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कम्पनी अधिनियम (1956 का 1), धारा 446(2) – सिविल वाद – सिविल न्यायालय की सक्षमता – समापन कार्यवाही लंबित – कम्पनी अधिनियम के उपबंध, कंपनी जज के साथ ही सिविल न्यायालय की अधिकारिता को अलग नहीं करते – म.प्र. राज्य ने अन्य सिविल वाद में शासकीय समापक के विरुद्ध कब्जे की वापसी और घोषणा चाही, जिसे कम्पनी न्यायालय से अनुमति के अभाव में अपोषणीयता के आधार पर खारिज किया गया – उक्त आदेश को अंतिमता प्राप्त हुई – इस प्रभाव की घोषणा कि विवादित सम्पत्ति समापन के अधीन कम्पनी की है, को अंतिमता प्राप्त हुई – अधिनियम की धारा 446(2) के अंतर्गत अनुमति हेतु आवेदन की खारिजी, किसी विपर्यस्तता या अवैधता या मनमानापन से ग्रसित नहीं – अपील खारिज। (सत्य नारायण वि. मे. जियाजीराव कॉटन मिल्स लि.) (DB)...243

Constitution – Article 19(1)(g) & Petroleum Act (30 of 1934), Section 3 & Petroleum Rules, 2002, Rules 144, 149 – Establishment of retail outlets by the Oil Company – NOC have been granted by various concerned department – Denial of NOC by NHAI based upon the guidelines – Held – Guidelines framed by the Indian Road Congress are not mandatory they have no statutory force – Therefore, a retail outlet can be established within the distance of 1000 meter of the existing fuel station – So, far as the toll plaza is concerned same is not in existence – Denial of establishment of retail outlets and denial of NOC to Indian Oil Corporation Ltd. amounting to violation of Fundamental Rights guaranteed under Article 19(1)(g) of the Constitution – Impugned order is set-aside. [Saroj Bhatia (Smt.) Vs. Indian Oil Corporation Ltd.] ...98

संविधान – अनुच्छेद 19(1)(जी) एवं पेट्रोलियम अधिनियम (1934 का 30), धारा 3 एवं पेट्रोलियम नियम, 2002, नियम 144, 149 – तेल कंपनी द्वारा खुदरा विक्रय केन्द्रों की स्थापना – भिन्न संबंधित विभाग द्वारा अनापत्ति प्रमाण पत्र जारी

किये गये - एन.एच.ए.आई. द्वारा अनापत्ति प्रमाण पत्र से इंकार, दिशा-निर्देशों पर आधारित - अभिनिर्धारित - भारतीय सड़क कांग्रेस द्वारा विरचित दिशा-निर्देश आज्ञापक नहीं हैं, वे कानूनी शक्ति नहीं रखते - अतः, विद्यमान पेट्रोल पंप से 1000 मीटर की दूरी पर एक खुदरा विक्रय केन्द्र स्थापित किया जा सकता है - जहां तक चुंगी-चौकी का संबंध है, वह अस्तित्व में नहीं है - इंडियन ऑयल कॉर्पोरेशन लिमिटेड को खुदरा विक्रय केन्द्र की स्थापना नामंजूर करना एवं अनापत्ति प्रमाण पत्र नामंजूर करना संविधान के अनुच्छेद 19(1)(जी) के अंतर्गत प्रत्याभूत मूलभूत अधिकारों का उल्लंघन की कोटि में आता है - आक्षेपित आदेश अपास्त। (सरोज माटिया (श्रीमती) वि. इंडियन ऑइल कारपोरेशन लि.) ...98

Constitution - Article 226 - Contract - Judicial Review - High Court in exercise of power under Article 226 would not normally grant the relief of specific performance of contract. [Sri Ram Builders Vs. State of M.P.] (SC)...1

संविधान - अनुच्छेद 226 - संविदा - न्यायिक पुनर्विलोकन - उच्च न्यायालय अनुच्छेद 226 के अंतर्गत शक्ति का प्रयोग करते हुए सामान्यतः संविदा के विनिर्दिष्ट पालन का अनुतोष प्रदान नहीं करेगा। (श्री राम बिल्डर्स वि. म.प्र. राज्य) (SC)...1

Constitution - Article 226 - Non-joinder of 22 applicants, who besides respondent No. 3, had not been granted lease - Held - Non-joinder of those 22 person is of no consequence. [Ultratech Cement Ltd. Vs. State of M.P.] (DB)...123

संविधान - अनुच्छेद 226 - 22 आवेदकों का असंयोजन जिन्हें प्रत्यर्थी क्र. 3 के अतिरिक्त पट्टा प्रदान नहीं किया गया - अभिनिर्धारित - उन 22 व्यक्तियों का असंयोजन प्रभावहीन है। (अल्ट्राटेक सीमेन्ट लि. वि. म.प्र. राज्य) (DB)...123

Constitution - Article 226 & 227 - Maintainability - Petitioner challenged validity of recommendations of State Govt. in favour of respondent No. 3 without assailing order executing mining lease in his favour by State Govt. - W.P. cannot be held to be not maintainable in absence of challenge to consequential order passed by State Govt. in granting lease to respondent No. 3. [Ultratech Cement Ltd. Vs. State of M.P.] (DB)...123

संविधान - अनुच्छेद 226 व 227 - पोषणीयता - याची ने राज्य सरकार द्वारा प्रत्यर्थी क्र. 3 के पक्ष में खनन पट्टा निष्पादित करने के आदेश को चुनौती दिये बिना, उसके पक्ष में राज्य सरकार की अनुशंसाओं की वैधता को चुनौती दी - प्रत्यर्थी क्र. 3 को पट्टा प्रदान करने में राज्य सरकार द्वारा पारित किये गये परिणामिक आदेश को चुनौती के अभाव में यह अभिनिर्धारित नहीं किया जा सकता कि रिट याचिका पोषणीय

नहीं है। (अल्ट्राटेक सीमेन्ट लि. वि. म.प्र. राज्य)

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Constitution – Article 226 & 227 – Territorial Jurisdiction – Respondent No. 3 has raised objection with regard to territorial jurisdiction of M.P. High Court – Land in question over which mining rights are being claimed is situated within territorial jurisdiction of M.P. High Court at Jabalpur – Similarly, order has been passed by State Govt. within territorial jurisdiction of M.P. High Court at Jabalpur – Thus, part of cause of action has arisen within territorial jurisdiction of M.P. High Court at Jabalpur. [Ultratech Cement Ltd. Vs. State of M.P.] (DB)...123

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Hindu Minority and Guardianship Act, (32 of 1956), Section 6, Guardians and Wards Act (8 of 1890), Sections 12 & 25 – Custody of minor girl aged 4½ years – Consideration – Custody given to mother – Paramount consideration is welfare of child and not rights of her parents – Both families belong to agricultural class and they have similar financial and social back ground – Daughter is still 4½ years old and the mother is capable for taking care her properly – No infirmity in the impugned order – Appeal dismissed. [Surendra Patel Vs. Ritu @ Vandana Patel] (DB)...177

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हिंदू अप्राप्तवयता और संरक्षकता अधिनियम, (1956 का 32), धारा 6, संरक्षक और प्रतिपाल्य अधिनियम (1890 का 8), धाराएं 12 व 25 - 4½ वर्ष की उम्र की अवयस्क बालिका का संरक्षण - विचारण - संरक्षण मां को सुपुर्द किया गया - शिशु का कल्याण सर्वोपरि विचार में लिया जाता है और न कि माता-पिता के अधिकार - दोनों परिवार कृषि वर्ग से संबंधित हैं और समान वित्तीय एवं सामाजिक पृष्ठभूमि के हैं - बालिका अभी 4½ वर्ष की है और उसकी उचित देखरेख करने में माता सक्षम है - आक्षेपित आदेश में कोई निःशक्तता नहीं - अपील खारिज। (सुरेन्द्र पटेल वि. रितु उर्फ वन्दना पटेल) (DB)...177

Income Tax Act (43 of 1961), Section 147 - Reassessment proceedings - Can it be reopened by Assessing Officer for the year 2007-08 on the basis of directions of CIT (Appeals) passed in appeal filed for the assessment year 2008-09 - Held - Since the impugned notice issued by the Assessing Officer u/s 147 of the Act merely on the basis of directions issued by CIT (Appeals) in the appeal filed in respect of the year 2008-09 - Same has not been issued independently - Is not sustainable - However, Assessing Officer can take fresh steps against the petitioner. [Pramod Kumari Singhal (Smt.) Vs. Income Tax Officer, Indore] (DB)...92

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District Jail available for promotion from amongst the Senior Probation and Welfare Officer – D.P.C. was convened and the respondent Nos. 3 to 7 were considered and as they have completed the requisite years of service – They have rightly been promoted – Petition dismissed. [Madhukant Tiwari Vs. State of M.P.] ...50

जेल सेवा (राजपत्रित) मर्ती एवं पदोन्नति नियम, म.प्र. 2002 – पदोन्नति – प्रत्यर्थी क्र. 3 से 7 तक को असंशोधित नियमों के अनुसार पदोन्नत किया गया – वरिष्ठ परिवीक्षा एवं कल्याण अधिकारी के पूर्व में विहित कोटा को, 25.10.2008 को नियम संशोधित करके 20 प्रतिशत से घटाकर 10 प्रतिशत किया गया – डी.पी.सी. मीटिंग 25.06.2009 को की गई – प्रत्यर्थी क्र. 3 से 7 की असंशोधित नियम, 2002 के अंतर्गत पदोन्नति की विधि में अनुचित बताते हुए चुनौती दी गई – अभिनिर्धारित – चूंकि वर्ष 2004, 2006 और 2007 में अधीक्षक, जिला जेल के किसी पद को वरिष्ठ परिवीक्षा एवं कल्याण अधिकारियों की पदोन्नति द्वारा नहीं भरा गया और उन्हें अग्रणीत किया गया – वरिष्ठ परिवीक्षा एवं कल्याण अधिकारी में से पदोन्नति हेतु अधीक्षक, जिला जेल के 5 अवशिष्ट पद उपलब्ध थे – डी.पी.सी. बुलायी गयी और प्रत्यर्थी क्र. 3 से 7 तक को विचार में लिया गया और जैसा कि उन्होंने अपेक्षित वर्षों की सेवा पूर्ण कर ली थी, उन्हें उचित रूप से पदोन्नत किया गया है – याचिका खारिज। (मधुकांत तिवारी वि. म.प्र. राज्य) ...50

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खनिज छूट नियम, 1960, नियम 63ए — याची ने खनन पट्टा प्रदान किये जाने हेतु आवेदन किया — खनन पट्टा प्रदान किये जाने हेतु आवेदन को कोई कारण दर्शाये बिना विलम्बित रूप से अस्वीकार किया गया — राज्य सरकार द्वारा आवेदनों का विनिश्चय करने में अत्याधिक विलम्ब का कोई कारण अभिलेख पर नहीं रखा गया — प्रकट रूप से याची ने आदेश पारित किये जाने में विलम्ब के फलस्वरूप प्रतिकूल प्रभाव सहन किया है — आक्षेपित आदेश को कायम नहीं रखा जा सकता। (अल्ट्राटेक सीमेन्ट लि. वि. म.प्र. राज्य) (DB)...123

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मोटर यान अधिनियम (1988 का 59), धारा 149 – बीमाकर्ता का दायित्व – 11 बजे दुर्घटना घटी – बीमा का प्रीमियम 3.10 बजे जमा किया गया – दुर्घटना के समय वाहन बीमित नहीं – बीमा कम्पनी का दायित्व नहीं। (नेशनल इश्योरेन्स कंपनी लि. वि. हरपाल सिंह) ...168

Motor Vehicles Act (59 of 1988), Section 149 – Liability of Insurer – Tractor was insured for agricultural purposes – At the time of accident, tractor was being used for transporting sand and deceased was sitting on the trolley of such tractor – As tractor was being plied contrary to the purpose for which the same was insured, the insurance company is not liable. [Karan Lal Vs. Charan Lal] ...164

मोटर यान अधिनियम (1988 का 59), धारा 149 – बीमाकर्ता का दायित्व – ट्रैक्टर को कृषि प्रयोजनों हेतु बीमित किया गया था – दुर्घटना के समय, ट्रैक्टर का उपयोग रेत परिवहन हेतु किया जा रहा था और उक्त ट्रैक्टर की ट्रॉली में मृतक बैठा था – चूंकि ट्रैक्टर को उस प्रयोजन के विपरीत चलाया जा रहा था, जिसके लिये वह बीमित था, बीमा कम्पनी उत्तरदायी नहीं। (करण लाल वि. चरण लाल) ...164

Payment of Gratuity Act (39 of 1972), Section 4 – See – Central Bank of India (Officers) Service Regulations, 1979, Regulation 46 [Zonal Manager, Central Bank of India Vs. R.R. Das] ...80

उपदान का मुगतान अधिनियम (1972 का 39), धारा 4 – देखें – सेंट्रल बैंक ऑफ इंडिया (अधिकारी) सेवा विनियमन, 1979, विनियम 46 (जोनल मैनेजर, सेंट्रल बैंक ऑफ इंडिया वि. आर.आर. दास) ...80

Penal Code (45 of 1860), Section 302 – Circumstantial Evidence – Appellant and his fiancée after joining the party went for an outing – Appellant informed the police that two unknown persons had attacked him and his fiancée – Deceased has suffered multiple injuries as well as appellant had also received multiple injuries including which was dangerous to life – Appellant alleged to have started disliking his fiancée because of her fattiness and introvert nature – Deceased had already joined health club for reducing her weight – Motive to commit murder due to deceased fattiness and due to her being introvert is wholly unreliable. [Ritesh Vs. State of M.P.] (DB)...218

दण्ड संहिता (1860 का 45), धारा 302 – परिस्थितिजन्य साक्ष्य – अपीलार्थी एवं उसकी मंगेतर समारोह में शामिल होने के बाद प्रमोद-भ्रमण पर गये –

अपीलार्थी ने पुलिस को सूचित किया कि दो अज्ञात व्यक्तियों ने उस पर एवं उसकी मंगेतर पर हमला किया — मृतिका ने अनेक क्षतियां सहन की, साथ ही अपीलार्थी को भी अनेक क्षतियां आईं, जिसमें जीवन के लिए घातक क्षतियां शामिल थी — अभिकथित है कि अपीलार्थी अपनी मंगेतर के मोटापे एवं अंतर्मुखी स्वभाव के कारण उसे नापसंद करने लगा था — मृतिका ने अपना वजन घटाने के लिए पहले ही हेल्थ क्लब में प्रवेश ले लिया था — मृतिका के मोटापे के कारण या उसके अंतर्मुखी स्वभाव के कारण हत्या कारित करने का हेतुक पूर्णतः अविश्वसनीय है। (रीतेश वि. म.प्र. राज्य) (DB)...218

Penal Code (45 of 1860), Section 302 – Injuries – Doctor had opined that injuries on the body of the deceased were caused by two different weapons – However, prosecution tried to fasten everything on appellant – Absence of blood group and absence of evidence of origin of blood group destroyed the case of prosecution – It is unreasonable to draw adverse inference against the appellant. [Ritesh Vs. State of M.P.] (DB)...218

दण्ड संहिता (1860 का 45), धारा 302 – क्षतियां – चिकित्सक का अभिमत कि मृतिका के शरीर की क्षतियां, दो भिन्न शस्त्रों द्वारा कारित थीं – किन्तु अभियोजन ने सब कुछ अपीलार्थी पर लादने का प्रयास किया – रक्त समूह की अनुपस्थिति तथा रक्त समूह के स्रोत के साक्ष्य की अनुपस्थिति से अभियोजन प्रकरण नष्ट हुआ – अपीलार्थी के विरुद्ध प्रतिकूल निष्कर्ष निकालना अयुक्तियुक्त है। (रीतेश वि. म.प्र. राज्य) (DB)...218

Penal Code (45 of 1860), Section 302 – Murder – Circumstantial Evidence – Court has to examine the evidence in its entirety especially in case of circumstantial evidence and ensure that the only inference drawn from evidence is the guilt of accused – If more than one inference can be drawn then the accused must have the benefit of doubt. [Ritesh Vs. State of M.P.] (DB)...218

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – परिस्थितिजन्य साक्ष्य – न्यायालय को साक्ष्य का परीक्षण उसकी संपूर्णता में करना चाहिए, विशेष रूप से परिस्थितिजन्य साक्ष्य के प्रकरण में और सुनिश्चित करना चाहिए कि साक्ष्य से निकाला गया निष्कर्ष केवल अभियुक्त की दोषिता का है – यदि एक से अधिक निष्कर्ष निकाले जा सकते हैं, तब अभियुक्त को संदेह का लाभ मिलना चाहिए। (रीतेश वि. म.प्र. राज्य) (DB)...218

Penal Code (45 of 1860), Section 302 – Murder – Complainant alongwith his son and daughter were collecting Mahua when the appellant No. 1 tried to stop them from doing so – On refusal to do so,

appellant No. 1 threatened that he will bring a gun and teach them a lesson – After some time, the complainant noticed that the accused persons were coming with gun and tangi – All the three persons ran towards their house – The appellants entered inside the house of the complainant and fired at son of complainant who died on the spot – Appellant No. 1 also fired causing injury to complainant – F.I.R. was lodged within 2 hours – Gun shot was fired by the appellant with an intention to kill deceased – Trial Court rightly convicted him u/s 302. [Samar Jeet Singh Vs. State of M.P.] (DB)...187

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – शिकायतकर्ता अपने पुत्र और पुत्री के साथ महुआ एकत्रित कर रहा था, जब अपीलार्थी क्र. 1 ने उसे ऐसा करने से रोका – इंकार करने पर अपीलार्थी क्र. 1 ने धमकाया कि वह बंदूक लायेगा और उन्हें सबक सिखायेगा – कुछ देर बाद शिकायतकर्ता ने देखा कि अभियुक्त गण बंदूक और टांगी लेकर आ रहे थे – तीनों व्यक्ति अपने घर की तरफ भागे – अपीलार्थीगण ने शिकायतकर्ता के मकान के अंदर प्रवेश किया और शिकायतकर्ता के पुत्र पर गोली चलायी, जिसकी मृत्यु घटनास्थल पर ही हो गई – अपीलार्थी क्र. 1 ने भी गोली चलायी, जिससे शिकायतकर्ता को चोट कारित हुई – प्रथम सूचना रिपोर्ट 2 घंटे के भीतर दर्ज कराई गई – अपीलार्थी द्वारा मृतक को जान से मारने के आशय से गोली चलायी गई – विचारण न्यायालय ने उसे उचित रूप से धारा 302 के अंतर्गत दोषसिद्ध किया। (समर जीत सिंह वि. म.प्र. राज्य) (DB)...187

Penal Code (45 of 1860), Section 302 – Murder – Last seen together – Appellant and deceased used to go of outing after their engagement – Appellant from very beginning had accepted that the deceased was with him – Doctor had opined that the injuries sustained by appellant cannot be self inflicted – In view of medical evidence, injuries suffered by appellant were neither self inflicted nor friendly hand. [Ritesh Vs. State of M.P.] (DB)...218

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – अंतिम बार एक साथ देखा जाना – अपीलार्थी एवं मृतिका अपनी सगाई के बाद प्रमोद-भ्रमण पर (बाहर घूमने) जाने लगे थे – अपीलार्थी शुरुआत से यह स्वीकार कर रहा है कि मृतिका उसके साथ थी – चिकित्सक का यह अभिमत कि अपीलार्थी को आई क्षतियां स्वयं कारित क्षतियां नहीं – चिकित्सीय साक्ष्य की दृष्टि से अपीलार्थी द्वारा सहन की गई क्षतियां न तो स्वयं कारित थी, न ही मैत्रीपूर्ण हाथों से। (रीतेश वि. म.प्र. राज्य) (DB)...218

Penal Code (45 of 1860), Section 302 – Murder – Seizure of weapon – On 09.12.1995, certain belongings of appellant and deceased were recovered but was not able to get Katar despite information of Ritesh –

Recovery of Katar on 10.12.1995 from the same place clearly goes to prove that it was planted on the spot after search on 09.12.1995 – Recovery of Katar unreliable. [Ritesh Vs. State of M.P.] (DB)...218

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – शस्त्र की जब्ती – 09.12.1995 को अपीलार्थी एवं मृतिका की कतिपय वस्तुएँ बरामद की गई थी, परन्तु रितेश की सूचना के बावजूद कटार नहीं मिल पाई – उसी स्थान से 10.12.1995 को कटार की बरामदगी, स्पष्ट रूप से साबित करती है कि उसे 09.12.1995 की तलाशी के पश्चात घटनास्थल पर रखा गया था। (रितेश वि. म.प्र. राज्य) (DB)...218

Penal Code (45 of 1860), Section 302 – Murder – Suspicion – Suspicion how so ever strong is suspicion only and cannot take shape of proof. [Ritesh Vs. State of M.P.] (DB)...218

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – संदेह – संदेह कितना ही प्रबल क्यों न हो वह केवल संदेह ही है और वह सबूत का रूप नहीं ले सकता। (रितेश वि. म.प्र. राज्य) (DB)...218

Penal Code (45 of 1860), Section 302 – Murder – Witness – Previous version of witnesses is duly corroborated by timely lodged FIR, Post-Mortem Report, M.L.C. of injured – Acceptable testimony of witnesses may be acted upon. [Samar Jeet Singh Vs. State of M.P.] (DB)...187

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – साक्षी – साक्षियों का पूर्वतर कथन, समय पर दर्ज की गयी प्रथम सूचना रिपोर्ट, शव परीक्षण प्रतिवेदन, आहत की एम.एल.सी. द्वारा सम्यक् रूप से अभिपुष्ट होता है – साक्षीगण की स्वीकार योग्य परिसाक्ष्य पर कार्यवाही की जा सकती है। (समर जीत सिंह वि. म.प्र. राज्य) (DB)...187

Penal Code (45 of 1860), Sections 302, 34 – Appellant Maiyadeen and Ramswaroop caused injury to the deceased and continued to assault him till he died – Both the accused showed common intention. [State of M.P. Vs. Maiyadeen] (DB)...200

दण्ड संहिता (1860 का 45), धाराएँ 302, 34 – अपीलार्थी मैयादीन एवं रामस्वरूप ने मृतक को क्षतियाँ पहुँचाई और उसकी मृत्यु होने तक लगातार प्रहार किये – दोनों अभियुक्तों का सामान्य आशय दर्शाता है। (म.प्र. राज्य वि. मैयादीन) (DB)...200

Penal Code (45 of 1860), Section 302/34 – Common intention – Appellant No. 1 had hot talk with complainant – He went to the house of complainant and his intention could be to kill the complainant – There was no need for appellant No. 1 to cause any harm to 11 year old boy who died in the incident – Appellant No. 1 never intended to kill the

deceased – Merely by going to the house of complainant with gun and two companions do not mean that appellant No. 1 had intended to kill the deceased – No common intention of appellant No. 1 with appellant No. 2 to kill deceased child – Conviction of appellant No. 1 for offence u/s 302/34 set aside. [Samar Jeet Singh Vs. State of M.P.](DB)...187

दण्ड संहिता (1860 का 45), धारा 302/34 – सामान्य आशय – शिकायतकर्ता के साथ अपीलार्थी क्र. 1 की कहा-सुनी हुई थी – वह शिकायतकर्ता के घर गया और उसका आशय शिकायतकर्ता को जान से मारना हो सकता है – 11 वर्षीय बालक को कोई हानि कारित करने की अपीलार्थी क्र. 1 को कोई आवश्यकता नहीं थी, जिसकी घटना में मृत्यु हुई – मृतक की मृत्यु कारित करने का अपीलार्थी क्र. 1 का आशय नहीं था – मात्र शिकायतकर्ता के घर बंदूक लेकर और दो साथियों के साथ जाने से यह अर्थ नहीं है कि अपीलार्थी क्र. 1 का आशय मृतक को जान से मारना था – मृतक बालक को जान से मारने का अपीलार्थी क्र. 2 के साथ अपीलार्थी क्र. 1 का सामान्य आशय नहीं – धारा 302/34 के अंतर्गत अपीलार्थी क्र. 1 की दोषसिद्धि अपास्त। (समर जीत सिंह वि. म.प्र. राज्य) (DB)...187

Penal Code (45 of 1860), Sections 302, 34 – Murder – Common intention or common object – Charges u/s 149 and 302 Penal Code – It is clear that the respondent Ramswaroop was jointly tried with the respondent Maiyadeen and his joint criminal actions were duly put to him in his examination u/s 313 of Cr.P.C. – Instead of charge u/s 149 of the Cr.P.C., if he is convicted with help of Section 34 of I.P.C. then, no prejudice would be caused to him – Appeal accepted against the respondents Maiyadeen and Ramswaroop – Convicted of offence u/s 302 I.P.C. and Section 302 r/w Section 34 of I.P.C. respectively and sentenced to life imprisonment. [State of M.P. Vs. Maiyadeen] (DB)...200

दण्ड संहिता (1860 का 45), धाराएं 302, 34 – हत्या – सामान्य आशय या सामान्य उद्देश्य – दण्ड संहिता की धारा 149 एवं 302 के अंतर्गत आरोप – यह स्पष्ट है कि प्रत्यर्थी रामस्वरूप का प्रत्यर्थी मैयादीन के साथ संयुक्त रूप से विचारण किया गया और उनकी संयुक्त आपराधिक कार्यवाही का दंड प्रक्रिया संहिता की धारा 313 के अंतर्गत सम्युक्त रूप से परीक्षण किया गया – यदि उसे दंड प्रक्रिया संहिता की धारा 149 के अंतर्गत आरोप के स्थान पर, भारतीय दंड संहिता की धारा 34 की सहायता से दोषसिद्ध किया जाता है, तब उस पर कोई विपरीत प्रभाव कारित नहीं होगा – प्रत्यर्थी मैयादीन एवं रामस्वरूप के विरुद्ध अपील स्वीकार की गई – क्रमशः दंड संहिता की धारा 302 के अंतर्गत एवं दंड संहिता की धारा 302 सहपठित धारा 34 के अंतर्गत अपराध के लिए दोषसिद्ध एवं आजीवन कारावास के दंड से दण्डादिष्ट। (म.प्र. राज्य वि. मैयादीन) (DB)...200

Penal Code (45 of 1860), Sections 302, 34 – Murder – Name of

accused Bandoo not mentioned in F.I.R. – No overt act attributed to him – It cannot be said beyond reasonable doubt that he participated in assault on deceased. [State of M.P. Vs. Maiyadeen] (DB)...200

दण्ड संहिता (1860 का 45), धाराएं 302, 34 – हत्या – प्रथम सूचना प्रतिवेदन में अभियुक्त बंडू के नाम का उल्लेख नहीं – उसका कोई प्रत्यक्ष कृत्य नहीं दर्शाया गया – इसे युक्तियुक्त संदेह से परे नहीं कहा जा सकता कि वह मृतक पर हमले में शामिल था। (म.प्र. राज्य वि. मैयादीन) (DB)...200

Penal Code (45 of 1860), Sections 302, 34 – No over act attributed to Sitaram for assaulting the deceased – Rightly acquitted for 302. [State of M.P. Vs. Maiyadeen] (DB)...200

दण्ड संहिता (1860 का 45), धाराएं 302, 34 – मृतक पर हमले में सीताराम का प्रत्यक्ष कृत्य नहीं दर्शाया गया – 302 के लिए उचित रूप से दोषमुक्त। (म.प्र. राज्य वि. मैयादीन) (DB)...200

Penal Code (45 of 1860), Sections 302, 34 – P.W. 2 stated that Tulsidas assaulted the deceased whereas no other eye witnesses alleged assault by Tulsidas on deceased – If P.W. 2 could see Tulsidas assaulting deceased then other witnesses would have corroborated the fact – Cannot be said that Tulsidas had common intention. [State of M.P. Vs. Maiyadeen] (DB)...200

दण्ड संहिता (1860 का 45), धाराएं 302, 34 – अभियोजन साक्षी क्र. 2 ने कथन किया कि मृतक पर तुलसीदास ने हमला किया जबकि अन्य प्रत्यक्षदर्शी साक्षियों ने नहीं कहा कि तुलसीदास ने मृतक पर हमला किया – यदि अभियोजन साक्षी क्र. 2 ने तुलसीदास को मृतक पर हमला करते देखा होता, तब अन्य साक्षियों ने इस तथ्य की पुष्टि की होती – नहीं कहा जा सकता कि तुलसीदास का सामान्य आशय था। (म.प्र. राज्य वि. मैयादीन) (DB)...200

Penal Code (45 of 1860), Sections 302/34, 307/34 – Common intention – Third appellant came to the spot alongwith two other appellants with tangi in his hand but there is no overt act on his part – Possibility cannot be ruled out that he would have changed his mind after his arrival at the spot – No overt act to show common intention with co-accused – Third appellant could not have been convicted for any of the offence with the help of Section 34. [Samar Jeet Singh Vs. State of M.P.] (DB)...187

दण्ड संहिता (1860 का 45), धाराएं 302/34, 307/34 – सामान्य आशय – तृतीय अपीलार्थी अन्य दो अपीलार्थियों के साथ अपने हाथ में टांगी लेकर घटनास्थल

पर आया, परंतु उसकी ओर से कोई प्रत्यक्ष कृत्य नहीं है — इस संभावना से इंकार नहीं किया जा सकता कि घटनास्थल पर पहुंचने के पश्चात् उसने अपना मन बदला होगा — सह-अभियुक्त के साथ सामान्य आशय दर्शाने के लिए कोई प्रत्यक्ष कृत्य नहीं — तृतीय अपीलार्थी को धारा 34 की सहायता से किसी अपराध हेतु दोषसिद्ध नहीं किया जा सकता था। (समर जीत सिंह वि. म.प्र. राज्य) (DB)...187

Penal Code (45 of 1860), Section 307 – Attempt to murder – Appellant No. 1 fired at complainant causing simple injury on his elbow – If overall conduct of appellant No. 1 is considered then, it would be apparent that he had intended to kill the complainant – Appellant No. 1 had committed an offence as u/s 307 of I.P.C. [Samar Jeet Singh Vs. State of M.P.] (DB)...187

दण्ड संहिता (1860 का 45), धारा 307 – हत्या का प्रयास – अपीलार्थी क्र. 1 ने गोली चलाकर शिकायतकर्ता को कोहनी पर साधारण चोट कारित की – यदि अपीलार्थी क्र. 1 का संपूर्ण आचरण विचार में लिया जाए, तब यह प्रकट होता है कि उसका आशय, शिकायतकर्ता को जान से मारने का था – अपीलार्थी क्र. 1 ने भा.द.सं. की धारा 307 के अंतर्गत अपराध कारित किया है। (समर जीत सिंह वि. म.प्र. राज्य) (DB)...187

Penal Code (45 of 1860), Section 307/34 – Common intention – Second appellant went to the house of complainant alongwith gun and fired from the gun killing the deceased – He had intention to kill the complainant – Second appellant shared common intention to kill the complainant – He is rightly convicted u/s 307/34 of I.P.C. [Samar Jeet Singh Vs. State of M.P.] (DB)...187

दण्ड संहिता (1860 का 45), धारा 307/34 – सामान्य आशय – द्वितीय अपीलार्थी बंदूक लेकर शिकायतकर्ता के घर गया और बंदूक से गोली चलाकर मृतक को जान से मार दिया – उसका आशय शिकायतकर्ता को जान से मारना था – भा.द.सं. की धारा 307/34 के अंतर्गत उचित रूप से उसे दोषसिद्ध किया गया। (समर जीत सिंह वि. म.प्र. राज्य) (DB)...187

Penal Code (45 of 1860), Sections 420, 467, 468, Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Forged Caste Certificate – State Level Schedule Caste Certificate Scrutiny Committee after scrutinizing the caste certificate of applicant held caste certificate produced by applicant before M.P.P.S.C. for obtaining service is illegal – As caste certificate was fabricated by practicing fraud in the shape of valuable security with dishonest intention to obtain Govt. service prima facie case made out. [Usha Ajay Singh (Smt.) Vs. Shri J.L. Mishra] ...260

दण्ड संहिता (1860 का 45), धाराएं 420, 467, 468, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – कूटस्थित जाति प्रमाण पत्र – राज्य स्तरीय अनुसूचित जाति प्रमाण पत्र छानबीन समिति ने आवेदक के जाति प्रमाण पत्र की जांच पड़ताल के पश्चात यह ठहराया कि आवेदक द्वारा नौकरी प्राप्त करने के लिए एम. पी.पी.एस.सी. के समक्ष प्रस्तुत किया गया जाति प्रमाण पत्र अवैध है – चूंकि जाति प्रमाण पत्र को, मूल्यवान् प्रतिभूति के रूप में, सरकारी सेवा अभिप्राप्त करने के आशय से कपट पूर्वक गढ़ा गया, प्रथम दृष्ट्या प्रकरण बनता है। (उषा अजय सिंह (श्रीमती) वि. श्री जे.एल. मिश्रा) ...260

Penal Code (45 of 1860), Section 450 – House Trespass – Incident took place in a courtyard – Courtyard was covered from 4 sides from walls and rooms of the house of complainant – It had a gate and no one can enter inside if gate is closed – Place of incident is nothing but a part of house – Appellants No. 1 and 2 are guilty of offence u/s 450 of I.P.C. [Samar Jeet Singh Vs. State of M.P.] (DB)...187

दण्ड संहिता (1860 का 45), धारा 450 – गृह अतिचार – घटना आंगन में घटी – आंगन चारों तरफ दीवार और शिकायतकर्ता के मकान के कमरों से घिरा था – उसका एक प्रवेशद्वार था और यदि प्रवेशद्वार बंद हो, कोई प्रवेश नहीं कर सकता था – घटनास्थल और कुछ नहीं बल्कि मकान का हिस्सा है – अपीलार्थी क्र. 1 व 2, भा.द.सं. की धारा 450 के अंतर्गत अपराध हेतु दोषी हैं। (समर जीत सिंह वि. म.प्र. राज्य) (DB)...187

Petroleum Act (30 of 1934), Section 3 – See – Constitution – Article 19(1)(g) [Saroj Bhatia (Smt.) Vs. Indian Oil Corporation Ltd.] ...98

पेट्रोलियम अधिनियम (1934 का 30), धारा 3 – देखें – संविधान – अनुच्छेद 19(1)(जी) (सरोज भाटिया (श्रीमती) वि. इंडियन ऑइल कारपोरेशन लि.) ...98

Petroleum Rules, 2002, Rules 144, 149 – See – Constitution – Article 19(1)(g) [Saroj Bhatia (Smt.) Vs. Indian Oil Corporation Ltd.] ...98

पेट्रोलियम नियम, 2002, नियम 144, 149 – देखें – संविधान – अनुच्छेद 19(1)(जी) (सरोज भाटिया (श्रीमती) वि. इंडियन ऑइल कारपोरेशन लि.) ...98

Representation of the People Act (43 of 1951), Sections 80, 81, Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Corrupt Practice – To prove the allegation of corrupt practice, it should be specifically pleaded as to how and from whom the petitioner has got the information but the petition is lacking of such specific pleadings – Even if the averments made in the election petition are taken on their face value and accepted in the entirety, no triable cause of action arises in absence

of specific, precise and complete pleading in respect of alleged irregularities as well as corrupt practice – Election petition dismissed. [Krishna Kumar Gupta Vs. Rajendra Shukla] ...152

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराएं 80, 81, सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – भ्रष्ट आचरण – भ्रष्ट आचरण का अभिकथन साबित करने के लिए यह विनिर्दिष्ट अभिवाक् किया जाना चाहिए कि याची को कैसे और किससे जानकारी मिली है, परंतु याचिका में उक्त विनिर्दिष्ट अभिवचनों का अभाव है – यदि निर्वाचन याचिका में किये गये प्राक्कथनों को वैसा ही मान लिया जाए जैसा प्रकट किये गये हैं और संपूर्णतः से स्वीकार किया जाए तब भी अभिकथित अनियमितता तथा भ्रष्ट आचरण से संबंधित अभिवचनों के विनिर्दिष्ट, स्पष्ट और पूर्ण होने के अभाव में कोई विचारणीय वाद कारण उत्पन्न नहीं होता – निर्वाचन याचिका खारिज। (कृष्ण कुमार गुप्ता वि. राजेन्द्र शुक्ला) ...152

Representation of the People Act (43 of 1951), Section 83(1) – Affidavit – Non filing of affidavit in Form 25 as prescribed under Rule 94-A of Conduct of Election Rules, 1961 is a curable defect and petition cannot be rejected. [Krishna Kumar Gupta Vs. Rajendra Shukla] ...152

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 83(1) – शपथपत्र – फॉर्म 25 में शपथपत्र प्रस्तुत नहीं किया जाना, जैसा कि निर्वाचन का संचालन नियम 1961 के नियम 94-ए के अंतर्गत विहित है, सुधार योग्य त्रुटि है और याचिका को अस्वीकार नहीं किया जा सकता। (कृष्ण कुमार गुप्ता वि. राजेन्द्र शुक्ला) ...152

Representation of the People Act (43 of 1951), Sections 86, 81(3) & 87(1), Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Corrupt Practice – Petitioner has substantially pleaded the material particulars with regard to corrupt practice mentioning the nature of corrupt practice, name of the persons involved – There is also no variance in the verification clause and the affidavit sworn by the petitioner – Provisions are complied with substantially. [Rahul Singh Lodhi Vs. Smt. Chanda Devi] ...143

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराएं 86, 81(3) व 87(1), सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – भ्रष्ट आचरण – याची ने भ्रष्ट आचरण के संबंध में भ्रष्ट आचरण का स्वरूप, सम्मिलित व्यक्तियों के नाम उल्लिखित करते हुए तात्त्विक विशिष्टियों का सारवान रूप से अभिवाक् किया – सत्यापन खंड और याची द्वारा दिये गये शपथपत्र में भी अंतर नहीं – उपबंधों का सारमूल रूप से अनुपालन किया गया। (राहुल सिंह लोधी वि. श्रीमती चन्दा देवी) ...143

Representation of the People Act (43 of 1951), Sections 86, 81(3)

& 87(1), Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Mandatory Condition prescribed in Section 81(3) – Copy supplied to the respondent bears signature of the petitioner beneath the word “true copy attested” – Petitioner has fully complied with the provisions of Section 81(3) of the Act, 1951. [Rahul Singh Lodhi Vs. Smt. Chanda Devi] ...143

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराएं 86, 81(3) व 87(1), सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – धारा 81(3) में आज्ञापक शर्त विहित है – प्रत्यर्थी को प्रदाय की गई प्रति पर “शुद्ध प्रतिलिपि साक्ष्यांकित” शब्द के नीचे याची के हस्ताक्षर हैं – याची ने अधिनियम 1951 की धारा 81(3) के उपबंधों का पूर्णतः अनुपालन किया है। (राहुल सिंह लोधी वि. श्रीमती चन्दा देवी) ...143

Representation of the People Act (43 of 1951), Sections 86, 81(3) & 87(1), Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Striking off the pleadings – Petitioner has made concise statement of material facts with regard to corrupt practice with name of parties who have committed such corrupt practice with the date and place of commission of the same – None of the pleading can be said to be scandalous and frivolous. [Rahul Singh Lodhi Vs. Smt. Chanda Devi] ...143

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराएं 86, 81(3) व 87(1), सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – अभिवचनों को खंडित किया जाना – याची ने भ्रष्ट आचरण के संबंध में पक्षकार जिन्होंने उक्त भ्रष्ट आचरण कारित किया है, के नाम के साथ, उक्त के कारित होने की तिथि और स्थान के साथ तात्विक तथ्यों का संक्षिप्त कथन किया है – किसी भी अभिवचन को कलंकाल्मक एवं तुच्छ नहीं कहा जा सकता। (राहुल सिंह लोधी वि. श्रीमती चन्दा देवी) ...143

Sahakari Bank Karmchhari Seva Niyam, M.P. 1982, Rule 16 – Probation period – Promotion – Petitioner joined service on 16.03.1961 and was confirmed as Samiti Sewak – He was inducted in the newly formed cadre of Samiti Prabandhak on 13.11.1967 on probation – Probation period was for one year – There is nothing on record to show that the said period was extended – There is also no formal order confirming the petitioner’s service on the said post – Claim of the petitioner was dismissed on the ground that since he was not confirmed in the newly formed cadre of Samiti Prabandhak he is not entitle for promotion and other benefit – Held – As per Rule 16 the period of probation can be of 12 months which can be extended for 2 years if the work of the employee is not satisfactory – It cannot be said that from 1967 to 1976 for a long period of 10 years, the petitioner was on

probation – Petitioner is assumed to have been confirmed – Petition is allowed, petitioner be given all the benefits as directed vide order dated 28.06.1990 within a period of 2 months. [Rajendra Prasad Kasera Vs. Indore Premier Cooperative Bank Ltd.] ...42

सहकारी बैंक कर्मचारी सेवा नियम म.प्र., 1982, नियम 16 – परिवीक्षा अवधि – पदोन्नति – याची 16.03.1961 को सेवा में आया और उसे समिति सेवक के रूप में स्थाई किया गया – उसे 13.11.1967 को समिति प्रबंधक के नव निर्मित कॉडर में परिवीक्षा पर नियुक्त किया गया – परिवीक्षा कालावधि एक वर्ष के लिए थी – यह दर्शाने के लिए अभिलेख पर कुछ नहीं कि उक्त अवधि को बढ़ाया गया था – उक्त पद पर याची की सेवाएँ स्थाई किये जाने का कोई औपचारिक आदेश भी नहीं – याची का दावा इस आधार पर खारिज किया गया कि चूंकि उसे समिति प्रबंधक के नव निर्मित कॉडर में स्थाई नहीं किया गया था, वह पदोन्नति एवं अन्य लाभों का हकदार नहीं – अभिनिर्धारित – नियम 16 के अनुसार परिवीक्षा की कालावधि 12 माह हो सकती है, जिसे 2 वर्ष के लिए बढ़ाया जा सकता है, यदि कर्मचारी का कार्य संतोषप्रद नहीं – यह नहीं कहा जा सकता कि 1967 से 1976 की 10 वर्ष की लंबी अवधि के लिए याची परिवीक्षाधीन था – याची के स्थाई होने की धारणा की गई – याचिका मंजूर, याची को 2 माह की अवधि के भीतर सभी लाभ दिये जाये जैसा कि आदेश दि. 28.06.1990 द्वारा निदेशित किया गया है। (राजेन्द्र प्रसाद कसेरा वि. इंदौर प्रीमियर कोऑपरेटिव बैंक लि.) ...42

Service Law – Compulsory retirement – Compulsory retirement is not treated as termination as would disentitle the employee of the pensionary benefits – Gratuity is an element of pension – Compulsory retirement of respondent and his prosecution would not disentitle him from gratuity. [Zonal Manager, Central Bank of India Vs. R.R. Das] ...80

सेवा विधि – अनिवार्य सेवानिवृत्ति – अनिवार्य सेवानिवृत्ति को सेवा समाप्ति के रूप में नहीं माना जाएगा, जिससे कि कर्मचारी पेंशन लाभों के लिए अपात्र हो – उपदान, पेंशन का एक तत्व है – प्रत्यर्थी की अनिवार्य सेवानिवृत्ति और उसका अभियोजन उसे उपदान के लिए अपात्र नहीं करेगा। (जोनल मैनेजर, सेन्ट्रल बैंक ऑफ इंडिया वि. आर.आर. दास) ...80

Service Law – Departmental Enquiry – Denovo – Enquiry Officer submitted its report exonerating the petitioner – Disciplinary authority instead of recording dissent note directed for fresh enquiry into the charges – Denovo enquiry in the teeth of findings of exoneration for same set of charges is not permissible. [Madhukar Shyam Jha Vs. Western Coal Fields Ltd.] ...77

सेवा विधि – विभागीय जांच – नये सिरे से – याची को विमुक्त करते हुए जांच अधिकारी ने अपना प्रतिवेदन प्रस्तुत किया – अनुशासनिक प्राधिकारी ने विसम्मति टिप्पणी

अभिलिखित करने की बजाए, आरोपों की नये सिरे से जांच करने के लिए निदेशित किया — विमुक्ति के निष्कर्षों के बावजूद समान आरोपों के समूह हेतु नये सिरे से जांच अनुज्ञेय नहीं। (मधुकर श्याम झा वि. वेस्टर्न कोल फील्डस् लि.) ...77

Service Law – Promotion – Promotion of petitioner on the vacancy occurred due to transfer of one employee from one place to another on the strength of circular issued by State Government on 09.06.1999, was cancelled and he was reverted back on his substantive post – Held – No restriction was put in the circular dated 09.06.1999 in respect of promotion on the post fallen vacant due to transfer of an employee from one municipality to another – In fact the object of said circular is that the vacancy so become available should not be filled in by direct recruitment as the lien of the transferred employee is always protected – The entire circular is misread and misconstrued – Petition is allowed, however, petitioner cannot be treated to be confirmed on the promotional post. [Mithlesh Giri Goswami Vs. State of M.P.] ...57

सेवा विधि – पदोन्नति – राज्य सरकार द्वारा 09.06.1999 को जारी किये गये परिपत्र के बल पर, एक कर्मचारी का एक स्थान से दूसरे स्थान पर स्थानांतरण के कारण उत्पन्न हुई रिक्ति पर याची की पदोन्नति को निरस्त किया गया और उसे उसके मूल पद पर प्रत्यावर्तित किया गया – अभिनिर्धारित – एक नगरपालिका से दूसरी में किसी कर्मचारी के स्थानांतरण के फलस्वरूप उत्पन्न रिक्ति के पद पर पदोन्नति के संबंध में परिपत्र दि. 09.06.1999 में कोई निर्बंधन नहीं लगाया गया है – वास्तव में, उक्त परिपत्र का उद्देश्य यह है कि ऐसी उपलब्ध रिक्ति को सीधी भर्ती द्वारा ना भरा जाए, क्योंकि स्थानांतरित कर्मचारी का लियन सदैव सुरक्षित रहता है – संपूर्ण परिपत्र का गलत पठन एवं अर्थान्वयन किया गया – याचिका मंजूर, किन्तु याची को पदोन्नत पद पर स्थायी नहीं माना जा सकता। (मिथलेश गिरि गोस्वामी वि. म.प्र. राज्य) ...57

Service Law – Revision of pay – Petitioner has already availed of the benefit of voluntary retirement scheme, has now claimed for enhancement of pay scale and other benefits – Held – Since the petitioner had undisputedly taken voluntary retirement before filing the instant petition, she cannot claim higher pay scale, emoluments and benefit. [Vanita Borakar (Smt.) Vs. State of M.P.] ...137

सेवा विधि – वेतन का पुनरीक्षण – याची पहले ही स्वेच्छिक सेवा निवृत्ति योजना का लाभ ले चुकी है, वह अब वेतनमान वृद्धि एवं अन्य लाभों के लिए दावा कर रही है – अभिनिर्धारित – चूंकि वर्तमान याचिका दायर करने के पूर्व ही याची अविवादित रूप से स्वेच्छिक सेवा निवृत्ति ले चुकी है, वह उच्च वेतनमान, परिलब्धियों एवं लाभों के लिए दावा

नहीं कर सकती। (वनीता बोराकर (श्रीमती) वि. म.प्र. राज्य) ...137

Service Law – Selection – Although the petitioner possesses an equivalent qualification of class 10th and has High School Certificate issued by M.P. Open School which has been duly recognized by Board of Secondary Education by notification dt. 04.10.1996 she was denied consideration, merely because the said qualification does not find mention in the advertisement – Held – Since the petitioner possesses the qualification equivalent to the Board of Secondary Education, respondents were not justified in rejecting the petitioner's candidature – Petition is allowed. [Poonam (Ku.) Vs. State of M.P.] ...89

सेवा विधि – चयन – यद्यपि याची. के पास कक्षा 10वीं के समकक्ष अर्हता है और म.प्र. मुक्त विद्यालय द्वारा जारी किया गया हाईस्कूल प्रमाण पत्र है, जिसे माध्यमिक शिक्षा मंडल की अधिसूचना दि. 04.10.1996 द्वारा सम्यक् रूप से मान्यता प्राप्त है, उसका विचार नहीं किया गया, मात्र इसलिए कि उक्त अर्हता का उल्लेख विज्ञापन में नहीं पाया जाता – अभिनिर्धारित – चूंकि याची के पास माध्यमिक शिक्षा मंडल के समकक्ष अर्हता है, प्रत्यर्थागण द्वारा याची की अम्यर्थिता अस्वीकार करना न्यायोचित नहीं था – याचिका मंजूर। (पूनम (कुमारी) वि. म.प्र. राज्य) ...89

Stamp Act (2 of 1899), Article 5(d), Schedule I-A, Arbitration and Conciliation Act (26 of 1996), Section 11(6):– Appointment of Arbitrator – Clause 19 of the agreement provides that if the dispute arises between the party same can be resolved by appointing one arbitrator each – The aforesaid clause is in contravention of Section 10(1) of the Act which provides that number of arbitrator shall not be an even number – Hon'ble Mr. Justice V.K. Agrawal is appointed sole arbitrator – Parties shall appear before him. [Alfa Constructions (M/s.) Vs. Vinod Kumar Thareja] ...239

स्टाम्प अधिनियम (1899 का 2), अनुच्छेद 5(डी), अनुसूची I-ए, माध्यस्थता और सुलह अधिनियम (1996 का 26), धारा 11(6) – मध्यस्थ की नियुक्ति – करार का खंड 19 उपबंधित करता है कि यदि पक्षकारों के मध्य विवाद उत्पन्न होता है, उसे दोनों के एक-एक मध्यस्थ की नियुक्ति द्वारा सुलझाया जायेगा – उपरोक्त खंड, अधिनियम की धारा 10(1) के विरुद्ध है, जो यह उपबंधित करता है कि मध्यस्थ की संख्या सम संख्या नहीं होगी – माननीय न्यायाधिपति श्री व्ही.के. अग्रवाल को एकमात्र मध्यस्थ नियुक्त किया गया – पक्षकार उनके समक्ष उपस्थित होंगे। (अल्फा कंस्ट्रक्शन (मे.) वि. विनोद कुमार थरेजा) ...239

Stamp Act (2 of 1899), Article 5(d), Schedule I-A, Arbitration and Conciliation Act (26 of 1996), Section 11(6) – Requirement under Article

5(d) of Schedule I-A of the 1899 Act – Since there is no stipulation in the agreement that building shall be held jointly or severally by the person other than the owner and remaining part thereof shall be sold jointly or severally by them, agreement is not required to be stamped. [Alfa Constructions (M/s.) Vs. Vinod Kumar Thareja] ...239

स्टाम्प अधिनियम (1899 का 2), अनुच्छेद 5(डी), अनुसूची I-ए, माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) – अधिनियम 1899 की अनुसूची I-ए के अनुच्छेद 5(डी) के अंतर्गत अपेक्षा – चूंकि करार में कोई शर्त नहीं कि भवन को स्वामी के अलावा, व्यक्ति द्वारा संयुक्त रूप से या पृथक रूप से धारण किया जायेगा और उसका शेष भाग उनके द्वारा संयुक्त रूप से या पृथक रूप से विक्रय किया जायेगा, करार स्टाम्पित किया जाना अपेक्षित नहीं। (अल्फा कंस्ट्रक्शन (मे.) वि. विनोद कुमार थरेजा) ...239

Value Added Tax Act, M.P. (20 of 2002), Section 57(5)(6)(8)(11)
– Petitioner who is goods transporter was carrying goods to deliver – During transportation goods were stopped by Commercial Tax Officer – Due to non-compliance of Section 57(6)(b) of the Act, tankers along with goods were detained – Penalty was imposed which was deposited by the petitioner – However, the prayer to release the tankers along with the seized goods was not accepted to effect the recovery of tax assessed against seller of the goods – Held – Once the petitioner had paid the penalty imposed against it, it was incumbent upon the Check Post Officer to exercise its power conferred u/s 57(11) of the Act to release the goods seized by it, in favour of the petitioner – Goods could not have been detained for realization of tax assessed against the seller – Action is violative of Section 57(11) of the Act – Same cannot be sustained. [Kabra Bulk Transport Carrier (M/s.) Vs. The Commissioner of Commercial Tax, Indore] (DB)...66

मूल्य वर्धित कर अधिनियम, म.प्र. (2002 का 20), धारा 57(5)(6)(8)(11) – याची जो माल परिवहन का कारोबारी है, माल को ठिकाने पर पहुंचाने के लिए ले जा रहा था – परिवहन के दौरान, वाणिज्यिक कर अधिकारी द्वारा माल रोका गया – अधिनियम की धारा 57(6)(बी) के अननुपालन के कारण माल के साथ टैंकरों को निरुद्ध किया गया – दण्ड अधिरोपित किया गया, जिसे याची ने जमा किया – किन्तु जब्त माल के साथ टैंकरों को छोड़े जाने की प्रार्थना को, माल के विक्रेता के विरुद्ध निर्धारित कर की वसूली के उद्देश्य से अस्वीकार किया गया – अभिनिर्धारित – एक बार याची द्वारा अपने विरुद्ध अधिरोपित अर्थदण्ड का भुगतान करने पर, चेक पोस्ट अधिकारी, अधिनियम की धारा 57(11) के अंतर्गत प्रदत्त अपनी शक्ति का प्रयोग करते हुए उसके द्वारा जब्त माल को याची के पक्ष में मुक्त करने के लिए कर्तव्यबद्ध

था - विक्रेता के विरुद्ध निर्धारित कर की वसूली हेतु माल को निरुद्ध नहीं किया जा सकता था - अधिनियम की धारा 57(11) के उल्लंघन में कार्यवाही की गई है - उक्त को कायम नहीं रखा जा सकता। (काबरा बल्क ट्रांसपोर्ट केरियर (मे.) वि. द कमिश्नर ऑफ कमर्शियल टैक्स, इंदौर) (DB)...66

Vishesh Sashastra Bal Niyam, M.P. 1973, Rule 56(3) - Out of turn promotion - Petitioners saved the life of 30 persons from being immersed into water and life of 6 persons who were surrounded by flood for which Rs. 2,000/- was awarded and appreciation certificate was also issued - Authorities made recommendations for their out of turn promotion - Held - Petitioners have passed only High School examination - Although they appeared in the examination for promotion on the post of Head Constable but they could not succeed - Alongwith petitioners there were 26 employees who performed well and they were also rewarded for their best services - No case for out of turn promotion is made out. [Anokhilal Billore Vs. State of M.P.] ...47

विशेष सशस्त्र बल नियम, म.प्र. 1973, नियम 56(3) - समय पूर्व पदोन्नति- याचीगण ने पानी में डूब रहे 30 व्यक्तियों एवं 6 व्यक्ति जो बाढ़ में घिर गये थे, की जीवन रक्षा की, जिसके लिये उन्हें 2000/- का पारितोषिक एवं प्रशस्ति पत्र भी प्रदान किया गया था - प्राधिकारियों ने उनकी समय पूर्व पदोन्नति हेतु अनुशंसा की - अभिनिर्धारित - याचीगण केवल हाईस्कूल परीक्षा उत्तीर्ण है - यद्यपि वे हेड कांस्टेबल के पद पर पदोन्नति के लिए परीक्षा में सम्मिलित हुए किंतु वे सफल नहीं हुए - याचीगण के साथ 26 कर्मचारी थे, जिन्होंने अच्छा प्रदर्शन किया और उन्हें भी उनकी उत्कृष्ट सेवाओं हेतु पुरस्कृत किया गया था - समय पूर्व पदोन्नति के लिए प्रकरण नहीं बनता। (अनोखी लाल बिल्लोरे वि. म.प्र. राज्य) ...47

Workmen's Compensation Act (8 of 1923), Section 30 - Interest awarded at the rate of 12% from the date of application - Held - It is not open to contend that the payment of compensation would fall due only after the Commissioner's order - Appeal is dismissed. [Oriental Insurance Co. Ltd. Vs. Smt. Bindiya] ...162

कर्मकार प्रतिकर अधिनियम (1923 का 8), धारा 30 - आवेदन की तिथि से 12 प्रतिशत की दर से ब्याज अवार्ड किया गया - अभिनिर्धारित - यह तर्क विचार में नहीं लिया जायेगा कि प्रतिकर का भुगतान केवल आयुक्त के आदेश के पश्चात ही देय होगा - अपील खारिज। (ऑरिएण्टल इश्योरेन्स कं. लि. वि. श्रीमती बिंदिया) ...162

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JOURNAL SECTION

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

**MADHYA PRADESH ACT
NO. 2 OF 2015
THE INDIAN STAMP (MADHYA PRADESH) AMENDMENT
ACT, 2014.**

[Received the assent of the Governor on the 6th January, 2015; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)" dated the 7th January, 2015, page no. 14(18) to 14(32)]

- An Act further to amend the Indian Stamp Act, 1899 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.- This Act may be called the Indian Stamp (Madhya Pradesh Amendment) Act, 2014.

2. Amendment of Central Act No. II of 1899, in its application to the State of Madhya Pradesh.- The Indian Stamp Act, 1899 (No. II of 1899) (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 3.- In Section 3 of the principal Act, in the first proviso, the words "subject to the exemptions contained in that Schedule" shall be omitted.

4. Substitution of Schedule 1-A.- For Schedule 1-A to the principal Act, the following Schedule shall be substituted, namely:-

“SCHEDULE 1-A
Stamp Duty on Instruments
(See Sections 3)

Description of Instruments	Proper Stamp Duty
(1)	(2)
1. Acknowledgement of a debt exceeding five hundred rupees in amount or value, written or signed by or on behalf of debtor in any book (other than a banker's pass book) or on a separate piece of paper, when such book or paper is left in the creditor's possession.	Ten rupees.
2. Acknowledgement of receipt of payment of consideration on account of another deed, which has been previously registered.	Five thousand rupees.
3. Administration-Bond , including a bond given under section 291, 375 and 376 of the Indian Succession Act, 1925 (39 of 1925) and Section 6 of the Government Savings Bank Act, 1873 (5 of 1873).	The same duty as a bond (No. 14) for the same amount.
4. Adoption deed , that is to say, any instrument (other than a will) recording an adoption or conferring or purporting to confer an authority to adopt.	Two thousand rupees.
5. Affidavit , that is to say, a statement in writing purporting to be a statement of fact, signed by the person making it and confirmed by	Fifty rupees.

him on oath or, in the case of persons by law allowed to affirm instead of swearing, by affirmation.

6. Agreement of Memorandum of an agreement-

(a) If relating to the sale of bill of exchange.	One rupee for every rupees 10,000 or part thereof.
(b) (i) If relating to the purchase or sale of a Government security.	One rupee for every rupees 10,000 or part thereof, of the value of the security at the time of its purchase or sale, as the case may be, subject to a maximum of rupees five thousand.
(ii) If relating to the purchase or sale of shares, scrips, bonds, debentures, debenture-stocks or any other marketable security of a like nature in or of any incorporated company or other body corporate.	Rupees two for every one lakh or part thereof, of the value of the security at the time of its purchase or sale, as the case may be, in case of non-delivery-based transactions; and one rupee for every rupees 10,000 or part thereof in case of delivery-based transactions.
(c) If relating to a permission granted by a manufacturer or owner of a business, know-how, brand name, trademark or the like to another person to carry on business or other activity using the grantor's know-how, brand name, trademark etc., i.e. the agreement of franchise.	Ten thousand rupees
(d) If relating to the development of land and/or construction of a building thereon by a person other than the	

owner or lessee of such land.

(i) if having the stipulation that after development, such developed property or part thereof shall be held/sold by the developer, by whatever name called, either severally or jointly with the owner/lessee -	The same duty as a conveyance (No. 25) on the, market value of only that portion of the entire land proposed to be developed which is proportionate to the developed property to be held/sold by the developer jointly or severally, or half of the duty as a conveyance (No. 25) on the market value of the entire land proposed to be developed, whichever is higher.
(ii) for cases not covered by (i) above -	0.25 percent of the market value of the entire land proposed to be developed, subject to a minimum of one thousand rupees.

Explanation - For the purposes of this article,

- (i) "development" and "developer" shall have the same meaning as assigned to them respectively in section 2(f) of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (No. 23 of 1973) and rule 2(1)(b) of the Madhya Pradesh Special Project and Township (Development, Regulation and Control) Rules, 2011.
- (ii) where the developed property is held/sold jointly but the share of the developer is not expressly mentioned in the document, the developer's share shall be deemed

to be 100 percent.

- (e) If relating to sale of immovable property-
 - (i) When possession of the property is delivered or is agreed to be delivered without executing the conveyance. The same duty as conveyance (No. 25) on the market value of the property.
 - (ii) When possession of the property is not given. One thousand rupees.
- (f) If relating to hire-purchase of immovable property. The same duty as a conveyance (No. 25) on the market value of the property.
- (g) If relating to secure repayment of a loan or debt. 0.25 percent of the amount of loan or debt, subject to a maximum of five lakh rupees.
- (h) If not otherwise provided for. Five hundred rupees.

7. Agreement relating to deposit of title deeds, pawn, pledge or hypothecation, that is to say, any instrument evidencing an agreement relating to -

- (a) the deposit of title deeds or instruments constituting or being evidence of the title to any property whatever (other than a marketable security), where such deposit has been made by way of security for the repayment of money advanced or to be advanced by way of loan or an existing or future debt. 0.25 percent of the amount secured by such deed, subject to a maximum of five lakh rupees.
- (b) the pawn, pledge or hypothecation 0.25 percent of the amount of loan or

of movable property, where such debt subject to a maximum of five lakh pawn, pledge or hypothecation has rupees. been made by way of security for the repayment of money advanced, or to be advanced by way of loan or an existing or future debt.

Explanation I - On an instrument relating to deposit of title deeds or pawn or pledge or hypothecation for securing repayment of money advanced or to be advanced by way of loan or an existing or future debt of a higher amount than one secured by earlier instruments of like nature, the duty shall be chargeable only on the additional amount in case the proper stamp duty has been paid on the earlier instrument.

Explanation II- for the purposes of clause (a) of this article, notwithstanding anything contained in any judgment, decree or order of any court or order of any authority, any letter, note, memorandum or writing relating to the deposit of title deeds whether written or made either before or at the time when or after the deposit of title deeds is effected, and whether it is in respect of the security for the first loan or any additional loan or loans taken subsequently, such letter, note, memorandum or writing shall, in the absence of any separate agreement

or memorandum of agreement relating to deposit of such title deeds, be deemed to be an instrument, evidencing an agreement relating to the deposit of title deeds.

8. **Appointment in execution of a power**, whether of trustees or of property, moveable or immovable, where made by any writing, not being a will. Five hundred rupees.
9. **Appraisement or valuation**, made otherwise than under an order of the Court in the course of a suit. Five hundred rupees.
10. **Apprenticeship deed**, including every writing relating to the service or tuition of any apprentice, clerk or servant, placed with any master to learn any profession, trade or employment. Two hundred rupees.
11. **Articles of a Company -**
 - (a) where the company has no share capital. Five thousand rupees.
 - (b) where the company has nominal share capital or increased share capital. 0.15 percent of such nominal or increased share capital, subject to a minimum of five thousand rupees and a maximum of twenty five lakh rupees.
12. **Award**, that is to say, any decision in writing by an arbitrator or umpire, on a reference made otherwise than Two percent of the award amount or market value of the property to which the award relates, whichever is higher.

by an order of the Court in the course of a suit, being an award made as a result of a written agreement to submit present or future differences to arbitration and not being an award directing a partition.

13. **Bank Guarantee.** Guarantee deed executed by a bank as surety to secure the due performance of a contract or the due discharge of liability. 0.25 percent of the amount, subject to a maximum of twenty five thousand rupees.
14. **Bond**, not being a debenture and not being otherwise provided for by this Act or by the Court-fees Act, 1870 (No. 7 of 1870).
 - (a) 0.5 percent of the amount or value secured subject to a minimum of five hundred rupees.
 - (b) Where no valuation is possible, five hundred rupees.
15. **Bottomry Bond**, that is to say, any instrument whereby the master of a sea going ship borrows money on the security of the ship to enable him to preserve the ship or prosecute her voyage. The same duty as a Bond (No. 14) for the same amount.
16. **Cancellation** - Instrument of cancellation of any previously registered document, if attested and not otherwise provided for. Five hundred rupees.

Explanation - I - If on the principal instrument stamp duty is paid on the basis of value, the duty on the instrument of cancellation shall be chargeable as per the principal instrument.

Explanation - II - If on the principal instrument stamp duty is paid on the basis of market value, the duty on the instrument of cancellation shall be chargeable as per the principal instrument on the prevailing market value.

17. **Certificate of Enrolment**, under section 22 of the Advocate Act, 1961 (No. 25 of 1961), issued by the State Bar Council of Madhya Pradesh. One thousand rupees.
18. **Certificate of Practice as Notary**, under sub-section (1) of section 5 of the Notaries Act, 1952 (No. 53 of 1952), or endorsement of renewal of such certificates under sub section (2) of the said section. Two thousand rupees.
19. **Certificate of Sale** (in respect of each property put up as a separate lot and sold), granted to the purchaser of any property sold by public auction by a Civil or Revenue Court or Collector or other Revenue Officer or an officer authorised to do so under any law for the time being in force. The same duty as a conveyance (No. 25) for the amount of purchase money only.
20. **Certificate or other document**, evidencing the right or title of the holder thereof, or any other person, either to any shares, scrip or stock in or of any incorporated company or other body corporate, or to One rupee for every one thousand rupees or a part thereof, of the value of the shares, scrip or stock.

become proprietor of shares, scrip or stock in or of any such company or body.

21. **Charter-Party**, that is to say, any instrument (except an agreement for the hire of tug steamer) whereby a vessel or some specified principal part thereof is let for the specified purposes of the charterer, whether it includes a penalty clause or not. One hundred rupees.
22. **Clearance List** -
 - (a) If relating to the transactions for the purchase or sale of Government securities submitted to the clearing house of a stock exchange. One rupee for every rupees 10,000 or part thereof in respect of each of the entries in such list on the value of securities calculated at the making up price or the contract price, as the case may be, subject to a maximum of rupees five thousand.
 - (b) If relating to the transactions for the purchase or sale of share, scrip, stock, bond, debenture, debenture - stock or other marketable security of a like nature in or of an incorporated company or other body corporate, submitted to the clearing house of a stock exchange. Rupees two for every one lakh or part thereof, of the value of the security at the time of its purchase or sale, as the case may be, in case of non-delivery-based transactions; and one rupee for every rupees 10,000 or part thereof in case of delivery-based transactions.
23. **Composition deed**, that is to say, any instrument executed by a debtor whereby he conveys his property for the benefit of his creditors or whereby payment of a composition or dividend on their debts is secured to the creditors, or whereby provision is made for the continuance of the debtor's Two thousand five hundred rupees.

business under the supervision of inspectors nominated by the creditors or under letters of licence for the benefit of his creditors.

24. **Consent deed** without any consideration, forming part of a document already registered or to be registered. One thousand rupees.
25. **Conveyance** - not being a transfer charged or exempted under No. 61. Five percent of the market value of the property which is the subject matter of conveyance or the amount of consideration set forth therein, whichever is higher.

Explanation - For the purpose of this article market value of any property which is subject matter of conveyance executed by or on behalf of the Central Government or the State Government, shall be the value shown in the instrument.

Provided that-

- (a) where an instrument relates to the merger or amalgamation of companies under the orders of Tribunal/Court under section 232 and 234 of the Companies Act, 2013 (18 of 2013), or under the order of the Reserve Bank of India under section 44A of the Banking Regulation Act, 1949 (10 of 1949) the duty chargeable shall be an amount equal to 5% of the market value of the immovable property transferred which is located within the State of Madhya Pradesh, or an amount equal to 0.5% of the aggregate of the market value of the shares issued or allotted in exchange or otherwise and the amount of consideration paid for such transfer, whichever is higher.

- (b) when an instrument relates to an assignment of a debt, the rate of duty shall be 0.25 percent on the amount of the debt assigned.
- (c) where an agreement to sell an immovable property is stamped with ad-valorem duty required for a conveyance and a sale deed in pursuance of such agreement is subsequently executed, the duty on such sale deed shall be the duty payable under the article less the duty already paid, subject to a minimum of Rs.1000.
- (d) where a power of attorney authorising the agent to sell immovable property is stamped with ad-valorem duty required for a conveyance and a sale deed is executed in pursuance of power of attorney between the executant of attorney and the person in whose favour it is executed, the duty on the sale deed shall be the duty payable under the article less the duty already paid, subject to a minimum of Rs. 1000.
- (e) where a mortgage deed or an agreement to mortgage is stamped with ad-valorem duty required for a mortgage under article 43 and a court decree in pursuance of a suit filed against the mortgaged property, or a mortgage deed is executed, the duty payable on the decree or the

mortgage deed shall be the duty payable under the article less the duty already paid under article 43 on the mortgage deed, subject to a minimum of Rs. 1000.

- (f) where by an instrument, a person includes the name of his wife or daughter or daughter-in-law severally or jointly as co-owner in his property, the rate of duty shall be 1 percent on the market value of the property.

26. **Copy or Extract**, certified to be a true copy or extract by or order of an public officer under section 70 of the Indian Evidence Act, 1872 (No.1 of 1872) and not chargeable under the law for the time being in force relating to court fees One hundred rupees.
27. **Counterpart or duplicate** of any instrument chargeable with duty and in respect of which the proper duty has been, paid. One thousand rupees.
28. **Customs Bond or Excise bond**, that is to say, any bond given pursuant to the provisions of any law for the time being in force or to the directions of any officer of Custom or Excise for, or in respect of, any of the duties of Customs and Excise or for preventing frauds or evasions thereof or for any other matter or thing relating thereto. The same duty as a Bond (No. 14) for the same amount.

29. **Declaration**, under the Madhya Pradesh Prakoshtha Swamitva Adhiniyam, 2000 (No. 15 of 2001). Ten thousand rupees.

30. **Delivery order in respect of goods**, that is to say, any instrument entitling any person therein named or his assigns or the holder thereof, to the delivery of any goods lying in any dock or port or in any warehouse in which goods are stored or deposited on rent or hire, or upon any wharf, such instrument being executed by or on behalf of the owner of such goods, upon the sale or transfer of the property therein when such goods exceed in value hundred rupees. Ten rupees.

31. **Divorce**, instrument of, that is to say, any instrument by which any person effects the dissolution of his marriage. One thousand rupees.

32. **Document** amending or correcting previously registered deed, but not making any material alterations. One thousand rupees.

Explanation - For the purpose of this article a material alteration is one which varies the rights, liabilities or legal position of the parties as ascertained from the instrument in its original state or otherwise varies the legal effect of the instrument as originally executed.

33. **Entry of certificate of marriage**, One hundred rupees.

in the register under the Special Marriage Act, 1954 (No. 43 of 1954) or any other law for the time being in force.

34. **Exchange of Property** - Instrument of The same duty as a conveyance (No.25) on the market value of the property of greater value, which is the subject matter of Exchange.
35. **Further charge** - Instrument of, The same duty as a conveyance (No.25) tint is to say, any instrument for the amount of further charge secured imposing a further charge on by such instrument. mortgaged property-
- (a) when the original mortgage is one of the description referred to in clause (a) of Article No. 43 (that is with possession).
 - (b) when such mortgage is one of the description referred to in clause (b) of Article No. 43 (that is, without possession)
- (i) If at the time of the execution of the instrument of further charge, the possession of the property is given or agreed to be given under such instrument. The same duty as a conveyance (No. 25) for the total amount of charge (including the original mortgage and any further charge already made) less the duty already paid on such original mortgage and further charge.
- (ii) If possession is not so given. The same duty as a Bond (No. 14) for the amount of the further charge secured by such instrument.
36. **Gift** - Instrument of, not being a settlement (No. 57) or will or transfer (No. 61):-

- (i) when made to member of a family. Half of the duty as a conveyance (No.25) on the market value of the property, which is subject matter of the gift.
- (ii) in all other cases. The same duty as a conveyance (No. 25) on the market value of the property, which is subject matter of the gift.

Explanation- For the purpose of this article, the term "family" shall mean mother, father, wife, husband, son, daughter, brother, sister, granddaughter and grandson,

- 37. **Indemnity Bond.** The same duty as a Bond (No.14) for the same amount.
- 38. **Lease, including an under-lease, or sub-lease and any agreement to let or sub-let or any renewal of lease-**
 - (i) where the lease purports to be for a term less than one year. 0.01 percent of the whole amount payable or deliverable under such lease, or of the market value of the property, whichever is higher.
 - (ii) where the lease purports to be for a term of not less than one year but less than five years. 0.1 percent of the amount of premium or money advanced or to be advanced as set forth in the deed plus the average annual rent reserved, or of the market value of the property, whichever is higher.
 - (iii) where the lease purports to be for a term of not less than five years but less than ten years. One percent of the amount of premium or money advanced or to be advanced as set forth in the deed plus the average annual rent reserved, or of the market value of the property, whichever is

higher.

(iv) where the lease purports to be for a term of not less than ten years but less than twenty years.	Two percent of the amount of premium or money advanced or to be advanced as set forth in the deed plus the average annual rent reserved, or of the market value of the property, whichever is higher.
(v) where the lease purports to be for a term of not less than twenty years but less than thirty years.	Four percent of the amount of premium or money advanced or to be advanced as set forth in the deed plus the average annual rent reserved, or of the market value of the property, whichever is higher.
(vi) where the lease purports to be for a period of thirty years or more, or in perpetuity, or does not purport to be for a definite period.	Five percent of the amount of premium or money advanced or to be advanced as set forth in the deed plus the average annual rent reserved, or of the market value of the property, whichever is higher.

Explanation-I- When an instrument of agreement to lease is stamped with the ad-valorem duty required for a lease, and a lease in pursuance of such agreement is subsequently executed, the duty on such lease deed shall be the duty payable under the article less the duty already paid, subject to a minimum of one thousand rupees.

Explanation-II- Where a decree or final

order of any Civil Court in respect of a lease is stamped with ad-valorem duty required for a lease, and a lease in pursuance of such decree or final order is subsequently executed, the duty on such lease deed shall be the duty payable under the article less the duty already paid, subject to a minimum of one thousand rupees.

Explanation-III- Any consideration in the form of premium, or money advanced or to be advanced by whatever name called shall, for the purpose of this article, be treated as consideration passed on.

Explanation-IV- The renewal period, if specifically mentioned in the lease deed, shall be treated as part of the present lease period.

Explanation-V- When a lessee undertakes to pay any recurring charge, such as Government revenue, the landlord's share of cesses or the owner's share of municipal rates or taxes, which is by law recoverable from the lessor, the amount so agreed to be paid by the lessee shall be deemed to be part of the rent. Also, rent paid in advance shall be deemed to be money advanced, unless it is specifically provided in the lease that rent paid in advance shall be set off towards the installments of rent.

Explanation-VI- For the purpose of this article royalty shall be treated as rent.

Explanation-VII- For the purpose of this article market value, premium and rent of any property, which is subject matter of lease executed by or on behalf of the Central Government or the State Government or any undertaking of the State Government shall be as shown in the instrument.

39. Letter of allotment of Shares, in any company or proposed company or in respect of any loan to be raised by any company or proposed company.	Ten rupees.
40. Letter of Guarantee.	One thousand rupees.
41. Letter of licence, that is to say, any agreement between a debtor and his creditors that the latter shall for a specified time, suspend their claims and allow the debtor to carry on business at his own discretion.	Two thousand rupees.
42. Memorandum of a company -	
(a) If accompanied by articles under section 5 of the Companies Act, 2013 (No. 18 of 2013)	Two thousand five hundred rupees.
(b) If not so accompanied.	The same duty as is chargeable on Articles under Article II, according to the share capital of the company.

43. **Mortgage deed**, not being an agreement relating to the deposit of title deeds, Pawn, Pledge or Hypothecation (No. 7), Bottomry bond (No. 15), Mortgage of a crop (No. 44), Respondentia Bond (No.55), or a Security bond (No. 56)-

(a) When possession of the property or any part of the property comprised in such deed is given by mortgagor or agreed to be given.	The same duty as a conveyance (No. 25) for the amount secured by such deed.
(b) When possession is not given or agreed to be given as aforesaid.	The same duty as a Bond (No. 14) for the amount secured by such deed.

Explanation-I- A mortgagor who gives to the mortgagee a power of attorney to collect rents of a lease of the property mortgaged or part thereof, is deemed to give possession within the meaning of this article.

Explanation-II- For mortgage, for creating development of or construction on land under the Madhya Pradesh Nagar Palika (Registration of Colonizer, Terms and Conditions) Rules, 1998 and the Madhya Pradesh Gram Panchayat (Registration of Colonizer, Terms and Conditions) Rules, 1999, the development expenses approved by the competent officer and set forth in the document, shall be the amount secured.

- (c) When a collateral or auxiliary or Five hundred rupees.

additional or substituted security, or by way of further assurance for the above mentioned purpose, where the principal or primary security is duly stamped.

44. **Mortgage of a Crop**, including any instrument evidencing an agreement to secure the repayment of a loan made upon any mortgage of a crop whether the crop is or is not in existence at the time of the mortgage. **Ten rupees.**
45. **Notarial Act**, that is to say, any instrument, endorsement, note, attestation, certificate or entry not being a protest (No. 51) executed by a Notary public in the execution of the duties of his office, or by any other person lawfully acting as a Notary public. **Fifty rupees.**
46. **Note or Memorandum**, sent by a broker or agent to his principal intimating the purchase or sale on account of such principal-
 - (a) of any goods exceeding in value one hundred rupees. **Two rupees for every rupees one lakh or part thereof, subject to a maximum of fifty rupees.**
 - (b) of any share, scrip, stock, bond, debenture, debenture stock or other marketable security of a like nature exceeding in value one hundred rupees, not being a Government Security. **Rupees two for every one lakh or part thereof, of the value of the security at the time of its purchase or sale, as the case may be, in case of non-delivery-based transactions; and one rupee for every rupees 10,000 or part thereof in case of delivery-based transactions.**

(c) of a Government Security.

One rupee for every rupees ten thousand or part thereof, of the value of the security, at the time of its purchase or sale, as the case may be, subject to maximum of five thousand rupees.

Explanation -

For the purpose of clause (a) of this article, the record of transaction (electronic or otherwise) relating to future and option trading and forward contracts of goods described in clause (a) effected by the firm for itself or by proprietor for himself, who is a trading member through stock exchange or an association as defined in clause (a) of section 2 of the Forward Contract (Regulation) Act, 1952 (No. 74 of 1952) shall be deemed to be a Note or Memorandum.

47. **Note of Protest**, by the master of a ship. Fifty rupees.

48. **Partition**- Instrument of-

- (i) when made within the family members. Half of the duty as a conveyance (No. 25) on the market value of the separated share or shares of the property.
- (ii) in any other case, The same duty as a conveyance (No. 25) on the market value of the separated share or shares of the property.

Note- The largest share remaining after

the property is partitioned (or if there are two or more shares of equal value and not smaller than any of the other share, then one of such equal shares) shall be deemed to be that from which the other shares are separated,

Explanation-I- For the purpose of this article, the term "family" shall mean mother, father, wife, husband, son, daughter, brother, sister, granddaughter and grandson.

Explanation-II- When an instrument of partition containing an agreement to divide property in severalty is executed and a partition is effected in pursuance of such agreement, the duty chargeable upon the instrument effecting such a partition shall be reduced by the amount of duty paid in respect of the first instrument, but shall not be less than one thousand rupees.

Explanation-III- Where the instrument relates to the partition of agricultural land exclusively (not situated within urban or planning area, or any other area as may be specified), the market value for the purpose of duty shall be calculated at hundred times the annual land revenue.

Explanation-IV- Where a final order for effecting a partition passed by any Revenue-authority or Civil Court or an award by an arbitrator

directing a partition, is stamped with the stamp required for an instrument of partition and an instrument of partition in pursuance of such order or award is subsequently executed, the duty on such instrument shall not be less than one thousand rupees.

49. Partnership -

A. Instrument of -

- (a) where there is no share of contribution in partnership or where such share of contribution does not exceed Rs. 50,000. Two thousand rupees.
- (b) where such share of contribution is in excess of Rs. 50,000. Two percent of the shares contributed, subject to a minimum of rupees two thousand and a maximum of rupees ten thousand.
- (c) where such share of contribution is brought by way of immovable property. Two percent on the market value of such property.

Explanation- Where such share of contribution is brought by way of cash and immovable property, clauses (b) and (c) both shall apply.

B. Dissolution of partnership or retirement of a partner.

- (a) Where on dissolution of partnership or on retirement of a partner, any immovable property is taken as his share by a partner other than a partner who brought in that property as his share of The same duty as a conveyance (No. 25) on the market value of such property.

contribution in the partnership.

- (b) In any other case. One thousand rupees.

50. Power of attorney as defined by section 2(21), not being a proxy -

- (a) when authorising one person or more to act in single transaction, excluding power of attorney coming under clause (c) or (d). One thousand rupees.
- (b) when authorising one person to act in more than one transaction or generally, or not more than ten persons to act jointly or severally in more than one transaction or generally, excluding power of attorney coming under clause (c) or (d). Two thousand rupees.
- (c) when given for consideration and authorising the agent to sell, exchange or permanently alienate any immovable property situated in Madhya Pradesh. The same duty as a conveyance (No. 25) on the market value of the property.
- (d) when given without consideration, and authorizing the agent to sell, gift, exchange or permanently alienate any immovable property situated in Madhya Pradesh -
- (i) when the agent is a member of the family. One thousand rupees.
- (ii) when the agent is not a member of the family. The same duty as a conveyance (No. 25) on the market value of the property.
- (e) when authorizing a person for the sole purpose of purchasing shares, scrips, bonds, debentures, debenture-

stocks or any other marketable security of a like nature in or of any incorporated company or other body corporate, in the name of the principal.

(f) in any other case.

One thousand rupees for each person authorised.

Explanation-I- For the purpose of this article, the term "family" shall mean mother, father, wife, husband, son, daughter, brother, sister, granddaughter and grandson.

Explanation-II- For the purpose of this article, more persons than one when belonging to the same firm shall be deemed to be one person.

51. **Protest of Bill or Note**, that is to say, any declaration in writing made by a Notary public, or other person lawfully acting as such, attesting the dishonour of a Bill of Exchange or Promissory Note. Fifty rupees.
52. **Protest by the Master of a Ship**, that is to say, any declaration of the particulars of her voyage drawn up by him with a view to the adjustment of losses or the calculation of averages, and every declaration in writing made by him against the charterers or the consignees for not loading or unloading the ship, when such declaration is attested or certified by a Notary Public or other person lawfully acting a such:. Fifty rupees.

- 53. Re-conveyance of Mortgaged Property, including mortgage by deposit of title deeds.** One thousand rupees.
- 54. Release, that is to say, any instrument (not being such a release as is provided for by section 23-A) whereby a person renounces a claim upon another person, or against any specified property -**
- (i) when in favour of any member of a family. Half of the duty as a conveyance (No. 25) on the consideration or market value of the share of the property over which the claim is relinquished, whichever is higher.
 - (ii) in any other case. The same duty as a conveyance (No. 25) on the consideration or market value of the share of the property over which the claim is relinquished, whichever is higher.
- Explanation-**For the purpose of this article, the term "family" shall mean mother, father, wife, husband, son, daughter, brother, sister, granddaughter and grandson.
- 55. Respondentia Bond, that is to say, any instrument securing a loan on the cargo laden or to be laden on board a ship and making repayment contingent on the arrival of the cargo at the port of destination.** The same duty as a Bond (No. 14) for the amount of the loan secured.
- 56. Security bond not being a Mortgage deed, where such** The same duty as a bond (No. 14) for the same amount.

security bond is executed by way of security for the due execution of an office, or executed by a surety to secure the due performance of a contract, or in pursuance of an order of the Court or public officer, not being otherwise provided for by the Court-fees Act, 1870 (No. 7 of 1870).

57. Settlement-

(a) Instrument of (including a deed of dower) -

(i) in case of family members.

Half of the duty as a conveyance (No. 25) on the market value of the property settled.

(ii) in any other case.

The same duty as a conveyance (No. 25) on the market value of the property settled.

Explanation-I - Where an agreement to settle is stamped with the stamp required for an instrument of settlement and an instrument of settlement in pursuance of such agreement is subsequently executed, the duty on such instrument shall not be less than one thousand rupees.

Explanation-II - For the purpose of this article, the term "family" shall mean mother, father, wife, husband, son, daughter, brother, sister, granddaughter and grandson.

(b) Revocation of.

One thousand rupees.

- 58. Share Warrants.** to bearer issued under the Companies Act, 2013 (No. 18 of 2013). One and a half times duty payable on a conveyance (No. 25) for a market value equal to the nominal amount of the shares specified in the warrant.
- 59. Shipping order,** for or relating to the conveyance of goods on board of any vessel. Fifty rupees.
- 60. Surrender of lease** without any consideration and when the subject matter property is in the same condition, as it was stated in the principal lease deed. One thousand rupees.
- 61. Transfer -**
- (a) of debentures, being marketable securities, whether the debenture is liable to duty or not, except debentures provided for by section 8. Fifty paise for every hundred rupees or part thereof, of the consideration amount of debentures.
- (b) of any interest secured by a bond, mortgage deed or policy of insurance. The same duty as a Bond (No. 14) for such amount or value of the interest.
- (c) of any property under section 22 of the Administrator's General Act, 1963 (No. 45 of 1963). One thousand rupees.
- 62. Transfer of lease,** by way of assignment and not by way of under lease. The same duty as a conveyance (No. 25) on the market value of the property, which is the subject matter of the transfer

63. Trust-

- A. Declaration of- of or concerning any

property when made by any writing,
not being a will-

- (a) where there is disposition of property. Three fourth of the duty as a conveyance (No. 25) on the market value of the property settled.
- (b) in any other case. One thousand rupees.
- B. Revocation of- of or concerning any property when made by any instrument, other than a will. One thousand rupees.
64. **Warrant for Goods**, that is to say, any instrument evidencing the title of any person therein named, or his assigns or the holder thereof to the property in any goods lying in or upon any dock, warehouse or wharf, such instrument being signed or certified by or on behalf of the person in whose custody such goods may be. Ten rupees."

Repeal and Saving. 5. (1) The Indian Stamp (Madhya Pradesh Amendment) Ordinance, 2014, (No. 5 of 2014) is hereby repealed.

(2) Notwithstanding the repeal of the said Ordinance, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act.

I.L.R. [2015] M.P., 1
SUPREME COURT OF INDIA

Before Mr. Justice Surinder Singh Nijjar & Mr. Justice A.K. Sikri

Civil Appeal No. 4896/2014 decided on 25 April, 2014

SRI RAM BUILDERS

...Appellants

Vs.

STATE OF M.P. & ors.

...Respondents

(Alongwith Civil Appeal No. 4897/2014, Civil Appeal No. 4898-4899/2014 & Civil Appeal 4900/2014)

A. Doctrine of Merger - Dismissal of S.L.P. in limine - S.L.P. dismissed in limine - Judgment of High Court cannot be said to have merged with the order of Supreme Court. (Para 47)

क. विलयन का सिद्धांत – विशेष अनुमति याचिका का आरंभ में खारिज किया जाना – विशेष अनुमति याचिका आरंभ में ही खारिज – यह नहीं कहा जा सकता कि उच्च न्यायालय के निर्णय का सर्वोच्च न्यायालय के आदेश के साथ विलय हुआ।

B. Constitution - Article 226 - Contract - Judicial Review - High Court in exercise of power under Article 226 would not normally grant the relief of specific performance of contract. (Para 52)

ख. संविधान – अनुच्छेद 226 – संविदा – न्यायिक पुनर्विलोकन – उच्च न्यायालय अनुच्छेद 226 के अंतर्गत शक्ति का प्रयोग करते हुए सामान्यतः संविदा के विनिर्दिष्ट पालन का अनुतोष प्रदान नहीं करेगा।

C. Doctrine of Frustration - I.D.A. leased out the land to MPRTC for construction of Bus Terminal for a period of 30 years in the year 1982 - MPRTC entered into an agreement with appellant for construction of commercial complex on BOT basis which was contrary to the term of lease - MPRTC was already directed to handover the possession of land back to I.D.A. - Amount received by MPRTC from the appellant under agreement was directed to be repaid to him - Lease period has already expired in 2012 - Doctrine of frustration would apply. (Para 55)

ग. विफलता का सिद्धांत – इंदौर विकास प्राधिकरण ने म.प्र. सड़क परिवहन निगम को बस टर्मिनल के निर्माण हेतु वर्ष 1982 में 30 वर्ष की अवधि के

लिए भूमि पट्टे पर दी – म.प्र. सड़क परिवहन निगम ने निर्माण, स्वयं संचालन एवं हस्तारण (बीओटी) के आधार पर व्यावसायिक कॉम्प्लेक्स के लिये अपीलार्थी के साथ अनुबंध किया, जो कि पट्टे की शर्तों का उल्लंघन था – म.प्र. सड़क परिवहन निगम को पहले ही निदेशित किया गया था कि भूमि का कब्जा वापस इंदौर विकास प्राधिकरण को सौंपे – अनुबंध के अंतर्गत म.प्र. सड़क परिवहन निगम द्वारा अपीलार्थी से प्राप्त की गई रकम उसे पुनः भुगतान हेतु निदेशित किया गया – पट्टा अवधि पहले ही 2012 में समाप्त हो चुकी है – विफलिकरण का सिद्धांत लागू होगा।

Cases referred :

(2010) 8 SCC 383, (1973) 2 SCC 825, (1963) Supp (2) SCR 417, (1960) 3 SCR 604, (1989) Supp (1) SCC 487, (2004) 1 SCC 1, (1969) 1 SCR 65, (2007) 1 SCC 477, (2007) 2 SCC 588, (2007) 5 SCC 614, (2000) 6 SCC 359, (2011) 4 SCC 602, (1986) 4 SCC 146, (1994) 6 SCC 651, (2006) 10 SCC 236, (1935) A.C. 524.

J U D G M E N T

The Judgment of the Court was delivered by :
SURINDER SINGH NIJJAR, J. :- Leave granted.

2. The Civil Appeal 4896 of 2014 arising out of S.L.P. (C) No. 35001 of 2012 impugning the judgment of the M.P. High Court at Jabalpur rendered in Writ Petition No. 2937 of 2009. The Writ Petition has been disposed of along with Review Application MCC No. 99 of 2009 and MCC No. 893 of 2008 as well as Contempt Petition No. 469 of 2008. The writ petition has been disposed of with certain directions. Whereas the aforesaid Contempt Petition and the two Review Petitions have been disposed of in view of the order passed in Writ Petition No. 2937 of 2009.

3. The relevant facts leading to the filing of the aforesaid SLP are as follows:-

4. In 1979, Respondent No.2 / Madhya Pradesh Road Transport Corporation (hereinafter referred to as “MPRTC”) proposed to construct a bus stand at Vijay Nagar, Indore. To this end, an Agreement for Lease dated 2nd November, 1981 was entered into between the Transport Corporation and Respondent No.5/ Indore Development Authority (hereinafter referred to as “IDA”), by which the land belonging to IDA, admeasuring 10 acres situated at Vijay Nagar, Indore (hereinafter referred to as “proposed site”) was agreed to be allotted to the Transport Corporation, initially, for 30 years.

In pursuance of the Lease Agreement, possession of the proposed site was handed over to the MPRTC.

5. The Council of Ministers, State of Madhya Pradesh, vide order dated 8th November, 2001, authorised the Transport Corporation to construct a commercial complex on the land owned by it or allotted to it on lease, under a Build, Own-Operate and Transfer ("BOT") Scheme through open tenders. The revenue generated from the said project(s) was to be used to discharge the liability of the MPRTC. On 13th April, 2003, a notice inviting bids for selection of a developer under the BOT Scheme was issued and published in the leading newspapers. In response to this notice, a total number of ten applications were received; and out of those ten applications, five were found to have satisfied the eligibility criteria. Appellant was placed at Sr. No.1 in the list of the candidates satisfying the eligibility criteria. Thereafter, a Special Committee was constituted for the scrutiny of tenders received for construction of the bus stand/commercial premises under the B.O.T. Scheme. On 3rd July, 2003, the Special Committee recommended that since the premium amount offered by the bidders was less, further negotiations be held with all the qualified bidders. Accordingly, the Special Committee held negotiations with the qualified bidders on 7th July, 2003, wherein the Appellant's bid for the B.O.T. Scheme was found to be the highest.

6. MPRTC, after scrutiny of the financial bid and the proposal submitted by the Appellant for B.O.T. scheme, approved its bid vide Acceptance Letter dated 3rd October, 2003. In the Acceptance Letter, the Appellant was directed to deposit 25 per cent amount of the total premium amount of Rupees One Crore Sixteen Lac Thirty Seven Thousand Seven Hundred and Fifty (Rs.1,16,37,750/-) within 15 days of the issuance of the Acceptance Letter. Accordingly, Appellant deposited the first installment of Rs.1,16,37,750/-. The appellant also have to pay a further sum of Rs.7,33,320/- demanded by MPRTC as consultancy fees.

7. In pursuance of the Acceptance Letter, an Agreement dated 4th February, 2004 was entered into between the Appellant and the MPRTC. This agreement *inter alia* provided that the tender document with scope of work general conditions, special conditions, general specifications, list of brands and offer price bid shall form part of the agreement.

8. The MPRTC issued a work order dated 16th March, 2004 to the Appellant for demolishing the existing structure on the land; to be replaced by

the commercial complex. On 11th May, 2004, the State Government issued a notification, in exercise of powers under Sections 35(2) and 35(3) of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (hereinafter referred to as "Adhiniyam"), by which out of 10 acres of land at Vijay Nagar which had been earmarked for the bus stand (proposed site), 3.59 acres of land was permitted to be used for commercial purposes.

9. On 14th May, 2004, the Appellant requested the MPRTC to hand over the possession of the proposed site, so that the structure existing thereon could be demolished and new bus stand-cum-commercial complex could be constructed, in accordance with the terms and conditions of the tender/agreement.

10. On 27TH May, 2004, a lease deed was executed in favour of MPRTC by the IDA upon payment of Rs. 24,27,052/- by the Appellant. This payment was made by the Appellant in order to let the Transport Corporation pay its arrears to IDA. Subsequently on 24th June, 2004, IDA gave a No Objection Certificate ("NOC") to the MPRTC for the proposed BOT project. Also, the Deputy Director, Town and Country Planning granted approval to the MPRTC for the construction of the Bus Stand and Commercial Complex.

11. On 28th June, 2004, Writ Petition No. 801 of 2004 came to be filed by one Suresh Seth, before the Indore Bench of the High Court of Madhya Pradesh, assailing the Notification dated 11th May, 2004. By this notification, as observed earlier, reservation of land use of 3.59 acres was changed by the State Government. The High Court, vide order dated 9th September, 2004, sought reports from the State Government as well as the MPRTC and IDA. In their respective reports, the State Government, MPRTC and IDA stated that the said BOT project was in public interest and justified the Notification dated 11th May, 2004.

12. Meanwhile on 6th January, 2005, the Joint Director, Town and Country Planning sanctioned the detailed site plan of proposed BOT project. The Appellant also applied the Municipal Corporation, Indore for sanction of the building plan, but the same was not granted on the ground that Writ Petition No. 801 of 2004 was pending before the High Court.

13. On 23rd February, 2005, IDA issued a certificate indicating therein that in respect of the proposed B.O.T. Project, premium as well as 15 years' lease rent had already been deposited. On the basis of the above, the IDA

indicated that there shall be no objection, if land in question is mortgaged with any bank, financial institution or the Government.

14. In the meanwhile, there was a move by the State Government for closure of the MPRTC. In this context, the Government of India granted no objection to the State Government on 23rd March, 2005, subject to the condition that the State Government shall ensure and be fully responsible for ensuring compliance of any existing/future order(s) passed by various Courts, including Tribunals, in any/all matters relating to MPRTC.

15. The Appellant filed Writ Petition No. 636 of 2005 in the High Court seeking a direction to the MPRTC to immediately hand over possession of the land in question to the Appellant and grant permission to demolish the existing structure. On 5th August, 2005, the Writ Petition No. 636 of 2005 was disposed of by the High Court with the following directions:

- i. "That petitioner shall deposit the entire balance amount within a period of one month alongwith interest @ 18% per annum, w.e.f. July 2004 when the 2nd installment became due
- ii. Upon depositing entire amount the respondent shall handover the vacant possession to the petitioner, within two weeks, with a permission, to demolish the structure as per the agreement. Respondent shall also pursue the matter with the Municipal Corporation to handover all part of the premises, which is in their occupation.
- iii. Respondent shall deposit the map for sanction before the competent authorities immediately, if not submitted, so far. In case the map has already been submitted the respondent shall give the authority to the petitioner, to pursue the matter before the competent authorities for obtaining the permission and shall extend all the assistance for the purpose of obtaining permission.
- iv. After taking possession, the petitioner shall construct and hand over the construction property to the respondent as per terms of the tender notice/agreement.
- v. The competent authorities shall consider the application

of the respondent for permission and shall grant the permission in accordance with law.”

The Appellant deposited Rs.2,95,03,752/- towards premium and a further sum of Rs.27,53,536/- towards interest to the MPRTC, in terms of the aforesaid order. Thereafter, again, the Appellant requested the Respondents herein to hand over the possession of the proposed site to the appellant. A Notice was issued by the appellant to the MPRTC dated 12th September, 2005, requesting to hand over possession of the land, in terms of the directions of the High Court dated 5th August, 2005.

16. At that stage, the Principal Secretary, Transport Department/ Respondent No. 2 herein, recorded a note dated 15th September, 2005, questioning the justification for constructing bus stand and observed that the construction was not in public interest particularly when a decision had been taken by the State Government to wind up the MPRTC. Soon thereafter, the MPRTC filed Special Leave Petition No. 20038 of 2005 before this Court challenging the order dated 5th August, 2005 passed by the High Court. This SLP was dismissed by this Court vide order dated 7th October, 2005.

17. Possession of the proposed site still not having been delivered, the Appellant filed Contempt Petition No. 466 of 2005 (renumbered as Contempt Petition No. 469 of 2008) before the High Court of Madhya Pradesh. In this Contempt Petition, the Appellant moved an application for injunction on 11th November, 2005 (I.A. No. 1060 of 2005) restraining the MPRTC from handing over the possession of the proposed site to the State Government for establishing the Regional Transport Office. The High Court on 14th November, 2005, directed MPRTC to maintain status quo and not to handover the possession of the proposed site or to create any 3rd party interest. In spite of the aforesaid order, the possession of the proposed site was handed over by the MPRTC to the Transport Department on 16th November, 2005, for opening the R.T.O. A test centre for driving licences has been established on the land meant for the commercial complex.

18. In the meantime, State of Madhya Pradesh moved an application, MCC No. 1072 of 2005, before the High Court, seeking recall of the order dated 5th August, 2005 passed in Writ Petition No. 636 of 2005. The MPRTC also filed MCC No. 5 of 2006, seeking identical relief, i.e. recall of order dated 5th August, 2005. It was claimed that a decision had been taken by the M.P. State Government to wind up MPRTC. On 23rd March, 2005, MPRTC

had been issued a notice of demand for recovery of Rs.2387/- crores as Tax dues. The property earmarked for the commercial complex, was one of the properties seized by the State Authorities on 19th July, 2005. Since the possession was already taken by the State, no direction for delivery of possession to the Appellant could have been issued on 5th August, 2005. These facts could not be placed before the High Court, as the State was not impleaded as a party in Writ Petition No. 636 of 2005.

19. Thereafter, Appellant moved I.A. No. 7064 of 2006 in the Contempt Petition before the High Court to implead the Transport Department - Respondent No. 2 herein, as a respondent in the Contempt Petition. This I.A. was allowed by the High Court by order dated 6th October, 2006. During the course of hearing of this Contempt Petition, Appellant moved another I.A. No. 6906 of 2007, seeking a direction to the respondents to place on record the following:

“1(a) On what date and which inward number the order of the government directing the RTO, Indore to attach the MPSRTC Property at Indore was received by RTO, Indore pursuant to which the so called attachment dated 9.7.2005 was made.

1(b) On what date, by which letter number and under what dispatch number the fact of attachment and acquisition of property/land was sent by RTO, Indore to the State Government (Original Letters, original dispatch register). And on what date, by which the inward number this information was received.”

According to the Appellant, the respondents could not furnish the said information to the Court, despite having sought a number of opportunities in that regard.

20. Meanwhile on 2nd November, 2007, the IDA cancelled the lease of the MPRTC for violation of the lease terms by running the RTO. Cancellation of the lease was challenged by the MPRTC through Writ Petition No. 6770 of 2007 in the High Court of Madhya Pradesh. On 11th December, 2007, the High Court without issuing notice to the Appellant, who was impleaded as Respondent No.3, disposed of the Writ Petition with the following observations:-

“When two instrumentalities of the State, such as in the present

case, choose to bring their disputes in open court, the loss is of the general public. The public confidence in the credibility of the State Govt. and its various wings/functionaries and its instrumentalities comes at stake.

In these circumstances, I do not find that this Court should continue with the proceedings in the present Petition. I deem it appropriate to request the Chief Secretary, State of Madhya Pradesh, to take up the matter at his level and after holding a meeting with the Principal Secretary, Transport Department, Principal Secretary, Housing and Environment Department and the Managing Director of the M.P. Road Transport Corporation Ltd. take such further action, as may be deemed appropriate, in the facts and circumstances of the case. However, the Chief Secretary shall ensure that the officers of the State Government and various other instrumentalities of the State Government are not allowed to bring out their inter se disputes in public in future”.

21. On 17th November, 2008, the Central Government, Department of Transport & Highways informed the State Government of Madhya Pradesh that the request for permission for closure of MPRTC under the provisions of the Road Transport Corporation Act, for which earlier no-objection had been given, was being declined keeping in view the decision of Ministry of Labour & Employment, and that it would now have to continue its current operations.

22. The Appellant submitted representation dated 20th February, 2009, wherein attention of the Chief Secretary was drawn to the pendency of the review petitions filed by the State of Madhya Pradesh and the MPRTC; and the Contempt Petition filed by the Appellant and the order passed therein, whereby status quo was ordered to be maintained.

23. In spite of the aforesaid representation, Respondent No. 1 held the meeting on 4th March, 2009 as directed by the High Court, wherein it was inter alia decided as under:

“I. Order dated 02.11.2007 and notice dated 30.06.07 for cancellation of lease of the land in question of the Transport Corporation by the I.D.A. be cancelled.

II. R.T.O. be ordered for releasing the land by the Transport

Department for attachment.

- III. The M.P. Road Transport Corporation shall hand over land in question to I.D.A.
- IV. The amount which has been received by the Transport Corporation from Sh. Ram Builders shall be returned along with interest to Sh. Ram Builder.
- V. Decision with respect to further use and management of the land shall be taken by I.D.A.”

24. Aggrieved by Clause (III), (IV) and (V) of the aforesaid decision, Appellant preferred Writ Petition No. 2937 of 2009 before the High Court of Madhya Pradesh. It was *inter alia* contended that the directions in aforesaid clauses were in violation of order dated 5th August, 2005 of the High Court and in violation of the principles of natural justice.

25. The High Court disposed of the Writ Petition on 27th September, 2012 with the following observations:-

“15. The order dated 5.8.2005 passed in Writ Petition No. 636/2005 directing the corporation to deliver possession of site to the petitioner cannot be implemented after the lease deed was cancelled by the IDA. It is this cancellation which became the subject matter of writ petition No.6770/2007 and the writ petition was decided vide order dated 11.12.2007 by another Single Judge Bench directing the Chief Secretary for resolving the dispute. As already mentioned above, the petitioner did not challenge the order dated 11.12.2007 and submitted a detailed representation dated 20.02.2009 to the Chief Secretary. The impugned decision taken by the Chief Secretary is in pursuance of the directions given by the High Court in Writ petition No. 6770/2007 in which the petitioner was also a party. There is, thus, no violation of the principles of natural justice. The decision reached by the Chief Secretary directs that the entire amount paid by the petitioner be returned to it with interest. The decision does not fix the rate of interest but we feel that 9% will be the proper interest having regard to all the circumstances. In view of the direction to return the amount with interest, as decided by us; there would be

apparently no loss to the petitioner. The respondents are directed to return the amount with interest within four months from today. If the petitioner still feels that there has been a breach of contract, it can pursue the remedy of specific performance or damages before a competent civil court. We; therefore, decline to interfere with the decision of the Chief Secretary except fixing the rate of interest, as indicated above.”

26. In view of the aforesaid directions, the High Court also disposed of the Contempt Petition No. 469 of 2008, Review Application Nos. MCC No. 99 of 2009 and MCC No. 893 of 2008 without any further directions.

27. We have heard the learned counsel for the parties.

28. Mr. R.F. Nariman and Mr. P.S. Patwalia, learned senior counsel, appearing for the appellant submitted that the reasoning adopted by the High Court in Paragraph 15 of the impugned judgment, which has been reproduced above, was not even supported by the respondents. The first reason given by the High Court is that the Order dated 5th August, 2005 in Writ Petition No. 636 of 2005 can not be implemented after cancellation of lease deed by the IDA. This, according to the learned senior counsel, is without any basis as by the order dated 22nd February, 2009, the Chief Secretary had cancelled the lease deed. Therefore, the order dated 2nd November, 2007 having been nullified, the lease in favour of MPRTC revived. This would also revive the application of MPRTC to cull the agreement with the appellant. The second reason given by the High Court, according to Mr. Nariman and Mr. Patwalia is that the order dated 11th December, 2007 passed in Writ Petition No. 6770 of 2007 was not challenged by the appellant, can not be supported in law. It is pointed out by the learned senior counsel that the aforesaid writ petition was filed by MPRTC challenging the order of cancelling the deed in its favour by the IDA. The appellant was not at all involved in the aforesaid *lis*. In any event, the High Court had not passed any order on merits. It had merely left it for the Chief Secretary to decide the issue. Therefore, no cause had arisen to the appellant to challenge the order dated 11th December, 2007. It is further pointed out that the Chief Secretary in fact decided the substance of the writ petition. Substance of the grievance raised in the writ petition was decided in favour of MPRTC by setting aside the order of cancellation of the lease by the IDA. It is pointed out by the learned senior counsel that IDA has not challenged the order of the Chief Secretary cancelling the direction of IDA with regard to the cancellation of the lease.

29. Learned senior counsel further submitted that the Chief Secretary was expected to take a decision in accordance with law, i.e., in accordance with the order of the High Court that has become final and binding and not contrary to that. Furthermore, the order of the Chief Secretary on directions (III), (IV) and (V), which affect the rights of the appellant was challenged in the writ petition in which the impugned judgment has been passed. According to the appellant, the decision Nos. (I) and (II) were correct and, therefore, there were no occasion to challenge the same. The directions (III), (IV) and (V) are contrary to Directions (I) and (II) and were beyond the scope of the controversy raised in Writ Petition No. 6770 of 2007, which had been referred to the Chief Secretary by the High Court. The order of the Secretary has been passed without issuing any notice to the appellant, even though in the writ petition, the appellant was impleaded as Respondent No. 3. It is pointed out by the learned senior counsel that by way of abundant caution, the appellant has challenged the order dated 11th December, 2007, passed in Writ Petition No. 6770 of 2007 in S.L.P.(C) No. 36887 of 2012.

30. Next it was submitted by the learned senior counsel that the actions of Madhya Pradesh Road Transport Corporation (Respondent No.3) are in gross contempt of the orders dated 5th August, 2005, which have not been purged till date. The aforesaid order has become final after the dismissal of SLP (C) No. 20038 of 2005 on 7th October, 2005. It is submitted that the Review Petition MCC No. 99 of 2009 filed on 2nd January, 2006 after dismissal of the aforesaid SLP on 7th October, 2005 is an abuse of process and not maintainable. In support of this submission, learned senior counsel relies on *Meghmala & Ors. Vs. G. Narasimha Reddy & Ors.* 1 (Paras 25 and 26). Similarly, the Review Petition MCC No. 893 of 2008 is not maintainable for the same reason. In any event, the Review Petition was not decided on merits, which was disposed of in view of the impugned order passed in the Writ Petition with regard to the cancellation of the lease.

31. Thereafter, very detailed submissions have been made on the construction of the lease deed. However, it must be noticed here that the manner in which these submissions have been advanced before us bear no resemblance to the manner in which these submissions were made before the High Court.

32. Mr. R.F. Nariman has also submitted that the term of lease has to be understood to have commenced from 26.05.2004, when the IDA executed a formal lease in favour of MPRTC. Further, learned senior counsel submitted that the possession of the site in terms of the lease cannot be held to be given on 22.1.1982, when the agreement to lease was executed. It was further submitted that where a literal reading of the lease leads to an absurdity, the court has the power to read it reasonably. Such a reasonable reading, according to Mr. Nariman, would support the aforesaid submission, i.e. the lease commences from 26.05.2004. In this context, learned senior counsel rely upon the following cases: *DDA vs. Durga Chand Kaushish*²; *Ramkishore Lal vs. Kamal Narian*³ and *Sahebzada Mohammad Kamgar Shah vs. Jagdish Chandra Deo Dabhal Deo*⁴. These cases reiterate the well established principles of law relating to the construction of deeds, which are as follows: first, that the intention of the parties to a grant must be ascertained first and foremost from the disposition clause. Second, clear disposition by an earlier clause will not be allowed to be cut down by a later clause; and third, that a deed, being a grantor's document, has to be interpreted strictly against him and in the favour of the grantee.

33. Mr. Nariman also submitted that the Respondents cannot rely upon Clause 5E of the Agreement to Lease, after the execution of the Lease Deed. Substantiating this, it was submitted that the Renewal Clause in the Agreement to Lease stood superseded by the express terms of the Lease Deed dated 26.05.2004. In this context, he relied upon *Provash Chandra Dalui vs. Biswanath Banerjee*⁵ and *State of U.P. vs. Lalji Tandon*.⁶

34. Further according to Mr. Nariman, the terms of the Agreement to Lease cannot be relied upon when a specific provision has been provided in the Lease Deed itself, which provides for extension of the lease. Clause (1) of the Lease enables the IDA to extend the lease for which neither the renewal nor permission of the State Government is necessary.

35. The argument of the Respondents that the Agreement of the MPRTC with the Appellant has been frustrated was sought to be countered by Mr. Nariman. It was submitted that self induced frustration cannot be a basis to

² (1973) 2 SCC 825

³ (1963) Supp (2) SCR 417

⁴ (1960) 3 SCR 604

⁵ (1989) Supp (1) SCC 487(Para 14)

⁶ (2004) 1 SCC 1 (Para 13).

frustrate a valid agreement. In this context, it was contended that the submission of the Respondents that MPRTC is being wound up is not tenable since such winding up is the result of an act of the Party itself. Reliance placed upon *Boothlinga Agencies vs. V.T.C. Poriaswami Nadar*⁷, wherein it was *inter alia* held that "the doctrine of frustration of contract cannot apply where the event which is alleged to have frustrated the contract arises from the act or election of a party." It was also contended that commercial exigencies can never lead to frustration. Reliance was placed upon *Pollock and Mulla*, 14th Ed. Pgs. 887-889.

36. Mr. Nariman also submitted that the submission of the IDA that the Appellant has no privity of contract with the Petitioner is not correct. Further, the submission of the IDA that the Agreement to Lease was only for a bus stand and no permission was granted by the IDA to MPRTC for constructing a commercial project has been submitted to be incorrect by Mr. Nariman. Another factual submission advanced by the Appellant is that the submission of the Respondents that MPRTC is being wound up is not correct.

37. Lastly, Mr. Nariman contended that on the balance of equity, the MPRTC ought to be directed to comply with the directions of the High Court contained in order dated 05.08.2005, and put the Appellant in possession of the plot.

38. Mr. J.P. Cama, learned senior counsel appearing for the 5th Respondent - Indore Development Authority has submitted that by an agreement dated 2nd November, 1981, IDA entered into a lease in respect of 10 acres of his property situated in its Scheme No. 54 at Indore in favour of MPRTC. Possession of the land was handed over on 22nd January, 1982. The first installment of the premium and leased rent was deposited on 3rd October, 1980. The lease was to be for a period of 30 years subject to renewal. The lease was to subsist in the first instance upto 21st January, 2012 but was terminated on 2nd July, 2007, i.e., before the expiry of the period of 30 years from the date of possession. MPRTC had challenged the aforesaid decision in Writ Petition No. 6770 of 2007. Since the appellant had no privity of contract with IDA, it could not have challenged the termination of the lease on 2nd July, 2007 and did not do so. Since the dispute was between two Government organizations, the High Court rightly remitted the matter to the Chief Secretary of the State of Madhya Pradesh for resolution. Even though, the appellant was not a party to the aforesaid writ petition filed by

⁷(1969) 1 SCR 65, at Page 79

MPRTC, it had submitted a representation on 22nd February, 2009. The directions issued by the Chief Secretary were challenged in Writ Petition No. 2937 of 2009 in which the impugned judgment has been passed. The submissions of Mr. Cama in brief are:-

- (i) That there was no privity of contract between IDA and Sri Ram Builders, i.e., the appellant. Therefore, the High court has rightly granted liberty to the appellant to file a Civil Suit, if so advised.
- (ii) The cancellation of the lease by IDA has become final. This has not been challenged by the appellant. Therefore, no Mandamus can be issued to IDA, to permit the appellant to construct the Bus Stand and commercial-cum-residential complex. Mr. Cama further submitted that the lease commences from 22nd January, 1982 when possession was handed over and expired on 21st January, 2012 upon completion of 30 years period of the lease. It is further submitted that MPRTC can not claim automatic renewal of the lease. It would be subject to the consent of IDA and the State Government. No application had been filed for such extension. In any event, the lease has come to an end by the efflux of time. Mr. Cama further submitted that IDA had given a lease in favour of MPRTC. Under the said lease, MPRTC had no authority to create further third party rights. Wrongly, according to Mr. Cama, MPRTC under the tender conditions / contract entered into with the appellant had given it the right to sell proposed commercial premises, and to collect premium on such allotment from prospective buyers. The MPRTC had only been given NOC for completing the bus stand and the commercial-cum-residential complex on B.O.T. basis. MPRTC had no legal right, being a sub-lessee higher than the lessee. The next submission of Mr. Cama is that MPRTC has completely wound up its operations; they have sold all their buses. Therefore, it can not be compelled to get the bus stand constructed from the appellant. Countering the submission of Mr. Nariman and Mr. Patwalia, he submits that the order of the High Court dated 5th August, 2005

directing MPRTC to hand over the possession to the appellant can not be relied upon by the appellant, the said order has not become final inasmuch as:-

- (i) IDA was not a party in the said proceedings;
- (ii) The HC had not decided the matter in relating to lease of the IDA
- (iii) State Govt had filed recall application – which was pending disposal before HC
- (iv) Even MPRTC filed a recall application wherein they pleaded that the entire order was based on the statement made by their counsel that they are not in a position to pay Sri Ram builders, however they made a statement, in recall application that they are now willing to repay Sri Ram and hence prayed for recall of order dated. 5.8.05 – which was also pending;
- (v) Where SLP is dismissed without giving reasons, there is no merger of the judgment of the HC with the order of SC. Hence judgment of HC can be reviewed, even after dismissal of SLP. Reliance was placed upon *Gangadhara Palo vs. The Revenue Divisional Officer & Anr.* [2011 (4) SCC 602]

39. It is submitted that construction of bus terminal on B.O.T. basis was a commercial transaction between MPRTC and the appellant. Even if the cancellation is not legal, this Court will not interfere in this decision as it was purely contractual in nature. He relies on the judgments of this Court in the case of *Rajasthan Housing Board & Anr. vs. G.S. Investments & Anr.*⁸ and *Ramchandra Murarilal Bhattad & Ors. vs. State of Maharashtra & Ors.*⁹

40. It is submitted that the arguments of the appellant that the lease, which was granted in the first instance for 30 years was intended to continue (automatically) for a further period of 30 years in terms of clause 1 of the

⁸ (2007) 1 SCC 477

⁹ (2007) 2 SCC 588

aforesaid lease deed is untenable. Even otherwise the submission can not be considered as there were no pleadings to this effect either in the original petition or in the grounds of SLP. In any event, according to the respondents, the initial period of the lease was for 30 years. Furthermore, Paragraph/Clause 5(E) of the agreement to lease makes it clear that after termination of the lease period, it can be extended after renewal; that too only with the consent of MPRTC and IDA and further obtaining sanction of the State Government. According to Mr. Cama, two short questions would arise namely:-

- (i) From what date, the period of 30 years is to be counted?
- (ii) Whether there is an automatic extension of lease?

41. It is according to Mr. Cama, admittedly possession of the property was given to MPRTC on 21st January, 1982. This premium, as well as the first lease rent had been deposited on 3rd October, 1980. It is also an admitted position that the lease rent for the entire period of 1982 onwards has in fact been paid by deposit of premium plus 15 years lease rent. It is reiterated by Mr. Cama that admitted date of actual possession by the lesser is 22nd January, 1982. Therefore, the first period of lease expired by efflux of time on 21st January, 2012. With regard to the renewal of the lease, it is submitted that even such renewal is on specific sanction of the IDA and the State Government. He submits that the concept of extension of the lease is distinguishable from the concept of renewal. In support of this submission, Mr. Cama relies on *Hardesh Ores (P) Ltd. Vs. Hede and Company*¹⁰ (Pages 627 & 628). He submitted that the agreement of lease used both words extension and renewal but extension is always made subject to renewal. Mr. Cama further pointed out that Order dated 5th August, 2005 has not become final and binding on all parties on the dismissal of the SLP filed by the MPRTC. The aforesaid SLP was dismissed in limine. Therefore, the judgment of the High Court can not be said to have merged with the order of this Court. In support of the submission, Mr. Cama relies on *Kunhayammed & Ors. vs. State of Kerala & Anr.*¹¹ and *Gangadhara Palo vs. Revenue Divisional Officer & Anr.*¹²

42. With regard to the submission relating to the order passed by the Chief Secretary, Mr. Cama submits that the appellant has to either accept or challenge the order in toto. If the complete order is accepted, the termination of the lease is set aside, the property would return to IDA with compensation to the

¹⁰ (2007) 5 SCC 614 ¹¹ (2000) 6 SCC 359 ¹² (2011) 4 SCC 602(Para 7)

appellant. In the event, the order is completely set aside, the termination of the lease remains in force and the property returns to the IDA. In either case, the land returns to the IDA. Mr. Cama submits that the order passed by the Chief Secretary is a comprehensive order and can not be permitted to be challenged in a truncated manner.

43. We have considered the submissions made by the learned counsel for the parties.

44. Before we proceed to examine the submission made by Mr. Nariman, it would be appropriate to cull out the bare essential facts for the determination of the controversy herein. A lease deed dated 2nd November, 1981 was entered into between MPRTC and IDA. The possession of the land was handed over to MPRTC on 22nd January, 1982. Initially, the lease was taken by the MPRTC for the purpose of a bus stand. It appears that no final decision was taken till 8th November, 2001 when the Council of Ministers of the State Government authorized the construction of a commercial complex on the land under BOT Scheme. A tender notice was issued on 13th April, 2002. On 7th July, 2003, the bid of the appellant was found to be the highest. The amount as mentioned in Para 6 earlier, was duly paid by the appellant. A separate agreement was entered into between MPRTC and the appellant on 4th February, 2004 which read alongwith the tender document provided as under:

“The successful promoters/builders will have the right to market the saleable space made available to him on different floors in the commercial complex, collect premium on such allotment from prospective buyers.”

45. On 25th May, 2004, MPRTC deposited the lease rental with IDA. A formal lease was executed on 26th May, 2004. As noticed earlier, the lease was for 30 years. The leased land (plot) was to be used only for the bus terminal. It was specifically provided that the plot cannot be divided. The possession of the plot had been received on 22nd January, 1982. The lease also provided that the Rules published in the gazette on 16th December, 1977 shall be binding on the lessee. Rule 40 of the aforesaid Niyam/Rules read as under :

“The lessee may take possession of the plot on the date fixed or notified to him for taking over possession of the plot and the lease of the plot shall commence from the date irrespective of the fact “whatsoever, possession of the plot has been taken

or not and the lessee shall pay all rates and taxes where leviable the owner or the lessee from the date.”

46. On 24th June, 2004, IDA gave its no objection for bus terminal-cum-commercial complex to be constructed under the BOT Scheme. On 18th December, 2005, the State Government decided to wind up the MPRTC. The proposal of the State Government was not approved by the Ministry of Shipping and Road Transport, Government of India. On 17th November, 2008, a letter was issued informing the State Government that the Ministry of Labour had declined to grant permission for closure under Section 25-O of the Industrial Disputes Act, 1947. On 5th August, 2005, the directions were issued by the High Court in the writ petition filed by the appellant. SLP filed against these directions was dismissed by this Court on 7th October, 2005. In the contempt petition filed by the appellant for non compliance of the directions of the High Court dated 5th August, 2005, MPRTC was restrained from handing over the possession of the property or to create third party interest/rights. On 2nd November, 2007, the lease was cancelled by IDA on the ground that MPRTC had violated the prescribed conditions by handing over the possession to RTO. As noticed earlier, the cancellation of the lease was challenged by MPRTC, by way of a writ petition, which was disposed of by the High Court on 11th December, 2007 by referring the entire issue to the Chief Secretary. The appellant did not challenge the order dated 2nd November, 2007 but submitted to the jurisdiction of the Chief Secretary by filing a comprehensive representation. Even in the writ petition in which the impugned order had been passed, the appellant had only challenged Clauses III, IV and V of the order of the Chief Secretary.

47. We shall now consider the submission of Mr. Nariman, *seriatim*. Can the order dated 5th August, 2005 be implemented and should the appellant be permitted to go ahead with the construction of commercial complex-cum-bus stand. Undoubtedly, the SLP filed by MPRTC against the order dated 5th August, 2005 in Writ Petition No.363 of 2005 has been dismissed by this Court, but it was a dismissal in *limine* without recording any reason. Therefore, the judgment of the High Court cannot be said to have merged with the order of this Court. In *Kunhayammed* (*supra*), this Court considered the effect of the dismissal of the SLP in *limine*. This Court reiterated the ratio laid down by this Court in *Indian Oil Corporation Ltd. vs. State of Bihar & Ors.*¹³ which considered the impact of the order dismissing the SLP with the following expression:

¹³ (1986) 4 SCC 146

“The special leave petition is dismissed.”

Considering the aforesaid order of this Court in *Indian Oil Corporation Ltd.* (supra), it has been observed as follows:

“The effect of a non-speaking order of dismissal of a special leave petition without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that this Court had decided only that it was not a fit case where special leave should be granted. This conclusion may have been reached by this Court due to several reasons. When the order passed by this Court was not a speaking one, it is not correct to assume that this Court had necessarily decided implicitly all the questions in relation to the merits of the award, which was under challenge before this Court in the special leave petition. A writ proceeding is a wholly different and distinct proceeding. Questions which can be said to have been decided by this Court expressly, implicitly or even constructively while dismissing the special leave petition cannot, of course, be reopened in a subsequent writ proceeding before the High Court. But neither on the principle of res judicata nor on any principle of public policy analogous thereto, would the order of this Court dismissing the special leave petition operate to bar the trial of identical issues in a separate proceeding namely, the writ proceeding before the High Court merely on the basis of an uncertain assumption that the issues must have been decided by this Court at least by implication. It is not correct or safe to extend the principle of res judicata or constructive res judicata to such an extent so as to found it on mere guesswork.

48. In reiterating the aforesaid observation, this Court in *Kunhayammed* (supra) observed as follows:

“27. A petition for leave to appeal to this Court may be dismissed by a nonspeaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a nonspeaking order, i.e., it does not assign reasons for dismissing the special leave petition, it would

neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared.”

49. The aforesaid ratio in *Kunhayamed* (supra) is reiterated by this Court in *Gangadhara Palo* (supra):

“7. The situation is totally different where a special leave petition is dismissed without giving any reasons whatsoever. It is well settled that special leave under Article 136 of the Constitution of India is a discretionary remedy, and hence a special leave petition can be dismissed for a variety of reasons and not necessarily on merits. We cannot say what was in the mind of the Court while dismissing the special leave petition without giving any reasons. Hence, when a special leave petition is dismissed without giving any reasons, there is no merger of the judgment of the High Court with the order of this Court.”

50. Even though the order of the High Court had not merged with the order passed by this Court in dismissing the SLP, can the appellant be deprived of the benefit of the order passed by the High Court on 5th August, 2005? Mr. Nariman has submitted that the order passed by the Chief Secretary on 11th December, 2007 even though on directions issued by the High Court in Writ Petition No.6770 of 2007 cannot nullify the directions given by the High Court earlier. The order passed by the Chief Secretary in its executive capacity cannot have the effect of nullifying the order passed by the High Court on 5th August, 2005. On first blush, the submission made by Mr. Nariman seems to be very attractive, but factually it has to be noticed that much more water has flown under the bridge since the passing of the order dated 5th August, 2005. Subsequently, the lease to MPRTC was cancelled on 2nd November, 2007 by the IDA. The appellant did not challenge the order dated 2nd November, 2007 passed by the IDA. The aforesaid order was challenged by MPRTC in Writ Petition No.6770 of 2007. On 11th December, 2007, the High Court without issuing notice to the appellant, who was impleaded as respondent No.3, disposed of the writ petition. The High Court noticed that two instrumentalities of the State have chosen to bring their disputes in open court. In such circumstances, the High Court was of the opinion that the entire dispute ought to be decided by the Chief Secretary of the State of Madhya Pradesh by holding meetings between the Principal Secretary of the Transport Department,

Principal Secretaries of Housing and Environment Department and the Managing Director of the MPRTC. The appellant accepted the aforesaid order passed by the High Court and submitted a detailed representation before the Chief Secretary on 20th February, 2009. The Chief Secretary in the meeting held on 4th March, 2009 took a comprehensive decision on all the issues involved in writ petition with regard to the cancellation of the lease deed in favour of MPRTC by IDA. The Chief Secretary revoked the order dated 2nd November, 2007 and notice dated 30th June, 2007 cancelling the lease of land in question granted to the MPRTC by IDA. RTO was directed to release the leased land from attachment. It is noteworthy that the appellant has not chosen to challenge the aforesaid two directions. However, as noticed earlier, the appellant challenged the directions issued in Clauses III, IV and V in Writ Petition No.2937 of 2009 in the High Court of Madhya Pradesh. It was, *inter alia*, contended that the directions in the aforesaid clauses were in violation of the order dated 5th August, 2005. It is noteworthy that even in this writ petition, challenging the direction Nos. III, IV and V issued by the Chief Secretary, the appellant had not challenged the competence of the Chief Secretary to decide the issues. The appellant cannot now be permitted to state that the aforesaid directions are without jurisdiction. Under the orders of the Chief Secretary dated 4th March, 2009, the possession of the land has already been delivered to IDA. Therefore, it would not be possible at this stage to direct that the mandamus granted on 4th August, 2005 in Writ Petition No.636 of 2005 shall be enforced.

51. In the ultimate analysis, the whole controversy boils down to a breach of contract by MPRTC entered into with the appellant. The scope of judicial review is very limited in contractual matters even where one of the contracting parties is the State or an instrumentality of the State. The parameters within which power of judicial review can be exercised, has been authoritatively laid down by this Court in a number of cases.

In *Tata Cellular vs. Union of India*,¹⁴ this court upon detailed consideration of the parameters within which judicial review could be exercised, has culled out the following principles:

“70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are

¹⁴ (1994) 6 SCC 651

inherent limitations in exercise of that power of judicial review. *The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State.* The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

* * *

77. The duty of the court is to confine itself to the question of legality. Its concern should be:

- (1) Whether a decision-making authority exceeded its powers?
- (2) committed an error of law,
- (3) committed a breach of the rules of natural justice,
- (4) reached a decision which no reasonable tribunal would have reached, or
- (5) abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) **Illegality:** This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) **Irrationality, namely, Wednesbury unreasonableness.**

(iii) **Procedural impropriety.**

The above are only the broad grounds but it does not rule out addition of further grounds in course of time.”

52. In our opinion, the case put forward by the appellant would not be covered by the aforesaid ratio of law laid down by this Court. The High Court, in our opinion, has rightly observed that the appellant can seek the appropriate relief by way of a civil suit. The High Court in exercise of its jurisdiction under Article 226 of the Constitution of India would not normally grant the relief of specific performance of a contract. This view is supported by *Ramchandra Murarilal Bhattad vs. State of Maharashtra*.¹⁵ This Court relying upon the earlier decision in *Noble Resources Limited vs. State of Orissa*¹⁶ held as under:

“50. ... this Court would not enforce specific performance of contract where damages would be adequate remedy. It was also held that conduct of the parties would also play an important role.

51. The expansive role of courts in exercising its power of judicial review is not in dispute. But as indicated hereinbefore, each case must be decided on its own facts.”

53. At no stage, the appellant had any privity of contract with IDA. MPRTC entered into a BOT contract with the appellant contrary to the terms and conditions of the lease which provided specifically that the land shall be used for constructing a bus stand—cum commercial complex. MPRTC had no legal right to create any further right in favour of the appellant with regard to the receiving of the premium on the constructed units sold to third party(ies). Even otherwise, the appellant seems to be *flogging a dead horse*. Admittedly, the possession of the proposed site was delivered to MPRTC on 22nd January, 1982. The maximum lease period was for 30 years. By efflux of time the aforesaid lease period expired on 21st January, 2012. We do not accept the submission of Mr. Nariman that as the entire rent had been paid, MPRTC would be entitled to automatic renewal of the lease for 90 years. The renewal clause in the lease subsequently provides that the renewal shall be with the consent of IDA. This consent by the IDA is not a mere formality. We are, therefore, not inclined to accept the submission of Mr. Nariman that the term of the lease has to be understood to have commenced from 26.05.2004.

¹⁵ (2007) 2 SCC 588

¹⁶ (2006) 10 SCC 236

54. This apart, there is much substance in the submission of Mr. Cama that no application has been filed even for this formal renewal by MPRTC. In any event, MPRTC would not be in a position to continue with the lease as it is heavily indebted presently, to the tune of Rs. 3500 crores. The property of the corporation has been attached by the various creditors. Even the proposed site where the bus stand – cum – commercial complex was to be constructed is under attachment. The claim made by the appellant is in the nature of damages for breach of contract and/or the relief of specific performance of contract. So far as the breach of contract is concerned, the appellant will have no cause of action against IDA as there is no privity of contract between the parties. So far as the specific performance is concerned, it appears that the entire purpose of the contract has been frustrated by subsequent events.

55. We are also not much impressed by the submission of Mr. Nariman that the doctrine of frustration cannot be applied here since it is a “self induced frustration”. In the case of *Boothalinga Agencies* (supra), this Court upon comparing and contrasting the English Law and the statement of Indian Law contained in Section 56 of the Indian Contract Act summed up the legal position with regard to frustration of contract as follows:-

“The doctrine of frustration of contract is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It should be noticed that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.

In English law therefore the question of frustration of contract has been treated by courts as a question of construction depending upon the true intention of the parties. In contrast, the statutory provisions contained in Section 56 of the Indian Contract Act lay down a positive rule of law and English authorities cannot therefore be of direct assistance, though they have persuasive value in showing how English courts have approached and decided cases under similar circumstances.”

We fail to see how the aforesaid observations are of any relevance in the facts and circumstances of this case.

56. We are also unable to accept the submission of Mr. Nariman that the Doctrine of Frustration would not apply in the facts of this case as it is a self induced frustration. The aforesaid expression seems to have been borrowed from certain observations made by the Judicial Committee in the case of *Maritime National Fish, Limited vs. Ocean Trawlers, Limited*¹⁷. The facts of that case, as narrated in *Boothalinga Agencies* (supra), would indicate that in that case, the respondents chartered to the appellants a steam trawler fitted with an otter trawl. Both the parties knew at the time of the contract that it was illegal to use an otter trawl without a licence from the Canadian government. Some months later the appellants applied for licences for five trawlers which they were operating, including the respondent's trawler. They were informed that only three licences would be granted, and were requested to state for which of the three trawlers they would like to have the licences. They named three trawlers other than the respondent's trawler, and then claimed that they would not be bound by the trawler of the respondent as it was frustrated. It was held by the Judicial Committee that the failure of the contract was the result of the appellant's own election, and, therefore, no frustration of the contract.

57. This Court distinguished the aforesaid judgment and observed as follows:-

“We think the principle of this case applies to the Indian law and the provisions of Section 56 of the Indian Contract Act cannot apply to a case of “self-induced frustration”. In other words, the doctrine of frustration of contract cannot apply where the event which is alleged to have frustrated the contract arises from the act or election of a party. “

58. In our opinion, these observations are of no assistance to the appellant as in this case, the lease has come to an end by efflux of time. This apart, MPRTC is heavily indebted and had sought permission of the State and the Union of India to wind up. Furthermore, there was also a breach of the terms and conditions of the lease on the basis of which it has been terminated in accordance with law.

59. In any event, these are issues which would involve adjudication of disputed questions of fact which can only be suitably adjudicated in the civil suit as directed by the High Court in the impugned judgment. The appellant shall be at liberty to seek its remedies against MPRTC for breach of contract.

¹⁷ (1935) A.C. 524

Our conclusion that the High Court was right in rejecting the contentions of the Appellant herein is also supported by the law laid in *Rajasthan Housing Board vs. G.S. Investments* (supra) which was relied upon by Mr. Cama. We may notice here the following excerpt:

“..the Court should exercise its discretionary power under Article 226 of the Constitution with great care and caution and should exercise it only in furtherance of public interest. The Court should always keep the larger public interest in mind in order to decide whether it should interfere with the decision of the authority.”

60. Also, we are not much impressed by the submission of Mr. Nariman that the order passed by the High Court on 11th December, 2007 has been challenged by the companion SLP (C) No 36887 of 2012. The aforesaid SLP has been filed merely to get over the earlier lapse of not challenging the order of the High Court at the appropriate time. Having submitted to the jurisdiction of the Chief Secretary, it would not be open to the appellant to challenge the order dated 11th December, 2007.

61. For the aforesaid reasons, we see no merit in the appeals. The civil appeals are, therefore, dismissed.

Appeal dismissed.

I.L.R. [2015] M.P., 26

WRIT APPEAL

Before Mr. Justice Rajendra Menon & Mr. Justice Anil Sharma

W.A. No. 1058/2009 (Jabalpur) decided on 29 September, 2014

B.L. SATYARTHI

...Appellant

Vs.

STATE OF MADHYA PRADESH & anr.

...Respondents

Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 20 - Departmental Enquiry - Appellant whose parent department is Forest Department was sent on deputation to Rajya Van Vikas Nigam in the year 1988 which is an independent autonomous corporation - He was repatriated back to the parent department where he joined after 06.11.1989 - On 08.05.1990, he was charge sheeted by M.D. of the borrowing Corporation - Held - Rule 20 provides for

provisions regarding officers lent to another department - Action by borrowing department can be taken under Rule 20 only when an employee is on deputation - After the employee is repatriated back to parent department, borrowing department cannot initiate departmental proceedings - Borrowing department may transmit the documents to parent department and may recommend for taking action - Punishment imposed is set aside - Borrowing department may recommend parent department to take action. (Paras 3, 5 & 12)

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 20 - विभागीय जांच - अपीलार्थी जिसका मूल विभाग वन विभाग है, उसे प्रतिनियुक्ति पर वर्ष 1988 में राज्य वन विकास निगम में भेजा गया, जो कि एक स्वतंत्र स्वायत्त निगम है - उसे मूल विभाग को वापस किया गया, जहाँ उसने 06.11.1989 के पश्चात पदमार ग्रहण किया - 08.05.1990 को उस पर आदाता निगम के एम.डी. द्वारा आरोप लगाया गया - अभिनिर्धारित - नियम 20, अन्य विभाग को सेवा प्रदाता अधिकारियों से संबंधित उपबंधों को उपबंधित करता है - आदाता विभाग द्वारा नियम 20 के अंतर्गत केवल तब कार्यवाही की जा सकती है, जब कर्मचारी प्रतिनियुक्ति पर हो - मूल विभाग में कर्मचारी की वापसी के पश्चात आदाता विभाग, विभागीय कार्यवाही आरंभ नहीं कर सकता - आदाता विभाग दस्तावेजों को मूल विभाग को भेज सकता है और कार्यवाही करने के लिये अनुशंसा कर सकता है - अधिरोपित शास्ति अपास्त - आदाता विभाग, मूल विभाग को कार्यवाही करने की अनुशंसा कर सकता है।

Cases referred :

AIR 2003 SC 1974, AIR 1993 SC 1321, W.P. No. 1604/2008 decided on 7th October, 2009, (1978) 1 MLJ 184.

D.K. Dixit, for the appellant.

Khatri & Hitendra Singh, for the respondents.

ORDER

The Order of the Court was delivered by :
RAJENDRA MENON, J. :- This appeal has been filed by the appellant under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaya Peeth Ko Appeal) Adhiniyam, 2005 calling in question tenability of an order dated 4.12.2008 passed by a learned Single Judge of this Court dismissing the writ petition filed challenging an order of punishment Annexure P/6 dated 28.8.2000, imposing a penalty of down grading in pay for a period of four years.

2. Facts in nut-shell goes to show that the appellant B. L. Satyarthi was working as a Range Officer in the Forest Department. At the relevant time when the cause of action for initiating the present proceedings commenced, he was a Forest Ranger working in the Forest Department, a Class 2 Gazetted post in terms of the Rules framed under Article 309 of the Constitution by the State of Madhya Pradesh.
3. The Madhya Pradesh Rajya Van Vikas Nigam is an independent autonomous Corporation. In the year 1988 appellant was sent on deputation to the Madhya Pradesh Rajya Van Vikas Nigam and while so working in the said Nigam on deputation, a notice for proposing recovery against him was issued by the Nigam (Corporation) on 12.8.1989 and it seems that certain recoveries were also ordered thereafter. Be it as it may be, the appellant continued on deputation in the Corporation upto 6.11.1989 when he was repatriated back to the parent Department namely the Forest Department and he joined the parent department immediately after 6.11.1989.
4. While so working in the Parent Department a charge sheet dated 8.5.1990 was served on him on 16.5.90 with regard to certain acts of commission and omission conducted by him while working in the Corporation as a Ranger. This charge sheet was issued by the Managing Director of the Corporation. Appellant denied the charges leveled, therefore, a departmental enquiry was ordered and finally after conducting an enquiry in accordance to the requirement of Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966 on 28.8.2000 vide Annexure P/6 punishment of down grading him in pay for a period of four years was passed by the State Government. Challenging the same the writ petition was filed and the writ petition having been dismissed, this appeal under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaya Peeth Ko Appeal) Adhiniyam, 2005.
5. Shri D. K. Dixit, learned counsel for the appellant employee invited our attention to the requirement of Rule 20 of the Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966 and argued that the provisions of Rule 20 only mandates taking of disciplinary action against an employee who is on deputation to a Foreign Department during the period of deputation. It is argued by him that if the employee is repatriated back to the Parent Department after conclusion of the period of deputation then the right to take and initiate departmental enquiry or action is not available to the

Foreign Department. It is only available to the Parent Department and as in this case the entire action for initiating the departmental enquiry by issuing the charge sheet on 8.5.1990, considering the reply to the charge sheet and appointing a Enquiry Officer on 22.8.1990, receiving the enquiry report and then recommending a punishment is undertaken by the Managing Director of the Madhya Pradesh Rajya Van Vikas Nigam, after repatriation the entire action stands vitiated as the Foreign department had no authority to initiate the departmental enquiry and conduct the disciplinary enquiry once the appellant was repatriated back to the parent department. Inviting our attention to a judgment of Supreme Court in the case of *Shivprasad Pandey Vs. Central Bureau of Investigation, New Delhi* – AIR 2003 SC 1974, Shri Dixit argued that if the provisions of Rule 20 of the Discipline and Appeal Rules are perused and if the principles of law laid down by the Supreme Court in the case of *Shiv Prasad Pandey* (supra) is applied, then on repatriation to the Parent Department, the Managing Direction (sic:Director) of the Nigam had no authority to initiate departmental enquiry. He therefore, prays for interference into the matter.

6. Shri Khatri and Shri Hitendra Singh, learned counsel appearing for the respondents refuted the aforesaid and placed reliance on a judgment of the Supreme Court in the case of *P. V. Shrinivasa Sastry Vs. Comptroller and Auditor General and others* – AIR 1993 SC 1321 to say the disciplinary proceedings need not be initiated by the appointing authority but it can be done by any other authority also. As in this case as Managing Director is the Presenting Authority to initiate departmental enquiry when the employee was on deputation to the Nigam, action taken is proper.

7. Accordingly, it is argued by Shri Khatri and Shri Hitendra Singh that the learned Writ Court has not committed any error in the matter. They also invited our attention to the unreported judgment by a learned Writ Court in W.P. No.1604/2008 – *Pramod Kumar Agrawal Vs. State of Madhya Pradesh* decided on 7th October, 2009, wherein certain action by an employee while on deputation in a Foreign Department in somewhat similar circumstances has been upheld by a learned Single Bench of this Court.

8. We have considered the rival contentions and we find that only question which warrants our determination is as to whether after the appellant was repatriated from the Madhya Pradesh Rajya Van Vikas Nigam, the Disciplinary Authority in the said Nigam namely the Managing Direction

(sic:Director) could initiate the Departmental enquiry and whether Rule 20 of the Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966 permit so?

9. Rule 20 of the M.P. Civil Services (CCA) Rules, 1966 contemplates a provision in the matter of taking disciplinary action against the officers of the State Government whose services are lent to the Union Government or any other subordinate or local authority. For the sake of convenience the provisions of sub rule 1 of Rule 20 is reproduced herein under :-

“20 Provisions regarding officers lent to the Union or any other State Government or any subordinate or local authority etc. (1) Where the services of a Government servant are lent by one department to another department or to the Union Government or to any other State Government or any authority subordinate thereto or to a local or other authority (herein after in this rule referred to as “the borrowing authority”), the borrowing authority shall have the powers of the appointing authority for the purpose of placing such Government servant under suspension and of the disciplinary authority for the purpose of conducting a disciplinary proceeding against him :

Provided that the borrowing authority shall forthwith inform the authority which lend the services of the Government servant (hereinafter in this rule referred to as “the lending authority”) of the circumstances leading to the order of suspension of such Government servant or the commencement of the disciplinary proceeding as the case may be

(2) In the light of the findings in the disciplinary proceedings conducted against the Government servant:

(I) If the borrowing authority is of a opinion that any of the penalties specified in clauses (i) to (iv) of rule 10 should be imposed on the Government servant, it may, after consultation with the lending authority, make such orders on the case as it deems necessary:

Provided that in the event of a difference of opinion between the borrowing authority and the lending authority, the services

of the Government servant shall be replaced at the disposal of the lending authority;

...

(iii) If the borrowing authority is of the opinion that any of the penalties specified in clauses (v) to (ix) of rule 10 should be imposed on the Government servant, it shall replace his services at the disposal of the lending authority and transmit to it the proceedings of the Inquiry and thereupon the lending authority, may, if it is the disciplinary authority pass such orders thereon as it may deem necessary, or, if it is not the disciplinary authority submit the case to the disciplinary authority, which shall pass such orders on the case as it may deem necessary:

Provided that before passing any such order the disciplinary authority shall comply with the provisions of sub rules (3) and (4) of rule 15”

(Emphasis Supplied)

10. The moot question is as to whether the procedure contemplated under Rule 20 as reproduced herein above is applicable only when the employee continues on deputation or can be invoked even after the period of deputation is over or the employee is repatriated back to his parent department.

11. In the case of *Shiv Prasad Pandey* (supra) the employee was working in the Police Department and while so serving he was deployed to work on deputation with the Border Security Force. While working in the Border Security Force because of certain offence committed by him, he was put to trial in accordance to the Border Security Force's Act much after he was repatriated back to the Police Department. It was held by the Supreme Court that on his repatriation to the Polices services, he ceases to be an officer of the Border Security Force from the date of his repatriation and therefore, he cannot be subjected to taking any action under the Border Security Force's Act. However, in the present case the Rules are different, and the action was taken after the repatriation from the Corporation.

12. Rule 20 of Madhya Pradesh Civil Services (CCA) Rules, 1966 as applicable to the State of Madhya Pradesh and reproduced herein above gives power to the borrowing department to take disciplinary action against a

Government servant who is on deputation and the powers of the appointing authority and the disciplinary authority are conferred on the borrowing department. The Rule contemplates that the borrowing department shall have the powers of the Appointing Authority for the purpose of placing the government servant under suspension and for taking disciplinary action against him but the proviso contemplates that the action taken has to be forthwith communicated to the parent Department. When power is given to any authority to suspend a Government servant or initiate disciplinary action against him an assumption has to be drawn that the power can be exercised so long as the relationship of master and servant, employer and employee subsists or the contract of employment is in existence. Once the relationship of master and servant or employer and employee or the contract of service itself comes to an end, the question would be as to how disciplinary action or power to suspend can be exercised by an authority with whom the contract of employment of the employee concerned is no more in existence. Rule 20 therefore, has to be interpreted by holding that the power conferred under Rule 20 to the borrowing department or authority to suspend a Government servant or to take a disciplinary action against him can be exercised only if the relationship of master and servant or the contract of employment between the borrowing department and the deputationist employee subsists. When an employee who is a government servant and holds a lien in a Government department is sent on deputation to Foreign Department or a Corporation, then during the period of deputation a temporary contract of service is brought into force between the borrowing department and the employee concerned and so long as its contract of employment subsists the borrowing department can invoke the provision of Rule 20 but once the employee is repatriated back to the foreign department then the contract of employment temporarily created during the period of deputation ceases and if that be the position, then the borrowing department does not have any authority to take action against the employee concerned. Apart from the above a perusal of Rule 20(2) and the proviso to Rule 20(2)(i) and (iii) also clarifies the position. After the departmental proceeding initiated by the Borrowing Department is completed and the finding of enquiry is recorded, in the light of the finding if the Borrowing Department wants to impose any of the penalties specified in clause (i) to (iv) of Rule 10, then after consultation with the lending department the punishment can be imposed. However, the proviso to Rule 20(2)(i) indicates that if there is any difference of opinion between the Borrowing Department and lending department then the service of the employee has to be replaced at the disposal

of the lending department. This clearly shows that action under these Rules can be taken only when the employee is on deputation not otherwise as the stipulation in proviso to Rule 20(2)(i) speaks about replacement of the employee to the lending department. Similarly in Rule 20(2)(i) and proviso thereto thereto also it is clearly provided that if the punishment to be imposed is a major punishment as provided in Rule 10 (v) to (ix), then the employee has to be replaced to the lending department and it is only the lending department which can take action. The stipulation in this part of the rule for replacement of the employee to the parent department clearly indicates the intention of the rule maker. In case Rule 20 was applicable to a employee who is already repatriated to the parent (lending) department then the provision for replacement of the employee to the lending department as contained in both the provisos to Rule 20 (2) (i) (iii) would not provide for replace the service of the government employee to the lending department. This in our considered view would be the interpretation which can be given to the powers that may be exercised by the borrowing department under Rule 20.

13. We are fortified in our aforesaid reasoning and the aforesaid finding if we take note of a decision and Circular of the Government of India in the Ministry of Human Affairs in the matter of taking disciplinary action under the provisions of Rule 20 of the Central Services (Classification, Control and Appeal) Rules, 1965. Rule 20 of the Central Services (Classification, Control and Appeal) Rules, 1965 is para materia and identical to the provisions of Rule 20 of M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 and while clarifying the powers available to the borrowing department for taking action against an employee lent to the service of Central Government by any other State Government or local authority, the Central Government has clarified the position in the Circular being File No.: 7/9/62: Ests.(A) and it is stipulated in the said Circular that Rule 20 is not applicable for the purpose of instituting departmental proceedings on a State Government servant whose services were borrowed by the Central Government has since been replaced or been repatriated back to the State Government. The Circular contemplates that in such cases, the concerned Ministry or department of the Central Government, where the employee was on deputation may complete the preliminary enquiry as may be considered necessary and thereafter forward the relevant records to the State Government for instituting departmental proceedings and for taking further action. That is the procedure contemplated by the Central Government for taking action under Rule 20 of the Central

Services (Classification, Control and Appeal) Rules, 1965 and if the aforesaid procedure contemplated by the Central Government is evaluated in the light of principles discussed by us herein above, we find that this is the only interpretation that can be given to the provisions of Rule 20 of M.P. Civil Services (CCA) Rules, 1966.

14. Somewhat similar situation was considered by the Madras High Court also in the case of *K. Kanagasabapathy Vs. City Supply Officer, Civil – (1978)1 MLJ 184*. In that case also the disciplinary proceedings were initiated by the borrowing department after the employee was repatriated to the parent department and it was held by the Madras High Court in the aforesaid case that after the employee had left the borrowing department and had gone back to the parent department, officers of the borrowing department had no jurisdiction to take any disciplinary proceeding against him. It is held that the power is made available to the borrowing department only so long as the concerned officer is serving in the said department but not after he gone back to the parent department.

15. Keeping in view the aforesaid principle also, we find that the action taken by the Madhya Pradesh Rajya Van Vikas Nigam for initiating departmental enquiry in the matter is unsustainable once the employee namely the appellant herein was repatriated back to the parent department.

16. Reliance placed on judgment of the learned Single Bench in the case of *Promod Kumar Agrawal* (supra) with due respect cannot be accepted by us for the reasons indicated herein above, the learned Single Judge has simply relied upon the law laid down in the case of *P. V. Shrinivasa Sastry* (supra) to say so. But in the case of *P. V. Shrinivasa Sastry* (supra) the question was with regard to who could be authority to initiate disciplinary proceeding and whether the departmental proceeding can be initiated by an authority other than the appointing authority. In the said case, the question of sending an employee on deputation or action to be taken during the or after the period of deputation and implication when the contract of service or employment after deputation is concluded was not considered. That being so, we hold that the said judgment does not put forth the law correctly and cannot be applied in a case where the employee has been repatriated back after deputation.

17. Even though we have held so, we may clarify that the principle laid down by us herein above pertains to sending an employee on deputation from the service of the State Government to the Central Government or to any other autonomous or statutory authority. The question as to what should be

the procedure for taking action when an employee is sent on deputation from one department to another department by the State Government is not considered by us and is not decided by us in this case because provisions of Rule 20 does not speak about deputation of an employee from one department to another of the State Government and therefore, principles laid down by us may not be applicable in case an employee of the State Government is sent on deputation to any other department of the State Government. The question has to be decided with reference to the specific rule as may be applicable in such cases as Rule 20 may not apply in such cases.

18. Accordingly, we allow this appeal and quash the order of the learned Single Judge so also the punishment order dated 28.8.2000. However, we grant liberty to the respondent M.P. Van Vikas Nigam to transmit the papers with regard to the allegation against the appellant to the State Government in the Forest Department, and recommend for taking action in the matter and it would be for the competent authority of the State Government in the Department concerned to take a decision in the matter of proceeding departmentally against the appellant in case they so desire.

19. With the aforesaid, the writ appeal stands allowed and disposed of.

Order accordingly.

I.L.R. [2015] M.P., 35

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 12439/2012 (Jabalpur) decided on 18 April, 2013

MOHAMMAD SADIK & ors.

...Petitioners

Vs.

KHURSHEED AHMED

...Respondent

Court Fees Act (7 of 1870), Section 35 - Suit for possession - Claimed exemption from payment of Court Fees under notification dated 01.04.1983, being a member of weaker section of society - Whether separate application under Order 33 Rule 1 of C.P.C. is required to be filed - Held - Since the respondent was not seeking permission to sue as an indigent person but was claiming benefit of exemption granted under notification dated 01.04.1983, he is required to make such a declaration in the plaint - There is no provision in the

Court Fees Act for making a separate application - Court is required to conduct a limited enquiry to conclude as to whether the said exemption is admissible to the plaintiff or not. (Paras 7,8,11)

न्यायालय फीस अधिनियम (1870 का 7), धारा 35 - कब्जे के लिए वाद - समाज के कमजोर वर्ग का सदस्य होने के नाते अधिसूचना दिनांक 01.04.1983 के अंतर्गत न्यायालय फीस के भुगतान में छूट का दावा - क्या सि.प्र.सं. के आदेश 33 नियम 1 के अंतर्गत पृथक से आवेदन प्रस्तुत करना अपेक्षित है - अभिनिर्धारित - चूंकि प्रत्यर्थी ने एक निर्धन व्यक्ति के तौर पर वाद प्रस्तुत करने की अनुमति नहीं मांगी, किन्तु अधिसूचना दिनांक 01.04.1983 के अंतर्गत छूट का लाभ दिये जाने का दावा किया था, उसे वाद पत्र में ऐसी घोषणा करना अपेक्षित है - न्यायालय फीस अधिनियम में पृथक से आवेदन देने हेतु प्रावधान नहीं है - यह निष्कर्ष निकालने के लिए न्यायालय से सीमित जांच करना अपेक्षित है कि उक्त छूट वादी को लागू होगी या नहीं।

Cases referred :

AIR 2002 Gauhati 129, AIR 2003 Karnataka 205.

M. Shafiqullah, for the petitioners.

Mukhtar Ahmed, for the respondent.

ORDER

K.K. TRIVEDI, J. :- A question has been raised in this petition under Article 227 of the Constitution of India, whether on a plaint while claiming exemption from payment of Court Fees, proceedings under Order 33 Rule 1 & 2 of Code of Civil Procedure (hereinafter referred to as CPC for brevity) are required to be done or merely because of the pleadings in the plaint, proceedings can be done for grant of such exemption.

2. Facts giving rise to filing of this writ petition are that the respondent/plaintiff filed a suit seeking possession, valuing his suit for Rs.40,000/- and damages Rs.7,000/- against the petitioners, alleging that the petitioners were the lessees of the respondent/plaintiff. However, they were not making the payment of the lease amount. As a result, a cause of action arose in favour of the respondent/plaintiff for filing of the said suit in the year 2004. The suit was presented in the year 2005. For the purposes of payment of Court Fees in paragraph 8 of the plaint it was contended that the suit was valued at Rs.40,000/- for possession and Rs.7,000/- for damages and the respondent being a member of the weaker section of society, was entitled to the exemption from payment of Court Fees in view of the Notification of the State

Government dated 1.4.1983.

3. On presentation of the plaint, the same was registered as Miscellaneous Judicial Case and an enquiry was conducted by the Court whether the respondent was entitled to grant of any exemption from payment of Court Fees or not. The notices were issued to the competent authorities with respect to submitting a report as also the petitioners herein who were defendants before the Civil Court. The respondent submitted his evidence, the prove of income as on the date of presenting the plaint and demonstrated that his total income on the date of presentation of the suit was not more than six thousand rupees per annum from all sources. The statements of witnesses were recorded and the enquiry was conducted when after such prolonged proceedings, an objection was filed by the petitioners herein under Section 151 of CPC raising contentions that the proceedings were required to be done in the manner indicated under Order 33 Rule 1 & 2 of CPC for examining whether the respondent was an indigent person and was not required to pay any Court Fees, but the proceedings were not done in the said manner. A reply to the said objection was filed by the respondent and since the said application has been rejected by the impugned order dated 24.7.2012, the present writ petition is required to be filed under Article 227 of the Constitution of India.

4. It is, vehemently, contended by learned counsel for petitioners that in fact the respondent was claiming exemption, in his capacity as an indigent person whose income was not more than six thousand rupees per annum and, therefore, he was required to move an application independently under Order 33 Rule 1 & 2 of CPC, seeking permission to sue as an indigent person. No such application was made and, therefore, it was not proper for the Court below to conduct an enquiry with respect to the financial status of the respondent. The entire proceedings done in this respect are void ab-initio and against the procedure laid down in the CPC. When the objection was raised in this respect, the same has been rejected without looking to the law laid down by the Courts, therefore, the order impugned is bad in law. In fact, the suit as presented by the respondent is liable to be dismissed.

5. Per contra, it is contended by learned counsel for the respondent that the respondent was not seeking any leave to file a suit as an indigent person. On the other hand, he was claiming exemption from payment of Court Fees in terms of the Notification issued by the State Government in exercise of power under Section 35 of the Court Fees Act, 1870. Thus, it is contended that the

procedure as laid down under Order 33 of CPC was not attracted at all. It was not necessary for the respondent to move an independent application seeking exemption as nothing is prescribed in this respect either in the Court Fees Act or under the CPC, or even in the Notification so issued by the State Government, therefore, if before registration of the plaint as a suit, the particular claim of exemption from payment of Court Fees is being enquired by the trial Court, by registering the plaint as Miscellaneous Judicial Case, no wrong was committed. Further for almost 8 years period, the petitioners though were aware of such proceedings have never raised any objection and only when after receiving the reports from all authorities, after examining the evidence of the parties, the Court has fixed the case for final hearing in the matter of grant of exemption from payment of Court Fees, such an objection was raised. The objection having been considered and rejected in appropriate manner, the order passed by the Court below is required to be upheld and this petition is liable to be dismissed.

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

7. After hearing learned counsel for the parties, this Court is of the considered opinion that such an objection raised by the petitioners was rightly rejected by the Court below. Firstly, the respondent was not seeking permission to sue as an indigent person as prescribed under Order 33 Rule 1 of CPC. Had it been a case that the respondent claiming himself to be an indigent person sought permission of the Court to sue as an indigent person, the respondent was required to move the application in accordance to the provisions of Order 33 of CPC. On the other hand, the respondent was claiming benefit of exemption granted by the State Government from payment of Court Fees. The State Government in exercise of its power under Section 35 of the Court Fees Act issued a Notification on 1.4.1983, which reads thus :-

“Notification dated 1.4.1983.- Notification No.F.9.83-b-XXI, dated 1.4.1983-Published in M.P. Rajpatra (Asadharan) dated 1.4.1983, p. 1068.-

In exercise of the powers conferred by S. 35 of the Court fees Act, 1870 (No.7 of 1870), the State Government hereby remits in the whole of the State of Madhya Pradesh, the Court-fees mentioned in Articles 1-A and 2 of the first Schedule and Articles 5,17 & 21 of the second schedule to the said Act payable on plaint by the following categories of

the persons whose annual income immediately preceding the date of presentation of plaint from all sources does not exceed rupees six thousand, namely-

- (i) member of Scheduled Tribes;
- (ii) member of Scheduled Castes;
- (iii) minors;
- (iv) women;
- (v) artisan;
- (vi) unskilled labourer;
- (vii) landless labourer;
- (viii) person belonging to the weaker section of the society.

Explanation.- For the purposes of this notification:-

(1) 'Member of Scheduled Castes' means a member of any caste, race or tribe or part of or group within caste, race or tribe specified as such with respect to the State of Madhya Pradesh under Article 341 of the Constitution of India;

(2) 'Member of Scheduled Tribes' means a member of any tribal community or part of or group within a tribe or tribal community specified as such with respect to the State of Madhya Pradesh under Article 342 of the Constitution of India."

8. If a suit is filed by a person of the categories mentioned in the Notification for the relief within the Articles mentioned in the Notification such person is exempted from payment of Court Fees. The said person is required to present a plaint by making such a declaration in the plaint itself with respect to grant of exemption. The Notification itself exempts such category of persons from payment of Court-fees. The only thing required to be examined was whether the respondent falls within the categories mentioned in the said Notification and whether the suit filed by him falls within the Article for which exemption from payment of Court Fees is granted by the State Government. At the same time, it was to be examined whether the respondent/ plaintiff was

having less (sic:less) than six thousand rupees annual income on the date of presentation of the suit or not. There is no provision made under the Court Fees Act for seeking such an exemption by making a separate application. Of course it was a right act on the part of the trial Court to register the plaint of the respondent as a Miscellaneous Judicial Case till an enquiry is completed with respect to the claim of exemption from payment of Court Fees, in terms of the Notification of the State Government. In view of this, there was no need of filing a suit either as an indigent person or along with an application seeking exemption from payment of Court Fees by the respondent. In the plaint averments, these facts the respondent was required to assert in appropriate manner. The respondent has said only this much that he was claiming exemption from payment of Court Fees in view of the Notification dated 1.4.1983, but he has not disclosed as to what would be his category and on which part of claim made in suit, the respondent was claiming exemption from payment of Court Fees. There was nothing indicated in the plaint that the annual income of the respondent, on the date of presentation of the suit, was less than six thousand rupees per annum. This being so, in fact either in the plaint sufficient material should have been indicated by the respondent or an independent application should have been filed seeking exemption from payment of Court Fees.

9.- Now apart from the aforesaid, even if any application was made by the respondent and as has been held herein above, independently application was not required to be made if the sufficient facts were pleaded in the plaint, the petitioners have taken part in the said enquiry which the lower Court has started after registering the plaint of the respondent as Miscellaneous Judicial Case. They cross-examined the witnesses as is clearly indicated in the documents filed along with the return of the respondent. The order sheets placed on record with the return indicate that after registering the plaint as Miscellaneous Judicial Case, the Court issued the notices to the Collector, the State Government and other defendants. The report from the Collector was submitted. The said report was taken note of. Thereafter, a reply was submitted by the petitioners and the case was fixed for hearing objections on the point of payment of Court Fees. The evidence was thereafter recorded and an opportunity to adduce the evidence in rebuttal was granted to the petitioner. The case was thereafter fixed for arguments on several occasions and, ultimately, an application was filed by the petitioners raising objection

that in absence of any such application made for grant of exemption from payment of Court Fees, the entire case was liable to be dismissed. These facts indicate that the petitioners were interested in delaying the process of the suit and were not interested to see that issues are properly decided. In case it is found by the Court below that the respondent was not entitled to any exemption, still the plaint was not to be rejected as an opportunity is to be granted to pay ad-valorem Court Fees and then to register the suit in regular basis. Still the plaint submitted by the respondent has not been registered as a suit and the enquiry is going on in respect of claim of exemption from payment of Court Fees even after lapse of about 8 years period.

10. Unfortunately, learned counsel for the petitioners has again placed reliance in the cases which are with respect to filing of a suit by an indigent person. In case of *M/s Pinku Trading Corpn. Ltd. Vs. Bank of Baroda and others* (AIR 2002 Gauhati 129) and in the case of *Doddanajappa and others Vs. The Sub-Registrar, Hoskote, Bangalore and others* (AIR 2003 Karnataka 205), the Court was dealing with the procedure to be adopted while considering an application for grant of permission to sue as an indigent person is made under Order 33 Rule 1 of CPC. As has been referred to herein above, such a submission made by the learned counsel for the petitioners is wholly misconceived as even under the Notification, nothing is said that the exemption would be claimed as an indigent person by any of the specified category of persons if a suit is required to be filed.

11. As the requirement of the enquiry and whether the Notification would give a benefit or not in the matter of grant of exemption from payment of Court Fees is the judicial domain of the Court. For the said purposes, the enquiry is to be conducted in a limited manner. This Court on certain occasions examined such a Notification and has reached to the conclusion that the Court is required to see whether the exemption is admissible to a particular plaintiff or not, in the matter of payment of Court Fees. This being so, it cannot be said that the Court below has erred in law in rejecting the application made by the petitioners.

12: In view of the above discussions, there is no substance in the writ petition which fails and is hereby dismissed. However, there shall be no order as to costs.

Petition dismissed.

I.L.R. [2015] M.P., 42

WRIT PETITION

Before Mr. Justice N.K. Mody

W.P. No. 1102/2004 (Indore) decided on 23 July, 2013

RAJENDRA PRASAD KASERA

...Petitioner

Vs.

INDORE PREMIER COOPERATIVE BANK LTD.

...Respondent

Sahakari Bank Karmchhari Seva Niyam, M.P. 1982, Rule 16 – Probation period – Promotion – Petitioner joined service on 16.03.1961 and was confirmed as Samiti Sewak – He was inducted in the newly formed cadre of Samiti Prabandhak on 13.11.1967 on probation – Probation period was for one year – There is nothing on record to show that the said period was extended – There is also no formal order confirming the petitioner's service on the said post – Claim of the petitioner was dismissed on the ground that since he was not confirmed in the newly formed cadre of Samiti Prabandhak he is not entitle for promotion and other benefit – Held – As per Rule 16 the period of probation can be of 12 months which can be extended for 2 years if the work of the employee is not satisfactory – It cannot be said that from 1967 to 1976 for a long period of 10 years, the petitioner was on probation – Petitioner is assumed to have been confirmed – Petition is allowed, petitioner be given all the benefits as directed vide order dated 28.06.1990 within a period of 2 months. (Paras 6, 7)

सहकारी बैंक कर्मचारी सेवा नियम म.प्र., 1982, नियम 16 – परीवीक्षा अवधि – पदोन्नति – याची 16.03.1961 को सेवा में आया और उसे समिति सेवक के रूप में स्थाई किया गया – उसे 13.11.1967 को समिति प्रबंधक के नव निर्मित कॉडर में परीवीक्षा पर नियुक्त किया गया – परीवीक्षा कालावधि एक वर्ष के लिए थी – यह दर्शाने के लिए अभिलेख पर कुछ नहीं कि उक्त अवधि को बढ़ाया गया था – उक्त पद पर याची की सेवाएँ स्थाई किये जाने का कोई औपचारिक आदेश भी नहीं – याची का दावा इस आधार पर खारिज किया गया कि चूंकि उसे समिति प्रबंधक के नव निर्मित कॉडर में स्थाई नहीं किया गया था, वह पदोन्नति एवं अन्य लाभों का हकदार नहीं – अभिनिर्धारित – नियम 16 के अनुसार परीवीक्षा की कालावधि 12 माह हो सकती है, जिसे 2 वर्ष के लिए बढ़ाया जा सकता है, यदि कर्मचारी का कार्य संतोषप्रद नहीं – यह नहीं कहा जा सकता कि 1967 से 1976 की 10 वर्ष की लंबी अवधि के लिए याची परीवीक्षाधीन था – याची के स्थाई होने की

धारणा की गई - याचिका मंजूर, याची को 2 माह की अवधि के भीतर सभी लाभ दिये जाये जैसा कि आदेश दि. 28.06.1990 द्वारा निदेशित किया गया है।

Cases referred :

AIR 1990 SC 1607, AIR 1968 SC 1210, AIR 1986 SC 1844, 2001 SCC (L&S) 1087.

L.C. Patne, for the petitioner.

A.K. Nalvaya, for the respondent.

ORDER

N.K. MODY, J. :- This petition was filed on 22/06/04 with a prayer to quash the order dated 22/12/2000 (Annexure P/5) passed by Joint (sic: Joint) Registrar, Co-operative Society and order dated 02/02/02 passed by M.P. State Co-operative Tribunal, Bhopal and also order dated 16/12/03 passed by Staff Sub Committee and to direct the respondent Bank to consider the case of the petitioner for promotion to the post of Branch Manager on the basis of seniority and confirmation dated 15/03/62 and to give all consequential benefits.

2. Undisputed facts of the case are that the petitioner was appointed on the post of Samiti Sevak on probation in the pay scale of Rs.45-100 vide order dated 16/03/61. Petitioner was confirmed on the post of Samiti Sevak vide order dated 17/03/62. Vide order dated 13/11/67 petitioner was inducted in the newly formed cadre of Samiti Prabhandak and was appointed on probation for a period of one year in the regular pay scale of Rs.90-190 alongwith admissible allowance. On 08/06/76 petitioner was terminated from service while working as Samiti Prabhandak. The order of termination dated 08/06/76 was challenged by the petitioner. Vide order dated 28/06/90 petitioner was directed to be reinstated by the Dy. Registrar, Co-operative Society with full backwages and continuity of service, seniority and all consequential benefits. Vide order dated 27/10/90 Joint Registrar, Cooperative Society dismissed the appeal filed by respondent Bank and upheld the order dated 28/06/90 passed by Dy. Registrar, Cooperative Society in favour of petitioner. In the contempt petition filed by petitioner vide order dated 20/04/94 on account of non compliance of order dated 28/06/90 Dy. Registrar, Co-operative Society disposed of the contempt petition upon the undertaking of respondent Bank to the effect that the petitioner shall be given his due seniority and it was observed in the order that the petitioner shall be given the benefit

of seniority by treating him in continuous service from the date of termination. It was also directed by the Dy. Registrar, Co-operative Society to comply with the order within a period of three months in letter and spirit. Case of the petitioner is that the orders dated 28/06/90, 27/10/90 & 20/12/94 have attained finality. Dy. Registrar, Co-operative Society vide order dated 03/01/2000 allowed the claim of the petitioner for grant of promotion at par with his immediate junior and held entitled to get benefit of all benefits including arrears of difference of salary. Vide order dated 22/12/2000 Joint Registrar, Co-operative Society allowed the appeal preferred by respondents and directed the respondent Bank to keep the matter of the petitioner before the Staff Sub Committee of the Bank for consideration with the recruitment Rules and in case the petitioner is found to be suitable, he be promoted to the post of Branch Manager with all consequential and monetary benefits. In Second Appeal, Co-operative Tribunal vide order dated 02/02/02 upheld the order passed by Joint Registrar. On 16/12/03 Staff Sub Committee dismissed the claim of the petitioner on the ground that the petitioner cannot be confirmed in the newly formed cadre of Samiti Prabhandhak and therefore, he is not entitled to be considered for promotion as no seniority can be granted owing to petitioner's confirmation.

3. Learned counsel for the petitioner submits that the impugned order passed by Sub Committee and also order dated 22/12/2000 & 02/02/02 are illegal, incorrect and deserves to be set aside. It is submitted that the case of the petitioner is rejected for consequential benefit only on the ground that petitioner was not confirmed on the post of Samiti Prabhandhak and therefore, petitioner was given seniority of temporary employee w.e.f. 08/06/76 to 28/06/90. it is submitted that the stand taken by the respondent is on the ground that the petitioner cannot be treated to be confirmed in the service of respondent Bank automatically as no positive order was passed regarding his confirmation by the Bank till his termination. It is submitted that it was observed by the committee that petitioner was reinstated as temporary employee in the service of respondent Bank, therefore, he cannot claim promotion at par with his juniors in whose favour separate orders of confirmation have been passed by the respondent Bank. It is submitted that it is settled position of law that seniority of incumbent is counted from the date of his initial appointment and not from the date of his confirmation as held by the Hon'ble Apex Court in the matter of *Director Recruitment Class-II Engineering Officer's Association Vs. State of Maharashtra*, AIR 1990 SC 1607. It is submitted that the services

of the petitioner is governed by the provisions of Sahkari Bank Karmchhari Seva Niyam, of which Rule 16 reads as under:

“16 Probation – A probationer shall be on probation for a period of 12 months. If during the period of probation, his work and conduct are found satisfactory by the Board, he will be confirmed on the post on completion his probationary period. If the probationer's work and conduct are not considered satisfactory and the Board is of the opinion that an extension of the probationary period is necessary, the Board may extend the period by such time as it may deem fit probation shall not exceed two years.”

4. Learned counsel further submits that since minimum period of probation was of two years beyond which the same cannot be extended, then in such circumstances the petitioner stood deemed to be confirmed on the post of Samiti Prabandhak after completion of atleast two years of service at par with his juniors. For this contention reliance is placed on the decisions in the matter of *State of Punjab Vs. Dharam Singh*, AIR 1968 SC 1210, *Omprakash Maurya Vs. U.P. Cooperative Sugar Factories Fed.*, AIR 1986 SC 1844 and *High Court of Madhya Pradesh Vs. Satyanarayan Jhanwar*, 2001 SCC (L & S) 1087. It is submitted that since the order dated 28/06/90 passed by Dy. Registrar, Co-operative Society was confirmed by the Joing (sic: Joint) Registrar, Co-operative Society and also vide order dated 20/12/94 benefit of reinstatement with continuity of service, seniority and other consequential benefits were given, therefore, subsequent orders dated 22/12/2000 and 02/02/02 are illegal on the principle of constructive *res judicata* and respondent is estopped from raising any voice in the mater (sic: matter) of grant of seniority or promotion to the petitioner which were already ordered by the learned authorities in the earlier round of litigation. It is submitted that the petition filed by the petitioner be allowed and necessary direction be issued.

5. Learned counsel for the respondent supports the stand taken by the Bank and submits that since at the time of termination on 08/06/76 petitioner was not confirmed as permanent employee and vide order dated 28/06/90 it was directed that the petitioner is entitled for benefits of seniority and others benefits, therefore, respondent bank has paid all the back wages and petitioner was taken in the service on same conditions on which he was terminated. It is

submitted that petitioner was working as temporary employee at the time of termination, hence respondent Bank has taken the petitioner as temporary employee in the service and paid all back wages and other benefits of temporary employee. It is submitted that it was not the direction that the petitioner be given back wages and seniority benefits of permanent employee. It is submitted that the petitioner was not confirmed till his retirement, which took place on 31/05/98. It is submitted that number of Court cases were pending. It is submitted that since the petitioner was temporary employee when he was terminated and was re-instated under the direction of Dy. Registrar, Co-operative Society and payment was made accordingly, therefore, the petition filed by the petitioner has no merits and the same deserves to be dismissed.

6. Undisputedly, petitioner joined the service on 16/03/61 as Samiti Sewak on probation in the payscale of 45-100/-. Petitioner was confirmed on the said post on 17/03/62. Vide order dated 13/11/67 petitioner was inducted in the newly formed cadre Samiti Prabandhak on probation in the payscale of 90-190. The period of probation was for one year. As per Rule 16 of the Rules, the period of probation can be of 12 months. In the probation period, if the Board is of the opinion that work of the employee concerned is not satisfactory then the period can be extended for a period of 2 years. Undisputedly, there is nothing on record on the basis of which it can be said that Board was of the opinion that period of probation be extended. At the same time, no formal order was passed, whereby petitioner was confirmed after completion of period of 16 years. Since petitioner was in service till 08/06/76 when the petitioner was terminated, therefore it cannot be said that right from 1967 to 1976 for a long period of 10 years, the petitioner was on probation. In the circumstances, it has to be assumed that the petitioner was confirmed on completion of period of probation. Since the services of the petitioner were restored vide order dated 28/06/90 and appeal filed by the respondent was dismissed on 27/10/90, therefore respondent was bound to comply with the order dated 28/06/90 in letter and spirit. From the reply also, it is evident that order has not been complied with and salary which is paid to the petitioner was the salary which was being paid to the petitioner on 08/06/76. Other benefits which were given to other similarly situated employees were not given to the petitioner.

7. In the facts and circumstances of the case, petition filed by the petitioner is allowed and order dated 22/12/2000 passed by the Joint Registrar, Co-

operative Societies dated 02/02/2000 and the order passed by the State Co-operative Tribunal, Bhopal and the order dated 16/12/03 passed by the Staff Sub-Committee stands quashed to the extent that in derogation of the order dated 28/06/90 passed by the Deputy Registrar, Co-operative Societies and order dated 27/10/90 passed by the Joint Registrar, Co-Operative Societies, whereby the order dated 28/06/90 was confirmed with a further direction to give all the benefits as directed vide order dated 28/06/90 to the petitioner within a period of 2 months positively, without fail as petition is pending since 2004 and the petitioner is in the age group of 70-75 years. In case of failure on the part of respondent/Bank, petitioner shall be further entitled for interest on the amount due @ 8% p.a.

8. With the aforesaid, petition stands disposed of.

Petition disposed of.

I.L.R. [2015] M.P., 47

WRIT PETITION

Before Mr. Justice N.K. Mody

W.P. No. 7732/2012 (Indore) decided on 25 July, 2013

ANOKHILAL BILLORE

...Petitioner

Vs.

STATE OF MADHYA PRADESH & ors.

...Respondents

Vishesh Sashastra Bal Niyam, M.P. 1973, Rule 56(3) - Out of turn promotion - Petitioners saved the life of 30 persons from being immersed into water and life of 6 persons who were surrounded by flood for which Rs. 2,000/- was awarded and appreciation certificate was also issued - Authorities made recommendations for their out of turn promotion - Held - Petitioners have passed only High School examination - Although they appeared in the examination for promotion on the post of Head Constable but they could not succeed - Alongwith petitioners there were 26 employees who performed well and they were also rewarded for their best services - No case for out of turn promotion is made out. (Paras 4 & 9)

विशेष सशस्त्र बल नियम, म.प्र. 1973, नियम 56(3) - समय पूर्व पदोन्नति-याचीगण ने पानी में डूब रहे 30 व्यक्तियों एवं 6 व्यक्ति जो बाढ़ में घिर गये थे, की जीवन रक्षा की, जिसके लिये उन्हें 2000/- का पारितोषिक एवं प्रशस्ति पत्र भी प्रदान

किया गया था – प्राधिकारियों ने उनकी समय पूर्व पदोन्नति हेतु अनुशंसा की – अभिनिर्धारित – याचीगण केवल हाईस्कूल परीक्षा उत्तीर्ण है – यद्यपि वे हेड कांस्टेबल के पद पर पदोन्नति के लिए परीक्षा में सम्मिलित हुए किंतु वे सफल नहीं हुए – याचीगण के साथ 26 कर्मचारी थे, जिन्होंने अच्छा प्रदर्शन किया और उन्हें भी उनकी उत्कृष्ट सेवाओं हेतु पुरस्कृत किया गया था – समय पूर्व पदोन्नति के लिए प्रकरण नहीं बनता।

Case referred :

2012(4) MPLJ 444.

V.P. Saraf, for the petitioner.

Vinita Phaye, G.A. for the respondents.

(Supplied : Paragraph numbers)

ORDER

N.K. Mody, J. :- This order shall also govern the disposal of WP No. 7733/2012 as in both the petitions the question involved is identical in nature.

2. The prayer in this petition is to consider the petitioners for out of turn promotion from the post of Head Constable to the post of Assistant Platoon Commander as per Rule 56 (3) of M.P. Vishesh Sashastra Bal Niyam, 1973 (hereinafter same shall be referred to as Niyam, 1973) with retrospective effect and to pay the benefits of the post.

3. In writ petition No. 7732/2012, Anokhilal is the petitioner while in writ petition No. 7733/2012, Ramlal is the petitioner.

4. The case of petitioners in both the petitions is that they were appointed on the post of Constable in the year 1991 in Pratham Vahini, Vishesh Surakhsha Bal. It is alleged that in the year 2004, there were 30 pilgrims taking bath in Kshipra River at Ujjain on account of Sinhashta Festival emerged into water. At that time, petitioners saved their life. It is alleged that on the recommendations submitted by the higher authorities, petitioners were recommended for out of turn promotion on the post of Head Constable as per Rule 56(3) of Niyam 1973. Further case of the petitioner is that on 10/8/05, petitioners saved the life of 6 persons in a rescue operation at Dewas when they were surrounded by flood. It is submitted that news were published in the newspaper in that regard. Collector Dewas sent a DO letter to the Collector Indore wherein the work of petitioner were appreciated. It is submitted that a sum of Rs. 2,000 was awarded to the petitioners for saving the life of six

persons. Appreciation certificate was also issued by the Collector Indore. Vide order dated 2/5/2006, case of petitioners was recommended for out of turn promotion for which reminder was also sent.

5. Shri V.P. Saraf, learned counsel for petitioners submits that inspite of repeated recommendations made by the authorities, out of turn promotion has not been given to the petitioners for which each of the petitioner deserves. Reliance is placed on a decision of this Court in the matter of *Pankaj Dixit Vs. State of MP*, reported in 2012 (4) MPLJ 444, wherein in case of promotion of police officer for distinguished services this Court held that right of promotion accrues to the police officer from the date of his excellent performance. It was further held that promotion must be given effect for their best performance and should not hang over for long period. Learned counsel submits that in view of the aforesaid petitions be allowed and out of turn promotion be given.

6. Ms. Vinita Phaye, learned G.A. for state submits that for the best performance, petitioners were rewarded at that very time. It is submitted that for the same, the petitioners cannot claim the benefit twice. It is also submitted that out of turn promotion cannot be claimed as of right as it is an award. It is also submitted that Rule 70-A has been deleted therefore, also petitioners are not entitled for consideration for the post of out of turn promotion. It is submitted that petitioners appeared in the examination for promotion on the post of Head constable but could not succeed. It is submitted that petitions have no merit therefore, same be dismissed.

7. Rule 56 of Niyam, 1973 deals with promotions and examinations. Rule 3 reads as under:-

“(3) Notwithstanding anything contained in the rules, the Deputy Inspector General of Police may promote a constable to the rank of a Head Constable, and with the approval of the Inspector General of Police a head Constable to the post of Platoon Commander, who has distinguished himself in anti-dacoity operations, law and order situations, or shooting competitions, or in some other field of duty, or who has been awarded the Indian Police Medal, or the President’s Police Medal and Fire Services Medal for Gallantry, or for distinguished service or for meritorious service, if he considers him suitable for promotion. The number of officers promoted under this rule shall not exceed 10 percent of their strength.

Similarly, the Inspector General of Police may promote a platoon Commander to the post of Company Commander or Company Second-in-command on similar grounds if he finds him suitable for promotion to the rank.”

8 From perusal of the record, it appears that petitioners are not highly educated but has passed only high school examination. Petitioners also appeared in the examination for the post of Head Constable unsuccessfully. It also appears that in the said rescue, it is not only the petitioners who have shown their extra-ordinary performance, but there were 26 employees who performed their duties with bravely and petitioners were also rewarded for their best services.

9 Keeping in view the services rendered by the petitioners their academic background and the fact that alongwith petitioners there were total 26 employees who performed well this Court finds that no case for out of turn promotion is made out. In view of this, petition filed by the petitioners have no merit and the same stand dismissed. Copy of order be placed in the record of connected writ petition. No order as to costs.

Petition dismissed.

I.L.R. [2015] M.P., 50

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 5588/2009(S) (Jabalpur) decided on 31 July, 2013

MADHUKANT TIWARI & ors.

...Petitioners

Vs.

STATE OF M.P. & ors.

...Respondents

(Alongwith W.P. No. 8516/2009(S) & W.P. No. 18109/2011(S))

Jail Services (Gazetted) Recruitment and Promotion Rules, M.P. 2002 - Promotion - Respondent Nos. 3 to 7 were promoted in accordance with unamended Rules - Rules were amended on 25.10.2008 by reducing earlier prescribed quota for Senior Probation and Welfare Officer from 20% to 10% - D.P.C. meeting was held on 25.06.2009 - Promotion of respondent Nos. 3 to 7 under unamended 2002 Rules was challenged as bad in law - Held - Since in the years 2004, 2006 and 2007, no post of Superintendent, District Jail were filled in by promotion of Senior

Probation and Welfare Officers, same were carried forward - There were 5 backlog posts of Superintendent, District Jail available for promotion from amongst the Senior Probation and Welfare Officer - D.P.C. was convened and the respondent Nos. 3 to 7 were considered and as they have completed the requisite years of service - They have rightly been promoted - Petition dismissed. (Paras 2, 8, 9 & 10)

जेल सेवा (राजपत्रित) भर्ती एवं पदोन्नति नियम, म.प्र. 2002 - पदोन्नति - प्रत्यर्थी क्र. 3 से 7 तक को असंशोधित नियमों के अनुसार पदोन्नत किया गया - वरिष्ठ परिवीक्षा एवं कल्याण अधिकारी के पूर्व में विहित कोटा को, 25.10.2008 को नियम संशोधित करके 20 प्रतिशत से घटाकर 10 प्रतिशत किया गया - डी.पी.सी. मीटिंग 25.06.2009 को की गई - प्रत्यर्थी क्र. 3 से 7 की असंशोधित नियम, 2002 के अंतर्गत पदोन्नति को विधि में अनुचित बताते हुए चुनौती दी गई - अभिनिर्धारित - चूंकि वर्ष 2004, 2006 और 2007 में अधीक्षक, जिला जेल के किसी पद को वरिष्ठ परिवीक्षा एवं कल्याण अधिकारियों की पदोन्नति द्वारा नहीं भरा गया और उन्हें अग्रणीत किया गया - वरिष्ठ परिवीक्षा एवं कल्याण अधिकारी में से पदोन्नति हेतु अधीक्षक, जिला जेल के 5 अवशिष्ट पद उपलब्ध थे - डी.पी.सी. बुलायी गयी और प्रत्यर्थी क्र. 3 से 7 तक को विचार में लिया गया और जैसा कि उन्होंने अपेक्षित वर्षों की सेवा पूर्ण कर ली थी, उन्हें उचित रूप से पदोन्नत किया गया है - याचिका खारिज।

Cases referred :

AIR 1983 SC 852, (1997) 10 SCC 419.

Mrigendra Singh, for the petitioners.

Rahul Jain, G.A. for the respondents No. 1 & 2.

Sanjay K. Agrawal, for the respondents No. 3,4,5 & 7.

ORDER

K.K. TRIVEDI, J. :- This order will also govern the disposal of W.P.No.8516/2009 and W.P.No.18109/2011. Since the petitions are directed against the same cause though by different petitioners, they were heard together and are being decided by this common order. For the purposes of this order, facts as have been mentioned in Writ Petition No.5588/2009 are taken.

2. The petitioners who were working as Deputy Superintendent of Jail have approached this Court, ventilating their grievance with respect to the selection and appointment of respondents No. 3 to 7 on the post of

Superintendent District Jail, contending *inter alia* that such a promotion was *de hors* the Rules i.e. M.P. Jail Services (Gazetted) Recruitment and Promotion Rules, 2002 (hereinafter referred to as Rules for brevity). It is contended that since amendment was made in the Rules only on 25.10.2008, the said amendment would be prospective in nature and, accordingly, all the vacancies are to be filled in by such a method as prescribed. It is contended that since the Departmental Promotion Committee (hereinafter referred to as the DPC for brevity) meeting was convened after making of the amendment in the Rules, vacancies were to be filled in only by means as indicated in the amended provisions of the Rules and not otherwise. Since the DPC meeting was held on 25.6.2009, there was no question of considering the claim of persons like respondents No. 3 to 7 for promotion on the post of Superintendent District Jail as they were not to be given the said benefit. By bifurcating the quota of promotion since limited posts were available, only such number of persons who were within the quota of said cadre of Senior Probation and Welfare Officer, were to be promoted. However, *de hors* the Rules, since the respondents No. 3 to 7 have been promoted acceding their quota, the order of promotion of respondents No. 3 to 7 is bad in law. It is contended that since the quota which was earlier prescribed, was 20% for Senior Probation and Welfare Officer to be promoted on the post of Superintendent District Jail, which now by way of amendment has been reduced to 10% only such number of persons could have been promoted, but since senior persons like petitioners have been ignored and the persons who were not to be promoted, have been promoted, the order of promotion issued in respect of respondents No. 3 to 7; is bad in law.

3. Elaborating the contentions, the petitioners have contended that there were only 22 posts of Superintendent District Jail including the post of Superintendent Juvenile Institution Narsinghpur and Principal Jail Training. Out of these 22 posts, 40% posts were to be filled in by direct recruitment as per Schedule-II of the Rules. 60% posts were to be filled in by promotion, out of which 40% posts were to be filled in by promotion of Jailor and 20% posts were to be filled in by Senior Probation and Welfare Officer. By a Gazette Notification dated 25.10.2008, an amendment was made in the Rules. The entries made with respect to total sanctioned posts was changed. Total 23 posts were said to be sanctioned including the Superintendent District Jail, Principal Jail Training Centre, Administrative Officer Regional Jail Management and Research Centre. The bifurcation of the quota of promotion of 60%

posts was amended and 50% posts were to be filled in by promotion of Jailor cadre officer and 10% posts were to be filled in from the cadre of Senior Probation and Welfare Officer. The persons like petitioner were appointed long back in the Jailor cadre. They were working on the post of Deputy Superintendent of Jail and were eligible to be considered for promotion in terms of Schedule-IV of the Rules. However, instead of considering the claim of petitioners when the DPC meeting was held in the year 2009, the Senior Probation and Welfare Officer were promoted by the impugned order. This being so, challenging such action, the writ petition is required to be filed. It is pointed out that on 3.9.2005, persons like respondents No. 3 to 7 were promoted from the post of Probation and Welfare Officer to the post of Senior Probation and Welfare Officer and just within no time they were made to work against the post of Superintendent District Jail vide order dated 17.11.2005. This is how the persons like respondents No. 3 to 7 were favoured superseding the claim of persons like petitioners who were senior enough to be promoted on the post of Superintendent District Jail. Thus, it is contended that since the entire action was bad in law when a representation was made, nothing was done, ultimately, the writ petition was required to be filed.

4. Upon service of the notices of the writ petition, the respondents No. 1 and 2 have filed their return. It is contended by the respondents that the respondents No. 3 to 7 belonging to Probation and Welfare Officer were rightly promoted on the post of Senior Probation and Welfare Officer. The vacancy occurred in their quota for filling in the post of Superintendent District Jail. Looking to the amendment made in the Rules, since the vacancies have occurred prior to coming into force of the amended provision of the Rules, the same was considered and filled in, in accordance to the Rules as stood before the amendment. This being so, the right seniority was taken into consideration and promotion of the persons like respondents No. 3 to 7 was done. One of the candidate was considered and promoted in accordance to the provisions made in the Rules and rest of the persons have been promoted in their quota, therefore, there is no wrong committed by the respondents in promoting such officers. The petition being devoid of any substance, deserves to be dismissed.

5. Respondents No. 4,5 and 7 have filed their independent return and have contended that the vacancies which occurred prior to coming into force of the amendment made in the Rules, were to be filled in by the procedure

and manner indicated in the unamended rules. It is contended that in the past the DPC meetings were convened for consideration of the cases for promotion of the Deputy Superintendent of Jail for promotion on the post of Superintendent of District Jail against the 40% quota of the total sanctioned post. 9 posts were to be filled in by promotion from amongst the Jailor cadre. 8 posts were already filled in by promotion from the Jailor cadre. As far as the 20% posts which were to be filled in by promotion of Senior Probation and Welfare Officer, the same remained unfilled as none of the candidates were found fit for such promotion. The respondents No. 3 to 7 have not completed the requisite years of service for such promotion and, therefore, the same remained unfilled. These posts were carried forward as quota was not to be violated in any manner. Later on, when the DPC meeting was again convened, these carried forwarded vacancies kept for the Senior Probation and Welfare Officer, were taken into consideration. One more vacancy became available in the channel of promotion and, therefore, for the said posts, a DPC meeting was held in the year 2009. Since the vacancies were occurred prior to coming into force the amendment made in the Rules, the same were to be filled in by following the unamended rules. That procedure was adopted and cases of those who were eligible to be considered for promotion were considered and resultantly orders were issued. That being so, it is contended that the petitioners would not be entitled to grant of any benefit in this petition. Subsequently, as per the vacancy available for the Jailor cadre, cases of petitioners were considered and since now all of them have been promoted, it is contended that the petition being devoid of any substance is liable to be dismissed.

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

7. Undisputedly, the amendment was made in the Rules on 25.10.2008. It is not made clear by the petitioners in their petition that all the posts of Superintendent in District Jail were already filled in from amongst the cadre of Senior Probation and Welfare Officer within their quota. Nothing has been indicated by the petitioners whether vacancies were available for promotion of Deputy Superintendent or Jailor cadre officers only for promotion on the post of Superintendent District Jail. If the petitioners say that the quota Rule was violated, in fact, it was their responsibility to indicate as to how much vacancies were available for filling up the posts of Superintendent District Jail from amongst the Jailor cadre and how many vacancies were available for promotion of Senior Probation and Welfare Officer. No distribution of such

post is indicated by the petitioners in their entire petition nor any information in this respect has been obtained by the petitioners. Only this much is said that 6 Senior Probation and Welfare Officers have been promoted by the recommendation of the DPC dated 26.5.2009. The petitioners have also not filed rejoinder to the statements of fact as have been made by the respondents No. 4,5 and 7 to deny that this was not the situation and that imaginary vacancies have been pointed out by the said respondents in their return. This being the necessary requirement of making a claim, unless the same is demonstrated in appropriate manner, it cannot be said that there was violation of quota Rules. Now adverting to the statements made by the respondents-State, it is contended by them that 40% vacancies of the posts of Superintendent District Jail were to be filled in by direct recruitment before amendment in the Rules, rest of the vacancies were to be filled in by promotion out of which 40% vacancies were diverted to be filled in by promoting Deputy Superintendent Jail and 20% to be filled in by way of promotion of Senior Probation and Welfare Officer. The respondents No. 1 and 2 have also not demonstrated that there were vacancies available for promotion of Senior Probation and Welfare Officer only. However, they have said that since the seniority was taken with effect from 1.1.2008, unamended rules were made applicable in the matter of consideration of promotion though the DPC meeting was held in the year 2009.

8. The only assistance is obtained by this Court from the statements of fact made by respondents No. 4,5 and 7 in their return. Uncontroverted statements made by respondents No. 4,5 and 7 in their return is that as per the unamended rules, 9 posts of Superintendent District Jail were to be filled in from amongst the cadre of Jailor to which the petitioners belong. Out of 9, 8 posts were filled in and only one vacancy was available. Thereafter, the DPC had taken into consideration the remaining vacancies and it was found that such vacancies were to be filled in by promotion of Senior Probation and Welfare Officer. However, suitable officers in sufficient number were not available, therefore, the vacancies were carried forward for promotion in the next year. The Rule contemplates that the DPC meeting is to be convened every year. As upto the year 2007, the suitable candidates were not available, though the persons like respondents No. 3 to 7 were made to work on officiating basis on the post of Senior Probation and Welfare Officer, but still they have not completed the requisite years of service and, thus, were not considered for promotion. When the DPC meeting was held in the year 2009,

a decision was taken to consider the cases of those who have completed the requisite years of service as on 1.1.2008. The vacancies were against the quota of Senior Probation and Welfare Officer and, therefore, claims of such persons were considered. This being so, only the respondents No. 3 to 7 were to be considered and they have rightly been considered and promoted. Since now their quota is fulfilled, when the vacancies occurred on the post of Superintendent District Jail, the required number of officers from Jailor cadre were considered and gradually promoted on the aforesaid post in subsequent year. It is seen that such a statement has not been controverted by the petitioners and, as such, it cannot be said that there was any violation of the provisions of quota Rule or same was acceded or violated by the official respondents while promoting the respondents No. 3 to 7.

9. The Apex Court in the case of *Y.V. Rangaiah and others Vs. J. Sreenivasa Rao and others* (AIR 1983 SC 852) has dealt with the quota Rule, its application and the manner of filling the posts which are diverted in particular quota. It is specifically held by the Apex Court that the vacancy which occurred prior to the amended Rules would be governed by old Rules and not by the amended Rules. Only the vacancy which occurred after the amendment in the Rules are to be filled in by amended Rules. This being the prospective effect of amendment, it has to be held that if vacancies were there for promotion of Senior Probation and Welfare Officer, which could not be filled in before the amendment made in the Rules, the said vacancies were to be filled in only and only by means of unamended rules and not otherwise. Yet another situation is examined by the Apex Court in the case of *State of Rajasthan Vs. R. Dayal and others* [(1997) 10 SCC 419] wherein the Apex Court has again reiterated that vacancies occurred prior to amendment of the Rules, would be governed by the original rules and not by the amended rules. It is further held that as a necessary corollary, the vacancy that arose subsequent to the amendment of the Rules are required to be filled in, in accordance with law existing on the date when the vacancy arose.

10. Now the question remains whether there were sufficient number of vacancies available to promote persons like respondents No. 3 to 7. As has been pointed out by the respondents No. 4, 5 and 7 i.e. upto the year 2004, no post of Superintendent District Jail were filled in by promotion of Senior Probation and Welfare Officer. Again in the year 2006, the said vacancies could not be filled in and were carried forward. In 2007, one additional post of Jail Superintendent was created and, therefore, the number of sanctioned

posts increased from 22 to 23. As on 1.1.2008, there were 5 backlog posts of Superintendent District Jail available for promotion from amongst the Senior Probation and Welfare Officer. This being so, the DPC took a decision to convene its meeting for the purposes of consideration of cases of those who were working only on the post of Senior Probation and Welfare Officer for promotion and after due consideration respondents were promoted vide orders dated 20.7.2008, 18.10.2008 and 1.6.2010. The only requirement as indicated in the Rules was fulfilled and that being so, it cannot be said that the respondents No. 3 to 7 were illegally promoted superseding the claim of senior persons like petitioners. The respondents No. 3 to 7 have completed the requisite years of service by counting the services from the calendar years and that being so there is no error in promoting respondents No. 3 to 7 by the impugned order.

11. From the discussions made herein above, there is no case made out to grant any relief to the petitioners. The petitions fail and are hereby dismissed. However, there shall be no order as to costs.

Petition dismissed.

I.L.R. [2015] M.P., 57

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 11853/2011 (Jabalpur) decided on 5 August, 2013

MITHLESH GIRI GOSWAMI

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Service Law - Promotion - Promotion of petitioner on the vacancy occurred due to transfer of one employee from one place to another on the strength of circular issued by State Government on 09.06.1999, was cancelled and he was reverted back on his substantive post - Held - No restriction was put in the circular dated 09.06.1999 in respect of promotion on the post fallen vacant due to transfer of an employee from one municipality to another - In fact the object of said circular is that the vacancy so become available should not be filled in by direct recruitment as the lien of the transferred employee is always protected - The entire circular is misread and misconstrued - Petition is allowed, however, petitioner cannot be treated to be confirmed on

the promotional post.

(Paras 1, 2 & 6)

सेवा विधि - पदोन्नति - राज्य सरकार द्वारा 09.06.1999 को जारी किये गये परिपत्र के बल पर, एक कर्मचारी का एक स्थान से दूसरे स्थान पर स्थानांतरण के कारण उत्पन्न हुई रिक्ति पर याची की पदोन्नति को निरस्त किया गया और उसे उसके मूल पद पर प्रत्यावर्तित किया गया - अभिनिर्धारित - एक नगरपालिका से दूसरी में किसी कर्मचारी के स्थानांतरण के फलस्वरूप उत्पन्न रिक्ति के पद पर पदोन्नति के संबंध में परिपत्र दि. 09.06.1999 में कोई निर्बंधन नहीं लगाया गया है - वास्तव में, उक्त परिपत्र का उद्देश्य यह है कि ऐसी उपलब्ध रिक्ति को सीधी भर्ती द्वारा ना भरा जाए, क्योंकि स्थानांतरित कर्मचारी का लियन सदैव सुरक्षित रहता है - संपूर्ण परिपत्र का गलत पठन एवं अर्थान्वयन किया गया - याचिका मंजूर, किन्तु याची को पदोन्नत पद पर स्थायी नहीं माना जा सकता।

Manoj Mishra, for the petitioner.

Sanjeev Kumar Singh, P.L. for the respondents No. 1 to 3.

O R D E R

K.K. TRIVEDI, J. :- The only grievance of the petitioner in this writ petition is against the order dated 11.7.2011 said to be issued cancelling the promotion of the petitioner on the post of Revenue Sub Inspector. It is contended that the petitioner was initially appointed in the Nagar Panchayat Palera, District Tikamgarh, and was working on the substantive post of Assistant Revenue Inspector. One other person was working as Revenue Sub Inspector in the said Nagar Panchayat on his promotion on the said post vide order dated 18.10.1995. Said Shri Deendayal Goswami was transferred from the Nagar Panchayat Palera to some other Municipal Council where he was posted as Incharge Chief Municipal Officer. Since the post of Revenue Sub Inspector was lying vacant, a resolution was passed by the President in Council of Nagar Panchayat Palera and the matter was referred for making promotion against the said post. Pursuance to the said resolution, certain information was asked for, which was sent. Thereafter, a Selection Committee meeting was held, the case of the petitioner was considered and he was promoted on the said post vide order dated 22.4.2008. The said order was issued after passing of the resolution by the President in Council of the Nagar Panchayat Palera. It appears that some complaint was made with respect to the promotion of the petitioner and upon some query, a report was submitted saying that the petitioner was illegally promoted *de hors* the circular of the State Government, therefore, the direction was given to convene a District Selection Committee meeting.

again where it was decided to revert back the petitioner on his substantive post. It is contended that all this was done only because some wrong information was submitted before the Legislative Assembly and this being so, the order impugned is bad in law.

2. This Court has entertained the writ petition and has granted an interim protection to the petitioner. Upon service of the notice of the writ petition, the official respondents have filed their return and have contended that on a report submitted by the Deputy Director Urban Administration and Development, Sagar Division, Sagar, it was found that the promotion of the petitioner was *de hors* the circular of the State Government dated 9.6.1999. There were instructions issued by the State Government to take action for cancellation of such illegal orders of promotion and that being so, it was not necessary to grant any opportunity of hearing to the petitioner and order was rightly passed directing cancellation of promotion of petitioner. The proceedings of subsequent District Selection Committee indicates that all the facts were taken into consideration and since it was found that promotion of the petitioner was against the circular of the State Government, rightly it was directed that he should be reverted back. This being so, it is contended that the entire petition being based on misconceived facts is liable to be dismissed.

3. By filing a rejoinder, the petitioner has pointed out that circular issued by the State Government on 9.6.1999 does not contain any condition that even the vacancies, which occurred on account of transfer of a Municipal employee from one Municipal Council to another, cannot be filled in by promotion of any other employee of the very same Municipal Council. It is contended that the circular has been misread by the respondents and a valid order of promotion of the petitioner is illegally interfered with only because of political interference. This being so, it is contended that the order impugned is still bad in law and is liable to be quashed.

4. After hearing learned counsel for the parties at length and perusing the circular dated 9.6.1999, it is clear that there was no such specific direction issued by the competent authority that if a vacancy has occurred on account of transfer of an employee from one place to another, it cannot be filled in by promotion of other employee serving in the very same Municipal Council. In fact, the object of the said circular is that the vacancy so become available on account of transfer of a Municipal

employee from one municipality to another is not required to be filled in by direct recruitment as the lien of the transferred employee is always protected against the said vacancy in his original Municipal Council. However, the promotion can always be made against such vacancy as the employee promoted on the said post can be sent back to his substantive post in case the transferred employee returns back to the original Municipal Council. This being the reason, the promotions were always made on officiating basis so that working in the particular Municipal Council on account of transfer of one employee from one Municipal Council to any other Municipal Council may not adversely affect. If it is not permitted and no posting is made in place of the transferred employee, the work of the Municipal Council or Nagar Panchayat is bound to be affected.

5. This was the reason, the resolution was passed by the President in Council of Nagar Panchayat Palera, as is clearly indicated in the resolution dated 8.3.2008. It was pointed out to the said council that because single post of Revenue Sub Inspector had become vacant on account of transfer of the incumbent working on that post to another Municipal Council, entire work of recovery of taxes and other work assigned to the said post were adversely affected. For this reason, the resolution was passed to make promotion of a candidate on the said post. This was rightly referred to the District Selection Committee and the said Committee after getting the reports from the Nagar Panchayat, decided to consider the cases of eligible candidates. The said Committee resolved to select the petitioner and when the recommendations were received by the President in Council of Nagar Panchayat Palera, rightly the resolution was passed and the order of promotion was issued in respect of the petitioner. All these aspects have neither been considered in the report submitted by the Deputy Director Urban Administration and Development, Sagar Division, Sagar, nor these facts have been explained as to why promotion was also bar under the circular of the State Government. The entire circular relates to the direct recruitment on such fortuitous vacancies which occurred on account of transfer of a Municipal employee from one Municipal Council to another. This being the reason and a specific condition mentioned in para 5 of the circular, it was wrongly construed as if the promotion on the said post was also not permissible. For the convenience, the circular of the State Government dated 9.6.1999 is reproduced for ready reference :-

“मध्य प्रदेश शासन, नगरीय प्रशासन एवं विकास विभाग
मंत्रालय

क्रमांक 120/60/18-6/99

भोपाल दिनांक 9 जून 1999

प्रति,

समस्त मुख्य नगरपालिका अधिकारी,
नगरपालिका/नगरपंचायत
मध्यप्रदेश।

विषय : नगरपालिका/नगरपंचायतों के कर्मचारियों के स्थानांतरित पदों पर पदोन्नति एवं नियुक्ति के संबंध में।

शासन के ध्यान में यह लाया गया है कि विभिन्न नगरपालिका/नगरपंचायतों के कर्मचारियों अर्थात् नगरपालिका सेवा के सदस्यों का स्थानांतर जब उनके मूल निकाय (वह निकाय जिसमें उनकी प्रथम नियुक्ति चयन के पश्चात् हुई है) से अन्य स्थानीय निकाय में किया जाता है तो मूल निकाय में जब पदोन्नतियां की जाती हैं तो ऐसे स्थानांतरित कर्मचारी को पदोन्नति के लिये विचारण में नहीं लिया जाता है। इसका तर्क यह दिया जाता है कि यह कर्मचारी अब उस मूल निकाय में पदस्थ नहीं है। दूसरी ओर जब ऐसा स्थानांतरित कर्मचारी नये निकाय में पहुंचता है तो इस नये स्थानीय निकाय में जब पदोन्नतियां होती हैं तो उस स्थानांतरित कर्मचारी का नाम भी पदोन्नति हेतु विचारण में लिया जाता है। यह व्यवस्था नियमों के नितांत विपरीत है। इस प्रक्रिया के कारण यह देखा गया है कि कई बार पात्र कर्मचारी पदोन्नतियों से वंचित रह जाते हैं।

2/ अतः निर्देश दिये जाते हैं कि जिस स्थानीय निकाय में नगरपालिका सेवा का कोई कर्मचारी मूल रूप से नियुक्त किया गया हो उसी निकाय में उसके संवर्ग की पदक्रम सूची में उसका नाम अंकित रहेगा और यदि ऐसा कर्मचारी जब मूल निकाय से स्थानांतरित होकर अन्य स्थानीय निकाय में जाता है तो मूल निकाय की पदक्रम सूची से उसका नाम विलोपित नहीं किया जायेगा। जब भी कभी मूल निकाय में पदोन्नतियां की जाना होता हो स्थानांतरित होकर बाहर गये ऐसे कर्मचारी का नाम भी विचारण में लिया जायेगा और यदि वह पदोन्नति के लिये उपयुक्त पाया जाता है तो उसे इस तथ्य के होते हुये भी वह तत्समय मूल निकाय में पदस्थ नहीं है। प्रोफार्मा पदोन्नति दी जायेगी उसे पदोन्नति से इस आधार पर वंचित नहीं किया जायेगा कि उसकी सेवायें मूल निकाय में तत्समय उपलब्ध नहीं हैं।

3/ उपरोक्त का स्वाभाविक परिणाम (Corollary) यह होगा कि जब नये निकाय में पदोन्नति होगी तो इस स्थानांतर पर आये हुये कर्मचारी का नाम पदोन्नति हेतु विचार में नहीं लिया जायेगा अर्थात् इस स्थानांतर पर आये हुये कर्मचारी के कारण निकाय के मूल कर्मचारियों को पदोन्नति पर कोई विपरीत नहीं पड़ेगा ।

4/ अतः निर्देशित किया जाता है कि उपरोक्त दिये गये निर्देशों के प्रकाश में स्थानांतरित कर्मचारियों की पदोन्नति के संबंध में कार्यवाही की जाये ।

5/ यह भी देखने में आया है कि मूल निकाय में पदस्थ किसी कर्मचारी का जब स्थानांतर हो जाता है तो रिक्त पद के विरुद्ध निकाय द्वारा नयी नियुक्तियां यह मानकर कर दी जाती है कि पद रिक्त है । यह सर्वथा अनियमित है स्थानांतर के कारण रिक्त हुये पद की पूर्ति नयी नियुक्ति से नहीं की जा सकती क्योंकि स्थानांतरित कर्मचारी का लियन मूल निकाय में बना रहता है । अतः यह ध्यान रखा जाये कि इस तरह की कोई नियुक्ति न की जाये और यदि इस तरह की कोई नियुक्ति की जायेगी तो उसके लिये संबंधित निकाय के मुख्य नगर पालिका अधिकारी को व्यक्तिगत रूप से उत्तरदायी माना जायेगा । शासन के पास रिक्त पदों की पूर्ति के लिये प्रकरण भेजते समय यह स्पष्ट उल्लेख होना चाहिये कि रिक्त पद जिस पर नियुक्ति की जाना है स्थानांतर के कारण रिक्त नहीं हुआ है ।

—आर.एन. वर्मा

अवर सचिव,

मध्य प्रदेश शासन,

नगरीय प्रशासन एवं विकास विभाग

पृष्ठ एफ.4/313/99/18-1

भोपाल दिनांक 09.06.1999

प्रतिलिपि:-

1 संचालक, नगरीय प्रशासन एवं विकास, म. प्र. भोपाल ।

2 समस्त उपसंचालक, नगरीय प्रशासन एवं विकास की ओर सूचनार्थ एवं आवश्यक कार्यवाही हेतु ।

अवर सचिव,

मध्य प्रदेश शासन, नगरीय प्रशासन एवं विकास विभाग”

6. What was specifically mentioned in the circular was 'Nai Niyukti' and common meaning of this word would be direct recruitment. Why direct

recruitment was restricted, is obvious. In case the person who is transferred, having lien on the post, is re-transferred on the post, a direct recruit cannot be permitted to continue on the said post because the post is to be occupied by the person, who has the lien on the said post. Further, lien of two persons cannot be created on one vacancy. In such circumstances, the direct recruit is required to be removed from the services and, therefore, it was rightly restricted by the State Government that no direct recruitment would be made on such fortuitous vacancies which occurred on account of transfer of a Municipal employee from one Municipal Council to another. However, the promotion will not be treated as direct recruitment or 'Nai Bharti'. It is the principle of Service Jurisprudence that all promotions are made on officiating temporary basis. Only when an employee is confirmed on the promotional post, his lien is suspended from the substantive post and shifted to the promotional post. This being the reason, a promotee always retains his lien on his substantive post till he is confirmed on the promotional post. The promotee in such a case would be entitled to work on the promotional post, get the salary of the said post till the original incumbent who has lien on that post is not come back. The moment person having lien on the post is re-transferred, the promotee will have to be reverted back to his substantive post. That way, neither the promotee is required to be removed from the post nor any orders are required to be issued in respect of original holder of the post, who has the lien on that post. This being so, the promotion is always permitted on such fortuitous vacancy and, therefore, no restriction was put in the circular dated 9.6.1999 in respect of promotion on said post. The entire circular is misread and misconstrued by the respondents and they have wrongly resolved to cancel the promotion of the petitioner.

7. In view of the discussions made herein above, this petition is allowed. The order dated 11.7.2011 and the resolution passed by the District Selection Committee in this respect are hereby quashed. The petitioner be allowed to continue on his post till the original holder of the post is sent back to work on the promotional post. However, the order of confirmation of the petitioner on the said post cannot be given a stamp of approval. The petitioner cannot be treated to be confirmed on the promotional post.

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

Petition allowed.

I.L.R. [2015] M.P., 64

WRIT PETITION

Before Mr. Justice U.C. Maheshwari

W.P. No. 14975/2013 (Jabalpur) decided on 11 September, 2013

SAROJ GARG (SMT.) & anr.

...Petitioners

Vs.

APARNA GUPTA & anr.

...Respondents

Civil Procedure Code (5 of 1908), Order 1 Rule 10 - Eviction Suit - Respondent No.1 filed suit for eviction against respondent No.2 - Petitioners filed application for impleading her as a party on the strength of will claiming infact testator of will was the owner of the property in dispute - Held - Since petitioners are not parties to the suit finding given by the trial on the issue of title shall not be binding on the petitioners - In a suit between landlord and tenant presence of other persons are not required - Other party or the court cannot insist to plaintiff of a suit to implead any person as defendant or in some other manner in such suit - Petition is dismissed. (Paras 3, 4)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10 - बेदखली का वाद - प्रत्यर्थी क्र. 1 ने प्रत्यर्थी क्र. 2 के विरुद्ध बेदखली हेतु वाद प्रस्तुत किया - याची ने वसीयत के आधार पर यह दावा करते हुए कि विवादित सम्पत्ति का स्वामी वास्तव में वसीयतकर्ता था, उसे पक्षकार के रूप में आलिप्त किये जाने हेतु आवेदन प्रस्तुत किया - अभिनिर्धारित - चूंकि याचीगण वाद के पक्षकार नहीं, विचारण न्यायालय द्वारा हक के विवादक पर दिया गया निष्कर्ष, याचीगण पर बंधनकारक नहीं होगा - मूमिस्वामी और किरायेदार के बीच के वाद में अन्य व्यक्तियों की उपस्थिति अपेक्षित नहीं - अन्य पक्षकार या न्यायालय किसी व्यक्ति को प्रतिवादी या किसी अन्य रूप में उक्त वाद में आलिप्त करने के लिए वाद के वादी से आग्रह नहीं कर सकता - याचिका खारिज की गई।

Siddarth Gulati, for the petitioners.

ORDER

U.C. MAHESHWARI, J. :- Heard on the question of admission.

The petitioners/ applicants have filed this petition under Article 227 of the Constitution of India being aggrieved by the order dated 5.8.13 (Annex.P/7) passed by the 17th Civil Judge Class-I, Bhopal in COS No.613- A/2012, filed by respondent No.1 as landlord against respondent No.2 stating him to be the tenant, whereby their application filed under Order 1 rule 10 of the CPC to implead them

as party in the matter has been dismissed.

2. Petitioners counsel after taking me through the papers placed on the record along with the impugned order, by referring the averments of the impugned application Annex.P/5 and some copies of the documents mentioned in such application argued that the disputed house was the property of Late Mrs Uma Gupta, the real sister of petitioner No.1 while the maternal aunt of petitioner No.2 and she died unmarried and issue-less. In her lifetime she executed a Will dated 11.3.11 (Annex.P/1) in favor of both the petitioners and bequeathed the disputed house in their favor. By virtue of such Will, after her death on dated 22.8.11, the petitioners have become the owner of such house. In the lifetime of Mrs Uma Gupta, she was receiving the rent of the disputed house and after her death, on the strength of the aforesaid Will, such right has been devolved in the petitioners and, in such premises, respondent No.1/ plaintiff did not have any authority even to file the impugned suit for eviction against respondent No.2 but contrary to the right and title of the petitioners, she has filed the suit for eviction against respondent No.2 and now is trying to get the decree of eviction for taking possession of the house and, if any decree is passed in such suit and possession of the house is delivered by respondent No.2 to respondent No.1 then the petitioners have to suffer in a lot. In such premises the impugned application permitting the petitioners to implead as party in the matter was filed and the same ought to have been allowed but under the wrong premises, the same has been dismissed by the trial court. In continuation, he said that any party who is having interest in the disputed property may apply and join the proceedings filed by some other to protect their interest and, in such premises, he prayed to set aside the impugned order and allow his application by admitting and allowing this petition.

3. Having heard, keeping in view the arguments advanced, I have carefully gone through the papers placed on the record along with the impugned order. It is apparent fact on record that the impugned suit has been filed by respondent No.1 against respondent No.2 for eviction as landlord. So, according to it, the impugned suit is between the landlord and tenant and the question of title is not involved in any manner in the suit although incidentally the issue No.1 regarding title of the property, in view of the pleadings of the parties has been framed by the trial court but I am of the considered view that any finding which would be given by the trial court on such issue shall not be binding on the petitioners because they are not the parties in such suit and, in such premises, petitioners shall be at liberty to approach the appropriate forum with appropriate proceedings to declare their title with respect of the house and protect the interest in that regard. Even otherwise, in a

suit between landlord and tenant, in normal course, presence of other persons are not required and if the relationship of such landlord and tenant is not proved in such suit then consequently, the suit may be dismissed and if such relationship is proved then the suit could be decreed for eviction only but the title shall not be decided by the trial court in the eviction suit. So, in such premises, firstly presence of the petitioners does not appear to be necessary to adjudicate the impugned suit because the same could be adjudicated only in presence of respondents No.1 and 2.

4. Apart the aforesaid, in view of the principle that the plaintiff is the sole dominus litus of his litigation and he is at liberty in his suit to implead the parties unless some compelling circumstances are available, the other party or the court cannot insist to plaintiff of a suit to implead any person as defendant or in some other manner in such suit. Although, in such a situation, the plaintiff shall be responsible for the consequences of such suit if the proper parties have not been impleaded in the same. So, in such premises also the trial court has not committed any error in dismissing the application of the petitioners. Consequently, I have not found any perversity, illegality, irregularity or any thing against the property of the law in the order impugned. Resultantly, this petition being devoid of any merit, deserves to be and is hereby dismissed.

5. However, it is made clear that any finding or observation of this order or of the impugned order of the trial court shall not create any obstruction in the way of the petitioners to file and prosecute their independent suit or other proceedings based on their title on the strength of a Will or otherwise.

6. Petition is dismissed with aforesaid observation, direction and liberty.

Petition dismissed.

I.L.R. [2015] M.P., 66

WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice Mool Chand Garg
W.P. No. 12488/2013 (Indore) decided on 19 November, 2013

KABRA BULK TRANSPORT CARRIER (M/S)

...Petitioner

Vs.

**THE COMMISSIONER OF COMMERCIAL TAX,
INDORE & ors.**

...Respondents

Value Added Tax Act, M.P. (20 of 2002), Section 57(5)(6)(8)(11)

- Petitioner who is goods transporter was carrying goods to deliver - During transportation goods were stopped by Commercial Tax Officer - Due to non-compliance of Section 57(6)(b) of the Act, tankers along with goods were detained - Penalty was imposed which was deposited by the petitioner - However, the prayer to release the tankers along with the seized goods was not accepted to effect the recovery of tax assessed against seller of the goods - Held - Once the petitioner had paid the penalty imposed against it, it was incumbent upon the Check Post Officer to exercise its power conferred u/s 57(11) of the Act to release the goods seized by it, in favour of the petitioner - Goods could not have been detained for realization of tax assessed against the seller - Action is violative of Section 57(11) of the Act - Same cannot be sustained. (Paras 8, 9, 10)

मूल्य वर्धित कर अधिनियम, म.प्र. (2002 का 20), धारा 57(5)(6)(8)(11) - याची जो माल परिवहन का कारोबारी है, माल को ठिकाने पर पहुंचाने के लिए ले जा रहा था - परिवहन के दौरान, वाणिज्यिक कर अधिकारी द्वारा माल रोका गया - अधिनियम की धारा 57(6)(बी) के अननुपालन के कारण माल के साथ टैंकरों को निरुद्ध किया गया - दण्ड अधिरोपित किया गया, जिसे याची ने जमा किया - किन्तु जब माल के साथ टैंकरों को छोड़े जाने की प्रार्थना को, माल के विक्रेता के विरुद्ध निर्धारित कर की वसूली के उद्देश्य से अस्वीकार किया गया - अमिनिर्धारित - एक बार याची द्वारा अपने विरुद्ध अधिरोपित अर्थदण्ड का मुगतान करने पर, चेक पोस्ट अधिकारी, अधिनियम की धारा 57(11) के अंतर्गत प्रदत्त अपनी शक्ति का प्रयोग करते हुए उसके द्वारा जब्त माल को याची के पक्ष में मुक्त करने के लिए कर्तव्यबद्ध था - विक्रेता के विरुद्ध निर्धारित कर की वसूली हेतु माल को निरुद्ध नहीं किया जा सकता था - अधिनियम की धारा 57(11) के उल्लंघन में कार्यवाही की गई है - उक्त को कायम नहीं रखा जा सकता।

Sumit Nema, for the petitioner

Mini Ravindran, Dy. G.A. for the respondents.

ORDER

The Order of the Court was delivered by :
SHANTANU KEMKAR, J. :- The petitioner engaged in the business of goods transport was carrying goods (Palm Oil) of M/s. Shri Hari Enterprises (seller of the goods) for being delivered to M/s. Mahajan Traders (buyer) in three tankers. On 13.08.2013 during transportation, the tankers along with the goods were stopped by the Commercial Tax Officer, Anti Evasion Bureau, Indore-A, Indore (hereinafter referred to Check Post Officer) in exercise of its powers

under Section 57 (5) of the Madhya Pradesh Value Added Tax Act, 2002 (for short, the Act). As the goods in movement were not supported by the documents, the Check Post Officer, in terms of Section 57 (6) (b) of the Act, detained the tankers along with the goods.

2. Thereafter, the Check Post Officer, proceeded under Section 57 (8) of the Act and imposed penalty on the petitioner / transporter vide orders dated 12.09.2013 cumulatively marked as Annexure P/1. The petitioner, on whom the penalty was imposed under Section 57 (8) of the Act, opted for composition of penalty, as provided under Section 57 (17) of the Act and deposited the amount of penalty on 20.09.2013. On depositing the penalty amount, the petitioner submitted letters dated 20.09.2013 cumulatively marked as Annexure P/3 under Section 57 (11) of the Act, seeking release of the tankers along with the seized goods in its favour. However, the petitioner's prayer was not acceded to by the Check Post Officer. On the other hand, the petitioner was directed to unload the tankers and to take delivery of only the empty tankers. The goods were not released in favour of the petitioner so as to effect the recovery of tax assessed by the Commercial Tax Department against seller of the goods M/s. Shri Hari Traders.

3. Aggrieved by denial of release of goods in its favour, the petitioner submitted a letter dated 03.10.2013 along with affidavit of the seller M/s. Shri Hari Enterprises, stating therein that it (the seller) has already sold the said goods and received the price of the goods from the buyer (M/s. Mahajan Traders). The petitioner also contacted M/s. Mahajan Traders, who had paid the price of the goods to the seller Shri Hari Enterprises, on which M/s. Mahajan Traders had informed the petitioner that they are willing to take delivery and shall also pay the petitioner, the amount of penalty paid by it as also the transportation and demurrage charges. In support of its claim, that it had already paid the price of the goods to M/s. Shri Hari Enterprises, M/s. Mahajan Traders (buyer) of the goods in question had tendered its bank statement to the petitioner. The petitioner submitted all the said documents to the Check Post Officer and reiterated his request to release the seized goods by stating that since M/s. Hari Traders has already sold the goods and therefore, for its alleged tax dues the goods in question cannot be detained. In spite of this, when the goods were not released, the petitioner had filed this writ petition under Article 226 of the Constitution of India.

4. The case of the petitioner is that the action of the respondents in

detaining the goods even after receiving from the petitioner, the amount of penalty imposed upon it, is mala fide and illegal. According to the petitioner, Section 57 (11) of the Act provides for release of the goods in favour of the transporter on payment of penalty imposed. The petitioner submits that for the alleged recovery of tax from the seller of the goods, who had already parted with the ownership of the goods, the petitioner cannot be deprived the benefit of Section 57 (11) of the Act. It is also the case of the petitioner that in case goods are not released in its favour, then it will not be possible for the petitioner to recover the penalty amount and cost of transportation from the concerned parties; resulting in irreparable financial loss to it.

5. The respondents have filed return and have stated that the petitioner was transporting palm oil from Gujarat to Madhya Pradesh in three tankers. The tankers were intercepted by a team of officers of Anti Evasion Bureau, Indore-A of the Commercial Tax Department. On inspecting the documents, it was found that the person in-charge of the respective vehicles was keeping the photocopy of Form-49 instead of original. During investigation, it was found that the buyer M/s. Mahajan Traders had not paid the amount to the seller of the goods M/s. Shri Hari Enterprises. The business place of seller of the goods M/s. Shri Hari Enterprises was visited by the officers of the Commercial Tax Department. It came to the notice of the said officers that M/s. Shri Hari Enterprises has not paid the tax to the Commercial Tax Department, which was actually payable. A notice for assessment was issued and thereafter on 10.09.2013 order was passed creating extra demand of Rs.57,44,000/- (rupees fifty seven lakhs and fourty four thousand) with total tax liability of Rs.74,39,950/- (rupees seventy four lakhs thirty nine thousand and nine hundred fifty) against M/s. Shri Hari Enterprises. After the aforesaid assessment, Revenue Recovery Certificate (RRC) was issued on 15.10.2013 for recovery of Rs.74,39,950/- against M/s. Shri Hari Enterprises. As the amount was not deposited by M/s. Shri Hari Enterprises, the recovery was to be made from its movable / immovable properties. Keeping in view the fact that the goods in question were belonging to M/s. Shri Hari Enterprises the same were not released, so that the tax could be recovered out of the sale proceeds of the goods. It is also the case of the respondents that M/s. Shri Hari Enterprises also had informed the respondents to recover its dues of taxes from the said detained goods therefore, the said goods were not released in favour of the petitioner.

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

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the record.

7. Before dealing with the controversy involved in this writ petition, it would be appropriate to extract Section 57 of the Act, which reads as under: -

“57: Establishment of check-post and inspection of goods while in movement.

- (1) The State Government or the Commissioner may, with a view to prevent or check evasion of tax under this Act, set up or erect in such manner as may be prescribed, check posts or barriers at such places in the State, excluding railway premises, as may be notified in the official gazette and an officer, not below the rank of Assistant Commercial Tax Officer shall be in-charge of the check post (hereinafter referred to as the check post officer) and he shall be assisted by other category of officials:

Provided that the Commissioner shall not set up a check post or erect a barrier for a period exceeding six months at a time.

- (2) The driver or the person in-charge of a vehicle or carrier or of goods in movement (hereinafter referred to as the transporter) shall –
- (a) carry with him an invoice, bill or challan or any other document and prescribed declaration forms issued by the consignor or consignee of the goods in movement and challan, bilties or any other document issued by the transporter;
 - (b) stop the vehicle or carrier at every check-post or bring and stop the vehicle or carrier at the nearest check-post, while entering and leaving the limits of the State, set up under sub-section (1);
 - (c) furnish all the documents including prescribed declaration forms relating to the goods before the check post officer;

- (d) give all the information relating to the goods ; and
- (e) allow the inspection of the goods by the check post officer or any other person authorised by the check post officer :

Provided that the documents including prescribed declaration forms shall be required to be carried and / or furnished only in respect of the goods as may be notified by the State Government.

Provided further that if the transporter transporting goods by a road on which check post or barrier is not established, furnishes the documents including declaration form specified in clause (a) at the nearest Commercial Tax Office, immediately after entry into the State of Madhya Pradesh or before exit from the State, he shall be deemed to have complied with the requirement made under clause (b).

- (3) The form of declaration specified in sub-section (2) shall be obtained by a registered dealer in the prescribed manner.
- (4) The documents required to be furnished under sub-section (2), may be furnished by means of such electronic devices, and may be accompanied by such processing fee, as may be prescribed.
- (5) Where any goods are in movement within the territory of the State of Madhya Pradesh, any officer, not below the rank of an Assistant Commercial Tax Officer, as may be authorised by the Commissioner, may for the purposes of this Act, stop the vehicle or the carrier or the person carrying such goods, for inspection, at any place or inspect such goods and the documents relating to the goods which are in the possession or control of a transporting agency or person or other such bailee and the provisions of sub-section (2) shall mutatis mutandis apply.
- (6) Where any goods in movement are not supported by

documents as referred to in sub-section (2), or documents produced appear false or forged, the check post officer or the officer empowered under sub-section (5), for reasons to be recorded in writing may-

- (a) direct the transporter not to part with the goods in any manner including re-transporting or rebooking, till a verification is done or an enquiry is made, which shall not take more than seven days;
 - (b) detain or seize the goods or the vehicle or carrier along with the goods and shall give a receipt of the goods or the vehicle or carrier along with the goods, if seized, to the person from whose possession or control they are seized;
 - (c) release the goods or the vehicle or carrier along with the goods seized in clause (b) in favour of the transporter, during the pendency of the proceeding if adequate security in the form of cash security or irrevocable bank guarantee of the amount equal to the penalty leviable under sub-section (8) or (10) is furnished.
- (7) The officer empowered under sub-section (5), who stops the vehicle or carrier, may direct the transporter to take the vehicle or carrier along with the goods and the documents to the nearest check post or any Commercial Tax Office to be named by him and stop it and keep it stationary there till such time as may be required for action in accordance with the provisions of this section, and the officer shall reach such check post or such Commercial Tax Office at the earliest and immediately on reaching there initiate action for seizure of goods or the vehicle or carrier along with the goods and impose penalty in accordance with the provisions of this section.
- (8) The check post officer or the officer empowered under sub-section (5), after having given the transporter a reasonable opportunity of being heard and after having

held such enquiry as he may deem fit, shall,-

- (i) release the goods or the vehicle or carrier along with the goods in favour of the transporter, if he is satisfied that no violation of the provisions of sub-section (2) has taken place; or
- (ii) impose, if he is not satisfied, on him for possession or movement of goods, whether seized or not, in violation of the provisions of sub-section (2) or for submission of false or forged documents or declaration, a penalty equal to maximum [3.5 times- 1.4.2006 to 31.3.2007] ten times (upto 31-07-2009) seven times of the amount of tax which would have been payable if the goods were sold within the State on the date of inspection :

Provided that the amount of penalty shall not be less than [3 times-1.4.2006 to 31.3.2007] eight times (upto 31-07-2009) five times of the amount of tax.

- (9) Where a transporter, in possession or control of goods, is found to be in collusion with a dealer involved in avoidance or evasion of tax, the check post officer or the officer empowered under sub-section (5) shall detain the vehicle or carrier of such transporter and after affording him an opportunity of being heard and with the prior approval in writing of the Deputy Commissioner having jurisdiction, may confiscate such vehicle or carrier.
- (10) Notwithstanding anything contained in this section, where the transporter abstains from bringing or stopping the vehicle or carrier at the check-post as provided under clause (b) of sub-section (2), the check post officer or the officer empowered under sub-section (5) may detain such vehicle or carrier and, after affording an opportunity of being heard to the transporter, may impose, in addition to a penalty which may be imposed

under sub-section (8), a penalty equal to maximum twice the amount of tax which would have been payable if the goods were sold within the State on the date of detention.

- (11) The check post officer or the officer empowered under sub-section (5) may release the goods in favour of the transporter, if seized and not already released under clause (c) of sub-section (6), on payment of the penalty imposed under sub-section (8) or (10).
- (12) If the amount of penalty specified in the order passed under sub-section (8) or (10) is not paid within fifteen days of the service of the order, the check post officer or the officer empowered under sub-section (5) shall, notwithstanding anything to the contrary provided in this Act or in any law for the time being in force, cause the goods to be sold in such manner as may be prescribed and apply the sale proceeds thereof towards the penalty and refund the balance, if any, to the transporter and if the sale proceeds of the goods are not sufficient to cover the amount of penalty or the goods can not be sold despite the efforts made for the same, the said officer shall cause the vehicle or carrier to be sold in the aforesaid manner and apply the sale proceeds thereof towards the balance of penalty and refund the balance of such sale proceeds, if any, to the transporter.
- (13) Where the officer seizing the goods, at any time during the pendency of the proceeding under sub-section (8) or (10), is of the opinion that the goods are subject to speedy and natural decay or when the expenses of keeping them in custody are likely to exceed their value, he may cause them to be sold in such manner as may be prescribed without waiting for the completion of the proceedings relating to the imposition of penalty and keep the sale proceeds thereof in deposit till the completion of said proceedings and the amount so kept

in deposit shall be applied towards such penalty, if any, as may be imposed and the balance, if any, shall be refunded to the transporter according to the provisions of sub-section (12).

- (14) The transporter may authorise, in such manner as may be prescribed, the consignor or consignee of the goods or the vehicle or carrier along with the goods seized under this section, to appear before the check post officer or the officer empowered under sub-section (5) in the proceedings under sub-section (8) or (10) and such consignor or consignee shall be deemed to be the transporter for all purposes mentioned in the aforesaid sub-sections and the provisions of section 31 shall apply to proceedings under this section as if the transporter is a dealer.
- (15) If a transporter fails to give information as required from him under clause (d) of sub-section (2) about the consignor, consignee or the goods within such time as may be specified or transports the goods with forged documents, besides imposing the penalty under sub-section (8), it shall be presumed that the goods so transported have been sold in the State of Madhya Pradesh by him and he shall be deemed to be a dealer for those goods under this Act.
- (16) The provisions of this Act shall, for the purpose of levy, collection and assessment of tax, payment and recovery of tax and interest, appeal and revision, apply to the transporter deemed to be a dealer under sub-section (15).
- (17) Subject to such restrictions and conditions and in such manner as may be prescribed, a transporter, on whom a penalty has been imposed under sub-section (8), may opt to pay in lieu of penalty a lump sum amount, which shall be [twice- 1.4.2006 to 31.3.2007] [five times - 1.4.2007 to 11.5.2008] three times the amount of tax referred to in sub-section (8) and once the transporter

has exercised the option he shall not have any right to challenge the order of penalty in any forum .

Explanation. - For the purposes of this section –

(i) "vehicle or carrier" means any means of transportation to carry goods from one place to another place; and

(ii) "goods in movement" means,-

(a) the goods which are in the possession or control of a transporting agency or person or other such bailee;

(b) the goods which are being carried in a vehicle or carrier belonging to the owner of such goods; and

(c) the goods which are being carried by a person.”

8. Having considered the submissions made by the learned counsel for the parties and the documents filed by them, it is revealed that after the order imposing the penalty against the petitioner was passed on 12.09.2013. The petitioner had opted to pay a lump sum amount as per Section 57 (17) of the Act and paid the penalty amount on 20.09.2013. In the circumstances, when once the petitioner had paid the penalty imposed upon it by the Check Post Officer, in our considered view, it was incumbent upon the Check Post Officer to have exercised its power under Section 57 (11) of the Act to release the goods seized by it in favour of the transporter.

9. As regards the alleged dues of tax against the seller from the documents filed by the parties, it is revealed that before expiry of period of Notice of Demand issued to seller M/s. Shri Hari Enterprises, as required under Section 27 of the Act read with Rule 41 of the MP VAT Rules, 2006 (for short, Rules), the goods were already sold by M/s. Shri Hari Enterprises to M/s. Mahajan Traders and its ownership no more remained with M/s. Shri Hari Enterprises. Thus, in our considered view, the seller M/s. Shri Hari Enterprises having already received the price of the goods and having handed over the goods to the petitioner / transporter for being delivered to the buyer, the goods could not have been detained by the Check Post Officer for realization of the tax assessed by it against the seller. The amount of tax against M/s. Shri Hari Enterprises was crystalized and became payable after the sale of the goods was already complete.

10. Having regard to the aforesaid, the action of the respondents in not

releasing the goods in favour of the petitioner / transporter is violative of Section 57 (11) of the Act, and therefore, the same cannot be sustained. In the result, the petition is allowed. The respondents are directed to release the tankers with goods in favour of the petitioner forthwith.

C. c. within three days.

Petition allowed.

I.L.R. [2015] M.P., 77

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 8953/2013 (Jabalpur) decided on 28 November, 2013

MADHUKAR SHYAM JHA

...Petitioner

Vs.

WESTERN COAL FIELDS LTD. & anr.

...Respondents

Service Law - Departmental Enquiry - Denovo - Enquiry Officer submitted its report exonerating the petitioner - Disciplinary authority instead of recording dissent note directed for fresh enquiry into the charges - Denovo enquiry in the teeth of findings of exoneration for same set of charges is not permissible: (Paras 6 & 11)

सेवा विधि - विभागीय जांच - नये सिरे से - याची को विमुक्त करते हुए जांच अधिकारी ने अपना प्रतिवेदन प्रस्तुत किया - अनुशासनिक प्राधिकारी ने विसम्मति टिप्पणी अभिलिखित करने की बजाए, आरोपों की नये सिरे से जांच करने के लिए निदेशित किया - विमुक्ति के निष्कर्षों के बावजूद समान आरोपों के समूह हेतु नये सिरे से जांच अनुज्ञेय नहीं।

Cases referred :

(2004) 13 SCC 342, (2006) 12 SCC 28.

S.K. Dubey, for the petitioner.

Greeshm Jain, for the respondents.

(Supplied : Paragraph numbers)

ORDER

SANJAY YADAV, J. :- Heard.

2. Petitioner, a Senior Surveyor, Western Coalfields Limited, posted at

Vishnupuri No.1 Pench Area, seeks quashment of initiation of fresh departmental enquiry directed by order dated 24.9.2012 on the same set of charges whereon a departmental enquiry was held and the enquiry officer had exonerated the petitioner of the charges.

3. That, the petitioner was proceeded against in a departmental enquiry with the issuance of charge-sheet dated 28.6.2011. The charges levelled against the petitioner were that in a vigilance inspection conducted on 9.6.2011 of coal stock at Urdhan O.C. Mine, 8.33% of shortage in coal stock was found and that the petitioner had failed to put into notice of the higher-ups regarding error in measurement conducted by him.

4. The denial of charges led to holding of a regular departmental enquiry culminating into the enquiry report dated 21.3.2012, recording the exoneration of the petitioner of the charges levelled against him.

5. The disciplinary authority, instead of recording a dissent note, directed for a fresh enquiry into the charges whereon already the enquiry was held and the enquiry officer had exonerated the petitioner of the charges.

6. The contention on behalf of the petitioner is that once an enquiry is held into the charges levelled in a departmental enquiry and the enquiry officer has recorded a finding exonerating an employee, incumbent it is upon the disciplinary authority to either exonerate the delinquent or record a dissent note and after affording an opportunity of hearing to the delinquent, to take decision thereon. It is urged that at the stage of enquiry report, it is not within the powers of the disciplinary authority, in the event of the delinquent being exonerated of the charges, to initiate *de novo* enquiry. It is, accordingly, urged that fresh proceedings initiated against the petitioner is liable to be quashed.

7. When called upon to respond, it is urged on behalf of respondents that since the presenting officer did not conduct the enquiry properly, therefore, it was decided to conduct fresh enquiry. It is urged that there being no illegality, no interference is warranted.

8. In the considered opinion of this Court, in the given facts of the present case, the respondents are not justified in their stand. No rule has been commended at by the respondents as would permit the disciplinary authority to order for a *de novo* enquiry on the same set of charges whereon the enquiry officer has already recorded the exoneration.

9. In *Lt. Governor, Delhi v. HC Narinder Singh* (2004) 13 SCC 342,

it has been held -

Reading of the show-cause notice suggests as if it is in continuation of the departmental proceedings. Lack of devotion to duty is mentioned as the reason for the proposed action which was the subject-matter of the earlier proceedings as well. The second proposed action based on the same cause of action proposing to deny promotion or reversion is contemplated under the impugned show cause notice. Second penalty based on the same cause of action would amount to double jeopardy. The Tribunal was, therefore, right in law in annulling such an action.

10. The above view has been further affirmed in *Union of India v. Kunisetty Satyanarayana* (2006) 12 SCC 28, wherein it is held by their Lordships -

“17. Learned counsel for the respondent submitted that the charge against the respondent had already been enquired into earlier and he had been exonerated of the charge in an earlier proceeding. Hence, he contended that the impugned Charge Memo would amount to double jeopardy and was therefore illegal. He relied upon the decision of this Court in *Lt. Governor Delhi and others vs. HC Narender Singh* 2004 (13) SCC 342.

18. We agree with the learned counsel for the respondent that if the charge which has been levelled under the Memo dated 23.12.2003 had earlier been enquired into in a regular enquiry by a competent authority, and if the respondent had been exonerated on that very charge, a second enquiry would not be maintainable”.

11. In view of above pronouncements of law as to impermissibility of *de novo* departmental enquiry in the teeth of findings of exoneration for same set of charges, the initiation of *de novo* enquiry vide order-dated 24.9.2012 deserves to be and is hereby quashed. The interim order dated 2.9.2013 is made absolute.

12. The disciplinary authority, however, is not excluded from dwelling upon the enquiry report already furnished on 21.3.2012 in accordance with law.

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

Certified copy as per rules.

Petition allowed.

I.L.R. [2015] M.P., 80

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 6551/2013 (Jabalpur) decided on 28 November, 2013

ZONAL MANAGER, CENTRAL BANK OF INDIA ...Petitioner

Vs.

R.R. DAS ...Respondent

A. Central Bank of India (Officers) Service Regulations, 1979, Regulation 46, Payment of Gratuity Act (39 of 1972), Section 4 - Payment of Gratuity Act being of superior status the provisions of Act of 1972 will have the overriding effect on the regulation. (Para 29)

क. सेंट्रल बैंक ऑफ इंडिया (अधिकारी) सेवा विनियमन, 1979, विनियम 46, उपदान का भुगतान अधिनियम (1972 का 39), धारा 4 - उपदान का भुगतान अधिनियम वरिष्ठ स्थिति पर होने के नाते, अधिनियम 1972 के उपबंधों का विनियम पर अध्यारोही प्रभाव होगा।

B. Service Law - Compulsory retirement - Compulsory retirement is not treated as termination as would disentitle the employee of the pensionary benefits - Gratuity is an element of pension - Compulsory retirement of respondent and his prosecution would not disentitle him from gratuity. (Para 3)

ख. सेवा विधि - अनिवार्य सेवानिवृत्ति - अनिवार्य सेवानिवृत्ति को सेवा समाप्ति के रूप में नहीं माना जाएगा, जिससे कि कर्मचारी पेंशन लाभों के लिए अपात्र हो - उपदान, पेंशन का एक तत्व है - प्रत्यर्थी की अनिवार्य सेवानिवृत्ति और उसका अभियोजन उसे उपदान के लिए अपात्र नहीं करेगा।

Cases referred :

(2010) 10 SCC 338, (1999) 9 SCC 43, (2013) 3 SCC 472, (1994) 1 SCC 9.

Arvind Pandey, for the petitioner.

B.L. Nag, for the respondent.

(Supplied : Paragraph numbers)

ORDER

SANJAY YADAV, J. :- With consent of learned counsel for the parties,

the matter is heard finally.

2. By this petition, under Article 226 of the Constitution of India, petitioner calls in question the correctness of order dated 12.11.2012; whereby, the Appellate Authority under Payment of Gratuity Act, 1972 (for short 'Act of 1972'), dismissed the appeal preferred by the petitioner.

3. The appeal preferred by the petitioner was directed against the order dated 7.6.2012 passed by the Controlling Authority whereby, in exercise of the powers under sub-section (4) of Section 7 of Act of 1972, held the respondent entitled to receive gratuity amount from the date of compulsory retirement i.e. 29.9.2010 along with the interest thereon @ 10% per annum till date of payment.

4. Relevant facts giving rise to controversy, briefly, are that respondent/ employee as Manager in the Central Bank of India was subjected to Departmental Enquiry vide charge-sheet dated 29.10.2009 for committing irregularities in disbursement of loan.

5. The departmental enquiry culminated in the order of punishment of compulsory retirement in terms of Regulation 4(h) of the Central Bank of India Officers Employees (Discipline and Appeal) Regulation 1976. And, that a First Information Report bearing No.RC0092007A0010 dated 10.9.2007 was also lodged by the Central Bureau of Investigation against the respondent on the charge of demanding/accepting illegal gratification from the borrower.

6. The respondent since was compulsorily retired and was subjected to criminal prosecution was denied the service gratuity on the basis of Regulation 46(1)(e) of the Central Bank of India (Officers) Service Regulations, 1979 and Regulation 46 of the Central Bank of India (Employees) Pension Regulations, 1995, which respectively stipulate -

Regulation 46 of 1979 stipulates -

"46. GRATUITY:

(1) Every Officer shall be eligible for gratuity on :-

(a) retirement

(b) death

(c) disablement rendering him unfit for further service

as certified by a medical officer approved by the Bank

(d) resignation after completing ten years of continuous service; or

(e) termination of service in any other way except by way of punishment after completion of 10 years of service.

(2) The amount of gratuity payable to an Officer shall be one month's pay for every completed years of service, subject to a maximum of 15 months pay.

Provided that where an Officer has completed more than 30 years, he shall be eligible by way of gratuity for an additional amount at the rate of one half of a month's pay for each completed year of service beyond 30 years.

Provided further that pay for the purpose of Gratuity for an Officer who ceased to be in service during the period 1.7.1993 to 31.10.1994 shall be with regard to scale of pay as specified in sub regulation (1) of Regulation 4.

Provided also that pay for the purpose of Gratuity of an officer who ceased to be in service during the period 1.4.1998 to 31.10.1999 shall be with regard to scale of pay as specified in sub-regulation (2) of Regulation 4.

Note: If the fraction of service beyond completed years of service is 6 months or more, gratuity will be paid pro rata for the period.

Regulation 46 of the Regulations, 1995 stipulates -

Provisional Pension – (1) An employee who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or departmental proceedings are continued, a provisional pension, equal to the maximum pension which would have been admissible to him, would be allowed subject to adjustment against final retirement benefit sanctioned to him, upon conclusion of the proceedings but no recovery shall be made

where the pension finally sanctioned is less than the provisional pension or the pension is reduced or withheld etc, either permanently or for a specified period.

2. In such cases the gratuity shall not be paid to such an employee until the conclusion of the proceedings against him. The gratuity shall be paid to him on conclusion of the proceedings subject to the decision of the proceedings. Any recoveries to be made from an employee shall be adjusted against the amount of gratuity payable.

Explanation. – In this chapter –

(a) the expression ‘serious crime’ includes a crime involving an offence under the Official Secrets Act, 1923 (19 of 1923);

(b) the expression “grave misconduct” includes the communication or disclosure of any secret official code or password or any sketch, plan, model, article, note, document or information, such as is mentioned in section 5 of the Official Secrets Act, 1923 (19 of 1923) which was obtained while holding office in the Bank so as to prejudicially affect the interests of the general public or the security of the State;

(c) The expression “fraudulently” shall have the meaning assigned to it under section 25 of the Indian Penal Code, 1860 (45 of 1860);

(d) The expression “criminal breach of trust” shall have the meaning assigned to it under section 405 of the Indian Penal Code, 1860 (45 of 1860);

(e) The expression “forgery” shall have the meaning assigned to it under Section 463 of the Indian Penal Code, 1860 (45 of 1860).

7. Aggrieved, the respondent preferred an application under Section 7 of the Act of 1972 before the Controlling Authority.

8. Petitioner-Bank contested the claim on the anvil of Regulation 46 of the Regulations, 1979 and Regulation 46 of the Regulations, 1995 as also on the fact that the respondent having suffered a punishment of compulsory

retirement and a criminal proceeding is pending against him.

9. Controlling Authority upheld the entitlement of respondent stating that "...I am of the considered opinion that the provisions of Section 4(6) of the Act do not come into play unless there is termination of service of an employee by the employer for the aforesaid acts. In the present case, admittedly, there was no termination of the service of the applicant due to alleged acts committed by him which resulted in involvement in bribery case thereby maligning the image and reputation of the Bank and also the applicant had committed various irregularities in the disbursement of loans. Therefore, the question of Section 4(6) of the Act, which empowers the employer to withhold gratuity under certain conditions, being applicable does not arise. Hence withholding of gratuity is held on facts not justified in view of Section 4(6) of Gratuity Act."

10. Controlling Authority directed the petitioner to make payment of gratuity as per provisions of the Act of 1972 from the date of compulsory retirement along with simple interest @ 10% per annum.

11. Aggrieved, petitioner herein preferred an appeal under Section 7(7) read with Rule 18 of the Act of 1972.

12. The Appellate Authority, vide impugned order dated 12.11.2012, dismissed the appeal and affirmed the order passed by the Controlling Authority. The Appellate Authority observed that in view of the conflict between Central Bank of India (Employees) Pension Regulations 1995 and the provisions of Payment of Gratuity Act, 1972, latter would prevail and the Rules of 1995 will give a way to statute in view of the provision under Section 14 of the 1972 Act.

13. Assailing the order passed by the Authorities under the Act of 1972, it is contended on behalf of the petitioner that the Regulation being a special law and having the force of law will prevail over the Payment of Gratuity Act, 1972, which is a general law and since the Regulation of the petitioner-Bank provides for withholding of payment of gratuity in case of pending criminal prosecution, the Authorities were not justified in directing the entitlement to the respondent for gratuity.

14. Reliance is placed on decision in *Ranjan Sandhi vs. Union of India* (2010) 10 SCC 338 and *R. Veerabhadram vs. Govt. of A.P.* (1999) 9 SCC 43, unreported judgment of the High Court of Judicature at Rajasthan, Bench at Jaipur in C.W.P. No.14358/2008 (*Rajendra Giriraj Prasad Tiwari, vs.*

Central Bank of India).

15. Countering the contention, it is stated on behalf of respondent that having been compulsorily retired, the respondent was entitled to receive all the retiral benefits, as the compulsory retirement even it is on the basis of departmental enquiry does not bar an employee for settlement of retiral dues. It is further contended that merely launching of criminal prosecution also does not debar the respondent from receiving the retiral dues.

16. Placing reliance of sub-section (6) of Section 4 of the Act of 1972, it is urged that unless the stipulation contained therein are meted out a regulation framed by the petitioner-Bank will not have overriding effect.

17. It is, accordingly, contended that the Controlling Authority under the Act of 1972, was well justified in directing the petitioner to settle the gratuity.

18. Considered the rival submissions.

19. Perused the records.

20. The basic facts being not disputed that the respondent is compulsorily retired having found guilty of charges and that an offence is registered against him under the Prevention of Corruption Act, 1988.

21. The question which crops up for consideration is whether while invoking clause 46 of the Central Bank of India (Officers) Service Regulations, 1979 and Pension Regulations, 1995, the petitioner is justified in non-grant of gratuity and whether the Authorities under the Act of 1972 are justified in holding that in view of provisions contained under Section 14 read with Section 4(6) of Act of 1972, the respondent is entitled for the gratuity.

22. The Payment of Gratuity Act, 1972 was enacted to provide for a scheme for the payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith or incidental thereto. Section 5 whereof empowers the appropriate Government, by way of notification and subject to such conditions as may be specified in the notification, exempt any establishment.

23. In the present case, learned counsel for the petitioner does not dispute that the petitioner is not exempted. Thus, the provisions of Act of 1972 are applicable.

24. Sub-section (1) of Section 4 of Act of 1972 stipulates that Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years, (a) on his superannuation, or (b) on his retirement or resignation, or (c) on his death or disablement due to accident or disease.

25. Sub-section (6) of Section 4 carves out an exception to sub-section (1) stipulating that -

 "(6) Notwithstanding anything contained in sub-section (1),-

 (a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;

 (b) the gratuity payable to an employee may be wholly or partially forfeited-

 (i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act or violence on his part, or

 (ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment".

26. Section 14 stipulates that the provisions of Act of 1972 or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act.

27. The first aspect for consideration is as to whether the Service Regulations and Pension Regulations framed by the Board of Directors of Central Bank of India after consultation with the Reserve Bank of India and with the previous sanction of the Central Government in exercise of the powers conferred clause (6) of sub-section (2) of Section 19 read with sub-section (2) of Section 12 of the Banking Companies (Acquisition and Transfer of

Undertakings) Act, 1970 will have the overriding effect on the provisions of Payment of Gratuity Act, 1972.

28. A recent decision of the Supreme Court in *Y.K. Singla vs. Punjab National Bank* (2013) 3 SCC 472 clinches the issue; wherein Pension Regulations similar to one in the present case, was under consideration. It has been held in *Y.K. Singla* (supra) -

"22. ... A perusal of Section 14 leaves no room for any doubt, that a superior status has been vested in the provisions of the Gratuity Act vis-à-vis any other enactment (including any other instrument or contract) inconsistent therewith. Therefore, insofar as the entitlement of an employee to gratuity is concerned, it is apparent that in cases where gratuity of an employee is not regulated under the provisions of the Gratuity Act, the legislature having vested superiority to the provisions of the Gratuity Act over all other provisions/ enactments (including any instrument or contract having the force of law), the provisions of the Gratuity Act cannot be ignored. The term "instrument" and the phrase "instrument or contract, having the force of law" shall most definitely be deemed to include the 1995 Regulations, which regulate the payment of gratuity to the appellant.

...

24. Furthermore, from the mandate of Section 14 of the Gratuity Act, it is imperative to further conclude, that the provisions of the Gratuity Act would have overriding effect, with reference to any inconsistency therewith in any other provision or instrument...."

29. Since the issue as to effect of the provisions of Payment of Gratuity Act, 1972 over the Pension Regulations, 1995 was directly and substantially involved in *Y.K. Singla* (supra) wherein it has been held that being of superior status the provisions of Act of 1972 will have the overriding effect on the Pension Regulations, 1995.

30. This leads to consideration of second aspect as to whether an employee as, in the present case, compulsorily retired on the outcome of a departmental enquiry would tantamount to "termination" for any act which constitutes "an offence

involving moral turpitude, as would disentitle him for gratuity under sub-clause (ii) of clause (b) of sub-section (6) of Section 4 of the Act of 1972.

Regulation 33 of the Pension Regulations, 1995 stipulates -

"33. Compulsory Retirement Pension - (1) An employee compulsorily retired from service as a penalty on or after 1st day of November, 1993 in terms of Discipline and Appeal Regulations or settlement by the authority higher than the authority competent to impose such penalty may be granted pension at a rate not less than two-thirds and not more than full pension admissible to him on the date of his compulsory retirement if otherwise he was entitled to such pension on superannuation on that date.

(2) Whenever in the case of a bank employee the Competent Authority passes an order (whether original, appellate or in exercise of power of review) awarding a pension less than the full compensation pension admissible under these regulations, the Board of Directors shall be consulted before such order is passed.

(3) A pension granted or awarded under sub-regulation (1) or, as the case may be, under sub-regulation (2), shall not be less than the amount of rupees three hundred and seventy five per mensem.

31. Thus, clear it is that the compulsory retirement, by way of punishment, is not treated as termination as would disentitle an employee of the pensionary benefits. And, it needs no elaboration to establish that the gratuity is an element of pension in view of decision in *Bakshish Singh vs. Darshan Engineering Works* (1994) 1 SCC 9, wherein it is held -

16. ... The recognition of gratuity as a retiral benefit brought in its wake further modifications of the concept. It could be paid even if the employee resigned or voluntarily retired from service. The minimum qualifying service for entitlement to it, rate at which it was to be paid and the maximum amount payable was determined likewise on the basis of the said factors. It had also to be acknowledged that it could not be denied to the employee on account of his misconduct. He could be denied

gratuity only to the extent of the financial loss caused by his misconduct, and no more".

32. Thus, merely because the respondent is compulsorily retired by way of punishment and is being prosecuted, will not disentitle him from gratuity.

33. In view whereof, the order passed by the Controlling Authority and affirmed in appeal does not warrant any interference.

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

Petition dismissed.

I.L.R. [2015] M.P., 89

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 14583/2010 (Jabalpur) decided on 3 December, 2013

POONAM (KU.)

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Service Law - Selection - Although the petitioner possesses an equivalent qualification of class 10th and has High School Certificate issued by M.P. Open School which has been duly recognized by Board of Secondary Education by notification dt. 04.10.1996 she was denied consideration, merely because the said qualification does not find mention in the advertisement - Held - Since the petitioner possesses the qualification equivalent to the Board of Secondary Education, respondents were not justified in rejecting the petitioner's candidature - Petition is allowed. (Paras 9,10 & 11)

सेवा विधि - चयन - यद्यपि याची के पास कक्षा 10वीं के समकक्ष अर्हता है और म.प्र. मुक्त विद्यालय द्वारा जारी किया गया हाईस्कूल प्रमाण पत्र है, जिसे माध्यमिक शिक्षा मंडल की अधिसूचना दि. 04.10.1996 द्वारा सम्पूर्ण रूप से मान्यता प्राप्त है, उसका विचार नहीं किया गया, मात्र इसलिए कि उक्त अर्हता का उल्लेख विज्ञापन में नहीं पाया जाता - अभिनिर्धारित - चूंकि याची के पास माध्यमिक शिक्षा मंडल के समकक्ष अर्हता है, प्रत्यर्थागण द्वारा याची की अभ्यर्थिता अस्वीकार करना न्यायोचित नहीं था - याचिका मंजूर।

Case referred :

AIR 1980 SC 1457.

R.B. Tiwari, for the petitioner.

S.S. Bisen, G.A. for the respondent No.1/State.

K.S. Wadhwa, for the respondent No.4.

Brijesh Choubey, for the respondent No.5.

(Supplied : Paragraph numbers)

ORDER

SANJAY YADAV, J. :- Heard.

1. Grievance raised by the petitioner is against her non-selection for the post of Multipurpose Health Worker (Female).
2. That, in pursuance to advertisement issued by Director, Health Services, Government of Madhya Pradesh on 17.5.2010 for appointment to the post of Multipurpose Health Worker (Female), petitioner applied for the post. However, despite of her having secured 72.6% marks, she was not placed in the select list, as compared to respondent no.6, 7 and 8 who, respectively secured 70%, 69.8% and 67.4%. On enquires made by the petitioner, it was informed that since she does not possess the requisite qualification i.e. Higher Secondary School Certificate (10+2) by Madhya Pradesh Madhyamik Shiksha Mandal, Bhopal, or the certificate issued by Central Board of Secondary Education or its equivalent with Science and Mathematics, she has not been considered.
3. Petitioner is Class 10th and has High School Certificate issued by Madhya Pradesh Open School.
4. Petitioner claims that since High School Certificate issued by M.P. State Open School has been recognized by Madhya Pradesh Madhyamik Siksha Mandal, Bhopal as equivalent to High School Certificate by the Madhya Pradesh Madhyamik Siksha Mandal vide its Notification No.366/मूल्याँ/1/96 dated 4.10.1996, the respondents are not justified in denying the petitioner's selection to undergo training for Multipurpose Health Worker (Female).
5. Respondents no.4 and 5-M.P. State Open School and Board of Secondary Education have supported the claim of the petitioner.
6. It is contended on behalf of M.P. State Open School that the certificate issued by it has to be recognized by each and every Body/Department of M.P. State Government. Whereas, M.P. Board of Secondary Education has to state that it has already recognized the certificate issued by M.P. State

Open School equivalent to the certificates (Class 10th and 12th) issued by the Board of Secondary Education.

7. Respondents no.1 to 3, the State of M.P. and its functionaries have, however, denied the claim. It is urged that, in the advertisement, it was specifically mentioned that the incumbent must have High School Certificate issued by M.P. Board of Secondary Education or Central Board of Secondary Education. It is urged that the petitioner since was having the High School Certificate issued by M.P. State Open School, her candidature was rejected.

8. The controversy, therefore, is whether in absence of the stipulation in the advertisement, the petitioner could have been considered for appointment on the basis that she possesses the equivalent qualification.

The advertisement in question stipulated the following qualification -

आवेदको को म.प्र. माध्यमिक शिक्षा मण्डल, भोपाल, केन्द्रीय शिक्षा बोर्ड से सम्बद्ध संस्थाओं से 10+2 शिक्षा पद्धति से दसवीं कक्षा विज्ञान एवं गणित विषय से उत्तीर्ण होना अनिवार्य है।

9. Question is whether, in a case as the present one when the petitioner possesses an equivalent qualification can be denied the consideration, merely because the said qualification does not find mention in the advertisement ?

10. It is not in dispute that M.P. State Open School is an instrumentality of the State discharging similar function as the Board of Secondary Education. Therefore, Board of Secondary Education vide notification-dated 4.10.1996 has recognized the High School Certificate/Higer Secondary School Certificate issued by M.P. State Open School equivalent to the certificate issued by Board of Secondary Education. It has been observed in *Uma Shankar Sharma v. Union of India* AIR 1980 SC 1457 -

“It seems to us that on a reasonable view of the facts the appellants should be taken to have fulfilled the condition of eligibility. The terms and conditions of service are intended to be construed reasonably, and too technical a view can defeat the essential spirit and intent embodied in them.”

11. In the case at hand, what is germane is to possess High School Certificate i.e. Class 10th under 10+2 pattern with Science and Maths subjects, which could be from the Board, either Board of Secondary Education or

92 Pramod Kumari (Smt.) Vs. I. T. O. Indore (DB) I.L.R.[2015]M.P.

Central Board of Secondary Education. Since the petitioner possesses the qualification equivalent to the Board of Secondary Education, the respondents, in the considered opinion of this Court, were not justified in rejecting the petitioner's candidature.

12. In view whereof, the petition is allowed. Respondents are directed to consider candidature of the petitioner along with respondents no.6 to 8 and if found more meritorious, allow her to undergo pre-appointment training of Multipurpose Health Worker (Female).

13. The petition is allowed to the extent above.

Certified copy as per rules.

Petition allowed.

I.L.R. [2015] M.P., 92

WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice S.C. Sharma

W.P. No. 12386/2013 (Indore) decided on 9 December, 2013

PRAMOD KUMARI SINGHAL (SMT.)

...Petitioner

Vs.

INCOME TAX OFFICER, INDORE & anr.

...Respondents

Income Tax Act (43 of 1961), Section 147 - Reassessment proceedings - Can it be reopened by Assessing Officer for the year 2007-08 on the basis of directions of CIT (Appeals) passed in appeal filed for the assessment year 2008-09 - Held - Since the impugned notice issued by the Assessing Officer u/s 147 of the Act merely on the basis of directions issued by CIT (Appeals) in the appeal filed in respect of the year 2008-09 - Same has not been issued independently - Is not sustainable - However, Assessing Officer can take fresh steps against the petitioner. (Paras 6,7,8)

आयकर अधिनियम (1961 का 43), धारा 147 - पुनर्निर्धारण कार्यवाही - निर्धारण वर्ष 2008-09 के लिए प्रस्तुत की गई अपील में पारित किये गये सी.आई.टी. (अपील) के निदेशों के आधार पर वर्ष 2007-08 हेतु क्या उसे निर्धारण अधिकारी द्वारा पुनः खोला जा सकता है - अभिनिर्धारित - चूंकि वर्ष 2008-09 में प्रस्तुत की गई अपील के संबंध में केवल सी.आई.टी.(अपील) द्वारा जारी निदेशों के आधार पर अधिनियम की धारा 147 के अंतर्गत निर्धारण अधिकारी द्वारा आक्षेपित नोटिस जारी किया गया - उक्त को स्वतंत्र रूप से जारी नहीं किया गया - कायम नहीं रखा जा सकता - किन्तु याची के विरुद्ध कर निर्धारण अधिकारी नये सिरे से कार्यवाही कर सकता है।

Cases referred :

AIR 1969 SC 1122, W.P. No. 1565/2013 and W.P. No. 2044/2013 decided on 14.03.2013.

Manoj Munshi, for the petitioner.

R.L. Jain with *Veena Mandlik*, for the respondents.

ORDER

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

By filing this petition under Article 226 of the Constitution of India, the petitioner has challenged the notice dated 27.02.2013 (Annexure P/4) issued by the Income Tax Officer Circle-2(1), Indore (hereinafter referred to as Assessing Officer) under Section 147 of the Income Tax Act, 1961 (for short '**the Act**').

2. The petitioner submits that merely on the basis of directions of CIT (Appeals) contained in the order dated 12.11.2012 passed in Appeal filed by the petitioner for the assessment year 2008-09 the assessment for the year 2007-08 could not have been reopened by the Assessing Officer as has been done vide impugned notice Annexure P-4. In support of this contention, learned counsel for the petitioner has placed reliance on the judgment passed by the Supreme Court in the case of *Commissioner of Income Tax, Kerala Vs. Manick and Sons* (AIR 1969 SC 1122).

3. Shri R.L. Jain learned senior Counsel placed reliance on two orders passed by a Division Bench of this Court on 14.03.2013 in writ Petition No. 1565/2013 (*Computer Science Corporation India Pvt. L.td. Vs. Additional Commissioner of Income Tax, Range-2 and Another*) and in Writ Petition No. 2044/2013 (*Computer Science Corporation India Pvt. Ltd. Vs. Assistant Commissioner of Income Tax, Circle-2, Indore*).

4. In the case of *Commissioner of Income Tax Kerala Vs. Manick and Sons*, the Supreme Court in **Paragraph-5** and in **Paragraph-11** has observed thus:-

"5. An assessment which has become final may be reopened in appeal by the Appellate Assistant Commissioner or the Tribunal or in revision by the Commissioner, or under an order of rectification of mistake, or pursuant to a notice

of reassessment. The Tribunal hearing an appeal may give directions for reopening assessment of the year to which the appeal relates: it cannot give any directions to reassess in case of a period not covered by that year. There is no sanction in law to enforce the undertaking by the respondent when urging his appeal in respect of the year 1953-54, to make a voluntary return for the year 1952-1953; and even if the respondents carried out that undertaking the assessment of 1952-53 could not be reopened otherwise than in the manner prescribed by law. The undertaking must therefore be ignored. Under Section 33 (4) of the Income Tax Act, 1922, the Income Tax Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power conferred by that Sub-section is wide, but it is still a judicial power which must be exercised in respect of matters that arise in the appeal and according to law. The Tribunal in deciding an appeal before it must deal with questions of law and fact which arise out of the order of assessment made by the Income Tax Officer and the order of the Appellate Assistant Commissioner. It cannot assume powers which are inconsistent with the express provisions of the Act or its scheme”.

“11. Turning then to the questions: counsel for the respondents conceded that the Tribunal had no jurisdiction to direct the Income Tax Officer to re-open the assessment for the year 1952-53. He submitted however that the Tribunal did not give any such directions: it merely recorded an undertaking given by the respondents that they will voluntarily submit a return for Rs. 50,000/- for the year 1952-53. But the context in which the statement recording the undertaking occurs in paragraph 7 of the judgment of the Tribunal and the direction given in paragraph 8 A leave no room of doubt that the Tribunal did give a direction to the Income-Tax Officer to re-assess the income for the year 1952-53. On the answer to the first question no further enquiry need be made on the second question”.

5. This Court in the cases relating to *Computer Science Corporation India Pvt. Ltd.* (Supra), after taking into consideration the stand taken by the respondents in the return filed in W.P. No. 1565/2013 to the effect that such directions by the CIT (Appeals) are not binding on the Assessing Officer and the Assessing Officer has to take the decision independently as per law, passed following order in W.P. No. 1565/2013.

“6. Shri R.L. Jain, learned Senior Counsel appearing for the respondents submitted that the directions which have been made are not binding in nature and it is open for the AO to act independently in accordance with law. In paragraph 5.37 of the return filed on behalf of the respondents we find a categorical stand taken by the respondents “that the findings and observations mentioned in the appeal order were required to be looked into and a decision was to be taken by learned AO independently as per law. Further the AO is not bound to agree with the findings and observations given by the learned CIT (A) and as per the Income-Tax Act no binding directions can be issued to AO except under Section 144-A by the Additional or Joint Commissioner of Income Tax”. In paragraph 5.40 of the return it has been further stated on behalf of the respondents” that the learned CIT (A) has only mentioned his findings and observations and no binding directions were issued as the learned CIT (A) cannot issue any binding direction for other assessment years which is sub-judice.”

“7 Having considered the submissions made by learned counsel for the parties and in view of the categorical stand taken by the respondents in reply to the petition in paragraph 5.37 and 5.40 as extracted above, we dispose of this petition by observing that the directions contained in para 5 and its sub-paragraphs of the impugned order passed by CIT (A) shall not be construed to be of binding nature by the AO and it will be open for AO to proceed with the assessment proceedings in accordance with law uninfluenced by the said impugned observations/directions contained in the impugned order.”

6. We have examined the directions contained in the order dated 12.11.2012 passed by the CIT (Appeals) in the appeal filed by the petitioner pertaining to the assessment year 2008-09 and the impugned notice issued by the Assessing Officer under Section 147 of the Act, and we find that the impugned notice has not been issued independently but has been issued merely on the basis of the directions issued by the CIT (Appeals) in the appeal relating to the year 2008-09.

7. Therefore, in view of the law laid down by the Supreme Court and the stand taken by the revenue in similar case relating to *Computer Science Corporation India Pvt. Ltd.* (Supra) the impugned notice which has not been issued independently but has been issued only on account of the directions contained in the order dated 12.11.2012 passed by the CIT(Appeals) cannot be sustained.

8. In the circumstances, we allow this petition by quashing the impugned show cause notice Annexure P-4 issued by the Assessing Officer, however with liberty to the Assessing Officer to take fresh steps against the petitioner in accordance with law, if so advised, uninfluenced by observations/directions issued by the CIT (Appeals).

9. The writ petition stands allowed to the extent indicated above.

Parties to bear their own costs.

CC within 3 days.

Petition allowed.

I.L.R. [2015] M.P., 96

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 20852/2013 (Jabalpur) decided on 13 December, 2013

MANOJ MISHRA

...Petitioner

Vs.

STATE OF M.P.

...Respondent

Criminal Procedure Code, 1973 (2 of 1974), Section 24 - Special Prosecutor - Court granted permission to two counsels to assist Public Prosecutor - Complainant cannot seek mandamus that his private counsels be appointed as Special Public Prosecutor. (Paras 4 & 5)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 24 – विशेष अभियोजक – लोक अभियोजक की सहायता के लिए न्यायालय ने दो अधिवक्ताओं को अनुमति प्रदान की – शिकायतकर्ता अपने निजी वकीलों को विशेष लोक अभियोजक के रूप में नियुक्ति के लिए परमादेश की मांग नहीं कर सकता।

Rajeev Barkur, for the petitioner.

V. Tiwari, P.L. for the respondent/State.

(Supplied : Paragraph numbers)

ORDER

SANJAY YADAV, J. :- Heard.

2. Petitioner seeks mandamus to the State of Madhya Pradesh and its functionaries to appoint one Ashish Tiwari, Advocate as Special Public Prosecutor in S.T.No.162/2012.

3. Respondents No.4 to 9 are being tried for the offences under Sections 120-B and 302 read with 34 of the Indian Penal Code and also under Section 25 and 27 of the Arms Act vide S.T.No.162/2012; in respect of homicidal death of Alok Mishra. Petitioner is the brother of deceased. On an application filed by the petitioner under Section 301(2) of the Code of Criminal Procedure, 1973, First Additional Sessions Judge, Betul granted leave to two of his counsel, viz, Shri Ashish Tiwari, Advocate and Shri Sanjay Mishra, Advocate to assist the Public Prosecutor by order dated 18.04.2013.

4. Petitioner, however, now seeks a direction to the State of Madhya Pradesh and its functionaries to appoint the counsel nominated by him as Special Public Prosecutor to conduct the trial.

5. Section 24 of the Code of Criminal Procedure provides for appointment of Public Prosecutors and Assistant Public Prosecutors whereunder sub-section (8) stipulates that the Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor. The provision thus enables the Central Government or a State Government to appoint a person to conduct any case or class of cases. It, however, does not create a corresponding right in favour of any person to seek mandamus to that effect. Merely because the private counsel are permitted to assist the Public Prosecutor as per provision contained in sub-section (2) of Section 301 of the Code of Criminal Procedure, 1973,

no right would accrue in favour of the petitioner to seek direction that these private counsel be appointed as Special Public Prosecutors.

6. The petition being misconceived is dismissed. However, no costs.

Petition dismissed.

I.L.R. [2015] M.P., 98

WRIT PETITION

Before Mr. Justice S.C. Sharma

W.P. No.9223/2012 (Indore) decided on 18 March, 2014

SAROJ BHATIA (SMT.)

...Petitioner

Vs.

INDIAN OIL CORPORATION LTD. & ors.

...Respondents

Constitution - Article 19(1)(g) & Petroleum Act (30 of 1934), Section 3 & Petroleum Rules, 2002, Rules 144, 149 - Establishment of retail outlets by the Oil Company - NOC have been granted by various concerned department - Denial of NOC by NHAI based upon the guidelines - Held - Guidelines framed by the Indian Road Congress are not mandatory they have no statutory force - Therefore, a retail outlet can be established within the distance of 1000 meter of the existing fuel station - So, far as the toll plaza is concerned same is not in existence - Denial of establishment of retail outlets and denial of NOC to Indian Oil Corporation Ltd. amounting to violation of Fundamental Rights guaranteed under Article 19(1)(g) of the Constitution - Impugned order is set-aside. (Paras 10,11)

संविधान - अनुच्छेद 19(1)(जी) एवं पेट्रोलियम अधिनियम (1934 का 30), धारा 3 एवं पेट्रोलियम नियम, 2002, नियम 144, 149 - तेल कंपनी द्वारा खुदरा विक्रय केन्द्रों की स्थापना - भिन्न संबंधित विभाग द्वारा अनापत्ति प्रमाण पत्र जारी किये गये - एन.एच.ए.आई. द्वारा अनापत्ति प्रमाण पत्र से इंकार, दिशा-निर्देशों पर आधारित - अभिनिर्धारित - भारतीय सड़क कांग्रेस द्वारा विरचित दिशा-निर्देश आज्ञापक नहीं हैं, वे कानूनी शक्ति नहीं रखते - अतः, विद्यमान पेट्रोल पंप से 1000 मीटर की दूरी पर एक खुदरा विक्रय केन्द्र स्थापित किया जा सकता है - जहाँ तक चुंगी-चौकी का संबंध है, वह अस्तित्व में नहीं है - इंडियन ऑयल कॉर्पोरेशन लिमिटेड को खुदरा विक्रय केन्द्र की स्थापना नामंजूर करना एवं अनापत्ति प्रमाण पत्र नामंजूर करना संविधान के अनुच्छेद 19(1)(जी) के अंतर्गत प्रत्याभूत मूलभूत अधिकारों का उल्लंघन की कोटि में आता है - आक्षेपित आदेश अपास्त।

Case referred :

W.P. No. 7123/2011 decided on 11.01.2013.

P. Namjoshi, for the petitioner.

Yogesh Mittal, for the respondent / Indian Oil Corporation Ltd.

Vivek Sharan, for the respondent No.3.

C.S. Ujjainiya, P.L. for the respondent No.2.

ORDER

S.C. SHARMA, J. :- The present petition has been filed against the order dated 7.5.13 by which the National Highway Authority of India (NHAI) has rejected the application of Indian Oil Corporation Ltd. for construction of a Retail Outlet at National Highway No. 3 CH-527.021, khasra No. 182/2 Village Rojwas Tehsil Tarana District Ujjain

2. The contention of the petitioner is that the petitioner has submitted an application for allotment of a Retail Outlet and she was selected by the Indian Oil Corporation Ltd. for allotment of a Retail Outlet. The petitioner has further submitted that the letter of intent was issued on 19.11.12 and a request was made by the Indian Oil Corporation Ltd. to the District Magistrate for grant of No Objection Certificate. The petitioner also submitted applications for grant of No Objection Certificate (NOC) / permission to the District Civil Supply Department, Town and Country Department and to the Department of Sanchalaya Nagriya Prasasan Evam Vikash and the NOCs were granted by all the departments/bodies of the State of Madhya Pradesh enabling the petitioner to establish the Retail Outlet. The Indian Oil Corporation Ltd. has approached the NHAI for grant of No Objection Certificate for establishment of Retail Outlet and the NHAI has rejected the application submitted by the Indian Oil Corporation Ltd. vide impugned order dated 7.5.13 (Annexure-p/14). The reasons assigned in the impugned order reflects that the Retail Outlet is being established at Khasra No. 182/2, Village Rojwas and a portion of the aforesaid Khasra admeasuring 0.021 hectare has been acquired under the provisions of Land Acquisition Act, 1956 therefore, the Retail Outlet cannot be established. The other reason assigned in the impugned order is that there is already a Retail Outlet in existence near the sight over which the Indian Oil Corporation Ltd. is going to establish a new Retail Outlet and the distance between two fuel stations should be 1000 meters. The next line of the same paragraph further states that the distance between existing and proposed toll-

plaza is 804 meter. The third reason assigned is that the distance between proposed toll-plaza and the fuel station should be 1 km. The petitioner's contention is that two petrol pumps can certainly be established even though the distance between two fuel stations is less than 1000 meters keeping in view the circular filed by the respondent-NHAI dated 25.9.2003. It has also been argued that the area offered by the Indian Oil Corporation Ltd. for establishment of a Retail Outlet is meeting the norms laid down by the Indian Oil Corporation Ltd. He has also argued that there is no toll-plaza constructed nor steps have been initiated by the NHAI for establishment of toll-plaza and denial of NOC is nothing, but it is an action at the behest of existing operator of the Retail Outlet, whose Retail Outlet is in existence.

3. A detailed and exhaustive reply has been filed by the respondent No.3-NHAI and the NHAI has admitted issuance of letter dated 7.5.13 (Annexure-P/14). The NHAI in paragraph No. 4 has detailed the reasons for rejecting the application of Indian Oil Corporation Ltd. Apart from the aforesaid reasons detailed by the NHAI, no other reasons have been assigned in the return for rejecting the application for grant of NOC for establishing for Retail Outlet.

4. Learned counsel appearing for the Indian Oil Corporation Ltd. has marked his appearance and his contention is that in spite of the fact that a part of the land has been acquired under the provisions of Land Acquisition Act, 1956, the land available at sight is more than sufficient for establishing a Retail Outlet as per the norms laid down by the Indian Oil Corporation Ltd. as well as Union of India.

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

6. The petitioner in the present case is aggrieved by the order dated 7.5.13, by which the National Highway Authority of India has rejected the application of Indian Oil Corporation Ltd. for construction of a Retail Outlet at National Highway No. 3 CH-527.021, Khasra No. 182/2 Village Rojwas Tehsil Tarana District Ujjain. The petitioner after he was successful in the process of selection has obtained No Objection Certificates from the following departments :-

(1) Sanchlanalay Nagriya Prasasan Evam Vikash on 31.1.13.

(2) Madhya Pradesh Paschim Kshetra Vidyut Vitran Company, Tarana on 16.1.2013.

(3) District Civil Supply Department Distt. Ujjain on 23.1.13.

(4) Dy. Director Town & Country Planning Department on 9.1.13.

(5) Gram Panchayat Titodi and Janpad Panchayat Taran dated 3.9.13.

(6) Madhya Pradesh Pollution Control Board on 29.12.12.

(7) Collector Office (food) Distt Ujjain on 28.1.13.

7. National Highway Authority of India has raised an objection that a part of the land bearing khasra No. 182/2 Village Rojwas has been acquired by them and therefore they are not granting the NOC. The selection of a dealer to establish a Retail Outlet is based upon the guidelines framed by the Oil Companies and the Indian Oil Corporation Ltd. has carried out an exhaustive survey of the land in question and even though a part of the land has been acquired, for the purpose of construction of retail outlet the land available is more than enough and is meeting the parameters required for establishment of a Retail Outlet. Learned counsel for the Indian Oil Corporation Ltd. has categorically stated in open court that the land which is available on site after acquisition is more than enough for establishing a Retail Outlet and is meeting the requirements of the guidelines framed by the Government of India as well as Indian Oil Corporation Ltd. It has also been stated that the land which is now available is infact more than the land required to establish a Retail Outlet. The National Highway Authority of India has also stated that there is already a petrol pump in existence and minimum distance between two fuel stations in National Highway should be 1000 meter, whereas in the present case the distance between existing retail outlet and proposed toll plaza is 804 meter. A similar explanation has been given in respect of other grounds by the National Highway Authority of India.

8. A similar problem arose in respect of establishment of a Retail Outlet of the Hindustan Petroleum Corporation Ltd. and Madhya Pradesh Road Development Corporation came up with similar plea before this Court. This Court in the case of *Amrish Dangi Vs. Hindustan Petroleum Corporation Ltd & Ors* (W.P. No. 7123/11) decided on 11.1.2013 in paragraphs 8 to 13 has held as under :-

“8. In the present case, it is not in dispute that the Hindustan

Petroleum Corporation Ltd. has issued a notice inviting applications for appointment of retail outlet dealers at various places including Village Bistan, Khargone District National Highway No. 31 on 17.2.2009. The petitioner was selected by the Hindustan Petroleum Corporation Ltd. and finally a letter of intent was issued on 12.9.11. It is not in dispute that a NOC has been issued by the Collector. Rule 144 of the Petroleum Rules, 2002 reads as under:-

"144. No objection certificate :- (1) Where the licensing authority is the Chief Controller or the Controller, as the case may be, an applicant for a new license other than a license in Form III, XI, XVII, XVIII or XIX shall apply to the District Authority with two copies of the site-plan showing the location of the premises proposed to be licensed for a certificate to be effect that there is no objection to the applicant receiving a license for the site proposed and the District Authority shall, if he sees no objection, grant such certificate to the applicant who shall forward it to the licensing authority with his application in form IX.

(2) Every certificate issued by the District Authority under sub-rule (1) shall be accompanied by a copy of the plan of the proposed site duly endorsed by him under his official seal.

(3) The Chief Controller or the Controller, as the case may be, may refer an application not accompanied by certificate granted under sub-rule (1) to the District Authority for his observations.

(4) If the District Authority, either on a reference being made to him or otherwise, intimates, to the Chief Controller or the Controller, as the case may be that any license which has been applied for should not, in his opinion, be granted, such license shall not be issued without the sanction of the Central Government.

(5) The District Authority shall complete his inquiry for issuing NO OBJECTION CERTIFICATE (NOC) under sub-rule (1) and shall complete the action for issue or refusal of

the NOC, as the case may be, as expeditiously as possible but not later than three months from the date of receipt of application by him.”

(9) The respondent-Collector keeping in view the statutory provisions as contained under the petroleum Rules has issued the NOC and various authorities have also issued the NOCs i.e. the Inspector General of Police (Fire) has issued a NOC on 6.6.11; the Town and Country Planning Department has issued a NOC on 31.5.11, the SDM has issued a NOC on 15.3.11, the Gram Panchayat, Bistanand Janpad Gogava and Madhya Pradesh Pollution Control Board has issued a NOC on 24.6.11. Thus, various no objection certificates as required under various statutory provisions have been issued by the various authorities from time to time. Only impediment, which coming in the way of the petitioner for installing the petrol pump is order dated 8.8.11 passed by the Madhya Pradesh Road Development Corporation, which is based upon the guidelines framed by the Indian Road Congress, which provides that minimum distance between two fuel station should be 300 meter. In the present case, a new retail outlet which is going to be established and the NOC has been denied by the Madhya Pradesh Road Development Corporation only because there is already a retail outlet in existence near the site and the distance is less than 300 meters from the existing retail outlet. Clause 4.6.4 of the guidelines framed by the Indian Road Congress relied upon by the Madhya Pradesh Road Development Corporation reads as under:

“4.6.4 For installation of new fuel station within the 1000 m or 300 m distance of existing fuel station as the case may be, new entrant would be responsible for construction and maintenance of the common service road, deceleration and acceleration lanes, drainage and traffic control devices. Wherever, available ROW is inadequate to accommodate such service roads, deceleration/acceleration lanes, etc. the additional land by the side of ROW to accommodate such service roads shall also be acquired by the new entrant Oil Company. In case of hilly/mountainous terrain, common service roads at all such locations may not be possible as per the site

conditions and therefore, common access through service roads would not be a pre-condition.”

10. The aforesaid clause permits for establishment of a retail outlet, even if the distance is less than 300 meters subject to construction and maintenance of the common service road, deceleration and acceleration lanes, drainage and traffic control devices. Thus, it is evident that there is no absolute bar in establishing the retail outlet, as held by the respondent No. 3. Not only this, the Division Bench of Punjab and Haryana High Court in the case of *Environment Society of India, Chandigarh and another Vs. Administrator, Chandigarh Administration, Union Territory, Chandigarh and others*, AIR 1998 Punjab and Haryana 94. In paragraph 20 in the aforesaid case has held as under :-

“20 Hitherto-for, the Gas Stations/Petrol Pumps/Fuel Filling Stations have been sanctioned in areas reserved for commercial use. So is the situation in the present case. Nothing new or unusual has been done. Furthermore, what should be the distance between the two Petrol Pumps? The Indian Road Congress has undoubtedly recommended that it should be 300 mts. However, it is only a recommendation. It is not mandatory provision of law. The Administration has categorically averred that it has not adopted the recommendations. In this situation, it cannot be accused of having acted illegally in sanctioning the site for the installation of the facility in dispute.”

11. In view of the aforesaid judgment as the guidelines framed by the Indian Road Congress are only recommendatory in nature and does not have statutory force, the same cannot be made to be the basis for denying a NOC to the petitioner. A similar view has been taken by the Allahabad High Court in the case of *Mahtab Ahmad Vs. Union of India Thru Prin. Sec. Mini of Pet. and others* in W.P. No. 43483 of 2010 and the same reads as under:-

“Heard learned counsel for petitioner, Sri Vikas Budhwar, learned counsel appearing on behalf of respondent Nos. 2 to 5 and Smt. Nuzhat Praveen, learned counsel

appearing on behalf of respondent No.1.

By this writ petition, petitioner has prayed for a mandamus directing the respondents not to establish any such fuel station nearby plot No. 275 and on 277.

Petitioner's case in the writ petition is that petitioner is a proprietor of Petrol and Diesel Dealership of Aliganj Road, under the scheme of Adarsh Kisan Sewa Kendra.

Learned counsel for the petitioner submits that respondent No. 6 is taking steps for establishment of another outlet for which license has been given on 18.11.2009. Learned counsel for the petitioner relying on a guideline issued by Indian Road Congress, 2009 submits that under Clause 4.5.1 of the said guideline at the place where respondent No. 6 is citing the outlet could not have been done.

Sri Vikas Budhwar submits that the guidelines on which petitioner is relying are issued by the Indian Road Congress which is not a statutory body and the guidelines have already been issued by the Government of India as well as by the Oil Companies for citing of the outlet and no breach is alleged of the aforesaid guidelines.

After considering the submissions of the parties we are of the view that the guidelines, annexure-1 to the writ petition which are said to be issued by the Indian Road Congress are not statutory guidelines which can be enforced by this court under Article 226 of the Constitution of India.

Writ petition is accordingly dismissed."

12. Keeping in view the aforesaid judgment delivered by the Allahabad High Court in the case of *Mahtab Ahmad* (supra), this Court is of the considered opinion that the guidelines framed by the India Road Congress are not at all statutory guidelines and which can be enforced by this Court under Article 226 of the Constitution of India. Resultantly, the impugned order based upon the guidelines framed by the Indian Road Congress is accordingly quashed. In the present case,

no other reason has been assigned by the respondent No. 3 for denying the NOC to the petitioner and therefore, as this Court has quashed the impugned order, the petitioner and the respondent No. 1 shall be free to establish a retail outlet as they have already obtained NOCs from various other authorities in accordance with law.

13. With the aforesaid the writ petition is allowed.”

9. In the present case, the petitioner as well as the Indian Oil Corporation Ltd. have obtained No Objection Certificates required under the Petroleum Act 1934 read with the Petroleum Rules, 2002. In the case of *Amrish Dangi* (supra) the distance between the existing Retail Outlet and the proposed Retail Outlet was less than 300 meter and this Court has allowed the writ petition preferred by Amrish Dangi. This Court in large number of cases has observed that the moment a new Retail Outlet is being established by the Oil Company, persons who are having existing Retail Outlets are filing complaints with the Oil Company or with the authorities, who are involved in the matter of grant of NOCs and based upon those complaints without verifying the statutory provisions as contained under the Petroleum Act 1934 read with the Petroleum Rules, 2002, No objection Certificates are being denied to the proposed dealer/oil companies. This Court in the case of *Amrish Dangi* has observed that the guidelines framed by the Indian Road Congress are only recommendatory in nature and does not have any statutory force and therefore denial of NOC based upon the guidelines framed by the Indian Road Congress or on the basis of some letter of Chief Engineer, Director General, Road Development and Special Secretary, Govt. of India, Ministry of Road Transport and Highways dated 25.9.2003 is bad in law. The so called letter of the Director General dated 25.9.2003 is certainly not at all a statutory notification. It has not been issued under the provisions of Petroleum Act nor under the provisions of Petroleum Rules. Even for a moment the letter dated 25.9.2003 is taken into account, the Appendix -1 certainly provides for establishment of a new fuel station, even when the distance is less than 1000 meter. Clause-4.4.3 and 4.4.4 of Appendix-1 of letter dated 25.9.2003 filed by the National Highway Authority of India Ltd reads as under :-

“4.4.3 If two or more fuel stations are to be sited in close proximity for some reasons, these would be grouped together to have a common access through a service road of 7.0 m width and connected to the highway through acceleration,

deceleration lanes. From these considerations, the permission for the new fuel stations would be considered only if it is either in proximity to the existing one so that the common access can be provided or the new one located at the distance of more than 1000 m.

4.4.4. For installation of new fuel station within the 1000m distance of existing fuel station in plain/rolling terrain and 300m in hilly/mountains terrain and urban stretch, new entrant would be responsible for construction and maintenance of the common service road, deceleration & acceleration lanes, drainage and traffic control devices. In case of hilly/mountainous terrain, common service roads at all such location may not be possible as per the site conditions and therefore, common access through service roads would not be a pre-condition."

10. In light of the aforesaid, even though the letter enclosed alongwith the return has got no statutory value, a Retail Outlet can be established within the distance of 1000 meter of the existing fuel station. So far as the question of establishment of a fuel station with 1000 meter from toll-plaza is concerned, the toll plaza is not in existence at all. As the guidelines framed by the Indian Road Congress are not mandatory as held by this Court and as the letter dated 25.9.2003 is not statutory notification, denial of establishment of the Retail Outlet to the petitioner and denial of No Objection Certificate to Indian Oil Corporation Ltd. is amounting to violation of Fundamental Rights guaranteed to the petitioner under Article 19(1)(g) of the Constitution of India. The record of the case further establishes that some one aggrieved in the matter on account of allotment of a Retail Outlet to the petitioner has started levelling all kind of frivolous allegations against him. It appears that the authorities of the National Highway Authority of India have given undue consideration to the so called complaint/objecton raised in the matter. The authorities involved in the matter to grant No Objection Certificate under the Petroleum Act and the Rules framed thereunder have already granted necessary No Objection Certificates and therefore, this Court is of the considered opinion that the impugned action of the respondent-National Highway Authority of India is bad in law and the order dated 7.5.13 deserves to be set aside and is accordingly set aside.

11. In light of the aforesaid, the writ petition deserves to be allowed and

the same is allowed. The petitioner as well as respondent No. 1 Indian Oil Corporation Ltd. shall be free to establish a Retail Outlet after obtaining No Objection Certificates as required under Rule 144 of the Petroleum Rules 2002 and the letter/order of the National Highway Authority of India dated 7.5.13 will not come in way of the Collector/District Authority in granting No Objection Certificate to the Indian Oil Corporation Ltd/petitioner. The impugned order dated 7.5.13 will also not come in way of the Indian Oil Corporation Ltd. and the petitioner in the matter of establishment of a Retail Outlet. The District Magistrate/Licensing Authority shall pass an appropriate order, if not passed so far, based upon the NOCs/permissions granted by the Director, Urban Administration and Development on 31.1.13, Madhya Pradesh Paschim Kshetra Vidyut Vitran Company, Tarana on 16.1.2013; District Civil Supply Department Distt. Ujjain on 23.1.13, Dy Director Town & Country Planning Department on 9.1.13 Gram Panchayat Titodi and Janpad Panchayat Taran on 3.9.13 Madhya Pradesh Pollution Control Board on 29.12.12 and Collector Office (food) Distt. Ujjain on 28.1.13.

12. The exercise of issuing a No Objection Certificate in accordance with law be concluded as expeditiously as possible preferably within a period of 30 days from the date of receipt of a certified copy of this order.

13. With the aforesaid, the writ petition stands allowed.

14. No. order as to costs.

Petition allowed.

I.L.R. [2015] M.P., 108

WRIT PETITION

Before Mr. Justice Alok Aradhe

W.P. No. 15988/2013 (Jabalpur) decided on 3 April, 2014

SONU DUBEY & ors.

...Petitioners

Vs.

SHRI VIRENDRA KUMAR RAI & ors.

...Respondents

A. Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Amendment - Delay - After closer of the plaintiff's evidence, defendant filed an application for amendment in the written statement - No explanation was offered for such delay - Held - The defendants have failed to satisfy that they could not file the application for amendment before the trial court despite due diligence at earlier point of time.

(Para 8)

क. *सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – संशोधन – विलम्ब –* वादी का साक्ष्य समाप्त करने के पश्चात, प्रतिवादी ने लिखित कथन में संशोधन हेतु आवेदन प्रस्तुत किया – उक्त विलम्ब के लिए कोई स्पष्टीकरण नहीं पेश किया गया – अभिनिर्धारित – प्रतिवादीगण इस बात की संतुष्टि करने में विफल रहे कि सम्यक् तत्परता के बावजूद समय के पूर्वतर प्रक्रम पर वे विचारण न्यायालय के समक्ष संशोधन हेतु आवेदन प्रस्तुत नहीं कर सके थे।

B. *Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Acceptance of cost, by reserving right to challenge would not preclude the petitioner to challenge the impugned order.* (Paras 8, 9)

ख. *सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – व्यय* की स्वीकृति, चुनौती के अधिकार को सुरक्षित रखते हुए याची को आक्षेपित आदेश को चुनौती देने से नहीं रोकेगी।

Cases referred :

(2013) 9 SCC 485, (2009) 2 SCC 409, 2006(3) MPLJ 215, 2007(4) MPLJ 200, 2011(1) MPLJ 239, AIR 1994 NOC 191, AIR 1999 Punj. & Haryana 229, (2008) 7 SCC 85, (2008) 5 SCC 117, (2008) 14 SCC 364, AIR 1934 Nagpur 163.

Ashish Shroti, for the petitioners.

S.A. Shah, for the respondent No.1.

Akhilesh Jain, for the respondents No. 2 to 5

(Supplied : Paragraph numbers)

ORDER

ALOK ARADHE, J. :- With consent of the parties, the matter is heard finally.

In this writ petition under Article 227 of the Constitution of India, the petitioners have challenged the validity of the order dated 17.7.2013 passed by the trial Court by which application for amendment of the written statement filed by respondents No. 2 to 5, has been allowed.

2. Facts giving rise to filing of the writ petition briefly stated are that the petitioner/plaintiff filed the suit inter-alia on the ground that one Vishnu Prasad was the owner of certain lands. Aforesaid Vishnu Prasad had two wives. The plaintiffs are the children from the second wife whereas, defendant No. 2 is the first wife of late Vishnu Prasad and defendants No. 3 to 5 are children

from the first wife. After the death of Vishnu Prasad, the property held by him devolved on plaintiffs as well as defendants No. 2 to 5. However, defendants No.2 to 5 unilaterally sold the suit property to defendant No. 1. Thereupon, the plaintiffs filed the suit seeking the relief of declaration and permanent injunction on or about 9.11.2004.

3. In the written statement, defendants No. 2 to 5 inter-alia denied the claim of the plaintiffs. It was pleaded that plaintiffs are not related in any manner with the deceased Vishnu Prasad. The plaintiffs adduced their evidence in the year 2009. On 29.1.2009, the case was fixed for recording the defendants' evidence. The defendants No. 2 to 5 filed an application after a period of approximately 4-1/2 years on or about 18.6.2013 seeking amendment of the written statement. By way of proposed amendment, defendants No. 2 to 5 wanted to incorporate the plea that late Vishnu Prasad had executed "Parvarishnama" in favour of defendant No. 2 for her maintenance.

4. The trial Court by the impugned order dated 17.7.2013 allowed the application for amendment and held that plaintiffs can be compensated in terms of cost.

5. Learned counsel for the petitioners submitted that the trial Court ought to have appreciated that the proposed amendment was highly belated and no explanation was offered for the delay and the proposed amendment if allowed, would change the nature of the suit. In support of his submissions, learned counsel for the petitioners has placed reliance on decisions of Supreme Court in *Mashyak Grih Nirman Sahakari Sanstha Maryadit Vs. Usman Habib Dhuka and others*, (2013)9 SCC 485 and *Vidyadbai and others Vs Padmalatha and another*, (2009) 2 SCC 409.

6. On the other hand learned counsel for respondents No. 2 to 5 has submitted that defendants No. 2 to 5 were not in possession of the documents and the proposed amendment is necessary for a fair and complete adjudication of the controversy involved in the suit. It is further submitted that since the plaintiffs have accepted the amount of cost, therefore, they cannot be permitted to challenge the order passed by the trial Court. In support of his submissions, learned counsel for respondents No. 2 to 5 has placed reliance on decisions reported in *Rajesh Kumar Aggarwal and others Vs K.K. Modi and others*, 2006(3) MPLJ 215, *Mangilal, S/o Ratanlal Patidar and others Vs. Dambarlal, S/o. Ratanlal Patidar and another*, 2007 (4) MPLJ 200, *Neeta*

Narang Vs. Beena Valicha, 2011(1) MPLJ 239, *Radheshyam Palod etc, Vs. Smt. Shantidevi and others etc.*, AIR 1994 NOC 191 and *Devinder Singh Vs. Jaspal Kaur*, AIR 1999 Punjab and Haryana page 229.

7. I have considered the submissions made by learned counsel for the parties. In *Gautam Sarup Vs. Leela Jetly and others*, (2008) 7 SCC 85, it has been held that while dealing with the prayer for amendment in the written statement, the discretion has to be exercised judicially. In *Chander Kanta Bansal Vs. Rajinder Singh Anand*, (2008) 5 SCC page 117, the Supreme Court has considered the expression “due diligence”, used by the Legislature in proviso to Order 6 Rule 17 of the Code of Civil Procedure and has held that due diligence means such diligence as a prudent man would exercise in conduct of his own affairs. In *Rajkumar Gurawara (dead) through LRs., Vs. S.K. Sarwagi and Company Private Limited and another*, (2008) 14 SCC 364, it has been held that since lesser degree of prejudice is caused in pretrial amendments, therefore, the same should be allowed more liberally. If in case of post-trial amendments, greater degree of prejudice is caused and, therefore, the Court should be satisfied that the application for amendment would not be made at earlier point of time despite due diligence.

8. In the backdrop of aforesaid well settled legal position, facts of the case may be seen. In the instant case, the suit was filed on 9.11.2004. The plaintiffs closed their evidence in January, 2009. Thereafter, the case was fixed for defendants’ evidence for the first time on 29.1.2009. The defendants No. 2 to 5 did not adduce evidence for a period of approximately four years and thereafter, they filed an application under Order 6 Rule 17 of the Code of Civil Procedure on 18.6.2013 by which amendment in the written statement was sought. In the application, it has only been stated that the document was discovered by them in the month of June, 2013. However, the date of discovery of the documents has not been mentioned in the application. Thus, in the considered opinion of this Court, the defendants have failed to show that notwithstanding exercise of due diligence, they could not file the application for amendment before the trial commenced in the suit. In *Abdul Rahman Khan and another Vs. Failkus Mohamadkhan and others*, AIR 1934 Nagpur 163, it has been held that if the party accepts the cost expressly reserving his right to challenge the order then in such a case, the party can challenge the order. From perusal of the impugned order, it is evident that the petitioner has accepted the cost by reserving his right to challenge the order in an appropriate proceeding. Therefore, the contention of learned counsel

for respondents No. 2 to 5 that since the petitioners have accepted the amount of cost, therefore, they cannot be permitted to challenge the impugned order, cannot be accepted.

9. In view of preceding analysis, the order passed by the trial Court suffers from the error apparent on the face of the record as well as jurisdictional infirmity, therefore, the same cannot be sustained in the eye of law. Accordingly, the same is quashed.

In the result, the writ petition is allowed.

C.C. as per rules.

Petition allowed.

I.L.R. [2015] M.P., 112

WRIT PETITION

Before Mr. Justice S.C. Sharma

W.P. No. 2757/2012 (Indore) decided on 5 May, 2014

AMAR SINGH KWATRA (MAJOR)(RETD.) & anr. ...Petitioners

Vs.

UNION OF INDIA & ors. ...Respondents

(Alongwith Cont. Petition No. 658/2012)

Cantonments Act (41 of 2006), Section 258, Cantonment Land Administration Rules 1937, Rule 3.1 - Cantonment Land - Army closed/ obstructed alleged road adjoining defence land and land belonging to petitioners - Land in question comes within category of class A(1) defence land - Army authorities have absolute right to use the same - No case made out for grant of any relief - Writ petition dismissed. (Paras 15 & 16)

छावनी अधिनियम (2006 का 41), धारा 258, छावनी भूमि प्रशासन नियम 1937, नियम 3.1 - छावनी भूमि - रक्षा विभाग की भूमि तथा याचीगण की भूमि से लगी हुई अभिकथित सड़क को सेना ने बंद/अवरुद्ध किया - प्रश्नाधीन भूमि, रक्षा विभाग की भूमि वर्ग ए (1) की श्रेणी में आती है - सेना प्राधिकारियों को उसके उपयोग का पूर्णाधिकार है - किसी अनुतोष को प्रदान करने का प्रकरण नहीं बनता - रिट याचिका खारिज।

(Supplied : Paragraph numbers)

ORDER

S.C. SHARMA, J. :- The petitioners before this Court have filed this present writ petition being aggrieved by the alleged action of the Indian Army in closing / obstructing the alleged road which is adjoining to the defence land and the land belonging to the petitioners.

2. Contention of the petitioners is that they have purchased land vide registered sale deeds dt. 8/5/07 and 14/2/08 bearing Survey No. 864 admeasuring 0.715 hectares and 0.143 hectares respectively in village Telikhedi, Mhow, Distt. Indore. The adjoining land belongs to the Indian Army (Army Golf Club) situated in GLR Survey No. 168. It has been further stated that the Army Authorities in the year 1983 in order to utilise the land in question have entered into a lease agreement with the predecessor in title and a small culvert was also constructed to provide free access for the golfers on the land in question across river Gambhir. The lease deed was later on extended in the year 1998. In the month of April, 2008 the petitioners after purchasing the land served a notice to the respondents informing about the sale of the land and the Army Authorities (respondent No.5) vide letter dated 13/8/2008 also paid lease rent to the petitioners. Thereafter the petitioners made an effort for extension of the lease, however, the lease was not extended and on 16/3/09 the petitioner No. 1's father requested the Army Authorities to vacate the land. Respondent No.5 informed the petitioners that they will be vacating the land by the end of 2009. Petitioners have further stated that the Army Authorities started threatening the petitioners by blocking the access of the petitioners as well as other family members to their land and the petitioners approached the Revenue Authorities to carry out a field survey regarding alternative route to Survey No.814. A Panchnama was prepared by the Revenue Authorities which is also on record dt. 29/11/10 and the Army also vacated the land. On 2/12/10 the respondent No.5 has informed the petitioners that the land has been vacated and they are constructing a boundary wall. Contention of the petitioners is that the Army Authorities while constructing a boundary wall are blocking the existing road which is impermissible in law keeping in view Sec. 258 of the Cantonments Act, 2006. The petitioners thereafter served notices to the respondents requesting them to stop construction of the boundary wall and as the Army Authorities continued with the construction of the boundary wall, the present Writ Petition has been filed. It has also been stated in the present Writ Petition that certain land belonging to the State Government on the east river bank of river Gambhir has been

encroached by the Army Authorities and as the existing road has been blocked the same is violative of Sec. 258 of the Cantonments Act. It has also been stated that the petitioners do not have access to their land and therefore, the action of the Army Authorities deserves to be set aside. The petitioners have prayed for the following reliefs :

(i) Issue a writ, direction or order in the nature of Certiorari or other appropriate writ, calling for the records of the petitioners' case from the respondents.

(ii) Issue a writ, direction or order in the nature of Mandamus or other appropriate writ restraining from obstructing / obliterating the public road which has been in existence from time immemorial and for greater clarity has been shown in the plan annexed hereinabove as Annexure P/15.

(iii) Issue a writ, direction or order in the nature of Mandamus or other appropriate writ directing the respondents to restore to then original condition the above public road (as per Annexure P/15) as also the light and heavy motarable bridge damaged / destroyed by them which connected the said road on the east bank of the Gambhir River with the lands situate on the west bank in village Telikhedi, Tehsil Mhow.

(iv) Award the costs of the present petition to the petitioners and

(v) Grant such other relief or reliefs as this Hon'ble Court deems fit.

3. A detailed reply has been filed on behalf of the respondent Nos.1 and 4 and it has been stated that the land in question which is in dispute was lying vacant and was not being utilised by the predecessor in title. The land was given on rent by the predecessor in title to the Golf Course and the Defence Forces were using the land for playing golf and for conducting other training. It has also been stated that the Government of India has sanctioned Rs.19.72 crores for construction of key location planning accommodation for infantry batallion and a boundary wall is required to ensure security and safety of defence installations which is as per Works of Defence Act, 1903. It has been further stated that the land on which boundary wall is being constructed is A(1) defence land. It has also been stated that the boundary wall is being constructed with due approval of the Competent

Authority, financed by the Ministry of Defence in respect of which the respondents have enclosed administrative approval of the work and the budget allotted. Respondents have further stated that Sec. 258 of the Act of 2006 is applicable to the roads under the cantonment and not to the roads under local military authority ie., under Defence A(1) land. It has been further stated that the defence authorities can regulate within unit access / use of own roads located in their area and the respondents have enclosed the relevant rules along with the reply. It has also been stated on affidavit that villagers of Telikheda are using main road ie., Telikheda Mhow Road and not the so-called alleged passage which the petitioners are stating to be a road. It has been further stated that no road exist on the east bank of Gambhir river and the portion of land which has been stated as road by the petitioner is nothing but a 'Kacha' track which was used by the Golf players to proceed towards Green Poles and was purely temporarily used by the Golf course at the relevant point of time. It has also been stated that the petitioners have purchased the land only in the year 2007 – 2008 and, therefore, it is incorrect on the part of the petitioners to state that they had an age old access to the Army Area. The respondents have further stated that the land in question as it was not required by the Army Authorities and as accommodation for an infantry battalion is being constructed the boundary wall is necessary and they are rightly constructing a wall exclusively on the land belonging to the Ministry of Defence. It has also been stated that the land in question has never been used for agricultural purposes at any point of time and the petitioner has made an attempt to mislead this Court by making incorrect statements. The respondents have prayed for dismissal of the Writ Petition.

4. Heard learned counsel for the petitioner at length as well as Mr. Vivek Sharan, learned Asstt. Solicitor General for the Union of India along with Brigadier Prakash Chandra, Station Commander and perused the record.

5. In the present case, the petitioner No.1 is a retired Major and the petitioner No.2 is wife of a Retired Wing Commander. It is an admitted fact that they have purchased land vide registered sale deed dt. 8/5/07 and 14/2/08 bearing Survey No. 864 admeasuring 0.715 hectares and 0.143 hectares respectively in village Telikhedi, Mhow, Distt. Indore. The land in question was given on lease to the Indian Army and was part of the Army Golf Club. The predecessor in title in the year 1998 entered into an agreement and used to receive rent from the Indian Army. It was only in April 2008 after the land was purchased by the petitioners, the petitioners started demanding rent and they were also paid rent by the respondents. The petitioners thereafter

requested for extension of lease, however, as the land was not required by the Army, the lease was not renewed and the Army has vacated the land and has also informed the petitioners that they have vacated the land. Petitioners, in the present case, are aggrieved by the construction of a boundary wall over A(1) land which belongs exclusively to local military authority (under defence A(1) Lands). The land falling in a Cantonment Area under the Cantonment Act are divided in various categories and the relevant statutory provisions governing the field relating to classification of the land under the Cantonment Act read with Cantonment Land Administration Rules, 1937, reads as under :

CHAPTER III

CLASSIFICATION AND MANAGEMENT OF LANDS **: LAND USE NORMS AND PLANNING FOR KLP** **PURPOSES**

3.0 General

Management of defence land is a very complex issue as it is not covered by any statute since land is a State subject while all Defence lands are Central Government holdings. A large number of administrative orders starting from British times exist for its management and these have never been consolidated at one place for the easy and quick reference of the practitioner who deals with A-1 lands. For effective management of the defence land, it is classified under rules 4, 5 and 6 of CLAR, 1937. Management of different classes is vested in various agencies such as Local Military Authorities(LMA), Defence Estates Officer (DEO) or Cantonment Executive Officer (CEO). Defence land within Cantts is classified and managed as listed subsequently.

3.1 Classification and Management of Defence Land.

3.1.1 A-1 That land which is actually used or is under the active occupation of the Military Authorities, for the purposes of fortifications, barracks, stores, arsenals etc (see Rule 5 (I) of CLAR). Management of this land is vested in LMA (see Rule 14 of CLAR). This category of land is of interest to us as it is in our physical possession and is also used for KLP purposes. All public funded works can only be

executed on land classified as A-1 and on none other. At the same time non public funded works cannot be executed on this land.

3.1.2 A-2 That land which is **kept reserved for specific future expansion** and must not be built upon either on temporary or permanent basis till its classification has been changed to A-1. Management of this land, if not physically held by QMG's branch, is vested in DEO. However, being vacant, large-scale encroachments have been reported in almost all Cantts since these had been leased in the past by DEOs and ex-lessees are now not vacating these lands. It is in our interest to get these lands reclassified to A-1 and handover management responsibility to units as per approved zonal plans. While preparing zonal plans, if deficiency exists in A-1 land, then all unencumbered and encroachmentfree A-2 category of land is considered for use before any other category.

3.1.3 B-1. That land which is under **occupation of any Central Govt Department other than MOD**. It is managed by the user department of the Central Govt. This category of land is not taken into account when planning to make up deficiency of land for KLP or zonal planning purposes.

3.1.4 B-2. That land which is **under occupation of any Department**. It is managed by the user department of the State Govt. This of land is not taken into account when planning to make up deficiency, KLP or zonal planning purposes.

3.1.5 B-3 The land which is **held by private persons** under terms/ leases, subject to conditions under which the Central Govt reserved to themselves, the proprietary rights in the soil. A separate devoted to leased lands. These lands are managed as under:-

3.1.5.1 Land within the jurisdiction of CBs manage. This is generally land of bazaars and civil areas.

3.1.5.2 Land outside the jurisdiction of CBs manage this is generally land of the bungalow colloquially grant

bungalows (OGBs).

3.1.6 B-4. That land which does not fall under any other CI as mentioned above in 3.1.1 to 3.1.5. The Army keeps this land vacant for expansion or use. The management of this land is vested in the DEO. It is for us to note that we should insist upon the DEOs to handover vacant these lands for KLP purposes and then reclassify them to A-1 to make up A1 defence lands for zonal plan purposes. In case we first reclassify to and then takeover their possession we will be saddled with the ex-lessees not vacate these lands. Therefore, if reclassification is sought to A-1, th be only for those lands which are unencumbered and free of encro unauthorised constructions.

3.1.7 C. That land, management of which is vested Municipal or other public purposes, under section 108 of the Cantts (Section 122 of the Act of 2006). This category of land is not taken I when planning to make up deficiency of land for KLP or zonal planning.

3.1.8 Analogous to A-1 Land outside cantt is not classi analogous to A-1. The management of such land remains with the department of the service concerned for whom the land is held. This approval of the Govt, may be placed under management of DEO purposes. This category of land may be considered for zonal planning preferably as outdoor training areas, ranges, driving tracks for mechanic training, butcheries, storage of ammunition and other stores etc since the a certain distance from the main townships. In our Command there are disused camping grounds (details are available at each nearest Station disused air fields of WW II vintage and at least six known disused rifle the cantonments. A consolidation exercise was done at HQ Central on 22 Aug 06 and minutes of the conference held with all DEOs were... ..

6. In the present case, it is an undisputed fact that the land in question is A(1) category land, which means that it is a land under the active occupation of the military authorities. (Annexure P/1) which is a map enclosed by the petitioner in respect of Cantonment boundary wall does not establish that the street in question is in existence adjoining the petitioners land and A(1) category

land. (Annexure P/2) is again a map also does not establish that there was a street in existence adjoining the village / petitioners land. The petitioner himself has admitted in the Writ Petition that the land in question was used by the Army Authorities for the purposes of Army Golf Club. A Map enclosed as Annexure P/15, which is again a Google Map does not establish that a road as alleged by the petitioner is in existence, however, it does establish that the land in question is adjoining the Army Golf Course. The Revenue Authorities have certainly stated that there was an access through A(1) land to the petitioners land but it does not mean that there was a road in question in existence since time immemorial. The present case reflects a very sorry state of affairs. The petitioners who are well versed and well acquainted to the defence system of the country bought the land with open eyes, adjoining A(1) category land. They did make a request to the Army Authorities to continue the lease agreement, however, as it was A(1) land and the Army Authorities were constructing the accommodation for infantry batallion under the key location planning, to ensure safety of the land, safety of its troops living in the accommodation which is being constructed for an infantry batallion, their request was not accepted. There is no authentic document on record which establishes that an old public road was in existence along with river Gambhir. The 'Kacha' track was exclusively used by the Army Golfers and the petitioners were very much aware of the same which is established from the fact that they have requested the authorities to continue the lease with the Army Golf Club in respect of the land in question.

7. Mr. Vivek Sharan, has informed this Court that large number of attacks have been carried out by the insurgents on defence installations all over the country resulting in loss of valuable life of Indian soldiers and, therefore, the Army Authorities all over the country are ensuring protection of their troops either by barricading their own land or by constructing wall over their own land. This is the case where in order to ensure safety of troops which is of paramount importance, the Army Authorities are constructing a wall over A(1) defence land.

8. Section 258 of the Act is not at all applicable in the present case. Not only this, the villagers of village Telikheda, for going to Mhow Market are using main road ie., Telikheda – Mhow Road and not a single villager was using nor is using the petitioners land for going to Mhow. Not only this, there is no road in existence on the east bank of Gambhir river. The petitioners cannot claim as a matter of right a road to be constructed adjoining A(1) land

and their own private land.

9. This Court while issuing notices on 22/3/12 has directed the parties to maintain status quo and a contempt petition has also been filed alleging non compliance of the order passed by this Court directing the parties to maintain status quo.

10. A detailed reply has been filed to the Contempt Petition and photographs are also on record. The photographs establishes that the Army Authorities have not consturcted a portion of the wall which adjoins the petitioners land and the Army A(1) land and therefore, this Court is of the considered opinion that no case for passing any order in respect of the Contempt Petition ie., Cont. Pet. No. 658 / 2012 is made out.

11. Not only this, while arguing the matter, learned counsel for the petitioner has also argued that the Army Authorities have again violated subsequent order passed by this Court dt. 15/7/13. The photographs on record and the reply of the Indian Army establishes that they have still not constructed the boundary wall over the disputed portion and, therefore, this Court is of the considered opinion that the respondents have again not violated the order dt. 15/7/13 passed by this Court.

12. The Army Personnels while posted at peace stations are also sometimes subjected to attacks by insurgents and other elements and it is the duty of the nation and every citizen to ensure protection of its troops while they are at a peace station. The construction of a boundary wall under the key location plan accommodation for an infantry batallion cannot be stopped only on flimsy and frivolous grounds. The land in question is exclusively A(1) category land. A wall is being constructed by obtaining necessary permission keeping in view the Works of Defence Act, 1903 by obtaining necessary budget under the Ministry of Defence Budget and the same cannot be stopped at the behest of the petitioners for no rhyme or reason.

13. Section 258 of the Cantonment Act, 2006 empowers the Cantonment Board for opening any street for public use and for closing any street which is for public use.

14. Section 258 of the Cantonment Act, 2006 reads as under :

258. Closing and opening of streets.- (1) A Board may open any street for public use.

(2) A Board shall not permanently close any street

without the prior permission of the General Officer Commanding in Chief, or the Principal Director: Provided that no such street shall be closed for reasons other than the security reasons and without giving a public notice inviting objections and suggestions from the general public.

(3) The Chief Executive Officer may, by public notice, temporarily close any street or any part of a street for repair or for the purpose of carrying out any work connected with drainage, water- supply or lighting or any other work which he is by or under this Act required or permitted to carry out: Provided that where, owing to any works or repairs or from any other cause, the condition of any street or of any waterworks, drain, culvert or premises vested in the Board, is such as to be likely to cause danger to the public, the Board shall-

(a) take all reasonable means for the protection of the adjacent buildings and land and provide reasonable means of access thereto;

(b) cause sufficient barriers or fences to be erected for the security of life and property, and cause such barriers or fences to be sufficiently lighted from sunset to sunrise.

15. The Andhra Pradesh High Court while dealing with a Public Interest Litigation in the case of *Father (Parish Priest), Holy Family Church, Trimulgherry, Secunderabad and others Vs. The Government of India, Ministry of Defence, New Delhi and others* (Public Interest Litigation No. 361 of 2012) was dealing with the issue of blocking a road known as Empress Road which was connecting a Church, Schools etc., It was a case where a road which was in existence over A(1) defence land was blocked by the Army Authorities and it was certainly a public road being used by various institutions. The Division Bench of the Andhra Pradesh High Court in the aforesaid case has held as under:

We have heard the learned counsel for the parties.

The main grievance of the petitioners in this public interest litigation is that respondent Nos. 5 and 6, being the military authorities have blocked the road known as "Empress Road". According to the petitioners, the said authorities are

constructing a wall in between to block the approach road to the Holy Family Church, St. Joseph's School, St. Joseph's Junior College, Holy Family Girls High School, Zilla Parishad Boys High School, M.B.R. Talent School and Shastri Nagar Colony, which would cause great hardship and inconvenience to the students and general public of the said area.

While opposing the said contentions, the respondents have filed a counter affidavit wherein it is specifically stated that as per Rule 9 of Cantonment Land Administration Rules, 1937 (for short 'the Rules'), the management and control of land inside the Cantonment solely vests with the military authorities. Rule 5(i) of the said Rules defines Class A(1) land as defence land. It is further stated that Empress Road is a Military road and it is located entirely within G.L.R. Nos. 291 and No. 309, which are Class A(1) defence lands and the Secunderabad Cantonment Board is no way concerned with the same and hence, Sections 258 and 259 of the Cantonment Act have no application to the facts of the present case. It is further stated that the petitioners' lands are situated at G.L.R. No. 287, which is part of Trimulgherry Bazar and well connected to "Main Bazar Road on the Northern side and Siddipet National Highway on the Western side. Hence, the petitioners have no need to enter the military area or use the military roads. It is further stated that the entire area on which the road is situated is Class A(1) Defence Land, which belongs to military authorities. Further, the said road has been laid by the military authorities and is not a public thoroughfare and these roads being narrow internal roads, they cannot take heavy traffic. It is also stated that the Holy Family Church and other Civil Colonies are located to the North of GLR 309 and the access to the petitioners and others into the Empress Road is neither permissible under law nor based upon any ground situation. In these circumstances, the respondents pleaded that the petition be dismissed.

After considering the facts and circumstances of the case and after perusing the counter affidavit filed by the respondent-authorities, it appears to us that since the land in question comes within the category of Class A(1) defence land and the whole area is managed and controlled by the military

authorities, it is the right of the military authorities to use the said road and the same cannot be permitted to be used as a public thoroughfare. Hence, in our opinion, the petitioners or the general public have no right to use the same.

Hence, we do not find that there is any merit in the petition.

The Public Interest Litigation is accordingly dismissed.

16. The Public Interest Litigation was dismissed as it was A(1) defence land and the Division Bench has also observed that it is the right of the military authorities to use the road and the same cannot be permitted to be used as public thoroughfare. In the present case, there is no such public road at all, though the petitioner is claiming it to be a 'kacha' road adjoining A(1) category defence land and the petitioners' land. Even if it is assumed for a moment that it was some 'kacha' public road, the Army Authorities can certainly construct a wall over A(1) defence land as they are empowered under the Cantonment Land Administration Rules, 1937 to administer A(1) defence land as per their requirement keeping in view various other factors.

17. This Court, in the light of the aforesaid judgment, is of the considered opinion that the petitioners have failed to make out a case for grant of any relief of whatsoever kind and the Writ Petition is accordingly dismissed.

18. The Contempt Petition No. 658/2012 is also accordingly dismissed.

No order as to costs.

Petition dismissed.

I.L.R. [2015] M.P., 123

WRIT PETITION

Before Mr. A.M. Khanwilkar, Chief Justice & Mr. Justice Alok Aradhe
W.P.No. 11918/2011 (Jabalpur) decided on 4 August, 2014

ULTRATECH CEMENT LIMITED

...Petitioner

Vs.

STATE OF MADHYA PRADESH & ors.

...Respondents

A. Constitution - Article 226 & 227 - Maintainability -
Petitioner challenged validity of recommendations of State Govt. in
favour of respondent No. 3 without assailing order executing mining
lease in his favour by State Govt. - W.P. cannot be held to be not

maintainable in absence of challenge to consequential order passed by State Govt. in granting lease to respondent No. 3. (Para 11)

क. संविधान - अनुच्छेद 226 व 227 - पोषणीयता - याची ने राज्य सरकार द्वारा प्रत्यर्थी क्र. 3 के पक्ष में खनन पट्टा निष्पादित करने के आदेश को चुनौती दिये बिना, उसके पक्ष में राज्य सरकार की अनुशंसाओं की वैधता को चुनौती दी - प्रत्यर्थी क्र. 3 को पट्टा प्रदान करने में राज्य सरकार द्वारा पारित किये गये परिणामिक आदेश को चुनौती के अभाव में यह अभिनिर्धारित नहीं किया जा सकता कि रिट याचिका पोषणीय नहीं है।

B. Constitution - Article 226 - Non-joinder of 22 applicants, who besides respondent No. 3, had not been granted lease - Held - Non-joinder of those 22 person is of no consequence. (Para 12)

ख. संविधान - अनुच्छेद 226 - 22 आवेदकों का असंयोजन जिन्हें प्रत्यर्थी क्र. 3 के अतिरिक्त पट्टा प्रदान नहीं किया गया - अभिनिर्धारित - उन 22 व्यक्तियों का असंयोजन प्रभावहीन है।

C. Constitution - Article 226 & 227 - Territorial Jurisdiction - Respondent No. 3 has raised objection with regard to territorial jurisdiction of M.P. High Court - Land in question over which mining rights are being claimed is situated within territorial jurisdiction of M.P. High Court at Jabalpur - Similarly, order has been passed by State Govt. within territorial jurisdiction of M.P. High Court at Jabalpur - Thus, part of cause of action has arisen within territorial jurisdiction of M.P. High Court at Jabalpur. (Para 13)

ग. संविधान - अनुच्छेद 226 व 227 - क्षेत्रीय अधिकारिता - प्रत्यर्थी क्र. 3 ने म.प्र. उच्च न्यायालय की क्षेत्रीय अधिकारिता के संबंध में आक्षेप उठाया है - प्रश्नगत भूमि जिस पर खनन अधिकारों का दावा किया गया है, वह म.प्र. उच्च न्यायालय जबलपुर के क्षेत्रीय अधिकारिता के भीतर स्थित है - उसी प्रकार से राज्य सरकार द्वारा म.प्र. उच्च न्यायालय जबलपुर की क्षेत्रीय अधिकारिता के भीतर आदेश पारित किया गया - अतः वाद कारण का हिस्सा म.प्र. उच्च न्यायालय जबलपुर की क्षेत्रीय अधिकारिता के भीतर उत्पन्न हुआ है।

D. Mineral Concession Rules, 1960, Rule 63-A - Petitioner applied for grant of mining lease - Application for grant of mining lease was rejected belatedly without assigning any reasons - No reasons have been placed on record to show the inordinate delay in deciding the applications by State Govt. - Apparently the petitioner has suffered a prejudice on account of delay in passing the order - Impugned order

cannot be sustained.

(Para 16)

घ. खनिज छूट नियम, 1960, नियम 63ए – याची ने खनन पट्टा प्रदान किये जाने हेतु आवेदन किया – खनन पट्टा प्रदान किये जाने हेतु आवेदन को कोई कारण दर्शाये बिना विलम्बित रूप से अस्वीकार किया गया – राज्य सरकार द्वारा आवेदनों का विनिश्चय करने में अत्याधिक विलम्ब का कोई कारण अभिलेख पर नहीं रखा गया – प्रकट रूप से याची ने आदेश पारित किये जाने में विलम्ब के फलस्वरूप प्रतिकूल प्रभाव सहन किया है – आक्षेपित आदेश को कायम नहीं रखा जा सकता।

E. Mines and Minerals (Development and Regulation) Act (67 of 1957), Section 11 and Mineral Concession Rules 1960, Rule 26 - Application of petitioner for grant of mining lease rejected by State Govt. - State Govt. has failed to assign reasons for rejection of the application of the petitioner by comparing the merits and demerits cases of other application qua the petitioner - Recording of reasons is a principle of natural justice - It ensures transparency and fairness in decision making - Impugned order has been passed contrary to the statutory mandate contained in Section 11(3) of the Act and Rule 26 of the Rules as well as in violation of principles of natural justice - Impugned order cannot be sustained in eye of law. (Para 15)

ड. खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), धारा 11 व खनिज छूट नियम, 1960, नियम 26 – खनन पट्टा प्रदान किये जाने हेतु याची के आवेदन को राज्य सरकार द्वारा अस्वीकार किया गया – जहां तक याची की योग्यता का संबंध है, अन्य आवेदन के प्रकरणों के गुण-दोषों की तुलना द्वारा याची के आवेदन की अस्वीकृति हेतु कारण दर्शाने में राज्य सरकार विफल रही है – कारण अभिलिखित किये जाना नैसर्गिक न्याय का सिद्धांत है – यह निर्णय करने में पारदर्शिता एवं न्यायपूर्णता सुनिश्चित करता है – आक्षेपित आदेश को अधिनियम की धारा 11(3) एवं नियमों के नियम 26 में अंतर्विष्ट कानूनी आज्ञा के विपरीत पारित किया गया है और नैसर्गिक न्याय के सिद्धांतों का उल्लंघन है – आक्षेपित आदेश को विधि की दृष्टि से कायम नहीं रखा जा सकता।

Cases referred :

(2001) 7 SCC 318, AIR 1948 Patna 414, (2002) 1 SCC 633, (2004) 6 SCC 440, (2010) 13 SCC 1, (2013) 6 SCALE 257, (2013) 5 SCC 252, 2014 (2) JLJR 611, AIR 2013 SC 2438, AIR 2010 SC 1116, 2002 (4) MPLJ 60, (2004) 3 SCC 682, (2010) 2 SCC 432, (2009) 5 SCC 616, (2010) 8 SCC 329, (2011) 5 SCC 702, ILR 1966 Bom. 228, (1996) 6

SCC 702, (2012) 11 SCC 1, 2010 (5) CTC 882, 2009 (5) ALT 200, 2012 (1) JCR 116 (Jhr.), AIR 1968 MP 17, 176 (2011) DLT 327, AIR 1981 SC 136, (1995) 1 SCC 478, AIR 1988 SC 1737, AIR 1962 SC 670, AIR 1963 SC 1124, AIR 1990 SC 10, (2013) 4 SCC 340, AIR 1966 SC 671, AIR 1967 SC 1606, AIR 1965 SC 1595, 1976 (2) SCC 82, AIR 1963 SC 874, AIR 1958 SC 398, AIR 1963 SC 734, AIR 2001 SC 1692, (2003) 6 SCC 675, (2008) 4 SCC 451, AIR 2013 SC 2417, AIR 1966 SC 81, (2001) 10 SCC 191, (2007) 11 SCC 335, (2000) 1 All ER 373, (1990) 4 SCC 594, (2010) 3 SCC 732, (2000) 2 SCC 13, (2003) 1 SCC 430, (2013) 9 SCC 549.

Siddharth Gupta, for the petitioner.

Samdarshi Tiwari, G.A. for the respondent No.1.

None for the respondent No.2.

A.K. Sanghi, for the respondent No.3.

O R D E R

The Order of the Court was delivered by :
ALOK ARADHE, J. :- In this writ petition under Article 226 of the Constitution of India the petitioner, *inter alia*, seeks quashment of orders dated 16.9.2008 and 14.6.2011 passed by the State Government and Central Government respectively. The petitioner also seeks a writ of mandamus for directing the State Government to grant mining lease over the area in question to the petitioner. The petitioner has also prayed for an alternative relief by way of writ of mandamus seeking a direction to the respondents to re-hear and decide the various applications for grant of mining lease over the area in question.

2. The facts leading to filing of the writ petition lie in a narrow compass. On 02.3.2007 the State Government issued a notification inviting applications for grant of mining lease in respect of an area admeasuring 2451.754 hectares situated in various villages in district Satna. In the aforesaid notification it was mentioned that preference will be given to the applicants who are willing to set up big industries on the basis of available minerals. In response to the aforesaid notification, 24 applicants including the petitioner and respondent no.3, submitted the applications for grant of mining lease. The petitioner submitted an application for grant of mining lease on 30.3.2007, whereas the respondent No.3 submitted its applications on 15.2.2007 and 02.4.2007. The State Government on 18.9.2007 afforded an opportunity of personal hearing to all the applicants including the petitioner and respondent No.3. Thereafter, by

communication dated 06.6.2008, the applicants were asked to submit their written submissions. In pursuance of aforesaid communication, the petitioner submitted its written submissions. The State Government vide order dated 16.9.2008 recommended for grant of mining lease in favour of respondent No.3 and sought approval/relaxation of the Central Government under section 6 of Mines and Minerals (Development and Regulation) Act, 1957 [hereinafter referred to as the 'Act']]. Being aggrieved by the aforesaid order the petitioner filed a revision under section 30 of the Act read with Rule 54 of Minerals Concession Rules, 1960 [for short "Rules"]. The Central Government vide order dated 14.6.2011 dismissed the revision preferred by the petitioner. In the aforesaid factual background the petitioner has approached this Court.

3. Learned counsel for the petitioner submitted that hearing before the State Government took place on 18.9.2007 and thereafter by communication dated 06.6.2008 the State Government required various applicants to submit the written submissions, pursuant to which, the petitioner submitted its detailed written submissions. Yet, the State Government ignoring the written submissions chose to decide applications on the basis of oral arguments after a period of one year from the date of hearing of the arguments. Thus, there was unreasonable delay between hearing of the arguments and delivery of the order. Rule 63A of the Rules was brought to our notice to contend that an application for mining lease should be disposed of within 12 months from the date of receipt of such an application. Second proviso to aforesaid rule mandates that the State Government shall give reasons for delay in writing, if the application so filed for grant of mining lease is not disposed of within the time limit stipulated under Rule 63A(c) of the Rules. Therefore, the delay in passing the impugned order is arbitrary and deserves to be quashed. In this connection, reference was made to the decision of Supreme Court in the case of *Anil Rai and another vs. State of Bihar*, (2001) 7 SCC 318 and *Jagarnath Singh and others vs. Francis Kharia and others*, AIR 1948 Patna 414.

4. It was further submitted that the authority dealing with the application for grant of mining lease is under an obligation to assign reasons for rejection of the application in view of Rule 26 of the Rules, which has not been done in the instant case, and the application submitted by the petitioner has been rejected in mechanical manner without even referring to the contents of written submission. It was also submitted that the rejection of application of the petitioner is contrary to statutory mandate contained in Section 11(3) of the Act as well as Rule 35 of the Rules. For the aforesaid proposition, reliance

was placed on the decisions of Supreme Court in the cases of *C.I.T. vs. Anjum M.H. Ganswala*, (2002) 1 SCC 633 and *Captain Sube Singh vs. Lt. Governor of Delhi*, (2004) 6 SCC 440. It was further argued that the mining lease has been granted to the respondent No.3 on irrelevant considerations by the State Government. In this connection reference has been made to the decisions of the Supreme Court in *Sandoor Manganese and Iron Ores Limited vs. State of Karnataka and others*, (2010) 13 SCC 1 and *Union of India vs. Sandur Manganese and iron Ores Limited and others*, (2013) 6 SCALE 257. It was further urged that the order passed by the revisional authority is *ex facie* unsustainable and the orders passed by the State Government and Central Government suffer from manifest error on record. Therefore, the impugned orders, in exercise of powers under Article 226/227 of the Constitution of India, are liable to be quashed. In this connection reliance has been placed on a decision in *Kalinga Mining Corporation vs. Union of India*, (2013) 5 SCC 252.

5. Learned counsel for the respondent No.1 has supported the impugned orders. Learned counsel for respondent No.3 at the outset raised an objection with regard to maintainability of the petition on the ground that the order passed by the Mines Tribunal is a *quasi* judicial order and, therefore, the petitioner ought to have filed a writ petition under Article 227 of the Constitution of India and the writ petition under Article 226 is not maintainable. In support of aforesaid submission, reliance is placed on the decision of a Division Bench of High Court of *Jharkhand in Murliwala Minerals Pvt. Ltd. vs. Union of India*, 2014 (2) J.L.J.R. 611. It is also pointed out that no ground has been mentioned in the writ petition to show as to how the order passed by the Mines Tribunal is illegal, so as to warrant interference of this Court in exercise of power under Article 227 of the Constitution of India. An objection with regard to territorial jurisdiction of this Court has also been taken on the ground that the impugned order dated 14.6.2011 ought to have been challenged before Delhi High Court. It is also urged that after the impugned order dated 14.6.2011, the State Government has passed an order granting the area in question to the respondent No.3 and the mining lease has also been executed in favour of the respondent No.3, which has not been challenged and, therefore, the writ petition is liable to be dismissed.

6. It is further submitted that since the writ petition has been filed against the order of recommendation in favour of respondent No.3 for grant of mining lease, which has been upheld by the Central Government, therefore, the writ

petition is premature. It is also submitted that this Court under Article 226 of the Constitution of India cannot act as a fact finding body and since the orders passed by the State Government as well as the Central Government are based on the relevant and material evidence adduced before the Tribunal, therefore, no interference is called for, and this Court in exercise of power under Article 226 cannot act as a Court of Appeal. It was urged that there is no scope of judicial review as new grounds were urged in the writ petition which were not urged before the revisional authority and, therefore, in view of principle of constructive *res judicata* the petitioner cannot be permitted to raise new grounds. It is also urged that decision to allow or reject an application for grant of mining lease is the prerogative of the State Government based on the interest of the State Government and the petitioner has failed to show any infirmity in the order passed, either by the State Government or the Central Government, warranting interference of this Court in exercise of power under Article 226 of the Constitution of India.

7. It was argued that even failure to record reasons for rejection of an application is acceptable as long as reasons are revealed at the revisional stage before the Central Government and the Rule 26 of the Rules is directory, and not the mandatory in nature. It is also argued that on the touchstone of criteria laid down under section 11(4) read with section 11(3) of the Act and taking into account the special knowledge of the experience as well as the available resources and availability of the technical staff with the respondent No.3, the authorities have taken a decision to grant mining lease in favour of respondent no.3. It is also urged that Corporate veil of the holding company and its subsidiary company may be pierced to reveal that they are two different concerns. Lastly, it is urged that the writ petition suffers from the vice of non-joinder of necessary party, as 22 applicants who had submitted applications for grant of lease have not been impleaded. In support of aforesaid submissions, reliance has been placed on the decisions in the cases of *Geomin Mineral & Marketing (P) Ltd. vs. State of Orissa and others*, AIR 2013 SC 2438, *Harjinder-Singh vs. Punjab State Warehousing Corporation*, AIR 2010 SC 1116, *M.P. Mineral Supply Co. Vs. Government of India*, 2002 (4) MPLJ 60, *Surya Dev Rai (supra)*, *Ranjeet Singh vs. Ravi Prakash*, (2004) 3 SCC 682, *Abdul Razak (D) through L.Rs. and others Vs. Mangesh Rajaram Wagle and others*, (2010) 2 SCC 432, *Radhey Shyam and another vs. Chhabi Nathe and others*, (2009) 5 SCC 616, *Shalini Shyam Shetty vs. Rajinder Shankar Patil*, (2010) 8 SCC 329, *Shankara Coop. Housing*

Society Ltd. Vs. M. Prabhakar and others, (2011) 5 SCC 702, *Kashiram Pandurang Rajguru vs. Maharashtra Revenue Tribunal, Bench at Nagpur and others*, [ILR 1966 Bom.228], *Dharambir Singh vs. Union of India and others*, (1996) 6 SCC 702, *Monnet Ispat and Energy Ltd. vs. Union of India and others*, (2012) 11 SCC 1, *Gem Granites vs. State of Tamil Nadu*, 2010 (5) CTC 882, *Exotic Granite Exports vs. The Government of Andhra Pradesh*, 2009 (5) ALT 200, *Brahmi Impex Limited, Kolkata vs. State of Jharkhand and others*, 2012 (1) JCR 116 (Jhr.), *Mineral Mining Co.Pvt. Ltd. v. State of Madhya Pradesh, Natural Resources Department*, AIR 1968 MP 17, *Ashapura Minechem Ltd. vs. Union of India and others*, 176 (2011) DLT 327, *S.L.Kapoor vs. Jag Mohan*, AIR 981 SC 136, *New Horizon Ltd. vs. Union of India*, (1995) 1 SCC 478, *State of U.P. vs. Renusagar Power Co. & others*, AIR 1988 SC 1737. *Shriram Jhunjhunwala vs. State of Bombay and others*, AIR 1962 SC 670, *Collector of Customs, Calcutta vs. East India Commercial Co. Ltd.* AIR 1963 SC 1124, *S.S. Rathore vs. State of Madhya Pradesh*, AIR 1990 SC 10, *State of Orissa and others vs. Mesco Steels Ltd. And another*, (2013) 4 SCC 340.

8. We have considered the respective submissions made by learned counsel for the parties. In *M.P. Industries Ltd. vs. Union of India and others*, AIR 1966 SC 671, the Supreme Court after taking note of Rules 54 & 55 of the Rules held that the Central Government is constituted as a tribunal to decide the revision, and while deciding the revision it is under an obligation to assign reasons. In *Bhagat Raja vs. Union of India*, AIR 1967 SC 1606 the Constitution Bench of the Supreme Court dealt with the question whether it is necessary for the Central Government while deciding revision to assign reasons and it was held that since the Central Government exercises *quasi* judicial powers, therefore, it is duty bound to assign reasons. The Supreme Court in *Associated Cement Companies Limited vs. P.N.Sharma*, AIR 1965 SC 1595 has held that, when the law under which the authority is making a decision itself requires judicial approach, the decision will be *quasi* judicial.

9. The Supreme Court while dealing with the question whether an award passed under section 10A of Industrial Disputes Act, 1947 is insulated from interference under Article 226 of the Constitution of India, in the case of *Rohtas Industries Limited vs. Rohtas Industries Staff Union*, 1976 (2) SCC 82, placing reliance on the constitution Bench judgment in the case of *Engineering Mazdoor Sabha and another vs. Hind Cycles Ltd.* AIR 1963 SC 874 has

held that writ of certiorari can be issued under Article 226 against the orders of the Courts and Tribunals. It is equally well settled legal proposition that if an authority exercises *quasi* judicial powers, its decisions are subject to jurisdiction of this Court under Article 226 of the Constitution of India and the role of this Court is limited to examine the question whether the orders suffer from manifest error, or if they are allowed to stand, the same will amount to perpetuation of grave injustice. It is equally well settled law that this Court while exercising jurisdiction in such matters cannot act as an appellate authority. [See: *Nagendra Nath Bora and another vs. Commissioner of Hills Division and Appeals, Assam and others*, AIR 1958 SC 398, *M/s Pioneer Traders vs. Chief Controller*, AIR 1963 SC 734 and *Ashok Kumar and others vs. Sita Ram*, AIR 2001 SC 1692.

10. In the instant case the petitioner has sought a writ of certiorari as well as writ of mandamus. The Supreme Court in the case of *Surya Dev Rai vs. Ram Chander Rai and others*, (2003) 6 SCC 675 has held that any authority or the body of persons constituted by law or having legal authority to adjudicate upon the questions affecting the rights of a subject and enjoined with a duty to act judicially or quasi judicially, is amenable to the certiorari jurisdiction of the High Court. It has further been held that distinction between two jurisdiction stands almost obliterated in practice. The view taken in *Surya Dev Rai* (supra) has been relied in the case of *Mani Raju vs. State of Karnataka*, (2008) 4 SCC 451. Therefore, we are not inclined to accept the view taken by Jharkhand High in the case of *Murliwala Minerals Pvt. Ltd.* (supra). For the aforementioned reasons, in our considered opinion the writ petition filed by the petitioner under Article 226 of the Constitution of India is maintainable.

11. Now, we shall deal with the objection with regard to maintainability of the writ petition in the absence of challenge to the order granting mining lease in favour of the respondent No.3. In the instant writ petition, the petitioner has challenged the validity of the recommendations made in favour of respondent No.3 for grant of mining lease. The aforesaid order has been upheld by the Central Government in exercise of revisional powers under section 30 of the Act, pursuant to which, the State Government has issued consequential order of grant of lease in favour of respondent No.3 and subsequently mining lease has been executed in favour of respondent No.3. However, the petitioner has not assailed the aforesaid order. The Supreme Court in the case of *Banglore Development Authority vs. M/s. Vijaya*

Leasing Ltd. and others, AIR 2013 SC 2417 while dealing with powers of the High Court under Article 226 of the Constitution of India to correct errors which are apparent on the face of record, though not specifically challenged by a party, held that the Court while exercising power under Article 226 can reach injustice wherever it is found and upheld the action of the High Court in quashing a notification which was not challenged, before it. While placing reliance on the decision in the case of *Dawarkanath vs. Income Tax Officer*, AIR 1966 SC 81 it was held that Article 226 also enables the High Courts to mould the reliefs. Similarly, in the case of *State of Kerala vs. Puthenkavu. S. Karayogam and another*, (2001) 10 SCC 191 the Supreme Court has held that once the main order is quashed, the order consequently made pursuant to main order, would automatically vanish. Therefore, we hold that writ petition cannot be held to be not maintainable in the absence of challenge to consequential order passed by the State Government in granting lease to respondent no.3.

12. So far as the objection raised by respondent No.3 with regard to non-joinder of 22 applicants who had submitted applications for grant of mining lease is concerned, the aforesaid objection deserves to be mentioned to be rejected, as aforesaid 22 applicants were not parties before the Central Government. The respondent No.3 in the return has not raised an objection in this regard. Therefore, the respondent No.3, for the first time, cannot be permitted to raise a new plea in the instant writ petition. There is no material on record to show that aforesaid 22 applicants, whose applications were rejected, had ever challenged the order before the Central Government. Thus, their absence in the instant writ petition is of no consequence. Accordingly, we hold that writ petition does not suffer from the vice of non-joinder of necessary parties.

13. The respondent No.3 has also raised an objection with regard to territorial jurisdiction of this Court. It is well settled in law that after amendment of Article 226 of the Constitution in the year 1962, the writ petition can now be instituted in the High Court within the territorial jurisdiction of which, cause of action, in whole or in part, has arisen. [See: *Alchemist Limited and another vs. State Bank of Sikkim and others*, (2007) 11 SCC 335]. In the instant case, the land in question over which the mining rights are being claimed is situated within the territorial jurisdiction of this Court. Similarly, the order has been passed by the State Government within the territorial jurisdiction of this Court. Thus, the part of cause of action has arisen within the territorial

jurisdiction of this Court and, therefore, the objection raised in this regard is rejected.

14. Sections 11(3) and 11(4) of the Act read as under:-

"11. Preferential right of certain persons.-

(3) *The matters referred to in sub-section (2) are the following:-*

- (a) *any special knowledge of, or experience in, reconnaissance operations, prospecting operations or mining operations, as the case may be possessed by the applicant;*
- (b) *the financial resources of the applicant;*
- (c) *the nature and quality of the technical staff employed or to be employed by the applicant;*
- (d) *the investment which the applicant proposes to make in the mines and in the industry based on the minerals.*
- (e) *Such other matters as may be prescribed.*

(4) *Subject to the provisions of sub-section (1), where the State Government notifies in the Official Gazette an area for grant of reconnaissance permit, prospecting licence or mining lease, as the case may be, all the applications received during the period as specified in such notification, which shall not be less than thirty days, shall be considered simultaneously as if all such applications have been received on the same day and the State Government, after taking into consideration the matters specified in sub-section (3), may grant the reconnaissance permit, prospecting licence or mining lease, as the case may be, to such one of the applicants as it may deem fit.*

Rule 26 of the Rules which deals with refusal of application for grant and renewal of mining lease reads as under:-

"26. Refusal of application for grant and renewal of mining lease.- (1) The State Government may, after giving an opportunity of being heard and for reasons to be recorded in writing and communicated to the applicant, refuse to grant or renew a mining lease over the whole or part of the area applied for.

(2) An application for the grant or renewal of a mining lease made under rule 22 or rule 24A, as the case may be, shall not be refused by the State Government only on the ground that Form I or Form J as the case may be, is not complete in all material particulars, or is not accompanied by the documents referred to in sub-clauses (d), (e), (f), (g) and (h) of clause (i) of sub-rule 22.

(3) Where it appears that the application is not complete in all material particulars or is not accompanied by the required documents, the State Government shall, by notice, require the applicant to supply the omission or, as the case may be, furnish the documents, without delay and in any case not later than third days from the date of receipt of the said notice by the applicant."

15. From conjoint reading of the relevant extract of Section 11 of the Act and Rule 26 of the Rules, it is evident that State Government has to take into account the factors mentioned in sub-section (3) of Section 11 while granting the mining lease and has to record reasons for refusal to grant mining lease. In *Sandur Manganese & Iron Ores Limited* (supra) the Supreme Court has held that once an area is notified for regrant, applications are invited from public for grant of mining lease, the applications must be disposed of in terms of provisions of the Act and the Rules and not *de hors* the same. The State does not have any power to frame any policy *de hors* the Act. In other words the State Government is required to evaluate the merits and de-merits of the respective applications while taking decision to grant mining lease. The duty to give reasons "is function of due process" and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties- especially the losing party- should be left in no doubt why it has won or lost.- The second is that a requirement to give reasons concentrates the mind and if it is fulfilled, the resulting decision is much more likely to be soundly

based. [See: *Flanery vs. Halifax Estate Agencies Ltd.*, (2000) 1 All ER 373.-Principles of Statutory Interpretation by Justice G.P. Singh, 13th Edition Page 454]. The Supreme Court has held that people must have confidence in the judicial or quasi judicial authorities. While emphasizing the need for assigning reasons, it was held that giving of reasons minimizes the chances of arbitrariness and hence, it is an essential requirement of the rule of law. [See: *S.N. Mukherjee v. Union of India*, (1990) 4 SCC 594]. Similarly, in *Secretary and Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity and Others*, (2010) 3 SCC 732, it has been held by the Supreme Court that reason is the heartbeat of every conclusion. Absence of reasons renders the order indefensible/ unsustainable particularly when the order is subject to further challenge before a higher forum. It has further been held that recording of reasons is a principle of natural justice. It ensures transparency and fairness in decision making. Therefore, the impugned order has been passed contrary to the statutory mandate contained in Section 11(3) of the Act and Rule 26 of the Rules as well as in violation of principles of natural justice. Therefore, it cannot be sustained in the eye of law.

In the instant case, from perusal of paragraph 8.4 of the order passed by State Government it is axiomatic that the State Government has failed to assign reasons for rejection of the application of the petitioner by comparing the merits and de-merits of cases of other applicants qua the petitioner. The State Government has also not taken into account the material furnished by the petitioner alongwith the written submissions, while rejecting the applications submitted by the petitioner. No reasons worth the name have been recorded by the State Government except stating that application of the petitioner is not found suitable under section 11(3) of the Act.

16. At this stage, we may advert to the issue of unexplained delay between hearing of the arguments and passing of the order by the State Government. From perusal of paragraph 8 of the order dated 16.9.2008 passed by State Government it is evident that hearing in the matter was conducted on 18.9.2007. Thereafter by communication dated 06.6.2008, the applicants were asked to submit their written submissions. The petitioner in compliance of aforesaid communication submitted its written submissions. However, from paragraph 8 it is also evident that State Government took a decision to decide the applications for grant of mining lease on the basis of hearing which took place on 18.9.2007. In other words, the written submissions filed by the applicants including the petitioner were discarded. The relevant extract of

Rule 63A of the Rules reads as under:-

"63A. The State Government shall dispose of the application for grant of reconnaissance permit, prospecting license or mining lease in the following period:-

(c) Mining Lease- within twelve months from the date of receipt of the application for mining lease under rule 22

Provided that the aforesaid periods shall be applicable only if the application for reconnaissance permit, prospecting license or mining lease, as the case may be, is complete in all respects;

Provided also that in case the State Government is not able to dispose of the application for grant of reconnaissance permit, prospecting license or mining lease within the period as specified above, the reasons for the delay shall be given in writing."

From perusal of relevant extract of Rule 63A it is evident that the State Government is under an obligation to dispose of the application for grant of mining lease within 12 months from the date of receipt of application and in case it is not able to dispose of the application within the stipulated time period, the reasons for the delay, have to be recorded in writing. In the instant case, the petitioner had submitted an application on 30.3.2007, whereas the respondent No.3 had submitted applications on 15.2.2007 and 02.4.2007. The State Government was under an obligation to decide the pending applications latest by April, 2008. However, the applications for grant of mining lease were decided on the basis of oral submissions after a period of one year from the date of hearing of applications. No reasons have been placed on record to show the inordinate delay in deciding the applications. The Supreme Court while approving the view taken in *Bhagwandas Fatechand Daswani and others vs. HPA International and others*, (2000) 2 SCC 13 and *Kanhaiyalal and others vs. Anupkumar and others*, (2003) 1 SCC 430 in *Telestar Travel Pvt. Ltd. vs. Enforcement Directorate*, (2013) 9 SCC 549 has held that any Court or authority hearing the matter must, within the reasonable time frame, pronounce the orders, as the inordinate delay gives rise to unnecessary apprehensions in the minds of the litigants. However, the question which still remains to be decided is whether the delay by itself would constitute a ground for setting aside the order. In the instant case, after

hearing the arguments, the State Government sought written submissions from the applicants. The petitioner submitted its written submissions. However, the State Government without considering the written submissions proceeded to decide the revision, on the basis of oral arguments advanced by parties and while doing so, it did not examine the case of petitioner on merits *vis-a-vis* respondent No.3. Thus, apparently the petitioner has suffered a prejudice on account of delay in passing the order. Therefore, for this additional ground also the impugned order cannot be sustained.

17. In view of preceding analysis, the inevitable conclusion is to remit the matter for fresh hearing to the State Government. Therefore, it is not necessary for us to deal with any other points urged by the parties. Accordingly, the impugned orders dated 16.9.2008 and 14.6.2011 passed by State Government and Central Government respectively in so far as it pertains to petitioner and respondent No.3, are hereby quashed. The matter is remitted to the State Government to afford an opportunity of hearing to the petitioner and respondent No.3 and to take decision by a reasoned order bearing in mind the mandate contained in the Act and the rule as well as the observations made in preceding paragraphs with regard to grant of mining lease in respect of the area in question expeditiously preferably within a period of three months from the date of receipt of copy of the order passed today.

18. Accordingly, the writ petition is disposed of. However, there shall be no order as to costs.

Petition disposed of.

I.L.R. [2015] M.P., 137

WRIT PETITION

Before Mr. Justice R.S. Jha

W.P. No. 5887/2001 (Jabalpur) decided on 28 October, 2014

VANITA BORAKAR (SMT.)

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Service Law - Revision of pay - Petitioner has already availed of the benefit of voluntary retirement scheme, has now claimed for enhancement of pay scale and other benefits - Held - Since the petitioner had undisputedly taken voluntary retirement before filing the instant petition, she cannot claim higher pay scale,

emoluments and benefit.

(Paras 3 & 5)

सेवा विधि - वेतन का पुनरीक्षण - याची पहले ही स्वेच्छिक सेवा निवृत्ति योजना का लाभ ले चुकी है, वह अब वेतनमान वृद्धि एवं अन्य लाभों के लिए दावा कर रही है - अभिनिर्धारित - चूंकि वर्तमान याचिका दायर करने के पूर्व ही याची अविवादित रूप से स्वेच्छिक सेवा निवृत्ति ले चुकी है, वह उच्च वेतनमान, परिलब्धियां एवं लाभों के लिए दावा नहीं कर सकती।

Cases referred :

1995(5) SCC 77, 2003(5) SCC 163.

Akash Choudhary, for the petitioner.

S.K. Verma, G.A. for the respondent No.1.

None for the respondent No.2.

ORDER

R.S. JHA, J. :- The petitioner who is working as a Draftsman in the establishment of the respondent M.P. Laghu Udyog Nigam Ltd. has filed this petition claiming parity of pay and emoluments as given to the State Government employees in accordance with the revision of the pay Rules, 1990.

2. It is submitted that the petitioner's claim was favourably recommended by the Board of Director but the State Government by its decision dated 10.09.2000 has rejected the recommendation of the Board of Director. The petitioner has also challenged the order dated 10.09.2000 by incorporating amendment in the petition.

3. The respondent no. 2 has filed a return and stated that the petitioner has alternative statutory efficacious remedy of approaching the labour court under the provisions of Industrial Law in view of the decision of the Supreme Court rendered in the case of *R.S.R.T. Corporation Vs. Krishnakant* 1995 (5) SCC 77. The respondent no. 2 by way of preliminary objection has also stated that the petitioner has already availed of the benefit of Voluntary Retirement Scheme and therefore in view of the decision of the Supreme Court in the case of *A.K. Bindal Vs. Union of India* 2003(5) SCC 163, she cannot claim any right regarding enhancement of pay scale etc. The fact that the petitioner has taken V.R.S. is undisputed.

4. The Supreme Court in the case of *AK Bindal* (supra) has held as under:-

“After the amount is paid and the employee ceases to be under the employment of the company or the undertaking, he leaves with all his rights and there is no question of his again agitating for any kind of his past rights, with his erstwhile employer including making any claim with regard to enhancement of pay scale for an earlier period. If the employee is still permitted to raise a grievance regarding enhancement of pay scale from a retrospective date, even after he has opted for Voluntary Retirement Scheme and has accepted the amount paid to him, the whole purpose of introducing the Scheme would be totally frustrated”

5. In view of the aforesaid law laid down by the Supreme Court, I find substance in the preliminary objections raised by the respondent as the petitioner in the instant case had undisputedly taken VRS before filing of the petition and therefore, she cannot subsequently turn around and claim higher pay scale, emoluments and benefit in view of the law laid down by the Supreme Court.

6. In the circumstances, without going into the merits of the claim made in the petition filed by the petitioner regarding her entitlement of higher pay scale, etc. the petition is dismissed in view of the preliminary objections raised by the respondent no. 1 and law laid down by the Supreme Court in the aforesaid case.

Petition dismissed.

I.L.R. [2015] M.P., 139

WRIT PETITION

Before Mr. Justice U.C. Maheshwari & Mr. Justice Sujoy Paul

W.P. No. 3021/2014 (Gwalior) decided on 9 January, 2015

BHOLERAM SONI

...Petitioner

Vs.

UNION OF INDIA & ors.

...Respondents

Central Civil Services (Classification, Control and Appeal) Rules, 1965, Rule 16(1)(b) - Minor Penalty - Dispensation of Departmental Enquiry - When allegations are factual in nature and are denied by the delinquent employee, departmental enquiry needs to be conducted in order to fulfill the requirement of principles of natural justice. (Para 8)

केन्द्रीय सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, 1965, नियम 16(1)(b) – लघु शास्ति – विभागीय जांच से मुक्ती – जब अभिकथन, तथ्यात्मक स्वरूप के हैं और अपचारी कर्मचारी द्वारा अस्वीकार किये गये हैं, तब नैसर्गिक न्याय के सिद्धांतों की अपेक्षा की पूर्ति हेतु विभागीय जांच संचालित की जानी चाहिए।

Cases referred :

(2001) 9 SCC 180, ILR (2008) MP 746.

Satish Chandra Sharma, for the petitioner.

M.K. Sharma, for the respondents.

ORDER

The Order of the Court was delivered by :
SUJOY PAUL, J. :- This petition filed under Article 227 of the Constitution challenges the order of Central Administrative Tribunal (Tribunal) passed in O.A. No. 191/2011 dated 02nd May, 2013. The Tribunal dismissed the said O.A. of the petitioner wherein the order of punishment dated 19.11.2007 and appellate order dated 07.05.2009 were called in question.

2. Brief facts necessary for adjudication of this matter are that petitioner was working as Senior Accountant with the respondent-department. As per petitioner, he has rendered 24 years of unblemished service with the department. A charge sheet dated 03.04.2007 under Rule 16 of the Central Civil Services (Classification, Control and Appeal) Rules 1965 was served on him. These rules are hereinafter called as (CCA) Rules. Petitioner submitted his reply dated 18.05.2007 thereafter the disciplinary authority without conducting any enquiry, inflicted the punishment of stoppage of one increment without cumulative effect by order dated 19.11.2007. The petitioner unsuccessfully challenged this order in departmental appeal. The appeal was rejected by order dated 07.05.2009. The petitioner feeling aggrieved by the punishment and appellate order aforesaid, preferred aforesaid OA. After completion of pleadings, the OA was heard and decided by the impugned order by the Tribunal.

3. Shri S.C. Sharma, learned counsel for the petitioner, raised singular contention. He submits that allegations mentioned in the charge sheet were factual in nature. Petitioner put forth his defence and stated that allegations are incorrect. In addition, he demonstrated the reasons for alleged delay in submitting the case of claimants before the authorities. Petitioner also prayed

for conducting an enquiry as per Rule 16(1)(b) of CCA, Rules. Respondents have erred in not conducting the enquiry. Criticizing the order of the Tribunal, it is contended that Tribunal's order runs contrary to the law laid down by the Supreme Court in (2001) 9 SCC 180 (*O.K. Bhardwaj Vs. Union of India and Ors.*). Reliance is also placed on ILR (2008) MP 746 (*Ajay Kumar Singh Vs. State of M.P.*). In nutshell, it is argued that respondents have erred in inflicting the punishment without conducting any enquiry.

4. Shri M.K. Sharma, learned counsel for the respondents, supported the order passed by the respondent-department. He submits that as per Rule 16(1)(b), it is the discretion of the disciplinary authority to decide whether an enquiry is required to be conducted or not. He relied on Govt. of India instruction (Annexure R/1) dated 28th October, 1985. On the strength of this instruction, it is contended that it was not obligatory on the part of the disciplinary authority to conduct the enquiry. In the peculiar facts of this case, the allegations were established on the basis of documentary evidence and, therefore, no enquiry was required. Neither the disciplinary authority nor the Tribunal have committed any error in dismissing the contention of the petitioner. No other point is pressed by learned counsel for the parties.

5. We have heard the parties at length and perused the record in the light of submissions.

6. A plain reading of charge sheet shows that allegation against the petitioner was that he was directed to issue last payment authority letter. The petitioner was sitting tight over the matter and did not submit the requisite case for 4 ½ months. In addition, it is alleged that in another case relating to one Nand Kishore Upadhyay, petitioner kept the file pending for 6 months. It is alleged that said conduct of petitioner shows that he is habitual in keeping the matters pending. The said conduct of the petitioner has tarnished the image of the department. In turn, petitioner filed his detailed reply dated 18.05.2007. In said reply he stated that he took prompt action on the file of Shri Gaya Prasad Kesharwani. The calculation sheet was approved on 21.08.2002 and on 27.08.2002 minus balance was also found. However, certain documents of said Shri Kesharwani were not available and, therefore, on the basis of pass-book the petitioner sent the proposal. This proposal, as contended by the petitioner, would have been cleared in 2002 itself but the then Asstt. Account Officer did not approve it and matter was transferred by order dated 31.01.2003. In addition, it is the case of the petitioner that delay was not

caused by him and it is because of pendency of file for approval before other authorities. He further stated that the names of Nirmal Kumar Upadhyay and Nand Kishore Upadhyay were mixed in the same account. These were required to be bifurcated. The account was not properly maintained since 1973-74. This consumed time to rectify the same. In nutshell, the stand of the petitioner is that the delay is not attributable to him. He has rendered 24 years of unblemished service. No adverse CR is ever communicated to him. The delay is caused because of pendency of file before different authorities. At last, petitioner prayed for a direction to conduct a departmental enquiry under Rule 16(1)(b) of CCA, Rules.

7. The core issue is whether in the aforesaid factual backdrop, it was necessary to conduct the enquiry. Disciplinary authority opined that since the allegations are based on documentary evidence, there is no need to conduct a departmental enquiry. In the opinion of this Court, the point involve in this matter is no more *res integra*. The curtains are finally drawn by the Apex Court in the case of *O.K. Bhardwaj* (Supra). In the said case, the Apex Court opined as under :-

“Even in the case of a minor penalty an opportunity has to be given to the delinquent employee to have his say or to file his explanation with respect to the charges against him. Moreover, if the charges are factual and if they are denied by the delinquent employee, an enquiry should also be called for. This is the minimum requirement of the principle of natural justice and the said requirement cannot be dispensed with.”

(Emphasis supplied)

8. In view of judgment of *O.K. Bhardwaj* (Supra), it is clear that when allegations are factual in nature and are denied by the delinquent employee, enquiry needs to be conducted in order to fulfill the requirement of principle of natural justice. As noticed, in the present case, the petitioner specifically denied the allegation of the charge sheet and put forth his defence on the basis of factual assertions. In our view, the petitioner had a valuable right as per principle of natural justice to put forth his defence by leading evidence in the enquiry. If enquiry would have been conducted, the petitioner would have been in a position to lead the evidence to establish that the delay was neither deliberate nor amount to misconduct. In such case, department also would have been in a position to lead the evidence to establish the charges. Tribunal has merely

opined that looking to the type of charges imputed against the applicant, the decision of not conducting enquiry is justifiable. However, Tribunal has not assigned any reasons as to why the judgment of *O.K. Bhardwaj* is not applicable in the matter. Needless to mention that Tribunal was bound by the decision of Apex Court in *O.K. Bhardwaj* (Supra).

9. As analyzed above, in our view, the disciplinary authority, appellate authority and Tribunal have missed the real point. Since factual (sic:factual) allegations were denied and petitioner gave explanation on facts and merits, in the fitness of things, the disciplinary authority should have conducted an enquiry as per Rule 16(1)(b) of CCA Rules. This would have been in consonance with the principle of natural justice. Apart from this, the discretion vested with the disciplinary authority to conduct an enquiry must be exercised in objective and judicious manner. The disciplinary authority in the present case has committed an error in not instituting the enquiry as per rules. Thus, we find flaw in the decision making process adopted by the department. Resultantly, the punishment order dated 19.11.2007 and the appellate order dated 07.05.2009 are set aside. The order of the Tribunal dated 02.05.2013 is also set aside. The matter is remitted back to the disciplinary authority to conduct the enquiry as per Rule 16(1)(b) of CCA Rules. It is open to the respondents to proceed against the petitioner from the said stage in accordance with law. It is made clear that this Court has not expressed any opinion on the merits.

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

Petition allowed.

I.L.R. [2015] M.P., 143

ELECTION PETITION

Before Mr. Justice G.S. Solanki

Election Petition No. 11/2014 (Jabalpur) decided on 8 July, 2014

RAHUL SINGH LODHI

...Petitioner

Vs.

SMT. CHANDA DEVI

...Respondent

A. Representation of the People Act (43 of 1951), Sections 86, 81(3) & 87(1), Civil Procedure Code (5 of 1908), Order 7 Rule 11 - Mandatory Condition prescribed in Section 81(3) - Copy supplied to the respondent bears signature of the petitioner beneath the word "true copy attested"- Petitioner has fully complied with the provisions of

Section 81(3) of the Act, 1951.**(Para 9)**

क. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराएं 86, 81(3) व 87(1), सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – धारा 81(3) में आज्ञापक शर्त विहित है – प्रत्यर्थी को प्रदाय की गई प्रति पर “शुद्ध प्रतिलिपि साक्ष्यांकित” शब्द के नीचे याची के हस्ताक्षर हैं – याची ने अधिनियम 1951 की धारा 81(3) के उपबंधों का पूर्णतः अनुपालन किया है।

B. Representation of the People Act (43 of 1951), Sections 86, 81(3) & 87(1), Civil Procedure Code (5 of 1908), Order 7 Rule 11- Corrupt Practice - Petitioner has substantially pleaded the material particulars with regard to corrupt practice mentioning the nature of corrupt practice, name of the persons involved - There is also no variance in the verification clause and the affidavit sworn by the petitioner - Provisions are complied with substantially. **(Para 14)**

ख. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराएं 86, 81(3) व 87(1), सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – भ्रष्ट आचरण – याची ने भ्रष्ट आचरण के संबंध में भ्रष्ट आचरण का स्वरूप, सम्मिलित व्यक्तियों के नाम उल्लिखित करते हुए तात्त्विक विशिष्टियों का सारवान रूप से अभिवाक किया – सत्यापन खंड और याची द्वारा दिये गये शपथपत्र में भी अंतर नहीं – उपबंधों का सारमूल रूप से अनुपालन किया गया।

C. Representation of the People Act (43 of 1951), Sections 86, 81(3) & 87(1), Civil Procedure Code (5 of 1908), Order 7 Rule 11- Striking off the pleadings - Petitioner has made concise statement of material facts with regard to corrupt practice with name of parties who have committed such corrupt practice with the date and place of commission of the same - None of the pleading can be said to be scandalous and frivolous. **(Para 25)**

ग. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराएं 86, 81(3) व 87(1), सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – अभिवचनों को खंडित किया जाना – याची ने भ्रष्ट आचरण के संबंध में पक्षकार जिन्होंने उक्त भ्रष्ट आचरण कारित किया है, के नाम के साथ, उक्त के कारित होने की तिथि और स्थान के साथ तात्त्विक तथ्यों का संक्षिप्त कथन किया है – किसी भी अभिवचन को कलंकात्मक एवं तुच्छ नहीं कहा जा सकता।

Cases referred :

JT 1991(2) SC 503, (1994) 4 SCC 274, (1989) 4 SCC 482, (1995)

Arpan J. Pawar, for the petitioner.

Manoj Sharma, for the respondent.

(Supplied : Paragraph numbers)

ORDER

G.S. SOLANKI, J. :- Heard on **L.A. No. 34/2014**, which is an application filed by the respondent under Sections 86, 81(3) and 87(1) of the Representation of People Act, 1951 read with Order 7 Rule 11 of the Civil Procedure Code, 1908.

2. This application has been filed by the respondent *inter-alia* pleading that :-

(a) the copy of the election petition served upon the respondent does not bear any stamp/seal of Notary in any of the pages throughout the memo of the petition.

(b) no seal/stamp of the Notary has been affixed in the affidavit annexed along with the election petition.

(c) no seal/stamp of the Notary has been affixed in the list of documents.

(d) the list of documents annexed with the election petition is undated.

(e) all the documents annexed along with the election petition do not bear any stamp/seal of Notary.

3. It is submitted that the copy of election petition received by the respondent is Document-1 and the instant election petition suffers from fatal defects. It is further submitted that the copy accompanying the election petition, which has been served upon the respondent is not a true copy of the election petition.

4. On the basis of aforesaid contentions, it is submitted that the petitioner has failed to comply with the provision of Section 81(3) of the Representation of People Act, 1951 (for short The Act, 1951), therefore, prayer is made to dismiss the instant election petition.

5. A reply of the application has been filed by the petitioner. It is submitted in the reply that the election petition was personally presented by the petitioner

himself before the Registrar in the set of 1+3, out of which one set was meant for the respondent and it was accompanied by his registered address and envelop. It is further submitted that the Registrar (J) had verified the aforesaid additional sets and the copy meant for the respondents, which has been certified as true copy by the petitioner.

6. The petitioner has denied the contention raised by the respondent in regard to non-compliance of Section 81(3) of the Act, 1951 and it is submitted that the petitioner has filed true and identical copy of the election petition for service of the respondent. It is further submitted that the copy of the election petition, meant for the respondent, was attested and signed on every page as true copy of the original by the petitioner in blue ink. Likewise all the documents along with the election petition were verified and signed in blue ink by the petitioner. There is no requirement under Section 81(3) of the Act, 1951 that the copy of the election petition should contain the notary's seal on the petition, affidavit and the documents.

7. On the basis of aforesaid contentions, it is prayed that the application is without any merit and therefore, the same deserves to be dismissed.

8. I have heard the learned counsel for the parties at length. Before considering the rival submissions raised by the counsel for the parties, it would be appropriate to reproduce the provision of Section 81(3) of the Act, 1951. Section 81(3) of the Act, 1951 is reproduced below:-

81. Presentation of petitions.

(1)

(2)

(3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.

9. It is clear from a bare perusal of the aforesaid provision that every copy of the election petition shall be attested by the petitioner under his own signature to be a true copy of the petition. I have perused the copy of the election petition served upon the respondent. Every page of the copy of the election petition has been attested by the petitioner himself after writing 'true

copy attested'. Thus, the petitioner has fully complied with the provision Section 81(3) of the Act, 1951.

10. The Apex Court in *F.A. Sapa etc. etc. vs. Singora & others etc.* - JT 1991 (2) S.C. 503 has observed that since there is no particular form of attestation prescribed, mere signature without the words like true copy, is sufficient attestation under Section 81(3) of the Act, 1951. The Apex Court in *T.M.Jacob Vs. C. Poulose and others* - (1999) 4 SCC 274 has laid down that 'True copy' of election petition within the meaning of Section 81(3) does not mean absolutely exact copy but it is one which no reasonable person can misunderstand as not being the same as the original. It should not contain any substantial variation of vital nature which can mislead such person to understand and meet the charge.

11. The copy supplied to the respondent bears signatures of the petitioner beneath the words "true copy attested" shows that the petitioner has complied with the provision of Section 81(3) of the Act, 1951, therefore, the objection raised by the respondent, that the petitioner has failed to comply the mandatory condition prescribed in Section 81(3) of the Act, 1951, is not acceptable.

12. Consequently, I.A. No. 34/2014 is hereby dismissed.

13. Heard on I.A. No. 35/2014, which is an application filed by the respondent under Section 87(1) of the Act, 1951 read with Order 7 Rule 11 of the Civil Procedure Code, 1908.

14. This application has been filed by the respondent *inter-alia* pleading that the copy of the election petition served upon the respondent lacks material facts, constituting the requisite cause of action; required under the Act, 1951. It is further submitted that the allegations of corrupt practice contained in Paragraphs 11, 12, 13, 14, 15, 16 and 17 do not complete the requisite chain of events which is the very basic requirement to constitute the bare minimum cause of action. It is further submitted that no material facts have been pleaded in regard to the fact that how information came to the knowledge of the petitioner pertaining to the incidents pleaded in the aforesaid paragraphs. It is further submitted that the petitioner has not pleaded the basis material fact pertaining to alleged corrupt practice qua personal knowledge or information through specific person is lacking in the petition. It is further submitted that the affidavit filed in support of the petition in connection with corrupt practices,

is also not in the format prescribed under the Act, 1951. The election petition has been presented and verified on 21.1.2014 whereas in the affidavit the date is mentioned as 20.1.2014, therefore, on the date when the affidavit was sworn, the election petition was not in existence, thus, the affidavit has been sworn in support of non-existing pleadings, therefore, the election petition deserves to be dismissed.

15. Learned counsel for the respondent has submitted that the petitioner has not pleaded as to how he got the information in regard to corrupt practices alleged against respondent No. 1 or her agents or relatives, therefore, there is substantial non-compliance of Section 83(1) of the Act, 1951. To buttress the aforesaid submission, learned counsel for the respondent has placed reliance on the decisions of the Apex Court in *U.S. Sasidharan Vs. K. Karunakaran and another* - (1989) 4 SCC 482 and *Gajanan Krishnaji Bapat and another Vs. Dattaji Raghobaji Meghe and others* - (1995) 5 SCC 347.

16. It is further submitted that the petitioner has verified the petition in Para No. 17 on the strength of personal knowledge, while the statutory affidavit accompanying the election petition in as many as on 1, 2, 3, 4, 5 and 6 paragraphs, the contents of Paragraph 17 have been repeatedly verified under oath on the basis of information. Thus, there is fatal contradiction between the statutory affidavit pertaining to corrupt practices and the statutory verification in terms of the provisions of the Act, 1951, which itself rendered the instant election petition susceptible to dismissal at the very threshold.

17. The reply of the application has been filed by the petitioner. The petitioner has denied the contentions raised by the respondent except the fact in regard to affidavit that the same was sworn on 20.1.2014. It is submitted that the election petition was presented before the Registrar (J) on 20.1.2014. It is further submitted that the corrupt practices pleaded in Para 11 to 17 specifically state the 'material facts' together with their 'particulars', thus constituting complete cause of action required under the Act, 1951. It is further submitted that the petitioner has substantially complied with the provision of Section 83(1)(a) and (b) and has pleaded all material facts and full particulars in regard to corrupt practices in the petition Paragraph Nos. 11 to 17. Counsel has further submitted that the question of cause of action ought to be decided by taking the averments in totality and by assuming them to be factually correct, therefore, this application is misconceived and therefore, is liable to be

dismissed. Petitioner's counsel has placed reliance on the decisions of the Apex Court in *Chandrakant Uttam Chodankar Vs. Dayanand Rayu Mandrakar and others* - (2005) 2 SCC 188 and *G.M.Siddeshwar Vs. Prasanna Kumar* - AIR 2013 SC 1549.

18. For the purpose of resolving the rival contentions, it would be appropriate to reproduce Section 83(1) of the Act, 1951. Section 83(1) of the Act, 1951 is reproduced below:-

83. Contents of petition.- (1) An election petition-

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

19. It reveals from a bare perusal of the election petition in the light of the provision of Section 83(1) of the Act, 1951 and the principles laid down by the Apex Court in this regard, that the petitioner has substantially pleaded the detailed facts in regard to the corrupt practice in petition Paragraph Nos. 11 to 17. The petitioner has substantially pleaded as to how respondent or her agents and family members were involved in corrupt practice of distributing the money to the villagers, name of the villagers who received the alleged money have also been disclosed and the agent of the petitioner had reported the matter to the authorities from time to time. The name of the person, who was involved in booth capturing has also been specifically pleaded and the agent of the petitioner had made a complaint to the returning officer by hand

as well as by e-mail. Thus, the petitioner has substantially complied with the provision of Section 83(1) of the Act, 1951 thereby he disclosed the cause of action.

20. So far as disclosing the source of information in regard to the charge of corrupt practice levelled against the respondent is concerned, learned counsel for the respondent has placed reliance heavily on a decision of the Apex Court in *Gajanan Krishnaji Bapat and another Vs. Dattaji Raghobaji Meghe and others* (supra). The facts of the said case were totally different tot the instant case. In the instant case, the petitioner has pleaded that his election agent, who was present on the spot, made report to the district returning officer in regard to booth capturing and further he informed to the petitioner. So far as pleadings of other corrupt practices like distribution of money is concerned, the petitioner has specifically pleaded the name of the persons, who had received the alleged amount and those persons are the source of information of the petitioner.

21. On a bare perusal of the affidavit filed by the petitioner, it reveals that the petitioner has sworn the affidavit that the facts in regard to corrupt practices are true to his information and word 'information' has been mentioned after narrating the facts wherein name of persons, who had received the money and name of the person who was involved in the booth capturing along with the name of polling agent of the petitioner, who was present on the spot and had reported the matter to Districting Returning Officer, in these circumstances it cannot be said that the petition and affidavit lacks in regard to pleading regarding source of information.

22. So far as verification clause and affidavit accompanied to the petition, are concerned, the petitioner has specifically pleaded in verification clause that Paragraphs 1 to 10 and 17 to 22 are true to his personal knowledge and Paragraph Nos. 11 to 17 are true and correct on information received and believed to be true. Paragraphs 1 to 10 are basic pleadings in regard to election petition and Paragraphs 17 to 22 are based on the pleadings of corrupt practice, which has been pleaded in Paragraphs 11 to 16 of the petition. IN the affidavit, the petitioner has pleaded that Paragraphs 11, 12, 13, 14, 15 and 16 are based on information which is in consonance with the verification clause. Thus, there is no variance in the verification clause and the affidavit sworn by the petitioner.

23. Considering aforesaid pleadings on record, I am of the view that I.A. No. 35/2014 has no force, same is hereby dismissed.

24. Heard on I.A. No. 36/2014, which is an application under Section 87(1) of the Representation of People Act, 1951 read with Order 6 Rule 16 of the Code of Civil Procedure, 1908.

25. This application has been filed by the respondent *inter-alia* pleading that pleadings of Paragraph 1 of the election petition deserves to be struck off as it is absolutely vague and unnecessary, lacking totally immaterial facts and particulars. Contents of Paragraphs 2 to 7 do not disclose any cause of action for the purpose of instant lis and deserves to be struck off. Further, contents of paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 being unnecessary, scandalous, frivolous and vexatious, deserve to be struck off.

26. A reply of this application has been filed by the petitioner. It is submitted that the pleadings made in Paragraphs 1 to 20 are necessary for just and proper adjudication of the instant election petition. All the pleadings, if read comprehensively and collectively, a complete picture of commission of corrupt practices by the respondent and with her consent, therefore, same cannot be said to be scandalous, frivolous or vexatious, therefore, this application is misconceived and deserves to be dismissed.

27. I have perused the entire pleadings right from Paragraph 1 to Paragraph 20, which are basic and concise statement of material facts in regard to corrupt practices and full statement as possible of names of parties alleged to have committed such corrupt practices along with date and place of commission of the aforesaid corrupt practice, therefore, the petitioner has pleaded his case in compliance of Section 83(1) of the Act, 1951 and none of the pleadings can be said to be scandalous, frivolous or vexatious, therefore, I do not find any ground to entertain this application.

28. Consequently, I.A. No. 36/2014 is hereby dismissed.

29. The respondent is directed to file written statement.

30. List on 22.7.2014.

Certified copy as per rules.

Order accordingly.

I.L.R. [2015] M.P., 152

ELECTION PETITION

Before Mr. Justice G.S. Solanki

E.P. No. 21/2014 (Jabalpur) decided on 7 August, 2014

KRISHNA KUMAR GUPTA

...Petitioner

Vs.

RAJENDRA SHUKLA & ors.

...Respondents

A. Representation of the People Act (43 of 1951), Section 83(1) - Affidavit - Non filing of affidavit in Form 25 as prescribed under Rule 94-A of Conduct of Election Rules, 1961 is a curable defect and petition cannot be rejected.

(Para 20)

क. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 83(1) - शपथपत्र - फॉर्म 25 में शपथपत्र प्रस्तुत नहीं किया जाना, जैसा कि निर्वाचन का संचालन नियम 1961 के नियम 94-ए के अंतर्गत विहित है, सुधार योग्य त्रुटि है और याचिका को अस्वीकार नहीं किया जा सकता।

B. Representation of the People Act (43 of 1951), Sections 80, 81, Civil Procedure Code (5 of 1908), Order 7 Rule 11 - Corrupt Practice - To prove the allegation of corrupt practice, it should be specifically pleaded as to how and from whom the petitioner has got the information but the petition is lacking of such specific pleadings - Even if the averments made in the election petition are taken on their face value and accepted in the entirety, no triable cause of action arises in absence of specific, precise and complete pleading in respect of alleged irregularities as well as corrupt practice - Election petition dismissed.

(Paras 6 & 22)

ख. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराएं 80, 81, सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 - भ्रष्ट आचरण - भ्रष्ट आचरण का अभिकथन साबित करने के लिए यह विनिर्दिष्ट अभिवाक् किया जाना चाहिए कि याची को कैसे और किससे जानकारी मिली है, परंतु याचिका में उक्त विनिर्दिष्ट अभिवचनों का अभाव है - यदि निर्वाचन याचिका में किये गये प्राक्कथनों को वैसा ही मान लिया जाए जैसा प्रकट किये गये हैं और संपूर्णतः से स्वीकार किया जाए तब भी अभिकथित अनियमितता तथा भ्रष्ट आचरण से संबंधित अभिवचनों के विनिर्दिष्ट, स्पष्ट और पूर्ण होने के अभाव में कोई विचारणीय वाद कारण उत्पन्न नहीं होता - निर्वाचन याचिका खारिज।

Cases referred :

2009 (9) SCC 310, (2009) 10 SCC 541, (2011) 2 SCC 621, (2012) 7 SCC 788, AIR 2004 Karnataka 289.

S.P. Mishra, for the petitioner.

Sanjay K. Agrawal, for the respondent No.1.

V.K. Shukla, for the respondent No.2.

O R D E R

G.S. SOLANKI, J. :- This order shall govern disposal of I.A. No. 39/ 2009, which is an application under Order 7 Rule 11 of the CPC for rejection of the election petition inter alia on the following grounds :-

(i) The petition is not accompanied by an affidavit as required under the proviso to sub-section (1) of Section 83 of the R.P. Act in support of allegation of corrupt practice and particulars thereof.

(ii) The petition is not only lacking compliance of mandatory provisions contained in Representation of People Act, 1951 (for short R.P. Act) but same also does not disclose any triable cause of action because the petition does not contain concise statement of the material facts and particulars on which the petitioner relies. If the averments made in the petition, are accepted to be true on the face value, they do not close any triable cause of action. The petitioner has alleged corrupt practice but necessary facts constituting such corrupt practice have not been disclosed in the petition.

(iii) It has not been pleaded that how the election of respondent No. 1 has been materially affected on account of alleged improper reception, refusal or rejection of the votes. It is further submitted that a bare perusal of Paragraphs 15(i) to (xix) clearly shows that the petitioner has not disclosed the particulars of the persons from whom he derived information required for filing the petition. It is also submitted that the petitioner has made defective pleadings in the relief clause, because the petitioner has firstly prayed for order direction reelection or repolling of votes in 74 Rewa Constituency and based on result of such re-polling has prayed for setting aside the election of respondent No. 1. On the basis of aforesaid submission, respondent No. 1 has prayed for dismissal of this election petition under Order 7 Rule 11 of the CPC read with Section 86 of the R.P. Act.

2. Learned counsel for respondent No. 1 has further submitted that the

pleadings in regard to corrupt practice is vague and do not spell out as to how election results have been materially affected because of the facts stated in the petition. In this way the facts stated in the petition do not formulate complete cause of action. Counsel has placed reliance on a decision of the Apex Court in *Anil Vasudev Salgaonkar Vs. Naresh Kushali Shigaonkar* – 2009(9) SCC 310 and *Ram Sukh Vs. Dinesh Aggarwal* - (2009) 10 SCC 541.

3. The petitioner has filed reply to the aforesaid application denying the grounds raised by respondent No. 1 for rejection of the petition. It is submitted that the petitioner has specifically pleaded the facts in regard to corruption and source of his information. It is further submitted that the petitioner has already filed an affidavit in compliance of Section 83(1) of the R.p. Act. Learned counsel for the petitioner has further submitted that all the necessary facts have already been pleaded in the election petition and to find out the existence of cause of action, the Court can not devide the pleadings in several parts, rather the petition will have to be read as a whole. Counsel has placed reliance on a decision of Apex Court in *Govind Singh Vs. Harchand Kaur* – (2011) 2 SCC 621 and *Ponnala Lakshmaiah Vs. Kommuri Pratap Reddy and others* – (2012)-7 SCC 788.

4. I have heard the learned counsel for the parties at length and gone through the law laid down by the Apex Court in the aforesaid cases. It is true that if there are any contradictions or some averments are lacking in verification or affidavit filed in support of the pleadings, same can be amended after providing the opportunity by the Court as held by the Apex Court in *Ponnala Lakshmaiah Vs. Kommuri Pratap Reddy and others* (supra) and in such circumstances, the petition cannot be dismissed in limine on ground No. (I).

5. So far as aforesaid ground Nos. (ii) and (iii) are concerned, the petitioner has pleaded in Paragraphs 9 and 10 of the petition that respondent No. 1 has not disclosed exact number of pending criminal case before High Court. On perusal of Annexure filed along with the petition, it reveals that instead of writing 'M.Cr.C' respondent No. 1 has written 'Revision' but the number 11950/2009 is same. In Paragraph 12, there is vague pleading in regard to Electronic Voting Machine. Now, I consider the pleadings made in Paragraph 15 of the election petition. The pleadings made in Paragraph 15 are reproduced below for ready reference:-

15. That petitioner submits that the election was not contested by the respondent no. 1 in free and fair manner and voting as

well as counting was not done in accordance with rules and it has been done in large scales in whole constituency, hence petitioner was declared defeated otherwise he would have victorious candidate. The fact is that there is manipulation in voting, preparation of account and counting of votes etc. in following manner “:-

(i) EVM machines which were packed in brief case were opened while depositing in strong room after polling.

(ii) In Lohi Polling Booth (Booth No. 186) one woman was trying to cast vote in favour of B.S.P. But the Presiding Officer himself casted vote in favour of Bhartiya Janta Party. The said news was published in Video City Cable on 25.11.2013 and News Paper published the news on 26.11.2013.

(iii) The details submitted in nomination formas pasted on the notice board reflects one criminal case against BJP candidate, whereas after election- they mentioned 3 numbers of criminal cases in the original nomination form.

(iv) City Cable, Rewa and Akashwani Rewa published news on 23rd, 24th and 25th of Nobember, (sic: November) 2013 that independent candidates have supported the B.J.P. Candidate.

(v) As per oral version of Abhishekh Tiwari (9669600045), a candidate of Rashtriya Kisan Vikas Party – received a mobile call from Akash Tiwari (94246066799) seeking information as to whether Abhisheikh supported the B.J.P.

(vi) Satya Narayan Gupta (9425874740) who was B.S.P. Additional Agent of the petitioner also received a telephone in Mobile No. 9826649619 on 24.11.2013 between 9-10 hrs. from Ram Raj Patel r/o Rathora that BJP candidates supporters are distributing liquor and blanket in area (Rani Talab) Nai Basti and Akola.

(vii) Polling Booth 42 (Boda Bag), Machine No. 52545, there was no green paper currency was fixed. Only strip seal number was mentioned which is C-00-9732642973266. As per Presiding Officer C-00-973264, C-00-973265, C-00-9266. P.O. has informed that remaining two green strips were

returned where as no such information in Form 17-Ga. mentioned.

(viii) Rule 49 (Dha) & 56 (Ga)(2)-Form No. 17- Ga. There is no signature – on form of returning Officer in respect of Polling Booth No. 42.

(ix) As per P.O. In Polling Booth No. 42-only 497 votes were cast but in counting it comes 499 in which B.J.P. Candidate received 272 votes and petitioner received 88 votes only, and it has been done in large scale.

(x) All the documents which has been supplied to the petitioner is shown as amended and it shows that there was manipulation done in the documents and while supplying the documents to the petitioner the returning officer had given amended document to the petitioner. The election agent submitted objection to collector (R.O.) and S.P. Closed his door and make correct/ caste two votes in the EVM machine about such discrepancies. This incident was published in newspaper. Two votes have been put in NOTA and total votes have been mentioned as 499, though the same is 497. A copy of form No. 17 – Ga of polling Booth No. 42 is annexed herewith as **Annexure P/8**. And in this regard petitioner election agent submitted his objection to the returning officer but without deciding the objection of the petitioner agent the counting was regularly going on. A copy of objection is annexed herewith as **Annexure P/8-A, P/8-B and P/8-C**.

(xi) In polling booth No. 42 Green paper currency was not mentioned, But in the diary number of P.O. It is mentioned. But, green paper currency is not placed in its original place.

(xii) The returning officer and presiding officer, district election officer had taken mobile in counting room, whereas the election agent and candidates were stopped from carrying mobiles on the ground that the same affects the EVM machines. However, rule in this regard is to be brought and place it on record. As **Annexure P/9**.

(xiii) In Samachar Patrika Good Morning dt. 26.11.2013 at

Page No. 3 published a news with regard to irregularities in EVM machines.

(xiv) The news with regard to disturbance during counting and stopped the media. And thereby changed two votes after closing doors and stoppage media from coverage. The voice raised by candidates was subsided by police force such news was published in news papers on 09.12.2013.

(xv) The B.J.P. Candidates installed flex hoarding at Sirmour Chowk on Anupam Building that he has won thrice and the opposite party clean bold at 2.30 p.m. On 08.12.2013 whereas the elections result were declared on 7.30 p.m. On 8.12.13. This has also been published in newspapers.

(xvi) The Collector called meeting of election agents and counting agents of all 8 on 06.12.2013 in APS University Hall with regard to management in the counting room (sic: room) to be made on 08.12.2013 and the instructions with regard to procedure to be followed in respect of election agent. However, there was ill management which created chaos which facilitated the authorities to manipulate things. Even there were no cameras as per instructions. The Video person was also only one whereas there were two rooms in which counting. When ever any dispute or objection with regard to counting, the camera persons were asked to shift to another room so that no recording of disputes can be made. There was no proper arrangement for even standing. This averments is supported the news paper cuttings datd. (sic: dtd.) 9.12.2013 published in "Star Samachar" daily under the caption/heading Rewa Ki Dedh Ghnate Ruki Rahi Matgadana. A copy of such news paper cutting page no. 4 dtd. 9.12.2013 is annexed herewith as **Annexure P/10**.

(xvii) The District President of Bahujan Samaj party, District Rewa has raised objection to the Chief Election Commissioner, Election Commission of India, New Delhi and requested for independent and fair counting of votes in 8 constituency elections areas in Rewa and pointing out irregularities and undue influence of ruling party over the state authorities. The

apprehension of irregularities in counting was already expressed prior of counting. There is direct fight in election between Minister Rajendra Shukla and B.S.P. Candidate making specific allegation that there is possibility that authorities would result in defeat of B.S.P. Candidate by committing irregularities in counting. Neither action was taken in this regard nor response has been received. A copy of the representation dtd. 30.11.2013 submitted by the BSP President in this regard is annexed herewith as Annexure P/11 and copy of the fax receipt is annex herewith as Annexure P/aa-A.

(xviii) the petitioner submitted an application 02.12.2013 seeking the certified copies of relevant documents but non cooperation has been shown b (sic:by) Returning Officer, District Election Officer and Collector in receiving such application. Therefore, the aforesaid application has been sent through registered post. A copy of the same with endorsement is annexed herewith as Annexure P/12. And copy of postal receipt dtd. 4.12.2013 is annexed herewith as Annexure P/12-A.

(xix) That, before counting of the votes i.e. 8.12.2013 the District President BSP, Rewa submitted his apprehension to the Election Commission of India on 6.12.13 there is possibility of mismanagement, hence there is need of new observers which comes from Delhi. But no action has been taken in this regard. A copy of the letter written to the election commission of India with copy of the receipt of Fax is annexed herewith as Annexure P/13 and P/13-A respectively.

6. It reveals from a bare perusal from the aforesaid pleadings that the petitioner has raised various grounds on the basis of newspaper and information received by someone else. It is well established principle of law that to prove the allegation of corrupt practice, it should be specifically pleaded as to how and from whom the petitioner has got the information but the petition is lacking of such specific pleading.

7. In Para 15(i) it is pleaded that EVM machines which were packed in brief case were opened while depositing in strong room after polling, but who has witnessed this incident, has not been specifically pleaded.

8. In Para 15(ii) it is pleaded that in Lohi Polling Booth (Booth No. 186) one woman was trying to cast vote in favour of B.S.P. But the Presiding Officer himself cast vote in favour of Bhartiya Janta Party. The said news was published in Video City Cable on 25.11.2013 and News Paper published the news on 26.11.2013. In this paragraph also nothing has been specifically pleaded that who was that woman and who has witnessed this incident. It appears that this pleading is based on news published in the newspaper and Video of City Cable, which are second hand informations.

9. In Para 15(iii) it is pleaded that the details submitted in nomination form-as pasted on the notice board reflects one criminal case against BJP candidate, whereas after election- they mentioned 3 numbers of criminal cases in the original nomination form. This pleading itself is contradictory to Para 10 of the petition wherein it was pleaded that respondent No. 1 has not disclosed all criminal cases pending against him. In this paragraph it has not been specifically pleaded as to how the same has materially affected the election of the petitioner.

10. In Para 15(iv) it is pleaded that City Cable, Rewa and Akashwani Rewa published news on 23rd, 24th and 25th of November, (sic: November) 2013 that independent candidates have supported the B.J.P. Candidate, however, firstly it has not been pleaded as to who was the independent candidate and secondly how it has materially affected the election of the petitioner if someone has supported the BJP candidate.

11. The pleadings made in Paras 15 (v) and (vi) are based on the facts that one Abhishek Tiwari received a mobile call from Aakash Tiwari seeking information as to whether Abhishek supported the BJP and second one Satya Narayan Gupta, who was B.S.P. Additional agent of the petitioner also received a telephone in his mobile from Ramraj Patel that BJP candidates supporters are distributing liquor and blanket in area (Rani Talab) Nai Basti and Akola, but the name of supporters of BJP candidate has not been specifically pleaded who are alleged to have distributed the liquor and blankets. Further it has not been disclosed that to whom the aforesaid articles have been distributed.

12. The pleadings made in Paras 15 (vii), (viii) and (ix) pertain to the procedure followed at the time of voting. Certainly the polling agents of the petitioner were present there at that time and the said proceedings took place in their presence but names of such polling agents have not been disclosed. Further there was dispute of two votes in counting. It has also not been

specifically pleaded that if respondent No. 1 received 272 votes and the petitioner received 88 votes, how the difference of two votes has materially affected the election of the petitioner.

13. The pleadings made in Para 15(x) relates to manipulation in the documents and amended documents are stated to have been supplied to the election agent. This pleading is again based on a news published in the news paper, which shows that if any discrepancy was found during the counting, same was ratified before the agents of the petitioner and the counting was continued.

14. The pleading made in Paras 15 (xi) and (xii) are absolutely superfluous. The petitioner has not pleaded that if the returning officer or presiding officer had taken mobile in the counting room, how the election of the petitioner has been materially affected and further it has not been pleaded as to who has witnessed the aforesaid fact.

15. The pleadings made in Paras 15 (xiii) and (xiv) are based on news published in Samachar Patrika 'Good Morning' and other news papers.

16. In Para 15(xv) it is pleaded that on the date of counting i.e. on 8.12.2013, the BJP candidates installed flex hoarding at Sirmour Chowk on Anupam Building that he has won thrice and the opposite party clean bold at 2.30 p.m. whereas the election results were declared on 7.30 p.m. Firstly, this pleading is also based on news published in the news paper and secondly it has not been pleaded specifically that if on the date of counting, someone has installed flex hoarding that he is going to win the election, how it has materially affected the election results, thus these pleadings do not constitute any ground to allege corrupt practice.

17. The pleadings made in Para (xvi) are with respect to mismanagement during counting. This pleading is also based on the news published in the news paper 'Star Samachar'.

18. In Paras 15 (xvii) and (xix), the pleadings have been made on the basis of the fact that the President of BSP has raised objection the Chief Election Commissioner, Election Commission of India, New Delhi in regard to independent and fair counting and this apprehension was expressed prior to counting but neither any action was taken in this regard nor any response has been received. Here also it has not been pleaded specifically that who was the District President of BSP and if such objection was raised by him,

how it has materially affected the election results it same was not responded by the Election Commission of India.

19. In Para 15(xviii), the petitioner has pleaded that he filed an application seeking certified copies of the documents but there was non-cooperation of the returning officer, therefore, he filed application by registered post, but nothing has been pleaded as to how it has materially affected the election results.

20. The non filing of the affidavit in Form 25 as prescribed under Rule 94-A of the Conduct of Election Rules, 1961 is a curable defect and on the basis of said defect, the petition cannot be rejected. So far as pleading in regard to corrupt practice is concerned, when the same is considered in its entirety, I find that the petition is absolutely lacking the material facts in regard to corrupt practice.

21. So far as objection raised in regard to irregularities in EVMs is concerned, all doubts and queries regarding EVMs have already been answered in FAQs on the website of Election Commission of India wherein it has been specifically shown that there is no possibility to vote more than once by pressing button again and again. Since the petitioner has raised doubts in regard to fairness or impartiality of the officials engaged in the counting process, he is under an obligation to demonstrate as to how the EVMs could be tampered with to get the desired result. However, no expert opinion has been placed on record regarding the chances of misalignment of EVMs. On the other hand, correctness of all the technical aspects of the matter, as reflected as FAQs and the Press Note issued and uploaded on its website by Election Commission of India, has already been verified on the judicial site in *Michael B. Fernandes Vs. C.K. Jaffer Sharief*, AIR 2004 Karnataka 289. Thus, the EVMs are full proof device for counting, therefore, the allegation made in the petition in regard to mal-functioning and tampering of EVMs used in counting of votes are baseless.

22. In view of the above discussion, even if the averments made in the election petition are taken on their face value and accepted in the entirety, no triable cause of action arises in the absence of specific, precise and complete pleading in respect of alleged irregularities as well as corrupt practice alleged to have been adopted by respondent No. 1 or his agent during the election.

23. In these circumstances, I.A. No. 39/2014 filed by respondent No. 1 under Order 7 Rule 11 of the CPC is hereby allowed. As a consequence thereof,

the election petition filed by the petitioner (sic: petitioner) is hereby dismissed for want of any cause of action. Parties to bear their own costs as incurred of this petition.

A copy of this order be forwarded to the State Election Commission as well as to the Speaker, Legislative Assembly.

Petition dismissed.

I.L.R. [2015] M.P., 162

APPELLATE CIVIL

Before Mr. Justice M.C. Garg

M.A. No. 644/2010 (Indore) decided on 1 April, 2013

ORIENTAL INSURANCE CO. LTD.

...Appellant

Vs.

SMT. BINDIYA & ors.

...Respondents

Workmen's Compensation Act (8 of 1923), Section 30 - Interest awarded at the rate of 12% from the date of application - Held - It is not open to contend that the payment of compensation would fall due only after the Commissioner's order - Appeal is dismissed. (Paras 1 & 3)

कर्मकार प्रतिकर अधिनियम (1923 का 8), धारा 30 - आवेदन की तिथि से 12 प्रतिशत की दर से ब्याज अवार्ड किया गया - अभिनिर्धारित - यह तर्क विचार में नहीं लिया जायेगा कि प्रतिकर का भुगतान केवल आयुक्त के आदेश के पश्चात ही देय होगा - अपील खारिज।

Case referred :

2012 ACJ 2126.

Manoj Jain, for the appellant.

Lokesh Mehta, for the respondents.

(Supplied : Paragraph numbers)

ORDER

M.C. GARG, J. :- The only point raised by the appellant in this case was the order of the Workmen's Commissioner on the point of interest inasmuch as, by the impugned award interest was direct to be paid on the claim amount at the rate of 12% from the date of filing of the application. According to the appellant this amount was on the higher side.

2. Learned counsel for the respondent submits that there is no error in the award made by the Workmen's Commissioner. He relies upon the judgment of the Apex Court delivered in the case of *Oriental Insurance Co. Ltd. Vs. Siby George and others* reported in 2012 ACJ 2126.

3. In this case also the appeal was filed by the Insurance Company before the High Court of Kerala on the point of interest which was dismissed then they went to the Supreme Court. The appeal filed before the Supreme Court was also dismissed with costs. The relevant paragraphs are 3, 12 and 13 which are reproduced here as under:-

3. In this case, the Commissioner for Workmen's Compensation, Ernakulam, by his order dated 26.11.2008 in W.C.C. No.67 of 2006 directed for payment of simple interest at the rate of 12% per annum from the date of the accident on 12.7.2006. The appellant's appeal (M.F.A. No.172 of 2009) against the order of the Commissioner was dismissed by Kerala High Court by order dated 22.7.2009 as barred by limitation. Against the order of the High Court the appellant filed the special leave petition (giving rise to this appeal) in which notice was issued 'limited to the interest'.

12. In light of the decisions in *Pratap Narain Singh Deo*, 1976 ACJ 141 (SC) and *Valsala K.*, 2000 ACJ 5 (SC), it is not open to contend that the payment of compensation would fall due only after the Commissioner's order or with reference to the date on which the claim application is made. The decisions in *Mubasir Ahmed*, 2007 ACJ 845 (SC) and *Mohd. Nasir*, 2009 ACJ 2742 (SC), insofar as they took a contrary view to the earlier decisions in *Pratap Narain Singh Deo* and *Valsala K.* do not express the correct view and do not make binding precedents.

13. In the light of the discussion made above, we find no merit in the appeal and it is dismissed with costs amounting to Rs.20,000/-. The amount of costs must be paid to the respondents within six weeks from today.

4. In view of the aforesaid, the appeal is dismissed with no orders as to costs.

Appeal dismissed.

I.L.R. [2015] M.P., 164

APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari

M. A. No. 2804/2011 (Jabalpur) decided on 3 April, 2013

KARAN LAL

...Appellant

Vs.

CHARAN LAL

...Respondent

Motor Vehicles Act (59 of 1988), Section 149 - Liability of Insurer - Tractor was insured for agricultural purposes - At the time of accident, tractor was being used for transporting sand and deceased was sitting on the trolley of such tractor - As tractor was being plied contrary to the purpose for which the same was insured, the insurance company is not liable. (Para 9)

मोटर यान अधिनियम (1988 का 59), धारा 149 - बीमाकर्ता का दायित्व - ट्रैक्टर को कृषि प्रयोजनों हेतु बीमित किया गया था - दुर्घटना के समय, ट्रैक्टर का उपयोग रेत परिवहन हेतु किया जा रहा था और उक्त ट्रैक्टर की ट्रॉली में मृतक बैठा था - चूंकि ट्रैक्टर को उस प्रयोजन के विपरीत चलाया जा रहा था, जिसके लिये वह बीमित था, बीमा कम्पनी उत्तरदायी नहीं।

Cases referred :

2010 ACJ 1020, 2008 ACJ 2017(M.P.), 2010 ACJ 2001 (M.P.), 2010 ACJ 2671, 2009 ACJ 1298.

Sanjay Sarvate, for the appellant.

None for the respondent.

ORDER

U.C. MAHESHWARI, J. :- The appellant/ registered owner of the offending tractor and trolley has filed this appeal under Section 173 of Motor Vehicle Act being aggrieved by the award dated 4.3.2011 passed by the Motor Accident Claims Tribunal, Balaghat in Motor Claim Case No.86/2009 whereby allowing the claim of respondent No.1 to 3 with respect of the vehicular death of Bhuvan Lal, aged about twenty years the son of respondent No.1 and 2 while brother of respondent No.3 by exonerating the Insurance Company respondent No.5 has been awarded against the appellant for the sum of Rs.2,10,000/- along with the interest @ 6 % p. a. from the date of filing the claim petition.

2. The facts giving rise to this appeal in short are that Bhuvan Lal son of respondent No.1 and 2 while brother of respondent No.3 was working as labour with respondent No.4 Shivshankar @ Kolhu Banote and under his instruction on 19.5.2009 in the morning he went on the tractor of the appellant bearing registration No. M.P.50-A-1758 to bring the sand and stones for the purpose of construction of the house and Court Yard of respondent No.4. Such tractor was driven by the deceased Driver Raman @ Ram Prasad. After loading the sand and stones in the trolley he was returning to the house by sitting on the trolley on the way some road being under construction was zig zag, resultantly the tractor trolley turned turtled. Consequently, aforesaid driver Raman and said Bhuvan Lal died on the spot. Incident was reported to the Police Station Navegaon, the dead bodies were sent to the hospital for postmortem, the same was carried out. Some merg intimation was also registered. As per further averments the deceased Bhuvanlal beside the work of labour with respondent No.4 was also doing some agricultural work and out of them was earning Rs.5,000/- p. m. It is further stated that due to his untimely death the respondent No.1 to 3 have been deprived from dependency and they have no other source of income. In such premises, the impugned claim was preferred for the sum of Rs.16,54,000/- against the appellant as well as the Insurance Company with a prayer to pass the award jointly and severely against them.

3. In joint reply of appellant and respondent No.4 under whose subordination the deceased was working as labour by admitting the registered ownership of tractor and trolley in the name of appellant, it is stated that tractor was duly insured with respondent No.5. However, the factum of accident was denied. In alternative it is stated that on holding any liability of the accident against them then same be saddled against the respondent No.5, as the tractor was duly insured with it. In such premises the prayer for dismissal of the claim was made.

4. In reply of respondent No.5/ Insurance Company by denying the averments of the claim petition the fact of alleged accident as well as the insurance of offending tractor with it were denied. In alternative, it was stated that tractor being driven by the deceased Raman @ Ram Prasad without having duly and effective driving licence contrary to the terms and condition of the policy, the Insurance Company is not liable to pay any claim to the respondent No.1 to 3. It is also stated that the tractor was registered in the name of appellant and insured with it for agricultural purpose and not for

commercial purpose but on the aforesaid date the tractor was plied by the appellant for commercial purpose to bring the sand and stones for construction of house of respondent No.4. So, in such premises also the Insurance Company is not liable to pay the compensation of the impugned claim and the prayer for exonerating the Insurance Company from the liability of compensation is made.

5. In reply of respondent No.6, the wife of the deceased Raman by admitting the registered ownership of the tractor in the name of appellant it is stated that tractor was duly insured with respondent No.5. She also admitted the averments regarding factum of the alleged accident. In further averments it is stated that her husband was working on such tractor as driver of the appellant and at the time of accident having duly and effective licence, the same was driven by him and at that time deceased Bhuvan Lal was sitting on the trolley. By disputing the quantum of compensation as prayed by the respondent No.1 to 3 the prayer to exonerate her from the liability of the claim is made.

6. In view of the aforesaid pleadings of the parties after framing the issues evidence was recorded. On appreciation of the same by holding that tractor insured for agricultural purpose being plied by the appellant contrary to such terms and condition of the policy for commercial purpose to bring the sand to make the construction of house of respondent No.4, the liability of the impugned claim could not be saddled against the Insurance company and in such premises by exonerating the Insurance Company from such liability, the claim by holding that the deceased Bhuvan Lal died due to rash and negligence driving of the above mentioned tractor under the instruction of the appellant by deceased Raman @ Ram Prasad without having the duly and effective driving licence was awarded against the appellant for the sum mentioned above. Being dissatisfied with such award the appellant has come to this Court with this appeal with a prayer to set aside the impugned award and dismiss the claim petition of the respondent No.1 to 3 with an alternative prayer to saddle liability of awarded compensation jointly and severally against the appellant as well as the respondent No.5 Insurance Company as the vehicle was duly insured with it for agricultural purpose for which the same was plied.

7. The appellant's counsel after taking me through the record of the Tribunal along with the evidence led by the parties, so also the impugned award said that aforesaid tractor was duly insured with the respondent No.5/ Insurance Company for agricultural purpose covering the entire risk of the same. In continuation he said that on the date of the incident the tractor was

plied to bring the sand for making construction of the house which was under construction for agricultural purpose and in such premises there was no occasion with the Tribunal to exonerate the Insurance Company from the liability of impugned claim but under the wrong premises by exonerating it the appellant has been held liable to pay the sum of the award and prayed for saddling the liability of the claim against the respondent No.5 by admitting and allowing this appeal.

8. Having heard the counsel keeping in view the arguments advanced by the counsel, I have carefully gone through the record as well as the impugned award.

9. It is apparent fact from the impugned award that the same has been passed taking into consideration that the tractor being registered in the name of the appellant was duly insured with respondent No.5 for agricultural purpose and on the date of the incident the same was plied by him through driver deceased Raman @ Ram Prasad for brining the sand of respondent No.4 and deceased Bhuvan Lal being labour of respondent No.4 was travelling on the trolley of such tractor. As per findings of the Tribunal based on appreciation of the evidence the tractor was neither insured to cover the risk of any labour nor for commercial use. After perusing the evidence, I have not found any error in such appreciation of the evidence by the Tribunal in holding the tractor was plied by the appellant contrary to the purpose for which the same was insured with the respondent No.5. As such at the time of the alleged accident the tractor and trolley was not plied for any agricultural purpose of the appellant but the same was plied contrary to the terms of the policy to bring the sand of respondent No.4.

10. It is settled proposition of law that where there is violation of terms and condition of the Insurance policy, the Insurance Company could not be held liable to pay any compensation to any of the claimants. It is also trite law whenever that where the tractor and trolley are insured for agricultural purpose and the same were used for non-agricultural purposes or for commercial purpose then in that circumstance no liability of claim could be saddled against the Insurance Company. In such case the liability of the claim could be saddled against the registered owner and driver of the tractor undisputedly driver has died in the alleged accident. So, in such premises the Tribunal has not committed any error in passing the award only against the registered owner the appellant by exonerating the Insurance Company. In this connection the

Tribunal has also cited the decided case laws in the matter of *United India Insurance Company Vs. Chhaniya* 2010 ACJ 1020, *Raja Bai Vs. New India Insurance Company* 2008 ACJ 2017 (M.P.), *National Insurance Company Vs. Sukhiya Bai* 2010 ACJ 2001 (M.P.) and in the matter of *United India Insurance Vs. Angoori Devi* 2010 ACJ 2671 and the decision of the Bombay High Court in the matter of *National Insurance Company Vs. Sushila* 2010 ACJ 2671. The principles laid down in the aforesaid cited cases are also directly applicable to the case at hand, hence I have not found any substance in the matter for saddling the liability of the impugned claim against the respondent No.5 the Insurance Company.

11. Apart the aforesaid in view of the decision of the Apex Court in the matter of *Sarala Verma and others Vs. Delhi Transport Corporation and another* reported in 2009 ACJ 1298, I have not found (sic: found) any material circumstance in the matter for reducing the sum awarded by the Tribunal, as such awarded sum is in consonance with the principle laid down by the Apex Court in the aforesaid case of *Sarla Verma* (Supra). So there is no scope in the matter even for reduction of the awarded sum.

12. In view of the aforesaid discussion, I have not found any substance in this appeal even for admission, consequently the same is hereby dismissed at the stage of motion hearing.

Appeal dismissed.

I.L.R. [2015] M.P., 168

APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari

M.A. No. 80/1997 (Jabalpur) decided on 3 April, 2013

NATIONAL INSURANCE CO. LTD.

...Appellant

Vs.

HARPAL SINGH & ors.

...Respondents

Motor Vehicles Act (59 of 1988), Section 149 - Liability of Insurer - Accident took place at 11 O'clock - Premium of insurance deposited at 3.10 O'clock - Vehicle was not insured when accident took place - Insurance Company not liable. (Paras 8 to 13)

मोटर यान अधिनियम (1988 का 59), धारा 149 - बीमाकर्ता का दायित्व - 11 बजे दुर्घटना घटी - बीमा का प्रीमियम 3.10 बजे जमा किया गया - दुर्घटना के

समय वाहन बीमित नहीं — बीमा कम्पनी का दायित्व नहीं।

Cases referred :

1990(2) ACJ 545, (1997) 1 SCC 66, 1996 ACJ 694.

Pramod Sahu, for the appellant.

None for the respondents.

ORDER

U.C. MAHESHWARI, J. :- The appellant – National Insurance Co. Ltd. has filed this appeal under Section 173 of the Motor Vehicle Act of 1988, in short “The Act”, being aggrieved by the award dated 8.10.1996, passed by the IXth Additional Motor Accident Claims Tribunal, Bhopal in MACC No. 13/96, whereby the claim of respondent no. 1 with respect of the injuries sustained in vehicular accident has been awarded for the sum of Rs.27264/- alongwith the interest @ 12% p.a. from the date of filing the claim petition, i.e. 5.8.1991 alongwith the cost of the case by saddling the liability to pay the same jointly and severally on the appellant, respondent no. 2, the Driver and respondent no.3, the registered owner of the offending vehicle.

2. The facts giving rise to this appeal in short are that on dated 5.4.1991 at about 11 o'clock in the morning, the respondent no. 1 herein alongwith his son was subjected to an accident by rash and negligent driving of the mini bus no. CPD -8266 by the respondent no. 2 under the employment of respondent no. 3, the registered owner of the bus. Resultantly he sustained injuries and became unconscious. He was taken to Hamedia Hospital where after fifteen days he got conscious. Thus, during this period, the surgery of his leg was also carried out. He also lost some vision and power of his right eye. The accident was reported to the P.S. Khajuri Road on the same day on which Crime No. 50/91 was registered. After holding the investigation, the respondent no. 2 was charge sheeted for the alleged offence. In addition to it, it is stated that the respondent no. 1, besides the injuries also sustained loss of his property because his motor cycle was damaged in such accident, on which he spent Rs.2500/- for repairing. It is further stated that inspite long treatment, he has not been fully cured and sustained permanent disability. By giving the elaborate description in pleadings, the respondent no. 1 filed his claim for the sum of Rs.5,18,740/- and for the interest on the same @ 12% p.a.

3. In response of the claim petition, the respondent nos. 2 and 3 have filed their reply stating that the respondent no. 1 – claimant was riding his motor cycle without having any duly and effective driving licence and such accident was not happened due to any negligence or mistake on the part of respondent no.2.

4. In reply of the appellant, the Insurance Co, it was stated that at the time of the alleged accident, the aforesaid offending mini bus being registered in the name of respondent no. 3 was driven by respondent no. 2. The same was not insured with it and in such premises, the prayer for exonerating the Insurance Co. from the alleged claim is made.

5. In view of pleadings of the parties, after framing the issues evidence was record. On appreciation of the same, it was found that the alleged accident had taken place at 11 o'clock on the aforesaid date, i.e. 5.4.1991 and the premium of the insurance was deposited at 3.10 o'clock on the same day with the Insurance Co. Pursuant to that the policy was issued. In such premises, by holding that after receiving the sum of the premium even at 3.10 o'clock (PM), the risk was covered by the Insurance Co. from 12 o'clock of the earlier mid night, i.e. of 4-5th April 1991 or in other case might have the premium was deposited by the agent of the Insurance Co. at belated stage, the claim was awarded for the sum of Rs.27,264/- alongwith interest as stated above by saddling jointly and severally liability against the appellant and respondent nos. 2 and 3 to pay the same. Being dissatisfied of such award saddling the liability against the Insurance Co, the same has come to this court with this appeal.

6. The appellant's counsel after taking me thorough the record of the Tribunal alongwith the impugned award, specifically para no. 21 and the insurance policy, Ex. D-1 and D-2 argued that undisputedly as per depositions of claimant himself the alleged incident had taken place at 11 o'clock in the morning on the aforesaid date and as per aforesaid insurance policy the premium of the same was deposited at 3.10 o'clock (PM) on the same day, i.e. subsequent to four hours and ten minutes from the time of occurring the accident. According to this policy, the appellant, insurance company has covered the risk of such vehicle from 3.10 PM of 5.4.1991 and not prior to that and in such premises, the approach of the tribunal holding that the respondent no.3 was standing in the line to deposit the premium in the office of the Insurance Co., and due to such reason, the delay was caused in

depositing the same, is not sustainable. He also argued that the approach of the Tribunal based on a decision in the matter of *New India Assurance Co. Ltd. Vs. Ram Dayal and others* reported in 1990 (Vol. II) ACJ 545 that the Insurance Co. covered the risk of such vehicle from the beginning of the date 5.4.1991 is not sustainable because the same is contrary to the subsequent decision of the Supreme Court and prayed to exonerate the appellant, insurance company to pay the awarded sum of the impugned award by allowing this appeal. He also placed his reliance on a decision of the Apex Court in the matter of *National Insurance Co. Ltd. Vs. Jikubhai Nathuji Dabhi (Smt.) and others* reported in (1997) 1 SCC 66.

7. No one has appeared on behalf of the respondents to assist the court to rebut the aforesaid arguments.

8. Keeping in view the aforesaid arguments, I have carefully gone through the record of the tribunal as well as the impugned award and the aforesaid insurance policy, Ex. D-2 and Ex. D-3 respectively, out of which, Ex. D-3 is the copy of Ex. D-2. It is undisputed from the impugned award as well as from the pleadings and the other record of the tribunal that the alleged incident had taken place at 11 o'clock (A.M.) on the aforesaid dated 5.4.1991 and the premium for issuing the insurance policy with respect of the offending vehicle was deposited on behalf of respondent no. 3, the registered owner on the same day at about 3.10 o'clock, (P.M.) (in noon), subsequent to accident, as evident from the insurance policy, Annexures D-2 and D-3, i.e. after four hours and ten minutes from the time of occurring the accident. So it is undisputed fact that the risk of the offending vehicle was not covered by the insurer at the time of occurring such accident.

9. So far the case law in the matter of *New India Assurance Co. Ltd. Vs. Ram Dayal and others*, (supra) cited by the tribunal in the impugned award is concerned, the same was not applicable to the present case because in such cited case the time of covering the risk was not mentioned in the insurance policy. Only the date of issuing the policy was mentioned and in that background, it was held that the policy was enforced from the beginning of such date, i.e. earlier midnight of such date, which is not the situation in the case at hand. In the case at hand mere perusal of the insurance policy, Annexure D-2, it is apparent that the contract of the insurance company with the respondent no. 3 to cover the risk of the aforesaid offending vehicle was started from 3.10 o'clock in the noon of aforesaid date 5.4.1991 and not

prior to that. So in such premises, I am of the considered view that the approach of the Tribunal saddling the liability to pay the sum of the impugned award against the appellant jointly and severally with the respondent nos. 2 and 3 is not sustainable.

10. My aforesaid view is fully fortified by the subsequent decision of the Apex Court in the matter of *National Insurance Co. Ltd. Vs. Jikubhai Nathuji Dabhi (Smt.) and others* reported in (1997) 1 SCC 66 presided over by Hon'ble three Judges of the Apex Court in which it was held as under :-

“Insurance -Policy when became operative – In view of special contract mentioned in the policy viz. It would be operative from 4.00 p.m. on the date of payment of premium; general provision under General Clauses Act that contract would be operative from midnight would not be applicable – Accident in this case having occurred around 11 a.m. on the date of payment of premium, held, insurance coverage would not enable the claimant to seek recovery of the amount from the appellant – Company”

11. While deciding the aforesaid subsequent case by the Apex Court, the aforesaid case of *New India Assurance Co. Ltd. Vs. Ram Dayal and others*, (supra), cited by the tribunal was also taken into consideration and distinguished on the reasons mentioned above.

12. Apart the aforesaid, on arising the occasion, this question was also answered by this court in the matter of *United India Insurance Co. Ltd. Vs. Motiram and others* reported in 1996, ACJ 694 in which it was held as under:-

“13. As observed above, though the normal rule is that a policy showing the effective date would be taken to have started from the beginning of the date, i.e. immediately after the previous midnight but where specific time of insurance and the proposal has been given and the same has been made effective after that time the same will have to be taken into consideration.”

13. In view of aforesaid discussion, it is held that the approach of the tribunal holding the liability to pay the awarded sum on the appellant, Insurance Company jointly and severally alongwith respondent nos. 2 and 3 being perverse and contrary to the dictum of the Apex Court, is not sustainable

under the law. Consequently, the same deserves to be set aside, hence by allowing this appeal, the findings of the tribunal holding the liability to pay the awarded sum jointly and severally against the Insurance Company is hereby set aside and till the extent of the appellant insurance company, the claim of respondent no. 1 is hereby dismissed. Accordingly the insurance company is exonerated from the liability of the impugned claim. So far other findings of the tribunal holding the liability to pay the awarded compensation to the respondent no.1 by respondent nos. 2 and 3 jointly and severally are hereby affirmed. However, it is observed that if the sum of any interim awarded or the impugned award has been deposited by the appellant – insurance company, then the Insurance Company shall be at liberty to recover such sum from the respondent no. 3 by filing the execution proceedings on the basis of this order and there shall be no need or necessity to file the separate application or the proceedings to the Insurance Company to recover such sum.

14. There shall be no order as to the costs.

15. The appeal is allowed, as indicated above.

Appeal allowed.

I.L.R. [2015] M.P., 173

APPELLATE CIVIL

Before Mr. Justice Shantanu Kemkar & Mr. Justice Mool Chand Garg

F.A.No. 665/2010 (Indore) decided on 23 October, 2013

MANOJ

...Appellant

Vs.

SMT. RAKSHA

...Respondent

Hindu Marriage Act (25 of 1955), Section 25 - Permanent alimony - Permanent alimony @ Rs. 4,000/- p.m. was granted while passing decree of divorce - No application in this regard was made - Held - Learned trial court has committed an error while awarding permanent alimony and maintenance u/s 25 of the Act without filing any application for this purpose by wife - Impugned order pertaining to grant of permanent alimony to respondent is set-aside. (Paras 2, 7, 8)

हिन्दू विवाह अधिनियम (1955 का 25), धारा 25 - स्थाई निर्वाह भत्ता - विवाह विच्छेद की डिक्री पारित करते हुए 4000/- रु. प्रतिमाह की दर से स्थाई निर्वाह भत्ता प्रदान किया गया था - इस संबंध में आवेदन नहीं दिया गया -

अभिनिर्धारित - पत्नी द्वारा इस प्रयोजन हेतु कोई आवेदन प्रस्तुत किये बिना विद्वान विचारण न्यायालय ने अधिनियम की धारा 25 के अंतर्गत स्थाई निर्वाह भत्ता एवं भरण पोषण प्रदाय कर त्रुटि कारित की - प्रत्यर्थी को स्थाई निर्वाह भत्ता देने से संबंधित आक्षेपित आदेश अपास्त।

Cases referred :

1999 (II) MPJR 82, 1983 MPJL 4.

Lokendra Joshi, for the appellant.

Vinay Gandhi, for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by :
SHANTANU KEMKAR, J. :- Feeling aggrieved by the judgment and decree dated 07.05.2010 passed by the Principal Judge, Family Court, Indore in Hindu Marriage Case No.690/2009, whereby granting maintenance to the respondent / wife and child, the appellant has filed this appeal.

2. The marriage between the appellant and the respondent was solemnized on 13.02.2006. Out of their wedlock, a son was born. After 7-8 days of the marriage, the respondent left the matrimonial home and started living with in her parental home. After two months, she returned back and started quarreling with the appellant and other family members. She always used to insist the appellant to start living with her parents at her parental home. When the appellant refused to do so, she left the matrimonial home on 27.11.2007 and started living with her parents. Even after repeated efforts of the appellant, she did not return. The appellant then filed application under Section 9 of the Hindu Marriage Act for restitution of conjugal rights in which a decree was passed in favour of the appellant. Even after passing of the decree for restitution of conjugal, the respondent did not turn up to stay with the appellant; in the circumstances, the appellant had filed an application for divorce. Before the trial Court, the respondent remained ex parte. The trial Court on the basis of un-rebutted evidence led by the appellant granted him the decree of divorce on the ground of desertion and cruelty. While granting decree of divorce, the trial Court awarded maintenance of Rs.4,000/- per month to the wife and her son. Feeling aggrieved by this part of the decree, the appellant has filed this appeal.

3. The only contention of the learned counsel for the appellant is that the

learned trial Court while passing of the decree of divorce could not have granted the relief of permanent alimony to the wife, without there being any application on her behalf in that regard. On the other hand, learned counsel for the respondent argued that it was not necessary for the respondent / wife to have filed application for the purpose.

4. In order to appreciate the contentions raised by the learned counsel for the parties, it would be appropriate to extract Section 25 of the Hindu Marriage Act, on the basis of which, the permanent alimony has been ordered by the trial Court: -

“25. Permanent alimony and maintenance.

(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, **on application made to it for the purpose by either the wife or the husband,** as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant the conduct of the parties and other circumstances of the case], it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(Emphasis supplied)

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under subsection (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the Court may deem just..

(3) If the court is satisfied that the party in whose favour an order has been made under this section has re-married or, if such party is the wife, that she has not remained chaste, or, if such, party is the husband, that has had sexual intercourse, with any woman outside wedlock, [it may at the instance of the other party vary, modify or rescind any such order in such

manner as the court may deem just]"

5. Having regard to the aforesaid provision, it is clear that filing an application is the requirement for the Court to grant relief. Admittedly, in the present case, no application, as required under Section 25 has been filed. On the other hand, the respondent remained ex parte before the trial Court through out.

6. We also find that the question involved in this appeal has already been considered and decided by a Division Bench of this Court in the case of *Smt. Chhaya Kshatriya v. Pramod Kumar Kshatriya* 1999 (II) MPJR 82, as also in the case of *Jitbandhan v. Gulab Devi* 1983 MPJL Short Note 4. In these cases, it has been held by this Court that jurisdiction under Section 25 of the Hindu Marriage Act is attracted on an application made to the Court for that purpose by either the wife or the husband. In the absence of an application by the wife or the husband, the Court has no jurisdiction to pass an order under Section 25 of the Hindu Marriage Act for permanent alimony and maintenance. The Division Bench of this Court in *Smt. Chhaya Kshatriya v. Pramod Kumar Kshatriya* (supra) has held, as under: -

“The nature of controversy which is determined under Section 25 of the Act is quite different what is done under Section 24 of the Act or for that matter u/s 26 of the Act. Considering the various factors to be taken into consideration and the nature of the case the Court is required to look into, the Legislature has used the words “on an application made to it for the purpose”.

We would hasten to add that when a liability is going to be saddled on the husband or wife, and the liability can be onerous, there has to be compliance with principles of natural justice. If no application is filed and the plea of the relief-seeker is not known and the other side is kept in dark and the Court exercises its jurisdiction without proper scrutiny of the factual backdrop, and without being in a position to consider the defences of the other side, the whole adjudication would be against the concept of, *audi alteram partem*, and for that reason, in our humble view, the Legislature in its wisdom has qualified the situation by ‘on an application made to it for the purpose’. The application can be filed during the pendency of the suit,

contesting respondent can be afforded reasonable opportunity to resist the same and thereafter, the Court would depose of the controversy at the time of delivery of the judgment if other condition precedent i.e. disruption of marital status, has been satisfied. The parties can adduce evidence in that regard and the Court on consideration of the materials on record can proceed to pass necessary order as enjoined under law. This would sub-serve the cause of justice and would be in consonance with the principles of natural justice.”

7. Having regard to the aforesaid clear legal position, we are of the view that the learned trial Court has committed error in passing the decree for grant of maintenance under Section 25 of the Hindu Marriage Act, without there being an application made for the purpose.

8. In the circumstances, the impugned order of the trial Court pertaining to grant of permanent alimony to the respondent deserves to be and is hereby set aside.

No order as to costs.

Order accordingly.

I.L.R. [2015] M.P., 177

APPELLATE CIVIL

Before Mr. Justice Rajendra Menon & Mr. Justice Alok Verma

M.A. No. 402/2013 (Jabalpur) decided on 10 July, 2014

SURENDRA PATEL & anr.

...Appellants

Vs.

RITU @ VANDANA PATEL

...Respondent

Hindu Minority and Guardianship Act, (32 of 1956), Section 6, Guardians and Wards Act (8 of 1890), Sections 12 & 25 - Custody of minor girl aged 4½ years - Consideration - Custody given to mother - Paramount consideration is welfare of child and not rights of her parents - Both families belong to agricultural class and they have similar financial and social back ground - Daughter is still 4½ years old and the mother is capable for taking care her properly - No infirmity in the impugned order - Appeal dismissed. (Paras 10, 11, 13 & 14)

हिंदू अप्राप्तवयता और संरक्षकता अधिनियम, (1956 का 32), धारा 6, संरक्षक

और प्रतिपाल्य अधिनियम (1890 का 8), धाराएं 12 व 25 - 4½ वर्ष की उम्र की अवयस्क बालिका का संरक्षण - विचारण - संरक्षण मां को सुपुर्द किया गया - शिशु का कल्याण सर्वोपरि विचार में लिया जाता है और न कि माता-पिता के अधिकार - दोनों परिवार कृषि वर्ग से संबंधित हैं और समान वित्तीय एवं सामाजिक पृष्ठभूमि के हैं - बालिका अभी 4½ वर्ष की है और उसकी उचित देखरेख करने में माता सक्षम है - आक्षेपित आदेश में कोई निःशक्तता नहीं - अपील खारिज।

Cases referred :

2014(2) MPLJ 408, 1984 (3) SCC 698.

B.S. Sahu, for the appellants.

Chaudhary Rahul Singh, for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by :
ALOK VERMA, J. :- This appeal has been filed under Section 47 of the Guardians & Wards Act, 1890 and directed against the order passed by the learned First Additional District Judge, Narsinghpur (MP) in Misc. Civil Case No.09/2012 dated 07/01/2013, whereby the learned Additional District Judge allowed the application filed by the respondent/applicant/wife Ritu @ Vandana Patel and granted custody of her daughter Vaishnavi aged about 2 years at the time of passing the order.

2. The facts of the case are that the appellant was married to the respondent Ritu alias Vandana on 18/04/2009. Thereafter, a daughter Vaishnavi was borne, (sic: born) out of their wedlock. After sometimes, discord aroses (sic:arose) allegedly on demand of dowry by the appellant. Thereafter the respondent left the house of the appellant and started living with her parents. The assertion of respondent is that her daughter was forcibly snatched by the appellant, therefore, she lodged an First Information Report (FIR) against the appellant which is under investigation.

3. On the other hand, the appellant alleges that the respondent left his house on her own. She was not taking care of her daughter and was not keen to give birth to the child and she also tried to avoid the delivery during her pregnancy. Under such allegations and counter allegations, the application under Section 25 read with Section 12 of the Guardians & Wards Act, 1890, was filed by the respondent before the learned First Additional District Judge, which was decided by the aforesaid impugned order and the custody of the child (daughter Vaishnavi) was handed over to the respondent.

4. Aggrieved by the aforesaid order, this misc. appeal is filed by the

appellant alleging that the child was living with him and his mother Smt. Sunita Kushwaha (Appellant No.2), when due to the order of the Court her custody was handed over to the respondent. According to him, respondent was never interested in the child and she left the child on her own and she was living with her parents on its own sweets will. As the interest of child for taking care more effectively by the father, the custody of the child be handed over to the father.

5. We have heard learned counsel for both the parties and perused the impugned order.

6. The learned counsel for the applicant draw our attention to para 8 of the statement of Bharat (PW-2) father of respondent (Ritu @ Vandana), who admitted therein that the respondent has been living with him and taking care of her handicapped mother. In the light of the statements of Ritu alias Vandana (PW-1) and Bharat (PW-2), the learned counsel pointed out that the respondent left the house of the appellant on her own for serving and taking care of her handicapped mother. Learned counsel has also drew our attention to para 10 of the statement of respondent Ritu @ Vandana (PW-1), wherein she admitted that there is a police post at Jhoteswar which is near to her village to show that FIR lodged against her was false and have lodged the report in the Police Station.

7. The learned counsel for the respondent argued that under Section 6 of the Hindu Minority & Guardianship Act, 1956, it is directed that ordinarily up to the age of 5 years, the custody of the minor child should remain with the mother. He also submitted that there is nothing on record to show that after the child given in the custody of her mother, her physical well being had been adversely effected.

8. Most of the facts are disputed in this case but it hardly matters how the child was in the custody of her father, when the impugned order was passed and her custody was delivered to her mother.

9. The paramount consideration of this case is "the welfare of the child" and not the rights of her parents. On this point, a judgment of this Court in the matter of *Rajeev vs. Santosh Kumar*, 2014 (2) MPLJ page 408, may be referred in which it was held that in case of minor girl, paramount consideration is "welfare of child" and not rights of her parents. We may also refer the judgment of Hon'ble Supreme Court in the case of *Gaurav Nagpal vs. Sumedha Nagpal*, passed in Civil Appeal No.5099/2007 on 19/11/2008, wherein in para 40 of the judgment,

the Hon'ble Supreme Court has observed that *"Merely because there is no defect in his personal care and his attachment for his children, which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. Children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the 25 requirements of welfare of the minor children and the rights of their respective parents over them."*

10. The Hon'ble Court also referred the order passed in *Surinder Kaur Sandhu (Smt.) vs. Harbax Singh Sandhu*, 1984 (3) SCC 698, wherein it was held that Section 6 of the Act constitutes father as a natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. Further in para 43 in its judgment, the Court observed that the moral and ethical welfare of the child must also weigh with the Court as well as its physical well being.

11. Returning back to the present case, it was informed by the learned counsel to the Bench during the argument that both the families belong to agricultural class. They have similar financial and social background. The daughter is still 4½ years old and the mother is capable for taking care her properly.

12. Since both the families have similar financial and social background. The child is still below five years of age, we find that the impugned order is according to the principles laid down in the aforementioned cases of the Hon'ble Apex Court and does not call for any interference.

13. In view of the aforesaid, we find no infirmity in the impugned order passed by the learned First Additional District Judge, Narsinghpur, including the visitation rights that were granted to the appellant/father by the impugned order.

14. In the result, the appeal is, therefore, dismissed. Parties to bear their own costs.

Appeal dismissed.

I.L.R. [2015] M.P., 181

APPELLATE CIVIL

Before Mr. Justice M.K.Mudgal

M.A. No. 3129/2012 (Jabalpur) decided on 3 November, 2014

CHANDRAKANT & ors.

...Appellants

Vs.

TIKAM DAS & ors.

...Respondents

Civil Procedure Code (5 of 1908), Order 7 Rule 10 - Return of plaint - Respondent No.1/Plaintiff filed the suit for declaration of title, permanent injunction and possession - Issue was framed that whether plaintiff had properly valued the suit and has paid proper court fee - Trial court held the suit has not been valued properly and proper court fees has not been paid - It was further held that trial court has no jurisdiction - Trial court also held that plaintiff has failed to prove his title - Held - After having held that trial court had no jurisdiction, court should have returned the plaint - There was no need for court to decide the case on merits - Direction by the Appellate Court for returning the plaint is proper - Appeal dismissed. (Paras 6, 7, 8 & 9)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 10 - वादपत्र की वापसी - प्रत्यर्थी क्र. 1/वादी ने हक की घोषणा, स्थायी व्यादेश एवं कब्जे हेतु वाद प्रस्तुत किया - विवाद्यक विरचित किया गया कि क्या वादी ने वाद का उचित रूप से मूल्यांकन किया और उचित न्यायालय शुल्क अदा किया है अथवा नहीं - विचारण न्यायालय ने अभिनिर्धारित किया कि वाद का उचित मूल्यांकन नहीं किया गया और उचित न्यायालय शुल्क अदा नहीं किया गया है - आगे अभिनिर्धारित कि विचारण न्यायालय को अधिकारिता नहीं थी - विचारण न्यायालय ने यह भी अभिनिर्धारित किया कि वादी अपना हक साबित करने में असफल रहा - अभिनिर्धारित - यह धारणा करने के पश्चात कि विचारण न्यायालय को अधिकारिता नहीं है, न्यायालय को वादपत्र वापस करना चाहिए - न्यायालय के लिए आवश्यक नहीं था कि प्रकरण को गुण-दोषों पर निर्णित करे - अपीलीय न्यायालय द्वारा वादपत्र की वापसी के लिये निदेश उचित - अपील खारिज।

Case referred :

2002(1) MPLJ 458.

Abdul Vaheed Choudhary, for the appellants.

Shailendra Verma, for the respondents.

J U D G M E N T

M.K. MUDGAL, J. :- The appellants/ L.Rs. of Defendant No. 1 have filed instant miscellaneous civil appeal under Order 43 Rule 1 (a) of the Code of Civil Procedure being aggrieved by the judgment and decree dated 10-09-12 passed by the Court of District Judge, Burhanpur in Civil Appeal No. 31A/12 setting aside the judgment and decree dated 10-04-12 passed in Civil Suit No. 17A/11 by the Court of Ist Civil Judge Class-I, Burhanpur directing the said Court to return the plaint to the respondent No. 1/plaintiff under Order 7 Rule 10 of C.P.C. holding that the worth of the disputed property was more than 60 to 70 lacs and as a result it ought to have been the valuation of the suit, hence the learned trial Court had no jurisdiction to entertain the suit. It is further mentioned here that the learned trial Court after recording the evidence of both the parties, dismissed the suit holding that the respondent No. 1/plaintiff had failed to prove his case and as the worth of the disputed property was more than 60 to 70 lacs and the valuation putforth by the plaintiff was not correct and the Court had no jurisdiction to entertain the suit.

2. Learned counsel for the appellants submits that the learned appellate Court has committed error in law in setting aside the judgment and decree of the learned trial Court hereby the suit filed by the respondent No. 1/plaintiff for declaration of title and permanent injunction was dismissed holding that the plaintiff had failed to prove his case on merits. In the said circumstances, the learned appellate Court ought to have considered the entire evidence on record and only the issue of valuation should not have been decided. Learned Counsel further submits that the valuation of the suit putforth by the plaintiff was just and proper according to the relief sought by the plaintiff in Para 16 of the plaint. Learned counsel further placing reliance upon the judgment in the case of *Dharamraj Singh Chhotelal Singh Chouhan vs Vaidya Nath Prasad Khare and others* 2002 (1) MPLJ Page 458 pleads that as per section 4 and 8 of the Suit Valuation Act the mode of valuation of the suit is the same as prescribed in the Court Fees Act for payment of court fees. According to the relief sought in the plaint the valuation of the suit putforth by the plaintiff is at 20 times of the land revenue payable for the land and is according to Sec. 7 of the Court Fees Act because the disputed land is land revenue paying land. Learned counsel further argued that the findings recorded by the learned trial Court regarding the merit of the dismissal of the suit should not have been set aside by the appellate Court as the plaintiff did not in succeeding to prove his case. On the aforesaid grounds, learned counsel for the appellants has

prayed for setting aside the impugned judgment and directing the appellate Court to decide the appeal on merits.

3. Learned counsel for the respondent No. 1/plaintiff opposing the submissions made on behalf of the appellant submits that the findings recorded by the learned appellate Court are appropriate as the plaintiff himself has admitted in Para-34 of his statement that the worth of the disputed property was about 60 to 70 lacs. On the basis of which the learned trial Court having considered the evidence on record has held in Para-12 that the valuation put forth by the plaintiff in Para-13 of the plaint was not proper. Learned counsel further pleads that the learned appellate Court also after considering the entire evidence on record has arrived at the conclusion that considering the statement of the plaintiff and worth of the disputed property the valuation put forth by the plaintiff in Para-13 of the plaint was not appropriate. The suit should have been valued at Rs. 60 lacs which would have put the suit beyond the jurisdiction of the trial Court, because as per section 6 (1)(b) of the Suit Valuation Act the learned Civil Judge Class-I had only jurisdiction to entertain the suit which is valued up to Rs.50,000/when the suit was filed.

4. Learned counsel further strenuously argued that the appellants/defendants themselves filing written statement challenged the suit valuation put forth by the plaintiff and pleaded that the trial Court had no jurisdiction to entertain the suit. In the said circumstances, the appellants are not entitled to say that the trial Court had jurisdiction to entertain the suit and the judgment and decree dated 10-04-12 passed by the said Court is just and proper. When the Court had no jurisdiction to try the suit the judgment and decree passed by the Court on merits is null and void, hence the findings recorded on merits set aside by the appellate Court are just and proper..

5. Heard the arguments and perused the record.

6. The respondent No. 1/plaintiff filed the suit for declaration of title, permanent injunction and possession regarding disputed property described in Annexure A of the plaint, assessing the valuation of the suit at Rs. 1068/in Para-13 of the plaint. The appellant/defendant along with other defendants submitting their written statements denying the title of the plaintiff and allegations of the plaint specifically pleaded in Para-12 that the valuation put forth by the appellant is totally arbitrary and contrary to law and the Court has no jurisdiction to entertain the suit. Learned trial Court vide order dated 29-08-11 framed 15 issues on the basis of pleadings of both the parties. Out of them issue No.

12 was framed regarding the valuation and court fees which reads as under :

क्या वाद का उचित मूल्यांकन कर पर्याप्त न्यायशुल्क चरपा कर प्रस्तुत किया गया है ?

7. The said issue could not be decided as preliminary issue by the Court because question of fact was involved in the issue along with that of the law. Thereafter evidence of both the parties was recorded. Learned trial Court having considered the evidence of both the parties on merit dismissed the suit vide judgment and decree dated 10-04-12 holding that the plaintiff had failed to prove his title in the disputed property. The learned Court in Para 18 of the judgment further held that the valuation putforth by the plaintiff was not correct because the plaintiff himself had admitted in Para 34 of his statement that the worth of the houses situated in the disputed property was near about 60 to 70 lacs. On the basis of which it was decided by the Court that the Court had no jurisdiction to entertain the suit.

8. The respondent No. 1/plaintiff being aggrieved by the judgment and decree challenging the legality and validity of the judgment filed the appeal before the District Judge. However, the appellant/defendant and other defendants did not challenge the findings of the trial Court in the appeal. Learned Appellate Court, having considered the merits of the case, has confirmed the finding of the trial Court regarding valuation in Para 6 to 9 in the impugned judgment. The findings recorded by the learned trial Court as well as Appellate Court in connection with the suit valuation appear to be justified because the worth of the disputed property was more than 60 to 70 lacs. The suit was filed for declaration of the title of the said property owing to which the suit ought to have been valued according to market value of the property. The findings of the trial Court had become final against the appellants/defendants as they did not challenge the finding of the trial Court in the Appellate Court by cross objection. In the said circumstances the appellants are estopped to challenge the findings of valuation of suit recorded by the learned trial Court in the instant appeal. Only the legality and propriety of the trial Court's judgment was challenged by the respondent No. 1/plaintiff before the Appellate Court, hence in this appeal the appellants are not entitled to say that the valuation putforth by the respondent No. 1/plaintiff was correct. As per pleadings appellants themselves challenged the valuation of the suit as well as jurisdiction of the trial Court, as a result the Appellate Court has also held in the impugned judgment that the trial Court had no jurisdiction to entertain the suit. When the trial Court had no jurisdiction to entertain the suit, there was no need for the Court to decide the case on merits and giving the finding to the effect that the plaintiff had

failed to prove his case. Therefore, the learned appellate Court rightly set aside the findings of the trial Court regarding the dismissal of the suit on merits. The judgment cited by the appellants in support of their submission does not help him in this case because as discussed earlier the valuation assessed by the trial Court as well as by Appellate Court cannot be challenged by the appellants against their pleadings stated in Para 12 of the written statement. Moreover the said judgment is related to the issue of the determination of court fees.

9. Considering the aforesaid facts and circumstances of the case, this Court comes to conclusion that the learned Appellate Court has not committed any error in setting aside the judgment of the trial Court and directing the Court for returning the plaint. Therefore, the appeal is hereby dismissed.

10. The appellants shall bear theirs own cost and the cost of respondent No. 1/plaintiff.

Appeal dismissed.

I.L.R. [2015] M.P., 185

APPELLATE CIVIL

Before Mr. Justice M.C. Garg

S.A. No. 1130/2005 (Gwalior) decided on 8 January, 2015

STATE OF M.P. & ors.

...Appellants

Vs.

RAJENDRA KUMAR & ors.

...Respondents

Land Revenue Code, M.P. (20 of 1959), Section 248 - Penalty for unauthorizedly taking possession of land - Held - That, the provisions of this Section are applicable to municipal area. (Para 5)

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 248 - अप्राधिकृत रूप से भूमि का कब्जा लेने के लिये शास्ति - अभिनिर्धारित - यह कि, इस धारा के उपबंध नगरपालिका क्षेत्र को लागू होते हैं।

Case referred :

2011 RN 406.

B. Raj Pandey, G.A. for the appellants/State.

Anvesh Jain, for the respondents.

(Supplied : Paragraph numbers)

ORDER

M.C. GARG, J. :- This second appeal under Section 100 CPC has been filed against the judgment and decree dated 05.04.2005 passed by 2nd Additional District Judge in Civil Appeal No. 62A/2005 reversing the judgment and decree dated 09.02.2006 passed by 2nd Civil Judge Class II in Civil Suit No. 36A/2004

2. This appeal is admitted on the following substantial question of law:

“As to whether the provision of Section 248 of the M.P. Land Revenue Code was not applicable to the municipal area or not?”

3. With the consent of parties, matter is finally heard.

4. The trial Court dismissed the suit, but in the first appeal, the Appellate Court allowed the appeal filed by the respondents holding, that the suit filed by the respondent/plaintiff was maintainable as provisions of Section 248 were not applicable to the municipal area.

5. It has been brought to our notice by the counsel for appellant/State that in a judgment passed by this Court in case of *Rashid Khan & Another Vs. State of M.P. & Others* reported in 2011 RN 406, where it has been categorically held that Section 248 of M.P. Land Revenue Code is applicable even in municipal area, which is based upon the judgment of Hon'ble Apex Court where a Division Bench judgment of this Court was reversed. Para 10 of the judgment is reproduced herein:

“So far as the contention of learned counsel for the appellants that since the land is in the Municipal area, the provisions of Section 248 of the Code are not applicable is concerned, the entire argument is based on the pivot of dictum laid down by the Division Bench of this Court in case of *Sind Mahajan* (Supra) which has been reversed by the Supreme Court in case of *State of M.P. & another Vs. Sind Mahajan Exchange Ltd.* reported in 1999 RN 328. Hence this contention cannot be accepted that in the Municipal area the provisions of Section 248 of the Code are not attracted.”

6. At this stage, learned counsel for the respondent submits that their grievance was not with respect to land forming part of survey no. 1175, whereas

reading of plaint itself shows that the respondent who has purchased the land forming part of survey no. 1174 had claimed that the land purchased by them was being shown as part of survey no. 1175.

7. The respondents submits that they are not claiming any interest in the land forming part of survey no. 1175 measuring 130x60 ft and if the appellant wishes to take steps about possession of that part, he will have no objection in that regard.

8. On the basis of statement made by learned counsel for the respondent and the law laid down by the Apex Court, appeal stands disposed of.

There is no order as to cost.

Appeal disposed of.

**I.L.R. [2015] M.P., 187
APPELLATE CRIMINAL**

Before Mr. Justice Ajit Singh & Mr. Justice N.K. Gupta

Cr. A. No. 118/2001 (Jabalpur) decided on 27 August, 2014

SAMAR JEET SINGH & ors.

...Appellants

Vs. :

STATE OF MADHYA PRADESH

...Respondents

A. Evidence Act (1 of 1872), Section 3 - Witness - Examination in chief of prosecution witnesses was recorded on 17.12.1999 - Witnesses were not cross examined on the ground of non-preparation of case - Prosecution witnesses were cross examined after one month when they turned hostile - Witnesses were either won over or they were threatened not to support the prosecution's case - In such circumstance, previous testimony cannot be brushed aside on the ground that the witness was declared hostile - Deposition of witness given prior to cross examination can be relied upon if there is corroborative evidence to that effect. (Para 10)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 - साक्षी - अभियोजन साक्षियों का मुख्य परीक्षण 17.12.1999 को अभिलिखित किया गया - प्रकरण की तैयारी नहीं होने के आधार पर साक्षियों का प्रतिपरीक्षण नहीं किया गया - अभियोजन साक्षियों का प्रतिपरीक्षण एक माह पश्चात किया गया, जब वे पक्ष विरोधी बन गये - साक्षीगण को या तो अपने तरफ किया गया या अभियोजन प्रकरण का समर्थन न करने के लिए धमकाया गया - उक्त परिस्थिति में, पूर्वतर

परिसाक्ष्य को इस आधार पर दुकराया नहीं जा सकता, कि साक्षी को पक्ष विरोधी घोषित किया गया था - प्रतिपरीक्षण से पूर्व साक्षी के कथन पर विश्वास किया जा सकता है, यदि उस प्रभाव का पुष्टिकारक साक्ष्य है।

B. Penal Code (45 of 1860), Section 302 - Murder - Witness
- Previous version of witnesses is duly corroborated by timely lodged FIR, Post-Mortem Report, M.L.C. of injured - Acceptable testimony of witnesses may be acted upon. (Para 11)

ख. दण्ड संहिता (1860 का 45), धारा 302 - हत्या - साक्षी - साक्षियों का पूर्वतर कथन, समय पर दर्ज की गयी प्रथम सूचना रिपोर्ट, शव परीक्षण प्रतिवेदन, आहत की एम.एल.सी. द्वारा सम्यक रूप से अभिपुष्ट होता है - साक्षीगण की स्वीकार योग्य परिसाक्ष्य पर कार्यवाही की जा सकती है।

C. Penal Code (45 of 1860), Section 302 - Murder -
Complainant alongwith his son and daughter were collecting Mahua when the appellant No. 1 tried to stop them from doing so - On refusal to do so, appellant No. 1 threatened that he will bring a gun and teach them a lesson - After some time, the complainant noticed that the accused persons were coming with gun and tangi - All the three persons ran towards their house - The appellants entered inside the house of the complainant and fired at son of complainant who died on the spot - Appellant No. 1 also fired causing injury to complainant - F.I.R. was lodged within 2 hours - Gun shot was fired by the appellant with an intention to kill deceased - Trial Court rightly convicted him u/s 302. (Para 12)

ग. दण्ड संहिता (1860 का 45), धारा 302 - हत्या - शिकायतकर्ता अपने पुत्र और पुत्री के साथ महुआ एकत्रित कर रहा था, जब अपीलार्थी क्र. 1 ने उसे ऐसा करने से रोका - इंकार करने पर अपीलार्थी क्र. 1 ने धमकाया कि वह बंदूक लायेगा और उन्हें सबक सिखायेगा - कुछ देर बाद शिकायतकर्ता ने देखा कि अभियुक्त गण बंदूक और टांगी लेकर आ रहे थे - तीनों व्यक्ति अपने घर की तरफ भागे - अपीलार्थीगण ने शिकायकर्ता के मकान के अंदर प्रवेश किया और शिकायतकर्ता के पुत्र पर गोली चलायी, जिसकी मृत्यु घटनास्थल पर ही हो गई - अपीलार्थी क्र. 1 ने भी गोली चलायी, जिससे शिकायतकर्ता को चोट कासित हुई - प्रथम सूचना रिपोर्ट 2 घंटे के भीतर दर्ज कराई गई - अपीलार्थी द्वारा मृतक को जान से मारने के आशय से गोली चलायी गई - विचारण न्यायालय ने उसे उचित रूप से धारा 302 के अंतर्गत दोषसिद्ध किया।

D. Penal Code (45 of 1860), Section 307 - Attempt to murder
- Appellant No. 1 fired at complainant causing simple injury on his elbow

- If overall conduct of appellant No. 1 is considered then, it would be apparent that he had intended to kill the complainant - Appellant No. 1 had committed an offence as u/s 307 of I.P.C. (Para 13)

घ. दण्ड संहिता (1860 का 45), धारा 307 - हत्या का प्रयास - अपीलार्थी क्र. 1 ने गोली चलाकर शिकायतकर्ता को कोहनी पर साधारण चोट कारित की - यदि अपीलार्थी क्र. 1 का संपूर्ण आचरण विचार में लिया जाए, तब यह प्रकट होता है कि उसका आशय, शिकायतकर्ता को जान से मारने का था - अपीलार्थी क्र. 1 ने भा.द.सं. की धारा 307 के अंतर्गत अपराध कारित किया है।

E. Penal Code (45 of 1860), Sections 302/34, 307/34 - Common intention - Third appellant came to the spot alongwith two other appellants with tangi in his hand but there is no overt act on his part - Possibility cannot be ruled out that he would have changed his mind after his arrival at the spot - No overt act to show common intention with co-accused - Third appellant could not have been convicted for any of the offence with the help of Section 34. (Para 14)

ज. दण्ड संहिता (1860 का 45), धाराएं 302/34, 307/34 - सामान्य आशय - तृतीय अपीलार्थी अन्य दो अपीलार्थियों के साथ अपने हाथ में टांगी लेकर घटनास्थल पर आया, परंतु उसकी ओर से कोई प्रत्यक्ष कृत्य नहीं है - इस संभावना से इंकार नहीं किया जा सकता कि घटनास्थल पर पहुंचने के पश्चात उसने अपना मन बदला होगा - सह-अभियुक्त के साथ सामान्य आशय दर्शाने के लिए कोई प्रत्यक्ष कृत्य नहीं - तृतीय अपीलार्थी को धारा 34 की सहायता से किसी अपराध हेतु दोषसिद्ध नहीं किया जा सकता था।

F. Penal Code (45 of 1860), Section 302/34 - Common intention - Appellant No. 1 had hot talk with complainant - He went to the house of complainant and his intention could be to kill the complainant - There was no need for appellant No. 1 to cause any harm to 11 year old boy who died in the incident - Appellant No. 1 never intended to kill the deceased - Merely by going to the house of complainant with gun and two companions do not mean that appellant No. 1 had intended to kill the deceased - No common intention of appellant No. 1 with appellant No. 2 to kill deceased child - Conviction of appellant No. 1 for offence u/s 302/34 set aside. (Para 15)

च. दण्ड संहिता (1860 का 45), धारा 302/34 - सामान्य आशय - शिकायतकर्ता के साथ अपीलार्थी क्र. 1 की कहा-सुनी हुई थी - वह शिकायतकर्ता के घर गया और उसका आशय शिकायतकर्ता को जान से मारना हो सकता है -

11 वर्षीय बालक को कोई हानि कारित करने की अपीलार्थी क्र. 1 को कोई आवश्यकता नहीं थी, जिसकी घटना में मृत्यु हुई - मृतक की मृत्यु कारित करने का अपीलार्थी क्र. 1 का आशय नहीं था - मात्र शिकायतकर्ता के घर बंदूक लेकर और दो साथियों के साथ जाने से यह अर्थ नहीं है कि अपीलार्थी क्र. 1 का आशय मृतक को जान से मारना था - मृतक बालक को जान से मारने का अपीलार्थी क्र. 2 के साथ अपीलार्थी क्र. 1 का सामान्य आशय नहीं - धारा 302/34 के अंतर्गत अपीलार्थी क्र. 1 की दोषसिद्धि अपास्त।

G. Penal Code (45 of 1860), Section 307/34 - Common intention - Second appellant went to the house of complainant alongwith gun and fired from the gun killing the deceased - He had intention to kill the complainant - Second appellant shared common intention to kill the complainant - He is rightly convicted u/s 307/34 of I.P.C. (Para 17)

छ. दण्ड संहिता (1860 का 45), धारा 307/34 - सामान्य आशय - द्वितीय अपीलार्थी बंदूक लेकर शिकायतकर्ता के घर गया और बंदूक से गोली चलाकर मृतक को जान से मार दिया - उसका आशय शिकायतकर्ता को जान से मारना था - भा.द.सं. की धारा 307/34 के अंतर्गत उचित रूप से उसे दोषसिद्ध किया गया।

H. Penal Code (45 of 1860), Section 450 - House Trespass - Incident took place in a courtyard - Courtyard was covered from 4 sides from walls and rooms of the house of complainant - It had a gate and no one can enter inside if gate is closed - Place of incident is nothing but a part of house - Appellants No. 1 and 2 are guilty of offence u/s 450 of I.P.C. (Para 17)

ज. दण्ड संहिता (1860 का 45), धारा 450 - गृह अतिचार - घटना आंगन में घटी - आंगन चारों तरफ दीवार और शिकायतकर्ता के मकान के कमरों से घिरा था - उसका एक प्रवेशद्वार था और यदि प्रवेशद्वार बंद हो, कोई प्रवेश नहीं कर सकता था - घटनास्थल और कुछ नहीं बल्कि मकान का हिस्सा है - अपीलार्थी क्र. 1 व 2, भा.द.सं. की धारा 450 के अंतर्गत अपराध हेतु दोषी हैं।

Cases referred :

AIR 1975 SC 1400, (1994) 2 SCC 220, AIR 1991 SC 1853, (2004) 3 SCC 793, AIR 1994 SC 1452, (1984) (Supp.) SCC 373, (1976) 3 SCC 779, (1976) 3 SCC 391, (2001) 4 SCC 193, AIR 1956 Punjab 122.

Aditya Adhikari with Satish Chaturvedi, for the appellants.

Yogesh Dhande, G.A. for the State.

J U D G M E N T

The Judgment of the Court was delivered by :
N.K. GUPTA, J. :- The appellants have preferred the present appeal against the judgment dated 11.12.2000 passed by the learned Additional Sessions Judge, Beohari, District Shahdol in S.T.No.193/1999 and S.T.No.65/2000, whereby the appellants have been convicted and sentenced as under:-

<u>Conviction</u>	<u>Sentence</u>	<u>Fine</u>	<u>Default Sentence</u>
U/s 302/34 of IPC	Life Imprisonment	Rs.500/-	R.I. for 3 months
U/s 307/34 of IPC	R.I. for 10 years	Rs.500/-	R.I. for 3 months.
U/s 450/34 of IPC	R.I. for 5 years	Rs.500/-	R.I. for 3 months.

2. The prosecution's case, in short, is that, on 26.3.1997, the complainant Ramkumar @ Pottu (P.W.8) alongwith his son deceased Babulal and daughter Sushila went to Gariyara Mauhaar to collect some Mahua, near his house, situated at village Pasaud (Police Station – Jaisingh Nagar, District Shahdol). Appellant Samarjeet Singh stopped him from picking up Mahua fallen from the tree. The complainant Ram Kumar told him that the tree of Mahua was his property and therefore, he alone will collect the Mahua of that tree. The appellant Samarjeet Singh also threatened the complainant that he would bring a gun to teach him a lesson. The complainant alongwith his son and daughter continued to collect Mahua. At about 9 a.m., the complainant saw the appellant Samarjeet Singh coming towards him having a gun in his hand alongwith Kaptan Singh and Sheopal Singh. The appellant Kaptan Singh also had a gun, whereas the appellant Sheopal Singh had a tangi (small axe). The complainant alongwith his children ran towards his house. But the appellants also chased and entered the house of complainant. Kaptan Singh fired with the gun, causing injury on the head of deceased Babulal. Head of deceased Babulal was broken and he fell on ground and died. Appellant Samarjeet Singh had also fired with the gun, causing injury in the left elbow of complainant Ramkumar and thereafter, the appellants had ran away. Sushila (P.W.9), daughter of complainant was also present at the spot at the time of incident, whereas Chhallu and Munna, brothers of complainant Ramkumar came to the spot after hearing the commotion. Thereafter, complainant Ramkumar went to the Police Station

alongwith Chhallu and Rampal and lodged an FIR, *Ex.P/18*. Complainant Ramkumar had been sent for his medico legal examination, whereas dead body of deceased Babulal was sent for post-mortem. Dr.Sampoorananand (P.W.1) had performed the post-mortem on the body of deceased Babulal @ Dadu, aged 11 years and gave his report, *Ex.P/1*. He found entry as well as exit wound on the head of deceased Babulal. His frontal, parietal and other various bones in the head were found broken. He died due to head injury caused by gun shot. His death was homicidal in nature. He had also examined the victim Ramkumar and gave his report, *Ex.P/3*. He found entry as well exit wound on left elbow of the complainant, caused by gun shot and he found consequential injuries on his left elbow. The police seized various articles from the spot, accused and the officials of hospital and sent them to the Forensic Science Laboratory after sealing them. In Forensic Science Laboratory report, *Ex.P/17*, it was opined that there was a dent mark of gun shot on bamboo, whereas a piece of lead was found by the police was a piece of bullet fired from a smooth bore weapon. After due investigation, a charge-sheet was filed before the JMFC, Beohari, who committed the case to the Sessions Court, Shahdol and ultimately, it was transferred to the learned Additional Sessions Judge, Beohari.

3. The appellants abjured their guilt. They did not take any specific plea in defence and therefore, no defence evidence was adduced.

4. The learned Additional Sessions Judge, after considering the prosecution's evidence, acquitted the accused Ajeet Singh but, convicted and sentenced the appellants as mentioned above.

5. We have heard the learned counsel for the parties at length.

6. In the present case, the witnesses Sushila (P.W.9), Bhuggi @ Juggi (P.W.11) and Ramkumar (P.W.8) were examined as eye witnesses. Initially they have stated about the entire incident. They have also stated that appellant Kaptan Singh fired his gun and caused a fatal injury to deceased Babulal, whereas due to gun shot fire made by appellant Samarjeet, Ramkumar sustained an injury on his left elbow. Other witnesses like Phool Bai (P.W.10), Munni (P.W.12), Munna (P.W.13) were examined as witnesses, who reached the spot, soon after the incident and they saw the appellants leaving the spot. The witnesses Ramkali (P.W.3), Ujariya (P.W.5), Ram Bai (P.W.6), Radhe (P.W.7) did not support the prosecution's story from very beginning. Witnesses Ram

Kumar (P.W.8), Sushila (P.W.9), Phool Bai (P.W.10), Buggi @ Juggi (P.W.11), Munni (P.W.12) and Munna (P.W.13) have turned hostile during their cross-examination. They gave a different version that two unknown persons came on motorcycle and out of them, one had fired from the gun and injuries were caused to deceased Babulal as well as complainant Ram Kumar.

7. The complainant Ramkumar had lodged an FIR, Ex.P/18 soon after the incident. Police station Jaisingh Nagar was 30 kms away from his house and he had lodged the FIR within two hours. Dr.Sampoorananand had proved the post-mortem report, *Ex.P/1* of deceased Babulal and MLC report, *Ex.P/3* of complainant Ramkumar and it is proved by Dr.Sampoorananand that deceased Babulal died due to gun shot head injury and complainant Ramkumar had sustained injury from gun shot. The learned counsel for the appellants has submitted that since the witnesses have turned hostile, therefore, their testimony could not be relied upon. In support of his contention, he has placed his reliance upon the judgment passed by Hon'ble the Apex Court in case of "*Jagir Singh Vs. The State (Delhi Administration)*", [AIR 1975 SC 1400] , in which it is held that if a witness has been called by the prosecution, is permitted to be cross-examined on behalf of the prosecution, the result of that course being adopted is to discredit altogether and not merely get rid of his testimony. However, thereafter, view of Hon'ble the Apex Court was slightly changed. In case of "*Dhananjay Chhaterjee Vs. State of West Bengal*", [(1994) 2 SCC 220] , it was held that testimony of a hostile witness should be carefully scrutinized. Such part of his testimony which has received corroboration from other evidence on record can be accepted. Under such circumstances, if a prosecution witness turns hostile then, his entire testimony should not be thrown but, acceptable portion of his testimony may be used while appreciating the evidence if such part is corroborated by other evidence. Under such circumstances, the testimony of the witnesses Ramkumar and Sushila is to be examined.

8. Initially, complainant Ramkumar and eye witness Sushila have stated about the incident and thereafter, they had changed their evidence in the cross-examination. It is true that only one piece of lead was found at the spot but, looking to the injuries caused to deceased Babulal and complainant Ramkumar, it would be apparent that they did not sustain injuries from one gun shot. It is not established by the circumstances that by firing a gun, pellets were discharged. If pellets would have been discharged from firing a gun then, deceased Babulal would have sustained injuries of different pellets and

similarly, complainant Ramkumar would have also sustained the injury of some pellets and some pellets would have also found on the wall and floor. But no multiple pellets were found at the spot, nor it is alleged that pellets struck on wall or other places. Hence, injuries caused to deceased Babulal and complainant Ramkumar had been caused by two different gun shots and therefore, the testimony of the witnesses, after they turned hostile, appears to be hypothetical, which is not corroborated by the medical evidence.

9. The learned counsel for the appellants has submitted that there was no enmity between the appellants and the complainant and therefore, there was no need to the appellant to go and fire at deceased and the complainant. It is true that there was no previous enmity between the parties but, according to the statements made by the witnesses, it would be apparent that when the complainant alongwith his children was picking up Mahua fallen from a tree then, appellant Samarjeet Singh stopped them and stated that he would bring a gun and teach a lesson and thereafter, he came with the gun. Therefore, though there was no previous enmity between the parties but, that enmity was created soon before the incident when the complainant and his children were picking Mahua fallen from the tree and therefore, the appellants cannot get any advantage that they did not have any enmity with the complainant.

10. It is pertinent to note that witnesses Ramkumar (P.W.8), Sushila (P.W.9), Phool Bai (P.W.10), Buggi @ Juggi (P.W.11) were initially examined on 17.12.1999 before the trial Court. On that day, the learned defence counsel sought an adjournment due to his non preparation of the case and thereafter, these witnesses were re-examined between 11.1.2000 to 1.7.2000 when they turned hostile. Apparently either the witnesses were won over after recording of their examination-in-chief or they were threatened not to support the prosecution's case. In this regard, the judgment passed by Hon'ble the Apex Court in case of "*Khujji @ Surendra Tiwari Vs. State of Madhya Pradesh*", [AIR 1991 SC 1853] may be referred, in which it is held that if a witness whose cross-examination is deferred and subsequently turns hostile then, his previous testimony cannot be brushed aside on the ground that he was declared hostile. A small portion of para 6 of that judgment may be read as under:-

"That the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and crossexamined him. The evidence of such witnesses cannot be treated as effaced or washed

off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof."

Such decision was taken by Hon'ble the Apex Court on the basis of following reasons:-

"The High Court came to the conclusion and, in our opinion rightly, that during the one month period that elapsed since the recording of his examination-in-chief something transpired which made him shift his evidence on the question of identity to help the appellant. We are satisfied on a reading of his entire evidence that his statement in cross-examination on the question of identity of the appellant and his companion is a clear attempt to wriggle out of what he had stated earlier in his examination-in-chief."

In the present case, it would be apparent that the witnesses Ramkumar, Sushila etc. have changed their testimony at the time of the cross-examination when cross-examination was deferred and therefore, their depositions given prior to the cross-examination may be relied upon, if there is corroborative evidence to that effect.

11. In the present case, the previous version of these witnesses is duly corroborated by timely lodged FIR, Ex.P/18, post-mortem report, Ex.P/1 of deceased Babulal and MLC report, Ex.P/3 of complainant Ramkumar. Under such circumstances, the acceptable testimony of witnesses Ramkumar and Sushila Bai may be acted upon and it is proved beyond doubt that appellant Kaptan Singh fired from a gun causing death of deceased Babulal, whereas appellant Samarjeet Singh fired from a gun, causing injury on the left elbow of complainant Ramkumar.

12. So far as the overt-act of appellant Kaptan Singh is concerned, he was not present at the scene of crime in the first part of the incident. He came with appellant Samarjeet Singh having a gun. The moment he entered inside the house, he fired his gun at Babulal, a small child of 11 years, who died on the spot. If appellant Kaptan Singh did not have any intention to kill deceased Babulal then, he would not have fired from his gun at the head. Hence, death of deceased Babulal was caused by appellant Kaptan Singh with an intention

to commit his murder and the trial Court has rightly convicted him of the offence under Section 302 of IPC.

13. So far as the act of appellant Samarjeet Singh is concerned when he reached the spot and his co-accused Kaptan Singh had fired with a gun, killing deceased Babulal, he fired from his gun and injury was caused to complainant Ramkumar. It was apparent that complainant Ramkumar sustained a simple injury on his left elbow but, looking to the nature of injury that there was an entry wound as well as exit wound, it would be apparent that bullet had passed through and through from a portion of his left elbow. The appellant Samarjeet Singh had given a threat to the complainant when he was picking up Mahua under a tree that he would come with a gun and teach him a lesson. Thereafter, he not only came with a gun but, also came with two persons, out of them, one had a gun, who fired from the gun, causing death of deceased Babulal. Thereafter, Samarjeet Singh had fired with the gun. It is true that gun shot did not hit the complainant Ramkumar on any vital part of the body but, that was due to act of God and his good luck. When the appellants learnt rushing of number of persons towards the spot, they fled and therefore, if complainant Ramkumar was left without fatal injury then also it makes no difference. If overall conduct of appellant Samarjeet Singh is considered then, it would be apparent that he had intended to kill the complainant Ramkumar and therefore, though no fatal injury was caused to complainant Ramkumar, appellant Samarjeet Singh had committed an offence under Section 307 of IPC. The learned Additional Sessions Judge has rightly convicted the appellant Samarjeet Singh of that offence.

14. As argued by the learned counsel for the appellants, it would be apparent that appellant Sheopal Singh did not assault anyone with the weapon, which was kept by him in his hand and therefore, he did not commit either an offence under Section 307 of IPC or any inferior offence of same nature as of Section 307 of IPC. So far as his common intention is concerned, it is true that he came with the co-accused persons, who had fire arms and they also fired from the fire arms but, possibility cannot be ruled out that appellant Sheopal Singh might not have any information about the probable activities of other co-accused persons when he reached to the spot with them. In this context, the learned counsel for the appellants has placed his reliance upon the judgment passed by Hon'ble the Apex Court in case of "*Girja Shankar Vs. State of Uttar Pradesh*", [(2004) 3 SCC 793], in which it is held that meeting of minds of all accused who committed the offence whether pre-

arranged or on the spur of the moment and action in furtherance of common intention is essential. Acts of all accused persons need not be the same or identical but, must be acted with the same common intention. Even an accused who has not caused any injury to the deceased, if some overt-act is shown to have been committed by him in furtherance of any common intention to cause death, he would be liable to be convicted of offence under Section 302 of IPC with aid of Section 34 of IPC. In the light of the judgment passed in case of *Girjashankar* (supra), if conduct of the appellant Sheopal Singh is considered, then it is true that he came to the spot along with two accused persons armed with guns but, after reaching the spot, there is no overt-act of appellant Sheopal Singh to show that he had intended to kill deceased Babulal or he intended to cause any injury to complainant Ramkumar. Possibility cannot be ruled out that he would have changed his mind after his arrival at the spot and therefore, there was no overt-act of appellant Sheopal Singh to show his common intention with the co-accused Samarjeet Singh or Kaptan Singh. Hence, appellant Sheopal Singh could not be convicted for any of the offences committed by the co-accused persons with help of Section 34 of IPC. The learned Additional Sessions Judge has committed an error in convicting the appellant Sheopal Singh of various offences.

15. Similarly, common intention of appellant Samarjeet Singh and Kaptan Singh may also be considered with each other because appellant Samarjeet Singh had committed the crime under Section 307 of IPC, whereas appellant Kaptan Singh had committed an offence under Section 302 of IPC and the learned Additional Sessions Judge convicted these two appellants of both the offences with help of Section 34 of IPC. The learned counsel for the appellant has placed his reliance upon various judgments passed by Hon'ble the Apex Court in cases of "*Lalaram and others Vs. State of Madhya Pradesh*", [AIR 1994 SC 1452], "*Dajya Moshya Bhil and others Vs. State of Maharashtra*", [(1984) (Supp.) SCC 373], "*Ramaswami Ayyangar and others Vs. State of Tamil Nadu*", [(1976) 3 SCC 779], "*Gajjan Singh Vs. State of Punjab*" [(1976) 3 SCC 391], "*Mithu Singh Vs. State of Punjab*", [(2001) 4 SCC 193] and *Girjashankar* (supra), in all the cases, the factual position was discussed and a conclusion had been drawn as to whether the co-accused had common intention with the main accused or not and in such cases, the principle to assess the common intention is also laid by Hon'ble the Apex Court. In the light of aforesaid judgments, if the common intention of the appellants Samarjeet Singh and Kaptan Singh is assessed then, it is proved

that appellant Kaptan Singh killed the child Babulal. The appellant Samarjeet Singh had a hot talk with complainant Ramkumar when he was picking Mahua under a tree, alongwith his children. There was no need for appellant Samarjeet Singh to cause any harm to 11 years old child Babulal, when he went to the house of complainant Ramkumar alongwith two accused persons armed with gun and Dhariya. Hence, his intention could be to kill the complainant Ramkumar. On reaching the house of appellant Ramkumar, he did not intend to kill child Babulal. Though he went with a fire arm alongwith two armed companions, but he never intended to kill child Babulal. Even he could not think of that the co-accused Kaptan Singh would fire from a gun and kill the child Babulal. Under such circumstances, by mere going to the house of complainant Ramkumar with a gun and taking two companions, it cannot be said that appellant Samarjeet Singh had intended to kill the deceased Babulal and therefore, there was no common intention of appellant Samarjeet Singh with appellant Kaptan Singh, who killed deceased child Babulal. The learned Additional Sessions Judge has wrongly convicted appellant Samarjeet Singh of offence punishable under Section 302 of IPC with aid of Section 34 of IPC.

16. On the other hand, it is apparent that appellant Kaptan Singh went with the co-accused Samarjeet Singh, who was also armed with a gun and as soon as he reached the spot, he fired from the gun. It means he had knowledge that they had to go to the house of complainant to kill complainant and in doing so, he killed the child Babulal. Under such circumstances, the overt-act of appellant Kaptan Singh clearly indicates that he had common intention with the co-accused Samarjeet Singh and therefore, the trial Court had rightly convicted appellant Kaptan Singh of offence under Section 307 read with Section 34 of IPC.

17. The trial Court has also convicted the appellants for offence under Section 450 of IPC. The learned counsel for the appellants has submitted that according to the witnesses, the incident took place at an open place in the courtyard and therefore, no offence of house trespass was made out. In this context, attention of this Court is invited to the spot map, Ex.P/13, in which it is proved by ASI Shri D.S.Dwivedi (P.W.16) that the incident took place in a courtyard and which cannot be considered a house. The contention of learned counsel for the appellants cannot be accepted because if the spot map, Ex.P/13 is considered minutely then, there was a badi prepared by the complainant near his house. There was a chogan (courtyard) which was not covered by

roof but fenced. The incident took place in a second courtyard, which has no roof but, it was covered from 4 sides with walls and rooms of the complainant. Also, it has a gate, so that anyone cannot enter inside if gate was closed. Therefore, the place of incident is nothing but, a part of house, within the meaning of Section 442 of IPC. In this context, the judgment of the Punjab High Court in "*Kartar Singh Vs. State of Punjab*", [AIR 1956 Punjab 122] may be referred, in which it is mentioned that the courtyard of the house where the complainant lived and tethered his cattle is a building, answering Section 442 of IPC. Hence, the place of incident was a house as defined under Section 442 of IPC. The appellant Samarjeet Singh and Kaptan Singh entered inside the house to commit a crime punishable with life imprisonment and therefore, they were guilty of offence under Section 450 of IPC. The learned Additional Sessions judge has rightly convicted these two appellants for the offence under Section 450 of IPC.

17. So far as the sentence is concerned, the appellant Sheopal Singh shall be acquitted of all the offences for which he was convicted and therefore, there is no need to discuss about his sentence. The appellant Kaptan Singh has been convicted of offence punishable under Section 302 of IPC and sentenced to life imprisonment. He has already undergone the sentence to the remaining offences. The trial Court did not impose death sentence for offence under Section 302 of IPC and therefore, already a lesser sentence has been imposed by the trial Court and hence, there is no need to interfere in the sentence passed by the trial Court against the appellant Kaptan Singh. The appellant Samarjeet Singh is found guilty of offence punishable under Sections 307/34 and 450 of IPC. He has already undergone the sentence directed by the trial Court of such offence. Hence, there is no need to make any interference in the sentence imposed by the trial Court against the appellant Samarjeet Singh.

18. On the basis of the aforesaid discussion, the appeal filed by the appellant Sheopal Singh is hereby allowed. Conviction and sentence of offence punishable under Sections 302/34 and 450/34 of IPC are hereby set aside. He is acquitted from the charges of all the offences. The appeal filed by the appellant Kaptan Singh is dismissed in toto. The appeal filed by the appellant Samarjeet Singh is hereby partly allowed. His conviction as well as sentence of offence punishable under Section 302/34 of IPC is hereby set aside. He is acquitted of that charge, whereas conviction of remaining offences as well as consequential sentence is maintained. Since he has already undergone the

sentence imposed for remaining offences, he shall be released from jail without any delay.

19. Office is directed to arrange for issuance of supersession warrant of the appellant Samarjeet Singh and released warrant of the appellant Sheopal Singh.

Order accordingly.

I.L.R. [2015] M.P., 200

APPELLATE CRIMINAL

Before Mr. Justice Ajit Singh & Mr. Justice N.K. Gupta

Cr. A. No. 277/1995 (Jabalpur) decided on 12 September, 2014

STATE OF MADHYA PRADESH

...Appellant

Vs.

MAIYADEEN & ors.

...Respondents

A. Penal Code (45 of 1860), Sections 302, 34 - Murder - Name of accused Bandoo not mentioned in F.I.R. - No overt act attributed to him - It cannot be said beyond reasonable doubt that he participated in assault on deceased. (Para 24)

क. दण्ड संहिता (1860 का 45), धाराएं 302, 34 - हत्या - प्रथम सूचना प्रतिवेदन में अभियुक्त बंदू के नाम का उल्लेख नहीं - उसका कोई प्रत्यक्ष कृत्य नहीं दर्शाया गया - इसे युक्तियुक्त संदेह से परे नहीं कहा जा सकता कि वह मृतक पर हमले में शामिल था।

B. Penal Code (45 of 1860), Sections 302, 34 - No over act attributed to Sitaram for assaulting the deceased - Rightly acquitted for 302. (Para 25)

ख. दण्ड संहिता (1860 का 45), धाराएं 302, 34 - मृतक पर हमले में सीताराम का प्रत्यक्ष कृत्य नहीं दर्शाया गया - 302 के लिए उचित रूप से दोषमुक्त।

C. Penal Code (45 of 1860), Sections 302, 34 - P.W. 2 stated that Tulsidas assaulted the deceased whereas no other eye witnesses alleged assault by Tulsidas on deceased - If P.W. 2 could see Tulsidas assaulting deceased then other witnesses would have corroborated the fact - Cannot be said that Tulsidas had common intention. (Para 26)

ग. दण्ड संहिता (1860 का 45), धाराएं 302, 34 - अभियोजन साक्षी क्र. 2 ने कथन किया कि मृतक पर तुलसीदास ने हमला किया जबकि अन्य प्रत्यक्षदर्शी साक्षियों

ने नहीं कहा कि तुलसीदास ने मृतक पर हमला किया — यदि अभियोजन साक्षी क्र. 2 ने तुलसीदास को मृतक पर हमला करते देखा होता, तब अन्य साक्षियों ने इस तथ्य की पुष्टि की होती — नहीं कहा जा सकता कि तुलसीदास का सामान्य आशय था।

D. Penal Code (45 of 1860), Sections 302, 34 - Appellant Maiyadeen and Ramswaroop caused injury to the deceased and continued to assault him till he died - Both the accused showed common intention. (Para 30)

घ. दण्ड संहिता (1860 का 45), धाराएं 302, 34 — अपीलार्थी मैयादीन एवं रामस्वरूप ने मृतक को क्षतियां पहुंचाई और उसकी मृत्यु होने तक लगातार प्रहार किये — दोनों अभियुक्तों का सामान्य आशय दर्शाता है।

E. Penal Code (45 of 1860), Sections 302, 34 - Murder - Common intention or common object - Charges u/s 149 and 302 Penal Code - It is clear that the respondent Ramswaroop was jointly tried with the respondent Maiyadeen and his joint criminal actions were duly put to him in his examination u/s 313 of Cr.P.C. - Instead of charge u/s 149 of the Cr.P.C., if he is convicted with help of Section 34 of I.P.C. then, no prejudice would be caused to him - Appeal accepted against the respondents Maiyadeen and Ramswaroop - Convicted of offence u/s 302 I.P.C. and Section 302 r/w Section 34 of I.P.C. respectively and sentenced to life imprisonment. (Paras 36 & 38)

ज. दण्ड संहिता (1860 का 45), धाराएं 302, 34 — हत्या — सामान्य आशय या सामान्य उद्देश्य — दण्ड संहिता की धारा 149 एवं 302 के अंतर्गत आरोप — यह स्पष्ट है कि प्रत्यर्थी रामस्वरूप का प्रत्यर्थी मैयादीन के साथ संयुक्त रूप से विचारण किया गया और उनकी संयुक्त आपराधिक कार्यवाही का दंड प्रक्रिया संहिता की धारा 313 के अंतर्गत सम्युक्त रूप से परीक्षण किया गया — यदि उसे दंड प्रक्रिया संहिता की धारा 149 के अंतर्गत आरोप के स्थान पर, भारतीय दंड संहिता की धारा 34 की सहायता से दोषसिद्ध किया जाता है, तब उस पर कोई विपरीत प्रभाव कारित नहीं होगा — प्रत्यर्थी मैयादीन एवं रामस्वरूप के विरुद्ध अपील स्वीकार की गई — क्रमशः दंड संहिता की धारा 302 के अंतर्गत एवं दंड संहिता की धारा 302 सहपठित धारा 34 के अंतर्गत अपराध के लिए दोषसिद्ध एवं आजीवन कारावास के दंड से दण्डादिष्ट।

Cases referred :

AIR 1972 SC 1764, (1985) (Supp.) SC 473, AIR 1972 SC 2462, AIR 1999 SC 138, AIR 1972 SC 2056, AIR 1968 SC 728, AIR 1965 SC 277, AIR 2003 SC 539, AIR 1979 SC 135, AIR 2010 SC 589, AIR 1974 SC 1256.

Vijay Pandey, Dy.A.G. for the appellant/State.

S.C. Datt with Siddharth Datt, for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by :
N.K. GUPTA, J. :- The State has preferred the present appeal against the respondents No.1 to 5 and 13 after getting leave vide order dated 9.1.1995 against the judgment dated 5.10.1993 passed by Additional Sessions Judge, Panna in S.T.No.77/1992, whereby the respondents have been acquitted of the charge under Sections 302 or 302/149 of IPC.

2. The prosecution's case, in short, is that, on 16.7.1992, at about 6 p.m., the deceased Anandilal went to offer a pooja at Chabutara (Platform) of Thakur Baba, one mile away from village Banharikala (Police Station Ajaygarh, District Satna) (sic:Panna). He was accompanied by Shukla Ahirwar (P.W.9), Rammilan (P.W.1) and other family members and relatives. At about 7 p.m., the respondents alongwith other accused persons reached the spot. The respondent No.1 Maiyadeen told the deceased Anandilal that his son had assaulted the son of the respondent Maiyadeen by Chappal and therefore, he would kill Anandilal and suddenly he gave a blow of *Lathi* (stick) on his head. Thereafter, all the accused persons brutally assaulted the deceased Anandilal with *lathis* (sticks). Hence, deceased Anandilal died at the spot. Rammilan who tried to save deceased Anandilal also sustained some injuries caused by various accused persons. Similarly, Munnilal (P.W.2), Prabhu (P.W.5), Hirabai (P.W.4) and Raja Bhaiya (P.W.6) also sustained injuries in saving deceased Anandilal. Rammilan took the body of deceased Anandilal to the Police Station Ajaygarh and informed about the incident. Rammilan, Munnilal, Prabhu, Raja Bhaiya and Hirabai had also been sent for their medico legal examination. Dr.V.S.Upadhyay (P.W.15) examined the injured witnesses Rammilan (P.W.1), Munnilal (P.W.2), Prabhu and Raja Bhaiya (P.W.6) and gave his reports, Ex.P/30 to Ex.P/33, whereas Dr.U.K.Gupta (P.W.16) examined the injured witness Hirabai and gave his report, Ex.P/34. Dead body of the deceased was sent for postmortem. Dr.P.C.Shrivastava (P.W.14) had performed the post-mortem on the body of the deceased Anandilal and gave his report, Ex.P/29. The police seized lathis from different accused persons. After due investigation, a charge-sheet was filed before the JMFC, Ajaygarh, who committed the case to the Court of Sessions, Panna and ultimately, it was transferred to Additional Sessions Judge, Panna.

3. The respondents abjured their guilt. They took a plea that deceased Anandilal had enmity with so many persons and they had been falsely implicated

in the matter. In this connection, Rajkumar Yadav (D.W.1) and Dassu Kontar (D.W.2) were examined as defence witnesses.

4. Additional Sessions Judge, Panna after considering the evidence adduced by the parties, convicted the respondents No.1 and 2 of offence under Sections 325/148 (2 counts) of IPC and sentenced them to jail sentence of the period for which they remained in the custody with fine of Rs.300/- and Rs.200/- respectively for each count of charge. Whereas respondents No.3 to 5 and 13 have been convicted of offence under Section 323/148 of IPC and sentenced to jail sentence of the period for which they remained in the custody with fine of Rs.100/-. However, the trial Court acquitted all the accused persons including the respondents of the charges under Sections 302 or 302/149 of IPC.

5. We have heard the learned counsel for the parties at length.

6. The present case depends upon the injuries caused to the deceased and other victims alongwith testimony of the eye witnesses. Dr.P.C.Shrivastava (P.W.14) performed the post-mortem on the body of the deceased Anandilal and gave his report, Ex.P/29. He found following injuries:-

1. Lacerated wound $3\frac{1}{4}$ " and $1\frac{1}{4}$ " bone deep on the right side of the scalp in parietal region. Effusion of the blood present in this region. Fracture of the right parietal bone present. Blood clots present on the meninges. This injury is fatal.
2. Contusion $2\frac{1}{2}$ " x $\frac{3}{4}$ " on left side of the back in upper part red in colour. Oblique.
3. Contusion $3\frac{1}{2}$ " x $\frac{3}{4}$ " on left side of the back in middle part red in colour.
4. Contusion $2\frac{1}{2}$ " x $\frac{1}{2}$ " on the lateral side of the right arm, middle part red in colour transverse. Fracture of the right humerus present. Deformity and swelling present.
5. Lacerated wound $\frac{3}{4}$ " x $\frac{1}{2}$ " x $\frac{1}{2}$ " Limar x Muscle deep on the lateral side of the right arm.
6. Contusion $2\frac{1}{2}$ " x $\frac{3}{4}$ " on the back of the left forearm middle part red in colour. Transverse.
7. Contusion $3\frac{1}{4}$ " x $\frac{3}{4}$ " on the lateral side of the left

forearm middle part red in colour. Fracture of the radius and ulna bone present. Deformity and swelling present.

8. Contusion 2¼" x ¼" in front of the right leg middle part red in colour.

9. Lacerated wound ¾" x ¼" bone deep in front of right leg middle part fracture of the tibia and fibula bone present. Deformity and swelling present.

7. Similarly, Dr.V.S.Upadhyay (P.W.15) has proved the injury reports *Ex.P/30* to *Ex.P/33* of the victims Rammilan, Munnilal, Prabhu and Raja Bhaiya. The witness Rammilan sustained two injuries, one was on left elbow and second was on back. Fracture was also found on his elbow due to injury caused. Munnilal sustained 5 injuries at right elbow, right arm, forehead, back and buttocks. The victim Prabhu sustained one lacerated wound on his back, whereas Raja Bhaiya sustained a wound on his tongue and an abrasion on his right shoulder. Dr.U.K.Gupta (P.W.16) has proved the injury report *Ex.P/34* of witness Hirabai. An abrasion was found on the right side of her face and she was complaining about pain on her right chest.

8. Injuries of the witnesses are not described here, for the purpose of the conviction of respondents but, to assess the participation of these witnesses in saving the deceased Anandilal. So far as the injuries caused to the deceased Anandilal are concerned, it would be apparent that he sustained 5-6 fractures on his body including a fracture on right parietal bone and he died due to head injury, hemorrhage and comma. However, Dr.Shrivastava has clearly mentioned that the injury No.1 of the deceased was fatal in nature, whereas injuries No.4, 7, 8 and 9 were grave and fatal. Remaining injuries were simple in nature.

9. In the present case, Rammilan (P.W.1), Munnilal (P.W.2), Narbadiya (P.W.3), Hirabai (P.W.4), Prabhu (P.W.5), Raja Bhaiya (P.W.6), Shukla (P.W.9) were examined as eye witnesses. Out of them, Narbadiya (P.W.3) could not tell about the incident in detail because she did not know each of the appellants by their names. Witness Rammilan, Munnilal, Prabhu, Hirabai and Raja Bhaiya were the injured witnesses, whereas Shukla (P.W.9) was the person, who was present at the spot to do the Pooja for the deceased Anandilal. Shukla (P.W.9) has turned hostile. He has accepted that some of the persons assaulted the deceased Anandilal with lathis and therefore, he died on the

spot but, he did not name any of the respondents in his evidence.

10. The learned senior Advocate has submitted that actually it was not established beyond doubt that each of the respondents No:1 to 5 and 13 had participated in the crime. The witnesses could not identify the actual assailants. If it is found that the respondents assaulted the deceased Anandilal then, looking to their overt act, at the most offence under Section 325 of IPC may constitute. In support of his contention, he has placed his reliance upon the judgment passed by Hon'ble the Apex Court in case of "*Jai Narain Mishra and others Vs. State of Bihar*", [AIR 1972 SC 1764] . Also, reliance has been placed upon the judgment of Apex Court in case of "*Mohinder Singh Vs. State (Delhi Administration)*", [(1985) (Supp.) SC 473] . The learned Senior Advocate has further submitted that if one injury was found on the head of the deceased and it is claimed by the witnesses that more than one assaults had been given on the head then, benefit of doubt is to be given to all the assailants and none of them can be convicted of offence under Section 302 of IPC because it cannot be ascertained that amongst the respondents who was the author of that fatal head injury. He has placed his reliance upon the judgment of the Apex Court in "*Ramlal Vs. State (Delhi Administration)*", [AIR 1972 SC 2462] . It is further submitted that it was alleged against the respondent Maiyadeen that he gave a blow on the head of the deceased in the beginning but, it is not confirmed by any of the witnesses. However, it was alleged against some of the respondents that they did not participate in the crime and they simply exhorted the main accused and therefore, their common intention cannot be presumed. Similarly, Additional Sessions Judge has found in para 19 of the judgment that an unlawful assembly was constituted only for the purpose of causing hurt to the deceased Anandilal and therefore, no respondent can be convicted of offence under Section 302 of IPC either with help of Section 34 or 149 of IPC. In this context, reliance has been placed upon the judgments of Apex Court in cases of "*Matadin Vs. State of Maharashtra*", [AIR 1999 SC 138], "*Shri Kishan and others Vs. State of U.P.*", [AIR 1972 SC 2056] and "*Baul and another Vs. State of U.P.*", [AIR 1968 SC 728] .

11. The submissions made by the learned Senior Advocate for the respondents may be considered according to the factual position of the present case because law laid by Apex Court can be applied in similar factual position only. In the present case, Rammilan, Munnilal, Hirabai, Prabhu and Raja Bhaiya have stated that when the deceased Anandilal was offering pooja, the

respondents suddenly came to the spot and the respondent Maiyadeen told the deceased Anandilal that his son assaulted the son of respondent Maiyadeen by a Chappal therefore, he would kill Anandilal and thereafter, the respondent Maiyadeen gave a blow of Lathi on the head of the deceased Anandilal. Some of the witnesses have stated that the respondent Ramswaroop had also given a forceful blow of lathi on the head of the deceased Anandilal. The witness Munnilal (P.W.2) has stated in para 18 of his cross-examination that the respondent Maiyadeen, Ramswaroop and Tulsiram had assaulted with lathis on the head of deceased Anandilal one by one. However, his version was not corroborated by other witnesses.

12. In this connection, the evidence of witness Sipahilal (P.W.7), son of the deceased Anandilal is also relevant. He has stated that Rajkumar, son of the respondent Maiyadeen had informed the invigilator and Sipahilal was caught red handed while he was copying during the examination and a quarrel took place between Sipahilal and Rajkumar. Thereafter, Ramswaroop came and beat the witness Sipahilal. On the next day, Sipahilal while going to the school gave a blow of Chappal on the buttock of son of respondent Maiyadeen. He has further stated that if he would have available at Chabutara (Platform) at the time of pooja then, the respondent would have also killed him. In this context, Ramkumar (D.W.1) son of respondent Maiyadeen was examined who has stated on oath that no such incident took place as described by the witness Sipahilal. It is stated that Sipahilal never assaulted him by a Chhapal. However, in para 8 of his cross-examination, he has accepted that when he informed the invigilator and Sipahilal was caught red handed while copying, a quarrel took place between him and Sipahilal. On his acceptance it appears that the evidence given by Sipahilal is acceptable and Ramkumar has not deposed truth before the trial Court.

13. It was suggested that the deceased Anandilal was target of so many persons. Several suggestions were given to the witness Rammilan to show the long criminal history of the deceased Anandilal but, no document could be filed by the respondents to show that the deceased Anandilal had enmity with so many persons. Shukla (P.W.9) who was admittedly present at the spot and who turned hostile was given a suggestion that Anandilal had enmity with different villagers of village but, no specific suggestion was given to him. Under such circumstances, the contention of the learned Senior Advocate for the respondents cannot be accepted that the respondents were falsely implicated on the basis of enmity.

14. Actually, no major enmity was found between the parties and on the basis of a small quarrel which took place between the son of the deceased and son of the respondent Maiyadeen, such a deadly incident had taken place. There was no reason with the complainant to lodge a false FIR against the respondents, whereas the complainant Rammilan (P.W.1) witnesses Munnilal (P.W.2), Hirabai (P.W.4), Prabhu (P.W.5) and Raja Bhaiya (P.W.6) had sustained injuries caused by the respondents in saving the deceased Anandilal.

15. A suggestion was given to the witness Rammilan that the incident took place at the time when there was no day light available. It was dark in the night but, Rammilan did not accept the suggestion. However, such suggestion was accepted by Shukla. A particular statement has been given by Shukla (P.W.9) that there was darkness because the sky was cloudy. No such suggestion was given to the witnesses Hirabai, Prabhu, Raja Bhaiya and Munnilal that due to non availability of day light, they could not see the actual assailants. No suggestion had been given to the complainant Rammilan that because of presence of clouds in the sky, there was no sufficient light. According to the statement given by Shukla (P.W.9) in para 17, it would be apparent that he accepted the suggestion with the pretext that since there were clouds in the sky therefore, there was darkness otherwise, there was no possibility of darkness at that time. The defence witness Thassu Kondhar (D.W.2) even did not say that there was no sufficient light at the time of the incident or the sky was cloudy. Since no suggestion of clouds in the sky was given to any of the other eye witnesses, it would be apparent that it was a hypothetical suggestion given to the hostile witness Shukla (P.W.9) to obtain a favour to the respondents. Shukla was a person who was a priest of that Chabutara to offer the pooja and therefore, he had to maintain good relations with all the villagers and therefore, it was for him to remain neutral between the parties. Nothing could be brought in the evidence of Shukla, so that any portion of his testimony can be relied when he was declared hostile.

16. Thassu Kondhar (D.W.2) was examined as a defence witness to show that a quarrel took place between the deceased and unknown persons. Thereafter, the injured witnesses had tried to escape and while running towards a safer side they fell and sustained injuries. Initially, this witness was a prosecution witness who was given up on apprehension that he will turn hostile. He too did not say that due to non availability of day light he could not see the actual assailants. It was not a case of robbery and hence crime must have been committed by the known enemies of the deceased. Hence, being resident

of same village it was not possible for him that he could not identify the assailants. Also, injuries on Rammilan were not of such nature that they could be caused due to his fall on uneven surface. Hence, it is clear that this witness was a won over witness by the accused and telling a baseless and false story.

17. The incident took place at about 6.30 to 7 p.m. and at 7 p.m., the deceased Anandilal had already been killed. The witnesses have stated that they arranged for a cot and took his dead body to the outpost Hanumatpura Toriya and thereafter to the Police Station Ajaygarh and therefore, FIR was lodged at 10.15 p.m. in the night. Under such circumstances, in the month of July at about 6.30 to 7 p.m. though no sun light was available but, there should have been sufficient light so that the assailants could be identified. Hence, if various injured witnesses have identified the assailants then, their testimony can be believed. Their testimony cannot be discarded on the ground that there was no sufficient light to identify the respondents.

18. Also, the FIR, Ex.P/1 was lodged within 3.15 hours of the incident. It is accepted by SHO Shri N.K.Parihar (P.W.21) in para 59 that there is a outpost near village Toriya and Hanumatpura, which is known as Hanumatpura Toriya outpost. He has proved that soon after recording the FIR, he sent the carbon copy of FIR to the concerned Magistrate. It was not possible for him to sent the counter of FIR to the concerned Magistrate to his residence because he did not want to disturb the Magistrate in the night but, the counter of FIR was sent on the next day and it was received by the concerned Magistrate on the next day at about 11 a.m. He has shown the photocopy of receipt and gave his statement in para 56 of his cross-examination. Under such circumstances, legal compliance of Section 157 of the Cr.P.C. is also established and the testimony of Shri Parihar can be accepted that the FIR was recorded at 10.15 p.m. in the night. Since the incident took place without any anticipation and therefore, after sustaining injuries, injured witnesses arranged for a cot to take the deceased to the outpost Hanumatpura and when they found that there was no authorized officer present, who could write down their FIR then, they went to the Police Station Ajaygarh. According to the witnesses they reached Ajaygarh at about 9 to 9.30 p.m. and thereafter, the FIR was lodged. The witnesses have given the account of time consumed by them before lodging the FIR. Under such circumstances, it cannot be said that FIR was lodged in delayed manner and therefore, it should be disbelieved.

19. The learned Senior Advocate has submitted that the deceased sustained

only 9 injuries and so many accused persons were implicated by the complainant in the FIR and therefore, it appears that the witnesses after having conference decided to implicate the accused persons by lodging a false FIR. However, the contention of the learned Senior Advocate cannot be accepted because if the witnesses would have decided after the conference then, FIR would have lodged against all of the accused persons against whom the charge-sheet was filed. According to the FIR, *Ex.P/1*, it was lodged against 12 persons, whereas 14 persons were charge-sheeted. It would be clear from the evidence of the witnesses that some of the accused persons had assaulted the deceased and some of them had assaulted different injured witnesses to prevent them from intervening and therefore, by counting the injuries of the deceased, it cannot be said that persons were falsely implicated.

20. In such a fight, where one person was killed and 4-5 others had sustained injuries, it was difficult for the witnesses to remember that who assaulted whom and in which serial order. Under such circumstances, if an FIR was lodged against 12 persons then, it cannot be said that they were falsely implicated after due deliberation. The testimony of the witnesses is duly supported by timely lodged FIR, *Ex.P/1*.

21. The testimony of the eye witnesses is also supported by the medical evidence. However, Additional Sessions Judge has acquitted 9 accused persons out of 14 and therefore, it is possible that the witnesses could not establish their overt-act in the scene of crime but, it cannot be said that those accused persons did not participate in the crime. If the witnesses could not remember their overt-acts at the time of their evidence then, they only got the benefit of doubt but, no such inference can be drawn that they were falsely implicated by the complainant.

22. The learned Senior Advocate for the respondents has submitted that witnesses have implicated as many as 12-14 persons in the case, whereas they could not state specifically attributed overt-act against the accused persons and therefore, their testimony relating to the respondents may also be discarded. However, the contention of the learned Senior Advocate cannot be accepted due to two reasons. Firstly, that the testimony of the witnesses relating to other accused persons was not discarded on the ground that they were telling a falsehood. The testimony is discarded on the ground that they could not state specifically against a particular accused and therefore, their omnibus allegations could not be accepted because a doubt was created in

favour of those accused persons. Secondly, maxim "*Falsus in Uno Falsus in Omnibus*" is not applicable in India and therefore, if a witness states about a particular fact which is not correct then, his entire evidence cannot be thrown out. In this context, the judgment of the Apex Court in "*Ugra Ahir Vs. State of Bihar*", [AIR 1965 SC 277] may be referred, in which it is held that the maxim "*Falsus in Uno Falsus in Omnibus*" is neither a sound rule of law, nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is therefore, the duty of the Court to scrutinize the evidence carefully but, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest. Hence, believable part of evidence given by the witnesses should be accepted while appreciating the evidence.

23. At present, leave is granted against the respondents No.1 to 5 and 13 and therefore, overt-acts of these respondents are to be considered in the present judgment. Also, the respondent Manno has expired during the pendency of this appeal and therefore, the overt-act of only five respondents are to be considered in the present appeal. Different eye witnesses have stated against the respondents by which it would be apparent that the respondents Maiyadeen and Ramswaroop had assaulted the deceased and thereafter, the witnesses have stated in omnibus manner against the remaining respondents.

24. First of all, case of the respondent Bandoo @ Bandi is considered then, there is no specific allegation against him that whether he gave any blow to the deceased or any other injured person directly. Though the named FIR, Ex.P/1 was lodged by the complainant Rammilan but, name of this respondent was not mentioned therein. If he was present and participated in the crime then, there was no reason why his name would have been mentioned in the FIR. Under such circumstances, when the name of the respondent Bandoo @ Bandi was not given in the FIR and his no specific overt act is told by the witnesses then, it cannot be said beyond doubt that he had participated in the crime or he assaulted the deceased. It is true that the trial Court has convicted the respondent Bandoo @ Bandi of offence under Section 323/148 of IPC but, it was not proved beyond doubt that he participated in assaulting the deceased Anandilal and therefore, the respondent Bandoo @ Bandi was rightly acquitted by the trial Court of offence under Section 302 of IPC.

25. If the testimony of the witnesses is considered minutely then, each of

them has stated that initially Maiyadeen gave a blow with lathi to the deceased Anandilal and thereafter, Ramswaroop also gave a blow. Some of the witnesses like Munnilal have stated that Tulsidas had also given a blow with a lathi to the deceased and thereafter, all the respondents assaulted the victim. By omnibus allegations against all the accused persons, where 14 persons were implicated in the case, it cannot be said that each of such accused would have participated in the crime because their name was not clearly mentioned by the witnesses that they caused any specific injury to the deceased or to any injured witness then, though such an accused was present but, in absence of real proof of his participation, he could not be convicted for any offence done by others. In the present matter, leave was granted against the respondent No.3 Sitaram, whereas there is no specific allegation that Sitaram gave any blow to the deceased Anandilal. The complainant Rammilan (P.W.1) has submitted that Sitaram assaulted the witness Prabhu, whereas Prabhu (P.W.5) has stated that he was beaten up by Ramswaroop. He did not say against Sitaram and therefore, there is no injured witness who stated that he was being assaulted by the respondent Sitaram. There is no specific allegation against Sitaram that he assaulted the deceased Anandilal in a particular manner. Hence, by making vague and omnibus allegations, it cannot be said beyond doubt that the respondent Sitaram had participated in the crime. The trial Court has rightly acquitted the respondent Sitaram of the offence under Section 302 of IPC in absence of any evidence to his overt-act that he assaulted the deceased Anandilal or he prevented others in intervention of the crime of murder.

26. So far as the accused Tulsidas is concerned, only Munnilal (P.W.2) has stated that Tulsidas gave a blow on the head of the deceased, whereas remaining eye witnesses Rammilan, Hirabai, Prabhu and Raja Bhaiya did not state against the respondent Tulsidas specifically that he assaulted the deceased and caused injury at a particular portion of his body. They made omnibus allegations against so many accused persons that they had assaulted the deceased Anandilal. Each of the injured witnesses was in a position to state specifically that who assaulted him particularly. Neither of them has stated that the respondent Tulsidas assaulted him. If the witness Munnilal could see that the respondent Tulsidas assaulted the victim on the head of the deceased Anandilal then, other 4-5 witnesses would have also corroborated that fact. They corroborated that the respondents Maiyadeen and Ramswaroop had assaulted the deceased Anandilal on his head one by one. Under these circumstances, the testimony of Munnilal cannot be accepted beyond doubt

that the respondent Tulsidas assaulted either the deceased or to other injured witnesses in preventing them to save the deceased. Under these circumstances, it cannot be said beyond doubt that the respondent Tulsidas had a common intention with the main accused or he participated in the crime. The Additional Sessions Judge has rightly acquitted the respondent Tulsidas of offence under Section 302 of IPC.

27. So far as the case of the respondent Maiyadeen and Ramswaroop is concerned, the witnesses have categorically stated that they assaulted the deceased Anandilal and also assaulted injured witnesses. The question arises as to who caused the fatal injury on the head of the deceased Anandilal. Out of different eye witnesses, Rammilan has stated that Maiyadeen opened the assault on deceased Anandilal. Munnilal, Hirabai, Prabhu and Raja Bhaiya have stated that Maiyadeen gave first blow on the head of deceased Anandilal. Munnilal, Prabhu and Raja Bhaiya have stated that again a second blow was given by Ramswaroop on the head of the deceased. The learned Senior Advocate for the respondents has submitted that a single injury was found on the head of deceased by Dr. Shrivastava. The witnesses have stated about 2-3 blows on the head of the deceased and therefore, it is not clear as to whether the respondent Maiyadeen assaulted on the head of the deceased or the respondent Ramswaroop assaulted on the head of the deceased and therefore, by quoting the judgment of the Apex Court in case of *Ramlal* (supra) it was submitted that both of the accused Maiyadeen as well as Ramswaroop were rightly acquitted by the trial Court of offence under Section 302 of IPC.

28. In the present case, it is clear that a powerful blow was given on the head of the deceased causing his death and therefore, the accused who caused the blow on the head of the deceased had intended to kill the deceased and therefore, it is necessary for the Court to ascertain as to who gave that fatal blow on the head of the deceased. It is clear by considering the injuries of the complainant Rammilan that he immediately intervened in the crime and he also sustained so many injuries. Therefore, he could not see the subsequent event in an attentive manner. The witnesses have stated that first blow was given by Maiyadeen on the head of deceased and thereafter, Ramswaroop also gave a blow on the head of deceased Anandilal. In this connection, the statement given by witnesses Hirabai and Prabhu is important. They have stated that Maiyadeen gave a blow of lathi on the head of the deceased Anandilal and therefore, he fell down. The witness Prabhu has cleared further that respondent

Maiyadeen assaulted the victim Anandilal when he was being seated and before he could stand, Ramswaroop gave a blow on his head and he fell down. Such a situation was duly corroborated by Raja Bhaiya and Munnilal. Raja Bhaiya was cross-examined in detail and he answered the question of the defence counsel in para 12 of his cross-examination that when the deceased Anandilal received the first blow of lathi caused by the respondent Maiyadeen, he put both the hands on his head and thereafter, Ramswaroop also gave a blow of lathi on the head. It is clear from the post-mortem report, Ex.P/29 proved by Dr.Shrivastava that he found 4 injuries on both the hands of the deceased Anandilal. Out of them, right humerus and left ulna and humerus bones were found broken. Such injuries caused to the arms of the deceased indicates that powerful blows were given by the assailants on the hands. If blows were given on the hands when the deceased Anandilal was lying on the ground then, force of the assault would have also affected the ribs and other parts of the body, which were close to the arms but, no rib was found broken. No fatal injury was found on the chest or back of the deceased. Hence, explanation given by the witness Raja Bhaiya appears to be acceptable that after the first fatal blow given on the head of the deceased Anandilal by the respondent Maiyadeen, the deceased put both his hands on the head by way of natural reflex to protect himself from receiving fatal injury there and therefore, the blows given by Ramswaroop had caused fractures on both his hands.

29. If someone suddenly sustains an injury or pain in any part of his body then natural human reflex would be that he immediately hold that portion of body by hands to get the feeling of pain reduced. Hence, the evidence given by Raja Bhaiya in this context is natural and believable. Under these circumstances, if a single injury was found on the head of the deceased and it was claimed by the witnesses that two of the respondents had assaulted the deceased on his head then, such a position is very well explained by the witnesses Raja Bhaiya, Prabhu and Munnilal. Explanation given by these witnesses is duly supported by the medical evidence and therefore, their testimony can be accepted. It is proved beyond doubt that it was the respondent Maiyadeen who gave a powerful fatal blow on the head of the deceased, so that he sustained head injury, which caused his death.

30. On the basis of the factual difference, the judgment of the Apex Court in *Ramlal* (supra) cannot be applied in the present case. So far as the intention is concerned, no quarrel had taken place between the parties. The complainant party was offering pooja at Chabutara of Devta and suddenly, the respondent

Maiyadeen alongwith other respondents and accused came to the spot and assaulted the deceased in such a forceful manner that while he was trying to get up, he could not stand up properly and fell down on the ground and died at the spot. By causing such a powerful blow to the deceased on the vital part of his body, where a fracture of parietal bone was caused and the deceased died due to head injury, it is clear from the evidence of the witnesses that the respondents Maiyadeen and Ramswaroop continued to assault the deceased till he died. Intention of the respondent Maiyadeen was established that he intended to kill deceased Anandilal.

31. In this connection, the contention advanced by the learned Deputy Advocate General is acceptable that if the evidence of eye witness is duly corroborated by medical evidence and conduct of the accused shows his intention then, in absence of the motive, the accused can be convicted of offence under Section 302 of IPC. In this context, the judgment of the Apex Court in "*Yunis @ Kariya and others Vs. State of Madhya Pradesh*", [AIR 2003 SC 539] may be referred, in which it is held that no material discrepancy between the medical evidence and evidence of the eye witnesses since at least 3 injuries referred to by the autopsy surgeon and confirming the part of medical evidence as stated by the eye witnesses are common. It is also held that ocular evidence was very clear and convincing, the role of the accused persons in the crime stands clearly established, failure to prove motive to commit crime is of no consequence. In the light of decision given by Apex Court in case of *Yunis @ Kariya* (supra), if facts of the present case are examined then, certainly the testimony of eye witnesses is duly corroborated by the medical evidence and specially it is established by the witnesses as to why a single injury was found on the head of the deceased though he was assaulted by atleast two persons on his head.

32. The learned senior Advocate has submitted that in case of appeal against acquittal, the appellate court is not required to appreciate the evidence in detail. In this context, reliance is placed upon "*Ganesh Bhavan Patel and another Vs. State of Maharashtra*", [AIR 1979 SC 135], in which it was held that where two reasonable conclusions can be drawn on the evidence on record, the High Court should as a matter of judicial caution refrain from interfering with the order of acquittal recorded by the Court below. In other words, if the main grounds on which the Court below has based its order acquitting the accused, are reasonable and plausible, and cannot be entirely and effectively dislodged or demolished, the High Court should not disturb

the acquittal. On the other hand, the learned Deputy Advocate General has submitted that if appreciation of evidence done by the trial Court appears to be perverse then, it could be reappreciated by the High Court. In this context, reliance has been placed upon the judgment passed by Apex Court in case of "*Gamini Bala Koteshwara Rao & others Vs. State of Andhra Pradesh*", [AIR 2010 SC 589], in which the Apex Court after considering the evidence found that there was no discrepancy in the evidence given by the eye witnesses, so that their evidence could be discarded and therefore, the High Court was found justified in reassessment of the prosecution's evidence. In the present case, the trial Court has found that the respondents Maiyadeen and Ramswaroop had assaulted the deceased Anandilal but, without considering their overt-acts, the trial Court acquitted the respondents Maiyadeen and Ramswaroop of offence under Section 302 of IPC and convicted them only for offence under Section 325 of IPC. Hence, after considering the facts of the present case, it is the duty of this Court to reappreciate the evidence, where it is found that the respondent Maiyadeen had intended to kill the deceased Anandilal. The judgment passed by Apex Court in case of *Ganesh Bhavan Patel* (supra) cannot be applied in the present case because of factual difference.

33. On the basis of the aforesaid discussion, it is very much clear that the respondent Maiyadeen came with so many persons to the spot when the deceased Anandilal was offering pooja at Chabutra and it was the respondent Maiyadeen, who opened the assault on the deceased for a very trifle reason. He gave a forceful blow on the head of the deceased Anandilal causing a fracture of parietal bone. He continued to assault the deceased till he died and therefore, his intention is very well established by the prosecution that he committed a crime of murder, which is punishable under Section 302 of IPC. The Additional Sessions Judge thus committed an error of law and fact in acquitting the respondent Maiyadeen of offence under Section 302 of IPC.

34. So far as the conduct of the respondent Ramswaroop is concerned, it is true that when he gave a powerful blow on the head of the deceased, the deceased had already placed his hands on his head and therefore, due to that blow, no harm was caused to the deceased on the head but, different bones of his hands were broken due to blow caused by the respondent Ramswaroop. In this connection, the learned Senior Advocate for the respondents has submitted that common intention or object of the accused should be drawn carefully. In this connection, the judgment passed by Apex Court in cases of

Matadin (supra), *Shri Kishan* (supra) and *Baul* (supra) have been referred. In case of *Matadin* (supra), common intention was to be drawn on the basis of exhortation. In the present case, there is no such allegation against the respondent Ramswaroop. In case of *Shri Kishan* (supra) it was found that injuries caused by the co-accused with lathi and therefore, his common intention to kill the deceased was not found. However, in the present case, it is alleged against respondent Ramswaroop that he forcefully assaulted the deceased on his head as a result of which different bones of his arms were broken because at that time had (sic:he) had kept his hands on the head. Also he assaulted the deceased till his death. He also assaulted various injured witnesses to prevent them in saving the deceased and therefore, due to factual difference, the decision passed in case of *Shri Kishan* (supra) cannot be applied in the present case. In case of *Baul* (supra) it was not proved that the particular co-accused caused any particular injury to the deceased and therefore, his intention to kill the deceased was ruled out. In the present case, as discussed above, the intention of the respondent Ramswaroop is clearly established. It is established by the witnesses that the respondent Ramswaroop came alongwith the main accused Maiyadeen, armed with lathi and participated in the crime from very beginning to the end till the deceased had died. In this connection, some portion of para 11 of the judgment passed by Apex Court in case of *Jai Narayan Mishra* (supra) may be perused, which is as under:-

"Where four or five persons attack a man with deadly weapons, it may well be presumed that the intention is to cause death".

35. In the present case, it was alleged against 7 accused persons that they surrounded the deceased armed with deadly weapons and caused him 9 injuries. Out of them, 4-5 were grave and one was fatal in nature. It is unfortunate that the witnesses could not tell about their specific overt-act and therefore, some of the accused persons got benefit of doubt but, the fact remains that the respondents Maiyadeen and Ramswaroop alongwith 4-5 persons surrounded the deceased who was offering pooja by sitting near the Chabutara and they shared common intention to cause death of the deceased. Additional Sessions Judge in para 11 of his judgment has committed an error that the respondents had intended only to cause hurt to the deceased. When it is proved beyond doubt that the respondent Ramswaroop had also intended to kill the deceased Anandilal, therefore, he too is guilty of offence under Section 302 of IPC with help of Section 34 of IPC.

36. Initially the case was prosecuted against 12 to 14 accused persons. However, overt-act of other accused persons could not be established beyond doubt. Hence, possibility cannot be ruled out that other accused persons did not constitute an unlawful assembly to kill the deceased Anandilal. Charges were framed against the respondent Ramswaroop of offence under Section 302 read with Section 149 of IPC and it was very much clear before him that he had to defend the case, where the main accused had killed the deceased Anandilal and there was an allegation against him that he participated in the crime being a member of unlawful assembly. Under these circumstances, if there was no charge of offence under Section 302 read with Section 34 of IPC against the respondent Ramswaroop still he can be convicted of offence under Section 302 read with Section 34 of IPC. In this context, the judgment passed by Apex Court in case of "*Bhoor Singh Vs. State of Punjab*", [AIR 1974 SC 1256] may be referred, in which it is held that if the accused has been charged under Section 302 read with Section 149 of IPC but, convicted under Section 302 read with Section 34 of IPC, though there was no specific charge under Section 34 of IPC, this tantamount to irregularity, if no prejudice has been caused to the accused. All the circumstances showing concert and participation in the joint criminal action by all the three appellants were duly put to them in their examination, under Section 342, Cr.P.C., 1898 (At present, under Section 313 of the Cr.P.C., 1974). The appellants were fully aware of the matter with which they were charged. No question of prejudice arises. In the light of aforesaid judgment, where it is clear that the respondent Ramswaroop was jointly tried with the respondent Maiyadeen and his joint criminal actions were duly put to him in his examination under Section 313 of the Cr.P.C. Instead of charge under Section 149 of the Cr.P.C. if he is convicted with help of Section 34 of IPC then, no prejudice would be caused to him.

37. On the basis of the aforesaid discussion, it is found that the respondent Maiyadeen had committed a crime under Section 302 of IPC, whereas the respondent Ramswaroop had committed an offence under Section 302/34 of IPC and therefore, they must be convicted in the present appeal for such offence. So far as the sentence is concerned, it is not a case, which may be considered in rare of the rarest category and therefore, it would be sufficient to impose a jail sentence of life imprisonment on the respondents No.1 and 2. Since they have deposited the fine amount on their conviction of offence under Section 325 of IPC, therefore, there is no need to further impose any fine on them.

38. On the basis of the aforesaid discussion, the State could not show any basis to accept its appeal against the respondents Sitaram, Tulsidas and Bandoo @ Bandi, therefore, appeal filed by the State against these respondents is hereby dismissed. The appeal filed by the State is accepted against the respondents Maiyadeen and Ramswaroop. Consequently, they are convicted of offence under Section 302 of IPC and Section 302 read with Section 34 of IPC respectively and sentenced to life imprisonment.

39. The respondents Maiyadeen and Ramswaroop are on bail. They are directed to surrender before the trial Court without any delay, so that their sentence may be executed.

40. The respondents Sitaram, Tulsidas and Bandoo @ Bandi are on bail. Their presence is no more required before this Court and therefore, it is directed that their bail bonds shall stand discharged.

Order accordingly.

**I.L.R. [2015] M.P., 218
APPELLATE CRIMINAL**

Before Mr. Justice S.K. Seth & Mr. Justice P.K. Jaiswal
Cr. A. No. 316/2003 (Indore) decided on 17 October, 2014

RITESH

...Appellant

Vs.

STATE OF M.P.

...Respondents

A. Penal Code (45 of 1860), Section 302 - Circumstantial Evidence - Appellant and his fiancée after joining the party went for an outing - Appellant informed the police that two unknown persons had attacked him and his fiancée - Deceased has suffered multiple injuries as well as appellant had also received multiple injuries including which was dangerous to life - Appellant alleged to have started disliking his fiancée because of her fattiness and introvert nature - Deceased had already joined health club for reducing her weight - Motive to commit murder due to deceased fattiness and due to her being introvert is wholly unreliable. (Para 43)

क. दण्ड संहिता (1860 का 45), धारा 302 - परिस्थितिजन्य साक्ष्य - अपीलार्थी एवं उसकी मंगेतर समारोह में शामिल होने के बाद प्रमोद-भ्रमण पर गये - अपीलार्थी ने पुलिस को सूचित किया कि दो अज्ञात व्यक्तियों ने उस पर एवं

उसकी मंगेतर पर हमला किया — मृतिका ने अनेक क्षतियां सहन की, साथ ही अपीलार्थी को भी अनेक क्षतियां आईं, जिसमें जीवन के लिए घातक क्षतियां शामिल थीं — अमिकथित है कि अपीलार्थी अपनी मंगेतर के मोटापे एवं अंतर्मुखी स्वभाव के कारण उसे नापसंद करने लगा था — मृतिका ने अपना वजन घटाने के लिए पहले ही हेल्थ क्लब में प्रवेश ले लिया था — मृतिका के मोटापे के कारण या उसके अंतर्मुखी स्वभाव के कारण हत्या कारित करने का हेतुक पूर्णतः अविश्वसनीय है।

B. Penal Code (45 of 1860), Section 302 - Murder - Suspicion - Suspicion how so ever strong is suspicion only and cannot take shape of proof. (Para 44)

ख. दण्ड संहिता (1860 का 45), धारा 302 — हत्या — संदेह — संदेह कितना ही प्रबल क्यों न हो वह केवल संदेह ही है और वह सबूत का रूप नहीं ले सकता।

C. Penal Code (45 of 1860), Section 302 - Murder - Last seen together - Appellant and deceased used to go of outing after their engagement - Appellant from very beginning had accepted that the deceased was with him - Doctor had opined that the injuries sustained by appellant cannot be self inflicted - In view of medical evidence, injuries suffered by appellant were neither self inflicted nor friendly hand. (Para 49)

ग. दण्ड संहिता (1860 का 45), धारा 302 — हत्या — अंतिम बार एक साथ देखा जाना — अपीलार्थी एवं मृतिका अपनी सगाई के बाद प्रमोद-ममण पर (बाहर घूमने) जाने लगे थे — अपीलार्थी शुरुआत से यह स्वीकार कर रहा है कि मृतिका उसके साथ थी — चिकित्सक का यह अभिमत कि अपीलार्थी को आई क्षतियां स्वयं कारित क्षतियां नहीं — चिकित्सीय साक्ष्य की दृष्टि से अपीलार्थी द्वारा सहन की गई क्षतियां न तो स्वयं कारित थी, न ही मैत्रीपूर्ण हाथों से।

D. Penal Code (45 of 1860), Section 302 - Murder - Seizure of weapon - On 09.12.1995, certain belongings of appellant and deceased were recovered but was not able to get Katar despite information of Ritesh - Recovery of Katar on 10.12.1995 from the same place clearly goes to prove that it was planted on the spot after search on 09.12.1995 - Recovery of Katar unreliable. (Para 50)

घ. दण्ड संहिता (1860 का 45), धारा 302 — हत्या — शस्त्र की जब्ती — 09.12.1995 को अपीलार्थी एवं मृतिका की कतिपय वस्तुएं बरामद की गई थी, परन्तु रितेश की सूचना के बावजूद कटार नहीं मिल पाई — उसी स्थान से 10.12.1995 को कटार की बरामदगी, स्पष्ट रूप से साबित करती है कि उसे 09.12.1995

की तलाशी के पश्चात घटनास्थल पर रखा गया था।

E. Penal Code (45 of 1860), Section 302 - Injuries - Doctor had opined that injuries on the body of the deceased were caused by two different weapons - However, prosecution tried to fasten everything on appellant - Absence of blood group and absence of evidence of origin of blood group destroyed the case of prosecution - It is unreasonable to draw adverse inference against the appellant. (Para 52)

ड. दण्ड संहिता (1860 का 45), धारा 302 - क्षतियां - चिकित्सक का अभिमत कि मृतिका के शरीर की क्षतियां, दो भिन्न शस्त्रों द्वारा कारित थीं - किन्तु अभियोजन ने सब कुछ अपीलार्थी पर लादने का प्रयास किया - रक्त समूह की अनुपस्थिति तथा रक्त समूह के स्रोत के साक्ष्य की अनुपस्थिति से अभियोजन प्रकरण नष्ट हुआ - अपीलार्थी के विरुद्ध प्रतिकूल निष्कर्ष निकालना अयुक्तियुक्त है।

F. Evidence Act (1 of 1872), Section 45 - Expert Opinion - Expert opinion can be admitted only when the expert opining the act has actually seen the corpus - Merely seeing the postmortem report and opining the expertness is not admissible. (Para 53)

च. साक्ष्य अधिनियम (1872 का 1), धारा 45 - विशेषज्ञ का अभिमत - विशेषज्ञ का अभिमत केवल तब स्वीकार किया जा सकता है, जब कृत्य का अभिमत देने वाले विशेषज्ञ ने प्रत्यक्ष रूप से शव देखा हो - मात्र शव विच्छेदन प्रतिवेदन देखकर विशेषज्ञ अभिमत देना ग्राह्य नहीं।

G. Criminal Procedure Code, 1973 (2 of 1974), Section 27 - Recovery of Weapon - Katar is alleged to have been recovered from an open place and everybody had access to the site - Blood group could not be ascertained - Recovery unreliable. (Para 54)

छ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 27 - शस्त्र की बरामदगी - अभिकथित रूप से कटार की बरामदगी खुले स्थान से की गई और वह स्थल सभी के लिए खुला था - रक्त समूह को सुनिश्चित नहीं किया जा सका - बरामदगी अविश्वसनीय।

H. Penal Code (45 of 1860), Section 302 - Murder - Circumstantial Evidence - Court has to examine the evidence in its entirety especially in case of circumstantial evidence and ensure that the only inference drawn from evidence is the guilt of accused - If more than one inference can be drawn then the accused must have the benefit of doubt. (Para 69)

ज. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – परिस्थितिजन्य साक्ष्य – न्यायालय को साक्ष्य का परीक्षण उसकी संपूर्णता में करना चाहिए, विशेष रूप से परिस्थितिजन्य साक्ष्य के प्रकरण में और सुनिश्चित करना चाहिए कि साक्ष्य से निकाला गया निष्कर्ष केवल अभियुक्त की दोषिता का है – यदि एक से अधिक निष्कर्ष निकाले जा सकते हैं, तब अभियुक्त को संदेह का लाभ मिलना चाहिए।

Cases referred :

2013 SC 912, AIR 2013 SC 3395, CR.L.R. (SC) 1994 Pg. 161, AIR 1977 SC 1294, J.T. 2014 Vol. (V) SC 239, (2012) 10 SCC 464.

P.K. Saxena & Jai Singh with Vivek Singh, for the appellant.

R.S. Bais, Dy. G.A. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by :
P.K. JAISWAL, J. :- Appellant – Ritesh was tried of a charge under Section 302, 201, IPC, 1860 and Section 25(1) (B) of the Indian Arms Act, 1959, on an allegation that on 25.11.1995, he committed the murder of Jaishree Thakkar who was engaged with him for marriage and thus, committed an offence under Section 302, IPC and with a view to obliterate evidence of commission of the aforesaid crime caused injuries to himself and further with a view to screen himself from punishment lodged a report at the police station through his friend – Alpesh Bhandari (PW10). The first Additional Sessions Judge, Indore, by impugned judgment dated 22.2.2003, convicted the appellant under Section 302, IPC for life imprisonment with fine of Rs.25,000/-, in default of payment of fine 3 years RI, but acquitted the appellant under Section 25 (1) (B) of the Arms Act and 201, IPC.

2. The facts emerging from the record of the case are as under :-

Jaishree Thakkar (the deceased), was daughter of Prakash Thakkar (PW9) and Preeti Thakkar (PW1). Preeti Thakkar (PW1) was from Parsi background and PW9 was Gujarati Hindu. They were married in 1972. The deceased was educated in Saint Raphaels Convent School, one of the most modern schools of Indore. She had her college education in Jagdale College, Indore. Jaishree was student of B.Com final in Gujarati College, Indore.

3. As per prosecution the appellant was attracted towards Jaishree, who was very good and beautiful and a proposal was made to her by him for marriage. This proposal was sent through Ashok Shah to her parents. The

parents took one month's time to consider the proposal and thereafter accepted the aforesaid proposal. Their engagement took place on 5.2.1995. After 2-3 months of engagement both Jaishree and Ritesh, started going out to various places together. It is alleged that Ritesh suggested to Jaishree that she should reduce her weight, their marriage was to solemnize on 30th November, 1995. It is further alleged that before marriage appellant Ritesh had started disliking Jaishree and he started feeling that after marriage it would not be possible to live together. On 25.11.1995, there was a party at the house of Sapna Turkiya (PW5), a childhood friend of Jaishree. On that date the appellant had picked up Jaishree from the house of Sapna (PW5) for their usual evening drive and for pleasure outing and carried her in the Maruti Car of Alpesh Bhandari (PW10), to a deserted place, on the bank of Biawali Tank. He while pretending to talk in love, took out a 'Katar' (knife) which he had concealed in his trouser and caused multiple injuries to her, which resulted in her death. Thereafter, he took out chain (bracelet) and ring from her body and threw the same in the tank of Biawali. In order to destroy the evidence and to mislead appellant – Ritesh struck his head by striking a stone and also inflicted a injury to himself by a knife (Katarnuma). Thereafter travelling a little distance from the spot of the crime, Ritesh came near the road and cried for help. His friend Alpesh Bhandari (PW10), who had reached there, was informed by him that two unknown assailants have injured Jaishree and while he intervened and tried to save her, he was also injured. This false story was reported by PW10 to the police. This report was registered as FIR No.505/93 at police station – Bhanwar Kuan, Indore.

4. During investigation on 25.11.1995, the police went to the spot and recovered the dead body of Jaishree where Maruti Car was also parked. The police found shoes of appellant – Ritesh and Jaishree were lying there. The key of Maruti Car was also lying there near the body of Jaishree and blood was found. Police also found that there was blood near the driving seat of the car and one spectacles near the car. The police found that dead body of Jaishree was having ear rings and bracelets in her hands. On 26.11.1995, body of Jaishree was sent for postmortem. Postmortem report, Exhibit P/8 was given by the doctors P.C. Jain (PW11), Sumitra Yadav (not produced) and Ravindra Chouhdary (not produced). As per postmortem report there were four ante-mortem injuries and four post-mortem injuries. The three doctors observed spermatozoa in the vagina / swab of Jaishree, which they had mentioned in the post-mortem report.

5. The appellant has also had several injuries, out of which one was very deep in the abdomen. He was admitted in T-Choitram Hospital. Dr.Chandrashekhar Chamniya (PW17) was posted as Senior Head Surgeon in the Choitram Hospital and he was called by Dr. Abhitash Goyal (PW25) who medically examined the appellant.

6. On the basis of FIR Exhibit P/7, the matter was investigated by Siraj Mohammed Khan (PW.33), who recorded the police statements of witnesses prepared the information memos and seizure memos. After completion of the investigation, the charge sheet was filed before the JMFC, Indore, who committed the case for trial in the Court of Sessions, Indore. After the case was committed to the Court of the learned Sessions Judge, Indore, for trial, the matter was transferred to the 1st Additional Sessions Judge, Indore. Charge under Section 302 and 201, IPC and Section 25 (1) (B) of Arms Act was framed against the appellant. The charge was read over and explained to him. He pleaded not guilty to the same and claimed for trial.

7. The defence of the accused is that it is a case of sexual assault and murder by two unknown persons and it is they who caused injuries to them. He had also suffered several injuries out of which one was very critical. He in his defence also stated that deceased was convent educated girl. She was modern and beautiful and had also participated in fashion show. Their marriage has to take place on 30.11.1995 and marriage preparations were in full swing and appellant was actively associated himself for the marriage preparation. It is a crude case of planting and false recovery. In support of the aforesaid, he examined 14 witnesses in defence and produced number of defence documents as Exhibit D/1 to D/19.

8. After recording of evidence of prosecution witnesses was over, the learned judge explained to the accused, the circumstances bearing against him in evidence of the prosecution witnesses and recorded his further statements as required under Section 313 of Cr.P.C, 1973. It was stated by the appellant that when he and deceased had gone for outing they were attacked by two unknown persons, he explained all the incriminating circumstances. The trial Court rejected the explanation offered by the appellant. On appreciation of the evidence adduced by the prosecution and defence taken by the appellant as well as defence evidence brought on record by the appellant, the trial Court held that case against the appellant rests on circumstantial evidence and came to the conclusion that the appellant was only responsible for murder of the

deceased and has recorded the conviction of the appellant under Section 302, IPC and sentenced him as afore-noted.

9. It is submitted by the learned Senior counsel for the appellant that the chain of circumstances is not complete and the charge against the appellant is not proved conclusively on the basis of evidence led by the prosecution. The learned trial court should not have relied on infirm and untrustworthy testimony of prosecution witnesses. There is no material on record to show that appellant had started disliking Jaishree. They also drew our attention to para 12 and 17 of the statement of the Vijay Kohtari (PW21), para 6,7 and 8 of Punit Tomya (PW3) and para 1 to 15 of Alpesh Bhandari (PW10), friends of appellant. They have deposed that appellant was madly in love with Jaishree and her parents were ready to give her hand into the hands of appellant – Ritesh, despite the fact that both the families did not belong to the same community, Smt. Preeti Thakkar (PW1) in para 12 of the statement has admitted that Jaishree had appeared as a model in the fashion show. They also placed reliance on the statements of Dr. P.C. Jain (PW11), Vijay (PW2) chowkidar of Biawali tank, Omkar Singh (PW4) agriculturist, Madan (PW6) tea vendor, Vinod Kumar Kothari (PW31) and Smt. Sheetal Gupta (PW32), instructor of Apple Health Club.

10. As per statement of Smt. Sheetal Gupta (PW32), the deceased had joined the health club in December 1994 and within couple of months she reduced 5 to 6 Kg of her weight. From the statement of Smt. Sheetal Gupta (PW32), it has been further proved that she joined the club much prior before the engagement took place. It is submitted that she realized that she should reduce her weight and therefore, she by her own started going to Gym and reduced her weight. They also denied that appellant has given any information resulting in recovery of 'Katar' (knife).

11. It is submitted by the learned Senior counsel that on 25.11.1995, appellant was admitted at T-Choitram Hospital, Indore and when his treatment was going on, on 7.12.1995, PW.33 arrested him. He was taken into custody on 7.12.1995, but arrest was shown on 8.12.1995. On 8.12.1995 vide Exhibit D/68, father of the appellant telegraphically reported about the police atrocities. The accused was produced at the residence of Chief Judicial Magistrate, Indore on 9.12.1995 at 5.20 PM, and not during court hours so that the CJM may not take cognizance of the report of atrocities when 9.12.1995 was working day. They could have produced him during the court hours. The police took

his remand till 14.12.1995. On 14.12.1995, application was filed by the accused before the JMFC regarding his further detention and police atrocities. His Memorandum was recorded on 9.12.1995, which is Exhibit P/27. His second memorandum was recorded on 10.12.1995 (Exhibit P/28). On the basis of second memo, 'Katar' (knife) was seized vide Exhibit P/30 on 10.12.1995, but the same was sent for FSL examination on 2.2.1996. The prosecution also relied on Exhibit P/75 FSL report. As per the aforesaid report blood stains scrapping from Article 'G' was found. No report of Serologist was called nor any fingerprints were taken to prove the case of the prosecution. As per postmortem report Exhibit P/8. The death was opined as homicidal in nature due to shock and hemorrhage. Exhibit P/9 is query report. As per query report only five injuries were caused by Katar and three injuries were by different weapons.

12. The defence counsel also submitted that on deceased's underwear blood stain and white spots were alleged, the same was sent for examination, but the report was not produced. The deceased was brought by Shankar and Sohanlal and they were cited as prosecution witnesses but were given up by the prosecution. As per report, injuries No.1 to 4 are ante-mortem and injuries no.5 to 8 are postmortem in nature.

13. It is submitted that there are material contradictions in the statements of PW7, PW5 and PW8. They in their 164 statements, which were recorded before the JMFC, very categorically stated that there was no dispute or differences between the deceased and the appellant, but they in their court statements have changed the version and stated that the deceased was shy child and was not modern and therefore the appellant started disliking her.

14. The learned Senior counsel also drew our attention to the major flaw of the opinion given by Dr. D.K. Satpathi (PW26) that some of the injuries of the deceased were by 'Katar'. They submitted that as per report of autopsy surgeon Dr. P.C. Jain (PW11) and query report Exhibit P/9, out of total eight injuries, three injuries of the deceased were by different weapons whereas the trial Court relied on the statement of Dr. D.K. Satpathi (PW26), who on the basis of diagram of 'Katar' (knife) given an opinion that all the injuries were caused by 'Katar' (knife).

15. It is also submitted that appellant also suffered serious injuries and could not at all be self inflicted. Exhibit P/25 is details of the injuries suffered by the appellant. As per Exhibit P/25, injury no.1 incised wound present over

left groin was about 2.5.cm x 1 cm. Injury no.2 a small penetrating wound midway between ant. sup. Spine and umbilicus; skin deep, no active bleeding. Injury no.3 is incised wound situated about 1 ½ from the mid line above the umbilicus on the left side of abdomen. Omentum was prolapsed, therefore, wound not explored for the size of depth and injury no.4 diffuse swelling with contusion mark present just above the right eyebrow tenderness present. Dr. Chandrashekhar Chamniya (PW17) and Dr. Abhitash Goyal (PW25) in their statements very categorically stated that injury no.1 has crossed the entered interior wall and has pierced the small intestine. The wound has passed in between ureter and venicova and had reached the muscle. As per para 5 of the statement of Dr. Chandrashekhar Chamniya (PW17), the aforesaid injury was not as ruled out that the aforesaid injury was self inflicted injury by the appellant. PW17 has performed operation of injury no.3. As per statement of Dr.Chandrashekhar Chamniya (PW17) unless the wound was opened, the real picture could not be noticed even by the doctor. This witness has not been declared as hostile and thus, his evidence is binding upon the prosecution.

16. The learned Senior counsel for the appellant would contend that Dr. P.C. Jain (PW11) who has performed postmortem examination on the body of the deceased has found signs of sexual assault on her. Dr. P.C. Jain has stated in para 22, of his statement that injuries No.5,6 and 8 on the body of the deceased could not be caused by Katar Article "L". This clearly goes to show that assaults on the body of the deceased were more than one. This also proves that so called recovery of Article "L" is not reliable. The prosecution itself has produced photographs, which show that the clothes of the deceased were disarrayed and that there were signs of sexual assault also. Zip of jeans was found open. It is also submitted that Dr. Abhitash Goyal (PW25) has given no reasons for the finding and has stated that the injuries on the body may be self inflicted with hesitation. His evidence is vague and without any data.

17. Dr. Abhitash Goyal (PW25) in para 31 of his statement has admitted that it is doubtful that if the injury no.3 on the body of the appellant could be caused by 'Katar' (knife) article "L".

18. The learned Defence counsel submitted that the trial Court totally overlooked the fact that PW25 in para 9, has agreed upon the statement of Dr.Chamniya that the injury no.3 on the body of Ritesh could not be self inflicted. The learned trial Court also overlooked the statement of Dr.Kailash Saluja (PW16),

who in para 9 of his statement has very categorically admitted that injuries on the body of the deceased were examined by the doctor of surgery department and he has further admitted that the surgeon examined the injuries very minutely and so injuries noted by the surgeon are correctly noted.

19. Shri R.S. Bais, learned Dy. Govt. Advocate placed the reliance on the finding recorded by the trial Court and submitted that it was sufficiently proved by the prosecution that death of deceased (Jaishree) was homicidal death whereas the conduct and motive of the appellant towards the deceased when she was alive also proved. Learned Dy. Government Advocate emphasized that on appreciation of evidence the trial Court has recorded the conviction of the appellant under Section 302 of IPC and prays for dismissal of the appeal.

20. This Court heard the learned counsel for the parties at length and considered the documents following the part of the appeal.

21. The learned trial court considered the following five circumstances :-

(i) *Appellant did not like Jaishree (deceased). He thought after marriage it will be harsh and impossible to survive the life with her.*

(ii) *Appellant took the deceased (Jaishree) from the house of her friend and he was accompanied with her till her death, which means that deceased was seen alive with the company of appellant.*

(iii) *On the basis of information given by the appellant the Katarnuma (knife) was seized from the place of occurrence near bushes which was seized through appellant on which blood stains were present.*

(iv) *The death of deceased was for loot or rape or attempt for rape on her is lack of circumstances.*

(v) *The description given by the appellant that at the time of occurrence the deadly injuries received by Jaishree (the deceased) and him are false and pretending.*

22. And held that all the circumstances have been proved the guilt of the appellant and convicted him by the impugned judgment dated 22.2.2003.

23. It is not in dispute that the case against the appellant rests on

circumstantial evidence. The circumstantial evidence is evidence of relevant facts from which, one can, by process of intuitive reasoning, infer about the existence of facts in issue or factum probandum. In dealing with circumstantial evidence there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion, however, strong cannot be allowed to take place of proof and, therefore, the court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof. However, it is not derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturisation of actual incident, but the circumstances cannot fail. Therefore, many a times it is aptly said that "*men may tell lies, but circumstances do not*". In case where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually.

24. In the case of *Munish Mubar vs State of Haryana*, 2013 SC 912, the Apex Court has observed that while appreciating the circumstantial evidence the Court has to make an approach from the point of view of the reasonable person. In para 22 the Court while examining the question of motive has observed that emotions, suspicions and conjectures do not make place of proof in the criminal matter.

25. It is equally well settled by the judgment of the Apex Court in the case of *Gyanchand & Ors. v/s. State of Haryana*, AIR 2013 SC 3395 vide paragraph No.16 that the prosecution cannot rely on Section 106 of the Evidence Act in order to press for the conviction of an accused by invoking the doctrine that how did the other person died being a fact within the special knowledge of the accused, therefore, in absence of proper explanation by the accused would the court would held him guilty.

"In State of West Bengal v. Mir Mohammed Omar & Ors. etc. etc., AIR 2000 SC 2988: (2000 AIR SCW 3220), this court held that if the fact is specifically in the knowledge of any person, then the burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of accused. Section 106 is not intended to relieve the prosecution of its case burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the

prosecution had succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer an explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused."

26. That in this judgment the Hon'ble Supreme Court observed that the burden to prove the case beyond reasonable doubt against the accused person always remains on the prosecution and it is only when the prosecution proves its case beyond reasonable doubt then the burden would shift to the accused to prove and explain the circumstances. Prosecution can invoke Section 106 of the Evidence Act only in the circumstances when it is impossible for the prosecution to establish certain facts which are within the special knowledge of the accused and which the prosecution cannot find out.

27. Having noticed the principles governing the case based on the circumstantial evidence this Court proposes to consider the circumstances relied upon by the prosecution.

28. Smt. Preeti Thakkar (PW1) in paragraph 12 of her statement has stated that when the first time Jaishree and Ritesh had gone out then one or two days thereafter Jaishree had informed her that Ritesh had pointed out that she is fatty girl and so she should reduce her weight. Ritesh had also persuaded her to learn dancing at the same point of time. These talks were taken place for the first time when both of them had gone to attend students party of MBA persons though she was asked that this occurred in the moth of July 1995, as Ritesh admitted in MBA in July 1995, she gave only a evasive answer. As per para 12 (c) of her statement, when she was showing photographs Ex.D/1 to Ex.D/18 that of fashion show in which Jaishree had participated. She invented an explanation that Jaishree was compelled to join fashion show as she was heavily pressurized by Ritesh, but she, however was examined on 2.11.1996 by police. She did not disclose that fact any time earlier or after before the police (Ex.P/19). She also gave evasive answer when it was asked about

the weight of her daughter.

29. Prakash Thakkar (PW9) in para 7 stated about differences of opinion of Ritesh and Jaishree, which he realized from his wife, which she said that Ritesh told their daughter to become little slim and modern in looks. He in para 8 has deposed that his daughter has reduced 10 Kg by joining apple club. In the same paragraphs he admitted that Jaishree reduced her weight and also started wearing jeans. He in para 10 has deposed about fashion show and tried to give explanation that appellant persuaded her to participate in the fashion show. In para 14, he admitted that his wife (PW9) was educated in Dalhousie in Himachal Pradesh in primary school and thereafter in Saint Raphaels school in Indore. In para 15 he admitted that he belongs to Gujarat Hindu family and in Gujarati community females and males girls and boys dance in Navratri.

30. From the family background of PW1 and PW9, it is clear that they were belonging to absolute free and open minded communities. Gujarati community is known as free and open minded community as stated by Prakash Thakkar (PW9) and Parsi's are also known as westernized persons in their way of life. The innovative story that appellant has developed disinclination to marry Jaishree will be unacceptable to any reasonable person in the light of evidence. The participation in fashion show was under compulsion and against the desire of Jaishree is a false pretext taken by PW1 and PW9. These facts are missing in their police statements.

31. Both the parents PW1 and PW9 accepted that Jaishree was attending Apple Health Club from December 1994 and the same fact is further fortified by the statement of Sheetal Gupta (PW32) who had been the trainer of Jaishree in the Apple Health Club. Destroying the exaggerated versions of the parents this witness has very categorically stated that Jaishree had come in December 1994 to join the Club and had lost 4 to 5 Kgs weights as against the alleged reduction of 8 to 11 Kgs. by PW1.

32. As per para 25 of PW1 the marriage of Ritesh and Jaishree was an arranged marriage. The proposal for marriage was never initiated on their behalf, but it was from family of Ritesh. In fact, she further asserts that the proposal for marrying to Jaishree had come from Ritesh because he was desirous of marrying Jaishree. The marriage was to be performed only after 5 days of the date of incident. PW9 father of the deceased in para 36 of his statement has deposed that the proposal had come from the side of the appellant.

33. That the fact that appellant – Ritesh wanted to marry Jaishree clearly belies the fact that he was not aware of the fatty body and her shyness which became the cause for disliking to the extent of killing Jaishree. A person who was desirous to marry Jaishree would suddenly develop such serious and fatal disliking for her being fatty is not acceptable to us as the same is most unnatural.

34. On 20.11.1995 appellant had given a birth day party, as per three witnesses PWs 5, 7 and 8. In this birth day party appellant had invited all the friends of Jaishree and picked all of them from their respective places and carried them via Bilawali Tank to hotel Mashal.

35. He attended another party on 24.11.1995 given by Nidhi Pahawa on her birth day at Hotel Sunder where each of the invitees had danced and enjoyed.

36. Last party on 25.11.1995 was organized by Sapna Turkhiya (PW5) for celebrating engagement of her bosom friend on 30.11.1995. These parties clearly established that there was absolutely no dissension in the mind of Jaishree and Ritesh about the marriage. There is no supportive evidence of any of the friends of Jaishree that there was any such disagreement between Jaishree and Ritesh which was of such a high magnitude that Ritesh would be compelled to take step to kill Jaishree

37. Friends of Ritesh, Punit Tomya (PW3) and Alpesh Bhandari (PW10) have deposed about the marriage preparation going on in full swing which contradicts any disinclination of Ritesh about the marriage which would have been shared with his friends at least.

38. The prosecution wants the court to believe that Ritesh would imagine to kill his fiance merely because she does not wear modern clothes and she is not slimming down. The further case of the prosecution based on Exhibit P/ 13 that Ritesh was perturbed that he thought of killing himself after finishing of Jaishree. There is no proof that the families of Ritesh or Jaishree, would not pay heed if there was any disinclination of marrying between Ritesh and Jaishree.

39. That it is a flight of imagination of Investigator that Ritesh would not dare to talk to his parents for breaking the marriage but dare to commit a most serious crime of murder of Jaishree which could entail a capital punishment for him. He has a brother whose wife was friend of Jaishree. Exhibit P/13

recitals that grand father of Ritesh would not accept it, therefore, he had no alternative but to liquidate himself and Jaishree to save the reputation of family of his broken marriage. The prosecution could not produce the grand father in support of this imaginary matter. Ritesh waited for two months for approval of his proposal by PW1 and PW9, ie., parents of deceased (Jaishree) with whatever the weight of Jaishree, with her attitude of life or her sense of dressing Ritesh liked her and requested for the engagement. There is absolutely no evidence led by prosecution as what transpire from January 1995 that Ritesh lost all attraction but became so uncomfortable as not only to marry but also to kill her.

40. It has very clearly come on record that Jaishree was herself conscious of her weight and so she had joined the Apple Club as deposed by PW32 and PW34 in December 1994. None of the friend witnesses of Jaishree have deposed that she was uncomfortable with Ritesh or vice versa and Ritesh was annoyed beyond repair.

41. In Exhibit P/13 except the only pointer of marriage date coming faster, there is no evidence on record to suggest that the situation had become so unbearable that Ritesh would plan to eliminate his fiance in such a cruel manner for whom he had requested the parents of Jaishree for marriage with him. Both Preeti (PW1) and her husband PW9 are firm on this point that Ritesh had proposed for marriage with Jaishree for which they agreed only after due deliberation and not instantly.

42. As per evidence which has come on record, Jaishree had joined health club in December 1994, even before engagement. She also started wearing jeans, indulging into the dance but it was inconvenient to her and she expressed it only before her mother and not to her friends. She did not make any complaint to her friends. There is no material in holding that appellant was finding the marriage absolutely to be trouble some problem, therefore, he had all inclination to commit murder of Jaishree.

43. As per statement of friends Ritesh and parents of the deceased, it has been clearly proved that both of them were very happy with their marriage because, in fact, it was Ritesh, who persuaded the parents of Jaishree to marry. The motive to commit this type of heinous crime due to Jaishree's is fattiness and due to her being introvert as per Exhibit P/13 is wholly unreliable. From the evidence on record, it is very clearly established that Jaishree had studied in Saint Raphaels school could not

be a shy and conservative girl. The dictation of Ritesh for wearing modern clothes and slimming down is an improved version given only in the trial court; it was not given at the investigation stage, as accepted by these witnesses, the parents Preeti Thakkar (PW1), Prakash Thakkar (PW9) and friends Sapna Turkhiya (PW5), Meghna (PW7) and Charu Malhotra (PW8) of Jaishree. The variation which has come from the statements though one under Section 161 and under Section 164 Cr.P.C. with trial Court clearly goes to prove that the witnesses were forced to give version designed by PW33 and so from these statements no inference against accused can be drawn.

44. The whole case is based on suspicion. Suspicion how so ever strong is suspicion only and cannot not take shape of proof. The entire prosecution story is highly improbable and from the facts of the case and evidence led, it is clearly made out that this was a case, which started from love affair, consent of the parents after due consideration was recorded. Certain observations alleged to have been by appellant – Ritesh to cut down her weight and Jaishree, could see reason in it, therefore, she cut down her weight by joining Gym.

45. The entire approach of the trial court is contrary to the law. In the aforesaid circumstances, we are therefore, of the view that the finding of the first circumstances recorded by the trial court is absolutely without any convincing evidence and such finding, therefore, could not be sustained.

46. So far as the second circumstance is concerned, the evidence has been led that the appellant took the deceased from the house of her friend Sapna (PW5) for their usual evening drive and for their outing and carried her in the Maruti Car of Alpesh Bhandari (PW10), on the bank of Bilawali Tank. From the evidence, it has come on record that they were engaged in February 1995 and after engagement they started going for outing. The appellant also in his 313 Cr.P.C statement very categorically stated that on the fateful day, he was along with the deceased and when they were at Bilawali Tank two unknown persons attacked them and also tried to sexually assault the deceased and also inflicted the injuries to appellant. It was the specific case of the accused that he also sustained grievous injuries.

47. The trial Court considered the evidence in para 37 that Jaishree was last seen alive in the company of the accused – Ritesh, but erred in holding guilty against Ritesh. This analysis was not required when the fact was accepted by the accused from the very beginning, but the trial court chose to refer the

testimony of the friends of Jaishree, Charu Malhotra (PW8) about the presence of Ritesh and Jaishree at Bilawali Tank in para 38. The statements of Punit Tomya (PW3) and Alpesh Bhandari (PW10) proved the presence of accused at Bilawali Tank. This natural circumstance over emphasized by the trial court in this case, when the accused has never disputed that he was with Jaishree at Bilawali tank.

48. Dr.Chandrashekhar Chamniya (PW17) has stated that the injury of appellant Ritesh, could not be self inflicted, so yet the court accepted the contention of the public prosecutor that Dr.Chandrashekhar Chamniya (PW17) is not reliable as compared to other opinion.

49. Dr.Chandrashekhar Chamniya (PW17) has stated that injuries of accused could not be said to be self inflicted or caused by friendly hand yet the trial court disbelieved his statement and gave a finding contrary to the evidence on record. In order to consider the view, the expert opinion that injuries of the accused were self inflicted or caused by friendly hand should not be accepted. It is quite evident that accused had sustained multiple injuries and one of such injury was incised wound situated above the umbilicus of the left side of the abdomen could not be said to be self inflicted. The aforesaid injury was dangerous to life. Dr.Chandrashekhar Chamniya (PW17), who had examined the accused has clearly stated that such injuries could not be self inflicted. Dr.Chandrashekhar Chamniya (PW17) had actually examined accused and noted the injuries himself, but other doctors gave their opinion on the basis of the injury report. In such circumstances, we are not inclined to rely more on the opinion of other doctors then on the opinion of Dr. Chimaniya (PW17). In our opinion, it is also highly improbable that such injury could be caused by the accused himself. On a careful consideration of expert opinion and the evidence adduced regarding the injury suffered by the appellant, we have no hesitation to hold that such injury suffered by the accused was neither self-inflicted nor caused by any friendly hand.

50. So far as circumstance no.3 is concerned, the 'Katar' Article (L) was seized vide seizure memo Exhibit P/30, on 10.12.1995 at 14.45 hours. PW19 and PW20 are the witnesses of the seizure of 'Katar'. They have not supported the version of the prosecution and were declared hostile. In the present case the panch witnesses have not supported either the disclosure statements or the recovery memos. Two disclosure statements of the appellant – accused were recorded one on 9.12.1995 (Exhibit P/27), leading to discovery of

'Katar' and second discovery is dated 10.12.1995 Exhibit P/8. Second memorandum also leading to discovery of 'Katar' and committing the murder of the deceased. The recovery of the aforesaid 'Katar' is per se unreliable because from the same spot on 9.12.1995 Siraj Khan (PW33) recovered articles belonging to Ritesh and Jaishree, but was not able to get 'Katar' despite information of Ritesh 'Katar' which was lying there from 25.11.1995 to 10.12.1995. This circumstance clearly goes to prove that it was planted on the spot after search on 9.12.1995, when the police was visiting the spot at Bilawali Tank.

51. As per postmortem report Exhibit P/8 and query report Exhibit P/9 and statement of autopsy surgeon Dr. P.C. Jain (PW11), out of eight injuries of the deceased five injuries were caused by 'Katar' and three injuries were by different weapon. When in the initial version of postmortem it is clearly opined that there were injuries on the body of deceased – Jaishree from two weapons, yet PW33 tried to fasten every thing on appellant – Ritesh.

52. Postmortem report further indicated that there was a sexual assault on Jaishree. The investigation tried to get the opinion of Dr. D.K. Satpathi (PW26) to counter postmortem report of two weapons without sending the weapon to Serologist. Absence of blood group and evidence of origin of blood completely destroyed the case of the prosecution that the weapon produced before the court was which was used in the commission of crime in the face of the fact that the postmortem conducting doctor positively stated that there were two weapons used in causing injuries to Jaishree. The prosecution inspite of clear opinion given by the autopsy surgeon called for the report of other doctors on this issue. There were difference of opinion between the doctors and thus, it will be unreasonable to draw an inference only against the accused in these circumstances. The difference of opinion proves that the evidence of use of weapon is inconclusive and therefore, it also established that the prosecution has failed to prove that 'Katar' was the weapon of offence.

53. In the case of *Eshwaraiah & Anr. v/s. State of Karnataka*, reported as Cr.L.R. (SC) 1994 Pg.161, the Apex Court has held that expert opinion can be admitted only when, the expert opining the act has actually seen the corpus. Merely seeing the postmortem report and opining the expertness is not admissible. This decision will squarely apply in the present facts and circumstances of the case. The Apex court was of the view that the High

Court has rightly held that the said doctor had no occasion to see the dead body and the injuries on the person of the dead body and only from the report of the postmortem the said doctor gave an expert opinion.

54. Undisputedly, the place from which 'Katar' is said to have been recovered is an open place and everybody had access to the site from where the 'Katar' is said to have been recovered. It is therefore, difficult to believe the recovery of the 'Katar'. The credibility of the evidence relating to recovery is circumstantially denied by the fact that that even though as per FSL report the blood stains found on the 'Katar' was those of human blood, the same could not be linked with the blood of the deceased. Unfortunately, the trial Judge overlooked this serious lacuna in this prosecution story and concluded that presence of human blood stains was sufficient to link him with the murder.

55. The opinion of sexual assault given by the postmortem contradicting Dr.P.C. Jain (PW11) was sought to be contradicted by investigation by obtaining the opinion of medical professor of pathology Dr. Sushma Bhargava (PW28). However, assuming that there exist difference of opinion between the doctors about the attempt of sexual assault on Jaishree or being habitual for sexual intercourse. When there is difference of opinion between the doctors then it is a settled law that it should be resolved in favour of the accused and not in favour of the prosecution particularly when case is based on circumstantial evidence.

56. The entire evaluation of the defence evidence is contrary to well established principles laid down by the Apex court. The Apex court in the case of *Satbir Singh & Anr. Etc. etc., v/s. State of Punjab*, AIR 1977 SC 1294 particularly in para 28 and 29 has held that extra judicial confession (Exhibit P/13) though technically it is not a confession of commission of crime but merely an expression of intention to do so is not a reliable piece of evidence.

57. In the case in hand, the document Exhibit P/13, when it accepted by the accused to be in his own hand writing but he has stated that it was written at the dictation of investigating officer PW33 at police station is to be accepted more as compared to the evidence of PW33, which has not been supported by the Panch witnesses.

58. In this case, appellant has positively stated that Exhibit P/13 was got written in police station under duress and the dictation of PW33 who got him to write various other specimen letters also. This letter is inadmissible as it is

recovered during the course of investigation. PW33 had indulged in piecemeal recording of the statements under Section 27 of the Evidence Act. He recorded one statement of Ritesh on 9.12.1995. He recorded another statement on 10.12.1995. He recorded Exhibit P/13 on 17.12.1995. These three stage-wise disclosures are not only inadmissible but are unreliable and it further goes to prove that as suggested to PW33, that he was trying to screen real offender and was trying to unnecessarily involved Ritesh into the commission of the crime.

59. In the present case, the panch witnesses have not supported either disclosure statement or the recovery. The recovery of knife is per se unreliable because from the same spot on 9.12.1995, to PW33 recovered articles belonging to both Ritesh and Jaishree, but was not able to get knife despite information of Ritesh about knife which was lying there from 25.11.1995 upto 10.12.1995. This circumstance clearly goes to prove that it was planted on the spot after search on 9.12.1995, when the police was visiting the spot at Bilawali Tank.

60. The prosecution has avoided to detect the two assailants inspite of their presence mentioned in the FIR Exhibit P/7 and it was reiterated by Ritesh in his defence version.

61. As per postmortem report injuries on the body of the deceased were caused by two weapons. Postmortem report further indicated that there was a sexual assault on Jaishree.

62. The opinion of sexual assault given by the postmortem conducting doctor was sought to be contradicted by investigation by obtaining the opinion of the medical college professor of pathology. His opinion is prefatory. There exists difference of opinion between doctors about the attempt of sexual assault on Jaishree or her being habitual to sexual intercourse. It is well settled that when there is difference of opinion between the doctors then it should be resulted in favour of the accused and not in favour of the prosecution. Particularly when the case is based on circumstantial evidence.

63. There is deliberate delay in recovering the weapon. Appellant was in custody on 8.12.1995 and the two statements were recorded on 8 and 9th December, 1995 for referring other articles at the very spot disproves that there was any knife, pointed out by the accused Ritesh voluntarily. In fact, it was under pressure of the Investigating officer that the false recoveries were

made to discover the investigating officer implanted knife at the spot.

64. In the present case, the appellant had suffered serious injuries and particularly in the abdomen region. He is an injured witness on the spot and he would have been fully relied if the investigation had honestly attempted to catch hold the culprits who assaulted Ritesh and Jaishree.

65. In the matter of *Prakash v/s. State of Karnataka* J.T. 2014 Vol.(V) SC 239, the Supreme Court has observed that the prosecution must establish the blood group of the deceased with the help of Serologist report, if such report is not obtained, the Hon'ble Supreme Court said in para 65 that it cannot be connected with the accused. In the present case, the blood group, despite the recommendation contained in Exhibit P/75, the police did not send it for opinion, so in the light of this judgment the accused cannot be connected with the weapon of the offence.

66. This judgment also says that in the case of circumstantial evidence the fact must be proved beyond reasonable doubt. In para 20 the court was pleased to observe that the weapon of the offence obtained from the scene of the crime was not sent to finger print examiner for examination, which would confirm that it was used by the accused and not sending the weapon of offence for chemical examination gave rise to a suspicion that the investigation was not fair and the benefit of this doubt must go to the accused.

67. In para 71 the Apex Court felt that the Investigating Officer has made up his mind to involve the accused that he committed the murder and directed the entire investigation to prove the accused guilty.

68. We would refer to the decision of this Court in *Munish Mubar v/s. State of Haryana* (2012) 10 SCC 464 wherein, the Apex Court stated the following:

"28.....The circumstantial evidence is a close companion of factual matrix, creating a fine network though which there can be no escape for the accused, primarily because the said facts, when taken as a whole, do not permit us to arrive at any other inference but one indicating the guilt of the accused."

69. A court has to examine the evidence in its entirety especially in case of circumstantial evidence and ensure that the only inference drawn from the

evidence is the guilt of the accused. If more than one inference can be drawn then the accused must have the benefit of doubt as it is not the court's job to assume and only when guilt beyond reasonable doubt is proved then it is fair to record conviction. In case of circumstantial evidence, each circumstance must be proved beyond reasonable doubt by independent evidence, and the circumstances so proved must form (sic:form) a complete chain without giving any chance of surmise or conjecture and must also be consistent with the guilt of the accused.

70. In the instant case after analyzing the fact, it appears to us that none of the circumstances relied upon by the prosecution and accepted by the trial Court can be said to be the probability of the appellant guilt or involvement in the commission of the crime. Therefore, for the reason recorded herein above, the judgment and order of the trial court is set aside; the appeal is allowed and the accused is acquitted forthwith from the charges levelled against him. The appellant is on bail. His bail bond and surety bond are hereby discharged.

Appeal allowed.

I.L.R. [2015] M.P., 239

ARBITRATION CASE

Before Mr. Justice Alok Aradhe

Arb. Case No. 108/2011 (Jabalpur) decided on 9 April, 2014

ALFA CONSTRUCTIONS (M/S)

...Applicant

Vs.

VINOD KUMAR THAREJA

...Non-applicant

A. Stamp Act (2 of 1899), Article 5(d), Schedule I-A, Arbitration and Conciliation Act (26 of 1996), Section 11(6) - Requirement under Article 5(d) of Schedule I-A of the 1899 Act - Since there is no stipulation in the agreement that building shall be held jointly or severally by the person other than the owner and remaining part thereof shall be sold jointly or severally by them, agreement is not required to be stamped. (Paras 5, 6)

क. स्टाम्प अधिनियम (1899 का 2), अनुच्छेद 5(डी), अनुसूची I-ए माध्यस्थता और सुलह अधिनियम (1996 का 26), धारा 11(6) - अधिनियम 1899 की अनुसूची I-ए के अनुच्छेद 5(डी) के अंतर्गत अपेक्षा - चूंकि करार में कोई शर्त नहीं कि भवन को स्वामी के अलावा, व्यक्ति द्वारा संयुक्त रूप से या पृथक रूप से धारण किया जायेगा और उसका शेष भाग उनके द्वारा संयुक्त रूप से या पृथक रूप से

विक्रय किया जायेगा, करार स्ताम्पित किया जाना अपेक्षित नहीं।

B. Stamp Act (2 of 1899), Article 5(d), Schedule I-A, Arbitration and Conciliation Act (26 of 1996), Section 11(6) - Appointment of Arbitrator - Clause 19 of the agreement provides that if the dispute arises between the party same can be resolved by appointing one arbitrator each - The aforesaid clause is in contravention of Section 10(1) of the Act which provides that number of arbitrator shall not be an even number - Hon'ble Mr. Justice V.K. Agrawal is appointed sole arbitrator - Parties shall appear before him. (Para 10)

ख. स्ताम्प अधिनियम (1899 का 2), अनुच्छेद 5(डी), अनुसूची I-ए माध्यस्थ और सुलह अधिनियम (1996 का 26), धारा 11(6) - मध्यस्थ की नियुक्ति - करार का खंड 19 उपबंधित करता है कि यदि पक्षकारों के मध्य विवाद उत्पन्न होता है, उसे दोनों के एक-एक मध्यस्थ की नियुक्ति द्वारा सुलझाया जायेगा - उपरोक्त खंड, अधिनियम की धारा 10(1) के विरुद्ध है, जो यह उपबंधित करता है कि मध्यस्थ की संख्या सम संख्या नहीं होगी - माननीय न्यायाधिपति श्री व्ही.के. अग्रवाल को एकमात्र मध्यस्थ नियुक्त किया गया - पक्षकार उनके समक्ष उपस्थित होंगे।

Cases referred :

2011 AIR SCW 4484, (2009) 1 SCC 475, (2010) 5 SCC 407, (2011) 3 SCC 507.

Vishal Bhatnagar, for the applicant.

Akhilesh Jain, for the non-applicant.

ORDER

ALOK ARADHE, J. :- By means of this petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (in short 'the Act'), the petitioner seeks appointment of an arbitrator.

2. The facts, giving rise to filing of the petition, briefly stated, are that the petitioner is a builder and developer, whereas the respondent is the owner of plot admeasuring 11000 square feet situate at Idgah Hills, Bhopal. The parties entered into a joint venture agreement on 2.7.2004 under which the petitioner agreed to construct duplexes on the land in question subject to the terms and conditions enumerated in the aforesaid agreement. The sale proceeds were to be divided in the ratio of 55% and 45% respectively between the petitioner and the respondent. The Municipal Corporation Bhopal granted the permission

for construction of duplexes on 16.6.2004 and thereafter the construction of the duplexes commenced. The petitioner executed sale deeds on behalf of the respondent as his attorney. However, the Municipal Corporation demolished all the duplexes constructed by the petitioner on 25.6.2005. It is the case of the petitioner that he has paid a sum of Rs. 16,85,000/- to the respondent. However, the respondent despite repeated requests did not refund the amount to the petitioner.

3. Clause 19 of the joint venture agreement provides that if any dispute arises between the parties, the same can be resolved by appointing one arbitrator each. The petitioner by a notice dated 27.4.2011 invoked the arbitration clause however, the respondent did not respond. In the aforesaid factual backdrop, the petitioner has approached this Court.

4. Learned counsel for the petitioner submitted that clause 19 of the joint venture agreement is in contravention of section 10 of the Act and the therefore, sole arbitrator should be appointed. It is further submitted that the Supreme Court vide order dated 8.2.2011 passed in Civil Appeal No. 1493/2011 has granted liberty to the petitioner to seek redressal of its' grievance against the respondent and arbitrator has the authority to decide about the maintainability of the claim raised before him. On the other hand learned counsel for the respondent submitted that the agreement in question is not duly stamped. In this connection reference has been made to article 5(d) of Schedule I-A of the Indian Stamp Act, 1899 (here in after referred to as 'the 1899 Act') as well as the decision of the Supreme Court in the case of *M/s SMS Tea Estates Pvt. Ltd. V. M/s Chandmari Tea Co. Pvt. Ltd.* 2011 AIR SCW 4484. Therefore, the agreement should be impounded. It is also urged that the claim of the petitioner is a dead one and is barred by limitation and, therefore, the same cannot be referred to the arbitrator.

5. I have considered the respective submissions made by learned counsel for the parties. Before proceeding further I deem it appropriate to examine the question whether the agreement is duly stamped as required under article 5 (d) of Schedule I-A of the 1899 Act. Article 5(d) reads as under:

“5. Agreement or memorandum of an agreement:-

(d) If relating to the construction of a building on a land by a person other than the owner or lessee of such land and having a stipulation that after construction, such building shall be held

jointly or severally by that other person and the owner or the lessee, as the case may be, of such land, or that it shall be held jointly or severally by them and the remaining part thereof shall be sold jointly or severally by them”

6. In the instant case, from perusal of relevant clauses, namely, (ii), (iii), (vi), (viii), (x) and (xii) of the joint venture agreement dated 2.7.2004 it is evident that the agreement in question does not fall within the purview of article 5 (d) of Schedule I-A of the 1899 Act as there is no stipulation in the agreement that building shall be held jointly or severally by the person other than the owner and remaining part thereof shall be sold jointly or severally by them. Therefore, the same is not required to be stamped as per article 5 (d) of Schedule I-A of the 1899 Act.

7. In *Speech and Software Technologies (India) P. Ltd. V. NEOS Interactive Ltd*, (2009) 1 SCC 475 it has been held that the preliminary matters to be considered by the court while dealing with the application under Section 11 (6) of the Act, are namely, (i) existence of an arbitration agreement; (ii) territorial jurisdiction; (iii) whether there are live issues to be referred to arbitrator; and (iv) whether the application is filed within the period of limitation prescribed by law.

8. In the case of *Anil Kumar V. B.S. Neelkanta and others*, (2010) 5 SCC 407 it has been held by the Supreme Court that if it is not possible to decide whether the live claim is made, without recording evidence such question should be left for decision of the arbitral tribunal. In the case of *Indian Oil Corporation V. SPS Engineering Ltd.*, (2011) 3 SCC 507 it has been held that in proceeding under Section 11 (6) of the Act, merits of the claim or maintainability or tenability of the claim either on the facts or law cannot be gone into. The scope of scrutiny is confined only to a claim which is evidently time barred and where there is no need of detailed consideration of evidence. It has further been held that the Court will not enter into disputed question whether the claim is barred by limitation or not and such issue should be left for decision of the arbitral tribunal.

9. In the backdrop of aforesaid legal position, the facts of the case may be seen. It is relevant to mention here that the petitioner in the petition under Section 11 (6) of the Act has not disclosed the date of payment of the amount to the respondent. The respondent has not filed any reply to the petition under Section 11 (6) of the Act. There is prima facie no material on record to hold

that the claim made by the petitioner is patently a dead claim. Therefore, the question whether the claim made by the petitioner is a dead claim cannot be decided without recording evidence and, therefore, has to be left for decision of the arbitral tribunal.

10. Clause 19 of the joint venture agreement provides that if any dispute arises between the parties, they can resolve the dispute by appointing one arbitrator each. The aforesaid clause is in contravention of Section 10 (1) of the Act which provides that number of arbitrator shall not be an even number. It is pertinent to mention here that during course of argument, learned counsel for the parties submitted that they have no objection for appointment of Mr. Justice V.K. Agrawal, as arbitrator. Accordingly, Mr. Justice V.K. Agrawal is appointed sole arbitrator to arbitrate the dispute between the parties. The parties shall appear before him along with a copy of this order. The Office is also directed to send a copy of this order to Mr. Justice V.K. Agrawal.

11. In the result, the petition is allowed.

Petition allowed.

I.L.R. [2015] M.P., 243

COMPANY APPEAL

Before Mr. Justice Brij Kishore Dube & Mr. Justice M.K. Mudgal
Company Appeal No. 2/2013 (Gwalior) decided on 7 August, 2013

SATYANARAYAN

...Appellant

Vs.

M/S JIYAJEERAO COTTON MILLS LTD. & anr.

...Respondents

Companies Act (1 of 1956), Section 446(2) - Civil Suit - Competency of Civil Court - Liquidation proceedings pending - Jurisdiction of Civil Court vis-a-vis Company Judge is not ousted by the provisions of Companies Act - State of M.P. in another Civil suit sought for declaration and recovery of possession against official liquidator which was dismissed on the ground of non-maintainability in absence of leave of the Company Court - Said order has attained finality - Declaration to the effect that property in dispute belongs to company under liquidation has attained finality - Dismissal of application for permission u/s 446(2) of the Act does not suffer from any perversity or illegality or arbitrariness - Appeal dismissed. (Paras 8, 13, 16)

कम्पनी अधिनियम (1956 का 1), धारा 446(2) – सिविल वाद – सिविल न्यायालय की सक्षमता – समापन कार्यवाही लंबित – कम्पनी अधिनियम के उपबंध, कंपनी जज के साथ ही सिविल न्यायालय की अधिकारिता को अलग नहीं करते – म.प्र. राज्य ने अन्य सिविल वाद में शासकीय समापक के विरुद्ध कब्जे की वापसी और घोषणा चाही, जिसे कम्पनी न्यायालय से अनुमति के अभाव में अपोषणीयता के आधार पर खारिज किया गया – उक्त आदेश को अंतिमता प्राप्त हुई – इस प्रभाव की घोषणा कि विवादित सम्पत्ति समापन के अधीन कम्पनी की है, को अंतिमता प्राप्त हुई – अधिनियम की धारा 446(2) के अंतर्गत अनुमति हेतु आवेदन की खारिजी, किसी विपर्यस्तता या अवैधता या मनमानापन से ग्रसित नहीं – अपील खारिज।

Cases referred :

AIR 1968 Calcutta 394, (1998) 7 SCC 105, (2003) 6 SCC 220, (2004) 12 SCC 356, (2008) 15 SCC 1, (2010) 10 SCC 553, AIR 1971 SC 374.

V.K. Bhardwaj with Anand V. Bhardwaj, for the appellant.

J.D. Suryavanshi, for the respondent No.1.

Vivek Dalal, for the auction purchaser, M/s Neminath Developers.

J U D G M E N T

The Judgment of the Court was delivered by :
BRIJ KISHORE DUBE, J. :- This is a third round of litigation/appeal under Section 483 of the Companies Act, 1956 (for short 'the Act') which has been preferred by the appellant herein/applicant against the impugned order dated 28.02.2013 passed on I.A.No.11342/2010 by the learned Company Judge in Company Petition No.4/1997 (M/s. J.C. Mills v. BIFR) whereby the same has been dismissed.

2. No exhaustive statement of facts of the case are required to be narrated for the purpose of disposal of this appeal. Suffice it to say that the appellant, Satya Narayan Somani filed an application, I.A.No.11342/2010 for seeking permission under Section 446 (2) of Companies Act, 1956 to file the civil suit for declaration and injunction against the respondent No.1 being M/s. Jiyajeerao Cotton Mills Limited (in liquidation). The application was firstly considered in the pending Company Petition No.4/1997 by the learned Company Judge and vide order dated 28.01.2011, the same was dismissed. Being aggrieved by the aforesaid order, the appellant preferred an appeal being Company Appeal No.2/2011 which was allowed by a Division Bench of this Court vide order dated 18.08.2011 by passing a common order alongwith Company Appeal No.1/2011 and remanded

the matter back, thereafter, the learned Company Judge again dismissed I.A.No.11342/2010 vide order dated 14.10.2011. Being aggrieved thereof again by the order dated 14.10.2011, the appellant preferred an appeal being Company Appeal No.11/2011, which was allowed by a Division Bench of this Court vide order dated 31.08.2012 and the matter was again remanded back for deciding it afresh. Thereafter, the matter was heard by the learned Company Judge and vide the impugned order dated 28.02.2013 again dismissed I.A.No.11342/2010, hence, this appeal.

3. Shri V.K. Bhardwaj learned senior counsel appearing on behalf of the appellant/applicant contended that the impugned order is illegal, incorrect and deserves to be set-aside. According to him, the learned Company Judge while passing the impugned order relied upon the order dated 02.02.2008 passed by the District Judge, Ujjain in Civil Suit No.28A/2007 (State of M.P. Vs. Official Liquidator, J.C. Mills Factory Agra Road, Ujjain) wherein the order dated 5.11.2004 passed in Company Case No.4/1997 was relied upon. The order dated 5.11.2004 passed in Company Case No.4/1997 is the subject-matter of Misc. Appeal No.1052/2004 in which a Division Bench of this Court ordered to maintained status-quo vide order dated 27.08.2007 and again on 30.04.2008. It is further submitted that the Civil Suit No.28A/2007 which was dismissed by the Trial Court vide order dated 02.02.2008 for non-obtaining the leave to file the civil suit and the same was affirmed by a Division Bench of this Court at Indore in in First Appeal No.366/2008 vide judgment dated 02.02.2010. The present application was filed by the appellant for seeking leave to file the civil suit against the Official Liquidator and others, on the basis of *Kabuliyatnama* submitted with the application, therefore, the same could not have been dismissed on the ground that the alleged suit was dismissed for want of taking permission to file the suit. It is further submitted that the appellant came to seek permission to file civil suit, the Company Judge is not competent to decide the question of title as the same is required to be adjudicated by the competent Civil Court. The jurisdiction of the Civil Court is not ousted under the Act. In this regard, learned counsel placed reliance on four judgments which are as under:-

- (i) *Narendra Nath Saha and another v. Official Receiver, High Court Calcutta and another*, AIR 1968 Calcutta 394;
- (ii) *Ammonia Supplies Corporation (P) Ltd., v.*

Modern Plastic Containers Pvt. Ltd. and others,
(1998) 7 SCC 105;

(iii) ***Dwarka Prasad Agarwal (D) by Lrs. and another v. Ramesh Chander Agarwal and others,*** (2003) 6 SCC 220;

(iv) ***National Organic Chemical Industries Ltd. v. Miheer H. Mafatlal and another,*** (2004) 12 SCC 356.

4. Learned senior counsel further submits that jurisdiction of the Company Judge is limited and if any order is passed in disregard of the mandatory provisions of law, the order would be without jurisdiction. In this regard, learned counsel placed reliance in the case of *Bakemans Industries Private Limited v. New Cawnpore Flour Mills and others*, (2008) 15 SCC 1. It is further submitted that the Company Judge has to look into the interest of the Public at large. In this regard, he cited the decision of Apex Court in *IBA Health (India) Private Limited v. Info-Drive Systems SDN. BND.*, (2010) 10 SCC 553. It is further submitted that the appellant is a journalist by profession having no personal interest in the property which belongs to the State of Madhya Pradesh, but the State Government is sitting tight over the matter and is doing nothing, therefore, permission to file civil suit may be granted. In this regard, learned senior counsel placed reliance upon *Smt. Jatan Kanwar Golcha v. M/s. Golcha Properties Private Ltd.*, AIR 1971 SC 374.

5. Shri J.D. Suryavanshi, counsel appearing on behalf of the respondent No.1 and Shri Vivek Dalal, learned counsel for the auction purchaser argued in support of the impugned order and prayed for dismissal of the appeal.

6. Shri Vivek Dalal, learned counsel further submits that the property in question was owned by M/s. Jiyajeerao Cotton Mills Limited (in liquidation) and the same was sold by the Official Liquidator to M/s. Neminath Developers vide sale deed dated 25.09.2007 for a consideration of Rs.21.76 Crores and the possession of the property in question had been duly handed over to the auction purchaser, M/s. Neminath Developers. The present appellant has no *locus-standi* to file the application as the title of the Company stood already decided by different Courts upto the Hon'ble Apex Court.

7. We have given our anxious consideration to the above arguments advanced before us by the learned counsel for the parties.

8. On a perusal of the record, it is transpired that earlier the State of Madhya Pradesh filed a civil suit for declaration and permanent injunction and recovery of possession against Official Liquidator, M/s. J.C. Mills Ltd. and M/s. Neminath Developers in respect of the land bearing Survey Nos.1563/1, 1563/2, 1563/3 and 1564 situated at Patwari Halka No.24, Ujjain. The civil suit was dismissed by the Trial Court vide judgment and decree dated 02.02.2008 passed in Civil Suit No.28-A/2007 on the ground that the civil suit was not maintainable before the civil Court in view of Section 446 of the Companies Act without leave of the Company Court. Being aggrieved thereof, the State of Madhya Pradesh filed First Appeal No.366/08 before this Court at Indore, the same was dismissed vide the judgment dated 02.02.2010. Against which, an SLP was preferred before the Apex Court, the same was also dismissed. The order dated 02.02.2008 passed in Civil Suit No.28A/2007 by the Trial Court attained finality. Thereafter, no further steps have been taken by the State of Madhya Pradesh.

9. So far as, the order dated 05.11.2004 passed in Company Case No.4/1997 is concerned, it is revealed from the record that in the aforesaid properties of the Company, i.e, M/s. Jiyajeerao Cotton Mills Limited (in liquidation) situated at Ujjain as well as at Gwalior were questioned and by the aforesaid order, it was found that the properties in question belongs to the Company. The relevant para No. 17 of order dated 05.11.2004 reads as under:-

“17. As discussed above the State Government has no right over the said property and the lands belong to the company and the lands are of the company. As regards the property of company at Ujjain, there is no objection by the State Government regarding its title. However, objection was raised by the Collector District Ujjain. This objection was uncalled for. Application of the State Government is therefore dismissed. The properties, which have been taken over by official Liquidator after winding up proceedings and are in control of official Liquidator shall be deemed to be the properties of the company. Other applications are accordingly disposed of.”

10. The State of Madhya Pradesh by preferring Misc. Appeal No.1052/2004 challenged the validity of the order dated 05.11.2004 passed in Company

Case No.4/1997. This Court considered the matter on interlocutory application and passed an order on 27.08.2007 and again on 30.04.2008 directing the parties to maintain status-quo.

11. From a bare perusal of the record of Misc. Appeal No.1052/2004, it is apparent that the property of company in liquidation situated at Ujjain has not been questioned in the aforesaid appeal, therefore, the submission of the learned counsel for the auction purchaser that the order dated 5.11.2004 passed by the Company Judge with regard to the property situated at Ujjain had attained finality seems to be prima-facie reasonable.

12. The ownership right in respect of property in question was claimed by Hari Singh and Yaswant Singh but they could not get success and property in question was sold by the Official Liquidator of Company in liquidation to M/s. Neminath Developers by registered sale deed dated 25.09.2007.

13. In *Narendra Nath Saha* (supra), liquidation proceedings of Company in liquidation were pending before the Calcutta High Court. Suit for ejectment and *mesne* profits against company represented by Official Receiver filed in City Civil Court. In such circumstances, it has been held that suit although would be triable by High Court by virtue of Section 446 (2) of the Companies Act, the jurisdiction of the City Civil Court to entertain and try the suit is not ousted. In *Ammonia Supplies Corporation (P) Ltd.*, (supra), it has been held by the Apex Court that there is nothing under the Companies Act expressly barring the jurisdiction of the civil court, but the jurisdiction of the "court" as defined under the Act exercising its powers under various sections where it has been invested with exclusive jurisdiction, the jurisdiction of the civil court is impliedly barred. The jurisdiction of the "court" under Section 155, to the extent it has exclusive jurisdiction, the jurisdiction of the civil court is impliedly barred. For what is not covered as aforesaid the civil court would have jurisdiction. Similarly even under Section 446(1), its words itself indicate the jurisdiction of the civil court is not excluded. The words "except by leave of the court" itself indicate on leave being given the civil court would have jurisdiction to adjudicate one's right. Of course discretion to exercise such power is with the "court". Similarly under Section 446(2), "court" is vested with powers to entertain or dispose of any suit or proceedings by or against the company. In *Dwarka Prasad Agarwal (D) by Lrs.*, (supra), the Hon'ble Apex Court considered the jurisdiction of Civil Court vis-a-

vis Company Court and held that jurisdiction of Civil Court to try a suit for eviction and injunction is not ousted by the provisions of Companies Act. In *National Organic Chemical Industries Ltd.* (supra), the Hon'ble Apex Court considered the jurisdiction of Company Court under Sections 391 and 394 of the Companies Act. In *Bakemans Industries Private Limited* (supra), the Hon'ble Apex Court in para Nos.44 and 76 observed as under:-

“44. Clause (11) of Section 2 of the Companies Act, 1956 provides for the definition of “the court”. In A. Ramaiya's Guide to the Companies Act, 16th Edn., 2004, the learned author opines that the jurisdiction of the assets of the Company Court those matters it has no jurisdiction.

76. If the jurisdiction of a Company Judge is limited, any substantial deviation and departure therefrom would result in unfairness. When an order is passed in total disregard of the mandatory provisions of law, the order itself would be without jurisdiction.”

14. In *Iba Health (India) Private Limited* (supra), the Apex Court held that the Company Court, at times, has not only to look into the interest of the creditors, but also the interests of the public at large. In *Smt. Jatan Kanwar Golcha* (supra), the Apex Court observed that it is well settled that a person who is not a party to the suit may prefer an appeal with the leave of the Appellate Court and such leave should be granted if he would be prejudicially effected by the judgment.

15. The above mentioned judgments on which reliance has been placed by learned senior counsel appearing on behalf of the appellant are not applicable to the facts and circumstances of the present case.

16. In view of the aforesaid, having carefully gone through the impugned order dated 28.02.2013 passed in Company Petition No.4/1997 by the learned Company Judge, we do not find any perversity or illegality or arbitrariness in it and in our considered opinion, the learned Company Judge rightly dismissed the application of the appellant being I.A.No.11342/2010.

17. Consequently, we do not find any merit in the appeal and the same is hereby dismissed.

Appeal dismissed.

I.L.R. [2015] M.P., 250

CIVIL REVISION

Before Mr. Justice K.K. Trivedi

Civil Rev. No. 373/2007 (Jabalpur) decided on 17 April, 2013

DAYALU

...Applicant

Vs.

MANNULAL SAHU

... Non-applicant

A. Civil Procedure Code (5 of 1908), Section 115 - Civil Suit - Suit for recovery of money was filed on the ground that wheat which was sold by applicant/defendant was taken back by applicant forcibly by stopping the tractor - F.I.R. in this regard was also made - Plaintiff however failed to place copy of F.I.R. on record - No independent evidence was produced - Lower appellate court failed to see the provisions of the Evidence Act - Respondent has to prove its case - He cannot be given benefit of the weakness of the applicant - Revision is allowed. (Paras 2, 11 & 12)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 115 - सिविल वाद - रकम की वापसी के लिए वाद इस आधार पर प्रस्तुत किया गया कि आवेदक/प्रतिवादी ने जो गेहूँ विक्रय किया, उसे आवेदक ने बलपूर्वक ट्रैक्टर रोककर वापस ले लिया था - इस संबंध में एफ.आई.आर. भी की गई थी - किन्तु वादी एफ.आई.आर. की प्रति अभिलेख पर लाने में असफल रहा - स्वतंत्र साक्ष्य प्रस्तुत नहीं किया गया - निम्न अपीली न्यायालय साक्ष्य अधिनियम के उपबंधों का अवलोकन करने में असफल रहा - प्रत्यर्थी को अपना प्रकरण साबित करना होगा - उसे आवेदक की कमजोरी का लाभ नहीं दिया जा सकता - पुनरीक्षण मंजूर।

B. Civil Procedure Code (5 of 1908), Section 115 - Civil Revision - Scope - Power u/s 115 of the Code though limited can be exercised if it is found that material irregularity of jurisdiction or law is committed by lower court. (Para 10)

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 115 - सिविल पुनरीक्षण - व्याप्ति - संहिता की धारा 115 के अंतर्गत शक्ति यद्यपि सीमित है, उसका प्रयोग किया जा सकता है, यदि यह पाया जाता है कि निचले न्यायालय द्वारा अधिकारिता या विधि की तात्त्विक अनियमितता कारित की गयी है।

Cases referred :

2001(1) J.L.J. 401, AIR 1949 Privy Council 156, 1969 (3) SCC 807.

R.L. Ariha, for the applicant.

S.P. Sharma, for the non-applicant.

ORDER

K.K. TRIVEDI, J. :- This revision is directed against the judgment and decree dated 07.08.2007 passed in Civil Appeal No.1-B/2006 by the III Additional District Judge (Fast Track), Tikamgarh whereby the judgment and decree dated 31.08.2006 passed in Civil Suit No.2-B/2006 by the Civil Judge, Class-II, Jatara, District Tikamgarh, has been reversed.

2. Facts giving rise to this revision in brief are, the respondent/plaintiff filed a suit for recovery of Rs.7,638/- with interest from the date of suit till the date of realization. It was contended in the plaint that the respondent/plaintiff was doing the business of purchase of grain. The applicant/defendant was also purchasing the grain seeds for the agriculture purposes. On 08.07.1998, applicant herein purchased 180 kilograms Soyabean from the respondent for which an amount of Rs.1,260/- was to be paid. Since this amount was not paid up to 08.02.1999, with interest an amount of Rs.1,638/- was to be recovered by the respondent/plaintiff from the applicant. On 22.07.1999 again the accounts were settled and since the respondent/ plaintiff has made purchase of wheat from the applicant, after adjusting the amount outstanding towards the applicant, Rs.6,000/- was paid by the father of the respondent/ plaintiff to the applicant. However, the wheat so purchased by the respondent/ plaintiff was loaded in a tractor and when it was being transported, the tractor was stopped on way and the wheat was taken back by the applicant. An F.I.R. to this effect was lodged and complaint was also made to the Superintendent of Police and Town Inspector by the respondent. Since, an amount of Rs.6,000/- was to be recovered by the respondent/plaintiff from the applicant together with the outstanding amount of Rs.1,638/-, thus, such a claim was made.

3. Denying the claim made by the respondent/plaintiff, a written statement was filed by the applicant categorically contending that no such wheat was ever purchased by the respondent/plaintiff nor any Soyabean was purchased by him on 08.07.1998. In fact the applicant has refused to sell any grain to the respondent/plaintiff because he was making the mischief in the payment of the price and was not paying the amount within time. When the applicant started selling the grains to other persons, the respondent/plaintiff threatened that he will rope the applicant in any false case.

4. The Trial Court framed the issues and recorded evidence of the parties. The respondent/plaintiff produced a temporary receipt said to be written by him in the name of his father for payment of Rs.6,000/- to the applicant. He produced a diary containing certain entries with respect to sale and purchase. However, nothing more evidence in writing was produced by the respondent/plaintiff. In his statement he admitted that he lodged a report in the police with respect to the incident, which has taken place on 02.07.1999. His witness also stated only this much that the payment was made by the father of the respondent/plaintiff to the applicant and wheat was loaded in a tractor but the tractor was stopped and the grain was taken back. The father of the respondent/plaintiff was examined and he also stated the same thing. In the cross-examination of PW-1 respondent/plaintiff, he admitted that there was no signature of applicant on the account diary maintained by the respondent/plaintiff. He further admitted that in some places in the said diary, the amount was acknowledged by putting signatures by some of the persons. He could not explain as to why signatures of applicant were not obtained on the said diary if any amount was outstanding towards the applicant. Again in Exhibit P-1 the receipt written by him, there is nothing written whether any amount was paid to the applicant, which was duly acknowledged by him. The fact relating to making of the report in the police with respect to the incident was admitted again in the cross-examination but the same was not produced in the evidence. He admitted that no case was registered by the Police. Same was the statement made by the other witnesses of the respondent/plaintiff. However, PW-2 Kunjilal and PW-3 Babloo stated that they came on the spot only when they were asked by the respondent/plaintiff. They further admitted that the applicant was the Sarpanch of the village Panchayat and was having good reputation in the area. Same was the statement with respect to the father of the respondent/plaintiff.

5. In rebuttal, evidence was produced by the applicant and he deposed categorically that because the respondent/ plaintiff was not keeping the right records of purchase and sale, he stopped dealing with the respondent/plaintiff. When the respondent asked the applicant to sale the grain to him only, he said that because of improper working of the respondent/plaintiff in business, he was not interested in selling him the grains. It was proved by the evidence of the applicant that he was having good reputation in the society and in the area. It was further proved that no case was registered against the applicant by the Police on the complaint made by the respondent/plaintiff.

6. After assessing the evidence available on record, the Trial Court reached to the conclusion that the respondent/ plaintiff failed to prove his case and dismissed the suit. Against the said judgment and decree, appeal was preferred by the respondent/plaintiff before the lower Appellate Court. Since the said appeal has been allowed and the suit of the respondent/plaintiff is decreed, this revision is filed under Section 115 of the Code of Civil Procedure, on account of a bar created under Section 102 of the Code of Civil Procedure with respect to filing of second appeal in money suits of less than Rs.25,000/- value.

7. It is vehemently contended by learned Counsel for the applicant that there was no cogent reason assigned by the lower Appellate Court in reversing the well reasoned judgment and decree of the Trial Court. It was categorically held by the Trial Court that no evidence was available to prove the fact relating to forcefully taking back the wheat purchased by the respondent. The report lodged in the Police by the respondent/plaintiff should have been produced and should have been proved so as to indicate that the transaction has taken place on the date and the applicant has in fact sold the grain to the respondent/ plaintiff. Merely because some of the interested witnesses examined by the respondent/plaintiff were stating that the money was paid to the applicant towards the sale consideration of the wheat, was not enough evidence to prove such a transaction. At least an acknowledgment of the same should have been obtained from the applicant. Exhibit P-1 was duly considered by the learned Trial Court and it was held that such a document was unreliable as it contains nothing but the writing of the respondent/plaintiff without any acknowledgment of the applicant, who was said to be recipient of the money. Similarly, the diary produced by the respondent/plaintiff was not reliable inasmuch as it was not a particular account book kept for the purposes of business transactions. It was also not proved in accordance to law. That being so, the Trial Court was right in holding that the respondent/plaintiff has utterly failed to prove his case. Drawing attention of this Court to the provisions of Section 34 of the Indian Evidence Act, 1872, it is contended that the entries of accounts regularly kept in the course of business are to be relied only if such statements are proved by sufficient evidence to charge any person with the liability. There was no evidence available on record to indicate that the diary Exhibit P-2 was maintained by the respondent/plaintiff as a book of accounts in regular course of business and, that, entry made in the same was not enough to show that the applicant has purchased any grain from the

respondent/plaintiff. This being so, the findings recorded by the lower Appellate Court are perverse and are liable to be set aside.

8. Per contra it is contended by learned Counsel appearing for the respondent that this Court has limited jurisdiction under Section 115 of the Code of Civil Procedure to interfere in a judgment and decree of the lower Appellate Court. It is contended that unless there is a substantial question of law involved, this Court would not entertain such a revision. Relying in the case of *Santosh Hazari vs. Purushottam Tiwari*, 2001 (1) J.L.J. 401, it is contended by learned Counsel for the respondent that there is no substantial question of law involved in the present revision and as such the same is not to be entertained. Further placing reliance in the case of *N.S. Venkatagiri Ayyangar and another vs. The Hindu Religious Endowments Board, Madras*, AIR 1949 Privy Council 156, it is contended by learned Counsel for the respondent that the scope of Section 115 of the Code of Civil Procedure is very limited and in exceptional circumstances, if it is found that the order of the subordinate Court is not within the jurisdiction or that the Court has failed to exercise the jurisdiction available or that while exercising jurisdiction the Court has acted illegally or the order passed by the Court below is in the breach of some provisions of law or that the material irregularity has been committed by the Court below in exercising jurisdiction, the High Court would be competent to exercise its powers under Section 115 of the Code of Civil Procedure. Further placing reliance in the case of *M/s D.L.F. Housing and Construction Company (P.) Ltd., New Delhi vs. Sarup Singh and others*, 1969 (3) SCC 807, it is contended that the Apex Court has also laid-down the law in this respect and, therefore, it would not be open to this Court to look into the well reasoned judgment and decree of the lower Appellate Court unless it is proved that there was material irregularity committed in appreciation of the evidence. It is contended that even in the second appeal stage, re-appreciation of the evidence is not permissible and, therefore, the revision is liable to be dismissed.

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

10. It is not in dispute that the power under Section 115 of the Code of Civil Procedure is limited and is to be exercised sparingly only in the given circumstances if it is found by this Court that material irregularity of jurisdiction or law is committed by the lower Court. The power is not to be exercised in all such cases where reasoned and lawful findings are recorded by the lower

Courts. However, after amendment in the Code of Civil Procedure and taking away the right of second appeal provided under Section 100 of the Code of Civil Procedure where a bar is created by Section 102 of the Code of Civil Procedure, it is not limited that the appellate forum or the revisional authority will look into the proceedings of the Courts below to satisfy itself whether any material irregularity in appreciating the law is committed by the Court below or not. Therefore, the first objection raised by the learned Counsel for the respondent with respect to the maintainability of the revision is overruled. It will be quite useful to point out that in the case of *N.S. Venkatagiri Ayyangar* (supra) and in the case of *M/s D.L.F. Housing and Construction Company (P.) Ltd., New Delhi* (supra) the Apex Court has not said that in any case the power under Section 115 of the Code of Civil Procedure would not be invoked. It has to be seen only that whether any of the circumstances as enumerated in the aforesaid decisions are available to exercise that power of revision by this Court or not. The other case in which the reliance is placed by the learned Counsel for the respondent relates to second appeal, which is to be filed under Section 100 of the Code of Civil Procedure and, therefore, it is not necessary that revisional power would be exercised only if a substantial question of law is made out.

11. Now coming to the facts relating to appreciation of evidence. Undisputedly, the claim was set by the respondent/plaintiff on an incident, which was said to have taken place on 02.07.1999. It was the case of the respondent/plaintiff himself that the report was lodged in the Police. The reliance was placed by the respondent/plaintiff on two documents, one which was said to be written by the respondent/plaintiff himself for payment of Rs.6,000/- to the applicant. However, there was nothing on the said document to show that the amount was actually paid to the applicant by the father of the respondent/plaintiff. Secondly, the diary said to be kept by the respondent/plaintiff was not an account book to be maintained for the purposes of business transactions. The entry made in the said diary was irrelevant. Again the same was not acknowledged by the applicant, though in the same diary, to some transactions, acknowledgments were obtained by the respondent/plaintiff from the concerned persons. No explanation was assigned by the respondent/plaintiff in this respect. He could not explain as to how and why he could not produce the copy of the report lodged in the Police with respect to the incident, which has taken place on 02.07.1999. If such a document would have been produced, the entire story made by the respondent/plaintiff would have been

treated to be proved by oral evidence. The contents of diary were also not proved by sufficient evidence independently produced. The respondent/plaintiff has either examined the persons, who were said to accompanying him or those who were closely related to him. No independent evidence was produced in this respect. The facts, as have been stated by the applicant, could not be disproved by the respondent/plaintiff even when the witnesses of the applicant were cross-examined to some extent. The status of the applicant in the society was admitted by the witnesses of the respondent/plaintiff. If this evidence was appreciated by the Trial Court and if it was held that the respondent/plaintiff has failed to prove his claim, in the considered opinion of this Court, the scope of interference was very less in an appeal. The Appellate Court while passing the judgment and decree in favour of the respondent/plaintiff, simply said that the Trial Court gravely erred in not accepting the correctness of the entry made in Exhibit P-2, the diary maintained by the respondent/plaintiff only because the same was not signed. The reason assigned by the lower Appellate Court is that the entry made in the said diary cannot be doubted only because the same are not acknowledged. Learned lower Appellate Court completely failed to see the provisions of the Evidence Act with respect to proof of documents and, therefore, committed an error of law in reversing the judgment and decree of the Trial Court.

12. One more aspect is that the respondent/plaintiff was in possession of the best evidence in proof of his claim, i.e. the report lodged in the Police. There was nothing suggested by him in his evidence as to how he could not produce the same before the Court at the time of trial. Even in the appellate stage, knowing fully well that only because of non-production of such material evidence the respondent was non-suited, no attempt was made to produce the said evidence at the appellate stage. The provisions are made in this respect in the Code of Civil Procedure, which could have been utilized by the respondent/plaintiff for fulfilling that requirement. The respondent/plaintiff was required to blame himself for all such infirmity and was not to be given the help from weakness of applicant, if at all any was there. However, on account of complete failure on the part of the respondent/plaintiff, decree was not to be granted in his favour by reversing the judgment and decree of the Trial Court.

13. In view of the aforesaid, it is a fit case in which power under Section 115 of the Code of Civil Procedure should be exercised by this Court. Accordingly, the revision is allowed. The impugned judgment and decree of Appellate Court is

set aside and the judgment and decree of Trial Court is affirmed. In the facts and circumstances of the case, parties to bear their own costs.

Revision allowed.

I.L.R. [2015] M.P., 257

CRIMINAL REVISION

Before Mr. Justice Alok Verma

Cr. Rev. No. 284/2014 (Jabalpur) decided on 4 August, 2014

JASHVANT RATHORE

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

(Alongwith Cr. Rev. 619/2014)

***Criminal Procedure Code, 1973 (2 of 1974), Section 319 -
Summoning of additional accused - Sessions Court can issue summons
on the basis of records transmitted to him as a result of the committal
order passed by Magistrate. (Para 7)***

*दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 - अतिरिक्त अभियुक्त
को समन किया जाना - मजिस्ट्रेट द्वारा पारित सुपुर्दगी आदेश के परिणामस्वरूप
उसे भेजे गये अभिलेखों के आधार पर सेशन न्यायालय समन जारी कर सकती है।*

Cases referred :

AIR 2013 SC 3018, 2005 (5) MPHT 19, 2007 CRI.L.J. 3198 (SC),
(1993) 2 SCC 16, (1998) 7 SCC 149.

J.N. Tripathi, for the applicant.

R.N. Yadav, P.L. for the non-applicant/State.

ORDER

ALOK VERMA, J. :- By this common order Criminal Revision No. 284/2014 and 619/2014 are being disposed of, as the both arise from the same impugned order passed by the learned First Additional Sessions Judge Anuppur in S.T. No. 75/2010 on 27/01/2014.

2. The relevant facts for disposal of this appeal are that the accused Sujit Mishra filed an application under Section 319(1) & 190 of the Code of Criminal Procedure, before the learned Additional Sessions Judge praying thereby to summon Dilip Jagwani and Bikki Jagwani as accused in the case.

The session trial before the learned Additional Judge was related to the land survey No. 58/3(ka) area 0.57 acre, village Samatpur, District Anuppur. It was alleged that by a forged document, said land was sold by one Nirmala Goyanka to Shanti Jagwani and Leela Jagwani. In the documents Dilip Jagwani and Bikki Jagwani signed as attesting witnesses. Learned Additional Sessions Judge placing the reliance on the judgment of Hon'ble Supreme Court in the case of *Dharam Pal & others vs. State of Haryana & others*, AIR 2013 SC 3018, found that Session Court can take cognizance against any person and summons him as an accused at any stage after case is committed to the Session Court for trial.

3. Following this principle and after going through the facts of the case, the learned Additional Sessions Judge found that Shankar Kumar Thakurta, the revisionist in Criminal Revision No. 619/2014 and Jashvant Rathore, the revisionist in Criminal Revision No. 284/2014 introduced one Smt. Gayatri Verma as *bhumi swami* in place of Nirmala Goyanka, the real *bhumiswami* and got the forged sale-deed executed and, accordingly, the revisionists in both the cases were arraigned as accused in the case and bailable warrant was issued against them.
4. Aggrieved by this order, the present revisions are filed on the ground that before recording any evidence and cross-examination of witnesses, the Court cannot take cognizance against any person who has not impleaded as an accused by the investigating officer.
5. Learned counsel for the revisionists placed reliance on the judgment of this Court in the case of *Surendra Singh vs. State of Madhya Pradesh*, 2005(5) MPHT 19(NOC), and judgment of Hon'ble Supreme Court in the case of *Mohd. Shafi vs. Mohd. Rafiq & another*, 2007 CRI.LJ.3198 (SC).
6. In the case of *Mohd. Shafi* (supra), the Hon'ble Supreme Court has held that the Court must arrive at satisfaction that there exists possibility that accused, so summoned, in all likelihood would be convicted and such satisfaction can be arrived at upon completion of cross-examination of witness, if the order passed at instance of witness at stage of examination under Section 161 of the Code of Criminal Procedure, such an order is improper. The Hon'ble Supreme Court has also observed in this case are that:

"But we would hasten to add that this is really an extraordinary power which is conferred on the court and

should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken."

7. However, the learned Additional Sessions Judge placed reliance on the case of *Dharam Pal* (supra), which is a judgment of constitutional Bench of Hon'ble Supreme Court, in this judgment the controversy raised by two judgments; one in the case of *Kishun Singh Vs. State of Bihar* (1993) 2 SCC 16, and the other is a decision of a Three Judge Bench in the case of *Ranjit Singh vs. State of Punjab* (1998) 7 SCC 149. *Ranjit Singh's* case disapproved the observations made in *Kishun Singh's* case. In this case, it was laid down that Session Court has power under Section 193 of the Code of Criminal Procedure, 1973, to take cognizance of an offence and summon other persons whose complicity in the commission of the trial could *prima facie* be gathered from the material available on record. However, in the case of *Ranjit Singh* (supra), the Three-Judge Bench disagreed with the observations given in the case of *Kishun Singh* (supra) and held that from the stage of committal till the Session Court reached the stage indicated in Section 230 of the Code of Criminal Procedure, that Court could deal only with the accused referred to in Section 209 of the Code of Criminal Procedure and there is no intermediary stage till then enabling the Session Court to add any other person to the array of the accused. This controversy has now been resolved by the constitutional Bench of the Hon'ble Apex Court in the case of *Dharam Pal* (supra), dealing with the case law on the controversy, in para, 30 of its judgment, the Court observed that :-

"30. The Reference to the effect as to whether the decision in Ranjit Singh's Case (supra) was correct or not in Kishun Singh's case (supra) is answered by holding that the decision in Kishun Singh's case was the correct decision and the learned Sessions Judge, acting as a Court of original jurisdiction, could issue summons under Section 193 on the basis of the records transmitted to him as a result of the committal order passed by the learned Magistrate."

8. Thus, the law as laid down in this case is that the Session Court can take cognizance against the persons who are not as accused in the case and issue summon to them to face trial along with other accused.

9. Coming to the merits on the case, learned Court has observed that the revisionists in the present revisions were instrumental in the deal and took active part in the execution of forged sale deed. *Prima facie* there appears to be no illegality and irregularity in the conclusion drawn by the learned Additional Sessions Judge, at this stage, when charges are yet to be framed in the case.

10. In view of the above, I find no merits in these revisions and, accordingly, the revisions are dismissed.

Certified copy as per rules.

Revision dismissed.

I.L.R. [2015] M.P., 260

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice U.C. Maheshwari

M.Cr.C. No. 13305/2011 (Jabalpur) decided on 22 April, 2013

USHA AJAY SINGH (SMT.)

...Applicant

Vs.

SHRI J.L. MISHRA

...Non-applicant

Penal Code (45 of 1860), Sections 420, 467, 468, Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Forged Caste Certificate - State Level Schedule Caste Certificate Scrutiny Committee after scrutinizing the caste certificate of applicant held caste certificate produced by applicant before M.P.P.S.C. for obtaining service is illegal - As caste certificate was fabricated by practicing fraud in the shape of valuable security with dishonest intention to obtain Govt. service prima facie case made out.

(Paras 8 to 12)

दण्ड संहिता (1860 का 45), धाराएं 420, 467, 468, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 - कूटस्थित जाति प्रमाण पत्र - राज्य स्तरीय अनुसूचित जाति प्रमाण पत्र छानबीन समिति ने आवेदक के जाति प्रमाण पत्र की जांच पड़ताल के पश्चात यह ठहराया कि आवेदक द्वारा नौकरी प्राप्त करने के लिए एम. पी.पी.एस.सी. के समक्ष प्रस्तुत किया गया जाति प्रमाण पत्र अवैध है - चूंकि जाति प्रमाण पत्र को, मूल्यवान् प्रतिभूति के रूप में, सरकारी सेवा अभिप्राप्त करने के आशय से कपट पूर्वक गढ़ा गया, प्रथम दृष्टया प्रकरण बनता है।

Case referred :

(2008) 9 SCC 54.

Sanjay K. Agrawal, for the applicant.

None for the respondent.

ORDER

U.C. MAHESHWARI, J. :- The applicant/accused has preferred this petition under Section 482 of Cr. P.C. for quashment of the complaint filed by the respondent against him in the Court of Judicial Magistrate First Class-Bhopal in which vide order dated 5.9.2011 (Ann. A.11) after taking the cognizance against the applicant for the offence of Section 420, 467 and 468 of IPC her presence has been directed to be secured in such Court by issuing the bailable warrant of Rs. 5,000/-.

2. Inter-alia the impugned private complaint has been filed by the respondent against the applicant for taking cognizance under Section 420, 467, 468 and 120-B of IPC on the ground that the applicant by practicing fraud on the basis of forged and fabricated caste certificate of schedule caste dated 29.3.1993 has got the Government service. The aforesaid alleged certificate was not obtained by the applicant in accordance with the procedure prescribed under the law but the same was obtained by practicing the fraud with the authorities. On receiving the complaint in this regard by the concerning department then the State Level Schedule Caste Certificate Scrutiny Committee (in short "the Committee) has scrutinized such matter and vide order dated 23.9.2009 such committee has resolved that the aforesaid certificate of Schedule Caste used by the applicant for obtaining the Government service is illegal document. In the light of such order when no action was taken by the State authorities against the applicant then respondent being Journalist/Press Reporter after collecting all requisite information and documents has filed the impugned private complaint against the applicant in the above mentioned Court on which by adopting the procedure provided in Section 200 and 202 of Cr. P.C. the statement of the complainant and his witnesses were recorded and in the light of such evidence and documents placed on the record the cognizance of the above mentioned offence was taken against the applicant and direction to secure her presence before such Court through bailable warrant was given.

3. It is noted that on earlier occasion also when the impugned complaint was at the initial stage that applicant herein came to this Court under Section 482 of Cr. P.C. with M.Cr. C. No. 7132/09 for quashment of the then proceeding of the impugned complaint. The same was heard on the question

of admission and dismissed taking into consideration various decisions of the Apex Court vide orders dated 31.7.2009 (Ann. A.10) in the following manner:

“It is settled that the inherent power are exercised for the limited purpose very sparingly where there is an apparent miscarriage of justice. On facts and in the circumstances, no case is made out for admission of this petition in exercise of jurisdiction under Section 482 of the Cr. P.C. to quash the complaint pending before CJM Bhopal where even applicant has not appeared and neither copy of the impugned complaint is filed before this Court, hence the petition is dismissed at motion stage.”

Subsequent to dismissal of the aforesaid petition the trial Court has taken the cognizance of the above mentioned offence against the applicant, on which the applicant has come against to this Court with this petition:

4. The applicant's counsel after taking me through the petition and annexed papers argued that the applicant come to this Court with a prayer of quashment of the impugned case on the ground that she belongs to Khangar community which is notified under the Schedule Caste in the State of Madhya Pradesh, according to M.P. (S.C.) Order No. 195, the same is annexed as Annexure A-1. Pursuant to that she appeared in the preliminary examination of M.P. State Civil Services conducted by the M.P.P.S.C. and cleared the same, consequently she became entitled to appear in the main examination. Since she was member of notified Schedule Caste and was not possessed the caste certificate issued by the competent authority, the applicant was required to submit a certificate in Form-iv appended with the application form. According to such form the same was required to be attested by the concerning revenue officer. In order to get said attestation the applicant obtained certificate from one of her close acquaintance who was posted as Tahsildar Nasrullaganj, Sehore to the effect that he knows the applicant personally and she belongs to Khangar caste, which is notified in the State of Madhya Pradesh as Schedule Caste. The copy of such certificate dated 29.3.1993 is annexure A.2. The same was issued by the Tahsildar Nasrullaganj on account of personal acquaintance and not as caste certificate. He further said that mere perusal of such certificate Ann. A.2, it is apparent that such certificate was issued by the authority in personal capacity on account of personal acquaintance and was not as caste certificate and therefore, it being not official certificate its dispatch number or other record for issuance of the same is not maintained in the office of such Tahsildar. He further said that on the basis of aforesaid certificate Ann. A.2 the

applicant appeared in the main examination, simultaneously she also applied for issuing temporary caste certificate the same was issued by the competent authority Naib Tahsildar, Huzur District Bhopal on 9.12.1998 after due inquiry. Such temporary caste certificate is annexed with the petition as Ann. A.3. It is further argued that the main examination as well as the interview for the alleged post was cleared by the applicant and she was appointed on the post of the District Organizer, Tribal Welfare vide order dated 17.11.1999. Subsequently, the applicant was also issued permanent caste certificate by the SDO Huzur, District Bhopal. Thereafter some complaint was made to the Caste Scrutiny Committee alleging that applicant has wrongly obtained the appointment on a post reserved for the category of Schedule Caste. A detailed inquiry was conducted by the the State Level Schedule Caste Certificate Scrutiny Committee regarding her caste status. In this regard the reports of Superintendent of Police and Collector Sehore were also requisitioned by such Committee and taking into consideration such reports in the meeting of such committee held on 29.1.2003 the permanent caste certificate of the applicant was held to be valid and legal. The copy of the minutes of meeting of Caste Scrutiny Committee dated 29.1.2003 is annexed herewith as Ann. A.4 and in such premises the complaint was closed vide order dated 25.10.2007 (Ann.A.5)

5. By referring the document Annexure A.6 he argued that in the year 2008 the matter was again referred to Scrutiny Committee for consideration, the same was closed on the ground that once matter has been examined by the Caste Scrutiny Committee, no further action can be taken in the matter.

6. It was further argued that after examining the matter again and again by the Caste Scrutiny Committee as well as by the State Government the applicant was again asked to submit an explanation in regard to the alleged caste certificate issued in her favour by the Tahsildar Nasrullaganj. In response of the same she filed the reply of such notice and submitted that the certificate issued by the Tansildar (sic: Tahsildar) Nasrullaganj was in fact not a caste certificate but a certificate issued in his personal capacity in order to enable the applicant to fill up Form-IV appended to the application form but without taking into consideration such submission of the applicant in right earnest, caste Scrutiny Committee in its meeting dated 23.9.2009 held that certificate issued by the Tahsildr (sic: Tahsildar) Nasrullaganj is not valid. He further said that such decision of Scrutiny Committee dated 23.9.2009, (Ann A.7) is under challenge at the instance of the applicant before this Court in W.P. No. 12297/09, and in such petition by an interim order vide dated 25.11.2009 the

effect and operation of the aforesaid decision dated 23.9.2009 of the Scrutiny Committee was stayed as it relates to the applicant service. In this regard he also referred the copy of the order Annexure A-8.

7. He also challenged impugned proceeding on the ground that the respondent did not have any locus standi to file the private complaint against the applicant. As such the respondent is neither her appointing authority nor the controlling authority and in such premises in the lack of locus standi of the respondent to file the complaint the same deserves to be quashed.

8. The minutes/proceeding dated 23.9.2009 (Annexure A.7) drawn up by the State Level Schedule Caste Certificate Scrutiny Committee also placed on the record. On perusing the internal page number 3 of the same while the compiling page number 40 of this petition I have found the following relevant proceeding/minutes.

“श्रीमती उषा अजय सिंह, सहायक आयुक्त, सिवनी— श्रीमती उषा अजय सिंह छानबीन समिति के समक्ष उपस्थित हुई तथा उनके द्वारा कथन किया गया कि समिति जिस प्रमाण पत्र को जाति प्रमाण पत्र मान रही हैं वह जाति प्रमाण पत्र नहीं हैं (तहसीलदार नसरुल्लागंज, जिला सिहोर से जारी जाति प्रमाण पत्र दिनांक 29.03.1993) और न ही उनहोने शासकीय सेवा में आने के लिए उसका उपयोग किया है जिस प्रमाण पत्र के आधार पर वे शासकीय सेवा में आई हैं उसकी प्रति पूर्व में प्रस्तुत की जा चुकी हैं। समिति द्वारा इन्हें दिनांक 29.03.1993 को तहसील नसरुल्लागंज, जिला सीहोर से जारी किये गये खंगार अनुसूचित जाति के जाति प्रमाण पत्र के संबंध में पुलिस अधीक्षक, सीहोर से प्राप्त जांच प्रतिवेदन क्रमांक 1665/08, दिनांक 20.03.2009 कलेक्टर, सीहोर का पत्र क्रमांक 11900 दिनांक 25.09.2008 तथा म. प्र. लोक सेवा आयोग के पत्र क्रमांक 40363/12/1999/चयन दिनांक 3 मार्च 2009 के संलग्नक आयेग द्वारा निर्धारित प्रपत्र-4 में जारी किये गये जाति प्रमाण पत्र के परिक्षणोपरांत निर्णय लिया गया कि श्रीमती उषा अजय सिंह को म. प्र. लोक सेवा आयोग में जिला संयोजक के पद पर नियुक्ति के समय आयोग द्वारा निर्धारित प्रपत्र-4 में नायब तहसीलदार हुजुर जिला भोपाल द्वारा प्रमाणित किये गये जाति प्रमाण पत्र को ही दिनांक 29.03.1993 को तहसीलदार नसरुल्लागंज, जिला सीहोर से जारी किये गये खंगार अनुसूचित जाति के जाति प्रमाण पत्र के आधार पर जारी किया जाना प्रमाणित किया गया है। जबकि पुलिस अधीक्षक, कलेक्टर, सीहोर एवं स्वयं श्रीमती उषा अजय सिंह द्वारा उक्त प्रमाण पत्र को तहसील नसरुल्लागंज से जारी होना नहीं बताया गया है अतः समिति द्वारा निर्णय लिया गया कि श्रीमती उषा अजय सिंह द्वारा म. प्र. लोक सेवा आयोग में प्रस्तुत किया गया जाति प्रमाण पत्र अवैध है। इसे तत्काल प्रभाव से निरस्त करने का निर्णय लिया जाता है। तदनुसार आदेश जारी किया जाये।

9. Aforesaid proceeding/minutes was drawn up by the State Level Schedule Caste Certificate Scrutiny Committee after extending the opportunity of hearing to the applicant herein in which her version was that the certificate dated 29.3.1993 issued by the Tahsildar, Nasrullaganj is not the caste certificate and the same was not used by her to get Government service. She got the Government service on the basis of another certificate. In aforesaid proceeding it is stated that the Committee was under the receipt of inquiry report bearing No. 1665/08 dated 20.3.2009 from the office of Superintendent of Police regarding validity and genuineness of the aforesaid caste certificate dated 29.3.1993. According to which the applicant was said to be the member of Khangar community covered under the Schedule Caste. Such inquiry report along with the letter of Collector Sehore bearing No. 11900 dated 25.9.2008 and the letter of M.P. Public Service Commission bearing No. 40363/12/1999/Chayan dated 3.3.2009, was taken into consideration by the committee and on that basis it was resolved that the applicant Smt. Usha Ajay Singh to get the appointment on the post of alleged District Organizer of Tribal Welfare submitted the caste certificate along with the application form of Public Service Commission in the prescribed proforma No.IV issued by the Tahsildar, Huzur District Bhopal which was issued on the basis of the aforesaid illegal certificate dated 29.3.1993 issued by the Tahsildar Nasrullaganj, in which the applicant was stated to be the member of Khangar community covered under the Schedule Caste. According to the aforesaid reports of Superintendent of Police and Collector Sehore so also according to the applicant herself it was shown that the above mentioned certificate 29.3.1993 was not issued by Tahsildar Nasrullaganj, consequently it was resolved that caste certificate of applicant submitted in the MPPSC is illegal and pursuant to that the same was cancelled with immediate effect with a further direction to issue the necessary order in this regard.

10. After perusing the earlier order dated 31.7.2009 passed by this Court in M.Cr. C. No. 7132/2009 (Ann. A. 10), I have not found any material or the papers in the record showing that aforesaid Scrutiny Committee was neither empowered nor having any authority to decide the validity of aforesaid certificate. As such the aforesaid committee under his vested power and authority taking into consideration, the report of Superintendent of Police as well as the Collector Sehore so also the relevant papers of M.P.P.S.C. regarding appointment of the applicant filed with the application for appointment on the aforesaid post, has taken the aforesaid decision on dated 29.3.2009.

11. In view of the aforesaid decision of Scrutiny Committee it is established

that on the basis of aforesaid false certificate of Khangar Community, covered under Schedule Caste, allegedly issued with the signature and seal of Tahsildar, Nasrullaganj, on dated 23.9.1993 the applicant has obtained the caste certificate on prescribed form no. IV of the application form of MPPSC, from the office of Naib Tahsildar Huzur and submitted the same along with the application for appointment on the aforesaid post of District Organizer, Tribal Welfare in the office of the M.P.S.C. and on the basis of such certificate the applicant appeared in competitive examination and got appointment on the alleged post of State of Madhya Pradesh. In such premises, prima-facie it is apparent that by practicing fraud on the basis of some forged and fabricated caste certificate dated 29.3.1993 the applicant has obtained the caste certificate on prescribed form no. IV from the Naib Tahsildar Huzur. In such premises it is prima-facie apparent that basic caste certificate of the applicant was fabricated by practicing fraud in the shape of valuable security with dishonest intention to obtain the government service and the same was placed with the application form. It is apparent from the record that after taking into consideration the aforesaid documents the aforesaid order dated 23.9.2009 was passed by the Scrutiny Committee but subsequent to that, when no step was taken by the State Authority in this regard against the applicant then the respondent being a Journalist and Press reporter after collecting the requisite document has filed the impugned complaint in which after recording the statement of the complainant and witness under Section 200 and 202 of Cr.P.C. on establishing the prima-facie ingredients of the offence of Section 420, 467 and 468 of IPC, the aforesaid Court has taken the cognizance of the same against the applicant by the impugned order dated 15.9.2011.

12. So far the interim stay order dated 25.11.2009 (Annexure A-8) passed in the aforesaid W.P. No. 12297/09 is concerned, it is apparent from such order that same has been passed in such petition to stay the operation of the aforesaid order Ann. A.7, so as it related to the applicant's service and to stay the proceeding of the impugned complaint pending against the applicant. So, such interim order is not helping to the applicant for quashment of the complaint.

13. So far the question regarding locus standi of the respondent to file the complaint is concerned in view of aforesaid discussion, it is apparent that at the initial stage the applicant has obtained the certificate dated 29.3.1993 regarding her caste Khangar, Schedule Caste from Tahsildar Nasrullaganj for which on making the inquiry by the above mentioned authorities including the Superintendent of Police Sehore no record of the same was found in such

office.

14. It is also prima-facie apparent as discussed above that on the basis of the aforesaid certificate of Tahsildar Nasrullaganj for which no record was found in such office another caste certificate in the prescribed form No.IV appended with the application filed to get the service was obtained from the office of Naib Tahsildar Huzur on 9.12.1998 (Ann.A.3). In such premises in the lack of any record of caste certificate dated 29.3.1993 in the office of Tahsildar Nasrullaganj the State Level Schedule Caste Certificate Scrutiny Committee has resolved on 23.9.2009 (Ann.A.7) that the applicant has got the appointment on the post of District Organizer Tribal Welfare on the basis of illegal caste certificate. In such premises, there was sufficient prima-facie circumstance to draw the inference that the applicant has committed the alleged cognizable offence and inspite direction of State Level Schedule Caste Certificate Scrutiny Committee when no action was taken by any authority of the State then with respect of the alleged cognizable offence the impugned private complaint was filed by the respondent herein and after adopting the procedure prescribed under Section 200 and 202 of Cr. P.C. on establishing the prima-facie ingredients of such offence the aforesaid Court has taken the cognizance in the matter then at this stage the impugned complaint could not be thrown away or quashed on the ground of locus standi of the respondent to file the same.

15. I would like to mention here that by virtue of Section 190 of Cr. P.C. the Court of the Judicial Magistrate is having the authority to take the cognizance of the offence in three modes, either by suo-moto or on the basis of the police report or of the private complaint. In such premises in the private complaint of the respondent on establishing the ingredients of the alleged cognizable offence if the cognizance of the same was taken by the Judicial Magistrate against the applicant then at this stage such complaint could not be quashed by holding that the complainant did not have the locus standi to file the same.

16. I would like to mention here that on the aforesaid question regarding locus standi of the respondent to file the impugned complaint the applicant's counsel has placed his reliance on the decision of the Apex Court in the matter of *Raju Ramsingh Vasave Vs Mahesh Deorao Bhivapurkar and others* reported in (2008) 9 SCC 54 and referred its paragraph 45.

17. After perusing the same I am of the considered view that such case being distinguishable on facts is not helping to the applicant in the above

mentioned scenario of the case at hand. This Court did not have any dispute regarding principle laid down in the cited case, but the same being not applicable to the present case is not helping to the applicant.

18. It is needless to state here that in the first inning of the litigation on filing the earlier petition bearing M.Cr. C. No. 7132/2009 (Ann. A. 10) by the applicant under Section 482 of Cr.P.C. various questions including some of the questions mentioned in the present petition for quashment of the complaint were raised but on consideration such petition was dismissed at the stage of motion hearing by extending a liberty to the applicant to take all the available defence before the trial Court at the appropriate stage in accordance with law.

19. Therefore; in view of aforesaid discussion so also in the light of said earlier decision of this Court dated 31.7.2009 (Annexure A/10) based on various decisions of the Apex Court, I have not found any merits in the present petition, on which the impugned complaint and its entire proceeding along with the impugned order taking the cognizance of the alleged offence against the applicant by the trial Court or it's other direction could be quashed under Section 482 of Cr. P.C. Consequently, this petition being devoid of any merits is hereby dismissed.

20. Petition is dismissed as indicated above.

Petition dismissed.

I.L.R. [2015] M.P., 268

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Sujoy Paul

M.Cr.C. No. 8992/2013 (Gwalior) decided on 12 December, 2013

VIKASH RAGHUVANSHI

...Applicant

Vs.

STATE OF M.P. & anr.

...Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 439(2) - Cancellation of bail - Locus Standi - Any member of public whether he belongs to any particular profession or otherwise can move High Court to remind it of the need to exercise its power suo motu. (Para 13)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439(2) - जमानत का निरस्तीकरण - सुने जाने का अधिकार - जन सामान्य का कोई सदस्य चाहे किसी विशिष्ट व्यवसाय से हो या अन्यथा हो, उच्च न्यायालय के समक्ष स्व प्रेरणा से उसकी शक्ति के प्रयोग की आवश्यकता का स्मरण कराने के लिए जा सकता है।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 439(2) - Cancellation of bail - Accused committed murder of complainant after his release on bail - Accused misused the bail - Bail liable to be cancelled - Accused directed to surrender. (Paras 15 & 17)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439(2) - जमानत का निरस्तीकरण - अभियुक्त ने जमानत पर छूटने के बाद शिकायतकर्ता की हत्या की - अभियुक्त ने जमानत का दुरुपयोग किया - जमानत निरस्त किये जाने योग्य - अभियुक्त को समर्पण हेतु निदेशित किया गया।

Cases referred :

1995 SCC(Cri.) 237, 2001 SCC(Cri) 1124, 2005 SCC(Cri) 1960(2), (2010) 14 SCC 496, (2011) 6 SCC 189, (2012) 9 SCC 446.

Deependra Raghuvanshi, for the applicant.

A.S. Rathore, P.L. for the non-applicant No.1/State.

R.K.S. Kushwaha, for the non-applicant No.2.

ORDER

SUJOY PAUL, J. :- This first petition under section 439 (2) of Code of Criminal Procedure, 1973 (Cr.P.C.) is filed for cancellation of bail order dated 08.10.2013 passed by this Court in M.Cr.C. No. 6833/2013.

2. The present applicant has prayed for cancellation of the bail by stating that respondent No.2 Toran Singh filed first bail application which was disallowed. Thereafter, he filed second bail application in connection with same crime No. 663/2012 registered in Police Station Ganjbasoda, District Vidisha. It is prayed that the bail granted by the order dated 08.10.2013 in M.Cr.C. No. 6833/2013 be cancelled.

3. The facts, as narrated by the petitioner, is that on 07.11.2011 FIR was registered by Rajesh Raghuvanshi against Toran Singh, Chaturbhuj and three other persons. The said FIR was registered in offences under sections 294, 324, 451 and 506 / 34 IPC. It was registered as crime No. 227/2011. Toran Singh filed a bail application before the trial Court. The trial Court by order dated 30.11.2011 enlarged Toran Singh on bail. However, certain conditions under section 437 (3) Cr.P.C were imposed in the said bail order for Toran Singh.

4. Shri Deependra Raghuvanshi, learned counsel for the petitioner,

submits that in the incident dated 07.11.2011 which was registered as crime No. 227/2011, Harishankar was not an accused, whereas Toran Singh and Chaturbhuj were accused. It is contended that Toran Singh violated the conditions of bail order dated 30.11.2011 and again attacked Rajesh Raghuvanshi. Rajesh Raghuvanshi was returning from his agricultural farm when Toran Singh and other persons including Harishankar and Chaturbhuj attacked him by use of farsa, axe and stick. Rajesh died on the spot. This incident was recorded as crime No. 663/2012.

5 It is contended by the petitioner that initially bail was refused to Toran Singh, but in M.Cr.C. No. 6833/2013 bail was granted by this Court on the basis of parity with Harishankar who was enlarged on bail by coordinate Bench. It is contended that the case of Harishankar and Toran Singh and Chaturbhuj are entirely different. Harishankar was not an accused in the first case i.e. crime No. 227/2011, whereas Chaturbhuj and Toran Singh were accused in the commission of first crime. Harishankar joined Toran and Chaturbhuj in the second attack in which Rajesh Raghuvanshi died.

6. It is submitted that, on the basis of aforesaid factual back ground, there is no parity between Harishankar and Toran Singh, and between Harishankar and Chaturbhuj. In addition, it is submitted that in view of conduct of Toran Singh, there is every likelihood of misuse of freedom by him. He will temper the evidence and material on record. In support of this contention, Shri Deependra Raghuvanshi relied on certain judgments.

7. Per Contra, Shri R.K.S. Kushwaha, learned counsel for the respondent No.2 opposed the prayer for cancellation of bail.

8. Shri A.S. Rathore, Panel Lawyer for State supported the prayer for cancellation of bail.

9. Shri R.K.S. Kushwaha, learned counsel for the respondent No.2, relied on 1995 SCC (Cri) 237 (*Dolat Ram and others Vs. State of Haryana*), 2001 SCC (Cri.) 1124 *Puran Vs. Rambilas and another*, 2005 SCC (Cri.) 1960 (2) (*State of U.P. through CBI Vs. Amarmani Tripathi*), and (2010) 14 SCC 496 (*Prashanta Kumar Sarkar Vs. Ashis Chatterjee and another*).

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

11. The bone of contention of Shri R.K.S. Kushwaha is that the factors for grant of bail and considering the rejection of bail are different. In other

words, Shri Kushwaha submitted that the criteria and ingredient for grant of bail are totally different than that of for cancelling the bail already granted. In support of this, he relied on *Dolat Ram* (supra). By relying on it, it is contended that very cogent and overwhelming circumstances are necessary for an order directing cancellation of bail, already granted. Bail can be cancelled when accused interferes or attempts to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. If Court is satisfied on the basis of material placed on record that accused may possibly misuse the bail order, bail can be cancelled, but it should not be cancelled in a mechanical manner. By relying on *Puran* (supra), it is contended that High Court can cancel the bail only if it feels there are sufficient reasons for doing so (para 14). The judgment of *Amarmani* (supra) is pressed into service in support of the contention that there must be material to establish that the accused has actually misused his freedom. Reliance is also placed on *Prashanta Kumar Sarkar* (supra) by Shri Kushwaha to bolster his submission.

12. In the aforesaid factual backdrop, one thing is clear that Harishankar was not an accused in the first incident which occurred on 07.11.2011 (Crime No. 227/2011). Chaturbhuj and Toran Singh were the accused in the said case. Toran was granted bail by the Court below on 30.11.2011. Certain conditions were imposed by the Court below, despite that it is Toran Singh who misused it and second incident took place on 29.10.2012 (Crime No. 663/2012). On 29.10.2012 complainant Rajesh Raghuvanshi died on spot. Thus, I find force in the contention of Shri Deependra Raghuvanshi, Advocate that there is no wholesome parity between Harishankar and Toran Singh.

13. In the considered opinion of this Court, law is well settled that there is nothing to indicate in section 439(2) Cr.P.C. that power of cancellation of bail can be exercised only if the State or investigating officer or Public Prosecutor moves the petition. The power so vested in the High Court can be invoked by the State or by any aggrieved party. Power of cancellation of bail can be exercised "*suo motu*" by the High Court. Any member of public whether he belongs to any particular profession or otherwise can move the High Court to remind it of the need to exercise its power *suo motu*. This view is taken by the Supreme Court in *Puran* (supra) (para 14).

14. The Apex court in *Prashanta Kumar Sarkar* (supra) again considered the judgment of *Amarmani* (supra). In (2011) 6 SCC 189 (*Prakash Kadam*

and others Vs. Ramprasad Vishwanath Gupta and another) the Apex Court opined that while considering the application for cancellation of bail, the Court needs to consider the gravity and nature of offence, prima facie case against the accused, position and standing of accused etc. Court opined that in cases of very serious allegations, bail can be cancelled even if he has not misused the bail granted to him. The Apex Court considered the judgment of *Daulat Ram* (supra) in the case of *Prakash Kadam* (supra). Paragraphs 17-19 of Kadam reads as under:-

“17. It was contended by the learned counsel for the appellants before us, and it was also contended before the High Court, that the considerations for cancellation of bail are different from the consideration of grant of bail vide *Bhagirathsinh Vs. State of Gujrat* reported in (1984) 1 SCC 284, *Dolat Ram* (supra) and *Ramcharan Vs. State of M.P.* (2004) 13 SCC 617. However, we are of the opinion that, that is not an absolute rule, and it will depend on the facts and circumstances of the case.

18. In considering whether to cancel the bail the Court has also to consider the gravity and nature of the offence, prima facie case against the accused, the position and standing of the accused, etc. If there are very serious allegations against the accused his bail may be cancelled even if he has not misused the bail granted to him. Moreover, the above principle applies when the same Court which granted bail is approached for cancelling the bail. It will not apply when the order granting bail is appealed against before an appellate/Revisional Court.

19. In our opinion, there is no absolute rule that once bail is granted to the accused then it can only be cancelled if there is likelihood of misuse of the bail. That factor, though no doubt important, is not the only factor. There are several other factors also which may be seen while deciding to cancel the bail.”

(Emphasis Supplied)

15. The judgment of *Prakash Kadam* is followed by the Supreme court in (*Ash Mohammad Vs. Shivraj Singh and another*) reported in (2012) 9 SCC 446 . As noticed above, the judgment of *Dolat Ram* was considered by the Supreme court in the latest judgment in *Prakash Kadam* (supra). It is held in the case of *Prakash Kadam* that once bail is granted it can be cancelled

if there is likelihood of misuse of the bail. In the considered opinion of this Court, Toran Singh is the accused in both the crime vide crime No. 227/11 and 663/12. He violated the conditions of bail. Complainant Rajesh Raghuvanshi died in the second incident. Harishankar is admittedly not an accused in the first crime. Thus there is no absolute parity between Toran Singh and Harishankar. Since Toran Singh is an accused in two criminal incidents, gravity of offence on his part is much higher.

16. Apart from this, likelihood of misuse of bail by Toran Singh cannot be ruled out. In view of the law laid down in *Prakash Kadam* (supra), I deem it proper to cancel the bail granted to Toran Singh by order dated 08.10.2013. Accordingly, the said order dated 08.10.2013 passed in M.Cr.C. No. 6833/2013 is cancelled.

17. The accused is directed to surrender for custody forthwith, failing which it shall be the duty of investigating agency to take him into custody immediately. It is made clear that anything which has been stated herein above, is only with a view to consider the question of annulment of grant of bail and it will have no bearing whatsoever on trial.

Petition is accordingly allowed.

Petition allowed.

I.L.R. [2015] M.P., 273

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Alok Verma

M.Cr.C. No. 5399/2014 (Indore) decided on 8 October, 2014

PREMSUKH & anr.

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Grant of Police remand - Order granting police remand is challenged on the ground that the same can be granted for 15 days and after the lapse of first 15 days police remand can not be granted - Held - Since the applicants were earlier in custody for another crime and the investigating officer could not get their custody for investigating the present crime, as such no irregularity has been committed by learned Special Judge in permitting their police custody for investigation.

(Paras 2, 8)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – पुलिस रिमांड की मंजूरी – पुलिस रिमांड मंजूर किये जाने के आदेश को इस आधार पर चुनौती दी गई कि उसे 15 दिनों के लिए मंजूर किया जा सकता है और प्रथम 15 दिन व्यपगत हो जाने के पश्चात पुलिस रिमांड मंजूर नहीं किया जा सकता – अभिनिर्धारित – चूंकि आवेदकगण पूर्व में अन्य अपराध हेतु अभिरक्षा में थे और वर्तमान अपराध के अन्वेषण हेतु अन्वेषण अधिकारी को उनकी अभिरक्षा नहीं मिल सकी, इस कारण जांच हेतु उनकी पुलिस अभिरक्षा मंजूर करने में विद्वान विशेष न्यायाधीश द्वारा कोई अनियमितता नहीं कारित की गई है।

Cases referred :

AIR 1992 SC 1768, 2010 CR.L.J. 3849.

Vikas Jain, for the applicants.

Mamta Shandilya, P.L. for the non-applicant/State.

ORDER

ALOK VERMA, J. :- This application under section 482 of Cr.P.C is directed against the order dated 11/03/2014 passed by the learned Additional Sessions Judge and Special Judge (under NDPS Act) Mandsaur, by which, the learned Additional Sessions Judge granted police remand of the present applicants Premsukh S/o Mohanlal and Madanlal S/o Devraj in crime no. 44/2013 under sections 8/15 and 26 of Narcotic Drugs and Psychotropic Substances Act.

2. Learned counsel for the applicants assails the impugned order on the ground that if a person is arrested in crime and is produced before the Magistrate, the Magistrate is entitled to grant police or judicial custody of the person for 15 days, but after the lapse of first 15 days, the police remand cannot be granted by the Magistrate.

3. To understand the real controversy in the present case, the brief relevant fact may be stated. The present applicants were arrested by police station – Nahargarh in crime no. 44/2013 under sections 8/15 and 26 of the NDPS Act. It transpires from the certified copy of the order sheet of the learned lower court that on 19/12/2013, an application was filed before the learned Special Judge that the present applicants were under custody in crime no. 135/2012 of police station – Jiran under sections 8/15 and 29 of the NDPS Act. They were finally arrested by the police in the present crime,

however, being in custody in another crime, their police custody could not be obtained, and therefore, they requested for issuance of production warrant. The learned Special Judge allowed the application and issued production warrant of the present applicants. The applicants could not be produced on 06/01/2014, which was the date fixed for their appearance before the Court. Finally, they were produced before the Court on 20/01/2014. On that date, however, they were sent back in police custody by preparing jail warrant by the Special Court and immediately after they were sent back to jail, an application was filed before the learned Special Judge by the Investigating Officer praying therein for judicial custody of the applicants. However, they were not produced before the Special Judge on 03/02/2014, 10/02/2014, 25/02/2014 and finally, they were produced before the Court on 11/03/2014, when the Special Judge passed the impugned order allowing police custody.

4. Before the learned Special Judge, the present applicants placed reliance on the judgment of Hon'ble Supreme Court in the case of *Central Bureau of Investigation Vs. Anupam J. Kulkarni* reported in AIR 1992 Supreme Court 1768 and also on the judgment of Hon'ble Supreme Court in the case of *Devender Singh and Anr Etc Vs. State of Haryana and Ors.* Etc. reported in 2010 Cr.L.J. 3849. However, the learned Special Judge found that the present applicants were under custody in different offences and therefore, the present Investigating Officer did not get an opportunity to investigate the case and therefore, he allowed the application of the Investigating Officer and granted police custody of the present applicants.

5. It is argued by learned counsel for the applicants that the present applicants after being formally arrested in the present case, remained in custody which may be considered as their judicial remand for more than 15 days and once initial 15 days have passed, then the Special Judge or the Magistrate is not entitled to grant police custody of the accused.

6. I have gone through the judgment of Hon'ble Supreme Court in the case of *Central Bureau of Investigation* (*supra*). In this case, however, Hon'ble Supreme Court observed in para 11 that

“ In the occurrence, it may so happen that the accused might have committed several offences and the police may arrest him in connection with one or two offences on the basis of the available information and obtain police custody. If

during the investigation, his complicity in more serious offences during the same occurrence is disclosed, that does not authorize the police to ask for police custody for a further period after the expiry of the first fifteen days. “

7. Thus, in a single occurrence, if the accused is found to be involved in more serious offences, then the Investigating Officer is not entitled for his police custody again after expiry of first 15 days of police custody. In the similar occurrence, the Hon'ble Supreme Court observed that, if that is permitted, then the police can go on adding some offence or the other of a serious nature at various stages and seek further detention in police custody repeatedly and this would defeat the very object underlying section 167. The Hon'ble Apex Court further observed that

“ However, we must clarify that this limitation shall not apply to a different occurrence in which complicity of the arrested accused is disclosed. That would be a different transaction and if an accused is in judicial custody in connection with one case and to enable the police to complete their investigation of the other case, they can require his detention in police custody for the purpose of associating him with the investigation of the other case. In such a situation, he must be formally arrested in connection with other case and then obtain the order of the magistrate for detention in police custody. “

8. This observation of Hon'ble Apex Court clearly covers the situation of the present case. In the present case also, the present applicants were formally arrested after obtaining the necessary permission from the Competent Court. Subsequently, they remained in custody for another crime, but the Investigating Officer could not get their custody for investigating the present crime, and as such, in my opinion, no irregularity has been committed by the learned Special Judge in permitting their police custody for investigation. As such, I do not find any force in the present application under section 482 of Cr.P.C and the same being devoid of merit, is dismissed.

C c as per rules.

Application dismissed.

I.L.R. [2015] M.P., 277

MISCELLANEOUS CRIMINAL CASE*Before Mr. Justice Alok Verma*

M.Cr.C. No. 1041/2012 (Indore) decided on 14 October, 2014

DONGAR SINGH RATHORE

...Applicant

Vs.

STATE OF M.P. & ors.

...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Sections 321, 482 - Withdrawal of criminal case - On the application filed by prosecution agency, trial Court permitted the withdrawal of criminal case - Revisional Court observed that the applicant and non-applicant are real brother and civil case is pending between them and found that no irregularity was committed by learned Magistrate - Held - There is nothing on record to show that learned Magistrate exercised the jurisdiction erroneously - In the instant case civil litigation is already pending - Question of ownership and possession can only be decided by the civil court - No case is made out for interfering in the order. (Para 11)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएं 321, 482 - आपराधिक प्रकरण को वापस लिया जाना - अभियोजन एजेंसी द्वारा प्रस्तुत किये आवेदन पर, विचारण न्यायालय ने आपराधिक प्रकरण को वापस लेने की अनुमति दी - पुनरीक्षण न्यायालय ने यह संवीक्षित किया कि आवेदक एवं अनावेदक सगे भाई हैं एवं उनके मध्य सिविल वाद लंबित है और यह पाया कि विद्वान मजिस्ट्रेट ने कोई अनियमितता कारित नहीं की - अभिनिर्धारित - अभिलेख पर कुछ भी नहीं जो यह दर्शाता हो कि विद्वान मजिस्ट्रेट ने अधिकारिता का त्रुटिपूर्ण प्रयोग किया है - वर्तमान प्रकरण में सिविल वाद पहले से लंबित है - स्वामित्व एवं कब्जे का प्रश्न केवल सिविल न्यायालय निर्णीत कर सकता है - आदेश में हस्तक्षेप के लिये प्रकरण नहीं बनता।

Cases referred :

1987(1) SCC 288, AIR 2005 SC 910.

A.S. Rathore, for the applicant.*O.P. Solanki*, for the non-applicants No. 3, 4 & 5.**ORDER**

ALOK VERMA, J. :- This application is filed under section 482 of Cr.P.C.

2. The brief facts necessary for disposal of this application are that the applicant – Dongar Singh Rathore is a resident of village – Panda, Tehsil – Badnawar, District – Dhar. He had ancestral house located in the village. According to the applicant, the house remained in his possession and he is the owner of the house. The non-applicant No.3 – Sabal Singh is the real brother of the applicant. The applicant due to old age, shifted to Indore however, his sons frequently visit the village to look after his agricultural work. When they visit the village, they stay in the house and they also keep their farm equipments and crops in the said house. On 28.05.2003, the present applicant received a message that non-applicant No.3 and his sons broke the lock of the applicant's house and tried to take forcible possession of the house. The matter was reported to the police and crime under section 448/34 of IPC was registered.
3. During the pendency of the criminal trial, the criminal court after considering the arguments from both the sides, granted interim custody of the house to the non-applicant No.3 on furnishing of Supurdnama for Rs.1,00,000/-. Under this order, non-applicant No.3 remained in possession of the house custodial "legis" of the house.
4. On 14.06.2005, the prosecution filed an application under section 321 of Cr.P.C., which was accepted by the learned Magistrate and the case was withdrawn.
5. Being aggrieved by the order passed by the learned Magistrate allowing the prosecution to withdraw the case, the revision was filed before the First Additional Sessions Judge, Dhar, which was decided on 31.10.2011 by the learned Additional Sessions Judge in Cr.R. No.189/2005. The revision was dismissed on the ground that the applicant and the non-applicant No.3 are real brothers and a civil case was pending between them. In that civil case, the present applicant sought relief of the possession by removing the lock putted on the house by the non-applicant No.3. However, this civil suit was dismissed by the Civil Court. Under this situation, the revisional Court found that no irregularity was committed by the learned Magistrate in allowing the application under section 321 of Cr.P.C.
6. Subsequent to this, the present applicant filed First Appeal before the First Additional District Judge, Dhar, which was registered as Civil Appeal No.20-A/2005. The First Appeal was allowed and decree to the following effect was passed by the Appellate Court:-

It is and decreed that विचारण न्यायालय द्वारा पारित निर्णय एवं डिक्री दिनांकित 25-03-2005 अपास्त की जाती है तथ यह अपील स्वीकार की जाती है एवं अपीलार्थी/वादी का वाद निम्नानुसार डिक्री किया जाता है :-

(अ) यह घोषित किया जाता है कि ग्राम पान्दा, तहसील-बदनावर, जिला-धार में स्थित वादग्रस्त मकान, वादी के स्वामित्व का है।

(ब) प्रतिवादी क्रमांक-2 को यह आदेश दिया जाता है कि यदि उसके द्वारा उक्त वादग्रस्त मकान के ताले पर लगायी गयी सील को यदि अभी तक नहीं हटाया गया है, तो सील को हटाया जावे।

(स) प्रतिवादी क्रमांक-1 को आदेश दिया जाता है कि वह वादग्रस्त मकान में लगाये गये अपने ताले को हटाकर वादग्रस्त मकान का आधिपत्य वादी को सौंपे।

(द) इस अपील का व्यय प्रत्यर्थी क्रमांक-1 वहन करेगा। अभिभाषक शुल्क नियमानुसार या प्रमाणित होने पर दोनों में से जो भी कम हो आँकी जाये।

(ए.के.गोयनर)

प्रथम अपर जिला न्यायाधीश
धार (म.प्र.)

7. The non-applicant No.3 filed a Second Appeal before the High Court which is pending.

8. In the background of the aforesaid facts, the applicant filed an application challenging the order of the Magistrate under section 482 of Cr.P.C. He placed reliance on the judgment of Hon'ble the Supreme Court in the matter of *Sheonandan Paswan Vs. State of Bihar and others* reported in 1987 (1) SCC 288. In para 79 of the judgment, Hon'ble the Supreme Court observed that:-

The Court's function is to give consent. This section does not obligate the Court to record reasons before consent is given. However, I should not be taken to hold that consent of the Court is a matter of course. When the Public Prosecutor makes the application for withdrawal after taking into consideration all the materials before him, the Court exercises its judicial discretion by considering such materials and on such consideration, either gives consent or declines consent. The section should not be construed to mean that the Court has to give a detailed reasoned order when it gives consent. If on a reading of the order giving consent, a higher Court is satisfied

that such consent was given on an overall consideration of the materials available, the order giving consent has necessarily to be upheld.

9. He has also placed reliance upon the judgment of Hon'ble the Supreme Court in the matter of *Rahul Agrawal Vs. Rakesh Jain and another* reported in AIR 2005 SC 910. In this judgment, the Court observed that withdrawal of the case should be permitted only when, it is likely to end in acquittal and continuance of the case is only causing severe harassment to the accused or to bring about harmony between the parties.

10. Reverting back to the present case, it is apparent that the case was withdrawn and the learned Magistrate has observed that withdrawal of the case is in the interest of society at large.

11. After going through the impugned order, I do not find any irregularity in the order passed by the learned Magistrate or revisional Court. The discretion lies with the learned Magistrate and there is nothing on record to show that the learned Magistrate exercised the jurisdiction erroneously. So far as the possession of the house under the order of the criminal court is concerned, the order was passed by the criminal court is an interim measure. The question of ownership and possession can only be decided by the Civil Court. In the present case, the civil litigation is already pending between the parties. There is a decree in favour of the present applicant, which apart from declaring his ownership also entitles him to obtain possession of the house. As such, no case is made out for interfering in the order passed by the learned Magistrate under section 321 of Cr.P.C. as, it will not serve any purpose whatsoever, as far as the possession of the house is concerned.

12. Accordingly, I find that no ground exists for exercising the extraordinary power conferred under section 482 of Cr.P.C. to this Court.

13. The M.Cr.C. is devoid of merit and liable to be dismissed and it is accordingly, dismissed.

C.c. as per rules.

M.Cr.C. dismissed.