimately the civil revision was got dismissed as infructuous with liberty to raise the grounds in appropriate manner in appropriate proceedings. The order dated 18.06.2010 is challenged by the applicant in Civil Revision No.309/2010 only on the ground that such an order has been passed in the proceedings, which were restored without granting any opportunity of hearing to the applicant Poonam Kumar Duggal. It is contended that since Poonam Kumar Duggal was already impleaded as party in the proceedings after the death of original non-applicant Shri Lal Singh, before directing restoration of the eviction application, at least an opportunity of hearing was required to be given to him. From the perusal of the order-sheets recorded in the said case, it is pointed out that the applicant herein was not granted any opportunity of hearing and, therefore, the order dated 18.06.2010 is bad in law.

4. In the other Civil Revision No.312/2010, almost similar claim has been made. It is pointed out that the order of restoration of the civil suit was

erroneously passed. An apprehension was shown by the applicant in the said case that he was having no faith in the Presiding Officer of the RCA that any justice would be done, he had approached the Collector, Bhopal for transfer of the case from the said authority to any other authority but no order was passed within the knowledge of the applicant. It is contended that in fact the case was posted for pronouncement of the order in open Court on 18.06.2010 but no order was passed within his knowledge on that date nor any order was shown to him. In fact knowing fully well that a complaint is made against the RCA before the Collector, Bhopal, an antedated order was passed by the RCA to frustrate the interim stay granted by this Court in civil revision. This being so, it is contended that the order passed by the RCA is bad in law.

5. Lastly, in Civil Revision No.350/2010, the grounds are taken that erroneously the MJC filed by the non-applicant No.2 for restoration of eviction application was allowed on 03.04.2010. The said order was called in question in a revision before this Court. However, before any interim order could be passed by this Court since the order dated 18.06.2010 was passed, liberty was obtained by the applicant for challenging such order before this Court. Since restoration of the eviction application itself was bad in law, the said order was liable to be set aside. Consequently, the order dated 18.06.2010 is also bad in law and is liable to be set aside. It is contended that from the facts as have come on record, the application filed by the non-applicant No.2 could not have been allowed without impleadment of the applicant and as such the order is neither binding on him nor is sustainable in the eye of law. On these premises, these revisions have been filed.

6. To understand the controversy involved in the present case, it would be necessary to examine the genealogy. The non-applicant No.2 is said to be the grandson of Sardar Basant Singh, who has one son Trilok Singh. Trilok Singh had two sons, Gurmeet Singh and Kulwant Singh. According to the non-applicant No.2, the property was partitioned in between the sons of Shri Trilok Singh and the demise premises fall within the share of non-applicant No.2. To some extent, this fact is not in dispute in view of the statements recorded by the RCA where the witness of the applicants have admitted such a situation to some extent where they have accepted the relationship of the non-applicant No.2 with Sardar Basant Singh. Similarly, the applicants herein have a genealogy. Originally Lal Singh was the tenant of Sardar Basant Singh and Trilok Singh, as is admitted by him in the reply to notice as also in the written statement and in the statement given in the Court. Lal Singh had three

sons, Indrajeet Singh, Kuldeep Singh and Poonam Kumar Duggal, the applicants in three revisions. The application for eviction was filed against Lal Singh and Kuldeep Singh. However, after the death of Lal Singh, Indrajeet Singh and Poonam Duggal were substituted as his legal representatives. The application itself was filed on 14.11.1985 under Section 23-A(b) of the Accommodation Act. It was categorically contended that by virtue of a gift-deed executed on 16.11.1962, Basant Singh gifted the property to the non-applicant No.2 and his brother Kulwant Singh. Prior to its gift, the property was let out to Lal Singh and Kuldeep Singh by Basant Singh in the year 1960. A partition took place in between non-applicant No.2 and his brother Kulwant Singh in the year 1981 and the demise premises fall within the share of non-applicant No.2. The non-applicant categorically contended that he was a handicapped person and was in the Govt. service. The handicap-ness of the non-applicant No.2 was proved by medical evidence produced on record. He issued a notice seeking vacation of the demise premises on 18.07.1985, which was replied by the applicants, more particularly by Lal Singh and his son Kuldeep Singh. The notice and the reply are available on record as Exhibit P-5 and P-6. The reply was given on 30.08.1985. On one count or another, the application remained pending adjudication and on death of Lal Singh, which took place on 21.11.2003, the legal representatives of Lal Singh were substituted on 17.02.2004. As has been referred to herein above, the application for eviction was dismissed on 29.12.2006 and an application under Order IX Rule 9 of the Code of Civil Procedure was moved on 27.04.2007 by the non-applicant No.2. A reply to the said application was filed on 13.07.2009 and ultimately the application was allowed on 03.04.2010. With this history of the litigation, it would be necessary to look into the claim made by the applicants in their revision.

7. Learned Counsel appearing for the applicant vehemently contended that when the applicant was originally a non-applicant in the eviction application, which was dismissed in default and when an application under Order IX Rule 9 of the Code of Civil Procedure was made for restoration of the said eviction application, it was necessary for the non-applicant No.2 to implead him as a party. Deliberately when application under Order IX Rule 9 of the Code of Civil Procedure was filed, the applicant was not impleaded as a party, as a result the applicant was denied an opportunity of hearing before restoration of the eviction application. That being so, the order passed by the RCA restoring the eviction application was bad in law. Since in the revision filed by

Indrajeet Singh Duggal against the order of restoration of the eviction application, liberty was granted to file appropriate application challenging the order of restoration of eviction application, the order dated 18.06.2010 passed in the eviction case is being sought to be challenged with the aforesaid liberty. It is contended that though the applicant was impleaded as a party in the proceedings but was not granted an opportunity of hearing, was not aware of the restoration of the eviction application, the order dated 18.06.2010 would not be binding on him. That being so, the eviction decree cannot be executed against him. Placing reliance in the case of *Nageshar and others vs. Bhagy Dubey,* AIR 1922 Oudh 160 and in the case of *Shamshad Mehdi vs. Mahbub Khan* and another, AIR 1925 Oudh 105, it is contended by learned Counsel for the applicant that impugned order is, thus, nullity in so far as the applicant is concerned. Further placing reliance in the case of *Yashwant Deorao vs. Walchand Ramchand,* AIR 1951 SC 16, learned Counsel for the applicant contended that in view of the well settled law, such an order would not be binding on the applicant. In fact there was a fraudulent plan in the mind of the non-applicant No.2 to obtain an ex parte order against the applicant. Further placing reliance in the case of *Vishnu Agarwal vs. State of U.P.* & another, AIR 2011 SC 1232, it is contended by learned Counsel for the applicant that ex parte recall of the order for any reason, even on the count that there was a mistake on the part of Counsel, was not permissible and as such the order passed by the RCA restoring the dismissed eviction application was not proper.

8. Per contra it is contended by learned senior Counsel for the non-applicant No.2 that upon the facts as have come on record, it would be clear that there was no question of impleadment of the applicant in the eviction case. He was in fact impleaded as a legal representative of the original tenant. Since by filing a written statement the original tenant has said that the shop was in fact in possession of Indrajeet Singh, the elder son of the original tenant, who was paying the rent to the landlord of the shop, even if the applicant in this revision was not granted an opportunity of hearing or not even impleaded as a party in the eviction proceeding, the order of eviction so passed cannot be said to be bad in law. Referring to the law laid-down by the Apex Court in several cases, it is contended that there was no question of granting any opportunity of hearing to the applicant. Even otherwise such an opportunity was made available to the original tenant, who was impleaded as a party. It was not a case where the demise premises was sub-let to anyone and, therefore, in such a case, if the order was passed by the RCA restoring the eviction application, no wrong was committed. Taking this Court to the

statement filed on record before the RCA, the evidence led by the applicant, it is pointed out that once it is admitted that the demise premises was in occupation of another brother of the applicant, the eviction order could be passed against such a person. Trite the law that in a case where jointness of a family is claimed, if one of the members of the family in occupation of the demise premises is arrayed as a party in a eviction suit, in fact a decree can be granted by a Court of law. Since such a power is conferred on the RCA under the Accommodation Act, nothing wrong was committed by the RCA in grating decree of eviction. It is further contended that under the scheme of the Act, the proceedings are to be conducted in the manner and procedure prescribed for conducting a small cause suit. Reading the provisions of Section 23-D of the Accommodation Act, learned senior Counsel has contended that the procedure as laid-down for the said proceedings is prescribed separately in the Code of Civil Procedure. Referring to Section 7 of the Code of Civil Procedure, it is contended that limited procedure is prescribed. The judgment and decree in a suit of small cause is passed in different manner after following the provisions as laid-down under Order L of the Code of Civil Procedure. Therefore, it would be clear that the rightful procedure was followed by the RCA after a long time. It is pointed out by referring to certain order-sheets that the statements of witnesses were recorded, opportunities were granted to file written arguments and, therefore, there was no need of hearing oral arguments as it is not prescribed for conducting a case of small cause. Therefore, the order, if passed after recording of these facts in the order-sheets, it cannot be said that the order is bad in law in any manner.

9. This Court is of the considered view that merely because the applicant in Civil Revision No.309/2010 was not noticed with respect to the filing of application under Order IX Rule 9 of the Code of Civil Procedure, no prejudice was going to cause to him. It is a fact that the demise premises was let out and was in possession of Indrajeet Singh as was admitted by the witnesses and more particularly the original tenant and non-applicant in the evidence in his Court statement. This fact was categorically averred not only in the reply to notice of eviction issued to the original tenant but in the written statement filed before the RCA. In view of this and in view of the well settled law, there was no need to grant any opportunity of hearing to the applicant. Therefore, in the considered opinion of this Court, the Civil Revision No.309/2010 is totally misconceived and deserves to be and is hereby dismissed.

10. Now coming to the Civil Revision No.312/2010. This revision is by

the person, who is said to be in possession of the demise premises. As far as the order dated 03.06.2010 is concerned, this Court has already held that such an order was rightly passed restoring the eviction application. The pleas raised in this respect are, therefore, not required to be adjudicated once again. Now coming to the defence whether the applicant could be said to be the tenant of non-applicant No.2 is required to be examined. The original record of the RCA is examined. From the notice of eviction contained in Exhibit P-5, the non-applicant No.2 categorically demanded vacation of the demise premises form (sic: from) Lal Singh and Kuldeep Singh. It was alleged that these two persons were holding the demise accommodation and were running a shop in the name of Appolo Electricals. Allegation was made that this shop is now handed over to Indrajeet Singh. In reply to this notice sent by Shri P.N. Sharma, Advocate, on behalf of Lal Singh and Kuldeep Singh, which is available on record of RCA as Exhibit P-6, it was contended that said persons were not aware whether the non-applicant No.2 was the landlord or owner of the demise premises but they admitted that they obtained the shop from Dr. Trilok Singh. In paragraph 2 of this notice it was contended while denying the allegations made in the notice that the shop was sub-let to Indrajeet Singh, that Indrajeet Singh was the son of Lal Singh and they are living jointly and, therefore, he is also a joint tenant along with Lal Singh in the demise premises. In the Court statement of said Lal Singh, which was recorded on commission, fact was categorically admitted that the demise premise was in the name of Indrajeet Singh, who was the tenant in the said shop. He again admitted that tenancy had commenced by Basant Singh, who was the father of Dr. Trilok Singh. With respect to the execution of the gift deed, he stated that he was not aware of such a gift since it was their domestic affair. He admitted in some way that the non-applicant may be the owner of the demise premise. He admitted that earlier the rent of demise premises was being paid to Basant Singh and subsequently the same was being paid by the non-applicant No.2 and to his father Trilok Singh. The other witness examined by the tenant was Kuldeep Singh Duggal. In paragraph 2 he said that the demise shop was earlier taken on rent from Dr. Trilok Singh but after obtaining an employment by the said witness Kuldeep Singh, shop was closed and returned back to Dr. Trilok Singh who let it out to Indrajeet Singh, the brother of said witness. Nothing more important is stated by the said person. This witness admits that a notice was received by him of which reply was given. Thereafter, written arguments were filed summarizing the claim made and certain citations were given to the RCA.

11. The non-applicant No.2 for proving his case has not only exhibited the notice of termination of tenancy issued by him but also the reply of the said notice. He placed on record the deed of gift and exhibited it as Exhibit P-1. He also placed on record an order passed in a civil suit filed by Kulwant Singh against the non-applicant as Exhibit P-2 wherein a decree of partition was granted between the non-applicant No.2 and his brother. The fact was that the non-applicant was in the Govt. service and was a handicap person, which too was proved by recording the evidence of witness PW-3 Dr. Shivaji Prasad. The medical certificate of handicapness of the non-applicant No.2 was duly proved by the said witness. With this evidence available on record, the RCA reached to the conclusion that after giving due opportunity of hearing, the case was fully proved that the non-applicant No.2 bonafidely required the demise premise. In view of these findings, it cannot be said that the eviction decree was illegally passed in favour of the non-applicant. The order-sheets indicate that such opportunity of hearing was afforded to all concerned. Therefore, challenge to the eviction order in Civil Revision No.312/2010 is also not sustainable. The revision stands dismissed.

12. Now the claim made in Civil Revision No.350/2010 by Kuldeep Singh Duggal is required to be considered. While assailing the order dated 18.06.2010 virtually the applicant in this revision has tried to assail the order dated 03.04.2010 passed in M.J.C. No.9/MJC/2007 by the RCA on the ground that the said order suffers from non-joinder of necessary party, the applicant herein. It is contended that in terms of the provisions of Civil Procedure Code, the applicant was the necessary party. He was already impleaded as a party in the eviction application and was, thus, required to be impleaded as a party in the application filed under Order IX Rule 9 of the Code of Civil Procedure by the non-applicant No.2. Referring to the application filed by the non-applicant No.2, it is contended that only Indrajeet Singh Duggal and Poonam Duggal were made party in the said application, being the legal representatives of Sardar Lal Singh, the original tenant. However, notice of the said application was never issued to the applicant herein as he was not impleaded as a party. The order was passed by the RCA restoring the eviction application in such illegal manner. When the objections were raised before the competent authority with respect to the maintainability of such eviction application after its restoration, the same was not considered. Prayer was made for transfer of the eviction application but again the same was not considered and the eviction order was passed. In view of this, it is contended that the order of eviction passed by the RCA is

not legal and valid order and need to be set aside by this Court.

13. In considering the claims made in other civil revisions, in foregoing paras of this order, all these aspects have been taken into consideration and this Court has reached to the conclusion that merely because one or another non-applicant in the eviction application was not impleaded as a party in the application for restoration of the eviction application, the said order of restoration of the eviction application cannot be said to be bad in law. Further, learned senior Counsel for non-applicant No.2 has placed reliance in several cases and has pointed out that if there are more than one tenants or if there is a joint tenancy of a family, if only one member of the family is impleaded as a party in the eviction proceedings, the said proceedings cannot be said to be bad in law. Placing reliance in the case of *Manik Mandal and others vs. Bharosi Singh,* AIR 1959 Patna 225 (DB), learned senior Counsel for non-applicant No.2 has contended that the failure to comply with the provisions of Order IX Rule 9(2) of the Code of Civil Procedure in setting aside the order of dismissal without giving notice to the defendant does not in any way affect the jurisdiction of the Court, although in doing so Courts commit an error of law. Since there is no appeal provided against an order affecting the jurisdiction of the Court under Section 105 of the Code of Civil Procedure, no appeal would lie against such an order nor the said order could be made a ground for challenging the final order of eviction. In view of this, it is contended that merely because the restoration application was allowed erroneously, the ultimate eviction order passed by the RCA is not to be challenged in present revision. It is further contended that in view of this, challenge put to the order of eviction is misconceived and not sustainable in the eye of law, therefore, the revision is liable to be dismissed. Further placing reliance in the case of *Midamati Venkata Narasimham vs. Pogaku Nagojirao,* AIR 1946 Madras 344, learned senior Counsel contends that since the order setting aside dismissal of the eviction application does not effect the decision of case on merits, it does not come within the scope of Section 105 of the Code of Civil Procedure and again a challenge on this count would not be maintainable. It is further cotnended (sic: contended)that in view of the fact that the Counsel for the applicant herein was present before the RCA, in view of the law laid-down by the Rajasthan High Court in case of *Pannalal and another vs. Firm Ballaram Basia,* AIR 1957 Rajasthan 391, no error of law was committed by the RCA in restoring the eviction application. It is further contended that in view of the law considered by the Rajasthan High Court in the case of *Pirag Chand vs. Firm Ramlal Channanmal,* AIR 1988 Rajasthan

201, again it was not necessary to issue a notice of restoration application to those who proceeded ex parte in the original proceedings. It is contended that since the applicant herein was not appearing in the said proceedings of eviction application, there was no question of giving him a notice. Therefore, there was no error of jurisdiction committed by the RCA in allowing the application for restoration of eviction application. In the case of *Jyoti Prasad Kishan Lal vs. The Punjab National Bank Ltd. and others,* AIR 1963 Allahabad 374, if a notice of such proceeding was given to the Counsel, the said service was treated to be sufficient for the purposes of consideration of the application for restoration. Reiterating such law, the Gauhati High Court in the case of *M/s Choukhanybag Tea Company Pvt. Ltd. and others* vs. *Prabhu Dayal Lohia and others,* AIR 1979 Gauhati 37, has upheld the order of restoration on such an application. Merely non-compliance of sub-rule (2) of Rule 9 of Order IX of the Code of Civil Procedure was not said to be such fetal that the proceedings were to be put at knot.

14. Referring to the order-sheets, learned senior Counsel for the non-applicant No.2 has contended that the scheme of the Act is required to be seen. Again reading the provisions of Section 23-D of the Accommodation Act, learned senior Counsel has contended that the procedure laid-down for the small cause cases was required to be followed as the intention of the legislature was to prescribe a speedy trial for disposal of the eviction application. Drawing attention of this court to the law laid-down by the Apex Court in the case of *Kanji Manji vs. The Trustees of the Port of Bombay,* AIR 1963 SC 468, it is contended that in terms of the provisions of Section 106 and Section 111 of the Transfer of Property Act if there was a joint tenancy, the notice to determine lis to one of the joint tenants was treated to be sufficient. The suit for ejectment against one of the tenants itself was good and, therefore, it was not necessary to issue a notice even of the eviction application to the applicant. The jointness of the tenancy, according to the own statement made in the reply to the notice of eviction, written statement filed before the RCA as also in the Court statement, was enough for the purposes of treating that there was a joint tenancy and, therefore, if the eviction proceedings were done against one of the joint tenant, the same was good enough. It is further contended by learned senior Counsel for non-applicant No.2 that if the complaint was made against the Presiding Officer, it was required to be presented before the proper forum and authority. Nothing can be alleged against such an authority in casual manner by making application

or by filing affidavit. The fact relating to non-representation of applicant herein by the Counsel before the RCA in particular restoration application was never brought to the notice of the Presiding Officer. Such scandalous allegations are being made in the revision only. In view of the law laid-down by the Apex Court in the case of *State of Maharashtra vs. Ramdas Shrinivas Nayak* and another, AIR1982 SC 1249, it is contended that such a stand was not acceptable and, therefore, on this basis also it cannot be said that action taken by the authority was bad in law. Thus, it is contended that in view of the aforesaid, if the grounds set forth in the revisions are looked into, it would be clear that nothing was stated with respect to the merit of the order passed by the RCA except challenging the order dated 03.04.2010 and in view of the aforesaid provisions of law as also the settled position of law, such a revision would not be maintainable.

15. After giving thoughtful consideration to such submissions made by the learned Counsel for the applicant as also the submissions made by learned senior Counsel for the non-applicant No.2, this Court will not hesitate in holding that such a revision is wholly misconceived. Not a single word is said as to how the order of eviction was bad in law, specially in view of the fact that there was material evidence available on record to show that the non-applicant No.2 was not only a specified landlord as defined in the Accommodation Act but was also having a bonafide need for getting the shop vacated from the applicant. The manner in which the eviction application was tried by the RCA is really shocking. An eviction application, which ought to be decided within a period of six months as far as possible, as per the scheme made under the Accommodation Act, was kept pending for decision for almost 25 years. The application, which was originally filed on 14.11.1985, was ultimately decided on 18.06.2010. In these revisions, interim stay was granted and the eviction order was not executed. This being so, the revision is wholly misconceived, deserves to be and is hereby dismissed.

16. Let the order of the RCA be executed immediately and non-applicant No.2 be delivered the possession of the demise premises within two months from the date of order. Non-applicant No.2 would also be entitled to the cost of these proceedings from the applicants. The Counsel fee is quantified to Rs.10,000/-, if precertified.

17. The revisions are dismissed with the costs.

Revision dismissed.

I.L.R. [2014] M.P., 1381
CRIMINAL REVISION
Before Mrs. Justice S.R. Waghmare
Cr. Rev. No. 1325/2013 (Indore) decided on 6 March, 2014

FARHAN KHAN ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Protection of Children from Sexual Offences Act, (32 of 2012), Section 7/8 - **Applicant is alleged to have caught hold the hand of the complainant and put his hand around her waist - Person who does "any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault" cannot be marginalised under the circumstances and it cannot be said that the act did not amount to sexual assault as per Section 7 of the said Act. (Paras 2 & 5)**

लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 7/8 – आवेदक ने अभिकथित रुप से शिकायतकर्ता का हाथ पकड़ लिया और अपने हाथ से उसकी कमर को घेर लिया – व्यक्ति जो "लैंगिक आशय से कोई अन्य कृत्य करता है जिसमें बिना प्रवेशन के शारीरिक सम्पर्क समाविष्ट है, लैंगिक हमला कारित करना कहा जायेगा" इसे परिस्थितियों के अधीन गौण नहीं बनाया जा सकता और यह नहीं कहा जा सकता कि उक्त कृत्य, अधिनियम की धारा 7 के अनुसार लैंगिक हमला की कोटि में नहीं आता।

Cases referred :

2000(2) MPLJ 322, 2000(1) SCC 138, 1996(4) SCC 659.

M.S. Khan, for the applicant.
Amit Purohit, P.L. for the non-applicant/State.

ORDER

MRS. S.R. WAGHMARE, J. :- By this revision under Section 397 & 401 of the Cr.P.C. the petitioner Farhan Khan has challenged the order dated 18.10.2013 passed by the 10th Additional Sessions Judge, Indore in Sessions Trial No.115/13, framing charges for offence under Section 354-A(1), 354(D) of IPC and 7/8 of the Protection of Children from Sexual Offences Act (for sake of brevity called "the Act" hereafter).

2. Counsel for the petitioner has vehemently urged the fact that the police

station Khajrana had wrongly registered an FIR dated 26.8.2013 against the petitioner Farhan Khan. The complainant prosecutrix is aged 15 years and stated that she had gone to take tuitions and was returning to her home when the accused petitioner Farhan and another Afsar started following her and suddenly he caught hold of her hand and Afsar put her hand around waist and stated that she should go with them to the bypass road; when she started shouting Anish came to the spot and the accused fled away and hence the FIR was lodged. The police recorded the statements and statement of the prosecutrix were recorded under Section 164 of the Cr.P.C. Thereafter the accused were arrested and on being produced before the Magistrate, the accused filed an application under Section 227 of the Cr.P.C. which was also dismissed by the trial Court. The accused abjured his guilt and stated that he was falsely implicated in the matter.

3. Counsel for the petitioner has basically challenged the framing of charge; stating that the statements of the prosecutrix were recorded after 26 days. Moreover the petitioner was a computer trainer and belongs to a respectable family and has been falsely implicated. Moreover Section 7 of the Protection of Children from Sexual Offences Act, 2012 reads thus:-

> "7. Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

And Counsel stated that the provisions of Section 7 for Sexual Offences were thus not at all fulfilled; since under the circumstances there are only allegations of the petitioner having caught hold hand of the prosecutrix. Similarly provisions of Section 354-A and 354-D of the IPC were not attracted. And since the FIR has also not been sent to the concerned Magistrate, the offence under Section 354 of the IPC cannot be imposed and the order dated 18.10.2013 framing charge were, therefore, illegal and arbitrary. Counsel prayed for quashment of the same.

4. Per contra Counsel for the respondent State has vehemently opposed the submissions of the Counsel for the petitioner. Placing reliance on the clause of Section 7 of the Act; "or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault", Counsel submitted that the offence under Section 7 of the Act was completely covered

and moreover in board (sic: broad) day light the accused persons have followed the prosecutrix and the present petitioner Farhan caught hold of her hand with sexual intent and even threatened her and was trying to drag her away; when Anish arrived on the spot and the prosecutrix thus saved. Counsel submitted that the present petitioner Farhan was completely involved in the offence and in today's scenario the sexual offences against women are on the rise and he prayed for dismissal of the petition.

5. On considering the above submissions and the impugned order, I find that no interference is called for in the said order, primarily because Counsel for the petitioner seems to have lost track of the fact that the partial interpretation of the Section 7 of the Protection of Children from Sexual Offences Act cannot be permitted. The words "or does any other act with sexual intent which involved physical contact" have not been taken into consideration by the Counsel. Basically Section 7 of the Act has been framed by the makers of law with an intent to protect the rights of the child and to prevent sexual exploitation and sexual abuse of children. Apparently in the present case the girl is only 15 years of age and an indecent assault is alleged to have been committed on her and a child of 15 years has no defence when she going take tuitions and unless, the provisions are vitiated in the sense even today, the petitioner has not controverted the fact that the petitioner had not done anything which did not indicate that it was an act of gross indecency. Committing such acts definitely would be within the purview of intention "to outrage the modesty of woman" and there is no getting away from the fact that there are two accused persons who were involved in the matter and the child had to seek protection of Anish (brother). In this sense the argument of the Counsel that the petitioner that the accused could at the most alleged to have held the hand of the prosecutrix is belied and although the argument is attractive at the first blush, yet the person who does "any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault" cannot be marginalised under the circumstances and it cannot be said that the act did not amount to sexual assault as per Section 7 of the said Act. Considering the facts of the case I find that the petition is without merit and so also more importantly what is to be considered at the time of framing of charge is whether a prima facie case is made out. So also it would be profitable to rely on *State of M.P. vs. S.B. Johari and others*: 2000(2) MPLJ 322, whereby the Court held thus:

"It is settled law that at the stage of framing the charge, the Court has to primafacie consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a prima facie case is made out for proceeding further, then a charge has to be framed."

(Also see *Umar Abdul Sakoor Sorathia vs. Intelligence Officer, Narcotic Control Bureau* : 2000 (1) SCC 138; *State of Maharashtra and other vs. Somnath Thapa and others*: 1996 (4) SCC 659).

6. The order of the trial Court imposing charges thus impeccable and does not call for any interference. The petition is, therefore, dismissed as being without merit.

Petition dismissed.

I.L.R. [2014] M.P., 1384
CRIMINAL REVISION
Before Mr. Justice G.S. Solanki
Cr. Rev. No. 2571/2013 (Jabalpur) decided on 1 April, 2014

BIRESH KUMAR SINGH ...Applicant
Vs.
STATE OF M.P. & ors. ...Non-applicants

***Criminal Procedure Code, 1973 (2 of 1974), Sections 451 & 457 - Supurdaginama* - Property has been seized not only under Wild Life Protection Act but also under Indian Forest Act and there is a specific bar of jurisdiction of the courts u/s 52-C of the Indian Forest Act - Held - No jurisdiction to release the disputed vehicle on supurdaginama to the applicant. (Paras 7 & 10)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 451 व 457 – सुपुर्दगीनामा – सम्पत्ति का अधिग्रहण न केवल वन्य जीव संरक्षण अधिनियम के अंतर्गत किन्तु साथ ही भारतीय वन संरक्षण अधिनियम के अंतर्गत किया गया और भारतीय वन अधिनियम की धारा 52–सी के अंतर्गत न्यायालय की अधिकारिता का स्पष्ट वर्जन है– अभिनिर्धारित–सुपुर्दगीनामे पर विवादित वाहन आवेदक को सौंपने की अधिकारिता नहीं।

Sanjay Singh, for the applicant.
Ramesh Kushwaha, P.L. for the non-applicants/State.

ORDER

G.S. SOLANKI, J. :- This revision has been filed by the applicant under Section 397/401 of the Cr.P.C. being aggrieved by order dated 5.8.2013 passed by Chief Judicial Magistrate Sidhi whereby the application filed by the applicant under Section 451/457 of the Cr.P.C. for releasing the vehicle on Supurdginama has been dismissed.

2. The facts, in short, giving rise to this revision are that the applicant is a farmer and owner of Tata-407 vehicle bearing No. MP53-GA-2054. He sent his driver with vehicle to purchase Sand for his personal use (for construction of his house). The driver was having all valid documents of vehicle and also having transit pass to transport the Sand. Despite that, the prosecution has registered an offence as Forest Offence Case No. 471/20 on 23.6.2013 against the driver for the offence punishable under Sections 27, 29, 39 and 51 of the Wild Life (Protection) Act alleging that he was unauthorizedly transporting the Sand from the protected area i.e. Son Ghariyal Wild Life Sanctuary, Sidhi. The vehicle was seized by the Police and Officer of Forest Department. Since the applicant was the registered owner of the vehicle, he filed an application under Section 451/457 of the Cr.P.C. before Chief Judicial Magistrate, Sidhi, which was dismissed with the observation that confiscation proceedings under Section 52 of the Indian Forest Act, 1927 have been initiated by the competent Authority, therefore, the Court of Chief Judicial Magistrate has no jurisdiction to release the aforesaid vehicle on Supurdginama, hence this revision.

3. Learned counsel for the applicant has submitted that the trial Court has committed illegality in dismissing the application filed by the applicant. The seized property cannot be said to be the property of State until and unless there is trial and finding reached by the competent Court that the property was used for committing an offence under Wild Life Protection Act, therefore, the impugned order be set aside and the aforesaid vehicle be ordered to be released on Supurdginama. Learned counsel for the applicant has placed reliance on a decision of Full Bench of this Court in *Madhukar Rao s/o Malik Rao Vs. State of M.P.* and others 2000(1) MPLJ 289. Counsel has also placed reliance on a decisions of this Court rendered vide order dated 13.11.2013 passed in M.Cr.C. No. 11367/2013 *(Yagyaraj Singh Vs. State of M.P.)*; order dated 11.2.2014 passed in M.Cr.C. No. 527/2014 *(Smt. Phoolkali Sahu Vs. State of M.P. and another)* and *Dilip s/o Ramvilas*

Meena Vs. State of M.P. 2012 (1) MPLJ 137.

4. Learned counsel for the State has supported the impugned order and submitted that if the offence has been registered under Indian Forest Act along with the offence under Wild Life (Protection) Act and if the Magistrate, having jurisdiction to try the offences, has received the intimation under Section 52(4) of the Indian Forest Act regarding initiation of proceedings for confiscation of the property, then the concerning Magistrate has no jurisdiction to release the disputed property on Supurdginama. In the instant case, Chief Judicial Magistrate has received the information under Section 52(4) of the Indian Forest Act regarding initiation of proceedings for confiscation, therefore, he has rightly dismissed the application filed by the applicant. Thus, no interference is called for in this revision and this revision is liable to be dismissed.

5. I have heard the learned counsel for the parties at length and gone through the impugned order and other material on record. It reveals from the impugned order that accused Pinku Kewat has been prosecuted for the offence punishable under Sections 27, 29, 39, 51 of the Wild Life (Protection) Act and under Sections 2, 41, 52 of the Indian Forest Act. It further reveals from the impugned order that the Chief Judicial Magistrate, Sidhi had already received an information under Section 52(4) of the Indian Forest Act in regard to the fact that the confiscation proceedings have been initiated in connection with seized vehicle. In these circumstances, the legal process regarding bar of jurisdiction of Courts has to be examined. There is specific bar of jurisdiction of Courts under Section 52-C of the Indian Forest Act, 1927, which reads thus :-

> **52-C: Bar of jurisdiction of Courts etc., in certain circumstances-** (1) On receipt of intimation under sub-section (4) of Section 52 about initiation of proceedings for confiscation of property by the Magistrate having jurisdiction to try the offence on account of which the seizure of property which is subject-matter of confiscation, has been made, no Court, Tribunal or Authority (other than the authorised officer). Appellate Authority and Revision Authority referred to in Section 52, 52A and 52-B shall have jurisdiction to make orders with regard to possession, delivery, disposal or distribution of the property in regard to which proceedings for confiscation are initiated in this act, or any other law for the

time being in force.

Explanation- Where under any law for the time being in force, two or more, courts have jurisdiction to try forest offence, then on receipt of intimation under sub-section (4) of Section 52 by one on the Court of Magistrates having such jurisdiction shall be construed to be receipt of intimation under that provision by all the Court and the bar to exercise jurisdiction shall operate on all such Courts.

(2) Nothing in sub-section (1) shall affect the power saved under Section 61.

6. The facts the case of *Madhukar Rao* (supra) are totally different than the instant case. In that case the offences were registered under Wile Life Protection Act. In that case, the main question for consideration was that whether withdrawal of power of interim relief conferred on authorities under the Act (Wild Life Protection Act) can be construed as taking away such power of Magistrate as Criminal Court competent to try the offences and to impose punishment or acquit the accused of the charge. The Full Bench of this Court after consideration of number of authorities held that the property seized under Section 52 of the Forest Act from the alleged offender cannot be the property of the State unless there is trial and finding reached by the competent Court that the property seized was used for committing the offence. It has been further held that any property including vehicle seized on accusation or suspicion of commission of an offence under the Act can, on relevant grounds and circumstances, be released by the Magistrate pending trial in accordance with Section 50(4) read with Section 451 of the Cr.P.C. Similar is the situation in the case of *Smt. Phoolkali Sahu* (supra).

7. In the aforesaid cases, the offences were not registered under the Indian Forest Act. But in the instant case the property has been seized not only under Wild Life Protection Act but also under Indian Forest Act and there is a specific bar of jurisdiction of the Courts under Section 52-C of the Indian Forest Act as mentioned hereinabove. Since as per impugned order, the information with respect to initiation of proceedings for confiscation was already received by the Chief Judicial Magistrate, Sidhi, therefore, he had no jurisdiction to release the disputed vehicle on Supurdginama to the applicant.

8. So far as the order passed by this Court on 13.11.2013 in M.Cr.C.

No. 11367/2013 (Yagyaraj Singh Vs. State of M.P.) is concerned, in that case it was not brought to the notice of this Court that any information has been received by the Chief Judicial Magistrate in regard to initiation of proceedings for confiscation in connection with the disputed property by the competent Authority. Thus, the aforesaid order has no bearing with the facts of the instant case.

9. In view of the aforesaid discussion, in my opinion, the trial Court has not committed any illegality in dismissing the application filed by the applicant.

10. Consequently, this revision being devoid of merit, is hereby dismissed.

Revision dismissed.

I.L.R. [2014] M.P., 1388
CRIMINAL REVISION
Before Mr. Justice G.S. Solanki
Cr. Rev. No. 402/2014 (Jabalpur) decided on 4 April, 2014

RABIA AHMED KHAN (SMT.) & ors. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

A. Evidence Act (1 of 1872), Section 132 - Self incrimination **- Evidence given by witness voluntarily without any compulsion or forced by court to depose before it - Proviso to Section 132 not applicable - His statement can be used against him. (Para 7)**

क. साक्ष्य अधिनियम (1872 का 1), धारा 132 – स्वयं को अपराध में फंसाने वाला कथन – साक्षी द्वारा बिना किसी विवशता के या न्यायालय द्वारा अपने समक्ष कथन देने की बाध्यता के बिना स्वेच्छापूर्वक साक्ष्य दिया गया – धारा 132 का परंतुक लागू नहीं होता – उसके कथन का उपयोग उसके विरुद्ध किया जा सकता है।

B. Penal Code (45 of 1860), Sections 420, 120B & 411, Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Cheating - Quashing **- Amount of Rs. 50 crores was mis-appropriated and was deposited in one fictious account - Several drafts were prepared in the names of different persons out of the amount of Rs. 50 Crores - Amount so deposited in the account of applicant No. 5 was withdrawn by him - Strong prima facie evidence of his involvement in conspiracy with other co-accused persons - Charges u/s 420/120B, 411 of I.P.C. rightly framed. (Para 8)**

ख. दण्ड संहिता (1860 का 45), धाराऐं 420, 120बी व 411, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – छल – अभिखंडित किया जाना – रु. 50 करोड़ की रकम का दुर्विनियोग और एक फर्जी खाते में जमा – रु. 50 करोड़ की रकम में से विभिन्न व्यक्तियों के नाम से कई ड्राफ्ट तैयार किये गये – आवेदक क्र. 5 के खाते में इस तरह जमा रकम को उसके द्वारा निकाला गया – षडयंत्र में अन्य सह अभियुक्तों के साथ उसके शामिल होने का प्रबल प्रथम दृष्ट्या साक्ष्य है – भा.द.सं. की धारा 420/120बी, 411 के अंतर्गत आरोपों को उचित रुप से विरचित किया गया।

C. Penal Code (45 of 1860), Sections 420, 120B & 411 - Cheating - **Amount transferred to the accounts of applicants No. 1 to 4 - Nothing on record that they had ever met with other co-accused persons - However, they are in possession of stolen property - Discharged for offence u/s 420, 120B, but charge u/s 411 affirmed.** **(Para 9)**

ग. दण्ड संहिता (1860 का 45), धाराऐं 420, 120बी व 411 – छल – आवेदक क्र. 1 से 4 तक के खातों में रकम अंतरित की गई – अभिलेख पर कुछ नहीं कि वे कभी भी अन्य सह अभियुक्तगण से मिले थे – किन्तु उनके कब्जे में चुराई गई सम्पत्ति है – धारा 420, 120बी के अंतर्गत अपराध से आरोपमुक्त परन्तु धारा 411 के अंतर्गत आरोप की पुष्टि।

Imtiyaz Hussain, for the applicants.
Pankaj Dubey, for the Non-applicant.

ORDER

G.S. Solanki, J. :- This revision has been filed by the applicants under Section 397/401 of the Cr.P.C. being aggrieved by order dated 14.2.2014 passed by Special Judge (Lokayukta), Jabalpur in S.T. No. 94/2011 whereby the charges for the offence punishable under Sections 420/120B, 411 of the IPC have been framed against the applicants.

2. The facts, in short, giving rise to this revision are that the applicants along with other co-accused persons have been charge sheeted by way of filing supplementary charge sheet for the offence punishable under Sections 420, 201, 203, 204, 217, 218, 406, 409, 120-B, 467, 468, 471 and 474 of the IPC. It is not in dispute that previously other co-accused persons have already been tried in Special Case No. 94/2011 before the Special Judge, appointed for trial of the cases arising out of the cases investigated by the Economic Offence Wing.

3. As per prosecution, it is alleged against the applicants that one Kshitij Dubey, Dy. Manager (Operation) of Axis Bank, Model Road Branch, Jabalpur entered into a conspiracy with Amil Shevre, Branch Head, Axis Bank, Jabalpur, Vikash Saxena, Manager, Axis Bank, Jabalpur, Ajay Pandey, Business Development Executive, Axis Bank, Chhindwara and Satish Babu Lodhi, Business Development Executive, Axis Bank, Damoh thereby they misappropriated a huge amount of Rs. 50 Crores, which is alleged to have been deposited by Apex Bank, Bhopal. It is further alleged that co-accused Wahid Siddiqui, Javed Ahmad Khan, Jyotsna Pare, Anil Kumar Gupta, B.D. Bairagi and Phool Miyan also entered into a conspiracy of misappropriation of the aforesaid huge amount of Rs. 50 Crores. In furtherance of aforesaid conspiracy, a fictitious account was opened in the name of Narmada Vikas Pariyojana Phase III and out of the aforesaid sum of Rs. 50 Crores, which were deposited in the saving accounts, FDRs of Rs. 4 Crores were prepared out of which O.D. Facility of Rs. 3,40,00,000/- was taken. It is further alleged that 13 Bank Drafts of Rs. 25 Lacs were prepared in the names of different persons on the instructions of Javed Khan, Jyotsna Pare and Wahid Siddiqui and Azhar Siraj. A sum of Rs. 10 Lacs was unauthorizedly transferred through pay order in the name of Sarika Naik Dubey, wife of Kshitij Dubey. It is further alleged that Rs. 2,05,50,000/- and Rs. 3,57,50,000/- were withdrawn by using O.D. facility against the FDRs of Rs. 1,52,00,000/- and Rs. 4 Crores. The aforesaid amount was misappropriated in the names of different accused persons. It is further alleged that one of the accused has impersonated himself as S.S. Siddiqui and committed forgery and withdrew a huge amount of Rs. 4 Crores for preparation of FDRs and further took O.D. facility without any sanction. The allegations against the applicants are that all these applicants are also involved in the aforesaid conspiracy and they are the beneficiaries of a sum of Rs. 1,82,000/-, which is alleged to have been deposited by co-accused Javed Ahmad and the applicants are related to Javed Ahmad.

4. The learned Special Judge (Lokayukta), on appraisal of evidence on record, framed the aforesaid charges against the applicants, hence this revision.

5. Learned counsel for the applicants has submitted that as per prosecution's case itself, applicant Kalam Ahmad was cited as witness in the previous special case No. 94/2011 and being a witness, he cannot be prosecuted for the answer which he gave in a criminal trial. Such privilege has been provided under Section 132 of the Indian Evidence Act. There is nothing on record to show that the applicants ever met Kshitij Dubey, Ajay Pandey or

Firdaus Siddiqui and they entered into a conspiracy of misappropriation of amount, which was deposited by the Axis Bank. It is further submitted that the applicants have no reason to believe that the amount deposited in their Bank accounts was the stolen property.

6. Learned counsel for the respondent has supported the order passed by trial Court and submitted that though applicant Kalam Ahmad was examined before trial Court in Special Case No. 94/2011 but he was not at all compelled to give any statement before the trial Court. In these circumstances, the proviso to Section 132 of the Evidence Act will not be attracted to this case. It is further submitted that since Kalam Ahmad gave his statement voluntarily in his cross-examination without any compulsion that he was present at the time of seizure of huge amount of Rs.7,92,000/-. He admitted that drafts of some amount were encashed by him. He further admitted that there were six drafts in the names of his family members. Thus, the involvement of applicant Kalam Ahmad in the conspiracy of misappropriation of the aforesaid amount is prima facie on record. The other applicants are also beneficiaries and draft of Rs. 1,82,000/- (each) was deposited in their accounts. Since there is sufficient evidence on record to the effect that the other co-accused persons misappropriated the aforesaid amount and committed criminal breach of trust, the same is designated as the stolen property and such properties have been found in the accounts of the applicants, therefore, the trial Court has not committed any illegality in framing the aforesaid charges against the applicants.

7. I have heard the learned counsel for the parties at length and perused the case diary along with the statement of applicant Kalam Ahmad (Annexure P-7), which was recorded before the trial Court in Special Case No. 94/2011. Section 132 of the Indian Evidence Act, 1872 reads thus :-

> **132. - Witness not excused from answering on ground that answer will criminate.-** A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:
>
> **Proviso.-** Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or

prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

It is clear that the proviso to Section 132 of the Indian Evidence Act would be applicable in the cases where the Court has compelled or forced the witness to answer inspite of his objection. If the witness has voluntarily answered the question, the protection of proviso to Section 132 cannot be given to him and the said answer would be admissible against him on a criminal charge. On perusal of deposition of Kamal Ahmad, it reveals that he was cited as Panch witness of seizure memo, which was executed by Javed Khan. There is nothing in his deposition to the effect that he was compelled or forced by the Court to state anything before the Court. On the contrary, he voluntarily disclosed the facts before the Court. In these circumstances, the protection given under Proviso of Section 132 of the Indian Evidence Act is not applicable to his case.

8. So far as involvement of the applicants in the conspiracy of misappropriation of the aforesaid huge amount or committing offence of any cheating is concerned, considering the statements of the witnesses along with the statement of applicant Kamal Ahmad and other material on record, there is prima facie evidence on record that applicant Kamal Ahmad was involved in the conspiracy of cheating or misappropriation of the amount, which was found in his account. Thus, there is strong prima facie case against him under Section 420/120-B of the IPC.

9. So far as the applicant Nos. 1, 2, 3 and 4 are concerned, there is no iota of evidence on record that they ever met Kshitij Dubey, Ajay Pandey or Firdaus Siddiqui etc. in order to commit any cheating or misappropriation of amount, thus, there is no prima facie case against applicant Nos. 1 to 4 under Section 420/120-B of the IPC. However, there is sufficient evidence on record that the amount found in the accounts of all the applicants was the amount transferred by co-accused persons by committing criminal breach of trust, therefore, the aforesaid amount comes under the definition of stolen property and same has been found in possession of the applicants, thus, there was a reason to believe that the amount found in the accounts of the applicants, which was not deposited by them, was the stolen property, thus there is strong prima facie case against all the applicants under Section 411 of the IPC.

10. In view of the aforesaid discussion, this revision is partly allowed.

The charge framed against applicant Nos. 1 to 4 under Section 420/120-B of the IPC is hereby set aside. Applicant Nos. 1 to 4 are discharged from the charge under Section 420/120-B of the IPC, however, the charge framed against applicant Nos. 1 to 4 under Section 411 of the IPC is hereby affirmed. The charges framed against applicant No. 5 Kamal Ahmad under Sections 420/120-B, 411 of the IPC are hereby affirmed.

Revision partly allowed.

I.L.R. [2014] M.P., 1393
CRIMINAL REVISION
Before Mr. Justice G.S. Solanki
Cr. Rev. No. 1465/2010 (Jabalpur) decided on 21 April, 2014

SHAMSHER BAHADUR SINGH CHANDEL @ GOLEND SINGH ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 320(2), Penal Code (45 of 1860), Sections 341, 294, 324, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(i)(x) - Compounding - **Complainant filed an application u/s 320(2) of the Cr.P.C. seeking permission to compound the aforesaid offences, which has been partly allowed and on the basis of compromise, the applicant has been acquitted to the charge u/s 341, 294 of the I.P.C. but the aforesaid application has been dismissed with respect to the offence u/s 324 of the IPC read with Section 3(i)(x) of the SC/ST (Prevention of Atrocities) Act on the ground that both the offences are not compoundable - Held - Amendment Act, 2005 has been made enforceable vide notification dated 30.12.2009 issued by Ministry of Home Affairs Notification No. S.O. 3313(E), dated the 30.12.2009 - It means before 31.12.2009, the offence punishable u/s 324 of the IPC was compoundable.** **(Paras 6 & 8)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 320(2), दण्ड संहिता (1860 का 45), धाराऐं 341, 294, 324 अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(i)(x) – प्रशमन – शिकायतकर्ता ने दंड प्रक्रिया संहिता की धारा 320(2) के अंतर्गत उपरोक्त अपराधों के प्रशमन की अनुमति चाहते हुए एक आवेदन पत्र प्रस्तुत किया, जो कि अंशतः मंजूर किया गया और समझौते के आधार पर, आवेदक को भा.द.सं. की धारा 341, 294 के अंतर्गत

आरोप से मुक्त किया गया किन्तु भा.द.स. की धारा 324 सहपठित धारा 3(i)(x) अनुसूचित जाति/अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम के अंतर्गत दोनों अपराध प्रशमनीय न होने के आधार पर उपरोक्त आवेदन खारिज – अभिनिर्धारित – गृह मंत्रालय की अधिसूचना क्र. एस.ओ. 3313(ई) दिनांक 30.12.2009 द्वारा संशोधन अधिनियम 2005 को अधिसूचना दिनांक 30.12.2009 से प्रवर्तनीय बनाया गया है – अर्थात 31.12.2009 के पूर्व भा.द.सं. की धारा 324 के अंतर्गत दंडनीय अपराध प्रशमनीय था।

Pushpendra Kumar Verma, for the applicant.
R.S. Dubey, P.L. for the non-applicant/State.

ORDER

G.S. Solanki, J. :- This revision has been filed by the applicant under Section 397/401 of the Cr.P.C. being aggrieved by order dated 20.8.2010 passed by Special Judge, SC/ST (Prevention of Atrocities) Act, Sidhi in Special Case No. 13/2007 whereby the application filed by the complainant under Section 320(2) of the Cr.P.C. has been partly allowed and on the basis of compromise entered into between the applicant and complainant, the applicant has been acquitted to the charge under Section 341, 294 of the IPC only, however, the application to compound the offence under Section 324 of the IPC has been dismissed.

2. The facts, in short, giving rise to this revision are that complainant Mudrika Prasad Prajapati lodged a report against the applicant on 24.11.2006 regarding wrongful restraint, using filthy language and causing simple injuries by sharp edged weapon. After registration of Crime, during investigation it was found that the complainant was humiliated during the incident by the applicant by using his caste name. The applicant was charge sheeted for the offences punishable under Sections 341, 294, 324 of the IPC read with Section 3(1)(x) of the SC/ST (Prevention of Atrocities) Act.

3. During the trial, the complainant filed an application under Section 320(2) of the Cr.P.C. seeking permission to compound the aforesaid offences, which has been partly allowed and on the basis of compromise, the applicant has been acquitted to the charge under Section 341, 294 of the IPC but the aforesaid application has been dismissed with respect to the offence under Section 324 of the IPC read with Section 3(1)(x) of the SC/ST (Prevention of Atrocities) Act on the ground that both the offences are not compoundable, hence this revision.

4. Learned counsel for the applicant has submitted that the trial Court has committed illegality in interpreting the Code of Criminal Procedure (Amendment) Act, 2005 (hereinafter referred to as the Amendment Act, 2005). Though the Amendment Act, 2005 was enacted in the year 2005 but it was further amended as Code of Criminal Procedure (Amendment) Amending Act, 2006) (hereinafter referred to as the Amending Act, 2006) whereby it has been enacted that *"In exercise of the powers conferred by sub-section (2) of Section 1 of the Code of Criminal Procedure (Amendment) Act, 2005 (25 of 2005), the Central Government hereby appoints the 23rd June, 2006, as the date on which the provisions of the said Act, except the provisions of Sections 16, 25, 28(a), 28(b), 38, 42(a), 42(b), 42(f)(iii) and (iv) and 44(a), shall come into force."*

Learned counsel for the applicant has further submitted that after the aforesaid amendment, the notification of enforcement of Section 28(a) of the Amendment Act, 2005 came into force only on 31.12.2009 by the notification issued by the Ministry of Home Affairs Notification No. S.O. 3313(E), dated the 30th December, 2009. Published in the Gazette of India (Extraordinary) Part II Section 3(ii) dated 30.12.2009 Page 1 (Annexure D-6), therefore, the offence punishable under Section 324 of the IPC was compoundable till 31.12.2009 and in the instant case, the incident had taken place on 16.11.2006, thus, the trial Court has committed illegality in interpreting the aforesaid notification, therefore, the impugned order be set aside to the extent of compoundability of Section 324 of the IPC only.

5. Learned Panel Lawyer appearing on behalf of the State has raised formal objection.

6. I have heard the learned counsel for the parties at length and gone through the impugned order, First Information Report (D-2) and the Amendment Act, 2005 (D-4), Amending Act, 2006 (D-5) and notification dated 30.12.2009 (D-6). It is true that the Amendment Act, 2005 came into force in the year 2005, however, by the Amending Act, 2006 (D-5) it was inserted that different dates may be appointed for different provisions of enforcement of the Amendment Act, 2005. It reveals from perusal of notification S.O. No. 923 (E) dated 21.6.2006, the other provisions of Act came into force except the provisions of Sections 16, 25, 28(a), 28(b), 38, 42(a), 42(b), 42(f)(iii) and (iv) and 44(a), which shows that Section 28(a) of the Amendment Act, 2005 has not been made enforceable by the aforesaid notification and

same has been made enforceable vide notification dated 30.12.2009 issued by Ministry of Home Affairs Notification No. S.O. 3313(E), dated the 30th December, 2009. It means before 31.12.2009, the offence punishable under Section 324 of the IPC was compoundable.

7. Since as per the First Information Report, in the instant case, the incident had taken place on 16.11.2006, therefore, on the date of incident, the offence under Section 324 of the IPC was compoundable and in my opinion, the trial Court has committed illegality in refusing the grant permission to compound the offence under Section 324 of the IPC, therefore, the impugned order is liable to be set aside to that extent only.

8. Consequently, this revision is partly allowed. The impugned order dated 20.8.2010 is hereby set aside to the extent of Section 324 of the IPC only. The concerned trial Court is directed to reconsider the application under Section 320(2) of the Cr.P.C. filed by the applicant seeking permission to compound the offence under Section 324 of the IPC and pass appropriate order in accordance with law.

Revision partly allowed.

I.L.R. [2014] M.P., 1396
CRIMINAL REVISION
Before Mr. Justice N.K. Gupta
Cr.Rev. No. 788/2000 (Jabalpur) decided on 7 May, 2014

RAMESH CHANDRA ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

A. ***Prevention of Food Adulteration Act (37 of 1954), Section 7(i) r/w Section 16(1)(a)(i) - Analyst report* - Readings of the analysis of the sample were marginally away from the standard fixed by the rules could be caused due to improper stirring of oil because if the sample is taken without churning the oil the thickness of the oil differs from layer to layer - It cannot be said that the sample taken from the applicant was adulterated - Revision is accepted. (Paras 9-14)**

क. खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 7(i) सहपठित धारा 16(1)(ए)(i) – विश्लेषक प्रतिवेदन – नमूने के विश्लेषण के अंकों का, नियमों द्वारा निर्धारित मानक से उपांतिक रुप से हटकर पाया जाना, तेल के अनुचित

विलोडन के कारण कारित हो सकता है क्योंकि यदि बिना मंथन किये तेल का नमूना निकाला जाता है, तेल का गाढ़ापन परत दर परत भिन्न होगा – यह नहीं कहा जा सकता कि आवेदक से लिया गया नमूना, अपमिश्रित था – पुनरीक्षण स्वीकार किया गया।

B. Prevention of food Adulteration Act (37 of 1954)- Section 16- Reduction of sentence - **If the minimum sentence is prescribed in the particular statute it cannot be reduced by any of the criminal court including the High Court - The mandate of Section 433 of the Cr.P.C. enables the Government in an appropriate case to commute the sentence of a convict and to prematurely order his release before expiry of the sentence. (Para 13)**

ख. खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 16– दण्डादेश को घटाया जाना – यदि किसी विशिष्ट कानून में न्यूनतम दण्डादेश विहित है, उसे किसी भी दाण्डिक न्यायालय द्वारा, जिसमें उच्च न्यायालय भी शामिल है, घटाया नहीं जा सकता – द.प्र.सं. की धारा 433 की आज्ञा, समुचित प्रकरण में सरकार को किसी सिद्धदोष का दण्डादेश घटाने एवं दण्डादेश की समाप्ति से पूर्व उसे समयपूर्व मुक्त करने का आदेश करने के लिये सक्षम बनाती है।

Cases referred :

2009(2) MPHT 177, AIR 1992 SC 240, JT 1988(3) SC 184, 2007(1) MPHT 435, (2009) 16 SCC 276, 2003 Cr.L.J. 4964, 2002 Cr.L.J. 4295.

Sunil Pandey, for the applicant.
G.S. Thakur, P.L. for the non-applicant/State.

ORDER

N.K. Gupta, J. :- The applicant was convicted for commission of offence under Section 7(i) read with Section 16(1)(a)(i) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as "Act, 1954") vide judgment dated 8.2.2000 passed by the Chief Judicial Magistrate, Khandwa in Criminal Case No.127/1991 and sentenced with six months' RI with fine of Rs.1000/-. In Criminal Appeal No.32/2000, the learned First Additional Sessions Judge, Khandwa vide judgment dated 8.6.2000 dismissed the appeal in toto. Being aggrieved with the aforesaid judgments, this criminal revision is preferred by the applicant.

2. The prosecution case, in short, is that on 12.10.1990 the Food Inspector

Ramsevak Mishra (PW-1) along with the flying squad went to the Tail Ghani (small scale oil mill) of the applicant, situated at Shivpuri Mohalla Mundi Tahsil Khandwa. At about 10:15 AM he found that in two drums the applicant had collected 200 kg groundnut oil. The Food Inspector proposed to take the sample of that oil and gave a notice. Thereafter he purchased 375 gms groundnut oil in sum of Rs.12/-. The payment was made. The entire groundnut oil was apportioned in three equal parts and kept the same in clean dried glass bottles and thereafter properly sealed with the help of slips issued by the Local Health Authority. A memo Ex.P-5 was prepared. One sample was sent to the Public Analyst for its analysis and vide report dated 20.11.1990 Ex.P-11 the Public Analyst found that the sample was adulterated. Thereafter the permission of prosecution was obtained from the concerned authority and a complaint was filed before the CJM Khandwa. Thereafter a notice under Section 13 of the Act was also sent to the appellant, which was served upon him in the month of January 1991.

3. The applicant-accused abjured his guilt. He did not take any specific plea in the case, but he has stated that he was extracting the groundnut oil for someone who had supplied the groundnut seeds to the applicant and the oil was collected in a huge drum. The Food Inspector took the sample from such drum. However, no defence evidence was adduced.

4. The learned Chief Judicial Magistrate after considering the prosecution evidence convicted and sentenced the applicant as mentioned above, whereas the appeal filed by the applicant was dismissed in toto.

5. I have heard the learned counsel for the parties.

6. The learned counsel for the applicant has argued the present revision only on two counts. Firstly, the sample was not exactly adulterated. A marginal error was found in the sample according to the report given by the Public Analyst and secondly the sentence of the applicant may be reduced to the period for which he remained in the custody. In support of the second contention, the learned defence counsel has relied upon the order passed by the Single Bench of this Court in the case of *"Tulsiram Mehta Vs. State of Madhya Pradesh"* (2009(2) MPHT 177). Reliance is also placed on the judgment/order of Hon'ble the Apex Court in the case of *"State of Orissa Vs. K. Rajeshwar Rao"* (AIR 1992 SC 240) and *"Braham Dass Vs. State of Himachal Pradesh"* (JT 1988(3) SC 184).

7. After considering the prosecution evidence, it would be apparent that the testimony of the Food Inspector Ramsevak Mishra (PW-1) was acceptable

to the effect that he took the sample and after apportionment of the same, he sealed the sample and sent it to the Public Analyst. No enmity between the applicant and the Food Inspector Ramsevak Mishra is evident. Similarly, the applicant had received a notice under Section 13 of the Act (Ex.P-13) and he did not apply for analysis of the sample from the Central Food Laboratory.

8. So far as the contention of the learned counsel for the applicant is concerned, there was a marginal error in the various results obtained by the Public Analyst in the sample which was examined by him and it may be compared with standard as mentioned in Appendix B of the Prevention of Food Adulteration Rules, 1955 at Article A.17.03. In that specification, it was mentioned that the groundnut oil should be clear, free from rancidity, suspended or other foreign matter,separated water, added colouring or flavouring substances, or mineral oil and it should confirm to the following standards:

	STANDARD		**(Extract of Ex.P-11)**
(a)	Butyro-refractometer reading at 41°C	54.0 to 57.1	57.3
	OR		
	Refractive Index at 40°C	1.4620-1.460	—
(b)	Saponification value	188 to 196	185.65
(c)	Iodine value	85 to 99	99.76
(d)	Unsaponifiable matter	Not more than 1.0 per cent	--"*"
(e)	Acid value	Not more than 6.0	1.23
(f)	Bellier test (Turbidity temperature-Acetic Acid method)	39°C to 41°C	39°C
	Test for argemone oil shall be negative		Test for added colour/ minerals oil/ rancidity negative

* Sample is clear, free from separated water and suspended matter.

For comparison on the basis of extract of the report Ex.P-11 is also mentioned in front of the standard given by Article A.17.03, if the scrutiny is made, then butyro-refractometer reading is slightly higher than the standard whereas saponification value is slightly lower than the standard. No result of unsaponifiable matter was given in the report Ex.P-11, whereas remaining readings were within the limit as shown by the standard. As stated by the applicant in the cross examination of the Food Inspector Ramsevak Mishra and in the accused statement, it appears that the applicant was collecting oil in huge drums after extracting it from the fresh groundnuts and the Food Inspector took the sample without churning. If the oil seed was not properly dried, then possibility the thickness of the oil may vary from layer to layer in a drum. When the oil is made available for sale in the market, then it would have been sealed in a tin or small tin or in pouch packet, and therefore it was expected from the applicant to stir properly the entire oil and thereafter to seal and to take oil for sale. Before taking the sample, if the oil was not properly stirred, then such marginal difference in the various readings in comparison with the standard given by the Prevention of Food Adulteration Rules, may occur.

9. In this context, the order passed by the Single Bench of this Court in the case of *"Babu Vs. State of MP"* [2007(1) MPHT 435] may be perused in which it was found that if there was slightly difference in the various readings between the sample and the standard fixed by the P.F. Rules, then the sample cannot be said to be adulterated. Similarly, in this context, the order passed by Hon'ble the Apex Court in the case of *"P.S.Sharma Vs. Madanlal Kasturichandji"* [(2009)16 SCC276] may be perused in which it is also laid that if there was a marginal difference in the various readings found in the sample in comparison with the standard fixed by the PF Rules, then the sample cannot be said to be adulterated. In the light of the aforesaid order of Hon'ble the Apex Court in the case of *P.S. Sharma* (supra) if the present matter is considered, then it would be apparent that there was marginal difference in the various readings obtained by the Public Analyst and that difference could be caused due to improper stirring of oil before taking the sample, because without churning the oil, if the sample was taken and thickness of the oil differs from layer to layer, results would vary with marginal differences in the analysis. Hence due to such marginal difference, it cannot be said that the sample was adulterated. The learned Additional Sessions Judge as well as the Chief Judicial Magistrate has committed an error in convicting the applicant for the aforesaid offence.

10. In the present case, the applicant is going to be acquitted, and therefore

there is no need to discuss on the point of the sentence in the present case. However, looking to the arguments advanced by the learned counsel for the applicant, it is necessary to discuss on the point of the sentence in the present case. It is the settled view of Hon'ble the Apex Court that if the minimum sentence is prescribed in the particular statute, then it cannot be reduced by any of the criminal Court including the High Court. In the present case, Section 16 of the P.F. Act provides minimum sentence of six months and it is mentioned in the proviso (ii) that if any person is found guilty for the said offence, then in appropriate cases a sentence of imprisonment may be reduced to the period for a term which shall not be less than three months. Under such circumstances, no such sentence could be given lower than the minimum limit prescribed by the statute. In the case of *K.Rajeshwar Rao* (supra) Hon'ble the Apex Court has mentioned that in that particular case the offence was committed prior to the amendment of Section 16 of the PF Act when the provision of imposition of minimum sentence was enacted, and therefore in the present case the offence is committed when the amended provision of Section 16 was already in force relating to the minimum sentence, therefore, the law laid down by Hon'ble the Apex Court in the case of *K.Rajeshwar Rao* (supra) cannot be applied in the present case. Similarly, in the case of *Brahma Dass* (supra) while reducing the jail sentence Hon'ble the Apex Court did not mention any provision in doing so, and therefore it would be apparent that such reduction was done by Hon'ble the Apex Court under the constitutional power of the Supreme Court, which cannot be enjoyed by other courts dealing with such circumstances.

11. So far as the order of the Single Bench of this Court in the case of *Tulsiram Mehta* (supra) is concerned, it appears that the applicant was given an opportunity to move an application for remission of sentence before the competent Govt. and a huge fine was directed to be deposited before the trial Court. However, such type of order cannot be passed in a criminal revision, because the scope of criminal revision is not so wide. It is for the revisionary Court to examine as to whether any illegality or perversity has been committed by the courts below in passing their judgments or not and if the judgments passed by the trial Court as well as the appellate Court are not perverse or illegal, then no interference can be done in such judgments specially where the minimum sentence is prescribed for a particular offence.

12. For reduction of the sentence, the learned counsel for the applicant has placed his reliance on the order passed by the Single Bench of this Court in the case of *Tulsiram* (supra), however the Single Bench of this Court has directed about the remission of the sentence and directed to pay some amount

before the trial Court. On this subject the order passed by Hon'ble the Apex Court in the case of *"K.Pandurangan Vs. S.S.R. Velusamy"* (2003 CRI.L.J. 4964) may be perused in which it is held that as per the provisions of Section 432 of Cr.P.C. power for remission of sentence vests with the appropriate Government and not with any Court and such power cannot be exercised by the appellate Court. Similarly, in the case of *"Delhi Administration (now NCT of Delhi" Vs. Manoharlal"* (2002 CRI.L.J. 4295) may also be referred in which it was laid as under:

> "5.....this court has issued directions in some other cases, to deal with the fact situation in those other cases, in the purported exercise of its undoubted inherent and plenary powers to do complete justice, keeping aside even technicalities, the High Court, exercising statutory powers under the Criminal Laws of the land, could not afford to assume to itself the powers or jurisdiction to do the same or similar things. The High Court and all other courts in the country were no doubt ordained to follow and apply the law declared by this Court, but that does not absolve them of the obligation and responsibility to find out the ratio of the decision and ascertain the law, if any, so declared from a careful reading of the decision concerned and only thereafter proceed to apply it appropriately, to the cases before them. Considered in that context, we could not find from the decisions reported in 1997 (9) SCC 101 (supra) and 2000 (9) SCC 151 (supra) any law having been declared or any principle or question of law having been decided or laid down therein and that in those cases this Court merely proceeded to give certain directions to dispose of the matter in the special circumstances noticed by it and the need felt, in those cases, by this Court to give such a disposal. The same could not have been mechanically, adopted as a general formula to dispose of, as a matter of routine, all cases coming before any or all the courts as an universal and invariable solution in all such future cases also. The High Court had no justifying reason to disturb the conclusion of the first Appellate Court in this regard....."

It is further laid by Hon'ble the Apex Court that if the Supreme Court has given any direction regarding commutation of the sentence in specific circumstances of the case before it, then the Apex Court could pass an order under its powers of Article 141 of the Constitution of India. The High Court

exercising its statutory powers under criminal laws could not assume the powers and jurisdiction by passing such or similar orders.

13. The provision of Section 433 of Cr.P.C. relating to remission for which Hon'ble the Apex Court has mentioned in para 6, which is as under:

> "6. That apart, Section 433 of the Code of Criminal Procedure, 1973 also enacts that the appropriate Government may, without the consent of the person sentenced, commute, among other things enumerated therein, a sentence of simple imprisonment for fine. This Court in *State of Punjab v. Kesar Singh* (supra) though while considering clause (b) of the very provision has observed as follows" "The mandate of Section 433, Cr.P.C.a enables the Government in an appropriate case to commute the sentence of a convict and to prematurely order his release before expiry of the sentence as imposed by the Courts.... That apart, even if the High Court could give such a direction, it could only direct consideration of the case of premature release by the Government and could not have ordered the premature release of the respondent itself. The right to exercise the power under Section 433, Cr.P.C. vests in the Government and has to be exercised by the Government in accordance with the rules and established principles....."

By the dictum laid by Hon'ble the Apex Court in the case of *Manoharlal* (supra), it would be apparent that scope of criminal revision is limited. If Hon'ble the Apex Court has directed for remission etc. to the accused under its special power of Article 141 of the Constitution of India, then such powers cannot be exercised by the High Court and such orders cannot be passed. In the light of the order passed by Hon'ble the Apex Court in the case of *Manoharlal* (supra) the orders passed by the High Court in cases like the order passed in the case of *Tulsiram* (supra) are nothing but *per incurium* from very beginning and such orders cannot be relied upon as precedents. In the light of the order passed by Hon'ble the Apex Court in the case of *Manoharlal* (supra) this Court's cannot give advantage to the applicant by such remission etc., and therefore the revisionary Court, who has limited jurisdiction is competent to find the illegality or perversity in the judgments of both the Courts below and can act accordingly. After conclusion of the revision the convict accused still has a right to move an application under Section 433

of Cr.P.C. before appropriate forum. As per the provisions of Section 16 of the P.F. Act, the minimum sentence cannot be reduced to the period for less than three months. Under such circumstances, the prayer of the applicant in following the order passed by the Single Bench of this Court in the case of *Tulsiram* (supra) cannot be accepted.

14. Though the applicant cannot be released on remission etc., but in the present case it was found that the readings of the analysis of the sample were marginally away from the standard, and therefore it cannot be said that the sample taken from the applicant was adulterated in the eye of law. Therefore, he cannot be convicted for the offence under Section 7(i) read with Section 16(1)(a)(i) of the Act.

15. On the basis of the aforesaid discussion, the revision filed by the applicant can be accepted. Consequently, it is hereby accepted. The conviction as well as the sentence directed by both the Courts below for the offence under Section 7(i) read with Section 16(1)(a)(i) of the Act is hereby set aside. The applicant is acquitted from all the charges appended against him. He would be entitled to get the fine amount back, if he has deposited the same before the trial Court.

16. At present the applicant is on bail, his presence is no more required, and therefore it is directed that the his bail bonds shall stand discharged.

17. A copy of this order be sent to the trial Court as well the appellate Court along with their records for information.

Order accordingly.

I.L.R. [2014] M.P., 1404

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice M.C. Garg

M.Cr.C. No. 863/2013 (Jabalpur) decided on 6 March, 2013

RAMYASH TIWARI ...Applicant

Vs.

STATE OF M.P. ...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Section 156(3)* - Power to direct for investigation u/s 156(3) - Guidelines for the exercise of power u/s 156(3) issued. (Para 9)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – धारा 156(3) के अंतर्गत जांच हेतु निदेश देने की शक्ति – धारा 156(3) के अंतर्गत शक्ति का प्रयोग करने के लिये दिशानिर्देश जारी किये गये।

K.K. Pandey, for the applicant.
Yogesh Dhande, P.L. for the non-applicant/State.

ORDER

M. C. GARG, J. :- This order shall also govern the disposal of Misc. Criminal Case No.12539/2012 *(Vanmali Prasad Dwivedi & two others Vs. Ram Milan Patel).*

In this case on a complaint filed by the complainant under Section 200, Cr.PC. without recording any evidence on behalf of the complainant and simply on the basis of application under Section 156 (3), Cr.PC. the Magistrate directed registration of FIR. The impugned order reads as under: -

"04.10.12

परिवादी सहित श्री शिंवरतन सेन अधि.उप. आवेदन पत्र अभियोग पत्र को प्राथमिकी के रूप में दर्ज कर अभियोजन के बाबत पर सुना गया

परिवाद पत्र एवं आवेदन का अवलोकन किया गया। अभि. गणों के विरूद्ध प्रथम सुचना रिपोर्ट दर्ज किये जाने के आधार हैं संबंधित थाना प्रभारी को निर्देशित किया जाता है कि परिवाद पत्र पर रिपोर्ट दर्ज कर 156(3) आई. पी.सी. के तहत जांच करें एवं अंतिम प्रतिवेदन न्यायालय में पेश करें।

प्रकरण अंतिम प्रतिवेदन अभियोग हेतु दि. 06.11.12."

2. The order shows that there had been no application of mind, no evidence has been recorded under Section 200, Cr.P.C. Such procedure has been deprecated by Hon'ble the Supreme Court as well as in the judgment delivered by this Court which stands approved by Hon'ble the Supreme Court in the case of *Subhkaran Luharuka and another Vs State & another* [Crl.M.C.Nos.6122-23/2005 & Crl.M.C.Nos.6133-.34/2005]. In the aforesaid case also the complainant filed a complaint under Section 200, Cr.P.C. along with an application under Section 156 (3), Cr.P.C., the trial Court without recording any evidence under Section 200, CrP.C. directed registration of FIR under Section 156 (3). This order of registration of FIR was challenged by the accused in a case before me while sitting as a Judge in

Delhi High Court while filing the petition under Section 482, Cr.PC. as also under Section 397, Cr.P.C. One petition was filed for quashing of the criminal complaint while the other petition was filed for quashing the registration of FIR.

3. In that case it was argued, that the Metropolitan Magistrate allowed the application under Section 156 (3), Cr.P.C. without examining the witnesses of the complaint under Section 200, Cr.P.C. by a cryptic order as has been passed by the Court of Judicial Magistrate First Class in this case even though, no case was made out.

4. This Court after examining the facts of the case and also having considered the judgments relied upon by the parties which included the judgment delivered by the Apex Court framed the following two questions:-

> (i) How and when powers under Section 156(3) of the Code are to be exercised by the Metropolitan Magistrate?
>
> (ii) Whether the complaint instituted under Section 200, the order dated 1.7.2005 passed under Section 156(3) of the Code and also the FIR No.436/2005 dated 6.8.05 of PS Defence Colony New Delhi registered pursuant to the aforesaid order, are liable to be quashed in exercise of powers vested in this Court under Section 482 of the Code in the peculiar facts of this case?"

5. Vide the detailed judgement given in that case, this Court quashed the FIR, which was registered on the basis of an order passed by the Magistrate under Section 156 (3), Cr.PC. without recording the evidence under Section 200, Cr.PC. Certain observations made by this Court in that case are relevant and are reproduce for the sake of reference: -

> "23. Since the first question is one of public importance. I have heard all concerned including the intervenors at length for the purpose of understanding scope and ambit of the powers of a Magistrate under Section 156(3) of the Code in the light of the provisions contained in Chapter XII and Chapter XV of the Code. All parties have filed written submissions and have also cited case laws. The issue has also been addressed by both sides even while addressing the final arguments.

24. The petitioners have relied upon following judgments on the first question:

i) *Maksud Syed Vs. State of Gujarat & Ors.* 2008 (5) SCC 668.

ii) *Sakiri Vasu Vs. State of UP & Ors.* 2008 (2) SCC 409.

iii) *Dharmesh Bhai Vasudev Bhai & Ors. Vs. State of Gujarat* 2009 (6) SCC 576.

iv) *Raghu Raj Singh Rousha Vs. Shivam Sunderam Promoters Ltd.* 2009 (2) SCC 363.

v) *Skipper Beverages Pvt. Ltd. Vs. State* 2001 (92) DLT 217.

25. The 2nd respondent/complainant has referred to the following Judgments:

(i) *Kanti Bhadra Shah & Anr. Vs. State of West Bengal,* 2000 (1) SCC 722

(ii) *Acharya Arun Dev Vs. State & Anr.* 2005 (2) JCC 897.

(iii) *Puran Mal Gupta & Ors. Vs. State & Anr.* 2008(4)JCC 2347

(iv) *Priya Gupta Vs. State* 2007 (2) JCC 1058

(v) *Vijay Bahadur Pandey Vs. State of U.P & Ors.* 2005 (5) CRJ. 647

(vi) *Hira Lal Vs. State of U.P* 2008 Crl.L.J.113

(vii) *Rajni Pairiwala Vs. D. Mohan* 2009 (3) JCC 1896

(viii) *Ritu Rawat Vs. Tej Singh* 2008 (4) Jcc 2854.

(ix) *Aloshia Joseph Vs. Dr. Joseph Kollamparambil & Anr.* 2009 Crl.L.J. 2190

(x) *Suresh Chand Jain Vs. State of M.P.* 2001 (I) AD(Crl.) S.C. 34.

(xi) *Ram Babu Gupta & Anr. Vs. State of U.P & Anr.* 2001 Crl.L.J. 3363

(xii) *S.P Sharma Vs. NCT of Delhi* 1991 JCC 59 (Delhi)

(xiii) *Iqbal Singh Marwah & Anr. Vs. Meenakshi Marwah & Anr.* 2005 II AD (Crl.) S.C. 12

(xiv) *Surinder Singh Sobti Vs. The State & Ors.* 1999 (I) JCC 107 (S.C.)

(xv) *Suprintendent of Police, CBI & Ors. Vs. Tapan Kumar Singh* 2003 SCC (Crl.) 1305

(xvi) *Renu Kumari Vs. Sanjay Kumar* 2008 (2) JCC 1032.

(xvii) *H.S. Bains, Director, Small Saving-cum-Deputy Secretary Finance, Punjab Chandigarh Vs. State,* 1980 (4) SCC 631

(xviii) *Collector of Central Excise, Calcutta Vs. Alnoori Tobacco Products and Anr.,* 2004 (6) SCC 186

(xix) *Sakiri Vasu Vs. State of U.P & Ors.* 2008 (2) SCC 409.

(xx) *Mohd. Yusuf Vs. Afaq Jahan (Smt.) and Anr.*, 2006 (1) SCC 627

(xxi) *Dilawar Singh Vs. State of Delhi* 2007 (12) SCC 641

(xxii) *R.R. Chari Vs. State of U.P,* 1962 Crl.L.J. 510.

(xxiii) *Tula Ram & Ors. Vs. Kishore Singh* 1977 (4) SCC 459

(xxiv) *Narayandas Bhagwandas Madhavdas Vs. State of West Bengal,* 1959 Crl.L.J. 1368

(xxv) *Devarapalli Lakshminarayan Reddy & Ors. Vs. V. Narayana Reddy & Ors.,* 1976(SCC) 252

(xxvi) *Gopal Das Sindhi and Ors. Vs. State of Assam & Anr.,* 1961 Crl.L.J. 39

(xxvii) *Jamuna Singh And Ors. Vs. Bhadai Sah.* 1964 (2) Crl.L.J. 468

(xxviii) *Sanjay Bansal & Anr. Vs. Jawaharlal Vats & Ors.* 2007 (13) SCC 71.

(xxix) *Madhu Bala Vs. Suresh Kumar & Ors.,* 1997 (8) SCC 476.

(xxx) *Supdt. & Remembrance WB. Vs. Abani Kumar,* 1951 Crl.L.J. 806.

26. The interveners cited following additional Judgments :-

i) *S.P Shenbagamooty Vs. Mu.Ka.Stelin* 2003 Crl.L.J. 271

ii) *Arvind Bhai Rajiv Bhai Patel Vs. State of Gujarat* 1998 Crl.LJ 463

iii) *Sukhwasi Vs. State of U.P* 2008 Crl.L.J 472

iv) *Nirmaljit Singh Hoon Vs. State of W.B.* 1973(3) SCC 753

v) *Mahesh K. Garg Vs. State* 64(1996) DLT 232

27. All these Judgments lays down as to how powers vested in the Court under Chapter XII and Chapter XV are to be exercised. It has been consistently held in all these cases that such power is to be exercised only after application of mind. One can take judicial notice of the fact that provisions of law, especially those relating to the procedure, often find misuse, generally enabled by an erroneous interpretation of a statutory provision. Thus reference becomes necessary to Chapter XII of the Code which starts from Section 154 of the Code titled as "INFORMATION TO THE POLICE AND THEIR POWER TO INVESTIGATE".

28. Section 154 of the Code enables every person who wishes to disclose information relating to commission of a cognizable offence to approach the concerned SHO, who then is required to reduce such information in writing and to register an FIR, if that information discloses commission of cognizable offences as provided for under Section 154(1) of the Code. Sub-Section (2) of the Code requires the SHO/ concerned official to supply a copy of the information so recorded to the complainant forthwith free of cost. However, if the SHO/ concerned officer is reluctant or refuses to register an FIR based upon the information with the complainant the

complainant may approach senior officers in view of the provisions contained under Section 154(3) of the Code as they also have similar powers in view of the Section 36 of the Code. Once the FIR is registered, then the criminal law procedures are set into motion which will mean investigation under Section 156 of the Code till filing of report under Section 173 of the Code. The procedure for investigation has been prescribed under Section 157 of the Code which enables the Investigating Officer to proceed to the spot, to investigate the facts and circumstances of the case and, if necessary, to take measures for discovery and even arrest of the offender even without warrant. After investigation a report is filed in Court by the concerned I.O. That report can either be for recommending prosecution or recommending closure. It is possible that in this process some degree of harassment may be there for the person who is sought to be made as an accused, which needs to be deprecated. Use of this to cut short the civil disputes, jealousies or for other undesirable purposes is growing fact as will be noticed in the later part of the judgement.

29. The SHO/concerned Authority whenever approached by the complainant is bound to receive it, though he is not bound to register it in case no offence or wrong has taken place and a totally false complaint is filed. Holding a preliminary enquiry to that extent is permissible even as per Punjab Police Rules which are applicable even in Delhi. Rule 24.4 of the Punjab Police Rules reads as under:-

> 24.4 Action when reports are doubtful,.--(1) if the information or other intelligence relating to the alleged commission of a cognizable offence is such that an officer in charge of a police station has reason to suspect that the alleged offence has not been committed, he shall enter the substance of the information or intelligence in the station diary and shall record his reasons for suspecting that the alleged offence has not been committed and shall also notify to the informant, if any, the fact that he will not investigate the case or cause it to be investigated.

(2) If the Inspector or other superior officer, on receipt of a copy of the station diary, is of opinion that the case should be investigated he shall pass an order to that effect, and shall, in any case, send on the diary or an extract therefrom to the District Magistrate for his perusal and orders.

(3) xxxxxx

(i) Even if the information discloses commission of cognizable offences and the SHO refuses to register a case, police manual provides that the complainant can go upto the higher officer (SSP) i.e. to the officers as provided for under Section 36 Cr.P.C. with a petition that the concerned SHO has not registered/refused to register the complaint. This is also the requirement of Section 154(3) of the Code, which reads as under:-

154. Information in cognizable cases.

(1) xxxxxxxxx

(2) xxx xxx xxx

(3) Any person, aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer Subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

(ii) Section 36 of the Code provides for the powers of the senior officers & reads as under:- 36. Powers of superior officers of police. Police officers superior in rank to an officer in charge, of a police station may exercise the same powers, throughout the local area to wish they are appointed, as may be exercised by such officer within the limits of his station.

(iii). It would be useful to also refer to Section 155 & Section 156 of the Code.

155. Information as to non-cognizable cases and investigation of such cases.

(1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.

(2) No Police officer shall investigate a non-cognizable case without the order of Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable.

30. As per section 155 of the of the Code, even if information given is in relation to commission of non-cognizable offence, it is required to be recorded in a book to be kept by an officer who is in-charge of the Police Station and in such a case investigation cannot be conducted by the Police without the permission of the Court whereas in the case of a cognizable offence investigation has to be conducted by the Police once it registers an FIR.

31. Section 156 of the Code reads as under :-

156. Police officer's power to investigate cognizable cases.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2)No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one, which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above mentioned.

32. It is the contention of the petitioners that the powers vested in the Court under Section 156(3) of the Code can be exercised by the Court only in two situations, i.e.,

(i) Where the Police despite having registered an FIR on the basis of information disclosing commission of cognizable offences is neither interested in investigating the crime nor the investigation is proceeding properly; Or

(ii) When the SHO has refused to record the information given by the complainant in writing, and/or to register an FIR even though commission of cognizable offences are disclosed. The senior officers also despite being approached have failed to take appropriate action in the matter as provided for under Section 154(3) of the Code.

Provided the Magistrate is satisfied that the information discloses commission of cognizable offences and, intervention of Police is necessary for digging out the evidence which is neither in the possession of complainant nor can be produced by him. It is also submitted that such power may also be exercised even if a request is made by way of an application filed along with a complaint under Section 200 Cr.PC but only if the Magistrate decides not to take cognizance on the basis of the Complaint under Section 190 of the Code for cogent reasons.

33. At this stage, I may also refer to the provisions of Chapter XV of the Code which provide for an alternative mode to the Complainant aggrieved from the inaction of the police in a case where the Complaint approaches the police with information disclosing Commission of Cognizable offence for the purpose of registration of an FIR. This starts from Section 200 and ends up to 210 of the Code. These provisions enable the Magistrate to take cognizance of the offences disclosed in the complaint in accordance with procedure prescribed in this Chapter. The relevant provisions are reproduced hereunder for the sake of reference:-

200. Examination of complainant.

A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) If a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint; or

(b) If the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

201. Procedure by Magistrate not competent to take cognizance of the case.

If the complaint is made to a Magistrate who is not competent to take cognizance of the offence he shall, -

(a) If the complaint is in writing, return it for presentation to

the proper court with to that effect;

(b) If the complaint is not in writing, direct the complainant to the proper court.

202. Postponement of issue of process.

(1) Any Magistrate, on receipt of a complaint of an offence which he is authorised to take cognizance or which has been made over to him under Section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by, a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,

(a) Where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) Where the complaint has not been made by a court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Court on an offer in charge of a police station except the power to arrest without warrant.

203. Dismissal of complaint.

If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry

or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

34. These provisions thus provide additional remedy to the complainant aggrieved of inaction on the part of the Police by filing a Complaint under Section 200 of the Code to seek redressal of his grievance. He can do so even when he is not satisfied with the police action under Chapter XII by approaching the senior officer under Section 154(3). However when Complaint is filed under Section 200 of the Code the Magistrate has a duty to record evidence led by the complainant and also to examine his witnesses and if necessary even to call for a police report, and then to decide as to whether he has to proceed under Chapter XV or has to dismiss the complaint.

36. At this stage it will be appropriate to take note of the observations made by the Apex Court in few cases. In the case of *All India Institute of Medical Sciences Employees ,, Union (Regd.)* Through its *President Vs. Union of India and Ors.*, (1996) 11 SCC 582 regarding the procedure to be followed if FIR is not registered under Section 154 of the Code The relevant observations made by the Court are reproduced hereunder:-

> 3. The Code of Criminal Procedure, 1973 (for short, the 'Code') prescribes the procedure to investigate into the cognizable offences defined under the Code.
>
> In respect of cognizable offence. Chapter XII of the Code prescribes the procedure for disclosing information to the police and their powers to investigate the cognizable offence. Sub-section (1) of Section 154 envisages that "every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant: and every such information, whether given in writing or reduced to

writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf," On such information being received and reduced to writing, the officer in charge of the police station has been empowered under Section 156 to investigate into the cognizable cases. The procedure for investigation has been given under Section 157 of the Code, the details of which are not material. After conducting the investigation prescribed in the manner envisaged in Chapter XII, charge--sheet shall be submitted to the court having jurisdiction to take cognizance of the offence. Section 173 envisages that: (1) Every investigation under this Chapter shall be completed without unnecessary delay. (2) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report in the form prescribed by the State Government giving details therein. Upon receipt of the report, the Court under Section 190 is empowered to take cognizance of the offence. Under Section 173(8), the investigating officer has power to make further into the offence.

4. When the information is laid with the police but no action in that behalf was taken, the complainant is given power under Section 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to inquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the concerned police to investigate into the offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the evidence

recorded prima facie discloses commission of the offence, he is empowered to take cognizance of the offence and would issue process to the accused.

5. In this case, the petitioner had not adopted either of the procedure provided under the Code. As a consequence, without availing of the above procedure, the petitioner is not entitled to approach the High Court by filing a writ petition and seeking a direction to conduct an investigation by the CBI which is not required to investigate into all or every offence.

37. This judgment was followed by the Apex Court in *Aleque Padamsee and Ors. Vs. Union of India and Ors.*, (2007) 6 SCC 171, which is a three Judges" Bench judgment. The relevant observations made in the said judgment are as under:

7. Whenever any information is received by the police about the alleged commission of offence which is a cognizable one there is a duty to register the FIR. There can be no dispute on that score. The only question is whether a writ can be issued to the police authorities to register the same. The basic question is as to what course is to be adopted if the police does not do it. As was held in *All India Institute of Medical Sciences's case* (supra) and re-iterated in *Gangadhar's case* (supra) the remedy available is as set out above by filing a complaint before the Magistrate. Though it was faintly suggested that there was conflict in the views in *All India Institute of Medical Sciences's case* (supra), *Gangadhar's case* (supra), *Hari Singh's case* (supra), *Minu Kumari's case* (supra) and *Ramesh Kumari's case* (supra), we find that the view expressed in *Ramesh Kumari's case* (supra) related to the action required to be taken by the police when any cognizable offence is brought to its notice. In *Ramesh Kumari's case* (supra) the basic issue did not relate to the methodology to be adopted which was expressly dealt with in *All India Institute of Medical Sciences's case* (supra), *Gangadhar's case* (supra), *Minu Kumari's case* (supra)

and *Hari Singh's case* (supra). The view expressed in *Ramesh Kumari's case* (supra) was re- iterated in *Lallan Chaudhary and Ors. v. State of Bihar* AIR 2006 SC 3376 . The course available, when the police does not carry out the statutory requirements under Section 154 was directly in issue in *All India Institute of Medical Sciences's case* (supra), *Gangadhar's case* (supra), *Hari Singh's case* (supra) and *Minu Kumari's case* (supra). The correct position in law, therefore, is that the police officials ought to register the FIR whenever facts brought to its notice show that cognizable offence has been made out. In case the police officials fail to do so, the modalities to be adopted are as set out in Sections 190 read with Section 200 of the Code.....

8. The writ petitions are finally disposed of with the following directions:

(1) If any person is aggrieved by the inaction of the police officials in registering the FIR, the modalities contained in Section 190 read with Section 200 of the Code are to be adopted and observed.

(2) It is open to any person aggrieved by the inaction of the police officials to adopt the remedy in terms of the aforesaid provisions.

38. The matter was also dealt with by the Apex Court in the case of *Sakiri Vasu Vs. State of Uttar Pradesh and Others,* (2008) 2 SCC 409, relied upon by both the sides. In this case, the Apex Court has discussed relevant provisions of Chapter XII and Chapter XV of the Code and has made the following observations:-

25. We have elaborated on the above matter because we often find that when someone has a grievance that his FIR has not been registered at the police station and/or a proper investigation is not being done by the police, he rushes to the High Court to file a writ petition or a petition under Section 482 Cr.PC. We are of the opinion that the high Court should not encourage this practice and should

ordinarily refuse to interfere in such matters, and relegate the petitioner to his alternating remedy, firstly under Section 154(3) and Section 36 Cr.PC. before the concerned police officers, and if that is of no avail, by approaching the concerned Magistrate under Section 156(3).

26. If a person has a grievance that his FIR has not been registered by the police station his first remedy is to approach the Superintendent of Police under Section 154(3) Cr.P.C. or other police officer referred to in Section 36 Cr.P.C. If despite approaching the Superintendent of Police or the officer referred to in Section 36 his grievance still persists, then he can approach a Magistrate under Section 156(3) Cr.P.C. instead of rushing to the High Court by way of a writ petition or a petition under Section 482 Cr.P.C. Moreover he has a further remedy of filing a criminal complaint under Section 200 Cr.PC. Why then should writ petitions or Section 482 petitions be entertained when there are so many alternative remedies?

27. As we have already observed above, the Magistrate has very wide powers to direct registration of an FIR and to ensure a proper investigation, and for this purpose he can monitor the investigation to ensure that the investigation is done properly (though he cannot investigate himself). The High Court should discourage the practice of filing a writ petition or petition under Section 482 Cr.P.C. simply because a person has a grievance that his FIR has not been registered by the police, or after being registered, proper investigation has not been done by the police. For this grievance, the remedy lies under Sections 36 and 154(3) before the concerned police officers, and if that is of no avail, under Section 156(3) Cr.PC. before the Magistrate or by filing a criminal complaint under Section 200 Cr.P.C. and not by filing a writ petition or a petition under Section 482 Cr.P.C.,

30. It may be further mentioned that in view of Section 36 Cr.P.C. if a person is aggrieved that a proper investigation

has not been made by the officer-in-charge of the concerned police station, such aggrieved person can approach the Superintendent of Police or other police officer superior in rank to the officer-in-charge of the police station and such superior officer can, if he so wishes, do the investigation vide *CBI v. State of Rajasthan and Anr.* 2001Cri.L.J 968, *R.P Kapur v. S.P Singh* [1961]2SCR143 etc. Also, the State Government is competent to direct the Inspector General, Vigilance to take over the investigation of a cognizable offence registered at a police station vide *State of Bihar v. A.C. Saldanna* 1980 (1) SCC 554.

39. A Division Bench of the Karnataka High Court in *Guruduth Prabhu and Ors. Vs. M.S. Krishna Bhat and Ors.,* 1999 Crl.L.J. 3909 has also discussed the issue in detail both in the context of Chapter XII and XV of the Code. The relevant paragraphs reads as under:

10. Let us first consider whether the learned Magistrate had jurisdiction to refer the matter for Police investigation under Section 156(3), Cr. PC.

Sub-section (1) of Section 156 confers on the police unrestricted power to investigate a cognizable offence without the order of a Magistrate or without a formal first information report. The police are entitled to investigate cognizable offence either on information under Section 154 or on their own motion, on their own knowledge or from other reliable information. This statutory right to investigate cognizable offence cannot be interfered with or controlled by the Courts including the High Court. It is open to the Court to take or not to take action when the police prefer a chargesheet after investigation. But the Court's function does not begin until the chargesheet is filed. Under Sub-section (2) police can investigate any offence taking the matter to be a cognizable offence although ultimately charges are filed for a non-cognizable offence since while investigating a cognizable offence, the police are not debarred from investigating any non-cognizable offence

arising out of the same facts and including it in the report to be filed by them under Section 173, Cr. PC., Sub-section (3) empowers the Magistrate to refer and direct the police to investigate a cognizable offence. But there is a restriction on the Magistrate before directing the police to investigate under Sub-section (3), the Magistrate should form an opinion that the complaint filed by the complainant before him disclose a cognizable offence. When the allegation made in the complaint does not disclose cognizable offence, the Magistrate has no jurisdiction to order police investigation under Sub-section (3). In the present case, the learned Magistrate without applying his mind had directed an investigation by the police. Such an order which is passed without application of mind is clearly an order without jurisdiction. Therefore, the order passed directing the police to investigate under Sub-section (3) of Section 156, Cr. P.C, passed without jurisdiction is liable to be quashed by this Court either under Section 482, Cr.PC, or under Article 226 of the Constitution of India. We find from the materials on record, the learned Magistrate has not at all applied his mind before directing police investigation under Section 156(3), Cr. P.C. If the Magistrate had applied his mind, the Magistrate could have found that no cognizable offence is made out even if the entire allegations made in the complaint are accepted. We have already come to the conclusion that none of the complaints filed by the complainants disclose a cognizable offence alleged under Section 167, IPC. On this count alone the direction given by the Magistrate is liable to be quashed. The Hon'ble Supreme Court in *State of Haryana V. Bhajan Lal* 1992Cri.L.J 527 has held that the High Court could either exercise its power under Article 226 of the Constitution of India or under Section 482, Cr. P.C and quash the investigation to prevent abuse of the process of law or to secure the end of justice.

11. Sub-section (3) of Section 156 Cr. PC, empowers Magistrate to order an investigation. Under Section 157(1), Cr. P.C. an officer in charge of a Police Station having

reason to suspect the commission of an offence which he is empowered under Section 156, Cr.P.C. to investigate should send a report to the Magistrate empowered to take cognizance of the offence upon a Police report and should proceed in person or depute one of his prescribed deputies to proceed to the spot to investigate under Section 157(1)(a) when the offender is named and if the case is not of a serious nature the officer need proceed in person or depute his subordinate. Under Section 157(1) (b) if it appears to such Police Officer that there is no sufficient ground for entering on an investigation he shall not investigate the case and the officer should inform the complainant under the prescribed manner. Thus, the Police Officer who is empowered to investigate on the information received by him of the commission of a cognizable offence can decide whether there is no sufficient ground for entering into an investigation and if there is no sufficient ground he should not investigate the case. But once the Magistrate orders an investigation under Section 156(3), Cr. PC. the Police Officer is bound to investigate the matter and there is no question of his deciding not to investigate. Thus, by an order of the Magistrate under Section 156(3) the discretion given to the Police Officer under Section 157 is taken away. It is therefore very important that the Magistrate applies his mind and finds that the allegations made in the complaint filed under Section 200, Cr. P.C, before him discloses an offence. If every complaint filed under Section 200, Cr.P.C, is referred to the police under Section 156(3) without application of mind about the disclosure of an offence, there is every likelihood of unscrupulous complainants in order to harass the alleged accused named by them in their complaints making bald allegations just to see that the alleged accused are harassed by the police who have no other go except to investigate as ordered by the Magistrate. Therefore, it is mandatory for the Magistrate to apply his mind to the allegations made in the complaint and in only cases which disclose an

offence, the Magistrate gets jurisdiction to order an investigation by the police if he does not take cognizance of the offence.

40. The aforesaid Judgment also emphasis that there should be application of mind before a Complaint is sent to Police for investigation and holds that it is not necessary to refer every Complaint filed under Section 200 to the police for investigation under Section 156(3) of the Code. It has been stated that if such order is passed in routine without application of mind there is every likelihood of causing harassment to the accused persons by unscrupulous Complainants.

41. In another judgment delivered by this Court in the case of *Skipper Beverages Pvt. Ltd. Vs. State* (supra) also relied upon by the petitioner a similar view has been taken by this Court also. In that case the judgment of the Apex Court in *Suresh Chand Jain Vs. State of Madhya Pradesh*(Supra) relied upon by the complainant has also been referred to. The relevant paragraphs of that judgment are also reproduced for the sake of reference:

7. It is true that Section 156(3) of the Code empowers a Magistrate to direct the police to register a case and initiate investigations but this power has to be exercised judiciously on proper grounds and not in a mechanical manner. In those cases where the allegations are not very serious and the complainant himself is in possession of evidence to prove his allegations there should be no need to pass orders under Section 156(3) of the Code. The discretion ought to be exercised after proper application of mind and only in those cases where the Magistrate is of the view that the nature of the allegations is such that the complainant himself may not be in a position to collect and produce evidence before the Court and interests of justice demand that the police should step in to held the complainant. The police assistance can be taken by a Magistrate even Under Section 202(1) of the Code after taking cognizance and proceeding with the complaint under Chapter XV of the Code as held by Apex Court in 2001 (1) Supreme Page 129 titled *'Suresh*

Chand Jain Vs. State of Madhya Pradesh & Ors. "

10. Section 156(3) of the Code aims at curtailing and controlling the arbitrariness on the part of the police authorities in the matter of registration of FIRs and taking up investigations, even in those cases where the same are warranted. The Section empower the Magistrate to issue directions in this regard but this provision should not be permitted to be misused by the complainants to get police cases registered even in those cases which are not very serious in nature and the Magistrate himself can hold enquiry under Chapter XV and proceed against the accused if required. Therefore the Magistrate, must apply his mind before passing an order under Section 156(3) of the Code and must not pass these orders mechanically on the mere asking by the complainant. These powers ought to be exercised primarily in those cases where the allegations are quite serious or evidence is beyond the reach of complainant or custodial interrogation appears to be necessary for some recovery of article or discovery of fact.

42. Thus, there are pre-requisites to be followed by the complainant before approaching the Magistrate under Section 156(3) of the Code which is a discretionary remedy as the provision proceeds with the word "May". The magistrate is required to exercise his mind while doing so. He should pass orders only if he is satisfied that the information reveals commission of cognizable offences and also about necessity of police investigation for digging out of evidence neither in possession of the complainant nor can be procured without the assistance of the police. It is thus not necessary that in every case where a complaint has been filed under Section 200 of the Code the Magistrate should direct the Police to investigate the crime merely because an application has also been filed under Section 156(3) if the Code even though the evidence to be led by the complainant is in his possession or can be produced by summoning witnesses, may be with the assistance of the court or otherwise. The issue of jurisdiction also becomes important at that stage and cannot be ignored.

45. The decision to take cognizance under Chapter XV or to refer matter under Chapters XII should be taken only after application of judicial mind has also been laid emphasis even in the case of *Ram Babu Gupta* (supra) also relied upon by Respondent No.2/Complainant heavily. The relevant observations made in this regard reads as under:-

> 17. In view of the aforesaid discussion on the legal provisions and decisions of the Supreme Court as on date, it is hereby held that on receiving a complaint, the Magistrate has to apply his mind to the allegations in the complaint upon which he may not at once proceed to take cognizance and may order it to go to the police station for being registered and investigated. The Magistrate's order must indicate application of mind. If the Magistrate takes cognizance, he proceeds to follow the procedure provided in Chapter XV of Cr P.C. The first question stands answered thus.

46. A learned Judge of this Court in the case of *State Vs. Mohd. Iqbal Ghazi and Ors.*, 154 (2008) DLT 481 has explained as to how application of mind can be made by the Magistrate in such matters. The relevant observation is reproduced hereunder:

> 31. But, for the guidance of the learned Metropolitan Magistrate, the facts of the instant case require something more to be stated. I have noted hereinabove the language of Section 154(1) of the Code of Criminal Procedure 1973. A bare look at the language of said provision reveals that the pre-requisite of registration of a FIR is that the information disclosed must relate to the commission of a cognizable offence. Thus, even a Magistrate cannot proceed to issue any direction under Section 156(3) of the Code unless he is prima facie satisfied that the information before him relates to the commission of a cognizable offence for the reason an order directing the police to investigate any cognizable offence would require the registration of a FIR inasmuch as relating to the commission of a cognizable offence no investigation can

proceed without the registration of a FIR.....

33. It means that the person required to apply his mind has to come to grips with the facts before him and has to bring into focus the law on the subject and applying the facts to the law, to arrive at a conclusion by a process of reasoning, evidencing that all relevant facts have been taken note of and properly analyzed in the light of the law applicable. A truncated and an gibberish reproduction of facts, excluding relevant facts from the focus of the mind, would result in a decision being taken which can be classified as a decision without the application of mind. Informed reasoning is the heart of the matter.

6. In view of the aforesaid judgment and the legal position as contained in Chapter-15 of the Code of Criminal Procedure this Court has observed: -

49. I am in complete agreement with the views expressed by Id. Brother Judges of this Court in the judgments cited above. I may also observe that if the Magistrate decides to proceed under Section 200 of the Code, then also the Magistrate has power to call for a police report before issuing the process as provided for under Section 202 of the Code. However, before calling for such a report, the Magistrate will have to record evidence of the complainant as may be produced. If such a procedure is followed, chances of abuse of the process are less. Another safeguard can be to call for a status report from the police about the stage of investigation if the complainant has already approached the police before taking a view as to whether he should proceed under Chapter XII or under Chapter XV.

50. This Court would also like to reiterate the observations made by the Division Bench of Karnataka High Court in the case of *Guru Dutt Prabhu & Ors.* (supra) expressing the fear in sending every complaint filed under Section 156(3) Cr.PC for Police investigation without application of mind, which certainly can be used as a tool of harassment in the hands of unscrupulous complainant and there are chances where this provision can be highly misused if the orders are passed under Section 156(3) of the Code in routine, even

where a complaint is filed under Section 200 of the Code.

51. The judgment delivered by another Single Judge of this Court long ago in the case of *Acharya Arun Dev Vs. State & Anr.* 2005 (2) JCC 897 relied upon by the Complainant dealing with similar direction given by the Magistrate under Section 156(3) of the Code can also be referred to. Only because in that case, the Court felt that there was a necessity for directing investigation by the Police for the purpose of collection of evidence. However, in the present case situation is different.Here the agreement, the subject matter of dispute, was very much with the complainant, yet he did not feel it appropriate to place it on record intentionally. He also failed to produce subsequent agreements whereby his entire interest in the property in question stood assigned/transferred to a third party who has not cared to come to the court even after mortgage which now stand re-conveyed. The narration of events mentioned by the Apex Court in the arbitration dispute (supra) also goes to show that the issues concerning the original agreement stood even otherwise settled between the parties. However, subsequently the complainant appears to have changed his mind and started litigating with the petitioners to force his design to insist upon giving him more land. None of these issues have been even discussed by the Metropolitan Magistrate. The Magistrate has not even cared to find out as to whether Delhi Courts will have jurisdiction or not and which part of the offence(s) if any has been committed in Delhi requiring investigation by Delhi Police. The Magistrate has neither discussed as to what offences are made out nor has discussed as to who are the persons actually responsible for the commission of such offence, if any.

7. In the light of the above discussion I quashed the FIR registered in that case on the direction of the Magistrate under Section 156 (3), Cr.P.C. without recording the evidence of the complainant under Section 200, Cr.PC. was also summarized as:

"(i) Whenever a Magistrate is called upon to pass orders under Section 156(3) of the Code, at the outset, the Magistrate should ensure that before coming to the Court, the Complainant

did approach the police officer in charge of the Police Station having jurisdiction over the area for recording the information available with him disclosing the commission of a cognizable offence by the person/persons arrayed as an accused in the Complainant. It should also be examined what action was taken by the SHO, or even by the senior officer of the Police, when approached by the Complainant under Section 154(3) of the Code.

(ii) The Magistrate should then form his own opinion whether the facts mentioned in the complaint disclose commission of cognizable offences by the accused persons arrayed in the Complaint which can be tried in his jurisdiction. He should also satisfy himself about the need for investigation by the Police in the matter. A preliminary enquiry as this is permissible even by an SHO and if no such enquiry has been done by the SHO, then it is all the more necessary for the Magistrate to consider all these factors. For that purpose, the Magistrate must apply his mind and such application of mind should be reflected in the Order passed by him. Upon a preliminary satisfaction, unless there are exceptional circumstances to be recorded in writing, a status report by the police is to be called for before passing final orders.

iii) The Magistrate, when approached with a Complaint under Section 200 of the Code, should invariably proceed under Chapter XV by taking cognizance of the Complaint, recording evidence and then deciding the question of issuance of process to the accused. In that case also, the Magistrate is fully entitled to postpone the process if it is felt that there is a necessity to call for a police report under Section 202 of the Code.

(iv) Of course, it is open to the Magistrate to proceed under Chapter XII of the Code when an application under Section 156(3) of the Code is also filed along with a Complaint under Section 200 of the Code if the Magistrate decides not to take cognizance of the Complaint. However, in that case, the Magistrate, before passing any order to proceed under Chapter XII, should not only satisfy himself about the pre-requisites as aforesaid, but, additionally, he should also be satisfied that it

is necessary to direct Police investigation in the matter for collection of evidence which is neither in the possession of the complainant nor can be produced by the witnesses on being summoned by the Court at the instance of complainant, and the matter is such which calls for investigation by a State agency. The Magistrate must pass an order giving cogent reasons as to why he intends to proceed under Chapter XII instead of Chapter XV of the Code.

8. In this case also there is no application of mind while directing registration of FIR. In this case simply on the basis of an application under Section 156 (3), Cr.P.C. by cryptic order Judicial Magistrate First Class has directed for registration of FIR. For the reason stated above, the FIR being Crime No.133/2012 is therefore, quashed. This means that all the proceedings, which arises therefrom are also quashed. However, a liberty is granted to the complainant to proceed with this complaint under Section 200, Cr.P.C. he may lead evidence in support of his complaint. The Court would be free to take cognizance of the complaint if evidence is lead by the complainant, which may make out a case for proceeding further against the petitioner. With the aforesaid reasons, Misc.Criminal Case No.12539/2012 is also allowed. A Copy of the order be supplied on that file,

9. For the guidance of all the Subordinate Judicial Magistrate in the State of Madhya Pradesh, the Registrar General of this Court is directed to circulate the guidelines as mentioned below for dealing with the cases under Section 156 (3), Cr.PC., the directions are as follows: -

(i) Whenever a Magistrate is called upon to pass orders under Section 156(3) of the Code, at the outset, the Magistrate should ensure that before coming to the Court, the Complainant did approach the police officer in charge of the Police Station having jurisdiction over the area for recording the information available with him disclosing the commission of a cognizable offence by the person/persons arrayed as an accused in the Complainant. It should also be examined what action was taken by the SHO, or even by the senior officer of the Police, when approached by the Complainant under Section 154(3) of the Code.

(ii) The Magistrate should then form his own opinion whether the facts mentioned in the complaint disclose commission of

cognizable offences by the accused persons arrayed in the Complaint which can be tried in his jurisdiction. He should also satisfy himself about the need for investigation by the Police in the matter. A preliminary enquiry as this is permissible even by an SHO and if no such enquiry has been done by the SHO, then it is all the more necessary for the Magistrate to consider all these factors. For that purpose, the Magistrate must apply his mind and such application of mind should be reflected in the Order passed by him. Upon a preliminary satisfaction, unless there are exceptional circumstances to be recorded in writing, a status report by the police is to be called for before passing final orders.

iii) The Magistrate, when approached with a Complaint under Section 200 of the Code, should invariably proceed under Chapter XV by taking cognizance of the Complaint, recording evidence and then deciding the question of issuance of process to the accused. In that case also, the Magistrate is fully entitled to postpone the process if it is felt that there is a necessity to call for a police report under Section 202 of the Code.

(iv) Of course, it is open to the Magistrate to proceed under Chapter XII of the Code when an application under Section 156(3) of the Code is also filed along with a Complaint under Section 200 of the Code if the Magistrate decides not to take cognizance of the Complaint. However, in that case, the Magistrate, before passing any order to proceed under Chapter XII, should not only satisfy himself about the pre-requisites as aforesaid, but, additionally, he should also be satisfied that it is necessary to direct Police investigation in the matter for collection of evidence which is neither in the possession of the complainant nor can be produced by the witnesses on being summoned by the Court at the instance of complainant, and the matter is such which calls for investigation by a State agency. The Magistrate must pass an order giving cogent reasons as to why he intends to proceed under Chapter XII instead of Chapter XV of the Code.

Cc as per rules

Order accordingly.

I.L.R. [2014] M.P., 1432
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice U.C. Maheshwari
M.Cr.C. No. 4456/2012 (Jabalpur) decided on 14 March, 2013

RAJENDRA AGRAWAL ...Applicant
Vs.
SMT. SUMAN AGRAWAL ...Non-applicant

A. Penal Code (45 of 1860), Section 420 - Quashing of charge - **There is sufficient evidence against the applicant to show the prima facie ingredients of the alleged offence defined u/s 415 and made punishable u/s 420 of IPC - Held - At the stage of framing the charge the court has to consider only the prima facie circumstances and the same is available in the matter - Impugned order is hereby affirmed. (Para 9)**

क. दण्ड संहिता (1860 का 45), धारा 420 – आरोप अभिखंडित किया जाना – भा.द.सं. की धारा 415 के अंतर्गत परिभाषित तथा धारा 420 के अंतर्गत दण्डनीय बनाये गये अभिकथित अपराध के प्रथम दृष्ट्या घटक दर्शाने के लिये आवेदक के विरुद्ध पर्याप्त साक्ष्य है – अभिनिर्धारित – आरोप विरचित किये जाने के प्रक्रम पर न्यायालय को केवल प्रथम दृष्ट्या परिस्थितियों को विचार में लेना चाहिए और मामले में यह उपलब्ध है – आक्षेपित आदेश एतद् द्वारा अभिपुष्ट।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Inherent power - **Powers u/s 482 can be exercised only when some error of law or illegality is found to be committed by courts below. (Para 7)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अंतर्निहित शक्ति – धारा 482 के अंतर्गत शक्तियों का प्रयोग केवल तब किया जा सकता है जब निचले न्यायालय द्वारा विधि की कोई त्रुटि या अवैधता कारित किया जाना पाया जाता है।

Cases referred :

AIR 2005 SC 1047, AIR 2008 SC 251.

R.L. Ariha, for the applicant.
H.S. Rajput, for the non-applicant.

ORDER

U. C. MAHESHWARI, J. :- The applicant/accused has filed this petition under section 482 of the Cr.P.C being aggrieved by the order dated 7.3.2012 passed by the Addl. Sessions Judge, Pipariya, district Hoshangabad in Criminal

Revision No.20/12 affirming the order dated 3.1.2012 passed by the Addl. Chief Judicial Magistrate, Pipariya in criminal case No.2/09 whereby on evaluation of the evidence recorded before charge in a private complaint of the respondent, the charges of section 420 of the IPC has been framed against the applicant.

2. The facts giving rise to this petition in short are that the respondent herein filed a private complaint under section 200 of the Cr.P.C in the trial court contending that she is residing in the house situated in Narmada Colony at Sadiya Road which was purchased by her through registered sale -deed from its earlier owner in the year 1992. The applicant, being her neighbour, was giving her respect as sister and taking advantage of such relation, after taking her into confidence, with intention to commit fraud, he took her to the Bank. Before taking her to the Bank, he assured her that she has to only identify him in the Bank, on which, C.C limit shall be extended to him. He also told her that a person having the immovable property is required to introduce him in the Bank for extending the aforesaid limit. Under such assurance of the applicant, she went to the Bank with him where, with dishonest intention, by practicing fraud with her, the original document of title of her house was taken by him and kept with the Bank. Her signatures were also taken on some paper in the Bank. Subsequently, on demand, when the sale-deed was not returned by the applicant then she inquired about it from the Bank then only she came to know abut (sic.about) the aforesaid fraud of the applicant committed with her. In such circumstances, the above- mentioned complaint along with necessary documents was filed by the applicant.

3. After recording the statements of the complainant under section 200 and her witnesses under section 202 of the Cr.P.C, the cognizance for the offence of section 420 of the IPC was taken against the applicant. He was summoned, on which, he appeared before the trial court. Thereafter, it being a warrant case, the before-charge evidence was recorded. On appreciation of the same, the prima facie ingredients of section 420 of the IPC are made out, on which, the charge of such section was framed against the applicant. Being dissatisfied with such order, the applicant filed the criminal revision before the subordinate sessions court. On consideration, by affirming the order of the trial court, the same was dismissed, on which, the applicant has come to this court with this petition.

4. Shri R.L.Arhia, counsel for the applicant, after taking me through the

papers placed on the record along with the averments of the petition as well as the impugned orders of the trial court and the revisional court, argued hat on proper appreciation of the evidence recorded as before-charge evidence by the trial court, the ingredients of fraud/ cheating defined under section 415 of the Cr.P.C are not established and, in the lack of it, the charge of section 420 of the IPC is not sustainable against the applicant. In support of such argument, he also referred the averments of the complaint as well as the deposition of the witnesses recorded as before charge evidence. He also said that looking to the nature of the transaction, it was a civil dispute for which the trial court as well as the revisional court, could not have permitted the respondent to prosecute the applicant and misuse the provisions of criminal law. He also placed his reliance on the reported decisions of the Apex Court in the matter of *Suresh Vs. Mahadevappa Shivappa Danannava* and another- AIR 2005 SC 1047 and in the matter *Inder Mohan Goswami and another Vs. State of Uttaranchal* and others- AIR 2008 SC 251 and prayed for setting aside the impugned orders and discharge the applicant from the above-mentioned charge by dismissing the impugned complaint by admitting and allowing this petition.

5. On the other hand, responding the aforesaid arguments, Shri H.S.Rajput, learned counsel for the respondent, by justifying the impugned order of the courts below said that the same being based on appreciation of the available evidence and is in consonance with the existing legal position, do not require any interference at this stage under section 482 of the Cr.P.C and prayed for dismissal of this petition.

6. Having heard the counsel at length, keeping in view their arguments, I hve (sic.have) carefully gone through the complaint as well as the deposition of the witnesses recorded as before-charge evidence, exhibited documents including the alleged copies of affidavits sworn by the respondent filed in the bank as also the alleged notice alongwith the aforesaid cited decisions of the Apex Court.

7. Before examining the matter on merits, I would like to state here that after passing the order by the trial court, the applicant herein had a remedy to challenge such order before the revisional court. The same was filed in which, on re-appreciation of the evidence, the order of the trial court was affirmed. As per settle proposition of the law, under the garb of section 482 of the Cr.P.C, the litigant like the applicant could not be permitted to prosecute the

second revision when, in the first revision, the factual matrix of the impugned case had already been considered in accordance with the existing law. Apart this, the order passed by the revisional court could be interfered under section 482 of the Cr.P.C only when some apparent error of law or illegality is found to be committed by the revisional court and if the revisional court has passed the order under its vested jurisdiction then there is no scope to interfere in such order under section 482 of the Cr.P.C. So, in such premises, I have not found any circumstance in the case at hand to interfere in the order of revisional court affirming the order of the trial court framing the charge of section 420 of the IPC against the applicant.

8. Coming to consider the case of the applicant on merits, keeping in view the arguments advanced by the counsel, on perusing the papers placed on record, it is apparent that the impugned case has been filed by the respondent as private complaint under section 200 of the Cr.P.C. Thereafter, statement of the complainant as well as her witnesses under section 200 and 202 of the Cr.P.C were recorded and on appreciation of the same, the cognizance of the aforesaid offence was taken against the applicant. After his appearance under the existing legal position, the beforecharge evidence was recorded by the trial court. In such evidence, the opportunity of cross-examination was extended to the applicant. In such evidence various documents including the aforesaid affidavit and notice were placed and exhibited on record.

9. On going through the recorded depositions of before-charge evidence and exhibited documents, I have found sufficient evidence against the applicants to show the prima facie ingredients of the alleged offence defined under section 415 and made punishable under section 420 IPC. Therefore in view of availability of such prima facie circumstance against the applicant for committing the aforesaid offence at the stage of framing the charge, the trial court or the revisional court or this court has not to consider the position whether ultimately the case will be culminated into conviction or not, the court has to consider only the prima facie circumstance for framing the charge and the same is available in the matter. So, at this stage, I am not inclined to discharge the applicant in the matter. Pursuant to it, the impugned order of the revisional court as well as the trial court deserves to be affirmed.

10. So far the case law cited on behalf of the applicant are concerned, the case of *Suresh* (supra), is concerned, such case was decided taking into

consideration the initial stage of the private complaint in which the only statement under section 200 and 202 of the Cr.P.C was recorded and on appreciation of such evidence even at the stage of SLP, the prima facie ingredients of the alleged offence was not found to be established and in such premises, such complaint was quashed which is not the situation in the case at hand as stated above.

11. So far the other case law in the matter of *Inder Mohan Goswami* is concerned, the same is distinguishable on facts from the facts of case at hand and in view of the aforesaid discussion, the same is not helping to the applicant herein. Although this court did not dispute the principle laid down by the Apex Court in the above mentioned cited case but the same are neither applicable nor helping to the applicant in the present matter.

12. In view of the aforesaid discussion, this petition, being devoid of any merit, by affirming the impugned order, the same is hereby dismissed. However, it is made clear that whatsoever observation or finding made by the courts below in the orders impugned or by this court in the present order shall not come in the way of the applicant in taking the appropriate defence in further trial of the case which is to be proceeded after framing the charge.

Petition dismissed.

I.L.R. [2014] M.P., 1436
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice U.C. Maheshwari
M.Cr.C. No. 14775/2012 (Jabalpur) decided on 20 March, 2013

DESHRAJ ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Quashing of FIR and investigation - Kidnapping **- Respondent No. 2 herself filed affidavit and stated that she voluntarily came and accompanied accused - After attaining maturity they got married - Marriage certificate produced - They also blessed with a son - They are leading happy family life - Held - No fruitful purpose would be solved in any case if the charge sheet is filed - To protect the life of the parties the impugned FIR and its entire investigation proceedings is quashed. (Paras 11-12)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – प्रथम सूचना रिपोर्ट एवं अन्वेषण को अभिखंडित किया जाना – व्यपहरण – प्रत्यर्थी क्र. 2 ने स्वयं शपथपत्र प्रस्तुत कर कथन किया कि वह स्वेच्छापूर्वक आयी थी और अभियुक्त के साथ रही – वयस्कता प्राप्त करने के पश्चात उन्होंने विवाह किया – विवाह प्रमाण पत्र प्रस्तुत – उन्हें पुत्र भी हुआ – वे सुखी पारिवारिक जीवन बिता रहे हैं – अभिनिर्धारित – किसी स्थिति में कोई लाभदायक प्रयोजन सफल नहीं यदि आरोप पत्र प्रस्तुत किया गया – पक्षकारों के जीवन की रक्षा के लिये, आक्षेपित प्रथम सूचना रिपोर्ट एवं उसकी संपूर्ण अन्वेषण कार्यवाही अभिखंडित।

Cases referred :

2006 CR.L.J. 4287, 1993 CR.L.J. 3825, 2009 CR.L.J. 1930, 1992 (Suppl.) SCC 715.

Manish Awasthy, for the applicant.
R.P. Tiwari, G.A. for the non-applicant/State.
Sharad Singh, for the prosecutrix.

ORDER

U.C. MAHESHWARI, J. :- The applicant Deshraj as well as the prosecutrix Babli along with their child Jatin Bansal aged 1 ½ years, are present in person, identified by their respective counsel.

Heard on IA No.6622/13 an application on behalf of the applicant to implead the aforesaid Babli as respondent No.2 in the petition. Such application has been filed in compliance of some earlier direction of this court dated 15.3.13.

On consideration, such IA is allowed and the applicant's counsel is directed to implead the name of said Babli as respondent No.2 on the record.

With permission of the court such name has been incorporated as respondent No.2 on the record by the applicant's counsel. The same is certified accordingly.

Also heard on IA No.6265/13 an application on behalf of the applicant to place the annexed affidavit of respondent No.2 Babli on record.

For the reasons stated in it, such document appears to be relevant with the matter,hence by allowing the IA, such affidavit is taken on record.

State counsel submits that he is under receipt of the case diary.

Looking to the nature of the case and the question involved in the petition as also in view of availability of the case diary, instead to hear the same on the question of admission, with the consent of the parties, this petition is heard for final adjudication.

1. The applicant, alleged accused has filed this petition under section 482 of the Cr.P.C for quashment of the FIR registered as Crime No.750/09 against him at police station Cantt, Sagar for the offence punishable under section 363 and 366 of the IPC. As alleged, he had kidnapped the respondent No.2 Babli in her age of below 18 years without consent of her natural guardian, the parents, with intention to perform the marriage and physical relations with her. Before hearing the arguments of the counsel of the parties, I deem fit to verify the averments of the petition as well as avermetns of the aforesaid affidavit of Babli respondent No.2.

2. On asking the applicant with respect of the averments of the petition, he categorically stated that the petition has been drafted at his instructions as well as instructions of his wife Babli/respondent No.2. He also admitted that he got married with Babli on dated 10.10.2010 at some Shiv Temple, A-block, Shastri Nagar, Ghaziabad and in that connection some Hindu Marriage Bureau of Gaziabad has also given them a marriage certificate dated 8.4.2011 (Annx.P-4) which certifies that aforesaid marriage had taken place on the aforesaid date according to the record of their institution. He also stated that subsequent to aforesaid marriage, they have been blessed with a son, namely, Jatin Bansal on dated 5.7.11. His birth certificate is placed on the record as Annex.P/5. He further said that he got married with respondent No.2, contrary to the wish of their parents and other family members that is why after leaving their native place by both of them to perform the marriage, the father of respondent No.2 lodged a missing person report (Annx.P/1) at Police Station Cantt. Sagar on dated 24.10.2009 and during the course of its inquiry, the impugned crime No.750/09 (Annx.P/2) was registered on dated 10.11.09 against him and some other co-accused for the offence under section 363 and 366 of the IPC. He also argued that according to the school record of respondent No.2, she was aged 17 years, six months and eight days on the date when she left her parental home but on the date of marriage 10.10.2010, she became major and got married with him in accordance with the Hindu rites and rituals, as stated above.

3. Subsequent to aforesaid on verification from Babli/respondent No.2

present in person along with the aforesaid child, namely, Jatin Bansal, she categorically stated that she voluntarily came and went with the applicant Deshraj and after attaining the age of 18 years, with her own wish, got married with him on aforesaid date and manner stated by applicant and since the date of marriage they are residing together happily as husband and wife. Out of such wedlock, they have also been blessed with the child, namely, Jatin Bansal. She further stated that initially she wanted to marry with the applicant but her parents were not prepared so she went with the applicant and after attaining the age of 18 years, performed the marriage with him. She also verified the aforesaid date of their marriage and date of birth of their child. She further stated that her parents were not prepared to marry her with the applicant and that is why after leaving the home voluntarily by her, her father lodged the aforesaid missing person report with the police and on its inquiry, the above-mentioned offence was registered against the applicant. She further stated that if the impugned FIR and criminal case is not quashed and applicant is taken in custody and prosecuted then in that circumstance, her life along with her child shall be destroyed within a very shorter period from the date marriage and in that situation, she and her child has to face the dire consequences and their future shall become dark and prayed to allow this petition with appropriate direction to quash the FIR and its entire investigation proceedings.

4. In view of the aforesaid verification, it has been established before the court that on the date when respondent No.2 accompanied voluntarily with the applicant, she was aged 17 years six months and eight days but subsequently she became major and got married with the applicant as stated above. In such premises, it appears that in continuation of the love affairs between the applicant and respondent No.2, by the time, the same has been culminated into marriage and further they have been blessed by the son and now they are living happily in their family but due to aforesaid missing person report on which the impugned crime has been registered by the police for the offence of section 363 and 366 of the IPC, their life have come in difficulty and if the investigation of said crime along with the FIR is not quashed till the extent of applicant then the future of their family would be destroyed. In such premises, the present petition appears to be bonafide, genuine and in order to save their life, this court has to pass the appropriate order.

5. After aforesaid verification, on asking the applicant's counsel to make his submission, on which, after taking me through the papers placed on the

record and the aforesaid facts as stated by the parties themselves, by placing reliance on a decision of the Allahabad High Court in the matter of *Mohan Mahali and another Vs. State of U.P.* And another-2006 Cr.L.J-4287 and in the matter of *Krishna Kumar and others Vs. State of U.P.* And others-1993 Cr.L.J-3825, the division bench decision of Gauhati High Court in the matter of *Mrs. Shania Rahman Choudhary Vs. State of Assam* and others-2009 Cr.L.J.-1930 and in the matter of *Sangita Rani alias Mehnaz Jahan Vs. State of U.P.*-1992 (Suppl). Scc-715, prayed for quashment of the aforesaid FIR as well as its investigation by admitting and allowing this petition.

6. Counsel of respondent No.2 has supported the aforesaid arguments of the applicant's counsel and prayed to quash the impugned FIR by allowing this petition.

7. Shri R.P.Tiwari, learned GA for the respondent/State, with the assistance of the case diary said that initially on the information of Vinod Ahirwar, father of respondent No.2 Babli, a missing person report (Annex.P/1) was registered against the applicant on 24.10.09 and during its inquiry the Crime No.750/09 (Annex.P/2) was registered against the applicant on 10.11.2009 for the offence punishable under section 363 and 366 of the IPC. By referring some papers of the case diary, he further said that on the date of the offence, respondent No.2 Babli was aged below 18 years and the applicant, with intention to get marry with her, took away her without the consent of her natural guardians, the parents, and, in such premises, he has committed the offence of section 363 and 366 of the IPC. He fairly conceded that subsequent to such incident, the applicant got married with respondent No.2 and out of such wedlock, they have been blessed with the child, namely, Jatin Bansal and now they are residing happily in their family. In response of some query of the court asking whether the applicant took away respondent No.2 from her residence or she herself came and accompanied him, on which, he submits that on the date of the incident respondent No.2 went to attend the school from where she did not return to home and, as per available record, she herself accompanied with the applicant and went away from the native place to some other place and thereafter they came back after getting married.

8. Keeping in view the aforesaid arguments, I have carefully gone through the papers placed on the record along with the averments of the petition as

well as the affidavits of the parties so also the aforesaid cases cited on behalf of the applicant. Before giving the findings with respect of the case at hand, I would like to reproduce the concerned abstract of the aforesaid decisions cited by the applicant's counsel. In the matter of *Mohan Mahali* (supra), the Allahabad High Court has held as under :-

> "8. The learned counsel for the applicant stated in the court that both Shanker Mahali and Anita are residing with the accused applicants as their son and daughter-in-law and children have also been born out of this wedlock during the period of last 5 ½. Under these circumstances when the parties have settled the entire dispute amicably and they are residing together with their progeny happily and when the so-called minor girl Anita allegedly aged 15 years in 2001 does not want to say anything against the accused persons even after obtaining majority, no fruitful purpose is going to be served by pursuing the case further under sections 363/366 of the IPC and it is in the interest of justice to drop those proceedings.
>
> 9. The application under section 482 Cr.P.C is, therefore, allowed and the proceedings of criminal case No.1298 of 2005 *State Vs. Mohan Mahali* under section 363 and 366 IPC pending in the court of Special Chief Judicial Magistrate Varanasi are hereby quashed."

In the matter of *Mrs. Shania Rahman* (supra), the Gauhati High Court has held as under :-

> "11. In view of the statement made by the petitioner before us today that she voluntarily got married to Nazim Ahmed leaves us with one option that her right to live wherever she likes cannot be interfered with and there is absolutely no reason to allow Hatigaon P.S 105 of 2008 under section 366/34 IPC pending against Md. Nazimuddin and others, to continue any more to multiply litigations.
>
> 12. In the facts and circumstances of the case, we deem it appropriate that the FIR filed in connection with kidnapping of the petitioner, which was registered as Hatigaon PS case

No.105/08 is required to be quashed and accordingly it is quashed."

In the matter of *Krishna Kumar* (supra), the Allahabad High Court has held as under :-

"5. The criminal case under section 363/366 IPC arising out of the FIR dated 3.3.93 and the Habeas Corpus petition No.13325 of 1993 can be conveniently decided together only on the question that Rachna Agarwal is whether a major lady and she is under illegal detention of any other person specifically illegal detention by Krishna Kumar. We consider it necessary and appropriate to record her statements in Chamber after giving her more than 2 hours' time for composing herself so that she may make a free independent statement before the Court. We have recorded her statement in presence of the learned counsel for the parties. The father of Rachna Agarwal, namely, Ram Autar Agarwal appeared before us and identified that the girl Rachna Agarwal appearing before this court is the same girl and his daughter. We are, thus, satisfied that the same person makes the statement before us. In the statement Rachna Agarwal categorically stated that she is major, aged about 22 years. She stated that she left her parental home out of her free will without any coercion, allurement, inducement or deception from any one. She stated to have left her parental home on 22nd of February, 1993 with Krishna Kumar, whom she stated to have married according to Hindu rites. An application for registering the marriage was also submitted before the Registrar Hindu Marriages Act and an application showing the entertainment of the application for registration of the marriage under Hindu Marriage Act is on record. By supplementary affidavit, it has been shown that the marriage was also registered on 22.2.93. After recording the statement of Rachana Agarwal, we are satisfied that she is a major girl, she is not under any type of illegal detention, she also stated that she is happily staying with Krishna Kumar and parents-in-law at

her husband's place. The family members of her husband are treating her with all love, affection and respect. In this circumstances, we consider it that no useful purpose would be served if investigation is allowed to continue arising out of the FIR noted above. The Supreme Court in similar circumstances in 1992 SCC (cri) 391 *Sangita Rani (Smt) alias Mehraj Jahan Vs. State of U.P* quashed the FIR and investigation. We consider it a fit case in which the FIR dated 3.3.93 Crime No.109 of 1993 under section 363/366 IPC, P.S. Khurja Nagar Dist. Bulandshar is liable to be quashed against all the accused persons, named in the FIR. No further investigation is further called for."

The aforesaid decision of the Allahabad High Court is based on the decision of the Apex Court in the matter of *Sangita Rani alias Mehnaz Jahan Vs. State of Uttar Pradesh*-(1992) Suppl. SCC 715.

9. In view of the aforesaid decision of different High Courts, on examining the case at hand, I have found sufficient circumstance in the matter to quash the FIR of the impugned case along with its entire investigation.

10. True it is that on the date when respondent No.2 Babli went with the applicant she was the age of 17 years six months and 8 days but it is apparent from the case diary as well as the submission of the State counsel that the applicant did not visit the residence of the parents of respondent No.2 to bring her with him. She voluntarily came and accompanied him and thereafter they went to some other place where only after attaining the age of maturity i.e more than 18 years by respondent No.2 on the above mentioned date, the applicant got married with her in some temple stated above for which the certificate of marriage was also issued by some Hindu institution of Gaziyabad Annex.P/4 and thereafter they are residing with each other happily in their family and out of such wedlock, they have also been blessed with the son, namely, Jatin Bansal whose birth certificate is placed on record Annex.P/5. The same has been issued by appropriate authority. In such certificate, the name of father is mentioned as Deshraj Bansal and name of mother is mentioned as Babli Bansal. It is settled proposition of the law when the applicant himself did not visit and took away the prosecutrix with him from lawful custody of her parents then he could not be deemed to be the accused for the offence of kidnapping.

instance of the applicant a proceeding under Section 9 of the Hindu Marriage Act for restitution of Conjugal Rights was filed against the applicant as Civil Original Suit No. 43-A/02 in the Court of District Judge, Katni. The same was decreed in favour of the applicant, vide judgment, (Annexure P-1), instead that the respondent did not come and reside with the applicant and subsequent to it, she had filed an application under Section 125 of the Cr.P.C. in the Court of Judicial Magistrate, Ist Class, Katni as MJC No. 110/05. The same was dismissed, vide order dated 5.9.2006, (Ann. P-2) holding that she does not have any sufficient cause for residing separately from the applicant.

3. On filing the revision by the respondent against such order, (Ann. P-2) before the Sessions Judge as Criminal Revision No. 149/06, on consideration, the IInd Additional Sessions Judge, Katni vide order dated 28.2.2007 by affirming the order of the trial court, dismissed such revision and thereafter no further petition under Section 482 of Cr.P.C. was filed on behalf of the respondent. Subsequent to aforesaid orders near about after more than one year, the respondent herein filed again fresh application under Section 125 of Cr.P.C. in the subordinate court for appropriate direction to the applicant to pay her the sum of the monthly maintenance. In such application, it is stated that in pendency of the aforesaid criminal revision, some compromise had taken place between the parties. Pursuant to that, in changed circumstances, she is entitled for maintenance. In continuation counsel said that in the available scenario such subsequent application of the respondent filed under Section 125 of Cr.P.C. in view of earlier orders could not be entertained. As such the averments of alleged compromise or settlement were not stated anywhere by the revisional court, either in its order, (Ann. P-2) or other place of such revision, (Ann. P-2). By referring some papers, he further said that the respondent being working as Aganwadi Karyakarta in some village is getting Rs.3000/- per month and in such premises, she is not entitled to get any sum of maintenance from the applicant. By referring Section 125 of Cr.P.C., applicant's counsel said that in the lack of believable prima facie evidence in the second application, as per requirement of Section 125 of Cr.P.C., such application could neither be entertained nor adjudicated on merits and prayed to quash the aforesaid second application of the respondent filed under Section 125 of Cr.P.C. by admitting and allowing this petition.

4. On the other hand, responding the aforesaid arguments, counsel for respondent submits that there is no bar under Section 125 of Cr.P.C in change

circumstances to file the second application. He fairly conceded that an application under Section 125 of Cr.P.C filed earlier by the respondent has been dismissed in the manner, as stated by the applicant's counsel. He further said that subsequent to dismissal of earlier application in the changed circumstances, fresh application could have been filed by the respondent, the same is not barred under law, even otherwise in any case such respondent's application could not be dismissed at the initial stage unless evidence is recorded and appreciated by the court. The case of the respondent could not be thrown away at the initial stage without examining the alleged changed circumstances of the matter and prayed for dismissal of this petition.

5. Having heard the counsel, keeping in view the arguments advanced, I have carefully gone through the papers placed on record alongwith the proceedings of Section 125 of Cr.P.C., so also aforesaid earlier orders referred by the applicant's counsel. True it is that on earlier occasion an application under Section 125 of Cr.P.C. filed on behalf of the respondent was dismissed by the trial court and such order of the trial court was affirmed by the revisional court. It is apparent from the record that impugned second application has been filed by mentioning some changed circumstances. I would like to mention here that in the impugned application, it is stated by the respondent that subsequent to dismissal of earlier application, some compromise had taken place between the parties and pursuant to that, on arising the occasion to get the sum of maintenance from the applicant, the second application has been filed. I am of the considered view that said fact could not be disbelieved at the initial stage and before recording the evidence and appreciation of the same by the court. It is apparent fact on record that after filing the impugned application no such evidence of either of the parties has been recorded by the trial court.

6. It is also settled position of law that the principle of res judicata is not applicable to the criminal proceeding including the proceeding under Section 125 of the Cr.P.C. In any case the impugned application under Section 125 of Cr.P.C. could not be treated to be second time prosecution of the applicant by the respondent. It is needless to state here that the provision of Section 125 of Cr.P.C has been enacted by the Legislature for the welfare of weaker section of the society like women, children and parents, who are unable to maintain themselves and if their applications are thrown away without making any enquiry on merits of the same, then till the extent of such parties, the

process of justice would be failed. So in such circumstances, without recording the evidence and examining the case on merits, I do not find fit to quash the application of the respondent filed under Section 125 of Cr.P.C. by invoking the power of this court enumerated under Section 125 of the Cr.P.C. Consequently this petition being devoid of any merits is hereby dismissed at this stage. However, it is observed that the applicant shall be at liberty to raise all the objections and grounds stated in the petition as well argued by him before the trial court at the appropriate stage of recording the evidence in defence of the applicant in the impugned case.

7. The petition is dismissed as indicated above with aforesaid observation, direction and liberty to the applicant.

C c as per rules.

Petition dismissed.

I.L.R. [2014] M.P., 1448

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Ajit Singh & Mr. Justice B.D. Rathi

M.Cr.C. No. 7678/2013 (Jabalpur) decided on 27 August, 2013

SHISHIR KUMAR SINHA ...Applicant

Vs.

CENTRAL BUREAU OF INVESTIGATION ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 482, 91 - **Application u/s 91, Cr.P.C. was filed requiring the production of letter sent for obtaining sanction and call detail record of the two mobiles seized from the complainant - Held - Whether any particular document should be summoned or not, is essentially in the discretion of the trial court - Trial court is not bound to requisition the same on the application of the accused except for a very good reason - Petitioner can himself call details from his service provider and produce the same in defence - It is for the prosecution to determine the manner in which it wants to prove its case. (Paras 6 to 7)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 482, 91 – मंजूरी अभिप्राप्त करने हेतु भेजे गये पत्र के प्रस्तुतीकरण एवं शिकायतकर्ता से जब्त दो मोबाईल पर हुए वार्तालाप का विस्तृत विवरण प्रस्तुत किये जाने की अपेक्षा करते हुए द.प्र.सं. की धारा 91 के अंतर्गत आवेदन प्रस्तुत किया गया था – अभिनिर्धारित

– क्या किसी विशिष्ट दस्तावेज को बुलाया जाना चाहिये या नहीं, यह आवश्यक रुप से विचारण न्यायालय के विवेकाधिकार में है – विचारण न्यायालय बिना प्रबल कारण के, अभियुक्त के आवेदन पर उसे मंगवाने के लिये बाध्य नहीं – याची स्वयं उसे सेवा प्रदान करने वाले से विवरण बुला सकता है और बचाव में उसे प्रस्तुत कर सकता है – अभियोजन को निर्धारण करना होता है कि वह अपने प्रकरण को किस ढंग से साबित करना चाहता है।

Ajay Mishra with *Gaurav Tiwari,* for the applicant.
Vikram Singh, 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"), challenging the order dated 29.5.2013 passed by the Special Judge (for CBI cases), Jabalpur in Special Case No.01/2013, whereby the application filed by the petitioner, under Section 91 of the Code, was rejected.

2. Brief facts of the case are that on 25/11/2012 complainant Kaustubh Verma, Proprietor of "Skolars" Coaching Classes, 428, New Adarsh Nagar, Jabalpur, lodged a written complaint against the petitioner, who at the relevant time was posted as Inspector, Preventive Branch, Service Tax, Central Excise, Jabalpur, to the effect that two months back, petitioner had visited his Coaching Centre and apprised him to obtain service tax registration, as well as, to file regular returns. After few mobile conversations between them, in the first week of November 2012, the petitioner again contacted the complainant and demanded a total bribe of Rs. 2 lacs threatening that on failure to pay the same, a service tax raid would be conducted at the coaching premises by Service Tax Department of Central Excise. Pursuant to the said information, a trap was laid and co-accused Deepak Dwivedi was caught red handed taking bribe of Rs.50,000/- on behalf of the petitioner. During investigation, conversations between the two were also recorded.

3. Learned counsel for the petitioner submitted that the letters sent for obtaining sanction from the CBI were not filed along with the charge-sheet. Moreover, call detail records of the two mobile numbers seized from the possession of complainant for the period 1/7/12 to 31/1/13 were also necessary for effective adjudication of the case to establish the conversations between the petitioner and the complainant. According to him, call details of two

independent witnesses viz. Kundan Kumar Mishra and Piyush Prakash, were also necessary in the facts and circumstances of the case.

4. Learned Standing Counsel opposed the prayer and submitted that no interference was warranted under the inherent powers with the impugned order.

5. A bare perusal of the impugned order reveals that the application was rejected on the ground that details of calls between complainant and the petitioner for the relevant period i.e. 1/11/2012 to 25/11/12 were already filed with the charge-sheet and call details of indepenent witnesses were not necessary as only the conversation taken place between petitioner and the complainant had to be looked into. The Court below also held that details of calls between the complainant and the petitioner for the period 1/7/12 to 31/1/13 were not relevant for the adjudication of the case.

6. Having regard to the arguments advanced by the parties, impugned order, charge-sheet and other documents available on record were perused.

Relevant Section 91(1) of the Code reads as under:-

> "Whenever any Court or any officer in charge of a olice station considers that the production of any document or other thing is necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order."

From a bare reading of the above provision, it is clear that whether a particular document should be summoned or not, is essentially in the discretion of the trial Court and the trial Court is not bound to requisition the same on the application of the accused. Except for a very good reason, the High Court should not interfere with the discretion (See *Asst. Customs Collector, Bombay Vs. L.R. Melwani* (AIR 1970 SC 962).

7. Besides this, the petitioner can always requisition his call details from his Service Provider for the period in question and produce the same in defence, as he used to himself receive the calls on his Mobile. Further, to prove that the independent witnesses were in constant touch with the CBI and were pet

witnesses, he can lead some other evidence as well, in defence and cross-examine the said witnesses. So far as documents forming basis of sanction are concerned, it is for the prosecution to determine the manner in which it wants to prove its case and the petitioner is always entitled to get the benefit, in accordance with law, out of lapse, if any, in the order of sanction.

8. The reasons given by the learned trial Court in support of its order are good reasons

9. The petition, therefore, fails and is, accordingly, dismissed with no orders as to costs.

10. Copy of the order be sent to the trial Court for information and compliance.

Petition dismissed.

I.L.R. [2014] M.P., 1451
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Subhash Kakade
M.Cr.C. No. 4714/2014 (Jabalpur) decided on 13 May, 2014

JITENDRA SINGH & ors. ...Applicants
Vs.
STATE OF M.P. & anr. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Penal Code (45 of 1860), Sections 498-A, 294, 506, 34 & Dowry Prohibition Act (28 of 1961), Section 3/4 - Inherent jurisdiction - Quashing FIR - **Quashment on the ground of compromise - Held - Settlement arrived at between the parties in form of marital settlement agreement (Annex. A/2) is a sensible step that will benefit the parties, give quietus to the controversy and rehabilitate and normalize the relationship between them - In light of compromise between the parties for offences related to matrimonial disputes chances of recording of conviction against the petitioners are totally bleak and the entire exercise of trial is destined to be exercise of futility - The continuation of criminal proceedings would tantamount to abuse of process of law. (Paras 5 & 9)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, दण्ड संहिता (1860 का 45), धाराऐं 498–ए, 294, 506, 34 व दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 3/4 – अंतर्निहित शक्तियां – प्रथम सूचना रिपोर्ट को अभिखंडित किया जाना

– समझौते के आधार पर अभिखंडित किया जाना – अभिनिर्धारित – पक्षकारों के बीच वैवाहिक समझौता करार (संलग्नक ए/2) के रुप में हुआ समझौता एक उचित कदम है जो पक्षकारों को लाभ पहुंचायेगा, विवाद को शांत करेगा और उनके बीच संबंधों को सामान्य करेगा – वैवाहिक विवादों से संबंधित अपराधों के लिये पक्षकारों के बीच के समझौते के आलोक में, याचीगण के विरुद्ध दोषसिद्धि अभिलिखित किये जाने की संभावना कम है और विचारण की संपूर्ण कार्यवाही, व्यर्थ कार्यवाही होगी – दाण्डिक कार्यवाही को जारी रखना, विधि की प्रक्रिया का दुरुपयोग होगा।

Cases referred :

2012 AIR SCW 5333, (1999) 2 SCC 213, (2008) 15 SCC 667, 2012 CR.L.R. (SC) 69.

Akhileshwar Shrivastava, for the applicants.
A.R. Singh, P.L. for the non-applicant No. 1/State.
Kuldeep Singh, for the complainant/non-applicant No. 2.

ORDER

SUBHASH KAKADE, J. :- This petition under Section 482 Cr.P.C. has been filed by the petitioners for quashment of the FIR registered as Crime No.249/13 at Police Station- Mahila Thana, Bhopal for offence punishable under Sections 498-A, 294 and 506,34 of IPC and Sections 3/4 of Dowry Prohibition Act.

2. Petitioner no.1 is the husband of respondent no. 2, their marriage was performed on 14.12.2007 from Bhopal according to Hindu custom and other applicants are the in-laws of the respondent no.2.

3. Certain unfortunate incidents relating to matrimonial matters have dragged the parties to this Court. The incident took ugly turn which resulted in lodging of the aforesaid FIR by respondent no.2. Now, the parties have settled all their disputes and want to compromise the matter. Copy of the Marital Settlement Agreement (Annexure A/2) has also been filed, which was filed by the parties before the learned trial Court along with the petition of compromise. In view of the compromise, I do not wish to narrate the facts of the case in detail.

4. As per the order of this Court willingness and consent of the parties have been recorded before Registrar (J-I). The applicants Jitendra, Kusum Singh, Ramnarayan Singh Gaur, Narendra Singh, Raveendra Singh, Kajal

Pawar, Vandana Singh and Puja Singh are present in person before this Court also and are identified by their counsel Shri Akhileshwar Shrivastava. Respondent no.2 Smt. Avantika Singh along with daughter Anushka Singh also present in person and she is identified by her counsel Shri Kuldeep Singh. Both parties i.e. applicants and respondent no.2 mentioned above submit that they are ready and willing to resolve their disputes voluntarily and by free consent. They have expressed in clear unequivocal terms that they understand the Marital Settlement Agreement Annexure A-2 and are executing their part mentioned in the settlement. In the light of the aforesaid factual position it is apparent that the applicants and the respondent have entered into compromise voluntarily and without any fear, undue influence or pressure.

5. The question which now remains to be answered is whether since some of the offences alleged in the FIR are not compoundable, the FIR could be quashed.

6. It is apparent from perusal of FIR and other related documents that petitioners and respondent no.2 are well educated and respectable citizens. It is pertinent to mention here that dispute between the parties is of private nature and having no adverse effect to others.

7. The Apex Court in the case of *Gian Singh vs. State of Punjab* and another 2012 AIR SCW 5333 considered the relevant provisions of the Code and concluded as under :-

> "The position that emerges from the above discussion can be summarised thus:
>
> the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be

prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative,the High Court shall be well within its jurisdiction to quash the criminal proceeding".

8. Reference in this regard may be made to the decisions of Apex Court in *Ram Lal and another vs. State of J & K* (1999) 2 SCC 213 , *Ishwar Singh vs.*

State of M.P. (2008) 15 SCC 667 and recently ruled by the Apex court in the case of *Pappu and others Vs. Radhika* and Anr. (2012 Cr.L.R (S.C.) 69).

9. Since the parties had buried the hatchet by amicably settling their disputes, this Court could allow the matter to be compounded. In the totality of the circumstances, I am of the view that the settlement arrived at between the parties in form of Marital Settlement Agreement (Annexure A/2) is a sensible step that will benefit the parties, give quietus to the controversy and rehabilitate and normalize the relationship between them. In light of compromise between the parties for offences related to matrimonial disputes chances of recording of conviction against the petitioners are totally bleak and the entire exercise of trial is destined to be exercise of futility. The continuation of criminal proceedings would tantamount to abuse of process of law.

10. In the above facts and circumstances of the case the answer of question giving in affirmative and resultantly the FIR registered as Crime No.249/2013 dated 18.12.2013 registered at Mahila Thana, Bhopal under Sections 498-A,506,34,294 of IPC and Section 3/4 of Dowry Prohibition Act and all consequential proceedings arising from it are hereby quashed. The petitioners are acquitted of the offences punishable under Sections 498-A, 294 and 506,34 of IPC and Sections 3/4 of Dowry Prohibition Act. Their bail bonds and surety bonds stand discharged.

The petition is allowed and disposed of accordingly.

Order accordingly.

I.L.R. [2014] M.P., 1455

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice N.K. Gupta

M.Cr.C. No.14466/2013 (Jabalpur) decided on 16 May, 2014

M.L. GAUR & anr. ...Applicants

Vs.

STATE OF M.P. ...Non-applicant

***Penal Code (45 of 1860), Sections 406, 420 & Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Quashing of trial proceeding* - Applicants, who were the office bearers of the Samiti alleged to have sold the plots - Mortgaged with Municipal Corporation without getting their redemption - Neither any loss was caused to the**

Municipal Corporation nor to the purchaser - Sale deed were also executed and possession was also handed over to them - Plots were also redeemed subsequently - It was also not shown that the plots were sold in lesser amount - Held - Applicants had no dishonest intention - As they got the plots redeemed subsequently - If a cheating was intended by the applicants, then there must be some unlawful gain to the applicants and some unlawful loss to any one involved in the transaction - Prima facie no offence u/s 420 is made out- Since by the transaction no loss was caused to the Samiti and the plots were obtained by the members of the society by sale - Then prima facie it cannot be said that the applicants committed any misappropriation of the property entrusted to them - No offence of breach of trust is made out - Petition is accepted. (Paras 7,8,9 & 10)

दण्ड संहिता (1860 का 45), धाराऐं 406 व 420 व दण्ड प्रक्रिया संहिता, 1973,(1974 का 2), धारा 482 – विचारण कार्यवाही को अभिखंडित किया जाना – आवेदकगण जो कि समिति के पदाधिकारी थे, ने कथित रुप से भूखंडों का विक्रय किया – उसका मोचन किये बिना नगरपालिका निगम के साथ बंधक किया – न तो नगरपालिका निगम को कोई हानि कारित हुई और न ही क्रेता को – विक्रय विलेख भी निष्पादित किया गया और उन्हें कब्जा भी सौंपा गया – तत्पश्चात भूखंडों का मोचन भी किया गया – यह भी नहीं दर्शाया गया कि भूखंडों को कम रकम पर विक्रय किया गया – अभिनिर्धारित – आवेदकगण का बेईमानी का आशय नहीं था – जैसा कि उन्होंने तत्पश्चात भूखंडों को मोचन कराया था – यदि आवेदकगण का आशय छल करना था तब आवेदकगण को विधिविरुद्ध कोई लाभ होना चाहिए और संव्यवहार में शामिल किसी को विधिविरुद्ध कोई हानि होनी चाहिए – प्रथम दृष्ट्या धारा 420 के अंतर्गत अपराध गठित नहीं होता – चूंकि संव्यवहार द्वारा समिति को कोई हानि नहीं हुई है और विक्रय द्वारा सोसायटी के सदस्यों ने भूखंड अभिप्राप्त किये हैं – तब प्रथम दृष्ट्या यह नहीं कहा जा सकता कि आवेदकगण ने उन्हें सौंपी गयी सम्पत्ति का कोई दुर्विनियोग कारित किया – न्यास भंग का अपराध गठित नहीं होता – याचिका स्वीकार की गई।

Cases referred :

M.Cr.C. No. 2356/2013 decided on 01.03.2013, (2009) 11 SCC 424, (2008) 8 SCC 413, 1992 AIR SCW 237.

Anil Lala, for the applicants.

Prakash Gupta, P.L. for the respondent/State.

ORDER

N.K. Gupta, J. :- The applicants have preferred the present petition under Section 482 of Cr.P.C. to quash the trial proceeding of the ST No.179/2013 pending before the 11th Additional Sessions Judge, Bhopal for the offence under Sections 406, 420 read with Section 34 of IPC.

2. The brief facts of the case are that the applicants were the office bearers of the Kamdhenu Grih Nirman Sahkari Sanstha Maryadit, Bhopal (hereinafter referred to as **"Samiti"**) at the relevant period. The Samiti mortgaged some of the plots including the Plot No.84 and 86 to the Municipal Corporation Bhopal and during the period of mortgage the applicants sold such plots to one Vandana Chourey and Masood Hussain Jafree whereas no redemption of such plots took place prior to sale, and therefore after due enquiry the Deputy Commissioner, Cooperative Societies, Bhopal sent an FIR to the Police Station Bagh Sewania which was registered vide Crime No.24/2010 and after due investigation a charge sheet was filed.

3. I have heard the learned counsel for the parties.

4. There is no dispute that the applicants were the office bearers of the Samiti in the period when the plots No.84 and 86 were sold to Vandana Chourey and Masood Hussain Jafree. It is also admitted that at the time of sale of such plots were under mortgage to the Municipal Corporation, Bhopal and at the time of sale no redemption took place of such plots. The learned counsel for the applicants has submitted that the overt-act of the applicants may be violation of the provisions of the MP Cooperative Societies Act, 1960 (hereinafter referred to as **"Act"**) or Rules made thereunder, but according to the provisions of the Act, no offence under Section 420 or 406 of IPC could be registered against the applicants. Secondly, it is further submitted that no offence under Section 406 or 420 of IPC was constituted against the applicants. There was a clerical mistake that plots No.84 and 86 were sold to the various members of the Samiti without getting their redemption, whereas redemption of such plots took place prior to such sale. Hence the applicant M.L. Gaur had imposed fine of Rs.500/- on the Administrative Officer of the Samiti, who was dealing with sale, purchase and redemption of the plots. Hence no offence is made out. The applicants are unnecessarily facing the

trial which is pending before the Sessions Court.

5. The learned counsel for the applicants has placed his reliance upon the order dated 1.3.2013 passed by the Single Bench of this Court in M.Cr.C. No.2356/2013 *(Avdesh Raghuvanshi Vs. State of MP)* in which the petition filed under Section 482 of Cr.P.C. was accepted in the same circumstances.

6. First of all it should be considered as to whether the overt-acts of the office bearers of the Samiti fall within the category of a crime under the Act, and whether the crime of IPC can be registered or not. In that respect the judgment of Hon'ble the Apex Court in the case of *"State of Madhya Pradesh Vs. Rameshwar & others"*, [(2009) 11 SCC 424] may be perused, in which it is laid that if the overt-act of the office bearer falls within the category of IPC crime, then such crime shall be registered simultaneously. Similarly, in the case of *"M.Natarajan Vs. State by Inspector of Police SPE, CBI, ACB Chennai"*, [(2008) 8 SCC 413] Hon'ble the Apex Court took the same view that if any overt-act falls within the category of crime under the Act as well as any IPC offence, then the case may also be registered for offences committed under the IPC. Under such circumstances, in the light of the aforesaid judgments of Hon'ble the Apex Court, it would be apparent that if the overt-act of the office bearers of the Cooperative Societies falls within the purview of an offence under the Act as well as IPC offence, then the case has to be registered under the IPC also. The contention advanced by the learned counsel for the applicants cannot be accepted that the applicants were the office bearers of the Samiti and if they have done any overt-act, which is a crime, then only a complaint could be filed under the Act. If any offence under Section 406 or 420 of IPC was made out against the applicants, then certainly the prosecution could be directed for that offence.

7. Secondly, it is to be considered as to whether any offence under Section 420 or 406 of IPC is made out against the applicants or not. For the offence of cheating under Section 420 of IPC, it is for the prosecution to establish *prima facie* that a cheating as mentioned in Section 415 of IPC was done. According to the provisions of Section 415 of IPC, someone who induces another person dishonestly or fraudulently so much so that he delivers any property to that person or gives consent for the delivery of such a property. The provision explains that dishonestly concealment of facts is a deception within the meaning of that section. In the present case, it would be apparent

that the applicants did not disclose the fact that the property was mortgaged before the Municipal Corporation, Bhopal to the purchasers, and therefore they committed concealment. However, it is apparent that the various plots were mortgaged before the Municipal Corporation, Bhopal with the pretext that if the development is not done by the colonizer, then by sale of the mortgaged plots, the Municipal Corporation, Bhopal could complete the development. It is also established that such plots were mortgaged in the year 2003, and thereafter some plots were redeemed. All the plots were redeemed in three steps. Therefore initially the applicants had no dishonest intention as they got redeemed thereafter. If a cheating was intended by the applicants, then there must be some unlawful gain to the applicants and some unlawful loss to anyone involved in the transaction.

8. If the case of the Municipal Corporation, Bhopal is considered that the plots which were mortgaged with the Municipal Corporation were sold without giving intimation to the Municipal Corporation, then by the conduct of the applicants, it would be apparent that the applicants developed the colony, and therefore the Municipal Corporation released the various plots from time to time from the mortgage. The plots No.84 and 86 were also released after sometime. Under such circumstances, no loss was caused to the Municipal Corporation and intention of the applicants cannot be presumed that they cheated the Municipal Corporation, Bhopal.

9. Similarly, the purchasers received their plots and sale deeds were done in their favour. The possession was also handed over and they had no grievance with the applicants, and therefore if the plots were sold when those were mortgaged before the Municipal Corporation, Bhopal, then it may be violation of the provisions of the Act and Rules made thereunder. But it cannot be said that the applicants did any cheating with the purchasers of the plots. Thirdly, the Samiti was constituted for purchase of land and to sell plots to its members. It is not shown by the complainant that any loss was caused to the Samiti as plots No.84 and 86 were sold to the members of the Samiti when the same were under mortgage. Under such circumstances, neither any loss was caused to the Municipal Corporation, Bhopal nor to the purchasers of the plots nor to the Samiti. Hence, intention of the applicants cannot be presumed that they had a dishonest intention. Looking to the statement, given by the applicant No.1 that the transactions were done by the Manager of the Samiti and it is

also apparent that some of the plots were redeemed prior to selling of these plots, and therefore it was possible that by mistake the applicants sold the plots No.84 and 86 with the presumption that those were redeemed by the Municipal Corporation, Bhopal, and therefore it may be a matter of clerical error or violation of the various provisions of the Act and Rules made thereunder. But looking to the conduct of the applicants that redemption took place after selling of the plots, the purchasers as well as Municipal Corporation, Bhopal had no grievance against the applicants for the alleged transaction. Hence, prima facie no offence under Section 420 of IPC is made out against the applicants.

10. Similarly, it is alleged against the applicants that they committed an offence of breach of trust. It is true that the entire property of the Samiti was entrusted to the office bearers including the applicants, but object of the Samiti was to sell the plots amongst the members. The complainant could not show that if the plots were sold to the various members when those were mortgaged, then how the misappropriation has been done of the property entrusted to the applicants by the applicants. It was not shown that the applicants sold the plots in lesser amount to the purchasers or they caused any financial loss to the Samiti. If by that transaction no loss was caused to the Samiti and the plots were obtained by the members of the society by sale, then prima facie it cannot be said that the applicants committed any misappropriation of the property entrusted to them. Therefore, no offence of breach of trust is made out against the applicants.

11. The police has not registered the case for the offence under Sections 467, 468 of IPC. However, it would be apparent that the sale deeds executed in favour of the purchasers Vandana Chourey and Masood Hussain Jafree were genuine. They got the possession of the property on the basis of those sale deeds and also title of the property, and therefore those sale deeds were genuine and were executed when the property was under mortgage with the Municipal Corporation, Bhopal, and therefore it cannot be said that the applicants committed any forgery in the present case.

12. On the basis of the aforesaid discussion, *prima facie* no offence under Sections 420, 406, 467 and 468 of IPC is made out against the applicants. It is possible that the applicants have committed an offence which falls within the purview

of Section 75 of the Act, but that offence is cognizable only for JMFC and it is mentioned in Section 76 of the Act that no prosecution shall be instituted under this Act without the previous sanction in writing of the Registrar and such sanction shall not be given without giving to the person concerned an opportunity to represent his case. Therefore, it is for the Judicial Magistrate First Class to take cognizance and cognizance must be taken on the complaint with the permission of the Registrar concerned. Under such circumstances, the police could not proceed with the case for the offence under Section 75 of the Act.

13. The learned counsel for the applicants has placed his reliance upon the judgment of Hon'ble the Apex Court in the case of *"State of Haryana Vs. Bhajanlal"*, (1992 AIR SCW 237) to show the grounds when the power of this Court under Section 482 of Cr.P.C. may be invoked. The relevant grounds laid in the case are as under:

> "(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not *prima facie* constitute any offence or make out a case against the accused.
>
> (2) where the allegations in the first information report and other materials, if any, accompanying the FIR do not discloss a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
>
> (3).....
>
> (4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code."

In the light of the aforesaid judgment, if the FIR lodged by the Deputy Commissioner, Cooperative Societies is considered, then *prima facie* no offence under Sections 406 and 420 of IPC is made out against the applicants, and therefore it is a fit case in which the applicants should not be directed to

face the trial without any basis. The Deputy Commissioner, Cooperative Society made file a complaint for the offence under Section 75 of the Act after taking a sanction from the concerned authority.

14. On the basis of the aforesaid discussion, the present petition filed by the applicants under Section 482 of Cr.P.C. can be accepted. Consequently, it is hereby accepted. The registration of offence vide Crime No.24/2010 at Police Station Bagh Sewaniya is hereby quashed. Accordingly, the proceedings of ST No.179/2013 are also quashed. The trial Court is directed to drop the proceedings against the applicants.

15. A copy of this order be sent to the trial Court or information and compliance.

Order accordingly.