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recommendation as submission of document was not within time – Held – Discrepancies in two letters issued by R.D.V.V. which was competent to issue those letters ought to have been ignored – Petitioner had submitted the consent of affiliation from Medical University before the meeting of Executive Committee and Union of India had also wrote to M.C.I. to process the recommendation in the light of consent – M.C.I. directed to take final decision before commencement of admission process for academic year 2015-16 – Petition allowed. [Gyanjeet Sewa Mission Trust Vs. Union of India] (DB)...2088

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Medical Council Act, (102 of 1956), Section 10-A and Establishment of Medical College Regulations, 1999 – Regulations 7 & 8 – Renewal – Reconsideration **– Power of Central Government to refer back the Scheme of yearly renewal to MCI for reconsideration – M.C.I. submitted negative recommendation for renewal of recognition to the Central Government – Petitioner submitted a new Scheme before the Central Government in reply to the notice – Central Government remanded the matter back to M.C.I. to reconsider in the light of Scheme submitted by Petitioner – Provision of Section 10-A applies to both for proposal for opening a new medical college as also for grant of renewal permission – Scheme for yearly renewal permission is required to be processed under Section 10-A read with Regulations framed in that behalf – Central Government has power to refer back the Scheme of yearly renewal to M.C.I. for reconsideration. [RKDF Medical College Hospital and Research Centre Vs. Union of India] (DB)...2107**

आयुर्विज्ञान परिषद् अधिनियम, (1956 का 102), धारा 10-ए एवं आयुर्विज्ञान महाविद्यालयों की स्थापना विनियमन, 1999 – विनियमन 7 व 8 – नवीनीकरण – पुनर्विचार – पुनर्विचार हेतु एम.सी.आई. को वार्षिक नवीनीकरण की योजना वापस निर्देशित करने की केन्द्र सरकार की शक्ति – एम.सी.आई. ने केन्द्र सरकार को मान्यता के नवीनीकरण हेतु नकारात्मक अनुशंसा की – नोटिस के उत्तर में याची ने केन्द्र सरकार के समक्ष नई योजना प्रस्तुत की – केन्द्र सरकार ने मामले को याची द्वारा प्रस्तुत योजना के आलोक में पुनर्विचार करने हेतु एम.सी.आई. को प्रतिप्रेषित

किया – धारा 10–ए का उपबंध, नया आयुर्विज्ञान महाविद्यालय खोलने के प्रस्ताव हेतु और साथ ही नवीनीकरण की अनुमति प्रदान करने हेतु, दोनों के लिये लागू होता है – वार्षिक नवीनीकरण अनुमति की योजना की कार्यवाही, धारा 10–ए सहपठित, इस संबंध में विरचित विनियमन के अंतर्गत की जाना अपेक्षित – वार्षिक नवीनीकरण की योजना को पुनः विचार किये जाने हेतु एम.सी.आई. को वापस निर्देशित करने की केन्द्र सरकार को शक्ति है। (आर.के.डी.एफ. मेडिकल कॉलेज हॉस्पिटल एण्ड रिसर्च सेन्टर वि. यूनियन ऑफ इंडिया) (DB)...2107

Medical Council Act, (102 of 1956), Section 10-A – Negative Recommendation **– M.C.I. submitted negative recommendation – Central Government referred the matter back to M.C.I. to reconsider in the light of fresh Scheme submitted by Petitioner – M.C.I. in its 2nd negative recommendations merely adverted to its previous recommendations and observations – MCI is not only expected to ensure that existing medical college fulfills all the norms and standards to ensure imparting of quality medical education, but must also be concerned about burgeoning requirement of society and of creating opportunity to the deserving students who are keen to pursue medical course, keeping in mind the deficient number of Doctor's ratio catering to the society – 2nd recommendation qua the scheme submitted by petitioner is unsustainable and hence quashed – Authorities to process the scheme for yearly renewal permission further and take it to its logical end expeditiously and in any case before commencement of admission process for academic year 2015-2016 – Petition allowed. [RKDF Medical College Hospital and Research Centre Vs. Union of India]** (DB)...2107

आयुर्विज्ञान परिषद् अधिनियम, (1956 का 102), धारा 10-ए – नकारात्मक अनुशंसा – एम.सी.आई. ने नकारात्मक अनुशंसा प्रस्तुत की – केन्द्र सरकार ने याची द्वारा प्रस्तुत नई योजना के आलोक में पुनर्विचार किये जाने हेतु मामला एम.सी.आई. को वापस निर्देशित किया – एम.सी.आई. ने अपनी द्वितीय नकारात्मक अनुशंसाओं में मात्र अपनी पूर्वत्तर अनुशंसाओं और संप्रेक्षणों का हवाला दिया – एम.सी.आई. से न केवल यह सुनिश्चित करना अपेक्षित है कि उत्तम चिकित्सीय शिक्षा प्रदान किया जाना सुनिश्चित करने के लिये, विद्यमान आयुर्विज्ञान महाविद्यालय सभी सन्नियमों एवं मानकों को पूरा करता है बल्कि समाज की बढ़ती अपेक्षाओं के बारे में भी विचार करना चाहिए और समाज को उपलब्ध चिकित्सकों के अनुपात को ध्यान में रखते हुए ऐसे सुपात्र विद्यार्थी जो चिकित्सीय पाठ्यक्रम जारी रखने में उत्सुक हैं, उनके लिये अवसर निर्माण करें – याची द्वारा प्रस्तुत योजना के संबंध में द्वितीय अनुशंसा अपोषणीय है, अतः अभिखंडित – प्राधिकारीगण, वार्षिक नवीनीकरण की अनुमति हेतु योजना में आगे कार्यवाही करें और किसी भी स्थिति में शैक्षणिक वर्ष 2015–2016

Penal Code (45 of 1860), Section 304-B and Evidence Act (1 of 1872), Section 32 – Dying Declaration – **Deceased in her dying declaration stated that accidentally she got burnt and her husband and sister-in-law rescued her – In inquest, father of deceased too stated that his daughter got burnt accidentally – Although, in his subsequent statement, he changed his entire version – No evidence that soon before death, she was subjected to cruelty – Respondent has been rightly acquitted by trial court – Leave refused. [State of M.P. Vs. Surendra Vishwakarma] (DB)...2251**

दण्ड संहिता (1860 का 45), धारा 304-बी एवं साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – मृतिका ने अपने मृत्युकालिक कथन में कहा है कि वह दुर्घटनावश जली और उसके पति तथा ननद ने उसे बचाया – मृत्यु समीक्षा में मृतिका के पिता ने भी कहा कि उसकी पुत्री दुर्घटनावश जली थी – यद्यपि अपने पश्चात्वर्ती कथन में उसने अपना संपूर्ण कथन बदल दिया – कोई साक्ष्य नहीं कि मृत्यु से तुरंत पहले उसके साथ क्रूरता का व्यवहार किया गया था – विचारण न्यायालय द्वारा उचित रूप से प्रत्यर्थी को दोषमुक्त किया गया – अनुमति अस्वीकार की गई। (म.प्र. राज्य वि. सुरेन्द्र विश्वकर्मा) (DB)...2251

Penal Code (45 of 1860), Section 304-B – Seven Years – **In FIR date of marriage is mentioned as 22.05.1987 and incident took place on 28.03.1994 i.e. within 7 years of marriage – FIR is not a substantive piece of evidence – No other evidence to prove the date of marriage – Witnesses have accepted that marriage took place about 8-9 years back – As prosecution failed to prove that incident took place within 7 years of marriage, no offence u/s 304-B could be made out. [Rajeev Ranjan Vs. State of M.P.] ...2223**

दण्ड संहिता (1860 का 45), धारा 304–बी – सात वर्ष – प्रथम सूचना रिपोर्ट में विवाह की तिथि 22.05.1987 उल्लिखित है और घटना 28.03.1994 को घटित हुई अर्थात् विवाह के 7 वर्षों के भीतर – प्रथम सूचना रिपोर्ट साक्ष्य का सारभूत अंग नहीं – विवाह की तिथि को साबित करने का कोई अन्य साक्ष्य नहीं – साक्षियों ने स्वीकार किया है कि विवाह लगभग 8–9 वर्ष पहले हुआ था – चूंकि अभियोजन यह सिद्ध करने में असफल रहा कि विवाह के 7 वर्षों के भीतर घटना घटित हुई थी, धारा 304–बी के अंतर्गत कोई अपराध नहीं बनता। (राजीव रंजन वि. म.प्र. राज्य) ...2223

Penal Code (45 of 1860), Section 304- (Part-2) – Culpable Homicide not amounting to murder – **Deceased sustained injuries while he was working in a rubber factory – F.I.R. was lodged after 9 hours mentioning the names of eye witnesses – One witness turned hostile and**

all other eye witnesses mentioned in the F.I.R. were given up – P.W. 4 deposed as an eye witness but his name was not mentioned in F.I.R. – P.W. 4 admitted that he is still working in the same factory and officers of the factory are standing outside the Court – Injuries could not have been caused by Rubber cutter which was seized from the possession of appellant – Rubber cutter also not sent to the autopsy Doctor – Appellant was all the time present in the factory at the time of incident and had no opportunity to take the blood stained rubber cutter to his house from where it was seized – No motive behind the commission of offence – Prosecution failed to prove the guilt of the appellant – Appeal allowed. [Sikandar Singh Vs. State of M.P.] ...2214

दण्ड संहिता (1860 का 45), धारा 304 (भाग–2) – हत्या की कोटि में न आने वाला आपराधिक मानव वध – मृतक को जब वह रबर फैक्ट्री में काम कर रहा था चोटें आईं – चक्षुदर्शी साक्षियों के नाम उल्लिखित करते हुए प्रथम सूचना रिपोर्ट 9 घंटे बाद दर्ज कराई गई – एक साक्षी पक्ष विरोधी हो गया और प्रथम सूचना रिपोर्ट में उल्लिखित सभी अन्य चक्षुदर्शी साक्षियों का परीक्षण नहीं किया गया – अ.सा. 4 ने चक्षुदर्शी साक्षी के रूप में कथन किया है परंतु प्रथम सूचना रिपोर्ट में उसका नाम उल्लिखित नहीं था – अ.सा.4 ने स्वीकार किया है कि वह अभी भी उसी फैक्ट्री में काम कर रहा है और फैक्ट्री के अधिकारीगण न्यायालय के बाहर खड़े हैं – चोटें उस रबर कटर से कारित नहीं की जा सकती जिसे अपीलार्थी के कब्जे से जप्त किया गया था – रबर कटर को शव परीक्षण करने वाले चिकित्सक को भी नहीं भेजा गया था – घटना के समय अपीलार्थी पूरे समय फैक्ट्री में उपस्थित था और रक्त रंजित रबर कटर को अपने घर ले जाने का उसके पास कोई अवसर नहीं था, जहां से उसे जब्त किया गया था – अपराध कारित करने के पीछे कोई हेतु नहीं – अभियोजन अपीलार्थी का दोष साबित करने में असफल रहा – अपील मंजूर। (सिकन्दर सिंह वि. म.प्र. राज्य) ...2214

Penal Code (45 of 1860), Section 306 – Abetment of suicide – Appellant/Husband was living as Ghar Jamai and was looking after the property of his in-laws alongwith his brother-in-law – P.W. 7 with whom it was alleged that appellant was having illicit relations has not stated about relation – Husband of P.W. 7 not examined – Deceased/wife never informed her maternal uncle about illicit relations, who had fixed the marriage after the death of father of deceased – No evidence that appellant had ever beaten the deceased in intoxicated condition – Nothing on record that who called the Panchayat – Neither deceased nor P.W. 7 or her husband called the Panchayat – Deceased was not having issue even after expiry of more than 7 years of marriage – Prosecution failed to prove that appellant abeted his wife to commit suicide – Appeal allowed. [Ramprasad

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THE INDIAN LAW REPORTS M.P. SERIES, 2015 (VOL-3)

JOURNAL SECTION

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

MADHYA PRADESH ACT

NO. 11 OF 2015

THE MADHYA PRADESH NAGARPALIK VIDHI (SANSHODHAN) ADHINIYAM, 2015

[Received the assent of the Governor on the 15th April, 2015; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 20th April, 2015, page no. 314(2) to 314(3)]

An Act further to amend the Madhya Pradesh Municipal Corporation Act, 1956 and the Madhya Pradesh Municipalities Act, 1961.

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

1. Short title. This Act may be called the Madhya Pradesh Nagarpalik Vidhi (Sanshodhan) Adhiniyam, 2015.

PART I

AMENDMENT TO THE MADHYA PRADESH MUNICIPAL CORPORATION ACT, 1956 (NO. 23 OF 1956)

2. Amendment to the Madhya Pradesh Act NO. 23 of 1956. In the Madhya Pradesh Municipal Corporation Act, 1956 (No. 23 of 1956)-(1) After section 293, the following section shall be inserted, namely : –

Provisions of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (No. 23 of 1973) to apply in respect of control of development and use of land. "293-A. Save as otherwise provided in this Act, the provisions of section 24 of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (No. 23 of 1973) and the rules made thereunder in respect of control of development and use of land shall *mutatis mutandis* apply for the purpose of control of development and use of land under this Act.".

(2) In section 294, after sub-section (4), the following new sub-section shall be inserted, namely : –

"(5) Notwithstanding anything contained in this section, the Commissioner may register and authorize as many number of Architects and Structural Engineers as he may deem fit, possessing the requisite qualification prescribed under the prevailing rules notified under the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (No. 23 of 1973), to examine and grant approval under this section for erection or re-erection of the building on behalf of the Corporation in respect of such plots, in such manner and on such conditions as may be prescribed by the State Government.".

(3) In section 295, in sub-section (1), for the word and figures "section 291," the words and figures "section 291 or 293-A shall be substituted.

(4) In Section 308-A, for the first proviso, the following proviso shall be substituted, namely : –

"Provided that in compounding the cases in respect of unauthorized construction, including the unauthorized constructions in the illegal colonies taken over under management by the competent authority for regularization, the fee shall be charged at such rate and on such conditions as may be

prescribed by the State Government.".

PART II

AMENDMENT TO THE MADHYA PRADESH MUNICIPALITIES ACT, 1961
(NO. 37 OF 1961)

3. Amendment to the Madhya Pradesh Act NO. 37 of 1961. In the Madhya Pradesh Municipalities Act, 1961 (No. 37 of 1961), –

(1) In Section 187, after sub-section (3), the following sub-section shall be inserted, namely:–

"(3A) Notwithstanding anything contained in this section, the Council may register and authorize as many number of Architects and Structural Engineers as it may deem fit, possessing the requisite qualification prescribed under the prevailing rules notified under the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (No. 23 of 1973), to examine and grant approval under this section for erection or re-erection of the building on behalf of the Council in respect of such plots, in such manner and on such conditions as may be prescribed by the State Government.".

(2) In Section 187-A, for the first proviso, the following proviso shall be substituted, namely : –

"Provided that in compunding the cases in respect of unauthorized construction, including the unauthorized constructions in the illegal colonies taken over under management by the completent authority for regularisation, the fee shall be charged at such rate and on such conditions as many by prescribed by the State Government.".

(3) After Section 187-C, the following section shall be inserted, namely : –

Provisions of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (No. 23 of 1973) to apply in respect of controal of development and use of

land. "187-D, Save as otherwise provided in this Act, the provisions of Section 24 of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (No. 23 of 1973) and the rules made thereunder in respect of control of development and use of land shall mutatis mutandis apply for the purpose of control of development and use of land under this Act.".

DEPARTMENT OF ANIMAL HUSBANDARY
MINISTRY, VALLABH BHAWAN, BHOPAL

Bhopal, the 19th June 2015

[Notification No. F-23-8-2015-XXXV published in Madhya Pradesh Gazette (Extra-ordinary) dated 19 June 2015 page no. 483]

In exercise of the powers conferred by Section 16 of the Madhya Pradesh Govansh Vadh Pratishedh Adhiniyam, 2004 (No. 6 of 2004), the State Government, hereby, nominates the District Collectors as Competent Authority to perform in any local area the functions of a Competent Authority under the Act.

By order and in the name of Governor of Madhya Pradesh

Kamla Ajitwar, Dy. Secretary.

MADHYA PRADESH ACT

No. 12 of 2015

THE REGISTRATION (MADHYA PRADESH AMENDMENT) ACT, 2014

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MADHYA PRADESH ACT

No. 12 OF 2015

THE REGISTRATION (MADHYA PRADESH AMENDMENT) ACT, 2014

[Received the assent of the President on the 27th June 2015; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 7th July, 2015, page nos. 540 (4) to 540 (7)]

A Bill further to amend the Registration Act, 1908 in its application to the State of Madhya Pradesh.

Be it enacted by the Madhya Pradesh Legislature in the sixty-fifth year of the Republic of India as follows:–

1. **Short title and commencement.** (1) This Act may be called the Registration (Madhya Pradesh Amendment) Act, 2014.

(2) It shall come into force from the date of its publication in the Madhya Pradesh Gazette.

2. **Amendment of Central Act No. 16 of 1908 in its application to the State of Madhya Pradesh.** The Registration Act, 1908 (No. 16 of 1908) (hereinafter referred to as the principal Act) shall in its application to the State of Madhya Pradesh be amended in the manner hereinafter provided.

3. **Amendment of Section 2.** In Section 2 of the principal Act, after clause (4-A), the following clause shall be inserted, namely :–

"(4-B)" electronic signature shall have the same meaning as assigned to it in clause (ta) of sub-section (1) of Section 2 of the Information Technology Act, 2000 (No. 21 of 2000);".

4. **Amendment of Section 17.** In Section 17 of the principal Act,–

(i) in sub-section (1), in clause (g), for full stop, the semi colon shall be substituted and thereafter the following clause shall be inserted, namely:-

"(h) any other instrument required by any law for the time being in force, to be registered.";

(ii) in sub-section (3), for the word "son", the word "child" shall be substituted.

5. **Amendment of Section 20.** In Section 20 of the principal Act, for sub-section (1), the following sub-section shall be substituted, namely :–

"(1) The registering officer may in his discretion refuse to accept for registration any document in which any interlineations, blanks, erasures or alterations appear, unless the persons executing and claiming under the document attest with their signatures or initials such interlineations, blanks, erasures or alterations.".

6. **Amendment of Section 21.** In Section 21 of the principal Act, for sub-section (1), the following sub-section shall be substituted, namely :–

"(1) No non-testamentary document relating to immovable

property shall be accepted for registration, unless it contains a description of such property along with a map and photographs showing its location and nature, sufficient to identify the same.".

7. **Amendment of section 22.** In Section 22 of the principal Act, for sub-section (1), the following sub-section shall be substituted, namely :–

"(1) Where it is, in the opinion of the State Government, practicable to describe houses and lands by reference to a Government map or survey, the State Government, may, by rule made under this Act, require that such houses and lands as aforesaid shall, for the purposes of section 21, be so described.".

8. **Substitution of Section 24.** For Section 24 of the principal Act, the following section shall be substituted, namely :–

Documents executed by several persons at different times. "24. Where there are several persons executing a document at different times, such documents may be presented for registration and re-registration within four months from the date of last execution.".

9. **Substitution of Section 25.** For Section 25 of the principal Act, the following section shall be substituted, namely :–

Provision where delay in presentation is unavoidable. "25. If, owing to urgent necessity or unavoidable accident, any document executed, or copy of a decree or order made, in India is not presented for registration till after the expiration of the time hereinbefore prescribed in that behalf, the Registering Officer, in cases where the delay in presentation does not exceed four months, may register the document, on payment of a fine not exceeding ten times the amount of the proper registration fee on such document.".

10. **Substitution of Section 32-A.** For Section 32-A of the principal Act, the following section shall be substituted, namely :–

Compulsory affixing of photograph, etc. "32-A. Every person

presenting any document at the proper registration office under section 32 shall affix his passport size photograph, thumb impression and signature to the document:

Provided that where such document relates to the transfer of ownership of immovable property, the passport size photograph, thumb impression and signature of each executant and claimant of such property mentioned in the document shall also be affixed to the document.".

11. **Amendment of Section 34.** In Section 34 of the principal Act,–

(i) in sub-section (1), for the existing provisos, the following proviso shall be substituted, namely :–

"Provided that when any document as notified by the State Government is presented in electronic form, personal appearance shall not be required.";

(ii) for sub-section (2), the following sub-section shall be substituted, namely :–

"(2) Appearances under sub-section (1) shall be simultaneous.";

(iii) in sub-section (3), after clause (a), the following clause shall be inserted, namely :–

"(ab) enquire whether or not the document is duly stamped as per provisions of the Indian Stamp Act, 1899;";

(iv) sub-section (4) shall be deleted.

12. **Amendment of Section 49.** In Section 49 of the principal Act, after the words, figures and bracket "Transfer of Property Act, 1882 (4 of 1882)" occurring twice, the words "or any other law for the time being in force" shall be inserted.

13. **Amendment of Section 57.** In Section 57 of the principal Act, in sub-section (5), for full stop, the colon shall be substituted and thereafter the following proviso shall be added, namely :–

"Provided that when a registered document is electronically signed

and stored in a database authorized by the Government under the concerning rules, then subject to the provision of section 67A of the Indian Evidence Act, 1872 (No. 1 of 1872), copies thereof may be downloaded/issued from the said authorized database and the same shall also be admissible for the purpose of proving the contents of the original document.".

14. **Insertion of Section 63-A.** After Section 63 of the principal Act, the following section shall be inserted in Part XI (B), namely :–

Presentation etc may be done in electronic form. "63-A. (1) All presentations, endorsements, filing, certifications, signatures and maintenance of books and indexes required under the Act, may be done in electronic form, as per procedure, if any, laid down under the rules.

(2) All books and indexes that are open to public inspection, may be made available for inspection through a Government website or the Electronic Registration System as notified by the Government for the purpose.".

15. **Substitution of section 82.** For Section 82 of the principal Act, the following section shall be substituted, namely :–

"82. Whoever–

Penalty for making false statements, false recitals, delivering false documents, or copies or translations, false personation, and abatement. (a) intentionally makes any false statement, whether on oath or not, and whether it has been recorded or not, before any officer acting in execution of this Act, in any proceeding or inquiry under this Act; or

(b) intentionally makes any false recital in a document presented for registration; or

(c) intentionally delivers to a registering officer, in any proceeding, a false document, or copy or translation of a document, or a false copy of a map or plan; or

(d) falsely personates another, and in such assumed character presents any document, or makes any admission or statement, or causes any summon or commission to be issued, or does any other act in any proceeding or enquiry under this Act; or

(e) abets anything made punishable by this Act,

shall be punishable with imprisonment for a term which may extend to seven years or with fine, or with both.".

16. **Amendment of Section 82-A.** In Section 82-A of the principal Act, in sub-section (2), for the words "two hundred rupees", the words "ten thousand rupees" shall be substituted.

Short Note

****(27) (DB)***

Before Mr. Justice Rajendra Menon & Mr. Justice M.C. Garg

M.A.I.T. No. 135/2006 (Jabalpur) decided on 21 April, 2015

COMMISSIONER OF INCOME TAX ...Appellant

Vs.

SHRI SANT RAMDAS CHAWLA ...Respondent

Income Tax Act (43 of 1961), Sections 133-A, 153-BB, 153-BC - Block Assessment **- For conducting block assessment, the Assessing Officer has to restrict himself to the evidence found or material collected during search only - He cannot rely upon any other material which did not form part of search and seizure operation - Therefore, material used and obtained from Sales Tax Department is not permissible for the purposes of making Block Assessment - Appeal dismissed.**

आयकर अधिनियम (1961 का 43), धाराऐं 133-ए, 153-बीबी, 153-बीसी – ब्लॉक निर्धारण – ब्लॉक निर्धारण करने हेतु निर्धारण अधिकारी को केवल तलाशी के दौरान एकत्रित तथ्य या पाये गये साक्ष्य तक सीमित रहना चाहिए – वह किसी अन्य तथ्य पर विश्वास नहीं कर सकता जो कि तलाशी एवं जप्ती कार्यवाही का हिस्सा निर्मित नहीं करते – इसलिए, विक्रय कर विभाग द्वारा प्रयुक्त एवं अभिप्राप्त सामग्री ब्लॉक निर्धारण के प्रयोजन हेतु अनुज्ञेय नहीं – अपील खारिज।

The Judgment of the Court was delivered by : RAJENDRA MENON, J.

Cases referred :

(2015) 1 SCC 1, (2003) 132 Taxman 274(MP), (2001) 247 ITR 448, (2009) 177 Taxman 494 (Delhi), (2001) 250 ITR 141.

Sanjay Lal, for the appellant.

Mukesh Agrawal, for the respondent.

Short Note

****(28)***

Before Mr. Justice Sanjay Yadav

W.P. No. 19359/2013 (Jabalpur) decided on 11 April, 2014

HIND KISHORE ...Petitioner

Vs.

STATE OF M.P. ...Respondent

Service Law - Contract Appointment **- Non-extension of a contract**

appointment - Petitioner was initially appointed by the Collector-cum-District Programme Coordinator and the extension from time to time has also been granted by the Collector - Collector is well within his power to decline extension of contract period - Petition dismissed.

सेवा विधि – संविदा नियुक्ति – संविदा नियुक्ति का न बढ़ाया जाना – याची को आरंभिक रूप से कलेक्टर–सह–जिला प्रोग्राम समन्वयक द्वारा नियुक्त किया गया था और समय समय पर कलेक्टर द्वारा वृद्धि भी प्रदान की गई है – संविदा अवधि की वृद्धि अस्वीकार करना भली भांति कलेक्टर की शक्ति में है – याचिका खारिज।

Gopal Singh, for the petitioner.

Short Note

**(29)*

Before Mr. Justice Sanjay Yadav

M.A. No. 1283/2014 (Jabalpur) decided on 25 June, 2014

KARI BAI @ KALI BAI (SMT.) & ors. ...Appellants

Vs.

UNION OF INDIA ... Respondent

***Railway Claims Tribunal Act, (54 of 1987), Section 16 - Date from which interest to be granted - Misjoinder of party* - Substitution on 17.06.2013 - Interest granted from 17.06.2013 and not from date of institution of claim petition - Held - As the liability rests on Union of India and a common man is not aware of territorial boundaries of Zonal Railways, so interest to be granted from date of institution of claim petition - Appeal allowed.**

रेल दावा अधिकरण अधिनियम (1987 का 54), धारा 16 – जिस तिथि से ब्याज प्रदान किया जाना है – पक्षकार का कुसंयोजन – 17.06.2013 को प्रतिस्थापित किया जाना – 17.06.2013 से ब्याज प्रदान किया गया और न कि दावा याचिका संस्थित किये जाने की तिथि से – अभिनिर्धारित – चूंकि भारत के संघ पर दायित्व आता है और सामान्य व्यक्ति ज़ोनल रेलवे की क्षेत्रीय सीमाओं से अवगत नहीं, इसलिये दावा याचिका संस्थित किये जाने की तिथि से ब्याज प्रदान करना होगा – अपील मंजूर।

Case referred :

AIR 1977 SC 1701.

Chandrahas Dubey, for the appellants.

Govind Patel, for the respondent on advance notice.

NOTES OF CASES SECTION

Short Note

****(30) (DB)***

Before Mr. Justice Rajendra Menon & Mr. Justice Sushil Kumar Gupta

W.P. No. 5637/2015 (Jabalpur) decided on 9 July, 2015

MANOJ SINGH JADHONE ....Petitioner

Vs.

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

National Security Act (65 of 1980), Sections 3 & 9 - Approval by Advisory Board **- State Govt. directed for detention for a period of three months - Order of detention was approved by Advisory Board - State Govt. subsequently extended the period of three months twice without seeking approval of Advisory Board - Held - For every extension approval by Advisory Board is essential - Detention beyond first period of three months is illegal accordingly quashed.**

राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धाराऐं 3 व 9 – सलाहकार बोर्ड द्वारा अनुमोदन – राज्य सरकार ने तीन माह की अवधि के लिये निरोध में रखने हेतु निदेशित किया – निरोध आदेश को सलाहकार बोर्ड द्वारा अनुमोदित किया गया – राज्य सरकार ने तत्पश्चात् तीन माह की अवधि को सलाहकार बोर्ड का अनुमोदन चाहे बिना दो बार बढ़ाया – अभिनिर्धारित – प्रत्येक वृद्धि के लिये सलाहकार बोर्ड का अनुमोदन आवश्यक है – प्रथम तीन माह की अवधि से परे निरोध अवैध है अतः अभिखंडित।

The Order of the Court was delivered by : RAJENDRA MENON, J.

Cases referred :

2011 CRLJ 4494, AIR 1988 SC 934, 2014 SCC Online SC 439.

Parag S. Chaturvedi, for the petitioner.

Swapnil Ganguly, G.A. for the respondents/State.

Short Note

****(31)***

Before Mr. Justice S.K. Gangele

W.P. No. 5409/2005 (Jabalpur) decided on 23 June, 2015

NATIONAL THERMAL POWER CORPORATION ...Petitioner

Vs.

STATE OF M.P. ...Respondent

Land Revenue Code, M.P. (20 of 1959), Section 59(2) - Premium and Penalty - Diversion of purpose **- Land was acquired for setting up a**

Thermal Power Plant by petitioner company - Compensation paid by company - Company constructed Thermal Power Plant as well as colony/ township as per plan - As there was no change of use, company is not liable to pay premium and penalty in accordance with Sections 59 & 172(4) of Code, 1959.

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 59(2) – प्रीमियम और शास्ति – प्रयोजन का परिवर्तन – याची कंपनी द्वारा ताप विद्युत संयंत्र स्थापित करने हेतु भूमि का अर्जन किया गया था – कंपनी द्वारा प्रतिकर अदा किया गया – कंपनी ने ताप विद्युत संयंत्र और साथ ही योजना के अनुसार कॉलोनी/उपनगर का निर्माण किया – चूंकि उपयोग में कोई बदलाव नहीं किया गया, संहिता 1959 की धारा 59 व 172(4) के अनुसार कंपनी प्रीमियम और शास्ति का भुगतान करने के लिये दायित्वाधीन नहीं।

P.R. Bhave with *R.C. Shrivastava,* for the petitioner.
A.P. Singh, G.A. for the respondent/State.

Short Note
****(32)***
Before Mr. Justice K.K. Trivedi
W.P. No. 4001/2010 (Jabalpur) decided on 14 March, 2014

OLPHERTS PVT. LTD. (M/S) ...Petitioner
Vs.
UNION OF INDIA & ors. ... Respondents

(Alongwith W.P. No.891/2013)

A. ***Mineral Concession Rules, 1960 Rule 22* - Applications for the grant of leases and applications for renewal - Only the provisions of law, as are available on the date of consideration, are to be looked into and not the law as was existing on the date of making of application.**

क. खनिज रियायत नियम, 1960, नियम 22 – पट्टों को प्रदान किये जाने हेतु आवेदन एवं नवीनीकरण हेतु आवेदन – केवल विधि के उपबंध जैसे कि विचारण की तिथि को उपलब्ध हैं, को विचार में लिया जाना चाहिए और न कि उस विधि को जो कि आवेदन करने की तिथि को विद्यमान थी।

B. ***Forest (Conservation) Act (69 of 1980), Section 2* - Approval before changing use of forest land for any non-forest purpose - Held - Prior approval of Central Government is necessary.**

ख. वन (संरक्षण) अधिनियम (1980 का 69), धारा 2 – वन भूमि का उपयोग किसी अवानिकी प्रयोजन हेतु परिवर्तित करने से पूर्व अनुमोदन – अभिनिर्धारित – केन्द्र सरकार का पूर्वानुमोदन आवश्यक है।

Cases referred : —

JT 2004 (Supp.1) SC 11, (1981) 2 SCC 205, (2013) 7 SCC 571, (2010) 13 SCC 1, 2012(3) MPLJ 146, (2009) 5 SCC 373.

Kishore Shrivastava with *Kapil Jain,* for the petitioner in W.P. No. 4001/2010.

Anil Khare with *Jasmeet Singh,* for the petitioner in W.P. No. 891/2013.

Sanjay Dwivedi, G.A. for the respondents No.2 in W.P. No. 4001/2010 and in W.P. No. 891/2013.

Pranay Verma, for the respondent No.3 in W.P. No. 4001/2010.

Archana Nagariya on behalf of *Pranay Verma,* for respondent No. 3 in W.P. No. 891/2013.

Short Note

****(33)***

Before Mr. Justice K.K. Trivedi

W.P. No.1258/2010 (Jabalpur) decided on 2 January, 2014

PRATIBHA RAJGOPAL (DR.) ...Petitioner

Vs.

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

Public Services (Promotion) Rules, M.P. 2002, Rule 7(9) - Promotion **- Denial of promotion to the petitioner on the post of Professor assailed on the ground that since the vacancy was of the year 2004, ACR from the year 1999 to 2004 were to be taken into consideration instead of ACR for the year 2005 onwards, therefore, entire consideration was improper - Held - Rule 7(9) prescribes grading of ACR's and assigning marks by considering preceding 5 years ACR's from the year of vacancy - Since vacancy occurred in the year 2004, consideration of ACR's for the year 2005 onwards vitiates procedure followed by the DPC - DPC proceedings are not sustainable, same are quashed - Matter is remitted back to respondents to hold review DPC in terms of provisions of Rules 2002.**

लोक सेवा (पदोन्नति) नियम, म.प्र. 2002, नियम 7(9) – पदोन्नति – याची को प्राध्यापक के पद पर पदोन्नति से इंकार किये जाने को इस आधार पर चुनौती दी गई कि चूंकि रिक्ति वर्ष 2004 की थी, वर्ष 2005 के वार्षिक गोपनीय प्रतिवेदन की बजाय वर्ष 1999 से 2004 तक के वार्षिक गोपनीय प्रतिवेदन विचार में लिये जाने थे, इसलिए संपूर्ण विचारण अनुचित था – अभिनिर्धारित – नियम 7(9) वार्षिक गोपनीय प्रतिवेदनों का श्रेणीकरण और रिक्ति के वर्ष से 5 वर्ष पूर्व के वार्षिक गोपनीय प्रतिवेदन विचार में लेकर अंक प्रदान करना विहित करता है – चूंकि रिक्ति वर्ष 2004 में अस्तित्व में आई,

वर्ष 2005 से आगे के वार्षिक गोपनीय प्रतिवेदनों का विचारण विभागीय पदोन्नति समिति द्वारा अपनाई गई प्रक्रिया को दूषित करता है – विभागीय पदोन्नति समिति की कार्यवाहियां कायम रखने योग्य नहीं, उन्हें अभिखंडित किया गया – मामला प्रत्यर्थीगण को नियम 2002 के उपबंधों की शर्तोंनुसार पुर्नविलोकन विभागीय पदोन्नति समिति आयोजित करने के लिये प्रतिप्रेषित किया गया।

Kishore Shrivastava with *R.S. Verma* for the petitioner.
S.M. Lal, G.A. for the respondents No. 1 to 4.
Vivek Agrawal, for the respondent No.6.
None for the respondent No. 5 though served.

Short Note

****(34)***

Before Ms. Justice Vandana Kasrekar

W.P. No.14437/2014 (Jabalpur) decided on 8 April, 2015

RAJIV GANDHI PRODYOGIKIYA SHRAMIK VISHWAVIDYALAYA KARMCHARI SANGH ...Petitioner

Vs.

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

Service Law - Contingency/Daily Wages Employees - Regularization **- State has issued a circular dated 29.09.2014 for regularizing the services of daily rated employees - University has also adopted the said circular - Employees working against vacant posts for more than 10 years - Respondent directed to constitute Committee for scrutinizing the cases of employees for regularization - Exercise be done within 6 months - Petition allowed.**

सेवा विधि – आकस्मिकता/दैनिक वेतनभोगी कर्मचारी – नियमितीकरण – राज्य ने दैनिक वेतन कर्मचारियों की सेवाओं का नियमितीकरण करने हेतु परिपत्र दिनांक 29.09.2014 जारी किया है – विश्वविद्यालय ने भी उक्त परिपत्र को अंगीकृत किया है – कर्मचारीगण 10 वर्षों से अधिक समय से रिक्त पदों के विरूद्ध कार्यरत – कर्मचारियों के नियमितीकरण के प्रकरणों की संवीक्षा हेतु समिति गठित करने के लिये प्रत्यर्थी को निदेशित किया गया – 6 माह के भीतर कार्यवाही पूरी की जाए – याचिका मंजूर।

Case referred :

(2006) 4 SCC 1.

Anubhav Jain, for the petitioner.
Piyush Jain, P.L. for the respondents No. 1,2, & 6.
Manish Verma, for the respondents No. 4,5, & 7.

I.L.R. [2015] M.P., 1943
SUPREME COURT OF INDIA
Before Mr. Justice Pinaki Chandra Ghose &
Mr. Justice Uday Umesh Lalit
Cr. A. Nos. 2096-2098/2009 decided on 1 July, 2015

STATE OF M.P. ...Appellant
Vs.
ASHOK & ors. etc. ...Respondents

Penal Code (45 of 1860), Sections 302/149, 148 - Murder - Unlawful Assembly **- Deceased was set on fire by two convicted accused persons - The respondents surrounded the deceased and were shouting that he be beaten and should not be left - Throwing burning tyre and sword also indicate the active role played by them - It is impossible to accept that the respondents arrived at the scene of occurrence after the crime was completed - Their role is that of participants in crime who did not allow deceased to escape by encircling him - Judgment of High Court acquitting the respondents set aside - Appeal allowed. (Paras 8 to 11)**

दण्ड संहिता (1860 का 45), धाराऐं 302/149, 148 – हत्या – विधिविरुद्ध जमाव – दो दोषसिद्ध अभियुक्तों द्वारा मृतक को जलाया गया था – प्रत्यर्थीगण ने मृतक को घेरा और चिल्ला रहे थे कि उसे पीटना है और छोड़ना नहीं है – जलता हुआ टायर और तलवार फेंकना भी उनके द्वारा निभायी गयी सक्रिय भूमिका दर्शाता है – यह स्वीकार करना असंभव है कि प्रत्यर्थीगण घटनास्थल पर अपराध पूर्ण होने के पश्चात् पहुँचे – उनकी भूमिका, अपराध में सहभागियों की है जिन्होंने मृतक को घेरकर उसे बचकर निकलने नहीं दिया – प्रत्यर्थीगण को दोषमुक्त करने का उच्च न्यायालय का निर्णय अपास्त – अपील मंजूर।

JUDGMENT

The Judgment of the Court was delivered by :
UDAY UMESH LALIT, J. :- These appeals by special leave challenge the Judgment and Order dated 11.01.2007 passed by the High Court of Judicature of Madhya Pradesh, Jabalpur bench at Jabalpur in Criminal Appeals Nos. 170 of 1995, 841 of 1995 and 369 of 1996 by which respondents Ashok s/o Banshilal Vedehi, Raju @ Rajendra s/o Banshilal Vedehi, Gullu @ Rajesh s/o Banshilal Vedehi, Gouri Shankar s/o Banshilal Vedehi, Vidhna @ Ramdas s/o Lallulal Kewat, Surendra s/o Harilal Vedehi were acquitted by the High Court of all the charges leveled against them.

2. According to the prosecution one Tikaram son of Chote Lal Pandey after finishing his duty was returning home at 8:00 p.m. on 11.04.1989. On the way he met his younger brother PW13 Sheetal Prasad. Both were coming on bicycles, PW13 being 10-15 feet behind said Tikaram. When Tikaram reached Tilwaraghat he was stopped in front of the house of Hari Maharaj by Dibbu @ Devendra by catching his bicycle. Said Dibbu then poured petrol over him and Jittu @ Jitendra burnt him by igniting a match stick. Tikaram started burning and ran from the spot. He was surrounded by present respondents and two others namely Harilal and Banshilal. All of them exhorted to beat him and to burn him and that he should not be allowed to run from the spot. Respondent Vidhna @ Ramdas threw a burning tyre upon him. While Tikaram was running helter-skelter, Harilal threw a sword at him. Tikaram ran to the house of PW3 Vinod and fell there. PW3 extinguished the fire. The incident was witnessed by PW13 who ran to the house and conveyed the fact of Tikaram having been set afire to the inmates of the house. As a result, PW4 Ravindra Kumar Pandey son of said Tikaram and PW15 Laxmi Prasad Pandey rushed to the scene of occurrence. Tikaram disclosed to both PWs 4 and 15 that he was set afire in the aforesaid manner and by the persons mentioned above. Tikaram was then removed to Medical College Hospital, Jabalpur.

3. On receiving information, PW16 inspector R.P. Singh went to the casualty ward and enquired about the condition of Tikaram with letter Ext.P-30. PW18 Dr. A.C. Nagpal gave certificate that Tikaram was conscious and in a position to speak. PW16 inspector R.P. Singh thereafter took the statement of said Tikaram, translation of which is to the following effect:

> "Sir, I am residing at Ramnagra. Today I was going to Ramnagra after performing my duty on Petrol Pump. This incident occurred at Tilwaraghat opposite the house of Hari Maharaj. I was going by my cycle. My brother Sheetal Prasad was following me. Dibbu caught hold my cycle and stopped me and poured petrol on me from a Jug and Jeetu set fire on me by a Match Box. My body started burning. Hari, Surendra, Bigna, Ashok, Bansi, Raju and the son of sister of Bansi Maharaj who lives in Kamla Nagar who has beard, the younger son of Bansi Gullu and 2-3 other persons from city their names I do not know, surrounded me. I ran away and entered into a room of house of Vinod Kumar situated nearest and they all were crying "Maaro Maaro Sale Ko, Bachne Na Paye" and I fell down there. There were so many

persons present who have seen this incident. There is an old enmity and quarrel was going on between us and Dibbu etc. For taking revenge from the said enmity today they poured petrol on me and set on fire, in order to kill me. My whole body has been burnt. My clothes also have been burnt. Report has been read over and the same has been written as stated by me. Please investigate the matter."

4. Pursuant to the aforesaid statement recorded at 8:30 p.m. Dehati Nalishi Ext. P-20 was lodged and crime was registered. Tikaram was shifted to ward no: 11 for further treatment. On the same night panchnama was prepared by said PW16. In the night of 11.04.1989 and 12.04.1989 PW5 Executive Magistrate S.P. Meshram recorded statement Ext. P-17 of said Tikaram. The statement was recorded after due certification from doctor about consciousness and fitness of said Tikaram. The translation of the statement Ext. P-17 is as under:-

"On 11.04.1989 at about 8 O'clock in the evening I was going to my home in Ramnagra from Jabalpur. Near Tilwaraghat Dibbu alias Devendra poured petrol on my body and Jittu alias Jitendra burnt me by igniting the matchstick. At that time I was going on a bicycle on the road. They stopped me and did this act. My younger brothers Sheetal and Manohar were about 15 Ft. behind me. I had enmity with Dibbu and Jittu from before. So they did this to me. Hari, Banshi, Ashok, Raju, Gaurishankar, Gullu, Surendra and Vidhna were the persons who assaulted me."

5. On 12.04.1989 at about 8:15 p.m. Tikaram succumbed to his injuries. On 13.04.1989 at 10:30 a.m. post mortem on the body of said Tikaram was conducted by PW17 Dr. D.K. Sakalle. According to the post mortem following facts were noticed:

"There were third degree burns on the body of the deceased on the scalp, all around neck, face, ears, lips, all over the trunk except the upper joint of the thighs, over scrotum and penis all around both upper limbs except tips and nails of fingers on right side. Third degree burns present all around left thigh, on right thigh all around except the back part and over upper part of the left leg and the middle part of the right leg.

There were blisters in some parts of the left leg due to burns. Similarly there were some blisters on the back of the right leg. There was inflammation around the burn injuries. The deceased was burnt about 90%. Apart from the burn injuries the following injuries were also there on the body of the deceased. Incised wound obliquely on back of chest. It was 4" long, 1" broad and maximum depth was 3/4". It contained a clot of blood and there was an abrasion on its left side. There was no injury in any internal organ of the deceased."

6. After due investigation charge sheet was filed and 10 accused persons were sent for trial. The prosecution examined twenty witnesses while three witnesses were examined in defence. Dying declarations namely statements Exts.P-20 and P-17, so also oral declarations as deposed by PWs 4 and 15 and the eye-witness account through PW13 were principally relied upon by the prosecution. Accepting the case of prosecution, the trial court convicted all the accused. Accused Dibbu @ Devendra and accused Jittu @ Jitendra were found guilty under section 302 I.P.C. and section 148 I.P.C. while others namely the present respondents along with Harilal and Banshilal were found guilty under section 302 read with section 149 I.P.C. Accused Dibbu @ Devendra and accused Jittu @ Jitendra were sentenced to life imprisonment under section 302 I.P.C. and to rigorous imprisonment of one year under section 148 I.P.C. All the other accused were sentenced to life imprisonment under section 302 read with section 149 I.P.C. and to rigorous imprisonment for 6 month under section 147 I.P.C.

7. All convicted accused persons challenged their conviction and sentence by filing Criminal Appeal Nos. 170 of 1995, 841 of 1995 and 369 of 1996. During the pendency of said appeals it was reported that accused Harilal and Banshilal had died and as such their appeals were declared to have abated. The High Court after going through the record found that the case of the prosecution was fully established as against accused Dibbu @ Devendra and accused Jittu @ Jitendra. The High Court however gave benefit of doubt to the respondents on the premise that they had reached the spot after the commission of offence and as such the charge of formation of unlawful assembly by them was not established. The observations by the High Court in that behalf were as under:

"Considering the over-all evidence on record, it is

proved beyond reasonable doubt that Dibbu alias Devendra and Jittu alias Jitendra have committed the offence. The case of Dibbu and Jittu is established by the prosecution beyond reasonable doubt in commission of offence. As regards other appellants in all the connected appeals are concerned, they are entitled for the benefit of doubt. It is narrated in the dying declaration and Dehati Nalishi that they reached the spot after the commission of offence. Therefore, formation of unlawful assembly by them is not established."

The judgment of the High Court affirming their conviction and sentence has not been challenged by the accused Jittu @ Jitendra and Dibbu @ Devendra. The judgment to the extent it acquitted the present respondents of all the offences is presently under challenge at the instance of the State of Madhya Pradesh in these appeals by special leave.

8. Ms. Vanshaja Shukla, learned advocate appearing for the State submitted that the role of the present respondents in the commission of crime was clearly made out from the dying declarations as well as from the testimony of the eye witness. The Injury as found in the post mortem also supported the eye witness account, which in turn indicated the role played by accused other than those who stand convicted by the High Court. In her submission, the view taken by the High Court was completely unsustainable. Mr. Akshat Srivastava learned advocate appearing for the respondent supported the judgment of the High Court. It was submitted that the principal role as alleged in the dying declarations was not as regards the present respondents and as such they were rightly granted benefit of doubt by the High Court.

During the course of hearing it was submitted that respondent no.6 namely Surendra s/o Harilal Vedehi had died during the pendency of these appeals. The learned counsel appearing for the State was directed to ascertain the fact. Accordingly death certificate of said respondent no.6 has been filed on record indicating that he died on 01.10.2014. We therefore direct that the proceedings stand abated as against said respondent no.6.

9. Statement Ext. P-20 leading to the registration of crime as well as statement Ext. P-17 recorded by the Executive Magistrate are dying declarations by Tikaram. Both these statements are consistent and name the present respondents and state the role played by them in surrounding Tikaram and giving cries that he be beaten and should not be left. In the face of such

assertions, it is impossible to accept that these respondents arrived at the scene of occurrence after the crime was completed. Their role is that of participants in the crime who did not allow Tikaram to escape by encircling him. The finding rendered by the High Court is against the record.

10. Both the statements clearly referred to the presence of PW13. It was PW13 who immediately ran home and intimated the fact that Tikaram was set afire, to the inmates of the house. Consequently PW4 and PW15 arrived at the scene of occurrence. Tikaram was then removed to the hospital. In his testimony PW13 stated that while Tikaram was burning, respondent Vidhna @ Ram Das threw a burning tyre upon him and original accused Harilal threw a sword at him. The post mortem clearly shows an incised injury in the back suffered by said Tikaram, which completely supports such assertion. Having gone through the record we find the presence of said PW13 completely established and accept him to be eye witness to the occurrence. It is relevant to note that the High Court has also not disbelieved the testimony of PW13.

11. In the light of the eye witness account and the post mortem report it is quite clear that the respondents were present when Tikaram was burning alive. The sequence of narration certainly shows that they were waiting in ambush. It may be that only two of them set Tikaram afire but the others definitely ensured by surrounding Tikaram that he would not be allowed to escape. Further, throwing of burning tyre and the sword would also indicate the active role played by them. Even if one of them was ready with a sword, that is clearly indicative of the level of preparedness on their part and we see no reason how they could not be said to be members of unlawful assembly. It was a crime which was committed by all of them guided by same purpose, acting in concert achieving the result that was desired. The intent of the entire assembly was clear, eloquently established by their presence, preparedness and participation. Though we are conscious that while considering an appeal against acquittal we should be extremely slow in interfering, in our considered view the assessment made by the High Court in the present case is completely unsustainable and against the record.

12. We therefore allow these appeals, set-aside the judgment and order of acquittal rendered by the High Court and restore the judgment of conviction and sentence as recorded by the trial Court against the respondents. The respondents shall be taken in custody forthwith to serve the sentence awarded to them.

Appeal allowed.

I.L.R. [2015] M.P., 1949

SUPREME COURT OF INDIA

Before Mr. Justice Dipak Misra & Mr. Justice Prafulla C. Pant

Civil Appeal No. 1971/2015 decided on 9 July, 2015

STATE OF MADHYA PRADESH & ors. ...Appellants

Vs.

ANAND MOHAN & anr. ...Respondents

Prevention of Corruption Act (49 of 1988), Section 19 - Sanction for Prosecution - Competent Authority - **Vide order dated 08.02.1988, the Chief Minister delegated the power to grant sanction for prosecution of Public Servants to the Law Secretary of M.P. Law Department - Economic Offences Wing sought sanction for prosecution from Department of Housing and Environment which refused to grant sanction - Trial Court directed the prosecution to obtain sanction for prosecution from Secretary Law Department - Sanction granted by Secretary Department of Law and Justice was quashed by High Court - Held - By circular dated 28.02.1998, the Secretary, Department of Law and Justice was conferred power to grant sanction in respect of cases registered by EOW - After the power to grant sanction was delegated to Department of Law and Justice, it cannot be said that the Administrative Department had power to decline sanction - Order of High Court quashing the sanction granted by Secretary, Department of Law and Legislative Affairs set aside - No infirmity as to the competence of Secretary, Department of Law and Legislative Affairs - Appeal allowed.** **(Paras 6 to 13 & 18)**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 19 – अभियोजन हेतु मंजूरी – सक्षम प्राधिकारी – आदेश दिनांक 08.02.1988 द्वारा मुख्यमंत्री ने लोक सेवकों के अभियोजन हेतु मंजूरी प्रदान करने की शक्ति को म.प्र. विधि विभाग के विधि सचिव को प्रत्यायोजित की – आर्थिक अपराध विंग ने गृहनिर्माण एवं पर्यावरण विभाग से अभियोजन हेतु मंजूरी चाही, जिसने मंजूरी प्रदान करने से इंकार किया – विचारण न्यायालय ने अभियोजन को विधि विभाग, सचिव से अभियोजन हेतु मंजूरी अभिप्राप्त करने के लिए निदेशित किया – विधि एवं न्याय विभाग के सचिव द्वारा प्रदान की गयी मंजूरी उच्च न्यायालय द्वारा अभिखंडित – अभिनिर्धारित – परिपत्र दिनांक 28.02.1998 द्वारा ई.ओ.डब्ल्यू. द्वारा पंजीबद्ध प्रकरणों के संबंध में मंजूरी प्रदान करने की शक्ति सचिव, विधि एवं न्याय विभाग को प्रदान की गई थी – मंजूरी प्रदान करने की शक्ति, विधि एवं न्याय विभाग को प्रत्यायोजित किये जाने

के पश्चात् यह नहीं कहा जा सकता कि प्रशासनिक विभाग को मंजूरी नकारने की शक्ति थी – सचिव, विधि एवं विधायी कार्य विभाग द्वारा प्रदान की गई मंजूरी को अभिखंडित करने का उच्च न्यायालय का आदेश अपास्त – सचिव, विधि एवं विधायी कार्य विभाग की सक्षमता के संबंध में कोई निर्बलता नहीं – अपील मंजूर।

Cases referred :

(2004) 2 SCC 297, 2015 (1) SCALE 457, (2014)11 SCC 388.

JUDGMENT

The Judgment of the Court was delivered by : PRAFULLA C. PANT, J. :- This Appeal is directed against judgment and order dated 03.09.2013 passed by the High Court of Madhya Pradesh at Jabalpur whereby said Court has allowed Writ Petition No. 21246 of 2012 challenging the order of sanction for prosecution, passed by Secretary, Law and Legislative Affairs, Government of Madhya Pradesh, Bhopal.

2. Brief facts of the case are that respondent No.1 was an Executive Engineer, and respondent No.2 was an Assistant Engineer with Bhopal Development Authority (for short "BDA"). Said authority got constructed 33/ 11 KV Sub-Station at Raksha Vihar Colony, Bhopal, for which tenders were invited on 25.07.1995, and work order was given in favour of one A.R.K. Electricals, Bhopal. The construction was completed on 25.09.1997, and ownership of the sub-station was transferred to Madhya Pradesh State Electricity Board (for short "MPSEB"). It is alleged that the respondents, in connivance with other accused, entered into a criminal conspiracy in connection with above construction work, and got prepared a forged note-sheet, pursuant to which excess payment of Rs. 9,51,657/- was paid to a contractor (Ashok Johri). On this information, Economic Offences Wing (for short "EOW") of the State Government registered Crime No. 28 of 2004 in respect of offences punishable under Sections 420, 467, 468, 471, 120B and 201 IPC, and under Section 13 (1) (d) read with Section 13 (2) of Prevention of Corruption Act, 1988 (for Short "the Act") against the respondents and other accused. After investigation, the Wing sought previous sanction necessary for prosecution of the respondents from the Administrative Department of the State Government. The Administrative Department of the State Government, after examining the papers declined the sanction vide its order dated 08.03.2011. However, on completion of investigation, when charge sheet was filed against the accused before the Court of Special Judge (Prevention of Corruption Act), Bhopal,

the court, vide its order dated 15.02.2012, directed that necessary sanction for the prosecution of respondents be obtained from appellant No. 2, Secretary, Department of Law and Legislative Affairs, Government of Madhya Pradesh, which is the Competent Authority. Said Authority after examining the papers vide order dated 20.11.2012, (Annexure P-8) granted necessary sanction to prosecute the respondents.

3. The respondents challenged the order dated 20.11.2012, passed by present appellant No.2 before the High Court through Writ Petition No. 21246 of 2012. The High Court allowed the Writ Petition holding that appellant No. 2, i.e. Secretary, Department of Law and Legislative Affairs was not the Competent Authority to grant the sanction.

4. Learned counsel for the appellants argued before us that the High Court has erred in law in holding that the Law Department was not the Competent Authority to grant sanction for the prosecution. In this connection reference was made to the Order/Notification dated 03.02.1988 (Annexure P-1) issued by the State Government regarding amendment in the relevant rules delegating the power relating to sanction of prosecution to the Department of Law and Legislative Affairs passed by the State Government.

5. On the other hand, learned counsel for the respondents contended that the Competent Authority to grant sanction for prosecution against the present respondents was appellant No. 1, Secretary, Housing and Environment of Government of Madhya Pradesh, and said authority had declined to grant the sanction vide its Order dated 08.03.2011. It is further submitted that appellant No. 2 was conferred power to grant the sanction vide circular dated 28.02.1998, as such it was not competent to grant sanction in respect of offence alleged to have been committed by the respondents in the year 1997.

6. We have considered the rival submissions of the parties. Section 19 (1) of the Prevention of Corruption Act requires previous sanction for prosecution of a public servant in respect of offence punishable under Section 13 of the Act, Section 19 of the Act reads as under:

> "19. Previous sanction necessary for prosecution. — (1) No court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction, save as otherwise provided in the Lokpal and Loakayuktas Act, 2013 -

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order

passed in any inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

Explanation.—For the purposes of this section,—

(a) error includes competency of the authority to grant sanction;

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature."

{In sub-section (1) words "save as otherwise provided in the Lokpal and Lokayuktas Act, 2013" are added vide Act (1) of 2014 with effect from 16.01.2014 before clause (a) of the sub section (1) from clause (b) of sub section (1).}

7. From the Section quoted above, it is clear that the sanction for prosecution in respect of the public servant employed in connection with affairs of the State, who is not removable from his office save by or with the sanction of the State Government, such Government shall be, authority to grant sanction for prosecution. It is not disputed that the previous sanction was sought by the EOW for prosecution of the respondents. The only issue is as to which of the department of the State was competent to grant the sanction. Order dated 03.02.1988 (Annexure P-1), published in the Official Gazette, whereby the Madhya Pradesh Works (Allotment) Rules (for Short "MPWAR) were amended, reads as under:

"Madhya Pradesh Gazette
(Extraordinary)
Published by Authority
No. 35, Bhopal Wednesday, 3rd February, 1988
Personnel Administrative Reforms & Training
Department
Bhopal, dated 3rd February, 1988

No. F A-1-1-88-49 (1)-225: In exercise of powers conferred by clauses (2) and (3) of Article 166 of the Constitution of India the Hon'ble Governor of Madhya Pradesh makes more amendments in Madhya Pradesh Works (Allotment) Rules, namely:-

Amendment

In the aforesaid rules: -

(1) The para 4 is replaced with the following para in the policy made in the para 21 in the Schedule-in (A) Department under Law & Legislative Affairs Department, namely:-

4 (One) Criminal Procedure includes all subjects coming under Criminal Procedure Code save the probation of the Criminals, and

(2) Sanction of prosecution under Section 6 of the Prevention of Corruption Act, 1947.

(2) The following term added by the Notification No. 2980-3632-A(1), dated 18th November, 1983 irrespective of any serial number to which it was added, and which has been amended from time to time in respect of the policy made in part (A) Department under the heads of all the departments, be deleted.

Sanction of the prosecution under Section 173 of the Criminal Procedure Code, 1973 and Section 6 of the Prevention of Corruption Act, 1947 in respect of services related to those departments.

By order & in the name of the Governor of MP

A.D. Mohile, Special Secretary"

8. Consequent to above amendment, Chief Minister of Madhya Pradesh vide order dated 08.02.1988 (Annexure P-2) delegated the power to grant sanction for prosecution of the public servants to the Law Secretary of Madhya Pradesh Law Department. Said document is reproduced below:

"Madhya Pradesh Government
Personnel, Administrative Reforms and Training
Department

ORDER

Bhopal, dated 8th February, 1988

According to the para (1) of Directive No.2 of Supplementary Directive Part-5 under Rule-1 of Works Rules of the Madhya Pradesh Government made by the Hon'ble Governor in exercise of powers conferred by Clause (2) and (3) of Article 166 of Constitution of India, No. F A 1-1/88/49/1, pursuant to the authority invested to me and superseding the order dated 4th November of the General Administrative Department, I Motilal Vora, Chief Minister, hereby direct that the Secretary, Madhya Pradesh Government, Law Department shall dispose of the cases related to the prosecution sanction of the Government servants.

Sd/-
Motilal Vora
Chief Minister"

9. By the Order dated 21.04.1997 (Annexure P-3), it is provided that the Department of Law and Legislative Affairs shall obtain opinion of the concern Administrative Department before granting the sanction. It is further provided that in case of conflict between the two departments, the matter shall be referred to Sub-Committee of the Cabinet. However, the order dated 21.04.1997 (Annexure P-3) was withdrawn vide letter dated 10.07.1997 (Annexure P-4) to the extent that in case of conflict the matter would be required to be referred to Sub-Committee of the Cabinet. Letter dated 10.07.1997 (Annexure P-4) is reads as follows:

"State of Madhya Pradesh
General Administrative Department

No.F-15(6)/96/1-10 Bhopal dated 10.07.1997

To

All member Secretary/Secretaries of the

Government
State of Madhya Pradesh
Bhopal

Sub. Sanction for prosecution against the Government Employees/Officers.

Ref.: Circular No. F-15(6)96/1-10 dated 21.04.1997 issued by this Department

Vide reference circular of this department, the procedure for according sanction for prosecution was determined.

As per order following part is deleted from the prescribed procedure in Para 2 of the said circular.

"In case of conflict between the Law Department and the Administrative Department, the case shall be presented before the Sub-Committee of the Cabinet by the Administrative Department."

Remaining procedure of the reference circular shall remain as it is. Please ensure action in the cases of sanction for prosecution in future accordingly.

Sd/-
A.V. Gwaliorkar
Deputy Secretary
State of MP
General Administrative Department

No.F-15(6)/96/1-10 Bhopal dated 10.07.1997

Copy to

Officer on Special duty, Lokayukta Office, Madhya Pradesh Bhopal for information

Sd/-
A.V. Gwaliorkar
Deputy Secretary
State of MP
General Administrative Department"

10. By the Order dated 28.02.1998, the State Government further clarified that in the matters of sanction for prosecution, the papers shall be sent by the Department of Law and Legislative Affairs along the record to the Administrative Department for its opinion and the Administrative Department shall give the same within a period of one month, whereafter Department of Law and Legislative Affairs shall take a decision.

11. It is not disputed that State of Madhya Pradesh Economic Offence Wing registered Crime No. 28 of 2004 in respect of offences under Sections 420, 467, 468, 471 and 120B IPC and under Section 13 (1) (d) read with Section 13 (2) Prevention of Corruption Act, 1988 against the respondents on the allegation that the respondents in connivance with others prepared forged note sheet, and made payment of Rs. 9,51,657/- to a contractor abusing their position. It is also not disputed that when the EOW sought sanction for prosecution from Department of Housing and Environment, it declined the sanction vide order dated 08.03.2011 (Annexure P-6). Question before us is that whether the Department of Law and Legislative Affairs which granted the sanction vide its order dated 20.11.2012 (Annexure P-8) was competent to do so or not.

12. The High Court in the impugned order observed that the (EOW) did not challenge legality and validity of order dated 08.03.2011, and submitted the charge sheet. It further held that since the appellant No. 2 was conferred power to grant the sanction only vide circular dated 28.02.1998, as such it was not competent to grant the sanction relating offences alleged to have been committed in the year 1997.

13. We are unable to accept the view taken by the High Court for the reason that from annexure P-1 and annexure P-2, it is evident that the power to grant the sanction for prosecution, already existed with the Department of Law and Legislative Affairs, since February, 1988. The circular letter dated 28.02.1998 (Annexure P-5) does not confer any new power and it only clarifies that Department of Law and Justice is a competent authority not only in respect of investigations made by Lokayukta Organization, but also the State Economic Offences Investigation Wing. The power with the appellant No.2 to grant the sanction is, in fact, conferred by the rule as amended vide notification dated 03.02.1988 published in the Official Gazette. After such amendment in the rule whereby power to grant sanction was delegated to Department of Law and Justice, it cannot said that Administrative Department

had power to decline sanction as it has done vide its order dated 10.07.1997.

14. In *DDA and others vs. Joginder S. Monga and others*[1] discussing the situation of conflict between statutory rule and executive instruction, this Court has clarified as under:

> "**30.** It is not a case where a conflict has arisen between a statute or a statutory rule on the one hand and an executive instruction, on the other. Only in a case where a conflict arises between a statute and an executive instruction, indisputably, the former will prevail over the latter. The lessor under the deed of lease is to fix the market value. It could do it areawise or plotwise. Once it does it areawise which being final and binding, it cannot resile therefrom at a later stage and take a stand that in a particular case it will fix the market value on the basis of the price disclosed in the agreement of sale."

15. On behalf of the respondents, reliance is placed in the case of *Sanjaysinh Ramrao Chavan Vs. Dattatray Gulabrao Phalke*[2], but on going through said case law we find that in said case investigation agency itself filed closure report as against the appellant Sanjaysinh Ramrao Chavan, and the same was accepted by the Magistrate, as such there was no question of sanction to be obtained from the Department concerned. In the circumstances, we find that the case of *Sanjaysinh Ramrao Chavan* (supra,) is of little help to the present respondents.

16. Recently in *State of Bihar and others v. Rajmangal Ram*[3], this Court has held as under: -

> "9. In the instant cases the High Court had interdicted the criminal proceedings on the ground that the Law Department was not the competent authority to accord sanction for the prosecution of the respondents. Even assuming that the Law Department was not competent, it was still necessary for the High Court to reach the conclusion that a failure of justice has been occasioned. ....."

17. From the sanction granted by the Law Department, copy of which is

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1. (2004) 2 SCC 297
2. 2015 (1) SCALE 457
3. (2014) 11 SCC 388

annexed as Annexure P-8, it is evident that the authority has examined the material on record before granting the sanction.

18. Therefore, we are of the view that the High Court has erred in law in allowing the Writ Petition filed by the respondents seeking quashing of sanction dated 20.11.2012 granted by appellant No.2, Secretary, Department of Law and Legislative Affairs, Government of Madhya Pradesh. We do not find any infirmity as to the competence of appellant No.2 to grant the sanction in the matter for the reasons discussed above. Accordingly, the appeal is allowed. The impugned order dated 03.09.2013, passed by the High Court, is set aside.

Appeal allowed.

I.L.R. [2015] M.P., 1959
SUPREME COURT OF INDIA
Before Mr. Justice V. Gopala Gowda & Mr. Justice R. Banumathi
Civil Appeal No.1801/2015 decided on 21 July, 2015

MADHYA PRADESH HOUSING AND INFRASTRUCTURE DEVELOPMENT BOARD ...Appellant
Vs.
B.S.S. PARIHAR & ors. ...Respondents

(Alongwith Civil Appeal Nos. 1802-1803/2015)

***Griha Nirman Mandal Adhiniyam, M.P. 1972, (3 of 1973), Section 50 and Housing Board Accounts Rules, M.P. 1991, Rules 5.4 & 5.7 - Cost of Land* - In Advertisement it was mentioned that the price of houses are provisional - Subsequent hike in price of Land at the time of allotment - In view of clause contained in advertisement and provisions of Act, 1972 and Rules, 1991, hike in price of land is permissible - However, the same has to be done by applying the doctrine of proportionality and not on the basis of Collector's guidelines - Cost of developed plot in the year 2009 was provisionally fixed at Rs. 16,500/- per sq. meter - Enhancement of the same to Rs. 30,000 per sq. meter bad - Price of developed plot may be revised by adding 10% to provisional cost every year upto the date of demand made upon the said amount - Interest at the rate of 9% per annum may be added on such enhanced revised value amount - Appeal partly allowed. (Paras 21 to 34)**

गृह निर्माण मण्डल अधिनियम, म.प्र. 1972 (1973 का 3), धारा 50 एवं गृह निर्माण मंडल लेखा नियम, म.प्र. 1991, नियम 5.4 व 5.7 – भूमि की कीमत – विज्ञापन में यह उल्लिखित था कि मकानों की कीमतें अनंतिम हैं – तत्पश्चात्, आबंटन के समय भूमि की कीमत में बढ़ोतरी – विज्ञापन में अंतर्विष्ट खंड तथा अधिनियम 1972 एवं नियम 1991 के उपबंधों को दृष्टिगत रखते हुए, भूमि की कीमत में बढ़ोतरी अनुज्ञेय है – किंतु, इसे आनुपातिकता का सिद्धांत लागू करके किया जाना चाहिए और न कि कलेक्टर के दिशानिर्देशों के आधार पर – वर्ष 2009 में विकसित भूखंड की कीमत अनंतिम रूप से रू. 16,500/– प्रति वर्ग मीटर निश्चित की गई थी – उक्त को रू. 30,000/– प्रति वर्ग मीटर बढ़ाया जाना अनुचित – उक्त राशि पर मांग की तिथि तक विकसित भूखंड की कीमत प्रत्येक वर्ष 10% अनंतिम व्यय जोड़कर पुनरीक्षित की जा सकती है – इस प्रकार बढ़ायी गई पुनरीक्षित मूल्य की राशि पर 9% प्रतिवर्ष की दर से ब्याज जोड़ा जा सकता है – अपील अंशतः मंजूर।

Cases referred :

(1994) Supp (3) SCC 494, (2011) 11 SCC 13, (2009) 8 SCC 483, (1991) 4 SCC 139, (2005) 10 SCC 796, (2007) 4 SCC 669, (2004) 2 SCC 130, (2001) 2 SCC 386, (2006) 3 SCC 276.

JUDGMENT

The Judgment of the Court was delivered by : **V. GOPALA GOWDA , J. :-** Civil Appeal No. 1801 of 2015 by special leave has been filed against the impugned judgment and order dated 31.7.2014 passed in Writ Appeal No. 1565 of 2013 by the High Court of Judicature at Madhya Pradesh at Jabalpur, whereas C.A. Nos. 1802-1803 of 2015 by special leave have been filed against the impugned judgment and order dated 31.7.2014 passed in Writ Appeal Nos. 1550 of 2013 and 1563 of 2013 by the same High Court. In both the matters, the dispute relates to the fixation of the price of the under construction 36 Duplex/Triplex HIG Houses, situated in "Riviera Towne", Bhopal, by the appellant-Madhya Pradesh Housing and Infrastructure Development Board (for short "the appellant-Board") and the method adopted by them for fixing the price of the properties in dispute and linking the cost price of the land with the Collector's guidelines on the date of completion of the project in the case of Self Financing Scheme. The High Court dismissed the writ appeals filed by the appellant-Board and quashed the enhanced/final demand for price fixation of land by the appellant-Board.

2. The brief facts of the case are stated hereunder to appreciate the rival legal contentions urged on behalf of the parties.

An advertisement was published on 9.11.2007 in the local daily newspaper 'Dainik Bhaskar' regarding the Housing Scheme which was floated by the appellant-Board for the allotment of 36 residential houses for the employees of the State Government and the State Public Sector Undertaking under the name of "Riviera Towne" in Bhopal with the following terms and conditions:-

1.	Application forms for residential houses in Riviera Towne, Bhopal can be purchased at a cost of Rs 250/- from the Punjab National Bank, R.S.S. Market Panch Bus Stop, Bhopal on all working days between 21.11.2007 and 7.12.2007 and Registration Amount / Banker's Cheque/ Demand Drafts can be deposited in the above bank on all working days till 7.12.2007.
2.	In case the number of applications are more than the number of premises advertised for sale, the registration will be done through a system of lottery which will be held at 4.00 pm on 14.12.2007 in the office of Estate Officer.
3.	Preference in registration will be given to those who pay the total estimated amount in one lump sum.
4.	Apart from the sale price, other charges and maintenance fee shall be payable as per the Board rules.
5.	Once registration is sanctioned under Self Financing Scheme, the applicants have to pay the balance amount in instalments as per the intimation given by the Board.
6.	Costs of the houses shown in this advertisement are totally provisional and the final fixation of the price will be done after completion of the Scheme. Allottees have to pay the difference of tentative cost and final sale price in fixation of final cost on intimation within the time stipulated.
7.	Other taxes and lease rent shall be payable as per rules.
8.	Applications for registration are invited from the officers and employees of various departments of the Madhya Pradesh Government and undertakings Institutions. Reservation of houses will be in accordance with the rules.

9.	Even after publication of two advertisements for registration of the house, if some houses still remain available, then application will be invited from General Category as per rules.
10.	Other terms and conditions apply.

Type of house	No.	Approx. carpet area in sq. mtrs.	Approx. / plot area in sq. mtrs.	Estimated / cost (in lakhs)	Regn. Amount (in lakhs)
Nice Duplex	18	184.57	150 sq. mtrs.	40.00	4
Nice Triplex	14	228.25	150 sq. mtrs.	45.00	4.50
Nice Duplex Corner	4	223.51	223 sq. mtrs..	53.00	5.50

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3. The appellant-Board held the draw of lots for the allotment of the said houses in dispute and the successful applicants were notified by the appellant-Board vide communication letter dated 20.12.2007 about the allotment of the said houses in their favour. The appellant-Board also took the administrative approval on 3.1.2008 for the construction of 36 houses of the disputed properties . The appellant-Board also constituted a Price Fixation Committee in its 199 th meeting for the fixation of the rational price for the said houses. They also issued two Circulars dated 30.9.2008 and 24.10.2008 relating to the fixation of cost of the said properties in dispute.

4. The Price Fixation Committee worked out the prices of the said 36 residential houses as mentioned below:-

Total Flats-18	**Total Flats-14**	**Total Flats-4**
Plot area- 150sq.mts.	Plot area- 150 sq.mts.	Plot area- 223 sq.mts.
Built up area-184.57 sq.mts.	Built up area-228.25 sq.mts.	Built up area-223.51 sq.mts.
Cost Rs.49,53,000/-	Cost- Rs. 55,91,000/-	Cost- Rs. 66,17,000/-

Upon getting the tentative cost of construction of the houses and on

the basis of the revised calculations and price determination of the said properties in dispute and after the receipt of tender, the demand letters were issued on 18.6.2009 to the respondent-allottees requesting them to submit their consent or dissent to the enhanced estimated cost in writing within 15 days from the date of the issuance of the letter.

5. The construction of the houses started from 30.6.2009 and almost 90% of the allottees gave their consent to the revised cost of the properties in dispute as determined by the appellant-Board on the report of the Price Fixation Committee.

6. The appellant-Board, vide letter dated 7.7.2009, sought for consent from the remaining allottees-respondents, who had not given their consent with regard to the revised fixation of prices on the said disputed properties, stating thereby that if they fail to do so , they will not be allotted the houses and the registration amount that they had earlier given towards the allotment of the houses will be refunded to them with interest as per the rules of the Madhya Pradesh Co-operative Societies Act, 1960 (hereinafter called as "the Societies Act") and Madhya Pradesh Co-operative Societies Rules,1962 (hereinafter called as "the Rules").

7. On 7.10.2009, the appellant-Board had informed that all the allotments that were made to the respondents subsequent to the issuance of the circulars dated 30.9.2008 and 24.10.2008, will be final and they will be bound by the said circulars.The draw of lots was conducted on 22.12.2009 for the allocation of house numbers to the eligible applicants. In the meeting held on 2.12.2011, it was decided by the appellant-Board that all the allotments made to the respective applicants will be governed by the notifications/circulars regarding the cost of fixation of the properties in dispute and also according to the appellant-Board.

8. The Price Fixation Committee in its meeting held on 9.12.2011 and in its report dated 15.12.2011, fixed the cost with regard to the houses to be allotted under the said "Riviera Towne" Scheme. In the report, the commencement of the Scheme is to be considered to be from the date of the Work Order and not from the date of the advertisement.Thereafter, taking into consideration the final cost determined by the Price Fixation Committee, the final demand letters were issued to the successful allottees on 24.12.2011.

9. Being aggrieved by the action of the appellant-Board, the respondents

filed Writ Petition No. 15983 of 2012 before the learned single Judge of the High Court of Madhya Pradesh, challenging the decision of the Price Fixation Committee, whereby the appellant-Board has directed the respondents to deposit the price for the said houses allotted to them at a highly enhanced rate which is 300% more than the original price of the said properties in dispute. The grievance of the respondents was that they had applied for the said Scheme and had been allotted houses in the year 2007 at the price prevalent at the relevant period of time, subject to reasonable escalation. But at the time of the delivery of possession of the said properties in dispute the appellant-Board has demanded the price of Rs. 30,000/- instead of Rs. 9,000/- per sq. mtr. which is highly unjustified on its part. The respondents have further contended that the appellant-Board has wrongly taken into consideration the subsequent guidelines and notifications issued by the Collector, notifying the price of the land for registration and the stamp duty which is contrary to the law down by this Court in a catena of cases.

10. The learned single Judge disposed of the said writ petition on 24.9.2012, and directed the appellant-Board to consider the representation of the respondents and the legal opinion obtained by them and decide the matter in accordance with the decisions of this Court in a catena of cases, after giving the respondent-allottees due opportunity of being heard.

11. Though various representations were filed before the appellant-Board by the allottees with regard to the fixation of the cost of the properties in dispute, the Commissioner of the appellant-Board by order dated 8.3.2013, after considering the representations of the respondent-allottees and by referring to the various circulars regarding the cost fixation, rejected the representations of the allottees.

12. The said action of the Commissioner of the appellant-Board led the respondents to file Writ Petition No. 5690 of 2013 and connected writ petitions before the learned single Judge of the High Court. During this period 3 applicants did not make the initial payment of Rs.4 lakhs i.e. 10% of the advertised tentative cost which resulted in the cancellation of their registration to the said properties and their duplex houses were put to auction.

13. The learned single Judge of the High Court disposed of the Writ Petition No.5690 of 2013 along with the other connected writ petitions vide its common order dated 21.11.2013. The learned single Judge allowed the writ petitions

of the respondents and directed the appellant-Board to fix the price of the land as it existed on the date of issuance of the allotment letter and consequently quashed the land price determined by the appellant-Board which was based on the guidelines of the Collector.

14. Being aggrieved by the order dated 21.11.2013, the appellant-Board filed Writ Appeals before the Division Bench of the High Court which were dismissed vide its common order dated 31.7.2014. The Division Bench upheld the findings of the learned singleJudge, thereby quashing the enhanced/final demand raised by the appellant-Board. Hence, these appeals have been filed by the appellant-Board, urging various legal grounds and contentions and prayed to set aside the impugned order passed by the High Court.

15. Mr. Sunil Gupta, the learned senior counsel appearing on behalf of the appellant-Board has relied upon the judgment of this Court in the case of *Delhi Development Authority v. Pushpendra Kumar Jain,*[1] in support of this case, wherein this Court has held that the allottee was bound to make the deposit at the enhanced rate as per the demand raised by the D.D.A. if he wanted to secure the flat. It was further held that an allottee gets as indefeasible right to allotment only on the date of communication of allotment and not on the date of draw of lots which is only a process to identify or select the persons for allotment and not the allotment itself. It was further held that when the cost was enhanced prior to the allotment letter, demand of the enhanced rate was justified. The learned senior counsel has contended that the impugned order of the High Court was not right as the same is contrary to the case of *Delhi Development Authority* (supra), which is squarely applicable to the fact situation of the instant case and the High Court has failed on its part by ignoring the same and passing the order against the appellant-Board.

16. It has been further contended by the learned senior counsel that the High Court has gravely erred in determining the price of the properties in dispute at a rate prevalent during the period 2007-2008 or 2008-2009, as the appellant-Board has sold and executed the sale deeds of the 1718 flats and 302 plots as per the guidelines of the Collector issued from time to time which would become applicable to the allottees as well.

17. The learned senior counsel has further contended that the fixation of the cost of the properties in dispute has been done in accordance with the

1. (1994) Supp (3) SCC 494

Scheme, the rules and the policy of the appellant-Board and the so-called allotment made in favour of the allottees is not an allotment but only a registration granted to them which the High Court has misconstrued as allotment of the said land.

18. On the contrary, the learned senior counsel appearing on behalf of the respondents has sought to justify the impugned judgment and order contending that the judgment of the High Court is perfect and justified. He has contended that on the issue of fixing the price of the land, the High Court has rightly held that the price or cost of the said land should be in accordance with the price or the cost of land which existed on the date of allotment.

19. He has further contended that the High Court has rightly held that the date of allotment is the date on which the offer of the respondents was accepted and the applications were registered and the allotments to the land were made accordingly, which is clear from the bare perusal of the letters indicating the acceptance of registration in allotment.

20. The learned senior counsel has further contended that the main dispute is with regard to the difference of the amount of the cost of the land that is being demanded by the appellant-Board as per the Collector's guidelines prevailing in the year 2011-12 and the actual cost that existed on the date of allotment of the said land. The applicants have already paid the entire cost as per the demand of the appellant-Board and have in fact paid 10% extra towards the cost of the said property and despite the same, the property has not been handed over to them which is a grave miscarriage of justice and the respondents have been suffering for a long time.

21. We have heard both the parties. On the basis of the aforesaid rival legal contentions urged on behalf of the parties and on perusal of the findings recorded by the High Court in its impugned judgment and order, we have to answer the points of dispute on the basis of the evidence produced on record. We record our reasons hereunder:-

The contentions urged on behalf of the respondents that once the appellant-Board has made the allotment of the said plot of land, it is debarred from raising the cost of construction or claiming enhanced prices for the said land, is wholly untenable in law in view of the clauses contained in the advertisement published in the newspaper *Dainik Bhaskar* dated 09.11.2007, which read that the cost of the houses shown in this advertisement are totally

provisional and the final fixation of the price will be done after the completion of the Scheme. Therefore, the allottees will have to pay the difference between the tentative cost and the final sale price of the land which is based on the fixation of the final cost of the land, within the stipulated time.

Therefore, in view of the aforesaid clause, the allotment of the said plot of land in favour of the respondent-allottees is only provisional in nature and the same would be subject to the final fixation of the price of the land that will be done after the completion of the Scheme as the said clause is binding upon the respondent-allottees.

22. Further, the said clause is also traceable to Section 50 of Madhya Pradesh Griha Nirman Mandal Adhiniyam, 1972 (in short 'the Act, 1972'), wherein the appellant-Board is empowered to retain, lease, sell, exchange or otherwise dispose of any land, building or other property vesting with it, situated in the area comprised in any housing Scheme or in any adjoining area. The Madhya Pradesh Housing Board Accounts Rules, 1991, (in short "the Rules, 1991") were framed in this regard, the relevant provisions of which are necessary to be extracted hereunder:

> **"5.4. SALE PRICE**
>
> Sale price of sites and buildings shall be separately determined in accordance with the guidelines issued by the Board. But where yield a sale price for any reason different from cost price determined under Rule 5.3.2 and 5.3.3 (e.g. due to adoption of different rates of overheads for different income groups, charging premium from higher income groups for appreciation in land value, grant of concessions to Board's employees adoption of average expenditure on project instead of year wise expenditure for calculating overheads on interest, adoption of uniform rate of interest of the entire construction period instead of varying rates of interest for separate years), sales may be brought to account in the revenue section of project accounts without prejudice to the operation of Rules 5.3.2 and 5.3.3 (These rules deal with account adjustment in the expenditure section of project account upto the state of recording under the account head "cost of Sales"). Accordingly account adjustment regarding capitalization of overheads,

transfer of assets from Division to Estate Management and incorporation of costs in the account "Cost of Sales" in the ledgers of Estate Management shall be carried out immediately on completion of project and not held up till sale price approved by the Competent Authority.

5.7 LAND

5.7.1 Land acquired shall be brought to account on accrual basis, land made over to the Board free of cost shall be brought to account at nominal price.

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5.7.4 For the purpose of assessing the cost of a project, i.e., debiting "Cost of Sales" as well. For the purpose of valuation of closing stock in Final Accounts, appreciation in land value shall be ignored. The Board may, however, take it into account for the purpose of determination of sale price."

23. The final sale price which is fixed and intimated to the allottees is in accordance with the provisions of the Act 1972, the Rules, 1991 and the clause of the advertisement which is binding on the respondent allottees. Therefore, the High Court has committed an error in law by quashing the demand notice of the appellant-Board for the payment of the final sale price and allowing the writ petitions of the respondent-allottees without considering the terms and conditions of the advertisement and the statutory provisions of the Act and the Rules towards the fixation of the cost of the land. On this ground, the impugned judgments of both the learned single Judge and the Division Bench of the High Court are liable to be quashed and set aside.

24. The learned senior counsel on behalf of the appellant-Board has rightly pointed out the concurrent findings recorded in the impugned judgment of the Division Bench, which has referred to the judgment of the learned Single Judge, wherein he has held that once the allotment of the said plot of land is made, the appellant-Board is denuded of its power to seek enhanced cost of land based on the Collector's guidelines, as erroneous in law. He has also relied on the principles that have been laid down in various cases of this court including the cases of *Tamil Nadu Housing Board v. Service Society & Anr*[2] *and*

2 (2011) 11 SCC 13

Delhi Development Authority (supra). He has rightly pointed out that the said conclusions of both the learned single Judge and the Division Bench of the High Court are erroneous in law and the same is a perverse finding of fact for the reason that they have misconstrued the registration of the applications and the allotments made with respect to the land in dispute which is in accordance with the clause published in the advertisement. Reliance has been placed in the case of *Delhi Development Authority* (supra) which reads thus:

> "8..... No provision of law also could be brought to our notice in support of the proposition that mere draw of lots vests an indefeasible right in the allottee for allotment at the price obtaining on the date of draw of lots. In our opinion, since the right to flat arises only on the communication of the letter of allotment, the price or rates prevailing on the date of such communication is applicable unless otherwise provided in the Scheme. If in case the respondent is not willing to take or accept the allotment at such rate, it is always open to him to decline the allotment. We see no unfairness in the above procedure."

25. The condition stipulated in the advertisement inviting applications from the applicants and the provision provided under Section 50 Rule (5)(iv) of the Act of 1972 and Rules 5.7.1 and 5.7.4 of the Rules, 1991 would make it clear that the law laid down in the *Delhi Development Authority* (supra) case is aptly applicable to the fact situation of the instant case. The same has not been considered by the High Court while passing its impugned order. On this ground also, impugned judgment is liable to be set aside.

26. The learned senior counsel on behalf of the appellant-Board has rightly pointed out that the determination of the sale price of the flats allotted in favour of the respondent-allottees is based on the cost price fixed as per the guidelines provided by the Collector from time to time for the relevant year for the final allotment. He has further pointed out that the total number of allottees who have applied to the advertisement through the procedure of drawing the lottery for the allotment of flats in their favour are 2531. The allottees who have accepted the final cost are 1472. The allottees who have not accepted the final cost and filed a petition against the same are 84. There are 975 applicants who have vacant houses and are awaiting the decision of the courts in other cases but they have neither

accepted nor refused the final cost fixation. Apart from the said factual position, about 700 HIG & MIG and 1500 LIG and EWS housing units would be further affected by the impugned judgment of the High Court. The legal issue that is present for our determination is, whether the demand of the final sale price which has been fixed by the appellant-Board in terms of the conditions stipulated in the advertisement with regard to the land in dispute for the year 2010-11 which has been done on the basis of the "Market Price Guiding Principles, District, Bhopal" by the Collector under Section 47(a) of the Indian Stamp Act, 1899 (Act No. 2 of 1899), read with Section 75 of the Madhya Pradesh Preparation and Revision of Market Value Guidelines Rules, 2000 (hereinafter called as "the Rules, 2000"), framed by the State Government for the determination of the market price of immoveable property and the tier review under Rule 4(b) of Rules, 2000, the proposal of rates of market price for the year 2011-2012, submitted by the sub-District Valuation Committee before the District Valuation Committee is legal and valid?

27. The provisos issued by the Central Valuation Board vide letter No. 713/ Ga.La./2011 Bhopal dated 29.03.2011 for the implementation of the rates of plots of land, buildings and agricultural land in Rule 3(2) of the Rules, 2000 and the after approval of the rate of the market price proposed by District Valuation Committee Guiding Principles (Guidelines) for the year 2011-2012 for reckoning the market price of the immovable property (plots of land, building and agricultural land) situated in the District Bhopal under Rule 4(2)(c) of the Rules, 2000, are forwarded by the Sub-Registrar of the Districts for the purpose of issuing directions under Section 47-A sub-section (1) of the Indian Stamp Act, 1899. The said valuation fixed by the District Valuation Committee under the Chairmanship of the District Collector of Bhopal is not under challenge by either the allottees or any other person. Therefore, the guiding principles for the determination of the final sale price of the plots in favour of the allottees cannot be termed as either erroneous or error in law. Further, the learned senior counsel for the appellant-Board has placed reliance upon the judgment of this Court in the cases of *BSEB v. Suresh Pd. Sinha*[3] and *State of U.P. v. Synthetics & Chemicals Ltd.*[4] in support of the proposition of law upon the principal of binding precedents, wherein this Court has held that any declaration or conclusion arrived at without application mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature and the same cannot been deemed as a precedent.

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3. (2009) 8SCC 483 4. (1991) 4SCC 139

The learned senior counsel on behalf of the appellant-Board has further rightly placed reliance upon the judgment of this Court in the case of *Tamil Nadu Housing Board* (supra) in support of his legal submission wherein, this court has held thus:

> "18. There is no term or provision in the contract that if the Board does not determine the final price within three years from the date of allotment, the Board would lose the right to determine the final price thereafter or that the tentative price would become the final price. If on account of delay in determination of compensation for land acquisition or delay on the part of the contractors in completing the development works or construction, or if there are any encroachments or if there are pending claims of contractors regarding development or construction, the Board would not be able to determine the final cost within three years. But that did not mean that the tentative cost would become the final cost in the absence of such a provision in the letter of allotment or lease-cum-sale agreement.
>
> 20. Clause 17 states that except the fixation of price with reference to the compensation finally awarded by the courts, the Board should fix the price of the LIG house before taking into consideration the development charges, cost of amenities and cost of buildings within three years from the date of allotment. If the final price is so fixed, thereafter what could be increased is only the land cost component on account of any increase in compensation that may be awarded by the courts. If the Board had earlier fixed the final price, the Society's contention might have merited acceptance as the component of price with reference to cost of development and amenities and cost of building would have attained finality on account of such final determination and only increase on account of award of compensation for land could be demanded after such determination of final price. But where the final price has not been determined at all, for whatsoever reason, and the final cost was being determined for the first time, the allottee cannot contend that only the increase on account of the land, and not the increase on account of development cost and construction cost, could be demanded.

Where the final price has not been fixed, the Board could, after ascertainment of various costs, determine the final price even after three years, and the finality in regard to cost of development and amenities and the cost of construction, referred under Clause 17, would not apply.

30. Whenever allotments are made even before the completion of the development of land and construction, necessarily the cost that is shown by the authority or the Board will be tentative. In regard to the land cost, there may be claims for enhancement of compensation before the Reference Court with appeals to the High Court and this Court. Sometimes the entire process may take 10 to 15 years and till that process is concluded the final cost of the land cannot be determined. An allottee cannot therefore say that the authority cannot increase the cost after 12 years.

32. Therefore, an allottee cannot contend that the increase, if any, should be determined within three years and if the increase is not so determined, the tentative cost would itself become the final cost: Such an interpretation of Clause 17 would be illogical and unreasonable. If the Board is able to show that there was sufficient cause for the delay in deciding the final price and that it was beyond its control to determine the final cost earlier (or within three years) it will be entitled to final cost even if the claim is delayed by few years. The allottee cannot refuse to pay it merely on the ground of delay.

37. We find that the allottees/Society do not dispute that the cost of the land increased considerably on account of enhancement of compensation. The Board showed that the total cost of land inclusive of interest up to 31-3-1987 was Rs. 35, 02,727 for 8 acres and 16,422 sq ft. The said figure was broadly accepted by the Society, in its calculation sheet. The Society arrived at the cost of a plot measuring 1040 sq ft as Rs. 3500 (paid as deposits) plus Rs. 8634 which aggregates to Rs. 12,134. But as noticed above, this is proportionate cost worked out for 1040 sq ft out of the total cost of an extent of 33,64,902 sq ft (8 acres and 16,422 sq ft). It is not possible for the allottee to contend that he will pay

only the proportionate actual cost of his plot. If the cost of the plot has to be worked out, the cost relation to proportionate share in the common/service areas (roads, parks, playgrounds, etc.) should be added. That means at least addition of another 40% to the price worked out for the actual extent of the plot. With reference to the cost worked out by the Society, if 40% is added, the increased cost of the plot would be around Rs. 16,987.60. According to the Society the original tentative cost for the plot was Rs. 3000. Therefore the increase in cost would be around Rs. 14,000. What is demanded as additional amount is Rs. 16,770. The difference is hardly Rs. 2770 which may be attributable to the increase in the cost of development/construction. It cannot therefore be said that the amount claimed under the demand notice dated 21-5-1988 is excessive or unreasonable. Neither party has given the full data or facts or accounts. The allotment was made 35 years back. No purpose would be served by remitting the matter for re-examination. In the facts and circumstances, we are satisfied that the demand is not open to challenge".

In view of the aforesaid decisions of this Court, both the learned single Judge and the Division Bench of the High Court have misconstrued the terms and conditions stipulated in the advertisement and have erroneously applied the same to the fact situation of the present case and came to the erroneous conclusion by placing reliance upon the judgment of this Court in the case of *M.P. Housing Board v. Anil Kumar Khiwani*[5], wherein this Court by referring to the observations made by the Division Bench in its judgment at paras 6,7,8,9,10,11,12,16 and 17 held that the Board was not entitled to raise the price of 71 lakhs particularly, when it was guilty of delaying the project. The strong reliance placed upon the aforesaid judgment by both the learned single Judge and the Division Bench of the High Court in holding that the appellant-Board is not empowered to determine the final cost of the properties in dispute is wholly erroneous in law as the said judgment does not deal with the role and the power of appellant-Board to determine the final price of the allotted plot which power is in conformity with the provisions of Section 50 of the Act of 1972 and the relevant rules referred to supra and the terms and conditions of the advertisement. Therefore, the said

5. (2005) 10 SCC 796

judgment does not have the binding precedent for the proposition of law that the appellant-Board does not have the power to re-determine the final price of the allotted properties after the applications of the allottees were registered. In this regard, the learned senior counsel for the appellant-Board has rightly placed reliance upon the judgment of this Court in the case of *State of U.P. v. Synthetics and Chemicals Ltd.* (supra), the relevant paras of which read thus:

> **"41.** Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind". In *Lancaster Motor Company (London) Ltd. V. Bremith Ltd.* the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in *Municipal Corporation of Delhi v. Gurnam Kaur.* The bench held that, 'precedents sub-silentio and without argument are of no moment'. The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not *ratio decidendi*. In *B. Shama Rao v. Union Territory of Pondicherry* it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law.

42. Effort was made to support the conclusion, indirectly, by urging that the State having raised same objections by way of review petition and the same having been rejected it amounted impliedly as providing reason for conclusion. Law declared is not that can culled out but that which is stated as law to be accepted and applied. A conclusion without reference to relevant provision of law is weaker than even casual observation. In the order of Brother Thommen, the extracts from the judgment of the Constitution Bench quoted in extenso demonstrate that the question of validity of levy of sales and purchase tax was neither in issue nor was it raised nor is there any discussion in the judgment except of course the stray argument advanced by learned Attorney General to the following effect:

> "But alcohol not fit for human consumption are not luxuries and as such the State legislatures, according to Attorney General, will have no power to levy tax on such alcohol."

Sales tax or purchase tax under Entry 54 is levied on sale or purchase of goods. It does not contemplate any distinction between luxury and necessity. Luxuries are separately taxable under Entry 62. But that has nothing to do with Entry 54. What prompted this submission is not clear. Neither there was any occasion nor there is any constitutional inhibition or statutory restriction under the legislative entry nor does the taxing statute make any distinction between luxuries and necessities for levying tax. In any case the bench did not examine it nor did it base its conclusions on it. In absence of any discussion or any argument the order was founded on a mistake of fact and, therefore, it could not be held to be law declared. The bench further was not apprised of earlier Constitution Bench decisions in *Hoechst Chemicals v. State of Bihar* and *Ganga Sugar Mill v. State of U.P.* which specifically dealt with the legislative competence of levying sales tax in respect of any industry which had been declared to be of public importance. Therefore, the conclusion of law by the Constitution Bench that no sales or purchase tax could be levied on industrial alcohol with utmost

respect fell in both the exceptions, namely, rule of *sub-silentio* and being in *per incuriam,* to the binding authority of the precedents."

Further reliance has been placed upon the decision of this Court in the case of *Bihar School Examination Board v. Suresh Prasad Sinha,* (supra), the relevant paras of which read thus:

"18. The courts should guard against the danger of mechanical application of an observation without ascertaining the context in which it was made. In *CIT v. Sun Engg. Works (P) Ltd.*

"39. .....It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings."

19. It is also necessary to keep in mind the following principles laid down by the *Govt. of Karnataka v. Gowramma* with reference to precedential value of decisions:

"10. '12. ..... Reliance on the decision without looking into the factual background of the case before it, is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving [a] judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided

and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. (See *State of Orissa v. Sudhansu Sekhar Misra and Union of India v. Dhanwanti Devi.*) A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in an Act of Parliament. In *Quinn v. Leathem the Earl of Halsbury, L.C.* observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since *the generality of the expressions which are found there are not intended to be the exposition of the whole law but governed and qualified by the particular facts of the case* in which such expressions are found and a case is only an authority for what it actually decides.'

11.'15. *Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have*

been stated. Judgments of courts are not be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

* * *

18. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptations to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

* * *

Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

20. In *Sarva Shramik Sanghatana (KV) v. State of Maharashtra* this Court cited the following passage from *Quinn v. Leathem* with approval:

".... Now, before discussing *Allen v. Flood* and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts

proved, or assumed to be proved, *since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but [are] governed and qualified by the particular facts of the case* in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

28. Applying the guideline rates in relation to the valuation of the land in accordance with Circular No. 21 of 2008 dated 24.10.2008, for the determination for the cost of the L.I.G./E.W.S. buildings, the Board has passed the following resolution:-

"Following decision has been taken by the competent authority in connection with the buildings of all the categories of E.W.S. /L.I.G. in all the districts of Madhya Pradesh whose registration has been carried out before 19th of December, 2011 and whose final determination of the value is effected the Circular No. 21/2008 dated 24.10.2008 :-

(i) From the date of coming into force of the Circular of the Board vide No. 21/08 dated 24.10.2008 and in between the period of coming into force of the Circular No. 15/11 dated 19.12.2011 the cost of the land in the final valuation of the buildings of E.W.S. /L.I.G. duly advertised, the value taken in the initial determination of the value, be determined.

(ii) In the final determination of the value of the aforesaid E.W.S. / L.I.G. buildings, following shall be the criteria/ingredients:-

(a) The cost of the land which was determined at the time of registration.

(b) Actual development expenditure incurred on the plot since after the registration.

(c) Total construction cost.

(d) Supervision fees (At the rate prevalent at the time

of the registration).

(e) Penal interest against the remaining instalments as per the rules of the Board (at the rate prevalent from time to time).

(f) Other charges as per the rules of the Board.

The said guidelines have been laid down by the Development Board during the pendency of this proceeding. The submission made by the learned senior counsel on behalf of the allottees is that the said benefit may be extended to these allottees involved in these proceedings. The rates with regard to the cost of flats as on the date of the publication of the advertisement in November, 2007, the cost of the flats fixed in the year June, 2009 and the total final demand for the cost of the flats in December, 2011 are furnished in the table which are extracted herein below for our perusal:-

Type of house	Advt. Cost (In lakhs) In November, 2007	Cost as told in June, 2009 (In lakhs)	Total Final Demand in Dece, 2011 (In lakhs)
Nice Duplex	40.00	49.53	81.73
Nice Triplex	45.00	55.91	88.97
Nice Duplex Corner	53.00	66.17	120.44

29. Dr. Rajeev Dhawan, the learned senior counsel for the respondent-allottees in C.A. Nos. 1802-1803 of 2015, has placed strong reliance upon Article 14 of the Constitution of India and upon the judgment of this Court in the case of *Coimbatore District Central Coop. Bank v. Employees Association*[6], in support of the proposition of law that the appellant-Board while exercising its power to fix the final rates of the allotted plots by invoking the clause contained in the notification issued by it for inviting applications, wherein it has retained its right to determine the final price of the allotted plot, must pass the test of the doctrine of proportionality in determining the final price of the plot. He has placed strong reliance in support of his case upon the following decisions of this Court in the cases of *Coimbatore District Central Coop. Bank (supra), Teri Oat Estates (P) Ltd. v. U.T. Chandigarh*[7], *Om*

6. (2007) 4 SCC 669 7. (2004) 2 SCC 130

Kumar v. Union of India[8] and *State of U.P. v. Sheo Shankar Lal Srivastava*[9] and has contended that the same have to be applied to the fact situation of the present case with regard to the legal principle of doctrine of proportionality. The relevant paras of the above mentioned judgments are stated hereunder:

In *Coimbatore District Central Coop. Bank* (supra), this Court has held thus:

> **"17.** So far as the doctrine of proportionality is concerned, there is no gainsaying that the said doctrine has not only arrived in our legal system but has come to stay. With the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by courts. If an action taken by any authority is contrary to law, improper, irrational or otherwise unreasonable, a court if law can interfere with such action by exercising power of judicial review. One of such modes of exercising power, known to law is the "doctrine of proportionality".
>
> **18.** "Proportionality" is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise- the elaboration of a rule of permissible priorities.
>
> **19.** de Smith states that "proportionality" involves "balancing test" and "necessity test". Whereas the former (balancing test) permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter (necessity test) requires infringement of human rights to the least restrictive alternative. [*Judicial Review of Administrative Action* (1995), pp. 601-05, para 13.085; *see also* Wade and Forsyth: *Administrative*

8. (2001) 2 SCC 386 9. (2006) 3 SCC 276

Law (2005), p.366.]

20. In *Halsbury's Laws of England* (4th Edn.), Reissue, Vol. 1(1), pp. 144-45, para 78, it is stated:

> "The court will quash exercise of discretionary powers in which there is no reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. The principle of proportionality is well established in European courts where European law is enforceable in the domestic courts. The principle of proportionality is still at a stage of development in English law; lack of proportionality is not usually treated as a separate ground for review in English law, but is regarded as one indication of manifest unreasonableness.""

In *Teri Oats Estates (P) Ltd.* (supra), it was held as under:

> "**46.** By proportionality, it is meant that the question whether while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority
>
> > "maintain a proper balance between the adverse effects which the legislation or the administrative order may have in the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve".
>
> **49.** Ever since 1952, the principle of proportionality has been applied vigorously to legislative and administrative action in India. While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India, this court had occasion to consider

whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. In cases where such legislation is made and the restrictions are reasonable; yet, if the statute concerned permitted administrative authorities to exercise power or discretion while imposing restrictions in individual situations, question frequently arises whether a wrong choice is made by the administrator for imposing the restriction or whether the administrator has not properly balanced the fundamental right and the need for the restriction or whether he has imposed the least of the restrictions or the reasonable quantum of restrictions etc. In such cases, the administrative action in our country has to be tested on the principle of proportionality, just as it is done in the case of main legislation. This, in fact, is being done by the courts. Administrative action in India affecting the fundamental freedom has always been tested on the anvil of the proportionality in the last 50 years even though it has not been expressly stated that the principle that is applied is the proportionality principle.

50. In *Om Kumar,* however, this Court evolved the principle of primary and secondary review. The doctrine of primary review was held to be applicable in relation to the statutes or statutory rules or any order which has the force of statute. The secondary review was held to be applicable inter alia in relation to the action in a case where the executive is guilty of acting patently arbitrarily. This Court in *E.P. Royappa v. State of T.N.* noticed and observed that in such a case Article 14 of the Constitution of India would be attracted. In relation to other administrative actions as for example, punishment in a departmental proceeding, the doctrine of proportionality was equated with Wednesbury unreasonableness.

52. In *Edore v. Secy. of State for the Home Deptt.* the appellant was a citizen of Nigeria who had entered the United Kingdom and remained back after her visa had expired. She had two children, born to a British citizen. The children were emotionally dependent on him and he was a stabling influence

on their lives. If the appellant and her children were returned to Nigeria, their relationship with their father would end. The Court trying to resolve the conflict at hand opined:

> Where the essential facts were not in doubt or dispute, the adjudicator's task was to determine whether the decision under appeal was properly one within the decision-maker's discretion, namely, that it was a decision which could be reasonably be regarded as striking a fair balance between the competing interests in play. If it were, then the adjudicator could not characterize it as a decision "not in accordance with the law" and so, even if he personally would have preferred the balance to have been struck differently, he could not substitute his preference for the decision in fact taken. However, there would be occasions where it could properly be said that the decision reached was outside the range of permissible responses open to him, in that the balance struck was simply wrong."

In *Om Kumar v. Union of India* (supra), this Court has held thus:

> **"28.** By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve". The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality.
>
> **67.** But where an administrative action is challenged as

"arbitrary" under Article 14 on the basis of *Royappa* (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is "rational" or "reasonable" and the test then is the Wednesbury test. The courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. In *G.B Mahajan v. Jalgaon Municipal Council,* Venkatchaliah, J. (as he then was) pointed out that "reasonableness" of the administrator under Article 14 in the context of administrative law has to be judged from the stand point of Wednesbury rules. In *Tata Cellular V. Union of India* (SCC at pp. 679-80), *Indian Express Newspapers Bombay (P) Ltd. v. Union of India* (SCC at p. 691), *Supreme Court Employees' Welfare Assn. v. Union of India* (SCC at p. 241) and *U.P. Financial Corpn.v. Gem Cap (India) (P) Ltd.* (SCC at p. 307) while judging whether the administrative action is "arbitrary" under Article 14 (i.e. otherwise then being discriminatory), this Court has confined itself to a *Wednesbury* review always.

68. Thus, when administrative action is attacked as discriminatory under Article 14, the principle of primary review is for the courts by applying proportionality. However, where administrative action is questioned as "arbitrary" under Article 14, the principle of secondary review based on *Wednesbury* principles applies.

71. Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary cases is questioned as "arbitrary" under Article 14, the court is confined to *Wednesbury* principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing court because

no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. The court while reviewing punishment and if it is satisfied that *Wednesbury* principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the courts, and such extreme or rare cases can the court substitute its own view as to the quantum of punishment."

In the case of *State of U.P. v. Sheo Shankar Lal Srivastava* (supra), this Court has held thus:

"**23.** In *V. Ramana v. A.P. SRTC* this Court upon referring to a large number of decisions held: (SCC p. 348, para 11)

"11. The common thread running through in all these decisions is that the court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in *Wednesbury* case the court would not go into the correctness of the choice made by the administrator open to him and the court should not substitute its decision for that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision."

24. While saying so, we are not oblivious of the fact that the doctrine of unreasonableness is giving way to the doctrine of proportionality.

25. It is interesting to note that the Wednesbury principles may not now be held to be applicable in view of the development in constitutional law in this behalf. See, for example, *Huang v. Secy. of State for the Home Deptt.* wherein referring to *R. V. Secy. of State of the Home Deptt., ex p Daly* it was held that in certain cases, the adjudicator may require to conduct a judicial exercise which is not merely

> more intrusive than *Wednesbury,* but involves a full-blown merit judgment, which is yet more than *ex p. Daly* requires on a judicial review where the court has to decide a proportionality issue."

30. The respondent-allottees have concurred with the fact that the appellant-Board has the right to re-determine the final cost price of the plots allotted on the basis of the escalation of rates with regard to both the land as well as the building materials used for the construction of buildings of the allotted plots in favour of the respondent-allottees. However, while exercising that power their decision in determining the final price of the property must pass the test of reasonableness and fairness which are the cardinal principles of law as enunciated by this Court in the catena of cases referred to the *supra* upon which the learned senior counsel for the respondents has placed strong reliance in support of his contention that the determination of the final price of the allotted plot which has been done on the basis of the Collector's guidelines, for the financial year 2011-12, was fixed at Rs. 30,000/- per sq. mtr. as per the Circular No. 1842, dated 30.9.2008 which is arbitrary, unreasonable and unfair.

31. We have in the earlier paragraphs held that the appellant-Board is entitled to fix the final cost of the land and the same is legal and valid. We however, agree with the learned senior counsel for the respondent-allottees that the same has been done arbitrarily, unreasonably, unfairly and without applying the principle of the doctrine of proportionality. The determination for the final price of the plots allotted to the allottees must be on the basis of the appellant-Board Rules read with the relevant aspects namely, the Collector's Guidelines, the Act, 1972 and the Rules, 1991, for the purpose of determination of the market value of the land. A statutory duty is cast upon the appellant-Board which is governed by the provisions of the Act and Rules and the appellant-Board being the statutory Board is amenable to Article 14 of the Constitution of India. The determination of the final cost of the land in dispute must be in consonance with the doctrine of proportionality but not on the basis of the market price, i.e. fixed by the Committee for the determination of guidance value of the immovable property in the District which would be arbitrary, unreasonable and unfair.

32. As could be seen from the letter dated 18.6.2009, by the officers of the appellant-Board addressed to Mr. B.S.S. Parihar and Mrs. Raina Singh

that as per the advertisement published by the appellant-Board, the estimated cost of the House of HIG was Rs. 40 lakhs and in view of the approved minimum bid rates, the costs of the aforesaid type of houses were likely to increase by Rs. 9.53 lakhs and therefore, the consent or dissent of the allottees for the enhanced estimated cost for the land was sought for, as the same was necessary before the allotment of land. The said value is for the final determination of the revised estimated cost of house which is taken into consideration by applying the Collector's guidelines, the same will be arbitrary and unreasonable. Therefore, the doctrine of proportionality must come into play for the determination of the final price of the allotted plot, keeping in view the relevant factors namely, the escalation of the cost of the building materials and the cost of land which are re-determined as the land is acquired by the State Government in favour of the appellant-Board and the State Government will have to pay the enhanced compensation of the land to the land owners. The relevant factor to be borne in mind for the purpose of re-determination of the cost of the land is that the relevant period from the date of advertisement in the year 2007 to 2010 should be taken into consideration.

33. The demand made by the appellant-Board from the allottees after the cost of the land was determined at Rs. 30,000/- per sq. mtr. is near about to double the cost of the developed plots for the Duplex and Triplex houses which were earlier fixed at Rs. 16,500/- as per the Rules of the Board. There is no justification on the part of the appellant-Board to fix the price of the land at Rs. 30,000/- per sq. mtr. and placing the said demand on the constructed HIG houses, from the respondent-allottees would be most unreasonable and unfair. Therefore, this Court has tried to maintain the balance between the figure Rs. 16,500/- per sq. mtr. fixed in relation to the cost of the developed plot by the appellant-Board, as per the Board Rules and Rs. 30,000/- per sq. mtr. fixed on the basis of the Collector's guidelines for the financial year 2011-12. It would be just and proper to take into consideration the cost of the developed plots at Rs. 16,500/- per sq. mtr. and take the escalation at the rate of 10% for every year from 2007 to 2011 and ask the respondent-allottees to pay simple interest on the said sum which would do complete justice to both the parties. The same would be in conformity with the doctrine of proportionality and it will pass the test of reasonableness and fairness.

34. For the aforesaid reasons, we partly accept the submissions made on behalf of the appellant-Board as well as the submission made on behalf of the respondent-allottees, particularly, the submission made by Dr. Rajeev Dhawan

on the principle of doctrine of proportionality, and applying the constitutional principles of reasonableness and fairness in fixing the cost of the developed plots allotted in favour of the respondent-allottees. Therefore, to that extent his submission is well founded and the same must be accepted as it is in conformity with the law enunciated by this Court in the catena of cases upon which he has rightly placed reliance. Therefore, to that extent, we have to modify the impugned judgment of the Division Bench of the High Court. We accordingly pass the following order:-

I. The appeals are partly allowed and the impugned judgment and order of the Division Bench of the High Court is set aside.

II. We modify the demand notice served upon the respondent-allottees and fix the cost of the developed plots for the year 2009 at Rs. 16,500/-. The same may be revised by adding 10% to the provisional cost every year upto the date of the demand made upon the said amount which is payable by the respondent-allottees. The interest at the rate of 9% per annum may be added on such enhanced revised value amount from the date of demand till the date of payment in modification of the demands to the aforesaid extent from the respondent-allottees.

III. The orders dated 24.11.2014 granting stay in C.A. No. 1801 of 2015 and the order dated 16.1.2015 granting stay in C.A. Nos. 1802-1803 of 2015 shall stand vacated. The applications for direction in C.A. Nos. 1802-1803 of 2015 are disposed of.

Appeal partly allowed.

I.L.R. [2015] M.P., 1989

WRIT APPEAL

Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice Alok Aradhe

W.A. No. 354/2012 (Jabalpur) decided on 26 March, 2015

HINDUSTAN PETROLEUM CORPORATION LTD. & ors. ...Appellants
Vs.
M/S ROYAL HIGHWAY SERVICES ...Respondent

A. ***Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005,***

Clause 8(6),10 & Marketing Discipline Guidelines, 2005, Clause 2.5 - Overriding Effect - Retesting of Sample **- There is no provision in Order 2005 for retesting - Guidelines 2005 contains provision for re-testing - Marketing Discipline Guidelines have not been framed by State Government but by Public Sector Oil Companies and therefore, the provisions of Order do not have any overriding effect in respect of Marketing Discipline Guidelines, 2005. (Para 11)**

क. मोटर स्पिरिट और हाई स्पीड डीजल (आपूर्ति, वितरण का विनियमन एवं अनाचार निवारण) आदेश, 2005, खण्ड 8(6),10 एवं मॉर्केटिंग डिसिप्लिन गाइड्लाइन्स, 2005, खंड 2.5 – अध्यारोही प्रभाव – नमूने का पुनःपरीक्षण – आदेश 2005 में पुनःपरीक्षण का कोई उपबंध नहीं – 2005 के दिशानिर्देशों में पुनःपरीक्षण अंतर्विष्ट है – मॉर्केटिंग डिसिप्लिन गाइड्लाइन्स को राज्य सरकार द्वारा विरचित नहीं किया गया है बल्कि सार्वजनिक क्षेत्र की तेल कंपनियों द्वारा और इसलिये, आदेश के उपबंधों का मॉर्केटिंग डिसिप्लिन गाइड्लाइन्स, 2005 के संबंध में कोई अध्यारोही प्रभाव नहीं है।

B. Marketing Discipline Guidelines, 2005, Clause 2.5 - Overriding Effect - Retesting of Sample **- Sample collected from the retail outlet was found OFF SPEC- Retesting was done at the request of petitioner (respondent) and in his presence who knew that the re-testing is being done under Guidelines, 2005 which too was found OFF SPEC - No objection was raised by petitioner (respondent) at that time regarding delay - Petitioner (respondent) cannot be allowed to approbate and reprobate - Petitioner (respondent) had waived his right to raise objection with regard to delay in drawing sample and is estopped by his conduct from challenging the procedure adopted by the appellants - Appeal allowed - Order of Single Judge set aside. (Paras 12, 13, & 19)**

ख. मॉर्केटिंग डिसिप्लिन गाइड्लाइन्स, 2005, खंड 2.5 – अध्यारोही प्रभाव – नमूने का पुनःपरीक्षण – खुदरा बिक्री केन्द्र से एकत्रित किया गया नमूना, ऑफ स्पेक (OFF SPEC) पाया गया था – याची/(प्रत्यर्थी) के अनुरोध पर और उसकी उपस्थिति में पुनः परीक्षण किया गया, जिसे पता था कि पुनःपरीक्षण को दिशानिर्देश, 2005 के अंतर्गत किया जा रहा है, इसे भी ऑफ स्पेक (OFF SPEC) पाया गया – विलंब के संबंध में उस समय याची (प्रत्यर्थी) द्वारा कोई आक्षेप नहीं उठाया गया – याची (प्रत्यर्थी) को अनुमोदन और निरनुमोदन की अनुमति नहीं दी जा सकती – याची (प्रत्यर्थी) ने नमूना निकालने में विलंब के संबंध में आक्षेप उठाने के अपने अधिकार का त्यजन किया है और उसके आचरण द्वारा उसे अपीलार्थीगण द्वारा अपनायी गई प्रक्रिया को चुनौती देने पर रोक है – अपील मंजूर – एकल न्यायाधिपति का आदेश अपास्त।

Cases referred :

(2003) 2 SCC 107, (2012) 2 SCC 1, (2013) 12 SCC 278, (2010) 3 SCC 321, 2011(4) MPLJ 2010, (2004) 11 SCC 569, (2010) 2 SCC 44, (2014) 2 SCC 465.

Anoop Nair, for the appellants.
Alok Vagrecha, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by :
ALOK ARADHE , J. :- In this intra-court appeal the appellants have assailed the validity of the order dated 07.02.2012 passed by learned Single Judge in Writ Petition No.10226/2008. In order to appreciate the appellants' challenge to the impugned order, few relevant facts need mention, which are stated infra.

2. On 6.2.2007, the retail outlet operated by the respondent was inspected by the Sales Officer. During inspection, the sample was taken from the outlet of the respondent and the same was sent to the testing laboratory at Pune which was received by the said laboratory on 2.3.2007. The sample was tested on 14.3.2007 by the approved laboratory and as per the Laboratory Report the sample of motor spirit was found being OFF-SPEC as per IS 2796:2000. Accordingly, vide notice dated 27.3.2007, an explanation was sought from the respondent. The respondent vide communication dated 4.4.2007 requested the appellants to take a considerate view and also requested for retesting of sample. The request made by the respondent was considered sympathetically and under clause 2.5(D) of the Marketing Discipline Guidelines, 2005 (hereinafter referred to as the "Guidelines") an approval was granted by the General Manager, West Zone for retesting of the sample. In view of request made by the respondent, the sample was sent for re-testing on 04.4.2007 and was re-tested on 06.6.2007 in presence of the respondent and it was found that sample did not meet the specification as per IS-2796:2000, as it failed RON test. Thereafter a show-cause notice dated 5.11.2007 was issued to the respondent by which an explanation was sought from the respondent. The respondent submitted his explanation on 20.11.2007. The appellants after consideration of the explanation offered by respondent decided to terminate the dealership agreement of respondent dated 29.2.2000 and by an order dated 1.8.2008, the same was terminated.

3. Being aggrieved, the respondent filed the writ petition,. namely, Writ Petition No.10226/2008 which was decided vide order dated 7.2.2012. Learned single Judge inter alia held that once the Marker test was conducted, there was no need to hold any further tests. It was further held that in case any laboratory test was required to be conducted, then the notice ought to have been given to the respondent. It was also held that there was an inordinate delay in conducting the second test and in any case even if the sample had failed the test, penalty of termination of dealership as per guidelines is harsh and excessive. Accordingly, the order dated 1.8.2008 terminating the dealership of the respondent was quashed and the appellants were directed to issue show-cause notice to the respondent and pass a fresh order after affording an opportunity of hearing to the respondent.

4. Learned counsel for the appellants submitted that the Marker test is conducted only to detect kerosene in the petroleum products. It is further submitted that in the absence of any express prohibition, there is no basis for recording the finding by the learned Single Judge that once Marker test fails, any other test cannot be held. It was further pointed out that respondent was present at the time when the sample was drawn and there is neither any averment made in the writ petition nor any argument was raised before the learned Single Judge that notice was required to be given for remaining present at the time of testing of the sample. While inviting the attention to Clause 2.5(L) of the Guidelines, it was urged that purpose of mentioning the time frame prescribed for various activities i.e. sending sample to Laboratory, preferably within ten days etc., is to streamline the system and is no way related to quality/result of the product. It was also pointed out that the test has been conducted under the Marketing Discipline Guidelines. It was further submitted that under the revised Marketing Discipline Guidelines, in case of an adulteration of the petroleum product, the penalty of termination of dealership is provided, therefore, the finding recorded by the learned Single Judge that the penalty of termination of dealership, as per guidelines is harsh and excessive, cannot be sustained.

5. On the other hand, learned counsel for the respondent has invited the attention of this Court to Clause 8(4) of the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005, and has submitted that under the aforesaid Clause, the authorised officer has to forward the sample of the product taken within ten days to the Laboratory for analysing with a view to check whether the density and other parameters of the product conform to the requirement of Bureau of Indian Standard Specification

No. IS-2796 and IS-1460 for Motor Spirit and High Speed Diesel, respectively. It was further urged that in the instant case, the time frame prescribed in Clause 8(4) of the Order, 2005, which is mandatory in nature, has not been followed, therefore, the entire action taken by the appellants against the respondent is vitiated in law. It is pointed out that Section 15(3) of the Act provides that the Standard Test Apparatus shall, on payment of the prescribed fee, be open to inspection at all reasonable times by any person wishing to inspect it, and the right to inspect the apparatus includes the right to witness the test in the Laboratory. It is further submitted that no notice was given to the respondent with regard to the test which was conducted in the Laboratory.

6. While referring to the second test report, it was pointed out that sample was not tested with regard to density and in the first sample, the variation in density was within the prescribed limits and from the test reports, it is not clear as to which sample has been tested by the respondent. It was pointed out that the Marker test applies for other petroleum products as well. It is also urged that as per the procedure prescribed for Marker test in case sample passes the Marker test, the second sample has to be returned to the dealer and the same could not have been sent unilaterally by the appellants herein for further tests. Lastly, it was argued that the sample collected at the supply location and transport trolley sample was not retested. However, it was fairly conceded by learned counsel for the respondent that under the revised marketing guidelines, the penalty of termination of dealership is prescribed, in case the sample is found to be adulterated. In support of his submissions, learned, counsel for the respondent has placed reliance on decisions of Supreme Court in *Harbanslal Sahnia and another Vs. Indian Oil Corporation Ltd., and others*, (2003) 2 SCC 107, *Allied Motors Limited Vs. Bharat Petroleum Corporation Limited,* (2012) 2 SCC 1, *Bharat Petroleum Corporation Limited Vs. Jagannath and company and others,* (2013) 12 SCC 278, *Hindustan Petroleum Corporation Limited and others Vs. Super Highway Services and another,* (2010) 3 SCC 321 and *Swantika, Bhopal Vs. Indian Oil Corporation Ltd., Mumbai,* 2011(4) MPLJ 2010.

7. We have considered the respective submissions made by learned counsel for the parties. In order to check adulteration of petroleum/diesel by unscrupulous elements the Central Government has taken various steps to curb the menace of adulteration. In exercise of powers under section 3 of the Essential Commodities Act, 1955 the Central Government has framed Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order,

2005 [hereinafter referred to as the **"2005 Order"**]. Under the aforesaid 2005 Order any Gazetted Officer of the Central Government or a State Government or Police Officer not below the rank of Deputy Superintendent of Police duly authorized, by general or special order of the Central Government or a State Government, as the case may be, or any officer of the oil company not below the rank of Sales Officer has been given the powers to make search and seizure. Clause 8 of 2005 Order deals with Sampling of Product. Clause 8(4) of 2005 Order provides that an authorized officer shall forward the sample of the product taken within ten days to any of the laboratories mentioned in Schedule III or to any other such laboratory when it may be notified by the Government in the Official Gazette for this purpose, for analyzing with a view to checking whether the density and other parameters of the produce conform to the requirements of Bureau of Indian Standard specifications number IS 2796 and IS 1460 for motor spirit and high speed diesel respectively.

8. Clause 8(6) of 2005 Order provides that authorized officer shall communicate the test result to the dealer or transporter or concerned person and the oil company, as the case may be, within five days of receipt of test results from the laboratory. Clause 10 of 2005 Order which deals with overriding effect of the Order reads as under:

> **"10. Overriding effect-**
> *The provisions of this Order shall have overriding effect notwithstanding anything to the contrary contained in any order made by a State Government or by an officer of such State Government before the commencement of this order except as respects anything done or omitted to be done there under before such commencement.*

From careful scrutiny of the provisions of 2005 Order, it is evident that there is no provision for re-testing of sample in 2005 Order.

9. The Public Sector Oil Marketing Companies have framed Marketing Discipline Guidelines, 2005 to ensure dispensation of correct quality and quantity of products sold through their network and to prevent malpractice in the sale of petroleum products. Chapter-2 provides for guidelines for sample collection and testing. Clause 2.5 deals with general points to be observed in all cases. The relevant extracts thereof read as under:

> ***"2.5 General points to be observed in all cases.-***

(A) All samples should preferably be suitably coded before sending to lab for testing within 10 days of drawal.

(D) In case of sample failure, in the event of request for testing by the dealer the same to be considered on merits by the State Officer/Regional/Zonal General Manager of the concerned Oil Company. If approved by GM, the sample of retail outlet retained by the dealer along with the counter sample retained with the Field Officer/ Oil Company are to be tested as per the guidelines, preferably in presence, of the Field Officer, RO dealer /representative & representative of QC Dept. of the Oil Co. after due verification of the samples. All the 3 samples should be tested only in the same lab, and if possible by the same person to ensure repeatability and reproducibility. The expenditure incurred for such testing should be recovered from the dealer. The decision of the GM which would be based on the test result of all the 3 samples would be decisive and binding on all.

(I) The purpose of mentioning time frame for various activities e.g. sending samples to lab preferably within 10 days etc. is to streamline the system and is no way related to quality/result of the product."

Note (xi) Appended to Chapter-6 reads as under:

"xi) Under existing laws, Control Orders etc. various authorities of Central Government/ State Government- in addition to Oil Company Officer-are empowered to carry out checks of the dealership for determining and securing compliance with such laws/ Control Order. If any "malpractice or irregularity" is established by such authorities after checking, the same would also be taken as a "malpractice or irregularity" under these guidelines and prescribed punitive action would be taken by the Oil Company, on receipt of advice from such authority.

Thus, it is evident that power to inspect retail outlet and to draw samples can be exercised under the Control Order framed under section 3 of the Essential Commodities Act, 1955 as well as under the Guidelines by the

Authorised Officer of the Oil Company. Appendix-1 annexed to the Guidelines provides that in case the sample is found to be adulterated, the penalty prescribed under the guidelines is termination of dealership..

10. Separate guidelines have been prescribed for conducting the marker test at the retail outlet. Clause 6 under the aforesaid guidelines stipulate that marker test has to be conducted after sending notice to the dealer and the transporter so that they can remain present at the time of marker test. From careful scrutiny of Marketing Discipline Guidelines, 2005 it is evident that there is no prohibition in the guidelines that once the sample passes the marker test, it cannot be subjected to any other test.

11. It is also relevant to notice that there is no provision in 2005 Order framed under section 3 of Essential Commodities Act, 1955 for retesting of a sample, whereas the provision of retesting exists under clause 2.5((D) of Marketing Discipline Guidelines, 2005. The 2005 Order as well as Marketing Discipline Guidelines, 2005 framed by Public Sector Oil Companies co-exist and clause 10 of 2005 Order does not have any overriding effect on the Marketing Discipline Guidelines, 2005 framed by the Public Sector Oil Companies as clause 10 of 2005 Order has overriding effect only in cases of contrary provision contained in the Order made by the State Government. Admittedly, the Marketing Discipline Guidelines have not been framed by the State Government but by the Public Sector Oil Companies and, therefore, the provisions of Order do not have any overriding effect in respect of Marketing Discipline Guidelines, 2005.

12. Admittedly, in the instant case, the retail outlet of the respondent was inspected by the Sales Officer of the appellants on 06.2.2007 and samples of motor spirit and high speed diesel were drawn and were sent to the laboratory for testing in consonance with the provisions of 2005 Order. The samples were collected from the outlet in the presence of respondent. The sample of motor spirit failed to meet the specifications which is evident from test report dated 14.3.2007 in which it is stated that Motor spirit sample is of OFF SPEC as per IS 2796:2000 specifications. A show-cause notice dated 27.3.2007 was issued to the respondent. Admittedly, the respondent furnished an explanation on 04.4.2007 and requested for re-testing of the samples on the following grounds:

(a) All samples passed in density test performed by the inspecting authority at the time of inspection and were within the permissible limits.

(b) There is marked variation in density of MS sample done by inspecting

authority and stationary lab.

(c) Marker Test of the samples was negative.

The request was made by the respondent for re-testing of the samples under Clause 2.5(D) of the Marketing Discipline Guidelines, 2005 as the Control Order does not contain any provision for retesting of the sample. On the basis of request made by the respondent, the same was sent for re-testing and the samples were re-tested on 06.6.2007. It is pertinent to mention here that at the time of re-testing of the sample the respondent was present and did not raise any objection which is evident from Annexure-P-8 annexed with the writ petition by respondent himself. The test report dated 06.6.2007 shows that sample failed RON test.

13. From the above narration of facts it is evident that action for retesting of the sample was taken under Clause 2.5(D) of Marketing Discipline Guidelines, 2005, in view of request made by the respondent. Thus, the respondent, who was present at the time of re-testing of sample and who did not raise any objection at the time of re-testing of the sample, was fully aware that re-testing of the sample is being done under the provision of Marketing Discipline Guidelines, 2005. The respondent cannot be allowed to approbate and reprobate. The respondent has, therefore, waived his right to raise an objection with regard to delay in drawing sample and is estopped by his conduct from challenging the procedure adopted by the appellants for re-testing the sample which was done at the request of the respondent who was present at the time when re-testing was done. [See: *Volats Ltd. vs. State of A.P.,* (2004) 11 SCC 569, *Allahabad Bank and another vs. All India Allahabad Bank Retired Employees Association,* (2010) 2 SCC 44 and *Shivshankar Gurgar vs. Dilip,* (2014) 2 SCC 465]. For the aforementioned reasons, we find force in the submission made by learned counsel for the appellant and are inclined to accept the same. Therefore, the contention of the respondent that since time limit prescribed under clause 8(4) of 2005 Order was not followed and, therefore, the entire action taken by the respondent is vitiated does not deserve acceptance.

14. So far as the contention of the respondent that he had a right to witness the test also does not arise in the facts as the respondent was present at the time of re-testing of sample. Similarly, the contention that second test report shows that sample was not tested with regard to density and variation as density in first sample was within permissible limits, is required to be stated to

be rejected as the dealership of the respondent has been terminated on the ground that sample has failed RON test and not with regard to variation in density in the sample. Learned counsel for the respondent was unable to point out any provision from the record that once the sample has passed the marker test, no other test can be conducted. Therefore, we are inclined to accept the submission made in this regard on behalf of the appellants and to reject the contention made by the respondent.

15. The contention of the respondent that as per procedure prescribed for marker test, if the sample passes the test, the same has to be returned to the dealer and the same cannot be sent unilaterally by the appellants for further test, is concerned, the same does not require any consideration as re-testing was done at the request of the respondent and he was present at the time of re-testing. The contention that Tank Trolley Sample and Depot Sample were not re-tested is concerned, in our considered opinion, the same was not required to be re-tested as the aforesaid samples had already passed earlier test.

16. The decision relied upon by the respondent in the case of *Harbanslal Sahnia* (supra) has no application to the facts of the case as the Supreme Court was dealing with a case where sample were drawn in violation of Order issued by the State Government. Therefore, it was held that delay in carrying out lab test in violation of provisions of the Order is irrelevant and non-existent fact for termination of dealership. In the instant case, re-testing has been done on the basis of request made by the respondent and in his presence under the provision of Marketing Discipline Guidelines, 2005. On the same analogy, the decision referred to by the respondent in the case of *Allied Motors Limited* (supra) has no application as in the aforesaid case samples were also drawn in violation of provisions of Motor Spirit and High Speed Diesel (Regulation of Supply and Distribution and Prevention of Malpractices) Order, 1998.

17. So far as the decision relied upon by the respondent in the case of *Bharat Petroleum Corporation Limited* (supra), the same has also no application to the facts of the case, as in that case the samples were drawn and the test was conducted in violation of provisions contained in Marketing Discipline Guidelines. In the instant case, as stated supra, re-testing of the sample was conducted on the basis of request made by the respondent and in his presence. It is relevant to mention here that respondent did not raise any objection whatsoever on any ground at the time of re-testing of the sample. Therefore, aforesaid decision is of no assistance to the respondent in the facts

of the case. The case relied upon by the respondent, namely, *Hindustan Petroleum Corporation Limited* (supra) has no application to the obtaining factual matrix of the case, as in that case action of termination of dealership was taken without giving proper notice to the dealer which is not the case here. The decision in the case of *Swantika, Bhopal* (supra) also is of no assistance to the respondent in the facts of the case, as the same was a case of short delivery of petroleum product.

18. The respondent in the instant case has not been able to demonstrate that samples were drawn or have been tested and re-tested in violation of the provision of Marketing Discipline Guidelines, 2005 by the appellants. Similarly, the respondent has failed to point out any provision that once the marker test is conducted, there is no need to hold any further tests. It is not open to the respondent to raise plea of inordinate delay in conducting the second test as the same was conducted in pursuance to the request made by respondent himself and the respondent was present at the time, when re-testing of the sample was done and has failed to raise any objection to the process of retesting. It is common ground that penalty of termination of dealership is provided under Marketing Discipline Guidelines, 2005 in case the petroleum product is found to be adulterated.

19. In view of preceding analysis, we set aside the order passed by learned Single Judge. In the result, the appeal succeeds and is hereby allowed. As a result, the writ petition filed by the respondent stands dismissed with no order as to costs.

Order accordingly.

I.L.R. [2015] M.P., 1999
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No. 17867/2013 (Jabalpur) decided on 18 October, 2013

RAM KHELAWAN GUPTA ....Petitioner
Vs.
BOARD OF REVENUE ...Respondent

A. ***Limitation Act (36 of 1963), Section 5 - Sufficient cause - Duty of Court*** **- It is true that 'Sufficient cause' should be considered by adopting liberal approach but the court is also bound to take care that on wrong facts no person should be benefited under the garb of lenient approach - In the**

present case delay of more than 6 years caused in filing Revision before Board of Revenue was declined to be condoned. (Para 8 & 10)

क. परिसीमा अधिनियम (1963 का 36), धारा 5 – पर्याप्त कारण – न्यायालय का कर्त्तव्य – यह सत्य है कि उदार दृष्टिकोण अपनाकर 'पर्याप्त कारण' को विचार में लिया जाना चाहिए परंतु न्यायालय यह सावधानी रखने के लिये भी बाध्य है कि गलत तथ्यों पर कोई व्यक्ति उदार दृष्टिकोण की आड़ में लाभान्वित नहीं होना चाहिए – वर्तमान प्रकरण में राजस्व मंडल के समक्ष पुनरीक्षण प्रस्तुत करने में कारित किया गया 6 वर्षों से अधिक का विलंब माफ करने से इंकार किया गया।

***B. Limitation Act (36 of 1963), Section 5 - Condonation of Delay* - Effect of not assailing impugned order within the period prescribed by law - It is settled proposition of law that after passing the order by any subordinate authority or court, if within the prescribed period the appeal or revision is not preferred against such order by the aggrieved party, a valuable right relating to limitation is accrued in favour of the other side in whose favour the order is passed - Such right could not be curtailed lightly contrary to available facts by adopting the lenient approach - If sufficient cause is not made out the delay cannot be condoned. (Para 8)**

ख. परिसीमा अधिनियम (1963 का 36), धारा 5 – विलंब के लिये माफी – आक्षेपित आदेश को विधि द्वारा विहित अवधि के भीतर चुनौती नहीं दिये जाने का प्रभाव – यह विधि की सुस्थापित प्रतिपादना है कि किसी अधीनस्थ प्राधिकारी या न्यायालय द्वारा आदेश पारित किये जाने के पश्चात् यदि विहित अवधि के भीतर असंतुष्ट पक्षकार द्वारा अपील या पुनरीक्षण प्रस्तुत नहीं किया जाता है, तब अन्य पक्षकार जिसके पक्ष में आदेश पारित किया गया है के पक्ष में परिसीमा के संबंध में मूल्यवान अधिकार प्रोद्भूत होता है – उक्त अधिकार को उदार दृष्टिकोण अपनाकर उपलब्ध तथ्यों के विपरीत हल्के रूप में संकुचित नहीं किया जा सकता – यदि पर्याप्त कारण नहीं बनता, विलंब को माफ नहीं किया जा सकता।

Case referred :

AIR 1962 SC 361.

Ravish Agrawal with *Pranay Verma* for the petitioner.

ORDER

U.C. MAHESHWARI, J. :- The petitioner has filed this petition under Article 227 of the Constitution of India being aggrieved by order dated 15.4.2013, (Ann. P-12), passed by the Board of Revenue, Gwalior in Revenue

Revision No. 49/Two-2013, whereby dismissing his application under Section 5 of the Limitation Act for condoning the delay in filing the aforesaid revision filed against the order dated 10.1.2006 passed by the Upper Commissioner, Rewa Division Rewa in Revenue Appeal No. 166/Appeal/99-2000 has been dismissed without entering on any of the merits of the matter.

2. The facts giving rise to this petition in short are that Balmiki Prasad Gupta, (since deceased), the predecessor in title of respondent nos. 5 to 9 had filed an application against the petitioner and respondent no. 10 for partition of agricultural land in the court of respondent no. 4, Tahsildar. The same was registered as Revenue Case No. 31/A/27/95-96. In such case, the reply (Ann. P-2) of admission was filed on behalf of petitioner and respondent no.10. On consideration, vide order dated 31.8.1996, (Ann. P-4) proposed partition of the alleged revenue land according to Batwara fard was accepted. Such order of Tahsildar was challenged on behalf of private respondent no. 10 in appeal before the respondent no. 3 SDO through revenue appeal no. 118/98-99. On consideration, vide order dated 6.11.1999 (Ann. P-5), such appeal was allowed in part and after setting aside the order of Tahsildar the case was remitted back with some directions to the Tahsildar to decide afresh.

3. The aforesaid order of SDO passed in appeal was challenged by the aforesaid Balmiki Prasad Gupta, the predecessor of respondent nos. 1 to 9 before the respondent no. 2, Upper Commissioner Revenue by way of Second Appeal No. 166/Appeal/1999-2000. On consideration vide order dated 10.1.2006, (Ann. P-7) such appeal was allowed and the order of SDO 6.11.1999 (Ann. P-5) was set aside. Being dissatisfied with such order of second appeal, the petitioner approached the Board of Revenue with impugned Revision on 4.1.2013. Such revision was filed alongwith an application under Section 5 of the Limitation Act for condoning the delay in filing the same because same was filed at belated stage after more than six years from the prescribed period of limitation to file the revision. In such application, inter alia it is stated that the petitioner was under the influence of his brothers Balmiki Prasad Gupta and respondent no. 10, Hanuman Prasad Gupta. Pursuant to that he had signed some papers and the Vakalatanama and subsequent to it, taking disadvantage of the said, said Balmiki Prasad Gupta and Hanuman Prasad Gupta had misused such papers contrary to his interest. It is further stated that in pendency of some other case before the Tahsildar regarding amendment/modification of the map of the land, the Halk Patwari had informed him on 25.12.2012 regarding aforesaid order of the Upper Commissioner.

On coming to know such fact immediately he rushed to the Court of Commissioner, Rewa and obtained certified copy of the impugned order of Commissioner on dated 31.12.2012 and thereafter filed the impugned revision on 4.1.2013 and in such premises, the prayer for condoning the alleged delay in filing the revision is made.

4. After extending the opportunity of hearing to the parties on the said application under Section 5 of the Limitation Act by the Board of Revenue, on consideration the same was dismissed. In the impugned order, it is stated by the Board of Revenue that the petitioner has filed revision near about after seven years from the date of passing the order by the Commissioner, stating that he came to know about such order on dated 25.12.2012 from the Patwari but in support of such contention neither the affidavit nor any other certificate of Patwari is placed on record. It is also stated that infact the petitioner had got the knowledge of the aforesaid order of Upper Commissioner dated 10.1.2006 on dated 7.10.2010 when the private respondent herein has filed a copy of such order of Commissioner alongwith the index in a pending appeal No. 103/Appeal/11-12 in the Court of Commissioner, Shahdol and in such premises, it was held that the contention of the petitioner that he came to know about the order of Upper Commissioner on 25.12.2012 is not reliable as such he had acquired the knowledge of such order on 7.10.2010 and in such premises by holding that the petitioner has not made out the sufficient cause to to condone the delay the application was dismissed.

5. It is also apparent from the impugned order that while dismissing the impugned revision the merits of the factual matrix of the matter were also taken into consideration and thereafter it was held that the petitioner has not made out any sufficient cause for condoning the alleged delay of near about seven years and in such premises, application has been dismissed and pursuant to that revision has also been dismissed.

6. It is apparent from the impugned application of the petitioner filed under Section 5 of the Limitation Act before the Board of Revenue that except the aforesaid ground, no any other ground for condoning the delay was taken in the same.

7. In view of the above mentioned factual matrix, I have not found any perversity, illegality, irregularity or anything against the propriety of law in the order impugned which requires any interference at this stage under Article

227 of the Constitution of India.

8. True it is that as per existing legal position while dealing with the application of Section 5 of the Limitation Act, the terminology of sufficient cause should be considered by adopting liberal approach but the court is also bound to take care that on the basis of wrong facts, no person should be benefited under the garb of the lenient approach.

9. It is settled proposition of law that after passing the order by any subordinate authority or court, if within the prescribed period provided under the law, the appeal or revision is not preferred against such order by the aggrieved party, then in that situation a valuable right relating to limitation is accrued in favour of the other side in whose favour such order has been passed. Such right could not be curtailed lightly contrary to the available facts by adopting the lenient approach. If sufficient cause is not made out for condoning the alleged delay, then such delay could not be condoned. My such view is based on the decision of the Apex Court in the matter of *Ramlal and others Vs. Rewa Coalfields Ltd.* reported in AIR 1962 SC 361. In such case it was held as under:-

> (7) In construing S. 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree - holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree holder by lapse of time should not be light heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excluding delay is shown discretion is given to the Court to condone delay and admit the appeal. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in *Krishna V. Chathappan* ILR 13, Mad 269,
>
> "Section 3 gives the Court a discretion which in respect

of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood the words 'sufficient cause' receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bonefide is imputable to the appellant. "

10. In view of aforesaid discussion, I have not found any error or perversity in the order impugned which requires any interference under Article 227 of the Constitution of India. Consequently this petition being devoid of any merits is hereby dismissed at the stage of motion hearing.

Petition dismissed.

I.L.R. [2015] M.P., 2004
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 17835/2013 (Jabalpur) decided on 17 September, 2014

ASHOK VIRANG (DR.) ...Petitioner
Vs.
PRINCIPAL SECRETARY, PUBLIC HEALTH AND FAMILY WELFARE DEPARTMENT & anr. ...Respondents

Service Law - Review D.P.C. **- In Writ Petition filed by Petitioner, the Division Bench of High Court directed to conduct review D.P.C. in accordance with directions issued therein - In subsequent writ petition filed by another person, Division Bench directed to conduct review D.P.C. in accordance with Promotion Rules, 2002 and earlier directions were not brought to the notice of the D.B. - Held - Rules as were available on the date of vacancy have to be applied for making consideration - Proceedings which were done adopting the norms prescribed in Promotion Rules, 2002 are not justified proceedings - Subsequent decision will not overrule the decision already rendered by Division Bench - Review D.P.C. be held strictly in accordance with order passed earlier.** **(Para 11)**

सेवा विधि – पुनर्विलोकन डी.पी.सी. – याची द्वारा प्रस्तुत रिट याचिका में, उच्च न्यायालय की खंड न्यायपीठ ने उसमें जारी निदेशों के अनुसार पुनर्विलोकन डी.पी.सी. आयोजित कराने के निदेश दिये – अन्य व्यक्ति द्वारा प्रस्तुत की गई पश्चात्वर्ती रिट याचिका में, खंड न्यायपीठ ने पदोन्नति नियम, 2002 के अनुसार

पुनर्विलोकन डी.पी.सी. आयोजित करने के निदेश दिये और पूर्ववर्ती निदेशों को खंड न्यायपीठ की जानकारी में नहीं लाया गया – अभिनिर्धारित – नियम, जैसे कि रिक्ति की तिथि को उपलब्ध थे, विचारण किये जाने हेतु लागू करने चाहिए – पदोन्नति नियम, 2002 में विहित सन्नियमों को अपनाकर जो कार्यवाहियां की गई थी, वह न्यायोचित कार्यवाहियां नहीं हैं – पश्चात्वर्ती निर्णय, खंड न्यायपीठ द्वारा पहले ही दिये गये निर्णय को नहीं उल्टायेगा – पुनर्विलोकन विभागीय पदोन्नति समिति कठोर रूप से पूर्वतर पारित आदेश के अनुसार आयोजित की जाये।

Cases referred :

AIR 1990 SC 1233, (1998) 9 SCC 223.

Anupam Lal Das & Karan Singh Thakur, for the petitioner.
Rajesh Tiwari, G.A. & *Puneet Shroti,* P.L. for the respondents.

ORDER

K.K. TRIVEDI, J. :- The petitioner by way of filing this writ petition has called in question the order dated 28.07.2011 by which after conducting a review DPC, the petitioner has not been found fit for promotion on the post of Director, Health Services, as also the proceedings of the review DPC said to be convened on 15.06.2011 on various grounds amongst others, essentially on the ground that the proceedings of review DPC were not in consonance with the directions issued by this Court in the earlier round of litigation and were also violative of the specific directions issued by the M.P. State Administrative Tribunal in the Original Application filed by the petitioner. It is contended that since the Madhya Pradesh Public Services (Promotion) Rules, 2002 (herein after referred to as 'Promotion Rules, 2002') would not be attracted, the entire consideration done by the respondents was dehors the directions issued by the M.P. State Administrative Tribunal and this Court, therefore, the order impugned is liable to be quashed. It is the case of the petitioner that since such review DPC is not convened in terms of the specific orders, the order impugned is liable to be quashed and the petitioner is entitled to be promoted on the post of Director from the date the said benefit was extended to the juniors to the petitioner.

2. The petition was initially filed before the Bench of this Court at Indore but subsequently has been filed in this Court as the petitioner is presently posted within the territorial jurisdiction of this Court. However, the fact remains that when the petition was filed at Indore, the respondents-State had filed a return in the said case but since the same was taken back by the petitioner for

presentation before the appropriate Bench, despite grant of opportunity, return has not been filed by the respondents in the present writ petition. The copy of the return filed at Indore has been placed on record of this petition by the petitioner and it appears that the respondents wish to go by the said return. However, during the course of arguments, Division Bench order passed by this Court in another writ petition has been relied by the respondents and it is their stand that the order impugned has rightly been passed as the petitioner is not found fit for promotion on due consideration in accordance to the Promotion Rules, 2002 and since such a direction was issued by the Division Bench of this Court at Indore in some other writ petition, no fault can be found in the proceedings conducted by the review DPC and as such the writ petition is also liable to be dismissed. In the light of these submissions of learned Counsel for the respondents-State, the matter is to be decided.

3. The history of the litigation is that when initially in accordance to the provisions of the Rules, which were in vogue at the relevant time, a DPC meeting was convened and certain promotion orders were issued in respect of some of the persons, O.A. No.611/1998 was filed by the petitioner before the M.P. State Administrative Tribunal, Bench at Indore. One Dr. Yogiraj Sharma was made a respondent in the said Original Application. Yet another Original Application was filed by another person, who too was aggrieved with the promotion of Dr. Yogiraj Sharma and the said Original Application was registered as O.A. No.910/1998. Both the Original Applications were heard together and by common order dated 06.11.1998, the Original Applications were decided. At the relevant time the petitioner and Dr. Ashok Sharma, who has filed O.A. No.910/1998, both were posted as Joint Director, Public Health, at Ujjain and Indore respectively. The grievance set forth in the original application was that in terms of the Madhya Pradesh Public Health and Family Welfare (Gazetted) Service Recruitment Rules, 1988 (herein after referred to as 'Rules of 1988), the consideration of the petitioner was not rightly done as the record of the Annual Confidential Report was not made available and, therefore, there was no appreciation of the merits at that time for consideration. While allowing the Original Application, the Tribunal recorded the facts relating to non-availability of the ACR records of the officers, who were considered by the DPC held in that year. It was found that the ACRs of certain officers were not available and, therefore, categorical findings were recorded by the Tribunal that the DPC was not justified in considering the cases of the candidates in appropriate manner without the ACR records of officers. While

recording such findings, the Tribunal gave a decision and issued directions in the following manner, as is reflected from paragraph 22 of the order passed in the aforesaid original application, which reads thus :

> *"22. The petition is, therefore, allowed and the orders dt.31.3.1998 (Annexure A-1) promoting the respondent Dr. Yogiraj Sharma to the post of Director, Family Welfare and the order dt. 3.8.1998 (Annexure A-15) modifying the order (Annexure A-1) and promoting the Respondent Dr. Yogiraj Sharma to the post of Director, Public Health & Family Welfare in a higher scale are hereby set aside. The respondents are directed to constitute a fresh D.P.C. and again consider the filling of the vacant posts keeping the following in view in strict sense :-*
>
> *(i) Depending upon whether the restrictions regarding zone of consideration imposed by the rules of 1997 issued by the G.A.D. of the Government if incorporated in the Recruitment Rules of 1988 of the Department, the zone of consideration shall be seven or atleast five for consideration. The case of Dr. Ashok Virang who stands at S.No.6, shall be considered if only the provisions of Recruitment Rules, 1988 are to be followed which provide for a zone of seven times. If the provisions of Rules of 1997 have been accepted by the Department or incorporated in the Recruitment Rules even then if Dr. K.K. Shukla has refused consideration for promotion Dr. Virang's number would then find at S.No.5 and would then come within the zone of consideration.*
>
> *(ii) Correct name of the post, its creation and its scale on which selection is to be made should be ascertained clearly and recommendations should be made for the same post clearly mentioning the same post clearly mentioning the same in the proceedings by the D.P.C. to avoid any confusion and illegality. The actual number of vacancies of the post of Director should be ascertained and action to select candidates for all the posts should be taken as per rules.*
>
> *(iii) The C.R.s of all the five years of all the eligible candidates falling within the zone of consideration should be considered to allow the assessment of comperative merit on*

equal footings ignoring unreasoned, uncommunicated remark Kha of Dr. Ashok Sharma.

(iv) As already directed in O.A. No.66/1998 before holding D.P.C. the seniority list as directed should be prepared and acted upon, if it applies to the cases.

The above directions should be complied with within a period of one month from the date of communication of this order because, as was claimed and done by the respondents, that the post of Director could not be kept vacant for long in the interest of Government work."

4. Dr. Yogiraj Sharma, who was respondent in the said case, being aggrieved by the order passed by the Tribunal approached the Division Bench of this Court at Gwalior by filing W.P. No.1847/1998 *(Dr. Yogiraj Sharma vs. State of M.P. & others)*. The said writ petition was decided by order dated 20.10.2000. After full analysis the Division Bench of this Court came to the conclusion that it was not open to the Tribunal to issue certain directions as have been indicated herein above and passed the order in the following manner, as is reflected in paragraph 11 of the judgment, which reads thus :

"11. In the result, the writ petition is partly allowed. The direction of the Tribunal for constitution of the D.P.C. and consideration of eligible five officers of the cadre of Joint Director, including Dr. Ashok Sharma, for promotion to the post of Director, Public Health & Family Welfare, is maintained and rest of the directions as preparation of seniority list, ignoring the gradation 'Kha' of Dr. Ashok Sharma etc. are set aside. The order of this Court dated 25.1.2000, staying the hearing of the petition O.A. No.1508/98 filed by the respondent Dr. Ashok Sharma in the Tribunal, questioning the selection of the petitioner Dr. Yogiraj Sharma, stands vacated. No order as to costs."

5. It is noteworthy that even when the order passed in the Original Application of the petitioner herein was not sought to be challenged but since the common order was passed in O.A. No.611/1998 filed by the petitioner and O.A. No.910/1998 filed by Dr. Ashok Sharma, the Division Bench decision would be applicable in the case of the present petitioner as well, as the said common order was called in question by Dr. Yogiraj Sharma. However, it

appears that the State had not initiated any proceedings challenging the order passed by the Tribunal nor called in question the order passed by the Division Bench anywhere. It further appears that the order passed by the Division Bench modifying the order of the Tribunal was not being complied with and, therefore, certain contempt proceedings were initiated under Section 17 of the Administrative Tribunals Act, 1985, before the Tribunal. However, since the Tribunal was closed, all pending petitions were transferred to the respective Benches of the High Court under an enactment and contempt application filed before the Tribunal was also transmitted to the High Court where the same was registered as M.C.C. No.679/2003. The said M.C.C. was decided on 08.02.2008. The operating part of the order passed by the Bench of this Court at Indore on aforesaid date in the aforesaid M.C.C. reads thus :

> *"The directions as issued by the Tribunal modified by the High Court has not been carried out, however urged that it is a fit case of deliberate and willful non-compliance of the order of the Court. Considering the fact that this petition was filed before the Tribunal invoking the jurisdiction under Section 17 of the M.P. State Administrative Tribunal Act, 1985. On abolition of Tribunal all the cases have been relegated to this Court. Therefore, it is thought proper to dispose of this petition with a direction to the respondents to carry out the order passed by the Tribunal, modified by the High Court, which is quoted herein above, now within a period of three months from the date of communication of this order.*
>
> *Accordingly this petition is disposed of."*

6. It is, thus, clear the direction to hold a review D.P.C., as was issued by the Tribunal, was neither interfered nor was set aside by any higher forum. From the reading of the direction issued by the Division Bench also it is clear that the direction to hold the review D.P.C. was not interfered by the Division Bench and, therefore, the review D.P.C. was to be held keeping in mind the year of vacancy and the rules, which were in vogue at the relevant time and not otherwise. It appears that rightful consideration was not done and yet another writ petition being W.P. No.6787/2008 was filed by the petitioner herein seeking compliance of the order passed by the Tribunal as modified by the Division Bench of this Court and in terms of the order passed in M.C.C. No.679/2003. Said writ petition came up for hearing before the single Bench of this Court at Indore and as all the facts including the fact that directions

were already issued on earlier occasion to constitute a review D.P.C. but the said order was not being complied with, were brought to the notice of this Court, ultimately the said writ petition was disposed of vide order dated 02.05.2011 giving a categorical direction that the order passed by the Tribunal, so modified by the Division Bench, be complied with. The operating part of the order passed by this Court, Bench at Indore, reads thus :

> *"Resultantly the present writ petition is disposed of with a direction to the State Government to hold a review DPC as directed by the M.P. State Administrative Tribunal as well as by this Court vide order dt.8/2/2008 within a period of 60 days from the date of receipt of certified copy of this order. In the present case, the order of M.P. State Administrative Tribunal is dt.6/11/98 and the order passed by this Court in WP NO.1847/1998 is dt. 20/10/2000. The order passed in Cont. Pet. is dt. 8/2/2008 and even after expiry of 2 years from the date of order passed in Cont. Petition the respondents have not cared to obey the order passed by this Court and therefore keeping in view the totality of the circumstances of the case a cost of Rs.5000/- is imposed upon the respondent State. The writ petition is allowed. No order as to costs."*

7. It appears that the review DPC was not rightly held and on 19.11.2009 a junior to the petitioner was promoted to the post of Director, Public Health & Family Welfare. Calling in question the said order, W.P. No.3926/2010 (S) was filed by the petitioner before the Bench of this Court at Indore. The said writ petition also came up for hearing on the same day when the earlier writ petition filed by the petitioner in the year 2008 was heard and by the order of the same date the said writ petition was also disposed of. The order of promotion of said Dr. A.N. Mittal was quashed and further direction was given to hold a fresh DPC keeping in view the provisions of the Recruitment Rules as also the Promotion Rules of 2002. The operating part of the order passed in this writ petition reads thus :

> *"It is pertinent to note that the respondents have not held the DPC till date as directed by this Court and on the contrary again promoted a junior on temporary basis depriving the petitioner of his legitimate right of consideration as directed by this court in the earlier round of litigation and therefore as the DPC has not been held in consonance with the provisions of the MP Public*

Services Promotion Rules, 2002, the proceedings of the DPC and the consequential promotion order dt. 19/11/2009 are hereby quashed. The respondents are directed to hold a fresh DPC keeping in view the provisions of the MP Public Services Promotion Rules, 2002.

The aforesaid exercise of holding DPC be concluded within 30 days from the date of receipt of certified copy of this order.

With the aforesaid this writ petition stands allowed."

8. This order passed in W.P. No.3926/2010 (S) was sought to be challenged by Dr. Amarnath Mittal in W.A. No.306/2011 before the Division Bench of this Court at Indore and the said writ appeal was considered and decided vide order dated 20.07.2011. However, the facts relating to previous litigations though recorded, were not weighed and Division Bench overlooking the Division Bench directions issued on earlier occasion, directed to hold the review DPC in terms of the Promotion Rules of 2002 only. The operating direction of the Division Bench in this writ appeal reads thus:

"21. In view of the aforesaid, we are of the view that no case to interfere with the order of learned Single Judge except that official respondents No.1 and 2 shall hold a fresh DPC under Rule 7 of Rules of 2002, as prayed by the appellant is made out. The appeal has no merit and is liable to be dismissed."

9. It is noteworthy that there was no whisper with respect to the compliance of the order issued by the Division Bench of this Court at Indore on earlier occasion nor any result of the said consideration was brought to the notice of the Court with a categorical declaration that the present petitioner, though was considered in the review DPC in compliance of the previous orders, was not found fit for promotion and, therefore, the orders passed in subsequent writ petition was to be complied with. This fact is not even noted in the order passed by the Division Bench when the writ appeal filed by Dr. Amarnath Mittal was decided. It is also noteworthy that the order passed in W.P. No.6787/2008 filed by the present petitioner was sought to be challenged by the State Government before the Division Bench of this Court at Indore by filing W.A. No.422/2011 but the said writ appeal was treated to be hopelessly barred by limitation and was dismissed vide order dated 17.08.2011. That being so, the entire controversy is to be considered in the light of these facts.

10. If from the analysis of facts made herein above the order impugned is tested, it would be clear that though it is said that the order is passed in compliance of order dated 06.11.1998 passed by the M.P. State Administrative Tribunal in O.A. No.910/1998 and O.A. No.611/1998, as modified by the order dated 20.10.2000 in W.P. No.1847/1998 and in terms of the order dated 08.02.2008 passed in M.C.C. No.679/2003, but if the entire proceedings are seen, it would be amply clear that the consideration of the case of the petitioner was not done in appropriate manner, as the criteria, which was not available in the year 1998 and which was made available only when Promotion Rules, 2002 were made, was adopted by the respondents for holding the review DPC, as if they were considering the case of the petitioner in a fresh DPC. If the order was passed by the M.P. State Administrative Tribunal to hold the review DPC or to take into consideration the availability of the vacancy on a particular time when the earlier DPC was convened, it will mean nothing but that the consideration was to be done in terms of the provisions of the rules which were in vogue on the date when the vacancies were indicated or when the proceedings were earlier done for consideration of cases for promotion and not otherwise. From this it is clear that the criteria, which is provided for consideration of cases for promotion in the Promotion Rules, 2002, is not to be made applicable. If that is wrongly done even if there was a direction to adhere to Promotion Rules, 2002 by the Division Bench in some other case, that would not nullify the earlier direction of the Tribunal and the Division Bench of this Court at Indore, more particularly when the proceedings are done in purported compliance of the orders passed by the Tribunal and the Division Bench in respect to the consideration of the case in review DPC.

11. The word 'review' has a very important significance. The review means re-assessment of the previous proceedings, which have already been done and it would never mean fresh consideration of the previous act done. Therefore, a simple principle would be applicable that whatever provisions were in vogue at the time when the initial proceedings were done and a direction to review such proceedings was issued, the very same provisions were to be adhered to. Whatever norms were adopted by the previous DPC were to be adopted though in appropriate manner as directed by the Division Bench of this Court at Indore and not otherwise. Even if in subsequent proceedings or in some other litigation direction was given by the another Division Bench to make applicable the provisions of Promotion Rules, 2002, the respondents were

not authorized to consider the case only under the Promotion Rules, 2002 ignoring the previous directions. Even otherwise the law as laid-down by the Apex Court is clear. The rules or the provisions of the law as available on the date of vacancy have to be looked into. In the cases of *N.T. Bevin Katti vs. Karnataka Public Service Commission and others,* AIR 1990 SC 1233 and *B.L. Gupta and another vs. M.C.D.,* (1998) 9 SCC 223, the Apex Court has categorically held that the rules as were available on the date of vacancy have to be applied for making consideration. This will make it clear that the proceedings as were done adopting the norms prescribed in Promotion Rules, 2002, are not the justified proceedings in compliance of the order passed by the Tribunal and by the Division Bench of this Court and, therefore, such proceedings cannot be given a stamp of approval by this Court.

12. The only submission which the State has made that the directions as contained in Division Bench decision in the case of *Dr. Amarnath Mittal* would hold the field, cannot be sustained as that decision will not overrule the decision already rendered by the Division Bench of this Court in W.P. No.1847/1998. Therefore, such contention raised by the learned Counsel for the respondents has to be ignored.

13. Resultantly, the writ petition succeeds and is allowed. The order dated 28.07.2011 and the proceedings done on 15.06.2011 by the review DPC are hereby quashed. Strictly a review DPC be held in terms of the order dated 06.11.1998 passed by the M.P. State Administrative Tribunal in O.A. No.611/1998 and O.A. No.910/1998, as modified by the Division Bench vide order dated 20.10.2000 in W.P. No.1847/1998, which has been reiterated in M.C.C. No.679/2003 and as has been categorically directed in W.P. No.6787/2008, decided on 02.05.2011, within a period of 45 days from the date of receipt of certified copy of the order and outcome be intimated to the petitioner immediately within the said period. Keeping in view the fact that the respondents deliberately and knowingly have not complied with the previous orders of this Court, strict warning is issued that in case this order is not complied with within the time frame, serious action for committing contempt of this Court would be initiated against the responsible officers. The respondents will pay the cost of this litigation to the petitioner, which is quantified to Rs.20,000/-.

14. The writ petition is allowed to the extent indicated herein above.

Petition allowed.

I.L.R. [2015] M.P., 2014
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 8656/2012 (Jabalpur) decided on 31 October, 2014

SHYAM SHARMA (DR.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Service Law - Pension*** **- Pension is a proprietary right of the retired Government servant and grant of pension is not dependent on the sweet will of State - There must be strong justified reasons for the withdrawal of pension.** **(Para 9)**

क. *सेवा विधि – पेंशन* – पेंशन सेवानिवृत्त सरकारी कर्मचारी का सांपत्तिक अधिकार है और पेंशन का प्रदान, राज्य की स्वेच्छा पर निर्भर नहीं – पेंशन वापस लिये जाने के लिये प्रबल न्यायोचित कारण होने चाहिए।

B. ***Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 9 - Right of Governor to withhold or withdraw Pension*** **- Governor may impose a penalty of withholding or withdrawing the pension or part thereof if case of misconduct is proved which is of such a nature that a penalty of dismissal could be imposed on Government Servant - Not only charges are to be levelled in such manner indicating such a grave misconduct but a finding is also to be recorded that such a grave misconduct is found proved so that the power of withdrawing or withholding the pension of a retired Government servant may be exercised.** **(Para 10)**

ख. *सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 9 – पेंशन रोकने या वापस लेने का राज्यपाल का अधिकार* – यदि अवचार का प्रकरण सिद्ध होता है जिसका स्वरूप ऐसा है कि सरकारी कर्मचारी पर पदच्युति की शास्ति अधिरोपित की जा सकती है, राज्यपाल पेंशन या उसका भाग रोकने या वापस लेने की शास्ति अधिरोपित कर सकता है – न केवल इस प्रकार के घोर अवचार को दर्शाते हुए आरोपों को लगाया जाना चाहिए बल्कि यह निष्कर्ष भी अभिलिखित किया जाना चाहिए कि इस प्रकार का घोर अवचार सिद्ध पाया गया है जिससे कि सेवानिवृत्त सरकारी कर्मचारी की पेंशन वापस लेने या रोकने की शक्ति का प्रयोग किया जा सके।

C. ***Civil Services (Classification, Control and Appeal) Rules,***

***M.P. 1966, Rule 9 - Punishment - Judicial Review* - Penalty can be interfered by Courts if it is shockingly disproportionate to alleged misconduct. (Para 11)**

ग. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 9 – दण्ड – न्यायिक पुनर्विलोकन – शास्ति में न्यायालय द्वारा हस्तक्षेप किया जा सकता है यदि वह अनुचित रूप से अभिकथित अवचार के अननुपातिक है।

***D. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 9 - Departmental Enquiry - Withholding of material* - If the material evidence is available to prove the charges or to rebut the allegations in defence but the same is not deliberately produced, this fact will go against the disciplinary authority and it has to be held that the enquiry was not properly held. (Para 12)**

घ. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 9 – विभागीय जांच – तथ्यों को रोक कर रखना – यदि आरोप साबित करने के लिये या बचाव में अभिकथनों का खंडन करने के लिये तात्विक साक्ष्य उपलब्ध है परंतु उसे जानबूझकर प्रस्तुत नहीं किया गया है, तब यह तथ्य अनुशासनिक प्राधिकारी के विरूद्ध जायेगा और यह अभिनिर्धारित किया जाना होगा कि जांच समुचित रूप से नहीं की गई है।

Case referred :

AIR 1977 SC 1512.

Mukesh Kumar Agrawal, for the petitioner.
Santosh Yadav, P.L. for the respondents.

ORDER

K.K. TRIVEDI, J. :- In this petition under Article 226 of Constitution of India, the grievance of the petitioner is that while he was in service, a charge sheet was issued to him on 2nd July, 2009 by the Commissioner, Rewa Division, Rewa for the alleged misconduct stating that while he was working as Block Medical Officer in Community Health Centre, Mauganj, he had not maintained the registered in appropriate manner for extending the benefit of 'Janani Suraksha Yojna' to the beneficiaries. The other charge was that the amount, to be paid immediately to the beneficiaries, was not disbursed. As a result, the delay was caused in making payment for a period of six months. The last charge against the petitioner was that even after grant of sanction, though cheques were prepared, the amount was not disbursed to the women

beneficiaries, who were entitled to receive the said benefit. It was alleged that the petitioner had not honestly discharged his duties, which earned the bad name to the State and that the conduct of the petitioner was violative of M.P. Civil Services (Conduct) Rules, 1965.

2. A reply was filed by the petitioner stating that he was not the drawing and disbursing authority and, therefore, he was not supposed to maintain the accounts, as was alleged against him. As soon as the sanction was granted, the moment the same was received, the amount was required to be disbursed by the drawing and disbursing authority and since the cheques were not prepared by the said authority, the payment could not be made to the beneficiaries within time. Lastly, it was contended that the moment the sanction was received and the cheques were delivered, the same were disbursed by the petitioner. It was contended that in fact the allegations, which have been levelled against the petitioner, were required to be levelled against Dr.Mamta Soni and Dr. S.N. Singh, who were responsible officers. Since the petitioner was only a Block Medical Officer, he was not in a position to interfere in the work of the aforesaid senior officers.

3. It appears that after conducting enquiry, since the petitioner had retired from service, the matter was referred to the State Government for imposition of proper penalty. After considering the aforesaid facts and the findings recorded against the petitioner, by the impugned order, 50% of the pension of the petitioner has been withheld in exercise of powers under Rule 9(1) and (4)(c) of the M.P. Civil Service (Pension) Rules, 1976 (hereinafter referred to as 'the Rules'). Against this order, the present writ petition has been filed.

4. It is contended by the learned counsel for the petitioner that the entire record available will indicate that the misconduct of the petitioner was not found proved, yet the penalty has been imposed on him so as to save the interest of the senior officers, who were responsible to discharge such functions. It is contended that even otherwise the penalty could not have been imposed in such a manner.

5. Per contra it is contended by learned counsel for the respondents that though return is not filed by the respondents but from the documents available on record it is clear that misconduct of petitioner was proved therefore rightly the penalty of withholding 50% pension is imposed on the petitioner as such the petition is liable to be dismissed.

6. Heard learned counsel and perused the record.

7. The provisions of Rule 9 of the Rules aforesaid lay down the circumstances in which after a departmental enquiry is concluded, in case the government servant has retired during the pendency of the departmental enquiry, the penalty can be imposed. The portions of Rule 9 of the Rules are reproduced for appreciation:-

> **"9. Right of governor to withhold or withdraw pension.**-(1) The Governor reserves to himself the right of withholding or withdrawing a pension or part thereof, whether permanently or for a specified period, and of ordering recovery from pension of the whole or part of any pecuniary loss caused to the Government if, in any departmental or judicial proceeding, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including service rendered upon re-employment after retirement:
>
> Provided that the State Public Service Commission shall be consulted before any final orders are passed:
>
> Provided further that where a part of pension is withheld or withdrawn, the amount of such pension shall not be reduced below [the minimum pension as determined by the Government from time to time];
>
> **2(a)** The Departmental proceedings [x x x], if instituted while the Government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced, in the same manner as if the Government servant had continued in service:
>
> Provided that where the departmental proceedings are instituted by an authority subordinate to the Governor, that authority shall submit a report regarding its findings to the Governor.
>
> **(b)** The departmental proceedings, if not instituted while the Government servant was in service whether before his retirement or during his re-employment:-
>
> **(i)** shall not be instituted save with the sanction of the

Governor;

(ii) Shall not be in respect of any event which took place more than four years before such institution; and

[(iii) shall be conducted by such authority and in such place as the Government may direct and in accordance with the procedure applicable to departmental proceedings:-

(a) in which an order of dismissal from service could be made in relation to the Government servant during his service in case it is proposed to withhold or withdraw a pension or part thereof whether permanently or for a specified period; or

(b) in which an order of recovery from his pay of the whole or part of any pecuniary loss caused by him to the Government by negligence or breach of orders could be made in relation to the Government servant during his service if it is proposed to order recovery from his pension of the whole or part of any pecuniary loss caused to the Government].

(3) No judicial proceedings, if not instituted while the Government servant was in service, whether before his retirement or during his re-employment, shall be instituted in respect of a cause of action which arose or in respect of an event which took place, more than four years before such institution.

(4) In the case of a Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension and death-cum-retirement gratuity as provided in [rule 64], as the case may be, shall be sanctioned:

[Provided that where pension has already been finally sanctioned to a Government servant prior to institution of departmental proceedings, the Governor may, by order in writing, withhold, with

effect from the date of institution of such departmental proceedings fifty per cent of the pension so sanctioned subject however that the pension payable after such withholding is not reduced to less than [the minimum pension as determined by the Government from time to time]:

Provided further that where departmental proceedings have been instituted prior to the 25th October, 1978, the first proviso shall have effect as it for the words "with effect from the date of institution of such proceedings" the words "with effect from a date not later than thirty days from the date aforementioned," had been substituted:

Provided also that-

(a) If the departmental proceedings are not completed, within a period of one year from the date of institution thereof, fifty per cent of the pension withheld shall stand restored on the expiration of the aforesaid period of one year;

(b) If the departmental proceedings are not completed within a period of two years from the date of institution the entire amount of pension so withheld shall stand restored on the expiration of the aforesaid period of two years; and

(c) If in the departmental proceedings final order is passed to withhold or withdraw the pension or any recovery is ordered, the order shall be deemed to take effect from the date of the institution of departmental proceedings and the amount of pension since withheld shall be adjusted in terms of the final order subject to the limit specified in sub-rule (5) of rule 43].

(5) Where the Government decides not to withhold or withdraw pension but orders recovery of pecuniary loss from pension, the recovery shall not be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government servant.

(6) For the purpose of this rule-

(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges

is issued to the Government servant or pensioner, or if the Government servant has been placed under suspension form an earlier date, on such date; and

(b) judicial proceedings shall be deemed to be initiated-

(i) in the case of criminal proceedings, on the date on which the complaint or report of a police officer, of which the Magistrate takes cognizance, is made, and

(ii) In the case of civil proceedings, on the date the plaint is presented in the court."

8. A perusal of the Rule will make it clear that the enquiry which was initiated while the Government servant was in service would continue in the same manner as if the Government servant was in service, in case the said Government servant has attained the age of superannuation during the pendency of enquiry and has retired. However, in such a case how the punishment would be imposed is not clear. In case the enquiry is initiated after retirement, penalty would be imposed as is categorically provided, that in case a misconduct is found proved for which an order of dismissal from service could be made in relation to the Government servant during his service, a proposal can be made for withholding or withdrawing the pension or part thereof whether permanently or for a specified period or if any loss is caused to the public exchequer on account of such a misconduct for recovery of the said loss. However, this provision is not made applicable in case where the enquiry is initiated before the retirement.

9. There is no specific provision made for imposition of penalty if the enquiry was initiated before the retirement. Only such rights of Governor are reserved to withhold or withdraw the part of pension by way of penalty whether permanently or for specified period. Again there is nothing provided as to what would be nature or gravity of misconduct which is found proved in enquiry on account of which the pension can be forfeited, withheld or withdrawn. It is settled law that pension is proprietary right of the retired Government servant and grant of pension is not dependent on the sweet will of State. If such a proprietary right is to be withdrawn there must be strong justified reasons for the same.

10. To ascertain what would be the appropriate penalty to be imposed in

case a misconduct is found proved in a departmental enquiry, in respect of an officer or employee, who has retired during the pendency of the departmental enquiry, certain provisions are to be examined. The penalties are prescribed under Rule 10 of the Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966 (hereinafter referred to as 'Rules of 1966'). The minor penalties are censure, withholding of promotion, recovery from the salary of any pecuniary loss caused by the Government servant and withholding of increments of pay. The major penalties are reduction to a lower stage in the time scale of pay for a specified period, reduction to a lower time scale of pay which shall ordinarily be a bar to the promotion to the Government servant, compulsory retirement, removal from service and dismissal from service. The minor penalties can be imposed after a summary enquiry whereas a detailed procedure is to be followed in case major penalty is to be imposed. However, aforesaid penalties cannot be imposed on a Government servant, who has retired, before conclusion of the departmental enquiry. This being the situation, the rule making authority has specifically prescribed in Rule 9 (2)(b) of the Pension Rules that in case in a departmental enquiry the misconduct is proved, which is such of a nature that a penalty of dismissal could be imposed on the Government servant had he remained in the employment, the Governor may impose a penalty of withholding or withdrawing the pension or part thereof. This provision is specifically made for imposition of penalty where departmental enquiry is initiated after the retirement of Government servant. Similar would be the situation in case the departmental enquiry is initiated before the retirement, which remained continue after the retirement of the Government servant. If that analogy is made applicable, not only the charges are to be levelled in such manner indicating such a grave misconduct, but a finding is also to be recorded that such a grave misconduct is found proved so that the power of withdrawing or withholding the pension of a retired Government servant may be exercised. This would be more necessary to be held so because a proprietary right is not to be withdrawn without there being a strong justified reason.

11. The law is well settled that in case where the judicial review of the penalty imposed after a departmental enquiry is held by the courts, the correctness of the order of penalty is to be tested only on the anvil that the penalty imposed should not be shockingly disproportionate to the gravity or nature of the alleged misconduct. The Apex Court in several cases has held that it is not open to the courts to sit as appellate authority in the matter of

disciplinary proceedings and to decide what would be the appropriate punishment for the proved misconduct. However, it has been held that a penalty can be interfered by the courts if it is shockingly disproportionate to the alleged misconduct. Over all consideration is to be done whether the penalty has rightly been imposed or not and whether the proceedings in the departmental enquiry were rightly held or not?

12. It was the responsibility on the respondents-State to produce the relevant record to show that the departmental enquiry was properly conducted and the charges levelled against the petitioner were appropriately proved which were constituting a misconduct of such a magnitude that penalty of dismissal could have been imposed on the petitioner, had he remained in the service, on account of such proved misconduct. As has been pointed out, nothing has been placed on record by the respondents in this respect. A perusal of the enquiry report (Annexure P-4) filed alongwith the writ petition indicates that the charges against the petitioner were found proved by the enquiry officer. However, there is no denial of the fact that the senior of the petitioner was in fact given the charge of the post with a direction to exercise the power of drawing and disbursing and that order was subsequently withdrawn, the said officer was shifted from the said place and the charge was given to some one else. Probably this was done because complaints were received against Smt. Mamta Soni, who was earlier made to function as drawing and disbursing officer and a report was made to that respect against her on 13.4.2009 by the Block Medical Officer of the Community Health Centre. It was the specific stand taken by the petitioner in his reply to the charge sheet that he was not required to make the drawal and disbursement. In the entire report submitted by the enquiry officer there is no whisper of meeting out such allegations made by the petitioner and, therefore, it has to be held safely that the material evidence was withheld by the respondents while conducting the enquiry against the petitioner. In case of *State of Haryana and another v. Rattan Singh* – AIR 1977 SC 1512 the Apex Court has held that if the material evidence is available to prove the charges or to rebut the allegations in the defence of delinquent employee, but the same is not deliberately produced, this fact will go against the disciplinary authority and it has to be held that the enquiry was not properly conduct. This aspect is required to be kept in mind while considering the other material available against the petitioner.

13. From the charge sheet the charges levelled against the petitioner were in respect of dereliction of duties when he was in service. The defence of the petitioner

was that he was not authorized to make drawal and disbursement of amount on the other hand his senior officers were required to discharge such functions. For the proof of such contentions he has placed on record, the orders issued in this respect. There is nothing available to remotely suggest that such a stand of the petitioner was incorrect. Those officials have not been examined. The allegations against the petitioner were with respect to delayed payment of amount to the beneficiaries, but it was not the allegation that despite sanction and availability of amount the same was not disbursed by the petitioner. If the petitioner was not the drawing and disbursing authority and drawal itself was made after a considerable delay by the competent authority, how the petitioner could be solely held responsible for the delay. On the contrary all the beneficiaries have deposed that they were paid the amount without raising any demand by the petitioner and they have no complaint against him. In fact all the findings were recorded against the petitioner to save those who were the drawing authorities and who have unnecessary delayed the payments to beneficiaries.

14. As has been pointed out, after retirement of a Government servant what would be circumstances on account of which pension can be withdrawn, are not indicated in the rules. Only in such case where the enquiry is initiated after retirement the circumstances are shown in Rule 9(2)(b) of the Rules. If the said analogy is applied in the present case, the misconduct of the petitioner even if proved, would not attract a major penalty of removal or dismissal from service had the petitioner remained in service. Even otherwise, there is no charge of financial irregularity levelled against the petitioner and loss to the Government. Therefore, provisions of Rule 9(4)(c) of Rules would not be attracted. As such the order of withholding 50% pension of the petitioner cannot be sustained.

15. On the aforesaid premises, the writ petition is allowed. The impugned order dated 23.4.2012 (Annexure P/1) is hereby quashed. The respondents are directed to restore the full pension of the petitioner from the date the respondents withheld the same alongwith arrears within a period of three months from the date of receipt of the certified copy of the order passed today, failing which the petitioner will get interest @6% per annum on the said amount from the respondents.

16. The writ petition stands **allowed and disposed** of, with the aforesaid.

Petition allowed.

I.L.R. [2015] M.P., 2024
WRIT PETITION

Before Mr. Justice P.K. Jaiswal & Mr. Justice S.C. Sharma
W.P. No. 1254/2014 (Indore) decided on 13 February, 2015

RUTVJ WAZE & anr. ...Petitioners
Vs.
UNION OF INDIA & ors. ...Respondents

(Alongwith W.P. No.2758/2014, W.P. No.1811/2014)

Education - Common Admission Test - Entrance Examination for admission in different institutes of IIM - Raw Scores **- Common Admission Test was conducted following the Item Response Theory (IRT) - Raw Scores are used in Traditional Examination System known as Classical Test Theory (CTT) - Raw Scores were applied to a process of equality and scaling using highly sophisticated mathematical modeling known as IRT - IRT approved by CAT Committee which is a body expert - Evaluation process is a academic policy cannot be subjected to writ petition in absence of any malafide or in absence of violation of any Statutory Provision - No malafide alleged against respondent No.3 who had conducted the examination in a most transparent manner - Petition dismissed. (Paras 1 to 4 & 57 to 59)**

शिक्षा – सामान्य प्रवेश परीक्षा – आई.आई.एम. की विभिन्न संस्थाओं में प्रवेश हेतु प्रवेश परीक्षा – रॉ स्कोर – आइटम रिस्पांस थ्योरी (आई.आर.टी.) का पालन करते हुए सामान्य प्रवेश परीक्षा आयोजित की गई – रॉ स्कोर को पारंपरिक परीक्षा प्रणाली में उपयोग किया जाता है जो क्लॉसिकल टेस्ट थ्योरी (सी.टी.टी.) के रूप में ज्ञात है – आई.आर.टी के रूप में ज्ञात उच्च रूप से जटिल/सुविज्ञ गणितीय मॉडलिंग का उपयोग करते हुए समानता एवं अनुपातिक प्रक्रिया के लिए रॉ स्कोर को लागू किया गया – सी.ए.टी. समिति जो एक विशेषज्ञ निकाय है के द्वारा आई. आर.टी. अनुमोदित – मूल्यांकन प्रक्रिया एक शैक्षणिक नीति है जिसे किसी दुराशय की अनुपस्थिति में या किसी कानूनी उपबंध के उल्लंघन के अभाव में रिट याचिका के अध्याधीन नहीं किया जा सकता – प्रत्यर्थी क्र. 3 के विरूद्ध कोई दुराशय अभिकथित नहीं जिसने अत्यंत पारदर्शी ढंग से परीक्षा संचालित की है – याचिका खारिज।

Cases referred :

AIR 2007 SC 950, (2013) 10 SCC 519, (2012) 12 SCC 106, (2012)

1 SCC 157, (2011) 6 SCC 597, (2011) 4 SCC 606, (2010) 8 SCC 372, (2009) 11 SCC 726, (2009) 1 SCC 610, (2006) 5 SCC 515, (2002) 7 SCC 368, (2002) 6 SCC 252, (1999) 9 SCC 8, (1994) 1 SCC 550, (1990) 2 SCC 746, (1990) 2 SCC 352, (1984) 4 SCC 27, (1980) 3 SCC 418, (1979) 2 SCC 339, (1971) 2 SCC 410, (2013) 12 SCC 589.

Piyush Mathur with *Mohan Sharma & Valmik Sakargayen*, for the petitioners.

A. Chitale with *Bharat Chitale,* for the respondents IIM Indore.

ORDER

The Order of the Court was delivered by :

S.C. SHARMA, J. :- Regard being had to the similar controversy involved in these cases, they have been heard analogously together with the consent of the parties and a common order is being passed in the matter. Facts of Writ Petition No.1254/2014 are narrated as under:-

2. The petitioners before this Court have filed this present petition being aggrieved by non-disclosure of raw marks as well as the method and procedure adopted by the respondents in conducting Common Admission Test, 2003 which is a test conducted for admissions to various Indian Institutes of Managements.

3. The contention of the petitioners is that in the year 2013 the Common Test committee has authorised the Indian Institute of Management, Indore for conducting common admission test and a notification to that effect was issued by the respondent No.2 in the month of May, 2013. The petitioners have appeared in the Common Admission Test, 2013 (hereinafter referred to as the " CAT, 2013") and the result was declared on 14.1.2014. The petitioners have enclosed their score card as Annexure-P/2. The petitioners have further contended that a method has been adopted by the respondents which includes the process of scaling the raw marks of the students, which the students have obtained, and finally after scaling the result is declared. The contention of the petitioners is that there are many flaws which have taken place while scaling the marks and the students are certainly entitled to know the raw marks obtained by them. The petitioners have further stated that the process of selection which has taken place is not a transparent process and the respondents are required to reveals the raw marks, to publish the normalization

of process establishing as to how the raw marks are the scaled. It has been further stated that the petitioners have done very well in the examination and were hoping to receive higher percentile, however on account of faulty process of evaluation, the petitioners and other several brilliant students have received the less percentile. The petitioners in short have raised various grounds in respect of process and procedure adopted by the respondents in the matter of grant of percentile and finally have prayed for following reliefs :-

> "(A) The respondent No.1 to 3 may kindly be directed to disclose the Raw marks of the petitioners and other CAT Aspirants obtained by them in CAT Exam 2013 and further the respondents may kindly be directed to disclose the Right answer keys, Method of scaling/noramalzation of Raw scores and answer sheets.
>
> (B) Kindly struck down the online examination conducted by the respondents as their process of Scaling/Normalization is against the settled principles of the Natural Justice and right to equality & further respondents be directed to hold or Conduct re-examination transparently."

4. A detailed and exhaustive reply has been filed by the respondent No.4-IIM, Indore and it has been stated that IIM, Indore has certainly conducted the CAT, 2013 and they have followed the **Item Response Theory** (IRT). It has further been stated that raw scores are used in traditional examination system based upon the **Classical Test Theory** (CTT) while in computing the CAT scores in order to enhance sensitivity of the results, the respondents have applied the raw scores to a process of equating and scaling using highly sophisticated mathematical modeling called as the **Item Response Theory** (IRT). The respondents have further stated that raw scores cannot be accurately used to assess candidates inter se ability in an examination formate such as CAT, which involves numerous exam forms and requires testing over multiple sessions spread over a number of days. It has further been stated that the Item Response Theory is more reliable and an accurate tool in the process of selection and the CAT Committee in charge of holding the examination, is a body expert in the field of academic valuation. It has further been stated that the evaluation process based on Item Response Theory rather than the Classical Test Theory is purely a matter of academic policy and cannot be subjected to

a challenge in a writ petition. It has further been stated that in light of the various judgments the scope of interference by this Court in respect of correctness, suitability or appropriateness of an education policy is quite limited. The courts are neither equipped nor have the academic or technical background to substitute themselves in place of professional technical bodies and to take decisions in academic matters involving the process of evaluation, ranking and selection of candidates for admission with reference to their performance. It is a purely a technical matter in the academic field. It has further been stated that there has been no violation of any enactment, statutory rule or regulation or notification in the matter nor the procedure adopted is arbitrary or capricious. The respondents have explained the procedure in respect of the Common Admission Test, 2013.

5. It has been stated Common Admission Test is an entrance test for admission to Post-Graduate Management Programmes of the Indian Institutes of Management (IIMs) and other participating institutions. It is reputed to be one of the toughest entrance test for admission to management and business schools worldwide.

6. It has further been contended that Indian Institutes of Management are autonomous institutions independent of each other. They variously use CAT scores in conjunction with other criteria such as written assessment tests, group discussions and interviews. Thus CAT scores are often used as the primary short-listing criterion for admissions.

7. The CAT examination is divided into two sections of thirty questions ("items"): (i) Quantitative Ability and Data Interpretation (QA & DI) and (ii) Verbal Ability and Logical Reasoning (VA & LR) each section carrying 225 marks, aggregating 450 marks. The two sections evaluate the candidates in two distinct sets of knowledge and skills; the two sections from mutually-exclusive compartments, and the scores do not correlate across the sections. Contrary to the suggestion made in the writ petition, a high score in one section may not entail a high score in the other section.

8. The respondents have further contended that they have a large item bank from which questions (items) are drawn. In each examination session, 60% or 18 out of 30 questions are the same, but in each candidate's test from they are shuffled in a randomly-generated sequence. In other words, question No.2 for one candidate may be question No.17 for another candidate

appearing in the same session. 40% or 12 out of 30 items are different for each candidate in the same session, generated by the computer by 'Linear On the Fly Testing' (LOFT). This process drastically reduces the likelihood of candidates using unfair means.

9. It has been further contended that to the year 2008 the CAT examination was a single-session pencil-and-paper examination where all the candidates attempted the same question paper. However, over the years, the number of candidates taking the examination rose steeply, and conducting CAT in its existing format began causing a severe strain on the administrative system of the IIMs.

10. It has been further contended that from 2009 the CAT test began to be held as a Computer-Based Test (CBT) in multiple sessions. In the year 2013, 173,738 candidates appeared for the CAT examination. The examination was held in 39 sessions across 19.5 days from 16.10.2013 to 11.11.2013.

11. Respondents have further stated that holding the examination in a large number of sessions spread over a number of days gives students choice and enables the students from all over India and abroad to appear in the test on the date of their preference without there being a clash with local examination dates. It also eases the logistical strain of holding the computer-based examination, as the examination can only be held in specially designed centers rigoursly inspected for security and with computers which have been disinfected of viruses and linked to the central server.

12. The respondents have further stated that there are various difficulties in evaluating candidates *inter se* in multiple item and multiple forms tests and in a testing system having diversity of questions (items) for each candidate and involving multiple sessions and different forms over time, various difficulties become apparent at once. It has been stated that questions often differ significantly in level of difficulty. A candidate answering an easy question correctly cannot be awarded the same marks as a candidate answering a difficult question correctly. Secondly, scores obtained from different sessions or forms of a test are required to be compared as if they came from the same test, but test held in multiple sessions will obviously differ in level of difficulty and therefore, it will be apparent that "raw scores" cannot be used to accurately determine candidates' inter se ability in a multi-session examination, as demanded by the petitioner in this writ petition.

13. The respondents have also thrown light over the necessity of equating and scaling and the same reads as under :-

> "(a) The equating is the statistical process of determining comparable scores across different forms of an examination. The purpose of equating is to adjust for differences in test from difficulty so that the forms can be used interchangeably.
>
> (b) For instance, if a candidate scored 60% on form A and another candidate scored 70% on from B, it will be difficult to know which candidate has a better grasp of over the other. It may will be that from A has very difficult items, while form B is somewhat easy. Equating analysis are performed to address this very issue, so that the scores are as fair as possible."

14. The respondents have further stated that there are two types of test scores-raw scores and scaled scores. A raw score is a score without any sort of adjustment or transformation, such as the simple number of answers, difficult or easy, answered correctly. A scaled score is the result of the appropriate transformation applied to the raw score.

15. The respondents have further contended that purpose of scaled scores is to report scores for all candidates on a consistent scale. The respondents have further stated that in case a test has two forms or sessions, and one is more difficult than the other, it has been determined by equating that a score of 65% on form A is equivalent to a score of 68% on form B. Scores on both forms can be converted to a single linear scale so that these two equivalent scores have the same reported scores. For example, they could both have a score of 350 on a scale of 100 to 500. Scaling does not affect the psychometric properties of a test, but takes place after the assessment of raw scores and equating is completed.

16. The process adopted by the respondents includes various steps, detailed as under :-

(a) **Scoring**

The scoring process for CAT 2013 is outlined below :

Step 1 : Raw score is calculated

The candidtes's raw score is calculated for each section based on the number of questions answered correctly (+3 points), incorrectly (-1 point) or left unanswered (0 point).

Step 2 : Raw score is equated

Equating, as stated above, is the statistical process used to adjust score on two or more alternate forms of an assessment so that the scores may be used interchangeably.

Step 3 " Equated raw score is scaled

In order to ensure appropriate interpretation of an equated raw score, the scores are placed on a common scale or mertic. A linear transformation is used for this scaling process.

IIM Scaling Model

Section scores = 0 to 225

Total exam score 0 to 450.

(b) Three scaled scores are presented to each candidate – an Over-all scaled score and two separate scaled scores for each section, i.e. (I) Quantitative Ability and Data Interpretation (QA & DI) and (ii) Verbal Ability and Logical Reasoning (VA & LR).

(c) Once scaled scores are established, the final step in the scoring process is to rank candidates according to their inter-se performance. A percentile rank is the percentage of scores that fall below a given score. With the total scaled scores arranged in a rank order from the lowest to the highest, in 100 equally-sized groups, a table with the total scale scores to percentile ranks will be created. This ranked list of candidates will allow for the identification and selection of candidates from the highest performers at the very top of the list.The entire process is performed by a computer and there is no human element in the evaluation.

17. The respondents have further described the item response theory in

detail and the same reads as under:

> "Item Response Theory
>
> Item Response Theory, the psychometric theory underlying the above processes, is also known as latent trait theory, strong true score theory, or modern mental test theory. It is a pardigm for the design, analysis and scoring of tests, questionnaires, and similar instruments measuring abilities, attitudes, or other variables. Unlike simpler alternatives for creating scales evaluating questionnaire responses, it does not assume that each item is equally difficult. This, distinguises IRT. From, for instance, the assumption in other systems of scaling that *"All items are assumed to be replications of each other"*, or in other words, items are considered to be parallel instruments. By contrast, item response theory threats the difficulty of each item as information to be incorporated in scaling items."

18. It has been further contended that Items Response Theory is based on the application of related mathematical models to testing data. It is generally regarded as superior to the Classical Test Theory, and it is the preferred method for developing scales, especially when optimal decisions are demanded, as in so-called high-stakes test e.g. the IIM CAT examination, or the American Graduate Record Examination (GRE), Scholastic Aptitude Test (SAT) Graduate Management Admission Test (GMAT), Law School Admission Test (LSAT) and Medical College Admission Test (MCAT).

19. The respondents have also made an attempt to establish before this Court that the item response theory is a better option than the Classical Test Theory. Their contention is that the subject of candidate evaluation using IRT has been studied extensively and its conclusions have proven validity. Two articles explaining the mathematical and theoretical basis of the Item Response Theory are annexed as Annexure-R4/1and AnnexureR4/2.

20. It has been further contended that the evaluation based on the Item Response Theory is generally considered to be more reliable, subtle, sensitive and an improvement over that based on the Classical Test Theory. For tasks that can be performed using CTT, IRT brings greater flexibility and provides more sophisticated information. Some applications such as computerised

adoptive testing, are enabled by IRT and cannot reasonably be performed using only the Classical Test Theory.

21. The respondents have further stated that the tests based on IRT are well established, and tests using equating and scaling and not raw scores are being used worldwide in highly-regarded academic aptitude testing examinations. The respondents have enclosed certain excerpts from independent websites and articles on the internet in respect of the **(I) Scholastic Aptitude Test (SAT) AnnexureR4/3, (ii) Graduate Management Admission Test (GMAT) AnnexureR4/4, (iii) Graduate Record Examination (GRE) AnnexureR4/5, (iv) Law School Admission Test (LSAT), AnnexureR4/6 () Medical College Admission Test (MCAT) AnnexureR4/7, etc. Prometric Testing Pvt. Ltd./ETS**

22. It has been further contended that the respondent No.3 Prometric Testing Pvt. Ltd. is a subsidiary of Educational Testing Service, founded in 1947 and the world's largest private non-profit educational testing and assessment organisation. The respondent No.2 was selected for carrying out the CAT 2013 examination by a specially-constituted Committee of the experts, the composition of the same has been enclosed as ANX.P/8..

23. It has been further contended that the respondent No.3 has long experience as well as an infrastructural set up for conducting similar examinations world-side. Its holding company Educational Testing Service has had a vital role in developing the theoretical framework for modern techniques of ability-evaluation including the Item Response Theory. An internet excerpt providing information about the respondent No.3 and its holding company is on record as AnnexureR-4/8.

24. The respondents have further stated that they have adopted the method of testing described above with the sole object of creating a more accurate, reliable and sophisticated testing system for admissions to the Indian Institutes of Management and other institutes. Its bona fide and reasonable decision ought not be overturned and substituted by an order to all the Indian Institutes of Management in India to apply only "raw scores" for the purpose of admissions to the Indian Institutes of Management. It has been further stated in the reply that raw scores cannot reflect the true ability of a candidate in a multiple testing window examination such as CAT 2013. Apart from being contrary to principles of academic independence, such a step will be seriously

detrimental to the interests of meritorious students and will unjustly affect numerous candidates of very high caliber, who have already gained admission to the Indian Institutes of Management on the strength of merit. The respondents have prayed that the present writ petition be dismissed, with costs.

25. A rejoinder has been filed by the petitioners and it has been stated that the respondent No.4 has not disclosed as to how the respondents have applied the Item Response Theory to raw-marks of the CAT 2013 aspirants. It has been stated that until and unless the respondents disclose the manner and method of their own application of Item Response Theory while calculating the CAT score, its correctness cannot be judged. It has also been stated that tabulation sheet has not been furnished in respect of scale and actual marks. It has also been stated that the respondents cannot compare various other examinations with the CAT Examination as done by them. The petitioner has placed heavy reliance upon a judgment delivered by the Apex Court in the case of *Sanjay Singh and Anr. Vs. UP,PSC and Anr.* reported in AIR 2007 SC 950. The petitioners have placed heavy emphasis upon the aforesaid judgment and have stated that the respondents should have produced actual marks and should have disclosed methodology before this Court.

26. This Court while hearing the matter has directed the respondents on 21.8.2014 specifically to the respondent No.3 to hand over the raw score to the second respondent in sealed cover. It was also directed by this Court that the respondent No.2 shall file a reply to the rejoinder explaining in detail the process of scoring and the examination. The same has been done and a detailed affidavit has been filed furnishing all minute details in respect of the process adopted by the respondents.

27. Heard the learned counsel for the parties at length and perused the record. The matter is being disposed of at the motion hearing stage with the consent of the parties.

28. In the present case, CAT 2013 and the procedure adopted by the respondents in conducting the process of examination is the subject matter of dispute before this Court. The petitioners are aggrieved by non-disclosure of raw-score and the method and procedure used by the respondents to evaluate the candidate inter-se ability in the CAT 2013, which is conducted for admission to the Indian Institutes of Management and other participating institutions across the country.

29. The Indian Institutes of Management are autonomous institutions independent of each other. They variously use CAT scores in conjunction with other criteria such as written assessment tests, group discussions and interviews. Thus CAT scores are usually used as the primary short-listing criterion for admissions, but they are not the sole or conclusive criterion.

30. The primary submission of the petitioners is that the respondents ought to declare and rely upon only "raw scores" and not "scaled scores" of candidates who had appeared for the CAT 2013 examination. On the other hand, the respondents do not agree that raw scores can be accurately used to evalute candidates appearing in the CAT 2013 examination, due to certain special features inherent in the CAT examination.

31. The material placed before this Court establishes that there are two kinds of examination (A)An examination may consist of a single session, where all the candidates appear on the same day and answer the same examination paper. Thus is called a 'single-from examination'. Raw scores can reliably be used in such traditional examination systems, which are based on what is called the Classical Test Theory (CTT). (B)In contrast, the IIM CAT examination consists of numberous examination sessions, and the candidate has the option to appear in any one of these examination sessions. Moreover, even in a particular examination session, each candidate gets a unique question paper having a different mix of questions. This is called a 'multi-form examination'. All these candidates, appearing in different examination sessions spread over different days, and answering different sets of questions varying in terms of item difficulty, have to be accurately evaluated inter se as if they had all appeared for a single examination with the same question paper. In such an examination, raw scores cannot accurately be used for inter se evaluation, since every candidate will get a set of questions having somewhat different level of difficulty. In order to bring all the candidates at par and to enhance sensitivity of the results while computing the CAT scores on a linear scale, the respondents apply to the raw scores a process of equating and scaling, using highly sophisticated mathematical modelling based on the **Item Response Theory (IRT).**

32. In Item Response Theory, each question is treated as the primary unit of evaluation and is called an "item'. The particular examination paper that a candidate may be required to answer, having a unique mix of questions (items)

is called as "form".

33. The CAT examination is divided into two sections of thirty questions ("items"0- (i) Quantitative Ability and Data Interpretation (QA & DI) and (ii) Verbal Ability and Logical Reasoning (VA & LR), each section carrying 225 marks, aggregating 450 marks. The two sections evaluate the candidates in two distinct sets of knowledge and skills; the two sections from mutually-exclusive compartments, and the scores do not correlate across the sections. Contrary to the suggestion made in the writ petition, a high score in one section may not entail a high score in the other section.

34. The facts on record reveal that respondents have a large item bank from which questions (items) are drawn. In each examination session, 60% or 18 out of 30 questions are the same, but in each candidate's test from they are shuffled in a randomly-generated sequence. In other words, question No.2 for one candidate may be question No.17 for another candidate appearing in the same session. 40% or 12 out of 30 items are different for each candidate in the same session, generated by the computer from the item bank 'Liner On the Fly Testing' (LOFT). This process drastically reduces the likelihood of candidates using unfair means.

35. The IIM CAT 2013 examination was conducted for 19 ½ days with 39 sessions. Each candidate even in the same examination session had a unique computerized test from (question paper).

36. Application of the Item Response Theory :-

Under this head, the respondents have furnished simplified illustrative examples to explain the application of the Item Response Theory. The relevant extraction of the explanatory note filed by the respondent No.4 from para 9 onwards reads as under :-

> "(a)The actual scoring is highly complex, subtle and can only be performed using advanced computerized mathematical applications.
>
> Let us say that there are 5 candidates and 5 items i.e. questions. Further these 5 candidates have attempted the 5 items in the following manner: 1 is used for right answer and 0 is used for wrong answer. This may be arranged in the form of Table 1 below:

Table 1

5 X 5 Candidate by Item Matrix						
	Item 1	Item 2	Item 3	Item 4	Item 5	Index for Candidate's Raw Score
Candidate 1	1	1	1	1	1	1
Candidate 2	0	1	1	1	1	0.8
Candidate 3	0	0	1	1	1	0.6
Candidate 4	0	0	0	1	1	0.4
Candidate 5	0	0	0	0	1	0.2
Index for Item Difficulty	0.8	0.6	0.4	0.2	0	

(b) From the above, candidate 1, who has answered all the questions correctly, tentatively can be considered having 100% raw score (or index of 1). Similarly, candidate 2 has a raw score index of 80%, candidate 3 has a raw score index of 60% etc.

Item 1 seems to be the most difficult because only 1 person out of 5 could answer it correctly. It is tentatively asserted that the difficulty level in terms of the failure rate for Item 1 is 0.8, meaning 80% of students were unable to answer the item correctly. In other words, the item is so difficult that it can "beat" 80% of students. The difficulty level for Item 2 is 60% Item 3 is 40% etc. Please note that for person proficiency we will count the number of successful answers, but for item difficulty we will count the number of failures.

(c) As we can observe, we cannot judge a person's ability merely based on the number of correct items he or she obtained. For more accurate inter se evaluation, the item difficulty, as observed above, should also be taken into account. In this highly simplified example, no examinees have the same raw scores. But what would happen if there is an examinee, say

candidate 6, whose raw score is the same as that of candidate 4 ? See Table 2 below.

Table 2

Two Persons Sharing the Same Raw Score						
Candidate 4	0	0	0	1	1	0.4
Candidate 5	0	0	0	0	1	0.2
Candidate 6	1	1	0	0	0	0.4

(d) In the above illustration, we cannot draw a firm conclusion that Candidate 4 and Candidate 6, though having the same raw score, have the same level of proficiency. That is because candidate 4 answered two 'easy' items correctly, whereas candidate 6 scored the same marks in two difficult questions instead. Thus, in this case, the raw scores do not accurately reveal the candidate's true proficiency.

(e) This issue will be further complicated when some items have the same difficulty index but are correctly attempted by candidates of different levels of proficiency. See Table 3 below

Table 3

5 X 5 Candidate by Item Matrix							
	Item 1	Item 2	Item 3	Item 4	Item 5	Item 6	Index for Candidate's Raw Score
Candidate 1	1	1	1	1	1	0	0.83
Candidate 2	0	1	1	1	1	0	0.67
Candidate 3	0	0	1	1	1	0	0.5
Candidate 4	0	0	0	1	1	0	0.33
Candidate 5	0	0	0	0	1	0	0.33
Index for Item Difficulty	0.8	0.6	0.4	0.2	0	0.8	

(f) In Table 3, Item 1 and Item 6 appear to have the same difficulty level. However, Item 1 was answered correctly by a person who has high proficiency (83%) whereas Item 6 was not (the person who answered it has 33% proficiency). It is possible that the text in Item 6 tends to confuse good candidates. In other words, that item does not have a good "discriminative value" or the ability to distinguish and set apart a good candidate from one who is not so good. The weight to be assigned to such question should not be the same as that attached to a question having high discriminative value, and the item may even be required to be removed from the evaluation process and not taken into reckoning.

(g) 'Equating' is the process by which these difficulties are solved, by assigning an adjusted value to each item, so as to bring each item at par with every other item, so that scores over diverse items or item forms can be meaningfully used to compare results. 'Scaling' is the process by which these scores are placed on a common scale or metric using linear transformation.

(h) The actual process of equating and scaling in the CAT 2013 examination involved extremely complex mathematical operations carried out on the entire examination database, using highly sophisticated computers. Contrary to the expectations of the petitioners, it cannot practicably be demonstrated manually, and does not lend itself to simpler explanation, using lay terminology.

Scoring

Thus the scoring process for CAT 2013 is outlined below:

Step 1: Raw score is calculated

The candidate's raw score is calculated for each section based on the number of questions answered correctly (+3 points), incorrectly (-1 point) or left unanswered (0 point).

Step 2 : Raw score is equated

Equating, as stated above, is the statistical process used

to adjust values of diverse items or forms of an assessment so that the scores may be used interchangeably.

Step 3: Equated raw score is scaled

In order to ensure appropriate interpretation of an equated raw score, the scores are placed on a common scale or metric. A linear transformation is used for this scaling process.

IIM Scaling Model

Section scores = 0 to 225

Total exam score = 0 to 450.

(i) Three scaled scores are presented to each candidate – an Over-all scaled score and two separate scaled scores for each section, i.e. (I) Quantitative Ability and Data Interpretation (QA & DI) and (ii) Verbal Ability and Logical Reasoning (VA & LR).

(j) Once scaled scores are established, the final step in the scoring process is to rank candidates according to their inter se performance. A percentile rank is the percentage of scores that fall below a given score. With the total scaled scores arranged in a rank order from the lowest to the highest, in 100 equally-sized groups, a table with the total scaled sores to percentile ranks will be created, allowing for the identification and selection of candidates from the highest performers at the very top of the list.

(k) The entire process is performed by computers using highly complex mathematical applications and there is no human intervention in the evaluation. The Item Response Theory is an established statistical method for comparing education testing scores and has been used internationally for decades in examinations such as SAT, GRE, GMAT, TOFT, LSAT, etc. From the above examples, it will be clear that the Item Response Theory has rightly been used for equating and scaling the scores of candidates in the CAT 2013 examination, and

the writ petition deserves to be dismissed, with cost for the answering respondents.

37. Learned Sr. Counsel for the petitioners has placed heavy reliance upon a judgment delivered by the Apex Court in the case of *Sanjay Singh* (supra) and his contention is that in light of the aforesaid judgment the respondents are required to disclose the raw-marks obtained by the candidates in the examination. Heavy reliance has been placed upon in pargraphs 35, 36, 37, 41 and 43 of the aforesaid judgment, which reads as under :-

> **"35.** The illustrations given above with reference to the 2003 examinations clearly demonstrate the arbitrariness and irrationality of scaling, particularly in cases falling at the two ends of the spectrum. We, therefore, hold that scaling system as adopted by the Commission is unsuited for the Civil Judge (Junior Division) Examination.
>
> **36.** We may now summarise the position regarding scaling thus:
>
> *(i)* Only certain situations warrant adoption of scaling techniques.
>
> *(ii)* There are number of methods of statistical scaling, some simple and some complex. Each method or system has its merits and demerits and can be adopted only under certain conditions or making certain assumptions.
>
> *(iii)* Scaling will be useful and effective only if the distribution of marks in the batch of answer-scripts sent to each examiner is approximately the same as the distribution of marks in the batch of answer-scripts sent to every other examiner.
>
> *(iv)* In the linear standard method, there is no guarantee that the range of scores at various levels will yield candidates of comparative ability.
>
> *(v)* Any scaling method should be under continuous review and evaluation and improvement, if it is to be a reliable tool in the selection process.
>
> *(vi)* Scaling may, to a limited extent, be successful in eliminating the general variation which exists from examiner to examiner,

but not a solution to solve examiner variability arising from the "hawkdove" effect (strict/liberal valuation).

The material placed does not disclose that the Commission or its expert committee have kept these factors in view in determining the system of scaling. We have already demonstrated the anomalies/absurdities arising from the scaling system used. The Commission will have to identify a suitable system of evaluation, if necessary by appointing another committee of experts. Till such new system is in place, the Commission may follow the moderation system set out in para 23 above with appropriate modifications.

37 We may now refer to the decision of this Court in *S.C. Dixit1*. The validity of scaling was considered in paras 31 to 33 of the judgment extracted below: (SCC p. 716)

"31. There is a vast percentage difference in awarding of marks between each set of examiners and this was sought to be minimised by applying the scaling formula. If scaling method had not been used, only those candidates whose answer-sheets were examined by liberal examiners alone would get selected and the candidates whose answer-sheets were examined by strict examiners would be completely excluded, though the standard of their answers may be to some extent similar. The scaling system was adopted with a view to eliminate the inconsistency in the marking standards of the examiners. The counsel for the respondents could not demonstrate that the adoption of scaling system has in any way caused injustice to any meritorious candidate. If any candidate had secured higher marks in the written examination, even by applying the scaling formula, he would still be benefitted.

32. The Division Bench of the High Court observed that the process of scaling was done examinerwise only and the scaling formula did not take into consideration the average of mean of all the candidates in one particular paper but took the mean of only that group of candidates which has been examined by one single examiner. The counsel for U.P. PSC submitted that

the observation made by the High Court is incorrect. The scaling formula was adopted to remove the disparity in the evaluation of 14 examiners who participated in the evaluation of answer-sheets and the details have also been furnished as to how the scaling formula was adopted and applied. Therefore, we do not think that the observation of the Division Bench that the Commission did not take care of varying standards which may have been applied by different examiners but has sought to reduce the variation of the marks awarded by the same examiner to different candidates whose answer-sheets had been examined, is correct. The Division Bench was of the view that as a result of scaling, the marks of the candidates who had secured zero marks were enhanced to 18 and this was illegal and thus affected the selection process. This finding is to be understood to mean as to how the scaling system was applied. 18 marks were given notionally to a candidate who secured zero marks so as to indicate the variation in marks secured by the candidates and to fix the mean marks.

33. In that view of the matter, we do not think that the application of scaling formula to the examinations in question was either arbitrary or illegal. The selection of the candidates was done in a better way. Moreover, this formula was adopted by U.P. PSC after an expert study and in such matters, the court cannot sit in judgment and interfere with the same unless it is proved that it was an arbitrary and unreasonable exercise of power and the selection itself was done contrary to the Rules. Ultimately, the agency conducting the examination has to consider as to which method should be preferred and adopted having regard to the myriad situations that may arise before them."

S.C. Dixit[1], therefore, upheld scaling on two conclusions, namely, *(i)* that the scaling formula was adopted by the Commission after an expert study and in such matters, the Court will not interfere unless it is proved to be arbitrary and unreasonable; and *(ii)* the scaling system adopted by the Commission eliminated the inconsistency arising on account of

examiner variability (differences due to evaluation by strict examiners and liberal examiners). As scaling was a recognised method to bring raw marks in different subjects to a common scale and as the Commission submitted that they introduced scaling after a scientific study by experts, this Court apparently did not want to interfere. This Court was also being conscious that any new method, when introduced, required corrections and adjustments from time to time and should not be rejected at the threshold as unworkable. But we have found after an examination of the manner in which scaling system has been introduced and the effect thereof on the present examination, that the system is not suitable. We have also concluded that there was no proper or adequate study before introduction of scaling and the scaling system which is primarily intended for preparing a common merit list in regard to candidates who take examinations in different optional subjects, has been inappropriately and mechanically applied to a situation where the need is to eliminate examiner variability on account of strict/ liberal valuation. We have found that the scaling system adopted by the Commission leads to irrational results, and does not offer a solution for examiner variability arising from strict/liberal examiners. Therefore, it can be said that neither of the two assumptions made in *S.C. Dixit*[1] can validly continue to apply to the type of examination with which we are concerned. We are therefore of the view that the approval of the scaling system in *S.C. Dixit*[1] is no longer valid.

41. The petitioners have requested that their petitions should be treated as being in public interest and the entire selection process in regard to Civil Judge (Junior Division) Examination, 2003 should be set aside. We are unable to accept the said contention. What has been made out is certain inherent defects of a particular scaling system when applied to the selection process of the Civil Judges (Junior Division) where the problem is one of examiner variability (strict/liberal examiners). Neither mala fides nor any other irregularities in the process of selection are made out. The Commission has acted bona fide in proceeding with the selection and neither the High Court nor

the State Government had any grievance in regard to selections. In fact, the scaling system applied had the seal of approval of this Court in regard to the previous selection in *S. C. Dixit*[1]. The selected candidates have also been appointed and functioning as Judicial Officers. Further as noticed above, the scaling system adopted by the Commission has led to irrational and arbitrary results only in cases falling at the ends of the spectrum, and by and large did not affect the major portion of the selection. We, therefore, direct that our decision holding that the scaling system adopted by the Commission is unsuited in regard to Civil Judge (Junior Division) Examination and directing moderation, will be prospective in its application and will not affect the selections and appointments already made in pursuance of the 2003 examination.

43. The petitions are allowed in part accordingly."

38. On the other hand, respondents have placed reliance upon a judgment delivered in the case of *University Grant Commission Vs. Neha Anil Bobde* [(2013) 10 SCC 519]. Para 30 and 31 of the aforesaid judgment read as under :-

30. We are of the considered view that the candidates were not misled in any manner. Much emphasis has been made on the words declaring the National Eligibility Test". "Clearing" means clearing the final results, not merely passing in Paper I, Paper II and Paper III, which is only the initial step, not final. To clear the NET Examination, as already indicated, the candidate should satisfy the final qualifying criteria laid down by the UGC before declaration of the results.

31. We are of the view that, in academic matters, unless there is a clear violation of statutory provisions, the Regulations or the Notification issued, the Courts shall keep their hands off since those issues fall within the domain of the experts. This Court in *University of Mysore vs. C.D. Govinda Rao,* AIR 1965 SC 491, *Tariq Islam vs. Aligarh Muslim University* (2001) 8 SCC 546 and *Rajbir Singh Dalal vs. Chaudhary Devi Lal University* (2008) 9 SCC 284, has taken the view

that the Court shall not generally sit in appeal over the opinion expressed by expert academic bodies and normally it is wise and safe for the Courts to leave the decision of academic experts who are more familiar with the problem they face, than the Courts generally are. UGC as an expert body has been entrusted with the duty to take steps as it may think fit for the determination and maintenance of standards of teaching, examination and research in the University. For attaining the said standards, it is open to the UGC to lay down any "qualifying criteria", which has a rational nexus to the object to be achieved, that is for maintenance of standards of teaching, examination and research. Candidates declared eligible for lectureship may be considered for appointment as Assistant Professors in Universities and colleges and the standard of such a teaching faculty has a direct nexus with the maintenance of standards of education to be imparted to the students of the universities and colleges. UGC has only implemented the opinion of the Experts by laying down the qualifying criteria, which cannot be considered as arbitrary, illegal or discriminatory or violative of Article 14 of the Constitution of India.

The contention of the respondents is that in light of the aforesaid judgment until and unless there is a clear violation of statutory provisions of law or regulation, question of judicial interference in the academic matter is not warranted. The respondents have placed reliance upon a judgment delivered in the case of *Sajeesh Babu K. Vs. N.K. Santhosh* [(2012) 12 SCC 106] and the respondents have placed heavy emphasis on paragraph 19 and 20, which reads as under:-

19 .In the High Court as well as in this Court, the University filed affidavit stating that the Expert Committee consisting of highly qualified 5 distinguished experts evaluated the qualification, experience and the published works of the appellants and found them eligible and suitable. In such circumstance, this Court observed in paragraph Nos. 20 & 21 as under:

20. It is abundantly clear from the affidavit filed by the

University that the Expert Committee had carefully examined and scrutinised the qualification, experience and published work of the appellants before selecting them for the posts of Readers in Sericulture. In our considered opinion, the Division Bench was not justified in sitting in appeal over the unanimous recommendations of the Expert Committee consisting of five experts. The Expert Committee had in fact scrutinised the merits and demerits of each candidate including qualification and the equivalent published work and its recommendations were sent to the University for appointment which were accepted by the University."

21. It is the settled legal position that the courts have to show deference and consideration to the recommendation of an Expert Committee consisting of distinguished experts in the field. In the instant case, the experts had evaluated the qualification, experience and published work of the appellants and thereafter recommendations for their appointments were made. The Division Bench of the High Court ought not to have sat as an appellate court on the recommendations made by the country's leading experts in the field of Sericulture.

20) It is clear that in a matter of appointment/selection by an Expert Committee/Board consisting of qualified persons in the particular field, normally, the Courts should be slow to interfere with the opinions expressed by the experts, unless there is any allegation of mala fides against the experts who had constituted the Selection Committee. Admittedly, in the case on hand, there is no allegation of mala fides against the 3 experts in the Selection Committee. In such circumstances, we are of the view that it would normally be wise and safe for the courts to leave the decision of selection of this nature to the experts who are more familiar with the technicalities/nature of the work. In the case on hand, the Expert Committee evaluated the experience certificates produced by the appellant herein, interviewed him by putting specific questions as to direct sale, home delivered products, hospitality/service industry etc. and awarded marks. In such circumstances, we hold that the High Court ought not to have sat as an appellate Court on the

recommendations made by the Expert Committee."

Contention of the respondents is that judicial review or interference in selection process in absence of malafide is not permitted.

39. The respondents have also placed reliance upon a judgment delivered in the case of *Sanchit Bansal Vs. Joint Admission Board* [(2012) 1 SCC 157] and heavy reliance has been placed upon paragraphs 17 to 33, 38 and 39 and once again the Apex Court dealing with IIT and JEE examination has held that the complicated procedure followed in selection does not render the said procedure arbitrary, unreasonable or discriminatory.

40. The respondents have placed reliance upon another judgment delivered in the case of *State of Himachal Pradesh Vs. Himachal Pradesh Nizi Vyavsayik Parishikshan Kendra Sangh* [(2011) 6 SCC 597] and the paragraphs 20 & 23 of the aforesaid judgment reads as under :-

> "20.It is seen that the Cabinet considered the proposal of the State Council for Vocational Training and after deliberation, the decision has been taken to continue various courses under SCVT except for the courses at Sl. No. 1 (Art and Craft), Sl. No. 4 (Library Science) and Sl. No. 7 (PTI). Though in the supplementary affidavit, the State has not highlighted the reason for discontinuing the three courses in the State of Himachal Pradesh, the High Court presumed that the State is precluded from taking fresh/revised policy in the matter of imparting technical education. In fact, in the said decision, the State has not barred all the institutions from continuing the courses already notified under SCVT. The Cabinet decided to discontinue only three courses. Inasmuch as the said Cabinet decision dated 18.07.2009 not being the subject matter or issue of the writ petition, the State was not in a position to highlight all the details before the Court. Accordingly, we are satisfied that the High Court was not justified in interfering with the Cabinet decision dated 18.07.2009 which was not the issue or challenge in the writ petition. We are also unable to accept the conclusion of the High Court that the petitioner's association (respondent herein) is entitled to run all the courses under the principle of 'legitimate expectation'.

23.Under these circumstances, the impugned order of theHigh Court quashing the Cabinet decision dated 18.07.2009 and issuing various directions including awarding cost of Rs.25,000/- in favour of the respondent-association are set aside. As observed earlier, the respondent's association or its members are free to challenge the order of the Government in the High Court by way of an appropriate writ by projecting valid grounds, if any. In such event, the State Government is equally entitled to highlight its policy, need for the change, and demand of the society insofar as courses prescribed under SCVTs are concerned With the above observations, the civil appeal is allowed with no order as to costs"

The contention of the respondents is that a policy decision can be interfered with only if it is against the constitutional mandate.

41. The respondents have also placed reliance upon another judgment delivered in the case of *Vishvesswaraih Technological University Vs. Krishnendu Halder* [(2011) 4 SCC 606] and the paragraphs 14, 15, 16 and 17 of the aforesaid judgment reads as under :-

"14. The respondents (colleges and the students) submitted that in that particular year (2007-2008) nearly 5000 engineering seats remained unfilled. They contended that whenever a large number of seats remained unfilled, on account of non-availability of adequate candidates, para 41(v) and (vi) of Adhiyaman would come into play and automatically the lower minimum standards prescribed by AICTE alone would apply. This contention is liable to be rejected in view of the principles laid down in the Constitution Bench decision in *Dr. Preeti Srivastava* and the decision of the larger Bench in *S.V. Bratheep* which explains the observations in Adhiyaman in the correct perspective. We summarise below the position, emerging from these decisions :

(i) While prescribing the eligibility criteria for admission to institutions of higher education, the State/University cannot adversely affect the standards laid down by the Central Body/ AICTE. The term `adversely affect the standards' refers to lowering of the norms laid down by Central Body/AICTE.

Prescribing higher standards for admission by laying down qualifications in addition to or higher than those prescribed by AICTE, consistent with the object of promoting higher standards and excellence in higher education, will not be considered as adversely affecting the standards laid down by the Central Body/AICTE.

(ii) The observation in para 41(vi) of Adhiyaman to the effect that where seats remain unfilled, the state authorities cannot deny admission to any student satisfying the minimum standards laid down by AICTE, even though he is not qualified according to its standards, is not good law.

(iii) The fact that there are unfilled seats in a particular year, does not mean that in that year, the eligibility criteria fixed by the State/University would cease to apply or that the minimum eligibility criteria suggested by AICTE alone would apply. Unless and until the State or the University chooses to modify the eligibility criteria fixed by them, they will continue to apply in spite of the fact that there are vacancies or unfilled seats in any year. The main object of prescribing eligibility criteria is not to ensure that all seats are in colleges are filled, but to ensure that excellence in standards of higher education is maintained.

(iv) The State/University (as also AICTE) should periodically (at such intervals as they deem fit) review the prescription of eligibility criteria for admissions, keeping in balance, the need to maintain excellence and high standard in higher education on the one hand, and the need to maintain a healthy ratio between the total number of seats available in the state and the number of students seeking admission, on the other. If necessary, they may revise the eligibility criteria so as to continue excellence in education and at the same time being realistic about the attainable standards of marks in the qualifying examinations.

15. The primary reason for seats remaining vacant in a state, is the mushrooming of private institutions in higher education. This is so in several states in regard to teachers training

institutions, dental colleges or engineering colleges. The second reason is certain disciplines going out of favour with students because they are considered to be no longer promising or attractive for future career prospects. The third reason is the bad reputation acquired by some institutions due to lack of infrastructure, bad faculty and indifferent teaching. Fixing of higher standards, marginally higher than the minimum, is seldom the reason for seats in some colleges remaining vacant or unfilled during a particular year. Therefore, a student whose marks fall short of the eligibility criteria fixed by the State/ University, or any college which admits such students directly under the management quota, cannot contend that the admission of students found qualified under the criteria fixed by AICTE, should be approved even if they do not fulfil the higher eligibility criteria fixed by the State/University.

16. The proliferating unaided private colleges, may need a full complement of students for their comfortable sustenance (meeting the cost of running the college and paying the staff etc.). But that cannot be at the risk of quality of education. To give an example, if 35% is the minimum passing marks in a qualifying examination, can it be argued by colleges that the minimum passing marks in the qualifying examination should be reduced to only 25 or 20 instead of 35 on the ground that the number of 15 students/candidates who pass the examination are not sufficient to fill their seats? Reducing the standards to 'fill the seats' will be a dangerous trend which will destroy the quality of education. If there are large number of vacancies, the remedy lies in (a) not permitting new colleges; (b) reducing the intake in existing colleges; (c) improving the infrastructure and quality of the institution to attract more students. Be that as it may. The need to fill the seats cannot be permitted to override the need to maintain quality of education. Creeping commercialization of education in the last few years should be a matter of concern for the central bodies, states and universities.

17. No student or college, in the teeth of the existing and

prevalent rules of the State and the University can say that such rules should be ignored, whenever there are unfilled vacancies in colleges. In fact the State/University, may, in spite of vacancies, continue with the higher eligibility criteria to maintain better standards of higher education in the State or in the colleges affiliated to the University. Determination of such standards, being part of the academic policy of the University, are beyond the purview of judicial review, unless it is established that such standards are arbitrary or 'adversely affect' the standards if any fixed by the Central Body 16 under a Central enactment. The order of the Division Bench is therefore unsustainable."

The contention of the respondents is that the academic policy is beyond the purview of judicial review.

42. The respondents have placed reliance upon another judgment delivered in the case of *Basavaiah (Dr.) Vs. Dr. H.L. Ramesh & Ors.*[(2010) 8 SCC 372] and the paragraphs 20, 21 and 22 of the aforesaid judgment reads as under :-

"20. It is abundantly clear from the affidavit filed by the University that the Expert Committee had carefully examined and scrutinized the qualification, experience and published 13 work of the appellants before selecting them for the posts of Readers in Sericulture. In our considered opinion, the Division Bench was not justified in sitting in appeal over the unanimous recommendations of the Expert Committee consisting of five experts. The Expert Committee had in fact scrutinized the merits and de-merits of each candidate including qualification and the equivalent published work and its recommendations were sent to the University for appointment which were accepted by the University.

21. It is the settled legal position that the courts have to show deference and consideration to the recommendation of an Expert Committee consisting of distinguished experts in the field. In the instant case, experts had evaluated the qualification, experience and published work of the appellants and thereafter recommendations for their appointments were made. The

> Division Bench of the High Court ought not to have sat as an appellate court on the recommendations made by the country's leading experts in the field of Sericulture.
>
> 22. A similar controversy arose about 45 years ago regarding appointment of Anniah Gowda to the post of Research Reader in English in the Central College, Bangalore, in the case of *The University of Mysore and Anr. v. C.D. Govinda Rao and Anr.* AIR 1965 SC 491, in which the Constitution Bench unanimously held that normally the Courts should be slow to interfere with the opinions expressed by the experts particularly in a case when there is no allegation of mala fides against the experts who had constituted the Selection Board. The court further observed that it would normally be wise and safe for the courts to leave the decisions of academic matters to the experts who are more familiar with the problems they face than the courts generally can be"

The contention of the respondents is that the Courts should not endeavour to sit in appeal over decisions of experts and the review of expert committee not justified.

43. The respondents have placed reliance upon another judgment delivered in the case of *All India Council for Technical Education Vs. Surinder Kumar Dhawan* [(2009) 11 SCC 726] and the paragraphs 14, 15, 16, 17, 18, 22, 23, 31 and 32 of the aforesaid judgment reads as under :-

> "14. There is considerable force in the submission of the appellant. Having regard to clauses (i) and (k) of section 10 of the All India Council for Technical Education Act, 1987 ['Act' for short], it is the function of the AICTE to consider and grant approval for introduction of any new course or programme in consultation with the agencies concerned, and to lay down the norms and standards for any course including curricula, instructions, assessment and examinations.
>
> 15.The decision whether a bridge course should be permitted as a programme for enabling diploma holders to secure engineering degree, and if permitted, what should be the norms and standards in regard to entry qualification, content of course

instructions and manner of assessing the performance by examinations, are all decisions in academic matters of technical nature. AICTE consists of professional and technical experts in the field of education qualified and equipped to decide on those issues. In fact, a statutory duty is cast on them to decide these matters.

16.The courts are neither equipped nor have the academic or technical background to substitute themselves in place of statutory professional technical bodies and take decisions in academic matters involving standards and quality of technical education. If the courts start entertaining petitions from individual institutions or students to permit courses of their choice, either for their convenience or to alleviate hardship or to provide better opportunities, or because they think that one course is equal to another, without realizing the repercussions on the field of technical education in general, it will lead to chaos in education and deterioration in standards of education.

17. The role of statutory expert bodies on education and role of courts are well defined by a simple rule. If it is a question of educational policy or an issue involving academic matter, the courts keep their hands off. If any provision of law or principle of law has to be interpreted, applied or enforced, with reference to or connected with education, courts will step in. In *Dr. J.P.Kulshreshtha v. Chancellor, Allahabad University* [1980 (3) SCC 418] this Court observed :

"Judges must not rush in where even educationists fear to tread... While there is no absolute bar, it is a rule of prudence that courts should hesitate to dislodge decisions of academic bodies."

18. In *Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth* [1984 (4) SCC 27] this court reiterated :

".....the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by

professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them."

22. The decision of AICTE not to permit bridge courses for diploma holders and its decision not to permit those who have passed 10+1 examinations (instead of 10+2 examination) to take the bridge course, relate to technical education policy which fall within their exclusive jurisdiction.

23. Courts will not interfere in matters of policy. This Court in *Directorate of Film Festivals v. Gaurav Ashwin Jain* [2007 (4) SCC 737] pointed out:

"Courts do not and cannot act as Appellate Authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary. Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review."

The above observations will apply with added vigour to the field of education.

31. These being educational issues, they cannot be interfered, merely because the court thought otherwise. If the AICTE was of the view that only those diploma holders with 10+2 (with PCM subjects) should be permitted to upgrade their qualification by an ad hoc bridge course or that such bridge course should not be a regular or permanent feature, there is no reason to interfere with such a decision. The courts cannot be their orders create courses, nor permit continuance of courses which were not created in accordance with law, or

lower the minimum qualifications prescribed for admissions. The High Court's decision to permit candidates who have completed 10+1 plus four years post diploma course to take the bridge course, cannot be sustained.

32. This is a classic case where an educational course has been created and continued merely by the fiat of the court, without any prior statutory or academic evaluation or assessment or acceptance. Granting approval for a new course or programme requires examination of various academic/ technical facets which can only be done by an expert body like AICTE. This function cannot obviously be taken over or discharged by courts. In this case, for example, by a mandamus of the court, a bridge course was permitted for four year Advance Diploma holders who had passed the entry level examination of 10+2 with PCM subjects. Thereafter, by another mandamus in another case, what was a one time measure was extended for several years and was also extended to Post Diploma holders. Again by another mandamus, it was extended to those who had passed only 10+1 examination instead of the required minimum of 10+2 examination. Each direction was obviously intended to give relief to students who wanted to better their career prospects, purely as an ad hoc measure. But together they lead to an unintended dilution of educational standards, adversely affecting the standards and quality of engineering degree courses. Courts should guard against such forays in the field of education.

The contention of the respondents is that the Courts cannot be substituted in place of technical bodies. Courts cannot interfere with policy.

44. The respondents have placed reliance upon another judgment delivered in the case of *Guru Nanak Dev University Vs. Sanjay Kumar Katwal* [(2009) 1 SCC 610] and the paragraphs 15 & 16 of the aforesaid judgment reads as under :-

"15. The first respondent has passed his M.A. (OUS) from Annamalai University through distance education. Equivalence is a technical academic matter. It cannot be implied or assumed. Any decision of the academic body of the university relating

to equivalence should be by a specific order or resolution, duly published. The first respondent has not been able to produce any document to show that appellant university has recognized the M.A. English (OUS) of Annamalai University through distance education as equivalent to M.A. of appellant university. Thus it has to be held that first respondent does not fulfil the eligibility criterion of the appellant university for admission to three year law course.

16. The first respondent made a faint attempt to contend that the distance education system includes `correspondence courses' and therefore recognition of M.A. (correspondence course) as equivalent to M.A. course of appellant University, would amount to recognition of M.A. - OUS (distance education) course, as an equivalent. For this purpose, he relied upon the definition of "distance education system" in section 2(e) of Indira Gandhi National Open University Act, 1985. But there is nothing to show that Annamalai University has treated correspondence course and OUS (distance education) course as the same. What is more important is that the appellant university does not wish to treat correspondence course and Distance Education Course as being the same. That is a matter of policy. Courts will not interfere with the said policy relating to an academic matter."

The contention of the respondents is that the Courts cannot interfere with the policy relating to an academic matter.

45. The respondents have placed reliance upon another judgment delivered in the case of *National Board of Examination Vs. Anand Ramamurthy* [(2006) 5 SCC 515] wherein the Supreme Court has held that there should not be an interference in the academic matters and the paragraphs 7 & 9 of the aforesaid judgment reads as under :-

"7. We have carefully considered the submissions made by both the learned Senior Counsel. In our opinion, the High Court was not justified in directing the petitioner to hold examinations against its policy in complete disregard to the mandate of this Court for not interfering in the academic matters particularly

when the interference in the facts of the instant matter lead to perversity and promotion of illegality. The High Court was also not justified in exercising its power under Article 226 of the Constitution of India to merge a past practice with decision of the petitioner impugned before it to give relief to the respondents herein. Likewise the High Court was not correct in applying the doctrine of legitimate expectation even when the respondents herein cannot be said to be aggrieved by the decision of the petitioner herein. The High Court was also not justified in granting a relief not sought for by the respondents in the writ petition. The prayer of the respondents in the writ petition was to seek a direction to the petitioner herein to hold the examinations as per the schedule mentioned in the Bulletin of 2003. However, the High Court passed an order directing the petitioner herein to hold the examinations for the respondents according to the schedule mentioned in the Bulletin of 2003. The effect of this order is that the petitioner would have to permit the respondents to take the exam even if they do not meet the eligibility criteria fixed by the petitioner in its policy of 2003. Our attention was also drawn to the Bulletin of Information of 2003. In view of categorical and explicit disclosures made in the Bulletin, all candidates were made aware that instructions contained in the Information Bulletin including but not limited to examination schedule were liable to changes based on decisions taken by the Board of the petitioner from time to time. In the said Bulletin of Information, candidates are requested to refer to the latest bulletin or corrigendum that may be issued to incorporate these changes. Thus, it is seen that the petitioner has categorically reserved its rights in the Bulletin of Information to change instructions as aforesaid which would encompass and include all instructions relating to schedule of examinations. It is also mentioned in the Bulletin in no unascertain terms that the instructions contained in the Bulletin including the schedule of examinations were liable to changes based on the decisions taken by the Governing Body of the petitioner from time to time. Hitherto Examinations were being conducted twice a year

i.e. in the months of June and December, 2006. There could be no embargo in the way of the petitioner bonafidely changing the Examination Schedule, more so when it had admittedly and categorically reserved its rights to do so to the notice and information of the respondent nos.1 and 2. In any event, the completion of three years training is a necessary concomitant for appearing in the DNB final examination.

9. No malafide has been alleged against the petitioner in the writ petition. The Governing Body of the petitioner in the larger interest of the candidates as well as of the petitioner, and medical education in general, has decided to change the current practice of conducting the examination on binnual basis for all the desciplines of modern medicine with the revised policy to conduct the binnual examination only in those streams where number of candidates is more than 100, from June 2006 onwards to curtail its expenditure. The above policy decision, in our opinion, cannot at all be faulted with.

46. The respondents have placed reliance upon another judgment delivered in the case of *Aruna Roy Vs. Union of India* [(2002) 7 SCC 368] and the paragraphs 96 and 97 of the aforesaid judgment reads as under :-

"96.As pointed out by learned counsel on behalf of petitioners, if there are certain offending portions in the curriculum, which are not historically correct or has a tendency to misrepresent, suppress or project a wrong information, they can be removed. The learned Solicitor General on behalf of the Union of India and the counsel appearing for NCERT have very candidly stated that if those portions are identified, there would be no objection to the Government to consider their deletion from the curriculum. It has been emphatically stated that the object of introducing 'study of religions' in the education from primary stage is to ensure all round development of a child and with the object that he grows as citizen with respect for constitutional values. As has been stated by us above, while dealing with the first point, that a National Policy of school education having effect and implications upon children of whole of India should

be prepared after careful and thoughtful deliberations. Learned Solicitor General stated that NCERT before finalising the curriculum has not only held symposiums, conferences, talks and debates, but also elicited opinions not only of members of NCERT, but also ex-officio members of CABE. It is stated that although a formal meeting of the members of CABE could not be called for seeking their advice, but each one of them individually was sent a copy of curriculum to elicit their views for and against it. It is after long deliberations, discussions and exchange of views that the curriculum has been finalised. It is submitted that any restraint puts on introduction of curriculum could harm the interest of the students, who have already started their academic session and a very large quantity of text books and literatures prepared by NCERT in conformity with the National Curriculum of 2002, would go waste. It is, therefore, stated that this Court should vacate interim order restraining introduction of National Curriculum on certain subjects as mentioned in the Order of this Court dated 1st March, 2002. We have looked into the Constitution and functions of CABE, copy of which has been provided to us. The Constitution and functions of NCERT are also given to us for perusal. From the language employed therein, we find that the functions of the two Bodies are not so clearly delineated as to put them in water tight compartments. In evolving a National Policy on Education and based thereon a curriculum, in accordance with long standing practice, it was desirable to consult CABE although for non-consultation the National Policy and the Curriculum cannot be set aside by the court. In a constitutional democracy, Parliament is supreme and policies have to be framed and approved by the Parliament. Parliament had constituted CABE and NCERT and if CABE has any objection to the National Curriculum nothing prevented it from expressing its opinion accordingly. It is ultimately for the Parliament to take a decision on the National Education Policy one way or the other. It is not the province of the Court to decide on the good or bad points of an Educational Policy. The Court's limited jurisdiction to intervene in implementation

of a policy is only if it is found to be against any statute or the Constitution. We have not found anything in the Educational Policy or the Curriculum which is against the Constitution. We have found no ground to grant any relief as prayed for by the Petitioners. We would, however, direct the Union of India to consider the matter of filling the vacancies in the membership of CABE and convening a meeting of CABE for seeking opinion on the policy and the curriculum.

97. All bodies created by executive power of the State, are answerable to Parliament which is the supreme legislative body with all powers in suggesting and formulating a National Education Policy. It is open to Parliament to fill nominations to CABE, re-constitute it or do away with it. The court can have no jurisdiction in that subject. This court can enforce constitutional provisions and laws framed by the Parliament. It cannot, however, compel that a particular practice or tradition followed in framing and implementing the policy, must be adhered to. The court has to keep in mind the above limitations on its jurisdiction and power. It is true that if a policy framed in the field of education or other fields runs counter to the constitutional provisions or the philosophy behind those provisions, this court must, as part of its constitutional duty, interdict such policy.

The contention of the respondents is that the educational policy is not province of courts. The courts must keep in mind its limitations.

47. The respondents have placed reliance upon another judgment delivered in the case of *State of Rajasthan Vs. Lata Arun* [(2002) 6 SCC 252] and the paragraph 13 of the aforesaid judgment reads as under :-

"13. From the ratio of the decisions noted above it is clear that the prescribed eligibility qualification for admission to a course or for recruitment to or promotion in service are matters to be considered by the appropriate authority. it is not for courts to decide whether a particular educational qualification should or should not be accepted as equivalent to the qualification prescribed by the authority."

The contention of the respondents is that the courts are not supposed to decide the educational qualifications in respect of a particular post and the same has to be looked into by the appropriate authority.

48. The respondents have placed reliance upon another judgment delivered in the case of *Pujab University Vs. Narinder Kumar & Ors.* [(1999) 9 SCC 8] and the paragraphs 10 of the aforesaid judgment reads as under :-

> "8. The first respondent has contended that if the post of a Lecturer in Gandhian Studies is given to a person who has obtained an M.A. degree in other subjects, the opportunities available to those like him, who have a specialisation in Gandhian Studies from M.A. level onwards, get reduced; and this would discourage people from taking a specialisation course in Gandhian Studies at the M.A. level. This argument, however, addresses itself on the policy relating to prescribing qualifications for the various posts. Such a policy has to be formulated by the University in accordance with the norms laid down by the University Grants Commission or any other Expert Body that may have been specified under the relevant statutes. We cannot examine such a policy or reframe it."

The contention of the respondents is that the courts cannot examine a policy or reframe it. It is the job of the expert bodies.

49. The respondents have placed reliance upon another judgment delivered in the case of *English Medium Students Parents Association Vs. State of Karnataka* [(1994) 1 SCC 550] and the paragraphs 23 and 24 of the aforesaid judgment reads as under :-

> **"23.** As rightly contended by the learned Advocate-General where the State by means of the impugned GO desires to bring about academic discipline as a regulatory measure it is a matter of policy. The State knows how best to implement the language policy. It is not for the Court to interfere. In *Hindi Hitrakshak Samiti v. Union of India*[6] this Court laid down as under: (SCR p. 592 : SCC p. 355, para 6)
>
> "It may be that Hindi or other regional languages are more appropriate medium of imparting education to very many and

> it may be appropriate and proper to hold the examinations, entrance or otherwise, in any particular regional or Hindi language, or it may be that Hindi or other regional language because of development of that language, is not yet appropriate medium to transmute or test the knowledge or capacity that could be had in medical and dental disciplines. It is a matter of formulation of policy by the State or educational authorities in charge of any particular situation. Where the existence of a fundamental right has to be established by acceptance of a particular policy or a course of action for which there is no legal compulsion or statutory imperative, and on which there are divergent views, the same cannot be sought to be enforced by Article 32 of the Constitution. Article 32 of the Constitution cannot be a means to indicate policy preference."
>
> 24. In a matter relating to policy this Court should decline to interfere. In the result, we conclude the writ petition is devoid of merits and is accordingly dismissed."

The contention of the respondents is that the academic discipline a matter of policy and the Courts should not interfere with the same.

50. The respondents have placed reliance upon another judgment delivered in the case of *Neelima Misra Vs. Harinder Kaur Paintal* [(1990) 2 SCC 746], wherein it has been held that in the matter of appointment, the courts should not interfere. Paragraph 32 of the aforesaid judgment reads as under:-

> "32.It is not unimportant to point out that in matters of appointment in the academic field the Court generally does not interfere. In the *University of Mysore & Ant. v.C.D. Govind Rao,* [1964] 4 SCR 575, this Court observed that the Courts should be slow to interfere with the opinion expressed by the experts in the absence of mala fide alleged 2against the experts. When appointments based on recommenda- tions of experts nominated by the Universities, the High Court has got only to see whether the appointment had con- travened any statutory or binding rule or ordinance. The High Court should show due regard to the opinion expressed by the experts constituting the Selection Committee and its recommendation on which the Chancellor has acted.

See also the decisions in *Dr. J.P. Kulshreshtha & Ors. v. Chancellor, Allahabad University, Raj Bhavan & Ors.*, [1980] 3 SCR 902 at 912 and *Dalpat Abasahed Solunke v.B.S. Mahajan,* [1990] 1 SCR 305 at 309-310."

51. The respondents have placed reliance upon another judgment delivered in the case of *Hindi Hitrakshak Samiti and Ors. Vs. Union of India & Ors.* [(1990) 2 SCC 352], wherein the writ petition filed for holding examination in a particular language has been dismissed and it has been held that for mode of examination no judicial intervention is permissible. Paragraphs 5 and 9 of the aforesaid judgment reads as under :-

"5 We have examined the matter and have heard Mr. L.M. Singhvi. We are of the opinion that the prayers sought for herein are not such which can be appropriately, properly and legitimately dealt with under Article 32 of the Constitution of India. The contention of the petitioners is, as mentioned hereinbefore, that premedical studies in medical and dental examination should be permitted in Hindi and other regional languages and not in English alone, and the admission to the Institutions should not be refused and/or examinations should not be held in English alone if the examinees or the entrants seek to appear in Hindi or other regional language.

9. In the background of the facts and the circumstances of the case and the nature of controversy that has arisen, we are of the opinion that proper and appropriate remedy in a situation where enforcement of the right depends upon the acceptance of a policy of examination for admission in any particular language to the Institution on that basis, is a matter of policy. Whether in particular facts and the circumstances of this case admission to medical or dental Institution by conducting examination in Hindi or other regional languages would be appropriate or desirable or not, is a matter on which debate is possible and the acceptance of one view over the other involves a policy decision. It cannot be appropriately dealt with by this Court, and order under Article 32 of the Constitution in those circumstances would not be an appropriate remedy."

52. The respondents have placed reliance upon another judgment delivered in the case of *Maharashtra State Board of Secondary and Higher Secondary Education Vs. Paritosh Bhupeshkumar Sheth* [(1984) 4 SCC 27] and the paragraphs 29 of the aforesaid judgment reads as under :-

> "Far from advancing public interest and fair play to the other candidates in general, any such interpretation of the legal position would be wholly defeasive of the same. As has been repeatedly pointed out by this court, the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual daytoday working of educational institutions and the departments controlling them. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the Court should also, as far as possible, avoid any decision or interpretation of a statutory provision, rule or byelaw which would bring about the result of rendering the system unworkable in practice. It is unfortunate that this principle has not been adequately kept in mind by the High Court while deciding the instant case."

The contention of the respondents is that the courts should be extremely reluctant in interfering with academic matters and wholly wrong for the court to make an idealistic approach.

53. The respondents have placed reliance upon another judgment delivered in the case of *(Dr.) J.P. Kulshrestha & Ors. Vs. Allahabad University & Ors.* [(1980) 3 SCC 418], wherein it has been held that the Courts should not interfere in educational matters. Paragraphs 11 and 17 of the aforesaid judgment reads as under :-

> "11.The second obscurantism we must remove is the blind veneration of marks at examination as the main measure of

merit. Social scientists and educational avant garde may find pitfalls in our system of education and condemn the unscientific aspects of marks as the measure of merit, things as they now stand. But, however imperfect and obtuse the current system and however urgent the modernization of our courses culminating in examinations may be, the fact remains that F he court has to go by what is extent and cannot explore on its own or ignore the measure of merit adopted by universities. Judges must not rush in where even educationists fear to tread. So, we see no purpose in belittling the criterion of marks and class the Allahahad University has laid down, although to swear religiously by class and grade may be exaggerated reverence and false scales if strictly scrutinized by progressive criteria.

17.Rulings of this Court were cited before us to hammer home the point that the Court should not substitute its judgment for that of academicians when the dispute relates to educational affairs. While there is no absolute ban, it is a rule of prudence that courts should hesitate to dislodge decisions of academic bodies. But university organs, for that matter any authority in our system, is bound by the rule of law and cannot be a law unto itself If the Chancellor or any other authority lesser in level decides an academic matter or an educational question, the Court keeps its hands off; but where a provision of law has to be read and understood, it is not fair to keep the Court out. In *Govinda Rao's* case (1) Gajendragadkar, J (as he they was) struck the right note:

"What the High Court should have considered is whether file appointment made by the Chancellor Had contravened any statutory or finding rule or ordinance, and in doing so, the High Court should have shown due regard to the opinions expressed by the Board and its recommendations on which the Chancellor has acted."

(Emphasis added)

The later decisions cited before us broadly conform to the rule of caution sounded in Govinda Rao. But to respect an

authority is not to worship it unquestioningly since the bhakti cult is inept in the critical field of law. In short, while dealing with legal affairs which have an impact on academic bodies, the views of educational experts are entitled to great consideration but not to exclusive wisdom. Moreover, the present case is so simple that profound doctrines about academic autonomy have no place here."

54. The respondents have placed reliance upon another judgment delivered in the case of *Dr. M.C. Gupta & Ors. Vs. Dr. Arun Kumar Gupta & Ors.* [(1979) 2 SCC 339], wherein it has been held that judges should leave the decisions of academic matters to experts. Paragraphs 7 of the aforesaid judgment reads as under :-

"Before the rival comments are probed and analysed, it would be necessary to keep in view the twilight zone of Court's interference in appointment to posts requiring technical experience made consequent upon selection by Public Service Commission, aided by experts in the field, within the framework of Regulations framed by the Medical Council of India under s. 33 of the Indian Medical Council Act, 1956, and approved by the Government of India on 5th June 1971. When selection is made by the Commission aided and advised by experts having technical experience and high academic qualifications in the specialist field, probing teaching/research experience in technical subjects, the Courts should be slow to interfere with the opinion expressed by experts unless there are allegations of mala fides against them. It would normally be prudent and safe for the Courts to leave the decision of academic matters to experts who are more familiar with the problems they face than the Courts generally can be. Undoubtedly, even such a body if it were to contravene rules and regulations binding upon it in making the selection and recommending the selectees for appointment, the Court in exercise of extraordinary jurisdiction to enforce rule of law, may interfere in a writ petition under Article 226. Even then the Court, while enforcing the rule of law, should give due weight to the opinions expressed by the experts and also show due regard to its

recommendations on which the State Government acted. If the recommendations made by the body of experts keeping in view the relevant rules and regulations manifest due consideration of all the relevant factors, the Court should be very slow to interfere with such recommendations (see, *The University of Mysore & Anr. v. C. D. Govinda Rao & Anr.*,(1). In a more comparable situation i*n State of Bihar & Anr. v. Dr. Asis Kumar Mukherjee, and Ors.*,(2) this Court observed as under:

> "Shri Jagdish Swaroop rightly stressed that once the right to appoint belonged to Government the Court could not usurp it merely because it would have chosen a different person as better qualified or given a finer gloss or different construction to the regulation on the score of a set formula that relevant circumstances had been excluded, irrelevant factors had influenced and such like grounds familiarly invented by parties to invoke the extraordinary jurisdiction under Art. 226. True, no speaking order need be made while appointing a government servant. Speaking in plaintitudinous terms these propositions may deserve serious reflection. The Administration should not be thwarted in the usual course of making appointments because somehow it displeases judicial relish or the Court does not agree with its estimate of the relative worth of the candidates. Is there violation of a fundamental right, illegality or a skin error of law which vitiates the appointment".

55. The respondents have placed reliance upon another judgment delivered in the case of *State of Maharashtra Vs. Lok Shikshan Sanstha* [(1971) 2 SCC 410], wherein it has been held that if there is no violation of fundamental rights, courts not to lay down its policy and to leave the State to decide policy matter. Paragraph 9 of the aforesaid judgment reads as under:-

> "Before we deal with the above contentions advanced before us on behalf of both sides, it is necessary to state that the High Court in the judgment under attack has made certain observations regarding what according to it should be the

policy adopted by the educational authorities in the matter of permitting the starting of a new school or of an additional school in a particular locality or area. It is enough to state that the High Court has thoroughly misunderstood the nature of the jurisdiction that was exercised by it when dealing with the claims of the two writ petitioners that their applications had been wrongly rejected by the educational authorities. So long as there is no violation of any fundamental rights and if the principles of natural justice are not offended, it was not for the High Court to lay down the policy that should be adopted by the educational authorities in the matter of granting permission for starting schools. The question of policy is essentially for the State and such policy will depend upon an overall assessment and summary of the requirements of residents of a particular locality and other categories of persons for whom it is essential to provide facilities for education. If the overall assessment is arrived at after a proper classification on a reasonable basis, it is not for the courts to interfere with the policy leading up to such assessment."

56. The respondents have placed reliance upon another judgment delivered in the case of *Prashant Remesh Chakkarwar Vs. Union Public Service Commission* [(2013) 12 SCC 589] and the paragraphs 14, 15 and 17 of the aforesaid judgment reads as under :

"14. Dehors the above conclusion, we are convinced that the impugned order[1] does not suffer from any legal infirmity. In *Sanjay Singh case*[11] the Court was called upon to decide the legality of the method of scaling adopted by the U.P. Public Service Commission for recruitment to the posts of Civil Judge (Junior Division). After examining various facets of the method adopted by the U.P. Public Service Commission and taking cognizance of the earlier judgment in *U.P. Public Service Commission v. Subhash Chandra Dixit*[12], the three-Judge Bench[11] observed: (*Sanjay Singh* case[11], SCC pp. 738-42, paras 20, 23 & 26)

"20. We cannot accept the contention of the petitioner that the words 'marks awarded' or 'marks obtained in the written

papers' refer only to the actual marks awarded by the examiner. 'Valuation' is a process which does not end on marks being awarded by an examiner. Award of marks by the examiner is only one stage of the process of valuation. Moderation when employed by the examining authority, becomes part of the process of valuation and the marks awarded on moderation become the final marks of the candidate. In fact Rule 20(3) specifically refers to the 'marks finally awarded to each candidate in the written examination', thereby implying that the marks awarded by the examiner can be altered by moderation.

* * *

23. When a large number of candidates appear for an examination, it is necessary to have uniformity and consistency in valuation of the answer scripts. Where the number of candidates taking the examination are limited and only one examiner (preferably the paper-setter himself) evaluates the answer scripts, it is to be assumed that there will be uniformity in the valuation. But where a large number of candidates take the examination, it will not be possible to get all the answer scripts evaluated by the same examiner. It, therefore, becomes necessary to distribute the answer scripts among several examiners for valuation with the paper-setter (or other senior person) acting as the Head Examiner. When more than one examiners evaluate the answer scripts relating to a subject, the subjectivity of the respective examiner will creep into the marks awarded by him to the answer scripts allotted to him for valuation. Each examiner will apply his own yardstick to assess the answer scripts. Inevitably therefore, even when experienced examiners receive equal batches of answer scripts, there is difference in average marks and the range of marks awarded, thereby affecting the merit of individual candidates. This apart, there is 'hawk-dove' effect. Some examiners are liberal in valuation and tend to award more marks. Some examiners are strict and tend

to give less marks. Some may be moderate and balanced in awarding marks. Even among those who are liberal or those who are strict, there may be variance in the degree of strictness or liberality. This means that if the same answer script is given to different examiners, there is all likelihood of different marks being assigned. If a very well-written answer script goes to a strict examiner and a mediocre answer script goes to a liberal examiner, the mediocre answer script may be awarded more marks than the excellent answer script. In other words, there is 'reduced valuation' by a strict examiner and 'enhanced valuation' by a liberal examiner. This is known as 'examiner variability' or 'hawk-dove effect'. Therefore, there is a need to evolve a procedure to ensure uniformity inter se the examiners so that the effect of 'examiner subjectivity' or 'examiner variability' is minimised. The procedure adopted to reduce examiner subjectivity or variability is known as moderation. The classic method of moderation is as follows:

(i) The paper-setter of the subject normally acts as the Head Examiner for the subject. He is selected from amongst senior academicians/scholars/senior civil servants/Judges. Where the case is of a large number of candidates, more than one examiner is appointed and each of them is allotted around 300 answer scripts for valuation.

(ii) To achieve uniformity in valuation, where more than one examiner is involved, a meeting of the Head Examiner with all the examiners is held soon after the examination. They discuss thoroughly the question paper, the possible answers and the weightage to be given to various aspects of the answers. They also carry out a sample valuation in the light of their discussions. The sample valuation of scripts by each of them is reviewed by the Head Examiner and variations in assigning marks are further discussed. After such discussions, a consensus is arrived at in regard to the norms of valuation to be adopted. On that basis, the examiners are required to complete the valuation of

answer scripts. But this by itself, does not bring about uniformity of assessment inter se the examiners. In spite of the norms agreed, many examiners tend to deviate from the expected or agreed norms, as their caution is overtaken by their propensity for strictness or liberality or erraticism or carelessness during the course of valuation. Therefore, certain further corrective steps become necessary.

(iii) After the valuation is completed by the examiners, the Head Examiner conducts a random sample survey of the corrected answer scripts to verify whether the norms evolved in the meetings of examiner have actually been followed by the examiners. The process of random sampling usually consists of scrutiny of some top level answer scripts and some answer books selected at random from the batches of answer scripts valued by each examiner. The top level answer books of each examiner are revalued by the Head Examiner who carries out such corrections or alterations in the award of marks as he, in his judgment, considers best, to achieve uniformity. (For this purpose, if necessary certain statistics like distribution of candidates in various marks ranges, the average percentage of marks, the highest and lowest award of marks, etc. may also be prepared in respect of the valuation of each examiner.)

(iv) After ascertaining or assessing the standards adopted by each examiner, the Head Examiner may confirm the award of marks without any change if the examiner has followed the agreed norms, or suggests upward or downward moderation, the quantum of moderation varying according to the degree of liberality or strictness in marking. In regard to the top level answer books revalued by the Head Examiner, his award of marks is accepted as final. As regards the other answer books below the top level, to achieve maximum measure of uniformity inter se the examiners, the awards are moderated as per the recommendations made by the Head Examiner.

(v) If in the opinion of the Head Examiner there has been erratic or careless marking by any examiner, for which it is not feasible to have any standard moderation, the answer scripts valued

by such examiner are revalued either by the Head Examiner or any other examiner who is found to have followed the agreed norms.

(vi) Where the number of candidates is very large and the examiners are numerous, it may be difficult for one Head Examiner to assess the work of all the examiners. In such a situation, one more level of examiners is introduced. For every ten or twenty examiners, there will be a Head Examiner who checks the random samples as above. The work of the Head Examiners, in turn, is checked by a Chief Examiner to ensure proper results.

The above procedure of 'moderation' would bring in considerable uniformity and consistency. It should be noted that absolute uniformity or consistency in valuation is impossible to achieve where there are several examiners and the effort is only to achieve maximum uniformity.

26. The Union Public Service Commission ('UPSC', for short) conducts the largest number of examinations providing choice of subjects. When assessing inter se merit, it takes recourse to scaling only in Civil Service Preliminary Examination where candidates have the choice to opt for any one paper out of 23 optional papers and where the question papers are of objective type and the answer scripts are evaluated by computerised scanners. In regard to compulsory papers which are of descriptive (conventional) type, valuation is done manually and scaling is not resorted to. Like UPSC, most examining authorities appear to take the view that moderation is the appropriate method to bring about uniformity in valuation where several examiners manually evaluate answer scripts of descriptive/conventional type question papers in regard to same subject; and that scaling should be resorted to only where a common merit list has to be prepared in regard to candidates who have taken examination in different subjects, in pursuance of an option given to them."

From the above extracted portion of the judgment in *Sanjay Singh* case[11], it is clear that the three-Judge Bench 11 had approved the method of moderation adopted by the Commission.

15. The argument of Shri Tulsi that in the garb of moderation, the Commission has resorted to scaling of marks and thereby deprived more meritorious candidates of their legitimate right to be selected does not commend acceptance because no material has been placed before this Court to substantiate the same. The mere fact that some of the candidates like the petitioner who cleared the preliminary examinations but could not cross the hurdle of main examination cannot lead to an inference that the method of moderation adopted by the Commission is faulty.

16. The suggestive argument made by Shri Tulsi that the award of roll numbers was manipulated by the officers/officials of the Commission for ensuring selection of their favourites does not merit acceptance because the documents produced before the Court and the information obtained by the petitioner by making application under the Right to Information Act do not show that any candidate selected by the Commission had been deliberately given the particular roll number.

17. Equally meritless is the submission of the learned Senior Counsel that the selection of large number of candidates from the block of first 50,000 should lead to an inference that the entire selection made by the Commission is tainted by mala fides. The table produced before this Court does not show that in each and every examination, 50% candidates were selected from those who were having Roll Nos. 1 to 50,000. That apart, in the absence of cogent evidence, the Court cannot accept such a specious argument ignoring that between 4 to 5 lakhs candidates appear in the annual examination conducted by the Commission for recruitment to Indian Administrative Services and other Allied Services."

Keeping in view the aforesaid, the contention of the respondents is that

moderation process in evaluation of marks is permitted for uniformity in results and merit list preparation.

57. In the aforesaid cases, it has been held that the courts are not equipped with experts and normally interference in technical and academic matters is allowed only if violation of law/malafide motive is proved.

58. This Court after careful consideration of the aforesaid judgments, is of the considered opinion that the selection process adopted by the respondents for selecting the candidates to various Indian Institutes of Management is fair and transparent process and highly sophisticated method has been adopted by the respondents in evaluating the candidates. The method selected and adopted by the respondents is based upon the valuation made by the academicians, who are the expert of the field and this Court in light of the judgment referred above would not like to sit in an appeal to test the wisdom of the academic experts in absence of any malafide or in absence of violation of any statutory provisions of law. The judicial review of academic matters is not permissible until and unless it is in clear violation of statutory provisions, regulations, etc.. The process adopted by the respondents, which is based upon the item response theory, is being used globally for all prestigious examinations. A scaled score is the result of the appropriate transformation applied to the raw score has to be treated as final score and based upon the valuation of the candidates on the basis of Item Response Theory selection has been made by the respondents. Not only this, no malafide has been alleged against the respondent No.3-Prometric Testing Pvt. Ltd., which is an independent Company and has conducted the examination in a most transparent manner.

59. Resultantly, this Court in light of the judgments referred above delivered in cases by the Apex Court, is of the considered opinion that no interference can be made in the matter. Ex-consequentia the present petition is dismissed and all other Writ Petitions are also dismissed.

10. A copy of this order be placed in the record of the connected Writ Petitions.

Petition dismissed.

I.L.R. [2015] M.P., 2075

WRIT PETITION

Before Mr. Justice R.S.Jha & Mr. Justice K.K. Trivedi

W.P. No. 3201/2015 (Jabalpur) decided on 18 March, 2015

JAGDISH BAHETI ...Petitioner

Vs.

HIGH COURT OF M.P. & ors. ...Respondents

Constitution - Article 226 - Departmental Enquiry - Judicial Review **- Charge sheet issued against Petitioner on the allegation that while working as District and Sessions Judge he had granted anticipatory bail to several persons by falsely recording the undertaking given by the Investigating Officer - Writ Petition is not maintainable against a charge sheet as issuance of same does not give rise to a cause of action on account of fact that it does not adversely affect the rights of a party except in cases where the charge sheet has been issued by an authority not competent to do so - Correctness or veracity of charges cannot be looked into in writ proceedings - Charge sheet cannot be quashed at the initial stage on merits - There is no allegation that charge sheet has been issued by an incompetent authority - Petitioner would be at liberty to raise all these objections and grounds in the departmental enquiry that is pending against him - Petition dismissed. (Paras 8, 9 & 23)**

संविधान – अनुच्छेद 226 – विभागीय जांच – न्यायिक पुनर्विलोकन – याची के विरूद्ध इस अभिकथन पर आरोप पत्र जारी किया गया कि जिला एवं सत्र न्यायाधीश के रूप में कार्यरत रहने के दौरान उसने अन्वेषण अधिकारी द्वारा दिये गये वचनबंध को मिथ्या रूप से अभिलिखित कर कई व्यक्तियों को अग्रिम जमानत प्रदान की थी – आरोप पत्र के विरूद्ध रिट याचिका पोषणीय नहीं क्योंकि इसका जारी किया जाना कोई वाद कारण उत्पन्न नहीं करता, इस तथ्य के कारण कि यह पक्षकार के अधिकारों को प्रतिकूल रूप से प्रभावित नहीं करता सिवाय ऐसे प्रकरणों में जहां आरोप पत्र को ऐसे प्राधिकारी द्वारा जारी किया गया हो जो ऐसा करने के लिये सक्षम नहीं है – रिट कार्यवाहियों में आरोपों की यथार्थता या सत्यता को विचार में नहीं लिया जा सकता – आरंभिक प्रक्रम पर आरोप पत्र को गुणदोषों पर अभिखंडित नहीं किया जा सकता – ऐसा कोई अभिकथन नहीं है कि आरोप पत्र को अक्षम प्राधिकारी द्वारा जारी किया गया है – याची इन सभी आक्षेपों एवं आधारों को उसके विरूद्ध लंबित विभागीय जांच में उठाने के लिये स्वतंत्र होगा – याचिका खारिज।

Cases referred :

(1982) 2 SCC 463, (2006) 12 SCC 28, (2012) 11 SCC 565.

Rajendra Tiwari with *Manoj Sharma*, for the petitioner.
Pushpendra Yadav, P.L. for the respondents.

ORDER

The Order of the Court was delivered by :

R.S. JHA, J. :- The petitioner has filed this petition praying for quashing the charge sheet dated 8.9.2014 issued by the High Court with a further prayer for protecting the petitioner's right for elevation as a High Court Judge. In addition, the petitioner has also prayed that the recommendation of the Collegium of the Madhya Pradesh High Court, whereby the petitioner's juniors have been recommended and have been considered for appointment as High Court Judges, be stayed and may be directed not to be finalized till disposal of the petition/departmental enquiry ordered against the petitioner.

2. The learned Senior Counsel appearing for the petitioner submits that the brief facts necessary for adjudication of the petition are that the petitioner, at the relevant time, was working as District & Sessions Judge, Gwalior and is at present posted as Principal Judge, Family Court, Singrauli. It is stated that the petitioner, while performing his duties as District Judge, had granted anticipatory bail to several applicants.

3. It is asserted that a false complaint, Annexure P-25, was filed by a fictitious person Anvesh Singh before the High Court of M.P. pursuant to which a preliminary fact finding enquiry was conducted against the petitioner and thereafter the impugned charge sheet, Annexure P-1, dated 8.9.2014 has been issued to the petitioner wherein it has been alleged that inspite of the fact that the State has opposed the applications for grant of anticipatory bail, the petitioner, by wrongly recording the concession of one Shri Jor Singh Bhadoriya, Investigating Officer, behind his back granted anticipatory bail to the applicants. It is submitted that the petitioner has been charged of recording a wrong undertaking of the said Investigating Officer in his absence after he was asked to leave the Court whereas the Investigating Officer has later on stated that he had not given any such undertaking.

4. The learned Senior Counsel appearing for the petitioner submits that the Departmental Enquiry has been initiated against the petitioner under the provisions of the M.P. Civil Services (Conduct) Rules, 1965 and the M.P. Civil Services (Classification, Control & Appeal) Rules, 1966 (hereinafter referred to as 'the Rules of 1966), on the basis of the judicial orders passed

by him by alleging that the petitioner knowingly and intentionally mentioned incorrect facts in the bail orders with an ulterior or corrupt motive or for extraneous consideration and thereby extended favour and undue benefit to the applicants in granting anticipatory bail to them. It is further stated that the petitioner had in fact directly approached the Supreme Court against the charge-sheet by filing a petition under Article 32 of the Constitution of India, but the same was withdrawn with liberty to approach the High Court by way of a Writ Petition, hence this petition.

5. It is contended by the learned Senior Counsel for the petitioner that no enquiry could have been initiated against the petitioner in respect of the statement recorded by the petitioner in the order sheet with regard to what transpired in the court proceedings as matters of judicial record cannot be questioned nor can they be made the basis for initiating a departmental enquiry. The learned Senior Counsel, in support of his submission, has relied upon the decision of the Supreme Court rendered in the case of *State of Maharashtra vs. Ramdas Shrinivas Nayak and Another,* (1982) 2 SCC 463. The learned Senior Counsel, relying on the aforesaid decision of the Supreme Court, has further submitted that in case the State or the Investigating Officer felt that the statement recorded in the order sheet was incorrect, the only course open to them was to seek clarification or recall of the order but no departmental proceedings in respect of judicial orders can be initiated against the petitioner.

6. Before we consider the contentions of the learned Senior Counsel for the petitioner it would be appropriate to consider the scope and extent of judicial review and interference in charge sheets permissible under Article 226 of the Constitution of India, as specified and laid down by the Supreme Court in a series of decisions. In the case of *Union of India and Another vs. Kunisetty Satyanarayana*, (2006) 12 SCC 28, the Supreme Court has held as under:-

> **"13.** It is well settled by a series of decisions of this Court that ordinarily no writ lies against a charge sheet or show-cause notice vide *Executive Engineer, Bihar State Housing Board vs. Ramesh Kumar Singh and others,* [(1996) 1 SCC 327], *Special Director and another vs. Mohd. Ghulam Ghouse and another,* [(2004) 3 SCC 440], *Ulagappa and others vs. Divisional Commissioner, Mysore and others,* [2001 (10) SCC 639], *State of U.P. vs. Brahm*

Datt Sharma and another, [(1987) 2 SCC 179], etc.

14. The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of any one. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.

15. Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge sheet.

16. No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter."

7. In the case of *Secretary, Ministry of Defence and Others vs. Prabhash Chandra Mirdha,* (2012) 11 SCC 565, the Supreme Court has held that ordinarily a writ petition does not lie against the charge-sheet or a show cause notice as it does not give rise to any cause of action unless the same has been issued by an authority not competent to initiate departmental proceedings. The Supreme Court has laid down the law in this regard by relying on several previous decision, in the following terms:-

"10. Ordinarily a writ application does not lie against a charge sheet or show cause notice for the reason that it does not give rise to any cause of action. It does not amount to an adverse

order which affects the right of any party unless the same has been issued by a person having no jurisdiction/competence to do so. A writ lies when some right of a party is infringed. In fact, charge sheet does not infringe the right of a party. It is only when a final order imposing the punishment or otherwise adversely affecting a party is passed, it may have a grievance and cause of action. Thus, a charge sheet or show cause notice in disciplinary proceedings should not ordinarily be quashed by the Court. (Vide : *State of U.P. v. Brahm Datt Sharma,* [(1987) 2 SCC 79]; *Executive Engineer, Bihar State Housing Board v. Ramesh Kumar Singh & Ors.*, [(1996) 1 SCC 327]; *Ulagappa & Ors. v. Div. Commr., Mysore & Ors.*, [(2001) 10 SCC 639]; *Special Director & Anr. v. Mohd. Ghulam Ghouse & Anr.*, [(2004) 3 SCC 440]; and *Union of India & Anr. v. Kunisetty Satyanarayana,* [(2006) 12 SCC 28.)].

11. In *State of Orissa & Anr. v. Sangram Keshari Misra & Anr.*, [(2010) 13 SCC 311], this Court held that normally a charge sheet is not quashed prior to the conclusion of the enquiry on the ground that the facts stated in the charge are erroneous for the reason that correctness or truth of the charge is the function of the disciplinary authority. (See also: *Union of India & Ors. v. Upendra Singh*, [(1994) 3 SCC 357)].

12. Thus, the law on the issue can be summarised to the effect that chargesheet cannot generally be a subject matter of challenge as it does not adversely affect the rights of the delinquent unless it is established that the same has been issued by an authority not competent to initiate the disciplinary proceedings. Neither the disciplinary proceedings nor the charge sheet be quashed at an initial stage as it would be a premature stage to deal with the issues. Proceedings are not liable to be quashed on the grounds that proceedings had been initiated at a belated stage or could not be concluded in a reasonable period unless the delay creates prejudice to the delinquent employee. Gravity of alleged misconduct is a relevant factor to be taken into consideration while quashing the proceedings."

8. The law laid down by the Supreme Court in the above quoted decisions, therefore, makes it clear that generally and ordinarily a writ petition is not maintainable against a charge-sheet as issuance of the same does not give rise to a cause of action on account of the fact that it does not adversely effect the rights of a party except in cases where the charge-sheet has been issued by an authority not competent to do so. The Supreme Court has also held that neither disciplinary proceedings nor a charge-sheet can be quashed at the initial stage on merits as it would be a pre-mature stage to deal with the merits of the case. The Supreme Court has also held that at the stage of issuance of chargesheet the correctness or veracity of the charges cannot be looked into in writ proceedings as that aspect is the domain of the disciplinary authority and not the High Court.

9. The contention of the petitioner needs to be examined in the light of the law laid down by the Supreme Court. In the instant case, as there is no contention or allegation on the part of the petitioner to the effect that the charge-sheet has been issued by an incompetent authority or by an authority which has no jurisdiction to do so and, therefore, no exceptional circumstances exist to ignore the general and ordinary rule of non-maintainability of the petition against a charge-sheet, mere issuance of which does not give rise to any cause of action as has been held by the Supreme Court in the above cited decisions.

10. It is also relevant to note from a perusal of the record specifically Annexure P-1, which is the impugned charge-sheet dated 8.9.2014, that the charges levelled against the petitioner are in respect of his conduct in the court proceedings and is based on the allegations that he had extended favour and undue benefit to the applicants by deliberately mentioning wrong facts in the bail orders for granting anticipatory bail to the applicants with an ulterior motive or for extraneous considerations and, therefore, he has failed to maintain absolute integrity and devotion to his duty and his conduct is unbecoming that of a judicial officer and amounts to a gross misconduct under the provisions of the Rules governing his services.

11. A perusal of the charge-sheet, wherein the contents of the order sheets of the petitioner are reproduced, indicate that the allegation against the petitioner is that while passing the order he has recorded that the Investigating Officer Shri Jor Singh Bhadoriya has stated that the matter is under investigation and material evidence is being collected and till then the applicant will not be arrested in connection with the case, whereas a perusal of Annexures P-10

and P-11, filed by the petitioner alongwith the petition, indicate that the Investigating Officer has in fact opposed the application for anticipatory bail in writing and while stating that evidence is being collected and investigation is under progress, has specifically prayed for rejecting and dismissing the application for anticipatory bail. Significantly, the charge-sheet also states that the fact that the anticipatory bail was opposed is also supported by the Public Prosecutor Shri J. P. Sharma and the Additional Public Prosecutor Shri A. S. Tomar who were representing the State and were present in the Court. It is this and other factual allegations, which have formed the prima facie basis for initiation of the Departmental Enquiry against the petitioner. If the charges levelled against the petitioner in the impugned charge-sheet are read as they are, they prima facie disclose the alleged misconduct and, therefore, the contention of the learned counsel for the petitioner that no misconduct is made out on the basis of charges levelled against the petitioner, is incorrect and misconceived.

12. We have taken note of the aforesaid facts only because of the contention of the learned Senior Counsel for the petitioner, which we have already rejected, that there is no prima facie material on record to justify issuance of a charge-sheet and that the charge-sheet has been issued by challenging the correctness of the judicial order passed by the petitioner which is not permissible. However, in view of the law laid down by the Supreme Court, this Court cannot look into the correctness or veracity of the charges at this stage in writ proceedings under Article 226 of the Constitution of India, which even otherwise involve highly disputed questions of fact which can only be decided in the departmental proceedings.

13. At the cost of repetition, we make it further clear that we have not expressed any opinion on the correctness or otherwise of the charges levelled against the petitioner as that is the exclusive domain of the departmental enquiry but we have taken note of the aforesaid aspect only because of the contention of the petitioner in this regard and anything mentioned by us in this order shall not be treated as an opinion expressed on the correctness or otherwise of the charges nor would the departmental authorities be in any way influenced by the same.

14. The reliance placed by the learned Senior Counsel for the petitioner on the decision of the Supreme Court rendered in the case of *Ramdas Shrinivas Nayak* (supra), specially in paras 4 to 8, is totally misconceived

inasmuch as the said decision relates to proceedings before the High Court whereas the present case deals with the question of serious misconduct and conduct unbecoming of a judicial officer of the State Higher Judicial Services who is governed by the provisions of the M.P. Civil Services (Conduct) Rules, 1965 and the M.P. Civil Services (Classification, Control & Appeal) Rules, 1966 and, therefore, the parity and comparison claimed by the petitioner on the basis of the aforesaid judgment is misplaced. Moreso as there are allegations against the petitioner based on the relevant service rules by which he is governed regarding his motives and integrity and his conduct which, it is alleged, amounts to a misconduct under the Rules specifically mentioned in the charge-sheet itself. We are of the considered opinion that the aforesaid judgment relied upon by the petitioner does not grant him immunity from being charged departmentally for misconducts prescribed under the Rules.

15. The learned Senior counsel for the petitioner has also contended that the enquiry initiated against the petitioner deserves to be quashed as it has been initiated on the basis of a frivolous complaint filed in the name of a fictitious person by contending that such complaint should have in fact been filed without taking any further steps thereon in view of the circular dated 20.11.2014, copy of which has been filed alongwith the petition as Annexure P-24. It is also contended that the departmental proceedings could not have been initiated against the petitioner without first giving him an opportunity to give an explanation in the preliminary enquiry conducted by the authorities.

16. Having heard the learned Senior counsel for the petitioner on this issue, we are of the considered opinion that the departmental enquiry has been initiated against the petitioner in accordance with the procedure prescribed under Rules 14 & 15 of the Rules of 1966, which do not contain any statutory mandatory provision for compulsorily holding a preliminary enquiry before initiating regular departmental proceedings or for giving any opportunity of hearing to the officer concerned during the preliminary enquiry. In fact the preliminary enquiry is conducted by the department at its own level with a view to arrive at an opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against an employee. Once an opinion is formed then the proceedings are initiated in accordance with the procedure prescribed under Rules 14 & 15 of the Rules of 1966.

17. In the circumstances, as the petitioner has failed to plead or establish any violation of the statutory procedure for conducting enquiry as prescribed

in Rules 14 & 15 of the Rules of 1966, the contention of the petitioner, which are not based on any statutory provision or right, is hereby rejected. Moreso as statutory proceedings initiated in accordance with the statutory provision of Rules 14 & 15 of the Rules of 1966, cannot be quashed merely on the asking, once it is established that the statutory procedure prescribed in the Rules has been followed and has not been violated and that there is no provision in the Rules statutorily requiring the authority to hold a preliminary fact finding enquiry by giving the petitioner an opportunity of hearing therein. It is, however, pertinent to note that the petitioner, when he came to know about the fact that a preliminary fact finding enquiry was being conducted, has on his own, filed a detailed representation and objections before the Registrar General of the High Court, copies of which have been annexed alongwith the petition as Annexures P-26 & P-27.

18. It is also pertinent to note that contrary to the contention of the petitioner, the basis for issuing the impugned charge-sheet against the petitioner is not the preliminary fact finding enquiry as alleged by the petitioner as there is no mention about it in the impugned charge sheet. In fact the list of documents supplied to the petitioner in support of the charge which are at page 65 of the petition, makes it clear that the report has not been made the basis for the charges but it is the statement of Shri Jor Singh Bhadoriya, the Investigating Officer, Shri A. S. Tomar, Additional Public Prosecutor in his Court and Shri J. P. Sharma, Public Prosecutor, who were present in the Court at the time of passing of the orders, which have led to the formation of an opinion to initiate a departmental enquiry.

19. In view of the aforesaid facts, the contention of the petitioner that the opinion of the officer conducting the fact finding enquiry who is junior to him and the report submitted by him has led to initiation of the departmental proceeding is hereby rejected as the same prima facie appears to be factually incorrect as the report or opinion of the fact finding officer has not formed the basis for issuance of the charge-sheet.

20. In addition to the above, it is pertinent to note that the High Court in M.Cr.C No.1754/2014 (Annexure P-21) took serious objection to the alleged concession of Shri Jor Singh Badoriya, Investigating Officer and directed the State and the police department to change the Investigating Officer and to take action against him and also to consider whether he was involved in the case.

21. We are of the considered opinion that in view of the aforesaid order

of the High Court, no exception to the holding of the preliminary fact finding enquiry can be taken and, therefore, the contention of the petitioner based on the circular of the High Court dated 20.11.2014, which even otherwise has been issued after the issuance of the charge-sheet on 8.9.2014, deserves to be and is hereby rejected.

22. The learned Senior Counsel for the petitioner has raised several grounds to contend that no misconduct has been committed by the petitioner.

23. We are of the considered opinion that in view of the law laid down by the Supreme Court in the cases referred to in the preceding paragraphs, this Court cannot go into the aforesaid contention of the petitioner which are based on seriously disputed question of fact which cannot be enquired into in proceedings under Article 226 of the Constitution of India. We, however, make it clear that the petitioner would be at liberty to raise all these objections and grounds in the departmental enquiry that is pending against him.

24. We are also of the considered opinion that in view of the aforesaid conclusions recorded by us, the other reliefs which are consequential also cannot be granted to the petitioner which basically depend upon the final outcome of the departmental enquiry.

25. In view of the aforesaid discussion and the law laid down by the Supreme Court, we do not find any merit in the petition. The petition, filed by the petitioner, being meritless is, accordingly, dismissed.

Petition dismissed.

I.L.R. [2015] M.P., 2084
WRIT PETITION
Before Mr. Justice R.S.Jha
W.P. No. 20196/2013 (Jabalpur) decided on 23 March, 2015

RAMESHWAR PRASAD PATHAK ...Petitioner
Vs.
SOUTH EASTERN COALFIELDS LTD. & ors. ...Respondents

Service Law - Date of birth **- Age Determination Committee rejected the contention of the petitioner that his date of birth is 01.07.1957 and not 13.12.1953 - As highly disputed question of facts are involved, the petitioner can raise a dispute before the Labour Court - Petition dismissed. (Para 7)**

सेवा विधि – जन्म तिथि – आयु निर्धारण समिति ने याची के इस तर्क को अस्वीकार किया कि उसकी जन्म तिथि 01.07.1957 है और न कि 13.12.1953 – चूंकि तथ्य का अति विवादित प्रश्न अंतर्ग्रस्त है, याची विवाद को श्रम न्यायालय के समक्ष उठा सकता है – याचिका खारिज।

Cases referred :

(2006) 5 SCC 469, (2008) 12 SCC 675.

K.C. Ghildiyal, for the petitioner.
Vivek Rusia, for the respondents.

(Supplied: Paragraph numbers)

ORDER

R.S. JHA, J. :- The petitioner has filed this petition being aggrieved by order dated 5.2.2013 issued by the respondent authorities whereby the petitioner has been informed that he would superannuate from service as a Clerk Grade-A w.e.f. 31.12.2013 on attaining the age of superannuation.

2. It is submitted by the learned counsel for the petitioner that the petitioner's date of birth recorded in the High School Certificate Examination is 1.7.1957. It is stated that in such circumstances the petitioner had raised an objection to the recording of his date of birth on the basis of the Implementation Instruction No.76 which was referred to the Age Determination Committee in view of the direction issued by this Court in the previous petition i.e. W.P No.14501/2011. It is submitted that thereafter the Age Determination Committee, by the impugned order dated 5.2.2013 has rejected the petitioner's objection and has held that his date of birth is 13.12.1953.

3. The learned counsel for the petitioner submits that the impugned order passed by the Age Determination Committee is contrary to the clauses of Implementation Instruction No.76. The learned counsel for the petitioner by way of a rejoinder has stated that the petitioner's date of birth recorded in the declaration of the person employed in a coal mine issued for the purposes of computing the provident fund of the petitioner on 31.10.1979 is also 1.7.1957. The learned counsel for the petitioner submits that in view of the aforesaid, it is apparent that the Age Determination Committee has not applied its mind to the facts of the case while deciding the petitioner's objection and, therefore, the impugned order passed by the Age Determination Committee suffers from

perversity and material illegality warranting interference by this Court.

4. The learned counsel for the respondents, per contra, submits that the Age Determination Committee has taken into consideration Form-B register maintained under the Mines Act at Bijuri Colliery; the document of transfer from Bijuri Colliery; the service register of the petitioner; the service extracts from the Register; P.S-3 and P.S-4 Form of the petitioner wherein the date of birth of the petitioner is mentioned as 31.12.1953 or 25 years as on 13.12.1978. The Age Determination Committee had also got a Radiological test of the petitioner conducted and after considering the aforesaid document as well as the Radiological test have rejected the petitioner's objection. The learned counsel for the respondents submits that in view of the aforesaid facts and circumstances, the matter has been considered by the Age Determination Committee and, therefore, does not warrant any interference by this Court.

5. By way of a preliminary objection, the learned counsel for the respondents submits that the petition filed by the petitioner is in fact not maintainable as the petitioner has an alternative efficacious statutory remedy of raising a dispute under the provisions of the Industrial Dispute Act. The learned counsel for the respondents has placed reliance on the decisions of the Supreme Court in the case of *State of Gujarat vs. Vali Mohd. Dosabhai Sindhi,* (2006) 5 SCC 469 in support of his aforesaid submission.

6. Having heard the learned counsel for the parties, I am of the considered opinion that the Age Determination Committee has considered the rival submission of the petitioner as well as the department and has taken a decision with which the petitioner being dissatisfied and has raised several disputed questions of fact and in such circumstances the appropriate remedy of the petitioner is to approach the labour court invoking the provisions of the Industrial Disputes Act, by taking up appropriate proceedings thereunder in accordance with law after the decision of the Age Determination Committee.

7. I am constrained to say so as the fact as to whether the date of birth of the petitioner is 1.7.1957 or 13.12.1953 is a highly disputed question of fact which cannot be decided by this Court in exercise of its extra ordinary jurisdiction under Articles 226 and 227 of the Constitution of India. The Supreme Court in similar situation has held that a writ petition is not maintainable in view of the alternative efficacious statutory remedy available to the petitioner in the case of *A. P. Foods vs. S. Samuel and others,* (2006) 5 SCC 469,

wherein it has been held in para 13 as under:-

> "13. As disputed questions of fact were involved, and alternative remedy is available under the ID Act, the High Court should not have entertained the writ petition, and should have directed the writ petitioners to avail the statutory remedy."

8. Similar view has also been taken by the Supreme Court in the case of State of *Uttar Pradesh and Another vs. Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti and Others,* (2008) 12 SCC 675, in para 53 as follows:-

> "53. Since we are of the view that one of the Judges of the Division Bench of the High Court which decided the matter at the initial stage was right in relegating the petitioners to avail of alternative remedy under the Industrial Law and as we hold that the High Court should not have entertained the petition and decided the matter on merits, we clarify that though the writ petition filed by the petitioners stands dismissed, it is open to the employees to approach an appropriate Court/ tribunal in accordance with law and to raise all contentions available to them. It is equally open to the Corporation and the State authorities to defend and support the action taken by them. As and when such a course is adopted by the employees, the court/tribunal will decide it strictly in accordance with law without being influenced by the fact that the writ petition filed by the writ petitioners is dismissed by this Court."

9. In view of the aforesaid facts and circumstances and the law laid down by the Supreme Court in the aforementioned decisions, the petition filed by the petitioner is disposed of with liberty to the petitioner to approach the concerned Labour Court in accordance with law.

10. At this stage it is submitted by the learned counsel for the petitioner that on account of the interim order passed by this Court, the petitioner has been permitted to continue in service though his age of superannuation according to the impugned order passed by the respondents is 31.12.2013.

11. In view of the aforesaid, it is observed that the Labour Court shall decide the matter by taking into consideration the aforesaid facts and in case

it ultimately finds that the petitioner's contention are correct and allows his claim, appropriate relief in that regard may be granted to him in accordance with law.

12. With the aforesaid liberty and observation, the petition, filed by the petitioner stands disposed of.

13. C.C as per rules.

Petition disposed of.

I.L.R. [2015] M.P., 2088
WRIT PETITION
Before Mr. Justice A.M. Khanwilkar, Chief Justice & Mr. Justice K.K. Trivedi
W.P. No. 7915/2015 (Jabalpur) decided on 1 July, 2015

GYANJEET SEWA MISSION TRUST ...Petitioner
Vs.
UNION OF INDIA & ors. ...Respondents

Constitution - Article 226 - Establishment of Medical College - **N.O.C. and consent of affiliation issued by University bearing same outward Number - M.C.I. sent negative recommendation on the aforesaid ground - Subsequently, as Medical Science University was established, the petitioner approached for grant of affiliation - Trust also deposited Rs. 50,30,000/- as affiliation fee - As Code of Conduct was in force in State of M.P., the University could not issue consent for affiliation - Subsequently, consent of affiliation was issued by Medical University on 25.04.2015 - However, in meeting dated 29.04.2015 Executive Committee of Medical Council gave negative recommendation as submission of document was not within time - Held - Discrepancies in two letters issued by R.D.V.V. which was competent to issue those letters ought to have been ignored - Petitioner had submitted the consent of affiliation from Medical University before the meeting of Executive Committee and Union of India had also wrote to M.C.I. to process the recommendation in the light of consent - M.C.I. directed to take final decision before commencement of admission process for academic year 2015-16 - Petition allowed. (Paras 3, 11, 14 & 16)**

संविधान – अनुच्छेद 226 – आयुर्विज्ञान महाविद्यालय की स्थापना –

विश्वविद्यालय द्वारा जारी किये गये अनापत्ति प्रमाणपत्र व संबद्ध किये जाने की सहमति पर समान जावक क्रमांक है – उपरोक्त आधार पर एम.सी.आई. ने नकारात्मक अनुशंसा प्रेषित की – तत्पश्चात्, चूंकि आयुर्विज्ञान विश्वविद्यालय स्थापित किया गया, याची ने संबद्धता प्रदान किये जाने हेतु निवेदन किया – न्यास ने संबद्ध किये जाने के शुल्क के रूप में रू. 50,30,000/– भी जमा किये – चूंकि म.प्र. राज्य में आचार संहिता लागू थी, विश्वविद्यालय संबद्ध किये जाने हेतु सहमति जारी नहीं की जा सकी – तत्पश्चात्, आयुर्विज्ञान विश्वविद्यालय द्वारा 25.04.2015 को संबद्ध किये जाने की सहमति जारी की – किंतु, आयुर्विज्ञान परिषद् की कार्यपालिक समिति ने दिनांक 29.04.2015 की बैठक में नकारात्मक अनुशंसा की क्योंकि समय के भीतर दस्तावेज प्रस्तुत नहीं किया गया था – अभिनिर्धारित – रा. दु.वि.वि. द्वारा जारी दो पत्र, जिन्हें जारी करने के लिये वह सक्षम था, के फर्क को अनदेखा किया जाना चाहिए था – याची ने कार्यपालिक समिति की बैठक के समक्ष आयुर्विज्ञान विश्वविद्यालय से संबद्ध किये जाने की सहमति प्रस्तुत की थी और भारत संघ ने भी एम.सी.आई. को सहमति के आलोक में अनुशंसा की कार्यवाही करने के लिए लिखा था – एम.सी.आई. को शैक्षणिक वर्ष 2015–16 हेतु प्रवेश प्रक्रिया आरंभ होने से पूर्व अंतिम निर्णय लेने के लिये निदेशित किया गया – याचिका मंजूर।

Cases referred :

2013(12) SCALE 145, (2005) 2 SCC 65, (2012) 7 SCC 433.

Amalpushp Shroti, for the petitioner.

Vikram Singh, for the respondent/Union of India.

Indira Nair with *Rajas Pohankar*, for the respondent No.2./Medical Council of India.

Manas Verma, for the respondent No. 6.

Paritosh Gupta, for the intervenor.

ORDER

The Order of the Court was delivered by :

A.M. KHANWILKAR, C.J. :- This petition filed on 26.05.2015, under Article 226 of the Constitution of India takes exception to the decision of the Executive Committee of Medical Council of India dated 29.04.2015 (Annexure P-22) and communication dated 11.05.2015 (Annexure P-26).Further direction is sought against the respondent No.2 to consider the application submitted by the petitioner for permission to establish a new Medical College at Jabalpur for the academic year 2015-16 and make recommendations to the respondent No.1 as per Establishment of Medical Colleges Regulations , 1999.It is further prayed that direction be issued to the respondent No.1 to pass appropriate

orders under Section 10A of the Indian Medical Council Act,1956 for granting permission to the petitioner-Trust for opening a new Medical College with intake capacity of 150 students for the academic year 2015-16.

2. The petitioner-Trust submitted application under Section 10A for grant of permission, to open a new medical college with intake capacity of 150 students for the academic year 2015-16, on 26.08.2014. According to the petitioner, all the necessary documents were submitted along with the said application. However, respondent No.2 forwarded a negative recommendation to the respondent No.1 on 15.01.2015(Annexure P-12), on the ground that the petitioner had submitted two letters (one letter giving NOC and another giving consent of affiliation) issued by the Rani Durgavati Vishwavidyalaya bearing the same outward No/ACA/2014/3037 and same date i.e. 01.08.2014. The Executive Committee of the Council in its meeting held on 13.01.2015, noted that Registrar, Rani Durgavati Vishwavidyalaya vide letter dated 10.12.2014 has informed that since the M.P. Medical Science University has been constituted in the State, w.e.f. 17.09.2014, any further processing of the proposal must be done by the said University. It was also observed that M.P. Medical Science University has not issued any consent of affiliation in favour of the petitioner, till the decision was taken by the Executive Committee on 13.01.2015. In view of this discrepancy, the Executive Committee decided to seek clarification from Rani Durgavati Vishwavidyalaya University about the circumstances in which the said two letters bearing the same outward number and date were issued by it. This was communicated by the Section Officer of respondent No.2, to the respondent No.1 vide letter dated 15.01.2015 (Annexure P-12). This fact was brought to the notice of the petitioner. The petitioner-Trust submitted explanation before the Hearing Committee of respondent No.1 on 9th February, 2015 (Annexure P-14). With regard to the question of affiliation of new medical college it was pointed out that Madhya Pradesh Medical Science University was established on 01.08.2011 in terms of notification dated 17.09.2014 in exercise of powers under Section 6 (2) of the Act, notifying 25.09.2014 as the date on which Colleges/Schools or Institutions situated within the limits of the area specified under Section (1), shall be deemed to be associated with and admitted to the privileges of the University.

3. The petitioner also pointed out that pursuant to the notification issued by M.P. Medical Science University dated 17.09.2014, the petitioner

approached the Vice Chancellor and Registrar of the University vide letter dated 26.09.2014 requesting to issue consent of affiliation in Form No.3. However, the said letter was returned on the ground that the petitioner will have to apply for affiliation after announcement is made on M.P. Medical Science University's website. The petitioner thereafter applied in prescribed format to M.P. Medical Science University on 30.10.2014 for grant of affiliation for academic year 2015-16 for 150 MBBS students. Further, the petitioner - Trust deposited Rs.50,30,000/- (Rupees Fifty Lacs Thirty Thousand) as affiliation fees as prescribed by the M.P. Medical Science University Act, 2011, prior to the submission of application for affiliation for academic year 2015-16. The petitioner asserts that the petitioner was the first applicant who had deposited such fees with the said University. On 20.09.2014, the petitioner-Trust requested M.P. Medical Science University to confirm receipt of application for affiliation with required fees already deposited. The University vide letter dated 20.09.2014, confirmed the receipt of affiliation fees for the academic year 2015-16 and assured that the same will be considered. A receipt for having received the amount deposited by the petitioner towards affiliation fees was issued to the petitioner on 29.09.2014, by the University. The petitioner once again requested the University vide letter dated 22.01.2015, to issue consent of affiliation in Form No.3 to facilitate the petitioner to fulfill the formalities for processing of the scheme for opening of new college submitted by it to the Medical Council. In response, the M.P. Medical Science University vide letter dated 24.01.2015, informed that the grant of affiliation for new Medical College was being processed and that consent cannot be issued due to Code of Conduct in force in the State of M.P. In other words, detailed explanation was offered to point out that the petitioner-Trust had taken all possible measures for expediting the issuance of consent of affiliation, but could not succeed in getting the same from the University, for reasons beyond its control. In the explanation offered by the petitioner, to the Hearing Committee of respondent No.1, the petitioner emphasized that it has already set up impeccable infrastructure with State of Art Medical equipments installed in the Hospital with 12 modular OT of Class 100. In substance, it is mentioned in the said explanatory note that the petitioner-Trust has complied with all requisite formalities while applying for approval of the scheme, except the consent of affiliation from the M.P. Medical Science University.

4. The petitioner-Trust received communication from the respondent No.1

dated 02.02.2015, for remaining present for hearing on 09.02.2015 at 2:00 PM at the stated address. It is then asserted that the Executive Committee of respondent No.2 Council in its meeting held on 27.03.2015 considered the scheme of petitioner - Trust and decided to submit negative recommendation to the Central Government. The minutes of the said meeting reads thus :-

> **4. Establishment of New Medical College at Jabalpur, Madhya Pradesh by Gyanjeet Sewa Mission Trust, Jabalpur, Madhya Pradesh u/s 10 A of the IMC Act, 1956 for the academic year 2015-16.**
>
> Read: the matter with regard to establishment of New Medical College at Jabalpur, Madhya Pradesh by Gyanjeet Sewa Mission Trust, Jabalpur, Madhya Pradesh u/s 10 A of the IMC Act, 1956 for the academic year 2015-16.
>
> The Executive Committee of the Council observed that at its meeting dt. 13/01/2015, it was decided as under:
>
> *"The Executive Committee of the Council considered the matter and observed that both the letters (one letter giving NOC & another giving consent of affiliation) issued in the name of Rani DurgavatiVishwavidyalaya bear the same outward no. - i.e. Aca/2014/3037 and same date - i.e. 01/08/2014. It was also observed by the Executive Committee that the Registrar; Rani Durgavati Vishwavidyalaya vide his letter dt. 10/12/2014 has informed that since M.P. Medical University has been constituted in the state, w.e.f 17/09/2014 and any further processing would be done by M.P. Medical University. It was also observed that M.P. Medical University has not issued any consent of affiliation till date.*
>
> *In view of above, the Executive Committee of the Council decided to accept the opinion of the Law*

Officer of the Council and decided to return the application recommending disapproval of the scheme for establishment of New Medical College at Jabalpur, Madhya Pradesh by Gyanjeet Sewa Mission Trust, Jabalpur , Madhya Pradesh u/s 10 A of the IMC Act, 1956 for the academic year 2015-16 since there is no provision u/s 10 A of the indian Medical Council Act, 1956 or the Regulations framed therein to keep the application pending in the Council office for the next academic year.

The Executive Committee of the Council further decided to seek a clarification from Rani Durgavati University about the discrepancy of two different letters bearing the same outward number."

The Committee further observed that vide its submission before the Committee appointed by the Ministry, applicant trust has stated as under:

"We have applied on 29/10/2014 for grant of affiliation for academic year 2015-16 for 150 MBBS student and deposited Rs. 50,30,000.00 as affiliation fees on 28/10/2014 thereafter Madhya Pradesh Medical Science University has informed on 20/11/2014 that our affiliation fees had been accepted and our affiliation is under consideration. Thus we are at a stage above "consent of affiliation" as our affiliation is under consideration with Madhya Pradesh Medical University."

In this regards, the Ministry has forwarded the recommendations of the Committee constituted by the Ministry in the matter, which is as under:-

"Recommended for review by MCI"

The Central Govt. has requested the Council to review/assess the scheme in the light of the documents submitted by the college/applicants in compliance and recommendations of the Committee

with the request to take necessary action(s) for review and furnish its recommendations accordingly to the Ministry immediately latest by 15.04.2015, if nothing is heard by Council then it will be presumed that the MCI has no further comments to offer in the matter."

From the above, it is evident that the applicant trust has not yet received consent of affiliation from affiliating University -i.e. Madhya Pradesh Medical Sciences University w.e.f. 17/09/2014 which is a Qualifying Criterion 3(2)(4) of Establishment of Medical College regulations, 1999.

The Committee further observed that the time schedule prescribed under Establishment of Medical College Regulations with regard to last date prescribed under Establishment of Medical College Regulations, 1999 as amended from time to time reads as under:

No.	*Stage of processing*	*Last Date*
1.	Receipt of applications by the Central Govt.	From 1st August to 31st August (both days inclusive) of any year
2.	Receipt of applications by the MCI from Central Govt.	30th September
3.	Recommendations of Medical Council of India to Central Government for issue of Letter of Intent	15th December
4.	Issue of Letter of Intent by the Central Government.	15th January
5.	Receipt of reply from the applicant by the Central Government requesting for Letter of permission.	15th February
6.	Receipt of Letter from Central Government by the Medical Council of India for consideration for issue of Letter of Permission	1st March
7.	Recommendation of Medical Council of India to	15th May

	Central Government for issue of Letter of Permission.	
8.	issue of Letter of Permission by the Central Government.	15th June

It was further observed that these Regulations being Statutory Regulations are mandatory and binding in character and are required to be strictly adhered to by all the authorities. The operative part of the order of Hon'ble in *Mridul Dhar's* case is as under:

"1-13 .....

14. Time schedule for establishment of new college or to increase intake in existing college, shall be adhered to strictly by all concerned

15. Time schedule provided in Regulations shall be strictly adhered to by all concerned failing which defaulting party would be liable to be personally proceeded with."

In view of above, the Executive Committee of the Council decided to reiterate earlier decision to return the application recommending disapproval of the scheme for establishment of New Medical College at Jabalpur, Madhya Pradesh by Gyanjeet Sewa Mission Trust, Jabalpur, Madhya Pradesh u/s 10 A of the IMC Act, 1956 for the academic year 2015-16 as the qualifying criterion 3(2)(4) of Establishment of Medical College Regulations, 1999 is not fulfilled and since there is no provision u/s 10 A of the Indian Medical Council Act, 1956 or the Regulations framed therein to keep the application pending in the Council office for the next academic year."

5. On the basis of the said decision of the Executive Committee, intimation was sent to the Central Government. The Central Government vide communication dated 07.04.2015 (Annexure P- 17) informed the petitioner

Trust that hearing on the scheme submitted by the petitioner would take place on 10.04.2015 at the stated address. The petitioner-Trust submitted its response during the said hearing. After considering the response and explanation given by the petitioner-Trust, the Central Government vide communication dated 17.04.2015 (Annexure P- 19), informed the Medical Council of India to give one last opportunity to the petitioner-Trust to furnish the required documents from the newly established University.

6. The petitioner-Trust could succeed in getting the consent of affiliation from the M.P. Medical Science University on 25.04.2015 (Annexure P-20), which was duly submitted to the Council.

7. On 27.04.2015, the Central Government vide communication issued under the signature of Under Secretary, wrote to the President of Medical Council of India to process the recommendation in the light of consent of affiliation submitted by the petitioner-Trust. Accordingly, in the meeting of the Executive Committee of respondent No.2 - Council dated 29 th April, 2015, the scheme of the petitioner-Trust was considered and decision was taken to reiterate the negative recommendation given on the earlier occasion by the Council. The minutes of the said meeting reads thus:-

> **120. Establishment of New Medical College at Jabalpur, Madhya Pradesh by Gyanjeet Sewa Mission Trust, Jabalpur, Madhya Pradesh u/s 10A of the IMC Act, 1956 for the academic year 2015-16.**
>
> *Read: the matter with regard to establishment of New Medical College at Jabalpur, Madhya Pradesh by Gyanjeet Sewa Mission Trust, Jabalpur, Madhya Pradesh u/s 10 A of the IMC Act, 1956 for the academic year 2015-16.*

No.	*Stage of processing*	*Last Date*
1.	Receipt of applications by the Central Govt.	From 1st August to 31st August (both days inclusive)
2.	Receipt of application by the MCI from Central Govt.	30th September

3.	Recommendation of Medical Council of India to Central Government for issue of Letter of Intent	15th December
4.	Issueof Letter of Intent by the Central Government.	15th January
5.	Receipt of reply from the applicant by the Central Government requesting for Letter of permission.	15th February
6.	Receipt of Letter from Central Government by the Medical Council of India for consideration for issue of Letter of Permission	1st March
7.	Recommendation of Medical Council of India to Central Government for issue of Letter of Permission.	15th May
8.	Issue of Letter of Permission by the Central Government.	15th June

It was further observed by the Committee that as has been incorporated in earlier decision, these Regulations being Statutory Regulations are mandatory and binding in character and are required to be strictly adhered to by all the authorities. The operative part of the order of Hon'ble Supreme Court in *Mridul Dhar's* case is as under:

"1-13 .....

14. Time schedule for establishment of new college or to increase intake in existing college, shall be adhered to strictly by all concerned.

15. Time schedule provided in Regulations shall be strictly adhered to by all concerned failing which defaulting party would be liable to be personally proceeded with."

The relevant operative part of the order of Hon'ble Supreme court in *Priya Gupta's* case is as under:

30. Thus, the need of the hour is that binding dicta be prescribed and statutory regulations be enforced, so that all concerned are mandatorily required to implement the time schedule in its true spirit and substance. It is dificult and not even advisable to keep some windows open to meet a particular situation of exception, as it may pose impediments to the smooth implementation of laws and defeat the very object of the scheme. These schedules have been prescribed upon serious consideration by all concerned. They are to be applied stricto sensu and cannot be moulded to suit the convenience of some economic or other interest of any institution, especially, in a manner that is bound to result in compromise of the above- stated principles. Keeping in view the contemptuous conduct of the relevant stakeholders, their cannonade on the rule of merit compels us to state, with precision and esemplastically, the action that is necessary to ameliorate the process of selection. Thus, we issue the following

vi) All admissions through any of the stated selection processes have to be effected only after due publicity and in consonance with the directions issued by this Court. We vehemently deprecate the practice of giving admissions on 30th September of the academic year. In fact, that is the date by which, in exceptional circumstances, a candidate duly selected as per the prescribed selection process is to join the academic course of MBBS/BDS. Under the directions of this Court, second counseling should be the final counseling, as this Court has already held in the case of Ms. Neelu Arora & Anr. v. UOI & Ors. [(2003) 3 SCC 366] and third counseling is not contemplated or permitted under the entire process of selection/grant of admission to these professional courses.

vii) If any seats remain vacant or are surrendered from All India Quota, they should positively be allotted and admission granted strictly as per the merit by 15th September of the relevant year and not by holding an extended counseling. The remaining time will be limited to the filling up of the vacant seats resulting from exceptional circumstances or surrender of seats. All candidates should join the academic courses by 30th September of the academic year.

viii) No college may grant admissions without duly advertising the vacancies available and by publicizing the same through the internet, newspaper, on the notice board of the respective feeder schools and colleges, etc. Every effort has to be made by all concerned to ensure that the admissions are given on merit and after due publicity and not in a manner which is ex-facie arbitrary and casts the shadow of favouritism.

ix) The admissions to all government colleges have to be on merit obtained in the entrance examination conducted by the nominated authority, while in the case of private colleges, the colleges should choose their option by 30th April of the relevant year; as to whether they wish to grant admission on the basis of the merit obtained in the test conducted by the nominated State authority or they wish to follow the merit list/rank obtained by the candidates in the competitive examination collectively held by the nominated agency for the private colleges. The option exercised by 30th April shall not be subject to change. This choice should also be given by the colleges which are anticipating grant of recognition, in compliance with the date specified in these directions.

31. All these directions shall be complied with

by all concerned, including Union of india, Medical Council of india, Dental Council of India, State Governments, Universities and medical and dental colleges and the management of the respective universities or dental and medical colleges. Any default in compliance with these conditions or attempt to overreach these directions shall, without fail, invite the following consequences and penal actions: -

a) Every body, officer or authority who disobeys or avoids or fails to strictly comply with these directions stricto sensu shall be liable for action under the provisions of the Contempt of Courts Act. Liberty is granted to any interested party to take out the contempt proceedings before the High Court having jurisdiction over such Institution/State, etc. respective states, immediately after each counseling

h) No college shall fill up its seats in any other manner.

The Committee further observed that no clarification has yet been received in the office of Council with regard to two letters being issued with same date and outward number from Rani Durgavati University, Jabalpur. Its response dated 19/02/2015 merely states that all matters regarding affiliation would be dealt by M.P. Medical University, Jabalpur without really giving any clarification about two letters bearing same date & outward number.

In view of above, the Executive Committee of the Council decided to reiterate earlier decision to return the application recommending disapproval of the scheme for establishment of New Medical College at Jabalpur, Madhya Pradesh by Gyanjeet Sewa Mission Trust, Jabalpur, Madhya Pradesh u/s 10A of the IMC

Act, 1956 for the academic year 2015-16 as the qualifying criterion

3(2)(4) of Establishment of Medical College Regulations, 1999 is not fulfilled and since there is no provision u/s 10A of the Indian Medical Council Act, 1956 or the Regulations framed therein to keep the application pending in the Council office for the next academic year."

8. This decision of the Executive Committee is the subject matter of challenge in the present petition. On the basis of this decision the Medical Council respondent No.2 under the signature of Section Officer dated 11.05.2015 communicated negative recommendation to the Secretary Ministry of Health and Family Welfare, Government of India, qua the petitioner-Trust, which reads thus:

"No.MCI-34(41)(E-64)/2014-Med./106550 Dt. 11.05.2015

The Secretary,
Govt. of India,
Ministry of Health & Family Welfare,
Nirman Bhawan,
New Delhi -110011

Sub: **Establishment of New Medical College at Jabalpur, Madhya Pradesh by Gyanjeet Sewa Mission Trust, Jabalpur , Madhya Pradesh u/s 10A of the IMC Act, 1956 for the academic year 2015-16.**

Sir,

Please refer to your letter No.U121012/1057/2015-ME (P-II) (Part-I), dated 17.04.2015 and letter dated 27.04.2015, on the subject noted above.

I am directed to inform you that the matter with regard to grant of letter of intent/Letter of permission for Establishment of New Medical College at Jabalpur, Madhya Pradesh by Gyanjeet Sewa Mission Trust, Jabalpur, Madhya Pradesh u/s 10A of the IMC Act, 1956 for the academic year 2015-16

was reconsidered by the Executive Committee of the Council at its meeting held on 29.04.2015 and it was decided as under:

The Executive Committee of the Council perused the communications from the Central Government dated 17.04.2015 and 27.04.2015 along with documents submitted by the applicant and observed that the Consent of Affiliation has been issued by M.P.Medical Univesrity only 25.04.2015 - i.e. long after last date of submission of application i.e. 30.08.2014 completed in all respects.

The Committee further observed that time schedule prescribed under Establishment of Medical College Regulations, 1999 is as under:-

.....[1]

Yours faithfully,
(S. Savitha)
Section Officer"

Even this communication of the Medical Council is the subject matter of challenge in this petition.

9. According to the petitioner, as the petitioner had already complied with all other requirements, except submitting the consent of affiliation of the M.P. Medical Science University due to reasons beyond the control of the petitioner and inspite of the best efforts made by the petitioner from time to time for obtaining the same and that even this was duly submitted to the Council before the impugned decision was taken by the Council, in the light of the dictum of the Supreme Court in the case of *Royal Medical Trust Vs. Union of India and others* [2], the decision of the Council to send negative recommendation is untenable in law. According to the petitioner, the fact situation of the present case and the case decided by the Supreme Court was more or less similar. The Supreme Court negatived the hyper-technical approach of the Authority after due consideration of its earlier decision in the case of *Mridhul Dhar Vs. Union of India* [3] and *Priya Gupta Vs. State of*

1. [Reproduced in Paragraph 7 at Page 11]
2. 2013 (12) Scale 145
3. (2005) 2 SCC 65

Chhattisgarh [4], and held as follows:

> *"12. In the instant case, the appellant mindful of the aforesaid directions of this Court had applied in due time adhering to the statutory timelines. Its application in terms of necessary documents was in fact complete but for the Affiliation Certificate from KUHS which was awaited by the appellant even after several reminders for its issuance to KUHS pressing upon the urgency of the matter. Since the appellant was not at fault but constrained due to delay on part of KUCH, the Council was expected to have appropriately considered the facts and circumstances of the case pleaded by the appellant and thereafter, reached a conclusion one way or the other on its merits instead of functioning in such mechanical manner by rejecting the application filed by the appellant and, thereafter, forwarding it to the Central Government with its adverse recommendations. In our considered opinion, this aspect of the matter ought to have been noticed by the Writ Court in Writ Petition as well as the Writ Appeal Since that has not been done, in our considered view, we cannot sustain the impugned judgment and order passed by the High Court.*
>
> *13. Accordingly, while allowing the appeal, we direct the Council to register the application for the academic year 2013-2014 and thereafter, proceed with the matter on its merits in accordance with Act and Rules thereto within 15 days time from today. The higher authority, after receipt of the recommendations made by the Council, will act upon such recommendations and pass appropriate orders in accordance with law as expeditiously as possible, at any rate within a month's time from today."*

10. It is, therefore, submitted that the respondents be directed to process the application of the petitioner for establishment of new Medical College for the academic year 2015-16 whilst condoning the submission of the consent

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4. (2012) 7 SCC 433

of affiliation in April, 2015. As a matter of fact, even the respondent No. 1 in its communication dated 27.04.2015 (Annexure P-21) had advised the respondent No.2 Council to afford one last opportunity to the petitioner - Trust to furnish the required document and since the petitioner had done that immediately after receipt of consent of affiliation on 25.04.2015, the Executive Committee should have considered the case of the petitioner favourably.

11. The respondents, in particular, Medical Council has opposed this petition mainly on the assertion that the submission of document was not within time. Hence, no error has been committed by the Executive Committee in reiterating its earlier negative recommendation in its meeting held on 29.04.2015 and to communicate that position to the Central Government. In support of this submission, emphasis is placed by the respondents on the decisions of the Supreme Court which have stipulated strict time frame for compliance as mentioned in the minutes of the Executive Committee of the Council.

12. Having considered the rival submissions, the core issue that arises for consideration is: whether in the peculiar facts of the present case, MCI was justified in sending negative recommendation to the Central Government on the ground of non-submission of the consent of affiliation by the petitioner within the prescribed time? Inasmuch as, the factum of discrepancies in the two communications issued by Rani Durgavati University, that reason cannot be cited as a ground to submit negative recommendation to the Central Government. For, the College will be now governed by the newly established M.P. Medical Science University. The petitioner-Trust had finally succeeded in obtaining the consent of affiliation from the new University after fervent efforts. Even the Central Government was inclined to think that the petitioner-Trust must get one last opportunity to furnish the same, as is evident from its letter dated 27.04.2015 (Annexure P-21).

13. In our opinion, the Executive Committee of the Council ought to have taken holistic approach in the matter and not lightly brush aside the spirit of the recommendation made by the Central Government - which indeed was in consonance with the dictum of the Supreme Court in *Royal Medical Trust* (supra).

14. As aforesaid, the discrepancy arising out of the two letters issued by the Rani Durgavati University, which, admittedly, was competent to issue those

letters at the relevant point of time, ought to have been ignored or overlooked by the MCI after the consent of affiliation was issued by the M.P. Medical Science University. The petitioner having submitted the consent of affiliation issued by M.P. Medical Science University, soon after its receipt on 25.04.2015 and before the meeting of the Executive Committee was held on 29.04.2015; coupled with the opinion expressed by the Central Government in its letter dated 27.04.2015, the Executive Committee of the Council should have considered the scheme appropriately as having been submitted in time, keeping in mind the exposition of the Supreme Court in the case of *Royal Medical Trust* (supra). That decision applies on all fours to the fact situation of the present case. Therefore, we have no hesitation in observing that the impugned recommendation sent by the Medical Council after remand, cannot be sustained in law.

15. As a result, the impugned decision dated 29.04.2015 of the Executive Committee of the Council as also the communication forwarded by the respondent No.2 to the Central Government, deserves to be quashed and set aside. Instead, the respondent No.2 should reconsider the said scheme and submit its fresh recommendation in Form No.4 to the Central Government on the proposal for establishment of a new medical college at Jabalpur submitted by the petitioner-Trust.

16. The question as to whether such direction can be issued, has been elaborately dealt with in the companion case decided today, bearing Writ Petition No.7521/2015. For the same reasons, to do complete justice-*ex debito justitiae*, we have no hesitation in issuing direction to the respondent No.2 - Council as also the Central Government, to process the Scheme submitted by the petitioner-Trust for establishment of a new medical college at Jabalpur and to take final decision in the matter one way or the other in accordance with law, expeditiously, and in case before the commencement of admission process for academic year 2015-16 after declaration of results of the entrance examination scheduled on 15.07.2015 and are being conducted as per the direction given in the case of *Tanvi Sarwal Vs. Central Board of Secondary Education and others* by the Supreme Court in Writ Petition No. (Civil) 298/2015 decided on 15.06.2015.

17. We may not be understood to have expressed any opinion either way on any other issue which may be germane for the consideration of the subject scheme. The same will have to be decided by the concerned Authorities on its

own merits, in accordance with law.

18. To complete the record, we may now advert to **I.A.No.5610/2015** - intervention application filed on 10.06.2015. According to the interventionist, there is dispute between the petitioner-Trust and the interventionist with regard to the land on which the petitioner-Trust intends to start the new Medical College. In our opinion, that issue cannot be resolved in the present proceedings. The interventionist must take recourse to appropriate remedy, including, is at liberty to bring that factual position to the notice of the Authorities considering the proposal of petitioner-Trust for establishment of a new medical college. If those facts are relevant and if found to have bearing on the issue of approval or disapproval of the proposal may be examined by the concerned Authority on its own merits in accordance with law. We may not be understood to have expressed any opinion on those issues either way. The interventionist is free to submit his representation to the Authorities within **three days** from today (as MCI is being directed to take decision expeditiously, preferably within one week), which if filed within that time, may be considered by the Authorities in accordance with law. Besides this, nothing more is required to be said in this application. Intervention application is **disposed of** accordingly with liberty to the applicant as aforestated.

19. For the aforesaid reasons, we **allow** this writ petition on the above terms, with no orders as to costs. The impugned decision of the Executive Committee of the respondent No.2 - Council dated 29.04.2015 (Annexure P-22) and the communication issued by the Council under the signature of Section Officer dated 11.05.2015 (Annexure P-26) are quashed and set aside. Instead, the respondent - Council is directed to reconsider the scheme for establishment of a new medical college submitted by the petitioner - Trust on all other issues; and forward its appropriate recommendation, expeditiously, preferably within **one week**, so that the Central Government may be in a position to take appropriate decision in the matter before the admission process for academic year 2015-16 commences on the basis of entrance examination to be held on **15.07.2015.**

20. We **order** accordingly.

Order accordingly.

I.L.R. [2015] M.P., 2107
WRIT PETITION

Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice K.K. Trivedi

W.P. No. 7521/2015 (Jabalpur) decided on 1 July, 2015

RKDF MEDICAL COLLEGE HOSPITAL AND RESEARCH CENTRE ...Petitioner
Vs.
UNION OF INDIA & anr. ...Respondents

A. ***Constitution - Article 226 - Writ Petition - Whether Infructuous*** **- Central Government referred the negative recommendation submitted by M.C.I. back for reconsideration of Scheme of yearly renewal - M.C.I. again submitted negative recommendation - Central Govt. during the pendency of the petition issued communication mentioning "Central Government has decided to accept the same - It does not state that Central Government has accepted the said recommendations of M.C.I. - Recommendations of M.C.I. can be accepted only after giving opportunity of hearing to petitioner due to submission of fresh recommendation - Second recommendation made by M.C.I. is also under challenge - Petition cannot be said to have become infructuous. (Para 15)**

क. संविधान – अनुच्छेद 226 – रिट याचिका – क्या निष्फल हो गई है – केन्द्र सरकार ने एम.सी.आई. द्वारा प्रस्तुत नकारात्मक अनुशंसा को वार्षिक नवीनीकरण की योजना का पुनर्विचार किये जाने हेतु वापस निर्देशित किया – एम. सी.आई. ने पुनः नकारात्मक अनुशंसा प्रस्तुत की – केन्द्र सरकार ने याचिका लंबित रहने के दौरान यह उल्लिखित करते हुए संसूचना जारी की कि "केन्द्र सरकार ने उसें स्वीकार करने का निर्णय लिया है" – इसमें यह नहीं कहा गया है कि केन्द्र सरकार ने एम.सी.आई. की अनुशंसाओं को स्वीकार किया है – नई अनुशंसा को प्रस्तुत किये जाने के कारण एम.सी.आई. की अनुशंसाओं को केवल याची को सुनवाई का अवसर देने के पश्चात् स्वीकार किया जा सकता है – एम.सी.आई. द्वारा की गई द्वितीय अनुशंसा को भी चुनौती दी गई है – याचिका निष्फल हो जाना नहीं कहा जा सकता।

B. ***Medical Council Act, (102 of 1956), Section 10-A and Establishment of Medical College Regulations, 1999 - Regulations 7 & 8 - Renewal - Reconsideration*** **- Power of Central Government to**

refer back the Scheme of yearly renewal to MCI for reconsideration - M.C.I. submitted negative recommendation for renewal of recognition to the Central Government - Petitioner submitted a new Scheme before the Central Government in reply to the notice - Central Government remanded the matter back to M.C.I. to reconsider in the light of Scheme submitted by Petitioner - Provision of Section 10-A applies to both for proposal for opening a new medical college as also for grant of renewal permission - Scheme for yearly renewal permission is required to be processed under Section 10-A read with Regulations framed in that behalf - Central Government has power to refer back the Scheme of yearly renewal to M.C.I. for reconsideration. (Paras 16 to 26)

ख. आयुर्विज्ञान परिषद् अधिनियम, (1956 का 102), धारा 10-ए एवं आयुर्विज्ञान महाविद्यालयों की स्थापना विनियमन, 1999 – विनियमन 7 व 8 – नवीनीकरण – पुनर्विचार – पुनर्विचार हेतु एम.सी.आई. को वार्षिक नवीनीकरण की योजना वापस निर्देशित करने की केन्द्र सरकार की शक्ति – एम.सी.आई. ने केन्द्र सरकार को मान्यता के नवीनीकरण हेतु नकारात्मक अनुशंसा की – नोटिस के उत्तर में याची ने केन्द्र सरकार के समक्ष नई योजना प्रस्तुत की – केन्द्र सरकार ने मामले को याची द्वारा प्रस्तुत योजना के आलोक में पुनर्विचार करने हेतु एम.सी.आई. को प्रतिप्रेषित किया – धारा 10–ए का उपबंध, नया आयुर्विज्ञान महाविद्यालय खोलने के प्रस्ताव हेतु और साथ ही नवीनीकरण की अनुमति प्रदान करने हेतु, दोनों के लिये लागू होता है – वार्षिक नवीनीकरण अनुमति की योजना की कार्यवाही, धारा 10–ए सहपठित, इस संबंध में विरचित विनियमन के अंतर्गत की जाना अपेक्षित – वार्षिक नवीनीकरण की योजना को पुनः विचार किये जाने हेतु एम.सी.आई. को वापस निर्देशित करने की केन्द्र सरकार को शक्ति है।

C. Medical Council Act, (102 of 1956), Section 10-A - Negative Recommendation - **M.C.I. submitted negative recommendation - Central Government referred the matter back to M.C.I. to reconsider in the light of fresh Scheme submitted by Petitioner - M.C.I. in its 2nd negative recommendations merely adverted to its previous recommendations and observations - MCI is not only expected to ensure that existing medical college fulfills all the norms and standards to ensure imparting of quality medical education, but must also be concerned about burgeoning requirement of society and of creating opportunity to the deserving students who are keen to pursue medical course, keeping in mind the deficient number of Doctor's ratio catering to the society - 2nd recommendation qua the scheme submitted by petitioner is unsustainable and hence quashed**

- Authorities to process the scheme for yearly renewal permission further and take it to its logical end expeditiously and in any case before commencement of admission process for academic year 2015-2016 - Petition allowed. (Paras 27 to 32 & 37)

ग. आयुर्विज्ञान परिषद् अधिनियम, (1956 का 102), धारा 10-ए – नकारात्मक अनुशंसा – एम.सी.आई. ने नकारात्मक अनुशंसा प्रस्तुत की – केन्द्र सरकार ने याची द्वारा प्रस्तुत नई योजना के आलोक में पुनर्विचार किये जाने हेतु मामला एम.सी.आई. को वापस निर्देशित किया – एम.सी.आई. ने अपनी द्वितीय नकारात्मक अनुशंसाओं में मात्र अपनी पूर्वतर अनुशंसाओं और संप्रेक्षणों का हवाला दिया – एम.सी.आई. से न केवल यह सुनिश्चित करना अपेक्षित है कि उत्तम चिकित्सीय शिक्षा प्रदान किया जाना सुनिश्चित करने के लिये, विद्यमान आयुर्विज्ञान महाविद्यालय सभी सन्नियमों एवं मानकों को पूरा करता है बल्कि समाज की बढ़ती अपेक्षाओं के बारे में भी विचार करना चाहिए और समाज को उपलब्ध चिकित्सकों के अनुपात को ध्यान में रखते हुए ऐसे सुपात्र विद्यार्थी जो चिकित्सीय पाठ्यक्रम जारी रखने में उत्सुक हैं, उनके लिये अवसर निर्माण करें – याची द्वारा प्रस्तुत योजना के संबंध में द्वितीय अनुशंसा अपोषणीय है, अतः अभिखंडित – प्राधिकारीगण, वार्षिक नवीनीकरण की अनुमति हेतु योजना में आगे कार्यवाही करें और किसी भी स्थिति में शैक्षणिक वर्ष 2015–2016 के लिए प्रवेश प्रक्रिया आरंभ होने से पूर्व उसे शीघ्र रूप से उसके तर्कसंगत परिणाम तक पहुँचाये – याचिका मंजूर।

Cases referred :

(2013) 1 SCALE 608, (2011) 4 SCC 623, 2013(12) SCALE 145, (2005) 2 SCC 65, (2012) 7 SCC 433, W.P. (C) No. 5041/2015 and CM No. 9119/2015 decided on 28-5-2015, (2002) 1 SCC 589, (1986) 2 SCC 667, (2002) 7 SCC 258, (2003) 5 SCC 283.

Nidhesh Gupta with *Amalpushp Shroti*, for the petitioner.
Vikram Singh, for the Union of India.
Indira Nair with *Rajas Pohankar*, for the Medical Council of India.

ORDER

The Order of the Court was delivered by :
A.M. KHANWILKAR, C.J. :- This writ petition filed on 15.05.2015, under Article 226 of the Constitution of India, essentially, takes exception to the decision of the Medical Council of India (hereinafter referred to as MCI) - Respondent No.2 dated 29.4.2015 (Annexure P-12) and communication dated 11.5.2015 (Annexure P-14). Direction is also sought against the

Respondent No.1 to grant renewal permission to the petitioner for the academic year 2015-16 for admission to the 2nd batch of 150 students in the petitioner medical college. Further relief is claimed against the Respondent No.2 to reconsider the application of the petitioner for renewal of permission for academic year 2015-16 in furtherance of the order passed by the Respondent No.1 on 17.4.2015 (Annexure P-11).

2. The petitioner was granted permission to establish new medical college - RKDF Medical College and Research Centre at Bhopal for MBBS course with an annual intake of 150 seats for the academic year 2014-15 under Section 10A of the Indian Medical Council Act, 1956. That permission was granted on 9.7.2014. The first batch has already commenced the MBBS course successfully. Accordingly, the petitioner applied for grant of renewal permission for the 2nd batch of MBBS course for the academic year 2015-16, within the prescribed time. According to the petitioner, that application was processed by the Respondent No.2 and negative recommendation was sent on 5.3.3015 to Respondent No.1, without giving opportunity whatsoever, much less sufficient time to the petitioner to rectify the deficiencies, if any. The said communication was sent by the Respondent No.2 on the basis of minutes of the meeting of its Executive Committee held on 2.3.2015. The Executive Committee, relying on the adverse observations made in the Council Assessor Report, decided not to consider the petitioner institution for renewal of permission for two academic years i.e. academic year 2015-16 and next academic year 2016-17. The relevant extract of minutes of the meeting of Executive Committee dated 2.3.2015, reads thus :-

> "Dr. V. N. Jindal recused himself from the meeting.
>
> 54. **Assessment of the physical and other teaching facilities available for renewal of permission for MBBS course for 2 nd batch (150 seats) of RKDF Medical College Hospital & Research Centre, Bhopal, Madhya Pradesh earlier under Barakatullah University and now under Sarvepalli Radhakrishnan University, Bhopal u/s 10A of the IMC Act, 1956 for the academic year 2015-2016.**
>
> Read the matter with regard to Assessment of the physical and other teaching facilities available for renewal of

permission for MBBS course for 2nd batch (150 seats) of RKDF Medical College Hospital & Research Centre, Bhopal, Madhya Pradesh earlier under Barkatullah University and now under Sarvepalli Radhakrishnan University, Bhopal u/s 10A of the IMC Act 1956 for the academic year 2015-2016.

The Executive Committee considered the Council Assessor report (23rd & 24th February 2015) and noted the following:-

1. Deficiency of teaching faculty is 19.81 % as detailed in the report.

2. Shortage of residents is 49 % as detailed in the report.

3. Bed occupancy is 48 % on day of assessment.

4. There were only 5 Major (which included 4 Cataract operations) & 4 Minor operations on day of assessment.

5. There was no normal delivery & 1 Caesarean section on day of assessment.

6. There was no patient in ICCU, SICU, PICU/NICU & only 1 patient in MICU on day of assessment.

7. With regard to clinical material, the following discrepancies were observed:

(a) In Casualty OPD, two fake patients of corneal abrasion were shown. On enquiry, both of them said that on their left eye was given eye pads just one hour before. On examination, both of them had no such problem.

(b) In Paediatrics ward, most of the patients had no significant illness to be treated as IPD patients. 5 patients from the same family were found in Paediatrics ward. Few other patients were also from the common family.

(c) In Obstetrics ward, 2 patients were aged more than 50 years – i.e. beyond reproductive age.

(d) In Tb & Chest ward, almost all the patients shown were

not having any chest complaint at all. Rather, they had other vague complaints like body ache, etc. not requiring admission.

(e) Overall, IPD patients were not having significant illness to be treated as IPD patients.

(f) Most of IPD patients were not investigated at all. Most of them were not given any medicine.

(g) More than 70 % patients were admitted on only 1 day – i.e.22/02/2015.

8. With regard to faculty & Residents, the following discrepancies are observed:

(a) Most of the Residents are not actually staying in campus accommodation.

(b) One Junior Resident in O.G. confessed that he is actually staying in teaching staff quarters but only on paper he was allotted a room in the hostel.

(c) A few teachers are engaged only periodically as per their teaching schedule.

(d) Most of the faculty are not actually staying in the quarters allotted to them.

(e) Significant number of faculty & Residents were unaware of other faculty & Residents of their own departments.

9. Dr. Navneet Mishra, Asst. Prof. of General Surgery had attached wrong experience certificate.

10. The following faculty were observed not to have done any work in the department:

(a) Dr. Sameer Zutshi, Asst. Professor, Anesthesia;

(b) Dr. Subrat Adhikary, Asst. Professor of General Medicine;

(c) Dr. Priya Singh, Asst. Prof. of General Surgery;

(d) Dr. Avinash Kaundinya, Professor of Ophthalmology.

11. In case of as many as 12 faculty, address does not match

with Dean's quarters allocation certificate.

12. In case of 14 Residents as detailed in the report, there is no signature of HOD on D.F.

13. Dr. Milan Pumbhadiya, Junior Resident had D.F. filled on 09/01/2015 while he was appointed on 20/01/2015.

14. In case of Dr. Jayesh Dholakiya, Junior Resident in General Medicine, date of joining is contradictory.

15. Name of faculty was not mentioned in weekly teaching programmes.

16. In Residents' hostel, ground floor is used as Autopsy block.

17. Teaching staff quarters are not actually staff quarters but like big sized rooms hostel. They are located on 2nd & 3rd floor above the library and reading room, which means that library is on ground floor, reading room is on I floor of teaching quarters hostel.

18. MRD: It is partly manual & partly computerized.

19. Nursing staff: 155 Nurses are available against requirement of 175 as per Regulations.

20. Paramedical staff: Only 65 are available against requirement of 100 as per Regulations.

21. Anatomy department: Embryology models are inadequate.

22. Access of RKDF Hospital is through very narrow road passing through slum area which is a major problem for ambulance to reach.

23. No separate Nursing hostel is available. I floor of Girls' hostel is utilized as Nursing hostel.

24. Other deficiencies as pointed out in the inspection report.

In view of the above, the Executive Committee of the Council decided to recommend to the Central Govt. not to renew the permission for admission of 2nd batch (150 seats) of RKDF Medical College Hospital & Research Centre,

Bhopal, Madhya Pradesh earlier under Barkatullah University and now under Sarvepalli Radhakrishnan University, Bhopal u/s 10A of the IMC Act, 1956 for the academic year 2015-2016. It was further decided to apply clauses 8(3)(1)(a)& 8(3)(1)(d) of Establishment of Medical College Regulation (Amendment), 2010 (Part II), dated 16th April, 2010 which read as under:-

"8(3)(1) .....[1]

In view of above, it was decided not to consider the institute for renewal of permission for two academic years i.e. that academic year (i.e. 2015-16) and the next academic year (i.e. 2016-2017.)

The Executive Committee further decided to refer the matter to the Ethics Committee."

3. The Respondent No.2/MCI vide communication dated 25.3.2015 (Annexure P-7), called upon the Dean/Principal of the petitioner college to appear before the Ethics Committee, in the meeting scheduled to be held on 6.4.2015 in the Council Office along with documents mentioned in the said communication.

4. On the basis of recommendation sent by the Respondent No.2, the Under Secretary of Respondent No.1 vide communication dated 31.3.2015, called upon the Dean/Principal of the petitioner college to remain present for the hearing before the Committee constituted for consideration of the proposal, in the meeting scheduled on 10.4.2015, failing which ex-parte decision may be taken against the petitioner college. According to the petitioner, the petitioner participated in the said hearing and pointed out the errors committed by the Respondent No.2 in forwarding its negative recommendation including that the petitioner was not afforded opportunity whatsoever much less to rectify the deficiencies noted in the Council Assessor Report and about the incorrect observations therein and that the recommendation of Respondent No.2 was not in Form No.4, which was mandatory requirement. The detail statement in support of the clarification and explanation was also submitted before the said Committee indicating pointwise compliance. After considering the said explanation-cum-compliance statement, the Respondent

1. [Reproduced in paragraph No.23 at page 35]

No.1 decided to refer back the matter to MCI for review/assess vide communication dated 17.4.2015. The name of the petitioner is mentioned at Serial No.23. The said communication reads thus:-

"No.U-12012/1057/2015-ME (P-II) (Part.I)
Government of India
Ministry of Health & Family Welfare
(ME P-II Section)

Nirman Bhawan, New Delhi-11
Date 17th April, 2015

To,

The Secretary,
Medical Council of India,
Pocket – 14, Sector – 8,
Dwarka, New Delhi – 75

Subject : Establishment of New medical College/Increase of MBBS seats/Permission for Renewal of MBBS course at existing Medical Colleges for the academic year 2015-16. Hearing granted to applicant/Medical Colleges where MCI has recommended for disapproval of schemes-reg.

Madam,

I am directed to refer to the subject noted above and to say that as per the proviso under Section 10(A)(4) of IMC Act, 1956, a committee has been constituted for granting opportunity of personal hearing the Ministry in case of disapproval/non-renewal recommendations of the Council in case of UG courses for the year 2015-16. The Committee has given personal hearing to the authorized representatives of the Medical colleges/applicants on 09 th and 10 th April, 2015. Based on the compliance submitted by the colleges concerned in support of their claim, the Committee has recommended that the case may be referred back to MCI for review/assessment with their respective recommendations in respect of the following schemes. The compliance report submitted by the colleges concerned in original alongwith

recommendation of the committee and its observation are also sent herewith as per detail given below:

SL	College/Proposer	Observation of the Committee
1to22	----------	--------
23	RKDF Medical College Hospital & Research Centre, Bhopal, Madhya Pradesh [Renewal of Permission]	Recommended for review by MCI
24to36	----------	---------

2. In view of above, MCI is requested to review/assess the schemes as per the specific recommendations of the hearing Committee and compliance documents submitted by the colleges/applicants and furnish its recommendations accordingly to this Ministry immediately.

Yours faithfully,

Sd/
(Sudhir Kumar)
Under Secretary to the Govt.of India
Telefax No.011-23062959"

(emphasis supplied)

5. The Executive Committee of Respondent No.2, however, in its meeting held on 29.4.2015; and without reference to the spirit of the said communication of Respondent No.1 dated 17.4.2015 and the material sent therewith, proceeded to mechanically reiterate its opinion given on the earlier occasion on 2.3.2015, mainly relying on the legal opinion. In conclusion, the Executive Committee of Respondent No.2 noted that on the basis of opinion of Additional Solicitor General of India application under Section 8 (3) (1) (a) and 8 (3) (1) (d), it has decided to reiterate the earlier decision to recommend to the Central Government not to renew the permission for admission of 2nd batch (150 seats) qua the petitioner college earlier under Barkatullah University and now under Sarvepalli Radhakrishnan University, Bhopal u/s 10A of the IMC Act, 1956 for the academic year 2015-16 and for 2016-17 also. On the

basis of the said decision, Section Officer of the Respondent No.2 Council wrote to Respondent No.1 vide letter dated 11.5.2015 and informed accordingly. The said communication reads thus :-

"No.MCI-34(41)(R-47)/2014-Med./106541 dt.11/5/2015

The Secretary,
Govt. of India,
Ministry of Health and Family Welfare,
Nirman Bhawan,
New Delhi -110011

Sub : Renewal of permission for MBBS course for 2 nd batch (150 seats) of RKDF Medical College Hospital & Research Centre Bhopal, Madhya Pradesh earlier under Barkatullah University and now under Sarvepalli Radhakrishnan University, Bhopal u/s 10A of the IMC Act,1956 for the academic year 2015-2016.

Sir,

Please refer to your letter No.U12012/1057/2015-ME (P-11) (Part-I) dated 17/04/2015, on the subject noted above.

I am directed to inform you that the matter with regard to grant of renewal of permission for MBBS course for 2nd batch (150 seats) of RKDF Medical College Hospital & Research Centre, Bhopal, Madhya Pradesh earlier under Barkatullah University and now under Sarvepalli Radhakrishnan Univesrity, Bhopal u/s 10A of the IMC Act, 1956 for the academic year 2015-2016 was re-considered by the Executive Committee of the Council at its meeting held on 29/04/2015 and it was decided as under :-

"The Executive Committee of the Council observed that at its meeting dt. 02/03/2015, the Executive Committee had decided as under :

..... [2]

2. [Reproduced in Para 2 at page 3]

The Committee further observed that the Central Govt. vide its communication dt. 17.04.2015 has requested the Council to review/assess the scheme in the light of the documents submitted by the college/applicants in compliance and recommendations of the Committee with the request to take necessary action(s) for review and furnish its recommendations accordingly to the Ministry.

The Executive Committee of the Council perused the legal opinion of the Ld. Addl. Solicitor General of India and decided to accept it, which reads as under:-

Legal opinion dated 14/03/2015

"The querist MCI as sought my opinion on the interpretation of Regulation 8(3)(1)(a), 8(3)(1)(b) and 8(3)(1)(c) of the Establishment of Medical College Regulations, 1999 . My opinion has been sought on the following issues:-

"1. Whether the Council should process the applications of the medical college for renewal of permission for admitting fresh batch of MBBS students for the academic session 2015-16 wherein the Council has invoked Regulations 8(3)(1)(a), 8(3)(1)(b) and 8(3)(1)(c) of Establishment of Medical College Regulation, 1999.

2. Whether the Council while applying Regulation 8(3)(1)(b) of Establishment of Medical College Regulation, 1999 can deny recognition of the MBBS degree granted by medical colleges for the students who have already completed their MBBS course or whether the same will be applicable while considering the case of a medical college for grant of renewal of permission for 5th batch of MBBS students."

I have gone through the Note for Opinion forwarded by the querist and have also discussed the matter for the querist.

The amendment notification dated 16.04.2010 inserting Clause 8(3)1 made it amply clear that the Central Govt. may at any stage convey the deficiencies found during the inspection of the applicant – medical college and provide them an opportunity

to rectify the same. However, in case of renewal of permission at different stages, in case the deficiencies with regard to teaching faculty and bed occupancy are found in the medical college above the percentage provided in Regulation 8(3)1(a), 8(3)(1)(b) and 8(3)(1)(c) respectively of the Establishment of Medical College Regulation, 1999, the application of the medical colleges cannot be processed further since, considering the fundamental nature of the deficiencies in clause 8 the rectification is not statutorily contemplated. In such cases there is no provision to grant any time to the medical college for rectification of the deficiencies as the same cannot be rectified within a short span of time.

The relevant portion of the above Regulation are reproduced as under:-

".....

(3)(1) .....[3]

I am informed that the assessment of MCI is carried out by the assessors who are Professors of eminence and high integrity belonging to various Govt. Medical Colleges of the Country and the assessment report is also acknowledged by the Dean/ Principal of the concerned medical college. The truthfulness and veracity of the contents of the report which incorporates factual findings, therefore, cannot be doubted, since, it is done by independent persons in the presence of the Dean/Principal of the concerned medical college. The medical college is statutorily required to maintain minimum academic standards for the benefits of the medical education and the students so as to ensure that the MBBS students get best of teaching and training. The above Regulations are required to be and were notified with the prior approval of the Central Govt. to ensure that each medical college maintains atleast a minimum teaching faculty, infrastructure, clinical material and other physical facilities in their medical colleges.

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3. [Reproduced in paragraph No.23 at page 35]

The Regulations framed by the querist are statutory in nature and hence the Council as well as the Central Govt. is bound to follow the same in letter and spirit.

I am of the considered opinion that in cases of the medical colleges wherein the Council has invoked Regulation 8(3)(1)(a), 8(3)(1)(b) and 8(1)(c) of the Establishment of Medical College Regulation, 1999, after an inspection by the MCI assessors, there is no statutory provision either under the Acts or under the Regulations authorizing the querist to process the same further.

As far as the second question is concerned, I am of the opinion that the applicability of Regulation 8(3)(1)(b) of the Establishment of Medical College Regulation, 1999 while considering the case of a medical college for grant of recognition of MBBS degree will directly affect the MBBS students who have already completed their MBBS course/studies. The language in Regulation 8(3)(1)(b) of the Establishment of Medical College Regulations, 1999, clearly provides that in case the institute fails to provide minimum teaching faculty and bed occupancy, the institute shall not be considered for renewal of permission. The statutory scheme does not however bar an institute to be considered for the purpose of recognition of MBBS degree of the students who have successfully completed the course. Any such action on part of the querist will be too harsh on such students who have already completed their studies and had/have no control over either the college, the querist or the Central Govt....."

Legal opinion dated 27/03/2015

"1. The querist – Medical Council of India has sought my opinion as to whether the querist is obliged to consider the case of a medical college for grant of renewal of permission, which has been barred under Regulation 8(3)(1)(d) of the Establishment of Medical College Regulation, 1999, for two academic years on account of submitting false and fabricated documents / declaration forms of the faculty employed in the

medical college. The opinion is sought based upon the facts of one particular case viz. case of **Malla Reddy Medical College.**

2. I have gone through the Note for Opinion forwarded by the querist and have also discussed the matter in detail for the querist. My opinion on the questions is as under :-

3. As can be seen from the Note for Opinion and the correspondence, Malla Reddy Medical College has been debarred for making admission of 150 MBBS students under Regulation 8(3)(1)(d) of the Establishment of Medical College Regulation, 1999, initially for the academic year 2014-15 & 2015-16 and now for the academic session 2015-16 & 2016-17.

4. In order to give a specific opinion in the matter in light of facts of the case, it is appropriate to consider Regulation 8(3)(d) of the Establishment of Medical College Regulation, 1999 along with the facts of the case. The relevant portion of the aforesaid Regulation is reproduced as under :-

"……

8. GRANT OF PERMISSION:

……

……

(3)(1) (d) :……[4]

5. Regulation 8(3)(1)(d) of the Establishment of Medical College Regulation, 1999, for a salutary provision to achieve the object of the Act providing that in case any medical colleges is found to have employed teachers with fake and forged documents and declaration forms, such an institute will not be considered for renewal of permission/recognition for award of MBBS degree / processing of their application for postgraduate courses, for two academic years i.e. the current

4. [Reproduced in paragraph No.23 at page 35]

academic year and the next academic year. This provision is apparently made to ensure that no medical college takes chance by resorting to forgery or use of fake documents.

6. The Regulation 8(3)(1)(d) was incorporated in order to work as a deterrent for a medical college from including in any malpractice in relation to the appointment of teaching faculty in a medical college as the same will affect the quality of teaching and training in any such institution and would ultimately defeat the very object of the Act.

7. In the case of Malla Reddy Medical College, the querist on its regular inspection found that the teaching faculty employed by the medical college as well as the declaration form submitted to the querist was forged / fabricated in order to get a favourable recommendation for admitting a fresh batch of students for academic year 2014-15.

8. When the above malpractice came to the notice of the querist, the querist conducted a detailed enquiry and also verified the experience certificate as well as the declaration form furnished by the **Malla Reddy Medical College.** The querist also verified the experience cum relieving certificate of the faculty members from their earlier employer and found it to be false and fabricated.

9. The querist, after considering the entire material in this regard, vide its letter dated 03.09.2014 communicated its decision to refer to the matter of the Ethics Committee of the querist for appropriate action against the concerned doctors for submitting false and fabricated documents / declaration form as well as to debar **Malla Reddy Medical College** from admitting fresh batch of MBBS students for two academic years i.e.2014-15 and 2015-16 in terms of Regulation 8(3)(1)(d) of the Establishment of Medical College Regulation, 1999.

10. Since the decision of the querist was not communicated to the medical college, the institution made admissions for the academic year 2014-15 in pursuance of the order dated

18.09.2014 and 25.09.2014 passed by the Hon'ble Supreme Court in the case of *Hind Charitable Trust Vs. Union of India*- W.P. (CO) No.269 of 2014.

11. Thereafter, in pursuance to the Central Govt. letter dated 05.01.2014, the querist reconsidered its decision on the ground that **Malla Reddy Medical College** has already made admission for the academic year 2014-15, the querist decided that in the case of Malla Reddy Medical College the current academic year shall mean to be 2015-2016 and the next academic year will be 2016-17. This was communicated to the Central Govt. vide letter dated 21.01.2015.

12. Indulging in malpractice of forgery and fabrication is a serious offence in law and the same cannot be taken lightly. Especially in the case of medical education, as the same will affect the quality of medical education provided by an institution. The institution which indulges in forgery and fabrication should be penalized as contemplated by statutory provisions as their actions affect the career of students pursuing MBBS education and may eventually affect the citizens.

13. In view of the clear reading of the Regulation 8(3)(1)(d) and the facts of the case, I am of the opinion that querist is not obliged to process the application of a medical college for renewal of permission which has been debarred from making admission for two academic years in conformity with Regulation 8(3)(1)(d) of aforesaid Regulation ."

In view of above and the opinions of the Ld. Additional Solicitor General of India application of Section 8(3)(1)(a) and 8(3)(1)(d), the Executive Committee of the Council decided to reiterate earlier decision to recommend to the Central Govt. not to renew the permission for admission of 2nd batch (150 seats) of RKDF Medical College Hospital & Research Centre, Bhopal, Madhya Pradesh earlier under Barkatullah University and now under Sarvepalli Radhakrishnan University, Bhopal u/s 10A of the IMC Act, 1956 for the academic year 2015-2016 and for 2016-17 also."

Yours faithfully,
Sd/-
(S.Savitha)
Section Officer."

(emphasis supplied)

6. In this backdrop, the petitioner had no other option but to approach this Court praying for setting aside the decision of the Executive Committee of Respondent No.2 dated 29.4.2015 (Annexure P-12) and also the communication dated 11.5.2015 (Annexure P-14) and to direct the Respondent No.1 to grant renewal permission to the petitioner for the academic year 2015-16. The petitioner, in the first place, submits that the Central Government should have independently applied its mind on the claim submitted by the petitioner and approved or disapproved the same without sending it back to the Respondent No.2 for review or reconsideration. In that, the Central Government is the final Authority and the Respondent No.2 is only a recommendatory body. In any case, the Respondent No.2 was obliged to review the case of the petitioner college after giving opportunity of hearing to the petitioner in which the petitioner could have demonstrated that the deficiencies noted in the Council Assessor Report were inappropriate and in any case, to give opportunity to the petitioner to rectify the same, if any. Further, the Respondent No.2 should have reconsidered the matter in the light of observation made by the Central Government in its communication dated 17.4.2015 and the document sent therewith which were submitted by the petitioner by way of explanation and statement of compliance. According to the petitioner, the parameter applied by the Respondent No.2 to determine the deficiencies in the petitioner college such as – bed occupancy or shortage of residents "on the given day of assessment" is not only a hyper technical approach but results in applying absurd logic. Instead, the average number of residents and bed occupancy during the relevant year (period) ought to have been reckoned, for assessing the compliance of standards in the petitioner college. Similarly, the explanation offered for the shortage or deficiencies in that behalf "on the day of assessment" should have been considered by the Authorities objectively. Further, the explanation about the experience certificate of Mr. Navneet Mishra should have been considered on its own merits and in any case appointment of one Professor who had attached wrong experience certificate, by no stretch of imagination by itself can be the basis to deny

renewal permission to the entire college when substantial compliance of all other requirements for maintaining high standards were fulfilled. According to the petitioner, the Respondent No.2 as well as Respondent No.1 have not taken into account all the relevant factors. That has not only jeopardised the college but the interests and prospects of several aspirants (atleast 150 students) who could get admission in the petitioner college. According to the petitioner, it is a classic case of non-application of mind, if not of abdication of power, both by Respondent No.1 in remitting the scheme to MCI as also by the Respondent No.2 of dealing with the issue mechanically and not objectively, keeping in mind the larger public interest.

7. The petitioner in support of its argument about the procedure that ought to be followed for considering the scheme submitted for renewal of permission has placed reliance on the decision of the Supreme Court in the cases of *Swami Devi Dayal Hospital and Dental College Vs. Union of India and others*[5] and *Priyadarshini Dental College and Hospital Vs. Union of India and others*[6]. Reliance is also placed on the recent decision of the Supreme Court in the case of *Royal Medical Trust (Regd.) Vs. Union of India and another*[7] to contend that irregularity or illegality committed by the Authorities for processing the scheme on time, should not come in the way of the petitioner for issuance of suitable writ or direction against the Authorities. The petitioner wanted to rely on other decisions of the Supreme Court included in the compilation of judgments handed in to the Court during the arguments, but the counsel submitted that if the petitioner was right in its argument that the MCI was obliged to reconsider the scheme afresh in accordance with law by giving opportunity to the petitioner and then to submit its fresh recommendation in Form No.4 - which was not done by the Respondent No.2 even on the earlier occasion, it would not be necessary to multiply those decisions.

8. The Respondent No.1, per contra, contends that the petition as filed has become infructuous in view of the decision of Respondent No.1 communicated to the petitioner vide letter dated 15.6.2015 clearly indicting that the scheme submitted by the petitioner has been rejected consequent to the fresh recommendation made by the Respondent No.2 on 11.5.2015 which was founded on the decision of the Executive Committee of Respondent No.2

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5. 2013 (1) SCAL 608
6. (2011) 4 SCC 623
7. 2013 (12) SCAL 145

dated 29.4.2015. According to Respondent No.1, the last date for sending recommendation to MCI was 15.5.2015; and for the Central Government to issue permission for renewal is 15.6.2015. Thus, no relief can be granted to the petitioner after the said cut off dates. Respondent No.1 further contends that the petitioner was afforded personal hearing on 10.4.2015 and after considering the written and oral submissions made by the representative of the petitioner college, Central Government decided to refer back the scheme to Respondent No.2 MCI for review/assessment. The Respondent No.2 MCI having reiterated its earlier decision, no further indulgence can be shown to the petitioner; and moreso, in view of the communication dated 15.6.2015 referred to above. It is submitted that the MCI is a body constituted under the provisions of the Indian Medical Council Act, 1956 and is bestowed with the responsibility of maintaining highest standards in medical education throughout the country. If the said body has given negative recommendation, that is normally honoured by the Respondent No.1 for approving or disapproving the scheme. The Respondent No.1 is relying on the decisions of the Supreme Court in the cases of *Mridul Dhar Vs. Union of India*[8] (Para 33) as also *Priya Gupta Vs. State of Chhattisgarh*[9].

9. The Respondent No.2 MCI, however, has taken somewhat extreme position. According to Respondent No.2, the Central Government was obliged to either approve or disapprove the scheme itself. No express powers have been conferred on the Central Government to remand the matter back to MCI for reconsideration. The requirement of giving opportunity of hearing applies only in case of consideration of scheme under Section 10A by the Central Government. Further, the power to remit the scheme for reconsideration to MCI can be exercised by the Central Government only in respect of proposal for setting up a new medical college and not in respect of renewal scheme. According to Respondent No.2, the Central Government itself should have considered all the issues after the first recommendation was submitted by the MCI, being a case of renewal scheme. It is contended on behalf of Respondent No.2 that Clauses (a) as well as (d) of Regulation 8 (3) (1) were attracted in the present case as could be discerned from the Council Assessor Report and, therefore, no fault can be found with the recommendation of the MCI, be it vide communication dated 5.3.2015 on the basis of the decision taken by the Executive Committee in its meeting dated 2.3.2015 or dated 11.5.2015

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8. (2005) 2 SCC 65 9. (2012) 7 SCC 433

on the basis of the decision taken by the Executive Committee in its meeting held on 29.4.2015. The Respondent No.2 submits that the petitioner is not entitled for any relief whatsoever. According to the Respondent No.2, the decision of the Supreme Court in the case of *Swami Devi Dayal Hospital and Dental College* (supra) has no application to the issue on hand, in particular regarding the power of the Central Government to remit the Scheme for reconsideration to MCI. In that, the power under Regulation 8 as amended is only applicable to the scheme for establishment of new colleges and not for scheme for yearly renewal permission. Any other interpretation of the amended Regulation 8 would be in the teeth of the provisions of Act of 1956, as it does not provide for opportunity of hearing or reconsideration of renewal. According to the Respondent No.2, validity of Regulation 8 has been upheld by the Delhi High Court in the unreported case of *Shree Chhatrapati Shivaji Education Society and another Vs. Union of India and another*[10]. It is submitted that MCI is not obliged to provide reasonable opportunity to the person or college concerned, in respect of scheme for yearly renewal except to the extent of difficulties or non-availability of any particulars in the scheme at the first instance. The Respondent No.2 has relied on the decisions of the Supreme Court in the case of *State of Maharashtra Vs. Indian Medical Association and others*[11](Para 3 and 4), *Christians Medical Educational Society Vs. Govt of Andra Pradesh* [12] (Para 10), *Medical Council of India Vs. Madhu Singh and others*[13] (Para 5, 19, 20, 29, 23), *Secretary Selection Committee MBBS Vs. N Anirudhan and others*[14] (Para 11).

10. To complete the record, we may note that this writ petition came up for hearing during vacation on 21.05.2015. The Court after considering the rival submissions granted interim relief in the following terms :-

> "Heard on the application for hearing the writ petition during summer vacation. For the reasons stated in the application, same is allowed.
>
> Heard on the question of interim relief.
>
> Learned counsel for the petitioner submits that by an order dated 17.4.2015, the Central Government had directed

10. W.P. (C) No.5041/2015 & CM No.9119/2015 decided on 28.5.2015
11. (2002) 1 SCC 589
12. (1986) 2 SCC 667
13. (2002) 7 SCC 258
14. (2003) 5 SCC 283

respondent No.2 to review the case of the petitioner, however, respondent No.2 has refused to review the case of the petitioner on the ground that there is no provision. It is further submitted that the aforesaid order has been passed in ignorance of Regulation No.7

On the other hand, learned counsel for the respondent No.2 has submitted that the last date for submission of the recommendation by Medical Council of India has already expired on 15th May, 2015.

We have considered the submissions made by learned counsel for the parties. From the revised schedule which has been mentioned at page No.202 of the paper-book, we find that the last date of submission of recommendation *prima facie* appears to be 31st May, 2015. In Regulation 7 of the Regulations, we direct respondent No.2 to comply with the directions issued by respondent No.1 as contained in order dated 17 th April, 2015 . It is made clear that the exercise which may be undertaken by respondent No.2 shall not create any equity in favour of the petitioner and the same shall be subject to result of the writ petition.

As prayed, let the writ petition be listed on 28.5.2015."

(emphasis supplied)

11. Against this interim order, the respondent No.2 MCI carried the matter in appeal by way of SLP (Civil) No.16454/2015 which was disposed of on 04.06.2015 in the following terms :-

"Heard the learned Additional Solicitor General for the petitioner and the learned senior counsel for the respondent No.1.

This special leave petition has been filed challenging the interim order dated 21.05.2015 passed in writ petition (Civil) No.7521 of 2015 by the High Court of Madhya Pradesh.

By the said interim order, the High Court has directed

the present petitioner – Medical Council of India to comply with the letter dated 17.04.2015 issued by the Union of India to review its decision.

Various pleas have been raised before us pointing out the deficiencies found in the inspection by the Medical Council of India. It is also argued that the recommendation cannot be made in violation of Regulation 8 (3) (1) (a) of the Establishment of Medical College Regulations, 1999.

We are of the view that all these pleas can be raised before the High Court where the Writ Petition is still pending.

We are of the opinion that since in the Writ Petition the relief of issuance of a writ in the nature of mandamus directing the Medical Council of India to review the application of the respondent No.1 herein – RKDF Medical College Hospital and Research Centre for renewal of permission for the academic year 2015-16 was sought, as such, the High Court has granted indirectly final relief in the form of interim relief.

In the above circumstances, we dispose of this special leave petition allowing the present petitioner – Medical Council of India to raise the above pleas raised before us, before the High Court by moving an appropriate application/written statement within a period of three days from today. The High Court is requested to decide the same as expeditiously as possible, preferably within a period of ten days from today."

(emphasis supplied)

12. In this backdrop the matter was notified before this Bench on 22.06.2015 after the Court reopened. It was adjourned to 23.06.2015 at the request of respondent No.2, on which date arguments of both sides were concluded. The counsel for the respondents sought time to file written submissions till 25.06.2015, which request was allowed. Accordingly, written submissions have been filed by the counsel for the respondents Nos. 1 and 2 respectively, whereafter the same have been circulated to us by the Registry.

13. Having gone through the pleadings and the relevant records as also

the oral and written arguments of the parties, the first question that may have to be addressed, as raised by the respondent No.1, is: whether this petition has become infructuous? According to the respondent No.1, during the pendency of this petition communication has been issued by the Under Secretary of Respondent No.1 on 15.06.2015, as a result of which the Scheme submitted by the petitioner for yearly renewal of 2nd batch (150 Seats) of MBBS Course in the petitioner – College for the academic year 2015-16 has been disapproved. The said communication reads thus :-

"No.U.12012/466/2015-ME (P-II)
Government of India
Ministry of Health and Family Welfare
(Department of Health & Family Welfare)

Nirman Bhawan, New Delhi
Dated the 15th June, 2015

The Dean/Principal,
RKDF, Medical College Hospital & Research Centre,
Jatkhedi, NH-12, Hoshangabad Road, Bhopal,
Bhopal.

Subject : Non-renewal of Central Government permission for admission of 2nd Batch (150 seats) of MBBs Course at RKDF Medical College Hospital & Research Centre Bhopal for the academic year 2015-16 –reg.

I am directed to refer to MCI letter(s) dated 11.05.2015 thereby recommending to the Central Government not to renew the permission for admission of 2nd batch (150 seats) of MBBS course at RKDF Medical College Hospital & Research Centre Bhopal for academic year 2015-16 and to say that the Central Government has decided to accept the recommendations of MCI.

You are therefore directed NOT to admit any students in 2nd batch (150 seats) in MBBS course for the academic year 2015-16. Admission in next batch of students (150 seats) for the year 2016-17 will be made only after obtaining the Central Government Permission.

Any admission made in the regard will be treated as irregular and action will be initiated as per the provisions of IMC Act, 1956 and Regulations made thereunder.

Further, the MCI has also informed to apply Clause 8 (3) (1) (a) & (d) of Establishment of Medical College Regulation (amendment), 2010.

Yours faithfully,
(Sudhir Kumar)
Under Secretary to the Govt. of India
Telefax : 011 -23062861

(emphasis supplied)

14. A bare reading of this communication would indicate that intimation has been given to all concerned about the receipt of negative recommendation of MCI vide letter dated 11.05.2015, on the subject. For that, no student should be admitted in the petitioner College, in the 2nd batch (150 seats) of MBBS course in the academic year 2015-16 or for the next batch of students (150 seats) for the year 2016-17, without obtaining permission of the Central Government. This communication by no stretch of imagination can be read to mean that the recommendation made by the MCI vide letter dated 11.05.2015 has been finally accepted by the Central Government. That can happen only after following procedure specified in Section 10A of the Act, by giving opportunity of hearing to the petitioner in that behalf.

15. Notably, the said letter dated 15.06.2015 merely records that the Central Government "has decided" **(read contemplating)** to accept the same. For, it does not state that the Central Government, in fact, has accepted the said recommendations of MCI. As aforesaid, that can be done only after giving opportunity to the petitioner in that behalf due to submission of "fresh" recommendation by the MCI consequent to remand. Further, the second recommendation made by MCI dated 11.05.2015, after remand by the Central Government itself is the subject matter of challenge in the present petition. That question is *subjudice* before this Court (because of pendency of this petition since 15.05.2015 and moreso because of the interim order passed on 21.05.2015). If the petitioner were to succeed in this petition, it would necessarily follow that the respondent No.2 – MCI will be obliged to review/assess the Scheme returned by the Central Government afresh. In that,

the challenge in this petition is to the decision of the Executive Committee of the respondent No.2 Medical Council of India dated 29.04.2015 (Annexure P-12); and the consequential communication sent by the respondent No.2 to the Central Government dated 11.05.2015 (Annexure P-14). Even if that challenge fails, the petitioner is entitled for an opportunity of hearing under Section 10A and the Regulations framed under the Act, before the Central Government takes final decision consequent to the submission of the fresh recommendation by the MCI on 11.05.2015. Only whence the final decision can be taken or said to have been lawfully taken by the Central Government on the said Scheme. Suffice it to observe that, the preliminary issue raised by the respondent No.1, that the petition has become infructuous is untenable.

16. The next moot question which the petitioner has touched in the grounds of challenge as also raised by the respondent No.2, is that, the Central Government should have decided the Scheme of renewal on its own, on all aspects raised by the petitioner. The respondent No.2 has gone a step further to contend that the Central Government has no power to refer back the Scheme of yearly renewal to respondent No.2 – MCI for reconsideration. For, such direction could be issued only in relation to a Scheme for establishment of a new College. The provisions in the Act of 1956 regarding permission for establishment of new Medical College and new course of study etc., is found in Section 10A. The same reads thus :-

> **"10A. Permission for establishment of new medical college, new course of study.** -(1) Notwithstanding anything contained in this Act or any other law for the time being in force-
>
> (a) no person shall establish a medical college; or
>
> (b) no medical college shall -
>
> (i) open a new or higher course of study or training (including a postgraduate course of study or training) which would enable a student of such course or training to qualify himself for the award of any recognised medical qualification; or
>
> (ii) increase its admission capacity in any course of study or training (including a postgraduate course of study or training),

except with the previous permission of the Central Government obtained in accordance with the provisions of this section.

Explanation 1 - For the purposes of this section, "person" includes any University or a trust but does not include the Central Government.

Explanation 2 - For the purposes of this section "admission capacity" in relation to any course of study or training (including postgraduate course of study or training) in a medical college, means the maximum number of students that may be fixed by the Council from time to time for being admitted to such course or training.

(2) (a) Every person or medical college shall, for the purpose of obtaining permission under sub-section (1), submit to the Central Government a scheme in accordance with the provisions of clause (b) and the central Government shall refer the scheme to the Council for its recommendations.

(b) The Scheme referred to in clause (a) shall be in such form and contain such particulars and be preferred in such manner and be accompanied with such fee as may be prescribed.

(3) On receipt of a scheme by the Council under sub-section (2) the Council may obtain such other particulars as may be considered necessary by it from the person or the medical college concerned, and thereafter, it may, -

(a) if the scheme is defective and does not contain any necessary particulars, give a reasonable opportunity to the person or college concerned for making a written representation and it shall be open to such person or medical college to rectify the defects, if any, specified by the Council;

(b) consider the scheme, having regard to the factors referred to in sub-section (7) and submit the scheme together with its recommendations thereon to the Central Government.

(4) The Central Government may after considering the scheme and the recommendations of the Council under sub-section (3) and after obtaining, where necessary, such other particulars as may be considered necessary by it from the person or college concerned, and having regard to the factors referred to in sub-section (7), either approve (with such conditions, if any, as it may consider necessary) or disapprove the scheme, and any such approval shall be a permission under sub-section (1):

Provided that no scheme shall be disapproved by the Central Government except after giving the person or college concerned a reasonable opportunity of being heard:

Provided further that nothing in this sub section shall prevent any person or medical college whose scheme has not been approved by the Central Government to submit a fresh scheme and the provisions of this section shall apply to such scheme, as if such scheme has been submitted for the first time under sub-section (2).

(5) Where, within a period of one year from the date of submission of the scheme to the Central Government under sub-section (2), no order passed by the Central Government has been communicated to the person or college submitting the scheme, such scheme shall be deemed to have been approved by the Central Government in the form in which it had been submitted, and accordingly, the permission of the Central Government required under sub-section (1) shall also be deemed to have been granted.

(6) In computing the time-limit specified in sub-section (5) the time taken by the person or college concerned submitting the scheme, in furnishing any particulars called for by the Council, or by the Central Government shall be excluded.

(7) The Council, while making its recommendations under clause (b) of sub-section (3) and the Central Government, while passing an order, either approving or disapproving the scheme under sub-section (4), shall have due regard to the following factors, namely:-

(a) whether the proposed medical college or the existing medical college seeking to open a new or higher course of study or training, would be in a position to offer the minimum standards of medical education as prescribed by the Council under section 19A or, as the case may be, under section 20 in the case of postgraduate medical education;

(b) whether the person seeking to establish a medical college or the existing medical college seeking to open a new or higher course of study or training or to increase it admission capacity has adequate financial resources;

(c) whether necessary facilities in respect of staff, equipment, accommodation, training and other facilities to ensure proper functioning of the medical college or conducting the new course or study or training or accommodating the increased admission capacity have been provided or would be provided within the time-limit specified in the scheme;

(d) whether adequate hospital facilities, having regard to the number or students likely to attend such medical college or course of study or training or as a result of the increased admission capacity, have been provided or would be provided within the time-limit specified in the scheme;

(e) whether any arrangement has been made or programme drawn to impart proper training to students likely to attend such medical college or course of study or training by persons having the recognised medical qualifications;

(f) the requirement of manpower in the field of practice of medicine; and

(g) any other factors as may be prescribed.

(8) Where the Central Government passes an order either approving or disapproving a scheme under this section, a copy of the order shall be communicated to the person or college concerned."

(emphasis supplied)

17. In the recent decision of the Supreme Court in the case of *Swamy Devi Dayal* (supra), the scope of Section 10A has been analyzed. Besides holding that the requirement of affording personal hearing and adhering to principles of natural justice while considering the proposal being inviolable, the Court has noticed that the provision operates both for proposal for opening a new medical college as also for grant of renewal permission. In other words, the Scheme for yearly renewal permission is required to be processed under Section 10A read with the Regulations framed in that behalf in exercise of powers under Section 33 read with Section 10A of the Act in the same manner as for a new college. There is no independent provision for processing the Scheme for yearly renewal permission to be granted by the Central Government.

18. Reverting to the Regulations framed for establishment of Medical Colleges titled as 'Establishment of Medical College Regulations 1999'and in particular the provision regarding reconsideration, it is expressly provided as under :-

> **"Reconsideration :-**
>
> When the Council in its report has not recommended the issue of Letter of Intent to the person, it may upon being so required by the Central Government reconsider the application and take into account new and additional information as may be forwarded by the Central Government. The Council shall, thereafter, submit its report in the same manner as prescribed for the initial report."

(emphasis supplied)

19. The argument of the respondent No.2 that this provision can be invoked only in respect of Schemes for establishment of a new college, in our opinion, will be a pedantic approach. This Regulation does not make that distinction either expressly or impliedly. It applies to "all proposals" referred to in Regulation 8 – which can be for establishment of a new medical college or for renewal of permission, as the case may be. On the other hand, the provision refers to both situations and in particular to the report to be submitted by the Council, which is required to be submitted for both purposes. This, obviously, is an enabling provision, empowering the Central Government to send back the proposal for reconsideration if new or additional information or material is

placed before the Central Government – other than reckoned by MCI in its recommendation report under consideration. Therefore, after the recommendation of MCI is received by the Central Government, it is open to the Central Government to examine the same itself or to require the Council to reconsider the Scheme and submit its fresh report in the same manner as is required to be submitted in the first instance by the Council in prescribed Form No.4 for that purpose.

20. Indubitably, the Central Government is the final Authority in the matter of grant or non-grant of permission. The Council is only a recommendatory Authority. It is a different matter that the recommendation of the Council being experts opinion, is honoured by the Central Government in respect of fulfillment and compliance of educational standards by the institutions. That, however, does not mean that the Central Government has no authority to call upon the Council to reconsider its recommendation, if it is of the opinion that new or additional information has been brought to its notice, which may have been overlooked by the Council while making recommendation or that has become available after the recommendation is made by the Council.

21. Regulation 7 speaks about the report of the Medical Council of India, which, it is expected to submit along with its recommendation to the Central Government for consideration. Regulation 7 reads thus :-

> **"7. REPORT OF THE MEDICAL COUNCIL OF INDIA:**
>
> (a) After examining the application and after conducting necessary physical inspections, the Medical Council shall send to the Central Government a factual report stating –
>
> 1. that the applicant fulfils the eligibility and qualifying criteria.
> 2. that the person has a feasible and time bound programme to set up the proposed medical college alongwith required infrastructural facilities including adequate hostels facilities separate for boys and girls, and as prescribed by the Council, commensurate with the proposed intake of students, so as to complete the medical college within a period of four years from the date of grant of permission;

3. that the person has a feasible and time bound expansion programme to provide additional beds and infrastructural facilities, as prescribed by the Medical Council of India, by way of upgradation of the existing hospital or by way of establishment of new hospital or both and further that the existing hospital as adequate clinical material for starting 1st year course.

4. that the person has the necessary managerial and financial capabilities to establish and maintain the proposed medical college and its ancillary facilities including a teaching hospital.

5. that the applicant has a feasible and time bound programme for recruitment of faculty and staff as per prescribed norms of the Council and that the necessary posts stand created.

6. that the applicant has appointed staff for the 1st year as per MCI norms.

7. that the applicant has not admitted any students.

8. Deficiencies, if any, in the infrastructure or faculty shall be pointed out indicating whether these are remediable or not.

(b) The recommendation of the Council whether Letter of Intent should be issued and if so, the number of seats per academic year should also be recommended. The Council shall recommend a time bound programme for the establishment of the medical college and expansion of the hospital facilities. This recommendation will also include a clear cut statement of preliminary requirements to be met in respect of buildings, infrastructural facilities, medical and allied equipments, faculty and staff before admitting the first batch of students. The recommendation will also define annual targets to be achieved by the person to commensurate with the intake of students during the following years.

(c) Where the Council recommends for not issuing of Letter

of Intent, it shall furnish to the Central Government –

(i) its reasons for not granting the Central Government permission; and (ii) documents /facts on the basis of which the Council recommends the disapproval of the scheme.

(d) The recommendation of the Council shall be in Form-4."

(emphasis supplied)

22. Form No.4 in which the recommendation is required to be submitted by the Council, is part of the Regulations. The same reads thus :-

FORM - 4

RECOMMENDATION OF THE MEDICAL COUNCIL OF INDIA

No.....
Medical Council of India

Place .....
Date .....

To
The Secretary,
Ministry of Health and Family Welfare
Nirman Bhawan,
New Delhi.

(Attention : ME(P) desk)

Sub: Establishment of a medical college at ..... by (name of the State Government/Union territory/Society/Trust).

Sir,

I am directed to refer to your letter No. ..... dated on the above subject and to say that the physical and other infrastructural facilities available at the proposed medical college to be set up at .....by the (person) were inspected on ..... by the Inspectors appointed by the Medical Council of India. A copy of the inspection report is enclosed.

2. The inspection report and all other related papers were placed before the Executive Committee of the Council in its meeting held on ..... On careful consideration of the proposal, the Executive Committee decided to recommend to the Central Govt. for approval/ disapproval of the Scheme. The decision of the Executive Committee has been approved by/will be placed before the General Body in its meeting/ensuing meeting held/to be held on .....

3. On careful consideration of the scheme and inspection report the Medical Council of India has arrived at the following conclusion:-

(i) that the applicant fulfils the eligibility and qualifying criteria.

(ii) that the applicant has a feasible and time bound programme to set up the proposed medical college along with required infrastructural facilities including adequate hostel facilities for boys and girls and as prescribed by the Medical Council of India, commensurate with the proposed intake of students so as to complete the medical college within a period of four years from the date of grant of permission.

(iii) that the applicant has a feasible and time bound expansion programme to provide additional beds and infrastructural facilities as prescribed by the Medical Council of India, by way of upgradation of the existing hospital or by way of establishment of new hospital or both so as to collectively provide the prescribed bed complement within a period of four years from the date of grant of permission to set up the proposed medical college.

(iv) That the applicant has necessary managerial and financial capabilities to establish and maintain the proposed college and its ancillary facilities including a teaching hospital.

(v) That the applicant has a feasible and time bound

programme for recruitment of faculty and staff as per prescribed norms of the Council and that the necessary posts stand created.

(vi) That the applicant has not admitted any students.

(vii) Deficiencies if any in the infrastructure or faculty shall be pointed out indicating whether these are remediable or not.

The position regarding infrastructural facilities is as under:-

Sl.No.	Requirement at the time of inception as per MCI Norms	Available	Remarks
1.	Staff		
2.	Buildings		
3.	Equipment		
4.	Other requirement		

In view of the above position, the Council recommends to the Central Government for issuing/not issuing the Letter of Intent -

In case the Council does not recommend issue of Letter of Intent, the reasons for disapproval of the scheme are as under:-

(a) .....

(b) .....

(c) .....

The scheme , in original, is returned herewith.

Yours faithfully,
SECRETARY
MEDICAL COUNCIL OF INDIA

Enclosures: - Inspector's report."

(emphasis supplied)

23. On receipt of the recommendation in the prescribed form, the Central Government is expected to process the same in terms of Regulation 8 (as amended) which reads thus :-

"8. GRANT OF PERMISSION:

(1) The Central Government on the recommendation of the Council may issue a Letter of Intent to set up a new medical college with such conditions or modifications in the original proposal as may be considered necessary. This letter of Intent will also include a clear cut statement of preliminary requirements to be met in respect of buildings, infrastructural facilities, medical and allied equipments, faculty and staff before admitting the first batch of students. The formal permission may be granted after the above conditions and modifications are accepted and the performance bank guarantees for the required sums are furnished by the person and after consulting the Medical Council of India.

(2) The formal permission may include a time bound programme for the establishment of the medical college and expansion of the hospital facilities. The permission may also define annual targets as may be fixed by the Council to be achieved by the person to commensurate with the intake of students during the following years.

(3) (1) The permission to establish a medical college and admit students may be granted initially for a period of one year and may be renewed on yearly basis subject to verification of the achievements of annual targets. It shall be the responsibility of the person to apply to the Medical Council of India for purpose of renewal six months prior to the expiry of the initial permission. This process of renewal of permission will continue till such time the establishment of the medical college and expansion of the hospital facilities are completed and a formal recognition of the medical college is granted. Further admissions shall not be made at any stage unless the requirements of the Council are fulfilled. The Central Government may at any stage convey the deficiencies to the applicant and provide him an opportunity and time to rectify the deficiencies.

PROVIDED that in respect of

(a) Colleges in the stage upto II renewal (i.e. Admission of third batch):

If it is observed during any regular inspection of the institute that the deficiency of teaching faculty and/or Residents is more than 30% and/or bed occupancy is < 60 %, such an institute will not be considered for renewal of permission in that Academic Year.

(b) Colleges in the stage from III renewal (i.e. Admission of fourth batch) till recognition of the institute for award of M.B.B.S. degree :

If it is observed during any regular inspection of the institute that the deficiency of teaching faculty and/or Residents is more than 20% and/or bed occupancy is < 70 %, such an institute will not be considered for renewal of permission in that Academic Year.

(c) Colleges which are already recognized for award of M.B.B.S. degree and/or running Postgraduate Courses:

If it is observed during any regular inspection of the institute that the deficiency of teaching faculty and/or Residents is more than 10% and/or bed occupancy is < 80 %, such an institute will not be considered for processing applications for postgraduate courses in that Academic Year and will be issued show cause notices as to why the recommendation for withdrawal of recognition of the courses run by that institute should not be made for Undergraduate and Postgraduate courses which are recognized u/s 11(2) of the IMC Act, 1956 along with direction of stoppage of admissions in permitted Postgraduate courses.

(d) Colleges which are found to have employed teachers with faked/forged documents:

If it is observed that any institute is found to have employed a teacher with faked / forged documents and have

submitted the Declaration Form of such a teacher, such an institute will not be considered for renewal of permission / recognition for award of M.B.B.S. degree / processing the applications for postgraduate courses for two Academic Years – i.e. that Academic Year and the next Academic Year also.

However, the office of the Council shall ensure that such inspections are not carried out at least 3 days before upto 3 days after important religious and festival holidays declared by the Central/State Govt.

(2) The recognition so granted to an Undergraduate Course for award of MBBS degree shall be for a maximum period of 5 years, upon which it shall have to be renewed.

(3) The procedure for "Renewal" of recognition shall be same as applicable for the award of recognition.

(4) Failure to seek timely renewal of recognition as required in sub -clause (a) supra shall invariably result in stoppage of admissions to the concerned Undergraduate Course of MBBS at the said institute."

(4) The council may obtain any other information from the proposed medical college as it deems fit and necessary."

(emphasis supplied)

24. On conjoint reading of these provisions, we are of the considered opinion that the procedure to be followed for submitting recommendation by the Council is common for setting up a new medical college or for that matter for scheme for renewal of yearly permission. The provisions regarding that procedure is composite and common for both situations. Further, it is open to the Central Government either to approve or disapprove the Scheme as recommended by the Council or to call upon the Council to review/assess the Scheme and to submit its fresh report-cum- recommendation in Form No.4. Any other interpretation would run counter to the legislative scheme and the checks and balances provided for ensuring quality education in particular in the field of medicine.

25. In the present case, the Central Government vide letter dated 17.04.2015 (Annexure P-11), referred back the scheme of selected Medical Colleges out of total 36 colleges, for review by MCI. It would have been desirable, if the Central Government while referring back the scheme in respect of given College were to also broadly indicate as to why review by MCI was found necessary and the matters in respect of which the review must be done. That would not only provide guidance or insight to MCI to re-examine the Scheme of the said College on those specific issues but also obviate any speculation and facilitate MCI to re-submit its recommendation in the specified time frame. This observation has become necessary in the backdrop of the grievance made by the petitioner about the inappropriateness of the observations made in the Council Assessor Report - which was made the foundation by the Executive Committee of the Council to make negative recommendation to the Central Government qua the petitioner. Inasmuch as, the grievance of the petitioner before the Central Government against the recommendation of the Council was manifold, including of having failed to adhere to principles of natural justice and moreso, of not having given time to rectify the deficiencies, if any. Further, the recommendation of the Council sent in the first round was not in Form No.4, to provide for classified information and observation [reasons as specified in Regulation 7(c)] and including as to whether the deficiencies noticed were remediable or not. This grievance assumes significance because permission for opening new College was already granted to the petitioner and first batch of students were pursuing medical course in the same College. If the deficiencies are of serious nature, it may have cascading effect on the quality of medical education imparted to the students pursuing medical course in such College. Neither the Council nor the Central Government can afford to be oblivious of this matter while considering the scheme for yearly renewal. Insistence by the Central Government for submission of recommendation in Form No.4, which is part of the Regulations can neither be objectionable nor that can be said to be a mere formality to be dispensed with by the Authorities. Suffice it to observe that there is ample indication in the provisions of the Act and the Regulations framed thereunder, to permit remand of the Scheme to the Medical Council for reconsideration and for submission of fresh recommendation in the prescribed Form No.4.

26. Reverting to the argument of the Respondent No.2 MCI that the Council had invoked powers under Section 10 A (4) of having sent its

recommendation to the Central Government in respect of scheme for yearly renewal, it is not open to the Central Government to refer back the matter to the MCI, will have to be stated to be rejected for the reasons already recorded hitherto. We are of the opinion that Section 10A is a composite provision dealing with both the schemes for establishment of a new medical college as also for yearly renewal of permission, as is the dictum of the Supreme Court in the case of *Swami Devi Dayal Hospital and Dental College* (supra). The procedure for processing of proposal in both the situations is governed by Section 10A of the Act read with Regulations 7 and 8 of the Regulations. Further, the provision in the Regulations regarding reconsideration, makes no distinction between the nature of recommendation or being limited to reconsideration of scheme for establishing a new medical college only. Any other view would be a pedantic approach. We hold that there is not only express provision to reinforce this view, but there is intrinsic power in the final Authority (Central Government) to call upon the recommending Authority (MCI) on matters which have been overlooked by the latter or because of new or additional information brought to its notice by the college which required due consideration. This is so because duty to ensure full compliance of all standards for imparting quality medical education rests on the MCI. Thus understood, the Central Government before taking final decision to approve or disapprove the scheme may justly rely on and insist for complete disclosure of matters referred to in Form No.4.

27. That takes us to the question of legality of the decision taken by the Executive Committee of the MCI on 29.4.2015 (AnnexureP-12), in the present case. The said decision has been reproduced in the communication dated 11.5.2015 (Annexure P-14). The Executive Committee of MCI has merely adverted to its previous recommendations and observations recorded in the minutes of its meeting dated 22.03.2015 and additionally to the legal opinion dated 14.03.2015 concerning the petitioner-College without referring to the spirit of the direction given by the Central Government dated 17.04.2015 to reconsider the scheme afresh. Notably, the legal opinion was sought on 14.03.2015 on "two queries" referred to therein and not with reference to the direction issued by the Central Government vide letter dated 17.04.2015 and more particularly, the documents forwarded to the MCI by the Central Government therewith, in subsequent point of time. The legal opinion dated 14.03.2015 was on the interpretation of Regulation 8 (3) (1) (a) (b) and (c); and not specific to the issues raised by the petitioners before the Central

Government and mentioned in the explanation-cum-compliance statement submitted by the petitioner for which the proposal was referred back for reconsideration. Be that as it may, the legal opinion was that there was no statutory provision under the Act or Regulation to authorise MCI to process the scheme for renewal after the finding is given by the Assessors on the factum of deficiencies referable to Regulation 8 (3) (1) (a), (b) or (c), being opinion of experts and independent persons. The MCI cannot grant any time to the Medical College for rectification of such deficiencies, as the same cannot be rectified within a short span of time. At the same time, the legal advise given to the MCI in the said opinion was that statutory scheme does not, however, bar an institute to be considered for the purpose of recognition of MBBS degree of the students who have successfully completed the course. Any action against such students by MCI will be too harsh on such students who have no control over either the College, MCI or the Central Government. Indeed, the MCI was within its rights to take that opinion or to accept the same on legal issues. But since the legal opinion did not specifically deal with the issues raised by the petitioner before the Central Government as a result of which the matter was referred back, can be of no avail. Notably, the Executive Committee has not only considered the aforesaid legal opinion qua the petitioner college but also the legal opinion given in respect of some other College, Malla Reddy College, with which the petitioner had no concern. Yet the Executive Committee considered both the opinions together to send negative recommendation against the petitioner College, as can be discerned from the concluding paragraph of the same minutes dated 29.04.2015.

28. The legal opinion as also the Executive Committee has considered the matter of petitioner on the basis of provisions of Regulations 8 (3) (1) (a) only, as was also argued before the Supreme Court whilst challenging the interim order dated 21.5.2015 in S.L.P. (C) No.16454/2015. The same is applicable to colleges applying for renewal in the stage upto (II) (i.e. Admission of 3rd batch) and because of the observations noted in the Council Assessors Report, in particular, at No.1, 2 3 & 9, the Executive Committee decided to submit negative recommendation. The relevant deficiencies noticed in the Council Assessor Report, as pressed into service by the MCI against the petitioner college reads thus :-

> "1. Deficiency of Teaching Faculty is 19.81% as detailed in report.

2. Shortage of residents is 49% as detailed in report.

3. Bed occupancy is 48% on the day of assessment.

4 to 8.....

9. Dr. Navneet Mishra, Asstt. Professor of General Surgery had attached wrong experience certificate."

(emphasis supplied)

29. The issue raised by the petitioner, however, was that the deficiencies were computed on the basis of the factual position noticed on the day of assessment and not on the basis of average shortage of residents or the bed occupancy. Neither the legal opinion nor the analysis done by the Executive Committee of MCI in its meeting dated 29.04.2015 have made any attempt to answer this explanation given by the petitioner. Similarly, with regard to deficiency No.9 regarding wrong experience certificate, the petitioner had raised a specific plea that wrong experience certificate of "one" Professor, in the college, cannot be the basis to invoke the extreme action. That approach is impermissible on the interpretation of sub-Clause (d) of Regulation 8 (3) (1). For, the said provision uses plural expression "Teachers". The later part of the said provision cannot be the basis to overlook this aspect. Even on this question, there is absolutely no consideration either in the stated legal opinion or the minutes of the Executive Committee dated 29.04.2015.

30. Suffice it to observe that specific explanation and compliance statement was submitted by the petitioner before the Central Government which was available with MCI as forwarded by the Central Government along with the communication dated 17.04.2015, for reconsideration. None of those points have been dealt with by the Executive Committee. Further, MCI has failed to submit its recommendation in Form No.4, which was mandatory. Even this plea raised by the petitioner before the Central Government has not been adverted to by the Executive Committee or the MCI before submitting its fresh recommendation to the Central Government.

31. It is thus evident that in the reconsideration process, the Executive Committee of the MCI did not advert to the explanation-cum- compliance report submitted by the petitioner before the Central Government pointwise. It would have been a different matter if the Executive Committee were to consider the same and then to form opinion one way or the other pointwise before taking final decision to resend the negative recommendation. The MCI

has acted mechanically in taking decision on 29.4.2015, which decision is bordering on non-application of mind if not abdication of its duty. The MCI can ill-afford to process the scheme for establishment of a new medical college or for additional capacity in any course of study in such casual manner. For, it not only affects the institution intending to start such courses, but the teeming million student population aspiring to pursue medical courses. The MCI is not only expected to ensure that the existing medical college fulfills all the norms and standards to ensure imparting of quality medical education, but must also be concerned about the burgeoning requirement of the society and of creating opportunity to the deserving students who are keen to pursue medical course, keeping in mind the deficient number of doctors' ratio catering to the society. The MCI is expected to adopt a pragmatic and holistic approach in processing of such schemes. We are required to make these observations as in companion W.P. No.7915/2015 *(Gyanjeet Sewa Mission Trust Vs. Union of India and others)*, which has been heard along with this writ petition and is disposed of today by a separate judgment, we have noticed the preposterous approach of the MCI in sending negative recommendation for permission to open a new medical college, inspite of compliance of the formality of consent of affiliation issued by the newly established M.P. Medical Science University as insisted by the Council and inspite of the observations made by the Central Government to give one more opportunity to the institute to do so.

32. Be that as it may, in our opinion, the decision of the Executive Committee of the MCI dated 29.4.2015 (Annexure P-12) qua the scheme submitted by the petitioner, is unsustainable in law and is not in consonance with the spirit of the directive given by the Central Government of review of the scheme for yearly renewal permission of the petitioner college.

33. The next question is whether the MCI, before submitting its negative recommendation report in prescribed form to the Central Government, is obliged to call upon the applicant college to explain the deficiencies or the adverse observations noticed by it and to give sufficient opportunity to the college to remove the deficiencies, if any, especially in the matter of renewal of yearly permission for a college which has already started functioning pursuant to a valid permission. This concern has been taken note of by the Supreme Court in the case of *Priyadarshini Dental College and Hospital* (supra). In paragraph No.23 of the said decision the Court observed thus :-

"23. In all these cases, the petitioners, who were the

applicants for renewal were existing dental college, which were functioning for three or four years and each college had admitted hundreds of students either directly or through the State Government allotment. The colleges had the benefit of initial permission and several renewals of permission. Refusal of renewal of permission in such cases should not be abrupt nor for insignificant or technical violations. Nor should such applications be dealt in a casual manner, by either granting less than a week for setting right the "deficiencies" or not granting an effective hearing before refusal. The entire process of verification and inspection relating to renewal of permission, should be done well in time so that such existing colleges have adequate and reasonable time to set right the deficiencies or offer explanations to the deficiencies. The object of providing for annual renewal of permissions for four years, is to ensure that the infrastructural and faculty requirements are fulfilled in a gradual manner, and not to cause disruption."

(emphasis supplied)

34. We may usefully also refer to the principle underlying the dictum of the Supreme Court in the case of *Swami Devi Dayal Hospital and Dental College* (supra), to reject the argument of Respondent No.2 (MCI) that there is no requirement of personal hearing before submitting its negative report to the Central Government. Indeed, in that case, the question considered by the Court was whether personal hearing was required to be given by the Central Government before passing the order refusing to grant the yearly renewal permission. However, after analyzing Section 10A of the Act, the Supreme Court went on to observe that principles of natural justice must be followed at two stages. Firstly, at the level of the Council to make a written representation and also to rectify the deficiencies, if any, specified by it and then by the Central Government before it passes any adverse orders, as it is final Administrative Authority vested with powers to pass such orders. In the abovenoted reported decision, the Supreme Court has referred to its earlier decisions and has noted that, in the absence of specific provision of giving hearing, the hearing is required in such cases unless expressly excluded by a statutory provision before recommending denial of permission by the MCI. It

is unnecessary to underscore the significance of affording hearing and to explain and satisfy the MCI about appropriateness of adverse observations. Further, keeping in mind that the decision of MCI of sending negative recommendation not only has serious ramification for the institution but also the students aspiring to pursue medical course, it would be just and appropriate that the MCI before submitting its adverse report on matters which otherwise could be explained and clarified by the institution, give opportunity to the institution in that regard, so as to fulfil its obligation of following principles of natural justice even at that stage. Indisputably, negative report by the MCI would inevitably visit the college with civil consequences, as the college may not be able to enroll fresh students in the new academic year. The fact that inspection was carried out and the Council Assessor Report identified certain deficiencies after giving opportunity to the petitioner college should not denude the institution – of an opportunity to explain the position to MCI, before MCI submits its negative recommendation. That procedure would facilitate MCI to make a clear recommendation including as to whether the deficiencies are remediable or not. On this count also, the decision of the Executive Committee of the MCI dated 29.4.2015 (Annexure P-12) deserves to be overturned and as a necessary corollary the communication sent by the MCI dated 11.5.2015 (Annexure P-14) deserves to be set aside.

35. The consequence of setting aside of the decision of the MCI dated 29.4.2015 (Annexure P-12) and the consequential communication dated 11.5.2015 (Annexure P-14), necessitates placing the parties in the same position as on the date of communication sent by the Central Government dated 17.4.2015, calling upon the MCI to review/assess the scheme of the petitioner and to submit fresh recommendation in Form No.4. Having said this, it is unnecessary for us to dilate on other questions raised by the petitioner about inappropriate observations in the Council Assessor Report or the deficiencies noticed by the MCI in its first negative recommendation, as those matters will have to be reconsidered by the MCI afresh after giving opportunity to the petitioner. That must be done at the earliest and before the ensuing Common Entrance Examination for admission to medical course commences, so that the Central Government would be in a position to take a final decision on the scheme for yearly renewal of permission submitted by the petitioner before the admission process to MBBS course for the academic year 2015-16 begins on the basis of the ensuing examination results. Indeed, the respondents have invited our attention to the decisions of the Supreme Court

in the case of *Mridul Dhar* (supra), *Priya Gupta* (supra) and the schedule appended to the Regulations to point out that the cut off date for granting permission has already lapsed on 15.6.2015. However, we are persuaded to grant relief to the petitioner keeping in mind the dictum of the Supreme Court in the case of *Royal Medical Trust (Regd.)* (supra). Even in that case, the medical college had approached the Authorities before the cut off date, as in the present case. But, the proposal was protracted due to circumstances beyond the control of the said applicant. The Court after considering the two decisions relied by the respondents before us, went on to observe as follows:-

> *"12. In the instant case, the appellant mindful of the aforesaid directions of this Court had applied in due time adhering to the statutory timelines. Its application in terms of necessary documents was in fact complete but for the Affiliation Certificate from KUHS which was awaited by the appellant even after several reminders for its issuance to KUHS pressing upon the urgency of the matter. Since the appellant was not at fault but constrained due to delay on part of KUCH, the Council was expected to have appropriately considered the facts and circumstances of the case pleaded by the appellant and thereafter, reached a conclusion one way or the other on its merits instead of functioning in such mechanical manner by rejecting the application filed by the appellant and, thereafter, forwarding it to the Central Government with its adverse recommendations. In our considered opinion, this aspect of the matter ought to have been noticed by the Writ Court in Writ Petition as well as the Writ Appeal. Since that has not been done, in our considered view, we cannot sustain the impugned judgment and order passed by the High Court.*
>
> *13. Accordingly, while allowing the appeal, we direct the Council to register the application for the academic year 2013-2014 and thereafter, proceed with the matter on its merits in accordance with Act and Rules thereto within 15 days time from today. The higher authority, after receipt of the recommendations made by the Council, will act upon such recommendations and pass appropriate orders in*

accordance with law as expeditiously as possible, at any rate within a month's time from today."

These directions were given on "10.9.2013", during the academic year 2013-14.

36. In the present case, the applicant had submitted the scheme for grant of yearly renewal permission in July 2014 for academic year 2015-16, which was processed by the MCI and culminated with the negative recommendation submitted by it to the Central Government on 5.3.2015. The Central Government after considering the objection and explanation of the petitioner thought it appropriate to refer back the matter to the MCI on 17.4.2015. No doubt, MCI took the decision on 29.4.2015 and communicated the same to the Central Government on 11.5.2015, but the petitioner immediately approached this Court on 15.5.2015 and also persuaded the Court to grant interim relief on 21.5.2015. However, the MCI took the matter to the Supreme Court against that decision, by way of SLP (Civil) No.16454/2015 which was disposed of on 4.6.2015.

37. Suffice it to observe, that the petitioner has acted with utmost dispatch and has succeeded in persuading the Court that the action of MCI of forwarding negative report even on the second occasion after remand, is unsustainable. In such a case, to do complete justice – *ex debito justitiae,* it has become essential to direct the Authorities to process the scheme for yearly renewal permission further and take it to its logical end expeditiously and in any case before commencement of admission process for the academic year 2015-16 after declaration of results of the examination scheduled on 15.7.2015 and are being conducted in furtherance of the decision of the Supreme Court in the case of *Tanvi Sarwal Vs. Central Board of Secondary Education and others* (W.P. (Civil) No.298/2015) dated 15.6.2015. Since declaration of Central Entrance Examination results may take some time, there is enough time for the Central Government to consider the subject scheme submitted by the petitioner and if the same is approved, no prejudice would be caused to any student. In other words, issuance of letter of permission by the Central Government can still be complied well in time.

38. We make it clear that we are not expressing any opinion on the merits of the other grounds raised by the petitioner. Those are all matters which will have to be considered by the MCI, in the first place, before sending its recommendation and also by the Central Government. We may not be

understood to have expressed any opinion on the issues which may be germane for grant of approval or disapproval of the scheme for renewal of permission submitted by the petitioner.

39. Reliance was placed by the Respondent No.2 on the unreported decision of the Supreme Court in the case of *Shree Chhatrapati Shivaji Education Society* (supra). Counsel for the petitioner, however, pointed out that the observation found in Paragraph No.23 of the said judgment is in the teeth of the observations of the Supreme Court in the case of *Swami Devi Dayal Hospital and Dental College* (supra). It is not necessary for us to elaborate on this matter, as the question considered in the said decision was essentially about the validity of proviso (b) to Regulation 8 (3) (1) as amended on 16.4.2010 of the Establishment of Medical College Regulations, 1999. Similarly, even the other Supreme Court decisions pressed into service by Respondent No.2, referred to in paragraph 9 above, are inapplicable to the questions dealt with in this judgement. For, the petitioner has not questioned the authority of the MCI to reconsider the scheme as directed by the Central Government as such or that MCI must decide the same *dehors* the provisions of the Act and the Regulations.

40. In view of the above, we set aside the impugned decision of MCI dated 29.4.2015 (Annexure P-12) as well as subsequent communication dated 11.5.2015 (Annexure P-14); and instead direct MCI to review/assess the scheme for yearly renewal of permission submitted by the petitioner college, in the light of the directions given by the Central Government vide communication dated 17.4.2015 (Annexure P-11). The Respondent No.2 shall expeditiously forward its recommendation report to the Central Government and preferably within one week from today to enable the Central Government to process the same further and take a final decision before the process of admission to medical course for academic year 2015-16 commences after declaration of examination results of the entrance examination scheduled on 15.7.2015.

41. We also direct the MCI as well as the Central Government to consider the subject scheme submitted by the petitioner without being influenced by the communication dated 15.6.2015 issued under the signature of Under Secretary, Government of India, Ministry of Health and Family Welfare, which is produced alongwith the written submission of Respondent No.1, as we have construed that communication to be only a direction given that the

petitioner college cannot enroll new students for the academic year 2015-16 without formal permission issued by the Central Government in that behalf.

42. Accordingly, the petition is allowed on the above terms, with no order as to costs. In-view of the disposal of this writ petition, the interlocutory applications are also disposed of.

Order accordingly.

I.L.R. [2015] M.P., 2155
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
S.A. No. 76/2006 (Jabalpur) decided on 14 March, 2014

RAJENDRA KUMAR ADHWARYU & anr. ...Appellants
Vs.
PARMANAND ...Respondent

Limitation Act (36 of 1963), Section 5 - Condonation of delay - **Condonation of delay sought on the ground that due to lack of communication between appellant and lawyer, appeal could not be filed - The party is bound to contact Advocate periodically to know the progress and status of case - If a party is negligent, then the right of other party has accrued on account of such negligence - Delay of 1 year & 170 days cannot be condoned - Application dismissed. (Para 7)**

परिसीमा अधिनियम (1963 का 36), धारा 5 – विलम्ब के लिये माफी – विलम्ब के लिये माफी इस आधार पर चाही गई कि अपीलार्थी एवं अधिवक्ता के बीच संसूचना के अभाव के कारण अपील प्रस्तुत नहीं की जा सकी – पक्षकार प्रकरण की प्रगति और स्थिति जानने के लिये नियमित रूप से अधिवक्ता के संपर्क में रहने के लिये बाध्य है – यदि पक्षकार उपेक्षावान है तब उक्त उपेक्षा के कारण अन्य पक्षकार को अधिकार प्रोद्भूत होता है – 1 वर्ष और 170 दिनों का विलम्ब माफ नहीं किया जा सकता – आवेदन खारिज।

Case referred :

AIR 1962 SC 361.

Abhishek Singh, for the appellants.
R.P. Agrawal with *Vaibhav Jain,* for the respondent.

(Supplied: Paragraph numbers)

ORDER

U.C. MAHESHWARI, J. :- In view of listing the matter for hearing IA No. 14107/11, respondents' application for early hearing of this appeal does not require any further consideration, hence the same is disposed of.

2. Heard on IA No. 312/06, appellants' application under Section 5 of the Limitation Act for condoning the delay in filing the present appeal as the same has been filed barred by 5 years and 130 days, as reported by the office.

3. In the aforesaid application, interlia (sic:inter alia) it is stated that the impugned judgment was passed by 2nd Additional District Judge, Tikamgarh in Civil Regular Appeal No. 09/98, vide dated 11.5.2000. Subsequent to such judgment, the period from 12.5.2000 to 25.2.2000 was spent by the appellant in obtaining the certified copy of the same. Thereafter on dated 22.8.2000 within the prescribed period, on behalf of the appellant against such judgment, S.A. No. 1011/2000 was filed. In pendency of the same under bonafide advise, an application for conversion of such appeal into civil revision was filed on 5.9.2000. After allowing such second appeal was converted as C.R. No. 1574/01 and was admitted on 7.7.2003. Subsequent to that on coming to know that revision is not tenable against the impugned judgment, then the appellant had withdrawn such civil revision with liberty to file writ petition vide order dated 25.8.2004 and subsequent to it, the present second appeal was filed on 21.12.2005, i.e. after near about 1 years and 170 days.

4. It is also stated that after withdrawal of the aforesaid civil revision due to lack of communication between the counsel and the appellants, they could not file the present appeal within a reasonable period or in any case within the prescribed limitation and stating such circumstances to be bonafide and sufficient for condoning the alleged delay in filing this appeal, this IA is preferred. The IA is further supported by an affidavit of Rajendra Adhvarya, appellant no.1. On argument by referring these facts, the appellants' counsel prayed to condone the aforesaid delay by allowing this IA.

5. On the other hand, by filing reply of this IA on behalf of the respondents, all the averments are denied. In addition to it, it is stated that whatsoever cause is stated in the IA, the same could not be treated to be sufficient cause as per requirement of Section 5 of the Limitation Act for condoning the alleged aforesaid long delay. Learned Senior Counsel also argued that it is apparent

fact from the impugned application that the appellants have failed to explain the circumstances regarding delay in filing the appeal for the period between 25.8.2004 to 21.12.2005 and unless such delay is properly explained, the application of the appellants in the present nature can not be allowed to condone the alleged delay.

6. Having heard, keeping in view the arguments advanced, I have carefully gone through the application alongwith the impugned judgment.

7. True it is that after passing the impugned judgment by the subordinate appellate court initially S.A. No. 1011/2000 was filed within limitation but subsequently the same was converted into civil revision, which was also withdrawn with liberty to file writ petition, vide dated 25.8.04, as stated above. Thereafter, the impugned appeal was filed on 21.12.05 near about after 1 year and 27 days from the date of withdrawal of aforesaid civil revision. It is apparent that in the impugned application to condone the alleged delay the appellants have shown the cause that due to lack of communication between the counsel of aforesaid revision and the appellants, they could not file the appeal within the limitation but in support of such contention the affidavit of the concerning counsel has also not been filed. Besides this, the appellants have also not stated that why they have not contacted themselves to the counsel for such a longer period to enquire the status of aforesaid earlier second appeal and the civil revision. In such premises, mere on the averments of the application that due to lack of communication from the counsel for want of knowledge of withdrawal of civil revision with some liberty, they could not file the appeal within the prescribed period could not be believed. The party is duty bound to contact the Advocate periodically to know the progress and the status of the case. In that respect if the party is negligent then on account of such negligence, the right of other party which has accrued on expiry of limitation for filing the proceeding could not be defeated and in such premises, whatsoever cause is stated by the appellants in the application, the same could not be treated to be sufficient cause as per requirement of Section 5 of the Limitation Act for condoning the alleged delay and in such premises, this application deserves to be dismissed.

8. It is settled proposition that on expiration of period of limitation prescribed to file the appeal gives rise the valuable right in favour of other party and such accrued legal right of the other party by lapse of time could not be lightly disturbed unless the sufficient cause for condoning such delay is

proved by reliable and admissible evidence and circumstances.

9. Such principle is laid down by the Apex Court in the matter of *Ramlal and others Vs. Rewa Coalfields Ltd.* reported in AIR 1962 SC, 361 in which it was held as under:-

> **(b) Limitation Act (1908) S. 5 - Principles.**
>
> In construing S. 5, it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree holder to treat the decree as binding between the parties and this legal right which has accrued to the decree holder by lapse of time should not be light heartedly disturbed. The other consideration, which can not be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to condone delay and admit the appeal.

10. In view of aforesaid, I have not found any sufficient cause for condoning the alleged delay in filing this appeal. Consequently this IA is hereby dismissed. Pursuant to it, the appeal is hereby also dismissed as barred by time.

No order as to cost.

Appeal dismissed.

I.L.R. [2015] M.P., 2158
APPELLATE CIVIL
Before Mr. Justice Sanjay Yadav
M.A. No. 3770/2010 (Jabalpur) decided on 5 April, 2014

LALJI BIND ...Appellant
Vs.
UNION OF INDIA ... Respondent

Railway Claims Tribunal Act, (54 of 1987), Section 16 and Railways Act (24 of 1989), Sections 123(c) & 124(a) **- Applicant's claim was denied on the ground that the death was not due to untoward incident - Held - In the absence of specific evidence that the train was stationary at the place where accident had occurred, it has to be presumed that the victim had fell down from the moving train - Finding arrived at by**

Claims Tribunal cannot be given the stamp of approval - Same are set-aside - Claimant would be entitled for compensation of Rs. 4 lakhs with 6% interest p.a. from the date of claim application - Appeal is allowed. (Paras 5, 6 & 9)

रेल दावा अधिकरण अधिनियम (1987 का 54), धारा 16 एवं रेल अधिनियम (1989 का 24), धाराऐं 123(सी) व 124(ए) – आवेदक का दावा इस आधार पर अस्वीकार किया गया कि मृत्यु दुर्भाग्यपूर्ण घटना के कारण नहीं हुई थी – अभिनिर्धारित – जहां दुर्घटना घटी उस स्थान पर रेलगाड़ी खड़ी थी के संबंध में किसी विनिर्दिष्ट साक्ष्य के अभाव में यह उपधारणा करनी होगी कि पीड़ित चलती रेलगाड़ी से नीचे गिरा था – दावा अधिकरण के निष्कर्ष को अनुमोदित नहीं किया जा सकता – उक्त को अपास्त किया गया – दावाकर्ता दावा आवेदन करने की तिथि से रू.4 लाख, 6% ब्याज प्रतिवर्ष के साथ प्रतिकर का हकदार होगा – अपील मंजूर।

Case referred :

(2008) 9 SCC 527.

Nitin Agrawal, for the appellant.
James Athony, for the respondent.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- With consent matter is heard finally.

1. Challenge in this appeal under Section 23 of the Railways Claims Tribunal Act 1987, is to a judgment dated 26.4.2010 passed in Original Application No.34/2006.

2. Rita Devi while travelling from Suryawa to Kalyan in Kashi Express No.1028 died on 14.2.2005 due to injuries sustained being run over by the train near Itarsi Station.

3. Appellant husband of the deceased, filed a claim application before Railway Claims Tribunal for compensation of Rupees Four Lacs.

4. Relevant facts borne out from record are that deceased was travelling with valid second class mail express ticket on Train No.1028 Kashi Express and because of the crowd in the compartment she fell down from the running train in the night near Itarsi Railway Station and was run over by another train on up track near Poll No.743/24-26 between Itarsi Railway Station and "C"

Cabin Mehragaon she succumbed to the injuries sustained.

5. Claims Tribunal while holding that the claimant are dependants and that the deceased was a bonafide passenger , however, non suited the claimants on the ground that the death was not due to untoward accident. To arrive at such conclusion Claims Tribunal relied on the statement of Ramesh Kumar, Loco Pilot Bhopal, who was examined as Railways witness and has stated "घटना दिनांक 14–02–2005 को वह गाड़ी कमांक–4313 दादर–बरेली एक्सप्रसे को भुसावल से भोपाल आ रहे थे कि रात के करीब 9–10 बजे इटारसी से पूर्व खंबा नम्बर–743/24–26 के मध्य "सी–कैबिन" मेहरागावं इटारसी के पास एक महिला अचानक अप ट्रेक से दौडते हुए उनकी गाड़ी के लोको नम्बर–20549 से डाउन लाइन पर टकराई एवं अप तथा डाउन ट्रेक के मध्य जो खाली जगह होती है, वहॉ गिरी।". However there is no material evidence on record to suggest that at the place where the accident had occurred the train in which the victim was travelling ,i.e, 1028 Kashi Express was stationary. In absence of this fact it has to be presumed that, the victim had fell down from moving train and in the State of Shock and in the realm of darkness, as the accident had occurred at about 9.00 pm, she went on the track resulting in the accident by oncoming train. Section 124 A of the Indian Railways Act, 1989 stipulates that when in the course of working of a railway an untoward incident occurs, then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would entitle a passenger who has been injured on the defendant of a passenger who has killed to maintain an action and recover damages in respect thereof the railway administration shall, notwithstanding anything contained in any other law, be liable to pay compensation to such extent as may be prescribed and to that extent only for loss occasioned by the death of, or injury to, a passenger as a result of such untoward incident. Exception has been caused by proviso stipulating that if the passenger dies or suffers injury due to (i) suicide or attempted suicide by him; (ii) self-inflicted injury; (iii) his own criminal act; (iv) any act committed by him in a state of intoxication or insanity; (v) any natural cause or disease or medical or surgical treatment unless such treatment becomes necessary due to injury caused by the said untoward incident then the railway administration will not be liable for the compensation.

6. In the case at hand attempt is being made on behalf of the Railways to bring the accident in question under the excepted category of 'self inflicted injury' and to an extent they succeed to establish before the Claim Tribunal on the basis of the evidence of Ramesh Kumar; however, close reading of the

evidence of Ramesh Kumar, though establishes the occurrence of an accident, but in absence of a specific deposition by him that the train No.1028 Kashi Express was stationery at the place where the accident had occurred, does not lend any support to establish theory of self inflicted injury. There is no evidence on record to suggest that the victim got down from running train. On the contrary since train was moving there is every possibility of her being pushed out of the General Compartment which as per claimant's evidence was crowded. Crowded General Compartment in Indian Railway is a common scene. Even the Reserve Compartment are not an exception.

7: Section 123 (c) of the Railways Act 1989, which defines untoward incident as -

> "(c) 1[" untoward incident" means- (1) (i) the commission of a terrorist act within the meaning of sub- section (1) of section (3) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 ; or
>
> (ii) the making of a violent attack or the commission of robbery or dacoity; or
>
> (iii) the indulging in rioting, shoot- out or arson, by any person in or on any train carrying passengers, or in a waiting hall, cloak room or reservation or booking office or on any platform or in any other place within the precincts of a railway station; or" has been liberally construed to include accidental falling of a passenger from a train carrying passenger.

8: In *Union of India v. Prabhakaran Vijay Kumar and others*: (2008) 9 SCC 527 it has been held-

> "11. No doubt, it is possible that two interpretations can be given to the expression 'accidental falling of a passenger from a train carrying passengers', the first being that it only applies when a person has actually got inside the train and thereafter falls down from the train, while the second being that it includes a situation where a person is trying to board the train and falls down while trying to do so. Since the provision for compensation in the Railways Act is a beneficial piece of legislation, in our opinion, it should receive a liberal and wider interpretation and not a narrow and technical one. Hence in

our opinion the latter of the abovementioned two interpretations i.e. the one which advances the object of the statute and serves its purpose should be preferred vide *Kunal Singh vs. Union of India* (para 9), *B. D. Shetty vs. CEAT Ltd., Transport Corporation of India vs. ESI Corporation."*

9. In the case at hand, material evidence on record indicates the accidental falling of Rita Devi from the train No. 1028 Kashi Express and being run over by another train, contrary conclusion arrived at by the Claims Tribunal cannot be given the Stamp of Approval, Consequently, the impugned judgment is set aside. Claim application filed by the claimant is allowed. The claimant would be entitled for compensation of Rupees Four Lakhs in lieu of death of Rita Devi due to accidental falling from train, along with interest @ 6% from the date of filing of Claim application.

10. The appeal is allowed, in above terms. No costs.

Appeal allowed

I.L.R. [2015] M.P., 2162
APPELLATE CIVIL
Before Mr. Justice Sanjay Yadav
M.A. No. 1871/2014 (Jabalpur) decided on 18 September, 2014

KAMAL KUMAR BACHANI ...Appellant
Vs.
DILIP SHIVHARE ... Respondent

***Accommodation Control Act, M.P. (41 of 1961), Section 10 - Fixation of Standard Rent - Maintainability* - Suit for eviction decreed against respondent on the ground of arrears of rent - In appeal both the parties agreed to payment of rent as directed by trial court - Application u/s 10 of Act, 1961 during the pendency of appeal is not maintainable before R.C.A. - Appeal allowed. (Para 14)**

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 10 – मानक भाड़ा निश्चित किया जाना – पोषणीयता – बेदखली हेतु वाद को भाड़े के बकाया के आधार पर प्रत्यर्थी के विरूद्ध डिक्रीत किया गया – अपील में दोनों पक्षकार विचारण न्यायालय द्वारा यथानिदेशित भाड़े का भुगतान किये जाने के लिये सहमत हुए – अपील लंबित रहने के दौरान आर.सी.ए. के समक्ष अधिनियम 1961 की धारा 10 के अंतर्गत आवेदन पोषणीय नहीं – अपील मंजूर।

Satyam Agarawal, for the appellant.
Abhijit Awasthi, for the respondent.

(Supplied: Paragraph numbers)

ORDER

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

2. This Appeal under Section 32 of M. P. Accommodation Control Act, 1961, is directed against the order dated 4.8.2014 passed by Thirteenth Additional District Judge, Bhopal in MCA No.36/2014, which was an appeal under Section 31 of 1961 Act against an order dated 31.1.2014 passed by Rent Control Authority in purported exercise of powers under Section 10 of the 1961 Act, fixing the Standard Rent of the suit premises which are shops one at ground floor of Avinash Complex, State Bank of India, Chowk Sultania Road, Bhopal, admeasuring 20' x 70' = 1400 sq. ft. and the another at first floor having area of 1003 sq.ft.

3. The matter has a brief history. Appellant is the owner of suit premises. The respondent having suffered a decree of eviction in Regular Civil Suit no.254-A/2010 on 9.2.2012 by Eleventh Additional District Judge, Bhopal, on the ground of Section 12 (1) (a) of Act of 1961, being in arrears of more than Rs.25 lacs preferred a First Appeal No.540/2012 wherein after initial stay an order was passed on 8.4.2013 on I. A. No.8730/2012 by a Division Bench in the following terms-

> "On perusal of the record, it becomes clear that plaintiff filed a suit no.254-A/10 for eviction on the ground of Section 12(1)(A) of the MP Accommodation Control Act as the defendant had not paid the agreed rent as per rate of Rs.1,00,000/- (One lac rupees) per month to the plaintiff. During pendency of the suit, the defendant had not paid the arrears of rent as well as monthly rent as per the provisions of Section 13(1) of the MP Accommodation Control Act which is mandatory to be complied by the tenant for defence of the suit owing to which the defence of the defendant was struck out u/s 12(6) of the M.P. Accommodation Control Act by the lower Court. Consequently, the defendant could not produce

any evidence before the trial Court. The suit has been decreed vide judgment dated 9-2-12 against the defendant for eviction as well as arrears of rent as stated earlier.

Indisputably, the huge amount of arrears i.e. more than Rs. 25,00,000/- (Twenty Five lac rupees) is due against the defendant. He has not deposited the arrears of rent without any cause . No explanation has been given by the defendant in this regard as to why he is not paying the rent and is not complying with the provisions of Section13(1) of the MP Accommodation Control Act which is mandatory to be complied by the defendant-tenant in the appeal also. The defendant is enjoying the valuable property without paying any rent for a long period.

Considering the above facts, the application made by the plaintiff deserves to be accepted.

Hence, allowing the application the stay order ranted by this Court dated 4-6-12 is hereby vacated."

4. That during pendency of First Appeal No.540/2013 the parties jointly filed an application I. A. No.5312/2013 and I. A. No.5584/2013 for settlement of payment of arrears of rent. Whereon following settlement was recorded and the order dated 8.4.2013 was recalled in the following terms-

"That, total rent of the suit premise from

1st April 2009 to 30th April 2013 would be Rs.49 lacs, out of which appellant has paid Rs.20 lacs during trial, hence arrears of rent till 30th April 2013 would be Rs.29 lacs.

That both the parties are ready for payment of aforementioned arrears of rent for payment of aforementioned arrears of rent in tour installments, according to following schedule:

a. Rs.8 lacs by 25th May 2013.

b. Rs.7 lacs by 30th August 2013.

c. Rs.7 lacs by 30th November 2013.

d. Rs.7 lacs by 25th February 2014.

That beside above rent current month from 1st may 2013 onwards shall be paid by 10th date of every month as agreed between the parties.

That, appellant is entitled to get refund the security deposit Rs.2,50,000/- as per agreed between them.

That, in case of a single default respondents would be at liberty to get the suit judgment and decree.

5. Evident it is from these orders that the parties were in terms and agreed over the rate of rent.

6. The rent having been agreed upon between the parties, the question which is being posed by the Appellant landlord is as to the jurisdiction of Rent Controlling Authority for fixing the Standard Rent in exercise of powers under Section 10 of 1961 Act and whether the same can be invoked by either of the party to circumvent the Judgment and Decree based on agreed rent.

7. In the context of the issue raised relevant facts would be necessary to take note of.

8. It was during pendency of suit for eviction before the Civil Court, the tenant moved the Rent Controlling Authority under Section 10 of 1961 Act. The application was moved on the basis of liberty granted by the Division Bench in R. P. No.19/2011 decided on 4.1.2012 holding-

> "So far as the order of the Rent Controlling Authority is concerned, the revisional authority, against the order passed by the Rent Controlling Authority, shall be free to deal the question of fixing of standard rent, in accordance with the provisions as contained in section 10 of the Act, without being prejudiced by the order dated 6.12.2010, expeditiously."

9. The application was rejected on 28.1.2011. The order was reversed in Appeal under Section 31 by order dated 9.5.2013 and the matter was remitted to the Rent Controlling Authority who passed an order on 31.8.2013 fixing the Standard Rent at Rs.16692 per month and by order dated 7.9.2013 made the same effective from 1.1.2011. These orders were however, set aside in an appeal under Section 31 forming subject matter of MCA No.162/

2013 by Thirteenth Additional District Judge by order dated 17.10.2013. On remand the Rent Controlling Authority by order dated 31.1.2014 had fixed the Standard Rent at Rs.25038 with effect from 1.1.2011. This order has been faulted with in Appeal MCA No.36/2014 and has been set aside on 4.8.2014 on a finding that the Rent Controlling Authority has failed to take into consideration various parameters required for assessing the Standard Rent of a commercial place. The Appellate Court found:

"13. अपीलार्थी/अनावेदक द्वारा यह भी व्यक्त किया गया कि विवादित स्थान का किराया अधिनियम की धारा–10 (4) में स्थापित सिद्धांत के अनुसार न होकर कलेक्टर द्वारा निर्धारित गाइड लाईन के अनुसार जो शासकीय उपयोग हेतु किराये पर लिए जाने वाले भवनों के लिए उपयोग में लाई जाती है। भाडा नियंत्रण अधिकारी ने स्थानिकता (लोकेलिटी) तथा उस स्थानिकता में वैसे ही या लगभग वैसा स्थान के संबंध में देय मानक भाडे का ध्यान नही रखा। जबकि अपीलार्थी/अनावेदक ने ऐसे लगभग 14 किरायेदारी अनुबंध प्रस्तुत किये थे जो अधीनस्थ न्यायालय/भाडा नियत्रंण अधिकारी के अभिलेख में संलग्न है। विवादित आदेश दिनांक 13.1.14 के अवलोकन से अपीलार्थी/ अनावेदक द्वारा कथित इस तथ्य की भी पुष्टि होती है। क्योंकि अधीनस्थ न्यायालय/भाडा नियंत्रण अधिकारी ने अपने विवादित आदेश में इसका उल्लेख नहीं किया है कि उनके द्वारा स्थानिकता (लोकेलिटी) तथा उस स्थानिकता में वैसे ही या लगभग वैसा स्थान के प्रस्तुत किरायेदारी अनुबंध को विचार में लिया है। अतः अधीनस्थ न्यायालय/ भाडा नियंत्रण अधिकारी का उक्त आदेश इस दृष्टि से भी उचित नहीं कहा जा सकता है।"

10. The Appellate Court while discarding the plea of the Appellant from applicant as to maintainability of the proceedings under Section 10 remitted the matter for reassessment by impugned order.

11. It is in realm of these facts the question arises as to whether the Rent Controlling Authority would have jurisdiction under Section 10 to fix Standard Rent.

12. Had it been that the rent fixed, during the eviction proceeding was a provisional rent under Section 11 of 1961 Act, the Rent Controlling Authority, in the considered opinion of this Court would have the jurisdiction to entertain an application under Section 10 which stipulates:

"10. Rent Controlling Authority to fix standard rent,etc.-

(1) The Rent Controlling Authority shall, on an application made to it in this behalf, either by the landlord or by the tenant, in the prescribed manner, fix in respect of any accommodation-

(i) the standard rent in accordance with the

provisions of Section7; or

(ii) the increase, if any, referred to in Section 8.

(2) In fixing the standard rent of any accommodation or the lawful increase thereof,the Rent Controlling Authority shall fix an amount which appears to it to be reasonable having regard to the provisions of Section 7 or Section 8 and the circumstances of the case.

(3) In fixing the standard rent of any accommodation part of which has been lawfully sub-let, the Rent Controlling Authority may also fix the standard rent of the part sub-let.

(4) Where for any reason it is not possible to determine the standard rent of any accommodation on the principles set forth under Section 7, the Rent Controlling Authority may fix such rent as would be reasonable having regard to the situation, locality and condition of the accommodation and the amenities provided therein and where there are similar or nearly similar accommodations in the locality, having regard also to the standard rent payable in respect of such accommodations.

(5) The standard rent shall be fixed for a tenancy of twelve months:

Provided that where the tenancy is from month to month or for any period less than a month, the standard rent for such tenancy shall bear the same proportion to the annual standard rent as the period of tenancy bears to twelve months.

(6) In fixing the standard rent of any accommodation under this Section, the Rent Controlling Authority shall fix the standard rent thereof in an unfurnished state and may also determine an additional charge to be payable on account of any furniture supplied by the landlord and it shall be payable on account of any furniture supplied by the landlord and it shall be lawful for the landlord to recover such additional charge from the tenant.

(7) In fixing the standard rent of any accommodation under this Section, the Rent Controlling Authority shall specify a date from which the standard rent so fixed shall be deemed to have effect:

Provided that in no case the date so specified shall be earlier than thirty days prior to the date of the filing of the application for the fixation of the standard rent.

13. Though true it is that, during pendency of First Appeal which is a continuation of a suit, the landlord tenant relationship subsists.

14. However, in a case as the present one as evident from orders dated 8.4.2013 and 3.5.2013 passed in First Appeal No.540/2012 that the parties to the lis have agreed to certain rate of rent which is not shown to be a provisional rent under Section 11 of 1961 Act. In view whereof it will be beyond the jurisdiction of the Rent Controlling Authority to entertain an application under Section 10, which in the given facts of the present case would not be tenable as the parties are bound by their own conduct and acts and cannot relegate therefrom.

15. Thus considered, the impugned order dated 4.8.2014 and the proceedings under Section 10 of 1961 Act before Rent Controlling Authority are liable to be and are hereby quashed.

16. The appeal is allowed, to the extent above. No costs.

Appeal allowed

I.L.R. [2015] M.P., 2168
APPELLATE CIVIL
Before Mr. Justice S.C. Sharma
M.A. No. 1089/2014 (Indore) decided on 26 March, 2015

GENDALAL & anr. ...Appellants
Vs.
CHAGGANLAL & anr. ...Respondents

***Civil Procedure Code (5 of 1908), Order 39 Rule 2-A - Punishment* - Trial court imposed fine of Rs. 5,000/-after having found that respondents have violated the temporary injunction order - Held - Either the property can be attached or a person can be sent to jail or**

both - There is no provision for imposition of fine only - Order set-aside only to the extent of punishment and remanded back to consider the question of punishment in the light of provision of Order 39 Rule 2-A and judgment of Apex Court after giving opportunity of hearing to the respondents. (Paras 5 & 6)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 2–ए – दंड – विचारण न्यायालय ने यह पाये जाने के पश्चात् कि प्रत्यर्थीगण ने अस्थाई व्यादेश के आदेश का उल्लंघन किया है, रू. 5,000/– का अर्थदंड अधिरोपित किया – अभिनिर्धारित – या तो संपत्ति कुर्क की जा सकती है या व्यक्ति को कारागृह भेजा जा सकता है या दोनों – केवल अर्थदंड अधिरोपित करने के लिए कोई उपबंध नहीं – केवल दंड की सीमा तक आदेश अपास्त और आदेश 39 नियम 2–ए का उपबंध तथा सर्वोच्च न्यायालय के निर्णय के आलोक में, प्रत्यर्थीगण को सुनवाई का अवसर दिये जाने के पश्चात् दंड के प्रश्न पर विचार करने हेतु प्रतिप्रेषित।

Case referred :

AIR 1998 SC 2765.

Arpit Oswal, for the appellants.
Hemendra Jain, for the respondents.

(Supplied: Paragraph numbers)

ORDER

S.C. SHARMA, J. :- The present appeal has been filed by the appellants being aggrieved by the order dated 28.3.2014 passed by 16th Additional District Judge, Indore.

2. Facts of the case reveal that an application was preferred in Civil Suit under Order 39 Rule 1 and 2 read with Section 151 of the CPC and an interim order was passed on 8.11.2006 directing the parties not to alienate the property in question, i.e. land bearing Survey No.96 situated in village Betma, Tehsil Depalpur. The dispute was between the family members and during the pendency of the injunction order, the land was sold and therefore, an application was preferred under Order 39 Rule 2A of the CPC. The trial Court has held the respondents guilty of committing a breach and a fine of Rs.5,000/- has been imposed.

3. Learned counsel appearing for the appellants has vehemently argued before this Court that the fine of Rs.5,000/- is too meager and the defendant

should have been sent to jail.

4. This Court has carefully gone through the Order 39 Rule 2A of the CPC which provides a punishment for disobedience or breach of injunction. Order 39 Rule 2 reads as under :-

> **"2. Injunction to restrain repetition or continuance of breach.**-(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained, of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.
>
> (2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise as the Court thinks fit.
>
> **2A. Consequence of disobedience or breach of injunction.**-(1) In the case of disobedience of any injunction granted or other order made under rule 1 or rule 2 or breach of any of the terms on which the injunction was granted or the order made, the Court granting the injunction or making the order, or any Court to which the suit or proceeding is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Court directs his release.
>
> (2) No attachment made under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the Court may award such compensation as it thinks fit to the injured party and shall pay the balance, if any, to the party entitled thereto."

5. The aforesaid statutory provision of law empowers the Court to pass

an order of detention of disobeying party or to attach his property. Not only this, it also empowers the Court to take both the steps or to take one of the steps depending upon the facts of the case. In the present case after holding the respondents guilty of committing breach of order dated 8.11.2006, fine of Rs.5,000/- has been imposed. Order 39 Rule 2A CPC does not provide for imposition of fine and no judgment of the Apex Court has been brought to the notice of this Court by learned counsel appearing for the respondents which empowers the trial Court to impose the fine as has been done by the learned 16th Additional District Judge, Indore. In the case of *Samee Khan Vs. Bindu Khan,* reported in AIR 1998 SC 2765, the Apex Court in Paragraph 11, 12 and 15 has held as under :-

> "11. At the first blush the above interpretation appeared attractive. But on a closer scrutiny we feel that such interpretation is not sound and it may lead to tenuous results. No doubt the wording as framed in Order 21 Rule 32(1) would indicate that in enforcement of the decree for injunction a judgment-debtor can either be put in civil prison or his property can be attached or both the said courses can be resorted to. But sub-rule (5) of Rule 32 shows that the court need not resort to either of the above two courses and instead the court can direct the judgement-debtor to perform, the act required in the decree or the court can get the said act done through some other person appointed by the court at the cost of the judgement-debtor. Thus, in execution of a decree the Court can resort to a three fold operation against disobedience of the judgment-debtor in order to compel him to perform the act. But once the decree is enforced the judgment-debtor is free from the tentacles of Rule 32. A reading of that Rule shows that the whole operation is for enforcement of the decree. If the injunction or direction was subsequently set aside or if it is satisfied the utility or Rule 32 gets dissolved.
>
> 12. But the position under rule 2A of Order 39 is different. Even if the injunction order was subsequently set aside the disobedience does not get erased. It may be a different matter that the rigour of such disobedience may be toned down if the order is subsequently set aside. For what

purpose the property is to be attached in the case of disobedience of the order of injunction? Sub-rule (2) provides that if the disobedience or breach continues beyond one year from the date of attachment the court is empowered to sell the property under attachment and compensate the affected party from such sale proceeds. In other words, attachment will continue only till the breach continues or the disobedience persists subject to a limit of one year period. If the disobedience ceases to continue in the meanwhile the attachment also would cease. Thus even under Order 39 Rule 2A the attachment is a mode to compel the opposite party to obey the order of injunction. But detaining the disobedient party in civil prison is a mode of punishment for his being guilty of such disobedience.

15. Hence the words "and may also" in Rule 2-A cannot be interpreted in the context as denoting to a step which is permissible only as additional to attachment of property of the opposite party. If those words are interpreted like that it may lead to an anomalous situation. If the person who defies the injunction order has no property at all the court becomes totally powerless to deal with such a disobedient party. He would be immuned from all consequences even for any open defiance of a court order. No interpretation shall be allowed to bring about such a sterile or anomalous situation (vide Constitution Bench in *Vidya Charan Shukla vs. Khubchand Baghel,* AIR 1964 SC 1099. The pragmatic interpretation, therefore, must be this; it is open to the court to attach the property of the disobeying party and at the same time the court can order him to be detained in civil prison also if the court deems it necessary. Similarly the court which orders the person to be detained in civil prison can also attach the property of that person. Both steps can be resorted to or one of them alone need be chosen. It is left to the court to decide on consideration of the fact situation in each case."

6. In the light of judgment delivered by the Apex Court and in the light of the statutory provision, the order dated 28.3.2014 is set aside only to the extent of punishment of Rs.5,000/- as has been awarded by the trial Court and the matter is remanded back to the trial Court to pass necessary order

that too after granting an opportunity of hearing to the respondents, keeping in view Order 39 Rule 2A of the CPC and also keeping in view the judgment delivered by the Apex Court in the case of Samee Khan (supra). The exercise of passing necessary order be concluded within a period of 60 days from the date of receipt of certified copy of this order.

7. The parties are directed to appear before the trial Court on 6.4.2015.

8. The petition accordingly stands disposed of.

C.C. as per rules.

Petition disposed of.

I.L.R. [2015] M.P., 2173
APPELLATE CRIMINAL
Before Mr. Justice Alok Verma
Cr. A. No. 15/2011 (Indore) decided on 6 January, 2015

MADHU @ MADALIYA ...Appellant
Vs.
STATE OF M.P. ...Respondent

***Penal Code (45 of 1860), Section 307 - Attempt to Murder - Sentence* - Appellant shot an arrow which hit on the left side of chest of complainant - FIR lodged within 4 hours as Police Station is 19 KM away - Villagers are adjusted to dark and they recognize the known person in dark - Medical evidence also corroborates ocular evidence - Appellant rightly convicted u/s 307 - However, sentence of 7 years is reduced to 6 years - Appeal partly allowed. (Paras 6, 7, 9 & 10)**

दण्ड संहिता (1860 का 45), धारा 307 – हत्या का प्रयत्न – दंडादेश – अपीलार्थी ने तीर चलाया जो शिकायतकर्ता के सीने के बायीं तरफ लगा – प्रथम सूचना रिपोर्ट 4 घंटों के भीतर दर्ज की गई क्योंकि पुलिस थाना 19 कि.मी. की दूरी पर है – ग्रामीण अंधेरे से अभ्यस्त हैं और वे अंधेरे में भी ज्ञात व्यक्ति को पहचानते हैं – चिकित्सीय साक्ष्य भी चक्षुदर्शी साक्ष्य की पुष्टि करता है – अपीलार्थी को उचित रूप से धारा 307 के अंतर्गत दोषसिद्ध किया गया – किंतु 7 वर्ष के दंडादेश को घटाकर 6 वर्ष किया गया – अपील अंशतः मंजूर।

Sharmila Sharma, for the appellant.
Rahul Vijayvargiya, P.L. for the respondent/State.

JUDGMENT

ALOK VERMA, J. :- This criminal appeal is filed against the conviction and sentence passed by the learned Additional Sessions Judge, Alirajpur in Sessions Trial No.83/2010 by judgment dated 22.11.2010 whereby, the learned Additional Sessions Judge found the present appellant guilty under sections 341 and 307 of IPC and convicted him to 7 years RI and fine of Rs.1000/- under section 307 of IPC and fine of Rs.200/- under section 341 of IPC. He was further directed to undergo two months additional imprisonment in default of payment of fine imposed on him under section 307 of IPC and Simple Imprisonment of 8 days for default of payment of fine under section 341 of IPC.

2. The prosecution story before the lower court was that on 20.02.2010 at about 7:00 pm, when the complainant/injured Edla Son of Nanbhai was coming from Nanpur, where he went to attend some ceremony in the house of his relative Hamji, to his village Chikhalkui, the accused Madaliya stopped him near his (the accused) house and with an intention to kill him, he shot an arrow on him with help of bow and arrow which hit him on his left chest. The arrow head was left inside the chest and the wooden portion of the arrow fell down. The co-accused Bahadarsingh, who was subsequently acquitted by the lower court, also came there with 'Faliya' in his hand and also threatened to kill him. When he raised alarm, the prosecution witnesses Lalu and his (injured's) wife Ralibai reached on the spot to whom, the injured narrated the incident. Subsequently, at about 11:15 pm, the matter was reported to the Police Station – Nanpur, District – Alirajpur where Crime No.33/2010 was registered under sections 341 and 307/34 of IPC.

3. Learned Additional Sessions Judge after recording the evidence of the prosecution and the defence, found the present appellant guilty under section 307 and 341 of IPC and sentenced him as aforesaid.

4. Aggrieved by the conviction and sentence imposed upon him, this appeal is filed on the grounds, inter alia, that there was no independent witness and, therefore, the lower court erred in relying solely on the testimony of the injured person. The FIR was lodged with delay, which makes the case of the prosecution suspicious. There was no motive for the present appellant to shoot the complainant with bow and arrow and the present appellant was falsely implicated in the case. During the arguments, it was also prayed by the learned counsel for the appellant that the sentence imposed on the present appellant is

disproportionate and he prays that it should be reduced to the period already undergone by him.

5. To see, whether the inferences drawn by the lower court are reasonable or perverted, we may refer the statement of the complainant Edla (PW1) before the lower court. In his statement, he said that the present appellant shoot him with bow and arrow. The arrow pierced inside his left chest. The arrow head remained inside the wound and back wooden portion fell down. Learned counsel for the appellant argues that during the cross examination, he gave varying statement in respect of the place of the incident. However, in paragraph 6, he said that the incident took place on the road near the house of the appellant and similarly, he stated the same fact in paragraph 4 of his statement. Learned counsel for the appellant also argues that when the incident took place, it was pitch dark and, therefore, it was not possible for the complainant to identify the assailant. However, as stated in the FIR Ex.P-1, the incident took place at about 7:00 pm. Learned counsel for the appellant argues that in the month of February, night falls early and, therefore, at 7:00 o'clock, darkness fell down in the rural area.

6. However, in the present case, the assailant was known to the complainant. It is also true that rural people are adjusted to darkness and in dark also, they recognize the known persons and, therefore, so far as the identity of the assailant is concerned, there can be no doubt that the complainant identified the assailant as his name was also mentioned in the FIR.

7. Learned counsel for the appellant also argues that the FIR was lodged with the delay of 4 hours. However, the Police Station is about 19 k.m. Far from the place of the incident. The complainant was seriously injured with arrow still inside his wound. It is explained in the FIR itself that to arrange the vehicle to shift him to the Police Station took some time. The FIR was lodged within 4 hours of the incident and that cannot be considered as unreasonable delay. In this case, the statement of the complainant supported by his wife Ralibai (PW2) and also Lalu (PW3), whose presence was also mentioned in the FIR. Further the averments made in the FIR are supported with the medical evidence of Dr. Vijay Singh Baghel (PW4), who found the arrow inside the wound. He advised for the Xray of the wound and in the Xray also, the arrow was found inside the wound. This fact was narrated in the FIR and supported by the medical evidence.

8. Taking all these facts into consideration, I do not find any perversity

or illegality in the finding of the lower court. The conviction of the appellant under sections 307 and 341 of IPC does not suffer from any legal infirmity and, therefore, no interference in such finding is called for.

9. This brought us to the point of sentence. Learned counsel for the appellant states that the sentence awarded to him is disproportionate and prays that it may be reduced to 5 years but, I find that looking to the injuries caused to the complainant, which was on the vital part of his body and also if, the Arrow penetrates further inside his body, he would have died of the wound. However, the fact that only single injury was caused to the deceased and the appellant did not attempt further to hurt him may also be taken into consideration. Taking this fact into consideration, I find that the sentence of 7 years rigorous imprisonment awarded on him is likely on higher side and, therefore, it may be reduced to 6 years imprisonment in place of 7 years imprisonment.

10. Accordingly, this appeal is partly allowed. The sentence awarded to the appellant is modified as above. With that modification, the appeal stands disposed of.

C.c. as per rules.

Appeal partly allowed.

I.L.R. [2015] M.P., 2176
APPELLATE CRIMINAL
Before Mr. Justice Alok Verma
Cr. A. No. 988/2010 (Indore) decided on 6 January, 2015

RAHUL ALIAS UMESH HADA ...Appellant
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 376 - Rape **- Prosecutrix is aged about 14 years on the date of incident - Injury marks were found on the body and private parts of prosecutrix - Statement of prosecutrix is reliable - Absence of sperm immaterial - Delay in lodging FIR properly explained - Appeal dismissed. (Paras 2 to 7)**

दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – घटना की तिथि को

अभियोक्त्री की आयु करीब 14 वर्ष – अभियोक्त्री के शरीर एवं गुप्तांगों पर चोट के निशान पाये गये – अभियोक्त्री का कथन विश्वसनीय है – शुक्राणु की अनुपस्थिति तत्वहीन –प्रथम सूचना रिपोर्ट दर्ज करने में विलम्ब समुचित रूप से स्पष्ट किया गया – अपील खारिज।

Cases referred :

AIR 2013 SC 2207, AIR 2009 SC 858, AIR 2013 SC 1497 & Cr.A. No. 363/1997 judgment dated 16.09.2014.

P.K. Saxena with *Sunil Verma*, for the appellant.
Mamta Shandilya, P.L. for the respondent/State.

JUDGMENT

ALOK VERMA, J. :- This appeal has been filed by the appellant aggrieved of the judgment dated 18.08.2010, passed by the learned II Additional Sessions Judge, Shajapur in Sessions Trial No.104/2010, whereby he has been convicted under Sections 376, 506-II and 342 of IPC and sentenced to 10 years rigorous imprisonment with fine of Rs.10,000/- under Section 376 of IPC, 2 years rigorous imprisonment with fine of Rs.5,000/- under Section 506-II of IPC and one year rigorous imprisonment with fine of Rs.1,000/- under Section 342 of IPC.

2. According to the prosecution story, the prosecutrix who was only 14 years of age at the time of incident, reported on 06.03.2010, at Police Station Sarangpur, district Shajapur that on 24.02.2010 at about 3 P.M., the present appellant came to her house, where she was working in a flour mill that was installed in the house itself and asked that the sister of the present appellant and friend of the prosecutrix Harshita was calling her. Believing him, she went to the house of the present appellant, but Harshita was not there. The present appellant took her to a room inside the house, bolted the room from inside and committed rape on her. He further threatened her that if she discloses the incident to anybody, he would kill her father.

3. Further as per the story of the prosecution, after the incident, the appellant alongwith other co-accused came to her flour mill and threatened her that she should send her sister to them otherwise they would defame them. After some time, she narrated the incident to her parents and her brother and the matter was reported on 06.03.2010 after delay of about 10 days.

4. The learned Additional Sessions Judge after recording the evidence of the prosecution and the defence found the present appellant guilty under Sections 376, 506-II and 342 of IPC and sentenced him as aforesaid. Aggrieved by such conviction and sentence, the present appeal is filed on the ground that in any manner the medical evidence do not confirm the commission of rape and the statement of the prosecutrix is not reliable.

5. Learned senior counsel for the appellant placed reliance on the judgment of the Hon'ble Supreme Court in the case of *State of Rajasthan Vs. Babu Meena* AIR 2013 SC 2207 in which it was held that conviction can be based on statement of solitary witness provided the statement is reliable. This principle applies with greater vigour in case of offence committed in seclusion. The Hon'ble Court further held that if medical and FSL report does not support the allegation of rape, the acquittal of the accused is proper. He also relies upon the judgment of the Hon'ble Apex Court in the case of *Rajoo and others Vs. State of M.P.* AIR 2009 SC 858 in which it was held that the prosecutrix alleged that she was raped by 13 persons, one after the other and still there was no marks of injury on her body, acquittal in such cases is proper. He relies on another judgment of the Hon'ble Supreme Court in the case of *Rajesh Patel Vs. State of Jharkh*and AIR 2013 SC 1497 and judgment of this Court in Cr.A.No.363/1997 dated 16.09.2014.

6. In all these cases, the statement of the prosecutrix was not found reliable. However, in this case, it is true that in the medical evidence, no specific opinion was given by the doctor, who examined the prosecutrix on 06.03.2010 at 5.50 P.M. However, marks of violence was found on her body. There were bruises on right forearm, thigh and left upper arm etc. and also on her private parts. This apart, her hymen was found torn partly with swelling after ten days of incident. So far as FSL report is concerned, it was not expected that after ten days human sperms can be found in the body of an unmarried girl aging 14 years. In such circumstances, merely absence of human sperm in the body of the prosecutrix do not make her statement unreliable. So far as her oral statement is concerned, she was examined as PW-1 and she was cross examined in detail. There is no omission found in her statement and there is no discrepancies in her statement recorded under Section 161 Cr.P.C.

7. Whatever omissions and contradictions are found in her statement are not of much importance. Her statement was considered by the learned Additional Sessions Judge in detail and the learned Judge found her statement

reliable. In my opinion also since her statement is supported by medical evidence, it may be relied upon and conviction can be based on her statement. So far as delay in filing of the FIR is concerned, in case where a girl of 14 years of age is raped, such a delay is normal. She stated in her statement that she was threatened by the present accused. He also visited her flour mill next day with two other co-accused and again threatened her and therefore taking all the factors into consideration, I find that the delay in filing of the FIR is not fatal in the present case and delay is fully explained by the prosecutrix and other attending circumstances.

8. As such, I do not find any infirmity or perversity in the impugned judgment. This appeal is devoid of any merit and is liable to be dismissed and is dismissed accordingly. The conviction and sentence passed by the impugned judgment are confirmed.

C.C.as per rules.

Appeal dismissed

I.L.R. [2015] M.P., 2179
APPELLATE CRIMINAL
Before Mr. Justice Alok Verma
Cr. A. No. 1287/2010 (Indore) decided on 8 January, 2015

JAIRAM & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Sections 392, 394, 397 & 323 - **Complainant alongwith two more persons was coming on a motor cycle and due to lathi blow given by miscreants they lost balance and fell down and suffered injuries - Mobile phone, wrist watch and cash was taken away - Accused persons were not identified in dock, no TIP was held during investigation - Seizure witnesses turned hostile - I.O. could not state that on what basis he arrested the accused persons as they were unknown to complainant - No offence made out - Appeal allowed.** **(Paras 4 to 8)**

दण्ड संहिता (1860 का 45), धाराऐं 392, 394, 397 व 323 – शिकायतकर्ता दो और व्यक्तियों के साथ मोटर साईकिल पर आ रहा था और शरारती तत्वों द्वारा किए गए लाठी के प्रहार से वे संतुलन खो बैठे और नीचे गिरे और उन्हें चोटें आई

– मोबाइल फोन, कलाई घड़ी और नकदी ले गए – कटघरे में अभियुक्त व्यक्तियों को नहीं पहचाना गया, अन्वेषण के दौरान कोई पहचान परेड नहीं कराई गई – जप्ती के साक्षी पक्ष विरोधी हो गए – अन्वेषण अधिकारी नहीं बता सका कि किस आधार पर उसने अभियुक्त व्यक्तियों को गिरतार किया क्योंकि वे शिकायंतकर्ता के लिए अनजान थे – कोई अपराध नहीं बनता – अपील मंजूर।

Cases referred :

2008(III) MPWN 37, 2003(4) MPLJ 240, AIR 1975 SC 907.

Nilesh Sharma, for the appellant No.1.
Ramesh Verma, for the appellant Nos. 2 & 3.
Rahul Vijaywargiya, P.L. for the respondent/State.

JUDGMENT

ALOK VERMA, J. :- This criminal appeal is arising out of conviction and sentence passed by the learned II Additional Sessions Judge, Badwani in Session Trial No.116/2009 dated 27.09.2010 by which the learned Additional Sessions Judge found the present appellants guilty under section 394 r/w section 397 IPC, section 394 IPC and section 323/34 IPC and convicted them for rigorous imprisonment of 7 years, 5 years and 3 months respectively and also fine of Rs.1,000/- and Rs.500/- under section 394 r/w section 397 IPC and 394 IPC respectively with default clause.

2. Prosecution case in brief is that the complainants Dhannalal S/o Maganlal along with Sunil S/o Pannalal and Bhagirath S/o Nyadar were coming back to their residence on motorcycle bearing registration No.MP46-MA-7645, the motorcycle was being driven by Dhannalal. At about 08:30 p.m. near Bhairwan Temple, 3 to 4 unknown person tried to stop them by giving on them lathi blows, due to which the motorcycle lost balance and they fell down. They sustained injuries while the complainant Dhannalal suffered fracture in his left radius bone. It is further alleged that the miscreants looted mobile phone and cash from Bhagirath, a wrist watch and cash from Dhannalal and cash from Sunil. They were shifted Hospital by the villagers nearby including Sunil (PW-1) who immediately fled away from the spot and then came back with help of villagers. On their report, Crime No.290/2008 under section 394 IPC was registered by Police Station Rajpur, District Badwani. During the investigation, the present appellants were arrested by the Police. On their information, memorandum under section 327 of Evidence Act were prepared

and mobile phone, wrist watch, cash and lathi, that were allegedly used in the crime, were seized from their possession. After investigation, chargesheet was filed before the concerning Court of Magistrate which was committed to Court of Sessions and made over to II Additional Sessions Judge who after recording evidence for both sides, passed the impugned orders and sentenced present appellants as aforesaid. The learned Additional Sessions Judge gave benefit of doubt to co-accused Luxman S/o Dhansingh on the ground that no property was recovered from his possession and also no other evidence was available against him and, therefore, giving benefit of doubt, co-accused Luxman was acquitted.

3. Aggrieved by the conviction and sentence passed on them, this criminal appeal is filed on the grounds, inter-alia, that there was no convincing evidence available against the present appellants for convicting them under the sections as mentioned above; that no independent witness supported the case of prosecution; that no Test Identification Parade was conducted on the present appellants; that the complainant Bhagirath (PW-4), Sunil (PW-1) and Dhannalal (PW-2) failed to identify the accused during the trial. Another witness of arrest and seizure memo Sanjay was not examined by the prosecution and the witness who was examined turn hostile and did not support the case of prosecution.

4. After hearing both the counsel and after perusing the record of the lower court, it is apparent that :- (i) no identification was conducted by the prosecution through investigation, (ii) the appellants were not identified by the prosecution witnesses during the trial (dock identification); (iii) Mohan (PW-6) examined as seizure witness and witness of memorandum under section 27 of Evidence Act had turned hostile and did not support the prosecution case, he only admitted his signatures on Ex.7 to 18 and also during his cross-examination by the public prosecutor, he did not support the prosecution case; (iv) only statement of investigating officer is available on record placing reliance his statement, the learned Additional Sessions Judge found memorandum prepared under section 27 of Evidence Act and consequential seizure made on the information given by the present appellants reliable and based conviction of the present appellants on the testimony of the investigating officer and the documents prepared by him.

5. No doubt that statement of investigating officer cannot be discarded merely on the ground that he was a police personnel and no supporting evidence

was available, however, to place reliance on such evidence, the statement of the investigating officer must be unimpeachable and should inspire confidence in the mind of the Court about its truthfulness. Examining his statement under the light of above principles, the investigating officer, B.S. Ahirwar (PW-10) in para 4 started his evidence with arrest of present appellants and preparation of arrest memo. It is nowhere stated in his statement that how he came to know that the present appellants were involved in the crime. No doubt that on the basis of statements of Sunil (PW-1), Dhannalal (PW-2) and Bhagirath (PW-4) a crime was committed on them but to connect the present appellants with the crime, there should be evidence beyond doubt that they took part in the crime and they were responsible for commission of the crime in the present case. However, as independent witness failed to support the evidence of investigating officer, it was his duty to satisfy the Court that he had reasonable evidence available on hand he had reason to believe that present appellants were involved in the crime. Only on the basis of such belief the present appellants should have been arrested. However, in the present case, no reason was given in his statement as to how he came to know, how he doubted that the present appellants were involved in the crime.

6. The property seized on information given by the present appellants was Nokia Mobile and Sony Wrist Watch. The learned Additional Sessions Judge observed in para 23 that the person who uses such property like mobile phone, and wrist watch usually recognizes his own property by merely looking at them. However, even if it may be believed that the mobile phone and the watch shown to them during identification parade was the same one which belonging to him, even then it should be proved that this property was seized on information given by the present appellants to the investigating officer and immediately after seizure the property was sealed with proper seal of investigating officer. However, on Ex.P/15, which is a seizure of mobile phone, bears no sample of seal is found of the investigating officer and similarly on other seizure memo Ex.P/16, P/17 and P/18, no such seal was placed, due to all these, placing reliance in this case on the statement of investigating officer does not seem proper and the statement does form such confidence in the mind of the Court which justify placing conviction of the present appellants on the sole statement of investigating officer.

7. Coming to section 397 IPC, the learned counsel for the appellants placed reliance on the judgment of this Court in *Bharatsingh and another v. State of M.P.*, 2008 (III) MPWN 37 and *Santosh v. State of M.P.*, 2003 (4)

MPLJ 240. In both the cases, this Court held that identity of miscreants should be established beyond doubt, without such identify being established they cannot be convicted for offence under sections 392, 394 and 307 of IPC. For an offence under section 397, the Court observed, placing reliance on judgment of *Hon'ble Supreme Court in Phool Kumar' v. Delhi Administrative*, AIR 1975 SC 907 that for an offence under section 397 individual overt act causing grievous injury should be established. However, in the present case, the learned Additional Sessions Judge did not follow this principle and convicted all the three appellants under section 397 IPC without assigning any overt act to them individually. This apart, as per the prosecution story itself in the present case, the complainants were coming on motorcycle when they were given lathi blows by the miscreants, due to which they fell down and sustained injuries. It is not stated in their Court statements that the miscreants further inflicted lathi blows on them due to which they sustained grievous injuries. Due to these reasons, in my opinion, no charge under section 397 is proved.

8. Thus, taking all the evidence produced by the prosecution into consideration, I find that present appellants cannot be had liable for the offence that was committed on the complainant and other two witnesses. They cannot be connected with causing grievous injuries during the incident and also for committing loot on them. In my opinion, the learned Additional Sessions Judge erred while finding them guilty under sections 392 (2 counts), 394 (2 counts) and sections 394 r/w section 397 of IPC and section 323 r/w section 349 of IPC.

9. Accordingly, this appeal is allowed. The appellants are acquitted from their charges under sections 392 (2 counts), 394 (2 counts) and sections 394 r/w section 397 of IPC and section 323 r/w section 349 of IPC. The sentence awarded on them by the learned Additional Sessions Judge is set aside. It is directed that they should be released forthwith from custody if not required in any other case. The amount of fine if deposited by them shall be returned to them.

10. With the aforesaid observations and directions, this criminal appeal stands disposed of.

Appeal disposed of

I.L.R. [2015] M.P., 2184
APPELLATE CRIMINAL
Before Mr. Justice Alok Verma
Cr. A. No. 630/2008 (Indore) decided on 9 January, 2015

KANHAIYA LAL ...Appellant
Vs.
STATE OF M.P. ...Respondent

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/18(b) **- Independent witnesses did not support the proceedings taken up by I.O. - Seized contraband not produced before the Court - Guilt of accused not proved - Appeal allowed. (Paras 12 & 13)**

स्वापक औषधि और मन:प्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8/18(बी) – स्वतंत्र साक्षियों ने अन्वेषण अधिकारी द्वारा की गई कार्यवाहियों का समर्थन नहीं किया – जप्तशुदा विनिषिद्ध को न्यायालय के समक्ष प्रस्तुत नहीं किया गया – अभियुक्त की दोषिता सिद्ध नहीं – अपील मंजूर।

Cases referred :

Cr.A.No.1085/2008 judgment dated 08.12.2009, Cr.A. No. 436/2008 judgment dated 04.01.2010, 2004(10) SCC 562, 2008(IV)AD (Cri) (SC) 337, 2005(2) JLJ 363, 2006(I) MPWN 16.

Vikas Jain, for the appellant.
Rahul Vijayvargiya, P.L. for the respondent/State.

JUDGMENT

Alok Verma, J. :- This criminal appeal arises out of conviction and sentence passed by learned Special Judge, Neemuch under Narcotics Drugs and Psychotropic Substance Act (hereinafter referred to as "the Act") in Special Sessions Case No.38/2006 by the impugned judgment dated 05.11.2007 whereby, learned Special Judge convicted the present appellant under section 8/18 (b) of the Act and sentenced him to undergo RI for 10 years with fine of Rs.1,00,000/and in case of default of payment of fine, the appellant was further directed to undergo RI for one year.

2. According to the prosecution story, on 31.08.2006, Piyush Charles (PW8), Incharge of Police Post, Nayagaon, received an information through the informant that the present appellant was transporting contraband Opium

in vehicle bearing registration No.RJ-09-UA-0098 and he is coming towards Neemuch. He is transporting the contraband Opium for its delivery to an outside smuggler. On receiving such information, Piyush Charles (PW8) completed all the formalities and proceeded towards Old Tole Tax Post with the police force. There, on seeing the vehicle approaching, he, with the help of police force intercepted the vehicle. During the search of the vehicle, 10 kg Opium was found under the seat of the driver, which was seized after completing all the formalities by Piyush Charles (PW8). The contraband was sealed in three packets and the main packet containing bulk quantity of the contraband was marked as Article-A while, two samples of 30 gms. each were marked as Article-A1 and A2. The samples were sent for examination and after completing investigation, charge-sheet was filed.

3. After recording the evidence of the prosecution and the defence, learned Special Judge found the appellant guilty under section 8/18(b) of the Act and sentenced him as aforesaid. Aggrieved by which, the present appeal is filed on the grounds, inter alia, that the seized contraband was not produced in the Court and, therefore, recovery of the alleged Opium from the possession of the present appellant was not proved. No independent witness supported the prosecution case and in such circumstances, sole statement of the Investigating Officer cannot be relied upon.

4. During the arguments, the main thrust of the defence counsel was on the fact that the contraband Opium was not produced by the prosecution before the Court. It was not marked as article and, therefore, the present appellant deserves to be acquitted.

5. Before proceeding to examine the case law produced by the learned counsel for the appellant, we may examine the record of the trial Court to assure whether, the contraband Opium was produced before the Court during trial and whether, it was marked as article by the learned Special Judge. Piyush Charles (PW8) was examined by the learned Special Judge on 25.09.2007. In the examination chief of this witness, it is nowhere mentioned that the contraband Opium or its samples were produced before him. The sealed packets were opened and the contraband was shown to him. It is also not mentioned in the examination chief of this witness that the contraband was marked as article during his examination, however, corresponding order-sheet dated 25.09.2007 mentions as under:

"उक्त साक्षी की साक्ष्य के दौरान जप्तशुदा मुद्देमाल बुलाया गया खोला गया पुनः सीलबंद कर मेरे हस्ताक्षर से सीलबंध किया गया"।

6. From the order-sheet, which must be relied at this stage, it is apparent that the seized Opium was produced before the Special Judge during examination of the Investigating Officer Piyush Charles (PW8). However, as stated earlier, the samples or the remaining bulk quantity was not marked as article and, therefore, it is apparent that the defence did not get an opportunity to cross examining the Investigating Officer on this point.

7. Learned counsel for the appellant relies upon the judgments of this Court passed in Criminal Appeal No.1085/2008 in the case of *Pokarram Vs. Union of India, Central Narcotics Bureau* dated 08.12.2009 and passed in Criminal Appeal No.436/2008 dated 04.01.2010 in the case of *Beer Balram Vs. Central Bureau of Narcotics*. In both the judgments, reliance was placed on the judgments of Hon'ble the Supreme Court in the case of *Jitendra and another Vs. State of MP* reported in 2004(10) SCC 562, *Noor Aga Vs. State of Punjab and another* reported in 2008 (IV) AD (Cri.) (SC) 337 and *Abdul Gani Vs. State of MP* reported in 2005 (2) JLJ 363.

8. In the case of *Jitendra* (supra), Hon'ble the Supreme Court observed that:

> In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the prossession (sic:possession) of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchanama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchanama is nothing but a document written by the concerned police officer. The suggestion made by the defence in cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with police had lodged a

false case only for evicting the accused from the house in which they were living. Finally, we notice that the Investigating Officer was also not examined. Against this background, to say that, despite the pancha witnesses having turned hostile, the non-examination of the Investigating Officer and non-production of the seized drugs, the conviction under the NDPS, Act can still be sustained, is far fatched.

9. In that case also, Panch witnesses were turned hostile. They did not support the prosecution case.

10. Similarly, in the case of *Beer Balram* (supra), this Court observed that when, the panch witnesses turned hostile, placing reliance on the sole testimony of Investigating Officer is not safe. It was also observed that the formalities under section 52-A of the Act was completed before learned ACJM, Jawad. Similarly, in this case, formalities under section 52-A of the Act were completed before the Executing Magistrate, Jawad. The order-sheet of the Magistrate is Ex.P-38. The contraband was handed over back to the Station Incharge CL Jatav. However, after receiving the material, whether the bulk quantity was disposed of under the provision of section 52-A of the Act is not clear, though, as stated earlier, during the cross examination of the witnesses, the same was not produced before the Court and was not marked as article. Thus, not producing the contraband before the Court and not affording an opportunity to the defence to cross examine the Investigating Officer on this fact is fatal to the prosecution.

11. So far as turning hostile all the independent witnesses are concerned, in this regard, learned counsel for the appellant has cited the judgment of this Court in the case of *Jamal Ali Vs. State of MP* reported in 2006 (I) MPWN (16). In this case, it was held by the Court that when, seizure witness did not support the case of the prosecution, the basing conviction on sole testimony of the Investigating Officer is not safe.

12. Applying the principle laid down in aforementioned cases on the facts of the present case, I find that in the present case, independent witnesses did not support the proceedings taken up by the Investigating Officer Piyush Charles (PW8). The other independent witness was not examined. The seized contraband was not produced before the Court during trial and, therefore, the case against the accused person is not proved.

13. At this stage, it may also be observed that not producing the contraband before the Court is a technical irregularity which may be cured. Option is available before the Court to remand the case back to the trial Court for removing such technical lapse. However, in the present case, record of the lower Court shows that the present appellant was arrested on 31.08.2006 immediately after the incident and he remained in custody till the judgment was pronounced on 05.11.2007. Thereafter, his jail sentence was not suspended and, therefore, he is still under custody continuously from 31.08.2006. The total period under custody comes to 8 years and 4 months. He was convicted by the trial Judge for 10 years R.I. and, therefore, only period of one year and eight months is left to complete the sentence awarded on him. Remanding back the case to the trial Court would take minimum 6 to 9 months and this would frustrate the purpose and in my opinion, no benefit would arise in remanding the case back to the trial Court.

14. Accordingly, this appeal is allowed. The conviction and sentence passed by the learned Special Judge in the impugned judgment on the present appellant under section 8/18 (b) of the Act is set aside. He is acquitted from the charges under section 8/18(b) of the Act. The trial Court is directed to release the appellant forthwith if, his presence is not required in any other case. The fine amount,be if any, deposited by the appellant shall be returned to him. The seized vehicle bearing registration No.RJ-09-UA-0098 shall be returned to its registered owner.

C.c as per rules.

Appeal allowed

I.L.R. [2015] M.P., 2188
APPELLATE CRIMINAL
Before Mr. Justice S.K. Gangele
Cr. A. No. 890/2001 (Jabalpur) decided on 24 March, 2015

DITTU SINGH @ DILIP BHILALA ...Appellant
Vs.
STATE OF M. P. ...Respondent

A. Penal Code (45 of 1860), Section 376 - Prosecutrix - **Conviction can be based for commission of offence on the sole evidence of prosecutrix - However, evidence of prosecutrix has to be scrutinized carefully. (Para 11)**

क. दण्ड संहिता (1860 का 45), धारा 376 – अभियोक्त्री – अपराध कारित करने के लिये मात्र अभियोक्त्री के साक्ष्य पर दोषसिद्धि आधारित की जा सकती है – किंतु अभियोक्त्री के साक्ष्य का परीक्षण सावधानीपूर्वक किया जाना चाहिए।

B. Penal Code (45 of 1860), Section 376 - Rape - Medical Evidence **- Doctor did not find any external injury - No injuries on private parts were found - Hymen was found intact - According to prosecutrix she had prepared meals when she was with the appellant and all other persons had also taken the meal - There were other persons also - When the statement of prosecutrix does not inspire confidence and it is contrary to the medical evidence, it would be unsafe to convict the appellant for offence under Section 376 of I.P.C. - However, the appellant had caught hold the hand of the prosecutrix and tried to outrage her modesty, appellant is convicted under Section 354 of I.P.C. (Paras 16,17, 18 & 20)**

ख. दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार –चिकित्सीय साक्ष्य – चिकित्सक ने कोई बाह्य चोट नहीं पाई – गुप्तांगों पर कोई चोटें नहीं पाई गई – योनिच्छद अक्षत पाया गया – अभियोक्त्री के अनुसार जब वह अपीलार्थी के साथ थी उसने भोजन तैयार किया था और सभी अन्य व्यक्तियों ने भी भोजन कर लिया था – वहां अन्य व्यक्ति भी थे – जब अभियोक्त्री का कथन विश्वास उत्पन्न नहीं करता और वह चिकित्सीय साक्ष्य के विपरीत है, तब भा.दं.सं. की धारा 376 के अंतर्गत अपराध के लिये अपीलार्थी को दोषसिद्ध किया जाना सुरक्षित नहीं होगा – किंतु अपीलार्थी ने अभियोक्त्री का हाथ पकड़ा था और उसकी लज्जा भंग करने का प्रयत्न किया, अपीलार्थी को भा.दं.सं. की धारा 354 के अंतर्गत दोषसिद्ध किया गया।

Cases referred :

(2014) 2 SCC 3905, (2008) 3 JLJ 233, 2004 SCC (Cri) 1266, AIR 2009 SC 1568.

G.R. Deshmukh, for the appellant.
Akshay Namdeo, G.A. for the respondent/State.

JUDGMENT

S.K. GANGELE, J. :- The appellant has filed this appeal against the judgment dated 10.04.2001, passed in Sessions Trial No.182/97. The trial Court found the appellant guilty for commission of offence under Sections 366 and 376 Part-I of I.P.C. and awarded a sentence of RI 7 years and fine amount of Rs.500/- and 1000/- respectively.

2. The prosecution story, in brief is that, on 05.02.1996, the prosecutrix

had gone to forest of Nandgaon to pluck the leaves. At that time, the appellant came to the prosecutrix. He had beaten the prosecutrix and thereafter, taken her into the forest. The appellant was with the prosecutrix for whole night and next day morning, the prosecutrix came to the house of her father. She told the story to him and thereafter, the report of the incident was lodged at the Police Station. The police conducted the investigation. The medical examination of the prosecutrix was conducted and after investigation, police filed the charge-sheet. The appellant/accused abjured the guilt. After trial, the trial Court found the appellant guilty for the offences and awarded the sentence as mentioned above.

3. Learned counsel appearing on behalf of the appellant has contended that as per medical report, there was no rape committed with the prosecutrix. The findings of the trial Court are contrary to the evidence. He further submitted that the trial Court has committed an error of law in convicting the appellants.

4. Learned Government Advocate has contended that there is enough evidence to convict the appellant for commission of offence and the findings recorded by the trial Court are in accordance with law.

5. Bhavsingh (PW-1), who is brother of the prosecutrix deposed that the prosecutrix had gone to the forest for taking fodder to buffalos and accused had beaten her. Same fact was told by Meera Bai (PW-5). He had searched the prosecutrix whole night, however, she could not find whereabouts of the prosecutrix. The prosecutrix came to the house at around 4 O'clock in the morning and she told the family members that the appellant had taken her forcefully and he wanted to marry with the prosecutrix. The prosecutrix further told the family members that the appellant had committed rape with her. Same facts have been deposed by Sonabai (PW-2), who is mother of the prosecutrix. (PW-3) Tersingh, who is father of the prosecutrix deposed that her daughter had gone to forest for collecting pala (leaves) for the purpose of fodder to the buffalos and at that time, the appellant had beaten the prosecutrix and he had forcefully taken her to some other place and committed rape with her.

6. (PW-4) prosecutrix deposed that she had been collecting leaves in the forest at around 2 O' clock. The appellant came at the place and caught hold her hand. He had beaten her from wooden stick and the beating was quite severe. Thereafter, the appellant had taken me to nearby hut in the field and committed rape with me at that time, Meera Bai was also with me. The appellant/accused had committed rape with me for 3-4 times. When the

appellant was sleeping in the night, I came to my house and told the incident to my mother and father. The report (Ex.P-1) was lodged at the Police Station. I was examined medically. She admitted in para 7 of her cross-examination that she had gone to Lalbadi where she prepared the meal and other persons had eaten the meal including myself and the accused/appellant and when the appellant was sleeping, I ran away from the place and reached to my house. She further deposed that the accused was 'jeth' of her sister.

7. (PW-5) Meera Bai, was declared hostile. She deposed that she did not know the prosecutrix. (PW-6) Arun, deposed that before him one packet was prepared and he singed the seizure memo (Ex.P.4). Banshilal (PW-7) declared hostile.

8. (PW-8) Dr. B.K. Maheshwari deposed that he had conducted the X-ray of the prosecutrix and found her age more than 18 years. (PW-9) Moujilal, simply deposed that Gildar told him that the appellant had taken her sister.

9. (PW-10) Mohd. Salim ASI deposed that he had recorded the FIR (Ex.P.1) and the prosecutrix signed on the FIR. Thereafter, the prosecutrix was sent to medical examination and her X-ray was also done. He had sealed the clothes and prepared the packet of seizure and after completing the investigation, the charge-sheet was filed before the Court.

10. (PW-12) Dr. Fehamida Qureshi, deposed that she was working as Lady Assistant Surgeon at Shahjapur, Community Health Center. On 6.2.1996, she had conducted the medical examination of the prosecutrix. There were no sign of injuries on the body of the prosecutrix. After internal examination, there was no sign of any injury on her private parts. However, there were some stretches on external genitalia. Slide of the secretion found in labia majora was prepared. Hymen of Vagina of the prosecutrix was intact. There was no sign of rupture of hymen. There was small whole in the hymen which was natural and there was some secretion. No definite opinion can be given by her that any rape was committed with the prosecutrix. She further deposed that there were no inquiries on the body of the prosecutrix.

11. It is well settled principle of law that the conviction can be based for commission of offence on the sole evidence of prosecutrix. However, the evidence of the prosecutrix has to be scrutinized carefully as held by the Hon'ble Supreme Court in the matter of *Hem Raj vs. State of Haryana* (2014) 2 SCC 3905 and has held as under:-

"6. In a case involving charge of rape the evidence of the prosecutrix is most vital. If it is found credible, if it inspires total confidence, it can be relied upon even sans corroboration. The court may, however, if it is hesitant to place implicit reliance on it, look into other evidence to lend assurance to it short of corroboration required in the case of an accomplice. (See *State of Maharashtra v. Chandraprakash Kewalchand Jain.*) Such weight is given to the prosecutrix's evidence because her evidence is on a par with the evidence of an injured witness which seldom fails to inspire confidence. Having placed the prosecutrix's evidence on such a high pedestal, it is the duty of the court to scrutinise it carefully, because in a given case on that lone evidence a man can be sentenced to life imprisonment. The court must, therefore, with its rich experience evaluate such evidence with care and circumspection and only after its conscience is satisfied about its creditworthiness rely upon it."

12. The Supreme Court in the matter of *Lalliram and another vs. State of M.P.* 2008 (3) JLJ 233 has held as under in regard to the fact when the statement of the prosecutrix is not corroborated by medical evidence:-

9. It is true that injury is not a sine qua non for deciding whether rape has been committed. But it has to be decided on the factual matrix of each case. As was observed by this Court in *Pratap Misra and others. v. State of Orissa* (1977 (3) SCC 41) where allegation is of rape by many persons and several times but no injury is noticed that certainly is an important factor if the prosecutrix's version is credible, then no corroboration is necessary. But if the prosecutrix's version is not credible then there would be need for corroboration. (See *Aman Kumar & Ors. v. State of Haryana* (2004 (4) SCC 379).

10. As rightly contended by learned counsel for the appellants a decision has to be considered in the background of the factual scenario. In criminal cases the question of a precedent particularly relating to appreciation of evidence is really of no consequence. In *Aman Kumar's* case (supra) it was observed that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice. There is no rule of law

that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal then the injured witness. In the latter case there is injury in the physical form while in the former both physical as well as psychological and emotional. However, if the court finds it difficult to accept the version of a prosecutrix on the face value it may search for evidence direct or circumstantial.

13. Another interesting statement of the prosecutrix was that accused Lalliram had dragged her by catching her bunch of hair for a considerable distance. The trial Court noticed that if that was so there would have been injuries and interestingly she had not stated about this part in the FIR. As noted above, she had spoken about scratches on her back due to dragging and other parts of the body and that blood had also oozed out. But the medical evidence is clearly to the contrary. In her statement she had deposed that her husband Daya Ram was also dragged by Pooran and Lalliram and he had also suffered several injuries. This part is also belied by the medical evidence. In cross-examination PW-1 admitted that accused persons harassed her and tried to kill her. She had admitted that she was assaulted by her husband. Those are relatable to the injuries which were fresh at the time of examination by the doctor on 5.10.1985.

13. The Supreme Court in the matter of *Aman Kumar and another vs State of Haryana,* 2004 SCC (Cri) 1266 has held in regard to ingredients of commission of offence of rape as under:-

> "Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little. The depth of penetration is immaterial in an offence punishable under Section 376 of I.P.C. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining

intact. The actus reus is complete with penetration. Thus, to constitute the offence of rape, it is necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law."

14. The Supreme Court further held in the case of *Arjun Singh vs. State of H.P.* AIR 2009 SC 1568, in regard to commission of rape and offences punishable under Section 511 of I.P.C.

"10. In the instant case though the rape does not appear to have been committed but the attempt to commit the rape is clearly established. That being so the conviction for offence punishable under Section 376 IPC is not made out but the offence punishable under Section 511 IPC is clearly made out. So far as the offence under Sections 365 and 366 IPC are concerned the trial Court and the High Court have analysed the evidence in great detail. We find no infirmity in the conclusion to warrant interference."

15. I would like to examine the evidence of the prosecutrix in the light of judgments and principles of law laid down by Supreme Court in the cases quoted above in the judgment.

16. (PW-5) Meera Bai did not support the evidence of the prosecutrix. She has been declared hostile. (PW-4) deposed that Meera Bai was with her at the time of incident. She further deposed that the accused had beaten her badly by wooden stock (sic:stick) and he had committed rape with her for 3-4 times. (PW-12) Dr. Fehamida Qureshi who examined the prosecutrix did not find any external injury on the body of the prosecutrix. She further deposed that there were no injuries on private parts of the prosecutrix. Her hymen was intact. There was no rupture of hymen. It means that there was no penetration. If the accused had committed rape for 3-4 times with the prosecutrix, then certainly there was rupture of hymen as held by Modi's Medical Jurisprudence and Toxicology in which it has been held as under:-

"In nubile virgins, the hymen, as a result of complete sexual intercourse, is usually lacerated, having one or more radiate tears (more so in the posterior half), the edges of which are

red, swollen and painful, and bleed on touching, if examined within a day or two after the act. These tears heal within five or six days and after eight to ten days, become shrunken and look like small tags of tissue. Frequent sexual intercourse and parturition completely destroy the hymen, which is represented by several small tags of tissue, which are called carunculae hymenealis or myrtiformes.

In cases where the hymen is intact and not lacerated, it is absolutely necessary to note the distensibility of the vaginal orifice in the number of fingers passing into vagina without any difficulty. The possibility of sexual intercourse having taken place without rupturing the hymen may be inferred if the vaginal orifice is capacious enough to admit easily the passage of two fingers."

Hence, the evidence of the prosecutrix does not inspire confidence of the Court. It is contrary to the medical evidence.

17. The prosecutrix herself deposed that she had cooked meal when she was with the appellant and all the persons had taken the meal. There were other persons also. When the statement of the prosecutrix does not inspire confidence of the Court and it is contrary to the medical evidence and the Doctor specifically opined that she could not give definite opinion about the commission of rape, in my opinion, it would be unsafe to convict the appellant for commission of offence punishable under Section 376 Part-I of I.P.C.

18. Similarly, the appellant could not be convicted for commission of offence under Section 366 of I.P.C., because as per the evidence of the prosecutrix, the appellant had used force and beaten her and thereafter, he had taken her to some places, is not reliable. However, the prosecutrix had specifically deposed that the appellant had caught hold her hand and tried to outrage her modesty. Hence, the appellant can be convicted for commission of offence under Section 354 of I.P.C.

19. In regard to award of punishment, the appellant has already undergone a jail sentence for more than one year, in my opinion, it would be just and proper if the appellant be awarded a sentence of already undergone for commission of offence under Section 354 of I.P.C.

20. Consequently, the appeal filed by the appellant is partly allowed. His

conviction under Sections 376 Part-I and 366 of I.P.C., and the sentence awarded by the trial Court for commission of offence, is hereby set aside. The appellant is acquitted from the aforesaid charges. The appellant is convicted for commission of offence under Section 354 of I.P.C., and awarded the sentence for which he had already undergone. The appellant is in jail, he be released forthwith, if he is not required in any other case.

21. Accordingly, appeal is partly allowed.

Appeal partly allowed.

I.L.R. [2015] M.P., 2196
APPELLATE CRIMINAL
Before Mr. Justice S.K. Gangele
Cr. A. No. 21/2004 (Jabalpur) decided on 26 March, 2015

SUSHILA BAI ...Appellant
Vs.
STATE OF MADHYA PRADESH ...Respondent

A. Penal Code (45 of 1860), Section 307 - Attempt to Murder - Ingredients - **There should be an intention or knowledge of the offence and secondly the act done for the purpose of carrying out the intention. (Para 18)**

क. दण्ड संहिता (1860 का 45), धारा 307 – हत्या का प्रयत्न – घटक – अपराध का आशय या ज्ञान होना चाहिए और दूसरा आशय को पूरा करने के प्रयोजन हेतु कृत्य किया गया।

B. Penal Code (45 of 1860),Section 307 - **When appellant reached the place of incident she was unarmed - She snatched the sickle from her mother-in-law and inflicted injuries to her - Appellant also received injuries including fracture of fibula bone - Injury caused to injured was not sufficient to cause death - Appellant not guilty of offence under Section 307 of I.P.C - Appellant held guilty for offence under Section 324 of I.P.C. - Appellant has already suffered jail sentence of 6 months - Appellant sentenced to period already undergone. (Paras 20 & 21)**

ख. दण्ड संहिता (1860 का 45), धारा 307 – जब अपीलार्थी घटनास्थल पर पहुंची वह निःशस्त्र थी – उसने अपनी सास के हाथ से हंसिया छीना और उसे चोटें पहुंचाई – अपीलार्थी को भी चोटें आई जिसमें बहिर्जंघिका अस्थि (फ़िब्यूलॉ बोन) का अस्थिभंग समाविष्ट है – आहत को कारित की गई चोट मृत्यु कारित करने के लिये

पर्याप्त नहीं थी – अपीलार्थी भा.दं.सं. की धारा 307 के अंतर्गत अपराध की दोषी नहीं – अपीलार्थी को भा.दं.सं. की धारा 324 के अंतर्गत दोषी माना गया – अपीलार्थी पहले ही 6 माह के कारावास का दंड भुगत चुकी है – अपीलार्थी को पहले ही भुगताई जा चुकी अवधि के लिये दंडादिष्ट किया गया।

Cases referred :

(2004) 13 SCC 189, (2007) 13 SCC 83.

None for the appellant.
Akshay Namdeo, G.A. for the respondent.

JUDGMENT

S.K. GANGELE, J. :- This Appeal is preferred by the accused/appellant being aggrieved by the judgment dated 5.12.2003 passed by the ASJ, Lakhnadon, District Seoni in S.T.No.61/2002. By the impugned judgment, the trial judge convicted the appellant for commission of offence under section 307 of the IPC with direction to undergo RI 5 years with fine of Rs.500/-.

2. The prosecution story in brief is that on 20.3.2002, the husband of the appellant was resting in his house. Suddenly, appellant came there, caught-hold him by his vest and asked why he had taken her to Banjari. Thereafter, due to fear, husband of the appellant went to the house of his elder brother. The appellant reached to the house of her mother-in-law Sukmani Bai and inflicted sickle injuries to her. Appellant also received some injuries. The report of the incident was lodged on 20.3.02 at 11.45 at P.S Lakhnadon, district Seoni. The police registered an offence for commission of an offence and conducted the investigation. After investigation, the charge sheet was filed before the court. Appellant abjured the guilt. After trial, learned trial judge found the charge proved against the appellant and awarded the sentence as mentioned above.

3. In support of the case, prosecution examined 12 witnesses whereas the appellant examined herself as (D.W.1) and Dr.Dipak Narayan Pandey (DW 2) as defense witness in her support.

4. Padam Singh (P.W.1), husband of the appellant, in his evidence, deposed that on the date of the incident appellant lost her mental balance and she tried to beat me. I ran away from the house and went to the house of my mother and brother. Appellant came behind. At that time my mother had been cutting vegetables by sickle. Appellant snatched the sickle from my mother's

hand and inflicted injuries to my mother. In his cross-examination, he admitted that appellant was insane at the relevant time.

5. Kher Singh (P.W.2), in his evidence, deposed that appellant is wife of my younger brother. I was sitting in the courtyard of my house. I heard the cry of Sukmani Bai and went to see her. I found that appellant had been inflicting injuries to Sukmani Bai by sickle. I tried to rescue the injured.

6. Ravi Prasad (P.W.3), in his evidence, deposed that appellant is wife of his younger brother. At around 9.30, he received the information from Ramesh that appellant had inflicted injuries to his mother Sukmani Bai. Thereafter, I came to the house and found that my mother was lying in injured condition. I went to the police station to lodge the report. My mother was taken to Lakhnadon hospital. Thereafter she was shifted to Seoni hospital. She was admitted there for eight days. A sickle was seized by the police before me vide seizure memo Ex.P/1. I signed the same. The spot-map was also prepared by Patwari which is Ex.P/3.

7. Sukmani Bai (P.W.4), the injured, in her evidence, deposed that at around 9 O' clock in the morning, she was sitting in the courtyard of her house and cutting the vegetables. Suddenly, appellant came there and inflicted injuries on her person by sickle. On hearing my cry, Kher Singh came and pacified the quarrel. Thereafter, police came and I was sent to the hospital. Police had seized my Blouse and Sari. In her cross-examination she said that there is no enmity between her and the appellant. However, appellant received attacks of hysteria upto some time. She denied the fact that appellant Sushila Bai received any injury.

8. Ramesh (P.W.5) turned hostile. Moolchand (P.W.6), in his evidence, deposed that police seized the sickle before me and I signed the seizure memo which is Ex.P/1. Sari and Blouse of victim Sukmani Bai were also seized by the police which is Ex.P/2.

9. Tularam (P.W.7) is the child witness. In his evidence he deposed that when he had reached the house he found that appellant had been inflicting injuries to his Dadi (grand mother) by a sickle.

10. Daduram (P.W.8) is also the child witness. In his evidence, he deposed that he had heard the cry of her grand mother and when he reached the house, he saw that appellant had been inflicting sickle blows to my grand mother.

11. Hariom Rajput (P.W.9) is the Patwari who prepared the spot-map which is Ex.P/4.

12. Dr. Dipak Pandey (P.W.10) in his evidence deposed that he was posted as Asst. Surgeon at Community Health Center, Lakhnadon on 20.3.2002. He had performed the medical examination of the injured Sukmani Bai. On examination, he found the following injuries on the person of victim Sukmani Bai:-

"1. एक कटा हुआ घाव डेढ इंच X 3/4 इंच क्वेरी डेप्थ (गहराई का पता नहीं) लेफट इलियक पोसा बांयी जांघ के उपर जहां पेट में हड्डी जुड़ती है पेट में नीचे की और बांयी तरफ।

2. एक खरमेंच आकार एक इंच X आधा इंच माथे पर बांयी ओर।

3. एक फआ हुआ घाव सूजन के साथ आकार 2Xआधा इंच और 2X3 इंच रंग लाल था बांयी भुजा पर।

4. एक खरोंच 2 X 1/10 इंच बांयी भुजा में मध्य मे थी।

5. एक फआ हुआ घाव 1/1/2 X 1/4 इंच आकार का 5 बांये अगूंठे के उपर कलाई पर।

6. एक कटा हुआ घाव जिसका आकार 1/2इंच X 1/8 X 1/8 इंच आकार का बांये हाथ की अंगूठे से लगी अनामिका उंगली पर सेकेन्ट एवं थर्ड सेरिंग के बीच में।

7. कटा हुआ घाव 1/2इंच X 1/4 X 1/4इंच आकार का चोट क्रं–6 के पास।

8. कटा हुआ घाव एक इंच X 1/4 इंच X 1/4 इंच आकार का बांये हाथ की बीच वाली उंगुली के नीचे मेटाकार्पल पर।

9. एक कटा हुआ घाव डेढ़ इंच 1/3X1/4 इंच आकार का सिर पर बायी पेराईटों टेम्पोरल बोन के पास में।

10. दो खरोंच दाहिने कान के पिन्ना पर प्रत्येक 1/4/ X 1/4 इंच आकार की।

11. एक कटा हुआ घाव गले में दाहिनी ओर 1इंच X 1/2 इंच आकार की चमड़ी लटकी हुई।

12. चार छोटे खरोंच दायें कंन्धे पर विभिन्न आकार के बहुत छोटी (इसलिये मेजरमेन्ट नहीं लिखा)।"

In para-2 of his deposition, he deposed that except injury No.1, all other injuries were simple in nature. The injury No.1,6,7,8,9 and 11 were caused by hard and sharp edged weapon and injuries No.2,4,10,12 were caused by hard and blunt object. He opined that incised injuries can be caused by a sickle.

13. P.L.Choudhary (P.W.11) is the Investigating Officer. He deposed that on 20.3.2002 he was posted at P.S Lakhnadon. A report was lodged by Padam Singh at the police station at around 11.45 which is Ex.P/8. Thereafter, the spot-map of the incident was prepared which is Ex.P/9. A sickle was also seized and seizure memo was prepared. Blood stained earth was also seized. Injured Sukmani Bai was sent to Govt. Hospital Lakhnadon. A Sari and a Blouse of the injured was also seized which is Ex.P/2. I requested the SDM to record the statement of injured Sukmani Bai. The medical examination of injured Sukmani Bai was also held. He admitted the fact that appellant Sushila Bai had also received some injuries.

14. H.D.Baghel (P.W.12) is the Naib Tehsildar who recorded the statement of injured Sukmani Bai.

15. In the defense, appellant Sushila Bai examined herself as (D.W.1). She deposed that she had gone to the house of her brother-in-law Ravi and thereafter she returned back. She further deposed that she had gone along with her husband to the house of her Jeth (brother-in- law) and at the house her mother-in-law Sukmani Bai and other family members were present. My Jeth had beaten me by Sabbal. I received injuries on my leg and head. Thereafter my husband had taken me to the hospital. In her cross-examination, she admitted that she had beaten her mother-in-law but she had no intention to kill her.

16. Dr. Deep Narayan Pandey (D.W.2) deposed that on 20.3.2002 he was posted as Asstt. Surgeon at Community Health Center, Lakhnadon. He had examined Sushila Bai and found some injuries on her person. Except injury No.5 and 9, all the injuries were caused by hard and blunt object. He further deposed that x-ray of Sushila Bai was taken out in which fracture of left fibula bone was found.

17. From the evidence of the prosecution witnesses, it is clear that the appellant had inflicted injuries to her mother-in-law. Appellant has also admitted this fact in her deposition. From the evidence of Dr. Deep Narayan Pandey (D.W.2), it is clear that appellant had also received some injuries. These injuries were not explained by the prosecution. There was a fracture of left fibula bone to the appellant. Dr. Deep Narayan Pandey (P.W.10) also examined the victim Sukmani Bai and deposed that except injury No.1, all other injuries were simple in nature. Injury No.1 was above left thigh and below the stomach. It is a fact that the appellant also received the injuries. The question is whether,

the injury No.1 caused to the victim was sufficient to cause death or not. The doctor has opined that if proper treatment had not been given to the victim then her death was possible.

18. In regard to constituting the offence under section 307 of the IPC, the Supreme Court in the matter of *Parsuram Pandey and others Vs. State of Bihar*-(2004) 13 SCC 189, has held as under :-

> "15. To constitute an offence under Section 307 two ingredients of the offence must be present:-
>
> (a) an intention of or knowledge relating to commission of murder ; and
>
> (b) the doing of an act towards it.
>
> For the purpose of Section 307 what is material is the intention or the knowledge and not the consequence of the actual act done for the purpose of carrying out the intention. Section clearly contemplates an act which is done with intention of causing death but which fails to bring about the intended consequence on account of intervening circumstances. The intention or knowledge of the accused must be such as is necessary to constitute murder. In the absence of intention or knowledge which is the necessary ingredient of Section 307, there can be no offence 'of attempt to murder'. Intent which is a state of mind cannot be proved by precise direct evidence, as a fact it can only be detected or inferred from other factors. Some of the relevant considerations may be the nature of the weapon used, the place where injuries were inflicted, the nature of the injuries and the circumstances in which the incident took place. On the evidence on record, where the prosecution has been able to prove only that the villagers have sustained injuries by indiscriminate firing and it was an open area with none of the injured nearby there is a complete lack of evidence of intention to cause such injuries for which the accused persons Parshuram and Bishram could have been convicted under Section 302 of the IPC. Nature of the injuries sustained by the villagers is simple. None of the witnesses have stated that the fire arm causing injuries was being used by any particular

accused for causing injuries to them. In fact the injured have not seen any of the accused persons using fire arms. There is no evidence about the distance from which the said two accused fired. The only evidence led by the prosecution is indiscriminate firing by Parshuram and Bishram which has caused simple injuries to the villagers. Amongst the injured villagers, only PW1 and DW-1 were examined. Thus this evidence does not constitute the intention or knowledge of the accused persons for committing the murder or doing of an act towards it. The evidence only shows that the villagers have sustained simple injuries. In the circumstances, we acquit Parshuram and Bishram under Section 307 of IPC."

As per the aforesaid judgment of the Supreme Court, for the purpose of commission of an offence under section 307 of the IPC, it is material that there should be an intention or knowledge of the offence and secondly the act done for the purpose of carrying out the intention.

19. The same principle of law had been laid down by the Supreme Court in the matter of *Sumersingh Umedsinh Rajput Vs. State of Gujarat*- (2007) 13 SCC 83. The same reads as under :-

"14. Even assuming that PW-8 received a fire arm injury which in the facts and circumstances of the case does not appear to be plausible, having regard to the positive evidence of the prosecution as has been stated by PW-4 Neelabhai it seems certain that a scuffle had ensued. A case of Section 307 of the Indian Penal Code, therefore, has not been made out. The ingredients of Section 307 are:

(i) an intention of or knowledge relating to commission of murder; and

(ii) the doing of an act towards it. "

20. From the aforesaid judgment also, it is clear that an intention of or knowledge relating to commission of murder and doing of an act towards it are the essential ingredients to constitute an offence under section 307 of the IPC,. In the present case, when the appellant reached the house of her mother-in-law, she was unarmed. She had snatched the sickle from her mother-in-law and inflicted injuries to her. Appellant also received some injuries and a fracture

of fibula bone. The examining doctor has deposed that only injury No.1 was grievous in nature which was sustained by a sharp edged weapon. However that injury was not sufficient to cause death. On the basis of aforesaid evidence, in my opinion, it could not be held that the appellant is guilty for commission of the offence under section 307 of the IPC. The trial court has over-looked the aforesaid vital aspect.

21. Looking to the nature of the case and the evidence on record, in my opinion, the appellant is guilty for commission of the offence punishable under section 324 of the IPC. The appellant was in jail since 21.3.2002 to 30.4.2002 (40 days) and from the date of the impugned judgment 5.12.2003 till suspension of her jail sentence i.e 26.4.04 (142 days). Accordingly she has already suffered the jail sentence of near about six months. Looking to the fact that the appellant has also received injuries on her leg and head. She belongs to a poor family and she has already suffered near about six months of jail sentence, in my opinion, it would be just and proper to award the jail sentence upto to the period already undergone by her.

22. Consequently, the appeal filed by the appellant is partly allowed. Her conviction and sentence awarded by the trial court for commission of the offence under section 307 IPC is set aside. Instead of it, she is convicted for commission of the offence punishable under section 324 of the IPC and punished with the jail sentence already undergone by her that is near about six months. If appellant is on bail, her bail bonds are discharged. If she is in jail, she be set at liberty forthwith if not required in any other case.

Appeal partly allowed.

I.L.R. [2015] M.P., 2203
APPELLATE CRIMINAL
Before Mr. Justice N.K. Gupta
Cr.A. No. 208/1997 (Jabalpur) decided on 21 May, 2015

RAMPRASAD LODHI ...Appellant
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 306 - Abetment of suicide - **Appellant/Husband was living as Ghar Jamai and was looking after the property of his in-laws alongwith his brother-in-law - P.W. 7 with whom it was alleged that appellant was having illicit relations has not stated about**

relation - Husband of P.W. 7 not examined - Deceased/wife never informed her maternal uncle about illicit relations, who had fixed the marriage after the death of father of deceased - No evidence that appellant had ever beaten the deceased in intoxicated condition - Nothing on record that who called the Panchayat - Neither deceased nor P.W. 7 or her husband called the Panchayat - Deceased was not having issue even after expiry of more than 7 years of marriage - Prosecution failed to prove that appellant abeted his wife to commit suicide - Appeal allowed. (Para 7 to 20)

दण्ड संहिता (1860 का 45), धारा 306 – आत्महत्या का दुष्प्रेरण – अपीलार्थी/पति घर जमाई के रूप में रह रहा था और अपने साले के साथ ससुराल की संपत्ति की देखभाल कर रहा था – अ.सा.7 जिसके साथ अपीलार्थी के अवैध संबंध होने का अभिकथन किया गया था, उसने संबंधों के बारे में कोई कथन नहीं किया है – अ.सा. 7 के पति का परीक्षण नहीं किया गया – मृतिका/पत्नी ने अवैध संबंधों के बारे में कभी अपने मामा को नहीं बताया था, जिन्होंने मृतिका के पिता की मृत्यु के पश्चात् उसका विवाह तय किया था – कोई साक्ष्य नहीं कि अपीलार्थी ने कभी मृतिका के साथ नशे की हालत में मारपीट की थी – अभिलेख पर कुछ नहीं कि पंचायत किसने बुलाई थी – न तो मृतिका न ही अ.सा.7 या उसके पति ने पंचायत बुलाई – विवाह के 7 वर्ष से अधिक समय बीत जाने के पश्चात् भी मृतिका की कोई संतान नहीं थी – अभियोजन यह सिद्ध करने में असफल रहा कि अपीलार्थी ने अपनी पत्नी को आत्महत्या कारित करने के लिये दुष्प्रेरित किया – अपील मंजूर।

Cases referred :

AIR 2007 SC 2045, AIR 2002 SC 1998, AIR 2005 SC 1775.

R.S. Patel, for the appellant.
Ajay Tamrakar, P.L. for the respondent/State.

JUDGMENT

N.K. GUPTA, J. :- The appellant has preferred the present appeal being aggrieved with the judgment dated 22.1.1997 passed by the Sessions Judge, Tikamgarh in S.T.No.17/1993, whereby the appellant has been convicted of offence under Sections 306, 498-A of IPC and sentenced to 5 years rigorous imprisonment with fine of Rs.1,000/- and 2 years rigorous imprisonment with fine of Rs.250/-, default sentence was also imposed in lieu of payment of fine.

2. The prosecution's case, in short, is that, on 22.1.1992, the deceased Asha Bai, wife of the appellant was taken to the hospital with the report that she

had consumed some poisonous substance. However, she could not be saved. Dr.A.K.Naik of Rajendra Hospital, Tikamgarh has sent a merg intimation to the police at Police Station Kotwali, Tikamgarh and it was registered as Ex.P/10. Dead body of the deceased was sent for post-mortem. A team of doctors including Dr.Amitabh Jain (P.W.5) performed the post-mortem on her body and gave a report, Ex.P/5. It was found that she had died due to consumption of Sulphas. After due investigation, a charge-sheet was filed before the JMFC, Tikamgarh, who committed the case to the Court of Sessions.

3. The appellant abjured his guilt. He took a plea that he was residing in the house of the deceased as "Ghar Jawai" and he was dependent upon the property of the deceased. He could not do anything and could not abet the deceased to commit suicide. After her death, he was falsely implicated, so that he may not claim the property of the deceased. In defence, Pooran Lodhi (D.W.1) and Ramjan Khan (D.W.2) were examined.

4. After considering the evidence adduced by the parties, Sessions Judge, Tikamgarh convicted and sentenced the appellant as mentioned above.

5. I have heard the learned counsel for the parties.

6. In the present case, according to the report given by Dr.Amitabh Jain (P.W.5), it is apparent that the deceased died due to consumption of poisonous substance. There is no allegation against the appellant that he forced the deceased to consume poison and there is no allegation that the death of the deceased was homicidal. No witness was given any suggestion that the deceased died due to an accident or due to mistake she consumed some poisonous substance. Learned counsel for the appellant does not challenge the fact that the death of the deceased was suicidal in nature. Under such circumstances, where death of the deceased was neither homicidal, nor accidental and therefore, it was suicidal. According to the witness Prabhudayal (P.W.3), Ganeshi Bai (P.W.1) and Deshraj (P.W.4), marriage of the deceased took place 6-7 years prior to her death, whereas Jhandu Singh @ Harsewak (P.W.2) has stated that marriage of the deceased took place 7-8 years back before her death. Under these circumstances, it is apparent that the deceased died after 6 years of her marriage but, a doubt is also created that she died after 7 years of her marriage. When doubt is created then, benefit of doubt is to be given to the accused and therefore, on doubt, it can be said that no presumption under Section 113-A of Evidence Act is applicable in the present case.

7. Various witnesses have tried to settle the case that the appellant was the person, who was brought by some relatives of the deceased in the house of the deceased to reside as Ghar Jawai and he was looking after the property of father of the deceased and maintaining the deceased and her brother Deshraj (P.W.4). Nobody has alleged that the deceased was being subjected to cruelty on the basis of any dowry demand. It is also stated by some witnesses that initially the elder brother of the appellant was working with father of the deceased in the fields and thereafter, the appellant was working in the fields and after death of father of the deceased, marriage of the deceased was performed with the appellant. Hence, it would be apparent that the property was of the deceased and her brother and the appellant was working on the property (land) being husband of the deceased and there was no demand from the side of the appellant. Various witnesses have shown two reasons of cruelty done by the appellant upon the deceased, prior to her death. One was that, he was beating his wife after consumption of liquor and secondly that he had illicit relations with one Bismillah Bai (P.W.7) and the deceased was annoyed due to such relations and therefore, she consumed poison. However, the evidence adduced by the prosecution should be examined minutely on both the counts.

8. Ganeshi Bai (P.W.1), Jhandu Singh @ Harsewak (P.W.2), Prabhudayal (P.W.3), Deshraj (P.W.4), Premchand Jain (P.W.5) were examined to show the relations of the appellant with the deceased prior to her death. However, Ganeshi Bai (P.W.1), Prabhudayal (P.W.3), Premchand Jain (P.W.6) have turned hostile. They did not state about any quarrel between the appellant and his wife in the past. Jhandu Singh @ Harsewak (P.W.2) and Deshraj (P.W.3) have stated that before death of the deceased, on several occasions quarrel took place between the appellant and the deceased and the appellant assaulted the deceased. Both the witnesses have stated that main cause of quarrel was that the appellant was visiting the house of Bismillah Bai and deceased had an objection to such a conduct. Jhandu Singh @ Harsewak has stated that after consuming liquor, the appellant was in habit to assault the deceased. However, Deshraj brother of the deceased did not state that the appellant assaulted the deceased after consumption of liquor. Deshraj was residing with his sister and the appellant in the same house and therefore, his observation should be in a better position than the statement given by Jhandu Singh @ Harsewak because the statement of Jhandu Singh @ Harsewak depends upon the information given by others and therefore, his statement falls within the category of hearsay

evidence, which is not admissible.

9. Also, it is apparent that Jhandu Singh @ Harsewak had some enmity with the appellant. In this connection, the defence witness Pooran Lodhi (D.W.1) has stated about the reason of quarrel between the appellant and Jhandu Singh @ Harsewak (P.W.2). Jhandu Singh @ Harsewak has accepted in his cross-examination that he gave a complaint to DSP that Investigation Officer and the appellant have settled the matter in a sum of Rs.10,000/-. He has stated that the complaint was made by him because he was a reputed member of the community of the deceased and it was his duty that the appellant should be punished. However, he does not appear to be a reputed member of the community because according to him, a Panchayat took place on the subject that the appellant was visiting the house of Bismillah Bai but, he was not called in the Panchayat though he himself went to view the proceedings of Panchayat and he remained at a side place. If he was a prominent and respected member of the community of the deceased then either he would have been called in the Panchayat or given any responsibility to look after the interest of the deceased. Hence, looking to the conduct of this witness that he lodged a fake complaint to the DSP concerned that the matter was settled between the appellant and Investigation Officer in sum of Rs.10,000/-, indicates that he had an enmity with the appellant and therefore, he gave his statement before the Court to implicate the appellant, without any basis.

10. Jhandu Singh @ Harsewak has tried to show that the deceased told him that the appellant had beaten her soon before the incident when he was going to his fields. He has also stated that the deceased told about the incident in street before one Pinpin but, neither Pinpin was examined before the trial Court, nor his name was shown in the witness list by the police. Such a fact is not told by this witness to the police and therefore, it appears that now he has made the story to show that soon before the death of the deceased, she told about the cruelty done by the appellant towards her, whereas such a fact is nothing but, an after thought, which cannot be accepted. Under these circumstances, the testimony of Jhandu Singh @ Harsewak is not at all acceptable. Most of his evidence depends upon the information received by him and being an enemy, he has given a false evidence against the appellant before the trial Court. If the testimony of Jhandu Singh @ Harsewak is discarded then, certainly, there is no other witness to say that the appellant is in habit to assault the deceased after consuming liquor.

11. Second point of the case is that since the appellant had illicit relations with Bismillah Bai (P.W.7) and the deceased had an objection to those relations. The appellant was in habit to assault the deceased on that count. However, Ganeshi Bai (P.W.1) was the person, who was present with the deceased with an information that she consumed some poisonous substance and she was to be taken to the hospital and also she went alongwith the deceased to the hospital but, according to Ganeshi Bai, the deceased did not say anything about the cause as to why she consumed the poison. Similarly, Prabhudayal (P.W.3) and Premchand Jain have turned hostile. They have accepted that they did not have any information as to whether the appellant was in habit to assault the deceased due to appellant's relations with Bismillah Bai (P.W.7) or not. Deshraj has stated that since the deceased had an objection about the relation of the appellant with Bismillah Bai but, she was often beaten by the appellant. However, Deshraj is brother of the deceased, who has stated that the appellant had lodged an application for mutation of the property of the deceased in the name of the appellant and a case was pending before the Revenue Court. He has further accepted that after death of the deceased, the crop was reaped by him and the appellant in winter season and thereafter, though the crop was sown by the appellant and him but, it was ripen by the witness Deshraj with help of his cousin brother Prabhydayal. He has also stated that immediately after the incident, he was taken by his maternal uncle, who got the marriage of the deceased performed with the appellant.

12. However, at the time of evidence given by this witness, his land was not looked after by his maternal uncle, whereas his land was looked after by his cousin Prabhudayal. Possibility cannot be ruled out that Deshraj, who was a boy of 13-14 years of age at the time of his deposition, was tutored by other persons that if he does not state against the appellant then, he has to share the property of his father with the appellant, who was a stranger in the family and therefore, he could state against the appellant with such allegation. It was stated that the appellant was visiting the house of Bismillah Bai and the deceased had an objection and therefore, the appellant was in habit to assault the deceased. If such a fact is examined on circumstances then, it would be apparent that the deceased had an opportunity to go to his maternal uncle, who settled the marriage of the appellant and the deceased with all allegations but, unfortunately, maternal uncle of the deceased was not at all examined. Even his name is not shown in the witness list. It is not alleged that the deceased went to his maternal uncle to get the problem resolved. It is important to

mention that Bismillah Bai (P.W.7) was examined before the trial Court. She did not state that the appellant was visitor to her house. She gave her evidence according to the statement given under Section 161 of the Cr.P.C. It was for the Investigation Officer to ask the questions about her relations with the appellant on the fact as to whether the deceased raised any objection before Bismillah Bai or any Panchayat took place on that count. However, neither Investigation Officer, nor the prosecutor placed any such question before Bismillah Bai to show that the appellant was visitor to the house of Bismillah Bai. Since the evidence given by Bismillah Bai was not challenged by the prosecutor and she was examined as a prosecution witness, her testimony is binding upon the prosecution and the theory placed by the prosecution, which was a reason of quarrel has discarded in the light of evidence given by Bismillah Bai (P.W.7).

13. Also, Deshraj and Jhandu Singh @ Harsewak has stated that a Panchayat took place due to dispute between the appellant and the deceased because the deceased was visitor to the house of Bismillah Bai. However, no independent witness was examined to prove that sitting of such Panchayat took place. Such Panchayat could be called either by husband of Bismillah Bai or the deceased Asha Bai. Name of the husband of Bismillah Bai was Rafiq Khan. In the witness list submitted alongwith the charge-sheet, name of Rafiq Khan has not been shown a witness. It is not at all clear as to whether Rafiq Khan was residing with Bismillah Bai in those days or not. However, non examination of Rafiq Khan by the police indicates that Rafiq Khan had no knowledge about the alleged relation of Bismillah Bai and the appellant, therefore, if any Panchayat was called on that issue then, it was not called by Rafiq Khan or Bismillah Bai. Certainly, it would have been called by Asha Bai. However, Jhandu Singh @ Harsewak has accepted in para 3 that in that Panchayat, Asha Bai was not present. It was strange that Panchayat was not called by Rafiq Khan or Bismillah Bai, it was not called by Asha Bai even because she was not present in the Panchayat then, there is no answer to this question as to who called the Panchayat. As discussed above, that Jhandu Singh @ Harsewak was telling a falsehood before the Court due to his enmity with the appellant and therefore, after discarding his evidence, there is no evidence on record to say that any Panchayat took place against the appellant on the aforesaid issue. Deshraj (P.W.4) could not explain about the fact of Panchayat and he was not so sure that such Panchayat took place.

14. After considering the aforesaid evidence, it appears that Bismillah Bai was examined and no suggestion was given to her by the Investigation Officer or the Prosecutor that the appellant had illicit relations with her and the deceased had an objection to those relations. Marriage of the deceased and appellant was settled by maternal uncle of the deceased but, name of that maternal uncle was neither informed to the Court, nor such maternal uncle was examined before the trial Court. If the deceased was tortured by the appellant or dealt with cruelty for his illicit relations with Bismillah Bai then, the deceased would have atleast made a complaint to her maternal uncle and he must have resolved the problem. Similarly, one Bhagwan Das, who was shown as a respected member of the community was listed as a witness in the list of witnesses submitted alongwith the charge-sheet but, he was given up by the prosecution when he was present before the trial Court. Similarly, Gulab S/o Babla and Jagan were also listed as witnesses but, they were dropped and not examined as witnesses. Ramjan Khan (D.W.2) was a member of community of Bismillah Bai. He has categorically stated that no such Panchayat took place on the issue that there was a dispute between the appellant and the deceased relating to illicit relations of the appellant with Bismillah Bai. He has stated that there was no rumour in the village about such relations. If conduct of the deceased is considered then, before consuming poison, she did not state about her problem to anyone, prior to her death. Nobody knew about her problem. Except Deshraj, there was nobody in the village, who could state that the appellant was in habit to assault the deceased because of her allegation that the appellant had illicit relations with Bismillah Bai.

15. It is pertinent to note that marriage of the deceased took place 7 years, prior to her death and in those 7 years, she could not be blessed with any child and therefore, she must have a reason to commit suicide that she could not be blessed with child. When the relatives of the deceased settled the marriage of the deceased with the appellant for her property be maintained and for maintenance of the deceased and her brother Deshraj. It is accepted by Deshraj that at the time of death of the deceased, property of her father was in the name of the deceased and her brother Deshraj. Appellant had no advantage with the death of the deceased. Under such circumstances, where it is very much clear that Deshraj, who was taken by his maternal uncle after the death of the deceased came to depose in the shelter of Prabhudayal, Prabhudayal and the witness Deshraj came to the Court in the company of each other as accepted by Deshraj in para 2 of his statement. Deshraj and

Prabhudayal were examined on 15.3.1994, whereas Prabhudayal had turned hostile and Deshraj has stated against the appellant. As discussed above, it was possible that to oust the appellant from the property of his sister, Deshraj could give such a statement against the appellant otherwise, Prabhudayal who came with the witness Deshraj to the Court and who was cousin brother of Deshraj, did not support the prosecution's story. There was no conflict of interest between Prabhudayal and Deshraj. Deshraj has accepted that on various dates, his maternal uncle was attending the trial Court. However, he denied that he gave his statement as tutored by his maternal uncle.

16. As discussed above, there is no believable evidence to accept that quarrel took place between the appellant and the deceased relating to relation of the appellant with Bismillah Bai. She did not inform her maternal uncle about such a fact and therefore, her maternal uncle never interfered in the family life of the deceased in the last 7 years of her married life. No FIR was lodged by the deceased against the appellant. The appellant was maintaining the deceased as well as her brother Deshraj for last 7 years. No respectable villager of that village has stated against the appellant that he ever assaulted the deceased due to any reason and therefore, the testimony of Deshraj cannot be accepted to the fact that the appellant was in habit to assault the deceased on her objection to his relation with Bismillah Bai. At this stage, it is necessary to mention that the case diary statement of Deshraj was different and he could not be confronted with his case diary statement at the time of his examination and therefore, on 9.10.1996, the appellant has moved an application under Section 311 of the Cr.P.C. to recall the witness Deshraj but, that application was not accepted. In these circumstances, where the statement of Deshraj given before the trial Court was different from his previous statement given before the police and therefore, testimony of Deshraj cannot be accepted.

17. On the basis of the aforesaid discussion, it is not proved that the appellant had ever assaulted the deceased after consuming liquor. It is not proved beyond doubt that the appellant ever assaulted the deceased on her objection to the relation of the appellant with Bismillah Bai. It is not at all proved that the appellant had any relation with Bismillah Bai (P.W.7). Hence, if any doubt is created then, benefit of doubt is to be given to the appellant.

18. Learned counsel for the appellant has placed his reliance upon the judgment passed by Apex Court in case of "*Bhagwan Das Vs. Kartar Singh and others*", [AIR 2007 SC 2045], in which it is held that harassment of

wife done by the husband due to their differences then, only by that overt-act provision of Section 306 read with Section 107 of IPC shall not be attracted and the accused cannot be convicted of offence under Section 306 of IPC. Reliance is also placed upon the judgment passed by Apex Court in case of *"Sanju @ Sanjay Singh Sengar Vs. State of M.P."*, [AIR 2002 SC 1998], in which it is held as under:-

> ***"13. .....The word 'instigate' denotes incitement or urging to do some drastic or unadvisable action or to stimulate or incite. Presence of mens rea, therefore, is the necessary concomitant of instigation. It is common knowledge that the words uttered in a quarrel or in a spur of the moment cannot be taken to be uttered with mens rea. It is in a fit of anger and emotional. Secondly, the alleged abusive words, said to have been told to the deceased were on 25th July, 1998 ensued by quarrel. The deceased was found hanging on 27th July, 1998. Assuming that the deceased had taken the abusive language seriously, he had enough time in between to think over and reflect and, therefore, it cannot be said that the abusive language, which had been used by the appellant on 25th July, 1998 drived the deceased to commit suicide. Suicide by the deceased on 27th July, 1998 is not proximate to the abusive language uttered by the appellant on 25th July, 1998. The fact that the deceased committed suicide on 27th July, 1998 would itself clearly pointed out that it is not the direct result of the quarrel taken place on 25th July, 1998 when it is alleged that the appellant had used the abusive language and also told the deceased to go and die. This fact had escaped notice of the courts below.***
>
> ***14. .....***
>
> ***15. .....it cannot be said that the suicide by the deceased was the direct result of the quarrel that had taken pace on 25th July, 1998. Viewed from the aforesaid circumstances independently, we are clearly of the view that the ingredients of 'abetment' are totally absent in***

the instant case for an offence under Section 306 I.P.C."

In that case, proceedings of the trial Court was quashed by the Apex Court under Section 482 of the Cr.P.C.

19. Learned counsel for the appellant has also placed his reliance upon the judgment passed by Apex Court in case of *"Netai Dutta Vs. State of W.B."*, [AIR 2005 SC 1775] , in which it is held that no reference of any act or incidence in alleged suicide note whereby accused has committed any wilful act or omission or intentionally aided or instigated deceased in committing act of suicide then, no offence under Section 306 of IPC may constitute.

20. In the light of aforesaid judgments, if facts of the present case is examined then, certainly, the prosecution could not prove any overt-act of the appellant which may fall within the purview of Sections 107 or 109 of IPC and no offence under Section 306 of IPC may constitute against the appellant. The trial Court has committed an error in convicting the appellant of offence under Section 306 of IPC. Hence, the conviction imposed by the trial Court of offence under Section 306 of IPC may be set aside.

21. So far as the offence under Section 498-A of IPC is concerned, the deceased had never made any complaint about the cruelty done by the appellant to anyone. Respectable persons of the society were given up. Nobody was present to say that the appellant dealt the deceased with cruelty in last 7 years of her marital life. Alleged maternal uncle was not examined before the trial Court, who could state that the deceased complained about the cruelty done by the appellant and he could say about the steps taken for resolution if any but, unfortunately, neither that maternal uncle was named in the witness list of the prosecution, nor he was examined before the trial Court. Hence, on the basis of evidence of Deshraj only, it cannot be said that the appellant has dealt the deceased with cruelty in her life time, prior to her death. Hence, the appellant cannot be convicted of offence under Section 498-A of IPC.

22. On the basis of the aforesaid discussion, the appeal filed by the appellant appears to be acceptable and therefore, it is hereby accepted. Conviction and sentence imposed upon the appellant by the trial Court for offence under Sections 306 and 498-A of IPC are hereby set aside. The appellant is acquitted from all the charges appended against him. He would be entitled to get the fine amount back, if he had deposited the same before

the trial Court.

23. The appellant is on bail, his presence is no more required before this Court and therefore, it is directed that his bail bonds shall stand discharged.

24. Copy of the judgment be sent to the trial Court alongwith its record for information and compliance.

Appeal allowed.

I.L.R. [2015] M.P., 2214
APPELLATE CRIMINAL
Before Mr. Justice N.K. Gupta
Cr.A. No. 1555/1997 (Jabalpur) decided on 30 July, 2015

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

Penal Code (45 of 1860), Section 304- (Part-2) - Culpable Homicide not amounting to murder **- Deceased sustained injuries while he was working in a rubber factory - F.I.R. was lodged after 9 hours mentioning the names of eye witnesses - One witness turned hostile and all other eye witnesses mentioned in the F.I.R. were given up - P.W. 4 deposed as an eye witness but his name was not mentioned in F.I.R. - P.W. 4 admitted that he is still working in the same factory and officers of the factory are standing outside the Court - Injuries could not have been caused by Rubber cutter which was seized from the possession of appellant - Rubber cutter also not sent to the autopsy Doctor - Appellant was all the time present in the factory at the time of incident and had no opportunity to take the blood stained rubber cutter to his house from where it was seized - No motive behind the commission of offence - Prosecution failed to prove the guilt of the appellant - Appeal allowed. (Paras 7 to 17)**

दण्ड संहिता (1860 का 45), धारा 304 (भाग–2) – हत्या की कोटि में न आने वाला आपराधिक मानव वध – मृतक को जब वह रबर फैक्ट्री में काम कर रहा था चोटें आईं – चक्षुदर्शी साक्षियों के नाम उल्लिखित करते हुए प्रथम सूचना रिपोर्ट 9 घंटे बाद दर्ज कराई गई – एक साक्षी पक्ष विरोधी हो गया और प्रथम सूचना रिपोर्ट में उल्लिखित सभी अन्य चक्षुदर्शी साक्षियों का परीक्षण नहीं किया गया – अ.सा. 4 ने चक्षुदर्शी साक्षी के रूप में कथन किया है परंतु प्रथम सूचना रिपोर्ट में उसका नाम उल्लिखित नहीं था

– अ.सा.4 ने स्वीकार किया है कि वह अभी भी उसी फैक्ट्री में काम कर रहा है और फैक्ट्री के अधिकारीगण न्यायालय के बाहर खड़े हैं – चोटें उस रबर कटर से कारित नहीं की जा सकती जिसे अपीलार्थी के कब्जे से जप्त किया गया था – रबर कटर को शव परीक्षण करने वाले चिकित्सक को भी नहीं भेजा गया था – घटना के समय अपीलार्थी पूरे समय फैक्ट्री में उपस्थित था और रक्त रंजित रबर कटर को अपने घर ले जाने का उसके पास कोई अवसर नहीं था, जहां से उसे जब्त किया गया था – अपराध कारित करने के पीछे कोई हेतु नहीं – अभियोजन अपीलार्थी का दोष साबित करने में असफल रहा – अपील मंजूर।

Cases referred :

AIR 1993 SC 1723, AIR1993 SC 1892, AIR 1971 SC 1586.

H.S. Dubey with *Abhinav Dubey*, for the appellant.
Siddharth Singh Chouhan, D.G.A. for the State/respondent.

JUDGMENT

N.K. Gupta, J. :- The appellant has preferred the present appeal being aggrieved with the judgment dated 3.7.1997 passed by the Sessions Judge, Raisen in S.T.No.44/1995, whereby the appellant has been convicted of offence under Section 304 (Part-2) of IPC and sentenced to 7 years rigorous imprisonment.

2. The prosecution's case, in short, is that, on 29.7.1994, at about 00.30 a.m., the deceased Prem Singh as well as the appellant were working in Ralson Factory, Mandideep, which was a tyre factory. Suddenly, the victim sustained an injury on his neck by sharp cutting weapon. Ramdhani Paswan, Shift Incharge rushed to the spot and with the help of Jung Bahadur and Bheem Singh, the deceased Prem Singh was sent to Hamidia Hospital, Bhopal in a vehicle. However, the deceased Prem Singh had expired. A merg intimation, Ex.P/10 was recorded at Police Station Mandideep, Bhopal on the basis of information given by Radio Operator, Non-Urban Control, Bhopal. On the same day, at about 9.40 a.m., Ramdhani Paswan had lodged an FIR, Ex.P/1 that a quarrel took place between the appellant and Prem Singh and therefore, the appellant gave a blow of rubber cutter on the neck of the deceased Prem Singh. The incident was seen by Kamta Prasad (P.W.2), Sohan Yadav, Trilokinath, Ramnath, Arjun Das Sharma and Mahendra Pandey. The dead body of the deceased was sent for post-mortem. Dr.C.S.Jain (P.W.5) did postmortem upon the body of the deceased Prem Singh and gave his report, Ex.P/9. A typography photo of the injury was given in the connected document,

Ex.P/9-A. He found one stab wound on left side of his neck and one incised wound on right knee of the deceased. After due investigation, a charge-sheet was filed before the concerned JMFC, who committed the case to the Court of Sessions and ultimately, it was transferred to the Sessions Judge, Raisen.

3. The appellant abjured his guilt. He took a plea that the deceased sustained injuries while he was working on a machine and the appellant was falsely implicated by the office bearers of the factory, so that they could be saved from giving any compensation to the family of the deceased Prem Singh. However, no defence evidence was adduced.

4. Sessions Judge after considering the evidence of the prosecution, acquitted the appellant from the charge of offence under Section 302 of IPC but, convicted him of offence under Section 304 (Part-2) of IPC and sentenced as mentioned above.

5. I have heard the learned counsel for the parties at length.

6. Dr.C.S.Jain (P.W.5) has done post-mortem on the body of the deceased and he found two incised injuries on the body of the deceased. First wound was a stab wound on left neck from Jaw to neck and various vital organs of that place were found cut. Second injury was an incised wound on right knee. Full pant over the right knee was also found cut. According to Dr.C.S.Jain, the deceased could not remain conscious for more than half a minute after getting injury No.1 and he would have died within two minutes of the injuries caused. Dr.C.S.Jain did not give any cogent information as to whether the death of the deceased was homicidal or not. Primarily he gave a opinion that the death of the deceased was homicidal but, in the cross-examination he has accepted that nature of death could be decided on the basis of other evidence.

7. In the present case, Ramdhani Paswan (P.W.1) has stated that he was informed by Sohan Yadav that the appellant gave a blow of knife on the neck of Prem Singh then, he went to the spot and found that blood was oozing from the neck of Prem Singh and therefore, he transmitted the deceased Prem Singh to Hamidia Hospital with help of Jung Bahadur and Bheem Singh. Thereafter, in the morning at about 9.40 a.m., he had lodged the FIR, Ex.P/1, in which he mentioned the name of eye witnesses, such as Sohan Yadav, Trilokinath, Ramnath, Arjun Das Sharma and Mahendra Pandey. The eye

witness Kamta Prasad (P.W.2) has turned hostile. He did not claim himself to be an eye witness. According to him, when he went to the spot, the appellant, Sikandar and one witness Ramnath were holding the neck of the deceased covering with some cloth. However, Bihari Shah (P.W.4) has stated that the appellant assaulted the victim Prem Singh. It is surprising that only one eye witness was examined against the appellant whose name was not mentioned in the FIR. Out of the eye witnesses mentioned in the FIR, only one Kamta Prasad was examined. When Kamta Prasad was examined on 4.8.1995, the eye witnesses Ramnath and Arjun Das Sharma have been given up on the same day. Again on the next day, the eye witness Trilokinath was given up and on 9.8.1996, learned Public Prosecutor has expressed that he did not want to examine any of the witnesses except Sub Inspector S.K.Tiwari and therefore, out of so many eye witnesses only Bihari Shah was examined whose name was not mentioned in the FIR. Hence, an adverse inference should be drawn against the prosecution that all the eye witnesses whose names were mentioned in the FIR would not have supported the prosecution's case, if they were examined. Bihari Shah (P.W.4) has accepted that after the incident, he did not inform the concerned supervisor or Manager about the incident and he continued with his work. He has also accepted that he was still working in the same factory when he appeared as a witness. He has also accepted in para 4 of his statement that 3-4 officers of the factory were present in the Court when he was giving his statement before the trial Court. Hence, possibility cannot be ruled out that Bihari Shah has given his statement under pressure of the officers of the factory otherwise, he would also have turned hostile. However, his testimony should be assessed on the basis of other circumstantial evidence.

8. Circumstances as proved by the prosecution are adverse to the testimony of Bihari Shah. The FIR, Ex.P/1 was proved as a corroborative piece of evidence. However, Ramdhani (P.W.1) could not give any explanation as to why he did not lodge the FIR at Police Station Mandideep soon after the incident. The incident took place at 00.30 a.m. and FIR was lodged at 9.40 a.m. though the deceased was sent to Hamidia Hospital, Bhopal with two labours. There was no reason with Ramdhani for having lodged the FIR, soon after the incident. Initially, he has stated that he himself went to lodge the FIR but, thereafter, he has accepted that he was sent by Makkhan Singh, Manager of the factory alongwith other witnesses to lodge the FIR. According to Bihari Shah, he went with the complainant Ramdhani to the Police Station

and all the eye witnesses were kept at Police Station up to 7 p.m. in the evening. It appears that since the management could not decide till morning that what would be the text of the FIR lodged by the supervisor and therefore, Ramdhani was not in a position to lodge the FIR before the police station soon after the incident. Such fact may also be collected from merg intimation, Ex.P/10 in which radio operator of non urban control, Bhopal has given an intimation to Police Station Mandideep that from Ralson Factory, Mandideep, 3-4 persons had brought the deceased Prem Singh to Hamidia hospital and informed that the deceased Prem Singh was caught by a machine having rubber cutter and he was declared dead by the concerned doctor.

9. Ramdhani Paswan (P.W.1) had sent Jung Bahadur and Bheem Singh alongwith the deceased Prem Singh. These two persons have been given up by the prosecution. If Ramdhani was informed that the incident was caused due to assault done by the appellant then, that fact must be in the knowledge of Jung Bahadur and Bheem Singh then, certainly these two persons have given a similar intimation to the Radio Operator, Non Urban Control, Bhopal relating to death of the deceased but, in that intimation it was mentioned that injury was caused due to an accident. Hence, the delay in lodging the FIR is fatal and possibility cannot be ruled out that to avoid payment of compensation to the legal representatives of the deceased Prem Singh, the case of accident was converted into a case of murder and the appellant who was resident of Bihar was implicated in the matter.

10. The aforesaid doubt is also confirmed by other circumstances. If it is accepted that the appellant assaulted the victim Prem Singh by a rubber cutter on his neck then, no explanation was given either by Bihari Shah or Ramdhani Paswan as to how the deceased sustained the injury on his knee as found by Dr.C.S.Jain (P.W.5). If the deceased was caught by a machine and sustained injuries by rubber cutter then, such two injuries were possible to be caused otherwise, the eye witness Bihari Shah did not give any information about the second injury caused to the victim Prem Singh on his knee. Secondly, a rubber cutter is shown to be seized from the appellant by the document, Ex.P/4. Sub Inspector S.K.Tiwari (P.W.7) has proved the document, Ex.P/4. In the document, Ex.P/4, it is mentioned that a rubber cutter having sharp edges was recovered whose sharp edges were in 'U' shape. Hence, it was necessary for the investigation officer to send the seized article to Dr.C.S.Jain to know as whether the injury of the deceased Prem Singh could be caused by that 'U'

shaped rubber cutter? Shri Tiwari did not send that seized rubber cutter to Dr.Jain for his opinion. Looking to the description of injuries caused to the deceased Prem Singh, such injuries could not be caused by that rubber cutter because of its shape on sharp side, if the deceased was assaulted by that rubber cutter then, two parallel injuries should have been caused on the neck of the deceased due to its shape.

11. Under such circumstances, the testimony of eye witness Bihari Shah cannot be believed. Bihari Shah was examined under the pressure of his employers and he was not a named witness in the FIR; whereas all the named eye witnesses were not examined before the trial Court, without giving any reason for their non examination. Hence, in such a circumstance, the chain of circumstantial evidence is to be examined by the Court. Ramdhani Paswan (P.W.1) has stated that he was informed by Sohan that such an incident took place in the factory and thereafter, he went to the spot. At that time, Ramnath and others have held the neck of the deceased Prem Singh with cloth. Ramdhani has stated that the deceased Prem Singh told him about the incident and hence, he tried to establish an oral dying declaration given by the deceased but, according to Dr.C.S.Jain (P.W.5) after getting such an injury, the deceased Prem Singh would have become unconscious within half a minute and he would have died within two minutes. After the incident, Sohan went to the place of Ramdhani and informed about the incident then, Ramdhani went to the spot. Hence, in doing so, it cannot be said that Ramdhani went to the spot within half a minute of the incident or the deceased was in a position to give any dying declaration. The evidence of oral dying declaration given by deceased to Ramdhani is nothing but, a bundle of falsehood, which was given by Ramdhani due to pressure of his employers, whereas he was working as a supervisor in the factory. His conduct is visible that he did not lodge the FIR for at least 4-5 hours. Hence, the story of oral dying declaration goes away.

12. Prosecution has tried to prove that weapon of offence was recovered from the appellant. However, Sub Inspector S.K.Tiwari (P.W.7) did not give any reason as to why he took an interested person Ramdhani Paswan as a witness in seizure memo of the weapon. Also, the weapon was sent to the Forensic Science Laboratory and blood was found on weapon but, the report, Ex.P/13 does not reveal that blood found on the weapon was human blood. Also, when a worker enters in a factory then, certainly he could not take any objectionable material alongwith him and therefore, it was not possible for

the appellant to take rubber cutter inside the factory. Bihari Shah has accepted in his cross-examination that deceased Prem Singh was working on a machine, which was automatic. It is not a case of prosecution that a rubber cutter was found loose at the spot and the appellant picked up that rubber cutter and assaulted the victim. Also, the appellant could not take that blood stained rubber cutter with him when he left the factory, whereas the rubber cutter is shown to be recovered from his house. Hence, possibility cannot be ruled out that one rubber cutter was separated by the management of the factory from the machine and it was shown to be seized from the appellant.

13. Ramdhani Paswan (P.W.1) has stated that one rubber cutter was recovered from the appellant before him. However, he has accepted that he did not visit the house of the appellant. Signatures of witnesses were taken by Shri Tiwari in the factory itself. Secondly, description of rubber cutter as given in seizure memo, Ex.P/4 reveals that handle of the rubber cutter was covered with rubber, whereas Ramdhani has stated that handle of the seized rubber cutter was covered with a cloth. Such statement given by Ramdhani indicates that at the time of alleged seizure Ramdhani could not even see the weapon of offence, which was shown to be recovered from the appellant. Under such circumstances, the testimony of Ramdhani as well as Sub Inspector Shri Tiwari cannot be relied and it is not proved beyond doubt that any rubber cutter was recovered from the appellant.

14. If the appellant would have assaulted the victim Prem Singh by a sharp cutting weapon in such a forceful manner so that a stab injury would have been caused and the deceased Prem Singh had died then, certainly there must be a motive with the appellant to kill the deceased. Neither Ramdhani, nor Bihari Shah could tell about the motive of the appellant to kill the deceased Prem Singh. According to them, a sudden quarrel took place between them. When the witness Bihari Shah could see that the appellant assaulted the victim by a rubber cutter then, he must know the reason by which sudden quarrel took place between them but, if evidence of Bihari Shah is considered he could not give any reason for that sudden quarrel. Under these circumstances, in absence of any motive or any reason for sudden quarrel, it was not possible for the appellant to give a blow of rubber cutter on the neck of the deceased. In this context, the judgment passed by the Apex Court in case of *"Surinder Pal Jain Vs. Delhi Administration"*, [AIR 1993 SC 1723] may be referred, in which it is held that the absence of motive, however, puts the Court on its

guard to scrutinize the circumstance more carefully to ensure that suspicion does not take the place of legal proof. Also, in case of *"Varkey Joseph Vs. State of Kerala"*, [AIR 1993 SC 1892] it is held by the Apex Court that suspicion is not the substitute for proof. There is a long distance between "May be true" and "Must be true" and the prosecution has to travel all the way to prove its case beyond all reasonable doubt.

15. Also, Ramdhani Paswan (P.W.1) has accepted in para 4 of his statement that soon after the incident, the appellant was present in the factory. He did not escape. If he would have assaulted the deceased Prem Singh then, he would have been captured by other workers or he would have tried to leave factory premises. At least it was not possible for him to take that blood sustained rubber cutter to his house. His presence in the factory and conduct shows that he did not feel guilty conscious. His conduct indicates his innocence. On the basis of aforesaid circumstances, testimony of sole eye witness Bihari Shah cannot be believed. In this connection judgment passed by the Apex Court in case of *"State of U.P. Vs. Jaggo @ Jagdish"*, [AIR 1971 SC 1586] may be referred, in which the Apex Court has observed that normally it is expected that name of eye witness be mentioned in the FIR. The Apex Court found that on assessment of evidence given by two eye witnesses in that case was not believeable, those were introduced to shape the prosecution case. Similarly, in the present case the testimony of eye witness Bihari Shah inspires no confidence.

16. If ocular evidence is discarded then, it is for the Court to assess the remaining circumstantial evidence. In the present case, on the basis of the aforesaid discussion, if entire evidence of the prosecution and its draw backs are considered simultaneously then, it would be apparent that there was no motive with the appellant to assault the deceased Prem Singh. All the named eye witnesses in the FIR did not support the prosecution story. Statement given by one eye witness Bihari Shah was not believable. The appellant could not take any rubber cutter in the factory or separate it from the machine, nor he could take that blood stained rubber cutter to his house . There is no allegation that he lifted the rubber cutter from the premises of the factory itself and caused that incident. Alleged rubber cutter shown to be seized from the appellant having sharp edges in 'U' shape, whereas that seized weapon was not sent to Dr.Jain to give his opinion as to whether such injuries could be

caused by that rubber cutter or not. Eye witnesses gave the description of causing one injury by the appellant on the neck of the deceased, whereas no reason has been shown by the eye witness as to how the deceased Prem Singh sustained the incised wound on his right knee as found by Dr.Jain. When two workers were sent by Ramdhani alongwith the deceased Prem Singh, they intimated about the death of the deceased with an intimation that the deceased died due to an accident. He sustained severe injuries due to rubber cutter affixed in the machine and he was caught in that machine. FIR was not lodged within time. It was highly delayed. Ramdhani and Bihari Shah were under pressure of the management of the factory. Hence chain of circumstantial evidence is not only broken but, it gives opposite indication against the prosecution's case. The prosecution has failed to prove that the appellant assaulted the victim Prem Singh by any weapon or he caused his death. Under these circumstances, possibility cannot be ruled out that the deceased Prem Singh sustained injuries due to an accident. He was caught by an automatic machine and sustained injuries on his neck as well as on knee and the appellant was falsely implicated in the matter, so that the management could be saved from giving any compensation to the Legal Representatives of the deceased Prem Singh. The prosecution could not prove its case beyond doubt that the appellant assaulted the deceased on his neck, causing his death. Under these circumstances, the appellant could not be convicted of offence under Sections 302 or 304 of IPC or any inferior offence of the same nature including offence under Section 304 (Part-2) of IPC. The trial Court has committed an error in convicting the appellant of offence under Section 304 (Part-2) of IPC.

17. On the basis of the aforesaid discussion, the appeal filed by the appellant is acceptable and hence, it is accepted. Conviction as well as sentence recorded by the trial Court of offence under Section 304 (Part-2) of IPC against the appellant Sikandar Singh is hereby set aside. The appellant is acquitted from all the charges appended against him.

18. The appellant is on bail. His presence is no more required before this Court and therefore, it is directed that his bail bonds shall stand discharged.

19. Copy of the judgment be sent to the trial Court alongwith its record for information.

Appeal allowed.

I.L.R. [2015] M.P., 2223
APPELLATE CRIMINAL
Before Mr. Justice N.K. Gupta
Cr.A. No. 374/1998 (Jabalpur) decided on 6 August, 2015

RAJEEV RANJAN & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

A. Penal Code (45 of 1860), Section 304-B - Seven Years - **In FIR date of marriage is mentioned as 22.05.1987 and incident took place on 28.03.1994 i.e. within 7 years of marriage - FIR is not a substantive piece of evidence - No other evidence to prove the date of marriage - Witnesses have accepted that marriage took place about 8-9 years back - As prosecution failed to prove that incident took place within 7 years of marriage, no offence u/s 304-B could be made out. (Paras 6 & 7)**

क. दण्ड संहिता (1860 का 45), धारा 304–बी – सात वर्ष – प्रथम सूचना रिपोर्ट में विवाह की तिथि 22.05.1987 उल्लिखित है और घटना 28.03.1994 को घटित हुई अर्थात् विवाह के 7 वर्षों के भीतर – प्रथम सूचना रिपोर्ट साक्ष्य का सारभूत अंग नहीं – विवाह की तिथि को साबित करने का कोई अन्य साक्ष्य नहीं – साक्षियों ने स्वीकार किया है कि विवाह लगभग 8–9 वर्ष पहले हुआ था – चूंकि अभियोजन यह सिद्ध करने में असफल रहा कि विवाह के 7 वर्षों के भीतर घटना घटित हुई थी, धारा 304–बी के अंतर्गत कोई अपराध नहीं बनता।

B. Penal Code (45 of 1860), Sections 498-A & 306 - **Although no charge u/s 498-A is framed but while acquitting u/s 304-B, a person can be convicted u/s 498-A, 306 - Material contradictions with regard to articles allegedly demanded by appellant - No specific article mentioned in FIR - Even according to prosecution witnesses there was no demand of dowry in the last two years of life time of deceased - No offence u/s 498-A or 306 made out - Appeal allowed. (Paras 8 to 18)**

ख. दण्ड संहिता (1860 का 45), धाराएं 498-ए व 306 – यद्यपि धारा 498–ए के अंतर्गत कोई आरोप विरचित नहीं किया गया है, किंतु धारा 304–बी के अंतर्गत दोषमुक्त किये जाते समय, किसी व्यक्ति को धारा 498–ए, 306 के अंतर्गत दोषसिद्ध किया जा सकता है – अपीलार्थी द्वारा अभिकथित रूप से मांगी गई वस्तुओं के संबंध में तात्विक विरोधाभास है – प्रथम सूचना रिपोर्ट में कोई विनिर्दिष्ट वस्तु उल्लिखित नहीं – अभियोजन साक्षीगण के अनुसार भी मृतिका के जीवनकाल के अंतिम दो वर्षों में दहेज की कोई मांग नहीं की गई थी – धारा

498–ए या 306 के अंतर्गत कोई अपराध नहीं बनता - अपील मंजूर।

Cases referred :

AIR 1997 SC 1873, 1997(2) MPLJ 163, AIR 1991 SC 1226, (2011) 2 SCC 47.

A.K. Jain, for the appellants.
Ajay Tamrakar, P.L. for the respondent.

JUDGMENT

N.K. GUPTA, J. :- The appellants have preferred the present appeal being aggrieved with the judgment dated 10.2.1998 passed by the IIIrd Additional Sessions Judge, Chhatarpur in ST No.145/1994 whereby, each of the appellants have been convicted of offence under Section 304-B of I.P.C and sentenced to 10 years rigorous imprisonment.

2. The facts of the case in short are that on 28.3.1994 at about 8.00 a.m., the appellant no.3 Vikas Sharma, who had slept on the terrace of his house (Village Bagauta, District Chhatarpur) in the previous night, went inside the house, he found that his sister-in-law Ram Kumari had committed suicide and her body was hanging with a rope in a room. He immediately informed his brother Rajeev Ranjan, appellant no.1 and the body of the deceased was removed from the hook and they found her to be dead. Vikas Sharma went to the Police Station Chhatarpur and lodged a merg intimation. On 5.4.1994 Shri Ramswarup Pateria (PW1), father of the deceased had lodged a typed report (complaint) before the SHO concerned and after merg enquiry, on 7.4.1994, a case of offence under Section 304-B of I.P.C was registered and investigation was initiated. The body of the deceased had already been sent for its post mortem. Dr. Sudhir Kumar Khare (PW11) performed the post mortem on the body of the deceased Ram Kumari at District Hospital Chhatarpur and gave his report. He found that the deceased died due to hanging. After due investigation, a charge sheet was filed before the JMFC Chhatarpur who committed the case to the Court of Sessions and ultimately it was transferred to the IIIrd Additional Sessions Judge, Chhatarpur.

3. The appellants abjured their guilt. They took a plea that the deceased was kept in comfort. She was never harassed for any dowry demand or otherwise. The appellant no.1 Rajeev Ranjan had already purchased a moped from his colleague Phoolchand Jain (DW2). In defence Nandkishore Shivhare

(DW1), Phoolchand Jain (DW2) and Prem Narayan (DW3) were examined.

4. After considering the evidence adduced by the parties, the Additional Sessions Judge convicted and sentenced the appellants as mentioned above.

5. I have heard the learned counsel for the parties.

6. After considering the submissions made by the learned counsel for the parties, the first question which is to be settled by this Court is whether the death of the deceased was caused within seven years of marriage. In the context of her marriage, Ramswarup (PW1) and Rajesh (PW3), brother of the deceased have stated that the marriage of the deceased and the appellant Rajeev Ranjan took place 6-7 years prior to the date of their statement. Ratti Bai (PW5), maternal aunt of the deceased, has accepted in para 4 of her cross examination that the marriage of the deceased and appellant no.1 took place 8-9 years prior to date of her statement. Ramadevi alias Ramdevi (PW6), cousin of the deceased, has sated in para 5 of her statement that the marriage of the deceased took place 10 years prior to the date of her statement. Savitri (PW7), mother of the deceased, has stated that marriage of the deceased took place 8-9 years prior to the date of her statement. All these witnesses were examined in the month of December, 1996 therefore, if computation is done on the basis of the statements of these witnesses, it appears that some of the witnesses have accepted that the deceased died after completing seven years of her marriage and some of the witnesses have stated that she died before completion of seven years of her marriage. Ramswarup (PW1) had lodged a typed FIR Ex.P/1 on 30.3.1994, in which it was mentioned that the marriage of his daughter, deceased Ram Kumari, took place on 22.5.1987 but, in the statement of other witnesses, nobody has stated about the date of marriage of the deceased with the appellant no.1 Rajeev Ranjan. It was not shown by the witnesses as to what was the basis for the date of marriage as given in the FIR Ex.P/1. No copy of the invitation card of the marriage was submitted before the trial Court. No person was examined to show that the marriage took place on a particular date. According to the FIR Ex.P/1, if date of marriage i.e. 22.5.1987 is considered then the deceased died after six years and ten months of her marriage.

7. If the facts mentioned in the FIR Ex.P/1 are compared with the statements of various witnesses then the possibility cannot be ruled out that only to show that the deceased died within seven years of her marriage, such

a date has been mentioned in the FIR Ex.P/1 otherwise, Ramswarup (PW1), the author of the FIR, could not show any basis for mentioning such a date of marriage in the FIR. FIR is not a substantial piece of evidence and therefore, if the date of marriage is mentioned in the FIR but, no evidence to substantiate its nature is produced to confirm the same, then the date of marriage as shown in the FIR Ex.P/1 is not at all proved by the prosecution. If evidence of the various witnesses is examined then Ramadevi alias Ramdevi (PW6) has accepted that marriage of the deceased had taken place 10 years prior to Ramdevi's statement i.e. 8 years prior to her death. It would be apparent that all such witnesses, examined before the Court as relatives of the deceased, are not found to be literate persons. There is no reason to disbelieve the witness Ramadevi alias Ramdevi. Looking at the conduct of Ramswarup, father of the deceased, that he gave a fictitious date of marriage in the FIR Ex.P/1, a doubt is created that the deceased died after seven years of her marriage and only to make the case against the appellants, the witness Ramswaroop is falsely claiming that the deceased died within 6-7 years of her marriage. A short margin of two months was shown in the FIR Ex.P/1 lodged by the father of the deceased and hence from the facts accepted by Ramadevi alias Ramdevi, cousin of the deceased, it appears that the deceased died after seven years of her marriage. According to the provision of Section 304-B of I.P.C the offence under the same would constitute if the deceased dies within seven years of her marriage. When a doubt arose that the deceased died after seven years of her marriage then benefit of the doubt is to be given to the accused and hence, it is clear that no offence under Section 304-B of I.P.C is made out against the appellants.

8. On the basis of the aforesaid discussion, the appellants cannot be convicted of offence under Section 304-B of I.P.C and their appeal may be accepted on a technical ground. However, merits of the case are yet to be considered. Dr. Sudhir Kumar Khare who performed the post mortem has given his report Ex.P/10. He found a ligature mark to the left neck of the deceased which was caused ante mortem. According to him, the death of the deceased could be suicidal in nature. Though some abrasions were found on her neck, Dr. Sudhir Kumar Khare has explained that when the rope tightens around the neck due to the weight of the person who tried to commit suicide, then that person tries to save herself and therefore, naturally nail marks of the deceased herself could be found on her neck. The Police did not file a case of murder. Ram Kumari could not have died in her house from hanging as an

accident and therefore, it is established that death of the deceased was suicidal in nature and therefore, it was an unnatural death.

9. Ramswarup (PW1) father of the deceased, Rajesh (PW3), brother of the deceased, Savitri (PW7) mother of the deceased, Ratti Bai (PW5) maternal aunt of the deceased, Ramadevi alias Ramdevi (PW6) cousin of the deceased, Santosh Singh (PW7) reputed citizen of the locality and Trilok Singh (PW9) an independent citizen of the locality were examined to prove that the deceased was being harassed for demand of dowry. Out of these witnesses, Santosh Singh and Trilok Singh have turned hostile. They did not state anything relating to demand of dowry. On the contrary they have stated that the deceased was kept in comfort. She had no problem in the house of her husband. These two witnesses are teachers and the appellant no.1 is also a teacher and therefore, it is possible that they would not have stated against the appellant no.1.

10. Ramswarup, Rajesh, Savitri, Ratti Bai and Ramadevi alias Ramdevi have stated that the deceased had told them about demands of various articles made by the appellants and she was beaten in consequence of the demands not being met.. However, there is lot of contradiction between the statements of these witnesses. All the aforesaid witnesses except Ramswarup have stated that there was a demand of a T.V made by the appellant whereas, Rajesh has stated that a motorcycle was also demanded. Ramswarup, father of the deceased, did not say anything about the demand of T.V. If the allegations made by these witnesses are compared with the FIR Ex.P/1 then in the FIR, which was lodged two days after the incident, no specific article was mentioned to be demanded by the appellants. It appears that the witness Ramswarup was examined by the Police on 10.4.1994 i.e. after 12 days of the incident and by this time the witnesses had developed their story relating to the demand of dowry and the particulars of articles demanded by the appellants. If the appellants ever demanded for a moped or a T.V then certainly such facts could be mentioned in the FIR Ex.P/1. Ramswarup (PW1) has accepted that he got the FIR typed in his office. He was working in the office of MPEB. If he had prepared a typed report in his office then certainly it shall be presumed that he would have received some suggestions from his colleagues and the person who typed the report. Still no specific article is shown to be demanded in that FIR Ex.P/1 and therefore, the statements given by the various witnesses appear to be after thought statements. Such inference could be gathered from the statement of Ramswarup himself. He has stated that the appellants had

demanded a TVS Luna from the deceased and consequently, she was tortured. However, the other witnesses except Rajesh were not literate persons and on tutoring them could gather first two words of the article i.e. "T.V." and therefore, they have stated that the appellants have demanded a T.V. If T.V. was demanded by the appellants then certainly Ramswarup, father of the deceased, must have beem (sic:been) aware of the demand and he would have stated about that demand. Ramswarup is silent on the demand of T.V then the statements given by the other witnesses relating to demand of T.V appear to be false and are therefore not acceptable. Hence, statements of Ratti Bai and Ramadevi alias Ramdevi have no value in the eye of law and cannot be accepted.

11. Ratti Bai and Ramadevi alias Ramdevi have accepted in their cross examination that the deceased told them about the demand of dowry being made only twice. Rattibai informed that 4- 5 years prior to her statement the deceased Ram Kumari told about the demand for first time and thereafter, after one year she informed about the demand. If time is computed according to the evidence of Rattibai then there was no demand from the side of the appellants in the last two years of the life time of the deceased Ram Kumari. Ramadevi @ Ramdevi has accepted in para 6 of her evidence that the deceased Ram Kumari did not tell about the dowry demand in her first few visits. She did not make her grievance known to this witness when she was residing at Village Loudi. Two to three years back she started living at Village Dhamora and then she got the version from Ram Kumari.

12. Ramswarup has categorically stated that only TVS Luna was demanded by the appellants from the deceased Ram Kumari. However, Rajesh (PW3) has stated that a motorcycle and T.V was demanded. Savitri (PW7) mother of the deceased, has stated that a motorcycle and T.V was demanded by the appellants from the deceased Ram Kumari. As discussed above, statements of Rajesh and Savitri cannot be accepted in relation to demand of T.V because those statements are not corroborated by Ramswarup. It was not the case of Ramswarup that the appellants have demanded a motorcycle from the deceased. Rajesh in the cross examination has accepted that he understands the difference between motorcycle and TVS Luna. Thereafter, he changed his version that Luna was demanded. It would be pertinent to note that each of the witnesses was suggested that the appellant no.1 Rajeev Ranjan had a moped purchased from Phoolchand Jain (DW2) and each of them have shown

ignorance about that fact. Phoolchand Jain (DW2) has stated that he sold a Hero Majestic Moped to the appellant no.1 on 8.5.1996 and he has shown a receipt Ex.D/5 relating to that sale. Under these circumstances, if the evidence of all the witnesses is considered in the light of the FIR then it would be clear that though Ramswarup etc. were present at the time of post mortem and other formalities of the deceased Rajkumani, (sic:Ram Kumari) they did not allege anything against the appellant at that time. After keeping silent for two days Ramswarup had lodged a written report but, demand of any specific article was not shown in that report. Thereafter, Ramswarup and the family members developed a story of dowry demand and fake allegations were made by the witnesses. On the basis of the aforesaid discussion, it is not proved beyond doubt that there was any dowry demand done by the appellants in the life time of the deceased.

13. Learned counsel for the appellants have placed his reliance upon the judgment passed by the Apex Court in the case of *"Sham Lal Vs. State of Haryana"* AIR 1997 SC 1873, in which it is held that there was no evidence, however, that the deceased was treated with cruelty or harassed with demand for dowry during the period between her going back to her home and her tragic end then presumption of dowry death cannot be raised and accused cannot be convicted of offence under Section 304-B of I.P.C.

14. In the light of the aforesaid judgment, if the evidence of these witnesses is otherwise examined then it would be clear from their evidence that the deceased Ram Kumari visited the house of the appellants for 8-10 times in her life time after marriage. No Panchayat of community was called by Ramswarup - father of the deceased, no FIR was lodged either by the deceased or her father Ramswarup in the life time of the deceased and no steps of redressal were taken by Ramswarup. When the deceased Ram Kumari was feeling harassment in consequence of dowry demand then, to pressurize the appellants so that they should talk about the matter with Ramswarup and his wife, the deceased Ram Kumari could have been detained in the house of Ramswarup. Savitri has stated that the deceased Ram Kumari was detained for 1 ½ years but, her statement was not corroborated by her son Rajesh or her husband Ramswarup and therefore, her statement appears to be falsehood that the deceased Ram Kumari was detained for some time so that her problem could be redressed. All the witnesses have accepted that before the death, she came to the house of her father at the time of death of her grandmother. Grandmother of the deceased Ram Kumari had expired in December, 1993 and

the incident took place on 28.3.1994. There is no evidence given by any of the witnesses about the behavior of the appellants towards the deceased Ram Kumari in those last four months and therefore, in the present case, it cannot be said that she was harassed for dowry demand soon before her death. Hence, in the light of judgment passed by the Apex Court in case of *Sham Lal* (supra) the appellants cannot be convicted of offence under Section 304-B of I.P.C.

15. The learned counsel for the appellants has also placed his reliance upon the judgment passed by the single Bench of this Court in the case of *"Phool Singh and another Vs. State of M.P."* [1997 (2) MPLJ 163] in which it is held that if the cruelty extended by husband or any relative of the husband is not proved for recording a conviction under Section 498-A of I.P.C, the very foundation of offence under Section 304-B of I.P.C., no conviction under Section 304-B of I.P.C. can be recorded. Though the charge of Section 498-A of I.P.C is not framed against the appellants however, in the light of the judgment passed by the Apex Court in the case of *"Smt. Shanti and another Vs. State of Haryana"* AIR 1991 SC 1226 in which it is held that the person charged and acquitted under Section 304-B of I.P.C can be convicted under Section 498-A of I.P.C. without the charge of that offence, if such a case is made out. A small portion of para 6 of the judgment passed by the Apex Court in the case of *Smt. Shanti* (supra) may be referred as under:

> "Under Section 304B it is the "dowry death" that is punishable and such death should have occurred within seven years of the marriage. No such period is mentioned in Section 498A and the husband or his relative would be liable for subjecting the woman to "cruelty" any time after the marriage. Further a person charged and acquitted under section 304B can be convicted under Section 498A without charge being there, if such a case is made out. But from the point of view of practice and procedure and to avoid technical defects it is necessary in such cases to frame charges under both the sections and if the case is established they can be convicted under both the sections but no separate sentence need be awarded under Section 498A in view of the substantive sentence being awarded for the major offence under Section 304B."

16. Similarly in the judgment passed by the Apex Court in the case of *"Narwinder Singh Vs. State of Haryana* [(2011) 2 SCC 47] in which it is

held that while dealing with the case under Section 304-B of I.P.C a separate charge of Section 306 of I.P.C is to be framed but, in the light of provision of Section 221 of the Cr.P.C. and after considering the facts of the case, the Apex Court convicted the accused of offence under Section 306 of I.P.C in absence of any charge of that offence. For ready reference para 22 of the judgment passed by the Apex Court in the case of *Narwinder Singh* (supra) is reproduced as under :

> "It is a settled proposition of law that mere omission or defect in framing charge would not disable the court from convicting the accused for the offence which has been found to be proved on the basis of the evidence on record. In such circumstances, the matter would fall within the purview of Sections 221(1) and (2) Cr.P.C.

In the light of the aforesaid the judgments passed by the Apex Court in the case of *Smt. Shanti* (supra) and *Narwinder Singh* (supra) it would be proper to consider the matter for offence under Section 306 and 498-A of I.P.C because the entire factual position was put before the appellants in their examination under section 313 of the Cr.P.C.

17. As discussed above, there was no evidence to show that the deceased was harassed for the demand of dowry. It was alleged by the witnesses that the deceased could not be blessed by a child in last 6-7 years of her marriage but, no witness has stated that due to that reason any satire was given by the appellants or she was harassed. Rajesh (PW3), brother of the decease, has stated in para 13 of his evidence that the deceased Ram Kumari was in a habit telling her mother that she was not blessed with a child. However, he did not state that the appellants misbehaved with the deceased on that count or blamed her on that count.

18. Except of the allegation of dowry demand and the fact that the deceased was not blessed with a child, there is no allegation made by the witnesses against the appellants relating to harassment of the deceased on any count whereas, it is not proved that the appellants have demanded any dowry or any article like moped or T.V from the deceased or she was being harassed on these counts. It is also established that she was not blamed at all because she did not have any issue in 6-7 years of her marital life. It is not stated by any of the witnesses that any threat or remark was given by the appellant

no.1. Under these circumstances, *prima facie* there is no evidence to convict the appellants of offence under Section 498-A of I.P.C.

19. The prosecution has failed to prove any cruelty done by the appellants upon the deceased. On the contrary, it is established that after death of the deceased, her parents and relatives have developed an after thought story of cruelty. When the appellants cannot be convicted of offence under Section 498-A of I.P.C, for demand of dowry or otherwise in absence of any cruelty, it cannot be said that the appellants abetted the deceased Ram Kumari to commit suicide. No overt act of the appellants is established by the prosecution which may fall within the purview of Section 107 or 109 of the I.P.C. Hence the appellants cannot be convicted of offence under Section 306 of I.P.C.

20. It would be apparent that death of the deceased took place after seven years of her marriage and it is not proved that the deceased had been harassed by the appellants either for demand of dowry or otherwise and therefore, the appellants cannot be convicted of offence under Section 304-B of I.P.C or 498-A of I.P.C. Hence the appeal filed by the appellants is acceptable and consequently, it is accepted. Their conviction and sentence of offence under Section 304-B of I.P.C is hereby set aside. They are acquitted from all the charges appended against them.

21. The appellants are on bail. Their presence is no more required before this Court and therefore, it is directed that their bail bonds shall stand discharged.

22. Copy of the judgment be sent to the Courts below along with its record for information and compliance.

Order accordingly.

I.L.R. [2015] M.P., 2232
CRIMINAL REVISION
Before Mr. Justice N.K. Gupta
Cr. Rev. No. 275/2015 (Gwalior) decided on 17 April, 2015

RAJENDRA ALIAS RAJE ...Applicant
Vs.
STATE OF M.P. & anr. ...Non-applicants

***Criminal Procedure Code, 1973 (2 of 1974), Section 319 - Additional Accused* - No charge sheet was filed against the applicant**

and the I.O. kept the investigation pending against the applicant, although his name finds place in F.I.R. and statements - On the basis of defence, the evidence given by injured witness cannot be brushed aside - No right had accrued to the I.O. to reserve investigation for a particular person/accused - Charge sheet has to be filed for the entire case and not for any particular person/individuals - I.O. has given undue shelter to applicant while filing charge sheet - As the I.O. kept the investigation pending against the applicant and applicant is not ready to appear before the Trial Court, arrest warrant could be issued directly - Revision dismissed. (Paras 5, 7 & 8)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – अतिरिक्त अभियुक्त – आवेदक के विरूद्ध कोई आरोप पत्र प्रस्तुत नहीं किया गया और अन्वेषण अधिकारी ने आवेदक के विरूद्ध अन्वेषण को लंबित रखा, यद्यपि उसका नाम प्रथम सूचना रिपोर्ट तथा कथनों में जगह पाता है – बचाव के आधार पर, आहत साक्षी द्वारा दिया गया साक्ष्य अस्वीकार नहीं किया जा सकता – अन्वेषण अधिकारी को किसी विशिष्ट व्यक्ति/अभियुक्त के लिये अन्वेषण आरक्षित करने का कोई अधिकार प्रोद्भूत नहीं हुआ था – संपूर्ण प्रकरण के लिये आरोप पत्र प्रस्तुत किया जाना चाहिए और न कि विशिष्ट व्यक्ति/व्यक्तियों के लिये – अन्वेषण अधिकारी ने आरोप पत्र प्रस्तुत करते समय आवेदक को असम्यक् आश्रय दिया है – चूंकि अन्वेषण अधिकारी ने आवेदक के विरूद्ध अन्वेषण लंबित रखा और आवेदक विचारण न्यायालय के समक्ष उपस्थित होने के लिये तैयार नहीं है, सीधे गिरफ्तारी वारंट जारी किया जा सकता है – पुनरीक्षण खारिज।

Case referred :

2014 Cr.L.J. 183.

Vijay Dutt Sharma, for the applicant.
B.P.S. Chauhan, P.L. for the non-applicant No.1/State.

ORDER

N.K. Gupta, J. :- The applicant has challenged in this revision petition, the order dated 13/03/2015 passed by IV Additional Sessions Judge, Morena in S.T.No.208/2014 whereby the applicant is added as an accused under section 319 of Cr.P.C.,

2. Facts of the case, in short, are that, one Smt. Sheela Bai had lodged an FIR on 29/10/2013 at about 4.00 pm., that she herself and Savadhan have been assaulted by various persons including the applicant. Complainant, Sheela after treatment recovered whereas Savadhan had expired thereafter. After

due investigation, Investigating Officer has filed a charge sheet against 04 accused persons whereas two accused were shown to be absconding. However, no charge sheet was filed against the applicant but the investigation was kept pending against the applicant under section 173(8) of Cr.P.C., During pendency of the sessions trial, an application was moved to add the applicant as an accused and thereafter IV Additional Sessions Judge, Morena vide order dated 13/03/2015 added the applicant as an accused.

3. I have heard the learned counsel for the parties on question of admission.

4. After considering the submissions made by learned counsel for the parties, it appears that the applicant took some grounds to show his innocence. Firstly; that a civil litigation was going on between the parties and, therefore, the applicant was falsely implicated in the offence, secondly; no charge sheet has been filed against the applicant and the investigating officer found that no sufficient evidence was available against the applicant, thirdly; the applicant is a disabled person and he could not participate in the crime, fourthly; that the deceased had died due to injuries caused by sharp cutting weapon whereas it was alleged against the applicant that he had armed with a stick, fifthly; in the dying declaration of complainant Sheela, she did not mention the name of applicant. Hence, he was falsely implicated in the matter. It is also submitted that the trial Court would not have issued the arrest warrant against the applicant at the first instance. In support of his contention, reliance has been placed on the judgment of the Apex Court in the case of *"Vikas Vs. State of Rajasthan"* (2014 Cri. L.J.183).

5. If the objection raised by the learned counsel for the applicant are examined and considered, then it would be apparent that named FIR has been lodged against the applicant. The Investigating Officer did not file any report under section 169 of Cr.P.C., It is strange that the statements of eye-witnesses were relied upon against 06 accused persons by the Investigating Officer and in the case of applicant, he did not rely upon such evidence and kept the investigation pending. Provisions of section 173(8) of Cr.P.C., are residuary provisions. If such additional evidence has been received by the investigation agency, then it can be filed by the Investigation Officer before the concerned Court under section 173(8) of Cr.P.C., The Investigating Officer has not accrued any right by that provision to reserve the investigation for a particular person/accused. The charge sheet has to be filed for the entire case and not against any particular accused/individuals. It appears that the Investigating Officer has given an undue shelter to the applicant while filing the

charge sheet.

6. Though the name of the applicant was not shown in the dying declaration of complainant, Sheela but by that time, she was seriously injured and in such painful condition, she could not give name of the each culprit. However, she had lodged the FIR soon after the incident and in that FIR, the name of the applicant was mentioned.

7. It is a matter of evidence as to whether the applicant is competent to assault any one with the help of a stick by his single hand. Under these circumstances, it cannot be said that being a handicapped person, the applicant could not commit such an offence, alongwith the co-accused persons. Similarly, the fact of enmity is a double edged weapon that any one can be falsely implicated due to enmity or an assault could be caused due to enmity. Hence, on the basis of defence of enmity, the evidence given by the injured cannot be brushed aside. There is *prima facie* case against the applicant and, therefore, the same is visible in the order dated 13/03/2015 passed by IV Additional Sessions Judge, Morena.

8. So far as issuance of arrest warrant is concerned, it is true that in the light of the judgment passed by the Apex Court in the case of *Vikas* (supra), no such warrant could be issued, particularly; when the accused is added under section 319 of Cr.P.C., However, in the light of the aforesaid judgment if the facts of the present case are examined, it would be apparent that the applicant was given shelter by the Investigating Officer and no final report under section 173 of Cr.P.C., was filed without any authority. The Investigating Officer kept pending the investigation against the applicant and it appears that the applicant is not ready to appear before the trial Court. Hence, it was a case in which arrest warrant could be issued directly and the same was done by the impugned order. As such; IV Additional Sessions Judge, Morena did not violate the principles as laid down in the case of *Vikas* (supra) by the Apex Court.

9. On the basis of the aforesaid discussion, there is no reason to admit the case for final hearing. Consequently, Under these circumstances, the revision petition filed by the applicant under sections 397/401 Cr.P.C., is hereby dismissed at motion stage.

10. A copy of the order be sent to the trial Court for information.

Revision dismissed.

I.L.R. [2015] M.P., 2236
CRIMINAL REVISION
Before Mr. Justice Rajendra Mahajan
Cr. Rev. No. 153/2015 (Jabalpur) decided on 15 July, 2015

AAMIR SALMAN — ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Section 12 - Bail **- Likely to come in contact with persons of known criminal background - Report of Probation Officer shows that this is the second sexual offence by applicant - Family of applicant belongs to labour class - He is drop out from school after passing 6th standard and since is doing manual labour - There are reasonable grounds for believing that if applicant is released on bail, he is likely to come again into the contact with persons of known criminal background - Application rejected. (Paras 8 & 9)**

किशोर न्याय (बालकों की देख–रेख और संरक्षण) अधिनियम (2000 का 56), धारा 12 – जमानत – ज्ञात आपराधिक पृष्ठभूमि के व्यक्तियों के संपर्क में आने की संभावना – परिवीक्षा अधिकारी का प्रतिवेदन दर्शाता है कि यह आवेदक द्वारा दूसरा लैंगिक अपराध है – आवेदक श्रमिक वर्ग के परिवार से है – उसने छठी कक्षा उत्तीर्ण करने के पश्चात् शाला छोड़ दी और तब से वह शारीरिक श्रमिक का काम कर रहा है – यह विश्वास करने के लिये युक्तियुक्त आधार है कि यदि आवेदक को जमानत पर छोड़ा गया तब उसकी पुनः ज्ञात आपराधिक पृष्ठभूमि के व्यक्तियों के संपर्क में आने की संभावना है – आवेदन अस्वीकार किया गया।

Manish Tiwari, for the applicant.
Shobhna Sharma, P.L. for the non-applicant/State.

ORDER

RAJENDRA MAHAJAN, J. :- Heard arguments.

2. Perused case diary and material on record.

3. Juvenile applicant, who is in conflict with law, has filed this criminal revision through his mother under Section 53 of the Juvenile Justice (Care & Protection of Children) Act, 2000 (for short the 'Act') being aggrieved by the order dated 26.12.2014, passed by the 5th Additional Sessions Judge, Bhopal in Criminal Appeal No. 1240/2014 *Amir Salman Vs. State of MP*, whereby

the learned Additional Sessions Judge has affirmed the order dated 09.12.2014 passed by the Juvenile Justice Board, Bhopal (for short the 'Board'). Vide its order, the Board has rejected the applicant's bail application under Section 12 of the Act.

4. The short facts of the case necessary for the adjudication of this revision are given below:-

(i) The Police Station, Shahjahanabad, Bhopal had registered the Crime No. 485/14 against the applicant and three other co-accused persons namely Ansar @ Bacha, Mahboob Ali and Anand Malviya for the offences punishable under Sections 294, 366, 506, 376-D and 34 of the IPC and 25 of the Arms Act upon the FIR of the prosecutrix. The facts of the case are that 19 years old prosecutrix is a resident of Mother India Colony, Bhopal, which is a predominantly slum area. On 15.10.2014 at about 8.30 p.m., the prosecutrix with her girl friend were proceeded to a clinic nearby as the prosecutrix was ill. On the way, when they were near a nursery, the applicant and co-accused Ansar, Mahboob and Anand came all of a sudden. They forced the prosecutrix to sit into a Auto-rickshaw wielding a chhuri (a big knife) at her. Seeing that, her girl friend ran away from the place of occurrence. However, one Nashim came to her rescue but they beat him. They took the prosecutrix into a Hanumanganj, Subji Mandi, where in a isolated place they committed rape upon her one after another. Thereafter, they took her near Sanjay Bakery, where she was dropped by them.

(ii) Upon the completion of the investigation into the case, the police filed the charge sheet against the applicant before the Board because the applicant being juvenile. However, the police filed the charge sheet against the remaining co-accused in a regular Court as they are major.

(iii) The applicant filed bail application under Section 12 of the Act before the Board. The learned Board has rejected the bail application on two grounds, firstly; prior to the registration of the present crime the police station Gandinagar,

Bhopal has registered Crime No. 178/14 against him for the offences punishable under Sections 452, 354-A of the IPC, secondly; the applicant has committed the crime in the present case along with three other major accused persons and if he is released on bail he may come into the contact with criminals.

(iv) Feeling aggrieved by the order of the Board, the applicant filed an application under Section 53 of the Act. Vide the impugned order dated 26.12.2014, the learned Additional Sessions Judge has dismissed the appeal affirming the Board's grounds of rejection of bail.

5. The learned counsel for the applicant submits that the Board and the appellate Court have not decided the applicant's bail application, keeping in view the provisions of Section 12 (i) of the Act. It is also submitted by him that the applicant has been in observation home since 09.10.2014 and the Board has not disposed of the case, despite the fact that more than 7 months have elapsed. Upon these submissions, learned counsel prays for grant of bail to the applicant by allowing this revision.

6. Learned Panel Lawyer has opposed the prayer and supported the impugned order passed by the appellate Court. It is also submitted by her that the report of the probation officer is against the applicant.

7. Section 12 (i) of the Act, provides for grant of bail to the juvenile. In this Section, a non obstante provision "notwithstanding anything contained in the Code of Criminal Procedure, 1993 or in any other law for the time being in force". has been placed, which clearly indicates that the provisions of Section 12 of the Juvenile Act has an overriding effect not only on the code but also on other laws, if any for the time being in force. Thus, this Section mandates that a delinquent juvenile has to be released on bail irrespective of nature of offence alleged to have been committed by him unless it is shown by the evidence that if he is released on bail there appear reasonable grounds for believing that the release of the delinquent juvenile is likely to bring him into association with any known criminal or expose him to moral, physical and psychological danger or that his released would defeat the ends of justice. In view of the aforesaid, the report of probation officer is material.

8. As per the report of the probation officer dated 05.12.2014, the applicant belongs to a family of labour class. His parents have four children

including the applicant. The social and economic conditions of the family is not satisfactory and the applicant is a school dropout. He left the school after passing the 6th standard and since then he has been doing manual labour. It is also stated in the report, that this is the second sexual offence committed by him and he has been found in the company of persons having criminal backgrounds. In view of the above, reasons the probation officer has not favoured the release of the applicant on bail.

9. Upon the overall consideration of the facts and circumstances of the case, the report of the probation officer and the criminal antecedents of the applicant, this Court is of the view that there are reasonable grounds for believing that if the applicant is released on bail, he is likely to come again into the contact with persons of known criminal background. Consequently, this revision is dismissed by this Court with a short direction that the Board shall dispose of the case as expeditiously as possible preferably within three months from the date of receipt of this order.

10. Let a copy of this order be sent without delay to the Juvenile Justice Board, Bhopal for information and compliance.

11. Accordingly, this revision is finally disposed of.

Certified copy as per rules.

Revision disposed of.

I.L.R. [2015] M.P., 2239
CRIMINAL REVISION
Before Mr. Justice Subhash Kakade
Cr. Rev. No. 1074/2008 (Jabalpur) decided on 27 July, 2015

MANOJ KAPADIA (DR.) ...Applicant
Vs.
SMT. MANISHA KAPADIA & anr. ...Non-applicants

A. ***Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Maintenance - False allegation*** **- Husband failed to prove that wife is living an adulterous life - Sufficient ground for wife to live separately. (Para 11)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – पोषणीयता – मिथ्या आरोप – पति यह सिद्ध करने में असफल रहा कि पत्नी जारता का जीवन जी रही है – पत्नी के पृथक रूप से निवास करने के लिये पर्याप्त आधार।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Legitimate child - Artificial insemination* - Child who is born as a result of artificial insemination is a legitimate child - Though husband is not a biological father, but he is liable for child's support because he willfully consented for artificial insemination which implied a promise to support - Child is also entitled for maintenance.(Paras 14, 16 & 17)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – धर्मज संतान – कृत्रिम गर्भाधान – कृत्रिम गर्भाधान के फलस्वरूप जन्मी संतान धर्मज संतान है – यद्यपि पति जैविक पिता नहीं परंतु वह संतान के लालन पालन हेतु उत्तरदायी है क्योंकि उसने कृत्रिम गर्भाधान हेतु स्वेच्छापूर्वक सहमति दी थी जिसमें लालन पालन का वचन विवक्षित है – संतान भरण पोषण के लिये भी हकदार है।

Abhilash Dey, for the applicant.
Vijay Baghav Singh, for the non-applicants.

ORDER

SUBHASH KAKADE, J. :- This revision under Section 397/401 of the Code of Criminal Procedure, 1973 (for short hereinafter referred to as 'the Code') has been filed by the applicant being aggrieved by the order dated 12.03.2008, passed in MJC No.410/2004, by the learned Family Court, Bhopal, granting maintenance of Rs.2,000/- per month to the respondent No.01.

2. The case of the respondents before the learned Family Court was that the marriage of the applicant and respondent No.01 was solemnized on 23.02.2000 as per Hindu rites and rituals and due to this wedlock respondent No.02 was born. After birth of respondent No.02, the applicant and his relatives started dowry demand and to fulfill this demand they have committed cruelty against the respondent No.01. Members of the Society and other relatives interfered in the matter, but, the behavior of the applicant never changed and ultimately he left the respondents and shifted to Burhanpur. On these series of facts respondents filed an application for maintenance before learned Family Court because the respondent No.01 was not having any source of income for the livelihood of the respondent No.01 and her son. The applicant being the Unani doctor, having source of income of Rs.12,000/- per month without having any responsibility.

3. The applicant appeared before the Court with the reply that the respondent No.01 never lived with him and after one day only she came to Bhopal with her

brother. When the applicant went at her parental home she refused to come with him. Meanwhile the applicant shifted to Surat and tried his level best to live together, but all the efforts turned futile. Matter was resolved on the basis that the applicant will settle at Bhopal where the parents of the respondent No.01 resides but her behavior does not change during stay at Bhopal. The respondent No.01 impose many more conditions, which cannot be complied with. Even then the applicant tolerated all misbehavior of the respondent No.01. Sometimes he found some pieces of cigarettes and also found empty liquor bottles in the room of the respondent No.01. When he inquired with the respondent No.01 she failed to give satisfactory reply. Due to all these situations the applicant was not having any mental or physical relationship with the respondent No.01. The respondent No.01 became pregnant due to her adulterous life and the respondent No.02 is the outcome of this adultery, therefore, the applicant challenged the paternity of the respondent No.02 also. On these sets of facts the applicant denied the maintenance of the respondents.

4. After affording opportunity to both the parties to file oral as well as documentary evidence learned Family Court accepted the claim of the respondent No.01 and awarded maintenance amount of Rs.2,000/- per month in her favour but, refused to give any amount to minor respondent No.02 on the ground that he is not legal son of the applicant. Against this, the applicant approached this Court.

5. Questioning the soundness of the impugned order Shri Abhilash Dey, learned counsel for the applicant submits that learned Family Court failed to believe the statements of witnesses examined by the applicant, therefore, impugned order is arbitrary, unjust, illegal and without application of mind. It is not made clear by learned Family Court that why the statement of applicant is not trustworthy. Also over looked this proved fact that the respondent No.01 was not having any valid reason to live separately from the applicant. Earning capacity of the applicant is also miscalculated, therefore, revision be allowed and impugned order be set aside.

6. Shri Vijay Raghav Singh, learned counsel for the respondents vehemently opposes the above mentioned submission made by the learned counsel for the applicant. As per the contention made in reply learned counsel for the respondents submits that applicant has made false and frivolous allegation against the respondent No.01 regarding living adulterous life but completely failed to establish this false and frivolous allegations, therefore, the impugned order passed by the learned Family Court does not requires

any interference.

7. Learned counsel for the parties has been heard at length. Their submissions have been considered carefully in the light of material available on record.

8. The marriage between the applicant and the respondent No.01 was solemnized on 23.02.2000 as per Hindu rites and rituals is a proved fact.

9. The applicant himself admitted this fact that he is getting salary of Rs.3,500/-.

10. Now, coming to the question whether the respondent No.01 was having justification for separate living from the applicant? It is manifestly clear that while filing the reply of main application of the respondents the applicant specifically raised allegations against the chastity of the respondent No.01 particularly in paragraphs 3, 4 and 5 of his reply.

11. Learned Family Court after appreciation of the evidence produced by both the parties in Para 16 to 20 lucidly discussed the evidence on the strength of mentioning case law and in Para-19 came to the conclusion that when the husband has leveled charges against his wife regarding leading adulterous life, but, failed to prove in these circumstances as a result these false allegations are sufficient reason for wife to live separately. In such premises when learned Family Court come to this conclusion that the respondent No.01 is having every right to live separately from the applicant is based on evidence led by the parties and does not requires any interference.

12. The respondent No.02 Anunay -Test Tube Baby

While dealing with the claim of minor respondent No.02 the parties lead the evidence regarding this fact that the respondent No.02 is born as the result of artificial insemination. Because, this fact was not pleaded by the respondent No.01 in her application, hence, there was no occasion for the applicant to rebute it or to raise any objection regarding the birth of respondent No.02 as Test Tube Baby.

13. Learned Family Court exonerated liability of maintenance by the applicant towards the respondent No.02. It is pertinent to mention here that the respondents were not adopted any legal recourse against the denial of maintenance amount for the respondent No.02.

14. Learned counsel for the respondents submitted that regarding birth of respondent No.02 Anunay, as Test Tube Baby, all relevant record which were made available to the respondent No.01 by the Hospital, were produced during the trial but, learned Family Court did not satisfied with available material brought on the record, hence, maintenance was not granted to the respondent No.02. It is also submitted that since the applicant was not physically capable of getting blessed by child therefore with the mutual consent of couple, Test Tube Baby the respondent No.02 Anunay was born.

15. The applicant, first time raised this issue in this revision memo with the allegations that the respondent No.01 maintained illegal relationship with another person and the respondent No.02 was born in 2002 through artificial insemination but, without his consent. In this sequence it is made clear on the strength of admissions of the applicant as well as the respondent No.01 that they are related with medical profession.

16. This fact is not disputed that a child who is born as the result of artificial insemination is legitimate child. A husband who permitted his wife to be artificially inseminated is entitled to the paternity rights of a natural father as well as also liable to fulfill his responsibilities towards Test Tube Baby. While the statute imposes liability on the father, the purpose of the statute with reference to that subject is to insure and facilitate the enforcement of that obligation, where necessary.

17. Though, the husband is not biological "father" of the Test Tube Baby, but the same time the child is not illegitimate child, because the husband is liable for the child's support because he willfully consented for artificial insemination which, implied a promise to support. The question of the liability of the husband for support of a child created through artificial insemination is one of first impression. A child conceived through artificial insemination is not illegitimate but, condition precedent is that the husband willfully consented for adopting this artificial technic of insemination for happiness of the couple who, are not naturally capable for having bassed with child.

18. Before parting with the case, it is clarified that the rights of maintenance of the respondent No.02 Anunay against the applicant cannot be considered in this revision which is filed by the applicant, not by the respondents. In these facts and circumstances, the respondents are having liberty to take necessary steps for determination of maintenance rights of respondent No.02 against the applicant.

19. So far this revision is concerned challenging the amount paid to the respondent No.01 these facts are proved that marriage between applicant and respondent No.01 was solemnized on 23.02.2000 and applicant is also getting salary of Rs.3,500/-. As alleged by the applicant against the respondent No.01 that she is leading adulterous life, but, failed to prove in these circumstances, as a result these false allegations are sufficient reason for the respondent No.01 to live separately.

Hence, in the result, this revision is dismissed.

Revision dismissed.

I.L.R. [2015] M.P., 2244
CRIMINAL REVISION
Before Mr. Justice C.V. Sirpurkar
Cr. Rev. No. 725/2014 (Jabalpur) decided on 28 July, 2015

SHYAMBAI & ors. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

Penal Code (45 of 1860), Section 306 - Abetment of suicide - Husband committed suicide **- Wife had admitted that she is having sexual relations with another person - Husband informed his mother-in-law and brother-in-law - They also started taking side of girl and threatened to implicate in false case - Held - Threat to implicate in false case, does not amount to abetment - Charges quashed. (Paras 9 to 18)**

दण्ड संहिता (1860 का 45), धारा 306 – आत्महत्या का दुष्प्रेरण – पति ने आत्महत्या की – पत्नी ने यह स्वीकार किया कि उसके अन्य व्यक्ति के साथ शारीरिक संबंध हैं – पति ने अपनी सास एवं साले को सूचित किया – वे भी लड़की का पक्ष लेने लगे एवं झूठे प्रकरण में फंसाने की धमकी दी – अभिनिर्धारित – झूठे प्रकरण में फंसाने की धमकी, आत्महत्या का दुष्प्रेरण नहीं – आरोप अभिखंडित।

Cases referred :

2008 Cr.L.J. 2104, AIR 2009 SC 2532, 2008(1) MPHT 92.

Anand Nayak, for the applicants.
Shaheen Fatima, G.A. for the non-applicant/State.

ORDER

C.V. SIRPURKAR, J. :- This criminal revision is preferred against order dated 29.03.2014 passed by the Court of A.J.S. Itarsi in Session Trial No.188/2013, whereby learned A.S.J. had framed charges under Sections 306 and in alternative 306 read with section 34 of the IPC against the revision petitioners/accused persons Shyambai, Rajesh @ Khuman Singh, Baijantibai and Kailash Thekedar.

2. The facts necessary for disposal of this criminal revision may briefly be summarized thus: Baijaintibai was wife, Shyambai was mother in law, Rajesh @ Khuman Singh was brother in law and Kailash Thekedar was neighbour of deceased Omprakash. Deceased Omprakash was married to Baijantaibai about 14 years before the date of incident. They had no issues and lived away from parent of the deceased since the year 2007. She had extra marital relationship with accused Kailash Thekedar since the year, 2009. This affair continued till August, 2012, under the garb of relationship between father and daughter. Family members of the deceased as well as neighbours and wife of Kailash warned the deceased about the illicit relationship between his wife and Kailash Thekedar but he did not believed them and on occasions even quarreled with them stating that they were leveling baseless allegations against his wife. However, gradually, the deceased also started to suspect the conduct of his wife, as he saw them talking with each other in suspicious circumstances. Kailash and Baijantibai used to talk frequently on mobile phone and after talking, Baijantibai used to delete the call details. They also used code words for sex and male organ and spoke as if they were husband and wife. On some occasions, the deceased also recorded their conversation. The deceased tried to reason it out that his wife; however, she always denied that she was having affair with Kailash. Deceased also started to believe that his wife and Kailash Thekedar were having sex regularly. He suspected that his wife was surreptitiously administering some drug to him inducing problem of pre mature ejaculation. She also avoided having sex with him on one pretext or the other. On 25th, 26th and 27th of July, 2012 Baijantibai left her bed and went outside for about an hour. When asked by deceased, she stated that that she was suffering from diarrhea.

3. On 28.07.2012, deceased ultimately confronted his wife with a recording of her and Kailash's conversation; whereon she reluctantly confessed that she

was having illicit relation with Kailash for a long time but promised to put an end to the affair and also suggested that the deceased could either sent her to her maternal home or he could bring his mother to their house to keep a watch on her. On 29.7.2012, deceased dropped Baijantibai at her parent's place.

4. When the deceased informed his mother in law Shyambai and brother in law Rajesh about the affair, they sided with Baijantibai and started blaming deceased for the state of affairs. Baijantibai, Rajesh and Shyambai also started abusing deceased and threatened to implicate him in false criminal cases. Deceased also took up the matter with other relatives of his wife but they said that this was a matter for the husband and wife to settle and they could do nothing in this regard. Thus, harassed and frustrated, deceased wrote an elaborate suicide note running into about 24 handwritten pages from 20.07.2012 to 31.07.2012 in his diary, recounting the entire tale. Thereafter, he was found dead at about 5.00 pm on 01.08.2012, hanging from the roof.

5. After investigation, a charge sheet was filed and learned trial Court framed the charges as aforesaid.

6. The impugned order framing charge against four accused persons/ revision petitioners has been challenged mainly on the grounds that elements of abetment of suicide are missing from the case; therefore, even if entire material placed on record by the prosecution is believed to be true, no case under section 306 or 306 read with section 34 would be made out. Thus, the revision petitioners deserve to be discharged.

7. Learned Government Advocate for the respondent State has supported the impugned order.

8. After perusal of record of the case and on due consideration of rival contentions, the Court is of the view that this revision petition must succeed for the reasons hereinafter stated:

(i) Section 306 of the Indian Penal Code reads as follows:-

> *"306. Abetment of suicide.- If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extent to ten years, and shall also be liable to fine."*

Term abetment has been defined under section 107 of the Indian Penal Code as follows:

"107. Abetment of a thing.- A person abets the doing of a thing, who-

First-*Instigates any person to do that thing; or*

Secondly- *Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or*

Thirdly-*Intentionally aides, by any act or illegal omission, the doing of that thing."*

9. The main question that arises for the Court to consider in this criminal revision is that whether the conduct of any of the accused persons/revision petitioners as brought forth by the suicide note and statement of witnesses, constituting abetment of suicide.

10. Reverting back to the facts and circumstances of the case at hand, we find that the deceased was a emotional person, who trusted his wife implicitly and could not imagine that she could be unfaithful to him; therefore, he did not believe his family members, neigbours and even wife of accused Kailash when they warned him about the extra-marital affair between Kailash and Baijantibai. However, gradually he started to suspect her conduct and keep a watch on her activities, particularly her telephonic conversation with Kailash Having collected enough material, he confronted his wife, who had to confess that she was having illicit affair with Kailash for a long time. However, she promised to discontinue the affair. Thereafter, he dropped her at her parent's place. When he took up the matter with the relative of his wife, they blamed him for the situation and threatened to implicate him in false cases. Thus, there is no doubt that there is sufficient material available on record to presume that the deceased was thoroughly dejected and disappointed on account of conduct of his wife and Kailash and felt harassed by the behaviour of his mother-in-law Shyambai and brother-in-law Rajesh. Consequently, he committed suicide on 01.08.2012. However, admittedly, his wife was not staying with him when he committed suicide.

11. Thus, there is sufficient material on record to presume that the deceased committed suicide because of conduct of his wife and his neighbour Kailash; however, the question that arises for consideration is whether conduct of Baijantibai and Kailash in having extra-marital affair amounted to abetment of suicide?

12. Punjab and Haryana High Court in the case of *State of Punjab Vs. Kamljit Kaur,* 2008 Cr.L.J. 2104 has held that where deceased along with his son had committed suicide and left suicide note to the effect that wife of the deceased was a women of bad character, in the absence of material showing that the accused wife was present at the time of commission of suicide or she had instigated or aided the suicide, it may be held that though the conduct of wife was bad, it was not for the purpose of inciting the deceased to commit suicide.

13. In the present case also, it may be said that the conduct of wife was unbecoming in having extra-marital affair with her neighbour under the garb of relationship of father and daughter but there is nothing on record to suggest that she actually instigated or aided the deceased to commit suicide. Though, the deceased felt humiliated by the extra-marital affair of his wife, it cannot be said by any stretch of imagination that she had created such situation for the deceased where he was left with no option but to commit suicide. In the circumstances, in which the deceased found himself, he had various options, which any man of ordinary prudence would have exercised. For example, he could have enlisted services of his family members to put an end to the affair. If all else failed, he could have divorced his wife but without exercising any of the aforesaid options, he wallowed in self-pity and impulsively committed suicide within days of the confession made by his wife. It is apparent that he was being ultra-sensitive to the situation.

14. It is true that the Supreme Court in the case of *Dammu Sreenu Vs. State of Andhra Pradesh.*, AIR 2009 SC 2532 has held that:

> *13. We have carefully examined the aforesaid statement of PW-5 and on perusal of the statement we do not find that any suggestion was made to the said PW-5 that there did not exist an illicit relationship between Accused No. 1 and Accused No. 2.Besides, the close relatives of the deceased who were also examined as witnesses had*

categorically stated in their statements that on coming to know of the fact that Accused No. 1 has taken Accused No. 2 from the house of PW-5 and left her only on 06.01.1996 at her parents' house, the deceased stated before the said inmates of his house that because of the said insult and humiliation he does not like to live. It is also proved that immediately thereafter in the night intervening 7th and 8th of January, 1996 the deceased committed suicide. The aforesaid fact leads to only one conclusion that it is on account of humiliation and insult due to the behaviour and conduct of Accused No. 1 and Accused No. 2 that he proceeded to commit the suicide.

14. The facts which are disclosed from the evidence on record clearly establish that Accused No. 1 had illicit relationship with Accused No. 2 who is the wife of the deceased. It is also not in dispute that Accused No. 1 was visiting the house of the deceased to meet Accused No. 2 and that he even went to the house of deceased when he came to know that the wife of the deceased was sent with her father for counselling and advise. He loudly stated that he would continue to have relationship with Accused No. 2 and would come to her house so long she does not object to the same. He also took her away from the house of PW-5, her brother and kept her with him for 4 days. Immediately after the said incident the deceased committed the suicide. Therefore, there is definitely a proximity and nexus between the conduct and behaviour of Accused No. 1 and Accused No. 2 with that of the suicide committed by the deceased. Besides, there is clear and unambiguous findings of fact of three courts that the appellant is guilty of the offence under Section 306 of IPC. Such findings do not call for any interference in our hand. This Court also does not generally embark upon re-appreciation of evidence on facts which are found and held against the appellant.

15. However, aforesaid authority is distinguishable on facts. In the present case, though, the wife was admittedly having illicit affair with his neighbour,

she was being discreet about it. She kept denying the affair, till she was cornered into confessing about the same. Both Kailash and Baijantibai were not brazen about the affair and did not inflict any public humiliation upon the deceased. No conduct on the part of the either Baijantibai or Kailash could be interpreted as an affront on his manhood. They did not incite or provoke the deceased in any manner for committing suicide. Simply having an illicit affair does not tantamount to inciting the husband to commit suicide nor a person of ordinary prudence would take such a step.

16. So far as role of in laws of the deceased Shyambai and Rajesh are concerned, it was natural for them to side with Baijantibai. Even if we assume for the sake of argument that Baijantibai, Shyambai and Kailash threatened to implicate the deceased in false criminal cases, this by itself does not amount to abetment of suicide. This Court has held in the case of *Sita @ Sita Pratap Vaishya Vs. State of M.P.*, 2008 (1) MPHT 92 that threatening to implicate a person in false cases cannot be equated with abetment of suicide.

17. On the basis of aforesaid discussion, this Court is of the view that there is no material on record to suggest that any of the accused persons/ revision petitioners had in any manner intended or wanted that the deceased should commit suicide. No action or conduct on their part, could be interpreted to mean instigation of aiding of suicide. Thus, even if the entire material collected by the prosecution is believed to be true, it would not constitute the offence of abetment. Thus, learned trial Court erred in framing charge against the accused persons/revision petitioners.

18. As such, there is no sufficient ground to proceed against the revision petitioners Shyambai, Rajesh @ Khuman Singh, Baijantibai and Kailash Thekedar under Section 306 or 306 read with section 34 of the IPC.

19. Consequently, they are entitled to be discharged in respect of aforesaid offences.

20. In the result, this criminal revision succeed. The impugned order is set aside. Revision petitioners/accused persons Shyambai, Rajesh @ Khuman Singh, Baijantibai and Kailash Thekedar are discharged of the offences under Section 306 and in the alternative 306 read with section 34 of the IPC.

Revision succeed.

I.L.R. [2015] M.P., 2251

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice U.C. Maheshwari &
Mr. Justice Sushil Kumar Gupta

M.Cr.C. No. 3163/2011 (Jabalpur) decided on 1 May, 2014

STATE OF M.P. ...Applicant

Vs.

SURENDRA VISHWAKARMA ...Non-applicant

Penal Code (45 of 1860), Section 304-B and Evidence Act (1 of 1872), Section 32 - Dying Declaration **- Deceased in her dying declaration stated that accidentally she got burnt and her husband and sister-in-law rescued her - In inquest, father of deceased too stated that his daughter got burnt accidentally - Although, in his subsequent statement, he changed his entire version - No evidence that soon before death, she was subjected to cruelty - Respondent has been rightly acquitted by trial court - Leave refused. (Paras 4 to 9)**

दण्ड संहिता (1860 का 45), धारा 304-बी एवं साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – मृतिका ने अपने मृत्युकालिक कथन में कहा है कि वह दुर्घटनावश जली और उसके पति तथा ननद ने उसे बचाया – मृत्यु समीक्षा में मृतिका के पिता ने भी कहा कि उसकी पुत्री दुर्घटनावश जली थी – यद्यपि अपने पश्चात्वर्ती कथन में उसने अपना संपूर्ण कथन बदल दिया – कोई साक्ष्य नहीं कि मृत्यु से तुरंत पहले उसके साथ क्रूरता का व्यवहार किया गया था – विचारण न्यायालय द्वारा उचित रूप से प्रत्यर्थी को दोषमुक्त किया गया – अनुमति अस्वीकार की गई।

Santosh Yadav, P.L. for the applicant/State.

ORDER

The Order of the Court was delivered by : **U.C. MAHESHWARI, J. :-** Heard on the question of admission.

1. On behalf of the State of M.P. this petition is preferred under Section 378 (III) of Cr.P.C. for grant of leave to appeal against the judgment dated 08.12.2010 passed by 6th Additional Sessions Judge (FTC), Chattarpur in S.T. No. 125/2008, whereby the respondent herein has been acquitted from the charge of Section 304-B of I.P.C. and 3/4 of Dowry Prohibition Act.

2. As per the case of prosecution, the deceased Santoshi got married with the respondent on 26th June, 2006 and on dated 17.07.2007 she died

unnatural death due to burn injuries. According to the prosecution subsequent to the marriage, in her lifetime she was subjected to cruelty and harassment by the respondent. Consequently, by pouring kerosene on her by setting the fire she has ablazed herself. Subsequent to sustain burn injuries she was taken to the hospital where she remained admitted as indoor patient between 6th July, 2007 till her death. During this period her dying declaration was also recorded. Subsequent to death, the inquest intimation was registered, in the course of its inquiry, the deposition of some witnesses including the parents of the deceased namely Dayaram Vishawakarma and Smt. Muliya Vishawakarma were also recorded. In the course of such enquiry so also after receiving the postmortem report, on establishing the ingredients of the offence of Section 304-B of I.P.C. and Section 3/4 of Dowry Prohibition Act, Crime No. 56/2008 was registered at Police Station Gadhimalhara, District Chhatarpur, against the respondent.

3. After holding the investigation, the respondent was charge sheeted by the prosecution under the aforesaid offences. After committing the case to the Sessions Court, after assessing the papers of the charge-sheet upon framing the charges of aforesaid Sections 304-B of I.P.C. and 3/4 of Dowry Prohibition Act, against the respondent, he abjured the guilt on which the trial was held, in which as many as 14 prosecution witnesses were examined while one witness Ratiram (DW-1) was examined on behalf of respondent in his defence.

4. On appreciation of the evidence, taking into consideration the dying declaration of the deceased Santoshi Vishwakarma (Ex. P/5) recorded in the hospital, after obtaining the fitness certificate, in which she categorically stated that while preparation to make the food, she was trying to take out some cooking impliment (Zhhara) from the Almirah, at that moment, the can of kerosene kept in such Armirah was fell down on the flames of fire and due to that she sustained burn injuries and thereafter her sister-in-law and her husband rescued her with further averments such fire was not set by any other person on her, alongwith the statement of the father of the deceased Dayaram Vishwakarma (PW-1) recorded in the inquest inquiry in which he had also stated that his daughter sustained the burn injuries while cooking the food. The trial Court has held that the alleged incident had taken place accidentally and was not the case of committing the suicide by the deceased.

5. True it is that after recording the aforesaid dying declaration of the deceased and the statement of her father Dayaram Vishawakarma (PW-1) (Ex-D/1) in the inquiry of the inquest intimation, on the basis of unnatural

death of Santoshi Bai and the statement of other witnesses in the inquest enquiry the aforesaid crime was registered against the respondent. After such registration on recording the interrogatory statement of said Dayaram, had changed his entire version stated in the aforesaid statement and made the allegations against the respondent regarding the alleged offence.

6. It is also apparent from the record that on recording the deposition of the parents of the deceased such Dayaram and Muliya Bai they have stated with respect of the cruelty committed by the respondent in regular course of the life with the deceased whenever she was resided with him in the matrimonial home. But even on taking into consideration the depositions of both the witnesses as accepted in its entirety, even then all requisite material ingredients of offence 304-B of I.P.C. and Section 3/4 of Dowry Prohibition Act are not made against the respondent. In order to prove the charge of Section 304-B of I.P.C. the prosecution is bound to prove that soon before the death the deceased was subjected to any cruelty or harassment by the accused on account of demand of dowry. In this regard no averments have been stated by any of such witnesses.

7. It is also apparent that the parents of the deceased were not present at the time of the incident at the matrimonial home of the deceased. No independent witnesses of the locality of the matrimonial home of the deceased and the respondent have supported the aforesaid depositions of the parents of the deceased. So in the lack of such material evidence to prove the material ingredient of the alleged offence of dowry death defined and made punishable under Section 304-B of IPC so also the offence of demand of dowry defined and made punishable under Section 3/4 of the Dowry Prohibition Act, the trial Court has not committed any error in extending the acquittal to the respondent.

8. After going through the entire record of the trial Court including the evidence adduced by the prosecution, we have not found any material circumstance or evidence on which the aforesaid dying declaration of the deceased could be discarded or disbelieved because the same was recorded by some doctor of the hospital, who was the impartial person and was not related in any manner either with the parental family of the deceased or with the matrimonial family of the deceased and such version of the dying declaration of the deceased that she sustained the burn injuries accidentally while cooking the food was accepted by the father of the deceased Dayaram at the first

instance on recording his statement in the inquest inquiry. So in such situation firstly we are of the view that there was no option with the trial Court except to extend the acquittal to the respondent.

9. For the sake of the arguments, if it is deemed that there are two versions on the record, one is based on the aforesaid dying declaration and the statement of Dayaram Vishwakarma (PW-1) in the inquest inquiry and another version is in the interrogatory statement of the witnesses and the depositions of the witnesses mainly of the parents of the deceased in which they categorically stated an oral dying declaration was also given to them by the deceased in which she had stated about the act of cruelty committed by the respondent with her and thereby implicated the respondent with the alleged offence. Even then firstly in the lack of the material ingredients of the alleged offence as stated above, the trial Court has not committed any error in extending the acquittal to the respondent and, secondly if two views, one is favourable and another is against the accused were available before the trial Court, then as per the settled preposition of law out of such views, the trial Court was bound to adopt the view which was favourable to the respondent-accused and the same was adopted by the trial Court. In such premises also, the impugned judgment does not requires any interference at this stage.

10. In view of the aforesaid, we have not found any prima facie circumstance in the matter on which the impugned judgment extending the acquittal to the respondent from the aforesaid charge, requires any interference at this stage. Consequently, this petition being devoid of any merits, deserved to be and is hereby dismissed at the motion hearing stage.

Petition dismissed.

I.L.R. [2015] M.P., 2254

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Subhash Kakade

M.Cr.C. No. 18938/2014 (Jabalpur) decided on 15 May, 2015

GURUDAYAL ...Applicant

Vs.

INDAL & ors . ...Non-applicants

A. Penal Code (45 of 1860), Section 379 - Theft of Crop - **Complainant must satisfactorily prove that he has sown and raised crop on the land recorded in his name and accused fails to show that he has**

any genuine counter claim or possession of land or that he grew the crop, and if cutting and removal of crop is proved then he can be convicted. (Para 10)

क. दण्ड संहिता (1860 का 45), धारा 379 – फसल की चोरी – शिकायतकर्ता को संतोषजनक रूप से साबित करना चाहिए कि उसने अपने नाम से अभिलिखित भूमि में फसल बोई और खड़ी की तथा अभियुक्त यह दर्शाने में असफल रहा कि उसके पास भूमि का कोई वास्तविक प्रतिदावा अथवा कब्जा है या उसने फसल उगाई है, और यदि फसल की कटाई एवं उसे हटाया जाना सिद्ध होता है तब उसे दोषसिद्ध किया जा सकता है।

***B. Penal Code (45 of 1860), Section 379 - Theft - Animus Furandi* - In absence of animus furandi and circumstances indicating that taking of movable property is in assertion of bonafide claim of right, though it may amount to civil injury, but does not fall within mischief of the offence of theft. (Para 12)**

ख. दण्ड संहिता (1860 का 45), धारा 379 – चोरी – चोरी का आशय – चोरी के आशय के अभाव में और परिस्थितियां यह दर्शाती हैं कि चल संपत्ति का लिया जाना अधिकार के सद्भाविक दावे के प्राख्यान में है, यद्यपि यह सिविल क्षति की कोटि में आ सकता है परंतु चोरी के अपराध की रिष्टि में नहीं आता है।

***C. Penal Code (45 of 1860), Section 379 - Theft of Crop* - Demarcation report shows that complainant party had encroached upon the land of respondents - There is dispute between the parties with regard to demarcation and physical possession - Since dispute is a civil dispute, no case of theft made out. (Paras 16, 20 to 26)**

ग. दण्ड संहिता (1860 का 45), धारा 379 – फसल की चोरी – सीमांकन प्रतिवेदन दर्शाता है कि शिकायतकर्ता पक्षकार ने प्रत्यर्थीगण की भूमि पर अतिक्रमण किया था – सीमांकन एवं वास्तविक कब्जे के संबंध में पक्षकारों के बीच विवाद है – चूंकि विवाद सिविल विवाद है, चोरी का प्रकरण नहीं बनता।

Cases referred :

(2002) 5 SCC 724, AIR 1972 SC 949 : 1972 Cr.L.J. 584, AIR 1965 SC 585, AIR 1979 SC 1825, AIR 1962 SC 586 : (1962) 1 Cr.L.J. 518, AIR 1957 SC 369: 1957 Cr.L.J. 552.

Devendra Kumar Shukla, for the applicant.

ORDER

SUBHASH KAKADE, J. :- This application under Section 378 (4) of Code of Criminal Procedure, 1973 in short 'the Code' has been filed by the complainant for grant of leave to file appeal against the judgment of acquittal dated 14.10.2014, passed by the learned Second Additional Sessions Judge, Betul, in Criminal Appeal No.82/2014, acquitting the respondents from the offence punishable under Section 379/34 of IPC, by setting aside the judgment dated 28.02.2014, passed in Criminal Complaint Case No.989/2011, by Judicial Magistrate First Class, Betul.

2. The case of the prosecution in brief is that the applicant is the owner of the agriculture land bearing Khasra No.110, Area 8.195 Hectare, Patwari Halka No.17, situate at Mouja Mandai Bujurg, Tahsil & District Betul having possession also and Soyabean crop was standing in the field. On 04.10.2010 the respondents brought tractor-trolley along with eight laborers and illegally started cutting the said crop. The complainant party restrained them, on account of this, the respondents abused and threatening for injury to person. They also committed theft of Soyabean crop worth Rs.20,000/- and also caused loss to the crop of the applicant by means of the tractor driven rashly on his field.

3. The applicant lodged a complaint at Police Out-Post Padhar of Police Station Betul. Since the Police did not took any action, the applicant field (sic:filed) a complaint case under Section 200 of the Code for the offence punishable under Section 379, 294 and 506/34 of IPC before the Judicial Magistrate First Class, Betul. After adopting due procedure learned trial Court registered Criminal Complaint Case No. 989/2011 against the respondents for the offence punishable under Section 379/34 of IPC.

4. To prove his case, the complainant examined himself as PW-1, his wife Jhelai (PW-2), and other witnesses Chandrakalabai (PW-3), Banwari (PW-4) and Pooja (PW-5) and also got exhibited documents (Ex. P-1 to P-3). During accused statement, respondents completely denied the evidence put-forth against them and to support their version respondent No.1 Rampal examined himself as DW-1.

5. On the basis of this evidence learned trial Court found that the respondents-accused guilty of the offence punishable under Section 379 of IPC and convicted the respondents-accused and sentenced to undergo rigorous imprisonment for one year and fine of Rs.1,000/- each. An appeal was

preferred against their conviction. Learned Appellate Court after hearing the parties and marshalling the material available allowed this appeal and acquitted the respondents from the aforementioned charge. Hence, this application for leave to appeal.

6. Shri Devendra Kumar Shukla, learned counsel for the applicant submitted that learned Appellate Court erroneously exercised the jurisdiction vested in him, hence the impugned judgment is illegal, contrary and is erroneous both of facts and in law. It is further submitted by learned counsel that on the basis of documentary as well as oral evidence this fact has been proved that the owner of the disputed land is the appellant and the respondents has cutting and removing stealthily standing Soyabean crop. Learned Appellate Court failed to see that the judgment and findings of the learned trial Court were just and proper, but learned Appellate Court given benefit of minor contradictions, omissions to the respondents, therefore, permission be granted to appeal against the impugned judgment.

7. Having heard learned counsel for the applicant and after perusal of the record and judgment under challenge, the Court is of the opinion that in this case leave to appeal cannot be granted.

Legal Position - Crop Theft

8. To prove the charge of theft against the accused punishable under Section 379 of IPC the prosecution must prove:-

(1) that he removed movable property.

(2) that the removed from out of the possession of another without his consent and,

(3) that he did so with a dishonest intention.

9. Cutting and removing stealthily standing crop from another's land would constitute offence under sec. 379 IPC- *Malhu Yadav v State of Bihar* (2002) 5 SCC 724.

10. If the complainant satisfactorily proved that he has sown and raised the crop on his land recorded in his name and on the other hand the accused failed to show that he has any genuine counter-claim or physical possession of the land or that he grew the crop and cutting and removal of the crop by the accused is proved, then he can be convicted.

11. The Apex Court in case of *Ram Ekbal v Jaldhari Pandey* reported in AIR 1972 SC 949: 1972 Cr.L.J. 584 held where the question of possession of land and crop on the date of occurrence, is open to doubt, the accused cannot be convicted for theft of crop.

12. *animus furandi;* the dishonest intention to cause wrongful gain to oneself or wrongful loss to another. Where there is absence of *animus furandi* and the circumstances indicate that the taking of movable property is in the assertion of a *bona fide* claim of right, the act, though may amount to a vicil (sic:civil) injury, does not fall within the mischief of the offence of theft.

13. *Mens rea* is necessary for an offence of theft. The ordinary rule that *mens rea* may exist even with an honest ignorance of law is sometimes not sufficient for theft. For example, where the taking of movable property is in the assertion of a *bona fide* claim of right, the act, though it may amount to a civil injury, does not fall within the offence of theft – *Chandi Kumar v Abanidhar* AIR 1965 SC 585 : (1956) 1 Cr.L.J. 496.

14. Where a *bona fide* claim of right exists, it can be a good defence to a prosecution for theft. In view of the *bona fide* dispute over land, harvesting the standing crop has been held not an offence of theft.

15. Now the position of law is clear that where there is *bona fide* counter-claim of the accused or where he succeeds in showing his possession or growing the crop, the dispute would have been a genuine civil dispute.

16. In a case of theft of crops where the dispute centers round the question of possession, it is a civil dispute; hence, no case of theft under Section 379 of IPC is made out.

17. Please see case of *Ram Ekbal* (supra), *State v Vishwanath* AIR 1979 SC 1825 CrLJ 1193, *Chandi Kumar v Abanidhar* AIR 1965 SC 585 : (1965) 1 CrLJ 496 ; *Abbarao v Lakshminarayan* AIR 1962 SC 586 : (1962) 1 CrLJ 518, *K.N. Mehra v State* AIR 1957 SC 369: 1957 Cr.L.J. 552, *Suvvari Sanyasi v Bodde Palli* AIR 1962 SC 586 : (1962) 1 CrLJ 518.

Legal Position - Granting of Leave to Appeal

18. Section 378(4) of the Code says that no appeal shall be entertained except with the leave of the High Court in cases of acquittal. The complainant must obtain the leave of the High Court before appeals are preferred against acquittals. Appeal cannot be entertained except with the leave of the High

Court. The High Court has an absolute discretion to grant or withdraw such leave but this discretion to be exercised judiciously.

19. The High Court shall consider any special feature in a particular case and cannot ignore the effect which the granting of leave to appeal without due discrimination may have on the principles of normal presumption of innocence of the accused in our criminal law. It will be better to keep in the mind settled position of law as well as principle laid down by the Apex Court in various cases that by the order of acquittal, the presumption of innocence of an accused is further strengthened and the golden thread which runs through the web of administration of justice in criminal cases that if two views are possible on the evidence available, one pointing to the guilt of the accused and the other to his innocence, the view which is favorable to the accused should be adopted.

20. The High Court while considering to grant leave to appeal against the judgment of acquittal is to be interfered only when there are compelling substantial reason for doing so. Accordingly, unless the High Court is satisfied, considered in the light above, about some indications or error in a judgment of acquittal the High Court may not grant leave.

21. While learned Appellate Court examined this question whether complainant succeed to prove that the Soyabean crop which were cutting and removing stealthily from the field was of possession of the complainant only? found that complainant failed to prove it and given the benefit of doubt to the respondents and acquitted them after marshalling the evidence filed by both the parties.

22. As per documentary evidence Ex.P-1 and P-2 this fact is proved that survey No.110 area 8.195 hectare belongs to Kiran Kumar, son of Gurudayal. But, this fact alone is not sufficient to convict the respondents for the offence punishable under Section 379 of the IPC. As per above discussed legal position this burden is also upon the complainant to prove this fact beyond doubt that the respondents cutting and removing stealthily Soyabean crop which was standing on the field of the possession of Kiran Kumar and Gurudayal.

23. As per Demarcation Report Ex.P-2 this fact is clear that complainant party encroached land area of 0.03 acre of survey No.14/1 which belongs to ownership of respondents and situated along with the land of the complainant and the respondents also encroached land area 0.35 acre of survey No.14/4 which belongs to ownership of Kiran Kumar son of complainant Gurudayal. On perusal of this Demarcation Report Ex. P-3, it is crystal clear that there is

existence of dispute between the parties with regard to the demarcation and actual possession of the land. This dispute would have been a genuine civil dispute.

24. During cross-examination Gurudayal (PW-1) frankly admitted this fact that at the time of cutting and removing stealthily the crop of Soyabean he was not present on the spot, but his wife was present, who informed, apprised him regarding this thief, therefore, learned Appellate Court rightly pointed out that Gurudayal (PW/1) is a hearsay witness.

25. Jhelai (PW-2) and other witnesses Chandrakalabai (PW-3) and Pooja (PW-5) were not able to specify the number of tractor, which is not of much importance, but these witnesses also admitted these facts in some or other way that there is no specific demarcation between these adjoining situated lands and both the parties claiming their ownership on the piece of land of each other.

26. In such premises learned Appellate Court did not commit any error and the acquittal of the respondents by the learned Appellate Court is not based on unwarranted assumption or erroneous appreciation of evidence by ignoring valuable incredible evidence, resulting in serious and substantial miscarriage of justice. The failure of the prosecution is also rightly pointed out by the learned Appellate Court which is completely creating doubtful situation. Hence, leave to appeal against the judgment of acquittal dated 14.10.2014 cannot be granted in light of above discussed legal positions.

27. Accordingly, the application for grant of leave to appeal is hereby dismissed at this preliminary stage of motion hearing.

Appeal dismissed.

I.L.R. [2015] M.P., 2260

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Subhash Kakade

M.Cr.C. No. 17218/2013 (Jabalpur) decided on 15 May, 2015

PUSHPA DHARWAL (KU.) & ors. ...Applicants

Vs.

STATE OF M.P. & anr. ...Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 321 - Withdrawal from Prosecution **- Law discussed. (Paras 9 to 13)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 321 – अभियोजन वापस लेना – विधि विवेचित।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 321 - Withdrawal from Prosecution - Functions of Public Prosecutor - **Withdrawal from prosecution is an executive function of Public Prosecutor and ultimate decision to withdraw is his power and must be exercised by Public Prosecutor and none else - Govt. may suggest to Public Prosecutor to withdraw a particular case and nobody can compel Public Prosecutor to withdraw. (Paras 15, 16 & 21)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), 321 – अभियोजन वापस लेना – लोक अभियोजक के कार्य – अभियोजन को वापस लेना लोक अभियोजक का कार्यपालिक कार्य है और वापस लेने का अंतिम निर्णय उसकी शक्ति में है और जिसका प्रयोग लोक अभियोजक द्वारा किया जाना चाहिए और न कि किसी और के द्वारा – सरकार लोक अभियोजक को कोई विशिष्ट प्रकरण वापस लेने के लिये सुझाव दे सकती है और वापस लेने के लिए कोई भी लोक अभियोजक को बाध्य नहीं कर सकता।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 321 - Withdrawal from Prosecution - Functions of Court - **Court performs supervisory and not adjudicatory function - Consent by Court is discretionary - Court must consider that (i) Whether withdrawal of prosecution would advance the cause of justice (ii) Whether case is likely to end in an acquittal (iii) whether continuance would only cause severe harassment to accused (iv) Whether withdraw is likely to resolve dispute (v) Whether grounds are valid (vi) Whether implication is bonafide or is collusive. (Paras 31 & 32)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 321 – अभियोजन वापस लेना – न्यायालय के कार्य – न्यायालय पर्यवेक्षण का कार्य करता है और न कि न्यायनिर्णयन का – न्यायालय की सहमति वैवेकिक है – न्यायालय को विचार करना चाहिए कि (i) क्या अभियोजन वापस लेने से न्याय का उद्देश्य अग्रसर होगा (ii) क्या प्रकरण का अंत दोषमुक्ति में होने की संभावना है (iii) क्या जारी रखने से अभियुक्त को केवल घोर उत्पीड़न कारित होगा (iv) क्या वापस लेने से विवाद सुलझने की संभावना है (v) क्या आधार वैध है (vi) क्या आलिप्त किया जाना सद्भाविक है या दुस्संधिपूर्ण है।

D. Criminal Procedure Code, 1973 (2 of 1974), Section 321 - Locus Standi - **Complainant or any other person has locus standi to**

oppose withdrawal of a case. (Para 40)

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 321 – सुने जाने का अधिकार – शिकायतकर्ता या किसी अन्य व्यक्ति को प्रकरण वापस लिये जाने का विरोध करने के लिये सुने जाने का अधिकार है।

***E. Criminal Procedure Code, 1973 (2 of 1974), Section 321 - Withdrawal from Prosecution - Cross case pending* - Case was not listed - Application u/s 34 was entertained without hearing complainant - Compelling one of parties to face trial and giving benefit to other by withdrawing the case ought not to be allowed - Order granting permission to withdraw from prosecution set aside - P.P. may file fresh application u/s 321 and court is free to decide the same after giving opportunity to complainant - Application allowed. (Paras 41 to 45)**

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 321 – अभियोजन वापस लेना – प्रति प्रकरण लंबित – प्रकरण सूचीबद्ध नहीं किया गया – शिकायतकर्ता को सुने बिना धारा 34 के अंतर्गत आवेदन ग्रहण किया गया – एक पक्षकार को विचारण का सामना करने के लिये बाध्य करना और दूसरे को प्रकरण वापस लेकर लाभ देना मंजूर नहीं किया जा सकता था – अभियोजन वापस लेने की अनुमति प्रदान करने का आदेश अपास्त – लोक अभियोजक धारा 321 के अंतर्गत नया आवेदन प्रस्तुत कर सकता है और शिकायतकर्ता को अवसर प्रदान करने के पश्चात् न्यायालय उसे निर्णीत करने के लिये स्वतंत्र है – आवेदन मंजूर।

Cases referred :

AIR 1980 SC 1510, (2005) 2 SCC 377, AIR 1983 SC 194 : 1983 Cr.L.J. 348, AIR 1967 SC 1214, AIR 1980 SC 423, (2000) 8 SCC 710, AIR 1977 SC 903, AIR 1957 SC 389, AIR 1987 SC 863, (1991) 4 SCC 584, AIR 1987 SC 1353, AIR 1998 SC 3222 : (1998) 7 SCC 123.

Vikalp Soni, for the applicants.
R.S. Dubey, P.L. for the non-applicant No.1/State.
None for the respondent No.2.

(Supplied: Paragraph numbers)

ORDER

SUBHASH KAKADE, J. :- This petition under Section 482 of the Code of Criminal Procedure, 1973, here-in-after referred to as 'the Code' has been filed by the petitioners invoking extra-ordinary jurisdiction of this Court being

aggrieved by the order dated 17.12.2012, passed in Criminal Revision No.UR/ 2012, by the learned 15th Additional Sessions Judge, Jabalpur, arising out of order dated 19.11.2011, passed in Criminal Case No.18749/2008, by the Judicial Magistrate First Class, Jabalpur, whereby the application preferred by A.D.P.O. (the prosecutor) under Section 321 of the Code has been allowed and the respondent no.2 has been acquitted from the charges punishable under Sections 341, 294 and 323, IPC.

2. The facts of the case in brief are that the petitioner no.2 Ku. Parbeen lodged an FIR at Police Station Cantt, Jabalpur against the respondent no.2 Ravindra Singh stating that on 25.10.2008 at about 11.45 a.m. the respondent no.2 has committed *Marpeet* with her and her family members the petitioner No.1 Ku. Pushpa and the petitioner No.3 Smt Thakri Devi and tried to disrobed to outrage her modesty. On the basis of said report the Police have registered a Crime No.377/2008, for the offence punishable under Section 341, 294 and 323, IPC.

3. Admittedly, with regard to this incident counter FIR has also been lodged by the respondent no.2 against the petitioners. On the basis of the said report the Police have registered the Crime No.378/2008, for the offence punishable under Sections 341, 294, 506, 323 and 34, IPC. After investigation, both the parties were charge-sheeted before the competent Court and after framing the charge, trial of these cross cases has been commenced and both the cases have been fixed for evidence before learned trial Court for 30.11.2011.

4. In between, on dated 19.11.2001 an application under Section 321 of the Code has been moved by the A.D.P.O. who was prosecuting the case on behalf of the respondent no.1-State before learned trial Court seeking permission to withdraw the Criminal Case No.18749/2008, pending against the respondent no.2. Learned trial Court allowed this application on the same day and acquitted the respondent no.2.

5. The petitioners have preferred a revision against the aforesaid order dated 19.11.2011 along with an application for condonation of delay of 10 months 20 days. The learned Revisional Court has dismissed the revision on the ground of delay as well as non-maintainability vide order dated 17.12.2012, hence, the petitioners before this Court.

6. Shri Vikalp Soni, learned counsel for the petitioners submits that the orders passed by the Courts below are erroneous, perverse and bad in the

eyes of law. There was sufficient material against the respondent no.2 to register the crime for the offence punishable under Section 354, IPC but the Police intentionally not registered the same because the respondent no.2 is a Police Head Constable. Learned trial court have failed to appreciate that the permission sought by the A.D.P.O. to withdraw the case should not be granted because the cross case regarding the same incident was still pending. The learned Revisional Court erred in holding that the revision filed by the petitioners is not maintainable because there is a provision of appeal against acquittal. It is also pointed out that learned Revisional Court has erred in dismissing the revision on the ground of delay because the delay caused in filing the revision was bona fide and not intentional. Learned counsel concludes his arguments submitting that permission of withdrawal of case can be granted only in the interest of justice and for valid reasons. It may be granted in a case which is likely to end in acquittal and continuance of case will cause severe harassment to the accused.

7. Shri R.S. Dubey, learned Panel Lawyer justified and supported the impugned orders passed by the Courts below.

8. None present on behalf of the respondent No.2 even after directions dated 10.11.2014 of the Court.

9. Having heard learned counsels present for the parties, going through the record, particularly impugned orders passed the courts below carefully.

SECTION 321 0F THE CODE, GENERAL

10. In understanding and applying the provisions of Section 321 of the Code two main features thereof have to be kept in mind. The initiative is that of the Public Prosecutor. And the trial Court has to do is to give its consent. But, the paramount consideration must always be the interest of administration of justice.

11. The principles justifying the regulating withdrawal from prosecution have been considered by the Supreme Court in a series of decisions.

12. In case of *Rajendra Kumar Jain v/s State* reported in AIR 1980 SC 1510, the Apex Court culled out the principles applicable for invocation of sec. 321 of the Code as under:-

(i) Under the scheme of the Code prosecution of an offender for a serious offence is primarily the responsibility of the Executive.

(ii) The withdrawal from the prosecution is an executive function of the Public Prosecutor.

(iii) The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to some one else.

(iv) The Government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.

(v) The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and, political purposes.

(vi) The Public Prosecutor is an officer of the Court and responsible to the Court.

(vii) The Court performs a supervisory function in granting its consent to the withdrawal.

(viii) The Court's duty is not to re-appreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The Court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution.

(ix) It shall be the duty of the Public Prosecutor to inform the Court and it shall be the duty of the Court to appraise itself of the reasons which prompt the Public Prosecutor to withdraw from the prosecution. The Court has a responsibility and a stake in the administration of criminal justice and so has the public Prosecutor, its 'Minister of Justice'. Both have a duty to protect the administration of Criminal Justice against possible abuse or misuse by the Executive by resort to the provisions of s. 361 Criminal Procedure Code. The independence of the judiciary requires that once the case has traveled to the Court, the Court and its officers alone must have control over the case and decide what is to be done in each case.

13. In case of *Rahul Agarwal vs. Rakesh* reported in (2005) 2 SCC 377, the Apex Court after consideration of a number of its earlier decisions,

laid down the law as under:

"... the law is very clear that the withdrawal of prosecution can be allowed only in the interest of justice. Even if the Government directs the Public Prosecutor to withdraw the prosecution and an application is filed to that effect, the court must consider all relevant circumstances and find out whether the withdrawal of prosecution would advance the cause of justice. If the case is likely to end in an acquittal and the continuance of the case is only causing severe harassment to the accused, the court may permit withdrawal of the prosecution. If the withdrawal of prosecution is likely to bury the dispute and bring about harmony between the parties and it would be in the best interest of justice, the court may allow the withdrawal. The discretion under Section 321 Code of Criminal Procedure is to be carefully exercised by the Court having due regard to all the relevant facts and shall not be exercised to stifle the prosecution. Every crime is an offence against the society and if the accused committed an offence, society demands that he should be punished."

FUNCTIONS OF THE PUBLIC PROSECUTOR

14. As to the role of the Public Prosecutor, it is specially laid down in case of *Sheonandan Paswan v State* AIR 1983 SC 194: 1983 CrLJ 348, which is a leading case on the subject that the Public Prosecutor must apply his mind to the facts of the case independently without being subjected to any outside influence.

15. The Apex Court in catena of cases held that the power must be exercised by the public prosecutor and by no one else.

16. That the withdrawal from the prosecution is an executive function of the public prosecutor and that the ultimate decision to withdraw is his.

17. Public prosecutor actually conducting prosecution can apply for withdrawal otherwise not – *State v Surjit* AIR 1967 SC 1214.

18. Public Prosecutor cannot act merely as a "Post Box". The withdrawal application must be "reflective of a free and uninfluenced application of mind".

19. The power of public prosecutor to withdraw from prosecution is wide but should not be used as a "rubber stamp" – *Rajendra Kumar Jain* case (supra).

20. The decision to withdrawal must be of the public prosecutor, not of other authorities, even of those where displeasure may affect his continuance

in office. In taking a decision for withdrawal the public prosecutor has to apply independent mind and exercise his discretion because he acts as a limb of the judicative process and not as an extension of the executive – *Subhash Chander v. State* AIR 1980 SC 423.

21. That the Government may suggest to the public prosecutor that a particular case may not be proceeded with, but nobody can compel him to do so. Receiving communication or instruction from the Government by the public prosecutor before filing application for withdrawal does not make the application illegal and he cannot be said to be under extraneous influence.

22. The Government may have ordered, directed or asked a public prosecutor to withdraw from a prosecution, it is for the Public Prosecutor to apply his mind and act in a way so that the public interest may be served. *Abdul Karim v State* (2000)8 SCC 710.

23. In case of *Rajendra Kumar Jain* (supra) the Apex Court also mandate that the bureaucrat should be careful not to use peremptory language when addressing the public prosecutor, such as 'he is directed' or 'he is instructed', since it may give rise to an impression that he is coercing the public prosecutor to move in the matter.

24. The Public Prosecutor has to make out some ground for withdrawal from prosecution like want of sufficient evidence, case not well founded, object of administration of justice would not be advanced, etc. - *State v Chandrika* AIR 1977 SC 903.

25. Application for withdrawal may be made by public prosecutor for reasons other than judicial prospects of prosecution.

26. Public prosecutor can, with the consent of the court, withdraw from prosecution a session's tribal case at committal stage – *State v Ram Naresh* AIR 1957 SC 389.

27. Application for withdrawal can be made at any time ranging between the court taking cognizance till such time the court actually pronounces the judgment. Even where reliable evidence has been adduced to prove the charges, the public prosecutor can seek consent of the court to withdraw the prosecution – *Md. Mumtaz v Nandini* AIR 1987 SC 863.

28. Where complainant has filed the case and conducting the prosecution, the public prosecutor cannot file application for withdrawal – *Surjit* case (supra).

29. Hence it is crystal clear that the purpose of sec. 321 of the Code it is the opinion of the public prosecutor alone which is material and the ground on which he seeks permission of the court for withdrawal of the prosecution alone has to be examined.

FUNCTIONS OF THE COURT

30. The independence of the judiciary requires that once the case has traveled to the Court, the Court and its officers alone must have control over the case and decide what is to be done in each case. The court has to be satisfied that the executive function of the public prosecutor has not been improperly exercised or that it is not an attempt to interfere with the course of justice for illegitimate purpose. The consent of the court under sec. 321 of the Code as a condition for withdrawal is imposed as a check on the exercise of that power.

31. The court while granting or refusing consent under the section performs supervisory and not adjudicatory function. The exercise of the power to accord or withdraw consent by the court is discretionary. Of course, it has to exercise the discretion judicially. The court should satisfy itself that application for withdrawal is a bona fide and supported by reasons of State or public policy. The court should satisfy itself that the executive function of the public prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes. *Ram Naresh* case (supra). All that, the court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. Discretion under sec.321 of the Code should not be exercised to stifle the prosecution. Consent will be given only if public justice in the larger sense is promoted rather than subverted by such withdrawal.

32. The court is required to consider relevant circumstances so as to find out:

(i) whether the withdrawal of prosecution would advance the cause of justice;

(ii) whether the case is likely to end in an acquittal;

(iii) whether continuance of the case would only cause severe harassment to the accused;

(iv) whether withdrawal is likely to resolve the dispute and bring

about harmony between the parties;

(v) whether the grounds of withdrawal are valid; and

(vi) whether the implication is bona fide or is collusive.

33. Whether consent should or should not be granted for withdrawal is a question to be decided by the Magistrate in a judicial manner.

34. The prayer for withdrawal from prosecution should not be refused merely on the ground that the case is at advance stage.

35. Chances of a likely failure is not per se a valid ground to withdraw from prosecution.

36. Magistrate can permit withdrawal for the reasons that the charges were not grave; the cases were pending for a very long time; and the other accused in the same case were acquitted.

37. It is not necessary for the court to assess the evidence to discover whether the case would end in conviction or acquittal.

38. That not merely inadequacy of evidence, but other relevant grounds such as to further the broad ends of public justice, economic and political; public order and peace are valid grounds for withdrawal.

39. Offences exclusively tribal by Court of Sessions, committing Magistrate is competent to give consent for withdrawal – *Rajendra Kumar Jain* (supra).

LOCUS STANDI OF THE COMPLAINANT

40. The proposition that State is the *dominos litis* in criminal cases is not an absolute one. The society for its orderly and peaceful development is interested in the punishment of the offender and if the offence is against the society and not merely an individual wrong, any member of the society must have *locus standi* to initiate a prosecution as also to resist withdrawal of such prosecution if initiated – *Union Carbide v Union of India* (1991)4 SCC 584. The complainant or any other person has *locus standi* to oppose withdrawal of a case involving offences of criminal breach of trust, cheating, forgery, etc. In case of corruption and criminal breach of trust any member of the society has *locus standi* to resist withdrawal.

41. It is undisputed on record that criminal case pending against the

petitioner as criminal case No. 15867/2008 and this criminal case pending against the respondent No. 2 as Criminal Case No. 18749/2008 had arisen out of the same incident took place on 25.10.2008 before learned trial Court. In these circumstances, both cases were the cross cases.

42. It is pertinent to mention here that when learned trial Court passed initial order dated 19.11.2011, this case No.18749/2008 was not listed for hearing on this day. Actually, this case was listed for dated 30.11.2011 for reordering of evidence along with cross case No.15867/2008. In these circumstances it is manifestly clear that at the time of passing order dated 19.11.2011 none was present on behalf of the petitioners, who were complainant in the cross case which was very much pending for adjudication.

43. It is well established principle of law that in the trial of cross cases, it is imperative on the part of the trial Court to reach to the conclusion that out of two parties who was the aggressor in the incident and thereafter dispose of the cases on merit. Since, learned trial Court have failed to consider the aforesaid matter of fact because non-appearance on behalf of the petitioners and allowed the application under Section 321 of the Code the A.D.P.O. for withdrawal from prosecution.

44. In a case charge-sheeted by police the complainant is competent to adopt proper course after Magistrate giving consent for withdrawal, on knowledge from any source.

45. Admittedly, arising out of the same incident two cross cases are pending. Simply because A.D.P.O. moved an application under the provisions of Section 321 of the Code, permission to withdrawal of only one case is not proper. Such a step taken on behalf of A.D.P.O. cannot be said to be in the public interest or in the interest of justice, as required under the law. Compelling one of the two parties to face the trial and giving benefit to the other party while withdrawing the case pending against him ought not to be allowed when the nature of the offences under which the other party is being tried is not very different. Withdrawal is like to bury the dispute and bring about harmony between the parties and alike. But, in this case withdrawal of the prosecution created more tension between the parties. In view of all this, order dated 19.11.2011 passed by learned trial Court allowing the application was erroneous, that too, without giving opportunity to the petitioners/complainant, who were having *locus standi* to resist the withdrawal of prosecution.

TECHNICAL GROUNDS

46. From the perusal of the record it is apparent that the learned Revisional Court rejected the petitioner's revision petition, firstly, on the ground that the effect of the order dated 19.11.2011 was acquittal; therefore, the applicant wrongly filed this revision.

47. If withdrawal is allowed under the provisions of Section 321 of the Code before framing of charge, the accused shall be discharged. But if charge has already been framed in that case the effect of withdrawal would be acquittal by the accused. There can be no doubt that the resultant order on the granting of the consent, being an order of 'discharge' or 'acquittal', would attract the applicability of correction by the High Court under various provisions of the Code. The function of the court may well be taken to be a judicial function. When a party is adopted wrong forum for his relief, it is the duty of the Court to apprise the party regarding his mistake.

48. In case in hand, the revision was filed after lapse of 10 months 20 days and this was the second ground of dismissal of the revision. Length of delay is not a matter, but acceptability of the explanation alone is the criterion. If the explanation does not show any *mala fide* or the same is not put forth in dilatory part of tactics, then the Court should show utmost consideration to the applicant.

49. An application for condonation of delay is moved in a criminal case, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interest of justice the court should condone the delay. Learned Revisional Court failed to see this fact that cross case was pending when order dated 19.11.2011 passed by learned trial Court.

50. It is well settled principle of law that rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not restore to dilatory tactics but seek their remedy promptly. Furthermore, the primary function of a Court is to adjudicate the dispute between the parties and to advance substantial justice. The time limit fixed for approaching the Court in different situation is not because on the expiry of such time a bad cause would transform into a good cause. Expression "sufficient cause" within the meaning of Sec. 5 of the Limitation Act or any other similar provision, should receive a liberal construction so as to advance substantial justice when

no negligence or inaction or want of bona fide is imputable to party. Earlier also, in case of *Collector, Land Acquisition, Anant Nag v. Katiji,* reported in AIR 1987 SC 1353, it was held by the Supreme Court that ordinarily a litigant does not stand to benefit by lodging an appeal late and refusing to condone delay can resulting a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties. The Supreme Court further held that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a nondeliberate delay. It was also observed by the Supreme Court that it must be grasped that judiciary is respected not on account of its power to legalise injustice on technical ground but because it is capable of removing injustice and is expected to do so.

51. On going through the decisions in *N. Balakrishnan v. M. Krishnamurthy,* reported in AIR 1998 SC 3222: (1998)7 SCC 123, it is clear that the principles relating to the matter of condonation of delay are well settled. The Court is armed with power to condone the delay. The judicial power and the discretion are given to the Court to advance substantial justice. If the spirit behind the empowerment of discretionary power on the Court is taken note of it would be clear that the Court is required to adopt liberal approach in the matter of interpretation of the phrase "sufficient cause" as mentioned in Sec. 5. This concept is adequately elastic to enable the Court to apply the law in a meaningful manner and the Courts are required to adopt rational, common sense and pragmatic approach. The substantial justice alone is to be preferred against technical flaws. Section 5 does not say that the discretion can be exercised only if the delay is within a certain limit. Length of delay is not a matter, but acceptability of the explanation alone is the criterion. If the explanation does not show any *mala fide* or the same is not put forth in dilatory part of tactics, then the Court should show utmost consideration to the applicant. While condoning the delay, the Court should not forget the case of opposite party altogether.

52. In various decisions, the Apex Court has held that the approach of the Court should be liberal and pragmatic when an application under Sec. 5 of the Limitation Act or any other similar provision is placed for condonation of delay. The power to condone the delay must be liberally exercised and unless

there is absolute negligence on the part of a party, the delay in filing the appeal must be condoned. Application may not be dismissed just on the technically and the circumstances pointed out for condonation of delay need not be considered in a pedantic manner, rather provisions must be interpreted in a justice oriented way.

53. On these facts and in the circumstances of the case it is clear that learned Revisional Court by dismissing the revision taking a artificial and technical view that the revision is wrongly instituted as well as is time-barred has caused serious injustice to the appellant without going into the merits that learned trial Court committed gross error while passing order dated 19.11.2011, and the High Court should at least have given thoughtful consideration to the merits of the case when injustice was writ large on the face of the record.

54. In light of above mentioned facts and in the circumstances of the case, the order passed by learned trial Court as well as by learned Revisional Court shall remain continued then it will be amount to harassment to the petitioners and further amount to abuse of process of law. Thus, the present petition is allowed and the order dated 19.11.2011 passed by learned trial Court in criminal case No. 18749/2008 *(State of Madhya Pradesh vs. Ravindra Singh)* and the order dated 17.12.2012 passed by learned Revisional Court in criminal unregistered revision case are hereby set asides. It is directed to learned trial Court to restore the criminal case No. 18749/2008 to its original number and proceed further in accordance with law. It is also made clear that the Public Prosecutor, who will actually conduct this criminal case No. 18749/2008 may file a fresh application for withdrawal of the prosecution under the provisions of Section 321 of the Code and after giving a full fledged opportunity to the petitioners, the complainants in that case learned trial Magistrate is free to decide the same on its merits, without keeping the findings of this order.

55. It is further directed to the learned Chief Judicial Magistrate, Jabalpur if cross case No. 15867/2008 State of *Madhya Pradesh vs. Pushpa Dharwal and another* is pending in any court under his jurisdiction, then this case be immediately transferred to that Court for analogous trial of both cases, which are cross cases to each other.

56. A copy of this order be sent to the learned Chief Judicial Magistrate, Jabalpur for compliance and necessary action. The ensuing summer vacation will going to start, therefore, the parties are directed to appear before the

learned Chief Judicial Magistrate, Jabalpur on dated 13.07.2015.

57. A copy of this order also be made available to the Director Prosecution, Bhopal to circulate this order among the Public Prosecutor under his control as matter is of general importance.

Order accordingly.

I.L.R. [2015] M.P., 2274

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice K.K. Trivedi

M.Cr.C. No.10945/2015 (Jabalpur) decided on 3 July, 2015

STATE OF MADHYA PRADESH ...Applicant

Vs.

VIPIN GOYAL ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 167(2) - Period of Police Remand **- Whether period of 15 days should be reckoned from the date of surrender or from the date when accused was produced by police before Court for police remand - Held - Respondent surrendered before the High Court on 18.06.2015 and was sent to Judicial Custody - Application under Section 439 of Cr.P.C. was rejected on 29.06.2015 and police took custody of respondent on 30.06.2015 and produced him before designated Court - Designated Court limited the period of police remand till 03.07.2015 as otherwise, period of 15 days would exceed - Period of 15 days would start from the date when the respondent was taken in custody by police and produced before Designated Court and not from the date of surrender - Application allowed. (Paras 7 to 14)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 167(2) – पुलिस रिमांड की अवधि – क्या 15 दिनों की अवधि की गणना आत्मसमर्पण की तिथि से होनी चाहिये या उस तिथि से जब अभियुक्त को पुलिस रिमांड हेतु पुलिस द्वारा न्यायालय के समक्ष पेश किया गया – अभिनिर्धारित – प्रत्यर्थी ने 18.06.2015 को उच्च न्यायालय के समक्ष आत्मसमर्पण किया और उसे न्यायिक अभिरक्षा में भेजा गया – दं.प्र.सं. की धारा 439 के अंतर्गत आवेदन 29.06.2015 को अस्वीकार किया गया और पुलिस ने 30.06.2015 को प्रत्यर्थी को हिरासत में लिया और नामनिर्दिष्ट न्यायालय के समक्ष उसे पेश किया – नामनिर्दिष्ट न्यायालय ने पुलिस रिमांड की अवधि 03.07.2015 तक सीमित की क्योंकि अन्यथा, 15 दिनों की अवधि निकल जाती/पार हो जाती – 15

दिनों की अवधि उस तिथि से आरंभ होगी जब प्रत्यर्थी को पुलिस द्वारा अभिरक्षा में लिया गया और नामनिर्दिष्ट न्यायालय के समक्ष प्रस्तुत किया गया और न कि आत्मसमर्पण की तिथि से – आवेदन मंजूर।

Cases referred :

(1992) 3 SCC 141, AIR 1986 SC 2130, (1986) 3 SCC 141, (2014) 2 SCC Online SC 257.

P.K. Kaurav, Addl. A.G., *Piyush Dharmadhikari,* G.A. & *Prakash Gupta,* P.L. for the applicant/State.

Anil Khare with *Priyankush Jain, Jasneet Hora, Renu Jain, Shantanu Saxena,* for the non-applicant/accused.

ORDER

The Order of the Court was delivered by :

A.M. KHANWILKAR, C. J. :- Heard counsel for the parties. By consent, matter is taken up for final disposal. The respondent waives notice through counsel for final disposal.

2. This application under Section 482 of the Code of Criminal Procedure (for brevity "Code") takes exception to the order passed by the Additional Sessions Judge, Bhopal dated 30.06.2015 in Crime No.14/2013. By this order, application preferred by the Investigating Officer for granting police custody of the respondent has been disposed of by allowing police custody only till 03.07.2015, on the sole finding that the respondent having been taken in judicial custody on 18.06.2015 in furtherance of the order passed by this Court in M.Cr.C. No.8811/2015 on the same date, the 15 days period provided in Section 167 of the Code would start running from that date; and by efflux of time, expire on 03.07.2015. The Court held that, beyond 03.07.2015, police custody of the respondent cannot be permitted, in law. The Trial Court has relied on the decision of *Central Bureau of Investigation, Special Investigation Cell-1, New Delhi vs. Anupam J. Kulkarni*[1] to answer the point in issue.

3. Before examining the correctness of the opinion recorded by the Trial Court, we may deem it appropriate to advert to some basic facts. The respondent has been named as accused in Crime No.14/2013 for offences

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1. (1992) 3 SCC 141

punishable under Sections 409, 420, 120-B of I.P.C. and Section 3 (Gha), 1, 2/5 of M.P. Manyata Prapt Pariksha Adhiniyam, 1937. The respondent, however, could not be arrested inspite of the efforts made by the Investigating Agency - because of the processes adopted by him since November, 2014, to which, elaborate reference has been made by us while deciding M.Cr.C. No.8811/2015 (application for bail filed by the respondent in the same crime) vide order dated 29.06.2015. After exhausting all remedies, finally, in view of the liberty given by the Supreme Court, the respondent was required to approach the Sessions Court by way of bail application. Without surrendering before the Trial Court, the bail application filed under Section 439 of the Code was heard and rejected by the Trial Court, because of the protection given to the respondent by the Supreme Court. Even this aspect has been referred to in the order dated 29.06.2015 passed in M.Cr.C. No.8811/2015.

4. The respondent then approached this Court by way of application under Section 439 of the Code being M.Cr.C. No.8811/2015. When the said bail application was listed for consideration on 16.06.2015, it was made clear to the respondent that prayer for bail of the respondent can be entertained only if the respondent was already in jail or police custody or at-least he surrenders before this Court, in the first instance. The respondent, accordingly, agreed to appear before the Court and surrendered on 18.06.2015. On 18.06.2015, however, the hearing of the bail application could not proceed because of the circumstances already recorded in the order passed on that date and the successive dates till the bail application was closed for orders on 26.06.2015. That bail application was eventually disposed of on 29.06.2015, by a speaking judgment. When the respondent had appeared before this Court on 18.06.2015 and surrendered; and as the hearing of the bail application was required to be deferred for reasons attributable to the respondent himself and also for further adjournment, the Court thought it appropriate to direct to keep the respondent in judicial custody at Jabalpur. Indeed, the Investigating Agency did not apply for grant of police custody of the respondent for the purpose of investigation of the said crime, either before this Court or any other Court until the bail application was finally decided.

5. Suffice it to note that the respondent surrendered before this Court on 18.06.2015 and was sent to judicial custody until further order and final decision on his bail application No.8811/2015, which was eventually disposed of as rejected on 29.06.2015. In that order, this Court issued consequential directions

whilst rejecting the prayer for bail, to the Investigating Agency to take custody of the respondent in accordance with law. Only thereafter, the Investigating Agency took custody of the respondent on 30.06.2015 at around 7.00 a.m. from the Central Jail at Jabalpur and took him to Bhopal by road; and produced him before the Designated Court at Bhopal between 1.30 to 2.30 p.m. On so producing, the Designated Court by the impugned order limited the police custody period only till 03.07.2015 for the reasons as noted earlier. In substance, the conclusion reached by the Designated Court is on the premise that the 15 days period referred to in Section 167(2) of the Code must be reckoned from the date of surrender of the respondent before this Court, which happened on 18.06.2015.

6. In this backdrop, the core issue that arises for consideration and which also has been adverted to by the Designated Court is: whether 15 days period specified in Section 167(2) of the Code should be reckoned from the date of surrender before this Court on 18.06.2015 or when the accused was first produced by the police before the Designated Court on 30.06.2015 for police remand?

7. On a bare reading of Section 167 of the Code, firstly it envisages about the obligation of the Police, who has arrested the accused by exercising police powers without arrest warrant, to produce him before the Magistrate within the time specified. The second part of Section 167 of the Code refers to the maximum time during which such accused can be allowed to remain in police custody for the purpose of investigation of the concerned crime, which has been specified as 15 days in the whole from the date on which the accused was produced before the Court for the first time by the police for giving police custody. The third facet of Section 167 is of giving discretion to the concerned Magistrate either to send the accused to police custody or judicial custody as may be warranted during the relevant period and before filing of the charge-sheet. The fourth facet is about the outer limit, within which, the charge-sheet/ police report must be filed by the Investigating Agency and the date from which the said period should be reckoned as also the effect of failure to do so. Besides this, we need not dilate on the scope of Section 167 further.

8. In the case of *Central Bureau of Investigation, Special Investigation Cell-1, New Delhi* (supra), of the Supreme Court relied upon by the Designated Court, the Court was called upon to consider the question in the context of the accused, who was arrested by the police without arrest

warrant on 04.10.1991 and produced before the Magistrate on 05.10.1991. On the request of CBI, the accused was remanded to judicial custody till October 11th 1991. On October 11th 1991 an application was moved by the Investigating Officer asking for police custody of the accused. When the accused was being taken, on his way, he pretended to be indisposed and was thus admitted in hospital where he remained confined till October, 21st, 1991, when he was referred to Cardiac Out-patient Department of G.B. Pant Hospital. Until 29.10.1991, the accused was again remanded to judicial custody by the Magistrate and thereafter sent to jail. The police could not take him in police custody during this period even after his first remand order passed on 05.10.1991; and for which reason applied for police custody of the accused in connection with investigation of the crime registered against him. The issue considered in this judgment was in the context of the fact situation of that case. The question, answered by the Court was whether or not after expiry of initial period of 15 days from the date of production of the accused by the police after his arrest without arrest warrant, before the Magistrate (i.e. on 05.10.1991), request for police custody can be entertained in law. The observations in this judgment, therefore, will have to be considered in the context of those facts and binding precedent for cases where the police has arrested the accused without arrest warrant in connection with alleged crime and produced for the first time before the Court within statutory time for obtaining police remand for investigation of that crime.

9. In the present case, however, admittedly, the police custody of respondent could not be taken by the police in connection with crime No.14/2013, till 30.06.2015. For the first time, police took custody of the respondent on 30.06.2015 and produced him before the Designated Court the same day, pursuant to the liberty given by this Court in its order dated 29.06.2015. The fact that respondent was ordered to be kept in judicial custody from 18.06.2015 in connection with the crime did not provide his access to the Investigating Agency to question the respondent nor such access was availed during that period. Further, no formal arrest of the respondent was effected by the police in connection with the said crime until 30.06.2015. This position is not in dispute.

10. The material fact in the context of Section 167 of the Code is when the accused (respondent) was taken in custody by the police and produced before the Designated Court soon thereafter. No more and no less.

11. On plain reading of Section 167 of the Code in particular sub-section (2), it is amply clear that the maximum period of police custody/police remand specified is 15 days in the whole. That is with reference to the production of the accused arrested by the police without arrest warrant, before the Magistrate for the first time for the purpose of police custody/police remand in connection with the Crime in question. The question of producing the accused before the Magistrate by the police will arise, only after the police were to get custody of the accused or his arrest without arrest warrant by invoking police powers under the Code. For, Section 167 of the Code makes reference to the situation arising after the arrest of the accused "by the police" without arrest warrant and corresponding obligation on police to produce that accused before that Magistrate within 24 hours from the time of his arrest. On such production the Magistrate can exercise his discretion to send the accused to judicial custody or allow the police to keep him in police custody till further orders but in any case not exceeding 15 days in the whole from the "first remand" order passed by it – be it of police custody or judicial custody. This legal position is expounded by the Supreme Court in the case of *Chaganti Satyanarayana and others vs. State of Andhra Pradesh*[2], in the following words:-

> "12. Keeping proviso (a) out of mind for some time let us look at the wording of sub-section (2) of Section 167. This sub-section empowers the Magistrate before whom an accused is produced for purpose of remand, whether he has jurisdiction or not to try the case, to order the detention of the accused, either in police custody or in judicial custody, for a term not exceeding 15 days in the whole. It was argued by Mr. Rao that the words "in the whole" would govern the words "for a term not exceeding 15 days" and, therefore, the only interpretation that can be made is that the detention period would commence from the date of arrest itself and not from the date of production of the accused before the Magistrate. Attractive as the contention may be, we find that it cannot stand the test of scrutiny. In the first place, if the initial order of remand is to be made with reference to the date of arrest then the order will have retrospective coverage for the period

2 AIR 1986 SC 2130

of custody prior to the production of the accused before the Magistrate, i.e. the period of 24 hours' custody which a police officer is entitled to have under Section 57 besides the time taken for the journey. Such a construction will not only be in discord with the terms of Section 57 but will also be at variance with the terms of sub-section (2) itself. The operative words in sub-section (2) viz. "authorize the detention of the accused..... for a term not exceeding 15 days in the whole" will have to be read differently in so far as the first order of remand is concerned so as to read as "for a term not exceeding 15 days in the whole from the date of arrest". This would necessitate the adding of more words to the Section than what the Legislature has provided. Another anomaly that would occur is that while sub-section (2) empowers the Magistrate to order the detention of an accused "in such custody as such Magistrate thinks fit, for a term not exceeding 15 days in the whole" the Magistrate will be disentitled to placing an accused in police custody for a full period of 15 days if the period of custody is to be reckoned from the date of arrest because the period of custody prior to the production of the accused will have to be excluded from the total period of 15 days.

13. Apart from these anomalous features, if an accused were to contend that he was taken into custody more than 24 hours before his production before the Magistrate and the police officer refutes the statement, the Magistrate will have to indulge in a fact finding inquiry to determine when exactly the accused was arrested and from what point of time the remand period of 15 days is to be reckoned. Such an exercise by a Magistrate ordering remand is not contemplated or provided for in the Code. It would, therefore, be proper to give the plain meaning of the words occurring in sub-section (2) and holding that a Magistrate is empowered to authorize the detention of an accused produced before him for a full period of 15 days from the date of production of the accused."

(emphasis supplied)

12. Notably, even in this reported case, the accused was arrested by the

police without arrest warrant and produced before the concerned Magistrate on the next day within 24 hours and initial judicial custody for a period of 15 days was ordered, which was extended from time to time.

13. In the case of *Central Bureau of Investigation, Special Investigation Cell-1, New Delhi* (supra), in paragraph 7 of this decision, the Supreme Court has reproduced the relevant extract from paragraph 15 of the decision in the case of *Chaganti Satyanarayana* (supra) as reported in (1986) 3 SCC 141 (equivalent paragraph 16 of the report in AIR 1986 SC 2130). The said observations must be understood in the context of the argument canvassed before the Supreme Court by the Counsel for accused in that case as noted in paragraph 3 of the reported decision - that the police custody, if at all, be granted by the Magistrate should be only during the period of first 15 days "from the date of production of the accused before the Magistrate" and not later and that subsequent custody, if any should only be judicial custody. and the question of granting police custody after the expiry of first 15 days remand does not arise.

14. As is noted earlier, the 15 days period specified in Section 167 is ascribable to the action taken by the police in compliance of its obligation under Section 57; and as a consequence of production of the accused before the Magistrate, the period specified in Section 167, would start running from the date of first remand order passed by the Magistrate and not otherwise. Further, the outer limit of 15 days provided by Section 167 of the Code is from the date of production of accused arrested by the police without arrest warrant, before the Magistrate and not the earlier period at all. That was the restriction to be borne in mind by the Designated Court, while considering the prayer made by the Investigating Agency for further police remand.

15. Counsel for the respondent was at pains to persuade us to take the view that the order dated 18.06.2015 must be construed as an order of remand for the purpose of Section 167 (2) of the Code and if so read, the 15 days period would expire on 03.07.2015. We are not impressed by this submission. For, the power of remand can be exercised by the Magistrate only after the accused is produced before him by the police after his arrest without arrest warrant, in terms of Section 167 of the Code before filing of the charge-sheet. Whereas, the High Court whilst hearing bail application under Section 439 of the Code, exercises special powers when the person is already in custody – police custody, judicial custody or surrenders before the Court for

consideration of his prayer for bail. Further, Section 167 of the Code is a provision stipulating limitation of maximum period of 15 days in the whole for police custody of the accused for facilitating investigation of a given crime. That time starts from the "first remand" order passed by the Magistrate after production of the accused arrested by the police without arrest warrant. The necessity of obtaining order of remand arises because of the arrest made by the police without arrest warrant. However, when it is a case of accused taken in judicial custody as in the present case, being condition precedent for consideration of his prayer for bail, by no stretch of imagination it can be ascribable to an arrest by the police without arrest warrant as such. As it cannot be termed as a case of arrest by the police without arrest warrant, the limitation provided under Section 167 of the Code will not get ignited. The provision such as Section 167 is to ensure that if a person is arrested by the police without arrest warrant or the custody given to the police of the accused pursuant to the order passed by the Court, police is obliged to produce that person before the Magistrate within 24 hours soon thereafter and abide by the directions issued by the Magistrate from time to time – be it in respect of judicial custody or police custody, as the case may be. It is only in that situation the rigours of Section 167(2) of outer limit of police custody of 15 days in the whole would come into play.

16. The question whether the person should be released on bail by the High Court without his arrest by the police is completely independent of the question whether the person should be sent to judicial custody or police custody during the relevant period. Indeed, during the pendency of the bail application before the High Court, the accused surrenders and is ordered to be sent to police custody. The situation may attract the rigours of Section 167 of the Code – of producing the accused before the Magistrate and to which the limitation of 15 days in the whole may be attracted. Further, if upon such production of the accused, the Magistrate directs judicial custody, before the High Court finally decides the prayer for bail and if the High Court finally rejects the prayer for bail of that accused with the finding that custody of the accused deserves to be given to police for the purpose of investigation of the same crime, the High Court being a Court of superior jurisdiction may also overturn the order of Magistrate of refusing to give police custody, subject to the limitation specified in Section 167 of the Code. However, we need not dilate on this aspect further as the same does not arise for consideration in the present case and leave it open to be considered in an appropriate case.

17. Suffice it to observe that the Trial Court in the impugned judgment has misread and misapplied the dictum of the Supreme Court in the case of *Central Bureau of Investigation, Special Investigation Cell-1, New Delhi* (supra) to the fact situation of the present case.

18. Counsel for the respondent was at pains to persuade us to take the view that recent decision of the Supreme Court in the case of *Sundeep Kumar Bafna v. State of Maharashtra & Anr.* (2014) 2 SCC Online SC 257 answers the issue under consideration. Our attention was invited particularly to paragraphs 20 and 23 of the said decision to persuade us to take the view that the order passed on 18.06.2015 by this Court was nothing short of an order to be passed in exercise of power under Section 167(2) of the Code. We reject this submission atleast on two counts. Firstly, because the observations found in the said decision as pressed into service, are in the context of the question answered by the Supreme Court as to whether the High Court is competent to allow the accused to surrender directly before it while considering his prayer for bail under Section 439 of the Code. The observations must be read in that context and would be binding precedent on the question decided by the Supreme Court. It is not possible to suggest that any observation made in paragraph 20 and 23 of this decision, which has been pressed into service, can be said to obiter dicta so as to have binding effect for considering the question posed in the present case. In that, the direction given by the High Court to send respondent to judicial custody during the hearing of his bail application after he had surrendered before the Court is ascribable to exercise of powers under Section 167 (2) of the Code by the High Court itself. On the other hand, the observation in paragraph 20 of the this reported decision makes it amply clear that after the bail application is rejected, the High Court may pass further direction of sending the accused to judicial custody or police custody. The question posed in the present application, as aforesaid, however, is the time from when 15 days period specified in Section 167 of the Code for police custody must be reckoned, which as noted earlier and as is explicit from Section 167 of the Code must commence from the date of production of the accused for the first time by the police before the concerned Magistrate in connection with same crime consequent to his arrest by the police without arrest warrant and as in the present case in furtherance of direction given by the High Court whilst rejecting the bail application. Person who surrenders before the Court and is, therefore, directed to be kept in judicial custody during the pendency of his bail

application can by no stretch of imagination be said to be have been arrested by the police (without arrest warrant in exercise of police powers) or to be in police custody as such. Thus understood, the decisions pressed into service by the respondents will be of no avail.

19. A priori, the opinion recorded by the Designated Court in the impugned order of limiting the period of police custody of the respondent only till 03.07.2015 is untenable.

ORDER

1) For the reasons dictated in open Court, we allow this application filed by the State and set aside the impugned order passed by the Trial Court dated 30.06.2015 to the extent of having given police custody of the respondent in respect of Crime No.14/2013 only upto 03.07.2015.

2) We hold that the Trial Court erroneously assumed that the maximum permissible period for police custody of respondent in the present case cannot exceed beyond 03.07.2015. Instead, we hold that in the facts of the present case, the Investigating Agency was entitled to ask for police custody of the respondent in connection with the above noted crime upto 15 days in the whole from 30.06.2015, being the date of "first remand" order passed by the Designated Court in exercise of powers under Section 167 of Cr.P.C. consequent to production of the respondent by the police before it for the first time, as per the liberty given by this Court vide order dated 29.6.2015 in M.Cr.C. No.8811/2015.

3) Further, keeping in mind the fact situation of the present case, as has been elaborately considered by us while deciding M.Cr.C. No.8811/2015 filed by the respondent for bail in the stated crime vide order dated 29.6.2015, for the time being, we extend the police custody of the respondent till 06.07.2015. The respondent shall remain in police custody till then and to be produced before the concerned Designated Court on or before 06.07.2015.

4) The Investigating Agency will be free to apply for further extension of police custody of the respondent in Crime No.14/2013, for part or for maximum period prescribed therefor, in terms of Section 167 of the Cr.P.C. The Designated Court may consider that request of the Investigating Agency on its own merits and in accordance with law.

5) All concerned to act on the basis of this operative order which is part

of the entire order dictated in open Court in the presence of the counsel appearing for the respective parties beyond the Court hours till 5:10 p.m. Inasmuch as, transcription and release of the entire order is likely to take some time and also because of the urgency.

6) **The operative part of this order be made available to the parties forthwith to enable them to produce the same before the Designated Court for information and compliance.**

Order accordingly.

I.L.R. [2015] M.P., 2285
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice C.V. Sirpurkar
M.Cr.C.No. 16978/2014 (Jabalpur) decided on 15 July, 2015

UMANG CHOUDHARY ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Penal Code (45 of 1860), Sections 420, 467, 406, 468 & 471/34 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Quashment of charge-sheet and proceedings - Compromise - **Commercial transaction between complainant and Company - Complainant has filed an application that outstanding issues between her and Company have been resolved and does not want any further action - No useful purpose would be served in pursuing such prosecution - Proceedings quashed. (Paras 8 to 15)**

दण्ड संहिता (1860 का 45), धाराऐं 420, 467, 406, 468 व 471/34 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – आरोप–पत्र एवं कार्यवाहियां अभिखंडित की जाना – समझौता – शिकायतकर्ता और कंपनी के बीच वाणिज्यिक संव्यवहार – शिकायतकर्ता ने आवेदन प्रस्तुत किया कि उसके और कंपनी के बीच के विद्यमान विवाद सुलझा लिये गये हैं और वह कोई अतिरिक्त कार्यवाही नहीं चाहता – उक्त अभियोजन को जारी रखने से कोई उपयुक्त प्रयोजन हासिल नहीं होगा – कार्यवाहियां अभिखंडित।

Cases referred :

(2003) 4 SCC 675, AIR 2009 SC 428, AIR 2008 SC (Supp.) 1171, (2012) AIR SCW 5333, 2014 AIR SCW 2065, (2014) 9 SCC 653.

G.S. Ahluwalia, for the applicant.
Shahinn Fatima, G.A. for the non-applicant/State.

ORDER

C.V. SIRPURKAR, J. :- This Miscellaneous Criminal Case has been instituted on application under Section 482 of the Cr.P.C. filed for quashing the charge-sheet and proceeding in the Sessions trial No.558/2014 pending in the Court of Shri M.C. Soni, Additional Sessions judge, Jabalpur, (M.P.).

2. It has been submitted hereby that the complainant/respondent No.2 Rashmi Shrivas lodged a first information report in P.S. Vijaynagar, District Jabalpur, to the effect with Key Electronic and System Private Limited, Mumbai, which also had a branch office in Noida, represented by accused persons Mukesh Bhardwaj, Punit Gaur, Aman Singh Yadav, Sandeep, Kishore Dhanraj, Ajay, Amit Suhag, Shahil Batra and Bhavna Bansal claiming to be Broker, Marketing Director, Company Head, Director, Manager, Technician etc., cheated the complainant/ respondent No.2 Rashmi Shrivas into opening a showroom as franchisee of aforesaid Key Electronic and System Private Limited at Home Science College Road, Right Town, Jabalpur. She paid Rs.14,16,640/- against the supply of Electronic Gadgets like television, mobile phone, mobile tablet and micro-wave oven etc. She also paid 5,00,000/- in cash to aforesaid accused persons Mukesh, Aman Yadav, Punit Gour and Taranjeet. The show-room was inaugurated on 20th October, 2015 by accused Mukesh Bhardwaj. Thereafter, the aforesaid company called back the Electronic Gadgets worth Rs.5,71,000/- on the pretext of replacement. However, in spite of repeated reminders neither any replacement nor any refund was made.

3. The entire transaction took place by way of e-mail. The e-mail ID of the complainant/respondent No.2 was also created by the company. However, they did not return the amount and in spite of repeated reminders, they did not honour their obligation. Gradually they started to avoid the phone calls and e-mails made by the complainant. After sometime, the branch office at Noida was also closed down and aforesaid accused persons went *incommunicado*.

4. After investigation, the police concluded that the applicant/accused Umang Choudhary, resident of Gurgaon (Haryana) who impersonated as Aman yadav, Ajay and Amit Suhag in collusion with co-accused Mukesh Bhardwaj, Punit Gour, Kishore Dhanraj, Shahil Batra, Bhavna Bansal and Taranjeet @ Taran Choudhary and Amit Suhag @ Sandeep Choudhary conspired to defraud the complainant

and created forged e-mails I.Ds. and documents and got a showroom of electronic gadgets opened by the complainant in the name of Seven Star Group and thereafter, they vanished. Thus, they defrauded the complainant/respondent No.2 Rashmi Shrivas of approximately Rs.25,00,000/-.

5. During investigation applicant Umang Choudhary was arrested on 19.05.2015. Co-accused Punit Gour was arrested on 24.02.2014. Consequently, charge-sheet under Sections 420, 406, 467, 468, and 471 read with Section 34 of the IPC was filed against the applicant /accused Umang Choudhary. Further investigation in respect of remaining accused persons under Section 173 (8) of the Cr.P.C is going on. Criminal case against the applicant Umang Choudhary is pending in the Court of Shri M.C.Soni, Additional Sessions Judge, Jabalpur in Sessions Trial No.558/2014.

6. This application under Section 482 of the Cr.P.C has been moved on behalf of the applicant Umang Choudhary on the ground that no first information report was lodged against the applicant Umang Choudhary. He has been falsely implicated in the case by the police alleging that he defrauded the complainant by impersonating as Ajay, Aman Singh Yadav and Amit Suhag. Thus, it is a case of mistaken identity.

7. Complainant Rashmi Shrivas and Sarla choudhary mother of the applicant Umang Choudhary filed a compromise application in the Court of Additional Sessions Judge, Jabalpur, wherein it was stated that the accused persons had induced her to deposit money with aforesaid company; however, now there is no dispute between the parties and she wished to enter into a compromise in the case with accused persons of her own free will. However, learned trial Court by order dated 29.09.2014 rejected the application for compromise on the ground that Sections 467, 468 and 471 are not compoundable.

8. Subsequently, aforesaid Sarla, mother of incarcerated accused Umang Choudhary and complainant Rashmi Shrivas have moved an application (I.A.No.12157/2015) before this Court on 26.06.2015; wherein, it has been submitted by complainant Rashmi Shrivas that she did not enter into any transaction with applicant Umang Choudhary and he has nothing to do with the case. Actually Umang Choudhary is an employee of Mercer India Limited, who used to supply human resources to Electronic System Private Limited. The complainant further submitted that the dispute between the Electronic System Private Limited and complainant Rashmi Shrivas has been settled and the parties have enteredin to a compromise. As such, the complainant/respondent No.2 does not want any action

to be taken against Electronic System Private Limited, Umang Choudhary and other accused persons.

9. She also stated in the application that she had entered into compromise without any coercion, threat or inducement and the parties shall not initiate any legal action against each other in future. Aforesaid compromise was verified by Registrar (J-I) of this Court on 30.06.2015, who has recorded the findings that the complainant had entered into a compromise and settled her dispute with the company without undue influence or coercion.

10. Parties have stated at bar that Session Trial No.558/2014 is still pending in the Court.

11. Now the question that arises for consideration is, whether the complainant can be allowed to enter into compromise with the accused persons including applicant Umang Choudhary in a case involving offences under Sections 467, 468 and 471 of the IPC, which are non-compoundable?

12. It has been held in the case of *B.S. Joshi Vs. State of Haryana* (2003) 4 SCC 675 that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code. In the case of *Nikhil Merchant Vs. CBI,* AIR 2009 Supreme Court 428, the apex Court held that in criminal proceedings filed under Section 420, 468 and 471 of the IPC, it was improper to refuse to quash such proceedings on the ground that the offences are non-compoundable even after parties have entered into a compromise. Further in the case of *Manoj Sharma Vs. State,* AIR 2008 SC (Supplementary) 1171, the Supreme Court held that in a case under Sections 420, 468, 471 read with Sections 34 and 120 (B) of the IPC, the dispute between the complainant and the accused being of private, personal nature, refusal to quash FIR on the basis of compromise was not sustainable In the case of *Gian Singh Vs. State* of Punjab (2012) AIR SCW 5333, the Apex Court held that in a Criminal case having overwhelmingly and predominatingly civil flavour, where the wrong is basically private or personal in nature and the parties have resolved their entire dispute, High Court may quash remaining proceedings if in its view, due to compromise between the offender and the victim, possibility of conviction is bleak and continuation of Criminal proceedings would cause extreme injustice to the accused. In the case of *Narendra Singh Vs. State of Punjab,* 2014 AIR SCW 2065, the Apex Court laid guidelines to the effect that Criminal cases having overwhelmingly and predominatingly civil character,

particularly those arising out of the commercial transactions, should be quashed when the parties have resolved their entire dispute among themselves. In a recent pronouncement along the same lines, in the case of *Yogendra Yadav Vs. State of Jharkhand* (2014) 9 SCC 653, the Supreme Court held that when the High Court is convinced that the offences are entirely personal in nature and; therefore, do not affect public peace or tranquility and where it feels that quashing of such proceedings on account of compromise would bring about peace would secure ends of justice, it should not hesitate to quash them, because in such cases, the prosecution becomes a lame duck prosecution, pursuit whereof would be wastage of time and energy.

13. Applying aforesaid principles to the case at hand, it may be observed that initially there was a commercial transaction between the parties, which in due course of time fell through. The dispute between the parties was of a private and commercial in nature. It is amicable resolution between the parties would neither effect the public at large nor send a wrong signal to the society. Though, the complainant was said to have been defrauded to the extent of Rs. 25,00,000/-, she has entered into a compromise with the company and the accused persons without any coercion or threat of her own freewill and accord. She has categorically stated that all the outstanding issues between herself and the company have been resolved to her satisfaction; therefore, she does not want any further action against the company and the accused persons including present applicant Umang Choudhary. Since the complainant and the accused persons have amicably resolved their dispute, the complainant is unlikely to support the prosecution version and pursuit of such prosecution would be a futile exercise. Thus, no useful purpose would be served in pursuing such the prosecution.

14. In aforesaid view of the matter, it would be in the interest of justice to quash the charge-sheet and the proceedings in Sessions Trial No.558/2014, arising therefrom.

15. Thus this petition under Section 482 of the Code of Criminal Procedure is allowed. Consequently, charge-sheet and proceedings in Sessions Trial No.558/2014 pending in the Court of Additional Sessions Judge, Jabalpur stand quashed.

16. In the result, applicant Umang Choudhary shall be set at liberty forthwith, if he is not required in connection with any other case.

C.C. as per rules.

Order accordingly.

I.L.R. [2015] M.P., 2290
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Shantanu Kemkar &
Mr. Justice Rajendra Mahajan
M.Cr.C. No. 2186/2015 (Jabalpur) decided on 27 July, 2015

T.R. TAUNK ...Applicant
Vs.
STATE OF M.P. & anr. ...Non-applicants

***Prevention of Corruption Act (49 of 1988), Sections 2(c)(i), 13(1)(d), 13(2) - Public Servant* - Petitioner had retired from service and is practicing as Advocate - He was appointed as Enquiry Officer to conduct departmental enquiry against complainant - Co-accused demanded Rs. 1 lac on behalf of applicant to exonerate him in the enquiry - Co-accused was caught red handed - Petitioner after being appointed as Enquiry Officer is to be remunerated by honorarium/fees for his services - Hence, petitioner is a public servant - F.I.R. has been rightly registered. (Paras 4 to 6)**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराऐं 2(सी)(i), 13(1)(डी), 13(2) – लोक सेवक – याची सेवा से निवृत्त हुआ था और अधिवक्ता के रूप में व्यवसाय कर रहा है – उसे शिकायतकर्ता के विरूद्ध विभागीय जांच संचालित करने के लिये जांच अधिकारी के रूप में नियुक्त किया गया – सह–अभियुक्त ने उसे जांच से विमुक्त करने के लिये आवेदक की ओर से रू. 1 लाख की मांग की – सह–अभियुक्त को रंगे हाथों पकड़ा गया – याची को जांच अधिकारी के रूप में नियुक्त किये जाने के पश्चात् उसकी सेवाओं के लिये मानदेय/फीस द्वारा पारिश्रमिक दिया जाना होगा – अतः, याची लोक सेवक है – प्रथम सूचना रिपोर्ट को उचित रूप से पंजीबद्ध किया गया।

Surendra Singh with *Akshat Agrawal*, for the applicant.
Pankaj Dubey, for the non-applicants.

ORDER

The Order of the Court was delivered by :
RAJENDRA MAHAJAN, J. :- The petitioner has evoked extraordinary jurisdiction of this Court under Section 482 of the Cr.P.C., praying for quashment of an F.I.R. bearing No.320/2014 registered at Special Police Establishment Lokayukta Office, Bhopal Division, Bhopal against him and one Gopal Shivhare for the offences punishable under Sections 7, 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988 (for short 'the Act') and 120(B) of the

I.P.C.

2. The brief facts of the case sans unnecessary details are given below:-

(2.1). The Hotel Lake View Ashok Bhopal (for short 'the hotel') is a joint venture of Government of Madhya Pradesh and Government of India. The hotel has adopted service rules of the Madhya Pradesh State Tourism Development Corporation Service (discipline, control and Appeal) Byelaws, 2004 (for short 'the byelaws') for its employees. At the relevant time Praveen Kumar Dubey was posted as Senior Front Office Assistant of the hotel. The Managing Director of the hotel, is the disciplinary authority of the employees of the hotel. He has initiated departmental enquiry against Praveen Kumar Dubey (for short 'the delinquent employee') for having committed gross misconduct in the course of discharge of his official duties. He has appointed the petitioner as Inquiry Officer and Gopal Shivhare, an employee of the Madhya Pradesh State Tourism Development Corruption, as Presenting Officer.

(2.2) During the pendency of the departmental enquiry, delinquent employee made a written complaint dated 01.07.2014 to the S.P.E. Lokayukta, Bhopal Division, Bhopal that Gopal Shivhare, the presenting officer of the departmental enquiry pending against him, has demanded rupees one lac on behalf of the inquiry officer i.e, the petitioner for giving inquiry report in his favour. Thereafter, he met the petitioner in his residence in the presence of Gopal Shivhare. At that time, the petitioner told him that his General Manager has asked him to submit inquiry report against him so that he may terminate his services. He does want to give them rupees one lac as bribe and get them caught taking bribe from him. Upon his report, on 12.07.2014, Inspector Neeta Choubey laid a trap in accordance with the procedure and caught Gopal Shivhare accepting Rs.25,000/- as bribe from him. Thereafter, the F.I.R. is registered against the petitioner and Gopal Shivhare for the aforesaid offences.

3. Learned counsel appearing for the petitioner submits that long back the petitioner had retired as Under Secretary to the Government of Madhya

Pradesh and thereafter he got himself enrolled as an advocate and has been practicing law. In view of the above facts, the status of the petitioner is not of a public servant as defined under Section 2(c) of the Act. Therefore, the respondents have wrongly registered the F.I.R. against him. Hence, the F.I.R. be quashed against the petitioner by this Court in exercise of power under Section 482 of the Cr.P.C.

4. Per contra, learned counsel appearing for the respondents submits that the byelaws permits the disciplinary authority to appoint any competent outsider as an inquiry officer. The petitioner had conducted some departmental enquiries against the employees of the hotel, therefore, he is appointed as an inquiry officer in the instant case. It is also submitted by him that the petitioner is to be remunerated by honorarium/fees for his services as the inquiry officer of the present case. Hence, the petitioner is a public servant in so far as the instant case is concerned as per the definition of public servant described in Section 2(c)(i) of the Act. In support of this contention learned counsel has referred to para two of the letter dated 31.07.2014 (for short 'the letter') written by the General Manager of the hotel to the respondent No.2 in which it is stated that the petitioner is appointed on fixed honorarium/fees as the inquiry officer and the same is approved by the Managing Director. Under the circumstances, the respondent has rightly registered the F.I.R. against the petitioner under the provisions of the Act.

5. Section (2)(c)(i) of the Act, defines public servant as

> *"any person in the service or pay of the government or remunerated by the Government by fees or commission for the performance of any public duty;"*

6. Upon the perusal of the letter in the context of the aforesaid definition of the public servant, we find that the petitioner is a public servant in so far as he is an inquiry officer of the delinquent employee. Therefore, the respondents have not committed any illegality and impropriety by registering the F.I.R. against the petitioner under the provisions of the Act. Consequently, this petition being meritless is dismissed.

7. Accordingly, this petition stands disposed of.

8. C.C. as per rules.

Order accordingly.