THE INDIAN LAW REPORTS

M.P. SERIES

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

Year-7
Vol.2

APRIL 2015 (pp. 807 to 1110) (Single Copy ₹40)

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2015

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सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 10 – नोटिस तामील होने से 90 दिन बीत जाने के पश्चात् लिखित कथन प्रस्तुत करने के अधिकार की समाप्ति – तत्पश्चात् याची ने एक पक्षीय साक्ष्य अभिलिखित किये जाने से पूर्व लिखित कथन के साथ विलम्ब हेतु माफी के लिये आवेदन प्रस्तुत किया इस प्रार्थना के साथ कि लिखित कथन को अभिलेख पर लिया जाये – इसे भी खारिज किया गया – अभिनिर्धारित – पति–पत्नि के बीच वैवाहिक मतभेद अति संवेदनशील होता हैं जिसें गुण–दोषों पर निर्णित किया जाना चाहिये और पक्षकारों के अधिकारों को गंभीर रूप से प्रभावित करने वाले तकनीकी आधारों पर अलग नहीं किया जाना चाहिये – लिखित कथन अभिलेख पर लिये जाने हेतु पुरोभाव्य शर्त के रूप में रू. 5,000/– व्यय के भुगतान के अधीन याचिका मंजूर। (रूपाली बड़कट्टे वि. सचिन बख्शी) ...863

Civil Procedure Code (5 of 1908), Order 16 Rule 7-A – Summoning and attendance of witnesses – **Closure of plaintiff's right**

to examine its witness – Held – Whenever any summons is issued to the witnesses and if the same is not received back either served or unserved then the Court is always bound to take appropriate steps to secure presence of such witnesses by issuing the fresh summons on the correct address of the witnesses or with any other appropriate order – Summons issued to the witnesses was not received back either served or unserved – Impugned order being perverse is hereby set-aside. [Adarsh Grah Nirman Sahakari Samiti Vs. Sushil Kumar] ...866

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 16 नियम 7–ए – साक्षियों को समन एवं उपस्थिति – वादी के अपने साक्षी के परीक्षण करने के अधिकार की समाप्ति – अभिनिर्धारित – जब कभी साक्षियों को समन जारी किया जाता है और यदि वह तामील अथवा अदम तामील प्राप्त नहीं होता है तब न्यायालय साक्षियों के सही पते के साथ नया समन जारी कर सकता है अथवा किसी अन्य समुचित आदेश द्वारा उक्त साक्षियों की उपस्थिति सुनिश्चित करने के लिये समुचित कदम उठाने के लिये सदैव बाध्य है – साक्षियों को जारी किये गये समन तामील अथवा अदम तामील प्राप्त नही हुये हैं – विपर्यस्त होने के नाते आक्षेपित आदेश एतद् द्वारा अपास्त। (आदर्श गृह निर्माण सहकारी समिति वि. सुशील कुमार) ...866

Civil Procedure Code (5 of 1908), Order 39 Rule 1, 2 & Hindu Succession Act (30 of 1956), Section 22 – Share – Temporary Injunction **– When share of each of the coparcener is clear and ascertainable and share is determined, it ceases to be a coparcenary property – If the share is not ascertainable and identifiable, temporary injunction was rightly granted. [Kamla Bai Vs. Nathuram Sharma] ...883**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1,2 एवं हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 22 – अंश – अस्थाई व्यादेश – जब प्रत्येक सहदायिक का अंश स्पष्ट एवं अभिनिश्चित है तथा अंश का निर्धारण किया गया है, वह सहदायिकी संपत्ति नहीं रह जाती – यदि अंश अभिनिश्चित एवं पहचान योग्य नहीं है, अस्थाई व्यादेश उचित रूप से प्रदान किया गया। (कमला बाई वि. नाथूराम शर्मा) ...883

Civil Procedure Code (5 of 1908), Order 39 Rule 1 and 2 – Temporary injunction **– Petition against rejection of application filed u/o 39 Rule 1 and 2 by both the Courts below – Held – Since plaintiff has failed to establish prima-facie that she is in settled possession of the suit property, Injunction application has rightly been rejected. [Geeta Dubey (Smt.) Vs. Saroj Suhane] ...872**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अस्थाई

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Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 9 – Suspension – Competent Authority – **Petitioner working as class-I officer – Collector cannot place her under suspension as neither he is appointing authority nor disciplinary authority – Subsequent approval by Commissioner cannot validate the order of suspension as Commissioner is not the appointing authority – Order of suspension quashed. [Savita Yadav (Dr.) (Ms.) Vs. State of M.P.]** ...944

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Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rules 10, 12 & 14(21) – Competence to issue charge-sheet by Divisional Commissioner – **Petitioner working as class-I officer – Charge-sheet issued by Divisional Commissioner – Held – In view of order passed by Governor in exercise of powers under Rule 12, Governor has authorised Divisional Commissioner to impose any of minor penalty – In view of provision of Rule 14(21) Divisional Commissioner is competent authority to issue charge-sheet. [Savita Yadav (Dr.) (Ms.) Vs. State of M.P.]** ...944

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Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule-13 – **Competence to issue a charge-sheet and to impose a penalty of removal from service by respondent no. 5 who was incharge Chief Medical & Health Officer – Held – Officers who have been given the current charge can not exercise statutory powers – As there was no delegation of powers in favour of respondent no. 5 to initiate D.E.**

against petitioner and respondent no. 5 has also included himself as a witness proves that he was having certain bias against the petitioner – Therefore, charge-sheet and inquiry is bad in law – Impugned orders are quashed – Petitioner be reinstated with all consequential benefits – However respondents can initiate D.E. afresh in accordance with law. [K.K. Gupta Vs. State of M.P.] ...845

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सिविल सेवा (चिकित्सीय परिचर्या) नियम, म.प्र. 1958, नियम 8 – अनुमति – याची की मां जो कि कैंसर रोगी है का उपचार – अनुमति अभिप्राप्त नहीं की गई – अभिनिर्धारित – पूर्वानुमति प्राप्त करना संभव नहीं – नियम 8 में अग्रिम अनुमति प्राप्त करने के संबंध में कुछ उल्लिखित नहीं – वस्तुतः अनुमति प्रदान की जा सकती है – चिकित्सीय खर्चों की प्रतिपूर्ति की जाये। (प्रशांत सिंह बघेल वि. म. प्र. राज्य) ...857

Civil Services (Medical Attendance) Rules, M.P. 1958, Rule 10,11 & Kalyan Nidhi Niyam, M.P. 1997 – Reimbursement of medical expenses of mother of petitioner **– Petitioner, a Govt. servant – Mother, a retired Govt. employee and receiving pension – Petitioner governed by the Medical Attendance Rules – 1997 Rules are specific rules for retired Govt. employees regarding Medical facilities –Held – Petitioner entitled for reimbursement of medical expenses of his mother who is**

dependent on petitioner – No specific bar is there in the Niyam of 1997 regarding applicability of Medical Attendance Rules, 1958 – Unless applicability of the Rules of 1958 is barred under the Rules of 1997, Rules of 1958 will be applicable – Petition allowed – Medical expenses to be reimbursed within two months. [Prashant Singh Baghel Vs. State of M.P.] ...857

सिविल सेवा (चिकित्सीय परिचर्या) नियम, म.प्र. 1958, नियम 10, 11 व कल्याण निधि नियम, म.प्र.1997 – याची की मां के चिकित्सीय खर्चों की प्रतिपूर्ति – याची, एक शासकीय कर्मचारी – मां, एक सेवानिवृत शासकीय कर्मचारी और पेंशन प्राप्तकर्ता – याची चिकित्सीय परिचर्या नियम द्वारा शासित होता है – 1997 के नियम चिकित्सीय सुविधाओं के संबंध में सेवानिवृत शासकीय कर्मचारियों के लिये निर्दिष्ट नियम है – अभिनिर्धारित – याची अपनी मां के चिकित्सीय खर्चों की प्रतिपूर्ति का हकदार जो कि याची पर आश्रित है – 1997 के नियमों में चिकित्सीय परिचर्या नियम 1958 की प्रयोज्यता के संबंध में विनिर्दिष्ट वर्जन नहीं – जब तक कि 1997 के नियमों के अंतर्गत 1958 के नियमों की प्रयोज्यता वर्जित नहीं की जाती, 1958 का नियम लागू होगा – याचिका मंजूर – दो माह के भीतर चिकित्सीय खर्चों की प्रतिपूर्ति की जाये। (प्रशांत सिंह बघेल वि. म.प्र. राज्य) ...857

Commercial Tax Act, M.P. 1994 (5 of 1995), Section 61 – Second Appeal – Imposition of Penalty **– During the pendency of the Second Appeal against assessment order, the Assessing Authority cannot levy penalty. [Lakhani Foot Care Ltd. Vs. State of M.P.] (DB)...906**

वाणिज्यिक कर अधिनियम, म.प्र. 1994 (1995 का 5), धारा 61 – द्वितीय अपील – शास्ति अधिरोपित किया जाना – निर्धारण आदेश के विरूद्ध द्वितीय अपील लंबित रहने के दौरान निर्धारण प्राधिकारी शास्ति अधिरोपित नहीं कर सकता। (लखानी फुट केयर लि. वि. म.प्र. राज्य) (DB)...906

Constitution – Article 12 & 226 – Maintainability – Private person **– Held – Learned Single Judge, without recording any finding that whether the appellant Director and the Private Limited Company in question were discharging any public duty or failed to discharge any public duty and they are amenable to the Writ jurisdiction, issued the directions to the individual and to a Private Limited Company – Same cannot be sustained – Writ petitions are restored for being decided by learned Single Judge afresh. [Ritesh Kumar Ajmera Vs. Smt. Manisha Parihar] (DB)...835**

संविधान – अनुच्छेद 12 व 226 – पोषणीयता – प्राइवेट व्यक्ति – अभिनिर्धारित – विद्वान एकल न्यायाधिपति ने कोई निष्कर्ष अभिलिखित किये बिना कि क्या प्रश्नगत

अपीलार्थी निदेशक एवं प्राइवेट लिमिटेड कंपनी किसी लोक कर्त्तव्य का निर्वहन कर रहे थे या किसी लोक कर्त्तव्य का निर्वहन करने में असफल रहे और वे रिट अधिकारिता के अधीन हैं, व्यक्ति एवं प्राइवेट लिमिटेड कंपनी को निदेश जारी किये – उक्त को कायम नहीं रखा जा सकता – विद्वान एकल न्यायाधिपति द्वारा नये सिरे से न्याय निर्णित किये जाने हेतु रिट याचिकायें पुनः स्थापित की गई। (रितेश कुमार अजमेरा वि. श्रीमती मनीषा परिहार) **(DB)...835**

***Constitution – Article 226 – Caste Certificate – Verification* – SDO conducted enquiry and declared that caste certificate was not issued by any competent authority – However no opportunity was given to petitioner before doing enquiry – Held – Verification of a caste of the petitioner or verification of the caste certificate has to be done through High Power Screening Committee as per the dictum of Apex Court in "Kumari Madhuri Patil" case – Consequently, show cause notice quashed – Respondents directed to refer the matter to High Power Screening Committee and thereafter to act accordingly. [Basant Kumar Burman Vs. M.P. State Electricity Board] ...867**

संविधान – अनुच्छेद 226 – जाति प्रमाणपत्र – सत्यापन – एस.डी.ओ. ने जांच संचालित की और घोषित किया कि जाति प्रमाणपत्र किसी सक्षम प्राधिकारी द्वारा नहीं जारी किया गया है – किन्तु जांच से पूर्व याची को कोई अवसर नहीं दिया गया – अभिनिर्धारित – "कुमारी माधुरी पाटिल" के प्रकरण में सर्वोच्च न्यायालय की उक्ति के अनुसार याची की जाति का सत्यापन या जाति प्रमाणपत्र का सत्यापन उच्च स्तरीय छानबीन समिति द्वारा किया जाना चाहिये – परिणामस्वरूप कारण बताओ नोटिस अभिखंडित – प्रत्यर्थीगण को मामला उच्च स्तरीय छानबीन समिति को निर्दिष्ट करने और तत्पश्चात् तद्नुसार कार्यवाही करने के लिये निदेशित किया गया। (बसंत कुमार बर्मन वि. एम.पी. स्टेट इलेक्ट्रिसिटी बोर्ड) ...867

***Constitution – Article 226 – Habeas Corpus – Age of girl* – Petitioner claims to have married with Corpus – Corpus also expressing her will to live with her husband/petitioner – Under Muslim law, a girl is competent to enter into a marriage contract if she has attained puberty – Under Muslim Law puberty is presumed on completion of the age of 15 years – As corpus is above the age of 15 years, she is competent to enter into a marraige contract – Corpus permitted to live with petitioner. [Rashid Khan Vs. State of M.P.] ...879**

संविधान – अनुच्छेद 226 – बंदी प्रत्यक्षीकरण – लड़की की आयु – याची ने बंदी से विवाहित होने का दावा किया – बंदी ने भी अपने पति/याची के साथ रहने के लिये अपनी रजामंदी व्यक्त की – मुस्लिम विधि के अंतर्गत लड़की विवाह करने के लिये सक्षम है यदि उसने परिपक्वता प्राप्त कर ली है – मुस्लिम विधि के अंतर्गत 15 वर्ष की

आयु पूर्ण होने पर परिपक्वता की अवधारणा की जाती है – चूंकि बंदी 15 वर्ष से अधिक आयु की है, वह विवाह करने के लिये सक्षम है – बंदी को याची के साथ रहने की अनुमति दी गई। (राशिद खान वि. म.प्र. राज्य) ...879

Constitution – Article 226, Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013 (14 of 2013), Section 11, Central Civil Services (Classification, Control and Appeal) Rules, 1965, Rules 3(C) & 14(2) & Administrative Tribunals Act (13 of 1985), Section 14 – Maintainability of writ petition – **Petitioner has challenged the enquiry report of Internal Complaints Committee – Section 11 of Act 2013 makes it clear that where respondent is an employee and Internal Committee proceeds to make enquiry into the complaint, it will be an enquiry in accordance with provisions of Service Rules – In view of Section 14 of Act 1985, Central Administrative Tribunal has jurisdiction to entertain – W.P. not maintainable. [Ramesh Pal Vs. Union of India]** ...890

संविधान – अनुच्छेद 226 – कार्यस्थल पर महिलाओं का यौन उत्पीड़न (रोकथाम, निषेध और निवारण) अधिनियम, 2013 (2013 का 14) धारा 11, केन्द्रीय सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, 1965, नियम 3(सी) व 14(2) एवं प्रशासनिक अधिकरण अधिनियम (1985 का 13), धारा 14 – रिट याचिका की पोषणीयता – याची ने आंतरिक शिकायत समिति के जांच प्रतिवेदन को चुनौती दी – अधिनियम 2013 की धारा 11 स्पष्ट करती है कि जहां प्रत्यर्थी एक कर्मचारी है और आंतरिक समिति शिकायत में जांच की कार्यवाही करती है तब वह जांच सेवा नियमों के उपबंधों के अनुसार होगी – अधिनियम 1985 की धारा 14 को दृष्टिगत रखते हुए केन्द्रीय प्रशासनिक अधिकरण को ग्रहण करने की अधिकारिता होगी – रिट याचिका पोषणीय नहीं। (रमेश पाल वि. यूनियन ऑफ इंडिया) ...890

Constitution – Article 226 – Transfer – **Petitioner has assailed his transfer order as well as transfer order of respondent no. 3 who has been transferred in his place – Held – As provided vide policy dated 05.07.2005 and Circular of State Government dated 19.12.1994, since petitioner has completed 6 months tenure at his present place of posting he has rightly been transferred, however, in view of transfer policy, observation made by Gwalior Bench and registration of criminal case against respondent no. 3 his field posting is nothing but a colourful exercise of power – Same can never be termed as administrative exigencies or in public interest – Undue favour has been extended to him – Therefore, only transfer of respondent no. 3 from Bhopal to Sendhwa is quashed with certain directions. [Kishore Singh Baghel Vs.**

State of M.P.] ...908

संविधान – अनुच्छेद 226 – स्थानांतरण – याची ने अपने स्थानांतरण आदेश के साथ ही प्रत्यर्थी क. 3 जिसे उसके स्थान पर स्थानांतरित किया गया है, के स्थानांतरण आदेश को चुनौती दी – अभिनिर्धारित – जैसा कि नीति दिनांक 05.07.2005 एवं राज्य सरकार के परिपत्र दिनांक 19.12.1994 द्वारा उपबंधित हैं, चूंकि याची ने अपनी वर्तमान पदस्थापना के स्थान पर 6 माह का कार्यकाल पूर्ण किया है उसे उचित रूप से स्थानांतरित किया गया है किन्तु स्थानांतरण नीति, ग्वालियर खंडपीठ द्वारा दिया गया संप्रेक्षण तथा प्रत्यर्थी क्र.3 के विरूद्ध आपराधिक प्रकरण पंजीबद्ध किये जाने को दृष्टिगत रखते हुये उसकी फील्ड पदस्थापना कुछ और नहीं बल्कि शक्ति का आभासी प्रयोग है – उक्त को प्रशासनिक सुविधा या लोकहित में नहीं कहा जा सकता – उसे असम्यक अनुग्रह प्रदान किया गया है – इसलिये केवल प्रत्यर्थी क्र. 3 का भोपाल से संघवा किया गया स्थानांतरण कतिपय निदेशों के साथ अभिखंडित। (किशोर सिंह बघेल वि. म.प्र. राज्य) ...908

***Constitution – Article 227 – Caste Certificate* – Father of the petitioner migrated from Rajasthan – Petitioner belongs to "Dhanuk" caste which is declared as S.C. in Rajasthan as well as in Madhya Pradesh – Petitioner born in Madhya Pradesh and completed her studies in Madhya Pradesh – Petitioner had not migrated from Rajasthan – Caste certificate was rightly issued as notification pertaining to migration would not apply to petitioner – Order of High Level Committee set aside – Petition allowed. [Vandna Dhakad Vs. State of M.P.] (DB)...898**

संविधान – अनुच्छेद 227 – जाति प्रमाणपत्र – याची के पिता ने राजस्थान से प्रव्रजन किया – याची 'धनुक' जाति का है जिसे राजस्थान और साथ ही मध्यप्रदेश में भी अनुसूचित जाति के रूप में घोषित किया गया है – याची का जन्म मध्यप्रदेश में हुआ और मध्यप्रदेश मे अपनी शिक्षा पूरी की – याची ने राजस्थान से प्रव्रजन नहीं किया था – जाति प्रमाणपत्र उचित रूप से जारी किया गया क्योंकि प्रव्रजन से संबंधित अधिसूचना याची को लागू नहीं होगी – उच्च स्तरीय समिति का आदेश अपास्त – याचिका मंजूर। (वंदना धाकड़ वि. म.प्र. राज्य) (DB)...898

***Constitution – Article 227* – Power under Article 227 can be exercised where the order suffers from flagrant abuse of fundamental principles of law and justice – This Court can not act as an appellate Court and reappreciate the evidence – Petition is dismissed. [Geeta Dubey (Smt.) Vs. Saroj Suhane] ...872**

संविधान – अनुच्छेद 227 – अनुच्छेद 227 के अंतर्गत शक्ति का प्रयोग वहां किया जा सकता है जहां आदेश विधि एवं न्याय के मूलभूत सिद्धांतों के प्रत्यक्ष

दुरूपयोग से ग्रसित है – यह न्यायालय अपीली न्यायालय के रूप में कार्यवाही नहीं कर सकता और साक्ष्य का पुनः मूल्यांकन नहीं कर सकता – याचिका खारिज। (गीता दुबे (श्रीमती) वि. सरोज सुहाने) ...872

Court Fees Act (7 of 1870), Section 7(iv)(c) – Fixed Court fee – Declaration – **Non-executant seeking declaration of sale deed as null & void and same is not binding on him, he is only required to pay the fixed court fee – If executant to the sale deed seeks cancellation of sale deed, he is required to pay advalorem court fee. [Baijnath Singh Vs. Jagdish]** ...1012

न्यायालय फीस अधिनियम (1870 का 7), धारा 7(iv)(सी) – निश्चित न्यायालय फीस – घोषणा – विक्रय विलेख शून्य एवं अकृत होने तथा वह उस पर बंधनकारी नहीं होने की घोषणा चाहने वाले गैर–निष्पादिती से केवल निश्चित न्यायालय फीस अदा करना अपेक्षित है– यदि विक्रय विलेख का निष्पादिती विक्रय विलेख का निरस्तीकरण चाहता है उसे मूल्यानुसार न्यायालय फीस अदा करना अपेक्षित है। (बैजनाथ सिंह वि. जगदीश) ...1012

Criminal Procedure Code, 1973 (2 of 1974), Section 228 – See – Penal Code, 1860, Section 302 **[Sunita Bai Vs. State of M.P.]** ...1083

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 228 – देखें – दण्ड संहिता, 1860, धारा 302 (सुनीता बाई वि. म.प्र. राज्य) ...1083

Criminal Procedure Code, 1973 (2 of 1974), Section 319 – Summoning of additional accused **– Addition of additional accused is warranted only when there is reasonable prospect of case ending in his conviction – Order cannot be passed because first informant or one of witnesses seeks to implicate other persons. [Virendra Singh Vs. State of M.P.]** ...1073

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – अतिरिक्त अभियुक्त को समन किया जाना – अतिरिक्त अभियुक्त को जोड़ा जाना केवल तब आवश्यक होगा जब प्रकरण उसकी दोषसिद्धि में समाप्त होने की युक्तियुक्त संभावना है – इसलिये कि प्रथम सूचना कर्ता या साक्षियों में से कोई एक अन्य व्यक्तियों को आलिप्त करना चाहता है आदेश पारित नहीं किया जा सकता। (वीरेन्द्र सिंह वि. म. प्र. राज्य) ...1073

Criminal Procedure Code, 1973 (2 of 1974), Section 319 – Summoning of Additional Accused **– During investigation it was found that respondent no. 2 was not present on spot and was present in ATM booth – CD produced by IO also proves the presence of respondent**

no. 2 in ATM booth – Nothing in evidence of PW-1 that absence of respondent no. 2 on the spot was deliberately shown by IO – Application rightly rejected. [Virendra Singh Vs. State of M.P.] ...1073

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – अतिरिक्त अभियुक्त को समन किया जाना – अन्वेषण के दौरान यह पाया गया कि प्रत्यर्थी क्रमांक 2 घटनास्थल पर उपस्थित नहीं था और ए.टी.एम. बूथ में उपस्थित था – अन्वेषण अधिकारी द्वारा प्रस्तुत की गई सी.डी. भी प्रत्यर्थी क्रमांक 2 के ए.टी.एम. बूथ में उपस्थिति को साबित करती है – अ. सा. 1 के साक्ष्य में कुछ नहीं कि प्रत्यर्थी क्रमांक 2 की घटनास्थल पर अनुपस्थिति को अन्वेषण अधिकारी द्वारा जानबूझकर दर्शाया गया – आवेदन उचित रूप से नामंजूर किया गया। (वीरेन्द्र सिंह वि. म.प्र. राज्य) ...1073

Criminal Procedure Code, 1973 (2 of 1974), Section 340 – False evidence **– Enquiry – Before preferring complaint, neither enquiry was made by ASJ nor any opportunity of hearing was given – Further also, facts mentioned in FIR, in 161 statement and in Court evidence are same – No case could be made out – Petition allowed – Proceedings quashed. [Shyam Kumar Vs. State of M.P.] ...1099**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 340 – मिथ्या साक्ष्य – जांच – शिकायत पेश करने से पूर्व अतिरिक्त सत्र न्यायाधीश द्वारा न तो जांच की गई. न ही सुनवाई का कोई अवसर दिया गया – इसके अतिरिक्त भी प्रथम सूचना रिपोर्ट. 161 के कथन एवं न्यायालीन साक्ष्य में उल्लिखित तथ्य समान हैं – कोई प्रकरण नहीं बन सकता – याचिका मंजूर – कार्यवाहियां अभिखंडित। (श्याम कुमार वि. म. प्र. राज्य) ...1099

Criminal Procedure Code, 1973 (2 of 1974), Sections 340 & 344 – Distinction **– Section 344 applies to judicial proceedings only whereas section 340 applies to proceedings other than judicial proceedings also. [Shyam Kumar Vs. State of M.P.] ...1099**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 340 व 344 – विभेद – धारा 344 केवल न्यायिक कार्यवाही को लागू होगी जबकि धारा 340 न्यायिकेतर कार्यवाही को भी लागू होती है। (श्याम कुमार वि. म.प्र. राज्य) ...1099

Criminal Procedure Code, 1973 (2 of 1974), Sections 341 & 482 – Alternative remedy **– Section 482 confers separate and independent power – Powers u/s 482 cannot be cribbed or hedged in by provisions of section 341(2) – Petition u/s 482 Cr.P.C. maintainable. [Shyam Kumar Vs. State of M.P.] ...1099**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 341 व 482 – वैकल्पिक

उपचार – धारा 482 पृथक एवं स्वतंत्र शक्ति प्रदान करती है – धारा 482 के अंतर्गत शक्तियों को धारा 341(2) के उपबंधों द्वारा न तो सीमित किया जा सकता है और न ही उसे छिपाया जा सकता है – दं.प्र.सं. की धारा 482 के अंतर्गत याचिका पोषणीय है। (श्याम कुमार वि. म.प्र. राज्य) ...1099

Criminal Trial – Denial of opportunity – Counsel of his choice **– Accused filed an application for deferring the cross-examination on the ground that cross-examination shall be done by senior Advocate – Counsel already engaged by accused refused to cross-examine the witnesses – Nothing on record that counsel engaged by Court was not competent to cross-examine the witnesses. [Santosh Kumar Singh Vs. State of M.P.] (SC)...807**

आपराधिक विचारण – अवसर नहीं दिया जाना – पसंद का अधिवक्ता – अभियुक्त ने प्रतिपरीक्षण स्थगित किये जाने हेतु इस आधार पर आवेदन प्रस्तुत किया कि प्रतिपरीक्षण वरिष्ठ अधिवक्ता द्वारा किया जायेगा – अभियुक्त द्वारा पहले से नियुक्त अधिवक्ता ने साक्षियों का प्रतिपरीक्षण करने से इंकार किया – अभिलेख पर कुछ नहीं कि न्यायालय द्वारा नियुक्त अधिवक्ता साक्षियों का प्रतिपरीक्षण करने के लिये सक्षम नहीं। (संतोष कुमार सिंह वि. म.प्र. राज्य) (SC)...807

Evidence Act (1 of 1872), Section 8 – Conduct **– Conduct of the appellant that if he did not demand and receive the money, why he fled away from the spot ? – This unnatural conduct is also relevant and admissible as evidence against the appellant. [Laxmikant Vs. State of M.P.] (DB)...1034**

साक्ष्य अधिनियम (1872 का 1), धारा 8 – आचरण – अपीलार्थी का आचरण कि यदि उसने रूपये की मांग एवं प्राप्ति नहीं की तब वह घटनास्थल से क्यों भागा ? – यह अस्वाभाविक आचरण भी अपीलार्थी के विरूद्ध साक्ष्य के रूप में सुसंगत एवं ग्राह्य है। (लक्ष्मीकांत वि. म.प्र. राज्य) (DB)...1034

Evidence Act (1 of 1872), Section 113-A – See – Penal Code, 1860, Sections 306 and 498A **[Arjun Singh Vs. State of M.P.] ...1041**

साक्ष्य अधिनियम (1872 का 1), धारा 113 ए – देखें – दण्ड संहिता, 1860, धाराऐं 306 एवं 498ए, (अर्जुन सिंह वि. म.प्र. राज्य) ...1041

Hindu Succession Act (30 of 1956), Section 22 – See –Land Revenue Code, M.P., 1959, Section 164 (As amended in 1961) **[Kamla Bai Vs. Nathuram Sharma] ...883**

हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 22 – देखें – भू राजस्व संहिता, म.प्र., 1959, धारा 164 (1961 में यथासंशोधित) (कमला बाई वि. नाथूराम

शर्मा) ...883

Income Tax Act (43 of 1961), Section 24 – Income – One Time Settlement – **Under O.T.S Scheme, the bank waived Rs. 88.39 lacs from Principal loan amount which was outstanding against assessee – Assessing Officer treated the component of principal amount of Rs. 88.39 lacs as income of the assessee – Held – Waiver of amount of loan being never claimed by the assessee as its expenditure, its waiver will not amount to income of assessee. [Commissioner of Income Tax-II Vs. M/s. Dholgiri Industries Pvt. Ltd.]** **(DB)...1087**

आयकर अधिनियम (1961 का 43), धारा 24 – आय – एकमुश्त निपटान – एकमुश्त निपटान योजना के अंतर्गत बैंक ने मूलधन ऋण राशि जो कि निर्धारिती के विरूद्ध बकाया थी में से रू. 88.39 लाख का अधित्यजन किया – निर्धारण अधिकारी ने रू. 88.39 लाख मूलधन राशि के घटक को निर्धारिती की आय मानी – अभिनिर्धारित – निर्धारिती द्वारा उसके खर्चों के रूप में ऋण की रकम के अधित्यजन का दावा नहीं किया गया, उसका अधित्यजन निर्धारिती की आय की कोटि में नहीं आयेगा। (कमिश्नर ऑफ इनकम टैक्स–II वि. मे. धौलगिरि इंडस्ट्रीज प्रा.लि.) **(DB)...1087**

Income Tax Rules, 1962, Rule 46A (3) – Additional documents – **Assessee's application under rule 46A of the Income Tax Rules for production of additional documents before Commissioner of Income Tax (Appeals) allowed – Assessing officer was not granted opportunity to submit the report or to verify the documents – Assessing officer busy in assessing 150 limitation cases and in Election duty – Held – Sufficient cause shown by Assessing officer for not verifying the documents on time – Assessing officer granted time for verification of additional documents – Petition allowed – Matter remitted back to Commissioner of Income Tax (Appeals) for decision afresh. [Commissioner of Income Tax-I Vs. Essence Commodities Ltd.]** **(DB)...1088**

आयकर नियम, 1962, नियम 46ए (3) – अतिरिक्त दस्तावेज – आयकर आयुक्त (अपील) के समक्ष अतिरिक्त दस्तावेज प्रस्तुत करने हेतु निर्धारिती का आवेदन आयकर नियम के नियम 46ए के अंतर्गत मंजूर किया गया – निर्धारण अधिकारी को प्रतिवेदन प्रस्तुत करने के लिये या दस्तावेज सत्यापित करने के लिये अवसर प्रदान नहीं किया गया – निर्धारण अधिकारी 150 परिसीमा प्रकरण के निर्धारण में और चुनाव कर्तव्यों में व्यस्त – अभिनिर्धारित – निर्धारण अधिकारी ने दस्तावेजों का समय पर सत्यापन नहीं किये जाने का पर्याप्त कारण दर्शाया है –निर्धारण अधिकारी को अतिरिक्त दस्तावेजों का सत्यापन करने हेतु समय प्रदान किया गया – याचिका मंजूर – मामला नये सिरे से निर्णित किये जाने हेतु आयकर आयुक्त (अपील) को प्रतिप्रेषित। (कमिश्नर ऑफ इनकम टैक्स–I वि. ऍसन्स कमोडिटीज लि.) **(DB)...1088**

Krishi Upaj Mandi (Allotment of Land and Structures) M.P. Rules, 2009, Rule 3(7) – Allotment – **Members of Association were trading in an area which was not notified under the M.P. Krishi Upaj Mandi Act – New market yard established for the first time – As it is not the case of transfer of market yard therefore provision of Rule 3(7)(a) would not apply – Provision of Rule 3(7)(b) would be applied – Question of conducting auction of plots only for the existing licencee cannot be countenanced – Auction proceedings already begun – Members of Association are free to participate – Petition dismissed. [Thok Sabji Vikreta Kalyan Sangh Vs. State of M.P.]** **(DB)...964**

कृषि उपज मंडी (भूमि और संरचनाओं का आबंटन) म.प्र. नियम, 2009, नियम 3(7) – आबंटन – संघ के सदस्य ऐसे क्षेत्र में व्यापार कर रहे थे जो म. प्र. कृषि उपज मंडी अधिनियम के अंतर्गत अधिसूचित नहीं था – नये बाजार स्थान को पहली बार स्थापित किया गया था – चूंकि यह प्रकरण बाज़ार स्थान स्थानांतरित करने का नहीं इसलिये नियम 3(7)(ए) का उपबंध लागू नहीं होगा – नियम 3(7)(बी) का उपबंध लागू होगा – केवल विद्यमान अनुज्ञप्तिधारी हेतु भूखंडों की नीलामी संचालित करने के प्रश्न का समर्थन नहीं किया जा सकता – नीलामी प्रक्रिया पहले ही आरंभ हो चुकी है – संघ के सदस्य हिस्सा लेने के लिये स्वतंत्र – याचिका खारिज। (थोक सब्जी विक्रेता कल्याण संघ वि. म.प्र. राज्य) **(DB)...964**

Land Revenue Code, M.P. (20 of 1959), Section 164 (As amended in 1961) & Hindu Succession Act (30 of 1956), Section 22 – Applicability of Personal Law on agricultural land – **In view of amended section 164, Personal Law applies to agricultural land – Judgments passed on the basis of unamended section 164 as it was prior to 1961 have no application. [Kamla Bai Vs. Nathuram Sharma]** **...883**

भू राजस्व संहिता, म.प्र., (1959 का 20), धारा 164 (1961 में यथासंशोधित) एवं हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 22 – कृषि भूमि पर स्वीय विधि की प्रयोज्यता – संशोधित धारा 164 को दृष्टिगत रखते हुये स्वीय विधि कृषि भूमि को लागू होगी – असंशोधित धारा 164 जैसे कि वह 1961 के पूर्व थी के आधार पर पारित किये गये निर्णय लागू नहीं होते। (कमला बाई वि. नाथूराम शर्मा) **...883**

Limitation Act (36 of 1963), Section 5 – Condonation – Objection – **Appeal barred by limitation – Delay already condoned – Held – It cannot be recalled afterwards – Principle – As per the dictum of Satyadhyan Ghosal's case by the Apex Court any order passed at earlier stage in the matter is binding as res judicata at any subsequent stage before the same Court. [Krishna Tiwari (Smt.) Vs. Ram Kumar]** **...977**

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परिसीमा अधिनियम (1963 का 36), धारा 5 – माफी – आक्षेप – अपील परिसीमा द्वारा वर्जित – विलम्ब पहले ही माफ किया गया था – अभिनिर्धारित – उसे बाद में वापस नहीं लिया जा सकता – सिद्धांत – सत्याध्यान घोषाल के प्रकरण में सर्वोच्च न्यायालय द्वारा दिये गये आदेश के अनुसार मामले में पूर्ववर्ती प्रक्रम पर पारित किया गया कोई आदेश समान न्यायालय के समक्ष किसी पश्चात्वर्ती प्रक्रम पर पूर्व न्याय के रूप में बाध्यकारी होगा। (कृष्णा तिवारी (श्रीमती) वि. राम कुमार) ...977

Limitation Act (36 of 1963), Section 5 – See – Civil Procedure Code, 1908, Section 96 **[Indore Municipal Corporation Vs. Mansukhlal] ...993**

परिसीमा अधिनियम (1963 का 36), धारा 5 – देखें – सिविल प्रक्रिया संहिता, 1908, धारा 96 (इंदौर म्यूनिसिपल कारपोरेशन वि. मनसुखलाल) ...993

Long Cohabitation **– If a woman resides with a particular person for a sufficient long period, it may not be required to prove that marriage has taken place in an appropriate manner – Appellant claiming to have resided with Santosh Guru only for a period of 13 months – She is required to prove that marriage took place as per Saptapadi or Bhanwar ceremony. [Meera Bai (Smt.) Vs. Ramesh Guru] ...1020**

दीर्घ सहवास – यदि कोई महिला किसी विशिष्ट व्यक्ति के साथ पर्याप्त रूप से दीर्घ अवधि तक निवासरत रहती है, तब यह साबित करना अपेक्षित नहीं कि समुचित ढंग से विवाह संपन्न हुआ है – अपीलार्थी का दावा कि वह संतोष गुरू के साथ सिर्फ 13 माह की अवधि के लिये निवासरत थी – उसे साबित करना अपेक्षित है कि सप्तपदी या भांवर रीति के अनुसार विवाह संपन्न हुआ है। (मीरा बाई (श्रीमती) वि. रमेश गुरू) ...1020

Motor Vehicles Act (59 of 1988), Section 166 – Initial injury claim **– During pendency of claim case injured died – Claim further proceeded by legal representatives – Held – Legal representatives entitled for compensation as the benefits of claim case becomes estate of deceased. [Ramkali Thakur (Smt.) Vs. Pancharam] ...968**

मोटर यान अधिनियम (1988 का 59), धारा 166 – आरंभिक अपहानि दावा – दावा प्रकरण लंबित रहने के दौरान आहत की मृत्यु हुई – विधिक प्रतिनिधिगण द्वारा दावे को आगे बढ़ाया गया – अभिनिर्धारित – विधिक प्रतिनिधिगण प्रतिकर के हकदार क्योंकि दावा प्रकरण के लाभ मृतक की संपदा होते हैं। (रामकली ठाकुर (श्रीमती) वि. पंचाराम) ...968

Motor Vehicles Act (59 of 1988), Section 173 – Assessment of compensation by Tribunal **– Deceased, was working as Assistant Teacher**

– Award of Rs. 48,42,440/- – 30% added towards future prospects – Rs. 1,00,000/- awarded towards loss of consortium and Rs. 25,000/- towards last rites & rituals – Held – Award not on higher side as per the dictum of Apex Court in Rajesh's case – Appeal by Insurance Co. dismissed. [National Insurance Company Vs. Bharti Kol] ...1018

मोटर यान अधिनियम (1988 का 59), धारा 173 – अधिकरण द्वारा प्रतिकर का निर्धारण – मृतक सहायक शिक्षक के रूप में कार्य कर रहा था – रू. 48,42,440/– का अवार्ड – भविष्य की संभावनाओं की ओर 30% जोड़ा गया – साथ (कॉन्सॉर्टियम) की हानि की ओर रू. 1,00,000/– तथा अंतिम क्रियाकर्म की ओर रू. 25,000/– अवार्ड किये गये – अभिनिर्धारित – राजेश के प्रकरण में सर्वोच्च न्यायालय के आदेश के अनुसरण में अवार्ड अधिक नहीं है – बीमा कंपनी की अपील खारिज। (नेशनल इंश्योरेन्स कंपनी वि. भारती कोल) ...1018

Motor Vehicles Act (59 of 1988), Section 173 – Compensation – Application of multiplier – Where the age of deceased is more than 15 years there is no necessity for seeking guidance or placing reliance on second schedule. [Bajaj Allianz Vs. Aditya] ...983

मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर – गुणक की प्रयोज्यता – जहां मृतक की आयु 15 वर्ष से अधिक है वहां द्वितीय अनुसूची पर मार्गदर्शन चाहने या निर्भर रहने की आवश्यकता नहीं। (बजाज आलियांज वि. आदित्य) ...983

Motor Vehicles Act (59 of 1988), Section 173 – Compensation – Future prospects – Addition of 50% salary where the deceased is below 40 years and has permanent job – Addition should be 30% if the age of deceased is between 40 to 50 years – There should be no addition if the age of deceased is more than 50 years and number of dependents are 2 to 3. [Bajaj Allianz Vs. Aditya] ...983

मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर – भविष्य की संभावनायें – 50% वेतन का संयोजन जहां मृतक 40 वर्ष से कम है और उसके पास स्थायी रोजगार है – संयोजन 30% होना चाहिये यदि मृतक की आयु 40 से 50 वर्ष के बीच है – कोई संयोजन नहीं होना चाहिये यदि मृतक की आयु 50 वर्ष से अधिक है और आश्रितों की संख्या 2 से 3 है। (बजाज आलियांज वि. आदित्य) ...983

Motor Vehicles Act (59 of 1988), Section 173 – Compensation – Standard deduction – Where deceased is married, 1/3rd should be deducted towards living expenses – Where number of dependants are 4 to 6, ¼th should be deducted and 1/5th should be deducted if number of dependents are more than 6. [Bajaj Allianz Vs. Aditya] ...983

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मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर – मानक कटौती – जहां मृतक शादीशुदा है, जीविका के खर्चों की ओर 1/3 घटाया जाना चाहिये – जहां आश्रितों की संख्या 4 से 6 है, ¼ घटाया जाना चाहिये और 1/5 घटाया जाना चाहिये यदि आश्रितों की संख्या 6 से अधिक है। (बजाज आलियांज वि. आदित्य) ...983

Motor Vehicles Act (59 of 1988), Section 173 – Contributory negligence – On the basis of uncontroverted evidence of Pillion rider and material documents, Tribunal has rightly held that deceased was not instrumental to accident. [Bajaj Allianz Vs. Aditya] ...983

मोटर यान अधिनियम (1988 का 59), धारा 173 – योगदायी उपेक्षा – पिछली सीट सवार के अविवादित साक्ष्य एवं तात्विक दस्तावेजों के आधार पर अधिकरण ने उचित रूप से अभिनिर्धारित किया कि दुर्घटना के लिये मृतक सहभागी नहीं था। (बजाज आलियांज वि. आदित्य) ...983

Motor Vehicles Act (59 of 1988), Section 173 – Enhancement – Deceased, aged 47 yrs., involved in agriculture and milk business – Owing 12 acres of agricultural land – Deceased supporting entire family of 7 persons including himself – Accident of the year 2003 – Held – Income assessed by the Tribunal @ Rs. 2,000/- p.m. is on lower side, it ought to be Rs. 5,000/- p.m. – 1/4 th deducted personal expenses as number of dependents were six in number as per the dictum of Sarla Verma's case – Multiplier of 13 adopted on the basis of the age of the deceased – So, in all total compensation of Rs. 6,15,000/- awarded. [Krishna Tiwari (Smt.) Vs. Ram Kumar] ...977

मोटर यान अधिनियम (1988 का 59), धारा 173 – बढ़ोत्तरी – मृतक, आयु 47 वर्ष, कृषि एवं दुग्ध व्यवसाय में संलग्न – 12 एकड़ कृषि भूमि का स्वामी – मृतक स्वयं को मिलाकर 7 व्यक्तियों के संपूर्ण परिवार को संभाल रहा था – दुर्घटना वर्ष 2003 की है – अभिनिर्धारित – अधिकरण द्वारा रू. 2,000/– प्रति माह की दर से निर्धारित की गई आय निम्नतर है वह रू. 5,000/– प्रतिमाह होनी चाहिए – व्यक्तिगत खर्चों के रूप में 1/4 घटाया गया क्योंकि आश्रितों की संख्या छः थी जैसा कि सरला वर्मा के प्रकरण में आदेशित किया गया है – मृतक की आयु के आधार पर 13 का गुणक अंगीकृत किया गया – अतः कुल प्रतिकर रू. 6,15,000/– अवार्ड किया गया। (कृष्णा तिवारी (श्रीमती) वि. राम कुमार) ...977

Motor Vehicles Act (59 of 1988), Section 173 – Income – Pay slip – Pay slip of deceased proved by claimant – In absence of any contradictory evidence, no doubt can be raised with regard to pay slip, which was issued in due course. [Bajaj Allianz Vs. Aditya] ...983

मोटर यान अधिनियम (1988 का 59), धारा 173 – आय – वेतन पर्ची – मृतक की वेतन पर्ची दावाकर्ता द्वारा साबित की गई – किसी विरोधाभासी साक्ष्य के अभाव में वेतन पर्ची जिसे यथासमय जारी किया गया था के संबंध में संदेह नहीं उठाया जा सकता। (बजाज आलियांज वि. आदित्य) ...983

Motor Vehicles Act (59 of 1988), Section 173 – Initial claim petition was for injuries **– During pendency of claim case, injured himself died – Cause of death whether connected to accident or not ? – Autopsy of corpus not carried out – Held – Because of lack of autopsy of corpus it could not be proved that injured died due to accident injuries – Hence, findings of Tribunal affirmed. [Ramkali Thakur (Smt.) Vs. Pancharam]** ...968

मोटर यान अधिनियम (1988 का 59), धारा 173 – आरंभिक दावा याचिका क्षतियों के लिये थी – दावा प्रकरण लंबित रहने के दौरान स्वयं आहत की मृत्यु हुई – मृत्यु का कारण क्या दुर्घटना से संबद्ध है अथवा नहीं? –शव परीक्षण नहीं किया गया – अभिनिर्धारित – शव परीक्षण के अभाव में यह साबित नहीं किया जा सकता कि आहत की मृत्यु दुर्घटना से आई क्षतियों से हुई – अतः अधिकरण के निष्कर्षों की पुष्टि की गई। (रामकली ठाकुर (श्रीमती) वि. पंचाराम) ...968

Motor Vehicles Act (59 of 1988), Section 173 – Injury case **– Fracture of wrist & ulna bones – Injured, a government servant – Entitlement – Injured entitled for salary equivalent to loss of leave period as leave could have been utilized elsewhere – Amount of Rs. 25,000/- awarded for loss of income. [Ramkali Thakur (Smt.) Vs. Pancharam]** ...968

मोटर यान अधिनियम (1988 का 59), धारा 173 – अपहानि प्रकरण – कलाई एवं प्रकोष्ठिका–अस्थि (अलना बोन) का अस्थिभंग – आहत एक शासकीय सेवक – हकदारी–अवकाश अवधि की हानि के समतुल्य वेतन हेतु आहत हकदार है क्योंकि अवकाश का उपभोग कहीं और किया जा सकता था – रू. 25,000/– की रकम आय की हानि हेतु अवार्ड की गई। (रामकली ठाकुर (श्रीमती) वि. पंचाराम) ...968

Motor Vehicles Act (59 of 1988), Section 173 – Liability of Insurance Company **– Held – In view of the decisions rendered by this Court and in view of finding recorded by Claims Tribunal that the driver of the tractor was negligent for injury caused to the claimant, Insurance Co. is liable for paying compensation – No illegality in the impugned award – Appeal is dismissed. [ICICI Lombard Gen. Ins. Co. Ltd. Vs. Kharagram Pajapati]** ...1016

मोटर यान अधिनियम (1988 का 59), धारा 173 – बीमा कंपनी का दायित्व

– अभिनिर्धारित – इस न्यायालय द्वारा दिये गये निर्णयों को दृष्टिगत रखते हुये और दावा अधिकरण द्वारा अभिलिखित किये गये इस निष्कर्ष को दृष्टिगत रखते हुये कि दावाकर्ता को कारित की गई क्षति के लिये ट्रेक्टर के चालक की उपेक्षा थी – बीमा कंपनी प्रतिकर का भुगतान करने के लिये दायी है – आक्षेपित अवार्ड में कोई अवैधता नहीं – अपील खारिज। (आई.सी.आई.सी.आई. लोम्बार्ड जनरल इंश्योरेन्स कं. लि. वि. खरगराम पजापति) ...1016

National Council for Teacher Education Regulations, 2002, Appendix 7 Clause 7(d) and Appendix 2B Clause (iv) – Withdrawal of Recognition – **Recognition was withdrawn that the education was being imparted in a building constructed on Kh. No. 146 and 147 and not on Kh. No. 27, 63 and 64 – Earlier the Committee was running the institute in a rented premises when the recognition was granted – Thereafter the managing Committee purchased the land and shifted the building – The lands are owned by the management and both the lands are situated in the same village – Various inspections were done and authorities allowed the Committee to conduct B.Ed. course from the building constructed on Kh. No. 146 & 147 from 2004 – Matter relegated back to appellate authority for fresh consideration of matter. [Naveen Swami Vivekanand B.Ed. College Vs. National Council For Teacher Eduction]** (DB)...951

राष्ट्रीय अध्यापक शिक्षा परिषद विनियमन, 2002, परिशिष्ट 7, खंड 7(डी) व परिशिष्ट 2बी खंड (iv) – मान्यता को वापस लिया जाना – मान्यता को इस आधार पर वापस लिया गया कि खसरा नंबर 146 एवं 147 पर निर्मित भवन में शिक्षा प्रदान की जा रही थी न कि खसरा नंबर 27, 63 एवं 64 पर – पूर्व में समिति संस्थान को किराये के परिसर में चला रही थी जब मान्यता प्रदान की गई थी – तत्पश्चात् प्रबंधन समिति ने भूमि कय की और भवन को स्थानांतरित किया – भूमियों का स्वामित्व प्रबंधन के पास है और दोनों भूमियां एक ही गांव में स्थित हैं – विभिन्न निरीक्षण किये गये और प्राधिकारीगण ने समिति को 2004 से बी.एड. पाठ्यकम का संचालन खसरा नंबर 146 एवं 147 पर निर्मित भवन में करने की अनुमति दी – मामला अपीली प्राधिकारी को नये सिरे से विचारण हेतु प्रतिप्रेषित। (नवीन स्वामी विवेकानन्द बी.एड. कॉलेज वि. नेशनल काउंसिल फॉर टीचर एजुकेशन) (DB)...951

Negotiable Instruments Act (26 of 1881), Section 138 & Stamp Act (2 of 1899), Section 33(2)(a) and 35 – **Whether a document can be impounded in a Criminal case u/s 35 for insufficiency of stamps – Held – Proceedings are criminal in nature and are of summary nature – Provisions of Section 35 of Stamp Act would not be attracted – Proviso to section 33(2)(a) of Stamp Act gives wide discretion to Magistrate to examine or impound – Petition u/s 482 of Cr.P.C. dismissed. [Ramesh**

Giri Vs. Dheeraj Gobhuj] ...1106

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 एवं स्टाम्प अधिनियम (1899 का 2), धारा 33(2)(ए) व 35 – क्या धारा 35 के अंतर्गत आपराधिक प्रकरण में स्टाम्प की अपर्याप्तता के लिये दस्तावेज को परिबद्ध किया जा सकता है – अभिनिर्धारित – कार्यवाहियां दांडिक स्वरूप की एवं संक्षिप्त स्वरूप की हैं – स्टाम्प अधिनियम की धारा 35 के उपबंध आकर्षित नहीं होगे – स्टाम्प अधिनियम की धारा 33(2)(ए) का परंतुक मजिस्ट्रेट को परीक्षण करने या परिबद्ध करने के लिये विस्तृत विवेकाधिकार देता है – द.प्र.सं. की धारा 482 के अंतर्गत याचिका खारिज। (रमेश गिरि वि. धीरज गोमुज) ...1106

Penal Code (45 of 1860), Section 302 & Criminal Procedure Code, 1973 (2 of 1974), Section 228 – Framing of charge **– Applicant had scuffle with her deceased mother -in-law who was aged about 82 years – Applicant pushed deceased on the road – Deceased died because of failure of cardio- respiratory system – No internal and external injury was found – No ingredients of Section 300 are attracted – No charge can be framed u/s 302 I.P.C. – Applicant is discharged from offence u/s 302 – Matter remanded back. [Sunita Bai Vs. State of M.P.]** ...1083

दण्ड संहिता (1860 का 45), धारा 302 व दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 228 – आरोप विरचित किये जाना – आवेदक ने अपनी मृतक सास के साथ हाथापाई की जो करीब 82 वर्ष आयु की थी – आवेदक ने मृतिका को सडक पर धकेल दिया – मृतिका की मृत्यु कार्डियो रेस्पाइरेटरी सिस्टम फेलूअर के कारण हुई – कोई अन्दरूनी एवं बाहरी चोट नहीं पाई गई – धारा 300 के घटक आकर्षित नहीं होते – भा.द.सं. की धारा 302 के अंतर्गत आरोप विरचित नहीं किया जा सकता – आवेदक को धारा 302 के अंतर्गत अपराध से आरोप मुक्त किया गया – मामला प्रतिप्रेषित किया गया। (सुनीता बाई वि. म.प्र. राज्य) ...1083

Penal Code (45 of 1860), Section 302 – Sentence – Rarest of rare case – Death sentence **– There is nothing to suggest the motive for committing crime except article and cash taken away by the accused – Accused is 26 years old having no previous criminal record – Case does not fall in the rarest of the rare category – Death sentence is excessive – Hence altered to life imprisonment – Rest part of sentence is affirmed – Appeal is partly allowed. [Santosh Kumar Singh Vs. State of M.P.]** (SC)...807

दण्ड संहिता (1860 का 45), धारा 302 – दण्डादेश – विरल से विरलतम प्रकरण – मृत्युदंड – अभियुक्त द्वारा वस्तुऐं एवं नकदी ले जाने के सिवाय अपराध

कारित करने के हेतु का कोई सुझाव नहीं है – अभियुक्त 26 वर्ष का है जिसका कोई पूर्व आपराधिक रिकार्ड नहीं – प्रकरण विरल से विरलतम श्रेणी में नहीं आता – मृत्युदण्ड अत्याधिक है – अतः आजीवन कारावास में संपरिवर्तित किया गया – दण्डादेश के शेष भाग की पुष्टि की गई – अपील अंशतः मंजूर। (संतोष कुमार सिंह वि. म.प्र. राज्य) (SC)...807

Penal Code (45 of 1860), Sections 302, 307, 394, 397 & 450 – Murder – **Accused allegedly assaulted deceased by iron hammer on head – P.W.4 was also assaulted who suffered fracture on head – P.W. 4 lodged F.I.R. – In view of evidence of injured witnesses duly corroborated by medical evidence and the recovery of stolen articles, iron hammer and blood stained clothes at the instance of accused from his house which is duly corroborated by independent witnesses of memorandum and seizure, accused is guilty. [Santosh Kumar Singh Vs. State of M.P.]** (SC)...807

दण्ड संहिता (1860 का 45), धाराऐं 302, 307, 394, 397 व 450 – हत्या – अभियुक्त ने अभिकथित रूप से मृतक के सिर पर लोहे के हथौड़े से हमला किया – अ.सा. 4 पर भी हमला किया गया जिसने सिर पर अस्थिभंग सहन किया – अ. सा. 4 ने प्रथम सूचना रिपोर्ट दर्ज की – आहत साक्षीगण का साक्ष्य चिकित्सीय साक्ष्य द्वारा सम्यक् रूप से अभिपुष्ट तथा अभियुक्त की निशानदेही पर चुराई गई वस्तुऐं, लोहे का हथौड़ा एवं रक्त रंजित कपड़ों की उसके घर से बरामदगी, जिसकी पुष्टि ज्ञापन एवं जप्ती के स्वतंत्र साक्षियों द्वारा सम्यक् रूप से की गई है, को दृष्टिगत रखते हुए अभियुक्त दोषी है। (संतोष कुमार सिंह वि. म.प्र. राज्य) (SC)...807

Penal Code (45 of 1860), Sections 306 and 498A & Evidence Act (1 of 1872), Section 113-A – Cruelty – **Marriage took place about 6 months prior to death – It is too early to hold that scolding on account of non performance of household work amounts to cruelty – Few incidents narrated regarding cruelty are simple problems which are faced in domestic married life – Ingredients of Section 107, 109 of I.P.C. are not available – Appellants acquitted. [Arjun Singh Vs. State of M.P.]** ...1041

दण्ड संहिता (1860 का 45), धाराऐं 306 एवं 498ए तथा साक्ष्य अधिनियम (1872 का 1), धारा 113–ए – क्रूरता – मृत्यु के करीब 6 माह पूर्व विवाह हुआ था – यह धारणा करना जल्दबाजी होगी कि घरेलू कामकाज का निर्वहन नहीं करने पर डांटना फटकारना क्रूरता की श्रेणी में आता है – क्रूरता के संबंध में बताई गई कुछ घटनाऐं साधारण समस्याऐं हैं जिनका सामना घरेलू वैवाहिक जीवन में करना होता है – भा.द.सं. की धारा 107 व 109 के घटक उपलब्ध नहीं – अपीलार्थी दोषमुक्त। (अर्जुन सिंह वि. म.प्र. राज्य) ...1041

Penal Code (45 of 1860), Section 307 – Attempt to murder – Enmity – **Both accused and complainant parties are Arms Dealers and are having business rivalry – Various criminal cases were registered between both the parties – Enmity is a double edged weapon – A person can be falsely implicated. [Chunnilal (Dead) and Santosh Vs. State of M.P.] ...1048**

दण्ड संहिता (1860 का 45), धारा 307 – हत्या का प्रयत्न – वैमनस्यता – दोनों अभियुक्त और शिकायतकर्ता पक्षकार आयुध डीलर हैं और व्यावसायिक प्रतिद्वंद्वी हैं – दोनों पक्षकारों के बीच विभिन्न आपराधिक प्रकरण दर्ज किये गये – वैमनस्यता एक द्विधारी शस्त्र है – किसी व्यक्ति को मिथ्या आलिप्त किया जा सकता है। (चुन्नीलाल (मृतक) एवं संतोष वि. म.प्र. राज्य) ...1048

Penal Code (45 of 1860), Section 307 – Attempt to murder – **No blood was found on spot although victim has stated that blood started oozing out after the gun shot hit his abdomen – Statements u/s 161 of Cr.P.C. were recorded after 2 days – No explanation for the same was offered by I.O. – Independent witnesses were given up – Material infirmities in statements of victim and his real brother – Appellant liable to be acquitted. [Chunnilal (Dead) and Santosh Vs. State of M.P.] ...1048**

दण्ड संहिता (1860 का 45), धारा 307 – हत्या का प्रयत्न – घटनास्थल पर रक्त नहीं पाया गया यद्यपि आहत का कथन है कि उसे पेट में गोली लगने के पश्चात् रक्त बहने लगा था – दं.प्र.सं. की धारा 161 के अंतर्गत कथन दो दिन पश्चात् अभिलिखित किये गये – अन्वेषण अधिकारी द्वारा उक्त का कोई स्पष्टीकरण नहीं दिया गया – स्वतंत्र साक्षियों का परीक्षण नहीं किया गया – आहत एवं उसके सगे भाई के कथनों में तात्विक कमियां – अपीलार्थी दोषमुक्त किये जाने योग्य। (चुन्नीलाल (मृतक) एवं संतोष वि. म.प्र. राज्य) ...1048

Penal Code (45 of 1860), Section 307 – Plea of alibi – **Police during investigation had formed that appellant was in Shimla at the time of incident – Defence witnesses also prove the presence of appellant in Shimla at the time of incident – Appellant liable to be acquitted – Appeal allowed. [Chunnilal (Dead) and Santosh Vs. State of M.P.] ...1048**

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THE INDIAN LAW REPORTS M.P. SERIES, 2015 (VOL-2)

JOURNAL SECTION

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

AMENDMENTS IN THE HIGH COURT OF MADHYA PRADESH RULES, 2008

[Notifications published in Madhya Pradesh Gazette, Part 4 (C) dated 29th May, 2009, page no. 354 to 356]

High Court of Madhya Pradesh, Jabalpur

Jabalpur, the 15th May 2009

Notification No. 1

No. 39-O.S.D. – 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 amendments in the High Court of Madhya Pradesh Rules, 2008, namely : –

AMENDMENT

In the said Rules, –

(1) **In Chapter I, sub-rule 12 of rule 4 of shall be substituted by the following :**

"(12) "Part-heard Case" means a case in which bipartite final hearing of a main case has commenced but not concluded and is marked "part-heard" by the Court :

Provided that an interlocutory application, heard in part, shall not be treated as part heard :

Provided futher that no case heard in part, in motion hearing stage, shall be treated as part heard."

(2) **In chapter II, after clause (f) the following shall be inserted :**

"(g) Other Tax Appeals (OTA)"

(3) **In chapter II, after rule 28 the following shall be inserted:**

"28A. An appeal under any enactment relating to taxation, other than those mentioned hereinbefore in this chapter shall be registered as Other Tax Appeals."

(4) **In chapter IV, clauses (c) & (d) of sub-rule (7) of rule 2 shall be substituted by the following :**

"(c) challenging interlocutory or final orders passed by a Tribunal constituted under articles 323A or 323B of the Constitution of India;

(d) challenging interlocutory or final orders passed by following Courts and Tribunals–

(1) A Civil Court constituted under Section 3 of the Madhya Pradesh Civil Courts Act, 1958 and a Family Court under the Family Courts Act, 1984;

(2) Labour Courts, Industrial Courts and Industrial Tribunals constituted under the Madhya Pradesh Industrial Relations Act, 1960 and the Industrial Disputes Act, 1947;

(3) Arbitration Tribunal consituted under the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983;

(4) Co-operative Tribunals consituted under the Madhya Pradesh Co-operative Societies Act, 1960;

(5) Debts Recovery Tribunal and Appellate Tribunals constituted under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

(6) Deputy Commissioner, Additional Commissioner and Commissioner appointed under the Bhopal Gas Leak Disaster (Proceesing of Claims) Act, 1985;

(7) State transport Appellate Tribunal constituted under the Motor Vehicles Act, 1988;

(8) Tribunals constituted under the Sick Industrial Companies (Special Provisions) Act, 1985;

(9) District Forum, State Commission and National Commission constituted under the Consumer Protection Act, 1986;

(10) Any other Court, or Tribunal comprising a judicial member, as may be specified by the Chief Justice by special or general order."

(5) **In chapter IV, clause (g) of sub-rule (7) of rule 2 shall be substituted by the following :**

"(g) Relating to Income Tax, Wealth Tax, Gift Tax, Estate Duty, Central Sales Tax, Central Excise, Service Tax, Customs Duty, M.P. General Sales Tax, Commercial Tax, Value Added Tax, Entry Tax, Purchase Tax and any other tax, cess or duty as may be specified by the Chief Justice, by a general or special order."

(6) **In chapter IV, after clause (i) of sub-rule (7) of rule 2, the following shall be inserted :**

"(j) Challenging orders passed in a case under Prevention of Corruption Act, 1988,"

(7) **In chapter IV, sub-rule (12) of rule 4 shall be substituted by the following :**

"(12) Matters arising from Corruption Cases –

All matters, except applications under Sections 438 & 439 of the Code of Criminal Procedure, 1973, arising from cases under the Prevention of Corruption Act, 1988."

(8) **In clause (a) of sub-rule (1) of rule 13 of Chapter IV, " (ii) " shall be substituted by "(2)".**

(9) **In Chapter IV, clause (b) of sub-rule (1) of rule 13 shall be substituted by the following :**

"(b) An application for review, clarification or modification of a judgment, decree or final order, passed by a Judge or Judges who or one or more of whom is or are –

(i) temporarily unavailable and in the opinion of the Chief Justice, the application, looking to the urgency of the matter, cannot wait for such Judge or Judges to resume work or,

(ii) permanently unavailable,

shall be heard–

(1) if the decree or order, review of which is applied for, was passed by a Judge sitting alone, by the regular division bench,

(2) If the said decree or order was passed by two or more Judges by a bench of coordinate strength, to be constituted by the Chief Justice. Such bench shall, however, include the Judge or Judges who was/were part of the bench whose decree or order is under review, if available :

Provided that where both Judges of a division bench are permanently unavailable, the matter shall be listed before the regular division bench."

(10) In chapter V, rule 2 shall be substituted by the following :

"2. The Taxing Officer shall decide all questions relating to Court fees falling under S. 5 of the Court Fees Act, 1870.

(11) In chapter V, rule 3 shall be substituted by the following :

" 3. (1) (a) Where the scrutiny assistant considers that any document filed in the presentation centre is insufficiently stamped, he shall record his opinion with reasons therefor. This report shall be brought to the notice of the advocate representing the party concerned who will not thereon whether he accepts or disputes the accuracy thereof. If he raises a dispute, the matter shall be placed before the Taxing Officer, notice of the date being given to the advocate concerned.

(b) The Taxing Officer shall, after hearing the advocate, decide the dispute; where the dispute relates to the necessity of applying a fee or the amount thereof as envisaged under S. 5 of the Court Fees Act, 1870; such decision shall be final, except where the question, in the opinion of the Taxing Officer, is one of general importance, in which case he shall refer it for final decision to the Taxing Judge.

(2) Where the dispute relates to valuation for the purpose of determining the amount of any court fee paid on a plaint or memorandum of appeal, as envisaged under S. 12 of the Court Fees Act, 1870, the Taxing Officer shall, with his opinion, place the matter before the Court."

(12) In chapter V, rule 6(1), words "supported by affidavit of the affiant", between the words "application" and "Such" shall be deleted.

(13) In chapter VII, rule 10 shall be substituted by the following :

"10. A case, wherein the vacation Judge has passed an order under this chapter, shall be listed before the appropriate bench immediately after the vacation.

(14) In chapter VIII, rule 5(1) sign and word "/durable" shall be inserted between the words "ledger" and "paper".

(15) In Chapter IX, rule 7 sign and word "/deponent" shall be inserted between the words "affiant" and "in".

(16) In chapter X, rule 16 (3), "(1)" shall be inserted between "30" and "(a)".

(17) In Chapter X, rule 50 shall be substituted by the following :

"50. Nothing hereinbefore contained in this chapter shall apply to criminal appeals and revisions preferred by a person confined in prison and sent through the officer-in-charge of the Jail."

(18) In chapter XI, rule 1 shall be substituted by the following :

"1. Every-

(1) main case,

(2) interlocutory application, or

(3) any other document in a main case,

-shall be presented in the presentation centre of the High Court during working hours by any party or his recognized agent or counsel, in person."

(19) In rule 12 of chapter XIII, between the words "events" and "to", following words shall be deleted:

"and brief written submission on the substantial question of law stated in the memorandum of appeal, so as."

(20) At the end of rule 19 of chapter XIV following paragraphs shall be inserted :

"The Dealing Assistant making proposal for listing of a case for hearing on an interlocutory application shall flag-mark with an alphabet, the application and reply thereof, if any, in the record of the case, mentioning the serial number of the application. He shall also ensure that all the flags posted on earlier occasions and irrelevant for the purpose of hearing are removed.

The flag-marked alphabet shall be published in the daily cause list."

(21) In chapter XVIII, sub-rule 5 of rule 1 shall be deleted.

(22) In chapter XVIII, rule 3 shall be substituted by the following :

"3. The applications for certified copies shall be received from 10.30 a.m. to 4.30 p.m. and certified copies to be delivered from 11.00 a.m. to 5.00, on all working days of the Registry:

Provided that the aforesaid timings shall not be applicable, where the Court makes an order for delivery of the certified copy, the same day."

(23) In Form No. 1 of the appendix, figure "7", between words "rule" and "chapter" shall be substituted by the figure "8".

(24) In Format No. 13, in paragraph 2, figure "439" shall be substituted by the figure "438".

Notification No. 2

"In exercise of the power conferred by rule 2 of Chapter II of the High Court of Madhya Pradesh Rules, 2008, Hon'ble the Chief Justice appoints 15th of June, 2009, as the date on which notified amendments to the High Court of Madhya Pradesh Rules, 2008, shall come into force.".

C.V. SIRPURKAR
Secretary,
High Court Rule Committee
15-5-2009.

I.L.R. [2015] M.P., 807
SUPREME COURT OF INDIA
Before Mr. Justice H.L. Dattu , Mr. Justice Sudhansu Jyoti Mukhopadhaya & Mr. Justice M.Y. Eqbal
Cr.A. Nos. 410-411/2012 decided on 3 July, 2014

SANTOSH KUMAR SINGH ... Appellant
Vs.
STATE OF M.P. ... Respondent

A. ***Penal Code (45 of 1860), Sections 302, 307, 394, 397 & 450 - Murder*** **- Accused allegedly assaulted deceased by iron hammer on head - P.W.4 was also assaulted who suffered fracture on head - P.W. 4 lodged F.I.R. - In view of evidence of injured witnesses duly corroborated by medical evidence and the recovery of stolen articles, iron hammer and blood stained clothes at the instance of accused from his house which is duly corroborated by independent witnesses of memorandum and seizure, accused is guilty. (Para 19)**

क. दण्ड संहिता (1860 का 45), धाराऐं 302, 307, 394, 397 व 450 – हत्या – अभियुक्त ने अभिकथित रूप से मृतक के सिर पर लोहे के हथौड़े से हमला किया – अ.सा. 4 पर भी हमला किया गया जिसने सिर पर अस्थिभंग सहन किया – अ.सा. 4 ने प्रथम सूचना रिपोर्ट दर्ज की – आहत साक्षीगण का साक्ष्य चिकित्सीय साक्ष्य द्वारा सम्यक् रूप से अभिपुष्ट तथा अभियुक्त की निशानदेही पर चुराई गई वस्तुऐं, लोहे का हथौड़ा एवं रक्त रंजित कपड़ों की उसके घर से बरामदगी, जिसकी पुष्टि ज्ञापन एवं जप्ती के स्वतंत्र साक्षियों द्वारा सम्यक् रूप से की गई है, को दृष्टिगत रखते हुए अभियुक्त दोषी है।

B. ***Criminal Trial - Denial of opportunity - Counsel of his choice*** **- Accused filed an application for deferring the cross-examination on the ground that cross-examination shall be done by senior Advocate - Counsel already engaged by accused refused to cross-examine the witnesses - Nothing on record that counsel engaged by Court was not competent to cross-examine the witnesses. (Para 22)**

ख. आपराधिक विचारण – अवसर नहीं दिया जाना – पसंद का अधिवक्ता – अभियुक्त ने प्रतिपरीक्षण स्थगित किये जाने हेतु इस आधार पर आवेदन प्रस्तुत किया कि प्रतिपरीक्षण वरिष्ठ अधिवक्ता द्वारा किया जायेगा – अभियुक्त द्वारा पहले से नियुक्त अधिवक्ता ने साक्षियों का प्रतिपरीक्षण करने से इंकार किया – अभिलेख पर कुछ नहीं कि न्यायालय द्वारा नियुक्त अधिवक्ता

साक्षियों का प्रतिपरीक्षण करने के लिये सक्षम नहीं।

C. Penal Code (45 of 1860), Section 302 - Sentence - Rarest of rare case - Death sentence - **There is nothing to suggest the motive for committing crime except article and cash taken away by the accused - Accused is 26 years old having no previous criminal record - Case does not fall in the rarest of the rare category - Death sentence is excessive - Hence altered to life imprisonment - Rest part of sentence is affirmed - Appeal is partly allowed. (Paras 29 & 30)**

ग. दण्ड संहिता (1860 का 45), धारा 302 – दण्डादेश – विरल से विरलतम प्रकरण – मृत्युदंड – अभियुक्त द्वारा वस्तुऐं एवं नकदी ले जाने के सिवाय अपराध कारित करने के हेतु का कोई सुझाव नहीं है – अभियुक्त 26 वर्ष का है जिसका कोई पूर्व आपराधिक रिकार्ड नहीं – प्रकरण विरल से विरलतम श्रेणी में नहीं आता – मृत्युदण्ड अत्याधिक है – अतः आजीवन कारावास में संपरिवर्तित किया गया – दण्डादेश के शेष भाग की पुष्टि की गई – अपील अंशतः मंजूर।

Cases referred :

1980 (2) SCC 684, 1983 (3) SCC 470, 1998 (3) SCC 625, (1989) 3 SCC 5, 2011 (7) SCC 437, 2012 (4) SCC 257, 2013 (5) SCC 546.

JUDGMENT

The Judgment of the Court was delivered by : **SUDHANSU JYOTI MUKHOPADHAYA, J. :-** These appeals are directed against the common impugned judgment dated 24th March, 2011 passed by the High Court of Madhya Pradesh, Principal Seat at Jabalpur, by which High Court upheld the judgment of conviction and sentence for the offences u/s 302, 307, 394, 397 and 450 IPC, as follows:

Section	Sentence imposed
For offence under Section 302 IPC (on two counts);	Sentenced to death.
For offence under Section 307 IPC (on two counts);	Sentence for life on each count with fine of Rs.10,000/- each on failure of payment RI for two years each.
For offence under Section 394 read with Section 397 (on four	RI for ten years on each count with fine of Rs.5,000/- each

counts);	on failure of payment further RI for one year each.
For offence under Section 450 IPC.	RI for ten years with fine of Rs.5,000/-. On failure of payment, further RI for one year.

2. The learned counsel for the appellant assailed the conviction, inter alia, on the following grounds:

(a) The trial was not fair as the appellant was not given an opportunity to defend by the counsel of his choice.

(b) The Trial Court gravely erred in placing implicit reliance on the statement of Razia Khatoon (PW-4) and Zeenat Parveen (PW-3) and on the evidence of recovery of the ornaments and other articles from the possession of the appellant.

(c) The death sentence awarded by the Trial Court as confirmed by the High Court is not justified, as no case of rarest of the rare is made out.

3. The case of the prosecution is that the accused-Santosh Kumar Singh was known to the family of Gulam Mohd. including his wife, Noorjahan, son Javed Akhtar, and daughters viz. Rozi @ Razia and Zeenat Parveen. On 7th May, 2010, accused came to their house in Sector No.12, Quarter No.B-664, N.C.L. Colony, Singrauli at about 2 p.m. He had a chat with Noorjahan Begum (deceased) for about 30 minutes. In the same room besides her Rozi @ Razia Khatoon(PW-4) and Zeenat Parveen (PW-3) were also present. Javed Akhtar (deceased), son of Noorjahan Begum was sleeping in the bedroom. After accused left, Noorjahan Begum (deceased) started offering Namaz, Rozi @ Razia went to bathroom to take bath and Zeenat Parveen was sitting in the outside room. After sometime, accused came back and knocked the door; Zeenat Parveen opened the door and the accused came inside. At that time Rozi @ Razia came out of the bathroom and saw accused talking to Zeenat in the outside room, at that moment, the accused suddenly pulled out an iron hammer from his T-shirt and hit on the head of Zeenat Parween two three times with hammer. Zeenat Parveen screamed and became unconscious. The accused, thereafter, with intention to kill Noorjahan Begum and Javed Akhtar also hit them with hammer on their heads, because of which

both fell down and became unconscious. After that accused hit Rozi @ Razia by the hammer on her head with an intention to kill her resultantly Razia's head got fractured. Thereafter, the accused opened the almirah, suitcases and boxes and looted two gold chains, one pair of tops, one pair of bali, one pair of jhala, three rings, one nose pin and four pairs of silver anklets, artificial jewellery etc. and Rs. 23,000/- cash of Noorjahan Begum. He also took out four brass bangles from the hands of Noorjahan Begum. As a result of assault Noorjahan Begum died on the spot. On hearing shrieks of Rozi @ Razia, Ramesh Satnami (PW-1), Ramawadh Pal (PW-5) and other people of the colony came. At the time of incident, Gulam Mohd. (PW-2) was on duty and on receiving the news he came to the place of incident and took Rozi @ Razia, Zeenat Parveen and Javed Akhtar to Nehru Hospital.

4. On the basis of the report, Ext.P-10, of Rozi @ Razia Khatoon (PW-4), a case Crime No.0/10 was registered under Section 302, 307, 450, 394 & 397 IPC at the Police Station Vindhya Nagar. After receiving the news of the death of Noorjahan and Javed Akhtar, Shiv Kumar Dubey (PW-13) recorded the marg intimation of Ext.P-24 & 25 in Police Chauki Jayant, P.S. Vindhya Nagar and the marg intimation-Ext.P/10 was sent to the concerned Police Station, on the basis of which Crime No.Ka-0-304/10 was registered at P.S. Baidhan and investigation was started.

5. Sub-Inspector, J.S. Paraste (PW-12), on the same day, went at the spot and prepared the inquest memo of the body of Noorjahan Begum (Ext.P/12).The dead body of Noorjahan Begum was sent for postmortem examination. After conducting inquest proceedings in respect of the dead body of Javed Akhtar, the same was also sent for postmortem examination. Dr. Vinod Sharma(PW.16) examined the injuries of Razia Khatoon and Zeenat Parveen and found injuries on their heads. The injuries, grievous in nature, were dangerous to life.

6. Dr. V.N. Satnami (PW-10) conducted autopsy of the body of Noorjahan Begum. He found three injuries on her skull, skull bones were fractured. He submitted his postmortem report- Ext.P/19. In his opinion, death of the deceased was homicidal in nature. Dr. V.N. Satnami (PW-10) also conducted autopsy of body of Javed Akhtar and found two injuries on his head. There was depressed fracture of skull bone underneath the injuries. In his opinion, death of the deceased was homicidal in nature. Postmortem report of Javed Akhtar is Ext.P/20.

7. Anil Upadhyay (PW-11) was the Investigation Officer, who on the same night apprehended the accused from Khariya Chowk and recovered Rs.23,020/- from the pocket of his pants. On the information given by the appellant under Section 27 of the Indian Evidence Act, he recovered stolen articles, iron hammer and blood stained clothes from the house of the accused situated in N.C.L. Colony. The recovered articles were identified by Gulam Mohd.(PW.2) and Razia Khatoon (PW-4).

8. After due investigation, the chargesheet was filed and the case was committed for trial. The appellant denied the guilt and pleaded false implication but he did not adduce any evidence in his defence.

9. Prosecution examined altogether 16 witnesses and produced a number of documentary evidence to prove their case. The Trial court on the appreciation of the evidence held the accused guilty and convicted and sentenced him for the offence as mentioned above, which was affirmed by the High Court.

10. Dr. V.N. Satnami (PW-10), who performed the postmortem examination of the body of Noorjahan Begum found the following injuries on her body:

> *"(1) Reddish contusion 5 cm x 4 cm present on right side of forehead. Red blood clot was deposited under the skin.*
>
> *(2) Lacerated wound 5 cm x 3 cm x bone deep on middle of the forehead posteriorly with depressed multiple fractures of underlying bone.*
>
> *(3) Lacerated wound 4 cm x 3 cm x bone deep on left occipito parietal region of head with depressed multiple fractures of underlying bones.*
>
> *In his opinion, death of deceased Noorjahan had occurred as a result of coma due to head injury. Death was homicidal in nature. The postmortem examination report (P/19) was written and signed by him."*

On the same day, Dr. Satnami (PW-10) performed postmortem examination of the body of deceased Javed Akhtar and found the following injuries:

"(1) Lacerated wound on left parietal region of head 2 cm x 1 cm x bone deep with peripheral contusions in size of 6 cm x 5 cm. subcutaneous reddish blood clot with multiple depressed fractures of underlying bone.

(2) Reddish contusion on occipital region of head 5 cm x 4 cm in size with subcutaneous reddish blood clot with depressed fracture of underlying bone.

In his opinion, death of Javed Akhtar had occurred as a result of coma due to injury. Death was homicidal in nature."

11. From the inquest memorandums (Ext.P/6 and P/12) and the evidence of Sub-Inspector, J.S. Paraste (PW-12) and constable Raj Bahadur Pandey (PW-15), who conducted inquest, it was established that Noorjahan and Javed Akhtar died of homicidal injuries found on their bodies.

12. Anil Upadhyay (PW-11), Investigation Officer arrested the accused from Khariya Chowk, Main Road, P.S. Shakti Nagar in the presence of witnesses Mohd.Sadiq (PW-6) and Mohd. Yunus (PW-7) and seized money from him and prepared seizure memo- Ext.P-15. After arrest the accused was brought to the Police Station-Jayant and was interrogated in front of the witnesses. During interrogation accused gave information regarding jewellery and the hammer which was used in committing crime; the clothes, hammer and jewellery were seized from the house of the accused vide memorandum-Ext.P-13, written by Anil Upadhyay (PW-11). Anil Upadhyay stated that he went to the house of accused and seized the jewellery article from articles-A1 to A 24; seizure memo-Ext.P-14 was prepared. He had also stated that blood stained clothes and iron hammer were seized in the presence of witnesses vide seizure memo- Ext.P-16.

13. Mohd. Sadiq (PW.6) and Mohd. Yunus (PW-7) are the independent witnesses of the memorandum of seizure. In their statement they deposed that the Police arrested the accused at Khariya Chowk in their presence and seized about Rs. 23,000/- from him and the accused was brought to the Police Station-Jayant for inquiry. At the Police Station the accused disclosed about the jewellery, hammer and clothes, on the basis of which jewellery, hammer and clothes were seized. Both the witnesses thereby have corroborated the statement of Anil Upadhyay(PW-11). During the cross-examination both the

witnesses, PW-6 and PW-7 admitted that they visited the house of Gulam Mohd. There is no infirmity or contradiction in the statements of the two witnesses.

14. Mohd. Ayaz Khan (PW-9) stated that on 8th July, 2010 at the request of the Police he conducted identification of the jewellery at stadium Baidhan and prior to the identification Police had handed over other jewellery in a sealed packet. He mixed it and then conducted the identification and during the identification Gulam Mohd. and Razia had identified the original jewellery. After identification he had handed over the jewellery in a packet to the Police who were standing outside the stadium.

15. Zeenat Parween(PW-3) and Razia Khatoon (PW-4), daughters of deceased Noorjahan and sisters of deceased Javed Akhtar are the injured eyewitnesses; both of them received serious injuries at the incident. Both the witness PW-3 and PW-4 clearly stated that sometime before the incident, the accused had come to their house and he being a prior acquaintance, the accused had taken refreshment sitting with their mother and also was talking with her. From the statements of both the witnesses the facts of the accused coming to their house before the incident, taking refreshment with deceased Noorjahan and talking with her are proved, which is also corroborated from the FIR-Ext.P-10. Both these witnesses have also stated that in the past the accused used to come for tuitions and their mother used to treat the accused like her son and the photograph of the accused was also hanging in their house. From the aforesaid evidence, it is clear that the PW-3 and PW-4 were in a position to identify the accused, the accused was well acquainted with both PW-3 and PW-4 since long. The prosecution proved beyond reasonable doubt that even prior to the incident the accused was known to the deceased and the injured witnesses PW-3 and PW-4 and on the date of incident also, the accused had come to their house and had taken refreshments and had talks.

16. Zeenat Parveen (PW-3) and Razia Khatoon (PW-4) in their statements clearly stated that initially the accused left their house and after sometime the accused had come again to their house. On opening the door he had hit the hammer on the head of Javed Akhtar, who had come out after hearing screams of Zeenat Parveen and then after entering into the bedroom he hit deceased Noorjahan on her head. From the statement of Razia Khatoon (PW-4), it is also clear that the accused after entering the store-room had hit on her head

and then the accused had taken out the money and jewellery from the almirah, suitcase, box and attaché, etc. In paragraph 7 Zeenat Parveen (PW-3), has also stated that she had seen the accused hit Javed Akhtar on his head but she could not see as to who hit Razia and her mother. Such statement cannot be stated to be contradiction and does not adversely affect the case of the prosecution in view of the deposition made by Razia Khatoon(PW-4).

17. Similarly, from the statement of Razia Khatoon (PW-4), we find that the accused after hitting Zeenat Parveen, Javed Akhtar and Noorjahan took away jewellery, cash amount and the bangles of Noorjahan and then he ran away after bolting the door from outside.

18. PW-4 further deposed that after the accused run away by bolting the door from outside she went into the balcony and stop Satnami (PW-1), who at that time had taken out his vehicle and was going somewhere. Then, the door was got open. Statements of Razia Khatoon (PW-4) about shouting from the balcony stopping Satnami (PW-1) and then opening of the door by Satnami are also proved by the statement of Ramesh Satnami (PW-1), who made similar statement.

19. In view of the statements made by the injured witnesses Zeenat Parveen (PW-3) and Razia Khatoon (PW-4) as corroborated by the postmortem report, seizure of jewellery, hammer, blood stained clothes (Ex.P-13)and statement of Anil Upadhyay (PW- 11), as corroborated by Sadiq (PW-6) and Yunus (PW-7), the Trial Court rightly held the accused guilty for the offences u/s 302, 307, 394 r/w 397 and 450 IPC.

20. First ground taken by the learned counsel for the appellant with respect to denial of opportunity to the accused to be defended by a counsel of his choice is incorrect as from the record we find that proper opportunity was given to the accused.

21. The order sheets of the Trial Court dated 25th September, 2010 shows that the appellant made an application that appellant wanted to get the witnesses cross-examined by senior Advocate, Mr. Rajendra Singh Chauhan, therefore, he requested to defer the cross-examination of the witnesses. The Trial court rejected the application. On 27th September, 2010, counsel of the accused, Mr. Amrendra Singh, who was defending the accused, refused to defend him. The Trial Court then appointed one Mr. G.P. Dwivedi, Advocate, as defence counsel on State expenses.

22. On perusal of records it transpires that Shri Amrendra Singh, Advocate had filed his Vakalatnama for representing the appellant. On 25th September, 2010, when the case was fixed for evidence though he was competent to cross-examine the witnesses but he moved the application to defer the cross-examination of the witnesses on the ground that the accused wanted to engage senior Advocate, Mr. Rajendra Singh Chauhan. However, neither Rajendra Singh Chauhan was present nor any Vakalatnama was filed on his behalf. On that day, two witnesses, namely Ramesh Satnami (PW-1) and Gulam Mohd. (PW-2) were examined and Mr. Amrendra Singh, Advocate had cross-examined those witnesses. None of those witnesses were eyewitnesses; in fact one of them, Ramesh Satnami (PW-1) was declared hostile. On 27th September, 2010, Mr. Amrendra Singh refused to appear on behalf of the appellant, when the appellant on asking expressed his inability to appoint any counsel. Since there was none to represent the accused, the Trial Court appointed Mr. G.P. Dwivedi, Advocate, to pursue the appeal. The appellant has failed to show that Mr. G.P. Dwivedi was not competent or was incapable of handling the case. On the contrary from the cross-examination of the witnesses made by Mr. G.P. Dwivedi we find that he was competent to deal with the case. Even on the next date neither Mr. Rajendra Singh Chauhan, Advocate appeared nor he filed his Vakalatnama.

23. The next question is whether death sentence awarded to the appellant is excessive, disproportionate on the facts and circumstance of the case, i.e. whether the present case can be termed to be a rarest of the rare case.

24. Guidelines emerged from *Bachan Singh vs. State of Punjab,* 1980 (2) SCC 684 were noticed by this Court in *Machhi Singh and others vs. State of Punjab,* 1983 (3) SCC 470. In the said case the Court observed:

> **38.** In this background the guidelines indicated in *Bachan Singh* case, 1980 (2) SCC 684 will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from *Bachan Singh case*(supra):
>
> "(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into

consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

39. In order to apply these guidelines inter alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

40. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

25. In *Ronny alias Ronald James Alwaris and others vs. State of Maharashtra,* 1998 (3) SCC 625, this Court held:

"45. These principles have been applied in various judgments of this Court thereafter and it is unnecessary to multiply the cases here. Whether the case is one of the rarest

of the rare cases is a question which has to be determined on the facts of each case. Suffice it to mention that the choice of the death sentence has to be made only in the rarest of the rare cases and that where culpability of the accused has assumed depravity or where the accused is found to be an ardent criminal and menace to the society and; where the crime is committed in an organised manner and is gruesome, cold-blooded, heinous and atrocious; where innocent and unarmed persons are attacked and murdered without any provocation, the case would present special reason for purposes of sub-section (3) of Section 354 of the Criminal Procedure Code."

In *Rony alias Ronald James Alwaris* (supra) this Court noted the law laid-down by this Court in *Allauddin Mian & Ors. Vs. State of Bihar,* (1989) 3 SCC 5, that unless the nature of the crime and circumstances of the offender reveal that criminal is a menace to the society and the sentence of life imprisonment would be altogether inadequate, the Court should ordinarily pass a lesser punishment and not punishment of death which should be reserved for exceptional case only. Considering the cumulative effect of all the factors, like the offences committed under the influence of extreme mental or emotional disturbance, the young age of the accused, the possibility of reform and rehabilitation, etc. the Court may convert the sentence into life imprisonment.

26. In *State of Maharashtra vs. Goraksha Ambaji Adsul,* 2011 (7) SCC 437, this Court made the following observation:

> **"30.** The principles governing the sentencing policy in our criminal jurisprudence have more or less been consistent, right from the pronouncement of the Constitution Bench judgment of this Court in *Bachan Singh v. State of Punjab,*(2010) 8 SCC 775. Awarding punishment is certainly an onerous function in the dispensation of criminal justice. The court is expected to keep in mind the facts and circumstances of a case, the principles of law governing award of sentence, the legislative intent of special or general statute raised in the case and the impact of awarding punishment. These are the nuances which need to be examined by the court with discernment and in depth.

31. The legislative intent behind enacting Section 354(3) CrPC clearly demonstrates the concern of the legislature for taking away a human life and imposing death penalty upon the accused. Concern for the dignity of the human life postulates resistance to taking a life through law's instrumentalities and that ought not to be done, save in the rarest of rare cases, unless the alternative option is unquestionably foreclosed. In exercise of its discretion, the court would also take into consideration the mitigating circumstances and their resultant effects.

32. The language of Section 354(3) demonstrates the legislative concern and the conditions which need to be satisfied prior to imposition of death penalty. The words, "in the case of sentence of death, the special reasons for such sentence" unambiguously demonstrate the command of the legislature that such reasons have to be recorded for imposing the punishment of death sentence. This is how the concept of the rarest of rare cases has emerged in law. Viewed from that angle, both the legislative provisions and judicial pronouncements are at *ad idem in law.* The death penalty should be imposed in the rarest of rare cases and that too for special reasons to be recorded. To put it simply, a death sentence is not a rule but an exception. Even the exception must satisfy the prerequisites contemplated under Section 354(3) CrPC in light of the dictum of the Court in *Bachan Singh*(supra).

33. The Constitution Bench judgment of this Court in *Bachan Singh* (supra) has been summarised in para 38 in *Machhi Singh v. State of Punjab,* (1998) 1 SCC 149, and the following guidelines have been stated while considering the possibility of awarding sentence of death: (*Machhi Singh case*(supra), SCC p. 489)

"(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also requires to be taken into

consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. ... death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

(emphasis supplied)

34. The judgment in *Bachan Sing*(supra), did not only state the above guidelines in some elaboration, but also specified the mitigating circumstances which could be considered by the Court while determining such serious issues and they are as follows: (SCC p. 750, para 206)

"206. ... 'Mitigating circumstances.—In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated.

The State shall by evidence prove that the accused does not satisfy Conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.'"

35. Now, we may examine certain illustrations arising from the judicial pronouncements of this Court.

36. In *D.K. Basu v. State of W.B.*,(2002) 1 SCC 351, this Court took the view that custodial torture and consequential death in custody was an offence which fell in the category of the rarest of rare cases. While specifying the reasons in support of such decision, the Court awarded death penalty in that case.

37. In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra,* (1972) 2 SCC 640, this Court also spelt out in paras 56 to 58 that nature, motive, impact of a crime, culpability, quality of evidence, socio-economic circumstances, impossibility of rehabilitation are the factors which the court may take into consideration while dealing with such cases. In that case the friends of the victim had called him to see a movie and after seeing the movie, a ransom call was made, but with the fear of being caught, they murdered the victim. The Court felt that there was no evidence to show that the criminals were incapable of reforming themselves, that it was not a rarest of the rare case, and therefore, declined to award death sentence to the accused.

38. Interpersonal circumstances prevailing between the deceased and the accused was also held to be a relevant consideration in *Vashram Narshibhai Rajpara v. State of*

Gujarat, (1996) 8 SCC 167, where constant nagging by family was treated as the mitigating factor, if the accused is mentally unbalanced and as a result murders the family members. Similarly, the intensity of bitterness which prevailed and the escalation of simmering thoughts into a thirst for revenge and retaliation were also considered to be a relevant factor by this Court in different cases.

39. This Court in *Satishbhushan Bariya* (supra) also considered various doctrines, principles and factors which would be considered by the Courts while dealing with such cases. The Court discussed in some elaboration the applicability of the doctrine of rehabilitation and the doctrine of prudence. While considering the application of the doctrine of rehabilitation and the extent of weightage to be given to the mitigating circumstances, it noticed the nature of the evidence and the background of the accused. The conviction in that case was entirely based upon the statement of the approver and was a case purely of circumstantial evidence. Thus, applying the doctrine of prudence, it noticed the fact that the accused were unemployed, young men in search of job and they were not criminals. In execution of a plan proposed by the appellant and accepted by others, they kidnapped a friend of theirs. The kidnapping was done with the motive of procuring ransom from his family but later they murdered him because of the fear of getting caught, and later cut the body into pieces and disposed it off at different places. One of the accused had turned approver and as already noticed, the conviction was primarily based upon the statement of the approver."

"**41.** The above principle, as supported by case illustrations, clearly depicts the various precepts which would govern the exercise of judicial discretion by the courts within the parameters spelt out under Section 354(3) CrPC. Awarding of death sentence amounts to taking away the life of an individual, which is the most valuable right available, whether viewed from the constitutional point of view or from the human rights point of view. The condition of providing special reasons

for awarding death penalty is not to be construed linguistically but it is to satisfy the basic features of a reasoning supporting and making award of death penalty unquestionable. The circumstances and the manner of committing the crime should be such that it pricks the judicial conscience of the court to the extent that the only and inevitable conclusion should be awarding of death penalty."

27. This Court in *Ramnaresh and others vs. State of Chattisgarh,* 2012 (4) SCC 257, noticed the aggravating and mitigating circumstances with respect to a crime and held as follows:

> **"76.** The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in Bachan Singh,(1980) 2 SCC 684, and thereafter, in Machhi Singh, (1983) 3SCC 470. The aforesaid judgments, primarily dissect these principles into two different compartments—one being the "aggravating circumstances" while the other being the "mitigating circumstances". The court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the court. It will be appropriate for the court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the court as contemplated under Section 354(3) CrPC.
>
> **Aggravating circumstances**
>
> (1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.
>
> (2) The offence was committed while the offender

was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 CrPC.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold-blooded murder without provocation.

(13) The crime is committed so brutally that it pricks

or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused.

While determining the questions relating to sentencing policy, the Court laid down the Principles at paragraph 77 which reads as follows:

"77. While determining the questions relatable to sentencing policy, the court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles

(1) The court has to apply the test to determine, if it was the "rarest of rare" case for imposition of a death sentence.

(2) In the opinion of the court, imposition of any other punishment i.e. life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime."

28. Recently, this Court in *Shankar Kisanrao Khade vs. State of Maharashtra,* 2013 (5) SCC 546, dealing with a case of death sentence, observed:

"52. Aggravating circumstances as pointed out above, of course, are not exhaustive so also the mitigating circumstances. In my considered view, the tests that we have to apply, while awarding death sentence are "crime test", "criminal test" and the "R-R test" and not the "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is, 100% and "criminal test" 0%, that is, no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record,

etc. the "criminal test" may favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the rarest of the rare case test (R-R test). R-R test depends upon the perception of the society that is "society-centric" and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges."

29. In the present case the appellant is an educated person, he was about 26 years old at the time of committing the offence. The accused was a tutor in the family of the deceased-Noorjahan. He was in acquaintance with the deceased as well as Zeenat Parveen (PW-3) and Razia Khatoon (PW-4). There is nothing specific to suggest the motive for committing the crime except the articles and cash taken away by the accused. It is not the case of the prosecution that the appellant cannot be reformed or that the accused is a social menace. Apart from the incident in question there is no criminal antecedent of the appellant. It is true that the accused has committed a heinous crime, but it cannot be held with certainty that this case falls in the "rarest of the rare category". On appreciation of evidence on record and keeping in mind the facts and circumstances of the case, we are of the view that sentence of death penalty would be extensive and unduly harsh.

30. Accordingly, we commute the death sentence of appellant to life imprisonment. The conviction and rest part of the sentence are affirmed. Appeals are partly allowed.

Appeal partly allowed.

I.L.R. [2015] M.P., 827
SUPREME COURT OF INDIA
Before Mr. Justice Sudhansu Jyoti Mukhopadhaya &
Mr. Justice Prafulla C. Pant

Civil Appeal No. 4335/2007 decided on 2 September, 2014

LIFE INSURANCE CORPORATION OF INDIA
& ors. ... Appellants
Vs.
TRIVENI SHARAN MISHRA ... Respondent

A. ***Service Law - Appointment*** **- Fixation of maximum qualification - High Court rightly held that fixation of higher/maximum qualification is violative of Article 14 of Constitution of India.**
(Paras 3 & 11)

क. *सेवा विधि – नियुक्ति* – अधिकतम अर्हता का निर्धारण – उच्च न्यायालय ने उचित रूप से अभिनिर्धारित किया कि उच्चतर/अधिकतम अर्हता का निर्धारण किया जाना भारत के संविधान के अनुच्छेद 14 के उल्लंघन में है।

B. ***Service Law - Misconduct*** **- Advertisement was issued for appointment on the post of peon fixing qualification as class IX and candidates having higher qualification were not to be considered - Respondent suppressed the fact that he was already graduate - Appellant had imposed the punishment of stoppage of 2 increments with cumulative effect to another similarly situated employee - High Court rightly quashed the order of removal from service and directed for consideration for imposition of similar punishment - Appeal dismissed.**
(Paras 12 to 14)

ख. *सेवा विधि – अवचार* – भृत्य के पद पर नियुक्ति हेतु कक्षा IX की अर्हता निर्धारित करते हुये विज्ञापन जारी किया गया और उच्चतर अर्हता वाले अभ्यर्थियों का विचार नहीं किया जाना था – प्रत्यर्थी ने तथ्य का छिपाव किया कि वह पहले से स्नातक था – अपीलार्थी ने समान रूप से स्थित अन्य कर्मचारी को संचयी प्रभाव से दो वेतन वृद्धियों को रोके जाने की शास्ति अधिरोपित की – उच्च न्यायालय ने उचित रूप से सेवा से हटाये जाने का आदेश अभिखंडित किया तथा समान शास्ति अधिरोपित करने के लिये विचार किये जाने हेतु निदेशित किया – अपील खारिज।

Cases referred :

(2006) 13 SCC 619, (2000) 2 SCC 606, (2003) 3 SCC 437.

JUDGMENT

The Judgment of the Court was delivered by : **PRAFULLA C. PANT, J. :-** This appeal is directed against the judgment and order dated 6th January, 2006 passed by the High Court of Madhya Pradesh in Writ Petition No. 542 of 2004 whereby the writ petition has been allowed, and the writ petitioner is directed to be reinstated in service. It is further directed by the High Court that the appellant may consider to impose the penalty against the present respondent as was awarded in the case of Daluram Patidar, another employee of the appellant-Corporation.

2. Brief facts of the case are that Senior Divisional Manager of Life Insurance Corporation of India, at Shahdol in order to recruit peons (sub-staff) invited applications from the qualified candidates through Employment Exchange. Pursuant to that, respondent - Triveni Sharan Mishra submitted his application. As per the qualification prescribed by the appellant, a candidate was required to have passed Standard IX, but the candidates who have passed Standard XII and have secured 50% or more marks, Graduates or Post-graduates were not to be considered for the post. The respondent (writ petitioner) in his application (Annexure P-3) for the above post mentioned his qualification "Higher Secondary (XIth old)". At the end of the application dated 20th January, 1996, a declaration was made by the candidate (writ petitioner) that he did not possess any other qualification except the one mentioned in the application. The respondent – writ petitioner appears to have got selected for the post of Peon. However, after couple of years of his service, it was found that he possessed Bachelor's Degree and he was pursuing M.A.(previous) in Economics at the time he applied for the post as above. On this, the respondent was served with the charge-sheet by the appellant and departmental enquiry was initiated. On conclusion of the departmental enquiry, the respondent (writ petitioner) was found guilty of misconduct. Consequently, he was served with the show-cause notice as to why he be not removed from the service. On consideration of the reply submitted by the respondent, the Senior Divisional Manager, L.I.C. of India, Shahdol vide his order dated 30th October, 2000 (Annexure P-11), removed the respondent - writ petitioner from the service. The said order was challenged by the respondent before the Departmental Appellate Authority i.e. Zonal Manager, Life Insurance Corporation of India, Delhi. Upon consideration of the appeal submitted by the respondent against imposition of penalty of removal in terms of Regulation 39(1)(f) of the LIC of India (Staff) Regulations, 1960 (hereinafter to be referred

to as 'the Regulations') passed by the Senior Divisional Manager, Shahdol, the Appellate Authority concurred with the view taken by the said Authority, and dismissed the appeal on 18th February, 2003.

3. Aggrieved by said order, the respondent filed writ petition No. 542 of 2004(s) before the High Court. The High Court after taking action and hearing the parties found that the qualification fixed by the present appellant that the candidate should not possess the higher qualification than the IXth Standard, is violative of Article 14 of the Constitution of India. It further found that similarly situated another employee with the department was inflicted with the penalty of stoppage of increments for two years with cumulative effect, as such the punishment awarded to the writ petitioner was discriminatory. Accordingly, the writ petition was allowed by the High Court. Aggrieved by the said decision of the High Court, this appeal was preferred by the employer – Life Insurance Corporation of India.

4. We have heard learned counsel for the parties and perused the papers on record.

5. The qualification prescribed by the appellant for the post of peon, as mentioned in Annexure P-1 reads as under:

> " b) Qualifications A pass in ST.IX. However Candidates who passed XII Std. and have secured 50% or more marks, graduates or post graduates will not be considered.
>
> Xx xx xx xx xx."

6. The charge-sheet served on the writ petitioner is reproduced below:

" CHARGE SHEET

You, Shri Triveni Sharan Mishra, SR no.704768, Sub Staff, Divisional Office Shahdol are hereby charged as under:

1. That, in your application dated 20.01.1996 for the post of Sub-Staff, submitted to Shahdol Divisional Office of LIC of India, you have mentioned your educational qualification as Higher Secondary (11th old), whereas your educational qualification at that time was of Graduation level, which was more than the desired qualification for the post of Sub- Staff.

2. That you have got appointment for the post of Sub-

Staff by fraudulently making false statement regarding the educational qualification, whereas you had taken admission as a regular student in Govt. Post Graduation College Shahdol in B.A.(Final) in academic year 1989-90 and your Roll no. was 48717 to appear in the examination. And in year 1990-91 also you had taken admission as a Regular student in M.A.(Previous) Economics & to appear in the examination your Roll No. was 12696, which was deliberately suppressed by you.

3. That in the declaration given on 22.03.1996 at the time of interview also, you have suppressed your actual educational qualification and fraudulently produced the duplicate Transfer Certificate no.79, of Government Raghuraj Higher Secondary School no.1, Shahdol in support of your having passed XI th standard.

(The provisional list of the documents on the basis of which the charges are to be proved is enclosed)

Your aforesaid act, is in contravention to rules of the Corporation and prejudicial to good conduct, thereby violating the provisions of Regulations 21, 24 and 39(1) of the aforesaid (Staff) Regulations 1960, for which one or more of the penalties specified under Regulation 39(1) (a) to (g) can be imposed on you.

However, before I proceed further in the matter, I hereby give you an opportunity to either admit or deny the aforesaid charges in writing. In case you admit the charges, a statement of admission and in the event of your denying the charges, a statement of denial, together with the list of documents by which and a list of witnesses through whom you propose to defend your case may be submitted to the undersigned within a period of 15 days from the date of receipt of this charge sheet.

In case your written statement, as mentioned above, is not received within the stipulated period or if it is found to be unsatisfactory, further proceedings shall ensue without any

reference to you."

7. The reply given by the writ petitioner to above charge-sheet to the Department is quoted below:

"To

The Divisioal Manager I/C.
LIC of India
Divisional Office
Shahdol
M.P.

Through Proper Channel

Dear Sir,

RE: DISCIPLINARY PROCEEDINGS UNDER REGULATION 39 OF THE LIC OF INDIA (STAFF) REGULATIONS, 1960 AND CHARGESHEET DATED 29.02.2000, ISSUED TO ME.

With reference to above charge sheet, my submission is as under :

1. That I was an unemployed person, and I was in dire need of employment. Therefore, when I got information regarding vacancy for the post of Sub- Staff from Employment Exchange Office, I immediately applied for the post of Sub-Staff.

2. It is true that the desired qualification for the post of Sub-Staff was XIth pass along with other documents.

3. Since I was XIth passed, hence I had mentioned my educational qualification as XIth, as the additional higher qualification was not a constraint in fulfilling the responsibilities for the applied post, I had not disclosed it. By doing so I did not intend to suppress my additional qualification.

4. After having been appointed on the post of Sub- Staff, I have served the Corporation with utmost integrity, honesty & capacity. And my higher qualification has been useful in

performing my duties towards the Corporation. Thus I have not violated the regulations 21 & 24.

5. If I have unknowingly violated any rules & regulations, I regret for the same. I have never intended to violate the regulations.

With my aforesaid submission, I humbly request you to take a sympathetic view in my case and absolve me from the above referred charges.

Yours faithfully,
Triveni Sharan Mishra
Sub-staff, Divisional Office,
Shahdol .R.No.704768."

8. It is not disputed before us that the respondent was already graduate on the date he submitted his application for the post of Peon, and the declaration made by him in Annexure P-3 at the time of seeking employment that he possessed no other qualification was incorrect. The question before us is as to whether the qualification as mentioned above is violative of Article 14 of the Constitution of India or not, and as to whether awarding punishment of removal to the writ petitioner, is discriminatory in the light of the one awarded to similarly situated one Daluram Patidar i.e. only punishment of stoppage of increments for two years with cumulative effect.

9. Mr. B.B. Sawhney, learned senior counsel appearing on behalf of the appellants heavily relied in the case of *Kerala Solvent Extractions Ltd. Vs. A. Unnikrishnan and Anr.* (2006) 13 SCC 619, and it is pointed out that in said case the maximum educational qualification for a "badli" workman was 8th standard, and the respondent of said case had made false declaration on which services of said workman were terminated. This Court in said case quashed the award of the Labour Court dated 23rd March, 1992 setting aside the order of termination dated 3rd March, 1989 of the workman, and further set aside the order passed by the High Court of Kerala upholding the award of the Labour Court.

10. We have carefully gone through the aforesaid case law. In said case issue involved was not whether or not maximum qualification can be fixed for a Class-IV/Grade-D employee, nor was in said case the employer appears to

be either State or instrumentality of the State. What this Court has held in *Kerala Solvent Extractions Ltd.* (Supra) is that the Court should not be led by misplaced sympathy. Paragraphs 9 and 10 of the said judgment are re-produced below:

> "9. Shri Vaidyanathan, learned senior counsel for the appellant, submitted, in our opinion not without justification, that the Labour Court's reasoning bordered on perversity and such unreasoned, undue liberalism and misplaced sympathy would subvert all discipline in the administration. He stated that the management will have no answer to the claims of similarly disqualified candidates which might have come to be rejected. Those who stated the truth would be said to be at a disadvantage and those who suppressed it stood to gain. He further submitted that this laxity of judicial reasoning will imperceptibly introduce slackness and unpredictability in the legal process and, in the final analysis, corrode legitimacy of the judicial process.
>
> 10. We are inclined to agree with these submissions. In recent times, there is an increasing evidence of this, perhaps well meant but wholly unsustainable tendency towards a denudation of the legitimacy of judicial reasoning and process. The reliefs granted by the courts must be seen to be logical and tenable within the framework of the law and should not incur and justify the criticism that the jurisdiction of the courts tends to degenerate into misplaced sympathy, generosity and private benevolence. It is essential to maintain the integrity of legal reasoning and the legitimacy of the conclusions. They must emanate logically from the legal findings and the judicial results must be seen to be principled and supportable on those findings. Expansive judicial mood of mistaken and misplaced compassion at the expense of the legitimacy of the process will eventually lead to mutually irreconcilable situations and denude the judicial process of its dignity, authority, predictability and respectability".

11. In our opinion, in the present case the High Court has rightly relied on the law laid down by this Court in *Mohd. Riazul Usman Gani and Ors. Vs.*

District & Sessions Judge, Nagpur and Ors. (2000) 2 SCC 606 wherein it has deprecated the criteria of maximum qualification for the post of peons. Relevant parts of para 16 and para 18 of the said judgment are quoted herein below:

> "16. In the present case we find that the candidates with higher education than Standard VII were completely shut out for being considered for the posts of Peons. The Recruitment Rules also provide for promotion. Rule 3(ii) we may quote:
>
> "(ii) The District Judge may promote-
>
> (a) a Peon, a Watchman, a Gardener, or a Sweeper to the post of Bailiff;
>
> (b) a Peon, a Watchman, a Gardener, a Sweeper or a Bailiff to the post of a Regional (Language) Section Writer, an English Section Writer or a Clerk; and
>
> (c) a Peon, a Watchman, a Gardener, a Sweeper, a Bailiff, a Regional (Language) Section Writer, and English Section Writer or a Clerk to the post of Stenographer".
>
> Xx xx xx xx xx
>
> 18. If the appointment of a candidate to the post of Peon is restricted to his having qualified up to Standard VII he will have no chance of promotion to the post of Regional Language Section Writer or Clerk.....".

12. However, on behalf of the appellants it is contended that suppression of material information and making false statement to secure the employment, is a serious offence to attract the dismissal of service. In this connection, learned senior counsel for the appellants referred to the case of *Kendriya Vidyalaya Sangathan and Ors vs. Ram Ratan Yadav* (2003) 3 SCC 437. But in our opinion, the aforesaid case referred on behalf of the appellants cannot be applied to the present case for the reason that in the said case the employee had concealed the facts relating to his character and antecedents. In said case, the employee who was selected for the post of a Teacher suppressed the

information that a criminal case relating to offences punishable under sections 323, 341, 294, 506-B read with section 34 of Indian Penal Code was registered against him. As such the facts in the present case cannot be equated with the case referred.

13. From the papers on record before us, it appears that for mentioning less qualification to secure the job, similarly situated another employee (one Daluram Patidar) was let off by the Life Insurance Corporation of India by awarding punishment of stoppage of increments for two years with cumulative effect. We are of the opinion that the High Court has rightly taken note of said fact while allowing the writ petition, and directing the employer to consider the imposition of similar penalty after reinstatement of the writ petitioner.

14. Therefore in view of the above discussion, we do not find any sufficient reason to interfere with the impugned order passed by the High Court. Accordingly, the appeal is dismissed. No order as to costs.

Appeal dismissed.

I.L.R. [2015] M.P., 835
WRIT APPEAL
Before Mr. Justice Shantanu Kemkar & Mr. Justice J.K. Jain
W.A. No. 221/2014 (Indore) decided on 25 March, 2014

RITESH KUMAR AJMERA & ors. ... Appellants
Vs.
SMT. MANISHA PARIHAR & ors. ... Respondents

Constitution - Article 12 & 226 - Maintainability - Private person **- Held - Learned Single Judge, without recording any finding that whether the appellant Director and the Private Limited Company in question were discharging any public duty or failed to discharge any public duty and they are amenable to the Writ jurisdiction, issued the directions to the individual and to a Private Limited Company - Same cannot be sustained - Writ petitions are restored for being decided by learned Single Judge afresh. (Paras 10,11 & 12)**

संविधान – अनुच्छेद 12 व 226 – पोषणीयता – प्राइवेट व्यक्ति – अभिनिर्धारित – विद्वान एकल न्यायाधिपति ने कोई निष्कर्ष अभिलिखित किये बिना कि क्या प्रश्नगत अपीलार्थी निदेशक एवं प्राइवेट लिमिटेड कंपनी किसी लोक कर्त्तव्य का निर्वहन कर रहे थे या किसी लोक कर्त्तव्य का निर्वहन करने में असफल

रहे और वे रिट अधिकारिता के अधीन हैं, व्यक्ति एवं प्राइवेट लिमिटेड कंपनी को निदेश जारी किये – उक्त को कायम नहीं रखा जा सकता – विद्वान एकल न्यायाधिपति द्वारा नये सिरे से न्याय निर्णित किये जाने हेतु रिट याचिकायें पुनः स्थापित की गई।

Cases referred :

AIR 2005 SC 3202, 2009 (9) SCC 610, 2010 (8) SCC 329, 2013 (8) SCC 345.

Vivek Dalal, for the appellants.
V.P. Khare and *P.C. Nair,* for the respondent no. 1.
Mini Ravindran, Dy. G.A. for the respondent nos. 2 to 6.

ORDER

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

2. This order shall govern the disposal of the W.A. No.222/14, W.A. No.223/14, W.A. No.224/14, W.A. No.225/14, W.A. No.228/14, W.A. No.229/14, W.A. No.231/14, W.A. No.232/14, W.A. No.233/14, W.A. No.234/14, W.A. No.235/14, W.A. No.236/14, W.A. No.237/14, W.A. No.238/14, W.A. No.239/14, W.A. No.240/14, W.A. No.241/14, W.A. No.242/14, W.A. No.243/14, W.A. No.244/14, W.A. No.245/14, W.A. No.246/14, W.A. No.247/14, W.A. No.248/14, W.A. No.249/14, W.A. No.250/14, W.A. No.251/14, W.A. No.252/14, W.A. No.253/14, W.A. No.254/14, W.A. No.255/14, W.A. No.256/14, W.A. No.257/14, W.A. No.258/14, W.A. No.259/14, W.A. No.260/14, W.A. No.261/14, W.A. No.262/14, W.A. No.265/14, W.A. No.267/14, W.A. No.271/14 and W.A. No.272/14 as they arise out of a common order dated 30.11.2013 passed in various writ petitions observing that the question involved in all of them are identical in nature.

3. For the sake of convenience, facts are taken from Writ Appeal No.221/14 arising out of the order passed in W.P. No.12992/13.

4. The first respondent had filed the aforesaid writ petition claiming following reliefs:-

"(i) to call for the relevant records of the case;

(ii) to direct the police Authorities for registration of F.I.R. against the culprit directors/shareholders/promoters of the company;

(ii) to return the amount of Rs.50,000/- along with the interest of current market rate to the petitioner or alternately Rs.16.50 crores collected by the company along with interest at current market rate to the residents Welfare Society formed by the plot owners of the Phoenix Township;

(iv) to direct the statutory authority to take over the management of the company and do the development of the township which comprises thousands of residents like petitioner;

(v) to award costs of this petition;

(vi) any other writ or direction which this Hon'ble Court may deem fit and proper in the peculiar circumstances of the case may also be issued."

5. The Writ Court vide impugned common order disposed of the writ petition by giving following directions:

"1. original Directors and substituted Directors namely Mr. Nilesh Ajmera, Smt. Sonali Ajmera, Ritesh Ajmera and Mr. Chirag Shah will join as Directors of respondent No.6/ company within a period of two weeks.

2. respondent No.6/company shall compete all the formalities and shortcomings of the Phoenix Township as promised initially within a period of six months without fail. The plots shall be demarcated and shall be marked so that the same can be identified easily by each of the plot holder.

3. Respondent No.6/company shall keep on site office at Phoenix Township so that the plot holders can get the required information easily.

4. So far as WP No.13623/2013; 13629/2013 and 13631/2013 are concerned, the allegations are that petitioner of these petitions are cheated as the amount was received

against allotment of plots in Phoenix Township but now the respondent No.6/company is offering the plots else where. In this regard suffice to say that respondent No.6/company shall fulfill the promise. Petitioner of these petitions are at liberty to take legal action in accordance with law.

5. It is informed that the plot holders who have issued cheques from time to time, were dishonoured. If the cheques are dishonoured then at the time of giving possession, it will be incumbent upon the plot holders to clear the dues for which the cheques were given. Similarly the outstanding amount which is shown in the sale deeds for which No Dues Certificate is not issued by respondent No.6/company, shall be, payable at the time of possession. Needful shall also be done by the respondent No.6/company and its Directors for collecting the sale deeds from the Office of Sub Registrar. In case of default in compliance of any of the directions issued by this Court, upon production of copy of the order, competent authority shall take appropriate action including criminal against respondent No.6/company and its Directors in accordance with law".

6. It has been argued by the learned counsel for the appellant that the learned Single Judge has committed gross illegality in issuing impugned directions for which no relief was claimed. He submits that issuance of the aforesaid directions to the appellant and to the Private Limited Company which has also filed appeals against the impugned common order is beyond the scope of the writ jurisdiction as the appellants, Directors/Exdirectors of the company in question 'Phoenix Devcons Pvt. Ltd.' are not amenable to the writ jurisdiction. Neither the appellant, nor the company are discharging any public duty which can be directed to be enforced by issuance of the writ and that they are not an authority under Article 12 of the Constitution. He further argued that the Commissioner's report received on the basis of the interim order passed by the learned Single Judge was in fact in favour of the appellants and the company, in the circumstances, there was absolutely no necessity for issuing the impugned directions. He submits that the direction No.1 contained in the order is matter relating to the Company Law regarding which there is a complete procedure and dehors to that no such direction can be issued in writ jurisdiction. He also submits that even if there were any deficiencies noticed, the learned Single

Judge should have only directed the writ petitioner to approach the State Government Authorities or any other appropriate forum for redressal of the grievance or the official respondents could have been issued some directions in accordance with law, but no directions in the nature contained in the impugned order could have been issued. He also submitted that the appellants' averments made in reply paragraph Nos.7, 8, 9 and 10 have been completely ignored by the learned Single Judge and the mention in the order that the appellant had agreed for issuance of the direction is wrong.

7. On the other hand, learned counsel appearing for the writ petitioners have supported the impugned order and have stated that on account of the lapses on the part of the appellant and the company, the writ petition was filed in which taking into consideration the Commissioner's report, the impugned directions have rightly been issued by the learned Single Judge which are well within the writ jurisdiction. In support, learned counsel for the writ petitioners placed reliance on the judgments of the Supreme Court delivered in the cases of *Binny Ltd. and another Vs. Sadasivan and others* (AIR 2005 SC, 3202); *Babubhai Jamnadas Patel Vs. State of Gujrat and others* (2009 (9) SCC, 610) and *Shalini Shyam Shetty and another Vs. Rajendra Shankar Patil* (2010 (8) SCC, 329).

8. We have heard learned counsel for the parties at length. Perused the impugned order, averments made in the writ petition, reply and the annexures as also the Commissioner's report.

9. On going through the relief clause as extracted above, we find that the writ petitioner had prayed for issuance of directions to the police authorities for registration of F.I.R. against the culprits directors/shareholders/promoters of the company and to return the amount of Rs.50,000/- along with interest of current market rate to the petitioner or alternately Rs.16.50 crores collected by the company along with interest at current market rate to the residents Welfare Society formed by the plot owners of the Phoenix Township and to direct the statutory authority to take over the management of the company and do the development of the township which comprises thousands of residents like petitioner.

10. However, instead of passing the order in regard to the reliefs claimed, we find that the learned Single Judge has issued altogether different directions than what was prayed. The Commissioner's report also prima facie appears

to have not been rightly dealt with. The learned Single Judge before issuance of the impugned direction did not consider and decide as to whether the appellant Director and the Private Limited Company in question are amenable to writ jurisdiction, are they discharging any public duty and whether they failed to discharge any public duty. In our considered view, the learned Single Judge could not have issued impugned directions to the individuals who are Directors of the Private Ltd. Company or to a private company without firstly giving any finding about constitution of the company, as to whether the entire share capital of the company is held by the Government; whether its administration is in the hands of the Board of Directors appointed by the Government and whether there exists within the company deep and pervasive State control. The Writ Court before issuing the impugned direction was required to examine the factors which are required to be considered, like whether the functions carried out by the company are closely related to the governmental function. The other factors like formation of appellant's company, its objectives, functions, its management and control, financial aids received by it, the question of its dominations by the Government as all these matters would only render it in as authority amenable to writ jurisdiction of High Court. Having failed to consider all these related issues in view of the law laid down by the Supreme Court in the case of *Balmer Lawrie & Co. Ltd. Vs. Partha Sarathi Sen Roy,* reported in 2013 (8) SCC, 345, the impugned directions as also the order passed by the learned Single Judge cannot be sustained.

11. As regards the reliance of the petitioner on the judgment passed by the Supreme Court in the case of *Binny Ltd. and another Vs. Sadasivan and others* (supra), the same will not help the petitioner for the simple reason that in that case also, the Supreme Court has held that a writ of mandamus can be issued against a private body or a person, but for enforcement of public duty **(emphasis supplied)**. In the case of *Babubhai Jamnadas Patel Vs. State of Gujrat and others* (supra), the Supreme Court has held that the High Court and Supreme Court are sentinels of justice. They have been vested with extra powers of judicial review and supervision to ensure that rights of citizens are duly protected. Courts have to maintain a constant vigil against inaction of authorities in discharging their duties and obligation in the interest of citizens, for whom they exist. The Supreme Court as also the High Court have to issue appropriate writ or directions from time to time to ensure that the authorities performed at least such duties as they were required to perform under various statutes and orders passed by administration. However, we

find in the present case, the directions which have been issued by the learned Single Judge are not to the authorities but, the same are issued to the individual and to a private limited company without recording a finding that they are amenable to the writ jurisdiction as they failed in discharging any public duty. In the case of *Shalini Shyam Shetty and another Vs. Rajendra Shankar Patil,* again the Supreme Court has said that under the phraseology of Article 226, the High Court can issue writ to any person but, the person against whom writ will be issued must have some statutory or public duty to perform **. (Emphasis supplied) .**

12. Keeping in view the aforesaid clear legal position, we are of the view that in the absence of there being finding recorded by the Writ Court in terms of the law laid down by the Supreme Court in various cases referred to above, in our considered view, the order passed by the learned Single Judge cannot be sustained. We, accordingly, set aside the impugned order. Writ Petitions are restored to its original numbers for being decided by the Single Bench afresh.

Order accordingly.

I.L.R. [2015] M.P., 841
WRIT APPEAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice Jarat Kumar Jain
W.A. No.556/2013 (Indore) decided on 28 March, 2014

ROHIT ... Appellant
Vs.
STATE OF M.P. & ors. ... Respondents

A. ***Service Law - Selection Process - Estoppel*** **- A person who had participated in selection process cannot challenge the selection process on the ground of estoppel. (Para 10)**

क. *सेवा विधि – चयन प्रकिया – विबन्ध* – कोई व्यक्ति जिसने चयन प्रकिया में हिस्सा लिया है वह चयन प्रकिया को विबन्ध के आधार पर चुनौती नहीं दे सकता।

B. ***Service Law - Appointment - Merit list*** **- Mere on the basis of selection, a person is not entitled to claim appointment. (Para 12)**

ख. *सेवा विधि – नियुक्ति – वरीयता सूची* – मात्र चयन के आधार पर कोई व्यक्ति नियुक्ति का दावा करने के लिये हकदार नहीं होगा।

Cases referred :

2008 (3) MPLJ 394, 2008 (4) SCC 171, 2011 (1) SCC 150, 1999 (1) JT 101, 1992 (4) SCC 683, AIR 1998 SC 375, W.P.(s) No. 483/2005 (Jabalpur) decided on 14.01.2005

Archana Kher, for the appellant.
Mini Ravindran, Dy.G.A. for the respondent/State.
S.R. Saraf, for the respondent no. 5.

ORDER

The Order of the Court was delivered by :
SHANTANU KEMKAR, J. :- By filing this intra court appeal under Section 2 (1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005, the appellant / writ petitioner of Writ Petition No.4393/2011 has challenged the common order dated 05.12.2012 passed in Writ Petition No.4393/2011 and in Writ Petition No.2314/2011.

2. Briefly stated, in pursuance to the advertisement dated 14.06.2008 issued by Gram Panchayat, Sajwani inviting applications for appointment on the post of Panchayat Karmi, the appellant submitted his application. In the merit list of the candidates prepared by the Gram Panchayat the appellant's name was at Serial No.1. However, no order of appointment was issued in favour of the appellant and the Chief Executive Officer, Janpad Panchayat, Barwani, on behalf of Gram Panchayat, Sajwani, issued a fresh advertisement on 01.01.2009 inviting applications for appointment on the said post. The appellant again applied for the said post. Again his name was at Serial No.1 in the merit list of the candidates. This time also, no appointment order was issued and instead the post was re-advertised vide advertisement dated 03.06.2009.

3. In pursuance to this third advertisement dated 03/06/2009 the appellant again submitted his application for being appointed on the said post of Panchayat Karmi. In this process of appointment, the 5th respondent stood first in the merit list and as such an order of appointment dated 27.06.2009 was issued in favour of 5th respondent, appointing him as Panchayat Karmi. Thereafter, he was conferred with the powers of Secretary under Section 69 (1) of the MP Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993 vide orders dated 18.08.2009 issued by the Chief Executive Officer on approval of the Collector.

4. When the matter stood thus, the Chief Executive Officer, on approval

of the Collector, Barwani, issued an order dated 09.06.2010 revoking the Secretarial powers of the 5th respondent on the ground that the appointment made by the Gram Panchayat was illegal as for the third time the advertisement was issued only to favour the 5th respondent. Feeling aggrieved, the 5th respondent filed Writ Petition No.2314/2011 challenging the order dated 09.06.2010 whereas the present appellant filed Writ Petition No.4393/2011, seeking directions to appoint him on the post of Panchayat Karmi stating therein that since he had received the highest marks in the earlier two round of selection process, he ought to have been given appointment.

5. The learned Single Judge by the impugned order allowed Writ Petition No.2314/2011 filed by the 5th respondent and set aside the order dated 09/06/2010, and dismissed the appellant's Writ Petition No.4393/2011 claiming appointment on the basis of earlier two selection process. Aggrieved, the appellant has filed this appeal.

6. It has been argued by the learned counsel for the appellant that the learned Single Judge has committed error in allowing the writ petition of the 5th respondent on the basis of the judgment passed by a Division Bench of this Court in the case of *Lalla Prasad Burman v. State of Madhya Pradesh* reported in 2008 (3) MPLJ 394. She submits that in the earlier two round of process of appointment, the appellant being the most meritorious, the third advertisement could not have been issued by the Gram Panchayat.

7. On the other hand, learned counsel appearing for the respondents have supported the impugned order passed by the learned Single Judge and have prayed for dismissal of the writ appeal.

8. We have considered the rival submissions and have gone through the impugned order as also the record.

9. It is not in dispute that in the earlier process of making appointment, the appellant was kept at top in the merit list. However, it is also clear from the record that no appointment was made in the earlier two process of appointment but the post was re-advertised on 03.06.2009. In response to the advertisement dated 03/06/2009, the appellant again applied and participated in the selection process. In this process of selection, the 5th respondent being the most meritorious candidate amongst all the candidates including the appellant, an order of appointment was issued in his favour.

10. From the narration of the aforesaid facts, it is undoubtedly clear that the appellant who is claiming his appointment on the basis of earlier two process of appointment had participated in the third round of process of appointment in which he was not successful. It is now well settled that having unsuccessfully participated in the process of selection without any demur, the candidate is estopped from challenging the selection process on account of principles of estoppel, acquiescence, waiver and doctrine of approbate and reprobate; [*See Dhananjay Malik & others v. State of Uttaranchal* 2008 (4) SCC 171; *Vijendra Kumar Verma v. Public Service Commission* 2011 (1) SCC 150; *Utkal University etc. v. Dr. Nrusingha Charan Sarangi & others* 1999 (1) JT 101 and 1992 (4) SCC 683].

12. Undoubtedly on earlier two occasions, the appellant was merely put in the merit list and no order of appointment was ever issued in his favour. Now, it is also well settled that on the basis of mere selection, the candidate is not entitled to demand the appointment.[See *Government of Orissa v. Harprasad Das & others* AIR 1998 SC 375 as also a Division Bench of this Court in the case of *Ramswaroop v. Union of India* [Writ Petition (s) No.483/ 2005 decided on 14.01.2005 at Jabalpur]

13. As regards reliance on the Division Bench judgment of this Court passed in *Lalla Prasad Burman* (supra), we are of the view that the same has rightly been relied by the writ Court for allowing Writ Petition No.2314/ 2011 filed by the 5th respondent as before passing the order dated 09.06.2010 denotifying the 5th respondent Panchyat Karmi as a Panchyat Secretary no enquiry was held as required under Rule 7 of the MP Panchayat Service (Discipline & Appeal) Rules, 1999.

14. In view of the aforesaid clear legal position and in view of the fact that the appellant had participated in the 3rd round of selection process and on being unsuccessful it was not open for the appellant to challenge the selection process and also to seek appointment on the basis of selection list, as prepared in pursuance to the first and second advertisements as on the basis of merit list alone, the appellant could not claim the appointment.

15. In the result, the appeal fails and is hereby dismissed.

No orders as to the costs.

Appeal dismissed.

I.L.R. [2015] M.P., 845
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 14747/2008 (Jabalpur) decided on 7 May, 2013

K.K. GUPTA ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule-13 **- Competence to issue a charge-sheet and to impose a penalty of removal from service by respondent no. 5 who was incharge Chief Medical & Health Officer - Held - Officers who have been given the current charge can not exercise statutory powers - As there was no delegation of powers in favour of respondent no. 5 to initiate D.E. against petitioner and respondent no. 5 has also included himself as a witness proves that he was having certain bias against the petitioner - Therefore, charge-sheet and inquiry is bad in law - Impugned orders are quashed - Petitioner be reinstated with all consequential benefits - However respondents can initiate D.E. afresh in accordance with law. (Paras 8 & 9)**

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम–13 – प्रत्यर्थी क्र. 5 जो कि प्रभारी मुख्य चिकित्सा एवं स्वास्थ्य अधिकारी था द्वारा आरोप–पत्र जारी किये जाने की और सेवा से हटाये जाने की शास्ति अधिरोपित करने की सक्षमता – अभिनिर्धारित – वह अधिकारी जिसे वर्तमान प्रभार दिया गया है कानूनी शक्तियों का प्रयोग नहीं कर सकता – चूंकि याची के विरूद्ध विभागीय जांच आरंभ करने के लिये प्रत्यर्थी क्र. 5 के पक्ष में शक्तियों का प्रत्यायोजन नहीं था और प्रत्यर्थी क्र.5 ने स्वयं को साक्षी के रूप में भी शामिल किया था, साबित करता है कि याची के विरूद्ध वह पूर्वाग्रह रखता था – इसलिये आरोप–पत्र एवं जांच विधि अंतर्गत अनुचित – आक्षेपित आदेश अभिखंडित – याची को सभी पारिणामिक लाभों के साथ बहाल किया जाये – तथापि प्रत्यर्थीगण विधि अनुसार नये सिरे से विभागीय जांच आरंभ कर सकते हैं।

Cases referred :

1973 JLJ 405, W.P. No. 13590/2009 (S) (Jabalpur) decided on 11.03.2011.

P.N. Dubey, for the petitioner.

S.K. Shrivastava, P.L. for the respondents no. 1 to 4.
D.K. Dixit, for the respondent no. 5.

ORDER

K.K. TRIVEDI, J. :- This petition under Article 226 of the Constitution of India is directed against the order dated 27.04.2007 passed by the respondent No.5 in his capacity as incharge Chief Medical & Health Officer, Katni, as also the order dated 22.05.2008 by which the appeal preferred by the petitioner against the order of penalty has been dismissed mainly on the ground of competence of respondent No.5 to impose such a penalty of removal from service on the petitioner after departmental enquiry.

2. Brief facts giving rise to filing of this petition are that the petitioner was initially appointed as Superior Field Worker in the District Filaria Unit, Katni. He was subsequently promoted on the post of Insect Collector on 27.04.2005. It is the averment of the petitioner that except the impugned charge-sheet issued to him, no disciplinary action whatsoever was taken against him. He was diligently, efficiently and honestly discharging the duties. However, as soon as the respondent No.5 was made incharge Chief Medical & Health Officer, the petitioner became an eyesore of the said respondent, who was putting pressure on the petitioner to do certain work. When the petitioner refused to carry out such orders, which according to the petitioner were illegal, he was threatened to dire consequences. The respondent No.5 thereafter issued an order of suspension against the petitioner on 13.09.2006 and issued a charge-sheet to the petitioner on 09.10.2006. As many as 7 charges were leveled against the petitioner, which he denied. However, subsequently a supplementary charge-sheet was issued to the petitioner by the same authority alleging three more charges on 23.12.2006. Surprisingly, the respondent No.5 described himself as a witness against the alleged charges in the supplementary charge-sheet. A reply was submitted by the petitioner, which was not accepted and ultimately an Enquiry Officer was appointed. Enquiry was conducted in hasty manner and a report was drawn against the petitioner.

3. In the meanwhile since the complaints of the petitioner were not being looked into by the authorities of the Department, he made complaint before the Lokayukt and the Collector of the District but nothing was done. A show cause was issued to the petitioner along with the enquiry report calling his explanation alleging that certain charges were fully proved and certain charges were partially proved against the petitioner in the enquiry. The petitioner was

having no hope that he will get any justice in the hands of respondent No.5 and despite all attempts since the petitioner was not granted any justice, on the other hand the order of penalty was issued against him, the petitioner was left with no option but to file an appeal and simultaneously approached this Court by way of filing W.P. No.8440/2007 (S). However, as the appeal against the order of penalty was pending before respondent No.3, this Court disposed of the writ petition directing the authorities to decide the appeal against the order of penalty, vide order dated 13.07.2007. The said order was brought to the notice of the authorities but since respondent No.3 has rejected the appeal of the petitioner without any cogent reason, ultimately the petitioner is required to file this writ petition before this Court.

4. Upon issuance of the notice of the writ petition, the respondents No.1 to 4 have filed their return and have denied the allegations made in the petition. It is contended by the respondents that the enquiry was rightly conducted in terms of the provisions of Madhya Pradesh Civil Services (Classification, Control & Appeal) Rules, 1966 (herein after referred to as 'Rules'). Since the charges were found proved against the petitioner, the competent authority, i.e. respondent No.4, has passed the order of punishment as prescribed under the Rules. It is contended that the petitioner is habitual in creating pressure upon the authorities by making false complaints and these facts were found proved in the enquiry. The respondent No.5 was the competent authority to impose the penalty on the petitioner as he was holding current charge of the post of Chief Medical & Health Officer, Katni, at the relevant time. It is, thus, contended that entire petition is misconceived and based on misleading statements, therefore, the same is liable to be dismissed.

5. This Court has specifically ordered the respondents-authorities to produce the relevant enquiry record. However, the enquiry record despite demand has not been made available to this Court, though orally it was assured by learned Panel Lawyer appearing for the respondents.

6. Heard learned Counsel for the parties at length and examined the record.

7. As is vehemently contended by learned Counsel for the petitioner, substantive rank of respondent No.5 at the relevant time was that of the Medical Specialist. He was not regularly promoted on the post of Chief Medical & Health Officer, Katni. This fact is not disputed by the respondents though they have tried to say that the respondent No.5 was eligible to be

appointed on the post of Chief Medical & Health Officer and was in fact given the current charge of the post. The fact remains that the respondent No.5 was only holding the current charge of the post of Chief Medical & Health Officer, Katni at the relevant time. It is trite that only a person, who is given the regular appointment on the post of appointing authority of any employee, is authorized to exercise the statutory powers. No debate on this is required as the same has already been settled in view of the law laid-down by the Apex Court in several cases. On an occasion, this Court has examined the law in this respect and has given categorical findings in this respect. This issue came up for consideration before the Full Bench of this Court in the case of *Girija Shanker Shukla vs. Sub Divisional Officer, Harda and others,* 1973 JLJ 405. Considering the law laid-down by the Apex Court in several cases, the Full Bench of this Court has held in paragraphs 16 and 17 as under:

> "16. The above cited decision of the Supreme Court clearly show that the authority of *Ramratan's* case, is in no way impaired; rather the view taken therein stands reinforced. However, that decision applies only to situations like those under Article 311(1) of the Constitution or the Defence of India Act or Rules where the delegate is names and further delegation is prohibited expressly or impliedly. In all such cases, emphasis is on rank, and the power can be exercised only by the holder of that rank. However, there are other categories of cases, like the present, where emphasis is not on rank but only on the authority to discharge a certain function. In this latter class of cases, all that has to be examined is whether the person discharging the impugned function is so empowered or not, there being no prohibition, express or implied, against delegation and there being no such emphasis on rank. The category to which a case belongs will depend on the nature of the function and the context in which the power is given. Thus, in every case the purpose and nature of the function, the provision conferring power and the context or setting in which it appears, have all to be seen in order to determine whether the power can be exercised only by the holder of a particular rank and none else.
>
> 17. From the decisions of the Supreme Court it follows that a person appointed permanently or to officiate on a post

holds that rank, whereas a person who is placed only in current charge of duties of a post does not hold that rank. Accordingly, those functions or powers of the post which depend on the rank cannot be discharged by a person who is placed only in current charge of the duties of that post."

This makes it clear that only the administrative functions are required to be discharged or the day to day work of the post is required to be discharged by an incumbent if he is posted on current charge of the said post. The statutory functions are required to be discharged by any such authority only when substantively a regular person is posted on the said post. Admittedly the respondent No.5 was a specialist as was certified by the authorities under the Right to Information Act on 21.10.2008. It was categorically informed to the petitioner that the respondent No.5 was a Specialist in Pediatrics posted in District Hospital, Katni and his salary was being drawn against the said post from District Hospital, Katni. However, he was made incharge Chief Medical & Health Officer of Katni. This being so, the respondent No.5 was not authorized to exercise the functions as a Disciplinary Authority against the petitioner. This fact is further proved by the findings recorded by the Appellate Authority in the order passed in appeal filed by the petitioner. There was a circular issued by the State Government in Health & Family Welfare Department on 06.06.1998 reiterating the circular issued by the State Government way back. it was said that the officers, who are to be given the current charge of the post, are required to function in terms of the circular, which was issued by the General Administration Department of Govt. of Madhya Pradesh on 1st February, 1964. The State Government has categorically said that the officers, who have been given the current charge, are not required to discharge the statutory functions attached to the post on which they are simply discharging the duties on current charge. The circular of the State Government reads thus:

"Copy of G.A.D. Memorandum No.213/2475-I(iii)/ 63 dated 1St February, 1964 addressed to All Departments of Government etc.

.....

Sub :-Arrangement for holding current charge of the duties of a post by another officer during the absence of the regular incumbent of the post.

Ref:- This Deptt.'s Memo No.1707-CR.175-I(iii)/61, dated the 5th July, 1961.

.....

In this department's Memorandum, referred to above, it was decided that an order appointing officer to held the current charge of the duties of another post should, in the absence of any specific directions to the contrary, be deemed to clothe the officer with all the powers vested in the full-fledged incumbent of the post, even though he may not get the full pay of the post.

2/ The State Government has since been advised that the statutory functions attached to any designated post can be performed only by a person holding a post so designated and not by one appointed to hold current charge of the duties of that post. An officer appointed to perform the current duties of a post can exercise administrative or financial powers vested in the full-fledged incumbent such as are granted by administrative orders, officer memorandum and the like. He cannot however, exercise statutory powers whether those powers are derived direct from an Act of the Legislature or Rules, regulations or Bye-Laws made under any article of the Constitution (e.g. Fundamental) Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Services Regulations, Rules regarding delegation of Financial Powers etc.)

3/ The above legal position may, in supersession of this department's memo under reference, please be borne in mind while appointing Government servants to hold current charge of the duties of posts, other than their own."

These are the categorical averments made in the petition by the petitioner and the documents are also annexed in support of such averments, more particularly in paragraph 5.10 and 5.11 of the petition as also the grounds raised in the ground paras of the writ petition.

8. As against this, the return filed by the respondents nowhere meets out

such allegations, specifically denying them nor the return of the State Government contains an averment that the circular issued by the State Government way back was superseded or replaced by any other circular. In absence of such a categorical statement, it has to be held that the allegations made by the petitioner are correct. Further, this Court has looked into this issue in W.P.No. 13590/2009 (S), *Ramesh Kumar Pandey vs. State of M.P. & others,* decided on 11.03.2011 and has specifically given the finding again based on the decision rendered by the Full Bench of this Court in the case of *Girja Shanker Shukla* (supra) in the following manner:

> "In view of the foregoing discussions and on consideration of the provision of Rule 13 of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 as well as the schedule of recruitment Rules of 1988 and the order Annexure R-1 whereby the additional charge have been given to Mr. Shriram Tiwari, in the opinion of this Court the power of the disciplinary authority has not been conferred on him, however, he is incompetent to issue the charge-sheet. Accordingly, this petition is allowed. Charge-sheet Annexure P-1 dated 24th of July, 2009 issued by the incompetent person is hereby quashed, consequently no further action in the departmental enquiry proceeding may be taken. However, the respondents are at liberty to take further action in accordance with law."

This being so, it is clear that the respondent No. 5 was not competent authority to initiate any departmental enquiry against the petitioner by issuance of the charge-sheet. Had it been a case that there is any delegation of power conferring any right or authority on the respondent No.5 to initiate any proceeding under the Rules against the petitioner, the said document would have been filed by the respondents. In absence of such a document, it has to be inferred that there was no delegation of power in favour of respondent No.5 to initiate any departmental enquiry against the petitioner and as such the charge-sheet itself is bad in law. One more aspect is required to be examined. If the respondent No.5 was the complainant or a witness in the departmental enquiry, he should not have issued the charge-sheet to the petitioner. The facts relating to issuance of charge-sheet vide Annexure P-5 and P-11 are not disputed by the respondents. Therefore, it is clear that respondent No.5 was not only incompetent authority to initiate departmental

enquiry against the petitioner but he was having certain bias against the petitioner inasmuch as he included himself as a witness in the list of witnesses to prove the charges leveled against the petitioner. The enquiry is bad on this count as well. These issues were raised before the respondent No.3 in appeal but cursory without getting any information, the said issues have been decided against the petitioner, therefore, in fact the appeal of the petitioner was also not decided in appropriate manner.

9. In view of the above discussions, this writ petition deserves to be and is hereby allowed. The impugned charge-sheet dated 09.10.2006 (Annexure P-5) and supplementary charge-sheet dated 23.12.2006 (Annexure P-11) as also the order impugned dated 17.04.2007 (Annexure P-1) and 22.05.2008 (Annexure P-2) are hereby quashed. The petitioner be reinstated in service immediately with all the consequential benefits. However, the respondents would be at liberty to initiate the departmental enquiry against the petitioner afresh, if any misconduct is said to have been committed by the petitioner, through a competent authority in accordance to law.

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

Petition allowed.

I.L.R. [2015] M.P., 852
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 22427/2003 (Jabalpur) decided on 20 August, 2013

D.P. SHARMA ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. Service Law - Grant of promotion - Seniority-cum-merit - **Last ACR of the petitioner average - Petitioner was not found fit for grant of promotion - Held - This could not be rightful assessment of an employee for promotion as in the terms of the criteria prescribed if the petitioner has not earned ACR of Good category in the last two years of ACRs which were taken into consideration, he could not have been denied the promotion, on the basis of criteria of seniority-cum-merit. (Para 6)**

क. सेवा विधि – पदोन्नति प्रदान की जाना – वरिष्ठता–सह–योग्यता –

याची का अंतिम वार्षिक गोपनीय प्रतिवेदन औसत–याची को पदोन्नति हेतु योग्य नहीं पाया गया – अभिनिर्धारित – यह पदोन्नति हेतु कर्मचारी का उचित मूल्यांकन नहीं हो सकता क्योंकि विहित मानदंडों की शर्तोनुसार यदि याची ने पिछले दो वर्षों के वार्षिक गोपनीय प्रतिवेदन जिन्हें विचार में लिया गया था, में अच्छा श्रेणीकरण अर्जित नहीं किया है, तब उसे वरिष्ठता–सह–योग्यता के मानदंड के आधार पर पदोन्नति से वंचित नहीं किया जा सकता था।

B. ***Service Law - ACR*** **- If such an ACR is coming in way, it has to be treated as adverse and is required to be communicated and then only the same can be taken into consideration. (Para 7)**

ख. सेवा विधि – वार्षिक गोपनीय प्रतिवेदन – यदि ऐसा कोई वार्षिक गोपनीय प्रतिवेदन प्रभावित कर रहा हो तब उसे प्रतिकूल माना जाना चाहिये और संसूचित किया जाना अपेक्षित है और केवल तब उसे विचार में लिया जा सकता है।

C. ***Service Law - Seniority-cum-merit/fitness - Criteria*** **- Only the minimum criteria can be laid down and merit assessment would not be necessary for inclusion in the select list - Petition allowed. (Para 6)**

ग. सेवा विधि – वरिष्ठता–सह–योग्यता/उपयुक्तता – मानदंड – केवल न्यूनतम मानदंड प्रतिपादित किया जा सकता है और चयन सूची में शामिल किये जाने हेतु योग्यता का निर्धारण आवश्यक नहीं होगा – याचिका मंजूर।

Cases referred :

AIR 1998 SC 2565, AIR 1996 SC 1661, AIR 1999 SC 3362, AIR 2008 SC 2513.

Sanjay Seth, for the petitioner.
Rajesh Tiwari, G.A. for the respondent nos. 1 to 3.
None for the respondent nos. 4 & 5.

ORDER

K.K. Trivedi, J. :- This petition was originally filed as Original Application before the M.P. Administrative Tribunal, Jabalpur, ventilating the grievance with respect to the promotion of respondents No. 4 and 5 on the post of Principal Class-II, superseding the claim of petitioner vide order dated 5.2.2003. The Original Application has remained pending when the Tribunal was closed and the same is transmitted to this Court and is registered as writ petition.

2. It is the contention of the petitioner that he was initially appointed on

the post of Instructor on 9.6.1962 in the Industrial Training Institute. Later on, the petitioner was promoted on the post of senior Instructor in the year 1968 and thereafter on the post of Group Instructor. Vide an order dated 1.1.1999, he was promoted to the post of Vice Principal. Throughout respondents No. 4 and 5 were shown junior to him. In the order dated 1.1.1999, the petitioner was shown at serial No.23, whereas, the name of respondent No.4 was at Serial No.34. Even the name of respondent No.5 was not shown in the said order. In the seniority list, the petitioner was shown senior to respondents No. 4 and 5. However, while considering the cases for promotion on the post of Principal Grade-II, he has illegally been superseded. This being so, the petitioner claimed the relief of promotion on the said post from the date the juniors to him were promoted with all the consequential benefits.

3. A return has been filed by the respondents No. 1 to 3 and they have contended that in terms of the Rules entitled M.P. Industrial Training (Gazetted) Service Recruitment Rules, 1992, consideration was to be done on merit-cum-seniority, for promotion on the next higher post shown in the Gazetted Rules. A Departmental Promotion Committee (hereinafter referred to as DPC for brevity) meeting was convened on 12.7.2002 in which cases of all such persons who were within the zone of consideration were considered. The criteria were prescribed by the DPC in the proceedings and after due consideration since the petitioner had not fulfilled the criteria laid down, his name was not included in the select list. The respondents No. 4 and 5 were found fit by the said DPC and were put in the select list, therefore, they were promoted. According to the respondents, since the right to be considered for promotion is the only right available to a Government employee and such right is rightly granted to the petitioner, no case is made out to grant any relief as claimed and the petition being devoid of any substance deserves to be dismissed.

4. No rejoinder whatsoever has been filed by the petitioner, but it is contended that consideration if not rightly done, as has been found in some of the cases, the petitioner would be equally entitled to the relief granted by this Court in similar matters.

5. Heard learned counsel for the parties at length, perused the record including the DPC proceedings produced by the Government Advocate.

6. This Court has considered the proceedings done by the DPC on earlier

occasion in two of the matters. In Writ Petition No.8116/2003, which too was filed by a person similarly situated like petitioner before the M.P. Administrative Tribunal Bench at Gwalior as O.A.No.280/2003 *(Iqbal Mohammad Vs. The State of M.P. and others)*, this Court has came to the conclusion that the DPC proceedings were not rightly done, in terms of the Rules referred to herein above. What was pointed out to this Court that though a criteria was specifically mentioned in Rule 15 of the Rules, wherein it was said that the selection for inclusion in such list shall be based on merit and suitability in all respect with due regard to seniority, but in view of the subsequent policy made by the State Government if promotion is not to be made on a Class-I post, the criteria of seniority-cum-merit alone was to be made applicable. It was further pointed out in view of the law laid down by the Apex Court in the case of *B.V. Sivaiah and others Vs. K. Addanki Babu and others* etc. [AIR 1998 SC 2565] that where the criteria of seniority-cum-fitness or seniority-cum-merit only is the basis for consideration, only the minimum criteria can be laid down and merit assessment would not be necessary for inclusion in the select list. This Court has considered the case of said *Iqbal Mohammad*, who has approached the M.P. Administrative Tribunal at Gwalior, vis-a-vis, the claim of promotion of Shri Y.P. Chaturvedi, Shri Jitendra Kumar and Shri R.K. Sharma, who were promoted in the like manner by the impugned order and has held that overall assessment of the Annual Confidential Reports (hereinafter referred to as ACR for brevity), was to be taken into consideration and not that of the criteria of merit. In the DPC record produced before this Court, it is clear that the petitioner was having three Good remark in the ACR, one Excellent ACR, but in the last ACR which was taken into consideration, the gradation of the petitioner was average. Thus, it has to be held that in fact only because of this last ACR said to be average i.e. ACR of the year 2001, the petitioner was not found fit for grant of promotion. This could not be rightful assessment of an employee for promotion as in the terms of the criteria prescribed if the petitioner has not earned ACR of Good category in the last two years of ACRs which were taken into consideration, he could not have been denied the promotion, on the basis of criteria of seniority-cum- merit.

7. The other reason is that in the year 1998, the General Administration Department of Government of Madhya Pradesh has formulated a policy after taking a cabinet decision that in all Service Rules, for promotion from Class-III to Class-II post, the criteria of seniority-cum-merit alone would be

applicable. Admittedly, the DPC meeting was held in the year 2002, i.e. after taking a policy decision by the State, therefore, there was no occasion to consider the case of the petitioner on the basis of merit-cum-seniority criteria. Again in some what similar circumstances where the promotion was called in question by one of the retired Vice Principal Shri V.V.J. Parthasarthi by filing a Writ Petition No.7467/2007(S), this Court while taking a decision on 8.11.2011 came to the conclusion that if there was any such ACR which was coming in way of promotion, the said ACR should have been communicated to the employee concerned. The Apex Court in the case of *U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others* (AIR 1996 SC 1661) and in the case of U.P. Jal Nigam Vs. S.C.Atri and another (AIR 1999 SC 3362) came to the conclusion that if such an ACR is coming in way, it has to be treated as adverse and is required to be communicated and then only the same can be taken into consideration. In the case of *Dev Datt Vs. Union of India* (AIR 2008 SC 2513), the law in this respect is reiterated by the Apex Court. One more glaring fact is that the penultimate year ACRs of the petitioner according to respondents themselves was excellent, but the last ACR of the petitioner was average. There was a downgrading from excellent to average in the matter of performance of the petitioner and this should have been brought to the notice of the petitioner immediately as the same would have come in way of the petitioner for promotion. Nothing is indicated in the return filed by the respondents that this ACR was brought to the notice of the petitioner and he was granted an opportunity to explain his conduct on account of which such a grading was done in the ACR. Thus, in all fairness, the petitioner should not have been denied the benefit of promotion. It has to be held that the right of consideration for promotion was not conferred on the petitioner in rightful manner as there was no proper assessment of the claim of petitioner for grant of such promotion in appropriate manner.

8. Consequently, the petition is allowed. The respondents are directed to hold a review DPC and to consider the case of petitioner for grant of promotion on the post of Principal Class-II as was done in case of respondents No. 4 and 5, adopting the same norms which ere adopted by the DPC, which convened its meeting on 12.7.2002, ignoring such an aspect on account of which the petitioner was superseded and to reconsider the case of petitioner for grant of promotion on the aforesaid post. In case the petitioner is found fit for grant of such promotion, the same be granted to him with retrospective effect, the date, the same was granted to respondents No. 4 and 5 vide order

dated 5.2.2003 with all the consequential benefits of such promotion, such as pay, allowances and seniority over and above the respondents No. 4 & 5. After grant of such promotion, the pay of the petitioner be revised on the pay scale available to the promotional post and consequential revision of pension and retiral dues of the petitioner be done and arrears of such amount be paid, within a period of three months from the date of receipt of copy of the order passed today.

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

Petition allowed.

I.L.R. [2015] M.P., 857
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 5477/2008 (Jabalpur) decided on 4 September, 2013

PRASHANT SINGH BAGHEL ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. Civil Services (Medical Attendance) Rules, M.P. 1958, Rule 10,11 & Kalyan Nidhi Niyam, M.P. 1997 - Reimbursement of medical expenses of mother of petitioner **- Petitioner, a Govt. servant - Mother, a retired Govt. employee and receiving pension - Petitioner governed by the Medical Attendance Rules - 1997 Rules are specific rules for retired Govt. employees regarding Medical facilities -Held - Petitioner entitled for reimbursement of medical expenses of his mother who is dependent on petitioner - No specific bar is there in the Niyam of 1997 regarding applicability of Medical Attendance Rules, 1958 - Unless applicability of the Rules of 1958 is barred under the Rules of 1997, Rules of 1958 will be applicable - Petition allowed - Medical expenses to be reimbursed within two months. (Paras 5 & 7)**

क. सिविल सेवा (चिकित्सीय परिचर्या) नियम, म.प्र. 1958, नियम 10, 11 व कल्याण निधि नियम, म.प्र.1997 – याची की मां के चिकित्सीय खर्चों की प्रतिपूर्ति – याची, एक शासकीय कर्मचारी – मां, एक सेवानिवृत शासकीय कर्मचारी और पेंशन प्राप्तकर्ता – याची चिकित्सीय परिचर्या नियम द्वारा शासित होता है – 1997 के नियम चिकित्सीय सुविधाओं के संबंध में सेवानिवृत शासकीय कर्मचारियों के लिये निर्दिष्ट नियम है – अभिनिर्धारित – याची अपनी मां के चिकित्सीय खर्चों की

प्रतिपूर्ति का हकदार जो कि याची पर आश्रित है – 1997 के नियमों में चिकित्सीय परिचर्या नियम 1958 की प्रयोज्यता के संबंध में विनिर्दिष्ट वर्जन नहीं – जब तक कि 1997 के नियमों के अंतर्गत 1958 के नियमों की प्रयोज्यता वर्जित नहीं की जाती, 1958 का नियम लागू होगा – याचिका मंजूर – दो माह के भीतर चिकित्सीय खर्चों की प्रतिपूर्ति की जाये।

B. Civil Services (Medical Attendance) Rules, M.P. 1958, Rule 8 - Permission - **Treatment of mother of petitioner who is a cancer patient - Permission not obtained - Held - Not possible to obtain prior permission - Rule 8 not mentioning about permission in advance - De Facto permission can be granted - Medical expenses to be reimbursed. (Para 6)**

ख. सिविल सेवा (चिकित्सीय परिचर्या) नियम, म.प्र. 1958, नियम 8 – अनुमति – याची की मां जो कि कैंसर रोगी है का उपचार – अनुमति अभिप्राप्त नहीं की गई – अभिनिर्धारित – पूर्वानुमति प्राप्त करना संभव नहीं – नियम 8 में अग्रिम अनुमति प्राप्त करने के संबंध में कुछ उल्लिखित नहीं – वस्तुतः अनुमति प्रदान की जा सकती है – चिकित्सीय खर्चों की प्रतिपूर्ति की जाये।

C. Words and Phrases - 'Wholly dependent' - **It has to be understood in the context in which it is used keeping in view the object of the particular Rules, where it is contained and it would include both financial & physical dependence. (Para 5)**

ग. शब्द और वाक्यांश – 'पूर्णतः आश्रित' – इसे उस संदर्भ में समझा जाना चाहिये जिसमें इसे विशिष्ट नियमों का उद्देश्य दृष्टिगत रखते हुये प्रयोग किया गया है, जिनमें वे अंतर्विष्ट है और इसमें दोनों वित्तीय एवं शारीरिक आश्रितता शामिल होगी।

Cases referred :

(1998) 1 SLR 232.

Sanjeev Tiwari, for the petitioner.
Lalit Joglekar, P.L. for the respondent nos. 1 to 3.
Puneet Shroti, for the respondent no. 4.

ORDER

K.K. Trivedi, J. :- Challenging the order dated 21.4.2004 passed by the respondent No.2, the Director of Medical Education, M.P., Bhopal, this writ petition under Article 226 of the Constitution of India, is filed seeking quashment of the said order and a direction against the respondents to grant

sanction to reimburse the amount of medical expenses incurred by the petitioner on account of ailment of his mother. It is contended that the petitioner being an employee, working as Technical Member District Project Supporting Unit of District Poverty Initiative Project (hereinafter referred to as DPIP for brevity) under the Rural Development Department, was entitled to the said benefit in terms of the provisions of M.P. Civil Services Medical Assistance Rules, 1958 (hereinafter referred to as the Rules for short). It is contended that in terms of the provisions made under the said Rules, the petitioner was entitled to the reimbursement of the amount so incurred by him for the treatment of his mother after making of a reference for such treatment by medical authorities of the State, therefore, only on lame excuses that the mother of the petitioner was a retired employee and a pensioner of the State, she would not be entitled to grant of permission of the said reimbursement, the rejection of such a reimbursement claim was improper.

2. Facts giving rise to filing of this writ petition are that the petitioner is working in the services of the aforesaid project. From the facts as have been stated in the petition, it is clear that the petitioner was appointed on 12.1.1987 in the project in Apex Bank on the post of Assistant Engineer. The petitioner was sent to work on deputation to DPIP, which is a World Bank Aided Project run by the State of Madhya Pradesh. For the said project, the Rules made by the State Government governing the services of the State employees are made applicable. It is contended by the petitioner that the mother of the petitioner was working as Assistant Teacher in the School Education Department of Government of Madhya Pradesh and on attaining the age of superannuation, she has retired with effect from 31.12.2001. The mother of the petitioner was receiving pension. The mother of the petitioner was suffering from hepatocellular carcinoma (liver cancer) and was referred for treatment to Bombay Hospital and Medical Research Centre, Mumbai. She was being treated at Rewa and the said Medical Officer referred the mother of the petitioner to aforesaid Hospital. Looking to such a situation, the petitioner moved an application seeking permission to take treatment for his mother out of the State. Such an application was referred to the respondent No.2, but the same has been rejected by the order under challenge, therefore, the writ petition is required to be filed. It is contended that in terms of the provisions of the Rules, the word 'dependent' has been interpreted by the M.P. Administrative Tribunal, which order has further been upheld by the Apex

Court, therefore, now on such a lame excuse, the claim of petitioner could not have been rejected. The mother of the petitioner was getting a meagre pension and, therefore, she was wholly dependent on the petitioner. That being so, the expression *'wholly dependent'* as prescribed in the Rules would be applicable and the petitioner would be entitled to get the reimbursement of medical expenses. This being so, it is contended that the order impugned is bad in law.

3. Refuting the allegations made by the petitioner, a return has been filed by the respondents No. 1 to 3 and it is contended that a pensioner cannot be termed to be wholly dependent of his/her son or daughter, whosoever in service. The State Government has made specific Rules known as Madhya Pradesh Kalyan Nidhi Niyam, 1997 (hereinafter referred to as Niyam for brevity) for the purposes of providing medical facilities to the retired Government servants and that being so, the mother of the petitioner would not be entitled to claim any reimbursement of the medical expenses. It is, thus, contended that the petition being wholly misconceived is liable to be dismissed. The respondent No.4 has simply adopted the return of the respondents No. 1 to 3.

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

5. It is not in dispute that the petitioner is an employee governed by the Rules, specifically the Medical Assistance Rules and other Rules made by the State Government. So far as this part is concerned, nothing has been said in the return by the respondents that the services of the petitioner are not governed by any such Rules framed by the State Government for its employees. The simple meaning is that a Rule as a whole would be applicable. It is not the case of the petitioner that he is seeking reimbursement of medical expenses of his mother under any other provisions except the Rules referred to herein above. Now whether because some Niyam have been made by the State giving medical assistance to the retired employees of the State, could it be said that the benefit as claimed by the petitioner for medical reimbursement would not be available to him. The Niyam referred by the respondents in their return have not been placed on record nor has it been pointed out that there is any specific provision made in the said Rules where application of Medical Attendance Rules etc., have been barred. That being so, it is incorrect on the part of the respondents to say that the mother of the petitioner being a retired employee, the petitioner would not be entitled to reimbursement of any medical expenses incurred by him for the treatment of his mother. The Apex Court in

the case of *State of Madhya Pradesh and others Vs. M.P. Ojha* [(1998) 1 SLR 232] has categorically laid down after interpreting the provision of the Rules that a Government employee in service can claim reimbursement of the amount of medical expenses of his father/mother if it is declared by him that the father or mother was wholly dependent on him and merely because the said relative of the employee of the State was receiving pension, it cannot be said that the employee would not be entitled to any reimbursement. In paragraph 13 of the report, after discussing at length and interpreting word *"wholly dependent"* the Apex Court has held that such employee would be entitled to get the reimbursement. For the convenience the said interpretation is reproduced :-

> "13. The expression "wholly dependent" is not a term of Art. It has to be given its due meaning with reference to the Rules in which it appears. We need not make any attempt to define the expression "wholly dependent" to be applicable to all cases in all circumstances. We also need not look into other provisions of law where such expression is defined. That would likely to lead to results which the relevant Rules would not have contemplated. The expression "wholly dependent" has to be understood in the context in which it is used keeping in view the object of the particular Rules where it is contained. We cannot curtail the meaning of "wholly dependent" by reading into this the definition as given in SR 8 which has been reproduced above. Further, the expression "wholly dependent" as appearing in the definition of family as given in Medical Rules cannot be confined to mere financial dependence. Ordinarily dependence means financial dependence but for a member of family it would mean other support, may be physical, as well. To be "wholly dependent" would therefore include both financial and physical dependence. If support required is physical and a member of the family is otherwise financially sound be may not necessarily be wholly dependent. Here the father was 70 years of age and was sick and it could not be said that he was not wholly dependent on his son. Son has to look after him in his old age. Even otherwise by getting a pension of Rs.414/- per month which by any standard is a

paltry amount it could not be said that the father was not "wholly dependent" on his son. That the father had a separate capacity of being a retired Government servant is immaterial if his case falls within the Medical Rules being a member of the family of his son and wholly dependent on him. A flexible approach has to be adopted in interpreting and applying the Rules in a case like the present one. There is no dispute that the son took his father to Bombay for treatment for his serious ailment after getting due permission from the competent authority. It was submitted before us that the father being a retired Government servant could himself get sanction for treatment outside the State as a special case from the competent authority. It is not necessary for us to look into this aspect of the matter as we are satisfied that under the relevant Medical Rules, the father was member of the family of his son and was wholly dependent on him and the 2nd respondent was thus fully entitled to reimbursement for the expenses incurred on the treatment of his father and other travelling expenses."

6. Now the question which is to be seen whether the petitioner has sought permission before undertaking the journey out of the State for treatment of his mother or not and whether because of this reason, the petitioner could be denied the benefit of reimbursement. It is specifically prescribed under the Rules that an application is to be made under Rule 8 of the Rules in prescribed form. It is not specifically mentioned that any permission in advance is required to be taken. However, a procedure of referral is prescribed by issuing the administrative instructions and committees are constituted for the said purposes. Looking to the circumstances in which the mother of the petitioner was suffering, it was not possible for him to obtain a referral prior to treatment of his mother. For that purpose, the *de facto* permission can be granted and reimbursement of such medical expenses could be authorised. In view of this, the reimbursement of the medical expenses incurred by the petitioner for the treatment of his mother cannot be denied.

7. Consequently, this writ petition is allowed. Order dated 21.4.2004 passed by the respondent No.2 is hereby quashed. The respondents are directed to reimburse the amount of medical expenses incurred by the petitioner for the treatment of his mother, within a period of two months from the date of

receipt of the order passed today.

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

Petition allowed.

I.L.R. [2015] M.P., 863
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No.15777/2013 (Jabalpur) decided on 10 September, 2013

RUPALI BADKATTE ... Petitioner
Vs.
SACHIN BAKSHI ... Respondent

***Civil Procedure Code (5 of 1908), Order 8 Rule 10 - Closure of right to file written statement after expiry of 90 days from the service of notice* - Subsequently before recording of ex-parte evidence petitioner moved an application for condoning the delay with written statement praying that W.S. may be taken on record - Which was also dismissed - Held - Matrimonial dispute between husband and wife is very sensitive, same should be decided on merits and should not be thrown away on technical grounds seriously affecting the rights of the parties - Petition is allowed subject to payment of cost of Rs. 5,000/- which shall be condition precedent for taking the W.S. on record. (Para 4)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 10 – नोटिस तामील होने से 90 दिन बीत जाने के पश्चात् लिखित कथन प्रस्तुत करने के अधिकार की समाप्ति – तत्पश्चात् याची ने एक पक्षीय साक्ष्य अभिलिखित किये जाने से पूर्व लिखित कथन के साथ विलम्ब हेतु माफी के लिये आवेदन प्रस्तुत किया इस प्रार्थना के साथ कि लिखित कथन को अभिलेख पर लिया जाये – इसे भी खारिज किया गया – अभिनिर्धारित – पति–पत्नि के बीच वैवाहिक मतभेद अति संवेदनशील होता हैं जिसें गुण–दोषों पर निर्णित किया जाना चाहिये और पक्षकारों के अधिकारों को गंभीर रूप से प्रभावित करने वाले तकनीकी आधारों पर अलग नहीं किया जाना चाहिये – लिखित कथन अभिलेख पर लिये जाने हेतु पुरोभाव्य शर्त के रूप में रू. 5,000/– व्यय के भुगतान के अधीन याचिका मंजूर।

Kunal Thakre, for the petitioner.
Aditya Naranay Sharma, for the respondent.

ORDER

U.C. MAHESHWARI, J. :- The petitioner has filed this petition being aggrieved by the order 5.8.2013, (Ann. P-3) and 16.8.2013, (Ann. P-4) passed by the Ist Additional Principle Judge, Family Court, Bhopal in Regular Civil Suit No. 162-A/12, whereby by first order, (Ann. P-3) after expiry of 90 days from the service of the notice of suit, her right to file W.S. has been closed and by the subsequent order (Ann. P-4) her application filed for taking annexed W.S. on record has been dismissed, as the same was filed barred by limitation and contrary to such earlier order, (Ann. P-3).

2. Having heard the counsel, keeping in view their arguments advanced, after perusing the record alongwith the impugned orders, I am of the considered view that this petition deserves to be allowed but subject to payment of some costs to other side.

3. True it is that after receiving the summon of the impugned petition filed under Section 13 (1) (i) (a) on the ground of cruelty under the Hindu Marriage Act 1955, (in short "The Act") for divorce on the grounds of cruelty within 90 days inspite taking various adjournments, W.S. was not filed on behalf of the petitioner, on which vide order dated 5.8.2013, her right to file the W.S. was closed. Subsequent to that alongwith an application with a prayer for condoning the delay in filing the W.S. was placed before the Family Court but on consideration such application was dismissed and pursuant to that W.S. was not taken on record.

4. It is undisputed fact that the petitioner and the respondent are married with each other but subsequently as alleged on account of their differences, they are residing separately. Thereafter the impugned case and one other case in some court of Ahamdabad are pending between them and as per available record the petitioner is resident of Ahmadabad while as per submission of the respondent's counsel, she is residing abroad in United Kingdom and doing some job. There can not be two versions on the question that matrimonial dispute between the husband and wife is very sensitive matter and, therefore in any litigation of them in the normal course should be decided on merits, if possible. As such same should not be thrown away on account of some technicalities of law and on account of any technicality if any right of the party of such litigation is seriously affected, then in that situation the purpose of the system may not be fulfilled. In such premises, court has to consider the situation

that when defaulter party comes forward at the appropriate stage before recording of exparte evidence of other side with the W.S., then with certain terms and conditions such party should be permitted to defend the matter to save her/his interest. In the case at hand, it is apparent, as stated above that within 90 days from the date of receiving the summon of the petition, W.S. was not filed, on which right of the petitioner to file W.S. was closed by the earlier order but subsequently before recording the exparte evidence of the respondent, the petitioner has come forward with W.S. with an application for condoning the delay in filing the same, but such application has been dismissed by the subsequent order. If such order is maintained, then certainly, it will create another complication between the parties, hence in order to avoid such further complication, in the available circumstances, just to extend the appropriate opportunity of hearing to the petitioner on merits, I deem fit to allow the application of the petitioner by imposition the cost of Rs.5000/- (Rs. Five thousand). Pursuant to it, by setting aside the impugned order, the aforesaid application of the petitioner is allowed and subject to payment of cost Rs.5000/-, the annexed W.S. is taken on record. Till the aforesaid extent the impugned order is set aside. Payment of cost shall be condition precedent for taking the W.S. on record.

5. At this stage, respondent's counsel submits that according to his instructions from the respondent, the petitioner be directed to deposit such cost with the District Legal Services Committee of the District Court, Bhopal to help poor litigants in their litigations, as such respondent does not want to take such cost.

6. In view of such submission, the petitioner's counsel is directed to deposit the aforesaid cost with the aforesaid District Legal Services Committee of the District Court, Bhopal to help the poor litigants. Depositing of cost shall be the condition precedent for taking the W.S. on record.

7. In the available circumstances, the trial court is further directed to take an endeavour to expedite the trial of the impugned case and conclude the same on or before 30.9.2014 under intimation to this court.

8. The petition is allowed, as indicated above.

Petition allowed.

I.L.R. [2015] M.P., 866
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No. 18962/2011 (Jabalpur) decided on 19 September, 2013

ADARSH GRAH NIRMAN SAHAKARI SAMITI ... Petitioner
Vs.
SUSHIL KUMAR & ors. ... Respondents

***Civil Procedure Code (5 of 1908), Order 16 Rule 7-A - Summoning and attendance of witnesses* - Closure of plaintiff's right to examine its witness - Held - Whenever any summons is issued to the witnesses and if the same is not received back either served or unserved then the Court is always bound to take appropriate steps to secure presence of such witnesses by issuing the fresh summons on the correct address of the witnesses or with any other appropriate order - Summons issued to the witnesses was not received back either served or unserved - Impugned order being perverse is hereby set-aside. (Paras 3 & 4)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 16 नियम 7–ए – साक्षियों को समन एवं उपस्थिति – वादी के अपने साक्षी के परीक्षण करने के अधिकार की समाप्ति – अभिनिर्धारित – जब कभी साक्षियों को समन जारी किया जाता है और यदि वह तामील अथवा अदम तामील प्राप्त नहीं होता है तब न्यायालय साक्षियों के सही पते के साथ नया समन जारी कर सकता है अथवा किसी अन्य समुचित आदेश द्वारा उक्त साक्षियों की उपस्थिति सुनिश्चित करने के लिये समुचित कदम उठाने के लिये सदैव बाध्य है – साक्षियों को जारी किये गये समन तामील अथवा अदम तामील प्राप्त नही हुये हैं – विपर्यस्त होने के नाते आक्षेपित आदेश एतद् द्वारा अपास्त।

Sachin Pandey, for the petitioner.
Satyam Agarwal, for the respondents no. 1 to 3.
Amit Sharma, P.L. for respondent no. 4.

ORDER

U.C. MAHESHWARI, J. :- Having heard, in the available circumstances, instead to hear only on the question of admission, with the consent of the parties, the same is also heard for final disposal.

2. Petitioner/ plaintiff has filed this petition being aggrieved by the order dated 13.7.11 passed by the II ADJ , Astha in COS No.10-A/09 whereby his right to examine its witness Dasrath Singh Rajput, has been closed and

pursuant to that the case has been directed to be placed for recording the evidence of respondents No.1 to 3.

3. Mere perusal of the impugned order, it is apparent that in order to secure presence of witness Dasrath Singh Rajput, some process was submitted on behalf of the petitioner. Pursuant to that, summons was also issued to such witness but the same was not received back either served or unserved and without considering such aspect with proper approach, the impugned order has been passed.

4. In view of the settled proposition that whenever any summons is issued to the witness and if the same is not received back either served or unserved then the court is always bound to take appropriate steps to secure presence of such witness by way of issuing the fresh summons on the correct address of the witness or with any other appropriate order. So, in such premises, the impugned order being perverse is hereby set aside and the trial court is directed to permit the petitioner to call and examine the aforesaid witness Dasrath Singh Rajput, Revenue Inspector.

5. It is specifically directed that such witness being the public servant, opportunity to call him through summons be extended to the petitioner.

6. The parties are directed to appear before the trial court first on 30.9.13 and petitioner counsel is directed to submit the certified copy of this order before the trial court on such date to comply the same.

7. Petition is allowed as indicated above.

Petition allowed.

I.L.R. [2015] M.P., 867
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 2486/2005 (Jabalpur) decided on 30 September, 2013

BASANT KUMAR BURMAN ... Petitioner
Vs.
M.P. STATE ELECTRICITY BOARD & ors. ... Respondents

Constitution - Article 226 - Caste Certificate - Verification - **SDO conducted enquiry and declared that caste certificate was not**

issued by any competent authority - However no opportunity was given to petitioner before doing enquiry - Held - Verification of a caste of the petitioner or verification of the caste certificate has to be done through High Power Screening Committee as per the dictum of Apex Court in "Kumari Madhuri Patil" case - Consequently, show cause notice quashed - Respondents directed to refer the matter to High Power Screening Committee and thereafter to act accordingly. (Para 5 to 8)

संविधान – अनुच्छेद 226 – जाति प्रमाणपत्र – सत्यापन – एस.डी.ओ. ने जांच संचालित की और घोषित किया कि जाति प्रमाणपत्र किसी सक्षम प्राधिकारी द्वारा नहीं जारी किया गया है – किन्तु जांच से पूर्व याची को कोई अवसर नहीं दिया गया – अभिनिर्धारित – 'कुमारी माधुरी पाटिल' के प्रकरण में सर्वोच्च न्यायालय की उक्ति के अनुसार याची की जाति का सत्यापन या जाति प्रमाणपत्र का सत्यापन उच्च स्तरीय छानबीन समिति द्वारा किया जाना चाहिये – परिणामस्वरूप कारण बताओ नोटिस अभिखंडित – प्रत्यर्थीगण को मामला उच्च स्तरीय छानबीन समिति को निर्दिष्ट करने और तत्पश्चात् तद्नुसार कार्यवाही करने के लिये निदेशित किया गया।

Cases referred :

AIR 1995 SC 94 : (1994) 6 SCC 241, W.P. No. 6440/2011(Jabalpur) decided on 06.12.2012, 2012 (1) MPHT 31.

D.K. Mishra, for the petitioner.
Anoop Nair, for the respondents no. 1 & 2.
Rahul Jain, G.A. for the respondents no. 3, 4 & 5.

ORDER

K.K. Trivedi, J. :- By this petition under Article 226 of the Constitution of India, the petitioner has called in question the action initiated by the respondents on the basis of a report sent by the revenue authorities with respect to the issuance of a caste certificate of reserved category. It is contended that if at all the genuineness of the certificate issued in favour of petitioner was required to be inquired into, only the High Power Screening Committee constituted in terms of the directions issued by the Apex Court was required to conduct an enquiry and to give a report. No such enquiry has been conducted, the matter has not been referred to the High Power Screening Committee and action is taken for the termination of the services of the petitioner, therefore, he is required to approach this Court by way of filing this

petition.

2. It is the contention of the petitioner that there was a post of Office Assistant, Grade-III, available in the establishment of respondents No.1 and 2. The petitioner, who belongs to *'Manjhi'* community of Scheduled Tribe, made an application for appointment on the said post pursuance to a certificate of caste issued by the competent authority, i.e. the Naib Tahsildar, Jabalpur. On selection the petitioner was appointed on the post of Office Assistant Grade-III and he started working. In the year 1995 the petitioner was called upon to submit another caste certificate, which the petitioner obtained and submitted on 09.12.1996. The second caste certificate submitted by the petitioner was sent for verification to the Office of Collector, Jabalpur, who conducted some sort of enquiry through the Sub Divisional Officer, Jabalpur, in this respect and declared that the certificate in question was not issued by any competent authority. The petitioner was served with a show cause notice dated 02.03.2002 calling his explanation as to why the services of the petitioner be not dispensed with. It was pointed out by the petitioner by filing an explanation that in terms of the circular issued by the State Government in General Administration Department on 06.03.1998, the caste certificate was to be verified by a Committee. In terms of the said circular, action was not to be taken against the petitioner. The very same instructions were reiterated in respect of some other sub-caste of Tribal community on 18.01.2002 and, therefore, services of the petitioner were not to be dispensed with. However, since no action is taken by the respondents, there is a threat of termination of services of the petitioner, therefore, he is required to approach this Court by way of filing present writ petition.

3. On issuance of notices of this writ petition to the respondents, return has been filed by respondents No.1 and 2 and it is contended that only on verification of the certificate of caste produced by the petitioner, by the revenue authorities of the State, when the report was submitted that such a caste certificate was a forged one, action was initiated by the respondents No.1 and 2 against the petitioner by issuing a show cause notice to him. It is contended that since action is not initiated by respondents No.1 and 2 on their own, the stand taken by the petitioner that such an act of the respondents is per se illegal, is incorrect and not sustainable. It is contended that even in the law laid-down by the Apex Court, there is no bar that such proceedings cannot be done. It is the contention of the respondents that since the caste certificate is not obtained by the petitioner in terms of the directives of the

Apex Court, he cannot claim any benefit whatsoever and the writ petition as filed by him is liable to be dismissed. No return whatsoever has been filed by respondents No.3, 4 and 5, though they were served long back.

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

5. It is not in dispute that the certificate of caste produced by the petitioner was the basis of grant of employment to the petitioner. It is also not in dispute that earlier the said certificate was not got verified. Only when the petitioner was called upon to submit yet another caste certificate, he moved another application for grant of caste certificate and since a certificate was issued in is favour on 02.07.1996, the same was produced by the petitioner before the respondents. It appears that when the caste certificate was sent for verification, some sort of enquiry was started but the document placed on record by the petitioner indicates that said notice could not be served on the petitioner as the report of the Server of notice indicates that the petitioner was not found on the given address. There is nothing available on record to indicate that at any point of time the petitioner was served with any show cause notice before giving a report on 29th November, 2001 by the Sub Divisional Officer, Jabalpur to the Collector. It appears that this particular report was the basis on which the show cause was issued to the petitioner by the respondents No.1 and 2 on 02.03.2002. Nothing is produced by the respondents to show that at any point of time enquiry with respect to the verification of the caste of the petitioner or verification of the caste certificate of the petitioner was got done through the High Power Screening Committee. The Apex Court in the case of *Kumari Madhuri Patil and another vs. Addl. Commissioner, Tribal Development and others,* AIR 1995 SC 94 : (1994) 6 SCC 241, has held that validity of a caste certificate has to be examined by a High Power Screening Committee. It has been categorically held that such a Committee is required to give a definite opinion with respect to the caste of any person or in respect of validity of a caste certificate. If there were allegations that such a caste certificate was not validly obtained by the petitioner or that the petitioner was not belonging to the particular sub-caste of a Tribal community, the matter was required to be referred to the High Power Screening Committee.

6. As has been indicated herein above, none of the respondents have contended that any such enquiry was conducted through the High Power Screening Committee. The State Government in compliance of the directives issued by the Apex Court in the case of *Kumari Madhuri Patil* (supra) has

already constituted a High Power Screening Committee to inquire into the correctness of the caste certificate as also the caste of a particular person. Therefore, merely because a report was sent by the Collector after obtaining a report from the Sub Divisional Officer, it was not correct on the part of respondents No.1 and 2 to initiate any proceeding against the petitioner. Aforesaid respondents No.1 and 2 were given to understand that the caste certificate of the petitioner was incorrect, therefore, they were required to refer the same to the High Power Screening Committee and after obtaining the report from the said Committee, to take an action against the petitioner. This particular aspect is considered by this Court in the case of *Jitu Prasad vs. Industrial Development Bank & another,* W.P. No.6440/2011, decided on 06.12.2012 and it has been categorically held that unless enquiry in respect of the caste certificate is conducted by the High Power Screening Committee, a decision could not have been taken in respect of initiating proceedings for cancellation of appointment or termination of services of any employee. Further in the case of *Archana Mourya vs. M.P. Bhoj Open University, thr. its Registrar,* 2012(1) MPHT 31, again this Court has categorically held that unless an enquiry in which the status of the petitioner with respect to the caste or community is verified or inquired by the High Power Screening Committee, it was not open to the employer to initiate a proceeding for cancellation of appointment obtained on the basis of a caste certificate. It has been further categorically held that such a High Power Screening Committee is not only clubbed with the power of recording evidence, it has right to inspect, examine and then make declaration with respect to correctness of the caste certificate or genuineness of the caste certificate or even the caste of a particular person.

7. Since it is the admission made by respondents No.1 and 2 in their return that they have initiated proceedings for cancellation of appointment of the petitioner only on the strength of report received from the Collector, Jabalpur and not on the strength of a report of High Power Screening Committee, it would not be proper to permit continuance of such proceedings of removal of the petitioner from service. It is seen that this Court has already protected the interest of the petitioner while entertaining the writ petition vide order dated 05.05.2005 as it has been directed that no coercive steps be taken against the petitioner pursuance to notice dated 16.11.2004. It is informed that the petitioner is continuously working in the employment on the strength of the interim protection granted by this Court.

8. Resultantly, this writ petition is allowed. The notice dated 16.11.2004

(Annexure P-15) is hereby quashed. The respondents No.1 and 2 are directed to refer the matter to the High Power Screening Committee for obtaining report on the caste certificate of petitioner and only after receiving such report, to take action in accordance to the recommendations made by the High Power Screening Committee.

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

Petition allowed.

I.L.R. [2015] M.P., 872
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 10275/2013 (Jabalpur) decided on 3 January, 2014

GEETA DUBEY (SMT.) ... Petitioner
Vs.
SAROJ SUHANE & ors. ... Respondents

A. Civil Procedure Code (5 of 1908), Order 39 Rule 1 and 2 - Temporary injunction - **Petition against rejection of application filed u/o 39 Rule 1 and 2 by both the Courts below - Held - Since plaintiff has failed to establish prima-facie that she is in settled possession of the suit property, Injunction application has rightly been rejected. (Para 6)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अस्थाई व्यादेश – आदेश 39 नियम 1 व 2 के अंतर्गत प्रस्तुत किये गये आवेदन को दोनों निचले न्यायालयों द्वारा अस्वीकार किये जाने के विरूद्ध याचिका – अभिनिर्धारित – चूंकि वादी प्रथम दृष्ट्या यह स्थापित करने में असफल रही कि उसके पास वाद संपत्ति का स्थापित कब्जा है, व्यादेश हेतु आवेदन को उचित रूप से अस्वीकार किया गया।

B. Constitution - Article 227 - **Power under Article 227 can be exercised where the order suffers from flagrant abuse of fundamental principles of law and justice - This Court can not act as an appellate Court and reappreciate the evidence - Petition is dismissed. (Para 7)**

ख. संविधान – अनुच्छेद 227 – अनुच्छेद 227 के अंतर्गत शक्ति का प्रयोग वहां किया जा सकता है जहां आदेश विधि एवं न्याय के मूलभूत सिद्धांतों के प्रत्यक्ष दुरूपयोग से ग्रसित है – यह न्यायालय अपीली न्यायालय के रूप में कार्यवाही नहीं कर सकता और साक्ष्य का पुनः मूल्यांकन नहीं कर सकता – याचिका खारिज।

Cases referred :

(1993) 4 SCC 375, (2010) 5 SCC 203, (2010) 14 SCC 316, (2004) 1 SCC 769, (1975) 4 SCC 518, (2010) 8 SCC 329, (2010) 9 SCC 385.

Ravish Agrawal with *K.S. Jha,* for the petitioner.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- Heard on admission.

1. This petition, under Article 227 of the Constitution of India at the instance of petitioner/plaintiff, is directed against the order dated 1.6.2013; whereby, an appeal under Order 43 Rule 1(r) of the Code of Civil Procedure, 1908 preferred by the petitioner against the order by Civil Court, rejecting the application under Order 39 Rule 1 and 2 of CPC, has been dismissed.

2. Suit by the petitioner is for declaration of title on the basis of adverse possession and for permanent injunction in respect of the property bearing Khasra No.37/1 (New No.35) situated at Village Kosamghat, Jabalpur on the ground that the petitioner and respondent no.1 jointly availed the loan from respondent no.2 and in lieu of security, the suit land was mortgaged. As per paragraph 4 of the suit plaint, the suit property i.e. Khasra No.37/1 belongs to respondent No.1, who is the owner of the said property and mortgaged along with the land bearing Khasra No.37/2 and 38/2 which belongs to the petitioner. It is alleged that the entire outstanding of Bank was paid by the petitioner's husband in the year 1995 and since then the petitioner is in possession of suit property and her peaceful possession having been disturbed, has led her to file the civil suit, wherein, an application for temporary injunction was filed. The application was dismissed by the Trial Court by its order dated 16.05.2013 on a finding that the plaintiff has failed to prove the *prima facie* case. As to possession, the Trial Court has returned a finding in paragraph 20 and 21 that the plaintiff has failed to prove an undisturbed, effective and long period in possession over the suit property. The Appellate Court, in appeal, affirmed the findings. In paragraph 19 of the impugned order-dated 1.6.2013, the Appellate Court has returned a finding that though the plaintiff is shown to be in possession and has cultivated the suit land in the year 2012-13, but has filed to establish long settled possession :

".. लेकिन महत्वपूर्ण तथ्य यह है कि विवादित भूमि पर वादी को जो अधिपत्य

है वह प्रथम दृष्टि में बहुत पुराना दर्शित नहीं होता है, जिस कारण स्थापित अधिपत्य की परिधि में नहीं आता है, बल्कि वादी का विवादित भूमि पर अतिक्रामक की हैसियत से कब्जा होना प्रथम दृष्टि में प्रकट होता है ।.."

3. It has been held in *Parsinni v. Sukhi* (1993) 4 SCC 375 that burden of prove lies on the party claiming adverse possession. He has to plead and prove that his possession must *be "nec vi, nec clam, nec precario"*, i.e. peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. Mere vague or doubtful assertions that claimant has been in adverse possession will not be sufficient (See also, *R. Hanumaiah vs. State of Karnataka* (2010) 5 SCC 203).

4. Furthermore, it has been held in *Chatti Konati Rao vs. Palle Venkata Subbarao* (2010) 14 SCC 316 that *animus possidendi* as is well known is a requisite ingredient of adverse possession and mere possession does not ripen into possessory title until the possessor holds the property adverse to the title of the true owner for the said purpose.

5. In *Rame Gowda vs. M. Varadappa Naidu* (2004) 1 SCC 769, while affirming the law laid down in *Puran Singh vs. State of Punjab* (1975) 4 SCC 518, it has been observed -

> "9. ... The possession which a trespasser is entitled to defend against the right owner must be settled possession, extending over a sufficiently long period of time and acquiesced to by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and re-instate himself provided he does not use more force than is necessary. Such entry will be viewed only as resistance to an intrusion upon his possession which has never been lost. A stray act of trespass, or a possession which has not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force. In *Puran Singh's* case (supra), the Court clarified that it is difficult to lay down any hard and fast rule as to when the possession of a trespasser can mature into settled possession. The 'settled possession' must be (i) effective, (ii) undisturbed, and (iii) to the knowledge of the owner or without

any attempt and concealment by the trespasser. The phrase settled possession does not carry any special charm of magic in it, nor is it a ritualistic formula which can be confined in a straitjacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession. The Court laid down the following tests which may be adopted as a working rule for determining the attributes of 'settled possession' :

(i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;

(ii) that the possession must be to the knowledge (either express of implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of *animus possidendi*. The nature of possession of the trespasser would however, be a matter to be decided on the facts and circumstances of each case.

(iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and

(iv) that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession."

6. In the case at hand, the petitioner/plaintiff having failed to establish *prima facie* that she is in settled possession of the suit property, her application under Order 39 Rule 1 and 2 of CPC has rightly been rejected by the trial Court as would warrant any interference.

7. Even otherwise, it is well settled that power under Article 227 of the Constitution of India cannot be exercised to correct all errors of judgment of

a Court acting within limitation. It can be exercised where the order suffers from flagrant abuse of fundamental principles of law and justice. The Court under Article 227 of the Constitution of India cannot act as a Court of Appeal and re-appreciate the evidence (See. *Shalini Shyam Shetty vs. Rajendra Shankar Patil* (2010) 8 SCC 329 and *Jai Singh vs. Municipal Corporation of Delhi* (2010) 9 SCC 385).

8. In view whereof, petition fails and is dismissed. However, no costs.

Petition dismissed.

I.L.R. [2015] M.P., 876
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 15557/2012 (Jabalpur) decided on 13 January, 2014

NARMADA PD. TIWARI ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

***Service Law - M.P. Power Generating Company Ltd. - Company's Human Capital Manual, Clause 34(1)* - Superannuation - Age of superannuation was enhanced from 58 years to 60 years - Option were invited to serve till 60 years from class I, II and class III employees who were to be retired after April 2012, i.e. within one month from the date of order i.e. 24.04.2012 - Petitioner submitted option on 25.05.2012 but he was made to retire on completion of 58 years of age - Held - Order dated 24.04.2012 was communicated to the department where the petitioner was employed on 3/4.05.2012 - Since petitioner submitted option on 25.05.2012 it was within the period of 30 days from the date of communication - The effective date is the date of communication and not the date of order - Petition is allowed. (Paras 8 & 9)**

सेवा विधि – म.प्र. पॉवर जनरेटिंग कंपनी लिमिटेड – कंपनी का ह्यूमन कैपिटल मैनुअल, खंड 34(1) – अधिवार्षिकी – अधिवार्षिकी आयु 58 वर्ष से बढ़ाकर 60 वर्ष की गई – प्रथम, द्वितीय व तृतीय श्रेणी कर्मचारी जो अप्रैल 2012 अर्थात् आदेश की तिथि से एक माह के भीतर अर्थात् 24.04.2012 के पश्चात् सेवानिवृत्त होने थे उनसे 60 वर्ष तक सेवा देने के लिये विकल्प आमंत्रित किये गये – याची ने 25.05.2012 को विकल्प प्रस्तुत किया परन्तु उसे 58 वर्ष की आयु पूर्ण करने पर सेवानिवृत्त किया गया – अभिनिर्धारित – जिस विभाग में याची नियोजित था उसको आदेश दिनांक 24.04.2012 की संसूचना 3/4.05.2012 को दी गई थी – चूंकि याची

ने 25.05.2012 को विकल्प प्रस्तुत किया वह संसूचना की तिथि से 30 दिनों की अवधि के भीतर था – संसूचना की तिथि प्रभावी तिथि है और न कि आदेश की तिथि – याचिका मंजूर की गई।

L.S. Singh with *J.L. Soni,* for the petitioner.
V. Shrivastava, P.L. for the State.
Anoop Nair and *K. Rohan,* for the respondent nos. 2 to 4.

(Supplied: Paragraph numbers)

ORDER

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

1. Assail is to an order dated 5.7.2012 whereby the respondent, M.P. Power Generating Company and its functionary while declining the option to serve till 60 years has directed the retirement of the petitioner on his completion of 58 years.

2. Petitioner, Senior Plant Assistant, Grade I, Boiler Operation availed Medical leave from 2.4.2012 to 25.5.2012. During the period when petitioner was on leave, the respondent No. 1 in pursuance to Department of Energy Government of Madhya Pradesh, communication No. 3313/13/2012/02 dated 24.4.2012 approved the proposal by respondent No. 2 of enhancing the age of superannuation from 58 years to 60 years and directed for amendment in Clause 34 (1) of Company's Human Capital Manual. It was also directed vide said communication that the option be invited from such Class I, II and III employees whose services were finally absorbed in Madhya Pradesh Power Generating Company Ltd. for the retirement at enhanced age of 60 years.

3. That in pursuance to the decision by the State Government, options were invited vide order No. मु.अ.(मा.सं.एवं प्र.)/मप्रपाजनकलि./1055 dated 24.4.2012.

The order is in the following term:-

"मध्यप्रदेश शासन, ऊर्जा विभाग, मंत्रालय, भोपाल के पत्र कमांक 3313/13/2012/02 दिनांक 24.04.2012 द्वारा दी गई सहमति के परिप्रेक्ष्य में लिये गये निर्णयानुसार, म.प्र. राज्य विद्युत मण्डल के प्रथम, द्वितीय एवं तृतीय श्रेणी के जिन कार्मिकों की सेवाओं का अंतिम रूप से मध्य प्रदेश पॉवर

जनरेटिंग कंपनी लिमिटेड में संविलियन किया गया है, को यह विकल्प दिया जाता है कि वे अपनी इच्छानुसार 60 वर्ष की सेवानिवत्ति की आयु का विकल्प स्वीकार कर सकते हैं, चतुर्थ श्रेणी के कार्मिकों की सेवानिवृत्ति की आयु यथावत 60 वर्ष ही बनी रहेगी।

उपरोक्त निर्णय तत्काल प्रभाव से लागू होगा।"

4. Apparently, the order does not stipulate any cut off date. The cut off date, however, was introduced in the option form. Note 1 and 2 stipulated :

"(1) : कार्यालय/विभाग प्रमुख माह अप्रैल 2012 में सेवानिवृत्त होने, वाले ऐसे कार्मिक जो 60 वर्ष की सेवानिवृत्ति की आयु के विकल्प हेतु इच्छुक है, से संलग्न विकल्प प्रपत्र में विकल्प भरवाकर दिनांक 28.04.2012 तक इस कार्यालय को प्रेषित किया जाना सुनिश्चित करें।

(2) : कार्यालय/विभाग प्रमुख माह अप्रैल 2012 के बाद सेवानिवृत्त होने वाले ऐसे कार्मिकों से संलग्न विकल्प प्रपत्र में विकल्प भरवाकर विकल्प आदेश जारी होने के एक माह की अवधि में प्रेषित किया जाना सुनिश्चित करें।"

5. The petitioner who was completing 58 years on 30.9.2012 was governed by Note 2 i.e. one month from the date of order seeking option i.e. one month from 24.4.2012.

6. The petitioner immediately on returning from medical leave on 25.5.2012 gave his option on 25.5.2012 which was duly acknowledged on 25.5.2012 by the Departmental Head.

7. The option, however, was not taken into consideration for the reasons, which finds mention in the returns, that it was given after expiry of one month.

8. The return, however, does not disclose as to when the order dated 24.4.2012 was communicated, because unless communicated the employees who are to be benefited will not be able to take the advantage. The order dated 24.4.2012 reveals the date on which it was communicated to the department where the petitioner was employed is 3.5.2012 and the seal thereon the right top corner bears the date 4.5.2012. Thus even if it is to be accepted that the option was required to be given within one month from the date of order, it is the date on which it was communicated and made known to all concern which will be the effective date and not the date of order.

9. In the case at hand, though the order inviting option to retire at enhanced age of 60 years was issued on 24.4.2012, however, the same was communicated at latter date. In the department where the petitioner was working, the order dated 24.4.2012 was communicated on 3/4.5.2012 and the petitioner having given his option on 25.5.2012, it was will within 30 days from the date of communication of order. Therefore, the respondents are not justified in declining to accept the option given by the petitioner to serve till 60 years of age. Consequently, the decision taken by respondents in not extending the benefit of extended age of superannuation from 58 to 60 years to the petitioner is set aside. Respondents are directed to accept the option form furnished by the petitioner on 25.5.2012 and grant the benefit of extended age of superannuation from 58 to 60 years.

10. Petition is allowed to the extent above.

C.C. as per rule.

Petition allowed.

I.L.R. [2015] M.P., 879
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 4768/2013 (Gwalior) decided on 13 February, 2014

RASHID KHAN ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Constitution - Article 226 - Habeas Corpus - Age of girl - **Petitioner claims to have married with Corpus - Corpus also expressing her will to live with her husband/petitioner - Under Muslim law, a girl is competent to enter into a marriage contract if she has attained puberty - Under Muslim Law puberty is presumed on completion of the age of 15 years - As corpus is above the age of 15 years, she is competent to enter into a marraige contract - Corpus permitted to live with petitioner. (Paras 6,10 & 11)**

संविधान – अनुच्छेद 226 – बंदी प्रत्यक्षीकरण – लड़की की आयु – याची ने बंदी से विवाहित होने का दावा किया – बंदी ने भी अपने पति/याची के साथ रहने के लिये अपनी रजामंदी व्यक्त की – मुस्लिम विधि के अंतर्गत लड़की विवाह करने के लिये सक्षम है यदि उसने परिपक्वता प्राप्त कर ली है – मुस्लिम विधि के

अंतर्गत 15 वर्ष की आयु पूर्ण होने पर परिपक्वता की अवधारणा की जाती है – चूंकि बंदी 15 वर्ष से अधिक आयु की है, वह विवाह करने के लिये सक्षम है – बंदी को याची के साथ रहने की अनुमति दी गई।

Cases referred :

AIR 1932 Lahore 280, AIR 1950 Lahore 45, 1980 CRI. L.J. 764, 1991 MPLJ 50, Delhi High Court in W.P.(CRL 446/2012, Crl. M.A. 3701/2012).

Rishikesh Bohre, for the petitioner.
B. Raj Pandey, G.A. for the respondents/State.
Dharmendra Shrivastava, for the respondent no. 4.

ORDER

SUJOY PAUL, J. :- In this petition filed under Article 226 of the Constitution, the petitioner has prayed for issuance of writ of habeas corpus for seeking custody of his wife from the mother of the wife.

2. Brief facts necessary for adjudication of this matter are as under :-

(i) Petitioner and Gulafsa (corpus) solemnized marriage in accordance with Muslim customs on 02.03.2013 at the office of Sharivah Kaza Khanugaon Bhopal (M.P.). 'Nikahnama' is filed as Annexure P/1. The corpus executed an affidavit on 02.04.2013 at Bhopal admitting the factum of marriage with petitioner. This Affidavit is filed as Annexure P/2.

(ii) The stand of the petitioner is that he and corpus are major and therefore, they were entitled to decide as to with whom they would marry. In support of contention regarding age, the voter ID and voter list are filed. 'Aadhar' registration slip is also relied upon for this purpose.

(iii) It is submitted that the mother of the corpus, respondent No.4, lodged FIRs against the petitioner and forcibly and illegally took away the corpus from the petitioner's custody. Petitioner was enlarged on bail and then filed this petition.

3. It is contended that as per the provisions of Mulsim Law marriage is in accordance with law and respondent No.4 is keeping the corpus without her will, which amounts to wrongful detention of corpus.

4. *Per Contra,* Respondent No.4 submitted that the date of birth of corpus is 15th July, 1997. Thus, she is about 16 years and 1 and ½ months old. Marks sheet Annexure R/1 for this purpose is relied upon. However, factum of marriage is not denied. It is contended that marriage was solemnized illegally without permission of respondent No.4. It is contended that since corpus is minor, the marriage without the consent of respondent No.4 is impermissible.

5. This Court on various occasions asked the corpus as to with whom she wants to reside. On every occasion, including on the last date of hearing on 10.02.2014, she in no uncertain terms stated that she on her own volition got married and wants to reside with the husband.

6. The Marriage in the present case is solemnized under the customs of Mahomedan Law. In AIR 1932 Lahore 280 *(Munshi Vs. Mt. Alam Bibi)* the Division Bench of the High Court opined that under Mahomedan Law even a girl under fifteen is competent to enter into a marriage contract if she has attained puberty. In AIR 1950 Lahore 45 *(Mt. Gulam Sakina Vs. Falak Sher Allah Bakhsh)* it was opined that "Puberty" under Muhammadan law is presumed, in the absence of evidence, on completion of the age of 15 years. It would, therefore, necessarily follow that the minor should exercise the option after the age of 15 years unless there is evidence to the contrary that puberty has been attained earlier and the burden of proving this shall lie upon the person so pleading. Anything done by the minor during the minority would not destroy the right which can accrue only after puberty.

7. The Division of Patna High Court in case of *(Md. Irdis, Vs. State of Bihar and others)* reported in (1980 CRI. L.J. 764) opined that it has to be held that under Mahomedan Law a girl, who has reached the age of puberty, i.e., in normal course at the age of 15 years, can marry without the consent of her guardian. This Court in 1991 M.P.L.J. 50 *(Noor Mohammad Vs. Mohammad Jiauddin and others)* opined that marriage solemnized under Mahomedan Law is purely a civil contract. The essentials of a valid Muslim marriage are offer and acceptance at the same sitting, by the parties to the marriage,of the proposal, in the presence and hearing of two male or one male and two female witnesses.

8. The Delhi High Court in W.P. (CRL(446/ 2012, Crl. M.A. 3701 / 2012 *(Mrs. Tahra Begum Vs. State of Delhi and Others.)* posed with a situation where the mother of the corpus was seeking the writ of habeas corpus

for getting custody from the husband of the corpus. In the said case, the corpus was a minor (age 15 years). She married with one Mehtab. Question was whether the mother can seek custody because corpus was minor/below 18 years of age. After considering various judgments, including the judgment of Patna High Court in case of *Md. Idrish* (supra), Delhi High Court opined that Mulsim girl, who has attained puberty, i.e. 15 years can marry and such marriage would not be a void marriage. However, it was held that she has an option of treating the marriage as voidable at the time of her attaining the age of majority, i.e. 18 years. It was held as under :-

> "The girl in this case, Shumaila, clearly expressed her choice of residing with her husband, this Court is of opinion that she ought to be allowed to exercise her option. This Court has today recorded her statement in that regard. We direct the presence of Mehtab, Shumaila and either of her in-laws once in six months, in order to ascertain her will being, till she attains the age of majority before the Child Welfare Committee. The Committee shall take necessary steps including obtaining the necessary undertaking from Mehtab in that regard Subject to completion of these steps, (which shall be within a week) Shumaila shall be allowed to live with Mehtab, in the matrimonial home.

9. Different authors have taken the same view regarding age of marriage of muslim girl which have been taken in the aforesaid judgments. This view is taken in "Principles of Mahomedan Law" by Mulla, "Mohammedan Law" by Aqil Ahmad and "Mohammedan Law" by B. R. Verma.

10. In the present case, admittedly the corpus has married after attaining the age of 15 years. Thus, her marriage cannot be said to be a void marriage. She on more than one occasion has expressed her wish to reside with her husband Rashid Khan. In this view of the matter, she has a right to reside with her husband. In view of option exercised by her to live with her husband, I deem it proper to direct the respondent No.4 to permit the corpus to go and live with her husband. However, in the facts and circumstances of this case, I deem it proper for the welfare of the corpus to give similar directions which were given by the Delhi High Court in the above case.

11. Resultantly, it is directed that corpus and her husband Rashid Khan shall present themselves once in six months before the Child Welfare Committee

constituted under Juvenile Justice (Care and Protection) Act at Gwalior. This is necessary in order to ascertain her well being till she attained age of majority. Committee shall take necessary steps including obtaining the necessary undertaking from the husband Rashid Khan in this regard. Subject to completion of these steps, corpus shall be allowed to live with her husband Rashid Khan, in the matrimonial home.

12. Petition is disposed of with the aforesaid directions.

Petition disposed of.

I.L.R. [2015] M.P., 883
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 8114/2012 (Gwalior) decided on 14 February, 2014

KAMLA BAI ... Petitioner
Vs.
NATHURAM SHARMA & ors. ... Respondents

*A. **Land Revenue Code, M.P. (20 of 1959), Section 164 (As amended in 1961) & Hindu Succession Act (30 of 1956), Section 22 - Applicability of Personal Law on agricultural land*** - **In view of amended section 164, Personal Law applies to agricultural land - Judgments passed on the basis of unamended section 164 as it was prior to 1961 have no application. (Paras 6 to 16)**

क. भू राजस्व संहिता, म.प्र., (1959 का 20), धारा 164 (1961 में यथासंशोधित) एवं हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 22 – कृषि भूमि पर स्वीय विधि की प्रयोज्यता – संशोधित धारा 164 को दृष्टिगत रखते हुये स्वीय विधि कृषि भूमि को लागू होगी – असंशोधित धारा 164 जैसे कि वह 1961 के पूर्व थी के आधार पर पारित किये गये निर्णय लागू नहीं होते।

*B. **Civil Procedure Code (5 of 1908), Order 39 Rule 1, 2 & Hindu Succession Act (30 of 1956), Section 22 - Share - Temporary Injunction*** - **When share of each of the coparcener is clear and ascertainable and share is determined, it ceases to be a coparcenary property - If the share is not ascertainable and identifiable, temporary injunction was rightly granted. (Para 17)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1,2 एवं हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 22 – अंश – अस्थाई व्यादेश

– जब प्रत्येक सहदायिक का अंश स्पष्ट एवं अभिनिश्चित है तथा अंश का निर्धारण किया गया है, वह सहदायिकी संपत्ति नहीं रह जाती – यदि अंश अभिनिश्चित एवं पहचान योग्य नहीं है, अस्थाई व्यादेश उचित रूप से प्रदान किया गया।

Cases referred :

1992 RN 277, 2006 RN 207, 2008 (7) SCC 46, S.A. No. 203/80 (G), S.A. No. 409/61 (I), S.A. No. 297/62 (I), 1998 RN 53, 1984 (Supp) SCC 175, 1987 JLJ 284, (2010) 8 SCC 329.

Vivek Jain, for the petitioner.
K.B. Chaturvedi with G.P. Chaurasiya, for the respondents.

ORDER

SUJOY PAUL, J. :- The petitioner/defendant No.1 feeling aggrieved and dissatisfied with the order passed by the Trial Court under Order 39 Rule 1 & 2 C.P.C dated 28.06.2012 which is affirmed in Misc. Civil Appeal No. 20/2012 by Learned District Judge, Bhind, has filed this petition under Article 227 of the Constitution.

2. Summarize and admitted facts are as under :-

The suit property was originally owned by deceased Prabhudayal and upon his death devolved upon the plaintiff and the defendants. The plaintiff is one of the sons, whereas defendant No.1 (present petitioner) is widow of another son. Other defendants are daughters of deceased Prabhudayal. All the four, i.e. plaintiff and defendants No. 1, 2 & 3 are having ¼ share each in the property. The plaintiff / respondent No.1 instituted a suit before the Trial Court against the defendant Nos. 1, 2 & 3 stating that there is certain property of deceased Prabhudayal and after his death, ¼ share of the said property is devolved to each of the parties by way of succession. It is contended in this suit that without getting the partition done, defendants are trying to sell the suit property which will be detriment to the interest of plaintiff because they have a preferential right on the said property under section 22 of Hindu Succession Act, 1956 (HS Act). The suit is filed on twin grounds. Firstly, on the ground of preferential right to purchase the property flowing from Section 22 of HS Act and secondly,

on the ground that unpartitioned property cannot be sold. Along with the plaint, an application seeking injunction was also filed. The petitioner filed written statement and also reply to the application seeking temporary injunction. The Trial Court allowed the application and granted temporary injunction by order dated 28.06.2012. Petitioner preferred an appeal under Order 43 Rule 1 before the Learned District Judge. The learned District Judge dismissed this appeal by order dated 17th October, 2012. These orders dated 28.06.2012 and 17.10.2012 are called in question in the present petition.

3. Shri Vivek Jain, learned counsel for the petitioner advanced two fold submission. Firstly, it is contended that in view of judgment of this Court in *(Chain Singh Vs. Ramchandra and Ors)*. reported in 1992 RN 277 and *(Madan Singh Vs. Papulal)* reported in 2006 RN 207, the provision of section 22 of Hindu Succession Act has no application on agricultural land. Secondly, it is contended that Learned District Judge has rejected the appeal on the basis of judgment of Supreme Court in the case of *(Hardeo Rai Vs. Sakuntala Devi & Ors)* reported in 2008 (7) SCC 46. By taking this Court on certain paragraphs of this judgment, it is contended that judgment speaks otherwise. Shri Jain submits that it is held that even a coparcenary interest can be transferred subject to the condition that the purchaser without the consent of other coparceners cannot get possession, but may sue for partition. It is further contended that for the purpose of assigning one's interest in the property, it is not necessary that partition by meets and bounds amongst the coparceners must take place. If intention is expressed to partition the coparcener property, the share of each coparcener becomes clear and ascertainable and therefore, the Court below has erred in rejecting the appeal on the basis of this judgment.

4. Per Contra, Shri K.B. Chaturvedi, learned senior counsel assisted by Shri G.P. Chaurasiya submits that the orders passed by the Court below are in accordance with law and do not require any interference by this Court. He relied on section 164 of M.P. Land Revenue Code, 1957 (MPLRC) to submit that personal law will prevail and HS Act is a piece of personal law.

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

6. The first contention of Shri Vivek Jain is based on the judgment of *Chain Singh* (supra). It is argued that the provision of Section 22 of Hindu Succession Act has no application on agricultural land. Before dealing with this aspect, it is apt to mention that section 164 of Madhya Pradesh Land Revenue Code was amended w.e.f. 08.12.1961. This Section before substitution by M.P. 38 of 1961 was differently worded. Unamended Section 164 of MPLRC reads as under :-

> **"164. Devolution** -(1) Notwithstanding any law, custom or usage to the contrary, the interest of a Bhumi-swami shall on his death devolve in accordance with the order of succession given below:-
>
> Class I- Son-predeceased son's son, son of a predeceased son's predeceased son, widow or husband as the case may be, predeceased son's widow, widow of predeceased son's predeceased son, and widow of a predeceased son's predeceased son's predeceased son."

7. Below this provision, two explanations I & II mentioned therein were given. This was amended by inserting a new section 164 w.e.f from 08.12.1961 which reads as under :-

> **"164. Devolution** - Subject to his personal law the interest of Bhumiswami shall, on this death, pass by inheritance, survivorship or bequest, as the case may be."

8. If unamended provision is examined in juxta position to amended section 164, it will be crystal clear that unamended provision began with a non-obstante clause. It had overriding effect on any other law, custom or usage to the contrary. In other words, unamended section 164 provided overriding effect on any other law, custom or usage. Amended provision is other way round. As per new section 164, the interest of Bhumi-swami is subject to personal law. In series of judgments, this Court considered the effect of unamended section. Other provision of MPLRC were also considered by taking into account section 4 (2) of HS Act. However, it is apt to mention that section 4 (2) was omitted by Act 39 of 2005 w.e.f. 09.09.2005. The sub section (2) before Omission was as under :-

"(2) for the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provision of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings."

9. The submission of learned counsel for the petitioner is based on *Chain Singh and Madan Singh* (supra). A microscopic reading of judgment of *Chain Singh* shows that a single bench of this Court has considered earlier judgments on this point. In para 15, the judgment of S.A. No. 203/80 (G)*(Gyan Singh and others Vs. Ghanshyam and others)* was considered. Facts reproduced from this appeal shows that it was arising out of a dispute when the provisions of Madhya Bharat Land Revenue and Tenancy Act, 1950, were applicable. This para makes it further clear that unamended section 164 and 165 were taken into account. Similarly in para 16, judgment of S.A. No. 409/61 (I) *(Dagdi bai Vs. Shyamrao and others)* was considered. In para 17, reliance is placed on judgment of S.A. No. 297/62 (I) *(Jhabarsingh Vs. Soudansingh).*

10. A careful reading of these paragraphs make it clear that MBLRT Act, 1950 and unamended section 164 of MPLRC were considered by this Court. In para 19 in *Chain Singh* (supra), this Court gave a finding which shows that it is based on principle laid down in aforesaid second appeals. The principles laid down in those second appeals were based on unamended Section 164. Thus, entire finding of this Court in *Chain Singh* is based on unamended section 164.

11. Considering the aforesaid, it was held that right to alienate the land is governed by Tenancy Law and not by provisions of personal law. In the considered opinion of this Court, finding in *Chain Singh* is based on judgments of different second appeals which were based on unamended Section 164 of MPLRC and therefore, the same are of no assistance to the petitioner in the teeth of amended provision, which became applicable w.e.f. 08.12.1961. A simple reading of amended section 164 makes it clear that the Legislature in its wisdom has decided to apply right of devolution subject to the personal law of the person concerned.

12. Interestingly, in *Madan Singh* (supra) this Court erroneously held that *Chain Singh* (supra) was decided by Division Bench, whereas it is factually

incorrect, it was, in fact, decided by a Single Bench. There is no discussion in *Chain Singh* about applicability of amended section 164 of MPLRC. Since whole judgment is passed by placing reliance on *Chain Singh* (surpa), the judgment which was based on unamended section 164 of MPLRC, it is of no help to the petitioner. Thus, these judgments are clearly distinguishable and are of no assistance to the petitioner. Admittedly in the present case amended section 164 will be applicable. Section 164, in no uncertain terms provides that interest of Bhumiswami shall be subject to his personal law.

13. Section 22 of HS Act, 1956 has been enacted to keep out stranger coming into heirs of class-I schedule after coming into force of said Act. A conjoint reading of section 164 of MPLRC and Section 22 of HS Act makes it clear that section 22 needs to be given preference. The effect of amended section 164 was taken into consideration by this Court in 1998 RN 53 *(Chaitram and Ors. Vs. Mrs. Itwarin)*. It was opined that if Phulabai died after this amendment, succession to her interest will be governed by the Hindu Succession Act, but if she died before 08.12.1961, her interest would devolve in accordance with the scheme under unamended section 164 of the Code. Thus, the judgment of *Chaitram* makes the said distinction very clear.

14. In *(Anant Kibe and Ors. Vs. Purushottam Rao and others)* reported in [1984 (Supp) SCC 175] the Apex Court considered the impact of amended section 164 of MPLRC and opined as under :-

> "Section 164 provides that subject to his personal law, the interest of a bhumiswami shall, on his death, pass by inheritance, survivorship or bequest, as the case maybe. On a combined reading of Sections 158 (1) (b) and 164, the legal consequence of succession by the rule of primogeniture which were terms of the grant of inam lands under the Jagir Manual of the Holkar State, stood extinguished."

The Apex Court has drawn the curtains on the issue by holding that as per Section 164, interest of Bhumiswami shall be subject to his personal law.

15. In 1987 JLJ 284 *(Dalchand Vs. Kamlabai & Ors.)* this court opined that it is now well settled that the devolution on the competency or incompetency to dispose of property in any particular mode is governed by the law applicable on the date of devolution or the date of disposition of property.

16. On the basis of aforesaid analysis, it is clear that amended section 164 will be applicable in the present case. Thus, I am unable to agree with the first contention of Shri Jain. The applicability and definitions of MPLRC makes it clear that it is applicable on agricultural land. Apart from this, the judgments of *Chain Singh and Madan Singh* (supra) are of no assistance to the petitioner in view of new Section 164 for the proposition that Section 22 of H.S. Act is not applicable on agricultural land.

17. The second submission of Shri Jain is based on finding of learned District Judge, which is based on judgment of Supreme Court in *Hardeo Rai* (surpa). It is canvassed by Shri Jain that as per this judgment, the petitioner became owner of her share and she was free to alienate the property of her share. A microscopic reading of para 21 to 25 shows that contention is not absolutely correct. In para 21, the Apex Court referred about the statement of a witness who admitted that appellants therein had been in separate possession. On the basis of this factual foundation, the Apex court opined in para 22 to 25. It is mentioned that when share of each of the coparcener is clear and ascertainable and share aforesaid is determined, it ceases to be a coparcenary property. In the present case, that stage has not come. Admittedly, the share of petitioner is not ascertainable and identifiable. Thus, said judgment cannot be read in the manner suggested by Shri Jain.

18. For the aforesaid reasons, in my opinion, the Courts below have not committed any error of law in passing the order dated 28.06.2012 and affirming it in Misc. appeal. The scope of interference under Article 227 of the Constitution is limited. If order is shown to be passed by a Court having no jurisdiction, it suffers from manifest procedural impropriety or perversity, interference can be made. Interference is made to ensure that Courts below act within the bounds of their authority. Another view is possible, is not a ground for interference. Interference can be made sparingly for the said purpose and not for correcting error of facts and law in a routine manner. This view is taken in *(Shalini Shyam Shetty and another vs. Rajendra Shankar Patil),* reported in [(2010) 8 SCC 329]. None of these ingredients are available here.

19. Resultantly, I find no reason to interfere. Petition sans substance and is hereby dismissed. No costs.

Petition dismissed.

I.L.R. [2015] M.P., 890
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 9086/2013 (Gwalior) decided on 14 February, 2014

RAMESH PAL ... Petitioner
Vs.
UNION OF INDIA & ors. ... Respondents

Constitution - Article 226, Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013 (14 of 2013), Section 11, Central Civil Services (Classification, Control and Appeal) Rules, 1965, Rules 3(C) & 14(2) & Administrative Tribunals Act (13 of 1985), Section 14 - Maintainability of writ petition **- Petitioner has challenged the enquiry report of Internal Complaints Committee - Section 11 of Act 2013 makes it clear that where respondent is an employee and Internal Committee proceeds to make enquiry into the complaint, it will be an enquiry in accordance with provisions of Service Rules - In view of Section 14 of Act 1985, Central Administrative Tribunal has jurisdiction to entertain - W.P. not maintainable. (Paras 13 to 22)**

संविधान – अनुच्छेद 226 – कार्यस्थल पर महिलाओं का यौन उत्पीड़न (रोकथाम, निषेध और निवारण) अधिनियम, 2013 (2013 का 14) धारा 11, केन्द्रीय सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, 1965, नियम 3(सी) व 14(2) एवं प्रशासनिक अधिकरण अधिनियम (1985 का 13), धारा 14 – रिट याचिका की पोषणीयता – याची ने आंतरिक शिकायत समिति के जांच प्रतिवेदन को चुनौती दी – अधिनियम 2013 की धारा 11 स्पष्ट करती है कि जहां प्रत्यर्थी एक कर्मचारी है और आंतरिक समिति शिकायत में जांच की कार्यवाही करती है तब वह जांच सेवा नियमों के उपबंधों के अनुसार होगी – अधिनियम 1985 की धारा 14 को दृष्टिगत रखते हुए केन्द्रीय प्रशासनिक अधिकरण को ग्रहण करने की अधिकारिता होगी – रिट याचिका पोषणीय नहीं।

Cases referred :

(1997) 6 SCC 241, (2013) 1 SCC 297, (2001) 10 SCC 623, (1997) 3 SCC 261.

Prashant Sharma, for the petitioner.
Anil Sharma, for the respondents.

ORDER

SUJOY PAUL, J. :- The petitioner, by invoking jurisdiction of this Court under Article 226 of the Constitution has challenged the enquiry report of Internal Complaint Committee (Probation and redressal of Complaints against Sexual Harassment of Women in Workplace). The consequential show cause notice dated 10.12.2013 (Annexure P-7) based on enquiry report Annexure P-1 is also called in question.

2. The admitted facts between the parties are that the petitioner is an employee (substantively holding the post of Professor) in respondent No.2-Organization viz., Laxmibai National Institute of Physical Education, Gwalior. At the relevant point of time, the petitioner was working as Incharge Vice-Chancellor. In this W.P., the respondents have filed an application for dismissal of the petition for want of jurisdiction of this Court. This application is based on the notification of Ministry of Personnel, Public Grievances & Pensions (Department of Personnel and Training) notification dated 31.10.2008 published in Gazette of India Extraordinary Part 3(ii). By this notification, in exercise of powers conferred by sub-section (2) of Section 14 of the Administrative Tribunals Act, 1985 (1985 Act), the Government has notified that respondent No.2 will fall within the jurisdiction of Central Administrative Tribunal. The preliminary objection is raised regarding jurisdiction of this Court to grant the relief desired by the petitioner. It is contended by the employer that the grievance of the petitioner amounts to "service matter" and in view of notification under section 14(2) of the Act, the proper forum is the Central Administrative Tribunal. The Tribunal being the Court of first instance for the purpose of adjudication of service matters, this Court cannot entertain this petition.

3. With the consent, matter was heard on the question of maintainability of this petition. The Apex Court in (1997) 6 SCC 241 *(Vishaka and others Vs. State of Rajasthan and others)* issued directions with a view to ensure that cases of sexual harassment of women at work place are properly dealt with and guilty are punished. After the said judgment, Central Government inserted proviso to Rule 14(2) of CCS (CCA) Rules, 1965. The said amendment reads as under:-

> "Provided that where there is a complaint of sexual harassment within the meaning of Rule 3-C of the Central Civil

Services (Conduct) Rules, 1964, the Complaints Committee established in each Ministry or Department or office for inquiring into such complaints, shall be deemed to be the Inquiring Authority appointed by the Disciplinary Authority for the purpose of these rules and the Complaints Committee shall hold, if separate procedure has not been prescribed for the Complaints Committee for holding the inquiry into the complaints of sexual harassment, the inquiry as far as practicable in accordance with the procedure laid down in these rules".

4. The amendment was also made by Central Government in CCS(Conduct Rules). This amendment reads as under:-

"3-C. Prohibition of sexual harassment of working women

(1) No Government servant shall indulge in any act of sexual harassment of any woman at her work place.

(2) Every Government servant who is in charge of a work place shall take appropriate steps to prevent sexual harassment to any woman at such work place.

Explanation.-- For the purpose of this rule,"sexual harassment" includes such unwelcome sexually determined behaviour, whether directly or otherwise, as--

(a) physical contact and advances;

(b) demand or request for sexual favours;

© sexually coloured remarks;

(d) showing any pornography; or

(e) any other unwelcome physical, verbal or non-verbal conduce of a sexual nature."

5. The Apex Court in subsequent judgments reiterated its view and expressed immediate need to create mechanism to deal with the cases of sexual harassment with a view to ensure that Article 21, 16, 14, 19, 15(1), 15(3), 42, 51-A(a) & 51-A(c), become reality.

6. In (2013) 1 SCC 297 *(Medha Kotwal Lele and others Vs. Union*

of India and others), the Apex Court had taken into account the amendments made by Central Government in CCA Rules and in Conduct Rules. It was directed that similar amendments are required to be made in other statutes including Industrial Employment (Standing Orders) etc. the Apex Court opined that existing law, if necessary, should be revised and appropriate new laws be enacted by Parliament and the State Legislatures to protect women from any form of indecency, indignity and disrespect. This judgment in *Medha Kotwal* (supa) was delivered by Supreme Court on October 19, 2012. Thereafter, the new act viz., The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013(No. 14 of 2013) (for brevity this Act is called as 'Act of 2013') came into being.

7. The Act of 2013 in section 2(a) defines "aggrieved woman". The woman who is allegedly subjected to sexual harassment is defined as "aggrieved woman". The person against whom aggrieved woman made compliant is defined as "respondent" in section 2(m). The definition of working place mentioned in section 2(o) is very wide. Section 4 deals with constitution of internal complaint committee. Section 6 deals with Constitution and jurisdiction of Local Complaints Committee. The method of preferring complaint is mentioned in Section 9 of the Act. Section 11 deals with methodology by which complaint needs to be inquired. Section 11(1) reads as under:-

> "(1) Subject to the provisions of section 10, the Internal Committee or the Local Committee, as the case may be, shall, where the respondent is an employee, proceed to make inquiry into the complaint in accordance with the provisions of the service rules applicable to the respondent and where no such rules exist, in such manner as may be prescribed or in case of a domestic worker, the Local Committee shall, if *prima facie* case exist, forward the complaint to the police, within a period of seven days for registering the case under section 509 of the Indian Penal Code (45 of 1860), and any other relevant provisions of the said Code where applicable:"

8. Section 13 deals with the methodology to deal with enquiry report. Section 13 (1) and (3)(i) reads as under:-

> "(1) On the completion of an inquiry under this Act, the Internal Committee or the Local Committee, as the case

may be, shall, provide a report of its findings to the employer, or as the case may be, the District Officer within a period of ten days from the date of completion of the inquiry and such report be made available to the concerned parties.

(3) Whether the Internal Committee or the Local Committee, as the case may be, arrives at the conclusion that the allegation against the respondent has been proved, it shall recommend to the employer or the District Officer, as the case may be--

(I) to take action for sexual harassment as a misconduct in accordance with the provisions of the service rules applicable to the respondent or where no such service rules have been made, in such manner as may be prescribed;"

9. Section 18 provides about appeal, which reads as under:-

"18.Appeal.-- (1) Any person aggrieved from the recommendations made under sub-section (2) of section 13 or under clause (i) or clause (ii) of sub-section (3) of section 13 or sub-section (1) or sub-section (2) of section 14 or section 17 or non-implementation of such recommendations may prefer an appeal to the court or tribunal in accordance with the provisions of the service rules applicable to the said person or where no such service rules exist then, without prejudice to provisions contained in any other law for the time being in force, the person aggrieved may prefer an appeal in such manner as may be prescribed.

10. Chapter VI of Section 19 defines duties of the employer. 19(i) reads as under:-

"(i) treat sexual harassment as a misconduct under the service rules and initiate action for such misconduct;"

11. The bone of contention of Shri Prashant Sharma, learned counsel for the petitioner is that Annexure P-1 is an enquiry report submitted by Internal Committee and, therefore, this cannot be challenged before the Tribunal. He submits that if action is taken as per section 13 (3)(i) and employer decides to proceed against the petitioner, then only the jurisdiction of the Tribunal can be

invoked. In other words, it is submitted that the Tribunal will have no jurisdiction to deal with the findings of report Annexure P-1 and Constitution of the Committee which submitted the report. He placed reliance on the judgment of Supreme Court reported in (2001)10 SCC 623 *(Union of India Vs. Rasila Ram and others).*

12. In the considered opinion of this Court, the provisions of 2013 Act are to be read with the provisions of C.C.A. and Conduct Rules. After the judgment of *Vishakha* (supra) as noticed above, the Central Government amended the Conduct and CCA Rules. Sexual harassment was brought within the ambit of 'misconduct' and the methodology to punish the employee was also introduced by way of amendment in Rule 14(2) of the C.C.A. Rules, 1965. In addition, 2013 Act was brought into force. In *Rasila Ram* (supra), the Apex Court decided against a full bench judgment of the Central Administrative Tribunal. In the said case, the employee continued to occupy the accommodation unauthorizedly. The proceedings against him were initiated and the order was passed by the competent authority under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 for his eviction. The Tribunal opined that it being a "service matter", Tribunal has jurisdiction to entertain the O.A. The Apex Court opined that once a Government servant is held to be in occupation of a public premise as an unauthorised occupant within the meaning of the Eviction Act, and appropriate order is passed thereunder, the remedy to such occupants lies, as provided under the said Act. Thus, the ratio of the said judgment is that if a particular act provides a particular remedy, it must be availed and Tribunal will have no jurisdiction in this regard.

13. The judgment of *Rasila Ram* (supra) is of no assistance to the petitioner. In the said judgment, the provision of P.P. Act were taken into account. The said act provided a different mechanism of adjudication whereas 2013 Act read with Conduct and CCA Rules makes it clear that only one mechanism is prescribed. 'Sexual harassment' is treated as misconduct. Report of internal committee is to be treated by the employer as enquiry report and action needs to be taken as per Service Rules. Thus, as per provisions applicable herein, remedy is not elsewhere. In other words, internal enquiry has to be treated as a service matter. 2013 Act makes it clear that intention of law makers is to treat the action on sexual harassment as service matter. As per this Act, the employee has to avail the remedy under the service Rules. This further shows that remedy available for 'service matter' shall be the appropriate remedy for the petitioner.

14. Section 11 of 2013 Act makes it clear that where respondent is an employee and internal committee proceeds to make enquiry into the complaint, it will be an enquiry in accordance with the provisions of service rules. Thus, the intention of the Legislature was to make an enquiry into the compliant in accordance with the provisions of the service rules. The enquiry report Annexure P-1 on the face of it shows that the committee has taken into account the service rules i.e. CCA and Conduct Rules. Section 13(3)((i) also makes it clear that the action on sexual harassment needs to be taken in accordance with the provisions of the service rules. Section 19 (i) makes it clear that employer is duty bound to treat sexual harassment as a 'misconduct' under the service rules and initiate action for such misconduct. A conjoint reading of the aforesaid provision of the Act makes it clear that the proceedings and report of internal committee has to be treated as a service matter. More-so, when respondent is an employee of respondent No.2.

15. Section 18 which provides provision of appeal also shows the intention of law makers to bring it within the ambit of service rules for a 'respondent' who is an employee and, therefore, it is mentioned that he may prefer an appeal under the Service Rules. Petitioner who is aggrieved by the recommendation Annexure P-1 can always challenge the recommendation by questioning the constitution of the committee also which gave the recommendations before the appropriate forum. Putting it differently, the petitioner if aggrieved by the recommendation, can very well assail it on merits as well as on the question of the constitution of the committee. The ancillary question is whether this grievance can be redressed here or before the Central Administrative Tribunal?

16. The jurisdiction of Central Administrative Tribunal can be traced from section 14 of the Administrative Tribunals Act. Relevant portion of Section 14 reads as under:-

> "(1) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately before that day by all courts (except the Supreme Court) in relation to--
>
> xxxx
>
> xxxx

(c) all service matters pertaining to service in connection with the affairs of the Union concerning a person appointed to any service or post referred to in sub-clause (ii) or sub-clause (iii) of clause (b), being a person whose services have been placed by a State Government or any local or other authority or any corporation (or society) or other body, at the disposal of the Central Government for such appointment.

[Explanation.--For, the removal of doubts, it is hereby declare that references to "Union" in this sub-section shall be construed as including references also to a Union territory.].

17. A bare perusal of this provision makes it clear that all service matters pertaining to service in connection with the affairs of the Union can be decided by the Tribunal. The service matter is defined in Section 3(q) which reads as under:-

"3. Definitions.--In this Act, unless the context otherwise requires,--

(q) "service matters", in relation to a person, means all matters relating to the conditions of his service in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India, or, as the case may be, or any corporation (or society) owned or controlled by the Government, as respects--

(i) remuneration (including allowances), pension and other retirement benefits;

(ii) tenure including confirmation, seniority, promotion, reversion, premature retirement and superannuation;

(iii) leave of any kind;

(iv) disciplinary matters; or

(v) any other matter whatsoever;"

18. Section 3(q) within its ambit takes disciplinary matters. As noticed above, a conjoint reading of sedition 11, 13, 18 and 19 of 2013 Act makes it clear that incident of sexual harassment amounts to misconduct and the enquiry

on the complaint has to be made as per Service Rules. The definition of 'service matter' in the A.T. Act, 1985 includes disciplinary matters.

19. On the basis of aforesaid analysis, it is clear that the internal enquiry against the petitioner falls within the ambit of "service matter". Thus, the Tribunal will have jurisdiction to decide the said aspect.

20. At the cost of repetition, in the considered opinion of this Court, the petitioner aggrieved by the recommendation of the committee can challenge it before the appropriate forum on merits as well as on the constitution of the committee which has ultimately given the recommendation.

21. A constitution bench of Supreme Court in *L. Chandra Kumar Vs. Union of India and others* reported in (1997) 3 SCC 261, opined that Tribunal is the Court of first instance and it will not be open for the litigant to approach the High Court as a Court of first instance (para 93).

22. In the considered opinion of this Court, since it is not in dispute that Tribunal has jurisdiction to deal with service matters of respondent-Organization, the proper remedy for the petitioner is to file an application under Section 19 of the Act before the Tribunal. In view of *L. Chandra Kumar* (supra), this petition cannot be entertained. The grievance of the petitioner falls within the ambit of 'service matter'. For these cumulative reasons, this petition is not maintainable before this Court.

23. Petition is accordingly, dismissed by reserving liberty to the petitioner to avail the said remedy. No cost.

Petition dismissed.

I.L.R. [2015] M.P., 898
WRIT PETITION
Before Mr. Justice S.K. Gangele & Mr. Justice B.D. Rathi
W.P. No. 1179/2006 (Gwalior) decided on 2 April, 2014

VANDNA DHAKAD ... Petitioner
Vs.
STATE OF M.P. & anr. ... Respondents

Constitution - Article 227 - Caste Certificate **- Father of the petitioner migrated from Rajasthan - Petitioner belongs to "Dhanuk" caste which is declared as S.C. in Rajasthan as well as in Madhya**

Pradesh - Petitioner born in Madhya Pradesh and completed her studies in Madhya Pradesh - Petitioner had not migrated from Rajasthan - Caste certificate was rightly issued as notification pertaining to migration would not apply to petitioner - Order of High Level Committee set aside - Petition allowed. (Paras 8 & 9)

संविधान - अनुच्छेद 227 – जाति प्रमाणपत्र – याची के पिता ने राजस्थान से प्रव्रजन किया – याची "धनुक" जाति का है जिसे राजस्थान और साथ ही मध्यप्रदेश में भी अनुसूचित जाति के रूप में घोषित किया गया है – याची का जन्म मध्यप्रदेश में हुआ और मध्यप्रदेश मे अपनी शिक्षा पूरी की – याची ने राजस्थान से प्रव्रजन नहीं किया था – जाति प्रमाणपत्र उचित रूप से जारी किया गया क्योंकि प्रव्रजन से संबंधित अधिसूचना याची को लागू नहीं होगी – उच्च स्तरीय समिति का आदेश अपास्त – याचिका मंजूर।

Cases referred :

AIR 1995 SC 94, W.P. No. 1160/2003 decided on 16.09.2013 at Gwalior, W.P. No. 5143/2005 decided on 15.11.2006, Bench Gwalior.

None for the petitioner.
Raghvendra Dixit, for the Respondents/State.

ORDER

The Order of the Court was delivered by :
B.D. Rathi, J. :- This petition has been preferred under Article 226/227 of the Constitution of India being aggrieved from the order dated 29.6.2005 Annexure P/1 passed by High Level Committee constituted by the State Government under the directions of the Supreme Court in the case of *Madhuri Patil Vs. Additional Commissioner, Tribal Development,* AIR 1995 SC 94.

2. Brief facts of the case are that father of the petitioner Shri Om Prakash Dhakad was migrated from the State of Rajasthan to the State of Madhya Pradesh. The petitioner-Vandna Dhakad has born on 17.1.1975 in Mandsor (State of Madhya Pradesh). Her father was posted as Temporary Sub Inspector in the State of Madhya Pradesh. The petitioner and her father belongs to "Dhanuk" caste which is declared as Scheduled Caste in the State of Madhya Pradesh as well as in the State of Rajasthan. Since the petitioner was born in the State of Madhya Pradesh and is continuously residing in the State of Madhya Pradesh since her birth. The caste certificate was issued by

the competent authority as Annexure P/3 and also issued by the Sub Divisional Officer and that was cancelled by passing the impugned order Annexure P/1 dated 29.6.2005. The impugned order is not in accordance with the law laid down in the case of *Neetu Singh Vs. State of M.P.* (W.P.No.1160 of 2003 decided on 16.9.2013 at Gwalior).

3. In reply, this fact was admitted by the respondents that petitioner has born in the State of Madhya Pradesh, studied and brought up in this State, but her claim of Schedule Caste flows from her parentage, hence, the petitioner's being migrated Scheduled Caste "Dhanuk" which is of its origin in the State of Rajasthan and because father of the petitioner migrated from the State of Rajasthan to the State of Madhya Pradesh, the petitioner is not entitled to get the benefit of Scheduled Caste in the State of Madhya Pradesh as per various circulars and orders issued by the Union of India from time to time and accordingly the petition filed by the petitioner deserves to be dismissed.

4. After taking into consideration the arguments advanced by the learned counsel on behalf of the respondents and on perusal of the impugned order dated 29.6.2005 Annexure P/1, it seems that impugned order has not been passed in accordance with law. In para 3 of the impugned order it was opined by the Committee that father of the petitioner was permanent resident of State of Rajasthan. He belongs to "Dhanuk" caste which comes under Scheduled Caste category in the State of Madhya Pradesh also, but even then certificate for Scheduled Caste cannot be issued in favour of the petitioner because it is a case of migration. The circular issued by the Government of M.P. No.B.C.-16014/1/82-S.C. & B.C.D-1 dated 6.8.1984 in which in para 2 there is clear direction which reads thus:

> "clarified that the Scheduled Caste/Scheduled Tribe person on migration from the State of his origin to another State will not lose his status as Scheduled Caste/Scheduled Tribe but he will be entitled to the concessions/benefits admissible to the Scheduled Castes/Scheduled Tribes from the State of his origin and not from the State where he has migrated."

5. It was also held by the Committee that in view of the circular issued by the General Administration Department vide letter No./एफ–1/सा.प्र.वि./आ.प्र. दिनांक 1-8-1996 the directions have been given and in para 16 it is clearly mentioned that when a person migrated from one State to another, the caste

certificate should be taken from the State from where he came.

6. We are of the considered view that because of admitted fact that the petitioner has born and brought up this State she has completed his entire education in this State. She has not migrated. Her father came from State of Rajasthan, therefore, the circulars mentioned in the impugned order are not applicable in this case. It is also an admitted fact that "Dhanuk" caste comes under the Scheduled Caste Category in both the States i.e. State of Madhya Pradesh and State of Rajasthan.

7. In view of the aforementioned facts and circumstances of the case and in view of the principles laid down by this Court in the case of *Neetu Singh* (supra) and also in the case of *Dr. Yamini Khapre Vs. State of M.P. and others,* (W.P.No.5143/2005 decided on 15.11.2006, Bench Gwalior), this petition deserves to be allowed.

8. Petitioner is born in the State of Madhya Pradesh. She had her entire education and career in the State of Madhya Pradesh. Her father migrated in Madhya Pradesh before her birth i.e. more than 20-25 years back. The caste "Dhanuk" is declared as Scheduled Caste in both the States and the competent authority had issued caste certificate in her favour in the year 1989 and on 17-05-2002 by SDO Gwalior. Thus, the petitioner in the present case is a bonafide resident of Madhya Pradesh and as has been held by this Court in the case of *Neetu Singh* (supra), she has acquired the status of permanent domicile in the State of Madhya Pradesh as she fulfills the following conditions viz-

(i) she has born in the State of Madhya Pradesh and had her entire education right from the beginning to M.B.B.S. in the State of Madhya Pradesh; and

(ii) her parents are continuously residing in the State of Madhya Pradesh for more than 25 years.

9. As the petitioner has complied with the conditions for acquiring the status of a permanent domicile and, the caste to which she belongs is declared as Scheduled Caste in the State of Madhya Pradesh, there is no reason to deny her the benefits of castes certificate.

10. In the result, the findings arrived by the State Level Committee vide its order dated 29.6.2005 Annexure P/1 cannot be sustained and are hereby

quashed. Order dated 29.6.2005 Annexure P/1 refusing her the caste certificate is quashed and the respondents are directed to extend all the benefits of Scheduled Caste to the present petitioner.

Petition stands allowed with no order as to costs.

Petition allowed.

I.L.R. [2015] M.P., 902
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 30/2013 (Gwalior) decided on 7 April, 2014

BALRAM MAHAJAN ...Petitioner
Vs.
PRAVEEN KUMAR & ors. ... Respondents

Civil Procedure Code (5 of 1908), Order 39 Rule 7 & Order 26 Rule 9 - Inspection **- Petitioner sought appointment of an Advocate/ employee of Court to determine the actual position of property in dispute - Held - Order 39 Rule 7 has been made for the purpose of keeping on record the existing condition of property so that if same is subjected to any change later on, it can be made known to the Court - Purpose of issuance of Commissioner u/o 26 Rule 9 is for collecting facts which in due course may be used as evidence - As petitioner was seeking investigation and not inspection, his application was rightly rejected - Petition dismissed. (Paras 9,10 & 11)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 7 एवं आदेश 26 नियम 9 – निरीक्षण – याची ने विवादित संपत्ति की वास्तविक स्थिति निर्धारित करने के लिये अधिवक्ता/न्यायालय के कर्मचारी की नियुक्ति चाही – अभिनिर्धारित – आदेश 39 नियम 7 को संपत्ति की विद्यमान स्थिति अभिलेख पर बनाये रखने के प्रयोजन हेतु बनाया गया है, जिससे कि यदि बाद में उसमें कोई बदलाव किया जाता है उसे न्यायालय की जानकारी में लाया जा सकता है – आदेश 26 नियम 9 के अंतर्गत कमिश्नर नियुक्त करने का उद्देश्य तथ्य एकत्रित करना है जिसे यथासमय साक्ष्य के रूप में उपयोग में लाया जा सके – चूंकि याची ने अन्वेषण चाहा है और न कि निरीक्षण, उसका आवेदन उचित रूप से अस्वीकार किया गया – याचिका खारिज।

Cases referred :

AIR 1980 Orissa 98, AIR 1954 (Calcutta) 233, (2010) 8 SCC 329.

D.D. Bansal and *Abhishek Bhadoria,* for the petitioner.
P.C. Chandil, for the respondent nos. 1 to 3.
Nidhi Patankar, G.A. for the respondent no. 4.

ORDER

SUJOY PAUL, J. :- This writ petition filed under Article 227 of the Constitution challenges the order dated 5.10.2012, whereby the application of the petitioner/plaintiff preferred under Order 39 Rule 7 r/w Section 151 C.P.C. is rejected by the Court below. The plaintiff filed the suit for declaration and permanent injunction. During the pendency of the suit, the plaintiff filed an application under Order 39 Rule 7 r/w Section 151 C.P.C. (Annexure P-4). In this application it was prayed that there is a dispute about the actual position of the cemented boundary wall and regarding actual position of latrine and bathroom of plaintiff. To determine the correct facts, it is necessary that the property in question be investigated. It was, therefore, prayed that the Court may appoint an Advocate or an employee of the Court for the purpose of investigation.

2. The prayer was opposed by the other side by filing reply (Annexure P-5). The Court below after considering the reply rejected the said application by impugned order.

3. Shri D.D.Bansal, learned counsel for the petitioner, submits that the impugned order is bad in law. By placing reliance on the language of Order 39 Rule 7 C.P.C., it is contended that the Court below has failed to exercise its jurisdiction. The order of Court below is based on the assumption that there exists a boundary wall.

4. Shri P.C.Chandil, Advocate for the other side supported the order and submits that the application under Order 39 Rule 7 C.P.C. is rightly rejected by Court below.

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

6. The Court below rejected the application on the ground that as per the averments of the application and the reply, it is clear that there exists a boundary wall. The existence of latrine and bathroom is also clear. The Court opined that at this stage no case is made out to invoke Order 39 Rule 7 C.P.C.

7. It is apt to quote Order 39 Rule 7 C.P.C. which reads as under:-

"7. Detention, preservation, inspection, etc., of subject-matter of suit.--(1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit,--

(a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein;

(b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and

(c) for all or any of the purpose aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this rule."

8. The Order 39 can be traced in chapter on "Temporary Injunctions and Interlocutory Orders" and Rule 7 thereof is placed under the sub-heading "Interlocutory Orders". Order 26 under the Chapter on "Commissions" and Rule 9 of Order 26 onwards come directly under the heading"Commissions to make Local Investigations".

9. In the opinion of this Court, when a person is deputed under Order 26 Rule 9 for ascertaining, collecting or elucidating facts in support of any matter in dispute and other things mentioned in the said rule, after proper scrutiny, enquiry, examination and sifting of the material, his report filed under Order 26 Rule 9 is admitted in evidence and forms part of the record. The dictionary meaning of the word "investigation" is: --

"Act of examining; ascertainment of facts;sifting of materials; search for relevant data".

The dictionary meaning of the word "inspect" is:--

"To examine; to look into; to look at narrowly, officially, or ceremonially."

'Inspection' is "the act of inspecting or looking into

matters; careful or official examination".

The context in which word inspection is mentioned in Rule 7, it is clear that the said provision has been made mostly for the purpose of keeping on record the existing condition of the property so that if same is subjected to any change later on , deteriorated or subjected to any mischief by any other party/s or by any other agency or reason that can be known to the Court and if occasion arises Court may take note of it. However, the purpose of issuance of Pleader/Commissioner under Rule 9 of Order 26 is for collecting the facts which in due course may be used as an evidence. I find support in my view from AIR 1980 ORISSA 98 *(Kalandi Swain and others Vs. Braja Kishore Dass and others).*

10. The Kolkatta High Court in AIR 1954 (Calcutta) 233 *(Lodna Colliery Co. (1920), Ltd. Vs. Bholanath Rai and others)* opined as under:-

> "About six years after the filing of the suit and two days before the actual hearing commenced the defendant company filed a petition on 15.3.1949 for holding a local inspection by the Court to see whether certain boundary pillars had been removed from the lands in question. The defendant alleged that there had been certain boundary pillars on the site and they had just before the application had been made come to know that such pillars had been removed. The learned Subordiante Judge refused the prayer as the existence of the pillars and their alleged removal could be proved by evidence in Court. Three days later when the hearing was proceeding another application was filed by the defendant for local inspection by the Court. This prayer also was refused. The defendant claimed that there were pillars on the boundary between Mouza Sripur and another contiguous Mouza Hariharpur and on another side of the said Mouza and Chak Brindabanpur. He rightly held that it was not a matter for local inspection under O.39 R.7, Civil P.C. but was a matter for local investigation under R.9 of O. 26 of the Code."

11. In the light of aforesaid, it is clear that the plaintiff, in fact, was seeking an investigation and not only the inspection. If his application Annexure P-4 is examined minutely, it will be clear that his purpose was to seek inspection to

ascertain the real position of the boundary wall and latrine and bathroom. This exercise cannot be undertaken for the said purpose under Order 39 Rule 7. Thus, I find no flaw in the order passed by the Court below.

12. The scope of interference under Article 227 of the Constitution is limited. If order is shown to be passed by a Court having no jurisdiction, it suffers from manifest procedural impropriety or perversity, interference can be made: Interference is made to ensure that Courts below act within the bounds of their authority. Another view is possible, is not a ground for interference. Interference can be made sparingly for the said purpose and not for correcting error of facts and law in a routine manner. This view is taken in *Shalini Shyam Shetty and another Vs. Rarjendra Shankar Patil* reported in (2010) 8 SCC 329.

13. In the present case, the Court below has taken a plausible view. There is no ingredient on which interference can be made. Petition fails and is hereby dismissed. No cost.

Petition dismissed.

I.L.R. [2015] M.P., 906
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice J.K. Jain
W.P. No. 1027/2009 (Indore) decided on 22 April, 2014

LAKHANI FOOT CARE LTD. ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Commercial Tax Act, M.P. 1994 (5 of 1995), Section 61 - Second Appeal - Imposition of Penalty **- During the pendency of the Second Appeal against assessment order, the Assessing Authority cannot levy penalty. (Para 8)**

वाणिज्यिक कर अधिनियम, म.प्र. 1994 (1995 का 5), धारा 61 – द्वितीय अपील – शास्ति अधिरोपित किया जाना – निर्धारण आदेश के विरूद्ध द्वितीय अपील लंबित रहने के दौरान निर्धारण प्राधिकारी शास्ति अधिरोपित नहीं कर सकता।

Cases referred :

(2014) 24 STJ 324 (MP)

P.M. Choudhary, D.S. Kale and *Anand Prabhwalkar* for the

petitioner.

Mini Ravindran, Dy. G.A., for the respondent/State.

(Supplied: Paragraph numbers)

ORDER

The Order of the Court was delivered by : SHANTANU KEMKAR, J. :- Heard on IA No.1425/2014, an application filed by the petitioner for placing subsequent events on record.

1. Along with the aforesaid application, the petitioner has filed an order dated 06.01.2012 passed by the Madhya Pradesh Commercial Tax Appellate Board (for short the Board), Bhopal in Appeal No.629/CTAB/08 (Entry Tax) in relation to the period 01.04.2003 to 31.03.2004.

2. On due consideration, the application is allowed.

3. With consent heard finally.

4. According to the petitioner, the said Second Appeal No.629/2008 has been allowed by the Board and the original assessment order has been set aside, with direction to the Assessing Officer to pass fresh order, in accordance with law.

5. Learned counsel for the petitioner, placing reliance on the judgment passed by a Division Bench of this Court in the case of *Laxhman Das Gunamal v. State of MP and others* [(2014) 24 STJ 324 (MP)], has submitted that in the similar circumstances, when the second appeal filed by the petitioner against the assessment order was pending, despite that, Assessing Authority levied penalty; the Division Bench held that penalty could be levied only after the assessment order has attained finality and so long as the second appeal is pending, the assessment order has not attained finality.

6. Learned counsel for the petitioner submits that the petitioner's case is on better footings, as the second appeal, which was filed by the petitioner against the assessment order, has now been decided in favour of the petitioner – assessee and the order of assessment has been set aside and the matter has been remanded back to the Assessing Officer for fresh decision. In the circumstances, he submits that this petition may be disposed of by setting aside the impugned revisional order dated 22.11.2008 (Annexure P/11) as also the original penalty order dated 28.06.2008 (Annexure P/8).

7. Ms. Mini Ravindran, learned Deputy Government Advocate, on the other hand, submits that if the aforesaid orders are being quashed, a liberty may be granted to the respondent / State to initiate fresh proceedings for penalty, in case need so arises.

8. Having considered the aforesaid submissions of the learned counsel for the parties and the law laid down by this Court in the case of *Laxhman Das Gunamal* (supra), we are of the view that this petition deserves to be allowed, as we find that the penalty was levied during the pendency of the second appeal against the assessment order and moreover now the said second appeal has been allowed and the matter has been remitted to the Assessing Officer to pass fresh order.

9. Accordingly, we quash the impugned order dated 22.11.2008 (Annexure P/11) as also the original penalty order dated 28.06.2008 (Annexure P/8); however, with liberty to the respondent / State to initiate fresh penalty proceedings, if need so arises.

10. The petition stands allowed to the extent indicated herein above.

Petition allowed.

I.L.R. [2015] M.P., 908
WRIT PETITION
Before Mr. Justice S.C. Sharma
W.P. No. 2124/2014 (Indore) decided on 8 May, 2014

KISHORE SINGH BAGHEL ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Constitution - Article 226 - Transfer - **Petitioner has assailed his transfer order as well as transfer order of respondent no. 3 who has been transferred in his place - Held - As provided vide policy dated 05.07.2005 and Circular of State Government dated 19.12.1994, since petitioner has completed 6 months tenure at his present place of posting he has rightly been transferred, however, in view of transfer policy, observation made by Gwalior Bench and registration of criminal case against respondent no. 3 his field posting is nothing but a colourful exercise of power - Same can never be termed as administrative exigencies or in public interest - Undue favour has been extended to**

him - Therefore, only transfer of respondent no. 3 from Bhopal to Sendhwa is quashed with certain directions. (Paras 24,25 & 26)

संविधान – अनुच्छेद 226 – स्थानांतरण – याची ने अपने स्थानांतरण आदेश के साथ ही प्रत्यर्थी क्र. 3 जिसे उसके स्थान पर स्थानांतरित किया गया है, के स्थानांतरण आदेश को चुनौती दी – अभिनिर्धारित – जैसा कि नीति दिनांक 05.07.2005 एवं राज्य सरकार के परिपत्र दिनांक 19.12.1994 द्वारा उपबंधित हैं, चूंकि याची ने अपनी वर्तमान पदस्थापना के स्थान पर 6 माह का कार्यकाल पूर्ण किया है उसे उचित रूप से स्थानांतरित किया गया है किन्तु स्थानांतरण नीति, ग्वालियर खंडपीठ द्वारा दिया गया संप्रेक्षण तथा प्रत्यर्थी क्र.3 के विरूद्ध आपराधिक प्रकरण पंजीबद्ध किये जाने को दृष्टिगत रखते हुये उसकी फील्ड पदस्थापना कुछ और नहीं बल्कि शक्ति का आभासी प्रयोग है – उक्त को प्रशासनिक सुविधा या लोकहित में नहीं कहा जा सकता – उसे असम्यक अनुग्रह प्रदान किया गया है – इसलिये केवल प्रत्यर्थी क्र. 3 का भोपाल से सेंधवा किया गया स्थानांतरण कतिपय निदेशों के साथ अभिखंडित।

Cases referred :

1991 Supp (2) SCC 659, (2009) 15 SCC 178, 2014 (1) MPLJ 620.

Ajay Bagadiya, for the petitioner.
C.S. Ujjaniya, G.A. for the respondents no. 1 & 2.
Varun K. Chopra, Anand Agrawal and *Sourabh Suran*, for the respondent no. 3.

ORDER

S.C. SHARMA, J. :- The petitioner before this court who is holding the post of Transport Inspector in the Transport Department of the State of Madhya Pradesh has filed this present petition being aggrieved by the order dated 20-02-2014, by which he has been transferred from Check post Sendhwa to Check post Jhabua and the respondent No.3 has been posted in place of the petitioner.

2. The facts of the case reveal that the petitioner was appointed as a Transport Sub-Inspector in the Transport Department in the year 1989, vide order dated 09-08-1989 and he was promoted to the post of Transport Inspector, vide order dated 31-12-2002. The petitioner vide order dated 31-07-2013, was posted from Check post Malthaon to Check post Sendhwa and by the impugned order he has been transferred from Check post Sendhwa to Check post Jhabua. In his place respondent No.3 Mr T.P.S. Bhadoriya,

who was posted in the Transport office, Bhopal has been posted at the Check post Sendhwa.

3. The petitioner has raised various grounds before this court and his contention is that his children are studying at Satya Sai School, Indore. The petitioner is also aggrieved in the present writ petition in the matter of seniority vis-a-vis respondents No.4 and 5. However, at the outset the learned counsel for the petitioner has confined his prayer only to the extent the petitioner has been transferred from Check post Sendhwa to the Check post Jhabua and to the extent the respondent No.3 has been transferred from the Transport Office, Bhopal to the Check post Sendhwa.

4. The petitioner has prayed for liberty to file a fresh writ petition, so far as the question of seniority vis-a-vis respondents No.4 and 5 is concerned.

5. The petitioner has raised other grounds also and his contention is that a criminal case has been registered against the Respondent No.3 by the Lokayukta Establishment on 23-11-2011 at Crime No. 133/2011 and, therefore, by no stretch of imagination the respondent No.3 could have been posted to the check post which is a very sensitive check post, keeping in view the Circular dated 19-12-1994. He has also drawn the attention of this court towards the interim order passed by the Gwalior Bench in Writ Petition No. 5595/2013 *(Praveen Nahar Vs. State of M.P. and others)* dated 23-08-2013, wherein it has been observed by the learned Single Judge that the respondent No.3 T.P.S. Bhadoriya should not have been posted to the sensitive check posts. Petitioner's contention is that inspite of there being an observation made by the Gwalior Bench of this court, a prime posting (field posting) has been granted to the respondent No.3 and the transfer order has been passed solely with a view to accommodate the respondent No.3, who is facing a criminal case (who is under cloud).

6. Learned counsel has drawn the attention of this court towards the various affidavits filed by the Transport Commissioner as directed by this court and his contention is that the Transport Commissioner in his first affidavit has admitted the pendency of the Lokayukta Case i.e Crime No. 133/2011 and his contention is that once a criminal case was pending for offences under the Prevention of Corruption Act, 1988, the Transport Commissioner in all fairness should not have transferred the respondent No.3 to a sensitive place (field posting). He has drawn the attention of this court towards the second affidavit

filed by the Transport Commissioner and his contention is that the Transport Commissioner has taken a somersault by filing a second affidavit and has stated that there is no departmental enquiry, no complaint about conduct, indiscipline or dereliction of duty is pending against the respondent No.3 and, therefore, the circular dated 19-12-1994 is not applicable. It has been argued that the present case reflects a colourful exercise of powers on the part of the Transport Commissioner and the transfer order has been passed to accommodate the respondent No.3, on account of extraneous considerations.

7. On the other hand, learned counsel appearing for the respondent No.3 has vehemently argued before this court that this court does not have a jurisdiction to decide the issue as the petitioner does not have a locus in the matter. He has placed reliance upon the judgment delivered in the case of *Shilpi Bose(Mrs) and others Vs. State of Bihar and others* reported in 1991 Supp (2) SCC 659 and his contention is that in light of the aforesaid judgment, the question of interference by this court, in the peculiar facts and circumstances of the case does not arise. He has also placed reliance upon a judgment delivered by the apex court in the case of *Rajendra Singh and others Vs. State of Uttar Pradesh and others* reported in (2009) 15 SCC 178 and his contention is that a Government servant has no vested right to remain posted strictly at a place of his choice nor he can insist that he must be posted at one place or the other. He has further stated that no Government can function if the government servant insists that once appointed or posted in a particular place or position, he should be permitted to continue at a such place or position as long as he desires. He prays for dismissal of the writ petition.

8. Detailed and exhaustive reply has been filed by the State Government (respondents No.1 and 2) and the respondents No.1 and 2 have defended the transfer order. In the reply it has been stated that there is no departmental enquiry pending against the respondent No.3 and the petitioner has been posted, keeping in view the administrative exigencies. It is also been stated that the Circular dated 19-12-2004 is not applicable against the respondent No.3. It has been further stated that the respondents No.1 and 2 have not received any information from the Lokayukta that the Lokayukta has concluded the enquiry. It has been further stated that the Transport Department is the revenue generating department and, therefore, it cannot be said that the Sendhwa or any other Check post is a sensitive post. Respondents have

prayed for dismissal of the writ petition. The learned Government Advocate has fairly stated before this court that in the Transport Department policy dated 05-07-2005 is in existence and transfers are being done, keeping in view the policy framed by the State Government

9. This court has also directed the Transport Commissioner to file an affidavit as that the transfer order was passed inspite of there being an observation made against the respondent No.3 by the Gwalior Bench in Writ Petition No. 5595/2013 *(Praveen Nahar Vs. State of M.P. and others)* dated 23-08-2013. The Transport Commissioner has filed two affidavits and in the first affidavit he has admitted that a criminal case i.e Crime No. 133/2011 has been registered by the Lokayukta against the respondent No.3 and in the second affidavit it has been stated that no departmental enquiry or disciplinary proceedings are pending against the respondent No.3. The first affidavit was filed by the Transport Commissioner on 25-03-2014. The second affidavit was filed by the Transport Commissioner on 29-04-2014. In paragraph-2 it has been stated that, 'as per the circular dated 19-12-1994 issued by the General Administration Department, those employees against whom the prosecution is pending consideration or against whom the case of major penalty is pending, should not be given the posting in fields'. It has been further stated in the same paragraph that no departmental enquiry or criminal case in court is pending against the respondent No.3. It has been further stated that the transfer order has rightly been passed, in the peculiar facts and circumstances of the case.

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

11. The present writ petition is arising out of the order dated 20-02-2014 passed by the Respondent No.2, Transport Commissioner, State of Madhya Pradesh. The petitioner as well as the respondent No.3 are working on the post of Transport Inspector. It is an admitted fact that the petitioner was transferred from the Check post Malthaon to Check post Sendhwa on 31-07-2013 and by the impugned order he has been transferred out from Sendhwa to Jhabua and by the same order, which is Annexure-P-3 dated 20-02-2014. The respondent No.3 has been posted from Bhopal to Check post Sendhwa. The Transport Department of the State Government has issued a

policy dated 05-07-2005 in order to ensure transparency in the matter of posting of its employees in the office as well as at Check post, which are certainly very sensitive check posts and the policy provides that its a rotational policy. A person who is posted at a Check posts is posted for a period of six months and after expiry of the period of six months, he is posted out of the check posts to some office posting/headquarter posting and the rotation has to be done after every six months. The clause-3 provides that in case any person is having a suspicious conduct (is under cloud) he will not be posted at a sensitive posting (field posting). The policy issued by the State Government which is applicable right from 2005 as informed to this court by the learned Government Advocate reads as under :-

मध्यप्रदेश शासन
परिवहन विभाग
मंत्रालय,
वल्लभ भवन, भोपाल–462004

कमांक एफ 1–104/2005/आठ भोपाल, दिनांक 05/07/2005

प्रति,

परिवहन आयुक्त,
मध्यप्रदेश, ग्वालियर ।

विषय :– परिवहन विभाग की सीमांतरण नीति–रोटेशन प्रणाली ।

संदर्भ :– विभाग का पत्र कमांक एफ 1–44/94/आठ, दिनांक 19.08.1994 एवं पत्र कमांक 626/99/आठ दिनांक 12.02.199.

–00–

परिवहन विभाग में लागू राटेशन प्रणाली के संबंध में पूर्व में जारी निर्देशो की अधिकमित करते हुए निम्नानुसार निर्देश जारी किये जाते है :–

(1) – आरक्षक से निरीक्षक स्तर तक के प्रवर्तन अमले का रोटेशन छः माह में एक बार किया जावेगा । यह रोटेशन मुख्यालय/क्षेत्रीय तथा जिला कार्यालय एवं चैकपोस्ट के मध्य किया जावेगा ।

(2) – रोटेशन के आदेश परिवहन आयुक्त द्वारा जारी किया जावेगा । जो प्रवर्तन अमला चेकपोस्ट में पदस्थ है, उन्हे आगामी रोटेशन में कार्यालय में इस प्रकार पदस्थ किया जावेगा कि सभी जिला कार्यालयों में पर्याप्त प्रवर्तन अमला पदस्थ हो ।

(3) – पदस्थापना करते समय कोई भी अधिकारी/कर्मचारी अपने गृह जिले मे पदस्थ नही होंगे । यदि किसी अधिकारी/कर्मचारी के विरूद्ध संदिग्ध आचरण, अनुशासनहीनता या लापरवाही की शिकायत की तो उन्हे सामान्यतः संवदेनशील स्थानों पर पदस्थ नहीं किया जावेगा, या तत्काल अन्यत्र हटाया जा सकेगा । ..... तो उन्हे तब तक फील्ड में पदस्थ नहीं किया जावेगा, जब तक वह पूर्ण निर्धारित अवधि के लिये कार्यालय में कार्य न करे । इसी प्रकार की लापरवाही यदि पुलिस से परिवहन विभाग में प्रतिनियुक्ति पर आये कोई अधिकारी/कर्मचारी करते है, तो उन्हें तत्काल परिवहन विभाग से उनके मूल विभाग में वापिस किया जावेगा ।

(5) – इसी प्रकार यदि किसी अधिकारी/कर्मचारी के विरूद्ध विभागीय अथवा अनुशासनात्मक कार्यवाही में वह जांच में सहयोग नही करते है, या अपने पदस्थापना स्थान पर क्षेत्रीय/जिला परिवहन अधिकारी द्वारा आदेशित कार्य को पूर्ण नही करते, जो जब तक वह जांच चलेगी या कार्य लंबित रहेगा, तब तक उक्त अधिकारी/कर्मचारी की पदस्थापना फील्ड में नही की जावेगी ।

(एम.के.राय)
प्रमुख सचिव
मध्यप्रदेश शासन, परिवहन विभाग

12. The State Government has issued another Circular dated 19-12-1994 which restrains persons of doubtful integrity to be given field postings. The Circular dated 19-12-1994 reads as under :-

मध्यप्रदेश शासन
सामान्य प्रशासन विभाग
मंत्रालय

एफ–11(38)/94/1–10 भोपाल, दिनांक 19 दिसम्बर, 1994

प्रति,

शासन के समस्त विभाग,
समस्त संभागीय आयुक्त,
समस्त विभागाध्यक्ष,
समस्त जिलाध्यक्ष,
मध्यप्रदेश ।

विषय :– लोकायुक्त संगठन/राज्य आर्थिक अपराध अन्वेषण ब्यूरों द्वारा अनुशासित अभियोजन के प्रकरणों से संबंधित शासकीय/अर्द्ध शासकीय कर्मचारियों की पदस्थापना ।

शासन द्वारा संदेशास्पद निष्ठावाले कर्मचारियों/अधिकारियों के संबंध में पूर्व में कर्मिक, प्रशासनिक सुधार एवं प्रशिक्षण विभाग के ज्ञापन 2(3)88/49–10 दिनांक 07.11.88 द्वारा निर्देश जारी किए गए थे, शासन के ध्यान में यह आया हैं कि उक्त निर्देशों का कड़ाई से सभी विभागों में नहीं किया जा रहा

है. शासन की स्पष्ट मंशा है कि ऐसे अधिकारी/कर्मचारी जिनके विरूद्ध लोक आयुक्त संगठन अथवा आर्थिक अपराध अन्वेषण ब्यूरों की सिफारिश पर अभियोजन की कार्यवाही विचारधीन हो या आदेशित की गई हो और ऐसे अधिकारी/कर्मचारी जिनके विरूद्ध उपरोक्त दोनो संगठनों की सिफारिश पर दीर्घशास्ती हेतु विभागीय कार्यवाही विचारधीन हो या आदेशित कर दी गई ऐसे अधिकारियों/ कर्मचारियों की फिल्ड में पदस्थापना न की जाए यथा संभव इन अधिकारियों/कर्मचारियों की पदस्थापना गैर संवेदनशील पर की जाए, प्रत्येक विभाग की अपनी परिस्थितियों अनुसार संवेदनशील पदों को चिन्हित करना आवश्यक होगा, इस सबंध में समुचित कार्यवाही प्रमुख सचिव/सचिव के निर्देशन में की जाये और संदेहास्पद विषयान्तर्गत कर्मचारियों/अधिकारियों की पदस्थापना की स्थिति की समय–समय पर समीक्षा की जाये एवं समान्य प्रशासन विभाग की सतर्कता इकाई को परिणामों से अवगत कराया जाये ।

हस्ता./–

(एन.एस.सेठी)
मुख्य सचिव,
मध्यप्रदेश शासन

13. In the present case, it is again not in dispute that a case has been registered against the respondent No.3 by the Lokayukta Establishment. The Superintendent of Police, Special Police Force Establishment (Lokayukta) vide letter dated 28-01-2012 has categorically informed the Deputy Secretary (Transport Department) about the registration of a criminal case u/s 13(1) (a) (d) 13(2) of the Prevention of Corruption Act, 1988 against the respondent No.3, T.P.S. Bhadoriya. Relevant paragraph of the aforesaid letter reads as under :-

विशेष पुलिस स्थापना लोक आयुक्त कार्यालय
रीवा संभाग रीवा(म.प्र.)

कमांक/3146/विपुस्था/2012 रीवा, दिनांक 26.11.2012

प्रति,

उप सचिव,
म0प्र0शासन परिवहन,
मंत्रालय, भोपाल ।

विषय :– अपराध कमांक 133/2011 धारा–13(1) (ए) (डी) 13 (2) भष्टाचार निवारण अधिनियम, 1988 विरूद्ध आरोपी श्री टी.पी.एस. भदौरिया परिवहन उप निरीक्षक, एवं अन्य परिवहन चैक पोस्ट हनुमना जिला रीवा (म.प्र.)

–00–

विषयान्तर्गत निवेदन है कि विषयांकित अपराध कमांक 133/2011 धरा–(1) (ए) (डी) 13 (2) भष्टाचार निवारण अधिनियम, 1988 विरूद्ध आरोपी श्री टी.पी.एस. भदौरिया परिवहन उप निरीक्षक, एवं परिवहन चैक पोस्ट हनुमना में पदस्थ स्टाफ के विरूद्ध पंजीबद्ध किया जाकर विवेचना में लिया गया एवं विवेचना के दौरान् दिनांक 23.11.2011 को परिवहन चैक पोस्ट हनुमना में छापे की कार्यवाही की गयी थी । क्षैत्रीय परिवहन अधिकारी रीवा संभाग रीवा से प्राप्त जानकारी अनुसार तत्समय श्री धनाराम अहिरवार परिवहन निरीक्षक, श्री टी.पी.एस. भदौरिया परिवहन उप निरीक्षक श्री राजत्रिपाठी तिवारी, श्री लल्लन उपाध्याय एवं श्री अपठित दिनांक 01.08.2011 से 31.12.2011 तक परिवहन चैक पोस्ट हनुमना जिला रीवा में पदस्थ थे । कृपया विवेचना के तारतम्य में निम्न बिन्दुवार जानकारी मय अभिलेखो के सत्यापित प्रति के इस कार्यालय को उपलब्ध कराने का कष्ट करें ।

14. It is an admitted fact that a criminal case under the Act of 1988 has been registered against the respondent No.3. It is pertinent to note that the respondent No.3 was earlier also posted against a field posting by the Transport Commissioner and against the posting a writ petition was preferred before the Gwalior Bench. The Gwalior Bench vide order dated 23-08-2013 passed in Writ Petition No. 5595/2013 *(Praveen Nahar Vs. State of M.P. and others)* held as under :-

> *"Parties are heard on the question of interim relief.*
>
> *Petitioner has filed this petition seeking the writ of mandamus to the respondents to allow him to work at check post, Morena in pursuance to the order Annexure P/1. Petitioner was posted to work on the said check post of Morena from Regional Transport office, Gwalior. In obedience of this order, petitioner was relived (sic:relieved) and he admittedly joined on the transferred place of Morena. The order dated 01-08-2013 shows that the petitioner was relived (sic:relieved) from Regional Transport office Gwalior to join at transferred place. Thereafter, petitioner submitted his joining at Morena. Grievance of the petitioner is that after executing the said order Annexure P/1 by the order dated 03-08-2013 Annexure P/1-A he was directed to join at Bhopal and in lieu thereof by the order of same date Annexure P/1-B, respondent No. 4 is posted at Morena.*
>
> *Shri D.K. Katare, learned counsel for the petitioner submits that posting of respondent No.4 runs contrary to*

rotation posting policy of the department. It is further contended that shifting of petitioner from Gwalior to Morena and from Morena to Bhopal amounts to change of his headquarter, therefore, falls within the ambit of 'transfer'. It is further contended that as per the policy Annexure P/12 dated 19th December, 1994, respondent No.4 should not have been posted at a sensitive place of check-post because he is under cloud of an enquiry and investigation by Lokayukt is going on against respondent No.4. By placing reliance on the document dated 26-11-2012 Annexure P/13, it is contended that respondent No.4 is under cloud and such person should not have been posted at a sensitive check post. To bolster his submission, reliance is also placed on Annexure P/4 dated 05-07-2005. In paragraphs 3 and 4 of this policy it is directed that employee whose conduct is under cloud, should not be posted at a sensitive place.

Per contra, Shri M.P.S. Raghuvanshi supported the orders and submits that executed order Annexure P/1 is not cancelled while separate orders Annexure P/1-A and Annexure P/1-B are passed. It is further submitted that petitioner is more energetic person and that is the reason to transfer him at Bhopal. To support his submission, photocopies of relevant pages of transfer file were shown to the court. The said photocopies are of note-sheet dated 03-08-2013. In addition, it is contended that transfer is in administrative exigency, therefore, no interference is warranted. It is further contended that petitioner was also posted contrary to the rotation policy which shows that it was only guidelines and its violation does not render the order as illegal. Shri D.S. Raghuvanshi, Advocate for respondent No. 4 borrowed the same arguments.

I have heard learned counsel for the parties

Upon the stand of parties it is not clear that whether shifting of petitioner from Gwalior to Morena and

from Morena to Bhopal and likewise shifting/posting of respondent No.4 from Bhopal to Morena amounts to change in the headquarter or not. Thus, I deem it proper to direct respondent No.2/3 to file an affidavit making it clear whether the aforesaid change of posting amounts to change of headquarter and resultantly amounts to transfer. Affidavit must be based on relevant legal provisions and must disclose the same. Let it be done within fifteen days.

Presently, it is clear that the petitioner had executed the order Annexure P/1. In the opinion of this Court, primafacie whether order Annexure P/1 is cancelled or the petitioner is further shifted by a separate order, net result will be his movement from Morena to Bhopal within a short span of time. Considering the aforesaid, and further considering the fact that in view of circular, primafacie it was not proper to post respondent No. 4 at a sensitive place because preliminary enquiry is going on against him in Lokayukt, I deem it proper to pass an interim order in favour of petitioner.

In view of the aforesaid, an interim measure, till next date of hearing, orders dated 03-08-2013 Annexure P/1-A and Annexure P/1-B shall remain stayed. Petitioner be permitted to work at the check post, Morena, pursuant to the order dated 31st July, 2013.

Registry is directed to list this matter immediately after filing of aforesaid affidavit by the official respondent. Respondent No.4, if advised, may file his return in the Meanwhile.

certified copy as per rules."

15. The Gwalior Bench in light of the Criminal case registered against the respondent No.3 has granted an interim order and has also held that in light of the circular dated 19-12-1994, primafacie the posting of T.P.S. Bhadoriya to Morena Check post was not proper. It is noteworthy to mention that during the pendency of the writ petition, the impugned posting order was issued and

it was brought to the notice of the learned Single Judge that subsequent posting order has been issued and in those circumstances the Gwalior Bench has passed the following order:-

> *"Counsel for the petitioner submits that challenge made to the impugned transfer order passed by the respondents'/authorities' to the extent it relates to the petitioner was stayed by this court vide order dated 23-08-2013 and the petitioner is still continuing at the present place of posting. It is further submitted that respondent No.4 who was transferred in place of the petitioner has been in fact accommodated and transferred to some other place. That being so, petitioner may be permitted to continue at the present place of posting.*
>
> *State's counsel and the counsel for respondent No.4 iointly submits that as on date, there is no administrative exigency to transfer the petitioner from the present place of posting. Under such circumstances, the impugned transfer order to the extent of petitioner may be set aide (sic:aside).*
>
> *In view of above, noting survives for adjudication in this petition. Accordingly, the impugned transfer order vide orders dated 31-07-2013 (Annexure-P-1), dated 03-08-2013 (Annexure-P/1A) and dated 03-08-2013 (Annexure-P/1B) to the extent it relates to petitioner alone stand set aside.*
>
> *The petition stands disposed of to the extent indicated hereinabove.*
>
> *Certified copy as per rules."*

16. This court is of the considered opinion that at the time the transfer order was passed i.e on 20-02-2014, the order passed by the Gwalior Bench dated 23-08-2013 was very much in existence and in all fairness such a transfer order could not have been passed in light of the findings arrived at by the learned Single Judge, vide order dated 23-08-2013.

17. The present case reflects very sorry state of affairs in which contradictory affidavits have been filed by the Transport Commissioner. The first affidavit of the Transport Commissioner which is on record dated 25-03-2014 in paragraphs 3 and 4 reads as under :-

> *"3. That I state that a preliminary inquiry against respondent No.3 is pending before the Lokayukta vide Case No. 133/2011.*
>
> *4. That, so far as circular dated 05-07-2005 issued by the Transport Department is concerned, I state that respondent No.3 is a RTI and he has been posted from Regional Office, Bhopal to check post Sendhwa after his completing six months' tenure at Bhopal office. The order of posting has been issued by me in the capacity of Commissioner, Transport, Sendhwa which comes within District Barwani is not a home town of respondent No.3. There is no complaint regarding integrity or dereliction in duty or any indiscipline against respondent No.3. There is no departmental enquiry or disciplinary proceedings pending against the respondent No.3. "*

18. The Transport Commissioner in the first affidavit has admitted that preliminary enquiry is pending against the respondent No.3 by the Lokayukta in respect of Crime No. 133/2011 and it has been stated that the respondent No.3 has rightly been posted. He has referred to some Circular dated 19-12-1996 and his contention is that the respondent No.3 has rightly been posted to Sendhwa. The Transport Commissioner has filed a second affidavit. Paragraph 5 of the second affidavit reads as under :-

> *"5. That, as per the circular dated 19-12-1994 issued by the General Administration Department, pertains to only those employees against whom the prosecution is pending consideration or against whom the case of major penalty is pending, should not be given the positing in fields. Sensitive posts in this connection be ear-marked. The copy of the circular dated 19-12-1994 is filed alongwith the Reply filed on behalf of State.*

It is submitted that no departmental enquiry or criminal case in court is pending against the respondent NO.3 at present.

It is also submitted that as per letter dated 26-11-2012 issued by the Lokayukta Police to the Deputy Secretary, Transport Department, Bhopal, the Lokayukta has sought some information regarding the respondent No.3 and four other officers. The disciplinary proceedings or D.E. is pending against the respondent No.3. In view of the above, the posting of the respondent No.3 has been ordered. The copy of the Guideline dated 05-07-2005 is also filed alongwith the reply filed on behalf of State."

19. Learned Transport Commissioner has stated in his affidavit that the respondent No.3 is an excellent worker and he has rightly been posted to Sendhwa. It has been also stated that no criminal case in court is pending against him and no departmental enquiry is pending against him.

It appears the Transport Commissioner has not read the letter of the Lokayukta Establishment dated 26-11-2012 carefully and the Circular of the State Government dated 19-12-1994. The letter of the Lokayukta Establishment makes it very clear that a criminal case has been registered against the respondent No.3 at Crime No. 33/2011 and, therefore, it definitely means that criminal case is under investigation registered at Crime No. 133/2011 by the Lokayukta Establishment. Rule 9 (1) of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 provides for suspension of a Government servant against whom any criminal offence is under investigation, enquiry or trial. The disciplinary authority in light of Rule 9 is empowered to place the petitioner under suspension also. The learned Transport Commissioner in respect of an employee against whom the criminal case has been registered is justifying his field posting.

20. In the instant case, this court has also carefully gone through the judgment relied upon by the learned counsel for the Respondent No.3 Mr Varun K. Chopra in the case of *Shilpi Bose (Mrs) and others* (supra) , the apex court in paragraphs No.3 and 4 held as under:-

"3. After hearing learned Counsel for the parties and having considered the facts and circumstances of the case,

we are of the opinion that the High Court committed serious error in interfering with the transfer Orders of primary school teachers. The High Court held that the District Education Establishment Committee had no jurisdiction to transfer the Primary School teachers on their request. We find no justification for this conclusion. There is no dispute that the District Education Establishment Committee is competent to transfer Primary School teachers from one place to the other but merely because such transfers were made on the request of teachers, the committee is divested of its jurisdiction. The Director of the Primary Education had issued directions that lady teachers posted in distant areas or rural areas may be accommodated to the place of their request to avoid hardship to them. These directions are reasonable, and the District Education Establishment Committee followed the same principles in transferring the appellants on their requests to avoid hardship with was being caused to them. The respondents challenged the validity of the transfer before the High Court on another ground also that Primary School teachers posted in the urban areas were not liable to be transferred to rural areas though the State Government had issued circular on March 30, 1984 permitting transfers from urban areas to rural areas. The High Court did not interfere with the Order of the transfer on this ground instead it held that the transfer Orders were without jurisdiction as the same had been made on the appellants' request with a view of accommodate them. We fail to appreciate the reasoning recorded by the High Court. If the competent authority issued transfer Orders with a view to accommodate a public servant to avoid hardship, the same cannot and should not be interfered by the Court merely because the transfer Order were passed on the request of the employees concerned. The respondents have continued to be posted at their respective places for the last several years, they have no vested right to remain posted at one place. Since they hold transferable posts they

are liable to be transferred from one place to the other. The transfer Orders had been issued by the competent authority which did not violate any mandatory Rule, therefore the High Court had no jurisdiction to interfere with the transfer Orders.

4. In our opinion, the Courts should not interfere with a transfer Order which are made in public interest and for administrative reasons unless the transfer Orders are made in violation of any mandatory statutory Rule or on the ground of malafide. A Government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer Orders issued by the competent authority do not violate any of his legal rights. Even if a transfer Order is passed in violation of executive instructions or Orders, the Courts ordinarily should not interfere with the Order instead affected party should approach the higher authorities in the Department. If the Courts continue to interfere with day-to- day transfer Orders issued by the Government and its subordinate authorities, there will be complete chaos in the Administration which would not be conducive to public interest. The High Court over looked these aspects in interfering with the transfer Orders."

21. The apex court in the aforesaid case as the transfer orders therein had been issued by the competent authority and which did not violate any mandatory rule has held that the High Court has no jurisdiction to interfere with the transfer orders. It has also been observed that the courts should not ordinarily interfere with the order instead affected party should approach the higher authorities in the department. It has been further observed that if the courts continue to interfere with day to day transfer orders issued by the Government and its subordinate authorities, there will be complete chaos in the administration, which would not be conducive to public interest.

22. This court has also carefully gone through the judgment relied upon by the learned counsel for the Respondent No.3 Mr Varun K. Chopra in the

case of *Rajendra Singh and others* (supra). The apex court has held that the employee does not have a vested right to remain posted at a place of his choice and the transfer is an incident of service.

23. The Gwalior Bench of this court in the case of *Pratap Singh Mandeliya Vs. State of M.P. & Others* reported in 2014(1) MPLJ 620 in paragraphs 13 to 16 held as under :-

> *"13. In 2003 (11) SCC 740 (Sarvesh Kumar Awasthi Vs. U.P. Jal Nigam and others) the Apex Court held that the power of transferring an officer cannot be wielded arbitrarily, malafide or an exercise against efficient and independent officer or at the instance of politicians. For better administration, the officers concerned must have freedom from fear of being harassed by repeated transfers or transfers ordered at the instance of someone who has nothing to do with the business of administration.*
>
> *14. The Allahabad High Court in 1996 (1) Labour Law Journal 26 W.P. 1191/2013 (Pawan Kumar Shrivastava Vs. U.P. Electricity Board and others) held that where the transfer order is on political considerations and complaints. and not based on administrative exigencies or public interests, it is bad in law. This Court in ILR (2011) MP 1720 (K.S. Verma Vs. State of M.P. and others) opined that note sheet / complaint is taken into consideration by the Minister. It is held that this kind of complaint cannot be a foundation for transferring the employee from one place to another. Except a bald complaint lodged by the district head of a political party, no other material brought on record to justify that the petitioner derelicted in his duty. The Court imposed cost also. This case has similarity with the present matter. The record shows that the entire action of transfer is based on bald complaint of Ex- MLA / Respondent No.2.*
>
> *15. In the light of aforesaid judgments, the transfer order on the basis of such complaint cannot be said to be a fair exercise of power. Such transfer cannot be said to be in*

administrative exigency or in public interest. Thus, it is clear that transfer order is passed for reasons which are not germane for passing the valid transfer order. On this score alone transfer order is liable to be interfered with.

16. This is settled in law that exercise of power for an extraneous or ulterior purpose amounts to "malice in law". Legal malice or malice in law means something done without lawful excuse. In other words, it is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill-feeling and spite. It is a deliberate act in disregard of the rights of the other(See: State of A.P. Vs. Goverdhanlal Pitti (2003) 4 SCC 739). Where government action is unreasonable or lacking in quality of public interest, though different from that of mala fides, it may in a given case furnish evidence of mala fides (See :Kasturi Lal Vs. State of J & K (1980) 4 SCC 10). Even if an order is found to be not vitiated by malice in fact, but still can be held to be invalid, if the same is passed for unauthorized purpose as it would amount to malafide in law [see: (2005) 6 SCC 776 (Punjab State Electricity Board Vs. Zora Singh)]. In (2009) 2 SCC 592 (Somesh Tiwari Vs. Union of India) it is opined that transfer order will be bad in law, if it is issued not based on any W.P. 1191/2013 factors germane to the passing of an order of transfer and based on irrelevant grounds."

24. Keeping in view the aforesaid judgment, as un-due favour has been extended to the respondent No.3 against whom a criminal case has been registered, by granting a field posting, the transfer order certainly is nothing but a colourful exercise of powers on the behalf of the respondents and such transfer order can never be said to have been issued on account of administrative exigencies or public interest, inspite of there being an observation by the Gwalior Bench. This court is of the considered opinion that the judgment relied upon by the learned counsel in the case of *Shilpi Bose (Mrs) and others* (supra) , and in the case of *Rajendra Singh and others* (supra) are of no help to the respondent No.3.

25. This court after careful consideration of the policy framed by the State Government is of the considered opinion that so far as transfer of the petitioner is concerned as he has completed six months tenure, has rightly been transferred out of Sendhwa on completion of six months tenure, keeping in view the policy framed dated 05-07-2005. Once a policy has been framed, the Department is required to follow the policy otherwise such a policy shall only be a piece of paper and shall loose its sanctity. So far as transfer order of the respondent No.3 is concerned, the respondent No.3 is certainly under cloud. The letter of the Lokayukta Establishment, establishes a criminal case has been registered against him and as per policy dated 05-07-2005 as well as Circular of the State Government dated 19-12-1994, by no stretch of imagination he could have been given field posting at Sendhwa, which is certainly a sensitive field posting. Resultantly, the impugned order only to the extent it relates to the respondent No.3 posting him from Bhopal to Sendhwa is hereby quashed forthwith.

26. The petition is disposed of with the following directions :-

"1. The transfer order dated 20-02-2014, by which the respondent No.3 has been transferred from Bhopal to Sendhwa is quashed, only to the extent it relates to the respondent No.3

2. This court has already quashed the transfer order of the respondent No.3 from Bhopal to Sendhwa and, therefore, the Respondent State as it has been stated that the Sendhwa is a sensitive check post is permitted to post another Transport Inspector, strictly in consonance with the transfer policy dated 05-07-2005, read with executive instructions dated 19-12-1994, as expeditiously as possible, preferably within a period of three days from today.

3. The State Government as well as the Transport Commissioner is directed to review all postings of various Regional Transport Inspectors/employees covered under the Policy dated 05-07-2005 and all those persons, who have completed six months tenure, as provided under the policy should be transferred out to Office postings/other

places provided under the policy.

4. The exercise of reviewing the transfers be concluded positively within a period of thirty days.

5. The respondents are also directed not to post a person against whom a criminal case has been registered either by Lokayukta Establishment or any other Government agencies or who is facing any departmental enquiry or who is otherwise under cloud to a field post, keeping in view the policy and circular dated 05-07-2005/ 19-12-1994 and the respondents shall act in accordance with the Circulars dated 05-07-2005 and 19-12-1994, while issuing fresh transfers in respect of the employees of the Transport Department.

6. The petitioner is granted a liberty to file an appropriate writ petition so far as the issue of seniority is concerned, vis-a-vis respondents No. 4 and 5."

Resultantly, the writ petition is partly allowed as aforesaid.

No order as to costs.

c.c. as per rules.

Petition partly allowed.

I.L.R. [2015] M.P., 927
WRIT PETITION
Before Mr. Justice S.C. Sharma
W.P. No. 5517/2006 (Indore) decided on 17 July, 2014

RAMESH ...Petitioner
Vs.
DEPUTY COMMISSIONER & ors. ... Respondents

(Alongwith W.P. No. 6506/2006 & W.P. No. 3043/2007)

*A. **Right to Information Act (22 of 2005), Section 8(1)(j) - Personal information - Application under** -* **Statement of immovable properties, movable properties, list of family members etc. sought - Held - Information sought is personal information - Cannot be disclosed**

unless larger public interest justifies disclosure of such information - Petition dismissed. (Paras 21 to 25)

क. सूचना का अधिकार अधिनियम (2005 का 22), धारा 8(1)(जे) – व्यक्तिगत जानकारी – अंतर्गत आवेदन – अचल संपत्तियां, चल संपत्तियां, परिवार के सदस्यों की सूची इत्यादि के विवरण चाहे गये – अभिनिर्धारित – चाही गई जानकारी व्यक्तिगत जानकारी है – प्रकट नहीं किये जा सकते जब तब कि उक्त जानकारी का प्रकटन वृहद लोक हित में न्यायोचित नहीं – याचिका खारिज।

***B. Words and Phrases* - Meaning of 'Personal information' 'Fiduciary', 'Fiduciary relationship', 'Life', 'Physical safety of any person' defined. (Paras 17,19 & 21)**

ख. शब्द और वाक्यांश – 'व्यक्तिगत जानकारी', 'वैश्वासिक', 'विश्वास्य संबंध', 'जीवन', 'किसी व्यक्ति की शारीरिक सुरक्षा' के अर्थ को परिभाषित किया गया।

Cases referred :

W.P.(C) No. 288/2009 decided on 02.09.2009 (Delhi High Court), (2011) 8 SCC 497, 2012 (12) JT 552, 2013 (2) MPLJ 295, Case No.CIC/AD/A/2009/001710 decided on 10.03.2010 (Central Information Commission), Appeal No. CIC/SG/A/2011/00464 decided on 18.05.2011 (Central Information Commission).

S.L. Nagare, for the petitioner.
Neelam Abhyankar, for the respondents no. 1 to 3.
Anand Pathak, for respondent no. 4.

ORDER

S.C. SHARMA, J. :- Regard being had to the similar controversy involved in above three cases, they have been heard analogously together with the consent of the parties and a common order is being passed in the matter. Facts of Writ Petition No. 5517 of 2006 are narrated as under:-

2. The petitioner before this court, who is an Editor-cum-Publisher of Weekly Newspaper known as **'Saptahik City Reporter, Indore, (Madhya Pradesh)'** has filed this present petition being aggrieved by the order dated 28-12-2005 passed by the Public Information Officer under the provisions of Right to Information Act, 2005 (hereinafter referred as **'the Act of 2005')**.

3. The petitioner is also aggrieved by the subsequent order passed by

the First Appellate Authority dated 15-02-2006 dismissing the appeal of the petitioner and also by order dated 17-07-2006 passed by the Second Appellate Authority under the Act of 2005.

4. Petitioner's contention is that he has submitted an application under the Right to Information Act, 2005 on 29-11-2005 seeking certain information in respect of the respondent No.4 to the Public Officer, Commercial Tax, Head Quarter. In the application details of statement of movable properties held by the respondent No.4, at the time of his first joining was sought i.e the statement of immovable properties for the year 2003-2004, list of family members and report of the investigation made in connection to the notice dated 02-08-2005. Petitioner's contention is that the Information Officer has dismissed the petitioner's application, keeping in view Section 8(1) (e), 8(1) (j) as well as Section 11 of the Right to Information Act, 2005.

5. The contention of the learned counsel arguing the matter is that the information was required by the petitioner as the respondent No.4 has acquired disproportionate assets and the petitioner wanted to file a complaint under the Prevention of Corruption Act, 1988 against the respondent No.4. The petitioner's contention is that the impugned orders are bad in law as they are violative of article 19(1) (A) of the Constitution of India and it is also been argued that the impugned orders have been passed without taking any notice of Section 74 and 76 of the Indian Evidence Act,1872. Hence, deserves to be set aside.

6. It is also been argued that the impugned orders are violative of the provisions as contained under Right to Information Act, 2005 and the respondents were duty bound to furnish the information as required by the petitioner. Learned counsel for the petitioner has placed reliance upon the judgment delivered by the Delhi High Court in the case of *The CPIO, Supreme Court of India, Tilak Marg, New Delhi Vs. Subhash Chandra Agarwal and another* in WP (C) 288/2009 decided on 02-09-2009 and his contention is that in light of the aforesaid judgement delivered by Delhi High Court, the orders passed by the Information Officer, by the First Appellate Authority and by the Second Appellate Authority are liable to be quashed.

7. On the other hand, learned counsel appearing for the respondents No. 1 to 3 Ms Neelam Abhyankar has vehemently argued before this court that the Public Information Officer has rightly passed the order dated

28-12-2005, keeping in view the statutory provisions as contained under the Right to Information Act, 2005 as the information sought in respect of respondent No.4 was personal in nature and was amounting to invasion with the personal liberty of the respondent No.4 granted to him under the Constitution of India. It is also been stated in the return that a complaint was made against the present petitioner before the Press Council of India. It is also been stated that the petitioner has not only filed any application under the Right to Information Act against the respondent No.4, but he has filed such applications against as many as eighteen officers of the Commercial Tax Department. Respondent State has prayed for dismissal of the writ petition.

8. Learned counsel for the respondent No.4 has vehemently argued before this court that the information sought cannot be granted to the petitioner and has rightly been denied in light of the exceptions, as provided under Section 8 of the Act, 2005 and infact the petitioner has invaded the personal life and liberty of the respondent No.4. He has placed reliance upon a judgment delivered by the apex court in the case of *Central Board of Secondary Education and another Vs. Aditya Bandopadhyay and others* reported in (2011) 8 SCC 497, in the case of *Bihar Public Service Commission Vs. Saiyed Hussain Abbas Rizwi another* reported in 2012 (12) JT 552 and also upon a judgment delivered by the apex court in the case of *Girish Ramchandra Deshpande Vs. Central Information Commissioner* reported in 2013(2) MPLJ 295.

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

10. In the present case, the petitioner who claims himself to be a Journalist has filed this present petition being aggrieved by the orders dated 28/12/2005, 15/02/2006 and 17/07/2006. The petitioner has stated in the writ petition that he is publishing a Weekly Newspaper in the name and style of *'Saptahik City Reporter, Indore (Madhya Pradesh)'* and the same is being published for the last thirty four years. Petitioner vide an application dated 29-11-2005 has sought the following informations :-

> *"(a) Certified copy of the statement of movable properties held by the respondent No.4 at the time of the first joining.*

(b) Certified copy of the statement of immovable properties for the year 2003 and 2004 of the said officer.

(c) List of the family members of the said officer.

(d) Report of the investigation made in connection to the notice dated 02-08-2005 of the Counsel of the petitioner."

11. The application of the petitioner has been rejected by the Public Information Officer vide order dated 28-12-2005. The First Appeal has been dismissed vide order dated 15-02-2006 and finally second appeal has been dismissed vide order dated 17-07-2006.

12. Learned counsel for the petitioner has placed reliance upon a judgment delivered by the Delhi High Court in the case of *The CPIO, Supreme Court of India, Tilak Marg, New Delhi Vs. Subhash Chandra Agarwal* (supra). The question before the Delhi High Court in the aforesaid case was whether the personal assets of Judges of the Supreme Court, made to the Chief Justice of India, pursuant to a Full Court Resolution of the Supreme Court of India, made in 1997 can be disclosed on an application preferred under the Right to Information Act, 2005, by the Central Public Information Officer, Supreme Court of India or not ? and the Delhi High Court has arrived at a conclusion that the declaration of assets, (and not the contents of the declarations, as that was not sought for) made by Judges of the Supreme Court can be disclosed by the CPIO.

13. Learned counsel for the petitioner has placed reliance upon a judgment delivered by the Central Information Commission in case of *Ms Shivkumari Kashyap Vs. S.E.C. Railway, Bilaspur* decided on 10-03-2010 in Case No. CIC/AD/A/2009/001710.

14. The aforesaid case reveals that it was a case wherein a legitimate wedded wife of one Mr Baldev Singh has sought information about the pay details of the husband and the Central Information Commission has held that the information be provided to the applicant, therein.

15. Learned counsel has placed reliance upon a judgment delivered by the Central Information Commission in the case of *V.R. Sharma Vs. Mr Prakash Tamrakar* decided on 18-5-2011 in Appeal No. CIC/SG/A/2011/ 00464 and the aforesaid case was relating to information sought in respect of

Annual Confidential Reports.

16. In the present case the information has been sought in respect of properties held by the respondent No.4, family members of the respondent No.4 and the statement of immovable properties for the year 2003-2004. Section 8 of the Right to Information Act, 2005 reads as under :-

> "Section 8. **Exemption from disclosure of information**.— (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—
>
> (a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;
>
> (b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court; "
>
> (c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;
>
> (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;
>
> (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;
>
> (f) information received in confidence from foreign government;
>
> (g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;
>
> (h) information which would impede the process of investigation

or apprehension or prosecution of offenders;

(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

(2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

(3) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section:

Provided that where any question arises as to the date from which the said period of twenty years has to be

computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act. "

17. The aforesaid statutory provisions of law exempts the Public Information Officer from disclosure of certain information as provided under the aforesaid statutory provisions of law. The aforesaid statutory provisions of law has been considered by the Apex court in the case of *Central Board of Secondary Education and another Vs. Aditya Bandopadhyay and others* (supra) and it has been held by the apex court that the Right to Information is a facet of freedom of speech and expression under article 19 and is subject to reasonable restrictions. The apex court in the aforesaid case in Paragraphs- 8, 9, 12, 22, 23, 24, 25 and 39 held as under :-

"8. A Division Bench of the High Court heard and disposed of the said writ petition along with the connected writ petitions (relied by West Bengal Board of Secondary Education and others) by a common judgment dated 5.2.2009. The High Court held that the evaluated answer-books of an examinee writing a public examination conducted by statutory bodies like CBSE or any University or Board of Secondary Education, being a `document, manuscript record, and opinion' fell within the definition of "information" as defined in section 2(f) of the RTI Act. It held that the provisions of the RTI Act should be interpreted in a manner which would lead towards dissemination of information rather than withholding the same; and in view of the right to information, the examining bodies were bound to provide inspection of evaluated answer books to the examinees. Consequently it directed CBSE to grant inspection of the answer books to the examinees who sought information. The High Court however rejected the prayer made by the examinees for re-evaluation of the answer-books, as that was not a relief that was available under RTI Act. RTI Act only provided a right to access information, but not for any consequential reliefs. Feeling aggrieved by the direction to grant inspection, CBSE has filed this appeal by special leave.

9. Before us the CBSE contended that the High Court erred in

(i) directing CBSE to permit inspection of the evaluated answer books, as that would amount to requiring CBSE to disobey its Examination Bye-law 61(4), which provided that no candidate shall claim or be entitled to re-evaluation of answer books or disclosure/inspection of answer books;

(ii) holding that Bye-law 61(4) was not binding upon the examinees, in view of the overriding effect of the provisions of the RTI Act, even though the validity of that bye-law had not been challenged;

(iii) not following the decisions of this court in *Maharashtra State Board of Secondary Education vs. Paritosh B. Sheth* [1984 (4) SCC 27], *Parmod Kumar Srivastava vs. Chairman, Bihar PAC* [2004 (6) SCC 714], *Board of Secondary Education vs. Pavan Ranjan P* [2004 (13) SCC 383], *Board of Secondary Education vs. S* [2007 (1) SCC 603] and *Secretary, West Bengal Council of Higher Secondary Education vs. I Dass* [2007 (8) SCC 242]; and

(iv) holding that the examinee had a right to inspect his answer book under section 3 of the RTI Act and the examining bodies like CBSE were not exempted from disclosure of information under section 8(1)(e) of the RTI Act.

The appellants contended that they were holding the "information" (in this case, the evaluated answer books) in as fiduciary relationship and, therefore,exempted under section 8(1) (e) of the RTI Act.

Relevant Legal Provisions

12. To consider these questions, it is necessary to refer to the statement of objects and reasons, the preamble and the relevant provisions of the RTI Act. RTI Act was enacted in order to ensure smoother, greater and more effective access to information and provide an effective framework for effectuating the right of information recognized under article 19 of the Constitution. The preamble to the Act declares the object sought to be achieved by the RTI Act thus:

"An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.

Whereas the Constitution of India has established democratic Republic; And whereas democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

And whereas revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information; And whereas it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal."

22. In *People's Union for Civil Liberties v. Union of India* - (2004) 2 SCC 476, this Court held that right of information is a facet of the freedom of "speech and expression" as contained in Article 19(1)(a) of the Constitution of India and such a right is subject to any reasonable restriction in the interest of the security of the state and subject to exemptions and exceptions.

Re : Question (i)

23. The definition of `information' in section 2(f) of the RTI Act refers to any material in any form which includes records, documents, opinions, papers among several other enumerated items. The term `record' is defined in section 2(i) of the said Act as including any document, manuscript or file among others. When a candidate participates in an examination and writes

his answers in an answer-book and submits it to the examining body for evaluation and declaration of the result, the answer-book is a document or record. When the answer-book is evaluated by an examiner appointed by the examining body, the evaluated answer-book becomes a record containing the `opinion' of the examiner. Therefore the evaluated answer-book is also an `information' under the RTI Act.

24. Section 3 of RTI Act provides that subject to the provisions of this Act all citizens shall have the right to information. The term `right to information' is defined in section 2(j) as the right to information accessible under the Act which is held by or under the control of any public authority. Having regard to section 3, the citizens have the right to access to all information held by or under the control of any public authority except those excluded or exempted under the Act. The object of the Act is to empower the citizens to fight against corruption and hold the Government and their instrumentalities accountable to the citizens, by providing them access to information regarding functioning of every public authority.

25. Certain safeguards have been built into the Act so that the revelation of information will not conflict with other public interests which include efficient operation of the governments, optimum use of limited fiscal resources and preservation of confidential and sensitive information. The RTI Act provides access to information held by or under the control of public authorities and not in regard to information held by any private person. The Act provides the following exclusions by way of exemptions and exceptions (under sections 8, 9 and 24) in regard to information held by public authorities:

(i) Exclusion of the Act in entirety under section 24 to intelligence and security organizations specified in the Second Schedule even though they may be "public authorities", (except in regard to information with reference to allegations of corruption and human rights violations).

(ii) Exemption of the several categories of information

enumerated in section 8(1) of the Act which no public authority is under an obligation to give to any citizen, notwithstanding anything contained in the Act [however, in regard to the information exempted under clauses (d) and (e), the competent authority, and in regard to the information excluded under clause (j), Central Public Information Officer/State Public Information Officer/the Appellate Authority, may direct disclosure of information, if larger public interest warrants or justifies the disclosure].

(iii) If any request for providing access to information involves an infringement of a copyright subsisting in a person other than the State, the Central/State Public Information Officer may reject the request under section 9 of RTI Act.

Having regard to the scheme of the RTI Act, the right of the citizens to access any information held or under the control of any public authority, should be read in harmony with the exclusions/exemptions in the Act.

39. The term `fiduciary' refers to a person having a duty to act for the benefit of another, showing good faith and condour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term `fiduciary relationship' is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction/s. The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and expected not to disclose the thing or information to any third party."

18. The apex court has also dealt with the term **"fiduciary relationship"**

and after defining the term **"fiduciary relationship"** has held that Right to Information is subject to exemptions and exceptions as provided under section 8 of the Constitution of India.

19. The apex Court has again in the case of *Bihar Public Service Commission Vs. Saiyed Hussain Abbas Rizwi another* (supra) in paragraph 28 has held as under :-

> "28. Now, let us examine the provisions of Section 8(1)(g) with greater emphasis on the expressions that are relevant to the present case. This section concerns with the cases where no obligation is cast upon the public authority to furnish information, the disclosure of which would endanger (a) the life (b) physical safety of any person. The legislature, in its wisdom, has used two distinct expressions. They cannot be read or construed as being synonymous. Every expression used by the Legislature must be given its intended meaning and, in fact, a purposeful interpretation. The expression "life" has to be construed liberally. Physical safety is a restricted term while life is a term of wide connotation. includes reputation of an individual as well as the right to live with freedom. The expression "life" also appears in Article 21 of the Constitution and has been provided a wide meaning so as to inter alia include within its ambit the right to live with dignity, right to shelter, right to basic needs and even the right to reputation. The expression life under section 8(1)(g) the Act, thus, has to be understood in somewhat similar dimensions. The term endanger or "endangerment" means the act or an instance of putting someone or something in danger; exposure to peril or such situation which would hurt the concept of life as understood in its wider sense [refer Black Law Dictionary (Eighth Edition)]. Of course, physical safety would mean the likelihood of assault to physical existence of a person. If in the opinion of the concerned authority there is danger to life or possibility of danger to physical safety, the State Information Commission would be entitled to bring such case within the exemption of Section 8(1)(g)

of the Act. The disclosure of information which would endanger the life or physical safety of any person is one category and identification of the source of information or assistance given in confidence for law enforcement or security purposes is another category. The expression for law enforcement or security purposes is to be read ejusdem generis only to the expression 'assistance given in confidence' and not to any other clause of the section. On the plain reading of Section 8(1)(g), it becomes clear that the said clause is complete in itself. It cannot be said to have any reference to the expression 'assistance given in confidence for law enforcement or security purposes'. Neither the language of the Section nor the object of the Section requires such interpretation. It would not further the cause of this section. Section 8 attempts to provide exemptions and once the language of the Section is unambiguous and squarely deals with every situation, there is no occasion for the Court to frustrate the very object of the Section. It will amount to misconstruing the provisions of the Act. The High Court though has referred to Section 8(1)(j) but has, in fact, dealt with the language of Section 8(1)(g). The reasoning of the High Court, therefore, is neither clear in reference to provision of the Section nor in terms of the language thereof."

20. In the aforesaid case, details was sought in respect of various examiners and in the aforesaid case, the apex court has held that information sought cannot be supplied as it would endanger the public life and stability of a particular person.

21. The apex court in the case of *Girish Ramchandra Deshpande Vs. Central Information Commissioner* (supra) has recently dealt the statutory provisions as contained u/s 8 (1) (j) of the Right to Information Act, 2005 and in the aforesaid cases details of personal information was sought by the applicant under the Right to Information Act. The apex court in the aforesaid case in paragraph 10 to 15 held as under :-

"10. This *Court in Central Board of Secondary Education*

and another v. Aditya Bandopadhyay and others (2011) 8 SCC 497 while dealing with the right of examinees to inspect evaluated answer books in connection with the examination conducted by the CBSE Board had an occasion to consider in detail the aims and object of the RTI Act as well as the reasons for the introduction of the exemption clause in the RTI Act, hence, it is unnecessary, for the purpose of this case to further examine the meaning and contents of Section 8 as a whole.

11. We are, however, in this case primarily concerned with the scope and interpretation to clauses (e), (g) and (j) of Section 8(1) of the RTI Act which are extracted herein below:

8. Exemption from disclosure of information.- (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,-

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information."

12. The petitioner herein sought for copies of all memos, show cause notices and censure/punishment awarded to the third respondent from his employer and also details viz. movable and immovable properties and also the details of his

investments, lending and borrowing from Banks and other financial institutions. Further, he has also sought for the details of gifts stated to have accepted by the third respondent, his family members and friends and relatives at the marriage of his son. The information mostly sought for finds a place in the income tax returns of the third respondent. The question that has come up for consideration is whether the above-mentioned information sought for qualifies to be "personal information" as defined in clause (j) of Section 8(1) of the RTI Act.

13. We are in agreement with the CIC and the courts below that the details called for by the petitioner i.e. copies of all memos issued to the third respondent, show cause notices and orders of censure/punishment etc. are qualified to be personal information as defined in clause (j) of Section 8(1) of the RTI Act. The performance of an employee/officer in an organization is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest. On the other hand, the disclosure of which would cause unwarranted invasion of privacy of that individual. Of course, in a given case, if the Central Public Information Officer or the State Public Information Officer of the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the petitioner cannot claim those details as a matter of right.

14. The details disclosed by a person in his income tax returns are" personal information" which stand exempted from disclosure under clause(j) of Section 8(1) of the RTI Act, unless involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information.

15. The petitioner in the instant case has not made a bona fide

public interest in seeking information, the disclosure of such information would cause unwarranted invasion of privacy of the individual under Section 8(1)(j) of the RTI Act. "

22. The apex court in the aforesaid case has held that the details disclosed by a person in any tax return are personal information which has been exempted from its disclosure under Clause (j) of Section 8(1) of the R.T.I. Act and the same cannot be disclosed unless it has to be revealed in public interest and the Public Information Officer is satisfied that the larger Public interest justifies disclosure of such informations.

23. This court keeping in view the judgments delivered by the apex court is of the considered opinion that the petitioner has sought details of personal information from the Information Officer, which includes copy of the statement of movable properties held by the respondent no.4, list of family members etc., and, therefore, the Public Information Officer was justify in rejecting the application submitted by the petitioner in light of exemption as provided u/s 8(1) (j) of the Right to Information Act, 2005.

24. The petitioner has not been able to make out a case that the information sought was in a bonafide public interest and, therefore, this court is of the considered opinion that the request for obtaining such information was against the statutory provisions of law as contained u/s 8(1) (j) of the Right to Information Act, 2005.

25. Resultantly, this court does not find any reason to interfere with the order dated 28-12-2005 passed by the Public Information Officer, order dated 15-02-2006 passed by the Appellate Authority, Commissioner of Commercial Tax, and the order dated 17-07-2006 passed by the State Information Commissioner.

The Writ Petition is accordingly dismissed and the other connected writ petitions are also dismissed.

No order as to costs.

Certified copy, as per rules.

Petition dismissed.

I.L.R. [2015] M.P., 944
WRIT PETITION
Before Mr. Justice Prakash Shrivastava
W.P. No. 7570/2012 (Indore) decided on 5 November, 2014

SAVITA YADAV (DR.) (Ms.) ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rules 10, 12 & 14(21) - Competence to issue charge-sheet by Divisional Commissioner - **Petitioner working as class-I officer - Charge-sheet issued by Divisional Commissioner - Held - In view of order passed by Governor in exercise of powers under Rule 12, Governor has authorised Divisional Commissioner to impose any of minor penalty - In view of provision of Rule 14(21) Divisional Commissioner is competent authority to issue charge-sheet. (Paras 12 to 14)**

क. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 10, 12 व 14(21) – संभागीय आयुक्त द्वारा आरोप–पत्र जारी करने की सक्षमता – याची प्रथम श्रेणी अधिकारी के रूप में कार्यरत – संभागीय आयुक्त द्वारा आरोप–पत्र जारी किया गया – अभिनिर्धारित – राज्यपाल द्वारा नियम 12 के अंतर्गत शक्तियों का प्रयोग करते हुए पारित किये गये आदेश को दृष्टिगत रखते हुये राज्यपाल ने संभागीय आयुक्त को कोई भी लघु शास्ति अधिरोपित करने के लिये प्राधिकृत किया है – नियम 14(21) के उपबंध को दृष्टिगत रखते हुये आरोप–पत्र जारी करने के लिये संभागीय आयुक्त सक्षम प्राधिकारी है।

B. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 9 - Suspension - Competent Authority - **Petitioner working as class-I officer - Collector cannot place her under suspension as neither he is appointing authority nor disciplinary authority - Subsequent approval by Commissioner cannot validate the order of suspension as Commissioner is not the appointing authority - Order of suspension quashed. (Paras 16 to 18)**

ख. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 9 – निलंबन – सक्षम प्राधिकारी – याची प्रथम श्रेणी अधिकारी के रूप में कार्यरत – कलेक्टर उसे निलंबन में नहीं रख सकता क्योंकि न तो वह नियोक्ता प्राधिकारी है न ही अनुशासनिक प्राधिकारी – आयुक्त द्वारा पश्चात्वर्ती अनुमोदन से निलंबन का आदेश विधिमान्य नहीं हो सकता क्योंकि आयुक्त नियोक्ता प्राधिकारी

नहीं है – निलंबन का आदेश अभिखंडित।

Cases referred :

(1993) 1 SCC 419, (1996) 2 SCC 145, (2003) 4 SCC 670, (2014) 1 SCC 351.

L.C. Patne, for the petitioner.
Neelam Abhyankar, for the respondents/State.

ORDER

PRAKASH SRIVASTAVA, J. :- The petitioner being aggrieved with the order of suspension dated 6/6/2012 and the charge sheet dated 7/7/2012 has approached this court.

2. In brief, the case of petitioner is that she was initially appointed as Medical officer on Class-II post and has been granted senior grade w.e.f. 1/1/1999 and the selection grade pay scale of Rs. 12,000-16500/- w.e.f. 1/1/2005 therefore, she has become class-I officer. She has been placed under suspension by order dated 6/6/2012 by the Collector. The order of suspension has been approved by the impugned order dated 7/7/2012 by the Commissioner. She has been issued the charge sheet dated 7/7/12 by the Commissioner. Petitioner has questioned the authority of Collector and Commissioner to pass the impugned orders of suspension and issuing charge sheet.

3. A reply has been filed by the respondents taking the stand that the petitioner has been placed under suspension in terms of the applicable service Rules and the Commissioner is competent to issue the charge sheet to the petitioner.

4. Learned counsel for petitioner submits that the Commissioner was not empowered to issue the charge sheet to the petitioner who is a class-I employee since the Disciplinary Authority for Class-I employee is the State Government which alone could have issued the charge sheet. He further submits that the Collector was not competent to place the petitioner under suspension and the subsequent approval of the order of suspension by the Commissioner will not validate the Collector's order.

5. As against this, Counsel for State has supported the order of suspension

and issuance of charge sheet on the ground that the petitioner has been suspended and charge sheet has been issued by the competent authority in accordance with Rules.

6. Having heard the learned counsel for the parties and on perusal of the record, it is found that the respondents have not disputed the fact that the petitioner is working on Class-I post. In terms of the M.P. Civil Services (Classification, Control & Appeal) Rules, 1966 (for short Rules) and Schedule appended thereto for Class-I post in the Public Health Department, the State Government is the appointing authority as also the authority competent to impose the penalties.

7. In the present case, charge sheet has been issued by the Commissioner and not by the State Government, therefore, it is to be examined if the Commissioner was competent to issue the charge sheet.

8. Major and minor penalties have been specified in Rule 10. Rule 12 of the Rules, provides for disciplinary authorities competent to impose penalty under Rule 10. Relevant part of Rule 12 reads as under:-

> **12. Disciplinary authorities.** (1) The Government may impose any of the penalties specified in rule 10 on any Government servant.
>
> (2) Without prejudice to the provisions of sub-rule (1), but subject to the provisions of sub-rule (3), any of the penalties specified in rule 10 may be imposed on-
>
> (a) a member of State Civil Service by the appointing authority or the authority specified in the Schedule in this behalf or by any other authority empowered in this behalf by a general or special order of the Governor.
>
> (b) a person appointed to a State Civil post by the authority specified in this behalf by a general or special order of the Governor. Or {x x x} by the appointing authority or the authority specified in the Schedule in this behalf.
>
> (3) Notwithstanding anything contained in this rule:-
>
> (a) no penalty specified in clauses (v) to (ix) of rule 10 shall be imposed by any authority subordinate to the appointing

authority:

(Provided that the High court shall have the power to impose all the penalties except penalties as specified in clause (vi) so far as it relates to reduction in rank i.e. post of service) and clauses (vii) to (ix) of rule 10):"

9. In terms of the Rule 12(2) any penalty, either minor or major, can be imposed by the appointing authority or the authorities specified in schedule or any other authority empowered by the general or special order of the Governor. The Governor by order dated 13th August 1997 exercising the power under Rule 12 (a) & (b) has issued the following order empowering all the Divisional Commissioners of the State to impose the minor penalties under Rule 10 on Class-I & Class-II Officers (except of the officers of the Judicial Services and the Police Department) of the State Government posted within their respective divisions:-

"**No. C-6-5-97-3-I.** -In pursuance of Clause (a) and (b) of sub-rule (2) of Rule 12 of the Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966, the Governor of Madhya Pradesh hereby, empowers all Divisional Commissioners of the State to impose the penalties specified in clauses (i) to (iv) of Rule 10 of the said rules on Class I and Class II officers (except of the officers of the Judicial Services and the police department) of the State Government posted within their respective divisions."

10. The position has further been clarified by subsequent order of Governor under the above Rules published in the gazette dated 15th September 2008 empowering all the Divisional Commissioners of the State to take disciplinary action and impose minor penalties, which reads as under:-

"Bhopal, the 15th September 2008

No. C-6-1-2008-3-I. In pursuance of clause (a) and (b) of sub-rule (2) of Rule 12 of the Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966 and in supersession of this Department's Notification No. C-6-5-97-3-I, dated 1st January, 2002, the Governor of Madhya Pradesh hereby empowers all Divisional Commissioners of the State to take disciplinary action and to impose the penalties specified

in clause (I) to (IV) of Rule 10 of said rules on Class I and Class II Government servants (except the officers of the Judicial services, police department and posted in non-governmental Institutions/Organizations/Undertakings) of the State Government posted within their respective divisions.

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

AQUEELA HASHMAT, Dy. Secy."

11. In terms of Article 311 (1) of the Constitution of India, no member of the State Civil Service or holder of the civil post can be dismissed or removed by an authority subordinate to the appointing authority, but Article 311(1) of the Constitution does not provide that even the departmental proceeding must be initiated only by the appointing authority. If there is no Rule providing for initiation of the departmental proceeding by the appointing authority, then any superior controlling authority can initiate departmental proceeding. Hence initiation and conducting of departmental proceeding can be by any superior controlling authority in addition to the authority competent to impose penalty, if the relevant service Rules do not prohibit the same (See: *P.V. Srinivasa Sastry and others Vs. Comptroller and Auditor General and others,* reported in (1993)1 SCC 419, *Inspector General of Police and another Vs. Thavasiappan,* reported in (1996) 2 SCC 145 *& State of UP and another Vs. Chandrapal Singh and another,* reported in (2003) 4 SCC 670).

12. A conjoint reading of the Rules of 1966 with the orders of Governor dated 13th August, 1997 and 15th September, 2008 make it clear that the State Government is competent to impose any penalty either minor or major to the petitioner and the Commissioner is competent to take disciplinary action and to impose minor penalty on the petitioner who is a class-I employee. No Rule has been pointed out by counsel for petitioner prohibiting the superior controlling authority other than the appointing authority or the disciplinary authority from initiation of the departmental enquiry and the conducting the same. Thus, the Commissioner is competent to initiate and conduct the departmental enquiry against the class I and II government employee for imposing minor or major penalty and he can also impose minor penalty but as required by Rule 12(3)(a) major penalty provided in Rule 10 (v) to (ix) cannot be imposed by the Commissioner since he is subordinate to the appointing authority. In such a case the commissioner is required to take recourse to Sub

Rule 21 of Rule 14 under which the Commissioner, after concluding the enquiry if finds it to be a case of imposition of major penalty, has to forward the record to the State Government/disciplinary authority competent to impose major penalty for appropriate decision. Rule 14(21) reads as under:

> "(21(a) Where a disciplinary authority competent to impose any of the penalties specified in clauses (i) to (iv) of rule 10, (but not competent to impose any of the penalties specified in clauses (v) to (ix) of rule 10), has itself inquired into or the articles of any charge and that authority, having regard to its own finding or having regard to its decision on any of the findings of any inquiring authority appointed by it, is of opinion that the penalties specified in clauses (v) to (ix) of rule 10 should be imposed on the Government servant, that authority shall forward the records of the inquiry to such disciplinary authority as is competent to impose the last mentioned penalties.
>
> (b) The disciplinary authority to which the records are so forwarded may act on the evidence on the record or may, if it is of the opinion that further examination of any of the witnesses if necessary in the interests of justice, recall the witness and examine, cross-examine and re-examine the witness and may impose on the Government servant such penalty as it may deem fit in accordance with these rules."

13. Counsel for petitioner has placed reliance upon the judgment of the Supreme court in the matter of *Union of India and others Vs. B.V. Gopinath* reported in (2014) 1 SCC 351, wherein the Supreme court explaining the expression of "shall cause to be drawn up" in Rule 14(3) of Central Civil Services (Classification, Central (sic:Control) and Appeal) Rules, 1965 has held that it permits the disciplinary authority to delegate to subordinate authority task of drawing up substance of proposed definite and distinct articles of charge-sheet only, but it does not provide for delegation of power of approval to proposed charge-sheet, and therefore, in that case in absence of the approval of disciplinary authority (FM) charge sheet was found to be non est but in the present case, the Commissioner who has issued the charge sheet is the competent authority in terms of Rule 12 and in terms of orders of Governor dated 13/8/97 and 15/9/2008.

14. Counsel for petitioner referring to order of the Governor dated 13/8/97 has submitted that power to take disciplinary action and initiating enquiry cannot be sub delegate to the Commissioner but the orders of Governor dated 13th August, 1997 and 15 September 2008 are not orders of sub-delegation but these are the orders passed by the Governor exercising power under Rule 12 (2)(a) & (b) of Rules, 1966 which empowers the Governor to authorise any authority to impose any of the minor penalty under Rule 10.

15. In view of the above, I am of the opinion that the charge sheet which has been issued by the Commissioner to the petitioner is by the competent authority and issuance of the charge sheet cannot be faulted on that ground.

16. The petitioner has also challenged the order of suspension dated 6/6/12 issued by the Collector as approved by the Commissioner Indore Division Indore vide order dated 7/7/12. The Collector is neither the appointing authority nor the disciplinary authority of the petitioner. Rule 9 provides for placing a government servant under suspension by the appointing authority or any authority to which it is subordinate or the disciplinary authority or any other empower authority. Second proviso to Rule 9 (1) deals with the case where the order of suspension is made by the authority lower than the appointing authority. Rule 9(1) reads as under:-

> "9.(1) The appointing authority or any authority to which it is subordinate or the disciplinary authority or any other authority empowered in that behalf by the Governor by general or special order, may place a government servant under suspension-
>
> (a) where a disciplinary proceeding against him is contemplated or is pending, or
>
> (b) where a case against him in respect of any criminal offence is under inventilation, inquiry of trial:
>
> [Provided that a Government servant shall invariably be placed under suspension when a challan for a criminal offence involving corruption or other moral turpitude is filed after sanction of prosecution by the government against him:]
>
> Provided further that where the order of suspension is made by an authority lower than the appointing authority, such

authority shall forthwith report to the appointing authority the circumstances in which the order was made."

17. In the present case the petitioner has been placed under suspension by the Collector who is neither the appointing authority of petitioner nor the disciplinary authority or an authority authorised by the order of Governor. In terms of the second proviso to Rule 9(i) the Collector has not reported to the appointing authority the circumstances in which the order was made. Mere approval of the order of suspension by the Commissioner will not validate the suspension order of the Collector because the Commissioner is not the appointing authority but he is only the disciplinary authority as held above.

18. Thus, the impugned order of suspension dated 6/6/12 passed by the Collector as approved by the Commissioner by order dated 7/7/12 cannot be sustained and is hereby set aside. It will be open to the competent authority to place the petitioner under suspension in accordance with the Rules.

C.C. as per rules.

Order accordingly.

I.L.R. [2015] M.P., 951
WRIT PETITION

Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Miss Justice Vandana Kasrekar

W.P. No. 7447/2013 (Jabalpur) decided on 13 November, 2014

NAVEEN SWAMI VIVEKANAND B.Ed. COLLEGE ... Petitioner
Vs.
NATIONAL COUNCIL FOR TEACHER EDUCATION
& ors. ... Respondents

National Council for Teacher Education Regulations, 2002, Appendix 7 Clause 7(d) and Appendix 2B Clause (iv) - Withdrawal of Recognition **- Recognition was withdrawn that the education was being imparted in a building constructed on Kh. No. 146 and 147 and not on Kh. No. 27, 63 and 64 - Earlier the Committee was running the institute in a rented premises when the recognition was granted - Thereafter the managing Committee purchased the land and shifted the building - The lands are owned by the management and both the lands are situated in the same village - Various inspections were done and authorities allowed the**

Committee to conduct B.Ed. course from the building constructed on Kh. No. 146 & 147 from 2004 - Matter relegated back to appellate authority for fresh consideration of matter. (Paras 9 to 12)

राष्ट्रीय अध्यापक शिक्षा परिषद विनियमन, 2002, परिशिष्ट 7, खंड 7(डी) व परिशिष्ट 2बी खंड (iv) – मान्यता को वापस लिया जाना – मान्यता को इस आधार पर वापस लिया गया कि खसरा नंबर 146 एवं 147 पर निर्मित भवन में शिक्षा प्रदान की जा रही थी न कि खसरा नंबर 27, 63 एवं 64 पर – पूर्व में समिति संस्थान को किराये के परिसर में चला रही थी जब मान्यता प्रदान की गई थी – तत्पश्चात् प्रबंधन समिति ने भूमि क्रय की और भवन को स्थानांतरित किया – भूमियों का स्वामित्व प्रबंधन के पास है और दोनों भूमियां एक ही गांव में स्थित हैं – विभिन्न निरीक्षण किये गये और प्राधिकारीगण ने समिति को 2004 से बी.एड. पाठ्यक्रम का संचालन खसरा नंबर 146 एवं 147 पर निर्मित भवन में करने की अनुमति दी – मामला अपीली प्राधिकारी को नये सिरे से विचारण हेतु प्रतिप्रेषित।

Cases referred :

W.P.No. 21371/2013 (Jabalpur) decided on 03.02.2014, (2012) 2 SCC 16, SLP (Civil) No(s) 4247-4248/2009 dated 07.03.2014.

Sankalp Kochar, for the petitioner.
K.K. Singh, for the respondents.

ORDER

The Order of the Court was delivered by :
A.M. KHANWILKAR, C.J. :- This writ petition, filed under Article 226 of the Constitution of India, takes exception to the order dated 30.01.2011 passed by the National Council for Teacher Education withdrawing recognition/ permission granted to the petitioner-institution regarding B.Ed. Course from the end of academic session. This drastic order was passed on the singular ground that no building exists on the land specified by the institution at the time of application. Instead, the B.Ed. Course was being imparted in a building constructed on Khasra Nos.146 and 147/1/1 of Village Barkhedi Kalan, Neelbad Road and not on Khasra Nos.27, 63, 64/1/3. That has resulted in contravention of Clause 7(d) of Appendix 7 and Clause (iv) of Appendix 2 B of NCTE Regulations, 2002. This decision was assailed by the petitioner-management by way of an appeal. The Appellate Authority, however, reconfirmed the said order on 6.3.2013. Even this decision is the subject matter of challenge in the present petition.

2. For examining the correctness of the opinion recorded by the two

Authorities, it may be worthwhile to refer to the relevant facts. The petitioner-College applied for grant of recognition to start B.Ed. Course in a rented building. That application was filed on 31.12.2001. The respondent No.2 caused to conduct inspection of the said building and infrastructure provided by the petitioner, on 12.6.2002. Thereafter, the petitioner acquired leased premises on 27.9.2002 and acquired part of the leased premises on ownership basis on 13.12.2002. The petitioner thereafter diverted the plot near Sharda Vidya mandir for educational use on 21.01.2003. The petitioner then requested the respondent No.2 to inspect the building in which B.Ed. Course was to be permitted. The respondent No.2 caused to make an inspection on 23.01.2003. The petitioner once again requested the respondent No.2 to undertake inspection near Sharda Vidya Mandir. The second inspection was thus conducted on 06.02.2003. That was followed by third inspection by the respondent No.2 on 13.06.2003 and the fourth on 13.09.2003. Thereafter, conditional recognition was granted to the petitioner to start the B.Ed. Course on 07.11.2003. Later on, unconditional recognition was granted by the respondent No.2 for the B.Ed. Course imparted by the petitioner on 09.07.2004.

3. After the High Court in a PIL directed the respondent No.2 to conduct inspection of all the B.Ed. Colleges in the State of Madhya Pradesh vide order dated 31.07.2008, fifth inspection of the petitioner College was made on 13.01.2009. The respondent No.2 thereafter withdrew the recognition of the petitioner- College on 06.04.2009. The petitioner preferred an appeal against that decision which was allowed and the recognition was restored vide order of the Appellate Authority dated 18.08.2009. Accordingly, the recognition was restored by the respondent No.2 on 07.10.2009. In the sixth inspection report dated 03.08.2010, however, it was noticed that the B.Ed. College run by the petitioner-management was on Khasra Nos.146 & 147/1/1. The respondent No.2 was of the opinion that from inception, the management had represented in all the documents that the B.Ed. College will be established on Khasra Nos.27, 63 & 64/1/3 in the same Village Barkhedi Kalan. In that view of the matter, the respondent No.2 withdrew the recognition of the petitioner College.

4. That decision was first challenged by the petitioner before the Delhi High Court by way of Writ Petition No.6797/2011. By way of interim order passed in the said proceedings before the Delhi High Court, a joint inspection

was directed. The joint Committee of AICTE, PCI and NCTE in its report dated 21.10.2011 has found as follows:

> "1. On the khasras Nos. 146, 147/1/1 in village Barkhedi in one building two colleges namely Naveen Swami Vivekanand B.Ed. College and Swami Vivekanand College of Pharmacy (Diploma in Pharmacy) are being run.
>
> 2. It is further observed that the same land documents of khasra Nos.146, 147/1/1 and the approved plan of the same building were submitted to the NCTE and PCI for seeking grant of recognition.
>
> 3. It was further observed that in the building plan there is no separate demarcation of the built-up area for two colleges. The building plan was originally approved by the competent authority for the vocational training centre. The team demanded the documentary proof for change of purpose of the building but the Management did not provide the same.
>
> 4. The Committee also observed that some rooms and common amenities are shared by both colleges.
>
> 5. The Committee then also visited the constructed premises on the khasras Nos.27,63,64/1/2 on which the engineering college building is in existence. It was further observed that the nomencalture of the institution is Swami Vivekanand College of Science and Technology and there were three buildings constructed on these khasras – one building in the front side was shown as Engineering College and the second building in the back side was shown as a Degree Pharmacy College which is not in use and the third building was closed and locked. The Management did not cooperate with the team in opening these closed and locked buildings.
>
> 6. It was further observed that the teaching staff of Engineering College and of the Degree Pharmacy College was not present, therefore, the joint team could not interact with them.
>
> 7. The team further observed that there were several

advertisements in the premises of the Engineering College regarding Professional Courses in Engineering Faculty. The team demanded the documents regarding these professional courses but the Management did not provide any documents to the Team."

(emphasis supplied)

5. The High Court thereafter relegated the parties before the respondent No.1 for reconsideration of the entire matter afresh. The respondent No.1, however, rejected the appeal on 06.03.2013 and reconfirmed the decision of the Respondent No.2 dated 30.01.2011. In the present petition, both these decisions are challenged.

6. Reverting to the order dated 30.01.2011, which is impugned in this petition passed by the respondent No.2, only reason recorded for withdrawal of recognition granted to the petitioner-College, is that, no building exists on the land specified by the institution at the time of application. Thereby the institution contravened Clause 7(d) of Appendix 7 and Clause (iv) of Appendix 2 B of NCTE Regulations 2002.

7. The Appellate Authority reconfirmed that decision and rejected the appeal filed by the petitioner. The petitioner had contended that when the petitioner had applied for permission to start B.Ed. Course, it was in a rented premises. Later on, the petitioner purchased part of the leased premises and became owner thereof. The petitioner has further asserted that Khasra Nos.27, 63, 64/1/3 was nowhere mentioned in the original application as that was purchased by the petitioner much later in the year 2005. Whereas, unconditional recognition was already granted to the petitioner on 09.07.2004. Further, the petitioner had purchased Khasra Nos.146 & 147/1/1 and constructed campus, to house two colleges of the same management to impart B.Ed. and Pharmacy Courses. The said Khasra Nos.146 & 147/1/1 was purchased on 13.12.2002. In substance, the case of the petitioner, is that, it is not as if no building existed to run the B.Ed. Course. Rather, the petitioner not only owned and possessed land bearing Khasra Nos. 146 & 147/1/1 but also constructed building thereon to house the B.Ed. College. Besides, this land was in the same village where the other land owned and possessed by the petitioner was located. Significantly, even the Joint Committee in its report dated 21.10.2011 has found that the land documents of Khasra Nos.146 &

147/1/1 were submitted with the approved plan to the NCTE and PCI for grant of recognition. More importantly, the petitioner was running B.Ed. College on that land since the grant of recognition to the knowledge of the Authorities. Thus, it is not as if the petitioner did not own any land. Both the lands bearing Khasra Nos.146 & 147/1/1 as also the survey Nos.27, 63 and 64/1/3 are owned and possessed by the same petitioner-management. In that view of the matter, it would be hyper technical approach to invoke Clause 7(d) of Appendix 7 and Clause (iv) of Appendix 2 B of NCTE Regulations, 2002.

8. From the facts as emerge from the record, it is noticed that both the lands bearing Khasra No.146 and 147/1/1 as also Khasra Nos.27, 63 and 64/1/3 respectively are owned and possessed by the petitioner. The ownership vests in the same management. It is not in dispute that the recognition to start B.Ed. Course was granted to the same management for village Barkhedi Kalan. Further, the B.Ed. Course was already started from the building constructed on Khasra Nos.146 and 147/1/1 of Berkhedi Kalan. Both the lands are situated in the same village at a distance of around ½ kilometer only. In that sense, stricto sensu, it would not be a case for withdrawal of recognition by invoking Clause 7(d) of Appendix 7 and Clause (iv) of Appendix 2 B of NCTE Regulations, 2002. That may apply to a case where no building whatsoever exists on the land specified in the application for grant of recognition by the management. It may be invoked also when the institution does not have its own land and building as is mentioned in the application for grant of recognition. That is not the case in hand. In the present case, the management itself is the owner of the land and has B.Ed. College building constructed on that land. Further, the course was imparted in the same building since 2004 till the withdrawal of recognition on 30.01.2011. This aspect has been completely glossed over by the Appellate Authority.

9. In our opinion, instead of examining the matter any further, it would be appropriate to relegate the parties before the Appellate Authority for reconsideration of the matter in the light of the indisputable facts referred to above. We are persuaded to do so as we find that the application for grant of recognition was made in the year 2001 with reference to another premises taken by the petitioner-College on rental basis. However, as noted in the joint inspection report submitted before the Delhi High Court dated 21.10.2011, the petitioner had submitted documents of Khasra Nos.146, 147/1/1 and the approved plan of the building thereon to NCTE and PCI for grant of recognition to start B.Ed. College. At best, it would be a case requiring the petitioner-

College to submit a formal application for shifting of premises referred to in the application. Significantly, the respondents having permitted to conduct the B.Ed. Course from the building situated on Khasra No.146 and 147/1/1 owned and possessed by the petitioner management since the year 2004, the Authorities ought to have examined these aspects, which would have vital bearing on the final decision to be taken by them. We find that these aspects have been overlooked by both the Authorities resulting in manifest error, if not a perverse decision.

10. Counsel for the respondents has invited our attention to the decision of the Division Bench of this Court in the case of *B.M. Educational Society Vs. NCTE and another* [1]. The exposition in the said decision will have no application to the fact situation of the present case. In that case, the management did not own and possess land of specified measurement but wanted the Authority to reckon another plot owned by the management across the road for the purpose of computing the total holding. That contention has been negatived. Counsel for the respondent then relied on the decision of the Supreme Court in the case of *Shri Morvi Sarvajanik Kelavni Mandal Sanchalit Mskm B.Ed. College Vs. NCTE* [2]. In that case, the Apex Court has referred to the mandatory requirements to be fulfilled before grant of recognition. Inter alia, that the institution must have its own land and building. As aforesaid, in the present case, the land and building is owned and possessed by the petitioner- management. At best, it would be a case for permission to shift the premises referred to in the original application which was taken on rental basis to one owned and possessed by the petitioner at the time of grant of unconditional recognition. Moreover, the unconditional recognition having been granted and was in force for more than seven years would certainly be a matter to be taken into accountas this drastic decision of withdrawal of recognition was to directly affect the students pursuing B.Ed. Course in the petitioner-College - which was otherwise duly recognized at the relevant time.

11. Counsel for the respondents has relied on the unreported decision of the Supreme Court in the case of *Rashtrasant T.M.S. & S.B.V.M.C.A. VID. & ors Vs. Gangadar Nilkant Shende & ors* [3] to contend that the petitioners be called upon to make fresh application for grant of recognition in the building

1. W.P. No.21371/2013 decided on 03.02.2014
2. (2012) 2 SCC 16
3. I.A. Nos.56-57/2014 in SLP(Civil) No(s) 4247-4248/2009 dated 7.3.2014

owned and possessed by the petitioner. We are not impressed by this submission. For, grant of fresh permission and continuation of recognition already granted, is perceptibly different. The petitioner is pursuing the remedy for continuation of unconditional recognition which was already granted in the year 2004 and has been withdrawn on untenable grounds.

12. Suffice it to note that as we are inclined to relegate the parties before the Appellate Authority for fresh consideration of the entire matter, it will be open to that Authority to examine all aspects of the matter and including about the effect of repeal of NICTE Regulations, 2002 and whether the issue regarding withdrawal of recognition *qua* the petitioner management should be considered and decided on the basis of extant Regulations. All questions will have to be considered on its own merit in accordance with law. We are not expressing any opinion either way on the merits of the controversy or the scope of the inquiry before the Appellate Authority for deciding the validity of the order dated 30.01.2011 withdrawing the recognition granted to the petitioner-College for B.Ed. Course.

12. The Appellate Authority shall decide the remanded proceedings expeditiously preferably within **three months** from today so that if the recognition is restored, the petitioner-College can restart the admission process at least from the next academic session i.e. 2014-2015 well in advance.

Petition is **disposed of** on the above terms.

Petition disposed of.

I.L.R. [2015] M.P., 958
WRIT PETITION
Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice Sanjay Yadav
W.P.No. 16248/2014 (PIL) (Jabalpur) decided on 27 November, 2014

ABHISHAEK @ CHINTU CHOUKSEY ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. ***Adhyaksha Tatha Upadhyaksha (Vetan Tatha Bhatta) Adhiniyam M.P., 1972 (27 of 1972), Section 4 - Entitlement of Speaker to occupy official residence*** **- Speaker or Deputy Speaker can remain in official residence "throughout their term of office" and for a period**

of one month immediately thereafter - Speaker died on 05.11.2013 and therefore, one month would commence from that date as he had ceased to be the Speaker. (Para 5)

क. अध्यक्ष तथा उपाध्यक्ष (वेतन तथा भत्ता) अधिनियम म.प्र., 1972 (1972 का 27), धारा 4 – शासकीय निवास स्थान के अधिभोग हेतु अध्यक्ष की हकदारी – अध्यक्ष या उपाध्यक्ष "अपने संपूर्ण कार्यकाल के दौरान" तथा उसके तुरंत पश्चात् एक माह की अवधि तक शासकीय निवास स्थान में निवास कर सकते हैं – अध्यक्ष की मृत्यु 05.11.2013 को हुई और इसलिये एक माह की अवधि इसी तिथि से आरंभ होगी क्योंकि उस तिथि से वह अध्यक्ष नहीं रहे।

***B. Adhyaksha Tatha Upadhyaksha (Vetan Tatha Bhatta) Adhiniyam M.P., 1972 (27 of 1972), Section 4 - Death of Speaker - Penalty/Compensation* - Family members of Deceased Speaker were allowed to occupy the Bungalow as the authorities were of the view that there is no formal declaration that the Bungalow has ceased to be official residence of Speaker - Non-issuance of declaration would not extricate the allottee from the rigours of Section 4(1) which postulates that Speaker and Deputy Speaker would be entitled to use of official quarters "throughout their term of office" and for a period of one month immediately thereafter - No more and no less. (Para 7)**

ख. अध्यक्ष तथा उपाध्यक्ष (वेतन तथा भत्ता) अधिनियम म.प्र., 1972 (1972 का 27), धारा 4 – अध्यक्ष की मृत्यु – शास्ति/प्रतिकर – मृतक अध्यक्ष के परिवार के सदस्यों को बंगले का अधिभोग करने के लिये अनुमति दी गई थी क्योंकि प्राधिकारियों का यह दृष्टिकोण था कि कोई औपचारिक घोषणा नहीं है कि बंगला अब अध्यक्ष का शासकीय निवास स्थान नहीं रहा – घोषणा जारी नहीं किया जाना आबंटिती को धारा 4(1) की सख्ती से मुक्त नहीं करेगा जो परिकल्पित करता है कि अध्यक्ष और उपाध्यक्ष "अपने संपूर्ण कार्यकाल के दौरान" तथा उसके तुरंत पश्चात् एक माह की अवधि तक शासकीय निवास स्थानों का उपयोग करने के लिये हकदार होंगे – न ज्यादा न कम।

Sourabh Kumar Sharma, for the petitioner.
Swapnil Ganguly, Dy. G.A. for the respondents/State.
R.P. Agrawal with *Y. Soni,* for respondent no. 5.

ORDER

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

This public interest litigation has been filed to question the inaction of the Authorities in initiating eviction proceedings in respect of Government premises Aawas No.893, North Civil Lines, Nagrath Chowk, Jabalpur, inspite of complaint made in that behalf.

2. The said premises were allotted as official residence to the then Speaker Shri Ishwardas Rohani. Admittedly, the allottee expired on 05.11.2013. Notwithstanding his death, the family members of the original allottee continued to occupy the official quarter. Indeed, the Competent Authority has now commenced the eviction proceedings because of institution of the present petition.

3. In the present petition, the private respondent No.5, who incidentally happens to be the son of the original allottee, has made a statement that he would vacate the premises by the end of March, 2015 and pay all the damages/ compensation/rent/penalty in respect of the said premises to the State Authorities for overstaying the allotment term.

4. Be that as it may, the provision regarding the terms and conditions on which residence is allotted to Speaker and Deputy Speaker can be traced to the provisions in the Madhya Pradesh Adhyaksha Tatha Upadhyaksha (Vetan Tatha Bhatta) Adhiniyam, 1972. Section 4 of the said Adhiniyam reads thus:-

> "4.(1) The Speaker and the Deputy Speaker shall be entitled, without payment of rent, to the use of a furnished residence thorough-out his term of office at Bhopal and for the period of one month immediately thereafter, and no charge shall fall on the Speaker or the Deputy Speaker personally in respect of the maintenance of such residence.
>
> *Explanation*- For the purposes of this section "residence" includes the staff quarters and other buildings appurtenant thereto and the garden thereof, and "maintenance" in relation to a residence includes the payment of local rates and taxes and the provision of electricity and water.
>
> (2) If the Speaker or the Deputy Speaker does not avail of the benefit of sub-section (1), he shall, in lieu thereof, be entitled to a house-rent allowance equal to twenty per centum of the salary payable to him under section 2.

(3) In addition to a free furnished residence at Bhopal under sub-section (1), the Speaker and the Deputy Speaker shall also be entitled to the use of a furnished residence without payment of rent at any other place which the State Government may, from time to time for purpose of this Act, declare to be the place of official residence of the Speaker or the Deputy Speaker, as the case may be, so long as such declaration remains in force."

(emphasis supplied)

5. On a bare perusal of this provision, it is clear that the allottee can legitimately continue to remain in occupation of the premises allotted to him as official residence for the period specified, commensurate with the term of his office of Speaker or Deputy Speaker, as the case may be. Sub-clause (1), however, predicates that the Speaker and Deputy Speaker can remain in official residence "throughout their term of office" and for a period of one month immediately thereafter. The term of office of Speaker or Deputy Speaker would ordinarily expire by efflux of time; but, in this case, because of the death of the father of respondent No.5 on 05.11.2013, the one month period would commence from that date as he had ceased to be the Speaker. The dependents of deceased allottee were obliged to vacate the premises within one month from the death of their predecessor. Having failed to do so, the Authorities should have proceeded against the occupants of the said Bungalow as unauthorized occupants on and from 05.12.2013.

6. As aforesaid, the Competent Authority has now issued a show cause notice as to why the occupants should not be evicted being unauthorized occupants. That proceedings have remained pending because of non-service of notice. Now that the notice is served, the said proceedings are scheduled for hearing on 10.12.2014. The occupants of the Bungalow are free to participate in the said proceedings. It is for that Authority to examine all issues on its own merits, in accordance with law, and including to consider the request of giving time to vacate the premises to the occupants if the said Authority is empowered to do so by virtue of the provisions of the M.P. Lok Parisar (Bedakhali) Adhiniyam, 1974 and the Rules framed thereunder and not otherwise.

7. The next question is: whether the amount towards damages/

compensation/penalty/rent payable by the respondent No.5, as determined by the Executive Engineer, PWD, Division No.1, Jabalpur vide letter dated 17.11.2014, can be said to be just and proper? It appears that the said Authority has calculated the amount on the assumption that since there was no formal declaration that the Bungalow had ceased to be official residence of the Speaker, the occupation thereof by the dependents of the then Speaker was authorized. This view has been formed on a complete misreading of sub-clause (3) of Section 4 of the Adhiniyam of 1972. No doubt, upon issuance of declaration and so long as it remains in force, the occupant/allottee of the Bungalow would be entitled to the use of the premises as his official quarters; but that does not extricate the allottee from the rigours of Section 4(1), which postulates that the Speaker and Deputy Speaker would be entitled to use of official quarters "throughout their term of office" and for a period of one month immediately thereafter. No more and no less.

8. Indubitably, the allotment of premises to the Speaker for his official residence as per the entitlement under Section 4(1), is personal to him and governed by that provision; whereas the declaration referred to in Section 4(3) is ascribable to the premises having been notified as official residence of the Speaker or Deputy Speaker. The two are independent. Thus understood, the sub-clause (3) of Section 4 of the Adhiniyam of 1972 will have to be construed in the context of and *ejusdem generis* with the stipulation contained in Section 4(1). As a result, the calculation done by the Executive Engineer, PWD, Division No.1, Jabalpur towards compensation/ penalty/rent in respect of the official Bungalow as being payable by the dependents of the original allottee for the use of the premises on and from 05.12.2013 and until the same is vacated, is on an erroneous understanding of the provision. For, the allottee can occupy the premises as official residence only during his term of office as Speaker or Deputy Speaker and for a period of one month immediately thereafter. On ceasing to be the Speaker or Deputy Speaker and on expiry of one month period thereafter, in law, the occupation of the premises cannot be treated as authorized occupation for the purposes of provisions of the Madhya Pradesh Lok Parisar (Bedakhali) Adhiniyam, 1974.

9. A priori, the fact that the declaration under Section 4(3) remained in force even after the death of the original allottee cannot and does not create any right in favour of the allottee or his dependent to remain in possession of the stated premises. The premises, though continued to bear the status or tag of official residence of Speaker or Deputy Speaker, as the case may be, the

occupation thereof by a person who had ceased to hold the stated office or as in the present case, by the dependents of the original allottee who ceased to hold the office of Speaker consequent to his death, will be nothing short of unauthorized occupation after expiry of one month period immediately from the date of ceasing to hold the office of Speaker or Deputy Speaker, for the purposes of Adhiniyam of 1972 and more particularly, in the context of the provisions of Adhiniyam of 1974.

10. Reverting back to the issue of compensation/penalty/ rent for the unauthorized user of the premises, we had called upon the Advocate for the respondent-State to submit a fresh calculation on the basis of the extant regulations in that behalf. He has submitted the calculation done by the officer on the basis of the extant norms specified in the Circulars issued by the State Government dated 24.10.2013 and 11.09.2014 respectively. The same reads thus:-

"SDO OMTI/Rent Control Authority of Omti

Division Jabalpur

"Rent for Bungalow no.893 (Old Type) at Nagrath Chowk, Jabalpur.

1. Rent for the month 01.12.2013 to 30.09.2014 (As per Commissioner Order No.1708/3-2/2013 dated 24.10.2013 attached @ Rs.10,662/- per month. I.e. of 10 months = Rs.1,06,620/-.

2. Rent for the month of Oct. 2014 (As per M.P. Govt. order No.F1- 25/2013/2-A(3) dated 11.09.2014 @ 30,000 per month i.e. for 1 month = 30,000 Rupees.

3. Total rent from December 2013 to Oct. 31st 2014 = Rs.1,36,620/-.

Sd/-
SDO Omti/Rent Control Authority of
Omti Division, Jabalpur."

11. Accordingly, we set aside the communication of the Executive Engineer, PWD, Division No.1, Jabalpur dated 17.11.2014 and the accompanying chart therewith at pages 13 and 14 of the counter; and instead direct the said

Authority to compute/determine amount towards penalty/compensation/rent and other outgoings to issue a fresh demand to the respondent No.5 within two weeks from today as per the extant norms for unauthorized user of the public premises on and from 05.12.2013 until the same is vacated by the respondent No.5 and other dependents of the original allottee. The respondent No.5 shall pay the amount as demanded within the time specified in the demand notice itself, without fail.

12. Needless to observe that if the respondent No.5 has already paid any amount towards compensation/ rent/penalty in respect of the said premises, that amount may be adjusted against the fresh demand as determined by the Executive Engineer, PWD, Division No.1, Jabalpur on the basis of the norms applicable for unauthorized user of the public premises.

13. Besides this, nothing more is required to be said in this petition. The same is **disposed** of on the above terms.

Petition disposed of.

I.L.R. [2015] M.P., 964
WRIT PETITION
Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice Sanjay Yadav
W.P. No. 15957/2014 (Jabalpur) decided on 27 November, 2014

THOK SABJI VIKRETA KALYAN SANGH ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

Krishi Upaj Mandi (Allotment of Land and Structures) M.P. Rules, 2009, Rule 3(7) - Allotment **- Members of Association were trading in an area which was not notified under the M.P. Krishi Upaj Mandi Act - New market yard established for the first time - As it is not the case of transfer of market yard therefore provision of Rule 3(7)(a) would not apply - Provision of Rule 3(7)(b) would be applied - Question of conducting auction of plots only for the existing licencee cannot be countenanced - Auction proceedings already begun - Members of Association are free to participate - Petition dismissed.**

(Paras 4, 5, 10 & 11)

कृषि उपज मंडी (भूमि और संरचनाओं का आबंटन) म.प्र. नियम, 2009, नियम 3(7) – आबंटन – संघ के सदस्य ऐसे क्षेत्र में व्यापार कर रहे थे जो म.प्र. कृषि उपज मंडी अधिनियम के अंतर्गत अधिसूचित नहीं था – नये बाजार स्थान को पहली बार स्थापित किया गया था – चूंकि यह प्रकरण बाज़ार स्थान स्थानांतरित करने का नहीं इसलिये नियम 3(7)(ए) का उपबंध लागू नहीं होगा – नियम 3(7)(बी) का उपबंध लागू होगा – केवल विद्यमान अनुज्ञप्तिधारी हेतु भूखंडों की नीलामी संचालित करने के प्रश्न का समर्थन नहीं किया जा सकता – नीलामी प्रक्रिया पहले ही आरंभ हो चुकी है – संघ के सदस्य हिस्सा लेने के लिये स्वतंत्र – याचिका खारिज।

Vivek Ranjan Pandey, for the petitioner.
Swapnil Ganguly, Dy. G.A. for the respondent no. 1/State.
Naman Nagrath with *Atulanand Awasthy,* for respondent/Mandi.

ORDER

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

This petition, though filed as Public Interest Litigation, is essentially a petition in representative capacity on behalf of the members of the petitioner-Association. The Association has 215 traders as its members. The grievance in this petition is essentially about the procedure followed by the respondent/ Mandi in allotment of land in its market yard.

2. This very petitioner had filed writ petition challenging the validity of the provisions of Rule 3 (7) of the Madhya Pradesh Krishi Upaj Mandi (Allotment of Land and Structures) Rules, 2009 by way of W.P. No.10244/ 2010. Traders in the locality had independently filed W.P. No.3957/2010, W.P. No.4880/2010, W.P. No.4890/2010 and W.P. No.6355/2010. All these petitions came to be disposed of by the Division Bench of this Court on 1.3.2012. The Division Bench rejected the challenge to Rule 3 (7) on all counts.

3. Notably, the earlier matters proceeded on admitted fact that the State Government, by issuing notification on 9.11.2000 under Section 3 of the Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972, **"for the first time established a new market yard"** for fruit and vegetable traders having 56 acres of land at Karond in Bhopal. In view of this indisputable fact the procedure to be followed by the respondent/Mandi for allotment of land or

structure in the market yard area could be only under Rule 3 (7) (b) of the Rules.

4. The grievance of the petitioner, however, is that, in the auction process, the plots to be alloted should have been offered first to the members of the petitioner Association, who had existing licence and were forced to shift from the old market area to new market area. If it was a case of transfer of market yard, this argument would have been valid - as that is the procedure prescribed under Rule 3 (7) (a) of the Rules. The dispensation provided for allotment of land or structure in the market yard area which is a newly established market yard for the first time is posited under Rule 3 (7) (b). Both these mechanisms are mutually exclusive. The last part of Rule 3 (7) (a), therefore, cannot be read into the mechanism specified for allotment of land and structure in a newly established market yard. That must be governed by Rule 3 (7) (b) only.

5. In our opinion, the argument of the petitioner is replete with confusion that it was a case of shifting or transfer of market yard, as the petitioners have been forced to shift from their original location to newly established market yard. Admittedly, the members of the petitioner-Association were trading in an area, which was not so notified under the Act of 1972 and, therefore, it will not be a case of transfer of market yard as such. In any case, it is not open to assume a fact which is contrary to the Notification issued in exercise of Section 3 of the Act of 1972, which in no uncertain terms mentions that for the first time new market yard for fruit and vegetable traders is being set up. Once this position is indisputable, the argument of the petitioner that it is a case of transfer of market yard will have to be rejected. Moreover, the grievance now made could have been agitated even in the earlier round of litigation. As a matter of fact, this shade of argument of the petitioner has been considered and negatived, as can be discerned from the discussion in Paragraphs No.10 to 12 of the judgment of the Division Bench of this Court dated 1.3.2012.

6. Notably, the petitioner in spite of having challenged the said decision before the Hon'ble Supreme Court, eventually, did not press that special leave petition being S.L.P. (Civil) No.10129/2012 and invited the following order :-

> *"Learned counsel for the rival parties are agreed to the disposal of the instant petition with liberty to the petitioner to move appropriate applications for allotment of plots.*

In case such applications are moved by the members of the petitioner Sangh, then the same shall be considered by the competent authority in accordance with the existing provisions.

Needless to say that the corporation will cooperate and the allotments shall be made by shifting of the licences to the notified Mandi area by exclusively considering the applicants licences.

The special leave petition is disposed of in the manner indicated above".

(emphasis supplied)

7. The order passed by the Supreme Court reinforces that the allotment of land or structure in the Mandi area of respondent/Mandi, which has been newly established will have to be taken forward in accordance with the "existing provisions". That means Rule 3 (7) (b).

8. Emphasis, however, was placed by the learned counsel for the petitioner on the expression **"exclusively considering the applicants licences".** That, in our opinion, does not mean that the Supreme Court has directed the respondent/Mandi to consider the case of the petitioner with reference to the mechanism provided in Rule 3 (7) (a), which applies to shifting of market yard.

9. Pertinently, it is mentioned in the reply affidavit filed by the respondent/ Mandi that the members of the petitioner Association have already participated in the auction process. Counsel for the petitioner, however, has disputed that factual position across the Bar, but the petitioner Association has not filed any rejoinder to refute the statement so made by the respondent/Mandi in the reply affidavit filed before this Court.

10. In any case, the claim of the members of the petitioner Association will have to be considered in the context of Rule 3 (7) (b) of the Rules. Thus understood, the question of conducting auction only for the existing licencee traders those are affected by the establishment of respondent/Mandi, cannot be countenanced. For, that may be necessary only if it was a case of transfer of market yard and thus, governed by the procedure prescribed in Rule 3 (7) (a) of the Rules.

11. It is also indisputable that the auction process has already been set in motion by giving public notice. The members of the petitioner Association were free to participate in the said auction process. Those who have participated, the respondent/Mandi would be obliged to consider their applications in accordance with the procedure prescribed in Rule 3 (7) (b) of the Rules. The last date of bid was 13.11.2014. In the auction process, the Mandi has already collected an amount of around Rs.31 crores from the participants. Even for that reason, the matter cannot brook any further delay - as it would be affecting the rights of those who have invested in the auction process with a sanguine hope of getting allotment of land or structure in the respondent/Mandi area.

12. Taking any view of the matter, therefore, this petition deserves to be **dismissed**. Ordered accordingly.

Petition dismissed.

I.L.R. [2015] M.P., 968
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
M.A. No. 4498/2009 (Jabalpur) decided on 10 April, 2013

RAMKALI THAKUR (SMT.) & ors. ... Appellants
Vs.
PANCHARAM & ors. ... Respondents

A. Motor Vehicles Act (59 of 1988), Section 173 - Initial claim petition was for injuries - **During pendency of claim case, injured himself died - Cause of death whether connected to accident or not ? - Autopsy of corpus not carried out - Held - Because of lack of autopsy of corpus it could not be proved that injured died due to accident injuries - Hence, findings of Tribunal affirmed. (Para 12)**

क. मोटर यान अधिनियम (1988 का 59), धारा 173 – आरंभिक दावा याचिका क्षतियों के लिये थी – दावा प्रकरण लंबित रहने के दौरान स्वयं आहत की मृत्यु हुई – मृत्यु का कारण क्या दुर्घटना से संबद्ध है अथवा नहीं? –शव परीक्षण नहीं किया गया – अभिनिर्धारित – शव परीक्षण के अभाव में यह साबित नहीं किया जा सकता कि आहत की मृत्यु दुर्घटना से आई क्षतियों से हुई – अतः अधिकरण के निष्कर्षों की पुष्टि की गई।

B. Motor Vehicles Act (59 of 1988), Section 173 - Injury

case **- Fracture of wrist & ulna bones - Injured, a government servant - Entitlement - Injured entitled for salary equivalent to loss of leave period as leave could have been utilized elsewhere - Amount of Rs. 25,000/- awarded for loss of income.** **(Para 15)**

ख. मोटर यान अधिनियम (1988 का 59), धारा 173 – अपहानि प्रकरण – कलाई एवं प्रकोष्ठिका–अस्थि (अलना बोन) का अस्थिभंग – आहत एक शासकीय सेवक – हकदारी–अवकाश अवधि की हानि के समतुल्य वेतन हेतु आहत हकदार है क्योंकि अवकाश का उपभोग कहीं और किया जा सकता था – रू. 25,000/– की रकम आय की हानि हेतु अवार्ड की गई।

C. Motor Vehicles Act (59 of 1988), Section 166 - Initial injury claim **- During pendency of claim case injured died - Claim further proceeded by legal representatives - Held - Legal representatives entitled for compensation as the benefits of claim case becomes estate of deceased.** **(Para 16)**

ग. मोटर यान अधिनियम (1988 का 59), धारा 166 – आरंभिक अपहानि दावा – दावा प्रकरण लंबित रहने के दौरान आहत की मृत्यु हुई – विधिक प्रतिनिधिगण द्वारा दावे को आगे बढ़ाया गया – अभिनिर्धारित – विधिक प्रतिनिधिगण प्रतिकर के हकदार क्योंकि दावा प्रकरण के लाभ मृतक की संपदा होते हैं।

Ravendra Kumar Tiwari, for the appellants.
None for respondent no. 1.
S.K. Rao with *Ajeet Agrawal,* for the respondent no. 2.
K.K. Singh and *Amit Mishra,* for respondent no. 3.

ORDER

U.C. MAHESHWARI, J. :- The appellants-claimants have filed this appeal for enhancement of the sum awarded by the Additional Motor Accident Claims Tribunal, Multai in MVC No. 05/06 whereby their claim regarding injuries sustained by their predecessor Illraj Singh Thakur, the husband of appellant no.1, while father of remaining appellants in vehicular accident by exonerating the respondent no. 3 -Insurer has been awarded for the sum of Rs.1,13,018/- alongwith the interest @ 6% p.a. from the date of filing the claim petition against the respondent nos.1 and 2 by saddling their joint and several liability to indemnify the same.

2. The facts giving rise to this appeal in short are that aforesaid Illraj Singh Thakur was working as Assistant Project Ranger in the M.P. Rajya Van

Vikas Ltd., Rampur, Bhatodi, Betul. On dated 18.11.2003, the said Illraj Singh Thakur while riding his motor cycle bearing registration no. M.P. -48-B-A-1399 was going to Rampur, Bhatodi from his residence situated at Multai. On the way near about 12.30 in the noon, he was dashed by truck bearing registration no. RJ.-21-G/2212 driven by respondent no. 1 in rash and negligent manner. Resultantly he fell down and sustained injuries on his both the hands, right leg and some other parts of the person and become unconscious. He was taken to hospital by Murlidhar and Anandrao where after medical examination, his MLC report was prepared. The information regarding accident was given to the Police, Multai. Looking to the serious nature of the injuries, he was advised to shift Nagpur for further treatment. Pursuant to it, he was taken to Nagpur, where he remained as Indoor Patient in some private hospital of V.K. Sood, where in further investigation, it was revealed that he sustained fracture of ulna bone of right hand and of the wrist of left hand. During the course of treatment, his surgery was carried out, in which rod was inserted in the right hand. Bone grafting was also carried out. Inspite long treatment, his right hand could not come in the position as before, hence he could not come to the position to walk as he was working prior to the accident. After holding investigation by the P.S., Multai, the respondent no. 1 truck driver was charge sheeted for his prosecution before the Court having the territorial jurisdiction over the matter. In such premises, initially the claim was preferred by Illraj Singh Thakur himself for the sum of Rs.4,54,280=95 p. but in pendency of the claim before the tribunal, the principle (sic:principal) claimant has passed away on 19.5.2005, on which his natural heirs and legal representatives, the appellants have come on record and amended the claim petition.

3. In such amendment, it is stated that due to complication of aforesaid injuries sustained in the alleged accident, Illraj Singh Thakur had developed the diabetes and due to its complications, he died on 19.5.2005. It is also stated that before the alleged accident, his salary from his Government Service was Rs.9330/- per month and the appellants were dependant on him. Due to his untimely aforesaid accidental death, the appellants have been deprived from their dependency and in such premises, by amendment, the appellants prayed to award the claim against the respondent nos. 1 to 3 for the sum of Rs.21,63,681/- by saddling their joint and severe liability to indemnify the same.

4. The respondent no. 1 was proceeded exparte before the tribunal, while in reply of respondent no. 2 -insurer of truck by denying the averments of the claim petition, it is stated the deceased Illraj Singh Thakur accompanied with his wife as pillion rider was riding his motor cycle in rash and negligent manner and due that he collied with some unknown truck and sustained the injuries but subsequently on false pretext, he got registered the criminal case against the respondent no. 1 by mentioning the registration number of the aforesaid offending truck while the alleged accident was not the cause and consequence of any rash and negligent driving of the alleged truck by the respondent no.1. It is further stated that the injuries sustained by Illraj Singh Thakur were simple in nature and not the grievous and by treatment, the same were cured. In further averments, it is stated that in any case, it could not be deemed that he died due to any complications of aforesaid injuries sustained in the alleged accident as such he was a diabetic patient since long before occurring the alleged accident. However, after taking treatment, he became fit and joined his duty and continued the same till his death. It is also stated the claim is made for excessive sum. In any case, this is not the case of permanent disability or the vehicular death of aforesaid victim. In addition, it is also stated that the aforesaid truck was driven by the respondent no.1 without having duly and effective driving licence under violation of the terms and conditions of the insurance policy, hence the liability of the impugned claim could not be saddled against it and prayer for dismissal of the claim is made.

5. In reply of respondent no. 3, by denying the averments of the claim petition, it is stated that the aforesaid motor cycle of the deceased was duly ensured with it but the deceased had not died due to any of the injuries sustained in the alleged accident. In fact any of the alleged injuries had not created any permanent disability or disfigration to the person of Illraj Singh Thakur. It is further stated that the aforesaid accident was the cause and consequence of negligent driving of aforesaid truck by respondent no. 1, against whom the criminal case was also registered. In such premises, the liability of the impugned claim could not saddled against this respondent. It is further stated that the deceased - Illraj Singh Thakur was not a third party for the purpose of insurance of the motor cycle. So in such premises, also the respondent no. 3 is not liable to indemnify the claim and prayer for dismissal of the claim against such respondent is made.

6. In view of aforesaid pleadings, after framing the issues, evidence was recorded. On appreciation of the same, it was held that the deceased - Illraj Singh Thakur had not died due to any injuries sustained in the alleged accident, as such due to aforesaid injuries of the accident, he sustained 25% permanent disability in his person and by holding that the alleged accident was the cause and consequence of rash and negligent driving of aforesaid truck by respondent no. 1, ensured with the respondent no. 2 by exonerating the respondent no. 3 - Insurance Co. of motor cycle, the claim of the appellants was awarded against the respondent nos. 1 and 2 only for the sum, as mentioned above by saddling their joint and several liability to indemnify the same. Being dissatisfied with the quantum of award, the appellants have come to this court with the prayer to hold that the deceased died due to complications of aforesaid injuries sustained by him in the alleged accident and so also for further enhancement of the sum awarded by the tribunal.

7. I am apprised by the counsel present that no appeal has been preferred on behalf of the Insurance Co. - respondent no. 2 against the impugned award. So the findings of the tribunal whereby the respondent nos. 1 and 2 have been held liable to indemnify the impugned claim jointly and severally has got finality between parties and now this court has to consider the only question whether the deceased Illraj Singh Thakur had died due to the injuries sustained in the alleged accident or he sustained only the permanent disability as held by the tribunal and this court has also to consider the matter for further enhancement of the sum awarded.

8. The appellants' counsel after taking me through the record of the tribunal including the available evidence and exhibited papers, so also the impugned award argued that before the alleged accident, the deceased was healthy and fit person and was not suffering from any disease but due to the injuries sustained in the alleged accident, he suffered with a acute diabetes and due to its complications, he was not fully cured upto his death and ultimately he died, for which sufficient evidence is available on record but the same has not been properly appreciated by the tribunal and contrary to the same, it was held by the tribunal that due to aforesaid alleged injuries the deceased Illraj Singh Thakur sustained only 25% permanent disability and his death could not be connected with the accident. In such premises, he firstly prayed to hold that Illraj Singh Thakur died due to the injuries sustained in the alleged vehicular

accident. He further said that in any case, if the death of Illraj Singh Thakur is not found to be the death in vehicular accident and the findings of the tribunal in this regard holding Illraj Singh Thakur sustained 25% permanent disability are affirmed, then whatsoever sum has been awarded by the tribunal, the same is very lower side and requires further enhancement on all the relevant heads including the head of permanent disability; physical and mental pain and agony, medical treatment, medicines, travelling expenses and the expenses of special diet and prayed to enhance the same by modifying the impugned award by allowing this appeal.

9. On the other hand, responding the aforesaid arguments, by justifying the findings of the impugned award, counsel for the respondent no. 2, Shri S.K. Rao, learned Sr. Adv assisted by Shri Ajeet Agrawal, said that the same being based on proper appreciation of the evidence is in conformity with law. It does not require any interference at this stage either to hold the death of Illraj Singh Thakur to be a death of vehicular accident or for further enhancement of the sum awarded by the Tribunal. In continuation he said that there is sufficient evidence on record to show that after getting the treatment of the aforesaid injuries either at Multai or at Nagpur, said Illraj Singh Thakur became fit and joined his duty. In this regard by referring the deposition of different Doctors, he said that on 9.7.2004 when the deceased Illraj Singh Thakur was lastly examined by Dr. V.K. Sood, (AW-3), according to his report, no infection or any complication was found in any of his aforesaid injuries. Even his diabetes was also found to be normal. In such premises, it could not be said that Illraj Singh Thakur died due to any infection or complications and of the aforesaid injuries. He further said that it appears from the deposition of Dr. D.K. Tiwari, (AW-5) that subsequent to curement of aforesaid injuries, he again suffered with some problems of diabetes for which on consultation, Illraj Singh Thakur was advised to go and consult some senior Doctor at Nagpur. He was also advised to take treatment from some Orthopedic Surgeon of Nagpur. He further said that there is no evidence on record to show that on the date of the death of deceased on 19.5.2005, said Illraj Singh Thakur died due to complications of any of aforesaid injuries. In such premises, he prayed that there is no scope in the matter for further enhancement of the sum awarded by the tribunal. It was also argued that initially the claim was filed by the deceased Illraj Singh Thakur and during pendency of the same he died and thereafter the matter relating to Law of

Torts, the appellants were not entitled to prosecute the claim. With these arguments, he prayed for dismissal of the appeal.

10. Counsel for respondent no. 3, Shri K.K. Singh and Amit Mishra, has justified the impugned award and prayed for dismissal of the appeal.

11. Having heard the counsel, keeping in view the arguments, I have carefully gone through the record of the tribunal alongwith the impugned award and unrebutted findings of the tribunal on record that the deceased Illraj Singh Thakur in his life time sustained the aforesaid alleged injuries in the aforesaid accident, which was cause and consequences of rash and negligent driving of the aforesaid truck, insured with the respondent no. 2, by the respondent no.1. In the lack of any appeal or cross objection at the instance of respondent nos. 1 and 2, such findings have got finality between the parties. Now this court has to consider whether the aforesaid injuries sustained by Illraj Singh Thakur was the cause of his death or he has died due to some other cause or in any case by natural death, so also the question for enhancement of the impugned awarded sum.

12. It is apparent from the record that in order to prove the cause of death of Illraj Singh Thakur, after his death, autopsy of his corpus was not carried out. So by medical evidence, it has not been proved that Illraj Singh Thakur died due to aforesaid injuries or any of them or its complications. In the lack of such material evidence, it could not be said that the death of Illraj Singh Thakur was cause and consequence of aforesaid injuries. Even otherwise on perusing the depositions of Dr. V.K. Sood, (AW-3), Dr. Yogesh Dagekar, (AW-4) and Dr. P.K. Tiwari, (AW-5), I have gathered the reliable information that subsequent to the accident after taking the treatment, Illraj Singh Thakur was cured and in this connection lastly he was examined by Dr. V.K. Sood, (AW-3) on 9.7.2004 and according to his deposition, he did not find any infection in any of his aforesaid injuries. His sugar was also found to be normal. All the wounds of aforesaid injuries were found to be hilled up. I have not found any subsequent paper to show that the deceased Illraj Singh Thakur was remained under treatment upto his death with respect of any of aforesaid injuries. In the light of this evidence, if Illraj Singh Thakur died due to complications of diabetes, then his death could not be connected with aforesaid accident or the injuries sustained by him in the same. So in such premises, I have not found any perversity in appreciation of the evidence by the tribunal

to hold that Illraj Singh Thakur had not died due to complication of any of the aforesaid injuries of accident. So arguments advanced by the appellants' counsel in this regard hereby fails. Pursuant to it, the findings of the tribunal in this regard is hereby affirmed.

13. The findings of the tribunal holding that to aforesaid injuries the Illraj Singh Thakur had sustained 25% permanent disability in his person due to fracture in his hand is in consonance of the evidence available on record. Even otherwise, in the lack of any appeal on behalf of any of the respondents such finding could not be interfered by this court in the present appeal. So this court has to consider the question for enhancement of the sum awarded by the tribunal. Keeping in view the aforesaid findings of the tribunal, according to which Illraj Singh Thakur sustained 25% permanent disability.

14. Keeping in view the nature of the injuries, sustained by the deceased Illraj Singh Thakur, the principle claimant, if the case is examined for further enhancement of the sum awarded by the tribunal, then it is apparent that inspite holding the case of 25% permanent disability of Illraj Singh Thakur, besides the expenses of treatment Rs.73018/-, they have been awarded only Rs.25,000/- in the head of. permanent disability while Rs.10,000/- for physical and mental agony and Rs.5000/- under the head of transport or travelling. So in all such heirs except the treatment, the compensation of the alleged injuries was awarded only for Rs.40,000/-.

15. It is a matter of experience that any fracture of ulna bone of human being takes more than two months in its curement, and not less than that. The fracture of wrist also takes time, more than six weeks in curing the same and not less than that. So in such premises, it could be deemed that the deceased Illraj Singh Thakur during the course of treatment and subsequent to same was not in a position to work from his right and left hand for the aforesaid period. Probably he might have taken leave from his department, which could have been utilized by him in his life time for some other purpose and as per settled proposition if he was compelled by the aforesaid injuries to take such leave, then in such premises, he was entitled for compensation equal to salary of near about 2 and ½ months but the same has not been awarded by the tribunal. Therefore, under such head at this stage, in the light of the sum of his monthly salary, as stated above, I deem fit to award Rs.25,000/- in the head of his loss of income. Besides this, the sum of Rs.40,000/- awarded by the

tribunal with respect of 25% permanent disability in all heads also appears to be at lower side, hence keeping in view overall circumstances, such sum is also enhanced from Rs.40,000/- to Rs.50,000/-. The same are awarded.

16. So far the arguments, advanced by the counsel of respondent no. 2 that initially the claim was filed by the deceased-victim and subsequent to his death the matter being related to the law of torts, his legal representatives are not entitled to get any compensation, is concerned, I am of the considered view that in the life time of victim the claim was preferred by him and at the event of his natural death or otherwise, which is not connected with the alleged incident, the present claim litigation has become the estate of the deceased and in such premises, even after death of principle claimant, his legal representatives could not be deprived from the benefit of the impugned claim. Even otherwise, if the claim petition had been decided in the life time of Illraj Singh Thakur then certainly he himself would have got the sum of the claim and could have been given by him to the appellants, his natural heirs. So in such premises, the benefit of the award could be given to the appellants. In such premises, the appellants could not be deprived from the benefit of the impugned claim.

17. Besides the aforesaid, it is apparent on record, as stated above, that the findings of the tribunal holding the entitlement of the appellants to get the awarded sum of the impugned claim has not been challenged on behalf of any of the respondents either by filing the cross objection in the present appeal or by any separate appeal. So in the lack of any such appeal or cross objection, such finding of the tribunal could not be interfered by this court, hence arguments advanced by the counsel for respondent no. 2 in this regard is hereby failed.

18. In view of aforesaid, by allowing this appeal in part, the sum of Rs.1,13,018/- awarded by the tribunal is enhanced from such sum to Rs.1,48,018/-. The enhanced sum of Rs.35,000/- shall carry interest @ 6% p.a. from the date of filing the claim petition before the tribunal. Liability to pay such enhanced sum is also saddled jointly and severally against respondent nos. 1 and 2 as held by the tribunal. There shall be no order to the costs.

19. The appeal is allowed, as indicated above.

Appeal allowed.

I.L.R. [2015] M.P., 977
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
M.A. No. 1408/2005 (Jabalpur) decided on 12 April, 2013

KRISHNA TIWARI (SMT.) & ors. ... Appellants
Vs.
RAM KUMAR & ors. ... Respondents

A. Motor Vehicles Act (59 of 1988), Section 173 - Enhancement - **Deceased, aged 47 yrs., involved in agriculture and milk business - Owing 12 acres of agricultural land - Deceased supporting entire family of 7 persons including himself - Accident of the year 2003 - Held - Income assessed by the Tribunal @ Rs. 2,000/- p.m. is on lower side, it ought to be Rs. 5,000/- p.m. - 1/4 th deducted personal expenses as number of dependents were six in number as per the dictum of Sarla Verma's case - Multiplier of 13 adopted on the basis of the age of the deceased - So, in all total compensation of Rs. 6,15,000/- awarded. (Paras 10 & 11)**

क. मोटर यान अधिनियम (1988 का 59), धारा 173 – बढ़ोत्तरी – मृतक, आयु 47 वर्ष, कृषि एवं दुग्ध व्यवसाय में संलग्न – 12 एकड़ कृषि भूमि का स्वामी – मृतक स्वयं को मिलाकर 7 व्यक्तियों के संपूर्ण परिवार को संभाल रहा था – दुर्घटना वर्ष 2003 की है – अभिनिर्धारित – अधिकरण द्वारा रू. 2,000/– प्रति माह की दर से निर्धारित की गई आय निम्नतर है वह रू. 5,000/– प्रतिमाह होनी चाहिए – व्यक्तिगत खर्चों के रूप में 1/4 घटाया गया क्योंकि आश्रितों की संख्या छः थी जैसा कि सरला वर्मा के प्रकरण में आदेशित किया गया है – मृतक की आयु के आधार पर 13 का गुणक अंगीकृत किया गया – अतः कुल प्रतिकर रू. 6,15,000/– अवार्ड किया गया।

B. Civil Procedure Code (5 of 1908), Order 41 Rule 22 - Cross-objection - Delay - **Cross-objection filed after a delay of six years from the date of notice - Notice was served after a period of six years by the Tribunal on Respondent No. 3 - Held - Appellants could not be penalised because it was not a fault on part of the appellants. (Para 12)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 22 – प्रत्याक्षेप – विलम्ब – प्रत्याक्षेप को नोटिस की तिथि से 6 वर्षों के विलम्ब के पश्चात् प्रस्तुत किया गया – अधिकरण द्वारा प्रत्यर्थी क्र. 3 को 6 वर्षों की अवधि के पश्चात् नोटिस तामील किया गया – अभिनिर्धारित – अपीलार्थीगण को दण्डित

नहीं किया जा सकता क्योंकि यह दोष अपीलार्थीगण की ओर से नहीं था।

C. Limitation Act (36 of 1963), Section 5 - Condonation - Objection - **Appeal barred by limitation - Delay already condoned - Held - It cannot be recalled afterwards - Principle - As per the dictum of Satyadhyan Ghosal's case by the Apex Court any order passed at earlier stage in the matter is binding as res judicata at any subsequent stage before the same Court.** **(Para 12)**

ग. परिसीमा अधिनियम (1963 का 36), धारा 5 – माफी – आक्षेप – अपील परिसीमा द्वारा वर्जित – विलम्ब पहले ही माफ किया गया था – अभिनिर्धारित – उसे बाद में वापस नहीं लिया जा सकता – सिद्धांत – सत्याध्यान घोषाल के प्रकरण में सर्वोच्च न्यायालय द्वारा दिये गये आदेश के अनुसार मामले में पूर्ववर्ती प्रक्रम पर पारित किया गया कोई आदेश समान न्यायालय के समक्ष किसी पश्चात्वर्ती प्रक्रम पर पूर्व न्याय के रूप में बाध्यकारी होगा।

Cases referred :

(2009) ACJ 1298, AIR 1960 SC 941.

Devika Singh, for the appellants.
None for the respondent no. 1 & 2.
Gulab Sohane, for the respondent no. 3.

ORDER

U.C. MAHESHWARI, J. :- The appellants- claimants have filed this appeal for enhancement of the sum awarded by the II nd Additional Motor Accident Claims Tribunal, Jabalpur in MVCC No. 05/04 whereby their claim regarding vehicular death of Santosh Tiwari, aged 47 years, husband of appellant no. 1, while father of appellant nos. 2 to 5 and son of appellant no. 6 has been awarded for the sum of Rs.2,37,500/- alongwith the interest @ 6% p.a. from the date of filing the claim petition and the cost of litigation against the respondents by saddling their joint and severe liability to indemnify the same.

2. As per claim of the appellants, the deceased Santosh Tiwari had died due to injuries sustained by him in the alleged vehicular accident caused on dated 9.5.2003 because of rash and negligent driving of truck of respondent no. 2 bearing registration no. M.P.-18-6333 by the respondent no. 1 for which a criminal case was also registered at P.S. Narsinghpur. During treatment on

dated 12.5.2003, he succumbed to the injuries. The postmortem of his corpus was also carried out. After holding investigation in Crime No. 329/2003, the respondent no. 1 was charge sheeted for the offence of Sections 279, 337 and 304-A of IPC. It is further stated that the deceased being an agriculturist was having the irrigated land of 35 acres. Besides this, he was also involved in the business of milk. Out of such agriculture and milk business, he was earing (sic:earning) Rs.50,000/- per month, out of which after spending Rs.10,000/- on himself, Rs. 40,000/- was given by him to the family for livelihood. It is further stated that aforesaid all four daughters of the deceased are still unmarried. In such premises, the impugned claim was preferred by the appellants for the sum of 70 lacs.

3. The respondent no. 1 was proceeded exparte before the tribunal while in reply of respondent no. 2, by denying the averments of the claim petition on the material facts of the same, it is stated that as aforesaid vehicle was duly ensured with the respondent no. 3 and the same was driven by the respondent no. 1 by having the duly and effective driving licence. The quantum of the income of deceased has also been disputed and in further averments, it is stated that on holding any liability of the claim against him, then the same be saddled against respondent no. 3 as the vehicle was duly ensured with such respondent.

4. In reply of respondent no. 3- Insurance Company, by denying the averments of the claim petition, it is stated that in the lack of any documentary evidence on behalf of the appellants, to show the earning of the deceased, Rs.50,000/-per month, such averment is not reliable and prayer for dismissal was made.

5. In view of pleadings of parties, after framing the issues the evidence was recorded. On appreciation of the same, after holding that the alleged accident in which the deceased sustained the injuries and succumbed to the same was the cause and consequence of rash and negligent driving of aforesaid dumper truck by respondent no. 1, the claim of the appellants was awarded for the sum as mentioned above by saddling the joint and severe liability to indemnify the same against the respondents. Being dissatisfied with the quantum of the awarded sum, the appellants have come to this court with this appeal.

6. After receiving the notice of this appeal on behalf of respondent no. 3

under Order 41, Rule 22 of CPC cross objections have also been filed. In such cross objection, prayer for dismissal of the claim of appellants against such respondent is made firstly on the ground that the respondent no. 3 was served with the notice of the claimants by the tribunal after near about six years from the date of filing the same. Besides this, such prayer is also made on the ground that aforesaid dumper was driven by respondent no. 1 without having duly and effective driving licence under violation of terms and conditions of the policy. So while deciding this appeal, this court has to consider the aforesaid cross objection also.

7. Having heard both the parties at length, I have carefully gone through the record of the tribunal as well as the impugned award.

8. It is settled proposition of law that the insurer is bound to prove that the above mentioned vehicle was driven by the respondent no.1- Driver without having duly and effective driving licence but I have not found any document or evidence at the instance of insurance company showing that the aforesaid vehicle was driven by the respondent no. 1 without having duly and effective driving licence. On the contrary, there is sufficient evidence and the circumstance on record to draw inference that offending vehicle was driven by the respondent no. 1 on the date of the accident having requisite duly and effective driving licence. In such premises, the approach of the tribunal in this regard holding that the offending vehicle was driven by respondent no. 1 having duly and effective driving licence does not require any interference. So in such premises, the cross objection of the respondent - insurer in this regard deserves to be and is hereby dismissed.

9. The findings of the impugned award holding that the alleged incident in which the deceased sustained the injuries and during treatment succumbed to the same was cause and consequence of rash and negligent of aforesaid offending vehicle by the respondent no. 1 have not been challenged by any of the respondents before this court either by cross objection or through separate appeal. So such findings have attained finality between the parties. So in such premises, this court has only to consider the question for further enhancement of the sum awarded by the tribunal.

10. As per impugned award, it was held that the deceased being agriculturist was having 12 acres of irrigated land and on the basis of such land and considering other available evidence, his income was assessed @

Rs.2000/-per month but on perusing the deposition of Smt. Krishna Bai, (AW-1) appellant no.1, I have found that she has categorical stated that her husband being agriculturist was having 35 acres of land and besides this, he was also involved in the business of milk and out of such agriculture and milk business, he was earing (sic:earning) Rs.50,000/- per month, out of which Rs.10,000/- was spent by him on himself while remaining sum of Rs.40,000/- was given by him to the family for their livelihood but in support of such contention, she has proved only Rin Pustika of agriculture land but actual produce of the agriculture has not been proved by any receipts of Krishi Upaj Mandi to assess the annual crops or the vegetables to assess the income of the deceased. But from such unrebutted deposition of the wife of deceased, it has been proved that the deceased Santosh Tiwari was involved in agriculture, cultivating his own land and out of its income, he was looking after the entire family of seven persons including himself. Although the accident had occurred in the year 2003, but even in such year also, a normal labourer was earning Rs.70-80/- per day and the capacity of the deceased was more than a labourer as he was an agriculturist. Except this, he was also involved in milk business and in view the aforesaid 12 acres of land on which the deceased was carrying out the agriculture activities, his income has been assessed by the tribunal @ Rs.2000/- per month is very lower side. In view of available evidence, the same ought to have been taken Rs.5000/- per month and not less than that. So the approach of the tribunal in this regard is not sustainable. The same requires modification. Pursuant to it, by setting aside such findings of the tribunal, the income of the deceased Rs.2000/- per month is held to be Rs.5000/- per month.

11. Keeping in view the aforesaid income of the deceased Rs.5000/- per month, I proceed to assess the total dependency of the appellants. In view of aforesaid the total annual income of the deceased comes to Rs.60,000/-. In view of decision of the Apex Court in the matter of *Sarla Verma and others Vs. Delhi Transport Corporation and another* reported in (2009) ACJ, 1298, in view of number of the claimants, i.e. six, this court has to deduct 1/4th sum with respect of expenses, which would have been spent by the deceased on himself, had he been alive. On deducting the same, the annual dependency comes to Rs.45,000/-. Again in view of aforesaid decision of the Apex Court, in view of age of the deceased, i.e. 47 years, the multiplier of 13 is applicable. On applying the same, the total dependency of the appellants

on the deceased comes to Rs.5,85,000/-. The same is awarded. The appellants are also entitled to Rs.10,000/-, which has been spent by them in the treatment of the deceased, as held by the tribunal. Besides, this they are also entitled for the sum of Rs.20,000/- on the conventional head, i.e. loss of company of the husband by the appellant no. 1, loss of estate of the deceased, expectancy of life and funeral expenses. Thus, the total comes to Rs.6,15,000. The same is awarded.

12. So far the question raised by the respondent no. 3 insurer that such respondent was served by the tribunal after six years and, therefore, the impugned award could not have been passed against the insurer has not appealed me because of the judicial system, if notice was served on the respondent no. 3 at belated stage, then the party like the appellants could not be penalized because it was not fault on the part of the appellants. So far other objections of insurer's counsel that the appeal was filed barred by time. In that respect it is suffice to say that by allowing the application under Section 5 of the Limitation Act filed on behalf of the appellants, such delay has already been condoned, vide order dated 2.9.2011 and such order could not be recalled at this stage by this court, in view of the principle laid down by the Apex Court in the matter of *Satyadhyan Ghosal and others Vs. Smt. Deorajin Debi and another* reported in AIR 1960 SC 941, holding that any order passed by the court at earlier stage in the matter, the same is binding as res judicata against the party as well as such court at any subsequent stage before the same court.

13. In view of aforesaid, this appeal is allowed in part and the sum awarded by the tribunal to the appellants is hereby enhanced from the sum of Rs.2,37,500/- to Rs.6,15,000/-. The enhanced sum shall carry interest @ 6% p.a. from the date of filing the impugned claim petition. The liability to indemnify such enhanced sum is also saddled against respondent nos. 1, 2 and 3 jointly and severally, as held by the tribunal. Till this extent, the impugned award is modified while other findings of the same are hereby affirmed. There shall be no order as to the costs.

14. The appeal is allowed, as indicated above.

Appeal allowed.

I.L.R. [2015] M.P., 983
APPELLATE CIVIL
Before Mr. Justice Sanjay Yadav
M.A. No. 1876/2010 (Jabalpur) decided on 8 January, 2014

BAJAJ ALLIANZ ...Appellant
Vs.
ADITYA & ors. ... Respondents
(Alongwith M.A. No. 1841/2011)

A. Motor Vehicles Act (59 of 1988), Section 173 - Contributory negligence - **On the basis of uncontroverted evidence of Pillion rider and material documents, Tribunal has rightly held that deceased was not instrumental to accident. (Para 8)**

क. मोटर यान अधिनियम (1988 का 59), धारा 173 – योगदायी उपेक्षा – पिछली सीट सवार के अविवादित साक्ष्य एवं तात्विक दस्तावेजों के आधार पर अधिकरण ने उचित रूप से अभिनिर्धारित किया कि दुर्घटना के लिये मृतक सहभागी नहीं था।

B. Motor Vehicles Act (59 of 1988), Section 173 - Income - Pay slip - **Pay slip of deceased proved by claimant - In absence of any contradictory evidence, no doubt can be raised with regard to pay slip, which was issued in due course. (Para 12)**

ख. मोटर यान अधिनियम (1988 का 59), धारा 173 – आय – वेतन पर्ची – मृतक की वेतन पर्ची दावाकर्ता द्वारा साबित की गई – किसी विरोधाभासी साक्ष्य के अभाव में वेतन पर्ची जिसे यथासमय जारी किया गया था के संबंध में संदेह नहीं उठाया जा सकता।

C. Motor Vehicles Act (59 of 1988), Section 173 - Compensation - Application of multiplier - **Where the age of deceased is more than 15 years there is no necessity for seeking guidance or placing reliance on second schedule. (Para 14)**

ग. मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर – गुणक की प्रयोज्यता – जहां मृतक की आयु 15 वर्ष से अधिक है वहां द्वितीय अनुसूची पर मार्गदर्शन चाहने या निर्भर रहने की आवश्यकता नहीं।

D. Motor Vehicles Act (59 of 1988), Section 173 - Compensation - Future prospects - **Addition of 50% salary where the deceased is below 40 years and has permanent job - Addition should**

be 30% if the age of deceased is between 40 to 50 years - There should be no addition if the age of deceased is more than 50 years and number of dependents are 2 to 3. (Para 15)

घ. मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर – भविष्य की संभावनायें – 50% वेतन का संयोजन जहां मृतक 40 वर्ष से कम है और उसके पास स्थायी रोजगार है – संयोजन 30% होना चाहिये यदि मृतक की आयु 40 से 50 वर्ष के बीच है – कोई संयोजन नहीं होना चाहिये यदि मृतक की आयु 50 वर्ष से अधिक है और आश्रितों की संख्या 2 से 3 है।

E. Motor Vehicles Act (59 of 1988), Section 173 - Compensation - Standard deduction **- Where deceased is married, $\frac{1}{3}$ rd should be deducted towards living expenses - Where number of dependants are 4 to 6, ¼th should be deducted and 1/5th should be deducted if number of dependents are more than 6. (Para 15)**

घ. मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर – मानक कटौती – जहां मृतक शादीशुदा है, जीविका के खर्चों की ओर $\frac{1}{3}$ घटाया जाना चाहिये – जहां आश्रितों की संख्या 4 से 6 है, ¼ घटाया जाना चाहिये और 1/5 घटाया जाना चाहिये यदि आश्रितों की संख्या 6 से अधिक है।

Cases referred :

Civil Appeal No. 4646/2009 decided on 02.04.2013, (2009) 6 SCC 121.

T.S. Lamba, for the appellant in M.A. No. 1876/2010.
Gulab Sohane, for the respondent no. 8 in M.A. No. 1876/2010.
Anil Lala, for the appellants in M.A. No. 1841/2011.

(Supplied : Paragraph numbers)

ORDER

SANJAY YADAV, J. :- Heard.

1. This order shall lead to final disposal of Misc. Appeal No.1876/2010 and Misc. Appeal No.1841/2011, as both these appeals emanate from an Award dated 22.1.2010 passed by the First Additional Member to the Fourth Additional Motor Accident Claims Tribunal (Fast Track Court), Khandwa [hereinafter referred to as 'Tribunal'].

2. Whereas, Misc. Appeal 1876/2010 is by the Bajaj Allianz General

Insurance Co. Ltd, on the findings regarding involvement of the offending vehicle and on quantum. The appeal has been filed on the strength of permission granted under Section 170 of the Motor Vehicles Act, 1988.

3. Misc. Appeal 1841/2011 is by the claimants for enhancement of compensation on the ground that the Tribunal has erred in properly computing the gross annual income of the deceased, in applying the multiplier of 13 instead of 15 and not granting compensation in lieu of future loss of income, as a deceased was a Govt. Servant.

4. Accident occurred on 30.4.2008 at 7.45 p.m. when the deceased Vikram Singh, driving the motorcycle no.MP-09-MC-5930 along with his friend, was coming back from village Bamnala Khandwa, was hit head on by the offending vehicle, bearing registration no.MP-12-MB-7037 driven by Ashok, respondent no.1 in the claim petition, at culvert near village Dondwada. Vikram Singh succumbed to the injuries. He was employed as Civil Assistant Grade II in the office of Executive Engineer, Madhya Pradesh Paschim Kshetra Vidyut Vitaran Company Ltd. The claim case was filed by the widow, son and daughters of the deceased for compensation of Rs.38,85,938/-. The offending vehicle was insured with the Bajaj Allianz General Insurance Company Ltd., the appellant in Misc. Appeal No.1841/2010. Whereas, the vehicle with which the accident had occurred was insured with National Insurance Company Limited.

5. To prove the accident, income, age of the claimants' son and daughters, the claimants filed the final report under Section 173 of the Code of Criminal Procedure, 1973 of the criminal case registered vide Crime No.104/2009 along with FIR (Ex.A/2), Crime Details Form comprising spot map (Ex.A/3), property seizure memo (Ex.A/4), MLC (Ex. A/5), Post-mortem Report (Ex. A/7), salary certificate (Ex.A/8) and Rin Pustika (Ex.A/12). Claimant No.4 examined herself and examined Suresh, son of Bhaiyalal, pillion rider accompanied the deceased when the accident occurred.

6. Respondents No.1 and 2 (Ashok Patel and Bhaghirath Tanwar), respectively the rider of offending vehicle and the owner of offending vehicle, though denied of the accident being due to their negligence; however, they did not enter the witness box to establish their contention.

7. That, respondent no.3, present appellant in Misc. Appeal No.1876/

2010 and respondent No.5-National Insurance Company Ltd., stated that the accident had occurred due to negligence of the deceased and not by the rider of the offending vehicle. It was further stated that the deceased and the rider of offending vehicle were not having the driving license and the vehicles were driven contrary to the insurance policy. However, neither Bajaj Allianze General Insurance Company Ltd. nor National Insurance Company Ltd. entered the witness box to establish their contentions in the written statement. Right of the appellant in Misc. Appeal No.1876/2010 was closed on 8.1.2010 as despite of repeated opportunities, it did not examine the witness in defence.

8. The Tribunal, in paragraph 18, returned a specific finding that the deceased was, in no manner, instrumental in the cause of accident and was not found having contributed to the accident. To arrive at this conclusion, the Tribunal relied upon the material documents and uncontroverted evidence of the pillion rider, applicant's witness no.2-Suresh, son of Bhaiyyalal.

9. As to the age and income of the deceased, the Tribunal relied on the MLC and post-mortem report and the income certificate and discarded the age in the ration card filed by the Bajaj Allianze General Insurance Company Ltd. in paragraph 26 of the award and determined the age of the deceased at the time of death being 48 years.

10. As for income of the deceased, in paragraph 22 of the award, the Tribunal recorded that on the date of death, the deceased was employed as Civil Assistant Grade-II and gross salary was Rs.21,712/- and the net salary after deductions towards gratuity and General Insurance Scheme was Rs.20,162/-.

11. Appellant in Misc. Appeal 1876/2010 i.e. Bajaj Allianz General Insurance Co. Ltd. questions the Award on the ground that the Tribunal committed grave folly in relying on the FIR and the income certificate to arrive at a conclusion that the offending vehicle was involved in the accident and that the deceased was employed as Civil Assistant Grade II and his gross salary was Rs.21,712/- and net income Rs.20,162/-.

12. It is urged that since FIR was lodged after four days, the same creates a doubt of accident having occurred. However, no evidence was led by the appellant-Bajaj Allianz General Insurance Co. Ltd to substantiate the doubt raised about the accident; therefore, the Tribunal was within its right, in absence

of any evidence to the contrary, to have relied on the FIR indicating that the offending vehicle being involved in the accident resulting in death of Vikram Singh. In respect of the pay of the deceased, the same has been proved vide Ex.A/8, pay certificate which has been issued in due course and the appellant fails to establish vide cogent evidence that the pay of the deceased was not as shown in Ex.A/8. The contention that unless a departmental personnel is examined, the pay certificate produced and proved by the claimant *ipso facto* will not be a proof of pay the deceased was receiving on the day when he met with accident. The contention could have been accepted had there been any evidence by the appellant-Insurance Company contradicting the pay certificate which has been issued in due course and does not, on the face of it, give rise to any doubt. Thus, there is no error on the part of the Tribunal in accepting the pay certificate and computing the deceased's income thereon.

13. Thus, the appellant in M.A. 1876/2010 fails to establish any error in the award dated 22.10.2010 as would warrant any interference at the instance of the Insurance Company.

14. Before dwelling on M.A. 1841/2011, an appeal by the claimant for enhancement, worth it would be to take note of recent development. In *Reshma Kumari and Ors. vs. Madan Mohan and Anr.* : Civil Appeal No.4646/2009 decided on 2.4.2013, a three-Judge Bench of the Supreme Court, on reference in respect of two issues viz. (i) whether multiplier specified in the Second Schedule appended to the Motor Vehicle Act, 1988 should be scrupulously applied in all cases ? and (ii) whether for determination of the multiplicand, the 1988 Act provides for any criterion, particularly as regards determination of future prospect, has held -

> 38. The above does provide guidance for the appropriate deduction for personal and living expenses. One must bear in mind that the proportion of a man's net earnings that he saves or spends exclusively for the maintenance of others does not form part of his living expenses but what he spends exclusively on himself does. The percentage of deduction on account of personal and living expenses may vary with reference to the number of dependant members in the family and the personal living expenses of the deceased need not exactly correspond to the number of dependants.

39. In our view, the standards fixed by this Court in *Sarla Verma* on the aspect of deduction for personal living expenses in paragraphs 30, 31 and 32 must ordinarily be followed unless a case for departure in the circumstances noted in the preceding para is made out.

40. In what we have discussed above, we sum up our conclusions as follows:

(i) In the applications for compensation made under Section 166 of the 1988 Act in death cases where the age of the deceased is 15 years and above, the Claims Tribunals shall select the multiplier as indicated in Column (4) of the table prepared in *Sarla Verma* read with para 42 of that judgment.

(ii) In cases where the age of the deceased is upto 15 years, irrespective of the Section 166 or Section 163A under which the claim for compensation has been made, multiplier of 15 and the assessment as indicated in the Second Schedule subject to correction as pointed out in Column (6) of the table in *Sarla Verma* should be followed.

(iii) As a result of the above, while considering the claim applications made under Section 166 in death cases where the age of the deceased is above 15 years, there is no necessity for the Claims Tribunals to seek guidance or for placing reliance on the Second Schedule in the 1988 Act.

(iv) The Claims Tribunals shall follow the steps and guidelines stated in para 19 of *Sarla Verma* for determination of compensation in cases of death.

(v) While making addition to income for future prospects, the Tribunals shall follow paragraph 24 of the Judgment in *Sarla Verma.* (vi) Insofar as deduction for personal and living expenses is concerned, it is directed that the Tribunals shall ordinarily follow the standards prescribed in paragraphs 30, 31 and 32 of the judgment in *Sarla Verma* subject to the observations made by us in para 38 above.

(vii) The above propositions mutatis mutandis shall apply to all pending matters where above aspects are under consideration.

15. In *Sarla Verma vs. Delhi Transport Corporation* (2009) 6 SCC 121, it has been held :

19. To have uniformity and consistency, Tribunals should determine compensation in cases of death, by the following well settled steps :

Step 1 (Ascertaining the multiplicand)

The income of the deceased per annum should be determined. Out of the said income a deduction should be made in regard to the amount which the deceased would have spent on himself by way of personal and living expenses. The balance, which is considered to be the contribution to the dependant family, constitutes the multiplicand.

Step 2 (Ascertaining the multiplier)

Having regard to the age of the deceased and period of active career, the appropriate multiplier should be selected. This does not mean ascertaining the number of years he would have lived or worked but for the accident. Having regard to several imponderables in life and economic factors, a table of multipliers with reference to the age has been identified by this Court. The multiplier should be chosen from the said table with reference to the age of the deceased.

Step 3 (Actual calculation)

The annual contribution to the family (multiplicand) when multiplied by such multiplier gives the 'loss of dependency' to the family.

Thereafter, a conventional amount in the range of Rs.5,000/- to Rs.10,000/- may be added as loss of estate. Where the deceased is survived by his widow, another conventional amount in the range of 5,000/- to 10,000/- should

be added under the head of loss of consortium. But no amount is to be awarded under the head of pain, suffering or hardship caused to the legal heirs of the deceased.

The funeral expenses, cost of transportation of the body (if incurred) and cost of any medical treatment of the deceased before death (if incurred) should also be added.

24. In Susamma Thomas, this Court increased the income by nearly 100%, in Sarla Dixit, the income was increased only by 50% and in Abati Bezbaruah the income was increased by a mere 7%. In view of imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. [Where the annual income is in the taxable range, the words 'actual salary' should be read as 'actual salary less tax']. The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardize the addition to avoid different yardsticks being applied or different methods of calculations being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances.

30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra, the general practice is to apply standardized deductions. Having considered several subsequent decisions of this court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members

is 2 to 3, one-fourth (1/4th) where the number of dependant family members is 4 to 6, and one-fifth (1/5th) where the number of dependant family members exceed six.

31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependent. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependents, because they will either be independent and earning, or married, or be dependant on the father.

32. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where family of the bachelor is large and dependant on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third.

16. In the case at hand, taking into consideration the fact that the net income of the deceased was Rs.20,162/- and that he was 48 years of age. Thus, applying multiplier of 13 and 1/5th income being spent on himself, the annual dependency has been taken to be at Rs.1,86,400/- and the total dependency at Rs.2,42,300/-. Thus, though the principle laid down in *Sarla Verma* (supra) has been followed, however, the Tribunal committed two fold error, (i) that the dependant being 4, yet, 1/5th is taken into consideration and (ii) loss of future prospect has not been considered.

17. The Award, therefore, is liable to be modified in the following terms -

Particulars	Amount in Rs.
Net Income	20162
Annual Income	20162 x 12 = 241944
Subtract Income Tax Rs.9000	241944-9000 = 232944
Deduct 1/4th from annual income [1/4 of 232944)	232944-58236=174708
Loss of prospective income being below 50 years of age @ 30% [232944x30%]	69883+174708=244591
Multiplier '13'	244591x13=3179683
Amount towards -	
(i) Loss of estate	10000
(ii) Loss of consortium	10000
Total	20000+3179683= 3199683

18. The loss of dependency then comes to Rs.31,99,683/- of which the amount of Rs.24,35,200/- (awarded by Tribunal) is deducted. The appellants in M.A. 1841/2011 would thus be entitled for enhanced amount of Rs.7,64,483/- and simple interest thereon @ 6% from the date of appeal till realization, to be deposited, in the same manner as has been ordered by the Tribunal.

In the result, -

(i) Misc. Appeal No.1876/2010 preferred by the Bajaj Allianz General Insurance Co. Ltd is dismissed.

(ii) Misc. Appeal No.1841/2011 filed by the claimants stands allowed to the extent above.

Order accordingly.

I.L.R. [2015] M.P., 993
APPELLATE CIVIL
Before Mr. Justice M.C. Garg
F.A. No. 643/2004 (Indore) decided on 21 February, 2014

INDORE MUNICIPAL CORPORATION ... Appellant
Vs.
MANSUKHLAL ... Respondent

Civil Procedure Code (5 of 1908), Section 96 & Limitation Act (36 of 1963), Section 5 - Condonation of delay **- Appeal against ex-parte decree filed after 10 years - Fact of filing application u/o 9 rule 13 and review suppressed in application for condonation of delay - Application dismissed with cost of Rs. 50,000/- which is recoverable from delinquent officer - Copy of order to be sent to Lokayukta and Chief Secretary for action. (Para 4,10 & 16)**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 96 व परिसीमा अधिनियम (1963 का 36), धारा 5 – विलम्ब के लिये माफी – एकपक्षीय डिक्री के विरूद्ध अपील 10 वर्ष पश्चात् प्रस्तुत की गई – विलम्ब के लिये माफी हेतु आवेदन में आदेश 9 नियम 13 के अंतर्गत आवेदन तथा पुनर्विलोकन प्रस्तुत किये जाने के तथ्य का छिपाव किया गया – रू. 50,000/– व्यय के साथ, जो कि अपचारी अधिकारी से वसूलने योग्य है, आवेदन खारिज किया गया – आदेश की प्रति उचित कार्यवाही हेतु लोकायुक्त एवं मुख्य सचिव को प्रेषित की जाये।

Anand Agrawal, for the appellant.
Kamal Airen, for the respondent.

JUDGMENT

M.C. GARG, J. :- This appeal arises out of the judgment and decree dated 08.12.1994 passed in Civil Suit No,37/A/1994 by XIIth Additional District Judge, Indore. The appeal is belated by more than ten years. An application filed under section 5 of the Limitation Act alongwith appeal was filed against the impugned order dated 08.12.1994.

2. This order shall dispose of an, application filed by the appellant under section 5 of the Limitation Act seeking condonation of delay in filing the appeal against the ex-parte decree passed against them on 8.12.1994. In the application the appellant has taken the following grounds:

1. After the Civil original suit No.37/A/1994 decided

and decreed ex-parte on 08.12.1994, the appellant submitted a Review Petition under section 114, of CPC but the appellant being a 'Corporation', the said concerning file was misplaced in the office record or mixed with some files.

2. Due to mistake of understanding instructions, on 30.06.2004, an application was submitted before the lower Court for withdrawing the Review Petition, which was dismissed as withdrawn.

3. In the citation of JUD TODAY 1996 Volume (3) SC 371 *(State of Himachal Pradesh Vs. Chandramani and others)* : the Hon'ble Supreme Court has held that in the Government department, semi - Govt. Deptts., Corporations, it is likely that the files are mixed up due to moving from one table to the other and hence such delay deserves to be condoned.

4. Hence the delay so caused deserves to be condoned.

3. The application was opposed by the learned counsel for the respondent by filing a detailed reply. Some averments made in the reply by the respondents to the application under section 5 of the Limitation Act, which is relevant, are reproduced here as under:-

It is very peculiar to state on behalf of the appellant that due to mistake of understanding instructions, an application for withdrawal of the review petition was filed on 30.06.2004 who has given instructions and who has misunderstood the instructions and the alleged instructions have been given on what date, has not been specified at all.

4. The respondents also stated that as against the ex-parte decree, the appellant also filed application under Order 9 Rule 13 of CPC in which there is no mention of the application filed by them under section 5 of the Limitation Act. The averment in this regard by the respondent are as under :-

The respondents submit that the judgment and decree dated 08.12.1994 was subject matter of challenge in the MJC proceedings under Order 9 Rule 13 of CPC. This application

was rejected-by the learned lower Court on 17.04.1995, against which MA No.69/95 filed by the appellant, which was also dismissed on 17.05.1995. Thus, the orders passed in, the proceedings under Order 9 Rule 13 of the CPC have become final and sufficiency of the cause can not be considered in the regular first appeal. No challenge has been made by the appellant for challenging the order dated 17.05.1995 before any Court.

5. It is matter of record that the order passed on the application under Order 9 Rule 13 of C PC have not been assailed by the respondents.

6. Further, the review petition filed by the appellant was dismissed on 30.06.2004 with the following order:-

प्रार्थी द्वारा श्री जाहिद खान अधि. उप.।

प्रतिप्रार्थी द्वारा श्री पोलेकर अधि.।

प्रकरण मूल आवेदन पत्र पर तर्क हेतु नियत है।

लेकिन प्रार्थी अधि. द्वारा यह प्रगट किया गया है कि वे उभयपक्ष के मध्य स्थित विवाद के संबंध में रिट पिटीशन प्रस्तुत करने की कार्यवाही करना चाहते है। अतः ऐसी स्वतंत्रा देते हुए इस प्रकरण को बल ना देने पर निरस्त कर दिया जावे।

इस संबंध मे उभयपक्ष को सुना गया ।

प्रार्थी विधि अनुसार कार्यवाही कर रिट पिटीशन करने करने हेतु इस न्यायालय के अनुमति के बिना भी स्वतंत्र है।

प्रार्थी की ओर से बल ना देने पर यी प्रकरण इसी आधार पर निरस्त किया जाता है। प्रकरण की परिस्थितियों को देखते हुए उभयपक्ष अपना–अपना वादव्यय स्वये वहन करेंगे प्रकरण अभिलेखागार में भेजा जावे।

7. A bare perusal of this order goes to show that the liberty was sought by the appellant to file writ petition.

8. However, the writ petition was not filed by them instead they file this appeal. The appellant filed an affidavit in support of the application under section 5 of the Limitation Act. The said affidavit reads as under :-

शपथ–पत्र

में शपथगृहिता सत्य प्रतिज्ञा पर कथन करता हूं कि–

मेरा नाम	–	राकेश सिंह
पिता	–	श्री आर पी सिंह
आयु	–	49 वर्ष
धंदा	–	आयुक्त इ.न.पा.नि.
निवास	–	इन्दौर नगर पालिक निगम, इन्दौर

2. यह कि श्रीमान बारवे अपर जिला न्यायाधीश इंदौर द्वारा व्यवहार वाद क्र. 37ए/1994 में इंदौर नगर पालिक निगम के विरुध्द एक पक्षीय आदेश पारित किया गया था जिस कि जानकारी अपीलार्थी को जब प्राप्त हुई जब अपिलार्थी ने दिनांक 22.02.2001 का विपक्षी को सूचना पत्र विवादित स्थान के बारे में जारी किया ओर दिनांक 9.4.2001 को मौका पंचनामा तैयार किया तब ज्ञात हुआ कि अधिनस्थ न्यायालय द्वारा अपीलार्थी के विरुध्द एक पक्षीय आदेश पारित किया गया है। सूचना पत्र एव मौका पंचनामा कि फोटो प्रति संलग्न है।

3. यह कि सूचना प्राप्त होने के उपरान्त अपीलार्थी द्वारा दिनांक 11.4.2001 को अधिनस्थ न्यायालय के समक्ष रिव्यु आवेदन प्रस्तुत किया जो 30.6.2004 को अधिनस्थ न्यायालय द्वारा निरस्त किया गया। रिव्यु आवेदन की प्रतिलिपी संलग्न है।

4. यह कि इसके पश्चात सदर प्रकरण कि फाईल किसी अन्य फाईल के साथ बंध जाने के कारण उक्त आदेश कि विरुध्द माननीय न्यायालय के समक्ष सदर अपील दिनांक 18.11.2004 को प्रस्तुत कि इस प्रकार से सदर अपील प्रस्तुत करने में देरी उत्पन्न हुई है जो न्यायहित में क्षमा किए जाने योग्य है।

5. यह कि माननीय न्यायालय के आदेश अनुसार सदर अपील प्रस्तुत करने में देरी के कारण को स्पष्ट करते हुए उक्त शपथ पत्र प्रस्तुत किया जा रहा है।

6. यह कि सदर प्रकरण में अधिनस्थ न्यायालय द्वारा को ई आदेश विवादित स्थान के संबंध में पारित किया गया होने के अभाव से एवं रिव्यू आवेदन के निराकरण व फाइल अन्य फाइल के बंध जाने के कारण विलंब हुआ है जो न्यायहित में क्षमा जाने योग्य है।

9. A bare perusal of the affidavit goes to show that despite having came to know of the averments made in the reply and mentioning therein about the

application filed by the appellant under Order 9 Rule 13 of CPC against the ex-parte order, no averment has been made even in the affidavit about that fact. There is also no explanation by the appellant as to how, the review would have been maintainable against the ex-parte decree. It is also not clear as to how after dismissal of the application under Order 9 Rule 13 of CPC the writ could have been filed which is also not the case of the appellant. Even if the additional affidavit filed by the appellant is considered, then also they came to know about the orders on 09.04.2001. There is no explanation as to why, they waited for more than three years in filing of the appeal.

10. Thus, it is apparent and clear that, the appellant have no respect to the law. They have treated themselves as one, above the law who have no regard for the procedure established by law in dealing with their affairs. Consequently, the application which has no merits and is also not based upon the correct facts deserves to be dismissed and is hereby dismissed with the cost of Rs.50,000/-.

11. Learned counsel for the appellant has submitted that the ex-parte decree should not preclude them from taking any action against the respondent because at the most the order in question could be taken to the benefit of the respondents to the extent that the construction raised by them was in accordance with law i.e. to say construction raised by them under permission of the authorised officer for there reference made in the order i.e. permission under section 27 of the MP Bhoo Vikas Nigam.

12. This fact is mentioned in paragraph 3 of the order. It is well settled that any illegal action which has no sanctity or sanctions of law can not be prevented by the Court or by any one who are bound to obey the law.

13. To that extent, it is made clear that the construction which has been protected by the impugned order only to the extent that the appellant will be precluded from demolishing the construction of the respondents for which they had permitted the respondents to carry out the construction. The impugned order can not be treated to be an order of said demolition which taking of any action by the appellant with respect to the construction which is not authorised by law. Of-course if any action is to be taken, it is to be taken only in accordance with law and after giving an opportunity of hearing to the respondents.

14. At this juncture, considering the way in which Indore Municipal Corporation conducted the matter which clearly goes to show that Indore

Municipal Corporation, even after they were proceeded ex-parte and they did file an application under Order 9 Rule 13 of CPC, which was dismissed and then M.A. was also dismissed, took no action to file this appeal promptly Even the liberty granted to file writ petition while disposing of the Review Petition was also not done by them. In this manner, they have allowed the order passed by the sub-ordinate Court to stand as against them and in favour of the respondents. It is not clear as to whether, the appellant has taken any action against the guilty officers.

15. This reflects not only inaction of the Officers of Corporation in the matter but also shows their collusion with the respondents permitting them to carry out illegal construction. This requires the investigation in the matter by the Lokayukt.

16. A copy of the order be sent to the Lokayukt to take appropriate action in the matter and bring the officers concerned, who are responsible in this case. A copy of the order be also sent to the Chief Secretary of Government of Madhya Pradesh to look into the matter and also take appropriate action against the officers administratively in the interest of justice and to ensure fair play in the action. Cost be recovered personally from the officers concerned, which shall be paid to legal services authority and shall be recovered by the Corporation personally from the officers, even by deducting some amount in case, they are retired.

C.c.as per rules.

Order accordingly.

I.L.R. [2015] M.P., 998
APPELLATE CIVIL
Before Mr. Justice Rohit Arya
S.A. No. 42/2014 (Gwalior) decided on 28 March, 2014

BUDDHIPRAKASH SHARMA ... Appellant

Vs.

SANJEEV JAIN & ors. ... Respondents

A. Accommodation Control Act, M.P. (41 of 1961), Section 12(4) - Period of one year - **Plaintiff purchased suit property on 13/09/2008 and filed suit on 05/01/2010 and eviction on the ground of bonafide requirement was added by amendment dated 17/03/2010 - Suit was filed**

beyond the statutory period of one year. (Para 16)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(4) – एक वर्ष की अवधि – वादी ने 13.09.2008 को वाद संपत्ति क्रय की और 05/01/2010 को वाद प्रस्तुत किया तथा संशोधन दिनांक 17/03/2010 द्वारा वास्तविक आवश्यकता के आधार पर बेदखली संयोजित की गई – एक वर्ष की कानूनी अवधि से परे वाद प्रस्तुत किया गया।

***B. Accommodation Control Act, M.P. (41 of 1961), Section 12 - Suit by co-owner* - Suit for eviction can be filed by one of the co-owners for eviction on any ground - Not necessary that all joint owners should be joined as plaintiffs - Need of one of the co-owners can be looked into for eviction from suit premises. (Para 17)**

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12 – सह–स्वामी द्वारा वाद – सह–स्वामियों में से किसी के द्वारा किसी भी आधार पर बेदखली हेतु वाद प्रस्तुत किया जा सकता है – आवश्यक नहीं कि सभी संयुक्त स्वामियों को वादी के रूप में संयोजित किया जाये – वाद परिसर से बेदखली हेतु सह–स्वामियों में से किसी एक की आवश्यकता को विचार में लिया जा सकता है।

***C. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - Bonafide requirement* - Plaintiff being owner has a right to run his Advocate's office in the suit premises as per his choice or preference or selection or convenience or favourite place - Cannot be left to be satisfied on the plea of availability and justifiability of alternate accommodation for establishing his office in his residence. (Para 20)**

ग. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – वास्तविक आवश्यकता – वादी स्वामी होने के नाते उसे अपनी पसंद या प्राथमिकता या चयन या सुविधा या प्रिय स्थान के अनुसार वाद परिसर में अपना अधिवक्ता कार्यालय चलाने का अधिकार है – उसे अपना कार्यालय अपने निवास स्थान पर स्थापित करने के लिये वैकल्पिक स्थान की उपलब्धता एवं न्यायोचित के अभिवाक् पर संतुष्ट होने के लिये नहीं छोड़ा जा सकता।

***D. Accommodation Control Act, M.P. (41 of 1961), Section 12 - Attornment of Tenancy* - Plaintiff purchased the property and defendant was already in possession as a tenant - Notice was served upon defendant clearly mentioning that plaintiff has purchased the property - Defendant has admitted the title of plaintiff in his written statement - Appeal dismissed. (Para 24)**

घ. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12 – अपने को नये स्वामी का अभिधारी मानना – वादी ने संपत्ति क्रय की और प्रतिवादी पहले से अभिधारी के रूप में कब्जाधारी – प्रतिवादी को स्पष्ट रूप से उल्लिखित करते हुये नोटिस तामील किया गया कि वादी ने संपत्ति क्रय की है – प्रतिवादी ने अपने लिखित कथन में वादी का हक स्वीकार किया – अपील खारिज।

Cases referred :

AIR 1977 SC 1599, AIR 1989 SC 758, 1990 JLJ 97 (FB), AIR 1999 SC 2507, (2000) 1 SCC 451.

Anil Mishra, for the appellant.
Prashant Sharma, for the respondent.

JUDGMENT

ROHIT ARYA, J. :- This appeal by the defendant is directed against the concurring judgment and decree dated 21/12/2013 passed in civil appeal No.54A/2013 by X Additional District Judge, Gwalior, District Gwalior affirming the judgment and decree dated 19/08/2013 passed in civil suit No.34A/2009 by V Civil Judge, Class-I, Gwalior under section 100 of CPC whereby suit of the plaintiff has been decreed as regards 'bona fide need of non-residential accommodation' as envisaged under section 12(1)(f) of the Madhya Pradesh Accommodation Control Act, 1961 (hereinafter referred to as 'the Act').

2. The subject-matter of the suit is a shop situated at Bhonsle Ka Bada, in front of Mrignayan show room, Patankar Bazar, Lashkar, Gwalior (hereinafter referred to as 'the suit premises') which was part of the property in dispute. The suit premises was purchased by the plaintiffs'/respondents.

3. As per the plaint allegations, the defendant/appellant was occupying the suit premises as tenant on rent at the rate of Rs.2,000/- per month.

4. There was a dispute between one Umaji Rao Bhonsle, predecessor-in-title of plaintiffs' (plaintiff) and one Ramji Das (defendant) in respect of the suit premises. During pendency of the suit, both had died and their legal representatives were substituted in that suit, i.e., 35A/2001. The said suit was decreed and the legal heirs of Ramji Das were directed to hand over the suit premises to the decree-holder vide the judgment and decree dated 13/09/2004.

5. Against the aforesaid judgment and decree dated 13/09/2004, defendant No.3 therein had filed F.A.No.14/2005 *(Dr. Om Prakash Gupta Vs. Umaji Rao Bhonsle and others)* and an interim order was passed vide order dated 14/02/2005 by a co-ordinate Bench of this Court to the following effect:

> "Execution of the decree so far as it relates to possession shall remain stayed. Cost of the suit shall be deposited by the appellant within one month."

6. On 13/09/2008, the plaintiffs herein had purchased the suit premises which was part of suit property referred to hereinabove from the legal heirs of Umaji Rao Bhonsale.

7. On 15/06/2009, the plaintiffs' had filed a suit for eviction of the defendant in respect of the suit premises on the grounds enumerated in sections 12 (1)(a) 'arrears of rent' and 12(1)(c) "nuisance" of the Act. Section 12(1)(f) "bona fide need of non-residential accommodation" for the need of plaintiff No.1, Sanjeev Jain, Advocate claiming that he has no other suitable alternate accommodation in Gwalior city of his own for running his lawyer's office and at present he some how accommodated himself in small chamber of his father Puttanlal Jain, Advocate situated at Jinsi Nala No.1, Khetan Chambers (Ambasdor Hotel), Lashkar, Gwalior. The office was also shared by his elder brother, Sourab Jain.

8. Defendant filed written statement and denied the plaint allegations that the suit premises was of the plaintiffs' ownership. It was averred that there was dispute as regards the suit premises between Umaji Rao Bhonsle and Ramji Das Gupta in the form of civil suit No.35A/2001. Though the suit has been decreed in favour of Umaji Rao Bhonsle, further appeal being F.A.No.14/2005 has been filed and the same is pending before this Court wherein vide interim order dated 14/02/2005 (supra) had been passed, as such, the alleged sale of the suit premises in favour of plaintiffs' by legal heirs of Umaji Rao Bhonsle during currency of interim order dated 14/02/2005 (Supra) does not confer a valid title upon the plaintiffs' and, therefore, it was denied that plaintiffs' are ownership over the suit premises. Hence, the suit for bona fide need under section 12(1)(f) of the Act was not maintainable at their instance. It was further averred that in fact, the defendant was tenant of Umaji Rao Bhonsle and his legal heirs. It was also denied that the rent was

Rs.2,000/- per month instead rent was Rs.25/- per month. It was also averred that the plaintiff No.1 has other alternate suitable accommodation in the city of Gwalior where his need as canvassed for non-residential accommodation of establishing advocate's office can be fulfilled.

9. The trial Court based upon the aforesaid pleadings had framed issues and allowed parties to lead evidence. Trial Court upon analysis of the evidence brought on record dismissed the suit primarily on the ground of pendency of F.A.No.14/2005 before this Court and there was an interim order dated 14/02/2005 (Supra) and, therefore, suit at the instance of plaintiffs' on the strength of sale deed dated 13/09/2008 was found to be not maintainable vide judgment and decree dated 15/09/2011.

10. However, on 09/11/2011, the legal heirs of Umaji Rao Bhonsle (predecessor-in-title) had filed an application in F.A.No.14/2005 (Supra) for modification of the interim order dated 14/02/2005 (Supra). A coordinate Bench of this Court considered and allowed the application vide order dated 01/02/2012 to the following effect:

> "Keeping in view the averments made in the application, I.A.No.503/12, the interim order dated 14/2/2005 passed by this Court stands modified to the effect that;
>
> > "The sale deed dated 13/9/08 executed by the legal heirs of respondent No.1, in favour of Smt.Sarika Jain, Sanjeev Jain and Smt. Prabha Sharma shall not affect the rights of the purchasers in pursuance to the interim order passed by this Court dated 14/2/005."
>
> The interim order passed by this Court dated 14/2/2005 shall stands modified accordingly.
>
> I.A. No.503/12 stands disposed of."

11. Against the aforesaid judgment and decree dated 15/09/2011 passed by the trial Court, the plaintiffs' have preferred an appeal in the Court of VIII Additional District Judge, Gwalior as civil appeal No.24/2012. Along with the appeal, an application under Order XLI Rule 27 of CPC was filed to take on record, an order dated 01/02/2012 passed in F.A.No.14/2005 modifying the interim order dated 14/02/2005 (Supra).

12. The first appellate Court allowed the appeal and set aside the judgment

and decree of the trial Court dismissing the suit and remanded the matter back to the trial Court vide order dated 22/11/2012. This order withstood the judicial scrutiny and was sustained vide order dated 04/04/2013 passed in M.A.No.146/2013 *(Buddhi Prakash Sharma Vs. Sanjeev Jain and others)* by a co-ordinate Bench of this Court.

13. The trial Court after remand, allowed the parties to lead evidence and decreed the suit on the ground envisaged under section 12(1)(f) of the Act vide the judgment and decree dated 19/08/2013. The said judgment and decree stands affirmed by the first appellate Court vide the impugned judgment and decree dated 21/12/2013 passed in civil appeal No.54A/13. As such, both the Courts below have recorded a concurring finding of fact as regards bona fide need of plaintiff No.1.

14. Before the first appellate Court, first submission advanced by the defendant was to the effect that though suit premises was said to have been purchased by the plaintiffs' vide registered sale deed dated 13/09/2008 but in the light of order dated 01/02/2012 in F.A.No.14/2005 (Supra) modifying the interim order dated 14/02/2005, the suit could not be filed before the expiry of one year from 01/02/2012 in view of section 12(4) of the Act and, therefore, the suit was premature. The first appellate Court has rejected the submission on the premises that the sale deed was executed on 13/09/2008 and the suit was filed on 05/01/2010. Besides, interim order dated 14/02/2005 (Supra) passed by this Court was only to the extent of staying delivery of possession and did not affect title of the predecessor-in-title of the premises and, therefore, sale deed dated 13/09/2008 was validly executed. As such, the suit was filed beyond the period of one year from the date of acquisition of the title of the suit premises. In any case, the interim order dated 14/02/2005 (Supra) was clarified vide order dated 01/02/2012 (Supra) to the effect that the said order shall not affect rights of the plaintiffs' by virtue of the sale deed dated 13/09/2008. Under such circumstances, the submission with regard to section 12(4) of the Act was rejected.

15. It would be appropriate at this stage to quote section 12(4) of the Act which reads as under:

> "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 acquisition.

16. After bare perusal of the aforesaid provision, this Court is of the considered opinion that it is unambiguously clear that a landlord who acquired any accommodation by transfer can institute a suit against the tenant thereof immediately after expiry of one year from the date of acquisition or in other words from the date of valid registered sale deed in terms of the grounds specified in clause (e) or clause (f) of section 12(1) thereof. In the present case, the landlords' acquired the suit premises by way of registered sale deed dated 13/09/2008 and the suit had been filed on 05/01/2010 wherein by amendment eviction on the ground of bona fide need was added as envisaged under clause 12(1)(f) of the Act on 17/03/2010. Hence, the first appellate Court has not committed an error of law in rejecting the first submission of the defendant.

(Emphasis supplied)

17. The second submission advanced by the defendant was to the effect that as per sale deed dated 13/09/2008, the plaintiff No.1 has only 10% share whereas other co-owners, Smt. Sarika Jain W/o Sanjeev Jain has 60% share and Smt. Prabha Sharma has 30% share and, therefore, for the need of the plaintiff No.1, no decree could have been passed under section 12(1)(f) of the Act as according to the defendant, 10% share of the suit premises is less than the area of the suit premises. This submission was also rejected by the first appellate Court primarily on the ground that eviction suit can be instituted by any one of the co-owners' or joint owners' in respect of the suit property for eviction on any grounds enumerated in the Rent Act or otherwise for eviction of a tenant and it is not necessary that all the joint owners' should be joined as plaintiffs' for maintaining suit for eviction. That apart, if the need of one of the co-owners' in a eviction suit filed at the instance of such co-owner can also be looked into for eviction from suit premises. As such, rejection of this submission stands fully justified being in consonance with the law laid down by the Apex Court in the following cases:

(i) *Smt. Kanta Goel Vs. P.Pathak and others,* AIR 1977 SC 1599;

(ii) *Pal Singh Vs. Sunder Singh (dead) by L.Rs., and others*, AIR 1989 SC 758; and

(iii) *Harbans Singh (Lt. Col.) Vs. Smt. Margret G. Bhingardive,* 1990 JLJ 97 (Full Bench).

18. In *Smt. Kanta Goel* (Supra) while dealing with Delhi Rent Control Act,1 958 ii was observed as under:

"5. The scheme of the statute is plain and has been earlier explained by this Court with special reference to sections 14A and 25B. The government servant who owns his house, lets it out profitably and occupies at lesser rent official quarters has to quit but, for that very purpose to be fulfilled, must be put in quick possession of his premises. The legislative project and purpose turn not on niceties of little verbalism but on the actualities of rugged realism, and so, the construction of section 14A(1) must be illumined by the goal, though guided by the word. We have, therefore, no hesitation in holding that section 14A(1) is available as a ground, if the premises are owned by him as inherited from propositus in whose name the property stood. In his name, and let out by him read in the spirit of the provision and without violence to the words of the section, clearly convey the idea that the premises must be owned by him directly and the lease must be under him directly, which is the case where he, as heir, steps into his father's 'shoes who owned the building in his own name and let it out himself He represents the former owner and lessor and squarely falls within section 14A. The accent on 'name' is to pre-empt the common class of benami evasions, not to attach special sanctity to nominalism. Refusing the rule of ritualism we accept the reality the ownership and landlordism as the touchstone.

6. Nor do we set much store by the submission that the 1 st respondent is not a landlord, being only a coheir and the will in his favour having been disputed. Equally without force in our view is the plea that one co-lessor cannot sue for eviction even if the other co-lessors have no objection. Section 2(e) of the Act defines 'landlord' thus:

"2(e) 'Landlord' means a person. Who, for the time being is receiving, or is enti-tled to receive, the rent of any premises, whether on his own account or on

account of or on behalf of, or for the benefit of, any other person or as a trustee, guardian or receiver for any other person or who would so receive the rent or be entitled to receive the rent, if the premises were let to a tenant."

'Tenant', by definition [s. 2(1)] means any person by whom or on whose account or behalf the rent of any premises is payable. Read in the context of the Rent Control law, the simple sense of the situation is that there should be a building which is let. There must be a landlord who collects rent and a tenant who pays it to the one whom he recognizes as landlord. The complications of estoppel or even the concepts of the Transfer of Property Act need not necessarily or inflexibly be imported into the proceedings under the rent control law, tried by special Tribunals under a special statute. In this case, rent was being paid to the late Das who had let out to the appellant, on the death of the former, the rent was being paid by the 1st respondent who signed his name and added that it was on behalf of the estate of the deceased Das. At a later stage the rent was being paid to and the receipts issued by the 1st respondent in his own name. Not that the little change made in the later receipts makes much of a difference, but the fact remains that the tenant in this case had been paying the rent to the 1st respondent. Therefore, the latter fell within the definition of 'landlord' for the purposes of the Act. We are not impressed with the investigation into the law of real property and estoppel between landlord and tenant, Shri Nariman invited us to make. A fair understanding of the relationship between the parties leaves little room for doubt that the appellant was the tenant of the premises. The 1st respondent, together with the other respondents, constituted the body of landlords and, by consent, implicit or otherwise, of the plurality of landlords, one of them representing them all, was

collecting rent. In short, he functioned, for all practical purposes as the landlord, and was therefore entitled to institute proceedings qua land- lord.

7. This Court, in *Sri Ram Pasricha Vs. Jagannath*, (AIR 1976 SC 2335) clarified that a co- owner is as much an owner of the entire property as any sole owner of the property is: "Jurisprudentially, it is not correct to say that a co-owner of property is not its owner. He owns very part of the composite property alongwith others and it cannot be said that he is only a part owner or a fractional owner of the property .. It is therefore, not possible to accept the submission that the plaintiff, who is admittedly the landlord and co-owner of the premises, is not the owner of the premises within the meaning of section 13'(l) (f). It is not necessary to establish that the plain- tiff is the only owner of the property for the purpose of section 13 (1) (f) as long as he is a co-owner of the property, being at the same time acknowledged landlord of the defendants." That case also was one for eviction under the rent control law of Bengal. The law having been thus put beyond doubt, the contention that the absence of the other co-owner on record disentitled the first respondent from suing for eviction, fails. We are not called upon to consider the piquant situation that might arise if some of the co-owners wanted the tenant to continue contrary to the relief claimed by the evicting co-owner."

19. As regards third submission relating to availability of alternate accommodation, the first appellate Court re-appreciated the evidence in paragraphs 17, 18, 21 and 22 of its judgment. The gist thereof reads as under:

"17. That, the plaintiff No.1 has stated in examination-in-chief, at present he is running his business some how accommodated in a tenanted small chamber of his father Puttanlal Jain situated at Jinsi Nala No.1, Khetan Chambers (Ambasdor Hotel), Lashkar, Gwalior. The said shop was owned by Khaintan. In addition, his elder brother, Sourab Jain is also doing his profession in the said shop. As such, there is no sufficient space in the said shop to carry on business by the

plaintiff No.1 and he does not have any other alternate suitable accommodation in the city of Gwalior.

18. That, plaintiffs' witness, namely; Nilesh Sharma husband of Smt. Prabha Sharma, one of the co-owners' deposed to the same effect. He further deposed that the duplex accommodation of 700 sq.feet situated at city centre, Gwalior was a residential one and, therefore, not suitable for the plaintiff No.1 for carrying on the profession of advocacy as the family of the plaintiff No.1 is residing therein.

21. That, by placing reliance on judgment of Apex Court in the case of *Madhusudan Das Vs. Narayani Bai,* AIR 1983 SC 114, it was observed that if two views are possible, the finding of the trial Court ought not to upset unless there is glaring error at the appellate stage. In the present case, such a situation arises as two views are possible, however, the finding of the trial Court deserves to be not interfered with.

22. That, based on re-appreciation of the evidence, it was concluded by the first appellate Court that the plaintiff No.1 has successfully established that he has no alternate suitable accommodation in the city of Gwalior for carry on his profession and upheld the finding of the trial Court in that regard."

20. The main thrust of the defendant was that the plaintiff No.1 could establish his advocate office even in residential area, therefore, in view of availability of alternate accommodation, the need of the plaintiff No.1 of the suit premises could not be said to be bona fide. The first appellate Court has considered this submission in *extenso* and on appreciation of evidence on record, it has been found that in the residential accommodation occupied by the plaintiff No.1, he is residing with his wife and children which does not have sufficient space to make a provision for establishing a professional office.

21. That apart, the plaintiff No.1 being a owner of the suit premises has a right to run his advocate's office in the suit premises owned by him as per his choice or preference or selection or convenience or favourite place etc., and he cannot be left to be satisfied on the plea of availability and justifiability of alternate accommodation as advanced by the defendant. As such, both the Courts below upon critical evaluation of the evidence on record have reached

a conclusion that the need of the plaintiff No.1 in respect of the suit premises was bona fide for opening and establishing advocate office to be run by him. With the aforesaid findings both the Courts below have decreed the suit.

22. The Supreme Court in *Shiv Sarup Gupta Vs. Dr. Mahesh Chand Gupta,* AIR 1999 SC 2507 has held as under:

> "13 Chambers 20th Century Dictionary defines bona fide to mean 'in good faith : genuine'. The word 'genuine' means 'natural; not spurious; real: pure: sincere'. In Law Dictionary, Mozley and Whit ley define bona fide to mean 'good faith, without fraud or deceit'. Thus the term bona fide or genuinely refers to a state of mind. Requirement is not a mere desire. The degree of intensity contemplated by 'requires' is much more higher than in mere desire. The phrase 'required bona fide' is suggestive of legislative intent that a mere desire which is outcome of whim or fancy is not taken note of by the Rent Control Legislation. A requirement in the sense of felt need which is an outcome of a sincere, honest desire, in contra-distinction with a mere pretence or pretext to evict a tenant, on the part of the landlord claiming to occupy the premises for himself or for any member of the family would entitle him to seek ejectment of the tenant. Looked at from this angle, any setting of the facts and circumstances protruding the need of landlord and its bona fides would be capable of successfully withstanding the test of objective determination by the Court. The Judge of facts should place himself in the arm chair of the landlord and then ask the question to himself-whether in the given facts substantiated by the landlord the need to occupy the premises can be said to be natural, real, sincere, honest. If the answer be in the positive, the need is bona fide. The failure on the part of the landlord to substantiate the pleaded need, or, in a given case, positive material brought on record by the tenant enabling the court drawing an inference that the reality was to the contrary and the landlord was merely attempting at finding out a pretence or pretext for getting rid of the tenant, would be enough to persuade the Court certainly to deny its judicial assistance to the landlord. Once the court is satisfied

of the bona fides of the need of the landlord for premises or additional premises by applying objective standards then in the matter of choosing out of more than one accommodation available to the landlord his subjective choice shall be respected by the court. The court would permit the landlord to satisfy the proven need by choosing the accommodation which the landlord feels would be most suited .for the purpose; the court would not in such a case thrust its own wisdom upon the choice Of the landlord by holding that not one. but the other accommodation must be accepted by the landlord to satisfy his such need. In short, the concept of bonafide need or genuine requirement needs a practical approach instructed by realities of life. An approach either too liberal or two conservative or pedantic must be guarded against.

14. The availability of an alternate accommodation with the landlord i.e. an accommodation other than the one in occupation of the tenant wherefrom he is sought to be evicted has a dual relevancy. Firstly, the availability of another accommodation, suitable and convenient in all respects as the suit accommodation, may have an adverse bearing on the finding as to bona fides of the landlord if he unreasonably refuses to occupy the available premises to satisfy his alleged need. Availability of such circumstance would enable the Court drawing an inference that the need of the landlord was not a felt need or the state of mind of the landlord was not honest, sincere, and natural. Secondly, another principal ingredient of clause(e) of sub-section (1) of Section 14, which speaks of nonavailability of any other reasonably suitable residential accommodation to the landlord, would not be satisfied. Wherever another residential accommodation is shown to exist as available than the court has to ask the landlord why he is not occupying such other available accommodation to satisfy his need. The landlord may convince the court that the alternate residential accommodation though available is still of no consequence as the same is not reasonably suitable to satisfy the felt need which the landlord has succeeded in demonstrating objectively to exist. Needless to say that an alternate

> accommodation, to entail denial of the claim of the landlord, must be reasonably suitable, obviously in comparison with the suit accommodation wherefrom the landlord is seeking eviction. Convenience and safety of the landlord and his family members would be relevant factors. While considering the totality of the circumstances, the court may keep in view the profession or vocation of the landlord and his family members, their style of living, their habits and the background wherefrom they come."

23. Apart from that, defendant raised a plea before the first appellate Court that there was no attornment of tenancy of the defendant by the predecessor-in-title, namely; Umaji Rao Bhonsle or his legal heirs in favour of the plaintiffs' and, therefore, the suit was not was maintainable at the instance of the plaintiffs' as there was no relationship of landlord and tenant between the plaintiffs' and the defendant was also justifiably rejected.

24. As regards to the aforesaid, the sale deed of the suit premises was executed by legal heirs of Umaji Rao Bhonsle in favour of plaintiffs' on 13/09/2008. At that time, the defendant was in occupation of the suit premises as tenant and in fact, the power of attorney holder of the appellant, Dr. Om Prakash Gupta in F.A.No.14/2005 had consented for the sale deed dated 13/09/2008. The plaintiffs' have served a notice to the defendant dated 10/02/2009 wherein it was clearly mentioned that the plaintiffs' have purchased the suit premises from their predecessor-in-title vide registered sale deed dated 13/09/2008. It was further stated therein that the defendant became tenant of the plaintiffs' (exhibit P/3 notice, exhibit P/4 postal receipt and exhibit P/5 acknowledgment). That apart, defendant in paragraph 8 of the written statement has also admitted that the plaintiffs' are valid title-holders having purchased the suit premises from the legal heirs of Umaji Rao Bhonsle. As such, defendant had knowledge of the fact that the plaintiffs' have acquired valid title over the suit premises by virtue of sale deed dated 13/09/2008 executed by the legal heirs of the predecessor-in-title, namely; Umaji Rao Bhonsle. Exhibit D/1, a rent note was in relation to the suit premises which was given on rent by the predecessor-in-title, namely; Umaji Rao Bhonsle executed in favour of defendant. Under such circumstances, conclusion as regards absence of attornment of tenancy of the suit premises is *de hors* on record. Hence, the judgment relied upon in the case of *C. Chandramohan Vs. Sengottaiyan (Dead) by LRs and others,* (2000) 1 SCC 451 will not render any assistance

in favour of defendant in any manner whatsoever.

25. After having gone through the concurrent impugned judgments of the Courts below, this Court is of the view that both the Courts below have recorded a comprehensive findings of fact upon critical evaluation of the evidence on record that the plaintiff No.1 has been able to establish 'bona fide need of non-residential accommodation' as contemplated under section 12(1)(f) of the Act and decreed the suit. The entire gamut of matter is in realm of facts. No question of law much less substantial question of law arises warranting interference under section 100 of the Code.

26. The appeal sans merit and is accordingly dismissed.

Certified copy as per rules.

Appeal dismissed.

I.L.R. [2015] M.P., 1012
APPELLATE CIVIL
Before Mr. Justice Rohit Arya
S.A. No. 307/2004 (Gwalior) decided on 22 April, 2014

BAIJNATH SINGH & anr. ... Appellants
Vs.
JAGDISH & ors. ... Respondents

Court Fees Act (7 of 1870), Section 7(iv)(c) - Fixed Court fee - Declaration **- Non-executant seeking declaration of sale deed as null & void and same is not binding on him, he is only required to pay the fixed court fee - If executant to the sale deed seeks cancellation of sale deed, he is required to pay advalorem court fee. (Para 6)**

न्यायालय फीस अधिनियम (1870 का 7), धारा 7(iv)(सी) – निश्चित न्यायालय फीस – घोषणा – विक्रय विलेख शून्य एवं अकृत होने तथा वह उस पर बंधनकारी नहीं होने की घोषणा चाहने वाले गैर–निष्पादिती से केवल निश्चित न्यायालय फीस अदा करना अपेक्षित है– यदि विक्रय विलेख का निष्पादिती विक्रय विलेख का निरस्तीकरण चाहता है उसे मूल्यानुसार न्यायालय फीस अदा करना अपेक्षित है।

Case referred :

(2010) 12 SCC 112.

S.K. Jain, for the appellants.

JUDGMENT

ROHIT ARYA, J. :- This appeal by defendants under Section 100 of C.P.C. is directed against the judgment and decree dated 28/2/2004 passed by Additional District Judge, Sabalgarh, District Morena in Civil Appeal No. 31-A/2001; reversing the judgment and decree dated 15/10/2001 passed by Civil Judge, Class I, Sabalgarh in Civil Suit No. 33-A/1998; by which though on merits the trial Court has recorded positive findings in favour of plaintiffs; however, dismissed the suit while answering issue No. 4 as regards pecuniary jurisdiction of the Court. First appellate Court has affirmed the findings of the trial Court on appeal by plaintiffs on merits of the suit as well as set aside the judgment of the trial Court on issue No. 4 relating to pecuniary jurisdiction.

2. Appeal is admitted on the following substantial question of law:-

"Whether, the first appellate Court was justified reversing the findings of the trial Court as regards pecuniary jurisdiction ?"

3. Facts necessary for disposal of this appeal in a narrow compass are that the plaintiffs have filed a suit for declaration and permanent injunction in respect of the Pator and open land of house No. 41 by stating themselves to be the owner of entire suit land ad-measuring 7 biswa falling in survey No. 461, village Sabalgarh, Ward No. 15 against defendants. Defendant No. 3 Kalawati on 13/3/1995 had executed a registered sale deed in favour of defendants No. 4 and 5 in respect of the suit land. On the day of sale deed, defendant No. 2 Babulal was residing in that Pator. Defendant No. 1 Nathi and defendant No. 2 Babulal and one Ramcharan are real brothers. The suit land was purchased by father of the plaintiffs Moti for his own residence in samwat 2015. There was an open land and Pator adjacent to the suit house of the ownership of Late Moti. Moti died 10 years preceding to the date of filing of instant suit. The plaintiff thereafter also purchased another open land adjacent to the suit land and constructed a house, where he used to live with his family and had also permitted defendant No. 2 Babulal to live therein. The house of the defendant No. 1 and his two brothers were on the western side of the suit house. Share of defendant No. 2 was sold by defendant No. 1 to one Murari Vaishya and ousted the defendant No. 2. The plaintiff allowed Babulal to live in suit house where he was living with his family. As defendants tried to forcibly take possession of the suit property, though they had no right,

title or interest over the same, plaintiff filed a suit against the defendants for declaration and injunction. During pendency of the suit, an amendment was brought seeking declaration of the alleged sale deed dated 13/3/1995 executed by defendant No. 3 Kalawati wife of Nathilal (defendant No. 1) in favour of defendants No. 4 and 5 as null and void.

4. Defendants No. 1 to 3 and 5 by filing joint written statement have denied the plaint allegations. It is submitted that since the suit property is not registered in the name of the plaintiffs in the municipal records, the plaintiffs cannot claim title over the suit land. It is also submitted that description of suit property is absolutely vague. It is submitted that suit property belong to one Pathua and after his death, his daughter/defendant No. 3 Kalawati become the owner and came in possession thereof. Accordingly, she has executed the sale deed dated 13/3/1995 to defendants No. 4 and 5. Defendant No. 2 Babulal has filed written statement supporting the claim of the plaintiff.

5. Based on the aforesaid pleadings, the trial Court framed issues and allowed the parties to lead evidence. The trial Court upon critical evaluation answered issue No. 1 to 3 in favour of the plaintiff, however, trial court dismissed the suit on the ground of lack of pecuniary jurisdiction. The first appellate Court on appeal at the instance of plaintiffs, re-appreciated the evidence on record. The first appellate Court has found that upon perusal of the Khasra Panchshala Ex. P/1 from Samwat 2021 to 2024, Ex. P/3 of Samwat 2015-2016, Ex. P/4 of Samwat 2025 and Ex. P/5 of Samwat 2041 to 2045, Trace Map, Ex. P/2, Khasra Ex. P/6 of year 1992-93, it is evident that the suit land falling in survey No. 1175 new number 461 is of the ownership of Nagar Palika by virtue of Patta in its name wherein the suit property is falling. Thereafter in khasra of Samwat 2015 name of late Moti has been shown in possession of the Patore. There is no mention in the record that Moti has ever been dispossessed by the Nagar Palika from the suit land. As such, late Moti was found to be in possession of the suit property as per record. The first appellate Court has further found that the defendants failed to establish that the suit property belong to Pathua as there is no documentary evidence to that effect. Accordingly, the first appellate Court has found that the alleged sale deed dated 13/3/1995, said to have been executed by defendant No. 3 Kalawati in favour of defendants No. 4 and 5 as null and void. As such, the findings of the trial Court as regards, the merits of the claim of the plaintiffs was confirmed. On issue as regards pecuniary jurisdiction, the first appellate

Court has discussed the matter in para 24 to 26, wherein, the first appellate Court has found that the trial Court has committed error of law and fact while dismissing the suit on the ground of pecuniary jurisdiction. It has been found that plaintiffs have sought declaration of sale deed dated 13/3/1995 as null and void. Admittedly, the plaintiffs were not party to the aforesaid sale deed and therefore, plaintiffs were not required to affix ad valorem court fees on the value of the sale deed shown. Instead fix court fees was rightly paid and affixed by the plaintiffs. As such the trial Court had pecuniary jurisdiction up to Rs. 50,000/- to try the suit. Of course, if the plaintiffs were party to the sale deed, they were required to pay ad valorem court fees in terms of Section 7(iv) (d) of the Court Fees Act, but that is not the case here and therefore, the trial Court has committed error of law having dismissed the suit for want of pecuniary jurisdiction. At this stage, reference may also be made over to the judgment of Supreme Court in the case of *Suhrid Singh alias Sardool Singh Vs. Randhir Singh and others,* (2010) 12 SCC 112; wherein; in para 7 it has been held as below:-

> "7. Whether the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non est, or illegal or that it is not biding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to A and B, two brothers. A executes a sale deed in favour of C. Subsequently, A wants to avoid the sale. A has to sue for cancellation of the deed. On the other hand, if B, who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by A is invalid/void and non est/illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If A, the executant of the deed, seeks cancellation of the deed, he has to pay ad valorem court fees on the consideration stated in the sale deed. If B, who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17 (iii) of the Second

Schedule of the Act. But if B, a nonexecutant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad valorem court fees as provided under Section 7 (iv) (c) of the Act."

6. Thus, in the light of aforesaid judgment, if the person non-executant seeking declaration of a sale deed as null and void and the same is not binding on him, he is only required to pay the fix court fees whereas, in a case where a person/executant to the sale deed seeks cancellation of the sale deed as null and void, he is required to pay ad valorem court fees.

7. Having considered the judgments impugned and the record of the case, this Court is of the view that as regard merits of the claim of the plaintiff, both the Courts have recorded concurrent findings of fact which do not warrant any interference. As regards pecuniary jurisdiction, the first appellate Court has rightly reversed the findings of the trial Court. Admittedly, the plaintiffs are not party to the alleged sale deed dated 13/3/1995. They merely sought a declaration that sale deed be declared as null and void and therefore, in the light of law laid down by Hon. Supreme Court in *Suhrid Singh* (supra), the plaintiffs were required to pay only the fix courts fees and therefore, the trial Court was having pecuniary jurisdiction to try the suit. Resultantly, the decree passed by the first appellate Court to the effect that defendants were restrained from dispossessing the plaintiffs is held to the fully justified. Accordingly, substantial question of law is answered in affirmative. Instant appeal at the instance of defendants is dismissed being sans merits.

Appeal dismissed.

I.L.R. [2015] M.P., 1016
APPELLATE CIVIL
Before Mr. Justice R.S. Jha
M.A. No. 1058/2014 (Jabalpur) decided on 7 May, 2014

ICICI LOMBARD GEN. INS. Co. LTD. ... Appellant
Vs.
KHARAGRAM PAJAPATI & anr. ... Respondents

***Motor Vehicles Act (59 of 1988), Section 173 - Liability of Insurance Company* - Held - In view of the decisions rendered by this Court and in view of finding recorded by Claims Tribunal that the driver**

of the tractor was negligent for injury caused to the claimant, Insurance Co. is liable for paying compensation - No illegality in the impugned award - Appeal is dismissed. (Para 4)

मोटर यान अधिनियम (1988 का 59), धारा 173 – बीमा कंपनी का दायित्व – अभिनिर्धारित – इस न्यायालय द्वारा दिये गये निर्णयों को दृष्टिगत रखते हुये और दावा अधिकरण द्वारा अभिलिखित किये गये इस निष्कर्ष को दृष्टिगत रखते हुये कि दावाकर्ता को कारित की गई क्षति के लिये ट्रेक्टर के चालक की उपेक्षा थी – बीमा कंपनी प्रतिकर का भुगतान करने के लिये दायी है – आक्षेपित अवार्ड में कोई अवैधता नहीं – अपील खारिज।

Cases referred :

2009 (3) ACCD 1753 (M.P.), 2010(1) ACCD 444 (M.P.)

T.S. Lamba, for the appellant.

(Supplied : Paragraph numbers)

ORDER

R.S. JHA, J. :- Heard on the question of admission.

2. The appellant has filed this appeal being aggrieved by the award dated 15-2-2014, passed by the A.M.A.C.T. Damoh in Claim Case No. 114/2013 whereby the claim of the respondent/claimant has been allowed and a compensation of ₹ 2,86,143/- has been awarded to him.

3. It is submitted by the learned counsel appearing for the appellant/ insurance company that the accident occurred while the claimant was using the tractor that was insured was being used for the purposes of threshing. It is submitted that on account of the negligence on the part of the claimant his right hand went inside the thresher and was required to be amputated. It is submitted that in such circumstances, the appellant/insurance company cannot be held liable as using of the tractor with the thresher was not covered by the policy.

4. Having heard the learned counsel for the appellant and after perusing the record it is observed that the Tribunal, by relying on two decisions rendered by this Court in the cases of *United India Insurance Company, Limited v.Anandi bai,* 2009(3) ACCD 1753 (M.P.) and *United India Insurance Company, Limited v. Rajendra & others,* 2010(1) ACCD 444 (M.P.) wherein

under similar circumstances of use of tractor for threshing this Court has held the insurance company liable for paying compensation and has allowed the claim of the claimants. It is also observed that the Claims Tribunal has recorded a finding to the effect that while operating the tractor on account of negligence on the part of the driver concerned the accelerator was suddenly pressed, as a result of which speed of the thresher increased suddenly and the right hand of the claimant went inside the thresher causing injury to the claimant. In the circumstances, the Claims Tribunal, by relying on the aforesaid decisions rendered by this Court has awarded compensation.

5. In view of the aforesaid, I am of the considered opinion that there is no illegality or manifest irregularity in the impugned award, warranting interference of this Court, therefore, the petition filed by the petitioner being meritless is accordingly dismissed.

Petition dismissed.

I.L.R. [2015] M.P., 1018
APPELLATE CIVIL
Before Mr. Justice R.S. Jha
M.A. No. 1578/2014 (Jabalpur) decided on 15 July, 2014

NATIONAL INSURANCE COMPANY ... Appellant

Vs.

BHARTI KOL & ors. ... Respondents

Motor Vehicles Act (59 of 1988), Section 173 - Assessment of compensation by Tribunal **- Deceased, was working as Assistant Teacher - Award of Rs. 48,42,440/- - 30% added towards future prospects - Rs. 1,00,000/- awarded towards loss of consortium and Rs. 25,000/- towards last rites & rituals - Held - Award not on higher side as per the dictum of Apex Court in Rajesh's case - Appeal by Insurance Co. dismissed. (Para 5)**

मोटर यान अधिनियम (1988 का 59), धारा 173 – अधिकरण द्वारा प्रतिकर का निर्धारण – मृतक सहायक शिक्षक के रूप में कार्य कर रहा था – रू. 48,42,440/– का अवार्ड – भविष्य की संभावनाओं की ओर 30% जोड़ा गया – साथ (कॉन्सॉर्टियम) की हानि की ओर रू. 1,00,000/– तथा अंतिम क्रियाकर्म की ओर रू. 25,000/– अवार्ड किये गये – अभिनिर्धारित – राजेश के प्रकरण में सर्वोच्च न्यायालय के आदेश के

अनुसरण में अवार्ड अधिक नहीं है – बीमा कंपनी की अपील खारिज।

Cases referred :

2013 (111) 459 (SC) = (2013) 5 SCR 961

N.S. Ruprah, for the appellant.

(Supplied: Paragraph numbers)

ORDER

R.S. JHA, J. :- This appeal has been filed by the Insurance Company being aggrieved by award dated 02.04.2014 passed by the Motor Accident Claims Tribunal, Rewa in Claim Case No. 35/2013 whereby a sum of Rs.48,42,440/- towards compensation has been awarded on the death of the deceased Sudama Kol who was working as an Assistant Teacher, in an accident that occurred on 19.11.2012 near Community House, Magrohar District Sidhi.

2. It is submitted by the learned counsel for the appellant that the compensation awarded to the claimants is exorbitantly high inasmuch as the income ascertained by the Tribunal was enhanced by 30% towards future prospects which is not permissible. It is further submitted that the Tribunal has erred in awarding Rs. One lac towards loss of consortium and Rs.25,000/- towards funeral and other expenses which is highly excessive and exorbitant.

3. The learned counsel for the appellant submits that the claim awarded by the tribunal is on higher side and therefore, the impugned award deserves to be set aside.

4. Having heard the learned counsel for the appellant it is observed that the tribunal has computed the annual income of the deceased as Rs.3,24,000/- and has added a sum of Rs.97,200/- towards future prospects i.e. a total sum of Rs.4,21,200/- and has thereafter applied a multiplier of 14 looking to the age of the deceased and after making deduction, has calculated the total compensation of Rs.47,70,440/-. The tribunal in paragraph 23 has thereafter taken into consideration the decision of the Supreme Court rendered in the case of *Rajesh and others Vs. Rajveer Singh and others* 2013(111) 459 (SC) and awarded Rs. One lac towards loss of consortium and Rs.25,000/- towards other heads.

5. In view of the aforesaid contention and looking to the law laid down

by the Supreme Court in the case of *Rajesh* (supra), I find that the addition of 30% in the income towards future prospects and award of Rs. One lac towards consortium, and Rs.25,000/- towards other heads is not on the higher side or excessive. The compensation awarded by the tribunal is in accordance with the law laid down by the Supreme Court in the case of *Rajesh* (supra).

6. Accordingly, I do not find any illegality or perversity in the impugned award warranting interference by this court.

7. The appeal being meritless is accordingly dismissed.

8. On the request of the learned counsel for the appellant, the Insurance Company is granted three months' time to deposit the amount of award with the interest.

Appeal dismissed.

I.L.R. [2015] M.P., 1020
APPELLATE CIVIL
Before Mr. Justice N.K. Gupta
F.A. No. 488/2002 (Jabalpur) decided on 11 November, 2014

MEERA BAI (SMT.) ... Appellant
Vs.
RAMESH GURU & anr. ... Respondents

A. Specific Relief Act (47 of 1963), Section 34 - Consequential relief - **Appellant filed suit for declaration that she is married wife of one Santosh Guru and is entitled for an amount of Rs. 2,80,000/- - No relief that the amount be paid to her was sought - In absence of consequential relief, suit for declaration simpliciter is not maintainable. (Para 16)**

क. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 34 – पारिणामिक अनुतोष – अपीलार्थी ने घोषणा हेतु वाद प्रस्तुत किया कि वह संतोष गुरू की विवाहिता पत्नी है और वह रू. 2,80,000/– के लिये हकदार है – कोई अनुतोष नहीं चाहा गया कि उसे रकम अदा की जाये – पारिणामिक अनुतोष की अनुपस्थिति में साधारणतः घोषणा हेतु वाद पोषणीय नहीं।

B. Civil Procedure Code (5 of 1908), Order 2 Rule 2(2) - Necessary Party - **Amount with LIC and MPEB - Amount not disbursed to appellant - Officials of LIC and MPEB are necessary party. (Para 14)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 2 नियम 2(2) – आवश्यक पक्षकार – जीवन बीमा निगम तथा म.प्र. विद्युत मंडल के पास रकम है – अपीलार्थी को रकम संवितरित नहीं की गई – जीवन बीमा निगम एवं म.प्र.विद्युत मंडल के अधिकारी आवश्यक पक्षकार हैं।

***C. Long Cohabitation* - If a woman resides with a particular person for a sufficient long period, it may not be required to prove that marriage has taken place in an appropriate manner - Appellant claiming to have resided with Santosh Guru only for a period of 13 months - She is required to prove that marriage took place as per Saptapadi or Bhanwar ceremony. (Para 12 & 13)**

ग. दीर्घ सहवास – यदि कोई महिला किसी विशिष्ट व्यक्ति के साथ पर्याप्त रूप से दीर्घ अवधि तक निवासरत रहती है, तब यह साबित करना अपेक्षित नहीं कि समुचित ढंग से विवाह संपन्न हुआ है – अपीलार्थी का दावा कि वह संतोष गुरू के साथ सिर्फ 13 माह की अवधि के लिये निवासरत थी – उसे साबित करना अपेक्षित है कि सप्तपदी या भांवर रीति के अनुसार विवाह संपन्न हुआ है।

Case referred :

AIR 1965 SC 1564.

M.L. Jaiswal with *K.K. Gautam,* for the appellant.
A.D. Mishra, for the respondents.

JUDGMENT

N.K. GUPTA, J. :- The appellant has preferred the present appeal being aggrieved with the judgment and decree dated 30.10.2002 passed by the First Additional District Judge, Sagar in Civil Suit No.30-A of 2002 whereby her suit for declaration and injunction was dismissed.

2. The facts of the case in short are that the appellant has filed a civil suit before the District Court, Sagar that she was widow of one Santosh Guru, who expired in an electrical accident on 14.6.1999 whereas, he was working as Line Helper in MPEB. After his death a sum of Rs.2,80,000/- was due in three insurance policies of salary saving scheme. The respondents were the nominees of the deceased Santosh Guru and they were entrusted to receive the Insurance amount from the department and therefore, a suit for declaration and injunction was filed that it be declared that being a widow of Santosh Guru the appellant was entitled to get a sum of Rs.2,80,000/- and a perpetual

injunction was sought that the respondents be prohibited to get the said sum.

3. The respondents in their written statement denied the claim of the appellant. They denied that the appellant was married to their brother Santosh Guru. After death of the deceased the department gave the remaining salary of 14 days of the deceased Santosh Guru and funeral expenses of Rs. 1500/- to the respondents. Initially a talk took place between the father of the appellant relating to marriage of deceased Santosh Guru but, after arrangement of engagement ceremony, marriage could not take place because the appellant was already married with one Jamna Prasad Chaturvedi and had a female child. Consequently, it was prayed that the suit filed by the appellant may be dismissed.

4. The learned Additional District Judge has framed the issues as to whether the appellant was widow of the deceased Santosh Guru, whether she was entitled to get the insurance amount of Rs.2,80,000/, whether she was already married with Jamna Prasad Chaturvedi and whether suit was filed without any basis. After considering the evidence adduced by the parties the trial Court dismissed the suit.

5. I have heard learned counsel for the parties at length.

6. In the present case the respondents have denied the marriage of the appellant with the deceased Santosh Guru. Also during the final argument the learned counsel for the respondents has submitted that declaratory suit filed by the appellant was not maintainable due to two reasons, firstly that necessary parties were not included in the suit and secondly no appropriate consequential relief was sought by the appellant and therefore, she was not entitled to get the declaratory decree. The learned counsel for the appellant has submitted that the respondents did not take any such ground before the trial Court and therefore, such grounds cannot be raised at this stage. However, the factual and legal position of the pleadings and case are to be considered one by one.

7. The appellant examined herself as PW1 along with Devi Prasad (PW3) as a priest, Makhan Arora (PW4) as a photographer, Jaishankar Prasad (PW4) and Jamna Prasad (PW5) as witnesses who, attended the marriage ceremony and Majboot (PW2) who, transported the luggage relating to marriage from Village Mohar to Village Bareli in his tractor trolley. On the other hand the respondents have examined Ram Dayal Dubey (DW1), Awadh Nàrayan

(DW2) Ramesh (DW3) and Suresh Guru (DW4) to contradict the evidence given by the appellant. The appellant has filed a copy of the invitation card Ex.P/11 and a receipt of payment of Rs.900/-given to one Majboot Singh. Majboot (PW2) has stated that he took the luggage relating to marriage from Village Mohar to Village Bareli but, in the cross examination he has accepted that he had relations with father of the appellant since 20-25 years. He was not even aware of the name of the appellant. He has further accepted that one year prior to his statement he met with the Advocate of the appellant and the learned Advocate told him about the facts which he had to say before the Court. The receipt Ex.P/11 is not a routine receipt. It is a receipt prepared by typing. Looking to the text and typing of the receipt, it appears that it was prepared in back date at the time of filing of the suit. The trial Court has rightly disbelieved the testimony of the witness Majboot that he transported any luggage relating to marriage of the appellant from Village Mohar to Village Bareli.

8. Meera Bai, Devi Prasad, Jamna Prasad and Jaishankar Prasad were examined as witnesses of the marriage. In the statement of the appellant Meera Bai she has stated that the marriage was performed by Pandit Devi Prasad only but, in the cross examination she has accepted that Devi Prasad was husband of her cousin. Devi Prasad initially claimed that he performed the marriage of the deceased Santosh with Meera Bai. However, in the cross examination he could not tell about the rituals and marriage hymns required to be read at the time of marriage and he shifted his responsibility to one Hari Sharan that the marriage was performed by Hari Sharan and the witnesses who, were examined after Devi Prasad have stated that the marriage was performed by Devi Prasad and Hari Sharan. However, Pandit Hari Sharan was not examined before the trial Court. If marriage was performed by Pandit Hari Sharan then this fact must be in the knowledge of the appellant but, she did not mention about such a fact in her statement and therefore, it is not established by the appellant herself that marriage was performed by Pandit Hari Sharan. It appears that the witness Devi Prasad could not tell about the procedure followed by the Pandit while performing the marriage and therefore, he shifted the responsibility upon someone else. Thereafter the witnesses improved the fact as developed by the witness Devi Prasad. A material contradiction is visible between the statements of the appellant and her witnesses Devi Prasad and Jaishankar Prasad. It is apparent that Devi Prasad

was not a competent Pandit to perform any marriage. He could not show any document of a particular year that he had performed the marriages of some reputed persons or other persons. He was brother-in-law of the appellant and therefore, if he was Pandit to perform the marriage then he must have also performed the marriage of brother of the appellant whereas, he could not tell the name of wife of brother of the appellant or father of the bride of the appellant's brother. After considering the evidence, it appear that he never performed the marriage of anyone. Therefore his claim that he performed the marriage of the appellant and the deceased Santosh appears to be a falsehood. Consequently, the testimony of Jamna Prasad (PW5) and Jaishankar Prasad (PW4) also appears to be doubtful that they saw the marriage performed by Pandit Devi Prasad. Jaishankar Prasad claims that he was present at the time of marriage but, he could not tell as to whether Devi Prasad (PW3) read the marriage hymns in Hindi or Sanskrit. If he was present in such a marriage then he should be certain about the fact that various marriage hymns were read in Sanskrit or Hindi. Jamna Prasad (PW5) is father of the appellant and he could not state about the details qf performance of the marriage done by the concerned Pandit. He denied that he was not related with Devi Prasad whereas, the appellant has accepted that Devi Prasad was the husband of her cousin. Hence the eye witnesses could not prove that the marriage of the appellant and the deceased Santosh Guru was ever performed. Nobody could prove that ceremony of Saptapadi took place between the appellant and the deceased.

9. The appellant has filed photographs in the case. The photographer Makhan Arora (PW4) could show only four negatives. However, six photographs were exhibited as Exs. P/1 to P16. The respondents have filed the photographs Exs.D/1 and D/2 to show that the document Ex.D/1 was the original photograph and the document Ex.D/2 was a derived copy from the photograph Ex.D/1 with the pretext that the photographs Exs.P/1 to P.6 were prepared photographs from the original photographs. Makhan Arora (PW4) has accepted that in June 2000 when Jamna Prasad Tripathi (PW5), father of the appellant, demanded photographs he did not have any negatives because negatives were given to one Chandra Shekhar Tiwari, he could not show any reason as to how he got four negatives of such photographs. He has accepted that by some photographs copy of the photographs and even negatives can be prepared. Under such circumstances, it could not be proved that negatives

Exs.P/1 to P/4 were the original negatives or he prepared the same on the basis of the photographs. On comparison of the photographs Ex.P/2 with photograph Ex.D/1, it appears that the photographs Ex.P/1 to P/6 are prepared photographs from the original photograph and image in such photograph is not so sharp as shown in the photographs Ex./D/1. Also it is accepted by the respondents that an engagement ceremony took place between the appellant and the deceased. Therefore, such photographs could be of that engagement ceremony. Makhan Arora has stated that he took 20-22 photographs on that day. Devi Prasad (PW3) has stated that when "bhanwar" (Saptapadi) took place between the appellant and Santosh Guru, photographs were taken. If a marriage took place between the appellant and Santosh Guru and photographs of *bhanwar* ceremony were taken then as to why such photographs of *bhanwar* ceremony were not placed before the trial Court.

10. When it is accepted by the respondents that an engagement ceremony took place between the parties then such photographs could be the photographs of that function. If Makhan Arora took 20-2 3 photographs in past relating to the marriage ceremony then photographs relating to *bhanwar* (Saptapadi) ceremony could have been filed before the Court. Similarly at the time of *kanyadan,* Jamna Prasad, father of the appellant, must have been present in the photographs but, no such photograph is produced before the trial Court to show that father of the appellant was present in any of the ceremonies. Hence by filing of 5-6 photographs it cannot be said that those photographs were related to the marriage ceremony. Those photographs could be of engagement ceremony and therefore, with the help of such photographs it was not proved that the marriage of the appellant took place with Santosh Guru.

11. In the present case according to the invitation given, marriage was performed in the house of one Awadh Narayan (DW2). Awadh Narayan (DW2) is examined from the side of the defence and he refused that such ceremony was performed in his house. Possibility cannot be ruled out that Awadh Narayan was a near relative of the respondents and therefore, he has taken such a somersault but the plaintiff has to stand its case on its own evidence. The appellant could not prove that her valid marriage took place with Santosh Guru.

12. If a woman resides with a particular person for a lengthier period then

it may not be required to prove that her marriage took place in an appropriate manner. However, in the present case the appellant claims that she resided with the deceased Santosh Guru only for 13 months and therefore, for such a small period, it cannot be presumed that she was a wedded wife of the deceased Santosh Guru. Except for the appellant Meera and her father Jamna Prasad there is no witness to establish that the appellant ever resided in the house of Santosh Guru or she resided in his house till *treodashi* ceremony after his death. Hence it is not proved that the appellant ever resided in the house of Santosh Guru.

13. If a person claims about a marriage with his or her spouse then it is to be proved that a ceremony of *Shaptadi or bhanwar* was performed by a Pandit between such a pair and if such customary procedure is not proved then it cannot be said that such person was married to her or his spouse. In case of *"Bhaurao Shankar Lokhande Vs. State of Maharashtra"*, [AIR 1965 SC 1564], it is held that to prove a valid hindu marriage, two ceremonies i.e. invocation before scared fire and Saptapadi are to be proved. In the present case, the appellant has failed to prove that she was the wedded wife of the deceased Santosh Guru. The trial Court has rightly found that the appellant could not prove her marriage with Santosh Guru.

14. When it is not established that the appellant was the wife of Santosh Guru then she was not entitled for any declaration or injunction in her favour. The learned counsel for the respondents have raised two objections about the maintainability of the declaratory suit. Though such objections have not been raised before the trial Court but, such objections are legal objections and those could be raised even in the first appeal. Therefore, it is necessary to decide such objections. The first objection relating to necessary party appears to be correct. For declaratory decree it is necessary that a person be made party who denied the right of the plaintiff. In the present case, the appellant gave a notice Ex.P/7 to Branch Manager, LIC, Sagar not to disburse policy amount to the respondents. It was apparent that the amount was under control of Branch Manager, LIC Sagar. On giving a notice to such Branch Manager he did not pay the amount of compensation or insurance amount to the appellant and therefore, apparently he had also denied the right of the appellant. Similarly, the appellant has sought the various dues from the employer of the deceased Satish Guru i.e MPEB and it is also apparent that the officers of MPEB did not make any payment to the appellant and therefore, they had also denied

about the rights of the appellant. Hence for a declaratory suit the officers of Life Insurance Corporation as well as MPEB were the necessary parties in the case otherwise, the relief sought by the appellant was futile in nature. If the respondents are directed not to take the amount from LIC or MPEB then no consequential benefit was available to the appellant.

15. The learned counsel for the appellant has submitted that after getting a declaratory decree the appellant can file a claim before the LIC and MPEB. However, such contention cannot be accepted in the light of the provision of Order 2 Rule 2 of C.P.C. In this context the text of order 2 Rule 2 (2) and 2 (3) may be read as under:

> **"2. Suit to include the whole claim.**
>
> **(2) Relinqushment of part of claim.** - Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> **(3) Omission to sue for one of several relief.** - A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

It would be apparent from that provision that if the appellant had not sought the relief of payment of the amount then a subsequent suit was barred for such demand after getting a declaratory suit. Hence, the officers of LIC and MPEB were necessary parties in the case and without impleading them as parties, suit filed by the appellant could not be decreed.

16. Similarly, the second objection raised by the learned counsel for the respondents is also acceptable that no appropriate consequential relief was sought in a declaratory suit and therefore, no declaratory decree can be given in favour of the appellant. The provision of section 34 of the Specific Relief Act may be read as under:

> **"34. Discretion of court as to declaration of status or right.** -Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or

right, and the court may in its discretion made therein a declaration that he is so entitled and the plaintiff need not, in such suit, ask for any further relief :

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so,"

In proviso of Section 34 it was necessary for the appellant to seek further relief which is available after the declaration. If she sought a declaration that she was entitled to get a sum of Rs.2,80,000/- then the consequential relief would be that she should have sought the payment of money to her. If the respondents were prohibited to withdraw the money from LIC or MPEB then still by mere declaration, no fruit was received by the appellant and in the light of the provisions under Order 2 Rule 2 of C.P.C., she could not file a further claim for payment of the amount and therefore, relief of injunction sought against the respondents was not an appropriate consequential relief after declaration. Hence, it is apparent that the appellant could demand the payment of the amount as a consequential relief but, she did not seek any further relief, no Court shall make any declaration in favour of the plaintiff according to the proviso of Section 34 of the Specific Relief Act. Hence, if the appellant would have proved that she was wife of the deceased Santosh Guru still she could not get any declaratory decree in her favour without any appropriate consequential relief.

17. Actually, it was a dispute of liquidated sum between brothers of the deceased and alleged wife of the deceased and therefore, there was no need to file a civil suit but, the appellant should have filed an application for succession certificate then she could get the entire relief, if she was found to be the legal representative of the deceased Santosh Guru. On the basis of the aforesaid discussion, the appellant could not get any relief in her civil suit either on the basis of the facts or on the legal position of the case. The trial Court has rightly dismissed the suit filed by the appellant. There is no reason so that the appeal filed by the appellant may be accepted. Consequently, the appeal filed by the appellant is hereby dismissed. There is no order as to costs.

Appeal dismissed.

I.L.R. [2015] M.P., 1029
APPELLATE CIVIL
Before Mr. Justice M.K. Mudgal
F.A. No. 673/2005 (Jabalpur) decided on 16 December, 2014

YASHODA DEVI (SMT.) & ors. ... Appellants
Vs.
STATE OF M.P. & ors. ... Respondents

Wakf Act (43 of 1995), Sections 4 to 7 and 85 & M.P. Gazette Notification dated 25.08.1989 - Wakf Land dispute - Maintainability of suit **- No notice was given to plaintiff by Survey Commissioner before converting disputed property into Wakf property - Therefore, bar u/s 85 not attracted - Civil Court has jurisdiction to entertain the suit - Setting aside the impugned judgment, case is remanded. (Paras 12 & 14)**

वक्फ अधिनियम (1995 का 43), धाराऐं 4 से 7 एवं 85 तथा म.प्र. राजपत्र अधिसूचना दिनांक 25.08.1989 – वक्फ भूमि का विवाद – वाद की पोषणीयता – सर्वेक्षण आयुक्त द्वारा विवादित संपत्ति को वक्फ संपत्ति में संपरिवर्तित करने से पूर्व वादी को नोटिस नहीं दिया गया – इसलिये धारा 85 के अंतर्गत वर्जन आकर्षित नहीं होता – सिविल न्यायालय को वाद ग्रहण करने की अधिकारिता है – आक्षेपित निर्णय को अपास्त करते हुए मामला प्रतिप्रेषित।

Cases referred :

2011 (2) SCCD 717 (SC), 2002 (2) MPLJ Page 50, 2010 (14) SCC 588.

Vishal Dhagat, for the appellants.
Devendra Shukla, P.L. for the respondent no. 1 & 2.
Shamim Ahmed, for the respondent no. 3.

JUDGMENT

M.K. Mudgal, J. :- The appellants/plaintiffs have filed this appeal under Section 96 of the Code of Civil Procedure being aggrieved by the judgment and decree dated 11-05-2005 passed by the Court of District Judge, Satna in Civil Suit No. 102-A/02 dismissing the suit filed by the appellants/ plaintiffs for declaration of title and permanent injunction holding that the Civil Court has no jurisdiction to entertain the suit as the property in dispute is related to waqf. In this appeal the appellants are referred to as the plaintiffs and the respondents as the defendants.

2. Facts in brief of the case are that the plaintiffs filed the suit regarding

agricultural land referred to in Para -2 of the plaint alleging that earlier Sitaram Marvadi who was the owner of the disputed land sold it to Hari Dutt s/o Ishwar Prasad vide registered sale deed dated 08-03-1956 on which basis the purchaser Hari Dutt became owner of the land. Hari Dutt executed a registered gift deed dated 26-12-1974 in favour of the plaintiffs No. 2 to 10. After the death of Hari Dutt, the plaintiffs became Bhoomi Swami of the land and they are in possession of the said land. The said land was unauthorizedly and illegally declared waqf Property vide State Gazette notification dated 25-08-89. No notice was given to the plaintiffs either by Survey Commissioner before converting the disputed land into waqf property or by the Revenue Authority before recording the said property as waqf Property. Hence, the suit for the aforesaid relief was filed before the trial Court.

3. The defendants denying the allegations of the plaint have submitted that the disputed Survey No. 715 is a waqf property which was declared by M.P. State in State Gazette dated 25-08-1989. The said land is entered in the Khasra as Kabristan and it is used for the same purpose. The defendants have further pleaded that the Civil Court has no jurisdiction to entertain the suit as per Section 85 of the waqf Act 1995 hereinafter is referred to as the Act as the said land belongs to the waqf property.

4. Learned trial Court framed issues and Issue No. 4 was decided as preliminary issue holding that the Civil Court had no jurisdiction to entertain the suit. Hence, in this appeal only one question is being considered whether the trial Court had jurisdiction to entertain the suit or the suit is barred by the provisions of Section 85 of the waqf Act, 1995.

5. Learned counsel for the appellants placing reliance upon Para20 & 21 of the Hon'ble Apex Court's judgment in the case of *Ramesh Gobindram (D.) through L.Rs. Vs. Sugra Humayun Mirza waqf* 2011 (2) SCCD 717 (SC) and inviting the attention of this Court to the Section 6 & 7 of the Act as well as judgment of this Court in the case of *Amil Hakimuddin and others vs. Abbas Hussain and others* 2002 (2) M.P.L.J. Page 50 has submitted that the question in dispute in the instant case can be entertained by the Civil Court as when the disputed property was surveyed by the survey commissioner as per Section 4 and it was declared by the State Government as waqf property vide gazette notification dated 25-08-89 no information or opportunity of hearing was given by the authority to the appellants resultantly the plaintiffs are entitled to challenge the status of the said waqf property before the Civil Court. Learned counsel further emphasizing Para-20 & 21 of the Hon'ble

Apex Court judgment in the case of *Ramesh Gobindram (D.) through L.Rs.* (supra) has argued that in the said case the Hon'ble Apex Court has held that the Civil Court has jurisdiction to entertain a suit pertaining to a waqf property. The learned trial Court did not properly considered the aforesaid provisions and has committed error in dismissing the suit holding that the suit filed by the appellants is barred by Section 85 of the Act.

6. Learned counsel for the respondents opposing the submissions made on behalf of the appellants have submitted that the disputed property was declared as waqf property in the M.P. State Gazette dated 25-08-89 and the plaintiffs did not challenge the said notification then and there. In the instant suit the question of title of the said property is involved. The plaintiffs have filed the suit for declaration of title and permanent injunction whereas the disputed property had also been declared the waqf property as stated earlier. In the said circumstances, the Tribunal has only jurisdiction to settle the dispute. Since, the Tribunal has also power of Civil Court to decide any dispute as mentioned in Section 83 and 85 of the Act. Learned counsels further plead that the judgment of the Hon'ble Apex Court in the case of *Ramesh Gobindram (D.) through L.Rs.* (supra) does not help the appellants in this case as the said suit was related to a tenancy on the basis of which the Hon'ble Apex Court has held that the Civil Court has jurisdiction to entertain the suit. The said judgment has been considered by the Hon'ble Apex Court in the case of *Board of waqf West Bengal and another vs. Anis Fatma Begum and another* 2010 (14) SCC 588 and held in Para-17 that the said decision is related to eviction proceedings which can only be decided by Civil Court and not by waqf Tribunal. Counsel further argues that the Hon'ble Apex Court in the case of *Board of waqf West Bengal and another*(supra) having considered the provisions of Section 83, 3 (r) and 84 of the Act has unequivocally held that where once a property has been found to be waqf property all matters pertaining to that property have to be agitated before the waqf Tribunal. In this manner, the question of dispute in this case is squarely covered by the said judgment. Therefore, the learned trial Court has not committed any error in dismissing the suit holding that the Court had no jurisdiction to entertain the same.

7. Heard the arguments of both the parties and perused the record.

8. Indisputably, in this case the nature of property as waqf property is disputed and still it has not been determined by any competent Court that the said land is waqf property. On bare reading of Section 85 of the Act it is obvious that the section does not exclude the jurisdiction of Civil Court in respect of any or every question or disputes only because the same is related to a waqf or a waqf property.

Section 85 in terms provides that the jurisdiction of the Civil Court shall stand exclude in relation to only such matter as required by or under this Act to be determined by the Tribunal. It is true that the Tribunal has exclusive jurisdiction to entertain any dispute, question or other matter relating to a waqf or waqf property. The SubSection 1 of Section 83 reads as under :

> The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property, under this Act and define the local limits and jurisdiction of such Tribunals.

9. On perusal of the said provision it transpires that normally, the Tribunal has jurisdiction to determine any dispute regarding waqf property. However, it has to be considered in conjunction with the Sections 4, 5, 6, 7 & 85 of the Act as being discussed hereafter.

10. To declare a property as waqf property the scheme has been laid down in Section 4, 5, 6, 7 & 40 of the Act. As per Section 4, a survey for declaration of waqf property shall be conducted by the survey commissioner. According to Sub-Section 4 of Section 4 of the Act, in the course of enquiry a notice shall have to be issued according to the dictates of natural justice to the person concerned before arriving at any conclusion. After making the enquiry, a report shall be submitted to the Board which shall examine the report and thereafter forward it to the State Government for its publication in the Official Gazette as per Section 5 of the Act.

11. As per pleadings of the plaint, the disputed land was purchased by ancestors of the plaintiffs in the year 1956 vide registered sale deed. The plaintiffs further averred that they were not given any notice by the survey commissioner or Board for declaring their property as waqf property and in this regard no enquiry was made in their presence. This Court in the case of *Amil Hakimuddin and others vs. Abbas Hussain and others* (supra) elaborately analyzing the provisions of Section 4, 5, 6, 7 & 40 of the Act has arrived at the conclusion in Para 5 to 11 that if a notice is not given to any person, interested in the property, by the survey commissioner before converting a property into waqf property, the limitation of one year from publication of the list of waqf property shall not be applicable to him for filing a suit before the competent civil jurisdiction. It is only if a notice has been

served to him and an objection is raised by him and it is decided against him by the authority i.e. survey commissioner under Sub-Section 4 of the Section 4 & 5 of the Act and a report is made to the Board for converting the property into waqf property, he would have to approach the Tribunal for the redressal of his grievance within one year of the publication of the notification.

12. In the instant case, it has not been pleaded by the respondents that any notice was given to the plaintiffs by the survey commissioner before converting the disputed property into waqf property nor do they have to say that any objection had been raised by the appellants/plaintiffs and it was decided by the authority as per the provisions. The judgment of the Hon'ble Apex Court in the case of *Board of waqf West Bengal and another*(supra) cited by the respondents does not bear any relevance to the case of respondents as in the said case the nature of the property as waqf property was not disputed. Apart from this that suit was not filed to challenge the notification where the property was declared waqf property.

13. The learned trial Court having considered the pleadings of the parties has held in Para 8 to 14 of the impugned judgment that the conversion of the disputed land into waqf land having been declared by M.P. Gazette notification dated 25-08-89 cannot be challenged before the Civil Court. The trial Court has not properly considered Sections 4, 5, 6, 7 & 40 of the Act in proper perspective in the light of the judgment in the case of *Amil Hakimuddin and others vs. Abbas Hussain and others* (supra). Hence, the findings recorded by the learned trial Court cannot be held to be appropriate.

14. Having considered the aforesaid facts of the case and the relevant provisions of the Act, it is concluded that the Civil Court i.e. the trial Court has jurisdiction to entertain the instant suit. Therefore setting aside the impugned judgment, the case is remanded to the trial Court with the direction that after recording the evidence of both the parties the case be decided as per provisions of law.

15. The parties are directed to remain present before the trial Court on 19-01-2015.

16. Office is directed to sent back the record to the trial Court promptly along with the copy of the order and ensure that the record reaches the trial Court before the fixed date.

17. Both the parties shall bear their own cost.

Order accordingly.

I.L.R. [2015] M.P., 1034
APPELLATE CRIMINAL
Before Mr. Justice G.S. Solanki & Mr. Justice N.K. Gupta
Cr. A. No. 2735/1998 (Jabalpur) decided on 20 December, 2013

LAXMIKANT ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. Prevention of Corruption Act (49 of 1988), Sections 7, 13(1) (d) r/w Section 13(2) - Illegal gratification - Motive & competence - Allegation of bribe - **Appellant was not competent for mutation but he was an important person to initiate the mutation proceedings - Motive to receive the bribe established - Trial Court has rightly disbelieved the defence witnesses - Demand and acceptance proved and duly corroborated by witnesses - Offence proved - Appeal dismissed. (Paras 9 & 16)**

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराऐं 7, 13(1)(डी), सह पठित धारा 13(2) – अवैध परितोषण – हेतु एवं सक्षमता – रिश्वत का अभिकथन – अपीलार्थी नामांतरण करने के लिये सक्षम नहीं था परंतु नामांतरण कार्यवाही आरंभ करने के लिये वह एक महत्वपूर्ण व्यक्ति था – रिश्वत प्राप्त करने का हेतु स्थापित होता है – विचारण न्यायालय ने उचित रूप से बचाव साक्षियों का अविश्वास किया – मांग और स्वीकृति साबित और साक्षियों द्वारा सम्यक् रूप से अभिपुष्ट – अपराध सिद्ध – अपील खारिज।

B. Evidence Act (1 of 1872), Section 8 - Conduct - **Conduct of the appellant that if he did not demand and receive the money, why he fled away from the spot ? - This unnatural conduct is also relevant and admissible as evidence against the appellant. (Para 15)**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 8 – आचरण – अपीलार्थी का आचरण कि यदि उसने रूपये की मांग एवं प्राप्ति नहीं की तब वह घटनास्थल से क्यों भागा ? – यह अस्वाभाविक आचरण भी अपीलार्थी के विरूद्ध साक्ष्य के रूप में सुसंगत एवं ग्राह्य है।

Cases referred :

2012 (1) MPLJ (Cri.) 483, 2012 (2) MPLJ (Cri.) 661, 2013 (1) MPLJ (Cri.) 17, AIR 1968 Kerala 60.

Sharad Verma, for the appellant.
Aditya Adhikari, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by :

G.S. SOLANKI, J. :- This appeal has been preferred by the appellant under Section 374 of the Cr.P.C. being aggrieved by judgment of conviction and order of sentence dated 29.10.1998 passed by Special Judge, Satna in Special Sessions Case No. 2/94 whereby the appellant has been convicted under Sections 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act and sentenced to R.I. for 1 year with fine of ₹1,000/- and R.I. for 1 year with fine of ₹1,000/- respectively with default stipulations.

2. The facts, in short, giving rise to this appeal are that complainant Umashankar Dwivedi (PW-8) met with the appellant, who was posted as Patwari at Patwari Halka Tyodhara, Tahsil Amarpatan, District Satna, for the purpose of mutation of his land bearing Khasra No. 9/2 Rakba 0.283 in his favour, for which the appellant demanded a sum of ₹300/- from the complainant as illegal gratification. The complainant gave a sum of ₹50/- to the appellant and agreed to give remaining sum of ₹250/- at Tehsil Office, Amarpatan. Not being inclined to give the bribe to the appellant, the complainant made a written complaint to the Superintendent of Police, Special Police Establishment (Lokayukta) Rewa who, in turn, directed Inspector R.R.Mishra (PW-11) to arrange a trap. Inspector R.R.Mishra (PW-11) initially gave the complaint for verification to independent witness R.P. Shukla (PW-2), who verified the facts of the complaint, thereafter the complainant gave a sum of ₹250/-, which were smeared with Phenolphthalein powder, thereafter preliminary Panchnama (Ex.P-6) was prepared and the trap party proceeded towards Tehsil Office, Amarpatan along with the Panch witnesses. The complainant handed over the money to the appellant, which was kept by him in the front pocket of his shirt, thereafter, after receiving the signal, the trap party caught hold the appellant. During the aforesaid process, Jivan Lal Shukla, Revenue Inspector made hue and cry and threatened the trap party, then other companion Patwaris like Dharmraj Singh, Banshilal Khare, Babu Nagesh Shrivastava started scuffling with the trap party in order to facilitate the appellant to run away from the spot. While running away from the spot, the appellant left his official bag/record on the spot. This fact has been verified by R.R. Mishra (PW-11), Tehsildar Amarpatan, that the said record was given on Supurdginama to him and the report was lodged against the persons who obstructed the trap party in discharging of their duties and offence under Sections 147, 153, 186, 294, 506 of the IPC was registered against them

and offences under Sections 7, 13(1)(d) and 13(2) of the Prevention of Corruption Act were registered against the appellant.

3. After due investigation, the appellant was charge sheeted before the Special Judge. Learned Special Judge framed the charges under Sections 7, 13(1)(d) read with 13(2) of the Prevention of Corruption Act and Sections 224, 201 of the IPC against the appellant.

4. The appellant abjured the guilt and pleaded false implication. He took the defence that the appellant was not authorized to pass the order of mutation and he did not make any demand. He further took the defence that he was not present on the spot at the time of incident, at that time he was at Teonthara. In his defence the appellant has examined Ramayan Prasad Pandey (DW-1) and Shivram Prasad (DW-2).

5. On appraisal of evidence on record, the learned Special Judge convicted and sentenced the appellant as mentioned hereinabove, hence this appeal.

6. Learned counsel for the appellant has submitted that the trial Court has committed illegality in not appreciating the evidence on record in its proper perspective. The appellant was not competent for mutation of the name as well as for issuing *Rin-Pustika* to the complainant. The alleged bribe money was not seized from the possession of the appellant. No witness of trap party accompanied the complainant at the time of giving the bribe money. Thus, the prosecution has failed to prove the case against the appellant for demand and acceptance of the bribe money, hence the conviction and sentence recorded by the trial Court be set aside and appellant be acquitted to the aforesaid charges. Learned counsel for the appellant has placed reliance on the decision of this Court in *Ram Mohan Agrawal (dead) through LRs Vs. State of M.P.* - 2012(1) MPLJ (Cri.) 483, *Shrikant S/o Kanhaiyalal Makhijani Vs. State of M.P. through SPE, Lokayukt* – 2012(2) MPLJ (Cri.) 661 and *Narendra Champaklal Trivedi Vs. State of Gujarat* 2013(1) MPLJ (Cri.) 17.

7. Learned counsel for the respondent has supported the judgment of conviction and order of sentence passed by the trial Court.

8. We have heard the learned counsel for the parties at length and gone through the evidence and other material on record. First coming to the submission raised by the learned counsel for the appellant that the appellant

was not competent for mutation of the name of the complainant and for issuing the *Rin-Pustika*; Ram Prasad Mishra, Tehsilar (PW-9) has admitted in his cross-examination that Patwari is only authorized to take the application for mutation and to make publication in the prescribed manner and then list the case for hearing before the Revenue Inspector and only the Revenue Inspector is authorized for mutation. Complainant Umashankar Dwivedi (PW-8) has stated that he met the appellant (Patwari) for the purpose of mutation and preparation of *Rin-Pustika,* he demanded bribe of ₹300/- for the said purpose, out of which he gave ₹50/- to him on the same day and the appellant told him to come with remaining ₹250/- on 11.8.1987 at Amarpatan. This very fact finds place in the report (Ex.P-5) filed by the complainant.

9. Now the main question for consideration arises that if the appellant was not competent for mutation, then what would be the impact on the case of the prosecution? This question has been considered by the *Kerala High Court in Cherian Lukose Vs. State of Kerala* – AIR 1968 Kerala 60, in which it has been observed by the Kerala High Court that though the nurse was not competent to allot the bed but her role for allotment of bed was important and general public had an impression that she was important person who could help in allotment so to offer bribe to her. A Division Bench of this Court by referring the decision of *Cherian Lukose Vs. State of Kerala* (supra) has taken the similar view in the judgment delivered in Criminal Appeal No. 81/2001 *(Jagdish Chandra Raikwar Vs. State of M.P.)* on 19.8.2010, which remained unchanged in S.L.P.(Cri.) No. 8598/2010, which was dismissed by the Apex Court on 25.10.2010.

Similar is the situation in the instant case. In this case though the appellant was not competent for mutation but he was an important person to initiate the mutation proceedings, therefore, the complainant must be under impression that the appellant would be helpful person in the process of mutation and preparation of *Rin-Pustika.* Thus, it cannot be said that there was no opportunity or motive to receive the bribe by the appellant.

10. Coming to the next submission raised by the learned counsel for the appellant that the alleged bribe money was not seized from the possession of the appellant and no witness of trap party accompanied the complainant at the time of giving the bribe money; Complainant Umashankar Dwivedi (PW-8) has stated that since he was not willing to give bribe money for mutation, he filed written report (Ex.P-5) in the office of Lokayukt, Rewa, thereafter he

gave money to the trap party and preliminary Panchnama (Ex.P-6) was prepared. Currency notes were smeared with Phenolphthalein power, thereafter they went to Tehsil Office, Amarpatan. He further stated that Ramesh Prasad Chaturvedi (PW-7) also accompanied him. They met the appellant and gave money to him but at the same time one Thakur was present there, he took the money from him. This witness has become partly hostile in regard to the fact that who received the money from him. On cross-examination by the Special Prosecutor, he admitted that the trap party came on the spot when the appellant was keeping the money in his pocket. He further admitted that after seeing the trap party, the appellant tried to throw the money then the trap party caught hold his hands.

11. Ramesh Prasad Chaturvedi (PW-7), who was the shadow witness of the appellant, stated that he saw that complainant Umashakar Dwivedi (PW-8) took out the money from his pocket and raised his hand towards the appellant, therefore, he presumed that the Patwari has accepted the money. At the same time he gave signal to the trap party and when trap party came on the spot and caught hold the appellant, there was scuffle between the trap party, appellant and his colleagues, thereafter, the appellant fled away from the spot. This witness has also become partly hostile.

12. Another independent witness like R.P. Shukla (PW-2), who was a Panch witness and sent by District Magistrate, has categorically stated that complainant Umashankar Dwivedi (PW-8) appeared before the Investigating Officer at Lokayukt Office, Rewa and gave a complaint and stated that the appellant has demanded illegal gratification of ₹300/- for the purpose of mutation, out of which a sum of ₹50/- has already taken by him. He further corroborated that remaining sum of ₹250/- was presented by complainant, same were smeared with Phenolphthalein powder, thereafter, he had gone with the complainant to the Tehsil Office, Amarpatan where the complainant met the appellant (Patwari). He has further stated that he and other witnesses were standing at such a place from where they could see the complainant and appellant. After receiving the signal, the trap party reached to the place where some money was given to the appellant. One of the members of trap party Vijay Singh caught hold the appellant, the appellant tried to throw the money and then there was hue and cry made by the appellant and his companion Patwaris, thereafter, the appellant fled away from the spot. This fact was substantially corroborated by another witness R.B. Singh (PW-5), who also accompanied the trap party and R.R. Mishra (PW-11) who arranged the trap of the appellant. Since independent witness Ramesh Prasad Chaturvedi

(PW-7) accompanied the complainant at the time of incident, in these circumstances, the principle laid down by this Court in *Shrikant S/o Kanhaiyalal Makhijani Vs. State of M.P. through SPE, Lokayukt* (supra) are not applicable to the instant case.

13. It is true that the demand and acceptance of the amount as illegal gratification is *sine-qua-non* for constituting the offence under Section 7, 13 of the Prevention of Corruption Act. The facts of *Ram Mohan Agrawal (dead) through LRs Vs. State of M.P.* and *Narendra Champaklal Trivedi Vs. State of Gujarat* are different than the instant case. In the aforesaid cases, the prosecution was failed to prove the demand and acceptance of amount of illegal gratification. But in the instant case, as discussed hereinabove, it has been proved on record that the complainant filed a complaint (Ex.P-5) before B.D.Handa (PW-4), who directed R.R.Mishra (PW-11) for further enquiry. This fact has been duly corroborated by R.R.Mishra (PW-11), independent Panch witness R.P. Shukla (PW-2) and further corroborated by R.B. Singh(PW-5), who was also the witness of aforesaid procedure. Though R.B. Singh (PW-5) was Inspector in the Police, but it is well established principle of law that Police Officer should not be disbelieved only on the basis of the fact that he is a Police Officer unless and until there is some enmity with the appellant brought on record.

14. So far as some discrepancies brought in the evidence of complainant Umashankar Dwivedi (PW-8) and Ramesh Prasad Chaturvedi (PW-7) with regard to fact that money was handed over to the appellant or one Thakur, are concerned, it is well established principle of law that the statement of witnesses should be evaluated as a whole and not on the basis of some admission as a stray statement. The wintesses R.P. Shukla (PW-2), R.B. Singh (PW-5) and R.R. Mishra (PW-11) who conducted the trap, had gone along with the complainant and his shadow witness Ramesh Prasad Chaturvedi (PW-7) to the place of incident where complainant Umashankar Dwivedi (PW-8) met the appellant and gave him money. This fact has been duly corroborated by Ramesh Prasad Chaturvedi (PW-7) with the discrepancy that he only saw that complainant offered the money and raised his hands towards the appellant, therefore, he presumed that the bribe was given to the appellant. If this statement is considered along with the statement of other witnesses like R.P. Shukla, R.B.Singh and cross-examination of complainant Umashankar Dwivedi, it amply proves on record that the complainant was called by the appellant for taking bribe of ₹250/-. He mentioned this fact in the written

report, which has been duly corroborated by Panch witness R.P.Shukla and thereafter the complainant and other witnessed had gone to Tehil (sic:Tehsil) Office, Amarpatan where complainant met the appellant and gave bribe money to him. It has also come in the evidence that the appellant and his companion Patwaris made hue and cry and scuffled with the trap party and during the said process, the appellant fled away from the spot. This fact has been corroborated by independent witnesses like R.P. Mishra (PW-9) Tehsildar and Arun Prasad Mishra (PW-10). As per the statement of R.P. Mishra (PW-9) Tehsildar, the official bag/record of the appellant was found lying on the spot and same was seized in his presence. Arun Prasad Mishra (PW-10) has categorically stated that the appellant was present there and appellant and his companion made hue and cry and scuffled with the trap party. Both these witnesses are independent witnesses and in our opinion, the trial Court has rightly believed them.

15. The evidence discussed hereinabove, further finds corroboration from the conduct of the appellant that if he did not demand and receive the money, why he fled away from the spot? This unnatural conduct is also relevant and admissible as evidence against the appellant under Section 8 of the Evidence Act.

16. Considering the aforesaid prosecution witnesses, in our opinion, the trial Court has rightly disbelieved the defence witnesses Ramayan Prasad Pandey (DW-1) and Shivram (DW-2) on the point of plea of alibi.

17. On careful scanning of aforesaid evidence on record, we are of the considered opinion that the trial Court has not committed any illegality in recording the conviction of the appellant under Sections 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act. So far as sentence is concerned, the trial Court has awarded minimum prescribed jail sentence to the appellant, therefore, no interference is called for in the same.

18. Resultantly, the appeal fails and is hereby dismissed. The conviction and sentence recorded by the trial Court is hereby affirmed. The appellant is on bail, his bail bonds and surety bonds stand cancelled. He is directed to surrender before the trial Court on or before 21.1.2014.

Record of the trial Court be sent back immediately along with the copy of this judgment for information and necessary action.

Appeal dismissed.

I.L.R. [2015] M.P., 1041
APPELLATE CRIMINAL
Before Mrs. Justice S.R. Waghmare
Cr. A. No. 1129/1998 (Indore) decided on 28 October, 2014

ARJUN SINGH & ors. ... Appellants
Vs.
STATE OF M.P. ... Respondent

Penal Code (45 of 1860), Sections 306 and 498A & Evidence Act (1 of 1872), Section 113-A - Cruelty - **Marriage took place about 6 months prior to death - It is too early to hold that scolding on account of non performance of household work amounts to cruelty - Few incidents narrated regarding cruelty are simple problems which are faced in domestic married life - Ingredients of Section 107, 109 of I.P.C. are not available - Appellants acquitted. (Paras 13 to 17)**

दण्ड संहिता (1860 का 45), धाराऐं 306 एवं 498ए तथा साक्ष्य अधिनियम (1872 का 1), धारा 113–ए – क्रूरता – मृत्यु के करीब 6 माह पूर्व विवाह हुआ था – यह धारणा करना जल्दबाजी होगी कि घरेलू कामकाज का निर्वहन नहीं करने पर डांटना फटकारना क्रूरता की श्रेणी में आता है – क्रूरता के संबंध में बताई गई कुछ घटनाऐं साधारण समस्यांऐं हैं जिनका सामना घरेलू वैवाहिक जीवन में करना होता है – भा.द.सं. की धारा 107 व 109 के घटक उपलब्ध नहीं – अपीलार्थी दोषमुक्त।

Cases referred :

AIR 1984 SC 1622, 2007 (10) SCC 797.

Disha Saxena, for the appellants.
C.R. Karnik, for the respondent/State.

JUDGMENT

MRS.S.R. WAGHMARE, J. :- By this appeal filed under Section 374 of Cr.P.C., appellants Arjun Singh, Kesharbai and Rampyari bai have challenged their impugned judgment of conviction dated 19.09.98 passed by Additional Sessions Judge, Mhow in Sessions Trial No.131/95 convicting them for offence under Section 498-A of IPC and sentencing them to 2 years RI each and fine of Rs.500/- each. They have also been convicted for offence under Section 306 of IPC, and sentenced to 5 years RI each with fine of Rs.1000/- each.

2. Briefly stated the prosecution case was that Sahodrabai married the accused appellant Arjun Singh at village Pigadmbar in a collective marriage (samuhik vivah) ceremony. It was alleged that Kesharbai the mother-in-law and Rampyaribai the sister-in-law, of deceased along with husband Arjun Singh used to physically harass the deceased Sahodarbai and treated her with cruelty. She returned to her parental home and Arjun Singh came to fetch her. Her mother asked appellant Arjun Singh to allow her to live with them for some more time, but permission was not granted and he took her back and they used to often beat her and being mental depressed and frustrated on the date of the incident, Sahodarabai went to the house of her sister and Vijay Singh PW3 and asked him to take to her parents. The mother-in-law and sister-in-law also came there and assured the deceased that they would send her back to her parents house. However on the next day when the people at home were busy in a pooja, Sahodarabai committed suicide by hanging in her room. The complaint was filed by husband Arjun Singh at Police Station Kishanganj. The merg was registered at No.49/94 and it was found that all the three accused persons used to cause marpit (beat) to Sahodarabai and being depressed, she had committed suicide. The FIR was, therefore, lodged vide Ex.P/10, crime was registered at No.373/94 and offence under Sections 373/94 & 306/34 of IPC was registered against three accused persons. The body was sent for the postmortem and nylon rope was seized, statements of witnesses were recorded, and spot map was prepared. After completion of investigation the challan was put up before the Judicial Magistrate who in turn committed to the accused to their trial.

3. The accused abjured their guilt and stated that they have been falsely implicated in the matter and their defence was that Sahodarabai did not want to live with her in-laws and it was a case of false implication. The trial Court on considering the evidence of the witnesses, however, convicted the accused as herein above indicated and hence the present appeal.

4. Counsel for the appellants has vehemently urged the fact that the trial Court had erred in convicting the accused when there was not an iota of evidence on record to sustain the conviction. The material witnesses are all interested witnesses and there were contradictions and omissions in their testimony; besides the trial Court had erred in holding that the appellants have forcibly taken back the deceased Sahodarabai, in fact within six months of marriage, she had kept going to the parents house and she did not perform any household work and hence she used to often scold the appellants, but there was no question of the accused having treated the deceased with cruelty and the case was not one abettment of

suicide as is being alleged by the prosecution. Moreover at the time of hanging, all the family members were away from home at a distance of three kilometers and admittedly the prosecutrix had stated before everybody that she wanted to go to her parents house. This clearly indicated that the attitude of the deceased that she was not willing to stay with the in-laws but by some reason, she wanted to go to her parents house. Moreover none of the prosecution witnesses are independent witnesses. The single witness, neighbour Maheshchandra has not at all supported the prosecution case.

5. Counsel relied on *Sharad Birdhichand Sarda Vs. State of maharashtra* [AIR 1984 SC 1622] to state that the close relatives of victim have tendency to exaggerate or add facts and the Court should examine their evidence with great care and caution. Counsel submitted that when the testimony of the witnesses does not relate to torture and the case pertains to household work not being done by the prosecutrix, then it does not meant to cruelty or abettment.

6. Counsel also relied on *Kishori Lal Vs. State of M.P.* [2007 (10) SCC 797] whereby the Apex Court held thus:-

> "In cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. The mere fact that the husband treated the deceased wife with cruelty is not enough. (See *Mahendra Singh v. State of M.P.*) Merely on the allegation of harassment conviction in terms of Section 306 of IPC is not sustainable. There is ample evidence on record that the deceased was disturbed because she had not given birth to any child. Pws 8, 10 & 11 have categorically stated that the deceased was disappointed due to the said fact and her failure to beget a child and she was upset due to this."

7. Considering the testimony of **Maheshchandra PW7** Counsel submitted that he has lived only 5-6 houses beyond the house of the deceased and there is omission in his statements before the police vide Ex.P/9 that Sahodarabai had gone to the house of one Vijay Singh since she did not want to live with her husband two days' prior to the incident. Similarly he has also denied making statement before the police that the mother-in-law and sister-in-law was causing *marpit* to deceased Sahodarabai and in this sense Counsel submitted that reliance could not be placed only on the testimony of interested witnesses who are PW1 Uday Singh, the brother of the deceased who has

stated that he did not know why the accused appellants were causing *marpit* to his sister Sahodarabai. Udaysingh has stated that the father-in law of his elder sister Parvatibai is Vijaysingh who lived the few houses of the house of the accused and it was alleged that Sahodarabai had gone to Vijaysingh for help. In para-10 of his statement this witness has admitted that the deceased sister had never told him or any complaint that in-laws have been used to beat her, however, this witness has been declared hostile at this stage and his testimony is, therefore, unreliable regarding Raju bai who is the mother of the deceased. She has stated that Udaysingh her son had returned empty handed when he had gone to fetch his sister and 6 days later her daughter had committed suicide. This witness has also submitted that in-laws used to complaint about deceased Sahodarabai by not knowing how to cook and make rotis and, therefore abused her and the fact had been told by Sahodarabai to her mother.

8. Besides in the present case there are no allegations of demand of dowry and presumptions under Section 113-A of the Evidence Act are available regarding demand of dowry. Relying on *Kishori Lal* (supra) Counsel submitted that the Apex Court had considered the fact that there was differences with the accused husband and the deceased have gone to reside with her parents only a month prior to the occurrence and no evidence was led to show that the accused were in any manner responsible for the suicide. The Court had held that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. Mere fact that the husband treated the deceased wife with cruelty is not enough and merely on the allegation of harassment, conviction in terms of Section 306 of IPC is not sustainable and there is ample evidence on record that the accused was disturbed because she had not given birth to any child and in such circumstances accused cannot be held liable. And the Apex Court had allowed the appeal and acquitted the accused. In the present case Counsel submitted that the deceased Sahodarabai was not happy with the marriage and immediately after marriage, she wanted to return to her parents house itself indicated that she did not get along with the husband or she was not happy with the alliance and had an affair elsewhere. Counsel submitted that the accused/appellants were falsely implicated in the matter.

9. Besides Vijay Singh was father-in-law of elder brother who lived nearby the accused persons and one day a meeting of the community was held and thereby the people had advised the accused persons not to quarrel and Vijay

Singh had stated that the deceased Sahodara bai should be sent back to the in-laws. This witness has, however, specifically admitted in impugned para 20 that Rampyaribai the accused sister-in-law was living separately and having three children by marriage and had only come to the house of the accused once in the month of May and she has also admitted that out of six months marriage, the deceased had lived only for four months with her in-laws. On being confronted with her police statements, this witness has stated that she did not make the statements that accused Arjun Singh had come to their house to fetch his wife, at that time when they refused to allow her to go back, and accused Arjun Singh had pulled out the lathi. She admitted that she had made the statement only in Court. This clearly indicated that there was omission in the statement of this witness. Counsel prayed that she was not at all reliable and trial Court had erred to rely her testimony for conviction.

10. Drawing the attention of this Court to the testimony of Vijay Singh PW 6, he has stated that one month after marriage Sahodarabai had come to his house and demanded that she be taken to the house of her mother. However Muni bai his daughter had intervened and taken the deceased Sahodarabai back to her husband. He has also denied making statements before the police vide Ex.P/2 that in-laws were caused *marpit* to the deceased Sahodarabai. considering the statement of Anarsingh (PW4) it was found that there is material omission in Ex.P/3 statement before the police and statement in Court regarding the objections given by the inlaws. Thus Counsel submitted that the impugned judgment was without concrete evidence and when the act abetted is committed in consequence of abettment and there is no provision for the punishment of such abettment under Sections 107 & 109 of the IPC and the same fact was missing in the present case. Counsel prayed for setting aside the conviction and acquitting the accused from the said offence. In the alternate Counsel submitted that if the Court was satisfied regarding conviction, the same be reduced to the period already undergone.

11. Counsel for the respondent/State, on the other hand, has opposed the submissions of the Counsel for the appellants and vehemently urged the fact that the death had occurred within six months of marriage and there were presumptions available under Section 113-A of the Evidence Act which clearly indicated that when there is a commission of suicide by a woman and had been abetted by her husband or any relatives of her husband and showed that she committed suicide within a period of 7 years of marriage, then there shall be a presumption that the suicide had been abetted by her husband and

relatives of husband. Counsel submitted that in the instant case there were reference of evidence of the mother Rajubai PW2, the brother Uday Singh PW 1 to state that the accused appellants treated the deceased Sahodarabai with cruelty and once in the community meeting also she had stated that she wanted to return to her parents. Moreover the testimony of Vijay Singh PW3 cannot be overlooked since he has categorically stated the accused persons treated her with cruelty. Moreover Counsel insisted that in such a situation the witnesses are all interested witnesses since they are the members of the family and it is natural that the testimony of deceased Sahodarabai would be confined to her brother and mother regarding trouble that she was facing in the house of in-laws and husband. Moreover there is also evidence on record to indicate that publicly Sahodarabai had stated in the meeting of the community that she wanted to go back to her parents house and being promised by accused mother-in-law and sister-in-law that they would not ill-treat her, the parents of the deceased had sent her home on the next day. Similarly the husband also had coaxed into an agreement by the parents of the deceased that he will not ill-treat Sahodarabai. In these circumstances Counsel submitted that the conviction was in accordance with the provisions of law and did not call for any interference. Counsel prayed that the appeal be dismissed.

12. On considering the above submissions, I find that two questions arise for adjudication in the present appeal; one whether the presumption under Section 113-A of the Evidence Act would be attracted in the present case against the accused appellants and second whether the conviction of the accused for abettment under Section 306 of the IPC is based on proper appreciation in this regard.

13. Considering the testimony of various witnesses as fully detailed above, I find that the sister-in-law Rampyaribai was living separately and the single incident is only considered to bring the deceased Sahodarabai back home from the house of Vijay Singh. There is no specific incident narrated against this accused appellant by any of the witnesses and placing reliance on *Kishori Lal* (supra) I find that there must be proof of direct or indirect acts of incitement to the commission of suicide, merely making omnibus statements that the accused appellant Rampyaribai used to treat the deceased with cruelty would not suffice for conviction. Besides the act of not cooking food properly are allegations which were made by the husband and mother-inlaw and cannot be foisted on the present accused Rampyaribai. Considering all the other accused, I find that there must be a probability of existence of a nexus between the

cruelty and the suicide suffered, however, the only allegations are that these accused appellants used to make complaint to the regarding her cooking, in fact it was the present appellant who has coaxed and brought Sahodarabai back from the public meeting. There was strained relationship between the husband and the wife and the present accused appellant Kesharbai cannot be made the victim. There is no direct evidence on record relating to harassment of the deceased Sahodarabai by mother-in-law Kesharbai also and this inevitably leads us to consider the case against the accused husband Arjun Singh.

14. Undoubtedly the presumptions are available to the complainant under Section 113-A of the Evidence Act, since the death has occurred soon after the marriage i.e. within a period of six months This singular fact cannot be construed against the accused appellant Arjun Singh primarily because in every marriage there are so many problem of domesticity and it is too soon to conclude that the scolding or reprimand for not cooking food properly and not doing the household work have become acts of cruelty and to be the acts of instigation or provocation to commit suicide as per provisions of Sections 107 & 109 of the IPC. The only sole factor that goes against the present accused appellant is that within six months of marriage Sahodarabai has committed suicide and there is no concrete reason except suggestion that her heart was elsewhere is brought on record. Undoubtedly all the witnesses are interested witnesses except Mahesh Chandra, the neighbour and he also has not related any incident alleging torture and I find that the few incidents narrated regarding cruelty are simple problems that are faced in a domestic married life anywhere and the period is too soon to hold that it was cruelty amounting to instigation. Hence placing reliance on *Kishori Lal* (supra) and *Sharad Birdhichand Sarda* (supra) I find that both the questions have now been suitably answered and there is no concrete evidence on record to hold that the presumptions would automatically apply in the present case; since there is no sufficient evidence on record to rely for the conviction and secondly there is no abettment (sic:abetment) of concrete straight incident construed the offence under Sections 106 & 109 of the Cr.P.C. (sic:I.P.C.) and thus I find that the impugned judgment requires to set aside.

15. Consequently considering the fact that the evidence is weak in nature, then to sustain the conviction, the evidence on record must be so complete that any other hypothesis, than that of the guilt of the accused should not be possible. The evidence should not only be consistent with the guilt of the

accused but should be inconsistent with his innocence as directed by the Apex Court in several cases.

16. Similarly, I find that there must be concrete evidence to show that the accused was in some manner responsible for the suicide. No such evidence is available on record and ingredients of Section 107 and 109 of the IPC regarding abettment (sic:abetment) are also not fulfilled under the circumstances.

17. Consequently, I find that the impugned judgment needs to be set-aside. The impugned judgment is, therefore, set-aside. The accused/appellants are acquitted from the aforesaid offences. They are on bail, their bail bonds are hereby, discharged.

16. The appeal is allowed to the extent hereinabove indicated.

Appeal allowed.

I.L.R. [2015] M.P., 1048
APPELLATE CRIMINAL
Before Mr. Justice Sushil Kumar Gupta
Cr.A. No. 747/2005 (Gwalior) decided on 17 December, 2014

CHUNNILAL (DEAD) AND SANTOSH & anr. ...Appellants
Vs.
STATE OF M.P. ...Respondent

A. Penal Code (45 of 1860), Section 307 - Attempt to murder - Enmity - **Both accused and complainant parties are Arms Dealers and are having business rivalry - Various criminal cases were registered between both the parties - Enmity is a double edged weapon - A person can be falsely implicated. (Para 18)**

क. दण्ड संहिता (1860 का 45), धारा 307 – हत्या का प्रयत्न – वैमनस्यता – दोनों अभियुक्त और शिकायतकर्ता पक्षकार आयुध डीलर हैं और व्यावसायिक प्रतिद्वंद्वी हैं – दोनों पक्षकारों के बीच विभिन्न आपराधिक प्रकरण दर्ज किये गये – वैमनस्यता एक द्विधारी शस्त्र है – किसी व्यक्ति को मिथ्या आलिप्त किया जा सकता है।

B. Penal Code (45 of 1860), Section 307 - Attempt to murder - **No blood was found on spot although victim has stated that blood started oozing out after the gun shot hit his abdomen - Statements u/s 161 of Cr.P.C. were recorded after 2 days - No explanation for the same was offered by I.O. - Independent witnesses were given up -**

Material infirmities in statements of victim and his real brother - Appellant liable to be acquitted. (Paras 21 to 30)

ख. दण्ड संहिता (1860 का 45), धारा 307 – हत्या का प्रयत्न – घटनास्थल पर रक्त नहीं पाया गया यद्यपि आहत का कथन है कि उसे पेट में गोली लगने के पश्चात् रक्त बहने लगा था – दं.प्र.सं. की धारा 161 के अंतर्गत कथन दो दिन पश्चात् अभिलिखित किये गये – अन्वेषण अधिकारी द्वारा उक्त का कोई स्पष्टीकरण नहीं दिया गया – स्वतंत्र साक्षियों का परीक्षण नहीं किया गया – आहत एवं उसके सगे भाई के कथनों में तात्विक कमियां – अपीलार्थी दोषमुक्त किये जाने योग्य।

C. Penal Code (45 of 1860), Section 307 - Plea of alibi - **Police during investigation had formed that appellant was in Shimla at the time of incident - Defence witnesses also prove the presence of appellant in Shimla at the time of incident - Appellant liable to be acquitted - Appeal allowed. (Paras 33 to 37)**

ग. दण्ड संहिता (1860 का 45), धारा 307 – अन्यत्र उपस्थित होने का अभिवाक् – अन्वेषण के दौरान पुलिस ने पाया कि घटना के समय अपीलार्थी शिमला में था – बचाव साक्षियों ने भी घटना के समय अपीलार्थी की उपस्थिति शिमला में होना साबित किया – अपीलार्थी दोषमुक्त किये जाने योग्य – अपील मंजूर।

Cases referred :

1993 MPLJ 532, AIR 1978 SC 59, AIR 1979 SC 135, 2014 CRI.L.J. 2133.

Y.K. Pathak and *Sanjay Gupta,* for the appellants.
Lallan Mishra, P.L. for the respondent/State.

JUDGMENT

SUSHIL KUMAR GUPTA, J. :- Feeling aggrieved by the judgment of conviction and order of sentence dated 29.10.2005 passed by learned Third Additional Sessions Judge, Gwalior in Sessions Trial No.147/2003 convicting the appellants under Section 307/34 of Indian Penal Code, 1860 (in short "Code, 1860") and thereby sentencing them to suffer five years' rigorous imprisonment and fine of Rs.1000/- (Rupees One Thousand), in default, further rigorous imprisonment of three months, the appellants have preferred this appeal under Section 374 of the Code of Criminal Procedure, 1973 (in short "Code, 1973").

2. During the pendency of this appeal, the appellant, Chunnilal had died

and his name has been deleted from the cause title, as the appeal stood abated against him.

3. In brief, the case of prosecution is that on dated 16.12.1998 in the night at about 9:30 when complainant Ashish alias Shyam (PW.3) had come on motorcycle to his house, at that time appellants/accused came on motorcycle armed with .35 bore revolver and fired on complainant with an intention to kill him, which hit on the abdomen of the complainant. On hearing the shrieks of the complainant, his father Balveer Singh Chauhan came down to open the gate of the house, at that time appellants/accused flee away on the motorcycle towards Gwalior. Appellants/accused committed this act of firing to kill the complainant Ashish due to business rivalry. Ramesh Mistri and Shailendra were present at the time of the incident. The complainant was taken to Police Chowki, Phool Bagh by Auto by his father Balveer Singh Chauhan and brother Shailendra (PW.4), thereafter Balveer Singh Chauhan lodged the report that was registered as Dehati Nalishi (Ex.P.2) by A.S.I. Punjab Singh (PW.7) and the complainant was referred to J.A Hospital for treatment. On the basis of Dehati Nalishi Head Constable Rajendra Bhaskar (PW.8) registered an FIR (Ex.P.8). During investigation, MLC report (Ex.P.1) received from the Hospital, Spot map Ex.P.5 has been prepared. One bullet which was hit on the motorcycle was seized by seizure memo (Ex.P.3). Clothes which were wearing by the complainant, at the time of incident, were also seized by seizure memo (Ex.P.4). One bullet which was taken out from the stomach of the complainant Ashish was also seized by seizure memo (Ex.P.7). Both the bullets as well as clothes were sent to the F.S.L. Sagar from where report (Ex.P.6) was received. The police after registering the offence took up the investigation and after its completion a charge-sheet was submitted under sections 450, 307 read with section 34 of Code, 1860 in the committal Court which on its turn committed the case to the court of Session and from where it was received by the trial court for trial.

4. The learned Trial Judge framed charges punishable under Sections 450, 307 read with section 34 of Code, 1860 against the appellants. Needless to emphasize all the accused persons abjured their guilt and pleaded complete innocence as they were not present at the time of incident and they have falsely been made accused in this case due to the old business rivalry.

5. In order to prove the charges, the prosecution examined as many as nine witnesses and placed Ex.P/1 to P/10 the documents on record. Though

the defence of accused person is of false implication and the same defence they set forth in their statement recorded under Section 313 of Code, 1973, but the specific defence of appellants are of alibi.

6. The learned Trial Court after appreciating and marshalling the evidence came to hold that all the appellant has committed the offence under Sections 307 read with section 34 of Code, 1860 and eventually convicted them and passed the sentence which is mentioned in the impugned judgment.

7. In this manner, the present appeal has been filed by the appellants assailing the judgment of conviction and order of sentence.

8. Appellants/accused challenging the conviction and sentence passed by the learned Trial Court on the ground that there is material contradictions and omissions in the statements of prosecution witnesses. Appellants/accused were not present at the time of incident on the spot, the independent witnesses as well as his family members have not supported the statement of the complainant. The important eye-witness has not been examined. A.S.I. Punjab Singh (PW.7) and S.P. Prem Kumar Dixit (DW.2) have admitted in their statements that appellants/accused were not present on the spot and the incident was committed by unknown persons. They have also opined that the false FIR has been registered against the appellants. They also admitted in their statements that offence was not committed by appellants/accused.

9. On the other hand learned Panel Lawyer for the State has submitted that the conviction and sentence directed by the Trial Court appears to be correct and no interference is required in the appeal.

10. I have heard the learned counsel for the parties at length.

11. The prosecution case rests mainly on the ocular evidence of injured Ashish Chauhan (PW.3) and Shailendra Singh alias Rajan (PW.4). Ramesh Mistri, as per prosecution story and FIR, who was admittedly present on the spot and had witnessed the incident was not examined at the trial and was given up by the prosecution, without any reason, although he was present on dated 25.6.2004. Statement of Pratibha W/o Shailendra as a eye witness was also recorded under section 161 of Code, 1973 by the police, but she was also not examined at the trial and was given up by the prosecution, without any reason, although she was present on 19.8.2004.

12. Injured Ashish alias Shyam (PW.2) and Shailendra alias Rajan (PW.4)

both are real brothers and the learned Trial Court having relied upon for the purpose of recording finding of guilt against the appellants/accused.

13. Dr. Ashok Kumar Bohare (PW.2) who has examined injured Ashish Chauhan and found following injuries on his person:

> "(1) Lacerated wound size 1.5 x 0.75 cm x depth not asses on the left side of hypochondrium near the coastal margin. Blackening present. This is a wound of entry.
>
> (2) The bullet feel superficially in the left side of lumbar region of Abdomen."

14. Pramod Singh Bhadoriya (PW.5), who is brother-in-law of the complainant, is the witness of the seizure memo of two bullets as per Ex.P.4 and spot map Ex.P.5. O.P. Shrivastava (PW.6) is the ballistic expert, who has examined two bullets and opined that these are .38 bore bullets and has fired by .38 bore factory made weapon, such as by .38 bore revolver.

15. Learned counsel for the appellants vehemently attacked on the testimony of Ashish Chauhan (PW.3) and Shailendra Singh alias Rajan (PW.4) and submitted that the testimony of both witnesses are too vague and false and no interference can be drawn against the appellants for committing the offence. It is further submitted that the investigation as also the conduct of prosecution at the trial suffers from certain serious infirmities and the benefit whereof should not be denied to the appellants.

16. In the light of the submissions advanced firstly I would scrutinze the testimony of two main witnesses Ashish Chauhan (PW.3) and Shailendra Singh alias Rajan (PW.4).

17. Ashish Chauhan (PW.3) stated that on 16.12.1998 at about 9:30 PM he was coming from market towards his house on Bike and when he reached at the home and knocked the door, his father get down from first floor, at that time he saw appellants/accused standing there and they all were having revolver in their hands and they fired on him with an intention to kill him. One bullet hit his abdomen, as soon as he ran inside the house, at that time appellants/accused fired five to six rounds and flee away from the place of incident. He further stated that at that time his father and brother Shailendra Singh came there and took him to Phool Bagh, Police Chowki by Auto.

18. Ashish Chauhan (PW.3) has admitted in para 3 to 5 that there is

business rivalry and old enmity between appellants/accused and his family. He has also admitted that between the parties so many criminal cases have been registered, pending and tried before the Court. He had admitted in para 3 that one case is still pending against him and his brother Shailendra for attempt to commit murder of appellant/Ashok by means of Revolver. It has also been admitted that both the parties are Arms Dealers. It has also been admitted that Ashish Chauhan and Shailendra Singh alias Rajan both are the real brothers. It is true that there was a business rivalry between the parties, but enmity is double edged weapon, that means due to enmity the appellant could assault the vicitim or due to that enmity the appellant could be falsely implicated by the victim and therefore, the evidence of witnesses should be scrutinized minutely.

19. Ashish Chauhan (PW.3) admitted in para 2 of the cross-examination that at the time of incident his mother Rani Chauhan and sister-in-law (Bhabhi) Pratibha Chauhan was present at the house, but statement of Rani Chauhan was not recorded by the police during investigation and the eye-witnesses Pratibha Chauhan was not examined by the prosecution. In para no.2 Ashish Chauhan (PW.3) denied the presence of Ramesh Mistri at the time of incident. Shailendra Singh alias Rajan (PW.4) also denied the presence of Ramesh Mistri in para 2 of cross-examination, but ASI Punjab Singh (PW.7) in para 8 of cross-examination has specifically admitted the presence of Ramesh Mistri as an independent eye-witness at the time of incident and the presence of Ramesh Mistri also mentioned in the FIR (Ex.P.8).

20. Ashish Chauhan (PW.3) also stated in para 7 of cross-examination that appellants/accused were armed with revolver or pistol. He again admits that he cannot say that appellants were having revolver or pistol. He denied this fact that appellants/accused having gun at that time. He again stated that he has not given statement to Doctor in Ex.D.2 that all the accused were having gun. However, according to FIR (Ex.P.8) appellants were armed with .32 bore revolver and .315 bore *Katta*. It is pertinent to mention here that he is a Arms Dealer and he very well knows the difference between the Revolver, Gun and *Katta*, but his changing version about the weapon creates doubt about his testimony. According to FIR (Ex.P.8) appellants fired by using .32 bore revolver and .315 bore *Katta* which hit abdomen of Ashish, but Ballistic Expert O.P. Shrivastava (PW.6) categorically stated in his statement that after examination of two bullets, he found that them .38 bore bullets. Those bullets are not belongs to .32 bore and .31 bore. The statement of Ashish is not

corroborated by the statement of Ballistic Expert O.P. Shrivastava (PW.6).

21. Further the statement of this witness was that appellants/accused all three having revolvers and fired five to six times, but only one bullet hit the abdomen of the injured Ashish Chauhan and no other bullets or sign of bullets were found on the spot. It is quite impossible that where three person fired by three fire arms five to six rounds and only one bullet hit Ashish even no other bullets or empty cartridges found on the spot as well as no sign of bullets were found on the spot as admitted by A.S.I. Punjab Singh (PW.7) in para 7.

22. As per the statement of this witness, his father and brother were taken to him to Police Chowki and Hospital in Auto, but Suresh Chaukotiya (PW.1) stated that he was also present in the Auto and he has not supported the evidence of Ashish. On the contrary Suresh Chaukotiya (PW.1) also stated the presence of Rani mother of Ashish. But, in para 9 Ashish (PW.3) specifically denied the presence of fourth person in the Auto.

23. Statement of Ashish Chauhan (PW.3) was recorded by the police on 18.12.1998 after two days of the incident. This witness stated in para 12 that on 16.12.1998 and 17.12.1998 he was unconscious and was not in a position to record the statement, but the A.S.I. Punjab Singh (PW.7) stated in para 22 of cross-examination that on 16th and 17th December, 1998 Ashish Chauhan was very well in position to give the statement, but he has recorded his statement on 18.12.1998. There is no explanation has been given about the delay in recording the statement of this witness. Ashish Chauhan (PW.3) also admitted in his cross-examination in para 12 that first time on 18.12.1998 he disclosed about the incident to police. He also stated in para 16 that blood were oozing out from the abdomen and was flow down on the spot, but no blood was found on the spot according to Punjab Singh (PW.7) in para 7. This non-availability of blood stain at the place of occurrence also makes the prosecution case doubtful. Shailendra Singh alias Rajan (PW.4) admitted in his statement in para 6 that he and his father's clothes were drenched with blood, but not seized by police.

24. Shailendra Singh alias Rajan (PW.4) stated in his examination-in-chief in para 1 about the incident that on dated 16.12.1998 at about 9:30 PM he was sitting in his house at first floor, at that time on hearing the door knocking, his father Balveer Singh Chauhan get down from the first floor with the key to open the door, at that time he came on balcony and saw that the appellants/ accused were standing on the road having revolvers in their hands and they

fired on his brother Ashish alias Shyam then he came down. In para 2 he stated that he and his father took away Ashish alias Shyam in Auto to Hospital.

25. Before consideration of cross-examination of this witness, it is pertinent to mention here that his wife Pratibha stated in the statement, recorded under section 161 of Code, 1973 that at the time of incident her husband was not present in the house, therefore, he had not gone in Auto with her father-in-law Balveer Singh at Police Chowki Phoolbagh and Hospital. Though Pratibha Singh W/o Shailedra Singh has not been examined by the prosecution, but accused can used her statement. Reliance placed on the decision of this Court in the case of *Ramdayal Vs. State of Madhya Pradesh,* 1993 M.P.L.J. 532 wherein it has been held as under:

> "In these circumstances, the F.I.R. Although a document of the prosecution, went unexhibited and unproved. Can an unproved document of the prosecution be used by the defence ? A view has been taken, with which I concur, that defence like F.I.R. just because the prosecution failed to formally prove it. It is also the view that if the prosecution suggests that its document should not be relied upon because it was a garbled document, it should have given evidence to that effect. In the absence of such evidence by the prosecution, the defence is entitled to use a prosecution document although unexhibited and unproved. The decision of our High Court in *Samedas Vs. State* of M.P., Cri. Revision 587 of 1963 decided on 30.1.1969 (a short report of which appears in 1969 JLJ S.N. 54) is one such decision. There is also earlier decision of Nagpur High Court in *Sheo Prasad Vs. Emperor,* 39 Cri.L.J. 917 to that effect. The following observations of Gruer, J., who spoke on behalf of the Bench, appearing at page 922 of the report, are pertinent :-
>
> > "The next irregularity is that the first information report (Ex.P.1) has not been proved by examining the scribe who wrote it. This is a formal objection and not one that should be advanced on behalf of the prosecution whose document Ex.P.1 is. The defence should not be shut out from using this document because the prosecution did not formally prove it. The presumption

> is that such a first information report represents the actual information given to the police and taken down by them, and if the prosecution wished to imply that the record of the information made by the police was garbled, it should have given evidence to that effect."

26. Therefore, presence of Shailendra Singh alias Rajan (PW.4), at the time of incident, was doubtful and candidly clear that this witness and Ashish Chauhan (PW.3) is telling lie about the presence of Shailendra Singh alias Rajan (PW.4). It is also pertinent to mention here that the statement of this witness has also been recorded on 18.12.1998 and no explanation has been given by the prosecution for delay in recording his statement. As per para 2 and 5 of this witness he was present on 16th and 17th December, 1998 at Police Chowki Phool Bagh, in the hospital why the statement of this witness was not recorded by the police. He has also admitted that he himself had not gone to get record his statement before the police and he has admitted that on 18.12.1998 first time police has recorded his statement.

27. After appreciation of the evidence of Ashish Singh alias Shyam (PW.3) and Shailendra Singh alias Rajan (PW.4) it is found that there are material contradictions, omissions and development in their statements about the incident as well as presence of eye witnesses. Non-examination of independent eye-witnesses Ramesh Mistri and Pratibha not only create a doubt about the incident, but fatal to prosecution.

28. The Apex Court in the case of *Bir Singh and others Vs. State of U.P.*, AIR 1978 SC 59 has held as under:

> "It is true that it was not incumbent on the prosecution to examine each and every witness so as to multiply witnesses and burden the record. This rule however does not apply where the evidence of the eye-witnesses suffers from various infirmities and could be relied upon only if properly corroborated. In the instant case all the eye-witnesses had serious animus against the accused and they were interested in implicating the accused. The substitution of Ram Dularey Singh in the general diary was a suspicious circumstance. The fact that the police was not able to recover any weapon or to explain how the appellants got hold of the guns was yet another circumstance that required a reasonable explanation from the prosecution. According to

> the finding of the learned Sessions Judge even the F.I.R. was ante-timed and although the High Court has not accepted this finding we feel, that the High Court on this aspect has entered into the domain of speculation. In view of these special circumstances it was incumbent on the prosecution to examine he two witnesses at least to corroborate the evidence and if they were not examined the Sessions Judge was justified in drawing an adverse inference against the prosecution."

29. For the foregoing reasons, I do not deem it safe to place reliance on the testimony of Ashish Singh alias Shyam (PW.3) and Shailendra Singh alias Rajan (PW.4).

30. So far as the delay in recording the statement of these witnesses the Hon'ble Apex Court in the case of *Ganesh Bhavan Patel and another Vs. State of Maharashtra,* AIR 1979 SC 135 observed as under:

> "Delay of a few hours, simpliciter, in recording the statements of eyewitnesses may not, by itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eyewitnesses to be introduced. Thus under the facts and circumstances of the case delay in recording the statements of the material witnesses, casts a cloud of suspicion on the credibility of the entire warp and woof of the prosecution story.
>
> Normally, in a case where the commission of the crime is alleged to have been seen by witnesses who are easily available, a prudent investigator would give to the examination of such witnesses precedence, over the evidence of other witnesses."

31. Ashish Singh alias Shyam (PW.3) in para 8 denied to give statement (Ex.D.4) to the CID Police, but Mukesh Saxena (PW.9) stated in para 2 that on 28.3.2000 he recorded statement Ex.D.4 of Ashish Singh alias Shyam (PW.3) in which he stated that:

> "16 दिसम्बर, 1998 को मेरे घर के सामने जब मैं मोटर साईकिल से अन्दर घर में घुस रहा था तब पीछे से किसी ने फायर किया था।"

This statement clearly shows that he did not know the person who has fired.

32. The appellants took the plea of alibi that they were not present on the spot. In defence they examined Adovcate Bhoop Singh Chaudhari (DW.1) who stated that appellant-Chunnilal was present with him in Bhind from 8:00 PM to 10:00 to 10:15 PM and distance of Bhind to Gwalior is 80 Km. It is not possible for him to reach Gwalior at the time of incident at 9:30 PM.

33. Manveer Singh (DW.3) stated that he resides in Shimla and journey from Shimla to Gwalior is of 16 hours. He further stated that on 16.12.1998 at 4:00 PM appellant/Ashok had came on his shop for business purpose and remained there till 8:00 PM. On 17.12.1998 at about 10:00 AM he again came on his shop. He further stated that appellant/Ashok on 16.12.1998 stayed in night at Ambah Hotel in Shimla. This Court in the case of *Rajendra Kumar Gupta and others Vs.State of Madhya Pradesh,* 2014 CRI.L.J. 2133 has held as under:

> "14.It is well settled law that defence is not required to prove the defence with the same standard of strict proof, which is applicable and is required to be proved by the prosecution. It would be sufficient if the probable defence has been taken and it has been proved by placing cogent evidence on record. Since the overwhelming material documents are on record and looking to the evidence of the doctors, the probable defence which has been taken by the defence is found to be proved.
>
> 15. It is well settled law that the defence witnesses are at par with that of prosecution witnesses and their testimony should not be disbelieved merely because they have been examined by the defence side. In this context I may profitably place reliance upon the decision of the Supreme Court *State of Haryana* (supra) and also some other decisions, they are S.Varadarajan v. State of Madras, AIR 1965 SC 942, *Sanjiv Kumar v. State of Punjab* (2009) 16 SCC 487, *Munshi Prasad and others v. State of Bihar* (2002) 1 SCC 351 (AIR 2001 SC 3031) and *State of U.P. v. Baburam* AIR 2000 SC 1735."

Here in the case in hand, statement of both the defence witnesses are very well supported by the Prem Kumar Dixit (DW.2) and also by prosecution witness A.S.I. Punjab Singh (PW.7) cannot be disbelieved.

34. Superintendent of Police, Prem Kumar Dixit (DW.2) specifically stated in para 4 that :

> "जॉच करने के बाद मै रिर्पोट अनुसार इस निष्कर्ष पर पहुॅचा था कि फरीयादी बलवीर सिंह चौहान के द्वारा की गयी रिर्पोट अनुसार घटना तो घटित हुयी है लेकिन वह घटना आरोपी अशोक अग्रवाल और उसका भाई सतीश अग्रवाल तथा सह आरोपी चुन्नी लाल परमार के द्वारा घटित नहीं की गयी।"

35. At the last but not the least statement of Punjab Singh (PW.7) is very important and on the basis of that it is crystal clear that the incident was caused by unknown person and not by appellants. Appellants/accused were not present on the spot and they have falsely been implicated in the case due the business rivalry and old enmity.

36. A.S.I. Punjab Singh (PW.7) admitted in paras 12, 14, 15, 16 , 17, 20 , 21 and 23 which reads thus:

> 12. "यह बात सही है कि अनुसन्धान के दौरान आरोपी अशोक अग्रवाल ने एक आवेदन इस आशय का पेश किया था कि वह घटना दिनांक को ग्वालियर में नहीं था बल्कि शिमला में था। वह आवेदन केस डायरी में उपलब्ध नहीं है। यह सही है कि मैने उस आवेदन की वरिष्ठ अधिकारियों के आर्देशानुसार जॉच की थी। यह जॉच मैने डी.आई.जी. साहब के आदेश पर की थी। उस समय कौन से डी. आई.जी थे आज याद नहीं है। यह बात सही है कि अभियुक्त अशोक अग्रवाल के द्वारा प्रस्तुत आवेदन के संबंध मे मै दिनांक 14.1.99 को ग्वालियर से शिमला के लिये जॉच करने रवाना हुआ था। यह बात भी सही है कि दिनांक 15.1.99 को मे होटल अम्बाह मे शिमला मे ठहरा था। यह बात सही है कि मैने शिमला मे जाकर जिस होटल में अभियुक्त अशोक अग्रवाल ने घटना के समय ठहरना बताया था उस अम्बाह होटल का रजिस्टर्ड भी अनुसन्धान के दौरान जप्त किया था। यह बात भी सही है कि शिमला जाकर मैने मनवीर सिंह, चरण जीत, प्यारे लाल, के कथन लिये थे। शिमला जाकर मेरे द्वारा होटल मेनेजर, वह होटल के वेटर के कथन लिये थे। यह बात सही है कि अभियुक्त अशोक अग्रवाल के द्वारा जो वरिष्ठ अधिकारियों को आवेदन दिया और मैने जब इस संबंध में शिमला जाकर जॉच की तो मुझे गवाहो ने बताया कि अभियुक्त अशोक अग्रवाल दिनांक 16.12.98 से 18.12.98 तक शिमला मे ठहरा था। यह सही है कि मैने जिन साक्षियों के कथन लिये थे उनसे मैने आरोपी अशोक अग्रवाल की पहचान भी करवायी थी। मैने गवाहों के आधार पर यह पाया था औरं केस डायरी में उल्लेख किया था कि आरोपी अशोक अग्रवाल घटना वाले दिन ग्वालियर मै नहीं था बल्कि शिमला मै था और इस संबंध में फरियादी बलवीर ने रिपोर्ट में गलत बात लिखायी।"

> 14. "यह बात सही है कि सी.एस.पी. दीक्षित साहब द्वारा जो जांच की गयी उस जांच रिपोर्ट की उन्होनें दिनांक 25.02.1999 को रिपोर्ट उप महानिरीक्षक को

भेजी थी। यह बात सही है कि उक्त रिपोर्ट यानि इस प्रकरण की जांच रिपोर्ट केस डायरी में संलग्न है। यह बात सही है कि सी.एस.पी. दीक्षित साहब द्वारा जो इस प्रकरण की जांच कर उप महानिरीक्षक की दिनांक 25.02.1999 को रिपोर्ट भेजी है उसमें इस बात का उल्लेख किया है कि गोली मारने वाले अशोक अग्रवाल, सतीश अग्रवाल, चुन्नी लाल शर्मा कदापि नहीं हैं। नगर पुलिस अधीक्षक ने जांच में यह भी पाया था कि घटना अज्ञात लोगों के द्वारा की गई थी।"

15. "यह बात सही है कि मैने दिनांक 13.03.1999 के केसडायरी के पर्चे नंबर 16 में इस बात का उल्लेख किया है कि हमलावर अज्ञात है। मैने इस बात का भी उल्लेख किया है कि गोली मारने वाले सतीश, अशोक चुन्नी लाल कदापि नहीं हैं और किसी अज्ञात व्यक्तियों के द्वैष के कारण घटित की है और प्रकरण की एफ. आईआर. असत्य पायी जाती है।"

16. "मैने इस प्रकरण का अनुसंधान 29.03.99 तक किया है। 29.03.99 तक मैने हमलावर का अज्ञात होने का उल्लेख किया है।"

17. "यह बात सही है कि अभियुक्त चुन्नी लाल ने वरिष्ठ अधिकारियों को इस संबंध में एक आवेदन दिया था कि उसे इस प्रकरण में झूठा फंसाया जा रहा है। चुन्नी लाल के आवेदन पत्र पर से मैने लोगों के कथन लिये थे और उपरोक्त कथन मैने रामकुमार शर्मा, एडवोकेट, भूप सिंह चौधरी, तथा अशोक दोहरे का कथन लिया था। मैने भिण्ड जाकर इन लोगों के कथन लिये थे। मैने साक्षियों के बताये अनुसार यह पाया था कि अभियुक्त चुन्नी लाल घटना के समय घटनास्थल पर मौजूद नहीं था। मैने अनुसंधान के दौरान अभियुक्तगण से कोई हथियार जप्त नहीं किये थे। यह बात सही है कि अनुसंधान के दौरान मेरी जानकारी में यह बात भी आयी थी कि फरियादी बलवीर सिंह की दुकान तथा अभियुक्त अशोक अग्रवाल दोनों आर्म्स डीलर हैं। मुझे इस बात की जानकारी नहीं है कि व्यापार के संबंध में दोनों पक्षों में प्रतिस्पर्धा थी । यह कहना गलत है कि मुझे बारे में जानकारी नहीं थी कि बलवीर सिंह के विरूद्ध कई आपराधिक प्रकरण लंबित है।"

20. "यह सही है कि मेरे बाद प्रकरण में श्री अरविन्द खरे नगर निरीक्षक ने प्रकरण में अनुसंधान किया था और अनुसंधान के दौरान उन्होनें यह पाया था कि उन्होनें आरोपीगण के विरूद्ध कोई अपराध नहीं बनता है इस लिये उन्होनें प्रकरण में खात्मा प्रस्तुत करने की अनुशंसा की थी। यह कहना गलत है कि मैने अनसंधान में यह पाया था घटना फरियादी के घर पर नहीं हुयी बल्कि किसी अन्य स्थान पर हुयी है। यह बात सही है कि जांच के दौरान ऐसा प्रतीत हुआ था कि आशीष के गोली उसके घर पर न लगते हुये कहीं अन्य स्थान पर गोली लगी है और घटना की रिपोर्ट बलवीर ने झूँठी की है।"

21. "यह बात सही है कि मेरे पास इस प्रकरण का जब तक अनुसंधान रहा तब तक किसी अज्ञात व्यक्ति के द्वारा घटना कारित करना प्रतीत हो रहा था। तथा नगर पुलिस अधीक्षक की रिपोर्ट श्री पी.के.दीक्षित की जांच रिपोर्ट आने के बाद ऐसा

प्रमाणित हुआ था। यह बात सही है कि श्री दीक्षित सी.एस.पी. ने जो जांच की थी वह जांच आरोपीगण द्वारा एक आवेदन इस आशय का दिया था कि उन्हें इस प्रकरण में झूँठा फंसाया है।"

23. "यह बात सही है कि मेरे द्वारा चुन्नी लाल के आवेदन पर जो वरिष्ठ अधिकारियों को दिये थे मैने साक्षी भूपसिंह, रामकुमार शर्मा, अशोक बहोरे के कथन भिण्ड में लिये थे वह डायरी में संलग्न हैं। यह बात सही है कि प्रकरण में नगर निरीक्षक श्री अरविन्द खरे, तथा सी.एस.पी. श्री दीक्षित ने प्रकरण में खात्मा की अनुशंसा की थी।"

37. On the basis of aforesaid discussion it is found that incident was caused by unknown person and not by the appellants/accused. Appellants/accused were not present on the spot and have falsely implicated in the case due to business rivalry and old enmity.

38. Accordingly, I am of the considered opinion that the prosecution case is doubtful and as such in view of the facts and circumstances the benefit of doubt can be extended to the appellants.

39. For the reasons stated hereinabove, the present appeal is allowed. The judgment of conviction and order of sentence dated 29.10.2005 passed by the Trial Court in S.T.No.147/2003 is hereby set aside and and they are acquitted from all the charges. Appellants are on bail, their bail bonds are discharged. The amount of fine, if deposited, be refunded to them.

Appeal allowed.

I.L.R. [2015] M.P., 1061
ARBITRATION CASE
Before Mr. Justice Prakash Shrivastava
Arb. Case No. 1/2013 (Indore) decided on 15 July, 2014

AJAY KUMAR JAIN ... Applicant
Vs.
STATE OF CHHATTISGARH & ors. ... Non-applicants

Arbitration and Conciliation Act (26 of 1996), Sections 11(6) and (8) - Territorial Jurisdiction **- Respondents are authorities of State of Chhattisgarh and every formalities of contract have been completed at Raipur - Offer of the applicant was accepted and the contract was made at Raipur - Breach of contract had also taken place at Raipur - No money was expressly or impliedly payable under the contract within the territorial**

jurisdiction of this Court - Hence matter is beyond the territorial jurisdiction of this Court - Application is dismissed. (Paras 14,15 19 & 20)

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराऐं 11(6) एवं (8) – क्षेत्रीय अधिकारिता – प्रत्यर्थीगण छत्तीसगढ़ राज्य के प्राधिकारी हैं और संविदा की सभी औपचारिकताऐं रायपुर में संपन्न हुई हैं – आवेदक का प्रस्ताव स्वीकार किया गया और संविदा रायपुर में की गई – संविदा का भंग भी रायपुर में हुआ – संविदा के अंतर्गत प्रत्यक्ष रूप से अथवा विवक्षित रूप से देय कोई रकम इस न्यायालय की क्षेत्रीय अधिकारिता के भीतर नहीं – अतः मामला इस न्यायालय की क्षेत्रीय अधिकारिता से परे है – आवेदन खारिज किया गया।

Cases referred :

(1989) 2 SCC 163, AIR 1962 SC 378, AIR 2007 Orissa 71, AIR 1961 Kerala 21.

Aniket Naik, for the applicant.
M. Ravindran, for the respondent/State.

ORDER

PRAKASH SHRIVASTAVA, J. :- This application has been filed under Section 11(6) and (8) of the Arbitration and Conciliation Act, 1996 (for short the Act) for appointment of an independent Arbitrator.

2. The applicant who is manufacturer and supplier of woolen apparels and other articles at Indore had submitted tender in response to NIT dated 28/5/2008 issued by the respondents authorities of State of Chhattisgarh for supply of certain articles. Case of the applicant is that the purchase order dated 27/8/2008 was sent to the applicant. Agreement was also sent to the applicant which was returned by the applicant duly signed alongwith covering letter dated 22/9/2008. Applicant had supplied the items and part payment was made but balance payment was denied on the ground of inferior quality of goods. Applicant had sent notice demanding the payment and respondents had issued show cause notice and by order dated 3/2/2010 had cancelled the purchase order terminating the agreement and forfeiting the earnest money as also black-listing the applicant firm for five years. This order was set aside by the High court of Chhattisgarh in WP No. 2771/2010 vide order dated 2/8/2010 with liberty to respondent No. 3 to pass fresh order dealing with the reply to show cause notice submitted by applicant on 8/4/2011. Respondent No. 3 had again issued the order for resupply of the woolen jerseys within 90 days which was challenged by the applicant in WP Nos. 2423/

11 and 2427/11 before Chhattisgarh High court which were dismissed by the Division Bench of the High court by order dated 12/6/2012. After giving the notice dated 15/9/2012, the applicant has filed the present application for appointment of an independent arbitrator.

3. Reply has been filed by the respondents raising the objection about territorial jurisdiction of this court on the ground that the contract was executed and material was supplied at Raipur in Chhattisgarh. They have further raised the objection that the arbitration clause provides for arbitration by the named arbitrator, therefore, the proper remedy for the applicant is to approach the named arbitrator.

4. Learned counsel for the applicant submits that this Court has the territorial jurisdiction since the contract was concluded at Indore where the applicant had accepted the counter offer of the respondents contained in purchase order dated 27/8/2008. He has further submitted that since there is reasonable apprehension of bias on the part of the named arbitrator who had blacklisted the applicant, therefore, the independent arbitrator needs to be appointed.

5. Counsel for respondents opposing the application have submitted that the contract was executed at Raipur where the offer of applicant was accepted unconditionally and that the apprehension of bias against the named arbitrator is unfounded.

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

7. The main objection of the respondent is about the territorial jurisdiction of this Court.

8. The present application has been filed under Section 11(6) and (8) of the Act. In terms of Section 11 (12)(b) of the Act, for the purposes of Section 11(6) and (8), the reference to the Chief Justice in these subsections is construed as reference to the Chief Justice of the High court within whose local limits, the principal civil court referred to in clause 2(1)(e) of the Act is situated. Section 2(1)(e) of the Act defines 'Court' to mean the principal Civil Court of original jurisdiction having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit. Thus, the Chief Justice or his designate of that High court will have the jurisdiction, within whose jurisdiction the civil court of original jurisdiction competent to decide the dispute forming the subject-matter of arbitration is

located. Therefore, it is to be seen if the parties, instead of invoking the arbitration clause, had decided to approach the Civil Court than which Civil Court of original civil jurisdiction would have the territorial jurisdiction to decide the dispute.

9. Section 15 to Section 20 of CPC provide for jurisdiction of the court in respect of different nature of suits. The provision of Section 20 of the CPC relevant in the present case reads as under:"

> **20. Other suits to be instituted where defendants reside or cause of action arises.**Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction
>
> (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
>
> (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such cases either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution, or
>
> (c) the cause of action, wholly or in part, arises."

10. So far as Clauses (a) & (b) of Section 20 CPC is concerned, undisputedly the defendant who is an authority of State of Chhattisgarh is beyond the territorial jurisdiction of this court, therefore, it is to be seen if any part of cause of action has arisen within the territorial jurisdiction of this Court to attract Clause (c) of Section 20.

11. In a suit for damages for breach of contract, the cause of action consists of making of the contract and its breach therefore, such a suit can be filed in the court within whose jurisdiction the contract was made or in the court within whose jurisdiction it was required to be performed and the breach took place. It is also settled that in such kind of cases, part of cause of action arises where money is expressly or impliedly payable under the contract and in case

of repudiation of a contract, the place where repudiation is received.

12. The Supreme court in the matter of *A.B.C. Laminart Pvt. Ltd. and another Vs. A.P. Agencies, Salem,* reported in (1989) 2 SCC 163 has held as under:"

> 15. In the matter of a contract there may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have been performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and nowhere else. In suits for agency actions the cause of action arises at the place where the contract of agency was made or the place where actions are to be rendered and payment is to be made by the agent. Part of cause of action arises where money is expressly or impliedly payable under a contract. In cases of repudiation of a contract; the place where repudiation is received is the place where the suit would lie. If a contractor is pleaded as part of the cause of action giving jurisdiction to the court where the suit is filed and that contract is found to be invalid, such part of cause of action disappears. The above are some of the connecting factors."

13. In the present case for the purpose of deciding the issue of territorial

jurisdiction following issues need consideration:

i) What was the place of making the contract?

ii) What was the place of performance of the contract and the place where breach occurred?

iii) Whether any money was expressly or impliedly payable under the contract within the jurisdiction of this Court?

14. So far as the first issue about making of contract is concerned, Section 3 of Indian Contract Act, 1872 provides that the communication of proposal and acceptance are deemed to be made by any act or omission of the party proposing or accepting , by which he intends to communicate such proposal or acceptance or which has the effect of the communicating it. In terms of Section 4, the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made and the communication of an acceptance as against the proposer is complete when it is put in a course of transmission to him so as to be out of power of the acceptor and as against that acceptor, it is complete when it comes to the knowledge of the proposer. Section 7 provides that in order to convert a proposal into promise, the acceptance must be absolute and unqualified. An acceptance with a variation or a condition is not an acceptance but is merely a counter proposal. An acceptance with introduction of new term constitutes counter-offer.

15. In the present case, the applicant firm has registered office at Indore. The respondents are the authorities of the State of Chhattisgarh at Raipur. The NIT dated 28/5/2008 was issued from Raipur. The supply of goods was to be made at Raipur. Applicant had sent the tender form to the respondents authorities at Raipur. The offer i.e. the tender form of the applicant was accepted by the respondents at Raipur and the purchase order dated 27/8/2008 was sent by the respondents from Raipur. On the acceptance of the tender form i.e. the offer of the applicant by the respondents at Raipur, the contract was made at Raipur. The sending of the copy of agreement by the respondents from Raipur to applicant at Indore for signature was a mere subsequent formality, therefore, even if the applicant had completed the formality of signing the agreement at Indore, on that basis it cannot be held that the contract was made at Indore.

16. Counsel for applicant has raised the plea that since the purchase order dated 27/8/08 contains the condition of deposit of 7% of the purchase value

within 10 days failing which the purchase order was to be treated as cancelled, therefore, it was a conditional acceptance amounting to counter offer by the respondents. Such a plea cannot be accepted because the applicant has not placed on record the original offer conditions to demonstrate that there was any deviation from offer or to show that such a clause was not there in the offer. On the contrary, opening paragraph of the purchase order dated 27/8/08 reveals that the purchase order was issued after accepting the applicant's offer.

17. Supreme court in similar circumstances in the matter of *Jawahar Lal Barman Vs. The Union of India,* reported in AIR 1962 SC 378 in a case where the letter of acceptance was issued stating that the offer was accepted subject to depositing 10% as security and further stating that contract was concluded by acceptance and formal acceptance, after reading the letter as a whole has held that it amounts to an absolute and unqualified acceptance of the offer or tender without making substantial variation in the contract.

18. Counsel for applicant has placed reliance upon the Division Bench judgment of Orissa High court in the matter of *Vishwa Industrial Company Pvt. Ltd. Vs. Mahanadi Coalfields Ltd. and others,* reported in AIR 2007 Orissa 71 but in that case the additional term of the performance bank guarantee was imposed for which the offerer had immediately written back refusing acceptance of that term therefore, that judgment stands on different footing. Counsel for applicant has also placed reliance upon the judgment of the Division Bench of Kerala High court in the matter of *Moolji Jaitha and Co. Vs. Seth Kirodimal,* reported in AIR 1961 Kerala 21 but in the facts of that case the telegram dated 15/1/52 was found to be a counter offer which is not so in the present case.

19. In view of the above analysis it is held that the offer of applicant was accepted at Raipur and the contract was made at Raipur.

20. So far as the second issue is concerned, it is not in dispute that the items in question were supplied by the applicant at Raipur. They were rejected by the respondents as substandard at Raipur, therefore, the breach had taken place at Raipur.

21. So far as the third issue is concerned, though Bank drafts payable at Indore for part payment of the amount were issued by the respondents but no term of contract or any relevant circumstances has been pointed out to this court from which it can be inferred that under the contract the money was

expressly or impliedly payable at Indore. Thus it can not be held that any money was expressly or impliedly payable under the contract within the territorial jurisdiction of this Court.

22. It is also worth noting that in the present case it is not the plea of the applicant that repudiation was received at Indore. Earlier also when the applicant was aggrieved with the order passed by the respondents in the course of execution of the contract, the applicant had approached Chhattisgarh High court by filing WP No. 2771/2010, WP No. 2423/2011 and 2427/2011.

23. Considering the above analysis, I am of the view that this court does not have territorial jurisdiction for appointment of arbitrator under Section 11 of the Act. The arbitration case is accordingly dismissed.

Application dismissed.

I.L.R. [2015] M.P., 1068
CIVIL REVISION
Before Mr. Justice Sanjay Yadav
Civil Rev. No. 113/2012 (Jabalpur) decided on 21 January, 2014

POORAN DAS ...Applicant
Vs.
PARMESHWAR DAS ...Non-applicant

Civil Procedure Code (5 of 1908), Sections 115 & 47 - Appointment of Commissioner **- Executing Court rejected an application filed u/o 26 Rule 9 & 18 to demarcate the property holding that as area being neither mentioned in the agreement of sale nor in the judgment and decree therefore executing Court can not go behind the decree - Held - Section 47 of CPC provides that all questions arising between the parties relating to the execution, discharge or satisfaction of the decree shall be determined by the executing Court and not by a separate suit - Therefore, on the basis of well described boundaries executing Court is well within its power to issue a Commission - Impugned order is set-aside - Revision is allowed. (Paras 9 & 11)**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 115 एवं 47 – आयुक्त की नियुक्ति – संपत्ति का सीमांकन करने के लिये आदेश 26 नियम 9 एवं 18 के अंतर्गत प्रस्तुत आवेदन को निष्पादन न्यायालय द्वारा यह धारणा करते हुए अस्वीकार किया गया कि चूंकि क्षेत्र न तो विक्रय के करार में और न ही निर्णय एवं डिक्री में

उल्लिखित है इसलिये निष्पादन न्यायालय डिक्री से पीछे नहीं जा सकता – अभिनिर्धारित – सि.प्र.सं. की धारा 47 उपबंधित करती है कि डिक्री के निष्पादन, निर्वहन या संतुष्टि के संबंध में पक्षकारों के मध्य उत्पन्न सभी प्रश्नों का निर्धारण निष्पादन न्यायालय द्वारा किया जायेगा और न कि पृथक वाद द्वारा – अतः मली–भांति वर्णित सीमाओं के आधार पर निष्पादन न्यायालय कार्यादेश जारी करने के लिये पूरी तरह सशक्त – आक्षेपित आदेश अपास्त – पुनरीक्षण मंजूर।

Cases referred :

AIR 1971 ALL 16, AIR 1982 KER 333, AIR 1987 KER 226, AIR 2003 KERALA 288.

R.K. Nagar, for the applicant.
S.B. Agnihotri, for the non-applicant.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- I.A. No.3935/2012, an application under Section 5 of the Limitation Act, 1963 for condonation of delay.

1. Reason assigned in the interlocutory application is that the petitioner had earlier filed Writ Petition 17338/11 and the said petition was allowed to be withdrawn with liberty to prefer a civil revision. It is contended that the writ petition, which was directed against the order-dated 19.8.2011 passed by VIII Civil Judge Class I, Jabalpur, was preferred within time.

2. There being sufficient explanation in respect of delay caused in filing the civil revision, the I.A. stands allowed and delay of 107 days is hereby condoned.

3. With consent of learned counsel for the parties, the matter is heard finally.

4. This revision, under Section 115 of the Code of Civil Procedure, 1908 (for short 'CPC') at the instance of decree holder, is directed against an order-dated 19.8.2011 passed by the Executing Court rejecting petitioner's application under Order 26 Rule 9 and 18 of the CPC; whereby the decree holder had sought appointment of Commissioner to demarcate the suit property. The application, as apparent from the order, is rejected on the finding that the Executing Court cannot go behind the decree.

5. Suit by the petitioner was for specific performance of agreement of sale dated 1.6.2003 in respect of House bearing No.341, 105 P.C. No.52, Khasra No.418 Area 0.138 Hectare, Village Barela Kisani Ward Tahsil and District Jabalpur, which was marked as A,B,C,D with the plaint map. The suit was decreed on 30.9.2008 in the following terms -

> अतः वादी का वाद प्रतिवादी के विरूद्ध निम्नानुसार जयपत्रित किया जाता है :– (क) यह कि प्रतिवादी अनुबंधपत्र (प्र.पी.–1) के अनुसार वादी से रू.13000 (तेरह हजार) प्राप्त कर वाद ग्रस्त मकान नंबर बंदोबस्त 341, 105 पटवारी हल्का नंबर 52, आबादी खसरा नंबर–418 रकबा 0.138 हेक्टेयर, स्थित ग्राम बरेला, तह. व जिला जबलपुर जिसके पूर्व दिशा में रास्ता, पश्चिम दिशा में रामेश्वर, कृष्णा कुमार का मकान, उत्तर में टिक्की लोधी का मकान, दक्षिण दिशा में भैया जी पटेल का मकान है जिसे कि वादपत्र के साथ संलग्न मानचित्र में अक्षर–अ,ब,स,द से दर्शित किया गया है, का विकयपत्र आज दिनांक से दो माह की अवधि के अंदर वादी के पक्ष में निष्पादित करेगा । यदि प्रतिवादी ऐसा नहीं करता है तो वादी न्यायालय के माध्यम से वादग्रस्त मकान का विकयपत्र निष्पादित करा पाने का अधिकारी होगा । (ख) यह कि वादपत्र के साथ प्रस्तुत नजरी नक्शा जयपत्र का अंग होगा । (ग) यह कि प्रतिवादी अपना वाद व्यय स्वयं वहन करेगा एवं वादी के द्वारा इस प्रकरण में अपगत किये गये व्यय भी वहन करेगा । अधिवक्ता शुल्क प्रमाणित होने पर अथवा सूची अनुसार जो भी कम हो छोड़ी जावे ।

6. It is not in dispute that the judgment and decree in the Civil Suit No.34-A/2008 has attained finality as the first and second appeal thereagainst, are dismissed.

7. Apparent it is from the judgment and decree that it does not disclose any area of the suit property, as the agreement of sale itself was silent about the area. Counsel for the petitioner does not dispute the fact.

8. That, before taking recourse to execution, the petitioner had approached the trial Court for correction of the decree vide application under Section 152 CPC for adding 29x15=435 was rejected by trial Court vide its order-dated 8.3.2011.

9. In execution proceedings, petitioner filed an application under Order 26 Rule 9 and 18 CPC for demarcating an area by appointing a Commissioner for effecting execution of the decree. The executing Court found that the area being not mentioned in the agreement of sale, not in the judgment and decree, a commission cannot be issued for carving out an area of suit property as the

same would amount to going behind a decree.

10. Rule 9 of Order 26 CPC provides for that "in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any *mesne profits* or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court." The local investigation under the provision thus presupposes the existence on record of independent evidence which requires elucidation.

11. Section 47 of the CPC makes a provision regarding questions to be determined by the Court executing the decree. Sub-section (1) stipulates that "all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit." The provision empowers the executing Court to objectively interpret the decree with the available evidence on record to facilitate the execution and not to discard it as a dead letter. Thus, when the description of suit property is well delineated as in the present case, except its area, then on the basis of well described boundaries, the executing Court would be well within its power to issue a commission for exact location of the suit property.

12. In *Rahim Bux v. Mohammad Shafi* AIR 1971 ALL 16, it has been held by Allahabad High Court -

> "6. Lastly, it was contended that due to the reconstruction of the building during the pendency of the case it has become difficult to identify the portion of it on which the plaintiff's shop existed and so the decree is not capable of execution. In my opinion this point does not arise at this stage. As mentioned above, the landlords were permitted to rebuild the building at their own risk which implied that the rights of the plaintiff would not be prejudiced thereby. It would, therefore, be for the execution court to decide, after taking such evidence as may be necessary, as to which portion of the present premises consisted of the shop which was in the tenancy of the plaintiff and to restore possession to him only in respect of that portion."

13. In *Chacko Geevarghese v. State* AIR 1982 KER 333, the Kerala High Court held -

> "7. The first question that may be considered in this case is whether the judgment and decree passed in terms of the award, enabling the party to realise the retention amount but without mentioning the actual amount due thereunder, is an executable decree. Can it be said that merely for the reason that the actual figure is not given in the decree, a decree is not executable at all? On principle and precedents, the proposition that a decree is not executable at all in such circumstances, does not appear to be tenable.
>
> 11. That an ascertainment of the property in execution, where it is the subject matter of the decree, is permissible, appears to be the view taken by the Travancore-Cochin High Court also (vide *Devan Krishnan Kartha v. Kochu Mohamed Pariathu*, AIR 1955 NUC 6036)."

14. In *Kassim Beevi v. Meeranchi Mytheen Beevi* AIR 1987 KER 226, it is held -

> "3. This is one of those cases where the execution of a decree is attempted to be stalled on mere technicalities. The suit itself was keenly fought out by the petitioner. The matter was carried through three courts. Thereafter when the execution is taken, technical pleas are raised as if the court is precluded from taking note of the actual state of affairs and conveying the property with a proper sale deed describing the actual boundaries. It is not as if there was any dispute as to the property in regard to which specific performance was sought. It was not in dispute that the property covered by Ext. P2 and that sold as per Ext. D2 was same and the same. That there was a mistake in the boundary description in Ext. P2 is also clear from the observations in para 13 of the judgement in the suit. The plaintiff is entitled, in a suit for specific performance, to have the property agreed to be sold to him, conveyed with a proper, correct and effective deed of sale. When there is no dispute regarding the identity of the property, there is no reason why the actual boundaries of the property, as understand by all the parties, should not be incorporated in the sale deed to avoid any possible confusion in future. It is not as if by doing so

the court is traversing beyond the decree or causing any prejudice to any of the parties or conveying property not agreed to he conveyed. In a case of this nature the court is bound to carry out and implement its decree in accordance with its tenor, which in turn would imply that the property should be correctly described with the proper boundaries. That is all that has been done by the lower court in approving the draft sale deed. The plaintiff has only incorporated the boundaries from Ext. D2, the sale deed in favour of the petitioner. In the absence of any dispute that this was the property which was the subject matter of Ext. P2 also, the lower court has only acted rightly in approving the draft sale deed."

15. In *P. N. Kurian v. Thulasidas* AIR 2003 KERALA 288, while considering the scope of Section 47 CPC, it has been held that an application for appointment of Commissioner and Surveyor for measuring and identifying property in terms of decree under execution can be allowed.

16. The impugned order, when tested on the anvil of the principle of law laid down by various Courts as to scope of Section 47 CPC and in the given facts of present case, deserves to be and is hereby set aside.

17. Let a Commissioner be appointed to determine the exact area as per the described boundaries.

The revision is allowed to the extent above.

Certified copy as per rules.

Revision allowed.

I.L.R. [2015] M.P., 1073
CRIMINAL REVISION
Before Mr. Justice B.D. Rathi
Cr. Rev. No. 314/2013 (Gwalior) decided on 27 March, 2014

VIRENDRA SINGH ...Applicant
Vs.
STATE OF M.P. & anr. ... Non-applicants

A. ***Criminal Procedure Code, 1973 (2 of 1974), Section 319 - Summoning of additional accused*** **- Addition of additional accused is warranted only when there is reasonable prospect of case ending in**

his conviction - Order cannot be passed because first informant or one of witnesses seeks to implicate other persons. (Paras 10 to 12)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – अतिरिक्त अभियुक्त को समन किया जाना – अतिरिक्त अभियुक्त को जोड़ा जाना केवल तब आवश्यक होगा जब प्रकरण उसकी दोषसिद्धि में समाप्त होने की युक्तियुक्त संभावना है – इसलिये कि प्रथम सूचना कर्ता या साक्षियों में से कोई एक अन्य व्यक्तियों को आलिप्त करना चाहता है आदेश पारित नहीं किया जा सकता।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 319 - Summoning of Additional Accused* - During investigation it was found that respondent no. 2 was not present on spot and was present in ATM booth - CD produced by IO also proves the presence of respondent no. 2 in ATM booth - Nothing in evidence of PW-1 that absence of respondent no. 2 on the spot was deliberately shown by IO - Application rightly rejected. (Paras 13-18)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – अतिरिक्त अभियुक्त को समन किया जाना – अन्वेषण के दौरान यह पाया गया कि प्रत्यर्थी क्रमांक 2 घटनास्थल पर उपस्थित नहीं था और ए.टी.एम. बूथ में उपस्थित था – अन्वेषण अधिकारी द्वारा प्रस्तुत की गई सी.डी. भी प्रत्यर्थी क्रमांक 2 के ए.टी.एम. बूथ में उपस्थिति को साबित करती है – अ.सा. 1 के साक्ष्य में कुछ नहीं कि प्रत्यर्थी क्रमांक 2 की घटनास्थल पर अनुपस्थिति को अन्वेषण अधिकारी द्वारा जानबूझकर दर्शाया गया – आवेदन उचित रूप से नामंजूर किया गया।

Cases referred :

(2001) Insc 341 (25 July 2001), (2006) Insc 197 (10 April 2006), (2007) Insc 804 (6 August 2007), (2007) 2 SCC (Cri) 412, AIR 1974 SC 344, 2009 CRI. L.J. 3978, (2009) 2 SCC (Cri) 79, (2006) 1 SCC (Cri) 568, (2009) 1 SCC (Cri) 844, (2009) 1 SCC (Cri) 1006, 2013 Cri. L. J. 3900, 1983 Cri L.J. 1394, 1985 Cri. L. J. 1238 (FB).

Arun Pateriya and *R.K. Shrivastava,* for the applicant.
Rajeev Upadhyay, P.L. for the non-applicant no.1/State.
R.K. Sharma and *Ankur Maheshwari,* for the non-applicant no.2.

ORDER

B.D. Rathi, J. :- With the consent of learned counsel for the parties, this matter is heard finally.

2. This revision petition has been preferred under Section 397 read with Section 401 of the Code of Criminal Procedure (hereinafter referred to as "the Code") being aggrieved by the order dated 3.4.2013 passed by Additional Session Judge, Jaura, District Morena in Session Trial No.83/2011, whereby application filed under section 319 of the Code by petitioner- Virendra Singh was dismissed on the ground that to corroborate oral evidence of Virendra Singh weapon i.e. fire arm allegedly used in commission of offence by Manoj Singh, which is belonging to his uncle Laxman Singh was not seized from Laxman Singh and there is no evidence to connect that the injury sustained by Shiv Kumar (since deceased) caused by fire arm belonging to Laxman Singh. This petition has been preferred for seeking relief that by allowing this revision petition, impugned order dated 3.4.2013 be set aside and respondent no.2-Manoj Singh be made accused in Session Trial No.83/2011 and also appropriate directions be issued that after making Manoj Singh as accused he should be tried along with co-accused persons in Session Trial No.83/2011 pending in the Court of First Additional Session Judge, Jaura, District Morena.

3. As per prosecution story, incident occurred on 3.11.2010 at 12:30 noon thereafter named FIR was lodged promptly at about 1:10 PM at Police Station Sumawali by present petitioner i.e. complainant-Virendra Singh against Manoj Singh S/o Bharat Singh Gurjar, Ajeet Singh S/o Bharat Singh Gurjar, Yogesh S/o Bharat Singh Gurjar, Dhunna S/o Bharat Singh Gurjar, Laxman S/o Raghunath Singh, Neetu S/o Laxman Singh, Shishupal S/o Laxman Singh, Badam S/o Pancham Singh, Jandel S/o Pancham Singh and Bhagwat S/o Ranveer Singh. Alleging therein that the complainant along with Vijendra Singh, Parimal, Balendra reached at the Police Station with injured Shivkumar made report that at around 12:30 PM the complainant and Shivkumar had gone to the Society for taking Kerosene Oil and when they reached on the public road situated near the bungalow of Karan Singh then from front side Manoj armed with mouzer gun of his uncle Laxman, Laxman armed with lathi, Ajeet armed with Farsa, Yogesh armed with Katta, Chhunna armed with 12 bore gun, Shishupal armed with Katta, Jandel armed with mouzer gun, Bhagwat armed with mouzer gun, Badam armed with lathi and Neetu armed with Farsa came there with common intention. Complainant and Shivkumar were hurled abuses due to election rivalry and thereafter Manoj with an intention to kill Shivkumar fired a gun shot, which hit on his (Shivkumar) right side of chest, he fell down there, thereafter Yogesh, Jandel and Bhagwat with an intention

to kill fired gun shots. Complainant rescued himself, ran away from the place of incident and shouted that Shivkumar has received gun shot injury. On hearing the shriek made by the complainant and noise of the gun shots Parimal, Damodar, Dilip, Beerbal and other persons rushed on the spot, then the accused persons fled away. On the basis of the aforesaid report, a case under sections 302, 147, 148, 149, 294 and 341 of IPC was registered against the accused persons at Crime No.130/2010 at Police Station Sumawali, District Morena. The criminal law was triggered and set in motion.

4. After completion of investigation charge-sheet was filed against the accused persons except against the Manoj (respondent no.2).

5. It is submitted by learned counsel for the petitioner that previously one application was also filed by the petitioner under section 319 of the Code on 3.4.2012 after recording of chief examination of the petitioner-Virendra Singh (PW.1), but that too was dismissed by the Trial Court. Against that Criminal Revision No.455/2012 was filed and by order dated 29.6.2012 the same was dismissed by this Court. Though liberty was granted to the petitioner that after completion of entire evidence of petitioner he may file another application under section 319 of the Code and on that eventuality the application shall be decided by the Trial Court without getting prejudice from the previous order.

6. It is also submitted by learned counsel for the petitioner that IInd application of the petitioner under Section 319 of the Code was again dismissed by the Trial Court only on the ground that there was no corroborative evidence present in support of the oral evidence of the petitioner-Virendra Singh and by observing this in para 13 of the impugned order dated 3.4.2013, the application was dismissed. It is also submitted by learned counsel for the petitioner that the Trial Court was committed error by believing the report of Investigating Officer that respondent no.2-Manoj Singh was not present on the spot and he has not committed any offence. In support of plea of alibi of Manoj Singh one CD of ATM Booth of Punjab National Bank, Hazeera, Gwalior was produced along with the charge-sheet by Investigating Officer. It is submitted by learned counsel for the petitioner that this defence of the respondent no.2-Manoj Singh could not be considered at this stage by the Trial Court. Respondent no.2-Manoj Singh has neither been arrested nor charge-sheet was filed by the investigating officer against him due to some ulterior motive. It was also submitted by learned counsel for the petitioner

that it is the choice of prosecution to prove its case on its own will. The prosecution cannot be asked to produce particular set of evidence to prove its case and because Manoj Singh was not arrested, therefore, question of seizure of fire arm belonging to Laxman Singh cannot be raised. The oral evidence of the petitioner and witnesses are sufficient to make respondent no.2- Manoj Singh as co-accused. It is also submitted by learned counsel that in the FIR specific allegations were made against Manoj Singh that he has fired gun shot by using mouzer gun belonging to his uncle Laxman Singh and the same allegations were also levelled against respondent no.2- Manoj Singh by the witnesses during investigation, even then he was not made party. Lastly it is prayed by learned counsel for the petitioner that by allowing this petition necessary direction be issued to make respondent no.2-Manoj Singh as co-accused in the Session Trial No.83/2011 and he be tried along with other coaccused persons. In support of his contentions, learned counsel for the petitioner has placed reliance on the following judgments:

(I) *Rakesh and another Vs. State of Haryana,* (2001) Insc 341 (25 July 2001);

(II) *Lok Ram Vs. Nihal Singh and another,* (2006) Insc 197 (10 April 2006);

(III) *Rajendra Singh Vs. State of U.P. and another,* (2007) Insc 804 (6 August 2007); and

(IV) *Y.Saraba Reddy Vs. Puthur Rami Reddy and another,* (2007) 2 SCC (Cri) 412.

7. On the contrary, it is submitted by Shri R.K. Sharma and Shri Ankur Maheshwari, learned counsel for the respondent no.2 that only on the basis of oral evidence of petitioner deposed to wreak vengeance, the respondent no.2 cannot be made accused without any corroborative evidence. On such evidence he cannot be convicted. Matter was fairly investigated by the Investigating Officer and found that respondent no.2-Manoj Singh was not present on the spot. At the time of incident he was present at the ATM Booth of Punjab National Bank situated at Hazeera, Gwalior at about 12:57 PM. In support of that CD was also produced along with the challan. The incident has occurred as per the FIR at 12:30 noon at Village Tiktoli situated near about 50 Km away from the ATM Booth of Punjab National Bank, Hazeera, Gwalior and he was found present as per CD at 12:57 PM in ATM Booth of

Punjab National Bank, and therefore, the distance between the ATM Booth to Village Tiktoli itself shows that it was not possible for respondent no.2 to reach within 27 minutes on the ATM Booth of Punjab National Bank situated at Hazeera, Gwalior from the place of incident only to establish the plea of alibi. Meaning by he was not on the spot at 12:30 noon. In such circumstances, the respondent no.2 could not made accused and it shows the fairness of the investigation, otherwise definition of fair investigation will come to an end. It is also submitted by learned counsel that neither any FIR nor in the statement of any of the witnesses it was mentioned that time of incident was approximately shown, but accurate time of incident as 12:30 noon was mentioned in FIR. It is also submitted by learned counsel for the respondent no.2 that from perusal of the case diary it can be seen that during entire investigation, Manoj Singh has extended his full cooperation in investigation to the investigating officer. In support of his contention, learned counsel for the respondent no.2 have placed reliance on the following judgments:

(I) *Harchand Singh and another Vs. State of Haryana*, AIR 1974 SC 344;

(II) *Sarabjit Singh and another Vs. State of Punjab and another*, 2009 CRI.L.J. 3978;

(III) *Brindaban Das and others Vs. State of West Bengal*, (2009) 2 SCC (Cri) 79;

(IV) *Palanisamy Gounder and another Vs. State Represented by Inspector of Police*, (2006) 1 SCC (Cri) 568;

(V) *Lal Suraj alias Suraj Singh and another Vs. State of Jharkhand*, (2009) 1 SCC (Cri) 844; and

(VI) *Kailash Vs. State of Rajasthan and another*, (2009) 1 SCC (Cri) 1006.

8. Learned Panel Lawyer for the respondent no.1/State opposed the revision petition and prayed for its rejection.

9. Having regard to the arguments advanced by the learned counsel for the parties,entire record and material available on record have been perused.

10. It is settled law that addition of additional accused warranted only

when there is reasonable prospect of case against such accused ending in their conviction. It is also settled law that order under Section 319 of Cr.P.C. cannot be passed only because first informant or one of witnesses seeks to implicate other persons. The evidence adduced against such persons must be substantive evidence in order to summon him for trial, there should be a good chance for his conviction.

11. Reading of provision of Section 319 of Cr.P.C. will be helpful to resolve the dispute, which reads thus:-

> "319. (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.
>
> (2) Where such person is not attending the Court, he may be arrested or summoned as the circumstances of the case may require, for the purpose aforesaid.
>
> (3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.
>
> (4) Where the Court proceeds against any person under sub-section (1), then -
>
> (a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;
>
> (b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

12. On bare perusal of this section, it is clear that the word "it appears" in section 319 are not to be read lightly, meaning thereby that merely because in the FIR or some witnesses have mentioned the name of person the discretion under Section 319 of Cr.P.C cannot be used by the Court. The discretion given under Section 319 of Cr.P.C. has to be exercised very sparingly and

with caution and only when the Court concerned is satisfied that some offence has been committed by such person. This power has to be essentially exercised only on the basis of the evidence. It could therefore be used only after the legal evidence comes on record and from that evidence if it appears that the person concerned has committed an offence, in that case only a new man can be made accused by using discretionary powers given under Section 319 of Cr.P.C. It is also settled law that where two views are possible then a view which is in favour of accused should be taken into consideration.

13. In the aforesaid legal position, it seems that the impugned order passed by the learned Trial Court is well merited and no interference is called for. The application under Section 319 of Cr.P.C was rightly dismissed.

14. During investigation it was found by the investigating officer that at the time of incident Manoj was not present on the spot, he was present in the ATM Booth of Punjab National Bank, Hazeera, Gwalior and in support of this fact investigating officer has produced one CD along with the charge-sheet to prove that on the date of incident i.e. on 3.11.2010 at 12:57:21 PM Manoj was present in the aforesaid ATM Booth. This fact is clear from perusal of CD and photographs of that enclosed herewith. In the entire evidence it was not deposed by Virendra Singh (PW.1) that absence of Manoj on the spot was deliberately shown by the investigating officer by adopting malpractice. It was also not deposed by Virendra Singh (PW.1) that investigating officer has conducted investigation unfairly to save Manoj from conviction. In the FIR lodged by Virendra Singh (PW.1) it was mentioned that Manoj has fired gun shot from the Mouzer gun of his uncle Laxman Singh. The statement of Virendra Singh (PW.1) was recorded on 3.4.2012 before the Trial Court. It was also deposed by him in para 1 of his evidence that Manoj has fired gun shot from the gun of his Uncle Laxman Singh due to that injuries on the right side of the chest was caused to Shivkumar and due to that Shivkumar had died.

15. In para 13 of the impugned order, it was observed by the Trial Court that Mouzer gun of Laxman was not seized. There is no evidence to prove the fact that injuries received by Shivkumar was caused from the gun of Laxman Singh. In para 15 of evidence it was deposed by Virendra Singh (PW.1) that in the year 2001 in the election of Gram Panchayat his father and this Manoj both were contesting the election against each other and ultimately Manoj won the election. Apart that, it is not satisfactorily explained by Virendra Singh (PW.1) that how he came to know that Mouzer Gun used by Manoj in commission of the offence was

belonging to his uncle Laxman Singh. In this way except the allegation made by Virendra Singh (PW.1) against Manoj there is no evidence to connect Manoj with the crime in this case. Even after taking into considering the facts in the FIR and the evidence deposed by Virendra Singh (PW.1) before the Court in its totality even then Manoj cannot be convicted with the offence of murder of Shivkumar because in support of allegation no other evidence is available on record, but on the contrary as per the report of investigating officer, Manoj was not present on the spot at the time of incident. Neither there is any ground nor any evidence to disbelieve the report of investigating officer that Manoj was not present on the spot. As per the FIR incident occurred on 3.11.2010 at 12:30 noon and as per the investigation report at about 12:57:21 noon Manoj was present in the ATM Booth of Punjab National Bank, Hazeera, Gwalior and there is a difference of 27-28 minutes between the presence of Manoj at ATM Booth and in the time of incident. Therefore, it was not possible for him to reach at ATM Booth within a short span of time of 27-28 minutes from the spot 50 kms. away from ATM Booth. Evidence of CD discloses that he was present at ATM Booth at 12:57:21 PM.

16. Apart that on account of inimical relationship, because of Panchayat election, the view (evidence of alibi) in favour of Manoj can be taken into consideration, specially in absence of supporting evidence for oral evidence. Case of *Y. Sarabareddy* cited by petitioner's counsel is not applicable in scenario of the present case. Hence plea of alibi was found true on the basis of evidence by Investigating Officer and same has not been challenged by Virendra Singh (PW.1) in his court evidence. View of this Court is based on the principles laid down by the Supreme Court in all other citations mentioned in this order.

17. So far as the objection that the plea of alibi cannot be considered at this stage by this Court is concerned in the considered view of this Court this objection is not tenable because here, in the present case, the plea of alibi has not been raised by respondent No.2 Manoj but it was the original case of prosecution itself that Manoj was not present on the spot and he has not committed any offence and therefore, investigating officer has not filed charge-sheet against Manoj, hence, the so called plea of alibi can very well be taken into consideration at this stage.

18. In view of the provisions of Section 227, 228 and 193 of the Code, the Court of Sessions has jurisdiction on committal of case to it to take

cognizance of the offence of the person not named as offender but whose complicity in the case would be evident from the material available on record. Hence, even without recording evidence upon committal under Section 209 of the Code, the Session Judge may summon those persons shown in the column 2 of police report to stand trial along with those already named therein. The plea that the Session Court would have no alternative but to wait till the stage under Section 319 of the Code was reached, before proceeding against the persons against whom a prima facie case was made out from the materials contained in the case papers sent by the learned Magistrate while committing the case to the Court of Session cannot be accepted.

19. Session Court can summon additional accused to stand trial along with other accused already committed to it on the basis of documents submitted in the final report by the investigating officer under Section 173 of the Code. Similarly Court can also discharge in absence of sufficient evidence to frame charge. The provisions of Section 319 of the Code are supplementary and complementary to Sections 226 to 228 of the Code (Provisions for discharge and for framing of charge, procedure for trial before the Court of Session Chapter XVIII of the Code). Both have to be read harmoniously and together.

20. In this case, after taking into consideration the case diary and other evidence available on record, trial Court was not inclined to call Manoj as an additional accused at the initial stage. On perusal of evidence of complainant PW-1, again on the same set of evidence this Court is not inclined to allow the plea of petitioner that under Section 319 of the Code Manoj should be made accused to face trial. Aforesaid view of the Court is based on the principles laid down in the case of *Dharam Pal and Others Vs. State of Haryana and another,* 2013 Cri. L.J. 3900, *Lal Chand and another Vs. State of Haryana,* 1983 Cri. L.J. 1394 and *Sk. Latfur Rahman and others Vs. The State,* 1985 Cri.L.J. 1238 (FB).

21. In the aforesaid premises, after taking into consideration the legal position, factual matrix and the evidence available on record, the Court is of the view that the impugned order passed by the learned Trial Court is well merited and no interference is called for. Accordingly, the petition is hereby dismissed.

Copy of the order be sent to Trial Court. Trial Court is also directed to go ahead with the case in accordance with law.

Petition dismissed.

I.L.R. [2015] M.P., 1083
CRIMINAL REVISION
Before Mr. Justice J.K. Jain
Cr. Rev. No. 682/2014 (Indore) decided on 18 November, 2014

SUNITA BAI ...Applicant
Vs.
STATE OF M.P. ... Non-applicant

***Penal Code (45 of 1860), Section 302 & Criminal Procedure Code, 1973 (2 of 1974), Section 228 - Framing of charge* - Applicant had scuffle with her deceased mother -in-law who was aged about 82 years - Applicant pushed deceased on the road - Deceased died because of failure of cardio- respiratory system - No internal and external injury was found - No ingredients of Section 300 are attracted - No charge can be framed u/s 302 I.P.C. - Applicant is discharged from offence u/s 302 - Matter remanded back. (Para 11)**

दण्ड संहिता (1860 का 45), धारा 302 व दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 228 – आरोप विरचित किये जाना – आवेदक ने अपनी मृतक सास के साथ हाथापाई की जो करीब 82 वर्ष आयु की थी – आवेदक ने मृतिका को सड़क पर धकेल दिया – मृतिका की मृत्यु कार्डियो रेस्पाइरेटरी सिस्टम फेलूअर के कारण हुई – कोई अन्दरूनी एवं बाहरी चोट नहीं पाई गई – धारा 300 के घटक आकर्षित नहीं होते – भा.द.सं. की धारा 302 के अंतर्गत आरोप विरचित नहीं किया जा सकता – आवेदक को धारा 302 के अंतर्गत अपराध से आरोप मुक्त किया गया – मामला प्रतिप्रेषित किया गया।

Case referred :

AIR 2012 SC 431.

Virendra Sharma, for the applicant.
S.D. Bohara, G.A. for the non-applicant/State.

ORDER

J.K. JAIN, J. :- THIS revision is filed under Section 397/401 of the Code of Criminal Procedure [for short "the Code"] against the order dated 06.06.2014 passed by Seventh Additional Sessions Judge, Ujjain in S.T.No.233/2014, by which learned ASJ framed the charges against the applicant under Sections 302, 294 and 506 of the IPC.

2. As per the prosecution case deceased Kanchan Bai (aged 82 years) was the mother-in-law of applicant Sunita Bai. On 23rd March, 2014 at about 11.45 PM there was scuffle between the applicant and the deceased and applicant pushed the deceased on the road from the house, therefore, she sustained injuries. Thereafter Shiv Kumar, son of deceased, immediately took her to Police Station Chimanganj Mandi, Ujjain and lodged the report. On this basis Crime No.221/2014 under Sections 294, 323 and 506 of IPC was registered. She was sent to medical examination. During treatment she died at about 12.45 PM. The Hospital Authority informed the police. Then Marg No.20/14 has been registered. Inquest report was prepared and thereafter her body was sent for postmortem. After completing the investigation, police has filed the final report against the applicant under Sections 294, 323, 506 and 304 of IPC. After hearing the parties vide impugned order dated 06.06.2014 learned ASJ framed the charges against the applicant under Sections 302, 294 and 506 of IPC. Being aggrieved with this order, the applicant has filed this revision.

3. I have heard Shri Virendra Sharma, learned counsel for the applicant and Shri S.D.Bohara, learned Govt. Advocate for the Non-applicant/ State.

4. Learned counsel for the applicant submits that asper prosecution case applicant pushed the deceased but applicant has not caused any injury to the deceased. As per postmortem report, no external or internal injury found on her body and she died due to cardio respiratory failure. The applicant was not armed with any weapon and from the facts it is clear that there was no intention to kill the deceased. Thus, the ingredients of the offence punishable under Section 302 of IPC are totally absent, the case may fall under Section 323 of IPC. Learned ASJ has not considered the total effect of the evidence and documents produced before him. Therefore, by no stretch of imagination the applicant can be charged for offence under Section 302 of IPC.

5. On the other hand, learned Govt. Advocate submits that there is ample evidence to fram the charges against the applicants. The charges are properly framed, therefore, the revision be dismissed.

6. I have gone through the impugned order, charges and the final report.

7. Before adverting into the issue, I would like to refer the judgment of Hon'ble apex Court reported in the case of *Ashish Chadha v/s Smt. Asha*

Kumari and another [AIR 2012 SC 431], in which the Hon'ble apex Court has held :-

> "The High Court has in its revisional jurisdiction appraised the evidence which it could not have done. It is the trial court which has to decide whether evidence on record is sufficient to make out a prima facie case against the accused so as to frame charge against him. Pertinently, even the trial court cannot conduct roving and fishing inquiry into the evidence. It has only to consider whether evidence collected by the prosecution discloses prima facie case against the accused or not. In this connection, it would be useful to refer to the observations of this court in *Munna Devi v. State of Rajasthan and another,* (2001) 9 SCC 631.
>
> "We find substance in the submission made on behalf of the appellant. The revision power under the Code of Criminal procedure cannot be exercised in a routine and casual manner. While exercising such powers the High Court has no authority to appreciate the evidence in the manner as the trial and the appellate courts are required to do. Revisional powers could be exercised only when it is shown that there is a legal bar against the continuance of the criminal proceedings or the framing of charge or the facts as stated in the first information report even if they are taken at the face value and accepted in their entirety do not constitute the offence for which the accused has been charged."

8. Thus, it is clear that while exercising the revisional power, the High Court has no jurisdiction to appreciate the evidence. But the High Court can see that the evidence taken at the face value and accepted in their entirety, even though no offence is made out against for which the the accused has been charged.

9. Now I have to consider whether the evidence on record is sufficient for framing the charge under Sections 302 of IPC.

10. In the FIR it is mentioned that on the date of incident at 11.45 PM

there was a scuffle between the applicant and the deceased and during the incident applicant pushed the deceased on the road from her house. Shiv Kumar, who is son of the deceased, took her mother to Police Station Chimanganj Mandi,Ujjain and lodged a report. Police has registered an offence under Sections 294, 323 and 506 of IPC and she was immedialy sent to hospital for medical examination. Dr. Y.K.Vyas examined her at 12.30 PM at Civil Hospital, Ujjain. He has not found any mark of injury on her body but she was feeling uneasy, therefore, she was admitted in the hospital. Just after 15 minute she died in the hospital at 12.45 PM. The intimation was sent to Police Station Chimanganj Mandi, Ujjain and Marg was registered. Thereafter inquest report was prepared by Sub Inspector Rajendra Jadhav. In the inquest report an abrasion was found on left hand and no other injury was found on the body of deceased. Her body was sent for postmortem examination. Dr. R. Nidariya conducted the postmortem. He has not found any external or internal injury. He opined that mode of death is cardio respiratory failure. But he has not given any opinion in regard to cause of death. Thereafter the Investigating Officer has sought opinion about the cause of death. Then Dr. R. Nidariya opined that "if the deceased was suffering from any heart disease, then during scuffle she may died due to heart attack".

11. As per the prosecution case there was scuffle between the applicant and deceased and applicant pushed the deceased on the road from her house. Deceased has not sustained any external or internal injury. But she died due to cardio respiratory failure. Therefore, by examining the entire evidence collected by the prosecution, it cannot be said that the applicant was intended to kill deceased who happens to be her mother-in-law. It is apparent that no ingredients of Section 300 of the IPC was attracted in the present case. Hence, if the evidence taken at the face value and accepted in their entirety, even though no charge under Section 302 of IPC could be framed against the applicant.

12. On the basis of the aforesaid discussions, the present revision is allowed. Consequently the impugned order dated 06.06.2014 passed by the VIIth ASJ, Ujjain in S.T. No.233/2014 is hereby set-aside. The applicant is discharged from the offence punishable under Section 302 of IPC. The matter is remanded back to the Trial Court to hear the learned counsel for the parties for framing of charges and to frame the charge a fresh. A copy of this order be sent to the Trial Court for information and compliance.

Revision allowed.

I.L.R. [2015] M.P., 1087
INCOME TAX APPEAL
Before Mr. Justice Shantanu Kemkar & Mr. Justice M.C. Garg
I.T.A. No. 58/2013 (Indore) decided on 8 October, 2013

COMMISSIONER OF INCOME TAX-II ... Appeallant
Vs.
M/S DHOLGIRI INDUSTRIES PVT. LTD. ... Respondent

Income Tax Act (43 of 1961), Section 24 - Income - One Time Settlement **- Under O.T.S Scheme, the bank waived Rs. 88.39 lacs from Principal loan amount which was outstanding against assessee - Assessing Officer treated the component of principal amount of Rs. 88.39 lacs as income of the assessee - Held - Waiver of amount of loan being never claimed by the assessee as its expenditure, its waiver will not amount to income of assessee. (Para 2&5)**

आयकर अधिनियम (1961 का 43), धारा 24 – आय – एकमुश्त निपटान – एकमुश्त निपटान योजना के अंतर्गत बैंक ने मूलधन ऋण राशि जो कि निर्धारिती के विरूद्ध बकाया थी में से रू. 88.39 लाख का अधित्यजन किया – निर्धारण अधिकारी ने रू. 88.39 लाख मूलधन राशि के घटक को निर्धारिती की आय मानी – अभिनिर्धारित – निर्धारिती द्वारा उसके खर्चों के रूप में ऋण की रकम के अधित्यजन का दावा नहीं किया गया, उसका अधित्यजन निर्धारिती की आय की कोटि में नहीं आयेगा।

R.L Jain with *Veena Mandlik,* for the appellant.

(Supplied: Paragraph numbers)

ORDER

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

1. This appeal under Section 260A of Income Tax Act, 1961 is directed against the order dated 12.04.2013 passed by the Income Tax Appellate Tribunal bench at Indore (for short "the Tribunal") in I.T.A. No.548/Ind/2012 for the Assessment Year 2007-08 whereby the Tribunal has affirmed the order dated 12.07.2012 passed by the CIT (Appeals).

2. Briefly stated, the respondent assessee had entered into One Time Settlement (OTS) with Dena Bank for the loan outstanding against it. Dena Bank waived the amount of Rs.88.39 lacs and interest to the extent of Rs.31.18 lacs

out of total outstanding which was Rs.289.58 lacs as on 31.03.2006. This OTS was subject to condition that payment of 25% of the compromise amount will be made by the respondent upto 31.08.2006 and the balance amount of Rs.148.75 lacs will be paid in 36 months' installments commencing from September, 2006. The Assessing Officer treated the component principal amount of Rs.88.39 lacs, which was waived as income in the hands of the assessee by holding that the assessee has earned this waived amount, and as such brought this amount for tax.

3. Aggrieved the assessee filed an appeal before the CIT (Appeals). The CIT (Appeals) allowed the appeal of the assessee and directed the Assessing Officer to delete the addition made at Rs.88.39 lacs. The order passed by the CIT (Appeals) was challenged by the Revenue before the Tribunal.

4. The Tribunal after considering the submissions made by the learned counsel for the parties, maintained the order of CIT (Appeals). Feeling aggrieved, the Revenue is before this Court.

5. Having considered the submissions made by the learned Senior Counsel for the appellant and after going through the orders of the Assessing Officer, CIT (Appeals) and the Tribunal, we are of the view that the Assessing Officer has committed error in treating the amount waived by the Bank to be the amount earned by the assessee. The principal amount of loan being never claimed by the assessee as its expenditure, its waiver will not amount to income of the assessee and as such, in our considered view, there is no infirmity in the order passed by Tribunal affirming the order of CIT (Appeals).

6. No question of law arises in the matter. As a result, the appeal fails and is hereby dismissed.

Appeal dismissed.

I.L.R. [2015] M.P., 1088
INCOME TAX APPEAL
Before Mr. Justice P.K. Jaiswal & Mr. Justice D.K. Paliwal
I.T.A No.6/2014 (Indore) decided on 30 October, 2014

COMMISSIONER OF INCOME TAX-I ... Appellant
Vs.
ESSENCE COMMODITIES LTD. ... Respondent

(Alongwith ITA No. 7/2014, ITA No. 8/2014, ITA No. 9/2014, ITA No. 10/2014, ITA No. 11/2014, ITA No. 12/2014, ITA No. 13/2014, ITA No. 14/

2014, ITA No. 15/2014, ITA No. 16/2014, ITA No. 17/2014, ITA No. 18/2014, ITA No. 19/2014.

***Income Tax Rules, 1962, Rule 46A (3) - Additional documents* - Assessee's application under rule 46A of the Income Tax Rules for production of additional documents before Commissioner of Income Tax (Appeals) allowed - Assessing officer was not granted opportunity to submit the report or to verify the documents - Assessing officer busy in assessing 150 limitation cases and in Election duty - Held - Sufficient cause shown by Assessing officer for not verifying the documents on time - Assessing officer granted time for verification of additional documents - Petition allowed - Matter remitted back to Commissioner of Income Tax (Appeals) for decision afresh. (Paras 23 to 27)**

आयकर नियम, 1962, नियम 46ए (3) – अतिरिक्त दस्तावेज – आयकर आयुक्त (अपील) के समक्ष अतिरिक्त दस्तावेज प्रस्तुत करने हेतु निर्धारिती का आवेदन आयकर नियम के नियम 46ए के अंतर्गत मंजूर किया गया – निर्धारण अधिकारी को प्रतिवेदन प्रस्तुत करने के लिये या दस्तावेज सत्यापित करने के लिये अवसर प्रदान नहीं किया गया – निर्धारण अधिकारी 150 परिसीमा प्रकरण के निर्धारण में और चुनाव कर्तव्यों में व्यस्त – अभिनिर्धारित – निर्धारण अधिकारी ने दस्तावेजों का समय पर सत्यापन नहीं किये जाने का पर्याप्त कारण दर्शाया है –निर्धारण अधिकारी को अतिरिक्त दस्तावेजों का सत्यापन करने हेतु समय प्रदान किया गया – याचिका मंजूर – मामला नये सिरे से निर्णित किये जाने हेतु आयकर आयुक्त (अपील) को प्रतिप्रेषित।

Cases referred :

[2010] 327 ITR 557 Madras, 2011 (332) ITR 396 (Delhi).

R.L. Jain with *Veena Mandlik,* for the appellant.
V.K. Jain and *Sumeet Nima,* for the respondent

ORDER

The Order of the Court was delivered by : **P.K. Jaiswal, J. :-** They are heard.

2. The controversy involved in these appeals are identical and they have been heard together analogously with the consent of the parties and are being disposed of by this common order.

3. By order dated 26.8.2014, notices were issued to the respondents.

On 14.10.2014, learned counsel for the respondent in all these appeals have filed their *Vakalatnama* on behalf of the respondent.

4. Learned Senior counsel for the appellant submits that no sufficient and reasonable opportunity to the assessing officer for admission and acceptance of additional evidence filed for the first time before the Commissioner of Income Tax (Appeals) as required under the Rule 46 of the Income Tax Rules, 1962 have been granted. He submitted that the assessment order was passed on 29.12.2010. Against the assessment order, the respondent assessee filed an appeal, before the Commissioner of Income Tax (Appeals) under Section 246(A) (1)(b)(a) of Income Tax Act, 1961 (in short 'IT Act'). For the first time on 9.12.2011, the documents were sent to the Assessing Officer for comments and remand report. On 16.1.2012 Assessing Officer vide application prayed for further time of more than one month to offer comments on the admissibility of the appellant's additional evidence forwarded to his office. The appellate authority without granting any further time admitted the aforesaid documents and set aside the assessment made by the assessing officer and allowed the appeal by order dated 31.1.2012. The order of the appellate authority has been affirmed by the ITAT by impugned order dated 23.8.2013. He submitted that all these appeals pertaining to the seven assessment years (assessment years 2003-04 to 2009-10).

5. Now the question is whether Commissioner (Appeals) granted reasonable opportunity to the assessing officer as required under the sub-Rule 3 of Rule 46(A) of Income Tax Rules, 1962. The learned Senior counsel to substantiate his claim is raising the following substantial questions of law which arise in all the appeals :-

> *"(i) Whether under the facts and circumstances of the case order allowing the application for additional evidence without according proper opportunity to submit its comments as required under Rule 46A of the Income Tax Rules is contrary to law ?.*
>
> *(ii) Whether the explanation offered by Deputy Commissioner of Income Tax for not submitting the comments due to being busy in deciding limitation cases totaling 150 cases and further due to election duty assigned by election commission, tentamounted to sufficient cause for not submitting the report?"*

6. For the sake of convenience the facts are borrowed from ITA. No. 6/2014

7. Brief facts of the case are that search under Section 132 was carried out to the assessee's premises on 2.5.2008. The respondent assessee is a broker in commodity exchange. It derives profit through transactions with various commodity exchanges such as Multi Commodity Exchanges of India Ltd (MCX) and National Board of Trade (NBOT) on its own behalf and also on behalf of its client. It was found that clients name did not appear in the records of the exchange, and the entire trade through exchange was made in the name of assessee. The profit derived through such transactions, however, was apportioned between the assessee and the clients. The assessing officer asked the assessee to prove the genuineness of the transactions recorded in their own books of accounts in the name of various clients and there by the transfer of profits to them. After examining the issue the assessing officer did not accept the assessee's version and Added the profit, which was transferred to various clients, to the total income of the assessee.

8. The assessee challenged the aforesaid order of the Assessing Officer by filing an appeal before the Commissioner of Income Tax (Appeals).

9. During the proceedings, the assessee further collected information or income tax return of the some of the clients in support, but all its claim of all its clients were genuine and the profit passed on to them were also reflected by them in their income tax return. It has been also submitted that inspite of their best efforts, they could not collect the ITRs of all its clients for the reasons that most of the persons are hesitant to provide such documents. The assessee made a request to admit all those documents as additional evidence under Rule 46A of Rules, 1962.

10. The applications of the assessee together with the additional evidences were sent to the Assessing Officer by office letter dated 18.7.2011 and 8.11.2011, respectively for his comments. In some of the cases, no comments have been received nor any written submissions on the admissibility of additional evidences under Rule 46A was filed. In some of the cases, an application dated 16.1.2012 was filed by the Deputy Commissioner of Income Tax stating therein that the additional evidence, which was filed by the assessee along with the application could not be verified as the under signed has engaged in the limitation cases involving more than 150 block assessments. Moreover,

taking into account the assessee's voluminous submission forwarded to the office and also to the fact that Deputy Commissioner of income tax, who is looking to the matter on behalf of the revenue has been assigned the duties of expenditure in the U.P. State Election in Ghaziabad Constituency by the Election Commission of India. It would be practically not feasible to offer comments on the aforesaid additional evidences immediately after the due verification of the same and requested time to offer comments on the admissibility of the assessee's additional evidences.

11. In the application the assessee had taken a plea that during the assessment proceedings those confirmations ITRs could not receive from the concerned clients inspite of its repeated request and as such, the assessee was prevented by sufficient cause to furnish those documents before the Assessing Officer. The learned Commissioner found that these documents in the form of additional evidences were not in the possession of the assessee, rather they had to collect it from its client; assessee could collect these documents with lot of difficulties, but after completion of assessment. The learned Commissioner agreed with the assessee's plea that it was prevented by sufficient cause to furnish those documents to Assessing Officer and accordingly admitted those documents as additional evidences, but refused to grant further time and decided the matter finally. In an appeal before the ITAT the contention of the revenue was that sufficient opportunity was not granted to the assessing officer, to verify those additional documents. Relevant part of the reasoning assigned by the Commissioner (Appeal) reads as under :-

> *"42.3 During the appeal proceedings, detailed submissions have been made which have been reproduced in para 3 above. It has been pleaded that all the claims are genuine and funds were transferred between the assessee and those clients through banking channels only; and that merely on account of failure for having registered those clients in the record of NBOT, the income of those clients cannot be added to its income it is explained that assessee had also taken part in the speculative business through the order exchange namely, MCX and NCDX and in accordance with the rules and regulations of those exchanges, it had got its clients (those who had done trading through the assessee broker in MCX and NCDX) registered in those exchanges; and no*

adverse view was taken as regards to the profits transferred to those clients. The assessee also accepted that as per the rules and regulations of NBOT, it was required to get its clients registered in that exchange also, but this was not done so by and large by all the brokers because the exchange (NBOT) did not enforce the registration; and the result was that though the name of clients (for whom the assessee had transacted i.e. sauda was effected in NBOT) did appear in its books of accounts but the same was not recorded in NBOT records. For this reason, entire pay-in and pay-out in the NBOT was recorded in the name of the assessee only, whereas, the financial records of the assessee did reflect the corresponding transactions and the ledger accounts of all those clients. It was pleaded that brokerage was duly charged on such transactions. During the proceedings, nevertheless, the assessee further collected the confirmations and / or ITRs of some of the clients in support of its claim that all its clients were genuine and the profit passed on to them were also reflected by them in their ITRs. It has been also submitted that inspite of their best effort, they could not collect the ITRs of all its clients for the reasons that most of the persons are hesitant to prove such documents. The assessee made a request to admit all those documents as additional evidence under rule 46A. The application of the assessee together with the enclosures (additional evidences) in this regard was sent to the A.O. vide this office letter dated 18.7.2011 and 8.11.2011 for his comments. A copy of the written submissions was separately sent to the A.O. vide this office letter dated 18.7.2011 for his comments. However, so far no comments has been received either on the written submission or on the issue of admissibility of additional evidences under rule 46A. In its application, the assessee had taken plea that during the assessment proceedings, those confirmations, ITRs could not be received from the concerned clients inspite of its repeated request and as such the assessee was prevented by sufficient cause to furnish those

documents before the A.O. I have considered the application so made by the assessee for admission of additional evidences. I find that these documents in the form of additional evidences were not in the possession of the assessee, rather they had to collect it from its clients; the assessee could collect these documents with lot of difficulty but after the completion of assessment. In view thereof, I agree with the assessee's plea that it was prevented by sufficient cause to furnish those documents before the A.O. Accordingly, I admit these documents as additional evidences."

12. The learned ITAT affirmed the aforesaid reasoning and stated sufficient opportunity was granted to the Assessing Officer and observed that the learned CIT (A) was not expected to wait for indefinite period and upheld the finding of the Commissioner Appeals.

13. Learned Senior counsel for the appellants submits that Rule 46A casts an obligation to the appellate authority to grant a proper and sufficient opportunity to the Assessing Officer to examine the admissibility of the additional evidences. He further submits that Rule 46A, prescribes a mandatory condition to be religiously followed and report from the Assessing Officer with regard to admissibility and merit of additional evidence is must. He placed reliance on the decision of the *Commissioner of Income – Tax v/s. Subbu Shashank,* reported as [2010] 32 7 ITR 557 Madras and submitted that impugned orders be set aside and matter be remitted to the Commissioner (Appeals) with a direction to grant reasonable opportunity to verify the additional evidences and submit a report and thereafter, decide the appeal on merit..

14. On the other hand, Shri Veer Kumar Jain, and Shri Sumit Nima, learned counsel for the respondents drew our attention to the findings recorded by the Commissioner as well as by the learned Tribunal and submitted that before admitting the additional evidences, the Commissioner of Income Tax (Appeals) had obtained a remand report from the Assessing Officer. The Assessing Officer inspite of sufficient opportunities granted to him failed to submit the same. They further submit that Rule 46A of the Rules permits the Commissioner of Income Tax (Appeals) to admit the additional evidences, if he finds that the same is crucial for disposal of the appeal. The learned Commissioner after considering the application gave a finding that the additional evidence is crucial

for disposal of the appeal and therefore, allowed the application and decided the appeal on merits. With the aforesaid, they prayed for dismissal of the appeal.

15. **Rule 46A of the Income Tax Rules of 1962 is relevant which reads as under :-**

> ***[Rule 46A. Production of additional evidence before the [Deputy Commissioner (Appeals)] [and Commissioner (Appeals)].*** *- (1) The appellant shall not be entitled to produce before the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the [Assessing Officer], except in the following circumstances, namely:-*
>
> *(a) where the [Assessing Officer] has refused to admit evidence which ought to have been admitted; or*
>
> *(b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the [Assessing Officer]; or*
>
> *(c) where the appellant was prevented by sufficient cause from producing before the [Assessing Officer] any evidence which is relevant to any ground of appeal; or*
>
> *(d) where the [Assessing Officer] has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.*
>
> *(2) No evidence shall be admitted under sub-rule (1) unless the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] records in writing the reasons for its admission.*
>
> *(3) The [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] shall not take into account any evidence produced under sub-rule (1) unless the [Assessing Officer] has been allowed a*

reasonable opportunity-

(a) to examine the evidence or document or to cross-examine the witness produced by the appellant, or

(b) to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant.

(4) Nothing contained in this rule shall affect the power of the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the [Assessing Officer]) under clause (a) of sub-section (1) of section 251 or the imposition of penalty under section 271.]"

16. As per sub-rule 1 of Rule of 46A, the appellant shall not be entitled to produce any evidence except where the Assessing Officer has refused the additional evidence, which ought to have been admitted or where the appellant was prevented by sufficient cause from producing evidence which he was called upon to produce by the Assessing Officer. It is not the case of the assessee that he was prevented by the sufficient cause from producing the additional evidence before the Assessing Officer. As per sub-rule 2 of Rule 46A, no evidence shall be admitted unless reasons in writing is recorded for its admission. As per Rule 3 unless the Assessing Officer has been allowed a reasonable opportunity to examine the evidence or documents, the appellate authority shall not take into account any evidence produced before him under sub-rule 1.

17. Rule 46A merely provides an opportunity to the assessee to produce documentary evidence or witnessess, as the case may be. In other words, a duty is cast upon the assessee to produce all evidence both oral and documentary before the Assessing Officer.

18. When the assessee was not able to produce the said evidence or witnesses before the Assessing Officer, the Commissioner of Income-tax (Appeals) has to convince himself about the reasonable cause shown by the

assessee for not producing them before the Assessing Officer and for placing it before the appellate authority for the first time.

19. In the case where the Commissioner of the Income-tax (Appeals) is convinced about reasonable cause then, he has to follow a procedure contemplated under rule 46A(3) by providing sufficient opportunity to the Assessing Officer to examine the evidence or document or to cross examine the witnesses, as the case may be.

20. The Commissioner of Income-tax (Appeals) should not ordinarily allow the new evidence to be adduced in order to enable the party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it.

21. It is not in dispute that additional evidence filed by the assessee could not be verified by the Assessing Officer because, he was engaged in the time bound matters involving more than 140 block assessments and also to the fact that he had been assigned the duties of expenditure in the U.P. State Election in Ghaziabad Constituency by the Election Commission of India and, therefore, it was practically impossible for him to offer the comments on the aforesaid additional evidence and, therefore, he sought one month further time for due verification of the same. The aforesaid facts are not disputed by the learned authorities nor by the assessee's.

22. The decision of Delhi High court cited by the learned counsel for the respondent in the case of *Commissioner of Income – Tax v/s. Virgin Securities & Credits Pvt. Ltd,* reported as 2011 (332) ITR 396 (Delhi) will not be applicable in the present facts and circumstances of the case, because in the case of *Virgin Security and Credit Pvt. Ltd* (supra) the Commissioner of Income Tax (Appeals) had obtained a remand report from the Assessing Officer. The Assessing Officer while submitting his report has not objected to the admission of the additional evidence but had merely reiterated contentions in the assessment orders.

23. In the case in hand, the reasons assigned by the Assessing Officer for asking for further time to verify the documents filed by the assessee was *bonafide* as he was on election duty and number of cases of assessment in which limitation was going to expire was pending and, therefore, Assessing

Officer was busy and thus, the reason assigned by him for asking more time was sufficient. He was prevented by sufficient cause from submitting the report. The learned Commissioner (Appeals) as well as learned ITAT have not been able to consider these relevant facts in their correct perspective before passing the impugned order. The discretion exercised by the Commissioner (Appeals) while refusing to grant further time to admit the additional evidence has not been based on sound judicial principles. The assessing authority had given satisfactory explanation and sufficient cause for not verifying the additional evidence filed before the appellate authority. The authorities ought to have granted some reasonable time to the Assessing Officer to verify the additional evidence.

24. On due consideration of the aforesaid, we are of the view that learned Commissioner as well as learned Tribunal erred in proceeding with the matter and admitting the additional evidence filed by the assessee without granting further time to verify the same and submit a report. Thus, we set aside the impugned orders dated 23.8.2013, 29.7.2013, 23.8.2013 passed by the Income Tax Appellate Tribunal, by answering the question of law in favour of the appellant / department and remit the matter back to the learned Commissioner (Appeals) with a direction that sufficient time be granted to the department to verify the documents and rebut that evidence and thereafter decide the controversy a fresh in accordance with law, as early as possible, and endeavour shall be made to conclude it within a period of six months from the date of receipt of certified copy of the order.

25. The substantial questions of law raised in all these batch of appeals are answered in favour of the revenue and all the appeals are allowed.

26. We make it clear that the order passed will not stand in the way of the Commissioner of Income-tax (Appeals) / Assessing Officer to comply with the other direction of the Tribunal insofar as in consideration of the materials produced by the assessee is concerned.

27. In the result, ITA.No.6/2014 and other connected appeals (ITA.Nos. 7/2014, 8/2014, 9/2014, 10/2014, 11/2014,12/2014, 13/2014, 14/2014, 15/2014, 16/2014, 17/2014, 18/2014 and 19/2014) are allowed on the same terms. No costs.

Appeal allowed.

I.L.R. [2015] M.P., 1099
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice B.D. Rathi
M.Cr.C. No. 4887/2013 (Gwalior) decided on 24 February, 2014

SHYAM KUMAR & ors. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

A. ***Criminal Procedure Code, 1973 (2 of 1974), Sections 341 & 482 - Alternative remedy*** - **Section 482 confers separate and independent power - Powers u/s 482 cannot be cribbed or hedged in by provisions of section 341(2) - Petition u/s 482 Cr.P.C. maintainable.** **(Paras 6 & 7)**

क. *दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 341 व 482 – वैकल्पिक उपचार* - धारा 482 पृथक एवं स्वतंत्र शक्ति प्रदान करती है – धारा 482 के अंतर्गत शक्तियों को धारा 341(2) के उपबंधों द्वारा न तो सीमित किया जा सकता है और न ही उसे छिपाया जा सकता है – दं.प्र.सं. की धारा 482 के अंतर्गत याचिका पोषणीय है।

B. ***Criminal Procedure Code, 1973 (2 of 1974), Sections 340 & 344 - Distinction*** - **Section 344 applies to judicial proceedings only whereas section 340 applies to proceedings other than judicial proceedings also.** **(Para 8)**

ख. *दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 340 व 344 – विभेद* – धारा 344 केवल न्यायिक कार्यवाही को लागू होगी जबकि धारा 340 न्यायिकेतर कार्यवाही को भी लागू होती है।

C. ***Criminal Procedure Code, 1973 (2 of 1974), Section 340 - False evidence - Enquiry*** - **Before preferring complaint, neither enquiry was made by ASJ nor any opportunity of hearing was given - Further also, facts mentioned in FIR, in 161 statement and in Court evidence are same - No case could be made out - Petition allowed - Proceedings quashed.** **(Paras 12 & 13)**

ग. *दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 340 – मिथ्या साक्ष्य – जांच* – शिकायत पेश करने से पूर्व अतिरिक्त सत्र न्यायाधीश द्वारा न तो जांच की गई न ही सुनवाई का कोई अवसर दिया गया – इसके अतिरिक्त भी प्रथम सूचना

रिपोर्ट, 161 के कथन एवं न्यायालीन साक्ष्य में उल्लिखित तथ्य समान हैं – कोई प्रकरण नहीं बन सकता – याचिका मंजूर – कार्यवाहियां अभिखंडित।

Cases referred :

AIR 1983 SC 67, (2013) 2 SCC (Cri.) 197.

Pradeep Katare, for the applicants.
Nutan Saxena, P.P. for the non-applicant.

ORDER

B.D. RATHI, J. :- By invoking the extra-ordinary jurisdiction of this Court, petitioners have preferred this petition under Section 482 of Code of Criminal Procedure, 1973 (in short 'the Code') seeking quashment of complaint made by learned Second Additional Sessions Judge, Ashoknagar to the Court of Additional Chief Judicial Magistrate, Ashoknagar under Section 340 of the Code.

2. As per petitioners' case Sewaram was tried for the offence punishable under Section 436 of IPC in S.T.No.317/2002 before the Court of Second Additional Sessions Judge, Ashoknagar. In that case, FIR was lodged by the complainant Shayam Kumar that on 29.02.2002 in the night his hut (tapariya) was set at fire and he saw accused Sewaram running from the back side of his tapariya. During investigation, same statement was given by complainant. During trial Shyama Kumar (PW-1), Ramprasad (PW-2) and Girish (PW-5) were examined and they have ratified their version recorded during investigation before police. Even then the complaint was made under Section 340 of the Code against the petitioners and referred for trial to the Additional Chief Judicial Magistrate, Ashoknagar by the Second Additional Sessions Judge, Ashoknagar but in the aforesaid circumstances, by no stretch of imagination it can be said that false evidence was given by the petitioners before the trial Court; intending thereby to cause, or knowing it to be likely that they will thereby cause, Sewaram to be convicted of any offence as mentioned in Section 195 of IPC.

3- Learned counsel for the petitioners submitted that there is no ground to initiate the proceedings against the petitioners under Section 340 of the Code. Even in case of initiating the proceedings under Section 340 of the Code, the procedure as prescribed should be adopted and opportunity to show cause that why petitioners be not punished for the offence should have been given. Such action could not be taken by the trial Court, hence prayed

for quashing the complaint made by 2nd ASJ, Ashoknagar to Addl. CJM, Ashoknagar. The said complaint was later on committed to the Court of First Additional Sessions Judge, Ashoknagar and S.T.No.174/2011 for the offence under Section 195 of IPC was registered, therefore, prayer for quashing that proceeding has also been made. Learned counsel for the petitioners further submitted that at the most action could have been taken under Section 344 of the Code and in that case also prior to taking any action, opportunity of hearing was required to be afforded.

4. Combating the submissions of petitioner's learned counsel, learned Public Prosecutor opposed the prayer and prayed for dismissal of petition on the ground of it being devoid of merits. He has further submitted that the order against which this petition is preferred under Section 482 of the Code is not maintainable as it is appeable order, therefore, on this count also petition deserves to be dismissed.

5. Having regard to the arguments advanced by learned counsel for the parties, entire material available on record has been perused. The moot question emanated in this case is to establish difference of procedure given under Section 340 and under Section 344 of the Code.

6. Since provisions of Section 340 of the Code is having material bearing over the matter hence it reads as under:

> ***"340. Procedure in cases mentioned in section 195.*** *(1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub- section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, -*
>
> *(a) record a finding to that effect;*
>
> *(b) make a complaint thereof in writing;*
>
> *(c) send it to a Magistrate of the first class having jurisdiction;*

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non- bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by sub- section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub- section (4) of section 195.

(3) A complaint made under this section shall be signed, -

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court.

(4) In this section," Court" has the same meaning as in section 195."

Any party who is aggrieved from the order passed under Section 340 of the Code may prefer an appeal under Section 341 of the Code which reads as under:

***"341. Appeal** (1) Any person on whose application any Court other than a High Court has refused to make a complaint under sub- section (1) or sub-section (2) of section 340, or against whom such a complaint has been made by such Court, may appeal to the Court to which such former Court is subordinate within the meaning of sub- section (4) of section 195, and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint, or, as the case may be, making of the complaint which such former Court might have made under section 340, and if it makes such complaint, the provisions of that section shall apply accordingly.*

(2) An order under this section, and subject to any such order, an order under section 340, shall be final, and shall not be subject to revision."

7. From perusal of aforesaid provisions, it is clear that non preferring of appeal under Section 341 of the Code against the order passed under Section 340 of the Code, does not mean that the order passed under Section 340 of the Code cannot quashed by invoking the inherent powers of this Court as enshrined under Section 482 of the Code. In *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi,* AIR 1983 SC 67, the Apex Court held that section 482 confers separate and independent power on the High Court lone to pass orders ex debito justitiae in cases where grave and substantial injustice has been done or where the process of the Court has been seriously abused. The Court also observed that the power conferred under Section 482 of the Code is not merely a revisional power meant to be exercised against the orders passed by subordinate Courts. The supreme Court, however, did not rule out the possibility that there may be overlapping in the exercise of power under Section 482 and the revisional power under Section 397 of the Code.

In view of the aforesaid decision of the Apex Court, this Court is of the opinion that the power conferred under Section 482 of the Code cannot be cribbed or hedged in by the provisions of Section 341(2) thereof. Thus, the preliminary objection as to the maintainability of the petition under Section 482 of the Code is overruled.

8. To establish the distinction between the procedure given under Section 340 and 344 of the Code, it would be apt to quote Section 344 of the Code:

"344. Summary procedure for trial for giving false evidence.*(1) If, at the time of delivery of any judgment or final order disposing of any judicial proceeding, a Court of Session or Magistrate of the first class expresses an opinion to the effect that any witness appearing in such proceeding had knowingly or willfully given false evidence or had fabricated false evidence with the intention that such evidence should be used in such proceeding, it or he may, if satisfied that it is necessary and expedient in the interest of justice that the witness should be tried summarily for giving or fabricating, as the case may be, false evidence, take cognizance of the offence and may,*

after giving the offender a reasonable opportunity of showing cause why he should not be punished for such offence, try such offender summarily and sentence him to imprisonment for a term which may extend to three months, or to fine which may extend to five hundred rupees, or with both.

(2) In every such case the Court shall follow, as nearly as may be practicable, the procedure prescribed for summary trials.

(3) Nothing in this section shall affect the power of the Court to make a complaint under section 340 for the offence, where it does not choose to proceed under this section.

(4) Where, after any action is initiated under sub- section (1), it is made to appear to the Court of Session or Magistrate of the first class that an appeal or an application for revision has been preferred or filed against the judgment or order in which the opinion referred to in that sub- section has been expressed, it or he shall stay further proceedings of the trial until the disposal of the appeal or the application for revision, as the case may be, and thereupon the further proceedings of the trial shall abide by the results of the appeal or application for revision."

On bare perusal of both these provisions, it is clear that Section 340 of the Code is general provisions which deals with the procedure to be followed in respect of variety of offence affecting the administration of justice which are specified in clause (b) of Section 195(1) of IPC but Section 344 of the Code is restricted in scope of offence falling under Section 193 to 195 of IPC. Similarly, Section 344 of the Code applies only to the judicial proceedings while Section 340 of the Code has wide scope in that it applies to the proceedings other than judicial also. The only qualification being that proceeding must be in relation to the Court.

9. Similarly, under Section 340(1) of the Code, the Court has to held a preliminary enquiry before making the complaint while under Section 344 of the Code, Court can try the offender summarily by taking cognizance of the

offence provided it gives a reasonable opportunity of showing cause why he should not be punished. For purposes Section 344 of the Code it is necessary for the Court to express an opinion in the judgment or final order itself that the person appearing before it as a witness has initially given false evidence or has intentionally fabricated false evidence. In absence of that, no action can be taken under Section 344 of the Code but the fact establishing falseness of the evidence or brought to the notice of the Court after delivery of judgment or order Section 344 of the Code cannot be applied and it would be open to the Court to take proceeding under Section 340 of the Code. Similarly under Section 340 of the Code, Court may proceed *suo motu* or on an application while under Section 344 of the Code no application is contemplated.

10. Under Section 344(3) of the Code powers of the Court to make complaint under Section 340 of the Code in respect of cases falling under Section 344 of the Code is not at all affected if the Court does not choose to proceed under Section 344 of the Code. Looking to the facts of the present case, it would be appropriate to quot the provisions of Section 195 of I.P.C.:

> ***'195. Giving or fabricating false evidence with intent to procure conviction of offence punishable with imprisonment for life or imprisonment :-*** *Whoever gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which by the law for the time being in force in India is not capital, but punishable with imprisonment for life, or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished."*

For taking action and punishing a person in the aforesaid penal section, procedure has been provided under both the provisions viz. Section 340 and 344 of the Code.

11. After taking into consideration the aforesaid discussions, this Court finds that if prima facie any offence is committed under Section 195 of I.P.C. then the action may be taken under Sections 340 or 344 of the Code, therefore, it cannot be said that only one particular procedure should be adopted by learned trial Court as in this case.

Resultantly, the contention of learned counsel for the petitioner that at

the most action could have been taken under Section 344 of I.P.C. is of no substance.

12. On perusal of impugned complaint dated 15-12-2004 and finding given in S.T.No.317/2002, it seems that before preferring the complaint under Section 340 of the Code neither enquiry was made by the Additional Sessions Judge nor any opportunity of hearing was provided to the petitioners, therefore, such action of learned trial Court is liable to be set aside in view of the principles laid down by the Apex *Court in the case of Sharad Pawar Vs. Jagmohan Dalmiya and others,* (2013) 2 5CC (Crl.) 197.

13. Apart the aforesaid, on merit also no case was made out to lodge the complaint under Section 340 of the Code against the petitioners because the facts mentioned in FIR, statements given to the police and the evidence deposed before the trial Court by the petitioners are same in nature, therefore, prima facie no case could be made out against the petitioners with regard to giving false and fabricated evidence.

14. In view of the above cumulative reasons and the propositions of law discussed above, the petition filed by the petitioners is allowed. Complaint made by learned Second Additional Sessions Judge, Ashoknagar to the Addl. CJM, Ashoknagar on the basis of finding given in S.T.No.317/2002 vide judgment dated 15-12-2004 is hereby quashed and the subsequent proceedings in the shape of S.T.No.174/2011 is also quashed, if not decided yet and in case of decision of S.T.No.1 74/2011, this order shall have no effect on that decision.

Copy of the order be sent to the trial Court for information and necessary compliance.

Petition allowed.

I.L.R. [2015] M.P., 1106
MISCELLANEOUS CRIMINAL CASE
Before Mrs. Justice S.R. Waghmare
M.Cr.C. No. 639/2013 (Indore) decided on 23 April, 2014

RAMESH GIRI ...Applicant
Vs.
DHEERAJ GOBHUJ ... Non-applicant

Negotiable Instruments Act (26 of 1881), Section 138 & Stamp Act (2 of 1899), Section 33(2)(a) and 35 - **Whether a document can be**

impounded in a Criminal case u/s 35 for insufficiency of stamps - Held - Proceedings are criminal in nature and are of summary nature - Provisions of Section 35 of Stamp Act would not be attracted - Proviso to section 33(2)(a) of Stamp Act gives wide discretion to Magistrate to examine or impound - Petition u/s 482 of Cr.P.C. dismissed. (Paras 6 & 7)

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 एवं स्टाम्प अधिनियम (1899 का 2), धारा 33(2)(ए) व 35 – क्या धारा 35 के अंतर्गत आपराधिक प्रकरण में स्टाम्प की अपर्याप्तता के लिये दस्तावेज को परिबद्ध किया जा सकता है – अभिनिर्धारित – कार्यवाहियां दांडिक स्वरूप की एवं संक्षिप्त स्वरूप की हैं – स्टाम्प अधिनियम की धारा 35 के उपबंध आकर्षित नहीं होगे – स्टाम्प अधिनियम की धारा 33(2)(ए) का परंतुक मजिस्ट्रेट को परीक्षण करने या परिबद्ध करने के लिये विस्तृत विवेकाधिकार देता है – द.प्र.सं. की धारा 482 के अंतर्गत याचिका खारिज।

Cases referred :

2011 (4) SCC 593, 2008(2) Kar.L.J. 276.

Manish Manana, for the applicant.
B.L. Jain, for the non-applicant.

ORDER

MRS. S.R. WAGHMARE, J. :- By this application under Section 482 of the Cr.P.C. Ramesh Giri has challenged the order dated 09/1/2013 passed by the Additional Sessions Judge, Ujjain in criminal revision No.11/2013 upholding the order of the trial Court and dismissing the objection raised by the accused petitioner regarding insufficiently stamped document.

2. Brief facts of the prosecution case are that the respondent complainant had filed a complaint for offence under Section 138 of the Negotiable Instrument Act (hereinafter referred as 'the Act') against the petitioner accused for settling a loan account with a Co-operative Society. The accused petitioner resisted the complaint by taking up a defence that a blank cheque was fraudulently obtained by respondent complainant and later on misused to file the present complaint. It came about that, while recording of the evidence of the complainant, he wanted a document dated 25/3/2011 to be marked as Exhibit P/1. The present petitioner accused objected to the document being first called a "receipt" since language in the document clearly indicated that it was a 'bond' which was not properly stamped and on this ground it was

inadmissible in evidence. This document was filed by the complainant as Annexure P/4. The trial Court has however, by order dated 11.12.2012 dismissed the objection of the accused petitioner that the proceedings u/s 138 of the Act are *quasi civil* in nature and that the provisions of Section 35 of the Stamp Act would be attracted.

3. Being aggrieved accused petitioner preferred a criminal revision before the Revisional Court and the Revisional Court had dismissed the same, vide order dated 9/1/2013. And hence, the present petition under Section 482 of the Cr.P.C.

4. Counsel for the petitioner has vehemently urged the fact that both the Courts below had failed to consider that the documents were required to be properly stamped under Section 35 of the Stamp Act if it is to be accepted in evidence. Otherwise it has to be impounded and only after payment of stamp duty fees and penalty as imposed by the stamp collector, the documents could have been exhibited. Counsel relied on *Kaushalya Devi Massand vs. Roopkishore* 2011 (4) SCC 593 to state that the Apex Court had while considering the gravity of the Indian Penal Code or other criminal offences vis-a-vis the Negotiable Instrument Act held that an offence under Section 138 of the Negotiable Instrument Act, 1881, is almost in the nature of a civil wrong which has been given criminal overtones. Counsel submitted that the offence was a quasi civil in nature and Section 35 of the Stamp Act would therefore, be naturally attracted. Placing reliance on *P.K.M. Caps and Polymers Pvt. Ltd vs. Sri K. Vishnu; Prasad* s/o K..... 2008(2) Kar.L.J. 276 whereby the High Court of Karnataka has considered the case that an agreement of sale, which was written on a white paper which ought to have been written on a stamped paper and the documents namely, the agreement and the cancellation deed were not duly stamped and Court held that the said document is inadmissible in evidence and although in the said case the Court had held that the objection was raised by the accused petitioner after the document has been exhibited. Counsel submitted that in the instant case the objection was properly raised at the initial stage itself by the applicant. Hence, Counsel submitted that the impugned order be set aside.

5. Counsel for the respondent, per contra has vehemently opposed the submissions put forth by the Counsel for the applicant and has fully supported the orders passed by both the Courts below. Counsel submitted that the provisions of Civil Procedure Code were not applicable in a criminal case;

similarly Section 35 of the Stamp Act also cannot be taken into consideration. Even considering the cases *Kaushalya Devi Massand and PKN Caps and Polymers Pvt. Ltd.* (supra) Counsel urged that the Revisional Court had categorically given a finding that both the authorities did not hold that an insufficiently stamped document should be impounded in a criminal case and cannot be taken into consideration under Section 33 of the Stamp Act. Considering the Section 36 of the Stamp Act Counsel submitted that the stage in which the objection can be raised as already passed and it was to the discretion of the Court under Section 61 to take a decision regarding insufficiency of stamp fees.

6. Considering the above submissions, I find that the sole question that arises in this petition is whether the impugned document Annexure P/4 can be taken into evidence in a criminal case without its being stamped at all, accordance with Section 35 of the Stamp Act ?

7. On considering Annexure P/4, I find that it is a receipt dated 25/3/2011 on white paper signed by accused Ramesh Giri. Whereas Counsel for the petitioner has vehemently urged the fact that it is a bond. Considering the receipt which is on a blank piece of paper handwritten and indicates as per language used; that the accused had availed of Rs.5,00,000/- from the respondent complainant and it is a receipt. Whereas Counsel for the petitioner urged that as per provisions of Negotiable Instruments Act, it is a bond which is not properly stamped in accordance with the provisions of Stamp Act. And hence Counsel for the petitioner submitted that the objection was properly raised at the initial stage itself by the applicant, but the same had been wrongly dismissed by the Courts below. On considering to Section 33 (2)(a) of the Stamp Act, I find that the proviso (2) (a) reads as under:

> **Provided 2(a). Nothing herein contained shall deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure 1898"**

And hence, the Trial Court had rightly relied on the proviso to discard the objection raised by the accused petitioner. Besides I also find that the proceedings under Section 138 of the Act are summary in nature and in this

regard also the Revisional Court as well as the Trial Court had properly held that the document Annexure P/4 does not require impounding and has been produced as a receipt by the complainant. In these circumstances, I find that the proceedings under Section 138 of the Act are criminal in nature although the offence may be in the nature of civil wrong. The Apex Court was in the case of *Kaushalya Devi* (supra) in fact; considering the case whether a jail sentence awarded to the accused appellant was really necessary to meet the ends of justice; since the appellant was a lady and only fine has been imposed. I find that the submissions as put forth by the Counsel for the petitioner are off at a tangent. There is no doubt that the proceedings for offence under Section 138 of the Act are criminal in nature and provisions of Stamp Act would not be attracted especially under Section 35 of the Stamp Act. So also the proviso under Section 33 (2)(a) of the Stamp Act itself gives wide discretion to the Judicial Magistrate to examine or impound an instrument filed before him. And in the present case the learned Judge of the lower Court has already accepted the receipt as evidence. In this light also, I find that the petition is without merit and it is, therefore, dismissed as such.

Petition dismissed.