# THE INDIAN LAW REPORTS

## M.P. SERIES

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

Year-7
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## 2015

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

## JOURNAL SECTION

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

*(Notification published in the Gazette of India, Extraordinary Part-III–Section 4, dated 13 July, 2015, page no. 2)*

**BAR COUNCIL OF INDIA**

**NOTIFICATION**

New Delhi, the 10th July, 2015

**Extracts of the Minutes of the**

**General Council Meeting held on 6th June, 2015**

**Item No. 196/2015**

**Resolution No. 119/2015.**—The Council has considered the various amendments proposed by the sub-Committee and the report of the Committee is accepted. Now, Rule 5(a) of Chapter I shall be repealed and new Rule 5(a) shall be inserted which runs as follows:-

"However, the senior Advocates designated under Section 16 of the Advocates Act and Advocates on Record of Supreme Court of India are required to fill Form E for Senior Advocates and Form F(new) for Advocates on Records. They shall also be required to send two passport size photographs alongwith duly filled up forms to their respective Bar Associations or the concerned State Bar Council, so that their names could be included in electoral roll of State Bar Council. The senior Advocates shall be required to deposit a sum of Rs. 500 and the AORs shall deposit the fee to be decided by their respective State Bar Councils. All the State Bar Council shall be required to inform the Supreme Court Bar Association and the AOR Association of Supreme Court about the fee for verification of Certificate of Practice fixed by them forthwith".

Similarly in chapter IV, new Rule 8.4(v) shall be substituted which is as follows:-

However, the State Bar Councils would be at liberty to make any change in the Verification/process fee as per their own requirements and necessities. But any such change shall be required to be approved by the Bar Council of India.

Chapter IV, Rule 14, Explanation:-

However, the Advocates doing chamber practices, or engaged with some Law firms who are unable to file vakalatnamas in any court or forum shall also be entitled to apply for verification of their certificates and place of practice. They shall be required to file an affidavit stating that they are doing Legal practice and shall have to furnish at least proof to this effect. Those who are engaged in any registered law firm shall be required to obtain a certificate from the Law firm and submit it alongwith their applications form.

ASHOK KUMAR PANDEY, Jt. Secy.

[ADVT.-III/4/Exty./96/15/(132)]

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## MADHYA PRADESH ACT

## No. 10 OF 2015

## THE MADHYA PRADESH CO-OPERATIVE SOCIETIES (AMENDMENT) ACT, 2015.

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## MADHYA PRADESH ACT

## No. 10 OF 2015

## THE MADHYA PRADESH CO-OPERATIVE SOCIETIES (AMENDMENT) ACT, 2015.

*[Received the assent of the Governor on the 9th April, 2015; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 13th April, 2015, page nos. 302 (7) to 302 (14) ].*

**An Act further to amend the Madhya Pradesh Co-operative Societies Act, 1960.**

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

1. **Short title and commencement.** (1) This Act may be called the Madhya Pradesh Co-operative Societies (Amendment) Act, 2015.

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

2. **Amendment of Section 2.** In Section 2 of the Madhya Pradesh Co-operative Societies Act, 1960 (No. 17 of 1961) (hereinafter referred to as the principal Act),—

(i) after clause (a-i), the following clause shall be inserted, namely:–

"(a-ii) "Administrator" means any Government Servant, not

below the rank of class III executive, who has been appointed as Administrator by the Registrar under the provisions of this Act, to conduct the business of the society and who shall work under the control and guidance of the Registrar;";

(ii) after clause (hh), the following clause shall be inserted, namely :—

"(hh-i) "Executive Magistrate" means an officer appointed under Section 20 of the Code of Criminal Procedure, 1973 (No. 2 of 1974);";

(iii) after clause (m), the following clause shall be inserted, namely :—

"(m-i) "Government sponsored business" means economic activities carried on by the society under any scheme or programme sponsored by Central or State Government;".

3. **Amendment of Section 19-A.** In Section 19-A of the principal Act, clause (d) shall be omitted.

4. **Insertion of Section 20-A.** After Section 20 of the principal Act, the following section shall be inserted, namely :—

"20-A. **Co-operative training to members, members of Board of Directors and employees** (1) Every society shall organise training programme in Co-operative matters for its members, officers and employees through National or State or District level Co-operative Training Institutes as may be specified by the State Government.

(2) Every member of the board of Directors shall undergo training in cooperative matters at such institutes and for such period and at such intervals as may be prescribed.".

5. **Amendment of Section 48.** In Section 48 of the principal Act, for sub-section (10), the following sub-section shall be substituted, namely :—

"(10) The Board of Directors may fill casual vacancies by co-option out of the same class of members, if the remaining term of office of the Board of Directors is two years or less on the date on which such vacancies has arsien :

Provided that if the remaining term of office of the members of the Board of Directors is more than two years and where

the seat remains vacant after election or a casual vacancy occurs, then the vacancy shall be filled by election out of the same class of members in respect of which vacancy has arisen.".

6. **Amendment of Section 48-A.** In Section 48-A of the principal Act, for sub-section (4), the following sub-section shall be substituted, namely:–

"(4) (a) No person shall be eligible to be elected as president or Chairman or Vice-President or Vice-Chairman of a society, it he is elected as a member of Parliament or Member of Legislative Assembly or elected to any post in District Panchayat, Janpad Panchayat, Gram Panchayat, Urban Local Bodies, Mandi Board or Mandi Committee:

Provided that if any person holds office of President or Chairman or Vice-President or Vice-Chairman of a society and is elected to any post in District Panchayat, Janpad Panchayat, Gram Panchayat, Urban Local Bodies, Mandi Board or Mandi Committee, then the president or Chairman or Vice-President or Vice-Chairman of the society shall cease to function as such from such date he is declared elected and the post shall automatically become vacant from the aforesaid date.

(b) A member of a society who is elected as a Member of Parliament of Member of Legislative Assembly or elected to any post in District Panchayat, Janpad Panchayat, Gram Panchayat, Urban Local Bodies, Mandi Board or Mandi Committee, may be elected as a director or representative of any society.".

7. **Amendment of Section 48-C.** In Section 48-C of the principal Act, for clause (b), the following clause shall be substituted, namely :—

"(b) elect the Chairman, other office bearers and representatives;".

8. **Amendment of Section 49.** In Section 49 of the principal Act,—

(i) for sub-section (2), (3) and (4), the following sub-sections shall be substituted, namely :–

"(2) Notice of such meeting shall be sent to such officer who

has been vested with the power of registration of the society at least fourteen clear days before the date of the meeting.

(3) The Registrar or such officer who has been delegated the power of registration of society may himself attend such meeting or depute any officer subordinate to him to attend it.

(4) The Registrar or such officer who has been delegated the power of registration of society shall have the right to address the meeting in respect of any matter pertaining to the subjects specified in clauses (a), (c), (d) and (e) of sub-section (1).";

(ii) for sub-section (7-A), the following sub-section shall be substituted, namely :—

"(7-A) (a) The term of the Board of Directors shall be five years from the date on which first meeting of the Board of Directors is held.

(b) On completion of the term of 5 years of the Board of Directors, the office of members of the Board of Directors shall be deemed to be vacated automatically on such day and the Registrar or an Administrator appointed by him shall take over the charge and shall cause to conduct election of the members of Board of Directors within a period of six months:

Provided that in the case of Co-operative Bank, the Registrar or Administrator shall cause to conduct election of the members of the Board of Directors of the Bank within a period of one year.

(c) In special circumstances, the State Government may, for reasons to be recorded in writing, extend the period for conducting the election of a society for a period not exceeding one year in total.

(d) The term of the representative elected by the Board of Directors to other societies shall be co-terminus with the term of Board of Directors of the society:

Provided that if such representative, elected as a members in the Board of Directors of the other society shall continue to hold officer till the expiry of the term of the Board of Directors of the society for which he is elected.".

9. **Amendment of Section 49-E.** Section 49-E of the principal Act,–

(i) in sub-section (1), for clause (a), the following clause shall be substituted, namely :—

"(a) Notwithstanding anything contained in this Act, or rules or byelaws made thereunder, for every apex society where the State Government has contributed to its share capital or has given loans or financial assistance or has guaranteed the repayment of loans granted in any other form, or the society does Government sponsored business or undertakes an activity as a representative or agent of the Central or State Government and the turnover of the above two business, together or separately, constitutes 50 percent or more of its total business, there shall be a Managing Director not below the rank of Class-I Officer, who shall be appointed by the State Government.";

(ii) in sub-section (2), for clause (b), the following clause shall be substituted namely :—

"(b) The Chief Executive Officer shall be appointed,—

(i) from among the officers of the cadre maintained under Section 54 if such a cadre has been created;

(ii) by the Registrar where the State Government has contributed to its share capital or has given loans or financial assistance or has guaranteed the repayment of loan granted in any other form or the society does Government sponsored business or undertakes an activity as a representative or agent of the Central or State Government and the turnover of the above two

businesses, together or separately, constitutes 50 percent or more of its total business;

(iii) in other cases with the prior approval of the Registrar.".

10. **Amendment of Section 50-A.** In Section 50-A of the principal Act, after sub-section (3), the following new sub-section shall be inserted, namely :–

"(4) No person shall be qualified to be a candidate for election as member of the board of director, representative or delegate of the society if he has any dues payable to Madhya Pradesh State Electricity Board or its successor companies, standing against his name for a period exceeding six months at the time of submission of nomination paper.".

11. **Amendment of Section 53.** In Section 53 of the principal Act, in sub-section (1),–

(i) clause (f) shall be omitted;

(ii) for the first, second and third proviso, the following provisos shall be substituted, namely :—

"Provided that in special circumstances, the State Government may, for reasons to be recorded in writing, extend the term of office of the Administrator for a period not exceeding one year in total:

Provided further that the Board of Directors of any such co-operative society shall not be superseded or kept under suspension where there is no Government share holding or loan or financial assistance or any guarantee by the Government or the society does Government sponsored business or undertakes an activity as a representative or agent of the Central or State Government and the turnover of the above two businesses, together or separately, constitutes 50 percent or more of its total business:

Provided further that in case of a co-operative bank, the order of supersession shall not be passed without

previous consultation with the Reserve Bank :

Provided further that the advice of the Reserve Bank shall be limited to the provisions of the Banking Regulations Act, 1949 (No. 10 of 1949):

Provided further that if no communication containing the views of the Reserve Bank, on action proposed is received within thirty days of the receipt by that bank of the request soliciting consultation, it shall be presumed that the Reserve Bank agrees with the proposed action and the Registrar shall be free to pass such order as may be deemed fit:

Provided also that in case the Registrar is not in agreement with the opinion of the Reserve Bank, he may pass an order, recording the reasons thereof in writing.";

(iii) for sub-section (5), the Following sub-section shall be substituted, namely :–

"(5) The Administrator so appointed shall manage the affairs of the society under the control and guidance of the Registrar and shall arrange the conduct of election under the direction of the Authority.";

(iv) in sub-section (7), for the words, bracket and figure "and the person or persons appointed under sub-section (1)", the words, bracket and figure "and the Administrator appointed under sub-section (1)" shall be substituted;

(v) in sub-section (10),—

(a) After the first proviso, the following proviso shall be inserted, namely :—

"Provided further that the advice of the Reserve Bank shall be limited to the provisions of the Banking Regulations Act, 1949 (No. 10 of 1949);";

(b) after the existing second proviso, the following proviso shall be inserted, namely :—

"Provided further that in case the Registrar is not in agreement with the opinion of the Reserve Bank, he may pass an order recording the reasons thereof in writing;";

(vi) for sub-section (12), the following sub-section shall be substituted namely :—

"(12) Notwithstanding anything contained in this Act or rules made thereunder or byelaws of society, if the Board of Directors of society ceases to function due to order of any court or in the absence of prescribed quorum, the Registrar may appoint an Administrator temporarily in place of Board of Directors till the court order is vacated or the new elections are held and the Board of Directors take charge:

Provided that if the society ceases to function due to absence of quorum as prescribed, the Administrator so appointed by the Registrar, shall conduct election within a period of six months and in the case of co-operative Bank within a period of one year from the date of appointment of such Administrator and ensure that the Board of Directors take charge:

Provided further that in special circumstances, the State Government may, for reasons to be recorded in writing, extend the election of a society for not exceeding one year in total:

Provided also that in case of a co-operative Bank the information of appointment of Administrator shall be sent to the Reserve Bank by the Registrar.".

12. **Amendment of Section 54.** In Section 54 of the principal Act for sub-sections (2) and (3), the following sub-sections shall be substituted, namely :–

"(2) The Registrar, the Apex Societies and Central Societies shall maintain such cadres of officers and other servants

as the State Government may, by order, direct and the conditions of service of members of such cadre shall be such as the Registrar may, by order, determine.

(3) The State Government may, by notification, specify the class of societies which shall employ officers from such cadres maintained by the Registrar, Apex Societies or Central Societies under sub-section (2) as may be specified therein and it shall be obligatory on the part of such class of societies to accept and appoint such cadre officers on the cadre posts as and when deputed by the Registrar, Apex Societies or Central Societies.".

13. **Amendment of Section 56.** In Section 56 of the principal Act, in sub-section (3),—

(i) first proviso shall be omitted;

(ii) in the second proviso, the word "further" shall be omitted.

14. **Amendment of Section 57-A.** In section 57-A of the principal Act, for sub-section (2), the following sub-section shall be substituted, namely :–

"(2) On receipt of the application under sub-section (1), the Executive Magistrate shall, within thirty days, authorise any police officer not below the rank of a sub-inspector to enter and search any place where the records and property are kept or likely to be kept and to seize them and handover possession thereof to the Registrar or the person authorised by him, as the case may be:

Provided that in special circumstances for reasons to be recorded the Executive Magistrate may proceed beyond thirty days.".

15. **Amendment of Section 57-C.** In Section 57-C of the principal Act, for sub-section (9), the following sub-section shall be substituted, namely:–

"(9) For the purpose of this Chapter the Officer nominated by the Registrar at State level. Joint Registrar at Divisional level and Deputy or Assistant Registrar at District level shall act as State Coordinator, Divisional Coordinator and District Coordinator respectively and shall

discharge such duties for the conduct of election as entrusted to them by the Authority.".

16. **Amendment of Section 57-D.** In Section 57-D of the Principal Act,–

(i) in sub-section (4), for full stop, the colon shall be substituted and thereafter the following proviso shall be inserted, namely:—

"Provided that if the society does not make available such information, books and records as is required by the Authority and the society fails to comply with the requisition made by the Authority, then the Authority shall inform the Registrar to take action against such society under the provisions of the Act.";

(ii) in sub-section (5), for full stop, the colon shall be substituted and thereafter the following proviso shall be inserted, namely:–

"Provided that if the society does not provide all such assistance as required by the Authority and the society fails to provide assistance as required by the Authority, then the Authority shall inform the Registrar to take action against such society under the provisions of the Act.".

17. **Amendment of Section 58.** In Section 58 of the principal Act, in sub-section (1),–

(i) in clause (a), for the existing proviso, the following proviso shall be substituted, namely:—

"Provided that if the general body of the society fails to appoint an auditor or auditing firm within the stipulated time, the Registrar shall appoint the auditor or auditing firm and shall cause the accounts to be audited :

Provided further that in every Co-operative Bank and in such societies where the State Government has contributed to their share capital or has given loans or financial assistance or has guaranteed the repayment of loans granted in any other form or the society does Government Sponsored

Business or undertakes an activity as a representative or agent of the Central or State Government and the turnover of the above two businesses, together or separately, constitutes 50 percent or more of its total business, then the auditor or auditing firm shall be appointed by the Registrar for audit from an approved panel:

Provided also that in case of a liquidated society, the liquidator is authorised to appoint an auditor or auditing firm from a penal approved by the Registrar.";

(ii) for clause (d), the following clause shall be substituted, namely:—

"(d) The apex society of which the annual turnover is more than 100 crore rupees, the audited financial statement of such society shall be laid on the table of the Legislative Assembly.".

18. **Substitution of Section 80.** For Section 80 of the principal Act, the following Section shall be substituted, namely:—

"80. **Transfer or withdrawal of cases.** The Registrar may, at any time on his own motion or on an application made by any party-

(a) make over any case or class of cases arising under the provisions of this Act, which are pending before him for consideration and disposal, to any officer subordinate to him who is competent to decide or dispose of the case or class of cases, or

(b) withdraw any pending case or class of cases from any subordinate officer for consideration and disposal or may transfer the same to any other subordinate officer for consideration or disposal, who is competent to decide or dispose of such case or class of cases.".

19. **Amendment of Section 90.** In Section 90 of the principal Act, for the words "under this Act", the words "under this Act or other Act" shall be substituted.

J/14

## AMENDMENTS IN THE HIGH COURT OF MADHYA PRADESH RULES, 2008

*[Notification published in Madhya Pradesh Gazette, Part (iv)(c) dated 13 September, 2013, page no. 569-570]*

**High Court of Madhya Pradesh, Jabalpur**

**Jabalpur, the 6th September 2013**

No.Q-1.– In exercise of the powers conferred by articles 225 of the Constitution of India, Section 54 of the States Reorganisation Act, 1956, clauses 27 & 28 of the Letters Patent, the High Court of Madhya Pradesh makes following amendment in Format No. 11, 13 and 14 in Cause Title, just below the Heading of the application under Section 389 (1)/438/439 respectively of the Code of Criminal Procedure, 1973 in " The High Court of Madhya Pradesh Rules, 2008", which shall come into force from the date of its publication in the Official Gazette:–

AMENDMENT

In the said Rules,–

In Format No. 11, 13 and 14 in Cause Title, just below the Heading of the application respectively under Section 389 (1)/438/439 of the Code of Criminal Procedure, 1973, following amendment shall be inserted :–

| Whether any Bail application is pending before or already disposed of by (if yes, give particulars) | Particular of Bail application | | |
|---|---|---|---|
| | No. | Date of Order | Result |
| Hon'ble Supreme Court of India | | | |
| Hon'ble High Court(s). | | | |
| Court(s) subordinate to High Court(s). | | | |

VED PRAKASH, Registrar General.

*NOTES OF CASES SECTION*

***Short Note***

****(21)***

***Before Mr. Justice Sanjay Yadav***

M.A. No. 3446/2013 (Jabalpur) decided on 5 April, 2014

BHARAT KUMAR ...Appellant

Vs.

UNION OF INDIA ...Respondent

***Railway Claims Tribunal Act, ( 54 of 1987), Section 23 and Railways Act (24 of 1989), Section 123(b) & 124(A) - Claim by parents*** **- Appellant's claim was denied on the ground that the claimants have failed to establish that the deceased was unmarried and they are dependants - Held - Since the claimants have stated on affidavit that the deceased was unmarried which was not rebutted hence burden to prove that the deceased was married lay on Railways which was not discharged - Undisputedly appellants are parents of the deceased and dependants u/s 123(b) of Railways Act, 1989 - Finding arrived at by Claims Tribunal being perverse and not based on sound reason is set aside - Appellants would be entitled for compensation of Rs. 4 lakhs with 6% interest p.a. from the date of claim application - Appeal allowed.**

*रेल दावा अधिकरण अधिनियम (1987 का 54), धारा 23 एवं रेल अधिनियम (1989 का 24), धारा 123(बी) व 124(ए) – माता–पिता द्वारा दावा* – अपीलार्थी के दावे को इस आधार पर अस्वीकार किया गया कि दावाकर्ता यह स्थापित करने में असफल रहे कि मृतक अविवाहित था और वे आश्रित हैं – अभिनिर्धारित – चूंकि दावाकर्ताओं ने शपथपत्र पर कहा है कि मृतक अविवाहित था जिसका खंडन नहीं किया गया, अतः यह साबित करने का भार कि मृतक विवाहित था, रेलवे पर आता है जिसका निर्वहन नहीं किया गया – अविवादित रूप से अपीलार्थीगण मृतक के माता–पिता हैं और रेलवे अधिनियम 1989 की धारा 123(बी) के अंतर्गत आश्रित हैं – दावा अधिकरण का निष्कर्ष विपर्यस्त होने और ठीक कारण पर आधारित नहीं होने के कारण अपास्त – अपीलार्थीगण दावा आवेदन की तिथि से 4 लाख रूपये 6% प्रतिवर्ष ब्याज के साथ प्रतिकर के हकदार होंगे – अपील मंजूर।

**Case referred :**

AIR 2003 Gauhati 11.

*Manoj Patel,* for the appellant.
*Govind Patel,* standing counsel for the respondent/UOI.

*NOTES OF CASES SECTION*

*Short Note*

**(22)*

***Before Mr. Justice M.C. Garg***

Cr. A. No. 221/2008 (Indore) decided on 16 May, 2014

HARBANSLAL ...Appellant

Vs.

SHYAMSUNDAR ...Respondent

*A. Negotiable Instruments Act (26 of 1881), Section 138- Dishonour of cheque*-**Overwriting on cheque not acknowledged by drawer -No evidence regarding transaction-Cheque was issued to discharge liability is suspicious.**

*क. परक्राम्य लिखत अधिनियम (1881 का 26),धारा 138–चैक का अनादरण* –चैक पर लिप्तलेखन/अधिलेखन को लेखीवाल द्वारा अभिस्वीकृत नहीं किया गया– संव्यवहार के संबंध में कोई साक्ष्य नहीं–दायित्व से मुक्त होने के लिये चैक जारी किया गया था, संदेहास्पद।

*B. Negotiable Instruments Act (26 of 1881), Section 138 - Service of demand notice* - **Different address in envelop and acknowledgment - Not established that the demand notice sent to the address as shown in complaint and notice - Not valid service.**

*ख. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138–मांग नोटिस की तामीली* – लिफाफे पर और अभिस्वीकृति पर भिन्न पता–स्थापित नहीं किया गया कि मांग नोटिस को शिकायत एवं नोटिस में दर्शाये गये पते पर भेजा गया–वैध तामीली नहीं।

*C. Negotiable Instruments Act (26 of 1881), Section 138 - Complaint in the name of proprietor* - **Cheque issued in the name of Firm -Not maintainable.**

*ग. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – स्वत्वधारी के नाम शिकायत* – चैक, फर्म के नाम पर जारी किया गया – पोषणीय नहीं।

*S.D. Bohra,* for the appellant.

*V.K. Varangaonkar,* for the respondent.

*Short Note*

**(23)*

***Before Mr. Justice K.K. Trivedi***

C.R. No. 86/2012 (Jabalpur) decided on 25 October, 2013

MUNIYA BAI ...Applicant

Vs.

GOLMAN & ors. ...Non-applicants

***Civil Procedure Code (5 of 1908), Section 151 & 152 - Correction***

***in the decree*** **- Mistake committed in the pleadings cannot be corrected in exercise of powers either u/s 151 or 152 CPC - Revision dismissed.**

*सिविल प्रक्रिया संहिता (1908 का 5), धारा 151 व 152 – डिक्री में सुधार* – अभिवचनों में कारित की गई गलती को सि.प्र.सं. की या तो धारा 151 या 152 के अंतर्गत शक्तियों का प्रयोग करते हुए सुधारा नहीं जा सकता – पुनरीक्षण खारिज।

**Cases referred :**

AIR 2009 SC 2141, AIR 2008 SC 225, 2004 (2) MPLJ 302, 2001 (4) MPLJ 402.

*A.D. Mishra,* for the applicant.
*Pushpendra Dubey,* for the non-applicants no. 2 & 3.
*Ashok Chourasiya,* for the non-applicant no. 9.

***Short Note***

****(24)***

***Before Mr. Justice K.K. Trivedi***

S.A. No. 530/2012 (Jabalpur) decided on 22 November, 2013

RAJU KUSHWAHA ...Appellant

Vs.

SMT. NAMITA GUPTA & anr. ...Respondents

***Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(a) - Suit for eviction*** **- Landlord-tenant relationship - Held - Respondents/ Plaintiffs could not establish the relationship of landlord and tenant between them and the appellant, the provisions of Section 12 of the M.P. Accommodation Control Act would not be attracted at all - Tenancy suit was not maintainable - Decree of eviction cannot be sustained - Appeal allowed.**

*स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ए) – बेदखली के लिये वाद* – मकानमालिक–किरायेदार संबंध – अभिनिर्धारित – प्रत्यर्थीगण/वादीगण उनके और अपीलार्थी के बीच मकानमालिक और किरायेदार का संबंध स्थापित नहीं कर सके हैं, म.प्र. स्थान नियंत्रण अधिनियम की धारा 12 के उपबंध बिलकुल भी आकर्षित नहीं होते – किरायेदारी वाद पोषणीय नहीं था – बेदखली की डिक्री कायम नहीं रखी जा सकती – अपील मंजूर।

*J. Laxmi Aiyer,* for the appellant.
*K.L. Gupta,* for the respondents.

## *NOTES OF CASES SECTION*

### *Short Note*

**(25)*

***Before Mrs. Justice S.R. Waghmare***

Cr.A. No. 1235/1998 (Indore) decided on 11 November, 2014

RAMESH ...Appellant

Vs.

STATE OF M.P. ...Respondent

***Penal Code (45 of 1860), Section 306 & 498-A - Abetment of suicide*** **- No evidence of cruelty or mal-treatment against appellant - He cannot be convicted merely because of some incidents of disagreement and petty quarrels in domesticity - Appeal allowed.**

*दण्ड संहिता (1860 का 45), धारा 306 व 498–ए – आत्महत्या का दुष्प्रेरण* – अपीलार्थी के विरूद्ध क्रूरता या दुर्व्यवहार का कोई साक्ष्य नहीं – मात्र कुछ मतभेदों और छुटपुट घरेलू विवादों के कारण से उसे दोषसिद्ध नहीं किया जा सकता – अपील मंजूर।

**Cases referred :**

(2012) 2 SCC (Cri) 42, SCC (Criminal) (2012) 2 SCC (Cri), 2010 (3) MPHT 239, 1999 (1) JLJ 232, (2002) 7 SCC 317.

*Paurush Raka* and *Rajesh Chauhan*, for the appellant.

*C.R. Karnik*, for the respondent/State.

### *Short Note*

**(26)*

***Before Mr. Justice Sanjay Yadav***

W.P. No. 4804/2014 (Jabalpur) decided on 5 April, 2014

RANNU BAI (SMT.) ...Petitioner

Vs.

STATE OF M.P. ...Respondent

***Service Law - Appointment of Anganwadi Karyakarta at Anganwadi centre*** **- On the date of selection the petitioner was not having any valid certificate establishing that she belongs to Scheduled Tribe (Kol) - Petitioner was not eligible for 10 marks towards Scheduled Tribe cannot be faulted with - Petition dismissed.**

*सेवा विधि – आंगनवाड़ी केन्द्र में आंगनवाड़ी कार्यकर्ता की नियुक्ति* – चयन की तिथि पर याची के पास यह स्थापित करने के लिये कोई वैध प्रमाणपत्र नहीं था कि वह अनुसूचित जनजाति (कोल) की है – इसमें कोई त्रुटि नहीं निकाली जा सकती कि अनुसूचित जनजाति के लिये 10 अंको हेतु याची पात्र नहीं थी – याचिका खारिज।

*Pranay Verma*, for the petitioner.

**I.L.R. [2015] M.P., 1625**
**SUPREME COURT OF INDIA**
***Before Mr. Justice T.S. Thakur & Mr. Justice Adarsh Kumar Goel***
Cr.Appeal No. 220/2015 decided on 4 February, 2015

VINOD BHANDARI (DR.) ...Appellant
Vs.
STATE OF M.P. ...Respondent

***Criminal Procedure Code, 1973 (2 of 1974), Section 439 - Bail - Admissions in Medical Colleges were given by corrupt means*** - **Offence has potential of undermining the trust of people in the integrity of medical profession - If undeserving candidates are admitted to medical courses by corrupt means, not only the society will be deprived of the best brains treating the patients, patients will be faced with undeserving and corrupt persons treating them - Bail cannot be granted - However, as applicant is in jail for more than 1 year and there is no substantial progress in trial, it is directed that in case trial is not completed within one year, the applicant shall be entitled to apply for bail afresh to the High Court. (Paras 17 & 18)**

*दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 – जमानत – आयुर्विज्ञान महाविद्यालय में भ्रष्ट साधनों द्वारा प्रवेश दिये गये* – अपराध में चिकित्सीय व्यवसाय की ईमानदारी पर से लोगों का विश्वास कमजोर करने की क्षमता है – यदि अयोग्य अभ्यर्थियों को भ्रष्ट साधनों द्वारा चिकित्सीय पाठ्यक्रमों में प्रवेश दिया जाता है, न केवल समाज उत्कृष्ट दिमाग वालों से मरीजों के उपचार से वंचित होगा, मरीज, उनका उपचार करने वाले अयोग्य और भ्रष्ट व्यक्तियों का सामना करेंगे – जमानत प्रदान नहीं की जा सकती – किन्तु जैसा कि आवेदक 1 वर्ष से अधिक समय से जेल में है और विचारण में कोई सारवान प्रगति नहीं हुई है, यह निदेशित किया गया कि यदि एक वर्ष के भीतर विचारण पूरा नहीं किया जाता, आवेदक, उच्च न्यायालय को नये सिरे से जमानत हेतु आवेदन करने का हकदार होगा।

**Cases referred :**

(2005) 2 SCC 42, (2005) 8 SCC 21, (2011) 1 SCC 784, (2012) 1 SCC 40.

**JUDGMENT**

The Judgment of the Court was delivered by : **ADARSH KUMAR GOEL, J. :-** Leave granted.

2. This appeal has been preferred against final judgment and order dated 11th August, 2014 passed by the High Court of Madhya Pradesh at Jabalpur in Misc. Criminal Case No.10371 of 2014 whereby a Division Bench of the High Court dismissed the bail application filed by the appellant.

3. M.P. Vyavsayik Pareeksha Mandal (M.P. Professional Examination Board) known as Vyapam conducts various tests for admission to professional courses and streams. It is a statutory body constituted under the provisions of M.P. Professional Examination Board Act, 2007. As per FIR No.12 of 2013 registered on 30th October, 2013 at police station, S.T.F., Bhopal under Sections 420, 467, 468, 471, 120B of the Indian Penal Code ("IPC") read with Section 3(d), 1, 2/4 of the Madhya Pradesh Manyata Prapt Pariksha Adhiniyam, 1937 and under Sections 65 and 66 of the I.T. Act, Shri D.S. Baghel, DSP (STF), M.P. Police Headquarters, Bhopal during the investigation of another case found that copying was arranged in PMT Examination, 2012 at the instance of concerned officers of the Vyapam and middlemen who for monetary consideration helped the undeserving students to pass the entrance examination to get admission to the M.B.B.S course in Government and Private Medical Colleges in the State of M.P. As per the material collected during investigation, in pursuance of conspiracy, the appellant Dr. Vinod Bhandari, who is the Managing Director of Shri Aurbindo Institute of Medical Sciences, Indore, received money from the candidates through co-accused Pradeep Raghuvanshi who was working in Bhandari Hospital & Research Centre, Indore as General Manager and who was also looking after the admissions and management work of Shri Aurbindo Institute of Medical Sciences, Indore, for arranging the undeserving candidates to pass through the MBBS Entrance Examination by unfair means. He gave part of the money to Nitin Mohindra, Senior Systems Analyst in Vyapam, who was the custodian of the model answer key, along with Dr. Pankaj Trivedi, Controller of Vyapam. During investigation, disclosure statement was made by Pradeep Raghuvanshi which led to the recovery of money and documents. The candidates, their guardians, some officers of the Vyapam and middlemen were found to be involved in the scam. It appears that there are in all 516 accused out of which 329 persons have been arrested and 187 are due to be arrested. Substantial investigation has

been completed and charge sheets filed but certain aspects are still being investigated and as per direction of this Court in a Petition for Special Leave to Appeal (C) .... CC No.16456 of 2014 titled "Ajay Dubey versus State of M.P. & Ors.", final charge sheet is to be filed by the Special Task Force on or before March 15, 2015 against the remaining accused. Allegations also include that some high scorer candidates were arranged in the examination centre who could give correct answers and the candidates who paid money were permitted to do the copying. Other *modus operandi* adopted was to leave the OMR sheets blank which blank sheets were later filled up with the correct answers by the corrupt officers of Vyapam. Further, the model answer key was copied and made available to concerned candidates one night before the examination. Each candidate paid few lakhs of rupees to the middlemen and the money was shared by the middlemen with the officers of the Vyapam. The appellant received few crores of rupees in the process from undeserving candidates to get admission to the M.B.B.S. and, as per allegation in the other connected matter, i.e., FIR No.14 of 2013 registered on 20th November, 2013 with the same police station, to the PG medical courses.

4. In the present case, the appellant was arrested on 30th January, 2014 while in the other FIR he was granted anticipatory bail on 16th January, 2014. Second Bail application of the appellant in the present case was considered by the 9th Additional Sessions Judge, Bhopal and dismissed vide Order dated 9.5.2014. Earlier, first bail application had been dismissed on 5th February, 2014. While declining prayer for bail, it was, *inter-alia,* observed :

> *"In the present case, it is alleged against the accused that he in connivance with the officers of coordinator State level institution (VYAPAM) in lieu of huge amount got the candidates selected in the examination after getting them passed in the Pre-Medical Test (PMT) Examination, which is mandatory and important for admission in the medical education institution. According to the prosecution, applicant snatched right of deserving and scholar students, he got selected ineligible candidates in the field of medical education. This case is not only related to economic offence, rather apart from depriving rights of deserving and scholar students, it is related to the human life and health."*

5. The Division Bench of the High Court, in its Order, referred to the supplementary challan filed against the appellant on 24th April, 2014, indicating the following material :

*"Offence of the accused :*

*The accused Dr. Vinod Bhandari has been the Managing Director of S.A.I.M.S., Indore and prior to the P.M.T. Examination 2012 he had in collusion with Nitin Mohindra, Senior System Analyst of Vyapam, for getting some of his candidates passed in the P.M.T. Examination, 2012 and stating to send list of his candidates and cash amount through his General Manager Pradeep Raghuvanshi, subsequently he sent list of his 08 candidates and 60 lakh rupees in cash through his General Manager and 07 candidates out of aforesaid candidates were got passed by using unfair means with the connivance of Nitin Mohindra by way of filling up the circles in their O.M.R. sheets and received the amount in illegally manner by hatching conspiracy which has been recovered/seized from his General Manager Pradeep Raghuvanshi. In this manner, the accused has committed a serious crime in well designed conspiracy by hatching conspiracy and committed organized crime.*

*Evidences available against the accused :-*

1. *The certified copy of the excel sheet of the data retrieved from the hard disc seized from the office of the accused Nitin Mohindra;*
2. *The documents, note sheets and the activity chart of P.M.T. Examination, 2012 seized from Vyapam;*
3. *The list of 150 candidates seized from Shri Aurbindo Institute of Medical Sciences College, Indore in respect of M.B.B.S. admission for the session 2012-13 at the instanced of the accused Dr. Bhandari;*
4. *Memorandums of other accused persons;*
5. *The seizure memo of the amount seized from*

*Pradeep Raghuvanshi."*

6. While declining bail, the High Court observed :

*"To put it differently after considering all aspects of the matter as the material already placed along with the first charge-sheet prima facie indicates complicity of the applicant in the commission of the crime and is not a case of no evidence against the applicant at all; coupled with the fact that if the charge is proved against the applicant, the offence is punishable with life sentence; as the role of the applicant is being part of the conspiracy and is the kingpin; further that the applicant is allegedly involved in huge money transaction including to sponsor 8 candidates who were to appear in the VYAPAM examination; and is also prosecuted for another offence of similar type of having sponsored 8 other candidates; and has the potential of influencing the witnesses and other evidence and more importantly the investigation of the large scale conspiracy is still incomplete; as also keeping in mind the past conduct of the applicant in going abroad soon after the registration of the Crime No.12/2013 and returning back to India on 21.1.2014 only after grant of anticipatory bail on 16.1.2014, for all these reasons, for the time being, the applicant cannot be admitted to the privilege of regular bail."*

7. We have heard learned counsel for the parties.

8. Main contention advanced on behalf of the appellant is that the appellant has already been in custody for about one year and there is no prospect of commencement of trial in the near future. Even investigation is not likely to be completed before March 15, 2015. There are about 516 accused and large number of witnesses and documents. Thus, the trial will take long time. In these circumstances, the appellant cannot be kept in custody for indefinite period before his guilt is established by acceptable evidence. Our attention has been invited to order dated 27th November, 2014 passed by the trial Court, recording the request of the Special Public Prosecutor for deferring the proceedings of the case till the cases of other accused against whom supplementary charge sheets were filed were committed to the Court

of Session and till supplementary charge sheet was filed against several other accused persons. In the said order, the Court directed the Investigating Officer to indicate as to against how many accused persons investigation is pending and the time frame for filing charge sheets/supplementary charge sheets. In response to the said order, the Investigating Officer, vide letter dated 25th December, 2014 filed before the trial Court, stated that 329 persons had already been arrested and 187 were yet to be arrested and efforts were being made to file the charge sheets by March 15, 2015 in compliance of the directions of this Court. Thus, the submission on behalf of the appellant is that in view of delay in trial, the appellant was entitled to bail.

9. On the other hand, learned counsel for the State opposed the prayer for grant of bail by submitting that this Court ought not to interfere with the discretion exercised by the trial Court and the High Court in declining bail to the appellant. He points out that the trial Court and the High Court have dealt with the matter having regard to all the relevant considerations, including the nature of allegations, the material available, likelihood of misuse of bail and also the impact of the crime in question on the society. He pointed out that the Courts below have found that there is a clear prima facie case showing complicity of the appellant, the offence was punishable with life sentence, the appellant was the kingpin in the conspiracy, he had the potential of influencing the witnesses, investigation was still pending and the appellant had earlier gone abroad to avoid arrest.

10. Referring to the counter affidavit filed on behalf of the State, he points out that in the excel sheet recovered from Nitin Mohindra, the appellant has been named and in the statement under Section 164 Cr.P.C. Dr. Moolchand Hargunani disclosed that he had met the appellant who asked him to meet Pradeep Raghuvanshi for admission to PMT and he was asked to pay Rs.20 lakhs. He could not pay the said amount and his son could not get the admission. A sum of Rs.50 lakh for PMT Examination and 1.2 crores for Pre PG Examination, 2012 was received from Pradeep Raghuvanshi who was General Manager of the appellant's hospital and in charge of admission to the institute of the appellant.

11. We have given due consideration to the rival submissions and perused the material on record.

12. It is well settled that at pre-conviction stage, there is presumption of

innocence. The object of keeping a person in custody is to ensure his availability to face the trial and to receive the sentence that may be passed. The detention is not supposed to be punitive or preventive. Seriousness of the allegation or the availability of material in support thereof are not the only considerations for declining bail. Delay in commencement and conclusion of trial is a factor to be taken into account and the accused cannot be kept in custody for indefinite period if trial is not likely to be concluded within reasonable time. Reference may be made to decisions of this Court in *Kalyan Chandra Sarkar vs. Rajesh Ranjan* [1] , *State of U.P. vs. Amarmani Tripathi* [2] , *State of Kerala vs. Raneef* [3] and *Sanjay Chandra vs. CBI* [4] .

13. In *Kalyan Chandra Sarkar* (supra), it was observed :

> *"8. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled to bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing require that*

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1. (2005) 2 SCC 42
2. (2005) 8 SCC 21
3. (2011) 1 SCC 784
4. (2012) 1 SCC 40

*such persons be released on bail, in spite of his earlier applications being rejected, the courts can do so."*

14. In *Amarmani Tripathi* (supra), it was observed :

*18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail [see Prahlad Singh Bhati v. NCT, Delhi[(2001) 4 SCC 280] and Gurcharan Singh v. State (Delhi Admn.) [(1978) 1 SCC 118]. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in Kalyan Chandra Sarkar v. Rajesh Ranjan [(2004) 7 SCC 528]: (SCC pp. 535-36, para 11)*

*"11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed*

*a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail;they are:*

*(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.*

*(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.*

*(c) Prima facie satisfaction of the court in support of the charge. (See Ram Govind Upadhyay v. Sudarshan Singh [(2002) 3 SCC 598]] and Puran v. Rambilas [(2001) 6 SCC 338.)"*

*22. While a detailed examination of the evidence is to be avoided while considering the question of bail, to ensure that there is no prejudging and no prejudice, a brief examination to be satisfied about the existence or otherwise of a prima facie case is necessary. An examination of the material in this case, set out above, keeping in view the aforesaid principles, disclose prima facie, the existence of a conspiracy to which Amarmani and Madhumani were parties. The contentions of the respondents that the confessional statement of Rohit Chaturvedi is inadmissible in evidence and that that should be excluded from consideration, for the purpose of bail is untenable. This Court had negatived a somewhat similar contention in Kalyan Chandra Sarkar thus: (SCC p. 538, para 19)*

*"19. The next argument of learned counsel for the respondent is that prima facie the prosecution has failed to produce any material to implicate the respondent in the crime of conspiracy. In this regard*

*he submitted that most of the witnesses have already turned hostile. The only other evidence available to the prosecution to connect the respondent with the crime is an alleged confession of the co-accused which according to the learned counsel was inadmissible in evidence. Therefore, he contends that the High Court was justified in granting bail since the prosecution has failed to establish even a prima facie case against the respondent. From the High Court order we do not find this as a ground for granting bail. Be that as it may, we think that this argument is too premature for us to accept. The admissibility or otherwise of the confessional statement and the effect of the evidence already adduced by the prosecution and the merit of the evidence that may be adduced hereinafter including that of the witnesses sought to be recalled are all matters to be considered at the stage of the trial."*

15. In *Raneef* (supra), it was observed :

*"**15.** In deciding bail applications an important factor which should certainly be taken into consideration by the court is the delay in concluding the trial. Often this takes several years, and if the accused is denied bail but is ultimately acquitted, who will restore so many years of his life spent in custody? Is Article 21 of the Constitution, which is the most basic of all the fundamental rights in our Constitution, not violated in such a case? Of course this is not the only factor, but it is certainly one of the important factors in deciding whether to grant bail. In the present case the respondent has already spent 66 days in custody (as stated in Para 2 of his counteraffidavit), and we see no reason why he should be denied bail. A doctor incarcerated for a long period may end up like Dr. Manette in Charles Dicken's novel A Tale of Two Cities, who forgot*

*his profession and even his name in the Bastille."*

16. In *Sanjay Chandra* (supra), it was observed :

*"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.*

*24. In the instant case, we have already noticed that the "pointing finger of accusation" against the appellants is "the seriousness of the charge". The offences alleged are economic offences which have resulted in loss to the State exchequer. Though, they contend that there is a possibility of the appellants tampering with the witnesses, they have not placed any material in support of the allegation. In our view, seriousness of the charge is, no doubt, one of the relevant considerations while considering bail applications but that is not the only test or the factor: the other factor that also requires to be taken note of is the punishment that could be imposed after trial and conviction, both under the Penal Code and the Prevention of Corruption Act. Otherwise, if the former is the only test, we would not be balancing the constitutional rights but rather "recalibrating the scales of justice".*

17. In the light of above settled principles of law dealing with the prayer for bail pending trial, we proceed to consider the present case. Undoubtedly, the offence alleged against the appellant has serious adverse impact on the fabric of the society. The offence is of high magnitude indicating illegal admission to large number of undeserving candidates to the medical courses by corrupt means. Apart from showing depravity of character and generation of black money, the offence

has the potential of undermining the trust of the people in the integrity of medical profession itself. If undeserving candidates are admitted to medical courses by corrupt means, not only the society will be deprived of the best brains treating the patients, the patients will be faced with undeserving and corrupt persons treating them in whom they will find it difficult to repose faith. In these circumstances, when the allegations are supported by material on record and there is a potential of trial being adversely influenced by grant of bail, seriously jeopardising the interest of justice, we do not find any ground to interfere with the view taken by the trial Court and the High Court in declining bail.

18. It is certainly a matter of serious concern that the appellant has been in custody for about one year and there is no prospect of immediate trial. When a person is kept in custody to facilitate a fair trial and in the interest of the society, it is duty of the prosecution and the Court to take all possible steps to expedite the trial. Speedy trial is a right of the accused and is also in the interest of justice. We are thus, of the opinion that the prosecution and the trial Court must ensure speedy trial so that right of the accused is protected. This Court has already directed that the investigation be finally completed and final charge sheet filed on or before March 15, 2015. We have also been informed that a special prosecutor has been appointed and the matter is being tried before a Special Court. The High Court is monitoring the matter. We expect that in these circumstances, the trial will proceed day to day and its progress will be duly monitored. Material witnesses may be identified and examined at the earliest. Having regard to special features of this case, we request the High Court to take up the matter once in three months to take stock of the progress of trial and to issue such directions as may be necessary. We also direct that if the trial is not completed within one year from today for reasons not attributable to the appellant, the appellant will be entitled to apply for bail afresh to the High Court which may be considered in the light of the situation which may be then prevailing.

19. The appeal is accordingly disposed of with the above observations. We make it clear that observations in our above judgment will not be treated as expression of any opinion on merits of the case and the trial Court may decide the matter without being influenced by any such observation.

*Appeal disposed of.*

**I.L.R. [2015] M.P., 1637**
**SUPREME COURT OF INDIA**
***Before Mr. Justice Dipak Misra & Mr. Justice Adarsh Kumar Goel***
Cr.A. No. 1584/2007 decided on 10 February, 2015

SHARAD KUMAR SANGHI ...Appeallant
Vs.
SANGITA RANE ...Respondent

***Penal Code (45 of 1860), Section 420 - Cheating*** **- Petitioner is a Managing Director of a Company which is engaged in sale of automobiles - Complainant purchased a vehicle and subsequently came to know that the engine number mentioned in the invoice and engine fitted in the vehicle are different - During transit vehicle had met with accident and therefore, engine was changed - Held - Allegations against applicant in the capacity of Managing Director are vague - It is essential to make requisite allegation to constitute the vicarious liability - Allegations have been made against Company, but Company has not been arrayed as accused - No proceeding can be initiated against Company as it has not been arrayed as party - Appeal allowed. (Paras 2, 11, 12 & 13)**

*दण्ड संहिता (1860 का 45), धारा 420 – छल* – याची एक कंपनी का प्रबंध निदेशक है जो ऑटोमोबाइल के विक्रय में संलग्न है – शिकायतर्ता ने एक वाहन क्रय किया और पश्चात्वर्ती रूप से उसे ज्ञात हुआ कि बीजक में उल्लिखित इंजन क्रमांक और वाहन में लगे हुए इंजन का क्रमांक भिन्न है – पारगमन के दौरान वाहन दुर्घटनाग्रस्त हुआ था और इसलिये इंजन बदला गया था – अभिनिर्धारित – प्रबंध निदेशक की क्षमता में आवेदक के विरूद्ध लगाये गये आरोप अस्पष्ट हैं – प्रतिनिधिक दायित्व गठित होने के लिये अपेक्षित अभिकथन किया जाना आवश्यक है – कंपनी के विरूद्ध अभिकथन किये गये परंतु कंपनी को अभियुक्त के रूप में दोषारोपित नहीं किया गया है – कंपनी के विरूद्ध कोई कार्यवाही आरंभ नहीं की जा सकती क्योंकि पक्षकार के रूप में उसे दोषारोपित नहीं किया गया – अपील मंजूर।

**Cases referred :**

(2008) 5 SCC 668, (2005) 8 SCC 89, (2008) 5 SCC 662, (2010) 10 SCC 479, (2013) 4 SCC 505, (2012) 5 SCC 661.

**JUDGMENT**

The Judgment of the Court was delivered by : **DIPAK MISRA, J. :-** Calling in question the legal validity of the order dated

30.11.2006 passed by the learned Single Judge of the High Court of Madhya Pradesh at Jabalpur in M.Cr.C.No. 1922 of 2002 whereby the learned Judge had declined to exercise the power under Section 482 of the Code of Criminal Procedure (Cr.P.C.) for quashing of the proceedings in Criminal Case No.895 of 2001 pending in the court of Judicial Magistrate First Class, Betul which has been registered under Section 420 of the Indian Penal Code against the appellant, the present appeal has been preferred by special leave.

2. Bereft of unnecessary details, the facts which are necessary to be stated are that the appellant is the Managing Director M/s. Sanghi Brothers (Indore) Ltd., Indore which is a registered company duly incorporated and registered under the Companies Act, 1956 and is engaged in the business of automobile sale, finance and shipping etc. having branches at various places, including the city of Bhopal. The respondent-complainant obtained a quotation from the Bhopal Branch for purchase of a TATA Diesel vehicle model SFC 709/38 LB in the month of April 1998 and the vehicle was delivered to the respondent on 01.05.1998 on payment of the price deposited at Bhopal vide Bank Draft issued from the State Bank of India, Sarni, Betul. The respondent faced difficulty with the vehicle and eventually he came to know in the month of August 2000 that a different engine number was made in the invoice that was issued to him than the engine that was put in the chasis. On further enquiry, he found that there is a letter issued by Tata Engineering and Locomotive Company (TELCO) on 7.11.2000 that in the course of transit from the company to Bhopal, the said vehicle had met with an accident as a result of which the engine was replaced by another engine. Coming to know of this, the respondent filed a complaint under Section 200 of the Cr.P.C. alleging that M/s Sanghi Brothers (Indore) Ltd., Indore being represented by the Managing Director, Sharad Kumar Sanghi, had suppressed the information and deliberately cheated the respondent.

3. The learned Magistrate, after following the procedure as contemplated under Section 202 of the Cr.P.C., took cognizance of the offence to which we shall advert to at a later stage.

4. After cognizance was taken and summons were issued, the appellant filed a revision before the learned Sessions Judge, Betul which was dismissed on 27.02.2002.

5. Being aggrieved by the aforesaid order, he preferred an application

under Section 482 of the Cr.P.C. before the High Court. It was contended before the High Court that the learned Magistrate had no territorial jurisdiction; that there was no deceit by the respondent; that the company was not made an accused in the complaint and, therefore, the complaint was not maintainable; and that there was no *mens rea.* The High Court, as is manifest from the order impugned, repelled all the submissions and dismissed the application for quashment.

6. We have heard Mr. Sidharth Luthra, learned senior counsel for the appellant and Mr. Akshat Shrivastava, learned counsel for the respondent.

7. It is not in dispute that the vehicle was purchased by the respondent on 01.05.1998. The invoice contained a different engine number than the engine that was fitted into the vehicle. The respondent lodged the complaint on 08.05.2001. To satisfy ourselves whether there has been any specific allegation against the appellant, we have carefully perused the complaint filed under Section 200 of the Cr.P.C. The English translation of the complaint has been brought on record. The original complaint which is in Hindi has also been filed. The allegations made against the appellant read as follows:

> "That the proprietor of M/s Sanghi Brothers Indore accused Sharad S/o Sohan Sanghi negligently prepare the accidental vehicle no.709 L.M. & projected the same as new to deliver the complainant causing gain to self and loss to the complainant which is punishable U/s 420 of the I.P.C.

8. Barring the aforesaid allegation, there is no allegation against him. In the initial statement made under Section 200 of the Cr.P.C., the complainant after narrating the facts, has stated thus:

> "Sanghi Brothers Limited run by Mr. Sharad Sanghi committed cheating with the Applicant by delivering accidented vehicle in place of a new one and caused gross financial loss. Applicant is operating the vehicle after borrowing loan from Bank and the vehicle is not worth operating at present due to said defects. I have filed the Photostat copies of the concerning documents in the case."

9. The allegations which find place against the Managing Director in his personal capacity, as we notice, are absolutely vague. When a complainant intends to proceed against the Managing Director or any officer of a company,

it is essential to make requisite allegation to constitute the vicarious liability. In *Maksud Sajyad vs. State of Gujarat*[1], it has been held, thus:

> "Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz, as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligator on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability."

In this regard, reference to a three-Judge Bench decision in *S.M.S.Pharmaceuticals Ltd. v. Neeta Bhalla and Another* [2] would be apposite. While dealing with an offence under Section 138 of the Negotiable Instruments Act, 1881, the Court explaining the duty of a Magistrate while issuing process and his power to dismiss a complaint under Section 203 without even issuing process observed thus:

> ".... a complaint must contain material to enable the Magistrate to make up his mind for issuing process. If this were not the requirement, consequences could be far-reaching. If a Magistrate had to issue process in every case, the burden of work before the Magistrate as well as the harassment caused to the respondents to whom process is issued would be tremendous. Even Section 204 of the Code starts with the words "if in the opinion of the Magistrate taking cognizance of

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1. (2008) 5 SCC 668 2. (2005) 8 SCC 89

> an offence there is sufficient ground for proceeding". The words "sufficient ground for proceeding" again suggest that ground should be made out in the complaint for proceeding against the respondent. It is settled law that at the time of issuing of the process the Magistrate is required to see only the allegations in the complaint and where allegations in the complaint or the charge-sheet do not constitute an offence against a person, the complaint is liable to be dismissed."

After so stating, the Court analysed Section 141 of the Act and after referring to certain other authorities answered a referent and relevant part of the answer reads as follows:

> "It. is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied."

10. The same principle has been reiterated in *S.K. Alagh v. State of U.P.*[3]; *Maharashtra State Electricity Distribution Company Ltd. v. Datar Switchgear Ltd.*[4] and *GHCL Employees Stock Option Trust v. India Infoline Ltd.*[5]

11. In the case at hand as the complainant's initial statement would reflect, the allegations are against the company, but the company has not been made arrayed as a party. Therefore, the allegations have to be restricted to the Managing Director. As we have noted earlier, allegations are vague and in fact, principally the allegations are against the company. There is no specific allegation against the Managing Director. When a company has not been arrayed as a party, no proceeding can be initiated against it even where vicarious liability is fastened on certain statutes. It has been so held by a three-Judge Bench in *Aneeta Hada v. Godfather Travels and Tours Private Limited*[6] in the context of Negotiable Instruments Act, 1881.

12. At this juncture, it is interesting to note, as we have stated earlier, that

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3. (2008) 5 SCC 662
4. (2010) 10 SCC 479
5. (2013) 4 SCC 505
6. (2012) 5 SCC 661

the learned Magistrate while passing the order dated 22.10.2001, had opined, thus :-

> "It appears prima-facie from the complaint filed by the complainant, documents, evidence and arguments that accused company has committed cheating with the complaint by delivering old and accidented vehicle to her at the cost of a new truck. Accordingly, prima-facie sufficient grounds exist for registration of a complaint against the accused U/s. 420 of I.P.C. and is accordingly registered?"

13. When the company has not been arraigned as an accused, such an order could not have been passed. We have said so for the sake of completeness. In the ultimate analysis, we are of the considered opinion that the High Court should have been well advised to quash the criminal proceedings initiated against the appellant and that having not been done, the order is sensitively vulnerable and accordingly we set aside the same and quash the criminal proceedings initiated by the respondent against the appellant.

14. The appeal stands allowed accordingly.

*Appeal allowed.*

**I.L.R. [2015] M.P., 1642**
**SUPREME COURT OF INDIA**
***Before Mr. Justice Vikramajit Sen & Mr. Justice Prafulla C. Pant***
Civil Appeal No. 2944/2015 decided on 17 March, 2015

STATE OF M.P. & ors. ...Appellants
Vs.
MALA BANERJEE ...Respondent

(Alongwith C.A. No. 2945/2015, C.A. No. 2946/2015, C.A. No. 2947/2015, C.A. No.2948/2015, C.A. No. 2949/2015, C.A. No. 2950/2015, C.A. No. 2951/2015, C.A. No. 2952/2015, C.A. No. 2953/2015, C.A. No. 2954/2015, C.A. No. 2955/2015, C.A. No. 2956/2015, C.A. No. 2957/2015, C.A. No. 2958/2015, C.A. No. 2959/2015, C.A. No. 2960/2015, C.A. No. 2961/2015, C.A. No. 2962/2015, C.A. No. 2963/2015, C.A. No. 2964/2015, C.A. No. 2965/2015, C.A. No. 2966/2015, C.A. No. 2967/2015, C.A. No. 2968/2015, C.A. No. 2969/2015, C.A. No. 2970/2015, C.A. No. 2971/2015, C.A. No. 2972/2015, C.A. No. 2973/2015,

C.A. No. 2974/2015, C.A. No. 2975/2015, C.A. No. 2976-2977/2015, C.A. No. 2978/2015, C.A. No. 2979/2015, C.A. No. 2980/2015, C.A. No. 2981/2015, C.A. No. 2982/2015, C.A. No. 2983/2015, C.A. No. 2984/2015, C.A. No. 2985/2015, C.A. No. 2987/2015, C.A. No. 2988/2015, C.A. No. 2989/2015, C.A. No. 2990-2991/2015, C.A. No. 2992/2015, C.A. No. 2993/2015, C.A. No. 2994/2015, C.A. No. 2995/2015, C.A. No. 2996/2015, C.A. No. 2997/2015, C.A. No. 2998/2015, C.A. No. 2999/2015, C.A. No. 3000-3003/2015)

*A. Constitution - Article 226 - Policy Matter - Judicial Review* - **Where a policy is contrary to law or is in violation of the provisions of Constitution, or is arbitrary or irrational, Courts must perform their constitutional duties by striking it down. (Para 7)**

*क. संविधान – अनुच्छेद 226 – नीतिगत मामला – न्यायिक पुर्नविलोकन* – जहां नीति विधि के विपरीत है या संविधान के उपबंधों के उल्लंघन में है या मनमानी एवं अयुक्तियुक्त है, न्यायालयों को उसे अभिखंडित कर अपने संवैधानिक कर्त्तव्यों का पालन करना चाहिए।

*B. Constitution - Article 226 - Precedence - Judgment of Co-ordinate Bench* - **A Bench should ordinarily follow the decision of a Co-ordinate Bench or else should forward the matter to the Chief Justice for constituting a Larger Bench in case the reasoning and conclusion of the Co-ordinate Bench is not acceptable. (Para 8)**

*ख. संविधान – अनुच्छेद 226 – पूर्व निर्णय – समकक्ष न्यायपीठ का निर्णय* – सामान्य रूप से एक न्यायपीठ को समकक्ष न्यायपीठ के निर्णय का अनुसरण करना चाहिए अन्यथा मामले को मुख्य न्यायाधिपति को वृहत् न्यायपीठ के गठन हेतु अग्रेषित करना चाहिए, यदि समकक्ष न्यायपीठ का तर्क और निष्कर्ष स्वीकार योग्य नहीं है।

*C. Service Law - Kramonnati* - **Lecturers/Teachers in the employment of Education and Tribal Welfare Department are entitled for the benefit of Kramonnati Scheme with effect from 19-4-1999. (Paras 8 to 10)**

*ग. सेवा विधि – क्रमोन्नति* – शिक्षा एवं आदिम जाति कल्याण विभाग में नियोजित व्याख्याता/शिक्षक 19–04–1999 से प्रभावी रूप से क्रमोन्नति योजना के लाभ हेतु हकदार हैं।

**Case referred :**

(2003) 4 SCC 289.

**JUDGMENT**

The Judgment of the Court was delivered by : **VIKRAMAJIT SEN, J. :-** Delay condoned. Leave granted.

2. These Appeals assail the Judgment of the learned Division Bench of the High Court of Judicature of Madhya Pradesh, Bench at Gwalior, delivered on 22.10.2008, which upheld the Judgment dated 16.10.2007 of the learned Single Judge.

3. Very briefly stated, the dispute pertains to the eligibility of the Respondents, all of whom are Lecturers/Teachers in the employment of the Education and Tribal Welfare Department, Government of Madhya Pradesh, for increased pay scales. The Respondents claim the benefits of the Kramonnati Scheme with effect from 19.4.1999, whereas the Appellants assert that they are willing to grant the benefit of the Kramonnati Scheme to them, and obviously others similarly placed as they are, but with effect from 1.8.2003.

4. Under the Madhya Pradesh Revision of Pay Rules, 1990, the Respondents, were eligible for a higher pay scale on completion of 12 years of service. Subsequently, a policy dated 19.4.1999 known as the said Kramonnati Scheme came to be introduced entitling all Government servants to the benefit of two higher pay scales, the first on completion of 12 years of service, and the second on the further completion of another 12 years (24 years in all). The Appellants contend that this Circular applied to all their employees except the Teacher cadre, since the latter had already enjoyed the benefit of the Madhya Pradesh Revision of Pay Rules. On 2.11.2001, the Commissioner Public Instructions sanctioned the second Kramonnati for teachers with effect from 19.4.1999. The stand of the Appellants is that this was erroneously extended without obtaining the consent of the Finance Department, and was accordingly corrected by order dated 11.10.2006. However, despite this stance, the State Government took a policy decision on 3.9.2005 granting the benefit of a second Kramonnati to Teachers, but with effect from 1.8.2003. Recovery proceedings were initiated against teachers who had been bestowed Kramonnati from the earlier date.

5. The object of the Kramonnati Scheme must be noted, as this sheds light on its application. The Scheme was introduced to remove frustration among employees who had stagnated at a particular scale for many years without promotional avenues, with the endeavour of removing any adversity

in their performance. Keeping this purpose in perspective, there is no basis or justification for discriminating between teachers and all other employees. The fact that the Madhya Pradesh Revision of Pay Rules were already in place at the time the Kramonnati Scheme was introduced indicates that the Appellants accepted that increase in pay scale are salutary and indeed important for educators on whose motivation and dedication the future of the country and of society is almost entirely dependent. We do not agree with the Appellants' submission that the Respondents are not entitled to claim the benefit of the Kramonnati Scheme because they were already covered under the Madhya Pradesh Revision of Pay Rules, as there is no basis for the two being mutually exclusive. Indeed, we find it logical that the application of the Madhya Pradesh Revision of Pay Rules regarding the eligibility of increased pay scales should be replaced by the Kramonnati Scheme, which is more generous in the benefits it provides. This is all the more so since the Appellants have themselves ordained that the said Scheme can be availed by the Respondents but from 1.8.2003, which we find to be arbitrary and devoid of any logical foundation.

6. The Appellants have claimed that its Notifications indicated with clarity that the Scheme would not apply to those Departments where a provision of Kramonnati was already available in their Recruitment Rules. However, a perusal of the relevant Clarification issued by the State Government dated 3.5.2000/17.5.2000 makes it clear that its purpose was to protect employees who were working in Departments that had a provision of Kramonnati in their Recruitment Rules, by preventing any reduction in Kramonnati pay scale as a consequence of the new 19.4.1999 policy. It is our understanding that the Clarification intended to prevent the class of employees envisaged therein from facing any monetary loss and not to disadvantage any class of employee.

7. We also find ourselves unable to agree with the Appellants submission that this is a policy matter and, therefore, should not be interfered with by the Courts. In *Federation of Railway Officers Association vs. Union of India* (2003) 4 SCC 289, this Court has already considered the scope of judicial review and has enumerated that where a policy is contrary to law or is in violation of the provisions of the Constitution or is arbitrary or irrational, Courts must perform their constitutional duties by striking it down. The Appellants have not been able to explain why it chose to deny teachers the benefit of the second Kramonnati while granting this benefit to all other employees, thus discriminating against them and violating their fundamental rights enshrined in Articles 14 and 16 of the Constitution. It is indeed paradoxical that teachers

who prepare persons for employment and leadership are dealt with in a parodical attitude by the State. Further, we reiterate that no explanation is forthcoming for granting the second Kramonnati with effect from 1.8.2003. This is neither the date in the original scheme nor justifiable on the basis of any other material available on the record. Many employees had completed twenty four years of service by 1999; therefore, in postponing their second Kramonnati by four years, the Appellants have departed from the basic object of the Scheme. The 3.9.2005 Order failed to explain the basis of this decision, and is thus arbitrary in nature and discriminatory towards the Respondents and others in their position.

8. The annals of this litigation also need to be considered in some detail. The arguments ventilated before us were considered in detail by the Writ Court in *Smt. Prerna v. State of Madhya Pradesh,* which was decided on 26.4.2007 by a learned Single Judge of that High Court at its Indore Bench. Thereafter, another learned Single Judge of that High Court at its Gwalior Bench decided the present Writ Petitions from which these Appeals/Petitions arise in favour of the Respondents vide its Judgment dated 16.10.2007. Although the reasoning that has persuaded the second learned Single Judge to decide in favour of the Respondents is evident from the perusal of that Judgment, reliance on the Judgment dated 26.4.2007 passed in Smt. Prerna had been duly considered. We must immediately emphasise that a Bench should ordinarily follow the decision of a Coordinate Bench or else should forward the matter to the learned Chief Justice for constituting a Larger Bench in case the reasoning and conclusion of the Coordinate Bench is not acceptable. The Appeal from the Judgment dated 16.10.2007, has been dismissed by the Division Bench in terms of the Judgment impugned before us, and that is how the Special Leave Petitions (now Appeals) came to be filed. In this interregnum, an appeal that had been preferred from the Order of the learned Single Judge, Indore Bench has also been decided on 18.12.2008 in favour of the Respondents, taking note of the Judgment by a Coordinate Bench presently impugned before us. We had made this clarification because one of the arguments that has been ventilated before us is that the two sets of petitions had not been considered threadbare by the two Benches located at Indore and Gwalior. This has not lead to any legal irregularity, in that the learned Single Judge, as well as the learned Division Bench have sequentially considered the matter in detail.

9. We do not find any illegality in the Impugned Judgment and the Appeals are dismissed, but we desist from imposing costs.

10. Since these Appeals are being dismissed, it would be a futile and wasteful exercise to take up all pending Applications. To remove possible doubts, all the Applications are dismissed.

*Appeal dismissed.*

**I.L.R. [2015] M.P., 1647**
**SUPREME COURT OF INDIA**
***Before Mr. Justice A.K. Sikri & Mr. Justice Rohinton Fali Nariman***
Civil Appeal No. 8192/2003 decided on 17 March, 2015

VIKRAM CEMENT & anr. ...Appellants
Vs.
STATE OF M.P. & ors. ...Respondents

***Constitution - Article 265 - Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, M.P. (52 of 1976), Section 3 - Entry Tax - Rate of Tax* - By notification dated 1-5-1997 which remained in force till 30-9-1997, rate of entry tax was reduced to 1% - However, as per proviso, the dealers who had already paid the tax at the higher rate were not entitled to refund of the same - Article 265 provides that no tax shall be levied or collected except by authority of law - Proviso providing for non-refund of tax paid at higher rate is unconstitutional being violative of Article 14 and 265 of Constitution of India - Appeal allowed.**

**(Paras 7 to 16)**

*संविधान – अनुच्छेद 265 – स्थानीय क्षेत्र में माल के प्रवेश पर कर अधिनियम, म.प्र. (1976 का 52), धारा 3 – प्रवेश कर – कर की दर* – अधिसूचना दिनांक 01–05–1997 जो 30–09–1997 तक प्रभावी रही, के द्वारा प्रवेश कर की दर को 1% घटाया गया – तथापि, परंतुक के अनुसार डीलर जो पहले ही उच्चतर दर पर कर का भुगतान कर चुके हैं वे उक्त के प्रतिदाय के लिये हकदार नहीं – अनुच्छेद 265 उपबंधित करता है कि कोई कर लगाया या वसूला नहीं जा सकता सिवाय विधि के प्राधिकार द्वारा – उच्चतर दर पर अदा किये गये कर का प्रतिदाय नहीं किया जाना उपबंधित करने का परंतुक भारत के संविधान के अनुच्छेद 14 व 265 के उल्लंघन में होने के नाते असंवैधानिक है – अपील मंजूर।

**Cases referred :**

W.P. No. 2917 of 2000, (1993) 1 SCC 333, (1983) 1 SCC 305, (1978) 1 SCC 248, 1959 SCR 279, 296, (1979) 1 SCC 380, (1974) 2

SCR 348, (1961) 3 SCR 77, (2009) 1 SCC 540.

**JUDGMENT**

The Judgment of the Court was delivered by : **A.K. SIKRI, J. :-** The bare minimum facts which are required to be mentioned to decide this appeal are recapitulated, in brief, hereinbelow:

2. The appellant Nos. 1 and 2 are the units of Grasim Industries Limited, which carries on manufacture and sale of cement. It requires raw material in the form of coal, gypsum and bauxite. On the aforesaid raw materials, the appellants had been paying entry tax for entry of these goods in the territory of the State of Madhya Pradesh under M.P. Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (hereinafter called the 'Entry Tax Act'). In the year 1997, the entry tax on the aforesaid items of raw materials payable under the Act was at the following rates:

| | | |
|---|---|---|
| COAL | – | 2.5% |
| GYPSUM | – | 2% |
| BAUXITE | – | 10% |

In the year 1999, respondent No.1 – State issued Notification No. A-3-80-98-ST-V (49) dated 4.5.1999. By this Notification it reduced the rate of entry tax, namely, coal, gypsum and bauxite by making the entry tax payable at the rate of 1% only. This Notification remained in force for a limited period, that is from 1.5.1997 to 30.09.1997. The rate of entry tax prior to 1.5.1997 and after 30.09.1997 remained the same, namely, 2.5%, 2% and 10% for coal, gypsum and bauxite respectively.

3. We are concerned here with the aforesaid period when entry tax payable was @ 1% only. However, while reducing the entry tax to 1%, in the same very Notification an Explanation was also appended stating that the amount which is already paid by the dealer at the higher rate shall not be refunded. This Explanation is worded in the following terms:

> "Explanation – The amount shall not be refunded in any case on the basis that the dealer had paid the tax at a higher rate."

As the Notification was issued only in May 1999 and it realted to the past period, i.e. 1.5.1997 to 30.09.1997 and the entry tax is payable at the point

of entry of the goods into the State, as and when the appellants were bringing the aforesaid raw material into the State of Madhya Pradesh, they had been paying the entry tax. During the period 1.5.1997 to 30.09.1997, they had paid the entry tax at the rate which was prevalent at that time, though reduced to 1% vide the Notification dated 4.5.1999. In this manner, according to the appellants, though they had paid the entry tax at the higher rate, which was now reduced to 1% vide the aforesaid Notification, they became entitled to get the refund of the excess amount paid, but were still deprived of that refund because of the aforesaid Explanation.

4. Naturally, being aggrieved by the said Explanation, the appellants challenged the validity of the Explanation by filing writ petiion in the High Court of Madhya Pradesh. The challenge was led primarily on two counts: (i) in the first instance, it was pleaded that this Explanation was arbitrary and discriminatory being violative of Article 14 of the Constitution inasmuch as the classification which has carved out because of the said explanation had the effect of treating the appellants and others who had paid tax at a higher rate, differently from those who had not paid the tax at all and were defaulted. It was argued that such a classification was not based on any intelligible differentia and had no nexus with any objective sought to be achieved. A number of judgments in support of this contention were cited in the High Court. (ii) The second argument raised was that it amounted to exaction of tax at a higher rate, namely, at the rate of 2.5%, 2% and 10% for coal, gypsum and bauxite respectively, though the rate fixed ultimately for the period in question by the Notification dated 4.5.1999 was 1%. Therefore, such an 'Explanation' in the Notification was in the teeth of Article 265 of the Constitution and *per se* illegal.

5. The High Court, though took note of the aforesaid arguments, did not deal with these arguments in the manner in which these submissions were made and dismissed the writ petition vide impugned judgment dated 11.9.2002 only on the ground that identical issue had been considered by its own Division Bench earlier in the case of *Century Textiles and Industries Ltd. v. State of Madhya Pradesh & Ors.*[1] To be fair to the High Court, we would also mention that the High Court has referred to another judgment of this Court in *Indian Oil Corporation v. Municipal Corporation, Jullundhar*[2] and having relied

1. Writ Petition No. 2917 of 2000
2. (1993) 1 SCC 333

upon the observations in the said case to the effect that where the octroi duty had already been collected, there was no question of any equity in favour of the Indian Oil Corporation to claim the refund thereof.

6. Learned counsel appearing for the appellants has placed before us the same arguments which were advanced before the High Court with the plea that the High Court did not even consider those arguments appropriately. He submitted that it was a clear case of discrimination *qua* the appellants who had faithfully paid the tax and, therefore, the provisions of Article 14 of the Constitution will squarely attract in the facts of the present case. The learned counsel for the State, on the other hand, referred to the reasoning given by the High Court in the impugned judgment in support of his submissions while countering the arguments by the learned counsel for the appellants.

7. After giving our thoughful consideration to the issue involved, we are of the view that there is force in the submission of the learned counsel for the appellants. The Explanation attached to Notification dated 4.5.1999, or for that mater the Notification dated 5.7.1999, which states that the amount shall not be refunded in any case on the basis that dealer had filed the tax at a higher rate, results in invidious discrimination towards those who have paid the tax at a higher rate, like the appellants, when compared with that category of the persons who were defaulters and have now been allowed to pay the tax at the rate of 1% for the relevant period. The consequence is that it carves out two categories of tax payers who are made to pay the tax at different rates, even though they are identically situated. There is no basis for creating these two classes and there is no rationale behind it which would have any causal connection with the objective sought to be achieved. It would be pertinent to mention that on repeated query made by this Court to the learned counsel for the respondents, he could not explain or show from any material on record as to what led the authorities to provide such an Explanation. Therefore, it becomes apparent that there is no objective behind such an Explanation appended to the Notification dated 4.5.1999 which is sought to be achieved, except that the Government, after collecting the tax from those who had paid at a higher rate, did not intend to refund the same. This can hardly be countenanced, more so when it results in discrimination between the two groups, though identically situated.

8. The law on the scope and meaning of Article 14 of the Constitution has now been well articulated. We may gainfully refer to the case of *D.S.*

*Nakara & Ors. v. Union of India*[3], wherein this Court observed as under:

> "10. The scope, content and meaning of Article 14 of the Constitution has been the subject-matter of intensive examination by this Court in a catena of decisions. It would, therefore, be merely adding to the length of this judgment to recapitulate all those decisions and it is better to avoid that exercise save and except referring to the latest decision on the subject in *Maneka Gandhi v. Union of India*[4], from which the following observation may be extracted:
>
> > "...what is the content and reach of the great equalising principle enunciated in this Article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits....Article 14 strikes at arbitrariness in State action and ensure fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence."
>
> 11. The decisions clearly lay down that though Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, viz. (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group; and (ii) that that differentia must have a rational relation to the objects sought to be achieved by the statute in question

3. (1983) 1 SCC 305 4. (1978) 1 SCC 248

> [See *Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar & Ors.* [5]]. The classification may be founded on differential basis according to objects sought to be achieved but what is implicit in it is that there ought to be a nexus, i.e. casual connection between the basis of classification and object of the statute under consideration. It is equally well settled by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure.
>
> (emphasis supplied)"

9. In Re.: *Special Courts Bill, 1978*[6], this Court undertook a survey of plethora of decisions touching upon the *'Equality'* doctrine enshrined in Article 14 of the Constitution and culled out certain principles. In principle No.3, the Court highlighted that though classification was permissible and it was not for the Courts to insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case, but, at the same time, classification would be treated as justified only if it is not palpably arbitrary. It was also emphasized that the underlined purpose in Article 14 of the Constitution was to treat all persons similarly circumstanced alike, both in privileges conferred and liabilities imposed. Following was the emphatic message given by the Court:

> "(4)...It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject matter of the legislation their position is substantially the same.
>
> (emphasis supplied)"

Another principle which was restated was that the classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all persons grouped together and not in others who are left out, but those qualities and characteristics must have reasonable relation to the object of the legislation.

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5. 1959 SCR 279, 296 6. (1979) 1 SCC 380

10. Article 14 eschews arbitrariness in any form. This principle was eloquently explained in *EP. Royappa v. State of Tamil Nadu* [7] holding that the basic principle which informs both Articles 14 and 15 is equality and inhibition against discrimination. We would like to quote the following passage from that judgment as well, which is as under:

> "From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 14. Article 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

On the application of the aforesaid principles to the facts of the present case, the irresistible conclusion is that the Explanation is highly discriminatory in nature.

11. The matter can be looked into from another angle as well, which will yield the same results.

12. We have to keep in mind that vide Notification dated 4.5.1999, it is the rate of entry tax on the aforesaid raw materials which is reduced to 1%. The effect of that would be that any person bringing raw materials, viz. coal, gypsum and bauxite, within the State of Madhya Pradesh was liable to pay the entry tax only at the rate of 1%. Once this aspect is kept in mind, the legal effect thereof has to be that all the persons including the appellants, who had already paid the tax, were supposed to pay the tax at the rate of 1% only. Therefore, if they had paid the tax at a higher rate, they were entitled to the refund of excess amount of tax paid. No reasons are coming forth in the counter affidavit filed by the State either in the High Court or in this Court or in any other form as to why there was a necessity of adding such an Explanation for not refunding the excess amount paid by the dealer in excess of 1% which was the entry tax legally payable for this period. Once we consider the matter from this angle, it also becomes clear that as the entry tax payable was at the

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7. (1974) 2 SCR 348

rate of 1% only, asking any person to pay at a higher rate would be clearly violative of Article 265 of the Constitution.

13. Article 265 of the Constitution has to be read along with Article 14 in the given context. This co-relation between the two provisions is beautifully brought out in *Kunnathat Thathunni Moopil Nair v. State of Kerala & Anr.*[8] as under:

> "10. The most important question that rarises for consideration in these cases, in view of the stand taken by the State of Kerala, is whether Art. 265 of the Constitution is a complete answer to the atack against the constitutionality of the Act. It is, therefore, necessary to consider the scope and effect of that Article. Article 265 imposes a limitation on the taxing power of the State in so far as it provides that the State shall not levy or collect a tax, except by authority of law, that is to say, a tax cannot be levied or collected by a mere executive fiat. It has to be done by authority of law, which must mean valid law. In order that the law may be valid, the tax proposed to be levied must be within the legislative competence of the Legislature imposing a tax and authorising the collection thereof and, secondly, the tax must be subject to the conditions laid sown in Art. 13 of the Constitution. One of such conditions envisaged by Art. 13(2) is that the Legislature shall not make any law which takes away or abridges the equality clause in Art.14, which enjoins the State not to deny to any person equality before the law or the equal protection of the laws of the country. It cannot be disputed that if the Act infringes the provisions of Art.14 of the Constitution, it must be struck down as unconstitutional. For the purpose of these cases, we shall assume that the State Legislature had the necessary competence to enact the law, though the petitioners have seriously challenged such a competence. The guarantee of equal protection of the laws must extend even to taxing statutes. It has not been contended otherwise. It does not mean that every person should be taxed equally. But it does not mean that if property of the same character has to be taxed, the taxation

8. (1961) 3 SCR 77

must be by the same standard, so that the burden of taxation, may fall equally on all persons holding that kind and extent of property. If the taxation, generally speaking, imposes a similar burden on everyone with reference to that particular kind and extent of property, on the same basis of taxation, the law shall not be open to attack on the ground of inequality, even though the result of the taxation may be that the total burden on different persons may be unequal. Hence, if the Legislature has classified persons or properties into different categories, which are subjected to different rates of taxation with reference to income or property, such a classification would not be open to the attack of inequality on the ground that the total burden resulting from such a classification is unequal. Similarly, different kinds of property may be subjected to different rates of taxation, but so long as there is a rational basis for the classification, Art. 14 will not be in the way of such a classification resulting in unequal burdens on different classes of properties. But if the same class of property similarly situated is subjected to an incidence of taxation, which results in inequality, the law may be struck down as creating an inequality amongst holders of the same kind of property. It must, therefore, be held that a taxing statute is not wholly immune from attack on the ground that it infringes the equality clause in Art. 14, though the Courts are not concerned with the policy underlying a taxing statute or whether a particular tax could not have been imposed in a different way or in way that the Court might think more just and equitable. The Act has, therefore, to be examined with reference to the attack based on Art. 14 of the Constitution."

14. At this stage, we would like to refer to another judgment of this Court which is quite proximate to the situation at hand, namely, *Corporation Bank v. Saraswati Abharansala & Anr.*[9] That was case where rate of Sales Tax was reduced from 1% to 0.5% vide SRO No. 1075/99 dated 27.12.1999, which was given retrospective effect from 1.4.1999. The respondent in that case, who had paid the sales tax @ 1% for the period 6.4.1999 to 10.12.1999, claimed refund of the excess tax paid, i.e. over and above 0.5%. This request

9. (2009) 1 SCC 540

was rejected by the Assistant Commissioner, Sales Tax. The assessee filed the writ petition challenging the order of the Assistant Commissioner, which was dismissed by the Single Judge of the High Court. However, the assessee's intra-court appeal was allowed by the Division Bench directing the authorities to refund the excess amount collected. The said decision of the Division Bench was upheld by this Court in the aforesaid judgment holding that non-refund would not only offend equality clause contained in Article 14 of the Constitution, it would also be in the teeth of Article 265 of the Constitution which mandates that no tax shall be levied or collected, except by authority of law. Following passages from the said judgment are worth a quote:

> "20. Article 265 of the Constitution of India mandates that no tax shall be levied or collected except by authority of law.
>
> 21. In terms of the said provision, therefore, all acts relating to the imposition of tax providing, *inter alia*, for the point at which the tax is to be collected, the rate of tax as also its recovery must be carried out strictly in accordance with law.
>
> 22. If the substantive provision of a statute provides for refund, the State ordinarily by a subordinate legislation could not have laid down that the tax paid even by mistake would not be refunded. If a tax has been paid in excess of the tax specified, save and except the cases involving the principle of 'unjust enrichment', excess tax realized must be refunded. The State, furthermore, is bound to act reasonably having regard to the equality clause contained in Article 14 of the Constitution of India.
>
> 23. It is not even a case where the doctrine of unjust enrichment has any application as it is not the case of the respondent/Setate that the buyer has passed on the excess amount of tax collected by it to the purchasers.
>
> 24. In view of the admitted fact that tax had been collected and paid for the period 6th April, 1999 and 10th December, 1999 @ 1% of the price which having been reduced from 1st April, 1999 to 0.5%, the State, in our opinion, is bound to refund the excess amount deposited with it."

15. It is possible, as was sought to be argued by the learned counsel for

the State, that while adding this Explanation the Government had kept in mind the principle of unjust enrichment. Presumably because of this reason, the High Court also referred to the judgment in the case of *Indian Oil Corporation* (supra). However, on such a presumption alone, there cannot be any justification for adding the Explanation of the nature mentioned above. In order to determine as to whether a particular dealer is in fact entitled to refund or not, the Government can go into the issue of unjust enrichment while considering his application for refund. That would depend on the facts of each case. It cannot be presumed that the burden was positively passed on to the buyers by these dealers and, therefore, they are not entitled to refund.

16. For all the aforesaid reasons, we are of the opinion that the impugned Explanations in the Notifications dated 4.5.1999 and 5.7.1999 are unconstitutional. We, accordingly, allow the appeal and quash the said Explanations.

No costs.

*Appeal allowed.*

**I.L.R. [2015] M.P., 1657**

**WRIT APPEAL**

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

W.A. No. 301/2014 (Indore) decided on 28 August, 2014

CHANDRAKANTA BAI ...Appellant

Vs.

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

*A.* ***Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 40 - Removal of Sarpanch*** **- Proceeding before SDO - Not empty formality - Principle of natural justice has to be followed - Opportunity to lead evidence and cross-examination be afforded. (Paras 11 & 13)**

*क. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 40 – सरपंच को हटाया जाना* – एस.डी.ओ. के समक्ष कार्यवाही – खाली औपचारिकता नहीं – नैसर्गिक न्याय के सिद्धांत का पालन होना चाहिएं – साक्ष्य पेश करने एवं प्रतिपरीक्षण का अवसर प्रदान किया जाना चाहिए।

*B.* ***Constitution - Article 227 - Writ - Maintainability -***

**Alternative remedy of appeal available - Violation of principle of natural justice - Availability of alternative remedy is no bar - Writ is maintainable. (Para 12)**

*ख. संविधान – अनुच्छेद 227 – रिट – पोषणीयता* – अपील का वैकल्पिक उपचार उपलब्ध – नैसर्गिक न्याय के सिद्धांत का उल्लंघन – वैकल्पिक उपचार की उपलब्धता कोई वर्जन नहीं – रिट पोषणीय है।

***C. Practice and Procedure* - Order for holding summary enquiry within fixed time limit by High Court - Effect - Does not mean to hold enquiry violating the principle of natural justice - If time lapses, extension may be sought. (Para 10)**

*ग. कार्यपद्धति एवं प्रक्रिया* – उच्च न्यायालय द्वारा नियत समयावधि के भीतर संक्षिप्त जांच किये जाने हेतु आदेश – प्रभाव – इसका अर्थ यह नहीं कि नैसर्गिक न्याय के सिद्धांत के उल्लंघन में जांच की जाये – यदि समय व्यपगत होता है, समयवृद्धि चाही जा सकती है।

**Cases referred :**

1999 (2) MPLJ 722, 2009 (3) MPHT 70, 2002 (5) MPHT 524, 2009 (2) MPHT 68, 2004 (1) MPLJ 27, 2003 (2) SCC 107.

*Aakash Rathi,* for the appellant.
*Sudhanshu Vyas,* P.L. for the respondent no. 1.
*A.K. Sethi* with *Kamal Airen,* for the respondent no. 3.

**ORDER**

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

This Writ Appeal under Section 2 of the Madhya Pradesh Uchacha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 (for short "the Act"), is directed against the order dated 03.03.2014 passed by the learned Single Judge of this Court in W.P. No.1630/14.

2. Brief facts necessary for the disposal of this appeal are that appellant/ writ petitioner was elected in the year 2009 as Sarpanch of the Gram Panchayat-Iklera, Distt.-Rajgarh. On receipt of a complaint against her, a show-cause notice dated 18.02.2013 under Section 40 of M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 was issued to her by the Sub

Divisional Officer. She submitted reply of the said show-cause notice denying the allegation levelled against her. However, without giving proper opportunity to defend, the SDO proceeded ex-parte against her in the enquiry and held her guilty of the misconduct, as a result she was removed vide orders dated 11.10.2013 from the post of Sarpanch.

3. Feeling aggrieved, the appellant had filed writ petition No.12816/2013. The said writ petition was disposed of by the learned Single Judge vide order dated 29.10.2013. He quashed the order dated 11.10.2013 passed by the SDO placing reliance on the order passed by this Court in the case of *Kailash Kumar Parmanand Dangi Vs. State of M.P. & Ors.* [1999 (2), MPLJ, 722]. The learned Single Judge sent the matter back to the SDO to take fresh decision within three months after holding a summary enquiry against the appellant.

4. In pursuance to the aforesaid order passed in Writ Petition No.12816/2013, the SDO conducted the enquiry and vide order dated 21.02.2014 directed removal of the appellant from the post of Sarpanch and also debarred her from contesting the election for next five years.

5. Aggrieved by the order dated 21.02.2014 passed by the SDO, the appellant once again approached this Court by filing W.P. No.1630/13. However, this time the learned Single Judge, although, referred the order passed by this Court in the case of *Kailash Kumar Parmanand Dangi* (supra) the orders passed in the cases of *Manita Jaiwar (Smt.) Vs. State of M.P. & Ors.*, reported in 2009 (3) MPHT, 70 and in *Kailashchandra Jain Vs. State of M.P. & Ors.*, reported in 2002 (5) MPHT 524, declined to interfere into the order dated 21.02.2014 passed by the SDO, Sarangpur on the ground that the appellant petitioner has got an alternative remedy of challenging the order of the SDO before the appellate authority.

6. Shri Akash Rathi, learned counsel for the appellant has argued that since the order passed by the SDO was in utter violation of the principles of natural justice, the writ court should have interfered in the order and the writ petition should not have been dismissed on the ground of availability of alternative remedy. He submits that SDO has recorded the finding of guilt against the appellant without recording the evidence. He also submits that since the order of the SDO is contrary to the settled legal position as per the various decisions of this Court including in the case of *Smt. Phoolbai Vs. State of M.P.*, 2009 (2) MPHT, 68; *Kailashchandra Jain Vs. State of M.P.*

*& Ors.* (supra) *Manita Jaiwar (Smt.) Vs. State of M.P. & Ors.* (supra); *Babita Lilhara Vs. Surndera Rana,* 2004 (1) MPLJ, 27 and *Kailash Kumar Dangi Vs. State of M.P.* (supra), the writ court should have interfered in the matter instead of dismissing the writ petition on the ground of availability of alternative remedy.

7. On the other hand, Shri A.K. Sethi, learned Senior Counsel has supported the impugned order. He argued that since in the earlier round of litigation the writ court vide order dated 29.10.2013 had directed the SDO to take fresh decision within a specified time of 3 months by holding summary enquiry the SDO has committed no error in passing the impugned order after considering the reply to show-cause notice.

8. On going through the impugned order dated 21.02.2014, it is manifestly clear that the appellant, though, specifically made a request to record the evidence about the alleged misconduct, but her prayer was turned down by the SDO by observing thus:-

> "8– उभयपक्षों के द्वारा प्रस्तुत तर्कों के श्रवण किए जाने के दौरान अनावेदक अभिभाषक द्वारा साक्ष्य बुलाई जाकर साक्ष्य के आधार पर प्रकरण में मुख्य कार्यपालन अधिकारी, जनपद पंचायत नरसिंहगढ़ द्वारा टीम गठित कर अभिलेख के आधार पर विस्तृत जॉच प्रतिवेदन प्रस्तुत किया गया है. इस प्रकार अभिलेखी साक्ष्य प्रमाणित हो जाने से प्रकरण में पृथक से साक्ष्य लिए जाने का ओचित्य नहीं होने से अनावेदक अभिभाषक द्वारा प्रस्तुत आवेदन पर निरस्त किया जाकर प्रकरण के आधार पर आदेश हेतु नियत किया गया ।"

9. It is also relevant from the order-sheet dated 10.02.2014 that the SDO had called report on 10.02.2014. And on that day itself the report of the Chief Executive Officer was received and thereafter without supplying copy of it to the appellant, the SDO proceeded in the matter and recorded the finding of guilt against the appellant vide impugned order.

10. Keeping in view the manner in which the SDO had proceeded in the enquiry as also the fact that in spite of specific request being made by the appellant, the evidence of the witnesses were not recorded in the enquiry and no opportunity of cross examination was afforded to the appellant, in our considered view, there is clear violation of the principles of natural justice in deciding the matter against the appellant. Merely because in WP No.12816/

2013 this Court had directed to hold summary enquiry and fixed time limit for deciding the matter does not mean that the SDO could have acted in violation of the principles of natural justice by not adhering to the settled legal principles. If the time limit fixed in WP No.12816/2013 was expiring, the SDO could have sought for extension of time from this Court.

11. It is now well settled that the enquiry under Section 40 of the Act is not an empty formality. There should be compliance of necessary provisions and person should be punished legally. In *Manita Jaiwar* (supra), a Division Bench of this Court after considering various earlier pronouncements of this Court has held that before removal of Sarpanch of Gram Panchayat principles of natural justice have to be followed. The Division Bench noticing the fact that no witnesses of preliminary enquiry, including the complainant were examined and naturally no opportunity to cross examine them was also afforded to the Sarpanch and she was also not afforded opportunity to adduce her evidence against the charges levelled against her, held that as no due and proper enquiry was conducted by the SDO before ordering removal of petitioner Sarpanch, the order is vitiated. The Division Bench then remitted the matter back to the SDO to conduct proper enquiry.

12. In the circumstances, in our considered view, as there was clear violation of the principles of natural justice on the part of the SDO and the order of the SDO also being against the various pronouncements of this Court, the learned Single Judge should have interfered into the matter instead of relegating the appellant to the appellate authority before whom also no useful purpose would have been served as in the matter no evidence was recorded by the SDO . The Supreme Court in the case of *Harbanslal Vs. Indian Oil Corporation,* 2003 (2) SCC, 107 has observed that in case of failure of principles of natural justice, availability of alternate remedy is not a bar for entertaining a writ petition under article 226 of the Constitution of India.

13. Having regard to the aforesaid, the appeal succeeds and is hereby allowed. The impugned orders passed by the SDO and the learned Single Judge are hereby set aside. The matter is remitted to the SDO for holding fresh enquiry within four months. The SDO is directed to examine the witnesses and afford opportunity to the appellant to cross examine the said witnesses and to adduce her evidence against the charges levelled against her. Copy of the report received from Chief Executive Officer be also supplied to the appellant, if it is to be utilized against her. Thereafter a reasoned order be

passed by the SDO in accordance with law.

14. During the period enquiry, as aforesaid, is conducted and findings are recorded, the appellant shall be allowed to continue on the post of Sarpanch. However, she shall not be allowed to exercise the financial powers till the matter is decided by the SDO as we find during all this period of litigation such powers were withheld by this Court by interim orders.

15. No orders as to the costs.

C.C. within 3 days.

*Appeal allowed.*

**I.L.R. [2015] M.P., 1662**
**WRIT APPEAL**
***Before Mr. Justice A.M. Khanwilkar, Chief Justice &***
***Mr. Justice C.V. Sirpurkar***
W.A. No. 960/2014 (Jabalpur) decided on 14 January, 2015

SANGEETA BANSAL (SMT.) ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

***Municipalities Act, M.P. (37 of 1961), Section 19 & 47(1) - Recalling of President*** **- Three fourth of elected Councillors - The definition of Councillor has to be read in the context of Section 19 of the Act - Section 19(1)(b) explicitly refers to the Councillors elected by direct election from the wards - Whereas President is elected by direct election from the Municipal area - Process of recall of President can be initiated only the Councillors elected by direct election - Merely because President is part of the Municipal Council, would not make him an elected Councillor within the meaning of Section 19(1)(b) and 47 - For initiating the process of recall of President, only specified number of elected Councillors of the Council need to be reckoned - For reckoning the number of three fourth of elected Councillors, the person holding the post of President cannot be taken into consideration.** **(Paras 6, 7 & 8)**

*नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 19 व 47(1) – अध्यक्ष को वापस बुलाया जाना* – निर्वाचित पार्षदों का तीन चौथाई – पार्षद की परिभाषा को अधिनियम की धारा 19 के संदर्भ में पढ़ा जाना चाहिए – धारा 19(1)(बी), वार्डों से प्रत्यक्ष निर्वाचन द्वारा निर्वाचित पार्षदों को स्पष्ट रूप से संदर्भित करती है – जब

कि अध्यक्ष को नगरपालिका क्षेत्र से प्रत्यक्ष निर्वाचन द्वारा निर्वाचित किया जाता है – अध्यक्ष को वापस बुलाने की प्रक्रिया केवल प्रत्यक्ष निर्वाचन द्वारा निर्वाचित पार्षदों द्वारा आरंभ की जा सकती है – मात्र इसलिये कि अध्यक्ष, नगरपालिका परिषद् का अंग है इससे वह धारा 19(1)(बी) व 47 के अर्थान्तर्गत निर्वाचित पार्षद नहीं होगा – अध्यक्ष को वापस बुलाने की प्रक्रिया आरंभ करने के लिये परिषद् के निर्वाचित पार्षदों की केवल विनिर्दिष्ट संख्या की गणना आवश्यक है – तीन चौथाई निर्वाचित पार्षदों की संख्या की गणना हेतु अध्यक्ष का पद धारण करने वाले व्यक्ति को विचार में नहीं लिया जा सकता।

**Case referred :**

(1997) JLJ SN 63.

*Rajendra Tiwari* with *Manikant Sharma*, for the appellant.
*Piyush Dharmadhikari*, G.A. for the respondent nos. 1 & 2/State.
*V.S. Shroti* with *Ashish Shroti*, for the respondent no. 3.
*Siddharth Seth*, for the respondent no. 4.
*V.K. Shukla*, for the intervenor.

*(Supplied: Paragraph numbers)*

**ORDER**

The Order of the Court was delivered by : **A.M. KHANWILKAR, C.J. :-** Heard counsel for the parties.

2. This appeal takes exception to the decision rendered by the learned Single Judge dated 20th December, 2014 in Writ Petition No.14819/2014.

3. The learned Single Judge has rejected the argument of the appellant that for reckoning the number of three-fourth of the elected Councillors, referred to in the first proviso to Section 47(1) of the Madhya Pradesh Municipalities Act, 1961 (hereinafter referred to as "the Act of 1961"), the person holding the post of President, should also be taken into consideration, being elected Member of the Council.

4. The learned Single Judge has examined this challenge in *extenso* with reference to the provisions contained in the Act of 1961 as also reported decisions pressed into service by both the parties including the decision in the case of *Laxmi Narayan Garg vs. Municipal Council Sardarpur and others*[1]. The learned Single Judge has distinguished the exposition in the case

1. (1997) JLJ SN 63

of *Laxmi Narayan Garg* as can be discerned from paragraphs 18 and 19 of the impugned judgment. The view so taken, in our opinion, is just and proper. That decision deals with the provision as obtained prior to amendment of 1994. After amendment, Section 47 of the Act reads thus:-

> **"47. Recalling of President.** – ( 1) Every President of a Council shall forthwith be deemed to have vacated his office if he is recalled through a secret ballot by a majority of more than half of the total number of voters of the municipal area casting the vote in accordance with the procedure as may be prescribed:
>
> Provided that no such process of recall shall be initiated unless a proposal is signed by not less than three fourth of the total number of the elected Councillors and presented to the Collector:
>
> Provided further that no such process shall be initiated:-
>
> (i) within a period of two years from the date on which such President is elected and enters his office;
>
> (ii) if half of the period of tenure of the President elected in a by-election has not expired:
>
> Provided also that process for recall of the President shall be initiated once in his whole term.
>
> (2) The Collector, after satisfying himself and verifying that the three fourth of the Councillors specified in sub-section (1) have the proposal of recall, shall send the proposal to the State Government and the State Government shall make a reference to the State Election Commission.
>
> (3) On receipt of the reference, the State Election Commission shall arrange for voting on the proposal of recall in such manner as may be prescribed."
>
> (emphasis supplied)

5. The moot controversy is about the purport of expression "elected Councillors" occurring in the first proviso to sub-section (1). According to the appellant, it would include the President as well. For that, reliance is now

additionally placed on the definition of "Councillor" prescribed in Madhya Pradesh Municipalities (Election of Vice President) Rules, 1998 which provides that the expression "Councillors" means the President and the elected Councillors of the Council. Reliance is also placed on Section 55 of the Act of 1961 to point out that the President must be reckoned as elected Councillor of the Council. Reliance is also placed on page 60 of the petition part of Annexure P-2, being proceedings of election of Vice President dated 23rd November, 2011, which indicates that the appellant had participated in that process.

6. Having considered the rival submissions, we are in agreement with the opinion recorded by the learned Single Judge that what is relevant to keep in mind is the express provision contained in Section 47 as amended, to be read with the definition of Councillor in Section 3(7) of the Act of 1961. The definition of Councillor in Section 3(7) of the Act prescribes that "Councillor" means any person who is legally a member of the Council. This, however, will have to be read in the context of Section 19 of the Act of 1961 which provides for the composition of the Council - as defined in Section 3(8) of the said Act. Section 19(1)(b) explicitly refers to the "Councillors elected by direct election from the wards", in contrast to the other constituents, *inter alia,* the President of the Council as specified in Section 19(1)(a) to be the Chairperson to be elected by direct election from the Municipal area. The amendment to Section 19 was effected alongwith amendment to Section 47. Keeping in mind the definition of Councillor in the Act and that the composition of the Council is of Councillors elected by direct election from the wards - (Sec.19 (1) (b), which is separate constituent than the President elected by direct election from the Municipal area – (Sec.19 (1) (a); coupled with the expression used in the first proviso to sub-section (1) – "elected Councillors", the same is ascribable to the constituent of the Council specified in Section 19 (1) (b) alone. Thus, the process for recall of President can be initiated only by the Councillors elected by direct election referred to in Section 19 (1) (b), by virtue of the first proviso to Section 47 of the Act as amended.

7. Notably, prior to amendment of 1994 the President was indirectly elected from amongst the elected Councillors of the Council. The fact that the President is part of the Municipal Council, therefore, does not make him an elected Councillor within the meaning of Section 19(1)(b) and 47. Similarly, the fact that the President is qualified to participate in the election of Vice-President as provided in the Act and Rules framed thereunder, does not make

him an elected Councillor within the meaning of Section 19 (1) (b) and 47. The definition of "Councillors" in the Rules of 1958 are for the purposes of that Rules – for election of Vice-President. For initiating the process of recall of President, only the specified number of "elected Councillors" of the Council need to be reckoned as has been held by the learned Single Judge. We are in agreement with that view. The decision of the Division Bench in the case of *Laxmi Narayan Garg,* as aforesaid, has been distinguished by the learned Single Judge and, in our opinion, rightly in paragraphs 18 and 19 of the impugned judgment.

8. The provisions contained in Rules of 1998 pressed into service or for that matter, Section 55 and the proceedings of the Council Annexure P-2, will be of no avail for construing the requirement of first proviso to Section 47 (1) of the Act of 1961. For that, it is only the elected Councillors, referred to in Section 19 (1) (b), who must initiate the proposal to be signed by not less than three-fourth of the total number of elected Councillors, as per first proviso to Section 47 (1) of the Act.

9. As a result, we find no merits in this appeal. The same is dismissed.

*Appeal dismissed.*

**I.L.R. [2015] M.P., 1666**
**WRIT APPEAL**
***Before Mr. Justice Rajendra Menon & Mr. Justice S.K. Gangele***
W.A. No. 125/2015 (Jabalpur) decided on 8 April, 2015

VIDHAN SABHA SACHIVALAYA & anr. ...Appellants
Vs.
KU. KAMLA YADAV ...Respondent

***Vidhan Sabha Sachivalaya Seva Adhiniyam, M.P. (20 of 1981), Section 5(4) - Fundamental Rules, M.P., Rule 56(2) - Compulsory retirement* - Respondent had received poor grading in last 15 years out of 20 years - There were adverse remarks with regard to her working and conduct - Physical capacity of employee was also found very poor - Her working during last few years had deteriorated and even her leave record is not good - There are enough material to hold the respondent to be dead wood and to take action as required under F.R. 56 - Order of writ Court set aside - Order of compulsory retirement upheld. (Paras 15 & 16)**

*विधान सभा सचिवालय सेवा अधिनियम, म.प्र. (1981 का 20), धारा 5(4) – मूलभूत नियम, म.प्र., नियम 56(2) – अनिवार्य सेवानिवृत्ति* – प्रत्यर्थी को पिछले 20 वर्षों में से 15 वर्षों में न्यून/खराब श्रेणी प्राप्त हुई – उसके कार्य एवं आचरण के संबंध में प्रतिकूल टिप्पणियां थी – कर्मचारी की शारीरिक क्षमता भी बहुत कमतर पाई गई – पिछले कुछ वर्षों के दौरान उसका कार्य भी बहुत खराब हुआ है और उसका अवकाश अभिलेख भी अच्छा नहीं – यह धारणा करने के लिए पर्याप्त सामग्री है कि प्रत्यर्थी अवांछित व्यक्ति है और मूलभूत नियम 56 के अंतर्गत कार्यवाही अपेक्षित है – रिट न्यायालय का आदेश अपास्त – अनिवार्य सेवानिवृत्ति के आदेश की पुष्टि की गई।

**Cases referred :**

2002 (4) MPLJ 343, 2003 (4) MPHT 254, AIR 1995 SC 161.

*P.K. Kaurav,* Addl. A.G. with *Aditya Khandekar,* for the appellants.

*Shobha Menon* with *R. Choubey & Ankita Khara*, for the respondent.

**ORDER**

The Order of the Court was delivered by : RAJENDRA MENON, J. :- Seeking exemption to an order dated 2.3.2015, passed by the learned writ court in W.P. No.18808/2014 quashing the order of compulsory retirement issued against the respondent, as per the provisions of Fundamental Rule-56(2) read with the provisions of Section 5(4) of the Madhya Pradesh Vidhan Sabha Sachvalaya Seva Adhiniyam, 1981 (hereinafter referred to as 'the Adhiniyam'), this appeal has been filed under Section 2(i) of the Madhya Pradesh Uchcha Nayalaya (Khandpeeth Ko Appeal) Adhiniyam, 2005.

2. Facts in nutshell goes to show that respondent was appointed as Lower Division Clerk on 21.6.1979, she was confirmed as Upper Division Clerk on 11.9.1985 and subsequently at the relevant time when the impugned action was taken she was working as Section Officer. After completing 20 years of service and 50 years of age in accordance to the requirement of Fundamental Rule-56(2), the respondent's case was also placed before the Screening Committee. The Screening committee met on 25.8.2014, as is evident from Annexure R-5 available in the record of the writ petition, recommended compulsory retirement of the respondent in public interest, therefore, the impugned action was accordingly taken.

3. Being aggrieved by the same, respondent challenged it in W.P.

No.18808/2014. One of the main ground for challenge in the writ petition was that the Screening Committee, which met on 25.8.2014 and recommended compulsory retirement had conducted its deliberation on the basis of a circular dated 12.12.2001, which contemplated a provision for awarding marks on the basis of entries made in the service record or gradings granted. It was said that this circular dated 12.12.2001 was superseded and withdrawn by the State Government vide order passed on 22.10.2014 / 25.10.2014 and, therefore, the action taken based on the circular dated 12.12.2001 is unsustainable.

4. When the matter came up before the writ court, on 2.3.2015 these facts were brought to the notice of the learned writ court. The learned writ court took note of these aspects. It was found that the learned Additional Advocate General on 21.01.2015 when the matter was considered by the court made a submission that the respondents are scrutinizing the case of the petitioner in terms of the subsequent circular issued by the State and, therefore, the respondent wanted time to reexamine the matter. The learned writ court found that even though opportunity was granted on 21.1.2015 and again on 12.2.2015, the report of the rescreening committee on reexamination was not placed on record, infact till 2.3.2013 no rescreening was done. The learned advocate appearing for the appellant sought further time to submit report of the Screening Committee, which according to him could not met till 2.3.2015 for various reasons. When such a submission was made, the learned writ court did not grant any time, instead allowed the writ petition, quashed the order of compulsory retirement dated 22.10.2014 only on the ground that as the compulsory retirement was ordered on the basis of a circular, that is the circular dated 12.12.2001, which has already been withdrawn and as no re-screening has been done, the compulsory retirement has to be quashed. That apart, the court found that even if in the re-screening the employee is found to be dead-wood the decision to compulsory retire the employee can only have prospective effect and not retrospective effect. Accordingly, on 2.3.2015 the following findings were recorded by the learned writ court, which reads as under:

> Whatever the circumstances, trite it is that an order of compulsory retirement cannot be issued with retrospective effect. If the screening of the case is necessary even in view of the subsequent circular of the State Government, reinstatement of petitioner in service is necessary so that order of compulsory retirement if at all necessary or required after re-screening could

be issued with prospective effect.

In any way, order dated 22.10.2014 is not sustainable in the eyes of law. This fact was not disputed by the respondents when the matter was heard on 21.01.2015.

In view of the aforesaid, the writ petition is allowed. Order dated 22.10.2014 and any consequently action taken thereof are hereby quashed. The petitioner be reinstated in service forthwith.

Keeping in view the circumstances available in the present case, the petitioner would be entitled to all the privileges and benefits of services. This order will not come on the way of respondents in considering the case of the petitioner for compulsory retirement in terms of the subsequent circular issued by the State Government, if at all necessary.

The writ petition is allowed and disposed of accordingly.

5. Now in this writ appeal, Shri P.K. Kaurav, learned Additional Advocate General appearing for the appellant made a twofold submission. It was his first contention that the learned writ court should have granted an opportunity to the appellants to conduct the re-screening and submit a report of such screening before taking any decision.

6. Bringing on record the report of the Screening Committee vide I.A. No.3154/2015 and taking us through the findings recorded by the Committee which reconsider the matter, on both the occasion Shri Kaurav argued that even on re-screening the respondent is found the deadwood and ignoring the circular dated 12.12.2001 the compulsory retirement is found to be proper even on re-screening by the Second Committee.

7. His second contention was that even if the circular dated 12.12.2001 was not applicable, the learned writ court committed an error in interfering with the order of compulsory retirement merely by holding that consideration on the basis of the circular dated 12.12.2001 is illegal.

8. He took us through the findings and records of the original Screening Committee which had met for the first time originally on 25.8.2014, the proceedings of the committee is available as Annexure R-5 in the record of

the writ petition and argued that the committee has evaluated the claim of the employee based on various criteria and not the circular alone. It is said that the decision was not based on the circular dated 12.12.2001 alone, but on various other criteria, and if independent of the circular dated 12.12.2001 the entire service record of the employee is evaluated, the compulsory retirement is sustainable, accordingly, there was no necessity for the writ court to interfere. It is stated that the writ court did not conduct this exercise and therefore there is illegality in the procedure followed by the learned writ court. He emphasized that the learned writ court was carried away by the fact that the circular dated 12.12.2001 has been followed and therefore, interfered into the matter.

9. In sum and substance with regard to second contention it is the case of Shri P.K. Kaurav that apart from the circular dated 12.12.2001, various other considerations and criteria for evaluating the suitability of the employee based on the entire service record was undertaken and if there is material enough to show that the compulsory retirement was proper the action of the respondent should have been sustained, it is submitted by learned counsel that the writ court did not advert to consider this aspect of the matter.

10. Smt. Shobha Menon, learned Senior Advocate refuted each and every contentions and argued that, as the impugned compulsory retirement was based on the report of the screening committee dated 25.8.2014 which considered the case and based its evaluation made as per the circular dated 12.12.2001, then when this circular had been withdrawn, the learned writ court has not committed any error. She took us through the evaluation made by the Screening Committee in its deliberation held on 25.8.2014 vide Annexure R-5 and tried to demonstrate that this evaluation was made by awarding appropriate marks on the basis of mathematical formula indicated in the circular dated 12.12.2001 and as the Compulsory retirement was based on the circular dated 12.12.2001 the learned writ court has not committed any error. She tried to emphasize that if the evaluation made, based on the circular dated 12.12.2001 is taken out and not considered then there is no material to hold that the employee is a deadwood, liable for retirement under FR-56 r/w the Adhiniyam of 1981 and rules framed thereunder.

11. Smt. Shobha Menon, learned Senior Advocate further argued that once the impugned compulsory retirement ordered on 22.10.2014 is found to be unsustainable and when action is to be taken now based on the subsequent screening committee undertaken on the bases of the report of the rescreening

committee filed as Annexure A-A1 along with I.A. No.3154/2014 then this compulsory retirement based on the subsequent evaluation can be only prospective in nature and in directing for reinstatement till fresh decision is taken the learned writ court has not committed any error. She further argued that there cannot be a retrospective compulsory retirement of an employee based on the report of the screening committee which is now held on 11.2.2015 and on various other dates as is indicated in Annexure A-A1 to I.A. No.3154/2015.

12. She took us through the report of both the Screening Committee held on 25.8.2014 to make out a case to say that in the facts and circumstances of the case based on the service record of the employee a case for compulsory retirement is not made out. In support of her contention, she places reliance on the following judgments: *State of M.P. Vs. Laxmi Chand Awadhiya and another* 2002(4) MPLJ 343 and *R.C. Bhargava Vs. M.P. Dugdh Mahasangh Sahkari Maryadit, Bhopal and others* 2003(4) MPHT 254 to say that the compulsory retirement in the present case is unsustainable.

13. We have heard learned counsel for the parties at length and we have also gone through the entire record. We find that initially for the purpose of considering the case of the employees who have completed 20 years of service or 50 years of age and whose case were to be scrutinized for retirement in accordance to the provisions of Fundamental Rule and the Adhiniyam of 1981 as applicable in the establishment of the appellant, a Screening Committee was constituted and this Committee met on 25.8.2014, as is evident from Annexure R-5 filed along with the writ petition. Along with various other employees, case of the respondent Ku. Kamla Yadav was also considered. Based on the recommendation made by this Screening Committee respondent Kamla Yadav was retired from service vide order dated 22.10.2014. It is a fact that while considering the case on 25.8.2014 the Screening Committee did take note of the circular dated 12.12.2001 and made some evaluation on the basis of this circular. It is also a fact that this circular dated 12.12.2001 was subsequently withdrawn vide order passed on 22.10.2014 / 25.10.2014 by the State Government and all cases which were evaluated on the basis of circular dated 12.12.2001 were required to be re-screened as per the new policy. It was because of these circumstances that when the matter came up before the learned writ court, a statement was made to say that the matter is being reconsider and after re-screening the report will be produced before this court. Time was granted to the appellant to conduct the re-screening on

21.1.2015 and again on 12.02.2015, but when the matter was taken up on 2.3.2015 as the report of the re-screening was not produced learned writ court interfered into the matter, as already indicated hereinabove, by holding that the action taken based on the circular dated 12.12.2001 is unsustainable.

14. If the compulsory retirement and the procedure for screening undertaken on 25.8.2014 by the Screening Committee was based solely on the circular dated 12.12.2001, then the entire action is liable to be quashed. But, if it is not so and as contended by Shri P.K. Kaurav if the compulsory retirement ordered on 22.10.2014 can be upheld without applying the principle or the procedure laid down in the circular dated 12.12.2001 then the order passed by the learned writ court warrants reconsideration, to that effect we are required to consider the manner in which screening was undertaken on 25.8.2014.

15. It is seen that the learned writ court did not evaluate the matter with this perspective in mind. It only interfered with the compulsory retirement after holding that the consideration of the circular dated 12.12.2001 is illegal. That being so, we propose to examine the matter and to consider as to whether independent of the circular dated 12.12.2001 the compulsory retirement originally ordered on 22.10.2014 can be sustained. Accordingly, we have examined the proceedings of the Screening Committee as contained in Annexure R-5 which met on 25.08.2014 and we find the the Screening Committee consisted of four officers they were, Shri A.P. Singh, Additional Secretary, Shri Bindheshwari Prasad Shukla Deputy Secretary- Member, Shri B.D. Singh Deputy Secretary-Member (representative) reserved category and Shri P.N. Vishwakarma Deputy Secretary-Member and representative/ President of the bank. The committee indicated in the minutes that they are taking up the cases of various Class-I, Class-II, Class-III and Class-IV employees, who have completed 20 years of service or 50 years of age and whose cases are to be scrutinized as per Fundamental Rule 56. The Committee also found that the screening has to be done as per the circular dated 22.8.2000, 12.12.2001, 30.01.2002 and 01.06.2002. The committee noted the requirement of all the circulars and laid down the parameters for considering the cases. The four parameters decided were; integrity and dedication to duties for which the entire service record of the employee is to be scrutinized, the physical capacity and capability of the employee, the working capacity and overall service performance or assessment and various other requirements as per law including scrutiny of adverse CRs if any as per the law laid down by

the Supreme Court in the case of *State of U.P. Vs. Bihari Lal*, AIR 1995 SC 161 and the last parameter laid down was that the overall service record of the employee during the entire service period should be good and also to find out if there is any deterioration in the working of the employee with the passage of time. It was also indicated that evaluation has to be made with specific reference of the previous five years ACR grading of the employee. The case of Ku. Kamla Yadav, the respondent has been considered in the category of Grade-II employee on the basis of these parameters. Her ACR grading for the past five years i.e. from 2008 to 2012 were evaluated and it was found that she has received 'B' grading in the year 2008, 2009 and 2012, she was graded 'average' in the year 2010 and 'poor' in the year 2011. Thereafter from page 123 onwards her entire service record right from the year 1979 to 2013 is evaluated. The grading along with adverse remarks in a tabulated form is indicated and it has been observed by the Committee that on going through the aforesaid service record it is clear that Sushri Yadav's working has been graded between 'good' and 'poor' during the various period, there are various adverse entries in her service records and there is no substantial improvement in her working. On the contrary, there is deterioration in her working and it is found that she is not discharging her duties to the best of her ability. After undertaking this exercise the mathematical calculation of her grading is also done, as required in the circular dated 12.12.2001, wherein it is found that she can be allotted only 1.55 marks which is less than 2. Thereafter, it is reported by the Committee that with regard to this employee the further question to be determined is as to whether in accordance to the circular dated 22.08.2000 after completing 20 years of service or 50 years of age, is it in public interest to retain her in service ? After so recording the Committee has recorded its opinion after evaluating the entire service record by pointing out three factors based on which the decision is taken, which is available at Page 125 and in Hindi reads as under :-

> "समिति के मत से पूर्व वर्णित स्थिति व सेवा अभिलेख के समग्र मूल्यांकन के परिप्रेक्ष्य स्पष्ट है कि:–
>
> 1. उक्त अधिकारी की शारीरिक क्षमता व कार्य दक्षता में कमी परिलक्षित हुई तथा वे अपने पद के दायित्वों का भलिमंति निर्वहन करने में सक्षम नहीं है।
>
> 2. उक्त अधिकारी को विगत वर्षों में से अधिकांश वर्षों में 'ग एवं ख' श्रेणियों में वर्गीकृत किया गया है तथा इनका औसतन मूल्यांकन अच्छा श्रेणी से कमतर रहा है।

3. समबद्धता का अभाव तथा पिछले वर्षों के कार्य के स्तर से गिरावट परिलक्षित है तथा कार्य के प्रति निष्ठा अपेक्षित स्तर की नहीं है।

अतः उक्तानुसार अनिवार्य सेवानिवृत्ति की परिधि में आती है।"

Accordingly, on the basis of these observations it is held that she is liable to be compulsorily retired. Thereafter it is seen that the Committee took note of the circular dated 22.08.2000, Fundamental Rule 56, Rule 5(4) of the Adhiniyam of 1981 and observed that the Committee is also required to see as to whether during the period of 20 years what is the leave record of the employee concerned. It is indicated that the employee's leave record is also not very good. From the aforesaid evaluation of the case of the respondent by the Screening Committee it is seen that the Committee has not based its finding solely on the assessment of the case based on the mathematical formula indicated in the circular dated 12.12.2001. It was only one of the consideration made and if this consideration is ignored we find that the Committee at the very first instance noted the CR gradings and adverse CR of the employee for the last 20 years and found that she has received poor grading in the year 1981, 1984, 1985, 1986, 1987, 1988, 1989, 1992, 1993, 1994, 1995, 2001, 2004, 2007 and 2011. She had also received adverse remarks with regard to her working and conduct in the year 1982, 1986, 1988, 1990, 1991, 1993 and 2005. The Committee found in its final assessment that the physical capacity of the employee is very poor. She is unable to discharge her duties properly and her working is below average, her working during the last few years has deteriorated and even her leave record is not good. The leave record of the applicant is available as it was evaluated by the second re-screening committee, which held on 11.02.2015 and various other dates as is evident from Annexure A-1 filed along with I.A. No.3154/2015 and we find that right from the year 1979 up to 2014-2015, there are consistent entries made with regard to overstay of leave; unauthorized absence and physical incapacity and incapability of employee to discharge duties. We find that in every year right from 30.08.1999 till 01.10.2014, there are remarks made with regard to her consistently being on leave on one pretext or other and overstaying of leave and taking of leave consistently for various periods, this material was also available with the first screening committee which met on 25.8.2014.

16. On evaluating the totality of circumstances, we find that it is not a case where solely or only based on the mathematical formula indicated in circular dated 12.12.2001 the impugned action is taken. On the contrary, the

requirement of the circular dated 12.12.2001 was only one of the criteria applied for assessing the overall service record of the employee by assessing the service record and allotting marks based on mathematical formula indicated in the circular dated 12.12.2001, but the entire service record of the employee has been evaluated independently with regard to her CR grading, the adverse entries, her physical capacity and her overall service performance determined on the basis of various other factors and in all respect she is found to be lacking and treated as a dead wood. That being so, it is a case where the impugned compulsory retirement of the employee is not based only on the evaluation made as per the circular dated 12.12.2001, but it is a case where the entire service record has been evaluated independent of the circular dated 12.12.2001 and after such act of evaluation the authorities have found her to be dead wood. That being the factual position, this is where the learned writ court committed an error. Having found that the retirement is not sustainable based on the circular dated 12.12.2001, the learned writ court should have proceeded further to examine the report of the Screening Committee Annexure R-5 and came to the conclusion as to whether ignoring the requirement of circular dated 12.12.2001 and consideration if any made on the basis of this circular, material was still available before the Screening Committee to hold that the respondent was a dead wood. This having not being done and as we having undertaken this exercise now and find that there was enough material before the Screening Committee which met on 25.08.2014 and whose report vide Annexure R-5 as detailed hereinabove does show that even if evaluation based on circular dated 12.12.2001 is ignored, there are enough material to held the respondent to be deadwood and to take action as required under F.R. 56. Once we come to such a conclusion we have no other option but to uphold the compulsory retirement ordered vide Annexure P-7 dated 22.10.2014 and allow this appeal. That apart, once we have recorded such a finding then it is not necessary now for us to go into various other aspects of the matter which were canvassed before us.

18. Accordingly, taking note of overall situations we find that it is a fit case where appeal should be allowed and action of the respondent in compulsory retiring the employee with effect from 22.10.2014 upheld. Accordingly, this appeal is allowed. The order passed by the learned writ court is quashed and we upheld the order of compulsory retirement dated 22.10.2014 which was impugned in the writ petition.

*Appeal allowed.*

**I.L.R. [2015] M.P., 1676**
**WRIT PETITION**
***Before Mr. Justice U.C. Maheshwari***
W.P. No. 16943/2013 (Jabalpur) decided on 8 October, 2013

HARISH PATEL ...Petitioner
Vs.
SANJAY KUMAR ...Respondent

***A. Suits Valuation Act (7 of 1887), Section 8 - Suit to declare sale deed executed by power of attorney as ab-initio void - Proper valuation thereof* - Petitioner filed suit to declare the sale deed to be ab-initio void which was executed on his behalf by his power of attorney (his real sister) - Under such circumstances it can be inferred that he was party of the impugned sale deed executed by his power of attorney with his consent - The plaintiff/petitioner is bound to value the suit equal to the consideration of sale deed and accordingly bound to pay court fee accordingly. (Para 4)**

*क. वाद मूल्यांकन अधिनियम (1887 का 7), धारा 8 – मुख्तारनामा द्वारा निष्पादित विक्रय विलेख को आरंभ से शून्य घोषित करने के लिये वाद – इसका उचित मूल्यांकन* – याची ने विक्रय विलेख को आरंभ से शून्य घोषित करने के लिये वाद प्रस्तुत किया जिसे उसकी ओर से उसके मुख्तारनामा (उसकी सगी बहन) द्वारा निष्पादित किया गया – इन परिस्थितियों में यह निष्कर्ष निकाला जा सकता है कि उसके मुख्तारनामा द्वारा उसकी सहमति से निष्पादित आक्षेपित विक्रय विलेख का वह पक्षकार था – वादी/याची विक्रय विलेख के प्रतिफल के बराबर वाद का मूल्यांकन करने के लिये बाध्य है और तद्नुसार न्यायालय फीस अदा करने के लिये बाध्य है।

***B. Constitution - Article 227 - Scope of interference* - Trial Court directed petitioner to pay ad valorem court fee on the suit - Impugned order was passed by the trial court under the vested discretionary jurisdiction and does not appear illegal, irregular or against the propriety of law, cannot be interfered at this stage - However, in the interest of justice in the available circumstances, petitioner is extended further period of 30 days to take steps to amend and modify the valuation and to pay court fee. (Paras 5 & 6)**

*ख. संविधान – अनुच्छेद 227 – हस्तक्षेप की सीमा* – विचारण न्यायालय ने याची को वाद में मूल्यानुसार न्यायालय फीस अदा करने के लिये निदेशित किया – आक्षेपित आदेश को विचारण न्यायालय द्वारा निहित वैवेकिक अधिकारिता के अंतर्गत पारित किया गया था तथा यह अवैध, अनियमित या विधि के औचित्य के विरूद्ध प्रतीत

नहीं होता, इस प्रक्रम पर हस्तक्षेप नहीं किया जा सकता – किंतु न्यायहित में, उपलब्ध परिस्थितियों में याची को मूल्यांकन संशोधित करने एवं उपांतरित करने तथा न्यायालय फीस अदा करने के लिये 30 दिनों की अतिरिक्त अवधि दी गई।

**Cases referred :**

AIR 2011 MP 18, AIR 2010 SC 2807, AIR 1973 SC 2384.

*D.K. Shrivastava,* for the petitioner.

*(Supplied: Paragraph numbers)*

**ORDER**

**U.C. MAHESHWARI, J. :-** He is heard on the question of admission.

2. Petitioner – plaintiff has filed this petition under Article 227 of the Constitution of India being aggrieved by the order dated 2.9.2013, (P-1), passed by 12th Civil Judge, Class-I, Bhopal whereby considering the application of respondent no. 5- defendant filed under Order 7, Rule 11 of CPC, the petitioner has been directed to make advolerum valuation of the suit on the value of the alleged sale deed, (Ann. P-3) executed by the respondent no. 3 in favour of respondent no. 4 and pay the court fee accordingly failing which the suit may be dismissed without extension of any further opportunity to correct the valuation and payment of the court fee accordingly.

3. The petitioner's counsel after taking me through the papers placed on record alongwith the impugned order argued that plaintiff accompanied with respondent nos. 1 and 2 had purchased the aforesaid land in their joint names from its earlier owner by registered sale deed, (Ann. P-2) and subsequently respondent nos. 1 and 2 themselves and respondent no. 3 by projecting herself to be the power of attorney holder of the present petitioner have jointly sold such land to the respondent no. 4 and he said that the petitioner has neither executed the power of attorney nor appointed to respondent no. 3, his sister to be his power of attorney to execute such document and without his consent under some conspiracy such sale deed, (Ann. P-3) was executed by the respondent nos. 1, 2 and 3 in favour of respondent no. 4. The property was remained and is still in possession of the petitioner. In continuation he said that as soon as the petitioner came to know about the aforesaid, then immediately he filed the impugned suit for declaration and perpetual injunction declaring the aforesaid sale deed, (Ann. P-3) to be ab initio void till the extent

of petitioner and for perpetual injunction to protect his right over the land. But in pendency of the suit, aforesaid IA was filed by the respondent/ defendant no. 5, the subsequent purchaser from respondent no.4 for dismissal of the suit in the lack of proper valuation and court fee accordingly. He said that on proper appreciation of the available factual matrix, this application ought to have been dismissed by the trial court taking into consideration that such sale deed, (Ann. P-3) was executed by the respondent no. 3 on behalf of petitioner on the basis of forged and fabricated power of attorney, so also without consent of the petitioner and in such premises, only fixed valuation of the suit and the court fee accordingly is required in the matter and the same has been paid. The petitioner is not bound to value the suit on the value of the consideration of the sale deed, (Ann. P-2) and to pay the court fee accordingly and prayed for setting aside the impugned order by dismissing the aforesaid application of the respondent no. 5 by admitting and allowing this petition.

4. Keeping in view the arguments advanced by the counsel, I have carefully gone through the papers placed on record alongwith the impugned order. True it is that the impugned property was purchased by the petitioner and respondent nos. 1 and 2 through sale deed in their joint names and thereafter by way of sale deed, (Ann. P-3), the respondent nos. 1, 2 and on behalf of the petitioner the respondent no. 3 by projecting herself to be the power of attorney of the petitioner have executed the sale deed in favour of respondent no. 4. It is also apparent on record that the respondent no. 3 is real sister of the present petitioner. So there is a prima facie circumstances, on which, it could be inferred that power of attorney was executed by the petitioner in favour of respondent no. 3, his sister and on the strength of the same accompanied with respondent nos. 1 and 2 co-owners of the property, she has executed the sale deed in favour of respondent no. 4 in consideration of Rs.4,50,000/-. So in such premises, it is apparent that the petitioner - plaintiff filed the suit to declare the sale deed to be ab initio void, which has been executed on his behalf by his power of attorney. So in such circumstances, prima facie it shall be inferred that he was party of the impugned sale deed executed by his power of attorney with his consent in favour of respondent no. 4 and in such premises, the petitioner is bound to value the suit equal to the consideration of sale deed, (Ann. P-3), Rs.4,50,000/- and also bound to pay the court fee accordingly. It is apparent from the impugned order that such aspect has been considered by the trial court taking into consideration the earlier decision of this court in the matter of *Amika Prasad Vs. Ram*

*Shiromani,* reported in AIR 2011 M.P. 18, which is based on the principle laid down by the Apex Court in the matter of *Suhrid Singh @ Sardool Singh Vs. Randhir Singh and others* reported in AIR 2010 SC 2807.

5. So in the aforesaid premises, the impugned order does not appear to be illegal, irregular or against the propriety of law. Besides this, the impugned order being passed by the trial court under the vested discretionary jurisdiction could not be interfered at this stage, as laid down by Apex Court in the matter of *Shamsher Singh Vs. Rajinder Prashad and others* reported in AIR 1973 SC 2384.

6. In view of the aforesaid discussion, this petition being devoid of any merits deserves to be and is hereby dismissed at the stage of motion hearing. However, in the available circumstances, the petitioner is extended further period of 30 days from today to take appropriate steps to amend and modify the valuation of the suit, so also to pay the court fee accordingly before the trial court failing which the petitioner shall not be entitled to get benefit of this direction.

7. C c as per rules.

*Petition dismissed*

**I.L.R. [2015] M.P., 1679**
**WRIT PETITION**
***Before Mr. Justice U.C. Maheshwari***
W.P. No. 10189/2012 (Jabalpur) decided on 11 October, 2013

SHANTI BAI & ors. ...Petitioners
Vs.
SUSHILA BAI & ors. ...Respondents

*A.* ***Hindu Succession Act (30 of 1956), Section 6 - Opening of succession of daughters becoming co-parceners in view of 2005 amendment*** **- Daughters who got birth after the enforcement of amended provisions of Section 6 have co-parcenary rights in the ancestral joint Hindu family property of their parents - Such daughters shall get the rights in such property on opening the succession on account of death of the co-parcener through whom they are claiming - In the present case the petitioners got birth before 2005, their succession rights has not been opened as their father is still alive and as such not entitled to**

**get any right, title or share in the disputed property as co-parcener.**
**(Para 7)**

क. *हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 6 – 2005 के संशोधन को दृष्टिगत रखते हुये पुत्रियों के सहदायिक बन जाने पर उत्तराधिकार प्रारंभ होना* – पुत्रियां जिनका जन्म धारा 6 के संशोधित उपबंधों के प्रवर्तन पश्चात् हुआ है, उन्हें अपने माता पिता की पैतृक संयुक्त हिंदू परिवार संपत्ति में सहदायिक अधिकार है – ऐसी पुत्रियों को उक्त संपत्ति में अधिकार मिलेगा जब सहदायिक जिसके द्वारा वे दावा कर रहे हैं कि मृत्यु के कारण उत्तराधिकार प्रारंभ होता है – वर्तमान प्रकरण में याचीगण 2005 के पूर्व जन्मे हैं, उत्तराधिकार के उनके अधिकार प्रारंभ नहीं हुए हैं क्योंकि उनके पिता अभी जीवित हैं और इस तरह विवादित संपत्ति में सहदायिक के रूप में कोई अधिकार, स्वत्व या हिस्सा मिलने के लिये हकदार नहीं।

***B. Civil Procedure Code (5 of 1908), Order 1 Rule 10* - Petitioners being sisters of deceased, born before coming in force the amended provisions of Section 6 of Hindu Succession Act, 1956 and their parent still being alive - Whether necessary party - Held - No - Suit filed for declaration and injunction by L.Rs. of deceased (one of the co-parcener) against the parents and brothers of deceased, then the petitioners who got birth prior to 2005 before coming in force the amended provisions of section 6 of the Act are neither necessary nor proper parties - The same could be adjudicated by passing the effective decree only in presence of respondents no. 1 and 2, the plaintiffs and the respondents no. 3 to 7 the defendants.** **(Para 8)**

ख. *सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10* – याचीगण, मृतक की बहनें होते हुए, हिंदू उत्तराधिकार अधिनियम, 1956 की धारा 6 के संशोधित उपबंध प्रभावी होने के पूर्व जन्में हैं और उनके माता–पिता अभी जीवित हैं – क्या आवश्यक पक्षकार हैं – अभिनिर्धारित – नहीं – मृतक के विधिक प्रतिनिधिगण (सहदायिक में से एक) द्वारा मृतक के माता–पिता एवं भाईयों के विरूद्ध घोषणा एवं व्यादेश हेतु वाद प्रस्तुत किया, तब याचीगण जो अधिनियम की धारा 6 के संशोधित उपबंध प्रभावी होने से पूर्व, 2005 से पहले जन्में हैं, न तो आवश्यक न ही उचित पक्षकार हैं – उक्त का न्यायनिर्णयन केवल प्रत्यर्थी क्र. 1 व 2, वादीगण तथा प्रत्यर्थी क्र. 3 से 7, प्रतिवादीगण की उपस्थिति में प्रभावी डिक्री पारित कर किया जा सकता है।

**Cases referred :**

AIR 2008 Orissa 133, AIR 2012 Bombay 101.

*S.B. Shrivastava,* for the petitioners.
*Ashok Tiwari,* for the respondent nos. 1 & 2.
*Shyam Yadav*, for the respondent nos. 3 to 5.
*None* for the respondent nos. 6 & 7.
*Amit Sharma,* P.L. for the respondent no. 8.

**ORDER**

**U.C. MAHESHWARI, J. :-** The petitioners- applicants have filed this petition being aggrieved by the order dated 17.5.2012, (Ann. P-1), passed by Additional Civil Judge, Class-II, Gadarwara in COS No. 19-A/2011 whereby their application, filed under Order 1, Rule 10 of CPC (Ann. P-4) to implead them as a party in a suit, filed by the respondent nos. 1 and 2 against respondent nos. 3 to 7 with impleading the respondent no.8 - State of M.P. as formal party for declaration, perpetual injunction and partition with some other reliefs, has been dismissed.

2. The facts giving rise to this petition in short are that respondent nos. 1 and 2 therein filed above mentioned suit against respondent nos. 3 to 7 for declaration and perpetual injunction and partition of the property described in the plaint, (Ann. P-2). In pendency of such suit on behalf of petitioners, the above mentioned application contending that Ramesh Kumar Bramin, the husband of respondent no. 1, while the father of respondent no. 2 was the brother of the petitioners- applicants while the respondent nos. 3 and 4 are their parents and the respondents no. 5 to 7 are their brothers. In continuation, it is stated that the petitioners are also having the right, title and share in the disputed property but in order to deprive them from their such right and shares, they have not been impleaded as party in the suit. If they are not impleaded as party in the matter then they will have to suffer a lot and they have to file their separate suit by spending lot of money. With these averments, prayer to implead them as party in the matter is made.

3. In the reply of respondent nos. 1 and 2, the averments of the aforesaid IA, (Ann. P-5), regarding the rights, share and title of the petitioners in the alleged property are denied. In addition to it, it is stated that the petitioners are married and their shares in the property has already been given at the time of their marriage. It is also stated that the petitioners are not necessary party in the matter and only on the ground of that if they are not impleaded as party, then they will have to file separate suit by allowing their application, they could not be impleaded as party in the matter.

4. On consideration, the trial court has dismissed such application (Ann. P-1) holding that in the available factual matrix, the petitioners are not necessary party. Being dissatisfied with such order, the petitioners have come to this court.

5. The petitioners' counsel after taking me through the averments of the petition alongwith the papers placed on record, so also the impugned order argued that in view of the amended provision of Section 6 of the Hindu Succession Act, which have come into force in the year 2005, the petitioners being daughters of the respondent nos. 3 and 4 by virtue of such amended provision are having share in the disputed property but without considering their such right, contrary to settled legal position and the above mentioned provision, their application has been dismissed under the wrong premises. In support of such contention, he also placed his reliance on a decision of the Orissa High Court in the matter of *Pravat Chandra Pattnaik and others Vs. Sarat Chandra Pattnaik and another* reported in AIR 2008, Orissa 133 and of the judgment of Bombay High Court in the matter of *M/s. Vaishali Satish Ganorkar & Anr. Vs. Satish Keshorao Ganorkar & Ors.* reported in AIR 2012, Bombay 101 and prayed to set aside the impugned order and allowing their application by admitting and allowing this petition.

6. Keeping in view the arguments, advanced, I have carefully gone through the impugned order alongwith papers placed on record, so also aforesaid cited cases.

7. It is undisputed fact in the matter that all the petitioners being married are residing in their matrimonial home and they have got birth prior to 2005, before coming into force the amended provision of Section 6 of the Hindu Marriage Act, in which the daughters have been extended the rights in the ancestral property of the parental family as co-parcenors with prospective effect. In view of the factum that all the petitioners have got birth before 2005, the cited cases are not helping to the petitioners because in such cases it was held that daughters, who have got birth subsequent to enforcement of aforesaid amended provision of Section 6 of the Hindu Succession Act, have a co-parcenory rights in the ancestral Joint Hindu Family Property of their parents. It is further held in the cited cases that such daughters shall get the rights in such property on opening the succession on account of death of the co-parcenors of the family through whom they are claiming the share. In the case at hand it is apparent that the respondent nos. 3 and 4, the parents of the petitioners are still alive. Therefore, in view of the factum that the

petitioners got birth before 2005, only on account of death of their brother, Ramesh Chandra in the life time of the father of the petitioners, it could not be said that their succession right has been opened. So in such premises, the petitioners are not entitled to get any right, title or share as co-parcenors in the disputed property.

8. Apart the aforesaid, the impugned suit being filed for declaration, perpetual injunction by the legal representatives of the deceased, one of the co-parcenor of family, Ramesh Chandra Bramin against the parents and brothers of such Ramesh Chandra Bramin, then the petitioners, who have got birth prior to 2005 before coming into force the amended provision of Section 6 of the Act are neither necessary nor proper party in the impugned suit. The same could be adjudicated by passing the effective decree only in presence of respondent nos. 1 and 2, the plaintiffs and the respondent nos. 3 to 7, the existing defendants.

9. In the aforesaid premises, the trial court has not committed any error in dismissing the impugned application of the petitioners. In such premises, I have not found any perversity, illegality, irregularity or anything against the property of law in the order impugned. Consequently, this petition being devoids of any merits deserves to be and is hereby dismissed at the initial stage of motion hearing.

*Petition dismissed.*

**I.L.R. [2015] M.P., 1683**
**WRIT PETITION**
***Before Mr. Justice Sanjay Yadav***
W.P. No. 9547/2013 (Jabalpur) decided on 18 February, 2014

GOVIND PRASAD ...Petitioner
Vs.
SANDEEP KUMAR ...Respondent

***A. Civil Procedure Code (5 of 1908), Section 10 - Stay of suit - Object*** - **To prevent trying of two suits in respect of the same matter in issue. (Para 9)**

*क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 10 – वाद पर रोक – उद्देश्य* – समान विवाद्य विषय के संबंध में दो वादों का विचारण रोकना है।

***B. Civil Procedure Code (5 of 1908), Section 10 - Matter in***

***issue - Means* - All the material disputed questions.** **(Para 9)**

*ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 10 – विवाद्य विषय – अर्थात् –* सभी महत्वपूर्ण विवादित प्रश्न।

***C. Civil Procedure Code (5 of 1908), Section 10 - Matter in issue, directly and substantially - Means* - The same must be necessary for the decision of previously instituted suit.** **(Para 10)**

*ग. सिविल प्रक्रिया संहिता (1908 का 5), धारा 10 – विवाद्य विषय, प्रत्यक्षतः और सारतः – अर्थात् –* यह पूर्व में संस्थित वाद के निर्णयन हेतु आवश्यक होना चाहिए।

***D. Civil Procedure Code (5 of 1908), Order 6 Rule 2 - Pleadings - Requirement* - Plead facta probanda not facta probantia.** **(Para 10)**

*घ. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 2 – अभिवचन – अपेक्षा –* तात्विक तथ्यों का अभिवाक् किया जाना चाहिए न कि उन साक्ष्यिक तथ्यों का जिनके द्वारा उन्हें साबित किया जाना है।

**Cases referred :**

1976 MPLJ 163, 1947 NLJ 31, 1962 JLJ 371, AIR 1973 MP 14, AIR 1975 Calcutta 411.

*Manoj Sanghi,* for the petitioner.
*N.P. Pandey,* for the respondent no. 1.

*(Supplied: Paragraph numbers)*

**ORDER**

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

2. Order-dated 27.4.2013 passed by VIIIth Additional District Judge, Jabalpur in Civil Suit No.10-A/2011 is being assailed vide this petition, under Article 227 of the Constitution of India; whereby, an application preferred by the petitioner/defendant no.1 under Section 10 of the Code of Civil Procedure, 1908 for stay of suit filed by respondent no.1/plaintiff has been rejected.

3. Suit by respondent no.1/plaintiff is for permanent injunction restraining the defendants not to dispossess the plaintiff from the suit property as well as

from the shop. That, during pendency of the suit, the plaintiff was allegedly dispossessed by the defendants, which led the plaintiff to seek the decree for possession and *mesne profits*. The right and title over the suit property is claimed on the basis of Will-dated 19.2.2001.

4. The petitioner/defendant no.1, on being summoned, filed an application under Section 10 of the CPC for staying the proceedings on the ground that earlier, petitioner/defendant no.1 had preferred a suit seeking declaration that the Will-dated 19.2.2001 executed by Hiralal as null and void. In said suit, the present plaintiff/respondent no.1 was impleaded as defendant no.5. That, out of five issues, the three issues relating the right and title, the entitlement of 1/5th share and as to Will dated 19.2.2001 were answered against the present petitioner by judgment and decree dated 6.11.2013; whereagainst an appeal, registered as F.A. No.104/2004 was preferred before this Court, which is pending adjudication.

5. The trial Court, by not disputing that the Will dated 19.2.2001 is the basis for claiming right over suit property; however, rejected the application for staying the suit on the ground that the earlier suit was for partition of the suit property by declaring the will dated 19.2.2001 as null and void; whereas, the present suit is for permanent injunction and for restoration of possession.

6. Criticizing the order, it is urged on behalf of petitioner/ defendant no.1 that, the trial Court committed gross error in misconstruing the cause of action in the subsequent suit which though directly and substantially similar to the issue in earlier, yet the proceedings of subsequent suit has not been stayed.

7. Respondent no.1/plaintiff, on his turn, has supported the order in question.

8. Considered the rival submissions.

9. Section 10 CPC stipulates that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court. The object is to prevent trying of two suits in respect of

the same matter in issue. The matter in issue means all the material disputed questions. In *Trivedi Devi vs. Vijay Mohan Bose* 1976 M.P.L.J. 163, it has been observed that it is enough that matters in controversy in the two suits are substantially the same. Further, it is held in *Trivedi Devi* (supra) -

> "9. To determine the question, it has first to be examined how the issues arise or framed in a suit for this recourse has to be made to Order 14, Rule 1 of the Code; the relevant portion whereof, which calls for consideration for the purpose of this case is set out below -
>
> *Order 14 Rule 1(1), (2) and (3)*
>
> *(1) Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other.*
>
> *(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.*
>
> *(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.*
>
> On a plain reading of the fore-quoted provision (Order 14 Rule 1) it is transparently clear that issues in a suit are not to be framed regarding every proposition of fact or law which is affirmed by one party and denied by the other, but regarding only material propositions and the rule also indicates that material propositions are those which a plaintiff must allege (in order to show a right to sue or a defendant must allege) in order to constitute his defence for the negation of plaintiff's right. At this stage, it would be pertinent to refer to Order 6 Rule 2 of the Code which reads thus -
>
> *"Every pleading shall contain, and contain only a statement in a concise form, of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be*

*proved, and shall when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures".*

10. According to this rule, a party to the suit is required to place *facta probanda* and not *facta probantia.* Thus, what is obtainable from the aforesaid provisions (Order 14 Rule 1 and Order 6 Rule 2) is that only those facts the proof or disproof matter in issue it is in the light of the aforesaid discussion that the expression "that matter in issue is also directly or substantially in issue" in section 10 of the Code has to be construed. The words "directly, and substantially in issue in the previous suit" further warrants a conclusion that the matter in issue in the subsequent suit should not only be directly, but shall be substantially in issue which means that it must be necessary for the decision of the previously instituted suit. The same is the view taken by this Court in *Krishnarao Namdeorao v. Shridar Ramchardra* 1947 NLJ 31 and *Sakhawatrai vs. Prem Narain* 1962 JLJ 371. The relevant observations from these decisions are reproduced below -

"3. The section nowhere states that the subject matter of both the suits must be the same, and in a Calcutta case reported in *Smt. Jinnat Bibi vs. Howrah Jute Mill Co. Ltd.* 19 AIR 1932 Cal. 751 it was clearly pointed out that the section makes no reference to the subject matter or the cause of action and that the test of the applicability of section 10 to a particular case is whether on a final decision being reached in the previous suit such decision would operate as *res judicata* in the subsequent suit. If in the previously instituted suit it is held that this lease called in question is bogus and is intended to secure interest only that decision is bound to be *res judicata* between the parties, inasmuch as this point was raised by the present defendant (applicant) and decision thereof was necessary to grant relief to the plaintiff in that suit. This lease was considered as one of the surrounding circumstances in deciding the question whether the transaction was that of a sale or a mortgage by conditional sale. As the nature of this transaction has bearing on the interpretation of the sale and is under consideration in the previous suit and the same point is involved in the present suit. I hold that the case falls within Section 10 CPC and that the trial of the present suit ought to be stayed till

the result of the second appeal pending in High Court. I, therefore, set aside the order of the Court below and order that the suit be stayed till the decision of the second appeal. Application for revision is allowed with costs. Pleader's fee Rs.10/-

8. .. Assuming that the issue is common in both the suits, it does not necessarily attract Section 10 CPC. That section comes into play when there is substantial identity of matters in controversy. See. *Sheikh Mohd. Yasim Vs. Sheikh Mohd. Abdur Razzaque* AIR 1954 PAt. 10, *Bharat Nidhi Ltd. Vs. Shadilal AIR 1957 Punj.* 114, *L. Nem Kumar vs. Nem Kunar* AIR 1958 All. 207. The very language of the section requires that the matter in issue in the two suits must be directly and substantially the same. In other words, there must be *substantial identity of the subject matter and the field of controversy between the parties* in the two suits, although they may not be the same in every particular. As seen above, the present suit could not be stayed under section 10 CPC."

11. In the case at hand, it is observed that issue no.1, 2 and 3 framed in earlier suit are identical to the issues no.1, 2, 5 and 6.

Issues no.1, 2 and 3 of earlier suit are -

1. क्या विवादित संपत्ति वादी एवं प्रतिवादीगण के संयुक्त स्वामित्व की है ?

2. क्या वादी विवादित संपत्ति में 1/5 हिस्सा पाने की अधिकारी हैं ?

3. क्या प्रतिवादी क्र.–1 एवं 5 के पक्ष में निष्पादित वसीयतनामा दिनांक 19.02.01 फर्जी होकर शून्य है ?

Whereas, issue no.1, 2, 5 and 6 of the current suit are -

1. क्या मृतक हीरालाल गुप्ता ने वादी के पक्ष में वाद मकान के संबंध में दिनांक 19.02.2001 को वसीयतनामा निष्पादित किया ?

2. क्या दिनांक 11.04.2001 को हीरालाल गुप्ता की मृत्यु उपरांत वादी जरिये वसीयतनामा वाद मकान का स्वामी हो गया ?

....

5. क्या वाद मकान वादी के पिता एवं प्रति. क्रं. 1 तथा उनके अन्य भाई बहनों की शामिल शरीक पैतृक संपत्ति हैं ?

6. क्या स्व. हीरालाल गुप्ता को दिनांक 18.02.2001 को वाद मकान का वसीयतनामा निष्पादित करने का अधिकार नहीं था ?

12. Furthermore, issue no.9 framed in the present suit i.e. क्या द्वितीय अपर न्यायाधीश, जबलपुर के व्यवहार वाद क्र.14–ए/03 गोविन्द प्रसाद गुप्ता वि. शारदा प्रसाद गुप्ता एंव प्रतिवादी क्र. 5 के वसीयतनामा दिनांक 19.2.2001 लिखा गया निष्कर्ष रेसज्यूडीकेटा प्रभाव रखता है ; does indicate that matter in controversy in both the suits are substantially the same. In *A.C.N. Roy vs. N. C. D. Corpn.* AIR 1973 MP 14, a Division Bench of this Court has held -

> "4. ....., as the language of that section indicates that its provisions can only apply where the subject-matter of the subsequent suit is directly and substantially involved in the previously instituted suit and it is only then that the subsequent suit is to be stayed. The idea is that as soon as the previously instituted suit is decided, the subsequent suit will practically stand disposed of as its conclusions would operate as *res judicata* and, therefore, in such a case only the subsequent suit ought to be stayed under Section 10 of the Code. In each case, therefore, the matter has to be looked at from this point of view."

13. Thus, the impugned order when tested on the principle of law enunciated under Section 10 of CPC and the decisions in *Trivedi Devi and A.C.N. Roy* (supra), the same cannot be given the stamp of approval. The judgment relied upon by the trial Court in *Shaw Wallace and Co. v. Bholanath* AIR 1975 CALCUTTA 411 turns on its own facts and the principle of law therein is not attracted in the given facts of the instant case.

14. Consequently, while setting aside the order-dated 27.4.2013, the application filed under Section 10 of CPC for stay of trial in Civil Suit No.10-A/2011 is hereby allowed. The same shall remain till final decision in F.A. No.104/2004.

15. The petition is allowed to the extent above. No costs.

*Petition allowed.*

**I.L.R. [2015] M.P., 1690**
**WRIT PETITION**
***Before Mr. Justice S.C. Sharma***
W.P. No. 498/2013 (S) (Indore) decided on 7 May, 2014

ANSHUL JAIN ...Petitioner
Vs.
NATIONAL THERMAL POWER CORPORATION LTD. ...Respondent

***Service Law - Appointment - Medical fitness - Appointment for the post of Executive Trainee (Finance)*** **- Appointment has been cancelled on the ground that the petitioner was found medically unfit as he does not have vision in one eye - Even if the petitioner is having normal vision in one eye he is certainly entitled to be appointed as an Executive Trainee (Finance) - Further petitioner had also passed Chartered Accountant Examination and is working on same job in Small Industries Development Bank of India - Further advertisement shows that seats have been reserved for persons with 40% disability - One eye is treated as 30% disability - Respondents directed to appoint the petitioner with all consequential benefits - Petition allowed. (Paras 12 & 14)**

*सेवा विधि – नियुक्ति – चिकित्सकीय योग्यता – कार्यपालिक प्रशिक्षणार्थी (वित्त) के पद पर नियुक्ति* – नियुक्ति इस आधार पर निरस्त की गई कि याची को चिकित्सीय दृष्ट्या अयोग्य पाया गया क्योंकि उसकी एक आंख में दृष्टि नहीं थी – यदि याची की एक आंख में सामान्य दृष्टि है तब भी वह निश्चित रूप से कार्यपालिक प्रशिक्षणार्थी (वित्त) के रूप में नियुक्ति का हकदार है – इसके अतिरिक्त याची ने चार्टर्ड एकाउंटेंट परीक्षा भी उत्तीर्ण की है और भारतीय लघु औद्योगिक विकास बैंक में समान कार्य पर कार्यरत है – इसके अतिरिक्त विज्ञापन दर्शाता है कि 40% रूप से निःशक्त व्यक्तियों के लिये पद आरक्षित हैं – एक आंख की निःशक्तता 30% मानी जाती है – याची को सभी परिणामिक लाभों के साथ नियुक्त करने के लिये प्रत्यर्थीगण को निदेशित किया गया – याचिका मंजूर।

**Cases referred :**

(2008) 149 PLR 431, CWP No. 19782 of 2001 decided on 22.6.2009 (Punjab and Haryana High Court), ILR 1999 KAR 3411, Civil Misc. Writ Petition No. 35898 of 2009 decided on 18.3.11 (Allahabad High Court).

*L.C. Patne*, for the petitioner.
*V.K. Dubey*, for the respondent.

## ORDER

**S.C. SHARMA, J. :-** The petitioner before this Court has filed this present petition being aggrieved by an order dated 21.12.11 passed by the National Thermal Power Corporation Ltd. (NTPC) cancelling the offer of appointment for the post of Executive Trainee (Finance). The contention of the petitioner is that an advertisement was issued on 12.2.11 inviting applications for the post of Executive Trainee (Finance) and the petitioner, who has cleared all three professional educational examination held by the Institute of Chartered Accountant of India submitted his application. He was declared successful in the process of selection and an appointment order was issued on 29.8.11. The petitioner was shocked to receive an order dated 21.12.11 by which the offer of appointment has been cancelled on the ground that the petitioner was found medically unfit. The petitioner has approached this Court praying for the following reliefs :-

> "(b) to quash the impugned communication dated 21.12.2011 (Annexure-P/9) issued by the respondent, by a writ of certiorai or any other appropriate writ, direction or order ;
>
> (c) to command the respondent to restore the offer of appointment dated 29.8.2011 (Annexure-P/8) and to issue a formal order of appointment in favour of the petitioner on the post of Executive Trainee (Finance) with all consequential and monetary benefits by fixing the pay of the petitioner and by releasing the arrears of salary alongwith interest @ 12%, by a Writ of Mandamus or any other appropriate, writ, direction or order."

2. The respondents have filed the reply and their contention is that the petitioner was certainly selected for the post in question, however he was subjected to medical examination and as per the medical report submitted by the Board, he was fund unfit. The respondent in the reply has stated that the petitioner is having zero vision in one eye and as he does not have vision in one eye, he cannot be appointed as Executive Trainee (Finance). The respondents have placed reliance upon the guidelines framed by NTPC, a Govt. of India Enterprise "Norms and Standards for Medical Fitness" and their contention is that the petitioner cannot be appointed on the post in question. The respondents have prayed for dismissal of the writ petition.

3. The petitioner has filed a rejoinder and his contention is that he is working and doing the same job with Small Industries Development Bank of India, which is again a Govt. of India Enterprise and is discharging the same duties. His vision in right eye is 6x6, though he is having some problem in left eye, he is able to discharge the duties properly. It has also been stated that the Govt. of India has also framed guidelines dated 29.12.2005, which provides that persons with disability can be appointed against unreserved vacancies on the post which is suitable for persons with disability of the relevant category. His contention is that even if it is presumed that he is having no vision in one eye, he can perform the work successfully with one eye and is entitled to be appointed.

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

5. In the present case, it is an admitted fact that the petitioner has been selected for the post of Executive Trainee (Finance) and an offer of appointed was issued on 29.8.11 and the same has been cancelled on 21.12.11 on the ground that he has been found medically unfit. The respondent in paragraph 9 of the reply have stated that the petitioner's medical report reflects that he is having zero vision in one eye.

6. This court has carefully gone through the norms and the standard for medical fitness framed by the NTPC Limited and paragraph 9 deals with the standards in respect of vision. The relevant paragraph 9.13 reads as under :-

> "9.13 One eyed person
>
> For regular service one eyed individual shall be considered as unfit except for ministerial and allied jobs where binocular vision is not considered essential. It will be ensured that the prognosis or the functioning eye is good and its vision is not likely to be endangered by the condition of the worse eye and the prescribed visual acuity standards are fully satisfied."

7. The aforesaid standard makes it very clear that one eyed individual shall be considered unfit except for ministerial and allied jobs where binocular vision is not considered essential. The petitioner has been appointed for a ministerial job and even if he is having one eye, he is fit to be appointed as as per the norms and standard relating to the medical fitness. In the present case,

the return of the respondents reflects that the petitioner does not have any vision in one eye and in other eye he is having the vision of 6x6. The medical report, which is on record categorically states that the petitioner is having poor vision in left eye. The medical report does not say that he is having no vision in left eye. Even it is assumed that he does not have any vision in left eye as he is having a vision of 6x6 with glasses in one eye i.e. right eye and he is certainly entitled to be appointed by virtue of Clause 9.13 of Norms and Standards for Medical Fitness, which has been filed by the respondents themselves.

8. The Punjab and Hariyana High Court in the case of *Shikha Malhotra Vs. State Bank of India and Anr.* decided on 6.12.2007 [reported in (2008) 149 PLR 431] while dealing with a petition filed by a person, who was declared unfit for the post of Probationary Officer in a Bank and who was also having no vision in one eye, has allowed the writ petition. Paragraphs 6, 7, 8, 9 and 10 of the aforesaid judgment reads as under :-

> "6. In fact, denied of opportunity of appointment on such ground is wholly arbitrary, discriminatory and violates the rights guaranteed under Articles 14 and 16 of the Constitution of India. The petitioner is being denied right of appointment for wholly untenable reason. The stand of the respondent is without any justification and is wholly arbitrary and has caused manifest injustice to the petitioner.
>
> 7. Reference may be made to a judgment of the Hon'ble Supreme Court in *Amita v. Unon of India* . In the said case, the candidate was not even permitted to appear as a candidate for appointment to the post of a Probationary Officer. During the pendency of the petition before the Hon'ble Supreme Court, the Union of India has filed an affidavit in respect of certain jobs which could be performed by the visually handicapped persons. Written submissions were filed on behalf of the Union of India, wherein it was stated to the following effect: It was further stated that the writ petitioner being a visually impaired candidate has to either appear in the examination for selection under the reserved category or she can appear with the general candidates. It was further clarified that if she wants to appear as a general category then she has

to compete with the general category candidates only and she cannot be given any weightage as the same would amount to discrimination to others competing with her in the said category. It was further clarified the position that O.M. No. 36035/4/ 2003-Establishment dated 8.7.2003 provided that the vacancies reserved for any category need to be filled by persons belonging to that category and such vacancies are not open to others. On the other hand, unreserved vacancies are open to all and reserved category candidates cannot be denied the right to compete for appointment against such vacancies, provided they are otherwise eligible.

8. Considering the stand of the Union of India, the Hon'ble Supreme Court has returned a finding that the nature of duties of a Probationary Officer can be performed by a visually impaired candidate and some percentage of impaired candidates are entitled to be selected and appointed as Probationary Officers of the Bank either from the General Category or from the reserved category. The Hon'ble Supreme Court in the Said judgment has observed as under:

That apart, the writ petitioner, although a visually impaired lady had not asked for any special favour for selection to the post of Probationary Officer. The writ petitioner without asking for any favour had only applied for writing the examination for selection not as a reserved handicapped candidate but along with general candidates who were allowed by the Board to sit and write the examination. Since the writ petitioner was similarly situated with other general candidates, and the writ petitioner had not asked for any advantage for being a visually impaired candidate, we failed to understand why she was not permitted to sit and write the examination for the post of Probationary Officer in the Bank.

At the risk of repetition, it may be reiterated that the writ petitioner fulfilled all the conditions mentioned in the advertisement for the post. The primary object which is guaranteed by Article 16(1) is equality or opportunity and that was violated by the Board by debarring the writ petitioner

from appearing in the examination on the mere fact of disability which was not mentioned in the advertisement and which according to the writ petitioner is not an impediment for the post. We are therefore, of the view that the action of the Board was arbitrary, baseless and was in violation of the right of the writ petitioner under Article 16(1) of the Constitution.

9. In the present case the petitioner has not sought any reservation as a visually handicapped person, therefore, she as a General Category candidate is entitled to be appointed as Probationary Officer.

10. In view of the above, we have no hesitation in setting aside and quashing the impugned order (Annexure P.5) and to direct the respondents to appoint the petitioner with all consequential benefits. The consequential benefits shall include pay fixation and seniority from the date, the other appointments were made, pursuant to advertisement (P.1). However, the petitioner shall not be entitled to any arrears of salary prior to her appointment. Such directions be complied within a period of two months from today."

9. In the aforesaid case for almost a similar nature of job, the Punjab and Hariyana High Court has directed appointment with all consequential benefits without arrears of salary. The judgment of Punjab and Hariyana High Court was subject to a judicial scrutiny before the Hon'ble Supreme Court and the Hon'ble Supreme Court has dismissed the SLP preferred by the State Bank of India on 18.7.2008. This Court in light of the aforesaid judgment, is of the considered opinion that the petitioner as he was issued an offer of appointment for ministerial job is entitled for appointment. The Punjab and Hariyana High Court in the case of *State Bank of India and Anr. Vs. Rajesh Babbar* (CWP No.19782 of 2001) decided on 22.6.2009 again relying upon the earlier judgment delivered in the case of *Shikha Malhotra* (supra) has allowed the writ petition preferred by one Rajesh Babbar, who was also facing the similar problem.

10. The Karnataka High Court in the case of *M. Dinesan Vs. State Bank of India, Bhuvaneshwar* reported in ILR 1999 KAR 3411 while dealing with the writ petition of a person having vision only in one eye, who was claiming appointment to the Senior Management Scale Gr.IV has allowed the

writ petition and in paragraphs 20, 21, 22 and 23 has held as under :-

> "20. A physical defect or deformity which in no way interferes with the normal or efficient functioning should not be considered as an absolute bar to public employment, in regard to posts not associated with physical activity. There can be no doubt that a person with only one eye can be rejected if on medical examination he is found to be unfit to discharge the functions normally associated with a supervisory personnel or managerial personnel. Similarly such a person may also be rejected for the post of a Driver of a vehicle. But, where interference with normal or efficient functioning is not likely, on account of such defect, and medical examination and opinion does not say so, existence of a mere physical defect or deformity by itself cannot be termed as unfitness for a job. The bank is not a private employer. It is an instrumentality of the State. It cannot act arbitrarily, unreasonably and high-handedly or practice discrimination. It owes a public duty to act fairly and reasonably and all its actions must be informed with reason. Therefore, either to formulate or enforce a policy not to consider any person who is having only one eye, for employment, irrespective of whether he is medically unfit or fit, is nothing short of arbitrariness and shows a baseless prejudice against such persons. No authority can formulate a policy relating to appointment, with such arbitrariness. The Courts will not interfere with the standards fixed by an employer (Authority) to ascertain medical fitness of a person for employment. But Courts will interfere with an arbitrary prohibition to appointment in absolute terms, merely on a physical defect or disformity, which is not shown to have any effect on the normal and efficient functioning of the person in the post. There can be no doubt that different standards of fitness may be required for different types of posts. For example, as noticed by the Division Bench in *Gururaj Rao's* case, supra, in regard to military service or police force, a minimum height may be prescribed and a minimum weight may be prescribed and a minimum physical fitness may strictly be insisted upon. But, for a post of Law Officer a minimum height has no relevance. What is required

is mental alertness and mental capability and physical fitness which will ensure efficient discharge of his functions. So long as the defect or disformity has no effect on the efficient and normal functioning of the person, the defect by itself cannot be a ground to disentitle the person for being considered for the post.

21. In this case, the petitioner has been found to be medically unfit not because on medical examination any defect is found in his eyesight, which was likely to interfere in the efficient discharge of the duties of a Law Officer, but because of the policy of the Bank not to employ persons with only one eye. The medical examiner's opinion that petitioner is unfit is based on the guideline that one eyed persons are unfit for selection, even though he found that eyesight was normal. The policy of the Bank that all one eyed persons are wholly unacceptable for employment to supervisory cadres (by direct recruitment) irrespective of the fact that they may be medically and physically fit to discharge efficiently the functions attached to the post, renders the policy and guideline arbitrary, capricious and unreasonable. When statutes and being enacted to provide equal opportunities to disabled and handicapped, to have a policy which treats a physical defect nor having any effect on efficient functioning as a disability and bar for employment is a retrograde step, not expected of an Authority required to act reasonably. The third point is therefore answered in the negative.

22. I am informed that the post, in regard to which the petitioner was offered an appointment, has been filled up and is no longer available. The selected candidate has not been impleaded and therefore there cannot be a direction to appoint the petitioner to that post. The petitioner has pursued this petition to prevent such injustice being perpetuated against one eyed persons.

23. In view of the above, the petition is allowed in part, as follows, moulding the relief suitable.---

(a) The policy of the Bank not to employ one eyed persons to supervisory cadre by direct recruitment, irrespective of their medical fitness, is declared to be illegal and arbitrary and therefore unenforceable.

(b) If petitioner applies to the Bank for any other similar post, his application shall not be rejected by the Bank merely on the ground that he is blind in one eye, if he is otherwise eligible, suitable and fit for employment.

(c) If the Bank has already advertised any post which is yet to be filled up, the petitioner's application to such post may be received and considered, even if it is filed after the last date."

11. The Karnataka High Court has held the policy of the bank not to employ one eyed persons to the supervisory cadre by direct recruitment as illegal. The Allahabad High Court in the case of *Yogesh Dutt Vs. Union of India & ors.* (Civil Misc. Writ Petition No.35898 of 2009) decided on 18.3.11 while dealing with a case of a person who was selected as a Probationary Officer and was having only one eye has allowed the writ petition directing the bank to appoint the petitioner therein as a Probationary Officer. Paragraphs 22, 23, 24, 25, 26, 27, 28, 29 and 30 of the aforesaid judgment reads as under :-

"22. In Syed *Bashir Ud Din Qadri vs. Nazir Ahmed Shah and others* (2010) 3 SCC 603 the Supreme Court, considering a matter in which the services of the petitioner as a teacher were terminated on account of his suffering with cerebral palsy which made him difficult to write on the black board, held the decision to be violative of Jammu and Kashmir Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1998. It was held that accepting the fact, that the appellant is a victim of cerebral palsy, which impairs movement of limbs and also speech, there is nothing on record to show that the appellant had not been performing his duties efficiently and with dedication. On the other hand, his performance as a teacher was reflected in exceptionally good results that he achieved in his discipline in the classes taught by him. Mere fact, that the appellant could not express himself

properly when he personally appeared before the High Court has to be seen in the context that his speech faculty must have worsened further on account of nervousness which he might have experienced while answering questions before the High Court. Intimidating atmosphere in the High Court must have triggered a reaction which made it difficult for him to respond to questions put to him. The Committee constituted to assess his performance as a teacher notwithstanding his disability had formed a favourable impression about him.

23. The editorial note to the judgment gives example of the persons, who have inspite of a severe disability contributed to the society. Stephen William Hawking-a British theoretical physicist is a world-renowned scientific with career span of over 40 years. He has 15 a neuro-muscular dystrophy that is related to Amyotrophic Lateral Sclerosis (ALS), a condition which has progressed over the years and has left him almost completely paralysed. He has overcome the disability, to be one of the foremost scientist in the world and his academic celebrity and Honorary Fellow of the royal Society of Arts, a lifetime member of the Pontifical Academy of Sciences and was awarded the Presidential Medal of Freedom, the highest civilian award in the United States.

24. In India we have many examples of the disabled persons excelling in music, law, science, sports. Shri Ravinder Jain a blind person is a singer and musician of great accomplishment. His total blindness has not come in his way in achieving laurels in musics. Shri Mansoor Ali Khan Pataudi, captained Indian Cricket team to victory in 14 matches and made a double century against West Indies after he lost his right eye in an accident. Several Advocates, and an Advocate General of the State of West Bengal was a blind person. He is a highly respected lawyer, who overcame his disability and used brail to read and argue cases.

25. The petitioner is a partially physically disabled person, but whether he treats himself to be disabled in life, is his personal choice. His vision has not been impaired by loss of one eye, in

the accident. His right eye has normal vision. The Senior Medical Officer of the State Bank of India found his vision of right eye to be 6/5 with naked eye, without glasses. Dr. Anand Sharma examining him on behalf of State Bank of India on 25.4.2009 and found his right eye to be absolutely normal. Dr. Atul Kumar, Senior Medical Officer declared him to be medically unfit in column15 and 16, with a note at the bottom of his report that as per Central Government Office Memorandum dated 3.5.2002 Annexure to G1, Ministry of Social Justice and Empowerment Notification dated 18.1.2007, if applicable in State Bank of India, he is medically fit.

26. The petitioner is measured to be physically disabled to the extent of 30%, which does not give him an opportunity to claim reservation either as a person, who is blind or a person with low vision, or orthopedic handicapped. He did not want to claim vertical reservation in the category of OBC. He was confident; competed in the general category and was selected in open competition to be appointed as Probationary Officer. He does not suffer with any handicap, nor is incapable of performing the normal duties as Officer in the Bank. There was no column in the application form nor was he required to give details of the events in his life in which he may have suffered any injuries or loss of limbs or parts of body. The loss of one eye in the accident in his childhood was thus not required to be disclosed in the application form, more so, when he did not treat it as an handicap in being selected and performing the duties of his job.

27. In the present case, we are unable to appreciate the approach of the Central Government and the Bank. The State Bank of India has treated the petitioner to be medically unfit, and placed him in the category of physically handicapped, not entitled to be appointed as an officer in the bank. He has been accused of failing to give the information of loss of one eye in the application form, and has been treated to be medically unfit for the job whereas he was not required to give any such information and his one eye is normal and healthy. There is nothing which he cannot do, which a person with two healthy

eyes can do.

28. The State Bank of India has not pleaded or placed on record any material to justify the Circulars dated 25.10.1983, and 16.1.2001, and its revision by circular dated 17.2.2007, providing that one eyed candidates would be barred from all further recruitment in clerical or official's cadre. There is absolutely nothing to show that a person with one healthy eye with normal vision cannot perform clerical or officers work in bank. There is no medical opinion supporting the decision of the bank. The decision is apparently full of prejudice to the handicapped persons. The enactment of PWD Act to provide social justice to disabled, and the shift in the approach to disabled persons by the Supreme Court negatives the argument in favour of the decision of the bank. When a totally blind person can claim to be appointed as an officer in the bank, the declaration that one eyed persons is medically unfit, is a contradiction in terms. The Circulars of the Bank denying opportunity of employment of one eyed persons as clerks and officers, is violative of Article 14 of the Constitution of India. The issue raised in the present case is more a human right issue, than a disability issue.

29. We are of the opinion that the petitioner has been illegally and arbitrarily denied appointment as a Probationary Officer. After change of the approach to the physically handicapped persons, under PWD Act, it is no longer open for the State Bank of India to contend that that a person with one normal eye is medically unfit to the officer's job in the Bank.

30. The writ petition is allowed. The communication of the Assistant General Manager (Human Resource), Human Resource Development, Local Head Office, State Bank of India, Mumbai dated 18.5.2009 declaring the petitioner unfit and denying him appointment is quashed. A writ of mandamus is issued to the respondents to appoint the petitioner as Probationary Officer for which he was selected in pursuance to advertisement No. CRPD/PO/0809/04 within one month and to give seniority with effect from the date when a person

next junior to him, in his category was appointed."

12. In light of the aforesaid discussion, the Allahabad High Court has observed that a person with one healthy eye with normal vision can perform the clerical or office work in a bank. In the present case also the petitioner has to work in the finance department which includes almost a similar job, which is done in a bank and one eyed person can certainly do the job as observed by the various high Courts and therefore, the action of the respondent-NTPC is certainly violative of Articles 14, 19 and 21 of the Constitution of India. The respondent NTPC has taken a very inhuman view in the matter, which deserves to be deprecated. The Andhra Pradesh High Court in the case of *Rasale Gopal* (Supra) while dealing with the similar issue of a disabled person with a single functional eye has allowed the writ petition directing the Bank not to discriminate the petitioner therein on the ground that he is having a single eye. In the present case, the petitioner has been selected in the Officer cadre as Executive Trainee (Finance) and as he is a Chartered Accountant, he has proved his worth by qualifying the Chartered Accountancy Examination as well the Examination conducted by the NTPC. He is doing the similar job successfully with Small Industries Development Bank of India, which is again a Government of India undertaking. The medical report reflects that his right eye is normal and in respect of left eye on account of poor vision, he is medically unfit. The return says that he does not have any vision in the left eye and therefore, in the considered opinion of this Court, even if the petitioner is having normal vision in one eye he is certainly entitled to be appointed as an Executive Trainee (Finance). The advertisement which is on record (Annexure-P/1) further reflects that there is a reservation for disabled persons and a person having disability up to 40% and above is entitled to apply for the seats reserved for disabled persons, meaning thereby a person of a low vision with minimum 40% disability is eligible to be appointed as an Executive Trainee (Finance). One eyed person is considered to have 30% disability keeping in view the guidelines framed for appointment by the Ministry of Social Justice and Impairment (as stated in the rejoinder) meaning thereby the petitioner is having 30% disability. It is really unfortunate that NTPC as per the advertisement is free to appoint a person with 40% disability or above and is not appointing a person, who is having 30% disability. The absurd reasoning assigned by the NTPC is nothing but it amounts to violation of fundamental rights guaranteed to the petitioner. The Govt. of India, Department of Personal, Public Grievances and Pensions has issued a Circular dated 29thth December,

2005 and paragraph 7 of the aforesaid circular reads as under :-

> **"7.ADJUSTMENT OF CANDIDATES SELECTED ON THEIR OWN MERIT: Persons with disabilities selected on their own merit without relaxed standards alongwith other candidates, will not be adjusted against the reserved share of vacancies. The reserved vacancies will be filled up separately from amongst the eligible candidates with disabilities which will thus comprise physically handicapped candidates who are lower in merit than the last candidate in merit list but otherwise found suitable for appointment, if necessary, by relaxed standards. It will apply in case of direct recruitment as well as promotion, wherever reservation for persons with disabilities if admissible."**

13. The aforesaid circular provides that in case a disabled person on merits is entitled for selection under the unreserved category, he is eligible for appointment under the un-reserved category (including reserved category). The petitioner In the present case, even it is assumed that he is a one eyed person, is certainly entitled for the appointment as an Executive Trainee (Finance) specially in light of the guidelines framed by the NTPC relating to the medical fitness certificate i.e. paragraph 9.13, which has already been quoted above.

14. This Court keeping in view the totality of the facts and circumstances of the case, is of the considered opinion that the petition deserves to be allowed and is accordingly allowed. The impugned order passed by the respondents dated 21.12.11 is hereby quashed. The respondents are directed to appoint the petitioner with all consequential benefits. The consequential benefits shall include the pay fixation and seniority, increments, etc., from the date the other appointments were made pursuant to the advertisement (Annexure-P/1). However, the petitioner shall not be entitled for any arrears of salary. The order passed by this Court be complied with within a period of 60 days from the date of receipt of a certified copy of this order.

15. No order as to costs.

*Petition allowed.*

**I.L.R. [2015] M.P., 1704**
**WRIT PETITION**
***Before Mr. Justice S.C. Sharma***
W.P. No. 5535/2014 (Indore) decided on 11 September, 2014

ANOOP SAXENA ...Petitioner
Vs.
THE SECRETARY, MINISTRY OF HOME AFFAIRS, BHOPAL & ors. ...Respondents

*A.* ***Rajya Suraksha Adhiniyam, M.P. 1990 (4 of 1991), Section 5 - Writ jurisdiction*** **- District Magistrate issued an order of externment based on previous five offences - Held - In the absence of any material to establish that witnesses are not coming due to apprehension of danger to property and person, order under Section 5 (b) of the Act cannot be passed. (Paras 2 & 8)**

*क. राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धारा 5 – रिट अधिकारिता* – जिला दण्डाधिकारी ने पिछले पांच अपराधों के आधार पर निष्कासन का आदेश जारी किया – अभिनिर्धारित – किसी तथ्य की अनुपस्थिति में जो यह स्थापित कर सके कि साक्षीगण संपत्ति एवं व्यक्ति को खतरे की आशंका के कारण नहीं आ रहे हैं, अधिनियम की धारा 5(बी) के अंतर्गत आदेश पारित नहीं किया जा सकता।

*B.* ***Rajya Suraksha Adhiniyam, M.P. 1990 (4 of 1991), Section 5 -Externment*** **- No documents were supplied with show cause notice - Statement of witnesses were not given - Old and stale cases considered - Held - Order passed in vindictive manner to suppress the voice of independent journalist. (Paras 9,10 & 11)**

*ख. राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धारा 5 – निष्कासन* – कारण बताओ नोटिस के साथ कोई दस्तावेज प्रदान नहीं किये गये – साक्षियों के कथन नहीं दिये गये – पुराने और घिसे पिटे प्रकरणों को विचार में लिया गया – अभिनिर्धारित – प्रतिशोधात्मक ढंग से स्वतंत्र पत्रकार की आवाज़ का दमन करने के लिये आदेश पारित किया गया।

*C.* ***Constitution - Article 19(1)(g) - Freedom of speech and expression*** **- Journalist reporting against corruption or misdeeds of public servants - Order passed against Journalist under M.P. Rajya Suraksha Adhiniyam based on petty cases - Impliedly means that**

**attempt is made by administration to silence the voice of Journalist - Infringement of fundamental rights - Order passed by District Magistrate and of Commissioner quashed with cost of Rs. 10,000/-.**

**(Paras 23, 24, 27 & 28)**

*ग. संविधान – अनुच्छेद 19(1)(जी) – बोलने की और अभिव्यक्ति की स्वतंत्रता* – लोक सेवकों के भ्रष्टाचार एवं कुकर्मों के विरूद्ध पत्रकार की रिपोर्टिंग – पत्रकार के विरूद्ध मामूली प्रकरणों के आधार पर मध्य प्रदेश राज्य सुरक्षा अधिनियम के अंतर्गत आदेश पारित किया गया – विवक्षित रूप से अर्थ निकलता है कि प्रशासन द्वारा पत्रकार की आवाज़ शांत करने के लिये प्रयत्न किया गया है – मूलभूत अधिकारों का अतिलंघन – जिला दण्डाधिकारी एवं आयुक्त द्वारा पारित किया गया आदेश, रू. 10,000/– व्यय के साथ अभिखंडित।

**Cases referred :**

2009 (4) MPLJ 434, (1983) 2 SCC 96, (1986) 1 SCC 133, (1988) 4 SCC 592, (1996) 6 SCC 466, (1999) 8 SCC 308, (2005) 6 SCC 109, (2010) 9 SCC 618, ILR (2010) MP 86,

*(Supplied: Paragraph numbers)*

**ORDER**

**S.C. SHARMA, J. :-** The petitioner before this Court has filed this present writ petition being aggrieved by the order dated 4/4/2014 passed by the District Magistrate, Rajgarh under the provisions of the M.P. Rajya Suraksha Adhiniyam, 1990. He is also aggrieved by the order dated 21/7/2014 dismissing his appeal, passed by the Commissioner, Bhopal Division, Bhopal.

2. Facts of the case reveal that the petitioner who is a Journalist was served with a Show Cause Notice dt. 21/11/2013 issued under the provisions of the M.P. Rajya Suraksha Adhiniyam, 1990 and the following cases were reflected in the Show Cause Notice :

(a) Crime No. 131/93 for offence u/S. 294, 448, 504 and 34 of the Indian Penal Code registered on 28/8/93.

(b) Crime No. 23/11 for offence u/S. 334, 509, and 506 of the Indian Penal Code registered on 25/6/11.

(c) Crime No. 449/11 for offence u/S. 354, 506, 294 of the Indian Penal Code read with Sec. 3(1)(x) of the Scheduled Caste / Scheduled Tribe

(Prevention of Atrocities) Act.

(d) Ishtgasha No.58/2012 u/S. 106 and 116(3) of the Code of Criminal Procedure, 1973

(e) Ishgtasha No. 71/12 u/S. 107, 116(3) of the Code of Criminal Procedure, 1973 on 5/4/2012.

3. A reply was filed by the petitioner stating therein that he was acquitted in Crime No. 230 and 440, in respect of Crime No. 131, he has stated that no further proceedings of any kind took place after registration of the crime and it was closed later on. In respect of proceeding u/s. 107 and 116(3) of the Code of Criminal Procedure, 1973 it has been stated that the proceedings also came to an end, meaning thereby, at the time the Show Cause Notice was issued, there was no case pending against the petitioner.

4. Learned counsel for the petitioner has argued before this Court that because the petitioner is a Journalist he is being harassed by the District Administration and the impugned orders deserves to be set aside. It has been further argued that the documents were not supplied along with the Show Cause Notice and the petitioner was not permitted to cross-examine the witnesses. He has further argued that the District Magistrate has nowhere in the impugned order named the witnesses who have not come forwarded to give statement against the petitioner in the criminal cases and other grounds have also been raised.

5. On the other hand, a detailed and exhaustive reply has been filed on behalf of the State Government and the State Government in its reply has stated that the action against the petitioner is in consonance with the statutory provisions governing the field. It has been further stated that a report was received from the Superintendent of Police and based upon the said report, a Show Cause Notice was issued and after granting a reasonable opportunity to the petitioner, the impugned orders have been passed. It has also been stated that the petitioner was involved in many criminal cases and, therefore, they have rightly passed the impugned orders.

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

7. In the present case, most of the cases reflected in the Show Cause Notice have come to an end. The petitioner has been acquitted in the criminal cases and as informed, there is no criminal case pending against the petitioner.

Not only this, old and stale cases were taken into account while passing the order of externment. The recent cases of the year 2012 are under Chapter – Security to Keep Peace and Good Behaviour, meaning thereby, under the prevention action of the police and based upon the cases reflected in the Show Cause Notice, the order of externment has been passed.

8. A Division Bench of this Court in the case of *Ashok Kumar Patel Vs. State of M.P.* Reported in [2009 (4) MPLJ 434, has exhaustively dealt with Sec.5 of the M.P. Rajya Suraksha Adhiniyam, 1990, and paragraphs 5 to 14 of the aforesaid judgment reads as under:

> "5. Section 5 of the Act of 1990 under which the order of externment has been passed in quoted hereinbelow:-
>
> "5. Removal of persons about to commit offence .- Whenever it appears to the District Magistrate -
>
> (a) that the movements or acts of any person are causing or calculated to cause alarm, danger or harm to person or property; or
>
> (b) that there are reasonably grounds for believing that such person is engaged or is about to be engaged in the commission of an offence involving force or violence or an offence punishable under Chapter XII, XVI or XVII or under Section 506 or 509 of the Indian Penal Code, 1860 (45 of 1860) or in the abetment of any such offence, and when in the opinion of the District Magistrate witnesses are no willing to come forward to given evidence in public against such person by reason of apprehension on their part as regards the safety of their person property; or
>
> (c) that an outbreak epidemic disease is likely to result from the continued residence of an immigrant;
>
> the District Magistrate, may by an order in writing duly served on him or by beat of drum or otherwise as the District Magistrate thinks fit, direct such person or immigrant -
>
> (a) so as to conduct himself as shall seem necessary in order to prevent violence and alarm or the outbreak or spread of such disease; or

(b) to remove himself outside the district or any part thereof or such area and any district or districts or any part thereof, contiguous thereto by such route within such time as the District Magistrate may specify and not to enter or return to the said district or part thereof or such area and such contiguous districts, or part thereof, as the case may be, from which he was directed to remove himself."

6. A plain reading of section 5(b) of the Act of 1990 quoted above, would show that for passing an order of externment against a person, two conditions must be satisfied:-

(i) There are reasonable grounds for believing that a person is engaged or is about to be engaged in commission of an offence involving force or violence or an offence punishable under Chapter XII, XVI or XVII or under section 506 or 509 of the Indian Penal Code, 1860 or in the abetment of any such offence; and

(ii) In the opinion of the District Magistrate, witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property.

7. In *State of N.C.T. of Delhi and another vs. Sanjeev alias Biuttoo* (supra), the Supreme Court had the occasion to interpret section 47 of the Bombay Police act, 1978, which contains provisions similar to section 5 of the Act of 1990 and has referred to these essential conditions for passing an order under section 47 of the Delhi Police Act in Para 10 of the judgment as reported in the AIR thus :-

"Section 47 consists of two parts. First part relates to that satisfaction of the Commissioner of Police or any Authorized Officer reaching a conclusion that movement or act of any person are causing alarm and danger to person or property or that there are reasonable grounds for believing that such person is engaged or is about to be engaged in commission of enumerated offences or in the abetment of anh (sic:any) such offence or is so desperate and dangerous as to

render his being at large hazardous to the community. Opinion of the Concerned Officer has to be formed that witnesses are not willing to come forward in public to given evidence against such person by reason of apprehension on their part as regards safety of person or property. After these opinions are formed on the basis of materials forming foundation therefore, the Commissioner can pass an order adopting any of the available options as provided in the provision itself. The three options are – (1) to direct such person to conduct himself as deemed necessary in order to prevent violence an alarm or (2) to direct him to remove himself outside any part of Delhi or (3) to remove himself outside whole of Delhi."

8. The expression "is engaged or is about to be engaged" in the commission of offence involving force or violence or an offence punishable under Chapter XII, XVI or XVII or under section 506 or 509 of the Indian Penal Code 1860 or in the abetment of any such offence, shows that the commission of the offence or the abetment of such offence by the person must have a very close proximity to the date on which the order is proposed to be passed under section 5(b) of the Act of 1990. Hence, if a person was engaged in the commission of offence or in abetment of an offence of the type mentioned in section 5(b), several years or several months back, there cannot be any reasonable ground for believing that the person is engaged or is about to be engaged in the commission of such offence.

9. We will therefore, have to examine the impugned order dated 18-11-2008 passed by the District Magistrate, under section 5(b) of the Act of 1990 to find out whether the petitioner was engaged in the commission of an offence or was about to be engaged in the commission of an offence mentioned in section 5(b) of the Act of 1990, or in the abetment of such offence, which was very close in proximity to 18-11-2008 when the impugned order of externment was passed. The first offence mentioned is alleged to have been committed by the petitioner on 9-4-1995 when the petitioner

and his other associates forcibly took possession of 'Mahuwa' of Tilakdhari Tripathi, son of Indramani Tripathi and collected the same, and Crime No.46/95 under Sections 447 and 379 of the Indian Penal Code was registered and the petitioner was arrested and produced before the Court. The second offence is alleged to have been committed by the petitioner on 14-3-2007 when the petitioner is alleged to have writtne (sic:written) a letter to Shivshankar Tripathi, son of Tilakdhari Tripathi, giving threats regarding construction of new building of Shiksha Guarantee School, and Crime No.42/2007 under sections 353, 294, 506 read with section 34 of the Indian Penal Code has been registered and a challan has been filed in the Court in Case No.729/2008. The third act which has been mentioned in the impugned order is not an offence alleged to have been committed but a Prohibitory Proceeding No.22/2007 under sections 107 and 116 (3) of the Code of Criminal Procedure instituted against the petitioner on 9-4-2007 and the petitioner has been produced in Court. The fourth offence alleged to have been committed by the petitioner is in July, 2008 when the petitioner along with 6 or 7 others is alleged to have caused hindrance in Government work during the election of Palak Shikshak Sangh and created disturbances in election work and committed 'Marpeet' on the basis of which Crime No.216/2008 for offences under sections 253, 294,233, 325 and 506-B read with section 34 of Indian Penal Code has been registered. In our considered years 1995 to 2007, cannot be the foundation of an order under Section 5(b) of the Act of 1990 as the alleged offences have no proximity at all to the order of externment passed on 18-11-2008. Even, the offence alleged to have been committed by the petitioner along with 6 or 7 other persons in July, 2008, cannot constitute a reasonable ground to believe on 18-11-2008 that the petitioner is engaged or is about to be engaged in offence mentioned in section 5(b) of the Act of 1990.

10. The second condition which must be satisfied for passing of an order of externment against a person is that in the opinion of the District Magistrate, witnesses are not willing

to come forward to give evidence in public against such person by a reason of apprehension on their part as regards safety of person or property. Construing a pari materia provision in section 27 of the City of Bombay Police Act, 1902 in *Gurbachan Singh vs. The State of Bombay and another*, AIR 1952 SC 221, the Supreme observed:-

" The law is certainly an extra-ordinary one and has been made only to meet these exceptional cases where no witnesses for fear of violence to their person or property are willing to depose publicly against certain bad characters whose presence in certain areas constitute a menace to the safety or the public residing therein."

11. In the instant case, the District Magistrate has in the impugned order only baldly stated that the list of offences registered against the petitioner reflects that he is a daring habitual criminal and because of this there is fear and terror in the public and has not recorded any clear opinion on the basis of materials, that in his opinion witnesses are not willing to come forward to given evidence in public against such person by a reason on apprehension on their part as regards safety of their person or property. In most of the cases, Challans have been filed by the Criminal procedure Code and the cases are pending in the Court. There is no reference in the order of District magistrate that witnesses named in the Challans filed by the Police are not coming forward to give evidence against the petitioner in Court. Hence, in the absence of any existence of material to show that witnesses are not coming forward by a reason of apprehension to danger to their person or property to given evidence against the petitioner in respect of the alleged offences, an order under section 5(b) of the Act of 1990 cannot be passed by the District Magistrate by merely repeating the language of Section 5(b) of the Act of 1990.

12. In *State of N.C.T. of Delhi and another vs. Sangeev alias Bittu* (supra), the Supreme Court interpreting section 47 of the Bombay Police Act, 1978, which is similarly worded as section 5 of the Act of 1990, has held in Para 25:-

"It is true that some material must exist but what is required is not an elaborate decision akin to a judgment. On the contrary, the order directing externment should show existence of some material warranting an order of externment. While dealing with question mere repetition of the provision would not be sufficient. Reference to be made to some material on record and if that is done the requirements of law are met. As noted above, it is not the sufficiency of material but the existence of material which is sine qua non."

13. The Act of 1990 certain serious restrictions on the fundamental right to freedom under Article 19(1) of the Constitution and unless the conditions mentioned under section 5(b) of the Act of 1990 are strictly safisfied, an order of externment, will have to be quashed by the Court. While considering a case under section 56 of the Bombay Police Act, which also empowered the police to pass an order of externment, the Supreme Court observed in *Pandharinath Shridhar Rangnekar vs. Dy. Commissioner of Police, State of Maharasthra* (supra), as under:-

"It is true that the provisions of section 56 make a serious inroad on personal liberty but such restraints have to be suffered in the larger interests of society. This Court in *Gurbachan Singh vs. The State of Bombay,* 1952 SCR 737 = AIR 1952 SC 221 had upheld the validity of section 27(1) of the City of Bombay Police Act, 1902, which corresponds to section 56 of the Act. Following that decision, the challenge to the constitutionality of section 56 was repelled in 1956 SCR 533 = AIR 1956 SC 585. We will only add that care must be taken to ensure that the terms of sections 56 and 59 are strictly complied with an that the slender safeguards which those provisions offer are made available to the proposed externee."

14. We are thus of the considered opinion that the two conditions for an order of extenment stated in Section 5(b) of the Act of 1990 do no exist in this case and the order passed by the District Magistrate and appellate order of the Commissioner are liable to be quashed. Since the impugned

order of externment passed by the District Magistrate and the appellate order passed by the Divisional Commissioner are liable to be quashed on this ground alone, it is not necessary for us to deal with the other grounds raised by the petitioner in this writ petition. In the result, we quash the impugned order dated 18-11-2008 passed by the District Magistrate Rewa in Cr.Case No.227/2008 as well as the appellate order dated 13-1-2009 passed by the Commissioner, Rewa Division.No costs."

9. Keeping in view the aforesaid judgment, as the District Magistrate, in the impugned order has baldly stated that the list of the offences registered against the petitioner reflects that the petitioner is a criminal and because there is a fear and terror in the public and in his opinion the witnesses are not coming forward to give evidence, has erred in law and facts in passing the impugned orders. The District Magistrate, inspite of the fact that two cases have been concluded, has not named a single witness who has not come forward to give evidence against the petitioner. Hence, in absence of any material to establish that the witnesses are not coming forward by reason of apprehension to danger to their property or person to give evidence against the petitioner in respect of all the offences, an order under Section 5(b) of the Act of 1990 cannot be passed by repeating the language of Sec. 5(b) of the Act of 1990.

10. Not only this, the present case reflects a sorry state of affairs and a Journalist who is supposed to report the incidents without fear and favour, has been subjected to externment. The petitioner who is a Journalist in his reply to the externment notice has categorically stated that on account of his Articles published in the Newspapers including the Times of India, as a correspondent of Nai Duniya, Free Press Journal besides other newspapers, the District Administration has acted with vengeance. The petitioner in his reply to the Show Cause Notice has categorically stated that the earlier Collector – Mr. M. D. Oza has committed gross irregularities and he has submitted a written complaint to the Chief Secretary on 23/6/2012 as well as to the Lokayukt Establishment. He has further stated that at the behest of the officers serving in the District he was subjected to proceedings u/S. 116 of the Code of Criminal Procedure, 1973 without there being any basis. He has also stated that he has reported various scams allegedly committed by the Goverment servants and the news items were published in various newspapers

from time to time and as he has not succumbed to the illegal pressure of the district administration, he has been subjected to the externment proceedings.

11. In the present case, it is an admitted fact that the documents were not supplied to the petitioner. The statements of witnesses recorded were also not given to the petitioner and old and stale cases were considered while passing the impugned order.

12. This Court is of the considered opinion that the cases reflected against the petitioner and the material reflected in the Show Cause Notice does not make it a fit case for passing an order in respect of the externment. From the record, this Court can safely gather that the order has been passed in a vindictive manner to suppress the voice of an independent journalist who has not allegedly succumbed to the pressure of the administration.

13. Freedom of Speech and Expression, is guaranteed under Article 19(1)(g) of the Constitution of India. The profession of journalism is a very noble profession and large number of issues of social importance have been brought to the notice of various High Courts and to the notice of Hon'ble Supreme Court of India by various journalist from time to time. A journalist Sheela Barse wrote a letter complaining custodial violence of women prisoner during the confinement in the police lock-up in the city of Bombay and cognizance was taken in the matter and the apex Court has delivered a landmark judgment which was initiated by a journalist in the case of *Sheela Barse Vs. State of Maharashtra* reported in (1983) 2 SCC 96. The apex Court in the case of *Express Newspapers Pvt. Ltd., and others Vs. Union of India and others* reported in (1986) 1 SCC 133, has held that freedom guaranteed under Article 19(1)(a) and (2) comprehends Freedom of Press. In the aforesaid case, notices of re-entry were issued upon forfeiture of lease and a threat of demolition of Express Building was also intended and in those circumstances the apex Court in paragraphs 73, 75 and 76 has held as under:

> 73. Here, the very threat is to the existence of a free and independent press. It is now firmly established by a series of decisions of this Court and is a rule written into the Constitution that freedom of the press is comprehended within the right to freedom of speech and expression guaranteed under Art. 19(1)(a) and I do not wish to traverse the familiar ground over again except to touch upon certain landmark decisions. In

*Romesh Thappar v. State of Madras,* [1950] S.C.R. 594, the Court observed that the Founding Fathers realized that freedoms of speech and of the press are at the foundation of all democratic organizations, for without free political discussion no public education, so essential for proper functioning of the processes of popular Government, is possible. In *Sakal Papers (P) Ltd. v. Union of India,* [1962] 3 S.C.R. 842, the Court reiterated :

"That the freedom of speech and expression guaranteed under Art. 19(1)(a) of the Constitution includes the freedom of press i.e. the freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation. Liberty of circulation is as essential to that freedom as the liberty of publication. Central to the concept of a free press is freedom of political opinion and at the core of that freedom lies the right to criticise the Government, because it is only through free debate and free exchange of ideas that Government remains representation to the will of the people and orderly change is effected. When avenues of political expression are closed, Government by consent of the governed would soon be foreclosed. Such freedom is the foundation of free Government of a free people. Our Government set up being elected limited and 475 responsible we need requisite freedom of any animadversion for our social interest which ordinarily demands free propagation of views. Freedom to think as one likes and to speak as one thinks are as a rule indispensable to the discovery and separate of truth and without free speech, discussion may be futile."

75. I would only like to stress that the freedom of thought and expression, and the freedom of the press are not only valuable freedoms in themselves but are basic to a democratic form of Government which proceeds on the theory that problems of the Government can be solved by the free exchange of thought and by public discussion of the various issues facing the nation. It is necessary to emphasize and one must not forget that the vital importance of freedom of speech

and expression involves the freedom to dissent to a free democracy like ours. Democracy relies on the freedom of the press. It is the inalienable right of everyone to comment freely upon any matter of public importance. This right is one of the pillars of individual liberty-freedom of speech, which our Court has always unfailingly guarded. I wish to add that however precious and cherished the freedom of speech is under Art.19(1)(a), this freedom is not absolute and unlimited at all times and under all circumstances but is subject to the restrictions contained in Art. 19(2). That must be so because unrestricted freedom of speech and expression which includes the freedom of the press and is wholly free from restraints, amounts to uncontrolled licence which would lead to disorder and anarchy and it would be hazardous to ignore the vital importance of our social and national interest in public order and security of the State.

76. In *Bennett Coleman's* case the Court indicated that the extent of permissible limitations on this freedom are indicated by the fundamental law of the land itself viz. Art. 19(2) of the Constitution. It was laid down that permissible restrictions on 476 any fundamental right guaranteed under Part III of the Constitution have to be imposed by a duly enacted law and must not be excessive i.e. they must not go beyond what is necessary to achieve the object of the law under which they are sought to be imposed. The power to impose restrictions on fundamental rights is essentially a power to 'regulate' the exercise of those rights. In fact, 'regulation' and not extinction of that which is to be regulated is, generally speaking, the extent to which permissible restrictions may go in order to satisfy the test of reasonableness." The Court also dealt with the extent of permissible limitations on the freedom of speech and expression guaranteed under Art.19(1)(a). The test laid down by the Court in *Bennett coleman's* case is whether the direct and immediate impact of the impugned action is on the freedom of speech and expression guaranteed under Art. 19(1)(a) which includes the freedom of the press. It was observed that the restriction on the number of pages, a restraint

on circulation and a restraint on advertizements would affect the fundamental right under Art.19(1)(a) on the aspects of propagation, publication and circulation of a newspaper. In repelling the contention of the learned Additional Solicitor-General that the newsprint policy did not violated Art. 19(1)(a) as it does not direct and immediately deal with the right mentioned in Art. 19(1)(a), the Court held that the test of pith and substance of the subject-matter and of direct and incidental effect of legislation are relevant to questions of legislative competence but they are irrelevant to the question of infringement of fundamental rights. The true test, according to the Court, is whether the effect of the impugned action is to take away or abridge fundamental rights. It was stated that the word 'direct' would go to the quality or character of the effect and not the subject matter and the restriction sought to be imposed by the impugned newsprint policy was, in substance, a newspaper control i.e. to control the number of pages or circulation of dailies or newspapers and such restrictions were clearly outside the ambit of Art. 19(2) of the Constitution and therefore were in abridgement of the right of freedom of speech and expression guaranteed under Art. 19(1)(a), and it added :

"The Newsprint Control Policy is found to be newspaper control order in the guise of framing an Import Control Policy for newsprint. This Court in the *Bank Nationalisation* case (supra) laid down two tests. First it is not the object of the authority making the law impairing the right of the 477 citizen nor the form of action that determines the invasion of the right. Secondly, it is the effect of the law and the action upon the right which attracts the jurisdiction of the court to grant relief. The direct operation of the Act upon the rights forms the real test.

...No law or action would state in words that rights of freedom of speech and expression are abridged or taken away. That is why Courts have to protect and guard fundamental rights by considering the scope and provisions of the Act and its effect

upon the fundamental rights."

We have only to substitute the word 'executive' for the word 'law' and the result is obvious. Here, the impugned notices of re-entry upon forfeiture of lease and of the threatened demolition of the Express Buildings are intended and meant to silence the voice of the Indian Express. It must logically follow that the impugned notices constitute a direct and immediate threat to the freedom of the press and are thus violative of Art. 19(1)(a) read with Art.14 of the Constitution. It must accordingly be held that these petitions under Art. 32 of the Constitution are maintainable.

The Government Grants Act, 1895 : Section 3: Purport & Effect of: Whether the notice of re-entry upon forfeiture of lease was valid and enforceable due to non-compliance of clause 6 thereof.

14. Thus, the apex Court in the aforesaid case has held that the Freedom of Thought and Expression and the Freedom of Press are not only valuable freedom in themselves but are basic to a democratic form of a Government.

15. In the year 1950, the apex Court has considered a Notification by which certain restrictions were imposed upon ORGANISER, an English Weekly of Delhi by the State of Delhi and the apex Court has quashed the Notification dt. 2/3/1950 again holding that imposition of censorship on a journal is a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression, as declared by Article 19(1)(g).

16. In the case of *Reliance Petrochemicals Ltd., Vs. Proprietors of Indian Express Newspapers, Bombay Pvt. Ltd., and others* reported in (1988) 4 SCC 592, the apex Court, after considering the test of imminent danger has lifted the injunction imposed upon the Indian Express in respect of a publication material against Reliance Petrochemicals Ltd., It is certainly true that in the profession of Journalism, a Journalist is required to ascertain the correctness of the News Item, as publishing false news items are having serious repercussions. But, at the same time, by using coercive method, journalist cannot be suppressed from raising voice against the corruption prevalent in the society.

17. The apex Court in the case of In Re : *Harijai Singh and another, In Re : Vijay Kumar* reported in (1996) 6 SCC 466 has again dealt with Freedom of Press and in paragraph 9 has held as under :

> 9. It is thus needless to emphasis that a free and healthy press is indispensable to the functioning of true democracy. In a democratic set-up, there has to be an active and intelligent participation of the people in all spheres and affairs of their community as well as the State. It is their right to be kept informed about current political, social, economic and cultural life as well as the burning topics and important issues of the day in order to enable them to consider and form broad opinion about the same and the way in which they are being managed, tackled and administered by the Government and its functionaries. To achieve this objective the people need a clear and truthful account of events, so that they may form their own opinion and offer their own comments and view points on such matters and issues and select their further course of action. The primary function, therefore, of the press is to provide comprehensive and objective information of all aspects of the country's political, social, economic and cultural life. It has an educative and mobilizing role to play. It plays an important role in moulding public opinion and can be an instrument of social change. It may be pointed out here that Mahatama Gandhi in his autobiography has stated that one of the objectives of the newspaper is to understand the proper feelings of the people and give expression to it; another is to arouse among the people certain desirable sentiments ; and the third is to fearlessly express popular defects. It, therefore, turns out that the press should have the right to present anything which it thinks fit for publication.

18. The Freedom of Expression, in the light of the aforesaid judgment is not absolute, unlimited and unfeterred at all times and in all circumstances as giving an unrestrictive freedom of speech and expression would amount to uncontrolled licence, but at the same time, the Editor or a Newspaper or Journal has to act with greater responsibility to guard against untruthful news and publications for the simple reason that his utterances have a far greater

circulation and impact than utterances of an individual and by reason of their appearing in the print, they are likely to be believed by the ignorant.

19. The apex Court has again dealt with the Freedom of Speech and Expression in the case of *Narmada Bachao Andolan Vs. Union of India and others* reported in (1999) 8 SCC 308, and paragraphs 6 and 7 reads as under :

> 6. While hypersensitivity and peevishness have no place in judicial proceedings-vicious stultification and vulgar debunking cannot be permitted to pollute the stream of justice. Indeed under our Constitution there are positive values like right to life, freedom of speech and expression, but freedom of speech and expression does not include freedom to distort orders of the Court and present incomplete and a one side picture deliberately, which has the tendency to scandalise the Court. Whatever may be the motive of Ms. Arundhati Roy, it is quite obvious that she decided to use her literally fame by misinforming the public and projecting in a totally incorrect manner, how the proceedings relating to Resettlement and Rehabilitation had shaped in this Court and distorting various directions given by the Court during the last about 5 years. The writings referred to above have the tendency to create prejudice against this Court. She seems to be wholly ignorant of the task of the Court. The manner in which she has given twist to the proceedings and orders of the Court is in bad taste and not expected from any citizen, to say the least.
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> 7. We wish to emphasise that under the cover of freedom of speech and expression no party can be given a licence to misrepresent the proceedings and orders of the Court and deliberately paint an absolutely wrong and incomplete picture which has the tendency to scandalise the Court and bring it into disrepute or ridicule. The right of criticising, in good faith in private or public, a judgment of the Court cannot be exercised, with malice or by attempting to impair the administration of justice. Indeed, freedom of speech and expression is "life blood of democracy" but his freedom is subject to certain qualifications. An offence of scandalising the

> Courtier se is one such qualification, since that offence exists to protect the administration of justice and is reasonably justified and necessary in a democratic society. It is not only an offence under the contempt of Courts act but is sui generis. Courts are not unduly sensitive to fair comment or even outspoken comments being made regarding their judgments and orders made objectively, fairly and without any malice, but no one can be permitted to distort orders of the Court and deliberately give a slant to its proceedings, which have the tendency to scandalise the Court or bring it to ridicule, in the larger interest of protecting administration of justice.

20. The Freedom of Speech and Expression was considered again by the apex Court in the case of *Rajendra Sail Vs. M.P.High Court Bar Association and others* reported in (2005) 6 SCC 109 and it was a case wherein the Media has criticised the judgment delivered by the Madhya Pradesh High Court in the case of *Shankar Guha Niyogi* murder case. A news was published in newspaper Hitavada on 4/7/1998 which became subject matter of initiation of Contempt of Court Proceedings against the alleged contemners. The apex Court has accepted the unconditional apology tendered by the contemners therein with a warning to be more careful and responsible in future.

21. The apex Court in the aforesaid case has held that no criticism of a judgment, however, vigorous can amount to contempt of court provided it is kept within the limits of reasonable courtesy and good faith. It was also held that a fair and reasonable criticism of a judgment which is a public document or which is a public act of a Judge concerned with administration of justice would not constitute a contempt.

22. The apex Court in the case of *Pebam Ningol Mikoldevi Vs. State of Manipur and others* reported in (2010) 9 SCC 618, has considered detention of a journalist who was Editor of a Manipuri paper on grounds of indulging in activities prejudicial to maintenance of public order being involved in extortion of money along with UNLF, an unlawful association. In the aforesaid case, the Writ Petition preferred by the wife before the High Court was dismissed and the matter went up to the apex Court. The apex Court has set aside the detention under the National Security Act, 1980 and paragraphs 27 to 29 and 32 to 39 of the judgment delivered by the apex Court, reads as under :

27) In light of these decisions, to determine the validity of the detention order, it is necessary to go into the materials relied on by the detaining Authority in passing the detention order. The documents relied upon by the District Magistrate, West Imphal, as mentioned in the Grounds for Detention dated 28/09/2009 are:

a) The statement of the detenu given before the I.O. on 18/09/2009.

b) Statement of S.I. T. Khogen Singh of CDO/I.W.

recorded under S. 161 Cr.P.C. in connection with F.I.R. No. 183 (9) 09 SJM-P.S. under S. 17/20 of the Unlawful Activities (Prevention) Act, 1967.

c) Statement of Rfm. No. 15007038 L. Rajen Singh of CDO/ I.W. recorded under S. 161 Cr.P.C. in connection with F.I.R. No. 183 (9) 09 SJM-P.S. under S. 17/20 of the Unlawful Activities (Prevention) Act, 1967.

d) Statement of C/No. 0601193 S. Khomei Singh recorded under S. 161 Cr.P.C. in connection with F.I.R. No. 183 (9) 09 SJM-P.S. under S. 17/20 of the Unlawful Activities (Prevention) Act, 1967.

e) Copy of arrest memo dated 17/09/2009.

f) Copy of seizure memo dated 17/09/2009.

g) Copy of Manipur Local daily "the Poknapham" dated 08/03/1999.

h) Copy of Notification under No. S.O. 1922 (E) dated 13/11/2007.

28) We are conscious of the fact that the grounds stated in the order of detention are sufficient or not, is not within the ambit of the discretion of the court and it is the subjective satisfaction of the detaining authority which is implied. However, if one of the grounds or reasons which lead to the subjective satisfaction of the detaining authority under NS Act, is non-existent or

misconceived or irrelevant, the order of detention would be invalid.

29) Keeping in view these well settled legal principles, we have perused the grounds of detention and the documents relied on by the detaining authority while passing the order of detention. In our considered view, the grounds on which detention order is passed has no probative value and were extraneous to the scope, purpose and the object of the National Security Act. This Court in the case of *Mohd. Yousuf Rather Vs. State of Jammu & Kashmir and Ors.* (AIR 1979 SC 1925) has observed that under Article 22(5), a detenu has two rights (1) to be informed, as soon as may be, of the grounds on which his detention is based and (2) to be afforded the earliest opportunity of making a representation against his detention. The inclusion of an irrelevant or non-existent ground among other relevant grounds is an infringement of the first right and the inclusion of an obscure or vague ground among other clear and definite grounds is an infringement of the second right. No distinction can be made between introductory facts, background facts and `grounds' as such; if the actual allegations were vague and irrelevant, detention would be rendered invalid.

32) Furthermore, none of the other documents substantiate the involvement of the detenu in unlawful activities as alleged in the detention order. Thus, it is clear that there was no pertinent or relevant material on the basis of which, the detention order could be passed.

33) The second issue is that of delay. There has been a delay of 7 days, i.e. from 09/10/2009 to 16/10/2009, in forwarding the representation of the detenu to the Central Government. There has been no explanation of the reasons for this delay given by the respondents.

34) Article 22(5) of the Constitution of India mandates in preventive detention matters. The detenu should be afforded the earliest possible opportunity to make a representation against the order. With regard to the importance of delay in preventive detention matters under the National Security Act,

it has been held by this Court in *Union of India v. Laishram Lincola Singh @ Nicolai,* (2008) 5 SCC 490, that: "There can be no hard and fast rule as to the measure of reasonable time and each case has to be considered from the facts of the case and if there is no negligence or callous inaction or avoidable red-tapism on the facts of a case, the Court would not interfere. It needs no reiteration that it is the duty of the Court to see that the efficacy of the limited, yet crucial, safeguards provided in the law of preventive detention is not lost in mechanical routine, dull casualness and chill indifference, on the part of the authorities entrusted with their application. When there is remissness, indifference or avoidable delay on the part of the authority, the detention becomes vulnerable." (emphasis supplied).

35) On the specific ground of delay in forwarding the representation under the National Security Act, it has been observed by this Court in *Haji Mohd. Akhlaq v. District Magistrate*, 1988 Supp (1) SCC 538, that:

"There can be no doubt whatever that there was unexplained delay on the part of the State Government in forwarding the representation to the Central Government with the result that the said representation was not considered by the Central Government till October 16, 1987 i.e. for a period of more than two months. Section 14(1) of the Act confers upon the Central Government the power to revoke an order of detention even if it is made by the State Government or its officer. That power, in order to be real and effective, must imply a right in a detenu to make representation to the Central Government against the order of detention. Thus, the failure of the State Government to comply with the request of the detenu for the onward transmission of the representation to the Central Government has deprived the detenu of his valuable right to have his detention revoked by that Government." (emphasis supplied)

36) In the matter before us, a delay of 7 days has occurred in the forwarding of the representation. This may not be inordinate;

however, at no stage has there been an explanation given for this delay. The State Government or Central Government has not clarified the same and thus the delay remains unexplained.

37) In light of the fact that none of the documents relied on by the detaining Authority in passing the detention order can be deemed to be pertinent, and the fact that the delay has remained unexplained, there is sufficient ground made out in order to quash the order of preventive detention made against the detenu.

38) Before parting with the case, we wish to add that in a criminal case, if it is initiated against the detenu, the prosecution would not be in a position to procure evidence to sustain conviction cannot be a ground to pass an order of preventive detention under National Security Act. Therefore, we cannot agree with the submission made by the learned counsel for the State of Manipur.

39) As a result of our above discussion, we cannot sustain the impugned judgment and order of the High Court and the order of detention passed by the detaining authority. Accordingly, the appeal is allowed. The impugned order of the High Court and the order of detention passed by the detaining authority are set aside. Ordered accordingly.

23. In the aforesaid case, the journalist was detained in National Security Act and the apex Court has held that the grounds on which the detention order was passed had no probative value and were extraneous to the scope, purpose and object of NSA. It has also been held in the aforesaid case that individual liberty is a cherished right, one of the most valuable fundamental rights guaranteed by the Constitution to the citizens of this country.

24. Freedom of expression, as contemplated by Article 19(1)(g) of the Constitution of India is available to the Press and merely because a Journalist is reporting against the corruption in the society or about the misdeeds of public servants, he cannot be slapped with an order passed under the M.P. Rajya Suraksha Adhiniyam. Though the order passed under the said Adhiniyam, does not refer to any report, but, at the same time in the manner and method the order has been passed in respect of externment of a journalist,

which is based upon petty cases, in which he has been exonerated, impliedly means that attempt was made by the administration to silence the voice of a journalist who was reporting against the administration.

25. The Constitution of India guarantees that there will be freedom of speech and expression, but reasonable restrictions can be imposed. Reasonable restriction does not mean to restrict a journalist by slapping an order of externment under the M.P. Rajya Suraksha Adhiniyam 1990. This Court, in view of the aforesaid, is of the considered opinion that the impugned order passed by the respondents was certainly an act amounting to infringment of fundamental rights guaranteed under the Constitution of India.

26. This Court in the case of *Ravindra Singh Sikarwar Vs. State of M.P.* Reported in ILR [2010] MP 86, in paragraphs 17 to 21 has held as under :

> 17. The learned counsel for the petitioner has relied upon a judgment delivered by this Court in the case of *Pyare Fukki Vs. District Magistrate, Bhopal and others* 2007(4) M.P.H.T.60 and paragraph 4 of the judgment is relevant which reads as under:
>
> "On a close scrutiny of the record, I find that on receipt of the information from the Superintendent of Police the matter was taken up and the statements of the witnesses were recorded. Thereafter, a show-cause notice under Section 8(1) of the Adhiniyam was issued to the petitioner. I find that along with the show-cause notice other material on the basis of which the said show-cause notice was issued, i.e., statement of witnesses were not supplied to the petitioner. The record indicates that before issuing show-cause notice the statement of four witnesses including the Police Personnels were recorded and it is on the basis of these statements the show-cause notice was directed to be issued. Having not supplied copies of the statements, in my considered view, the petitioner has been denied proper and effective opportunity of submitting reply to the show-cause notice. From the record, I find that the statements of in all four witnesses were recorded and on the basis of the aforesaid statements the case was registered against

the petitioner and he was issued a show-cause notice. The non-supply of these vital documents to the petitioner vitiates the entire proceedings. Even after the petitioner appeared through his Counsel the aforesaid documents were not supplied to him and therefore, passing of the ex parte order of externment without supplying all these documents to the petitioner is not proper (See *Dinnu @ Dinesh Vs. State of M.P.* 2005 (II) MPJR SN 16)."

18. In the case of *Pyare Fukki* (supra), the learned single Judge of this Court has again held that the statements of witnesses including the police personnel recorded in the matter should have been supplied to the person facing the proceedings under the provisions of the Adhiniyam, 1990 and as the same was not done, the order of externment and the order passed by the appellate authority affirming the same were set aside.

19. The learned counsel for the petitioner has further relied upon a judgment delivered by a Division Bench of this Court in the case of *Ramkhiladi Gurjar vs. State of M.P., and another,* 2008(2) JLJ 430 wherein an order of detention of the petitioner therein passed by the competent authority under the National Security Act, 1980 has been set aside on the ground that no objective consideration of the matter was done by the competent authority while passing an order under the Act , 1980.

20. Lastly, the learned counsel for the petitioner has relied upon a judgment delivered by the Hon'ble Apex Court in the case of *State of Maharashtra Vs. Public Concern for Governance Trust and Others* (2007) 3 Supreme Court Cases 587. wherein the Hon'ble Apex Court has held that the principles of natural justice and fair play are to be afforded where an order has been passed against a person adversely effecting the person concerned. Paragraphs 39 to 41 are relevant and the same reads as under:

"The party-in-person has also pointed out certain findings in the judgment of the High Court. We do not propose to go into the merits of the other contentions which are the subjectmatter

of Special Leave Petition No.336 of 2006. In our opinion, when an authority takes a decision which may have civil consequences and affects the rights of a person, the principles of natural justice would at once come into play. Reputation of an individual is an important part of one's life. It is observed in *D.F. Marion Vs. Minnie Davis* and reads as follows:

"The right to enjoyment of a private reputation, unassailed by malicious slander is of an ancient origin, and is necessary to human society. A good reputation is an element of personal security, and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property."

This Court also in Board of Trustees of the *Port of Bombay V. Dilipkumar Raghavendranath Nadkarni* has observes that right to reputation is a facet of right to life of a citizen under Article 21 of the Constitution.

It is thus amply clear that one is entitled to have an preserve one's reputation and one also has a right to protect it. In case any authority in discharge of its duties fastened upon it under the law, travels into the realm of personal reputation adversely affecting him, it must provide a chance to him to have his say in the matter. In such circumstances, right of an individual to have the safeguard of the principles of natural justice before being adversely commented upon is statutorily recognized and violation of the same will have to bear the scrutiny of judicial review."

21. Keeping in view the fact that the impugned order of externment dated 06th November, 2008 (Annexure P/2) passed by the District Magistrate, Morena and the order dated 25th March,2009 passed by the Commissioner, Chambal Division, Morena (Annexure P/1) having been passed without affording proper opportunity of hearing and without supplying all the relevant material documents are therefore set aside, both the writ petitions stand allowed and the matter is remanded to the District Magistrate, Morena, for a fresh decision in the matter. The entire exercise shall be concluded by the District

Magistrate, Morena, within a period of sixty days from the date of receipt of a certified copy of this order.

27. In the light of the aforesaid judgment, as there is a complete violation of the principles of natural justice and fair play in the light of the fact that the District Magistrate, has not provided all material documents including the statements of witnesses, the order passed by the District Magistrate, deserves to be set aside and is accordingly set aside.

28. Resultantly, the impugned order dt. 4/4/2014 passed by the District Magistrate, Rajgarh and the order dt. 21/7/2014 passed by the Commissioner, Bhopal Division, Bhopal are quashed with costs of Rs.10,000/- to be paid by the State Government through Collector within a period of 30 days from today.

*Order accordingly.*

**I.L.R. [2015] M.P., 1729**
**WRIT PETITION**
***Before Mr. Justice S.C. Sharma***
W.P. No. 3611/2007 (Indore) decided on 3 November, 2014

TOOFAN SINGH ...Petitioner
Vs.
M.P. STATE CIVIL SUPPLIES & anr. ...Respondents

(Alongwith W.P. No. 4004/2007)

***Service Law - Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 14*** **- Punishment of stoppage of one increment with cumulative effect and recovery against petitioner in joint enquiry - Held - No violation of law - Scope of interference is limited - No reason to interfere - Petition dismissed. (Paras 16 & 20)**

*सेवा विधि – सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14* – संयुक्त जांच में याची के विरूद्ध संचयी प्रभाव से एक वेतन वृद्धि रोके जाने और वसूली की शास्ति – अभिनिर्धारित – विधि का कोई उल्लंघन नहीं – हस्तक्षेप की परिधि सीमित है – हस्तक्षेप का कोई कारण नहीं – याचिका खारिज।

**Cases referred :**

(2003) 9 SCC 286, (2006) 7 SCC 212, (2007) 4 SCC 669, (2008) 5 SCC 569, (2008) 15 SCC 657, (2012) 6 SCC 357, (2009) 15 SCC 620,

(2011) 11 SCC 535.

*A.K. Sethi* with *Rishabh Sethi,* for the petitioner.
*A. Tugnawat,* for the respondents.

**ORDER**

**S.C. SHARMA, J. :-** Regard being had to the similar controversy involved in these cases, they have been heard analogously together with the consent of the parties and a common order is being passed in the matter. Facts of Writ Petition No.3611/2007 are narrated as under:-

2. The petitioner before this Court has filed this present petition being aggrieved by the order of punishment dated 7.1.2006 passed by the respondent No.1 as well as the order rejecting his appeal dated 7.5.2007.

3. The facts of the case reveal that the petitioner at the relevant point of time was working as a District Manager, Madhya Pradesh Civil Supply Corporation Ltd. and was posted at Badwani, a charge sheet was issued on 29.11.2002 under rule 14 of M.P. Civil Services (Classification Control and Appeal) Rules 1966. Three charges were levelled against the petitioner. The petitioner has submitted a reply on 12.12.2002 and thereafter an order was passed on 7.4.2003 appointing the Inquiry Officer and the Presenting Officer. Five witnesses were produced on behalf of the department and the petitioner has also submitted the defence statement alongwith 8 documents. It has further been stated that the Inquiry Officer vide enquiry report dated 19.11.2004 has held that the charge No.1 and 3 were found partly proved and charge No.2 was found fully proved. It has been submitted that the petitioner was served the Inquiry Report alongwith a show cause notice dated 13.10.2005 to which the reply was filed on 28.10.2005. Thereafter a punishment order was passed on 6.1.2006 by which a punishment of withholding one increment with cumulative effect was inflicted upon him and a recovery of Rs.2,77,462/-has also been inflicted upon him. As it was a case of joint enquiry 75% of the aforesaid amount was to be paid by the petitioner. The petitioner has thereafter preferred an appeal and the appeal of the petitioner was dismissed by an order dated 7.5.2007 and the same has been communicated vide letter dated 4.6.2007.

4. The petitioner has raised various grounds before this Court and his contention is that no charge sheet was issued jointly to the petitioner and without there being any order of holding a common enquiry as provided under rule 18 of M. P. Civil Services (Classification Control and Appeal) Rules 1966, the proceedings which too took place are void-ab-initio. The second

ground raised is in respect of additional charge sheet dated 21.3.2003 and the contention is that no Inquiry Officer nor the Presenting Officer was appointed and therefore, the proceedings pursuant to the charge sheet dated 21.3.2003 are bad in law. It has also been stated that in the departmental enquiry proceedings none of the charges against the petitioner can be proved either on the basis of oral evidence or on the basis of documentary evidence and the present case is a case of perverse findings, hence the order of the punishment and the order dismissing the appeal of the petitioner deserves to be set aside.

5. Another ground has been raised that the misconduct, if any cannot constitute a misconduct in the eyes of law and the charges if any were against Mr. A.K. Parasar, Accountant and the petitioner has been unnecessary punished by the respondents. It has been stated that the petitioner has not been permitted to lead the evidence in the matter. Only oral statement was recorded and the defence witnesses were not permitted to be examined. The documents mentioned in the charge sheet were also not given to the petitioner and therefore, the procedure as prescribed under rule 14 of M.P. Civil Services (Classification Control and Appeal) Rules 1966 was not followed.

6. Another ground has been raised that the Inquiry Report dated 19.11.2004 and 31.8.2005 do not contain the contents as required under rule 14 (23) of Rules 1966. It has been further stated that the Inquiry Report is based upon the surmises, conjecture and assumption as well as presumption and therefore, the findings arrived at by the Inquiry Officer are perverse findings. It has also been stated that the petitioner was never found to be indulged in any misconduct as levelled in the charge sheet and the Inquiry Officer has given the perverse findings. The further contention of the petitioner is that the defence of the petitioner has not been considered at all and therefore the impugned orders deserve to be set aside. Another ground has been raised that the Inquiry Officer as well as disciplinary authority has failed to take into account the rate approved by the Collector and the transportation done in the matter was less than the rate approved by the Collector and therefore, no loss was caused to the Corporation in transportation, which is the subject matter of the charge sheet. Lastly a ground has been raised that the order passed by the disciplinary authority is an unreasoned and non- speaking order. The petitioner has prayed for quashment of the order passed by the disciplinary authority as well as the appellate authority.

7. A reply has been filed in the matter and the stand of the Corporation is that the petitioner was charge sheeted on 29.11.2002 for committing a misconduct and he did submit a reply. The respondents have further stated that another charge sheet dated 3.4.2003 was issued and the Inquiry Officer was appointed to enquire into the charges in respect of both the charge sheets as the additional charge sheet was in continuance to the charges earlier framed and the Inquiry Officer, who has submitted the report in respect of other charge sheet was authorised to submit the report in respect of the additional charges also. The authorisation letter was also issued in that behalf on 25.7.2003. The respondents have also stated that show cause notices were issued to the petitioner on 13.10.2005 and 5.1.2005, meaning thereby after conclusion of both the departmental enquiry and the petitioner did submit reply to the show cause notices and after conducting a detailed enquiry they have passed the order of punishment. The respondents have also replied to the grounds raised by the petitioner. It has been stated that the joint enquiry was conducted as per the order and and approval of Managing Director by General Manager (Administration) and Company Secretary. It has also been stated that the Inquiry Officer has been appointed in both the enquiries and no findings are perverse findings. In respect of principles of natural justice and fair play it has been stated that the defence witnesses were also permitted to be examined and it is wrong on the part of the petitioner to say that the documents mentioned in the charge sheet were not supplied to him. The petitioner in case documents were not supplied to him as alleged, could have certainly made a request to the Inquiry Officer demanding those documents, but no such request was made. The respondents have followed the rule of 14 (23) M. P. Civil Services (Classification Control and Appeal) Rules 1966. The respondents have stated that the petitioner being a District Manager at the relevant point of time was responsible for all transportation and therefore, he has been punished after finding him guilty in the departmental enquiry.

8. A rejoinder is also on record and the same reflects that the petitioner has raised a ground that he has not been granted an opportunity of personal hearing. It has also been stated that no loss was caused to the State Exchequer and it can never be said that the transportation done under the order of the petitioner was contrary to the various policies and the instructions issued from time to time. It has also been brought to the notice of this Court that the petitioner has attained the age of superannuation in the year 2012 and so far as the punishment of withholding of one increment now it has lost its significance.

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

10. In the present case the petitioner at the relevant point of time was working as a District Manager, Madhya Pradesh Civil Supply Corporation Ltd. and was posted at Badwani. A charge sheet was also issued on 29.11.2002 and thereafter a supplementary charge sheet was also issued. On 3.4.2003 an Inquiry Officer was appointed and the Inquiry Officer has submitted its report after meticulously scrutinizing the evidence on record. Based upon the report of the Inquiry Officer and after issuing a proper show cause notice dated 13.10.2005 a punishment order has been passed on 6.12007, withholding one increment with cumulative effect and recovery has also been ordered. The appeal of the petitioner has already been dismissed by an order dated 7.5.2007. This court has carefully gone through the entire record and it is a case where the petitioner was served with a charge sheet and the petitioner did submit a detailed and exhaustive reply to the charge sheet in question. An order was passed for holding a joint enquiry with the approval of the Managing Director and the findings arrived at by the Inquiry Officer are based upon the oral as well as documentary evidence. It has been vehemently argued that certain documents were not supplied to the petitioner. There is no document on record to establish that the petitioner demanded certain documents and they were not given by the Inquiry Officer. It has been stated that no Presenting Officer was appointed in the matter. The charges have been established against the petitioner based upon the oral as well as documentary evidence and the petitioner has not been able to point out the prejudice caused to him in the matter. The principles of natural justice and fair play have been followed in the matter. It has also been stated that the petitioner was not permitted to cross-examine the witnesses. There is no document on record which establishes that the petitioner was not permitted to cross-examine the witnesses, in fact the department has permitted the defence witnesses to be examined. This itself shows that the department has given a fair and reasonable opportunity to the petitioner while conducting the departmental enquiry. The opportunity of personal hearing after conclusion of the enquiry cannot be claimed as a matter of right as claimed in the present writ petition. The departmental enquiry has been held strictly in consonance with the statutory provisions of law governing the field i.e. M.P. Civil Services (Classification Control and Appeal) Rules 1966 and the learned counsel appearing for the petitioner has not been able to point out violation of any statutory provisions

of law in the matter nor violation of any statutory provision of law has been noticed by this Court from the record available. The respondents, as the petitioner has been found guilty for the alleged misconduct, has rightly punished and for the loss caused to the State Exchequer recovery has been ordered. The scope of interference by this Court has been considered by the Hon'ble Supreme Court in catena of judgments. The apex Court in the case of *State of Rajasthan and Ors. Vs. Sujata Malhotra* reported in (2003) 9 SCC 286 in paragraphs 3 and 5 has held as under :-

> "3. Against the said order of termination, she approached the High Court by filing a writ petition. By the impugned judgment, the High Court being of the opinion that the punishment of termination is grossly disproportionate to the delinquency in question, set aside the order of termination and directed reinstatement and payment of 50 per cent as back-wages with the further direction that the period of absence would be treated as extraordinary leave which, according to the High Court, is itself a punishment for over-stay. The aforesaid conclusion of the High Court; on the face of it, is erroneous inasmuch as the order of an employer to treat a particular period of absence as extraordinary leave when the employee has no leave due, by no stretch of imagination can be held to be an order of punishment.
>
> 5.Having considered the rival submissions and on examining the impugned judgment of the High Court, we find considerable force in the submissions made by the learned counsel for the appellant. The High Court possibly would not be within its power to interfere with an order of punishment inflicted in a departmental proceeding until and unless any lacuna in the departmental proceeding is noticed or found. But having regard to the fact that the order of reinstatement has already been implemented and the respondent is continuing in service subsequent to the date of the order of the High Court, we are not inclined to interfere with that part of the order of the High Court even though, we find considerable force in the arguments of the counsel for the State of Rajasthan. While, therefore, the order directing reinstatement of the respondent is upheld, we cannot sustain the other part of the order directing payment of

back-wages to the extent of 50 per cent for the period the respondent was not in service, we, therefore, set aside that part of the order of the High Court. For the purpose of clarification, we reiterate that though the respondent would be entitled to be reinstated in service and the period of her absence would be treated as a part of continuity in the service for the purpose of retiral benefit but she would not be entitled to any pecuniary benefits for the total period of her absence till the date of her reinstatement in service. The appeal stands disposed of accordingly."

In the aforesaid case it has been held that interference by the High Court is not permissible until and unless any lacuna is established in the departmental enquiry.

12. The apex Court in the case of *State Bank of India and Ors. Vs. Ramesh Dinkar Punde* reported in (2006) 7 SCC 212 in paragraphs 6, 9, 12 and 13 has held as under :-

"6. Before we proceed further, we may observe at this stage that it is unfortunate that the High Court has acted as an appellate authority despite the consistent view taken by this Court that the High Court and the Tribunal while exercising the judicial review do not act as an appellate authority. Its jurisdiction is circumscribed and confined to correct errors of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of principles of natural justice. Judicial review is not akin to adjudication on merit by re-appreciating the evidence as an Appellate Authority. (See *Govt. of A.P. and Ors. (appellant) v. Mohd. Nasrullah Khan (respondent)* (2006) 2 SCC 373 at page SCC 379).

9. It is impermissible for the High Court to re-appreciate the evidence which had been considered by the Inquiry Officer a Disciplinary Authority and the Appellate Authority. The finding of the High Court, on facts, runs to the teeth of the evidence on record.

12. From the facts collected and the report submitted by the Inquiry Officer, which has been accepted by the Disciplinary

> Authority and the Appellate Authority, active connivance of the respondent is eloquent enough to connect the respondent with the issue of TDRs and overdrafts in favour of Bidaye.
>
> 13. We are, therefore, clearly of the view that the High Court was erred both in law and on facts in interfering with the findings of the Inquiry Officer, the Disciplinary Authority and the Appellate Authority by acting as a court of appeal and re-appreciating the evidence."

In the aforesaid case the Apex Court has held that re-appreciation of evidence is impermissible and the High Court has erred in acting as a court of appeal and re-appreciating the evidence. In light of the aforesaid judgment, the question of re-appreciating the evidence in question does not arise especially when the principles of natural justice and fair play have been followed by the respondents.

13. The apex Court in the case of *Coimbatore District Central Cooperative Bank Vs. Coimbatore District Central Cooperative Bank Employees Association and Anr.* reported in (2007) 4 SCC 669 in paragraphs 15, 18, 19 and 30 has held as under :-

> "15 At the enquiry, all the charges levelled against the employees were established. In the light of the said finding, the Management imposed punishment of (i) stoppage of increment of 1 to 4 years with cumulative effect; and (ii) non-payment of salary during period of suspension. In our considered opinion, the action could not be said to be arbitrary, illegal, unreasonable or otherwise objectionable. When the Union challenged the action and reference was made by the 'appropriate Government' to the Labour Court, Coimbatore, the Labour Court considered all questions in their proper perspective. After affording opportunity of hearing to both the parties, the Labour Court negatived the contention of the Union that the proceedings were not in consonance with principles of natural justice and the inquiry was, therefore, vitiated. It held that the inquiry was in accordance with law. It also recorded a finding that the allegations levelled against the workmen were proved and in view of the charges levelled and proved against the workmen, the punishment imposed on them could not be said to be excessive, harsh or disproportionate. It accordingly

disposed of the reference against the workmen. In our considered opinion, the award passed by the Labour Court was perfectly just, legal and proper and required 'no interference'. The High Court, in exercise of power of judicial review under Article 226/227 of the Constitution, therefore, should not have interfered with the well-considered award passed by the Labour Court.

18. 'Proportionality' is a principle where the Court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached aconclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise # the elaboration of a rule of permissible priorities.

19. de Smith states that 'proportionality' involves 'balancing test' and 'necessity test'. Whereas the former('balancing test') permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter('necessity test') requires infringement of human rights to the least restrictive alternative. ['Judicial Review of Administrative Action'; (1995); pp. 601-605; para 13.085; see also Wade & Forsyth; 'Administrative Law'; (2005); p.366].

30. In our opinion, therefore, the High Court was not right in exercising power of judicial review under Article 226/227 of the Constitution and virtually substituting its own judgment for the judgment of the Management and/or of the Labour Court. To us, the learned counsel for the appellant-Bank is also right in submitting that apart from charges 1 and 2, charges 3 and 4 were 'extremely serious' in nature and could not have been underestimated or underrated by the High Court."

In the aforesaid case, it has been held that until and unless the findings are based upon no evidence or are perverse, the high court cannot interfere with such findings, which are based upon the evidence.

14. The apex Court in the case of *Chairman-Cum- Managing Director V.S.P. & Ors. Vs. Goparaju Shri Prabhakar Hari Babu* reported in (2008) 5 SCC 569 in paragraphs 16, 18, 19, 20, 21 and 22 has held as under :-

> 16. Indisputably, respondent was a habitual absentee. He in his explanation, in answer to the charge sheet pleaded guilty admitting the charges. In terms of Section 58 of the Indian Evidence Act, charges having been admitted were not required to be proved. It was on that premise that the enquiry proceeding was closed. Before the enquiry officer, he did not submit the explanation that his mother being ill. He, despite opportunities granted to report to duty, did not do it. He failed to explain even his prior conduct.
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> 17. *In Sangramsinh P. Gaekwad & Ors. v. Shantadevi P. Gaekwad (Dead)* through LRs & Ors. 2005 (11) SCC 314, this Court noticing Section 58 of the Indian Evidence Act, held :
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> "214. In terms of the aforementioned provision, things admitted need not be proved. In view of the admission of Respondent 1 alone, the issue as regards allotment of 6475 shares should have been answered in favour of the appellants. The company petitioner at a much later stage could not be permitted to take a stand which was contrary to or inconsistent with the original pleadings nor could she be permitted to resile from her admissions contained therein."
>
> 18. It was observed that judicial admissions can be made the foundation of the rights of the parties.
>
> 19. A subsequent explanation before another authority, which had not been pleaded in the departmental proceedings, cannot by itself a ground to hold that the principles of natural justice had not been complied with in the disciplinary proceedings.
>
> 20. The jurisdiction of the High Court in this regard is rather limited. Its power to interfere with disciplinary matters is circumscribed by well known factors. It cannot set aside a

well reasoned order only on sympathy or sentiments. *[See Maruti Udyod Ltd. v. Ram Lal and Others* [(2005) 2 SCC 638]; *State of Bihar & Ors. v. Amrendra Kumar Mishra* [2006 (9) SCALE 549]; *Regional Manager, SBI v. Mahatma Mishra* [2006 (11) SCALE 258]; *State of Karnataka v. Ameerbi & Ors.* [2006 (13) SCALE 319]; *State of M.P. and Ors. v. Sanjay Kumar Pathak and Ors.* [2007 (12) SCALE 72] and *Uttar Haryana Bijli Vitran Nigam Ltd. & Ors. v. Surji Devi* [CA No.576 of 2008 decided on 22.1.2008].

21. Once it is found that all the procedural requirements have been complied with, the Courts would not ordinarily interfere with the quantum of punishment imposed upon a delinquent employee. The Superior Courts only in some cases may invoke the doctrine of proportionality. If the decision of an employer is found to be within the legal parameters, the jurisdiction would ordinarily not be invoked when the misconduct stands proved. {[See *Sangeroid Remedies Ltd. v. Union of India & Ors.* [(1999) 1 SCC 259]}.

22. The High Court in exercise of its jurisdiction under Article 226 of the Constitution of India also cannot, on the basis of sympathy or sentiment, overturn a legal order.

In the aforesaid case, it has been held that well reasoned order of departmental authority cannot be interfered with on the basis of sympathy or sentiments and there is a limited scope of interference that too when the principles of natural justice and fair play has been violated or there is violation of any statutory provisions of law.

15. The apex Court in the case of *State Bank of Hyderabad and Anr. Vs. P. Kata Rao* reported in (2008) 15 SCC 657 in paragraphs 21, 22, 23, 24, 25, 26 and 32 has held as under :-

"21. The case at hand is an exceptional one. Respondent was a responsible officer. He was holding a position of trust and confidence. He was proceeded with both on the charges of criminal misconduct as also civil misconduct on the same set of facts, subject, of course, to the exception that charges Nos.

11 and 15 stricto sensu were not the subject matter of criminal proceedings, as integrity and diligence, however, were not in question. Before us also it has not been contended that he had made any personal gain.

22. The High Court in its judgment categorically opined that he merely had committed some inadvertent mistakes. He did not have any intention to commit any misconduct. The purported misconduct on his part was neither willful nor there existed any fraudulent intention on his part to falsify the account. The High Court opined that the prosecution had failed to bring home the guilt of the accused beyond all reasonable doubts for the offences punishable under the provisions under the Indian Penal Code.

The judgment of the High Court states a definite view. It opined that the finding of the learned Trial Judge holding him guilty under Section 477A of the Indian Penal Code and the provisions of the Prevention of Corruption Act was perverse. The circumstances in favour of the accused, the High Court inferred, had wrongly been attributed against him by the Trial Judge.

23. A learned Single Judge of the High Court in his judgment dated 7.02.2005 only upon taking into consideration the observations made by the High Court in the said criminal appeal but also the other circumstances, brought on record, directed fresh consideration and disposal of the matter in accordance with the law upon giving an opportunity of hearing to the respondent. The Division Bench of the High Court, in the first round of litigation, noticed that the entire record had been perused by the learned Single Judge. It was found that the original authority had imposed a punishment of only stoppage of one increment with cumulative effect which was modified by the appellate authority into one of withholding of increment without cumulative effect and held that failure of the disciplinary and appellate authorities to take into consideration modified punishment has caused serious prejudice to the respondent.

24. It was furthermore noticed that in purported compliance of the directions issued by the learned Single Judge, the penalty of dismissal from service was re-imposed on the respondent.

25. The Division Bench, however, disagreed with the conclusion of imposition of stoppage of one increment. Even then it observed that in the facts and circumstances of this case the issue relating to dismissal of respondent needs reconsideration. It was directed:

"While doing so, the concerned authority shall keep in view the following factors:

(i) Both the disciplinary authority and this Court in Criminal Appeal No. 12 of 1996 found the respondent not guilty of charges of misappropriation, deriving the personal benefit for himself and causing loss to the bank.

(ii) The effect of the Judgment of this Court in Criminal Appeal No. 12 of 1996 in the light of the decision of the Supreme *Court in M. Paul Anthony's* case (supra) and *G.M. Tank's* case (supra).

(iii) Modified punishment of withholding of increment without cumulative effect imposed on the respondent is a minor penalty unlike the punishment of withholding of increment with cumulative effect, which was held to be a major penalty by the Supreme Court in *Kulwant Singh Gill's* case (supra).

(iv) While considering the proportionality of the punishment, distinction lies between the procedural irregularities constituting misconduct from the acts of misappropriation of finances, causing loss to the institution, etc."

26. We do not see any reason keeping in view the peculiar facts and circumstances of the case to disagree with the said findings, although we would like to reiterate the principles of law to which we have referred to hereinbefore.

32. As the respondent has merely been found to be guilty of commission of procedural irregularity, we are of the opinion

> that it is not a fit case where we should exercise our discretionary jurisdiction under Article 136 of the Constitution of India, particularly in view of the fact that the respondent has now reached his age of superannuation, and the appropriate authority of the appellant would be entitled to impose any suitable penalty upon him."

The Apex Court in the aforesaid case, has held that jurisdiction of superior court is quite limited in the matter of departmental enquiry.

16. In the present case, the respondents have passed the order of punishment based upon the enquiry report, which is again based upon the ample evidence available against the petitioner and therefore, in light of the aforesaid judgment, the question of interference in the facts and circumstances of the case with the punishment and the order passed by the appellate authority does not arise.

17. The apex Court in the case of *Registrar General, High Court of Patna Vs. Pandey Gajendra Prasad and Ors.* reported in (2012) 6 SCC 357 in paragraphs 18, 19, 20, 21, 22, 23 and 24 has held as under :-

> "18. It is trite that the scope of judicial review, under Article 226 of the Constitution, of an order of punishment passed in departmental proceedings, is extremely limited. While exercising such jurisdiction, interference with the decision of the departmental authorities is permitted, if such authority has held the proceedings in violation of the principles of natural justice or in violation of statutory regulations prescribing the mode of such enquiry or if the decision of the authority is vitiated by consideration extraneous to the evidence on the merits of the case or if the conclusion reached by the authority, on the face of it, is wholly arbitrary or capricious that no reasonable person could have arrived at such a conclusion, or grounds very similar to the above. (See: *Shashikant S. Patil & Anr.* (supra)).
>
> 19. Explaining the scope of jurisdiction under Article 226 of the Constitution, in *State of Andhra Pradesh Vs. S. Sree Rama Rao*[3], this Court made the following observations:
>
> The High Court is not constituted in a proceeding

> under Article 226 of the Constitution a court of appeal over the decision of the authorities holding a departmental enquiry against a public servant:

it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence.

20. Elaborating on the scope of judicial review of an assessment of the conduct of a judicial officer by a Committee, approved by the Full Court, in *Syed T.A. Naqshbandi & Ors. Vs. State of Jammu & Kashmir & Ors.*[4] this Court noted as follows:

> â€oeAs has often been reiterated by this Court, judicial review is permissible only to the extent of finding whether the process in reaching the decision has been observed correctly and not the decision itself, as such. Critical or independent analysis or appraisal of the materials by the courts exercising powers of judicial review unlike the case of an appellate court, would neither be permissible nor conducive to the interests of either the officers concerned or the system and institutions of administration of justice with which we are concerned in this case, by going into the correctness as such of ACRs or the assessment made by the Committee and approval accorded by the Full Court of the High Court.

21. In *Rajendra Singh Verma (Dead) Through LRs. & Ors. Vs. Lieutenant Governor (NCT of Delhi) & Ors.*[5], reiterating the principle laid

down in *Shashikant S. Patil & Anr.* (supra), this Court observed as follows:

> In case where the Full Court of the High Court recommends compulsory retirement of an officer, the High Court on the judicial side has to exercise great caution and circumspection in setting aside that order because it is a complement of all the Judges of the High Court who go into the question and it is possible that in all cases evidence would not be forthcoming about integrity doubtful of a judicial officer. It was further observed that:

If that authority bona fide forms an opinion that the integrity of a particular officer is doubtful, the correctness of that opinion cannot be challenged before courts. When such a constitutional function is exercised on the administrative side of the High Court, any [pic]judicial review thereon should be made only with great care and circumspection and it must be confined strictly to the parameters set by this Court in several reported decisions. When the appropriate authority forms bona fide opinion that compulsory retirement of a judicial officer is in public interest, the writ court under Article 226 or this Court under Article 32 would not interfere with the order.

22. In the present case, the recommendation of the Standing Committee to dismiss the first respondent from service was based on the findings in the enquiry report submitted by the enquiry officer pursuant to the departmental enquiry; his reply to the show cause notice; his ACR and other materials placed before it. The recommendation of the Standing Committee was approved and ratified by the Full Court.

23. There is nothing on record to even remotely suggest that the evaluation made, firstly by the Standing Committee and then by the Full Court, was so arbitrary, capricious or so irrational so as to shock the conscience of the Division Bench to justify its interference with the unanimous opinion of the Full Court. As regards the observation of the Division Bench on the reputation of the first respondent based on his ACRs, it would suffice to note

that apart from the fact that an ACR does not necessarily project the overall profile of a judicial officer, the entire personal file of the respondent was before the Full Court when a conscious unanimous decision was taken to award the punishment of his dismissal from service. It is also well settled that in cases of such assessment, evaluation and formulation of opinion, a vast range of multiple factors play a vital and important role and no single factor should be allowed to be blown out of proportion either to decry or deify issues to be resolved or claims sought to be considered or asserted. In the very nature of such things, it would be difficult, rather almost impossible to subject such an exercise undertaken by the Full Court, to judicial review, save and except in an extra-ordinary case when the court is convinced that some exceptional thing which ought not to have taken place has really happened and not merely because there could be another possible view or there is some grievance with the exercise undertaken by the Committee/Full Court. [(See: *Syed T.A. Naqshbandi* (supra)].

24. Having regard to the material on record, it cannot be said that the evaluation of the conduct of the first respondent by the Standing Committee and the Full Court was so arbitrary, capricious or irrational that it warranted interference by the Division Bench. Thus, the inevitable conclusion is that the Division Bench clearly exceeded its jurisdiction by interfering with the decision of the Full Court."

The Apex Court in the aforesaid case has held that the court may interfere, judicial review is permissible only when there is a violation of natural justice/ statutory regulations prescribing the mode of departmental enquiry or where the decision of the authorities is vitiated by considerations extraneous to evidence on merits of the case. In the present case the penalty order has been passed based upon an inquiry report in which the petitioner has been held guilty and the respondents have followed the statutory provisions as well as principles of natural justice and fair play, hence the question of interference keeping in view the judgment delivered by the Apex Court in the aforesaid case does not arise.

18. The apex Court in the case of *Chairman-cum- Managing Director Coal India Ltd. and Anr. Vs. Mukul Kumar Choudhuri and Ors*. reported

in (2009) SCC 620 again while dealing with the judicial review in the matter of departmental enquiry in paragraphs 13 and 14 has held as under :-

> 13. It has been time and again said that it is not open to the High Court to examine the findings recorded by the Inquiry Officer as a Court of Appeal and reach its own conclusions and that power of judicial review is not directed against the decision but is confined to the decision making process. In a case such as the present one where the delinquent admitted the charges, no scope is left to differ with the conclusions arrived at by the Inquiry Officer about the proof of charges. In the absence of any procedural illegality or irregularity in conduct of the departmental enquiry, it has to be held that the charges against the delinquent stood proved and warranted no interference.
>
> 14. The Single Judge of the High Court in paragraphs 43 and 44 of the judgment observed thus:
>
> "43. This Court is of the view that the so-called order dated 29.11.2000 is a mere communication WITHOUT ACTUALLY serving the original Order of the Disciplinary Authority. Merely transmitting the decision of the Disciplinary Authority was not sufficient since this was a matter involving the punishment of removal from service entailing civil consequences.
>
> 44. We are dealing with a case of removal from service for an alleged absence of 6(six) months. This Court is of the 10 view that the Respondents were bound to adhere to a fair and transparent procedure by firstly serving the actual order of the Disciplinary Authority upon the petitioner and then, by giving reasons as to why they chose not to agree with what the Petitioner wanted to say qua his absence when, after admitting the absence, he gave reasons as to why he had remained absent. They were also obliged to strictly obey with the Orders of this, court. In that view of the matter, the argument of Mr. Aloke Banerjee to the effect that the Respondents were not required to give reasons, are not acceptable to this Court. Consequently the Judgments cited by him namely AIR 1987

SC 2043 and the other Judgments such as 2001 (2) CHN 632 and 1991(2) SCC 716 are held to be not applicable because in this case, it was the desire and Order of the Hon'ble Division Bench that the Respondents should deal with the matter in accordance with law. In the opinion of this Court, "in accordance with law" means and includes observing the principles of natural justice and giving reasons because the Respondents were supposed to be dealing with his pleas relating to his explanations which were so very very crucial to his case. Consequently and in the facts and circumstances of this case, none of the Judgments cited by Mr. Banerjee can be said to have any Application."

In what we have already discussed, we find it difficult to accept the view of the Single Judge. The Division Bench like the Single Bench fell into grave error in not adequately adverting to the fact that the charges were admitted by the delinquent unequivocally and unambiguously and, therefore, misconduct of the Respondent No. 1 was clearly established. We are, therefore, unable to persuade ourselves to concur with the view of the High Court.

19. The apex Court in the case of *Union of India & Ors. Vs. Manab Kumar Guha* reported in (2011) 11 SCC 535 in paragraphs 11, 12 and 13 has held as under :-

"11. True it is that the Appellate Authority while setting aside the order of removal and directing for de-novo enquiry earlier had found the same bad in law on account of various grounds including the ground of non-examination of the victim Harish Chandra Ram. Thereafter in the de novo enquiry, the enquiry officer had taken pains to call Harish Chandra Ram from his native place but he did not appear during the enquiry. It is not the case of the writ petitioner that the disciplinary authority purposely withheld Harish Chandra Ram from appearing in the departmental enquiry. Harish Chandra Ram had given a written complaint, a copy of which was produced during the course of enquiry which supports the charge levelled against the writ petitioner.

12. Further writ petitioner in his defence had accepted the detention of Harish Chandra Ram and his release. However, he has denied the allegation of snatching of money from him but from his own defence, it is evident that he had accepted the incident except of course that he had not snatched the money.

13. On the basis of the materials on record, the enquiry officer held the writ petitioner guilty with which the disciplinary authority as also the appellate authority agreed. It is well settled that High Court while exercising the power of judicial review from the order of the disciplinary authority do not act as a Court of appeal and appraise evidence. It interferes with the finding of enquiry officer only when the finding is found to be perverse. We are of the opinion that the Division Bench of the High Court erred in setting aside the order of learned Single Judge and quashing the order of compulsory retirement. The finding recorded by the enquiry officer is based on the materials on record and on proper appreciation of evidence which cannot be said to be perverse calling for interference by the High Court in exercise of its power of judicial review.

The apex court in the aforesaid case held that the high court while exercising the power of judicial review in respect of order of disciplinary authority does not act as a court of appeal and appraise evidence. It can interfere with the finding of Inquiry Officer only when such findings are perverse.

20. In the present case as discussed earlier, the findings recorded by the Inquiry Officer are not at all perverse findings. The petitioner has been inflicted with a punishment of stoppage of one increment with cumulative effect and a recovery has been also ordered against him. It was a case of joint enquiry, the petitioner as well as other persons have already been found guilty for the misconduct and a recovery has been ordered against both the persons. In absence of violation of any statutory provision of law and also keeping in view the scope of interference by this Court, as per the law laid down by the Apex Court in the aforesaid cases, this Court does not find any reason to interfere with the departmental enquiry with, the order of punishment as well as order passed by the appellate authority. Ex-consequentia, the writ petition fails and is accordingly dismissed.

21. The connected writ petition i.e. WP No. 4004/2007 is also dismissed.

*Petition dismissed.*

**I.L.R. [2015] M.P., 1749**
**WRIT PETITION**
***Before Mr. Justice Alok Aradhe***
W.P. No. 13983/2014 (Jabalpur) decided on 19 November, 2014

ANIL SHRIVASTAVA (DR.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

(Alongwith W.P. No. 13984/2014, W.P. No. 14890/2014, W.P. No. 15197/2014 & W.P. No. 15203/2014.)

*A.* ***Service Law - Deputation*** **- Deputation can only be on temporary basis and in public interest to meet the exigency of public service - Provisions of Article 166 of the Constitution are only directory in character. (Para 7)**

*क.* *सेवा विधि – प्रतिनियुक्ति* – प्रतिनियुक्ति केवल अस्थाई आधार पर एवं लोक सेवा की आवश्यकता को पूरा करने के लिये लोक हित में की जा सकती है – संविधान के अनुच्छेद 166 के उपबंध केवल निदेशात्मक स्वरूप के हैं।

*B.* ***Service Law - Repatriation - Administrative instructions*** **- Do not have any force of law - Since petitioners have continued on deputation for more than 10 years and by the impugned orders they are being posted in rural areas with the object to provide medical facilities to the public in general - There is no infringement of the legal rights of the petitioners in withdrawing their deputation - Petition dismissed. (Paras 9 & 10)**

*ख.* *सेवा विधि – प्रत्यावर्तन – प्रशासनिक अनुदेश* – किसी विधि का बल प्राप्त नहीं – चूंकि याचीगण दस वर्षों से अधिक के लिये निरंतर प्रतिनियुक्ति पर रहे और जनसामान्य को चिकित्सीय सुविधायें उपलब्ध कराने के उद्देश्य से आक्षेपित आदेशों द्वारा उन्हें ग्रामीण क्षेत्रों में पदस्थ किया जा रहा है – याचीगण की प्रतिनियुक्ति वापस लेने से उनके विधिक अधिकारों का कोई अतिलंघन नहीं हुआ है – याचिका खारिज।

**Cases referred :**

AIR 1989 SC 1577, (1997) 8 SCC 372, (2000) 5 SCC 362, (2007) 14 SCC 498, (2013) 3 SCC 559, (1994) 4 SCC 659, AIR 1952 SC 317, AIR 1959 SC 65, AIR 1952 SC 12, AIR 1962 SC 1044, AIR 1980 SC 1037.

*Rajendra Tiwari* with *R.N. Tiwari & Suyash Tripathi,* for the petitioner.

*R.N. Singh* with *Rahul Rawat,* P.L. for the respondents.

**ORDER**

**ALOK ARADHE, J. :-** In this bunch of writ petitions singular issue, namely, the validity of the order of repatriation of services of petitioners to their parent department arises for consideration. Accordingly, the writ petitions were heard analogously and are being decided by this order. For the facility of reference, facts from Writ Petition No.13983/2014 are being referred to.

2. The petitioner was appointed as Medical Officer in the year 1978 under the Health and Family Welfare Department, Government of Madhya Pradesh and was posted at Mini Primary Health Centre, Kesharpal, District Bastar (now in Chhattisgarh). Thereafter, the petitioner was promoted to the post of Medical Specialist vide order dated 13.4.2000 by the Parent Department i.e. Health and Family Welfare Department, Government of Madhya Pradesh. By an order dated 05.6.2000 passed by and in the name of Governor, the services of the petitioner were handedover on deputation to the Medical Education Department. The petitioner was posted in G.M.Hospital, Rewa. The petitioner performed various duties assigned to him from time to time in G.M.Hospital, Rewa. The Dean, Medical College, Rewa by an order dated 09.5.2013 assigned the duties of the post of Senior Resident, Department of Medicine to the petitioner. However, by order dated 04.9.2014 the services of the petitioner were repatriated to his parent department and he was posted in Civil Hospital, Teothar, District Rewa. In the aforesaid background the petitioners have approached this Court.

3. Mr.Rajendra Tiwari, learned senior counsel for the petitioners submitted that petitioners hold Class-I Gazetted Post and by order dated 05.6.2000 issued by and in the name of Governor by the State Government the services of the petitioner were handed-over on deputation to Medical Education Department. Therefore, withdrawal of order of deputation of the petitioner cannot be by any authority other than the State Government. However, in the instant case the impugned order has been passed by the Additional Director, Administration. It is further submitted that the aforesaid order has been passed in contravention of Business Rules framed by the State Government under Article 166 of the Constitution of India. In this connection the learned senior counsel has also invited the attention of this Court to Rule

20 of Madhya Pradesh (Control, Classification & Appeal) Rules, 1966.

4. It is urged that there is no mention in the impugned order dated 04.9.2014 that any post facto sanction has been accorded to the order of repatriation and, therefore, the same smacks of foul play. It is also urged that Commissioner, Health has no power to pass any order in respect of the employees holding Class-I Gazetted post. It is pointed out that the services of the petitioners who were posted in District Rewa alone have been repatriated to the Parent Department whereas such exercise has not been undertaken in any other district. Lastly, it is submitted that the consent of Borrowing Department has not been taken. In support of aforesaid submissions, reference has been made to decision of Supreme Court in the case of *Jawaharlal Nehru University vs. Dr.K.S.Jaswatkar and others*, AIR 1989 SC 1577.

5. Mr.R.N.Singh, learned senior counsel has submitted that the services of the petitioners have been repatriated and the petitioners have been posted in various hospital in District Rewa in public interest. It is further submitted that petitioners were continuing on deputation for 14 years, 27 years, 16 years, 20 years and 19 years respectively and the impugned orders have been passed by the State Government. It is urged that there is no violation of Business Rules while passing the impugned orders and the petitioners have no legal right to continue on deputation. It is also urged that provisions of Article 166 of the Constitution of India are directory in nature. Learned senior counsel has also invited the attention of this Court to instructions dated 02.12.1988 and 31.3.2006 issued by General Administration Department to point out that maximum period of deputation shall be 4 years and thereafter, the order of deputation comes to an end automatically. In support of aforesaid submissions, learned senior counsel has placed reliance on the decisions in the cases of *State of Punjab and others vs. Inder Singh and others*, (1997) 8 SCC 372, *Kunal Nanda vs. Union of India and another*, (2000) 5 SCC 362, *Managing Director, U.P.Rajkiya Nirman Nigam vs. P.K.Bhatnagar and others*, (2007) 14 SCC 498 and *State of Bihar and another vs. Sunny Prakash and others*, (2013) 3 SCC 559.

6. By way of rejoinder reply learned senior counsel while referring to circular dated 31.3.2006 has submitted that Department of Health & Family Welfare ought to have approached the Medical Education Department for repatriation of services even as per the provisions of circular dated 31.3.2006.

It is further submitted that since the petitioners have spent long period on deputation, it is deemed that the competent authority has given its consent. It is further submitted that the Borrowing Authority can repatriate the services of the petitioner. However it is fairly submitted by learned senior counsel for petitioners that parent department has the power to repatriate the services of the petitioner but the procedure prescribed in the circular has to be followed which has not been followed in the instant case. It is also submitted that the decisions on which reliance has been placed by the respondents have no application to the facts of the case.

7. I have considered the respective submissions made by learned senior counsel for the parties. The concept of deputation is well understood in service jurisprudence and has recognized meaning. In other words, the deputation means service outside the cadre or outside the parent department. The deputation is deputing or transferring an employee to a post outside his cadre to another department on a temporary basis. The deputation can be aptly described as an assignment of an employee of one department to another department. The necessity for sending on deputation arises in public interest to meet the exigency of public service. See: *Umpati Choudhary Vs. State of Bihar and another,* (1994) 4 SCC 659. In *State of Bombay Vs. Purshottam Jog*, AIR 1952 SC 317, it has been held that if an order has not been passed in accordance with requirement of Article 166 of the Constitution, the order in question would be defective in form and it would be open to the State Government to prove by other means that such an order had been validly made. This view was affirmed by the Supreme Court subsequently, in the case *Ghaiomal & Sons Vs. State of Delhi*, AIR 1959 SC 65. Recently, the Supreme Court in the case of *State of Bihar and another (supra)* while taking note of the aforesaid decision held that provisions of Article 166 of the Constitution are only directory and not mandatory in character and if they are not complied with, it can be established as a question of fact that the impugned order infact was issued by the State Government.

8. While dealing with the amplitude of power under Article 226 of the Constitution of India in the case of *State of Orissa vs. Madan Gopal Rungta*, AIR 1952 SC 12 and in the case of *Calcutta Gas Co. Vs. State of West Bengal*, AIR 1962 SC 1044 it has been held that writs/directions/orders under Article 226 can be issued only after recording a finding that aggrieved party has a legal right and any such right has been infringed. It is well settled legal proposition that Article 226 of the Constitution grants an extraordinary remedy

which is essentially discretionary. Accordingly, the granting or withholding of relief may properly be dependent upon consideration of public interest. [See: *Shiv Shanker Dal Mills vs. State of Haryana*, AIR 1980 SC 1037].

9. In the instant case, from the data base of the Department of Health & Family Welfare, Government of Madhya Pradesh, it was found that 50 posts of Medical Specialists and 74 posts of Medical Officers are sanctioned in rural areas in Rewa District against which, only 6 Specialists and 55 Medical Officers are posted. It was further noticed that on account of deficiency of the Medical Specialists and the Medical Officers, the department is unable to provide medical services in rural areas. It was also noticed that petitioners have been posted on deputation in Government Medical College, Rewa for 14, 27, 16, 20 and 19 years respectively. Accordingly, a decision was taken to repatriate their services and to post them in rural area. Accordingly, an order dated 4.9.2014 was issued which was duly approved by Health Commissioner as well as Principal Secretary of Health & Family Welfare Department, Government of Madhya Pradesh which is evident from the note-sheets available on record. Thus, it is evident that the order has been passed by the State Government, in public interest.

10. So far as contention made by learned senior counsel that procedure prescribed in circular dated 31.3.2006 has not been followed is concerned, suffice it to say that the instructions on which reliance has been placed do not have any force of law. Admittedly, the petitioners have continued for more than ten years in Government Medical College, Rewa and they are being posted in rural areas with a view to provide medical facilities to the public in general. Even assuming that the procedure prescribed in the executive instructions dated 31.3.2006 has been violated, the same does not confer any legal right to the petitioners to continue on deputation, as the executive instructions do not have any force of law. At the most the petitioners can approach the competent authority for redressal of their grievance, if any, by submitting representations. The petitioners do not have any legal right to continue on deputation. In the absence of infringement of any legal right, no relief in exercise of extraordinary discretionary jurisdiction under Article 226 of the Constitution of India can be granted to the petitioners, specially in view of the fact that the impugned orders have been passed in public interest i.e. with the object to provide medical facilities to the public in general in rural areas.

11. In view of preceding analysis, I do not find any merit in the writ petitions. The same fail and are hereby dismissed.

*Petition dismissed.*

**I.L.R. [2015] M.P., 1754**
**WRIT PETITION**
***Before Mr. Justice A.M. Khanwilkar, Chief Justice &***
***Miss Justice Vandana Kasrekar***
W.P.(S) No. 12387/2004 (Jabalpur) decided on 5 December, 2014

SHAILENDRA SINGH NAHAR ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

*A.* ***Civil Services (Pension) Rules, M.P. 1976, Rule 42(1)(b), District and Sessions Judges (Death-cum-Retirement Benefits) Rules, M.P. 1964, Rule 1-A and Higher Judicial Service (Recruitment and Conditions of Service) Rules, M.P. 1994, Rule 14 - Compulsory retirement*** **- Petitioner - Additional District and Sessions Judge - Grant of selection grade - Previous adverse entries "Integrity Doubtful" - Held - After considering entire service record, even if judicial officer was awarded selection grade that would not wipe the previous adverse entries - Petition dismissed. (Paras 11 to 13)**

*क. सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 42(1)(बी), जिला एवं सत्र न्यायाधीश (मृत्यु सह सेवानिवृत्ति लाभ) नियम, म.प्र., 1964, नियम 1–ए एवं उच्चतर न्यायिक सेवा (भर्ती और सेवा शर्तें) नियम, म.प्र., 1994, नियम 14 – अनिवार्य सेवानिवृत्ति* – याची – अतिरिक्त जिला एवं सत्र न्यायाधीश – सिलेक्शन ग्रेड का प्रदान – पूर्ववर्ती प्रतिकूल प्रविष्टियां "सत्यनिष्ठा संदेहास्पद" – अभिनिर्धारित – संपूर्ण सेवा अभिलेख का विचार किये जाने के पश्चात् भी यदि न्यायिक अधिकारी को सिलेक्शन ग्रेड प्रदान किया गया, इससे पूर्ववर्ती प्रतिकूल प्रविष्टियां नहीं हटेंगी – याचिका खारिज।

*B.* ***Civil Services (Pension) Rules, M.P. 1976, Rule 42(1)(b), District and Sessions Judges (Death-cum-Retirement Benefits) Rules, M.P. 1964, Rule 1-A & Higher Judicial Service (Recruitment and Conditions of Service) Rules, M.P. 1994, Rule 14 - Compulsory retirement*** **- Administrative Committee made recommendation that 'suitable to continue in service' - Held - Full Court is the final authority and the decision of Full Court will prevail over the recommendation of**

**Administrative Committee.** **(Para 14)**

*ख. सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 42(1)(बी), जिला एवं सत्र न्यायाधीश (मृत्यु सह सेवानिवृत्ति लाभ) नियम, म.प्र., 1964, नियम 1–ए एवं उच्चतर न्यायिक सेवा (भर्ती और सेवा शर्तें) नियम, म.प्र., 1994, नियम 14 – अनिवार्य सेवानिवृत्ति* – प्रशासनिक समिति ने अनुशंसा की कि 'सेवा में बने रहने के लिये योग्य' – अभिनिर्धारित – फुल कोर्ट अंतिम प्राधिकारी है और फुल कोर्ट का निर्णय प्रशासनिक समिति की अनुशंसा पर अध्यारोही होगा।

*C. Interpretation of statute* - **(a) Even a Single adverse entry about integrity of a judicial officer may be sufficient to compulsorily retire him from service. (b) Theory of effacement of adverse entry is not attracted in respect of consideration of proposal for compulsory retirement.** **(Paras 12 & 13)**

*ग. कानून का निर्वचन* – (अ) किसी न्यायिक अधिकारी की सत्यनिष्ठा के बारे में एकमात्र प्रतिकूल प्रविष्टि भी उसे सेवा से अनिवार्य सेवानिवृत्त किये जाने के लिये पर्याप्त हो सकती है। (ब) प्रतिकूल प्रविष्टि के विलोपन का सिद्धांत, अनिवार्य सेवानिवृत्ति के लिये प्रस्ताव के विचारण के संबंध में आकर्षित नहीं होता।

**Cases referred :**

AIR 1977 SC 2411, 1978 LAB. I.C. 839, (2012) 3 SCC 580, (2010) 10 SCC 693, (2012) 8 SCC 58.

*Sankalp Kochar*, for the petitioner.
*Piyush Dharmadhikari*, G.A. for the respondent no.1/State.
*Ashish Shroti*, for the respondent no. 2.

**ORDER**

The Order of the Court was delivered by :
**MISS VANDANA KASREKAR, J. :-** The petitioner has filed the present writ petition challenging the order dated 27.11.2004 passed by respondent WPS No.12387/2004 No.1 thereby compulsorily retiring the petitioner with immediate effect. The said order is purportedly passed under Rule 42(1)(b) of M.P. Civil Services (Pension) Rules, 1976 (hereinafter referred to as "the Rules of 1976"), Rule 1-A of the M.P. District and Sessions Judges (Death-cum- Retirement Benefits) Rules 1964, Rule 56(2)(a) of Fundamental Rules and Rule 14 of the M.P. Higher Judicial Service (Recruitment and Service

Conditions) Rules, 1994. At the time when order of compulsory retirement was passed, the petitioner was working on the post of Additional District Judge.

2. The petitioner was selected for appointment on the post of Civil Judge Class-II on 21.07.1978. Thereafter, on 10.8.1978, he joined the post of Civil Judge Class-II. He was confirmed on the said post on 30.6.1982. The petitioner was thereafter promoted to the post of Civil Judge Class-I on 03.08.1984. Thereafter the petitioner was selected and appointed to the post of Chief Judicial Magistrate and then promoted and appointed as Officiating District and Sessions Judge in higher judicial service in the year 1991. The petitioner was confirmed on the post of District and Sessions Judge by the Full Court on 06.09.1995. The Administrative Committee No.1 in its meeting on 03.09.2001, found the petitioner suitable to continue in service and this recommendation was further unanimously approved in the Full Court meeting held on 03.11.2001. Thereafter, selection grade was given to the petitioner vide order dated 07.12.2001 w.e.f. 03.11.2001.

3. The petitioner has contended that his case was not considered for the purpose of compulsory retirement by the Full Court in its meeting in the year 2002-03. On 27.8.2004, however, the case of the petitioner was again considered for compulsory retirement and the Administrative Committee No.1 during the next screening in accordance with Clause 3(b) of the State Guidelines, opined that the petitioner is found suitable to continue in service. However, the Full Court took a contrary view. As a result, on 11.09.2004, the High Court i.e. respondent No.2 recommended to the State Government for compulsorily retiring the petitioner. On the basis of the said recommendation, respondent No.1 passed an order dated 13.09.2004 thereby retiring the petitioner compulsorily. That decision is the subject matter of this writ petition. The petitioner then filed SLP (Civil) No.7294/2011 challenging the interlocutory order passed in this writ petition, before the Apex Court. That SLP was withdrawn by him vide order dated 25.07.2012 with a liberty to pursue his present writ petition pending before this Court.

4. Learned counsel for the petitioner has assailed the order of compulsory retirement on the following grounds:

i) The service record of the petitioner is quite satisfactory and

he has received four grade "C" and one grade "B" during his preceding five years of service.

ii) That the petitioner was served with two adverse entries in the year 1994-95 and 1998-99, however, these two adverse entries are wiped out as he was granted the selection grade vide order dated 07.12.2001 w.e.f. 03.11.2001. The contention of the petitioner is that for the adverse entry of the year 1994-95, he submitted a representation which was rejected vide order dated 17.5.1995. So far as the adverse entry for the year 1998 is concerned, it is submitted that the petitioner submitted a representation against the same adverse entry and the said representation was rejected vide order dated 15.07.1999, however, his subsequent representation was allowed by Hon'ble the Chief Justice on 07.03.2002 and he has been upgraded from Grade "C" to Grade "B".

iii) That the Administrative Committee No.1 having considered the case of the petitioner for compulsory retirement and having found him to be suitable to continue in service, yet the order of compulsory retirement has been passed.

iv) The petitioner has further raised a ground that he has not attained the age of 50 years and, therefore, the order could not have been passed under Rule 42(1)(b) of the Pension Rules.

5. On the other hand, the respondents have supported the order of compulsory retirement on the ground that the entire service record of the petitioner was perused by the Full Court and on the basis of the record, the respondents have issued the order of compulsory retirement. The respondents have further contended that one adverse entry regarding integrity is sufficient to retire the petitioner compulsorily and the recommendation of the Administrative Committee is not binding on the Full Court. The respondents have further contended that overall performance of the petitioner was not satisfactory.

6. The respondent No.2 in the reply-affidavit, to oppose this petition, has asserted that the petitioner was retired when he was working as Additional District & Sessions Judge keeping in mind the proviso to Rule 42(1)(b) of the Rules of 1976, which stipulates that the Appointing

Authority in public interest may retire a Government servant after he has completed 20 years of qualifying service or 50 years of age, whichever is earlier. Indisputably, the petitioner had completed 20 years of qualifying service. Further, the decision was taken by the Full Court in its meeting held on 11.09.2004 after considering the case of the petitioner with reference to his entire service record. His overall performance was considered by the Full Court and the subjective satisfaction of the Full Court cannot be questioned by the petitioner much less the judicial review thereof is not open. The reply-affidavit refers to the ACR entries pertaining to the petitioner from the date he entered service and, in particular, for the year 1979-80 onwards, which reads as follows:

| **ACR FOR THE PERIOD ENDING** | **REMARK COMMUNICATED TO THE PETITIONER** |
|---|---|
| **31st March, 1980** | "Knowledge of law and judicial capacity were average and he was graded 'D'. |
| **31st March, 1983** | "Better disposal was expected from him. It appears that on account of his having presided over the Mobile Court of Motor Vehicle Magistrate, he could pay scant attention to proper law and procedure. However, he cherishes a desire to have required grasp over law and procedure. If he continues to work hard in that direction, he may acquire good grasp over law and procedure." |
| **31st March, 1984** | "His average monthly disposal works out to be 81.40%. He should improve his disposals." |
| **31st March, 1985** | "..... he should try to be more cordial with litigants and witnesses." |
| **31st March, 1986** | "4. Knowledge of law & ... Judicial capacity. — He is neither analytical nor scientific in his approach to judicial problems."<br>5. Is he industrious & .. has he coped effectually with heavy work? — "though young and energetic he did not show that zeal and spirit." |

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| | 6. Remarks about his promptness in the disposal of cases. | "Keeping in view the percentage of his disposal and the congetion of civil work in his Court, he has not shown that promptness which is natural with a young civil Judge handling a heavy file. |
| | 8. Remarks about supervision of the distribution of business among & his control over the subordinate Courts. | "He should follow Rules and order Civil and Criminal while fixing cases, for evidence." |
| | 13. General Remarks.... | "Shri Nahar will do better with cool mind and heart. His working is likely to improve. He has committed certain errors and omissions in the procedural matters which can be cured by concentration and devotion." |
| **31st March, 1987** | 8. Remarks about supervision of the distribution of business among & his control over the subordinate Courts. | ... "He should strictly follow Rules & Orders Civil & Criminal while fixing cases for evidence. He should maintain judicial diary properly." |
| **31st March, 1992** | "Necessity of doing court work with more patience & devotion.... Necessity of deep study of law.... Not doing monthly inspection.... But necessity of making habit of writing judgment by deep study of case." | |
| **31st March, 1993** | ".....His supervision over the section in his charge is very ordinary, and his control over his subordinate staff is also just ordinary.... He possesses just an | |

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| | ordinary reputation.... He writes just ordinary judgments, civil as well as criminal. |
| **31st March, 1994** | "The disposal is not very prompt.... he also has just ordinary control over his subordinate staff." |
| **31st March, 1995** | ".....General reputation is not satisfactory. Considering his over-all performance, he is in category 'D'.<br><br>**Note:**<br><br>(i) Representation against this adverse remarks – **rejected** vide D.O. No.506 dated 17.5.1995.<br><br>(ii) Vide Minutes of the Court Meeting of Hon'ble Judges held on 29.4.1995 at Subject No.4 recommendation of the Committee regarding consideration of question of confirmation of officers in HJS were accepted subject to following modifications:<br><br>"Shri Shailendra Singh Nahar is found suitable for confirmation. The adverse remarks in the A.C.R. to the effect that his reputation is not upto the mark shall be removed." |
| **31st March, 1997** | ".... However, he did not take pains in disposal of old civil suits, civil appeals and special cases. He should give priority in disposal of old pending cases...." |
| **31st March, 1998** | ".... He appears to be an average worker.... Graded 'D'. |
| **31st March, 1999** | Quality of Work : Average<br><br>Quality of Judgments : Average quality.<br><br>Capacity to motivate.. subordinate staff : Average<br><br>... Capacity for judicial or administrative work was just ordinary. Has not regularly inspected his court....<br><br>"There are some reports raising suspicion about his integrity..." |

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| | (BY HON. P.J. IN INSPECTION REPORT)<br>'..... on discussion with senior members of Bar & inspection of records he cannot be found to be an officer of integrity... (BY HON. C.J.)<br>Poor 'E'<br>**Note:**<br>(i) Vide D.O. No.560 dated 15.7.1999 1st representation **rejected.**<br>(ii) Vide order of C.J. dated 07.03.2002, second representation dated 26.4.2001 was allowed and he has been upgraded from Grade "E" to "C". |

7. The reply-affidavit also refers to the special report submitted by the District Judge (confidential note), which was directed to be kept in ACR of the petitioner. The petitioner's integrity was also not good. The Portfolio Judge after inspection of the judicial record and on discussion with the senior members of the Bar had opined that the integrity of the petitioner was doubtful; his moral character was also challenged by anonymous complaint of a lady. In substance, the Full Court was of the opinion that the petitioner had become a deadwood and was required to be weeded out. It is stated that the fact that the representation made by the petitioner was allowed or that he was subsequently granted selection grade will be of no avail in the fact situation of the present case. The other adverse entries in the ACR and regarding the poor performance of the petitioner cannot be treated as having been wiped out for the purposes of consideration of his case for compulsory retirement. In the present case, the Full Court having considered the entire service record of the petitioner and having formed that subjective satisfaction, the same cannot be said to be irrational or founded on extraneous considerations.

8. The petitioner, no doubt, has filed rejoinder affidavit and has attempted to explain each of the entries noted in his ACR, to contend that the same were not sufficient to arrive at the decision that the petitioner deserved to be compulsorily retired having become a deadwood and more so, keeping in mind his performance for the past preceding five years.

9. The petitioner has relied on decisions of the Apex Court in *State of Uttar Pradesh v. Chandra Mohan Nigam and others*[1], *State of Uttar Pradesh v. Batuk Deo Pati Tripathi and another*[2] and *Nand Kumar Verma v. State of Jharkhand and others*[3].

10. The respondents in support of their contentions have relied on two decisions of the Apex Court in *Pyare Mohan Lal v. State of Jharkhand and others*[4] and *R.C. Chandel v. High Court of Madhya Pradesh and another*[5].

11. Before we advert to the factual aspects of this matter, it may be useful to refer to the decision of the Apex Court in the case of *R.C. Chandel* (supra) directly on the point. It is held that the High Court has to maintain constant vigil on its subordinate judiciary. The power of the High Court to recommend to the Government to compulsorily retire a judicial officer on attaining the required length of service or requisite age and consequent action by the Government on such recommendation are beyond any doubt. Notably, the Court has held that the fact that the judicial officer was awarded selection grade would not wipe out the previous adverse entries, which have remained on record and continued to hold the field. For, the criterion for promotion or grant of increment or higher scale is different from an exercise which is undertaken by the High Court to assess a judicial officer's continued utility to the judicial system. In assessing potential for continued useful service of a judicial officer in the system, the High Court is required to take into account the entire service record and overall profile of a judicial officer is the guiding factor. The judicial officers of doubtful integrity, questionable reputation and wanting in utility are not entitled to benefit of service after attaining the requisite length of service or age. Moreover, compulsory retirement from service is neither dismissal nor removal. It differs from both of them. In that, it is not a form of punishment prescribed by the Rules and involves no penal consequences. Inasmuch as, the person retired is entitled to pension and other retiral benefits proportionate to the period of service standing to his credit. The Court went on to observe that the judicial service is not an ordinary Government service and the Judges are not employees as such. The Judges hold the public office and in discharge of their functions and duties, they represent the State. A Judge must be a person of impeccable integrity and unimpeachable independence. The standard of conduct expected of a Judge

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1. AIR 1977 SC 2411 2. 1978 LAB. I.C. 839 3. (2012) 3 SCC 580
4. (2010) 10 SCC 693 5. (2012) 8 SCC 58

is much higher than an ordinary man.

12. In another decision of the Apex Court in the case of *Pyare Mohan Lal* (supra), the Court has restated the legal position that while considering the proposal of compulsory retirement of a judicial officer, the Authority has to consider "entire service record" of the officer irrespective that adverse entries had not been communicated to him and the officer had been promoted earlier in spite of those adverse entries. The ACR entries always remain part of record for overall consideration even when the employee has been subsequently promoted and the washed-off theory does not have universal application. The washed-off theory may have relevance while considering the case of Government servant for further promotion but not in case where employee is assessed for retention in service or compulsory retirement, as suitability is to be assessed taking into consideration his "entire service record". Further, the Court went on to observe that even a single adverse entry about integrity of the judicial officer may be sufficient to compulsorily retire him from service.

13. Considering the settled legal position, the argument of the petitioner that his service record for preceding five years before the proposal was considered for compulsory retirement was 'good', cannot be taken any further. In that, the entire service record of the petitioner was required to be considered and, as is found from the record, it was so considered by the Full Court. Similarly, the effacement of adverse entry for the year 1994-95 or of upgrading the petitioner to grade 'C' for the period 1998-99 will be of no avail to the petitioner. The acceptance of representation of the petitioner by the Chief Justice and upgrading the petitioner from Grade 'E' to Grade 'C' has no effect of effacing the adverse remark about integrity of the petitioner for 1998-99. The subjective satisfaction of the Full Court having been reached on the basis of entire service record of the petitioner, which contained adverse entry and, more particularly of the year 1998-99 i.e. "There are some reports raising suspicion about his integrity" and the opinion of the Portfolio Judge that "on discussion with senior members of Bar and inspection of records he cannot be found to be an officer of integrity" by itself, was sufficient in the light of the abovesaid pronouncements. The fact that the case of petitioner was considered by the Full Court in its meeting dated 3rd November, 2001 and the entry about the integrity of petitioner for the year 1998-99 was part of the service record at that time, did not denude the Full Court from

considering the entire service record of petitioner when the proposal was once again considered in 2004. In that meeting, if the Full Court decided to take the said entry into account and considered the proposal keeping in mind the entire service record of the petitioner, in law, no fault can be found with such decision of the Full Court. For, the theory of effacement of adverse entry is not attracted in respect of consideration of proposal for compulsory retirement.

14. Indeed, the Administrative Committee had recommended the petitioner as 'suitable to continue in service'. Since the said recommendation was placed for consideration before the Full Court, which is the final Authority and the Full Court having opined that the petitioner had become a deadwood and required to be weeded out, that decision ought to prevail. The recommendation of the Administrative Committee was only recommendatory and not binding on the Full Court as such. It is not a case where the Administrative Committee was delegated with the power to take a "final decision" on the proposal. On the other hand, the Administrative Committee merely submitted its recommendation to the Full Court, which as aforesaid, after consideration of the entire service record of the petitioner, decided in favour of premature retirement of the petitioner. As the decision of the Full Court is founded on the entire service record, the fact that it differed from the recommendation of the Administrative Committee, will be of no avail to the petitioner. The subjective satisfaction of the Full Court ought to prevail.

15. We are also not impressed by the argument that the petitioner could not have been compulsorily retired from service as he had not completed the qualifying service. This argument is completely in ignorance of the proviso to Rule 42(1)(b) of the Rules of 1976. The proviso thereto enables the Authority to retire any Government servant at any time after he has completed 20 years qualifying service by giving him three months' notice in Form 29. It is not the case of the petitioner that he had not completed 20 years of service. The fact that he had not attained the age of 50 years, therefore, cannot be the basis to question the decision of the Authority, which otherwise is valid in terms of the abovestated proviso.

16. That takes us to the decision of the Supreme Court in the case of *Chandra Mohan Nigam* (supra) relied by the petitioner. Emphasis was placed on paragraph 27 of this decision. In our opinion, the exposition in this decision will be of no avail to the petitioner as it was not a case of review by the Full

Court but substantive decision taken by the Full Court after considering the entire service record of the petitioner and including being conscious of the recommendation made by the Administrative Committee.Even this decision reiterates the position that termination of service by way of premature retirement cannot be equated with the penal order of removal or dismissal and that when integrity of an officer is in question, that will be an exceptional circumstance for which the action can be resorted to, if other conditions of the Rule permitting compulsory retirement are fulfilled, apart from the choice of disciplinary action, which is also open to the Authority.

17. The decision of the Apex Court in the case of *Batuk Deo Pati Tripathi* (supra), in our opinion, will be of no avail to the petitioner as that decision is an authority on the exposition that the High Court can authorize an Administrative Judge or an Administrative Committee to act on behalf of the Court. As aforesaid, in the present case, the Administrative Committee merely made recommendation to the Full Court and the final decision on the proposal, therefore, vested in the Full Court. In the concluding part of paragraph 18 of this judgment, similar argument has been rejected. The Court found that the recommendation made by the Administrative Committee that the respondent should be compulsorily retired cannot, therefore, be said to be suffer from legal infirmity.

18. Counsel for the petitioner, no doubt, made a feeble attempt to distinguish the exposition of the Apex Court in *R.C. Chandel* (supra) on the argument that, in that case, the service record of the officer was blemished and there was a clear remark as regards his integrity. In the present case, we have noticed that the remark regarding integrity of the petitioner in the service record pertaining to period 1998-99 has become final because of rejection of the representation in that behalf. Moreover, as observed by the Apex Court in the case of *Pyare Mohan Lal* (supra) even one entry about integrity against a judicial officer cannot be countenanced and can be reckoned for the purposes of compulsory retirement of such officer.

19. It was argued that in *R.C. Chandel's* case (supra), the conduct of the judicial officer was found to be reprehensible as he attempted to influence the administrative decision by approaching the Member of Parliament and Law Minister. In our opinion, the legal position already adverted to above, has been restated in the said decision. That is not in the context of the facts of that case. That legal principle is binding on this Court.

20. For the reasons already recorded, even the decision in the case of *Nand Kumar Verma* (supra) will be of no avail to the petitioner. Even in this decision, the Apex Court has restated that there is very limited scope of judicial review of an order of compulsory retirement. The Court can examine where some ground or material germane to issue exists but cannot enter into the realm of sufficiency of material upon which such order rests, that being the subjective satisfaction of the Authority concerned. In the present case, as is already noticed, the entire service record of the petitioner was considered by the Full Court. In that case, however, the High Court had taken decision of compulsory retirement on the basis of selective service record of the officer ignoring the totality of relevant material. In the facts of the present case, it is not open to argue that the Full Court considered only selective service record of the petitioner.

21. Taking any view of the matter, therefore, this petition should fail being devoid of merits. Hence, **dismissed** with no order as to costs.

*Petition dismissed*

**I.L.R. [2015] M.P., 1766**
**WRIT PETITION**
***Before Mr. Justice A.M. Khanwilkar, Chief Justice &***
***Mr. Justice R.S. Jha***
W.P. No. 19552/2014 (Jabalpur) decided on 20 February, 2015

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

***Minor Mineral Rules, M.P. 1996, Rule 30(6) - Power to impose penalty*** **- In case any person is found transporting minerals or their products without a valid pass on the strength of an incomplete, distorted or tampered transit pass, the Collector, Addl. Collector, Chief Executive Officer of Zila/Janpad Panchayat, Deputy Director, Mining Officer, Asstt. Mining Officer or Mining Inspector may seize the mineral or its products together with all tools and equipments and the vehicle used for transport - In view of amended provision of Rule 30(16), the Collector has the power or authority to impose penalty upto ten times the market value of the mineral and vehicle can be released on depositing of such penalty - Order imposing penalty to the ten times of the market value is proper - However, the petitioner may avail alternative,**

**efficacious and statutory remedy of filing an appeal under Rule 57 along with an application for condonation of delay. (Paras 14 to 16)**

*गौण खनिज नियम, म.प्र. 1996, नियम 30(6) – शास्ति अधिरोपित करने की शक्ति* – कोई व्यक्ति बिना किसी वैध पास के या अपूर्ण, विरूपित या छेड़छाड़ किये गये पारगमन पास के बल पर खनिजों का या उनके उत्पादों का परिवहन करते पाये जाने की स्थिति में, कलेक्टर, अतिरिक्त कलेक्टर, जिला/जनपद पंचायत का मुख्य कार्यपालिक अधिकारी, उपनिदेशक खनन अधिकारी, सहायक खनन अधिकारी या खनन निरीक्षक, खनिज या उसके उत्पादों को, सभी औजार एवं उपकरणों के साथ तथा परिवहन के लिये उपयोग किये गये वाहन को जप्त कर सकता है – नियम 30(16) के संशोधित उपबंध को दृष्टिगत रखते हुए कलेक्टर को खनिज के बाज़ार मूल्य के दस गुना तक की शास्ति अधिरोपित करने की शक्ति या प्राधिकार है और उक्त शास्ति जमा किये जाने पर वाहन को मुक्त किया जा सकता है – बाज़ार मूल्य के दस गुना शास्ति अधिरोपित करने का आदेश उचित है – किंतु याची नियम 57 के अंतर्गत, विलम्ब के लिये माफी के आवेदन के साथ अपील प्रस्तुत करने का वैकल्पिक, प्रभावकारी एवं कानूनी उपचार का अवलंब ले सकता है।

**Case referred :**

W.A. No. 1320/2011 decision dated 21/03/2012.

*Petitioner* in person.

*(Supplied: Paragraph numbers)*

**ORDER**

The Order of the Court was delivered by :

**R.S. JHA, J. :-** The petitioner appears in person. He submits that this petition is pending since 7.12.2014 and even in the past whenever the matter was listed the Advocates engaged by him expressed inability to appear before the Court because of the call given by the Bar Association to boycott the Court.

2. He submits that in view of the urgency he cannot wait any further as the Truck seized by the respondent-Authority is the only source of income for the petitioner. He submits that he may be permitted to discharge the Advocate engaged by him who has expressed inability to appear before the Court today.

3. The petitioner was counseled that in that case later on the petitioner will not be permitted to insist for rehearing of the case on the ground that on the earlier occasion the matter was not argued by the Advocate. The petitioner has understood the consequences of discharging the Advocate and is yet

determined to argue the case personally. He accepts that if the petition is dismissed he will not resort to filing of an application for restoration of writ petition on the ground that his Advocate be permitted to argue the case afresh. On that understanding, we have allowed the petitioner to discharge his Advocate namely Shri R. M. Sharma, Advocate.

4. We have heard the petitioner and perused the relevant record appended to the writ petition as well as the reply affidavit filed by the respondents.

5. The petitioner has filed this petition praying for quashing of the order dated 28-11-2014, passed by the Collector, Mining Section, Panna by which in the proceedings initiated against the petitioner for illegal transportation of minerals a penalty equivalent to ten times the market value of the minerals has been imposed upon him. The petitioner has also prayed for a direction to the respondents No. 2 and 3 to release the petitioner's truck, bearing No. MP19HA-3868, which has been seized on account of illegal transportation of minerals.

6. The petitioner, by relying on the provisions of the M.P. Minerals (Prevention of Illegal Mining Transportation and Storage) Rules, 2006 (for short -"the Rules of 2006") as well as the decision rendered by a Division Bench of this Court in the case of *Rajiv Agrawal Vs. State of M.P. & others* (W.A.No.1320/2011), dated 21-3-2012, submits that the Collector has no power to impose penalty equivalent to ten times the market value as has been held by the Division Bench of this Court in the aforesaid decision while interpreting the provisions of Rule 18(5) of the Rules of 2006, more so, as the petitioner had not given his consent for compounding the offence and in such circumstances the Collector should have sent the matter to the competent Magistrate without passing any order. It is submitted that the authority seizing the vehicle had asked the driver of the petitioner to give consent for compounding in writing on an affidavit which is not binding upon the petitioner and in such circumstances, the impugned order imposing penalty as well as seizing the vehicle deserves to be set aside. It is submitted that the authority has failed to notice that the petitioner had a valid transit pass for transporting the minerals and, therefore, no action against him could have been initiated against him.

7. The respondents have filed a return and have stated that the vehicle of the petitioner was found illegally transporting road metal Gitti which is a minor mineral and the alleged transit pass which was produced before the authority

did not contain the date and time which is mandatory to be specified and in such circumstances, proceedings against the petitioner were initiated by seizing the vehicle under the provisions of the M.P. Minor Mineral Rules, 1996 (in short - "the Rules of 1996") as well as the Rules of 2006.

8. It is stated that subsequently a notice dated 27-11-2014 was issued to the petitioner as well as his driver pursuant to which his driver filed an affidavit as well as the reply accepting the defect in the transit pass and requesting for compounding the offence. It is stated that in view of the aforesaid facts and circumstances the impugned order dated 28-11-2014 has been passed by the respondent No. 2 which is in accordance with law as the Collector has power and authority to impose penalty to the extent of ten times the market value of the mineral in view of the amended provisions of Rule 30(16) of the Rules of 1996, as amended by notification dated 23-3-2013, a copy of which has been filed by the respondents alongwith the return as Annexure R-2.

9. It is stated that in view of the aforesaid provisions of law and the stand taken on affidavit, the benefit and relief as sought for by the petitioner on the strength of the aforesaid decision rendered by the Division Bench of this Court in the case of *Rajiv Agrawal* (supra) is misconceived and misplaced.

10. Having heard the petitioner as well as having perused the return and the record of the case it is observed that the truck of the petitioner, bearing No. MP19HA-3868 was seized by the respondent /authorities on 26-11-2014 and thereafter a show cause notice, Annexure P-5, dated 27-11-2014 was issued to the petitioner as well as his driver and the lease holder, Shri Madan Lal Grover in respect of the offence alleged to have been committed by them under the provisions of Rule 30 of the Rules of 1996 as well as Rule 18(5) of the Rules of 2006. It is also apparent that the petitioner as well as the driver have filed a reply to the show cause notice on 27-11-2014 but the driver, in addition, submitted an affidavit as well as made an additional statement in his reply agreeing to compounding of the offence. The record further indicates that the Collector (Mines) thereafter proceeded against the petitioner and has passed the impugned order imposing penalty equivalent to ten times the market value of the minerals in view of the provisions of Rule 30 (16) of the Rules of 1996.

11. From the aforesaid undisputed facts, it is clear that the petitioner was

transporting road metal Gitti which is a minor mineral and, therefore, the authority had initiated proceedings against the petitioner under the provisions of the M.P. Minor Mineral Rules of 1996 and under the provisions of the Rules of 2006.

12. The relevant provisions of the Rules of 1996 necessary for adjudication of the dispute raised herein are Rule 30, sub rules (15), (16), (17) and 18 which are to the following effect :-

> "(15) Whosoever transports minerals or their products like bricks, tiles, lime, dressed stone, clocks, Slabs, tiles, chips, stone dust and ballast etc. without a valid pass in For IX or if the transit pass is found to be incomplete distorted or tampered with, the Collector, Additional Collector, Chief Executive Officer of Zila/Janpad Panchayat and [officer authorised by the Gram Sabha]/Deputy Director, Mining Officer, Assistant Mining Officer or Mining Inspector may seized the mineral or its products together with all tools and equipment and the vehicle used for transport.
>
> (16) The Collector, Additional Collector, Chief Executive Officer of Zila/Janpad Panchayat and Gram Panchayat/Deputy Director, Mining Officer by an order in writing may impose a penalty up to Rs. Ten Thousand which in no case shall be less than rupees one thousand."
>
> (17) The seized mineral or its products, tools, equipment and vehicle may be released when the penalty so imposed is deposited by the offender.
>
> (18) If the penalty so imposed is not paid within 15 days from the date of the order, of imposing the penalty, all the minerals or its product, tools equipment and vehicles etc. so seized shall stand forfeited and shall become the property of the State Government."

13. It is also clear from a perusal of Annexure R-2 that Rule 30(16) has been amended vide Gazette notification dated 23-3-2013 as under :-

> "in sub-rule (16), after the words "Mining Officer" the words "Officer Incharge Mining Section, Officer In-charge Flying Squad" shall be inserted and at the place of words "upto Rupees Ten Thousand" the words "upto Ten Times of Market

Value" shall be substituted."

14. A bare perusal of the aforesaid provisions of law makes it clear that in case any person is found transporting minerals or their products without a valid pass as prescribed under Form IX or on the strength of an incomplete, distorted or tampered transit pass, the Collector, Additional Collector, Chief Executive Officer of Zila/Janpad Panchayat and [officer authorised by the Gram Sabha]/Deputy Director, Mining Officer, Assistant Mining Officer or Mining Inspector may seize the mineral or its products together with all tools and equipment and the vehicle used for transport.

15. Sub Rule (16) of Rule 30 as amended by the Gazette notification dated 23-3-2013 provides that the said authorities as well as the "Officer In-charge Mining Section, Officer In-charge Flying Squad" may by an order in writing impose a penalty up to ten times of market value. Sub Rule (17) provides that the seized tools or vehicle may be released when the penalty so imposed is deposited by the offender.

16. In view of the aforesaid specific and clear provisions of the Rules of 1996 it is luminescently clear that the Collector has the power or authority to impose penalty up to ten times the market value of the mineral and the vehicle of the petitioner can be released on depositing of such penalty. In view of the aforesaid provisions of sub rules (15), (16), (17) and 18 of Rule 30 of the Rules of 1996 action has been taken against the petitioner and the impugned order has been passed.

17. We are also of the considered opinion that the contention of the petitioner that the matter in the present petition is squarely covered by a decision of this Court in the case of *Rajiv Agrawal* (supra) is also misconceived and misplaced as the decision in the case of *Rajiv Agrawal* (supra) was rendered in context of the provisions of Rule 18(5) of the Rules of 2006 and related to major mineral i.e. coal. The present petition relates to transportation of a minor mineral in which action against the petitioner has been taken under the provisions of the Rules of 1996 as amended by a Gazette notification dated 23-3-2013 and an order imposing penalty has been issued. A bare perusal of the impugned order itself indicates that it has not been passed under Rule 18(5) of the Rules of 2006.

18. In view of the aforesaid discussion, we have no hesitation in holding that the contention of the petitioner that the Collector concerned has no power or authority to pass the impugned order deserves to be rejected in view of the specific and clear provisions of sub rules (15), (16), (17) and 18 of Rule 30

of the Rules of 1996.

19. We are also of the considered opinion that having rejected the contention of the petitioner regarding jurisdiction of the Collector and the contention that the issue involved herein was squarely covered by the decision of this Court in the case of *Rajiv Agrawal* (supra) this Court need not go into the other factual aspects raised by the petitioner in view of the provisions of Rule 57 of the Rules of 1996 which, in no uncertain terms, provides for an alternative, efficacious, statutory remedy of filing an appeal against the impugned order and, therefore, while the contentions of the petitioner regarding jurisdiction of the Collector and the matter being squarely covered by the decision of this Court in the case of *Rajiv Agrawal* (supra) are rejected, the petition as filed by the petitioner is disposed of with liberty to the petitioner to avail the alternative, efficacious, statutory remedy of filing an appeal against the impugned order under Rule 57 of the Rules of 1996 in respect of all other issues including the factual disputes raised by him.

20. It goes without saying that the petitioner would also be at liberty to file an application for condonation of delay as provided under Rule 59 of the Rules of 1996 before the appellate authority and would be at liberty to take benefit of the pendency of the present proceedings by bringing that fact to the notice of the appellate authority while praying for condonation of delay.

21. With the aforesaid observations and liberty the petition filed by the petitioner stands disposed of.

*Petition disposed of.*

**I.L.R. [2015] M.P., 1772**
**WRIT PETITION**
***Before Mr. Justice A.M. Khanwilkar, Chief Justice &***
***Mr. Justice Alok Aradhe***
W.P. No. 2804/2015 (Jabalpur) decided on 24 March, 2015

SATYA PAL ANAND ...Petitioner
Vs.
BAL NEKETAN NYAS, BHOPAL & ors. ...Respondents

***Constitution - Article 226 - Maintainability of Writ Petition against Judicial Orders*** **- Writ Petition filed against the order by which application under Order 21 Rule 97 of CPC has been rejected - Appeal would lie under Order 21 Rule 103 - When other statutory remedies**

**are available to the petitioner for redressal of his grievance, judicial orders passed by Civil Court are not amenable to writ jurisdiction under Article 226 of Constitution. (Paras 16 to 19)**

*संविधान – अनुच्छेद 226 – न्यायिक आदेशों के विरूद्ध रिट याचिका की पोषणीयता* – आदेश जिसके द्वारा सि.प्र.सं. के आदेश 21 नियम 97 के अंतर्गत आवेदन अस्वीकार किया गया, के विरूद्ध रिट याचिका – आदेश 21 नियम 103 के अंतर्गत अपील होगी – जब याची को अपनी शिकायत के निवारण हेतु अन्य कानूनी उपचार उपलब्ध हैं, सिविल न्यायालय द्वारा पारित न्यायिक आदेश, संविधान के अनुच्छेद 226 के अंतर्गत रिट अधिकारिता के अध्यधीन नहीं।

**Cases referred :**

2015 SCC Online SC 170, AIR 1967 SC 1, AIR 1973 SC 1461, (1981) Supp. SCC 87, (1988) 2 SCC 602, (1998) 1 SCC 1, AIR 1992 SC 904, (2010) 6 SCC 417, AIR 2009 SC 2214, (1986) 3 SCC 156, 2013 SCC Online HP 2955, (2012) 3 SCC 619, 2002 (4) MPHT 200, (2002) 2 SCC 420.

*Petitioner* in person.
*Shobha Menon* with *Ankita Khare,* for the respondent no.1.
*None* for the respondent no. 2.
*Swapnil Ganguly,* G.A. for the respondent no. 3.

**ORDER**

The Order of the Court was delivered by : **ALOK ARADHE, J. :-** In this petition titled as one under Article 226 readwith Articles 14, 19, 21, 215 and 235 of the Constitution of India, the petitioner has prayed for multiple reliefs which are reproduced below for the facility of reference:

> *"7. (a) In view of the submissions made above, the impugned order dated 16.12.2014 directing dismissal of the MJC No.40/2013 be kindly be quashed by a writ of Certiorari and granting such other reliefs as deemed deserved in law exercising constitutional powers vested in this Hon'ble Court under Article 226 of the Constitution of India and by a writ of Mandamus the respondent No.2 be directed not to re-issue any warrant of delivery of physical possession of the premises in the lawful possession*

*of the petitioner in this own rights till the mandatory investigations are completed as per law, so that a running business of the petitioner is not disturbed abruptly in violation of his rights to have justice as per law of this land.*

*(b) And the amount of the compensation claimed be kindly granted as prayed or such other amount as estimated to be just upon the facts herein in the public law proceedings and the respondents be directed to make payment of the directed amount of the compensation and exemplary costs in a just time and report compliance to this Hon'ble Court within directed time.*

*(c) And the respondent No.3 be kindly directed to investigate and submit his report under what circumstances such heavy Police force remained at the premises of the petitioner when it is said in the order dated 16.5.2014 that there was no judicial order passed directing the Police force to be present there during the far long time when the execution of the warrant for delivery of the physical possession was being carried out on 23.4.2014 till 2.00 p.m. and even thereafter without the authority of law and directing such action against the process servers who have made a false statement of fact that there was no police force when they had been executing the warrant under question on 23.4.2014.*

*(d) That the order passed in case of MJC No.563/12 on 16.12.2014 be kindly quashed and set aside passing such order thereupon as deemed just.*

*(e) That Judges (Protection) Act, 1985 be kindly read down as prayed herein.*

*(f) That such further or additional reliefs as deemed just be kindly granted together with costs deemed just".*

2. In order to appreciate the scope and ambit of reliefs and the context in which the aforesaid reliefs are prayed for by the petitioner, it is apposite to

refer to few relevant facts which are stated *infra*. The respondent No.1 Trust filed a suit for eviction, possession and *mesne* profits against Anand Automobiles of which petitioner is the owner and proprietor. In the plaint, it was aver red that provisions of M.P. Accommodation Control Act, 1961 (hereinaf ter referred to as " the Act " ) are inapplicable to the suit premises as it is owned by a charitable trust, in view of notification dated 7.9.1989 issued by the State Government granting exemption to accommodations from provisions of the Act issued in exercise of powers under Section 3(2) of the Act f rom provisions of the Act. The tenant resisted the suit inter -alia on the ground that issuance of notification dated 7.9.1989 does not result in an exemption from provisions of the Act in so far as respondent No.1-Trust is concerned. The trial Court framed an issue and decided the same in favour of respondent No.1 vide order dated 15.3.2004. Being aggrieved, the petitioner filed a writ petition namely W.P. No.3192/2004 in which fol lowing reliefs were claimed: -

> *" (i) for a declaration that Section 3 of the Act are unconstitutional.*
>
> *(ii) for a declaration that the notification dated 7.9.1989 issued by the M.P. State Government in exercise of power under Section 3(2) of the Act is constitutionally invalid and void ab initio and also ultra vires Section 3(2) of the Act.*
>
> *(iii) for a declaration that each Trust claiming an exemption from the applicability of the Act, will have to make an application to the State Government disclosing the particulars entitling them to exemption under Section 3(2) of the Act and the State Government will have to decide whether such Trust is entitled to the exemption after hearing the affected persons and a further declaration that the notification dated 7.9.1989 does not grant any general exemption to charitable Trusts in particular the second respondent-Trust, from the application of the Act.*
>
> *(iv) for a consequential declaration that the civil Court has no jurisdiction to entertain or hear the suit for eviction Civil Original Suit No.20-A/2002 filed by the second*

*respondent-Trust.*

*(v) for quashing the order dated 15.3.2004 passed by the trial Court answering the preliminary issue in favour of the landlord, the provision of Section 3(2) of the Act is unconstitutional ".*

3. A Division Bench of this Court vide order dated 17.8.2004 dismissed the writ petition. The relevant extract of the order reads as under : -

*"Once the Supreme Court has held that the notification dated 7.9.1989 is valid, it is impermissible for us to entertain a contention that the decision of the Supreme Court upholding the validity of the notification dated 7.9.1989 is erroneous with reference to some general principles laid down in an earlier decision of the Supreme Court. As the notification which is under challenge has been upheld by the Supreme Court and the other reliefs claimed by the petitioner are consequential upon the relief relating to the validity of notification dated 7.9.1989, the petition is liable to be dismissed as having no merit . Accordingly, it is dismissed".*

4. The petitioner once again filed an application raising similar objection in the Civil Suit , which was rejected by the trial Court vide order dated 29.11.2005. That order was subject matter of challenge at the instance of the petitioner in W.P. No.2842/2006, in which a Division Bench of this Court granted stay of proceeding before the trial Court , which was subsequently vacated vide order dated 17.7.2012. The trial Court vide judgment and decree dated 10.10.2012 decreed the suit for eviction and directed the petitioner to vacate the suit premises and to deposit arrears of rent due to respondent No.1-Trust.

5. The petitioner filed First Appeal No.1037/12, which was admitted by a Bench of this Court vide order dated 21.12.2012 and the execution of the decree for eviction was stayed subject to fulfillment of conditions mentioned therein. The relevant extract of the order reads as under : -

*"Several contentions have been raised by appellant including virus and provisions as envisaged under Section*

*3 of the M.P. Accommodation Control Act to be unconstitutional and further it has been submitted that appellant never agreed to payrent @ Rs.15/- per square feet of the tenanted premises and therefore he is not bound to pay or deposit the rent as decided by learned trial Court in the impugned judgment. Appellant further submits that notice of enhancement of rent sent by respondents to appellant was never served upon him although it was served upon his Manager. Hence according to him, service on Manager of said notice cannot be said to be service upon appellant. It has also been submitted by him that he is ready to pay or deposit the contractual rent which is Rs.75/- per month. Hence, it has been prayed that monetary part of the decree be also stayed alongwith the eviction part of the decree till the decision of this appeal.*

*Having heard appellant and learned senior counsel for respondents, it is directed that eviction part of the decree shal l remain stayed till the decision of this appeal. However , since there will be no irreparable loss to the appellant in depositing the decreetal amount and further he will not suffer any ir reparable loss in case he deposi ts monthly rent @ Rs.5692/- as directed by learned trial Court that part of decree is not stayed.*

*The objection which appel lant has raised during the course of argument shall be decided at the time of final adjudication of the appeal.*

*Thus, the execution of eviction part of decree shall remain stayed on the fol lowing conditions: -*

*(i) The appellant shall deposit decreetal amount of Rs.1,13,840/- on or before 22.12.2012 in the trial Court/ Executing Court.*

*(ii) he shall also deposit the monthly rent @Rs.5692/- strictly in terms to Section 13 of the M.P. Accommodation Control Act.*

*(iii) the appellant shall also deposit the cost of plaintiffs/ respondents on or before 22.12.2012 as directed by the learned trial Court and*

*(iv) the respondents No.1 to 12 shall be free to withdraw the amount so deposited by appellant in the trial Court/ Executing Court after furnishing security to the satisfaction of that Court .*

*It is however , made clear that if any of the aforesaid conditions is violated by the appellant , the respondents No.1 to 12 shall be free to execute the decree" .*

6. Thereafter, a Division bench of this Court vide order dated 22.4.2014 dismissed the writ petition namely W.P. No.2842/2006. The relevant extract reads as under : -

*"5. Suffice it to observe that the issue regarding validity of the provisions and including the notification in question has already been dealt with in extenso by the Division Bench of this Court vide order dated 17th August, 2004 whilst dismissing the writ petition No.3192/04. In our opinion, it is not possible to depart from the said legal position and in any case permit the petitioner to resort to successive proceedings for the same issue.*

*6. Besides, we find that the issue raised by the petitioner that the impugned notification does not deal with cardinal requirement stipulated in sub-section (2) of Section 3 of the Act that the whole of the income derived from which is utilized for that institution or nursing home or maternity home. This aspect has been dealt with by the Apex Court in the case of Ramgopal and another Vs. Balaji Mandir Trust and others, AIR 2003 SC 1883. From para 4 of the said decision, it is clear that this very contention was raised on behalf of the appellants therein but it did not find favour with the Apex Court. In the circumstances, the observation made in the order dated 22nd February, 2006 by our predecessors is no impediment for us to answer the preliminary objection raised by the respondents, which*

*we find to be appropriate. Accordingly, this petition ought to fail.*

*7. We may place on record that the petitioner has asked for further reliefs including to initiate criminal contempt action against First Additional District Judge, Bhopal. However, in our order passed Yesterday, while disposing of I.A. No.12193/2012, we have made it clear that the present petition having been filed under Articles 226 and 228 of the Constitution of India cannot be mixed up with the relief of initiating criminal contempt action and, more so, without making the person concerned party-respondent in the proceeding. As a result, even that relief need not detain us in disposing of this petition.*

*10. We also place on record that the petitioner has filed interlocutory applications No.14871/2012 for stay; 13881/2012 for taking subsequent events on record, 669/2013 for quashing the judgment and decree passed on 10.10.2012 by the Ist Additional District Judge, Bhopal and other reliefs; 1474/2014 application for amendment in the relief clause of the main petition and 4834/2014 for recalling the order dated 10.03.2014. In view of the dismissal of the writ petition, in our opinion, there is no need to hear these applications separately and the same, therefore, are disposed of.*

*11. At this stage, the petitioner makes an oral request that the order passed today should be kept in abeyance for a period of four weeks to enable the petitioner to file SLP before the Apex Court.*

*12. We find no reason to accede to this request. It is a matter of record that the petitioner has already filed First Appeal against the decree passed by the trial Court in which interim relief has been granted in favour of the petitioner. In that sense, no prejudice will be caused by rejecting the request for continuing the stay of this order. In fact, in the present petition, there is no interim order*

*operating, as of today. Hence, this request is turned down".*

7. Being aggrieved by the impugned judgment and decree of eviction and arrears of rent dated 10.10.2012, the petitioner filed an application under Order 21 Rule 35 and Rule 103 of the Code of Civil Procedure which was registered as MJC No.561/12 on the ground that the decree for eviction does not bind the petitioner as the decree has been passed against the partnership firm whereas, the petitioner is in possession of the suit shop as owner of Anand Automobiles. The petitioner also filed an application which was registered as MJC No.40/13 in which inter-alia it was prayed that judgment and decree dated 10.10.2012 is null and void as the same has been passed in violation of Articles 14, 19, 21, 50, 141, 215 and 301 of the Constitution of India. The Executing Court rejected both the appl ications vide order dated 16.12.2014. The application preferred by the petitioner under Order 21 Rule 35 read with Rule 103 of the Code of Civil Procedure was rejected on the ground that petitioner participated in the proceeding for eviction and in case he was not in occupation of the suit shop as partner, but as owner, he ought to have taken objection at the first instance. Having failed to do so, the petitioner is estopped by his conduct and the decree deserves to be executed against the petitioner, as he himself is in possession of the suit shop. The application preferred by the petitioner for recalling the judgment was rejected on the ground that judgment and decree dated 10.10.2012 is subject matter of challenge in the First Appeal.

8. Thus, from above narration of facts, it is evident that principal relief in this petition preferred under Article 226 of the Constitution of India is to seek quashment of order dated 16.12.2014 passed in MJC No.561/12 and MJC No.40/13 by the executing court.

9. At the outset, learned senior counsel for respondent No.1 has raised an objection with regard to maintainability of this petition under Article 226 of the Constitution of India, in view of law laid down by Three Judge Bench of Supreme Court in the case of *Radheshyam and another Vs. Chhabinath and others*, 2015 SCC Online SC 170 and has contended that judicial orders of the Civil court are not amenable to writ jurisdiction under Article 226 of the Constitution of India. In view of aforesaid preliminary objection raised by learned senior counsel for respondent No.1, we called upon the petitioner to address this Court with regard to maintainability of the writ petition which has been filed under Article 226 of the Constitution of India, which is directed

against the orders passed by the Executing Court.

10. We have heard the petitioner as well as learned senior counsel for respondent No.1 only on the issue of maintainabi lity of this writ petition preferred under Article 226 of the Constitution of India and, therefore, we shall deal with the aforesaid limited question whether the present writ petition filed under Article 226 of the Constitution of India against the order passed by the Executing Court is maintainable.

11. The petitioner submitted that the decision of the Supreme Court in the case of *Naresh Shridhar Mirajkar Vs. State of Maharashtra,* AIR 1967 SC 1 has been dealt with in the celebrated case of His Holiness *Keshavanand Bharti Vs. State of Kerala and another*, AIR 1973 SC 1461 and, therefore, the ratio laid down in the case of *Mirajkar* (supra) stands watered down if not overturned, in terms of the view taken by the larger Bench. The petitioner has invited our attention to paragraphs 1717 to 1719 of the judgment in the case of *Keshavanand Bharti* (supra) and has submitted that judiciary is a State and is an authority under Article 12 of the Constitution of India and judicial process is a State action. While referring to judgment of the Supreme Court in the case of *S.P. Gupta Vs. Union of India* (1981) Supp. SCC 87, it is contended that judiciary is a separate but equal part of the State and is duty bound to meet the constitutional objection of providing economic and social justice through the process of law and must be involved not merely as an umpire but more actively to bring social and economic justice to common man. It is further submitted that violation of fundamental right itself renders the judicial decision a nullity. In this connection, reliance has been placed on a decision of the Supreme Court in the case of *A.R. Antuley Vs. R.S. Nayak,* (1988) 2 SCC 602. While referring to paragraph 58 of the decision of the Supreme Court in the case of *State of Rajasthan Vs. Prakash Chand,* (1998) 1 SCC 1, it is pointed out that Constitution of India vests limited powers to all Judges at all levels and that a Judge is although free but not totally free. It is also pointed out that Dr. Durga Das Basu has criticized the dictum in *Mirajkar's case* (supra) and has observed that the same is contrary to the Constitution of India.

12. It is urged that decision of the Supreme Court in *Mirajkar's case* (supra) is apparently unconstitutional in as much as it holds that a judicial decision never violates fundamental right. It is also contended that State as well as respondent No.1-Trust and respondent No.2, who is a Judicial Officer,

who has intentionally, will fully and deliberately refused to follow judgments of the Supreme Court, has rendered himself liable for facing *suo motu* contempt proceeding and for payment of compensatory cost. In this connection reference has been made to the decisions of Supreme Court in the case of *Pritam Pal vs. High Court of Madhya Pradesh, Jabalpur,* AIR 1992 SC 904, *Rabindra Nath Singh vs. Rajesh Ranjan alias Pappu Yadav and another*, (2010) 6 SCC 417 and AIR 2009 SC 2214. It is also pointed out that the petitioner has claimed the relief for reading down the Judges Protection Act and the aforesaid reliefs can be granted only in a writ petition filed under Article 226 of the Constitution of India. It is also urged that the Executing Court while passing the impugned judgment has committed jurisdictional error which renders the judgment *ultra vires* and, therefore, the same is nullity. In this connection, reliance has been placed on a decision of the Supreme Court in (1981) Supp. SCC 87 and *Central Inland Water Transport Corporation vs. Brojo Nath Ganguly*, (1986) 3 SCC 156.

13. It is urged that the writ petition was lawfully filed and has been entertained by this Court directing issuance of notices and in compliance of the order dated 5.3.2015, the petitioner has already paid the process fee. It is further submitted that decision rendered by Three Judge Bench in the case of *Radheshyam and another* (supra) appears to be limited to a case whereupon on facts, relief is claimed to quash the order passed by the Civil Court and no other relief is claimed as has been claimed in the instant writ petition. Therefore, the decision in the case of *Radheshyam and another* (supra) has no application. It is also submitted that decision of *Radheshyam and another* (supra) is per-incuriam, as it has failed to notice the decision rendered by 13 Judge Bench of the Supreme Court in the case of *Keshavanand Bharti* (supra). It is also urged that reasonable time be granted to the petitioner so that he could make deeper study on question of law. Lastly, it is contended that any adverse order is passed against the petitioner, operation of the order dated 25.2.2015 be suspended for a period of four weeks in order to enable the petitioner to approach the Supreme Court.

14. On the other hand, learned senior counsel for respondent No.1 submitted that principal relief claimed in this writ petition is with regard to quashment of orders dated 16.12.2014 passed by the Executing Court in MJC No.561/12 and MJC No.40/13. It is further submitted that Three Judge Bench of the Supreme Court in the case of *Radheshyam* (supra), by placing reliance on decision rendered by Nine Judge Bench in the case of *Mirajkar*

(supra) has rightly held that judicial orders passed by the Civil Courts are not amenable to writ jurisdiction under Article 226 of the Constitution of India and, therefore, the instant writ petition is not maintainable under Article 226 of the Constitution of India. It is further submitted that the petitioner has statutory remedy available to him under Code of Civil Procedure, 1908 as his objection preferred under Order 21 Rule 97 of the Code has been rejected. In case, the petitioner feels that the objection has been rejected upon adjudication, the remedy of an appeal under Order 21 Rule 103 of the Code of Civil Procedure is available to him and in the alternative, the remedy of filing a revision under Section 115 of the Code of Civil Procedure is available to the petitioner. It is contended that the present writ petition is frivolous and vexatious proceedings initiated by the petitioner knowing full well that it is open to him to challenge the validity of the decree as well as the impugned order passed by the Executing Court by way of remedy prescribed under Order 21 of the Code of Civil Procedure. Therefore, it is urged that in any case, the instant writ petition under Article 226 of the Constitution of India is not maintainable. Learned senior counsel for respondent No.1 has also referred to Division Bench decision of Himachal Pradesh High Court in the case *Deepak Khosla Vs. State of Himachal Pradesh and others,* 2013 SCC Online HP 2955.

15. We have considered the respective submissions made by the petitioner and learned senior counsel for respondent No.1. As stated supra, we are dealing with the issue of maintainability of this writ petition preferred under Article 226 of the Constitution of India alone and are not expressing any opinion with regard to any other issues in writ petition and in particular on the merits of the decision of the Executing Court challenged in the writ petition.

16. On perusal of the multiple reliefs claimed in the writ petition, it is evident that the principal relief claimed in the writ petition is with regard to quashment of order dated 16.5.2014 passed by the Executing Court in MJC No.561/12 and MJC No.40/13, which is evident from relief clause 7(a) (c) and (d) of the writ petition. The other reliefs are founded on the validity of order dated 16.05.2014 passed by the Executing Court and not independent thereto. In other words, the other reliefs claimed by the petitioner are intrinsically dependent on challenge to the validity of the said order – having been passed without jurisdiction and nullity in law. Suffice it to observe that the other reliefs may require consideration only if the petitioner succeeds in challenging the validity of the order passed by the Executing Court referred to above.

17. It is well settled in law that right to access to justice is a fundamental right. *See: Manohar Joshi Vs. State of Maharashtra and others,* (2012) 3 SCC 619. However, that right is prescribed as per the procedure established by law. In this context, we may examine the grievance of the petitioner with regard to violation of fundamental right. In the instant case, the objection preferred by the petitioner under Order 21 Rule 97 of the Code of Civil Procedure has been rejected by the Executing Court vide order dated 16.5.2014 passed in MJC NO.561/12, which amounts to an adjudication under Order 21 Rule 101 of the Code of Civil Procedure. Against that order, the petitioner has the statutory remedy of filing an appeal under Order 21 Rule 103 of the Code of Civil Procedure. Similarly, against the order rejecting the appl ication preferred by the petitioner for treating the judgment and decree dated 10.10.2012 passed in Civil Suit No.19-A/2004 by the Executing court as nullity, the petitioner has the remedy of filing a revision under Section 115 of the Code of Civil Procedure. See: *Sawal Singh Vs. Ramsakhi,* 2002(4) MPHT 200. The contention raised in this writ petition about the validity of order of the Executing Court being without jurisdiction and nullity in law can be tested at the instance of the petitioner, if he were to resort to remedy under Order 21 of the Code of Civil Procedure mentioned herein before. It is not open to argue that that plea cannot be adjudicated by the forum/remedy provided for under Order 21 of the Code of Civil Procedure. Thus understood, the High Court should be loath to entertain the challenge such as in the present writ petition in exercise of extraordinary jurisdiction under Article 226 of the Constitution of India. For, statutory remedies are available to the petitioner for redressal of his grievance as well as in view of law laid down by Nine Judge Bench of the Supreme Court in the case of *Mirajkar* (supra) and Three Judge Bench in the case of *Radheshyam and another* (supra), wherein, it has been held that judicial orders passed by the Civil Court are not amenable to writ jurisdiction under Article 226 of the Constitution of India. The contention raised by the petitioner with regard to violation of fundamental right is *sans* any substance, as the petitioner is not being denied access to justice.

18. The reliefs claimed by the petitioner with regard to reading down the provisions of Judges Protection Act, payment of compensation as well as initiation of *suo motu* proceeding against respondent No.2 are concerned, in our considered opinion, in the facts of the present case, have been sought only to justify the remedy by way of writ petition under Article 226 of the Constitution of India. In one sense, the other reliefs claimed (except challenge

to the validity of order of the Executing Court) are premature and superfluous. These reliefs may become necessary only if the Court of competent jurisdiction in the first instance were to accept the challenge founded on the argument that the order of the Executing Court is without jurisdiction and nullity in law. As a matter of fact, if the Court of competent jurisdiction were to accept that argument of the petitioner, as a necessary corollary, it would quash and set aside the order of the Executing Court on that count. We may hasten to add that the other reliefs, as sought, in the writ petition, are to justify the challenge to the order passed by the Executing Court by way of petition under Article 226. We may reiterate that if the competent forum in the specified proceedings, resorted to by the petitioner under Order 21 were to accept the plea of nullity of the decree or the order passed by the Executing Court which it is competent to do, then only the question of reading down the provisions of Judges Protection Act and for grant of compensation and initiation of *suo motu* contempt proceeding against respondent No.2 may arise which may have to be dealt with on it's own merit. Such a stage has not at present arisen, as the finding is yet to be recorded by the competent forum with regard to the validity of the judgment and decree dated 10.10.2012.

19. As the principal reliefs for consideration in this writ petition are of quashment of orders dated 16.12.2014 in M.J.C.Nos. 563/2012 and 40/2013 passed by the Executing Court, therefore, the ratio laid down in *Radheshyam* (supra) squarely applies to the facts of the present case and the contentions of petitioner that said decision does not apply, deserves to be repelled.

20. As far as the contention of the petitioner that the law laid down by Nine Judge Bench of the Supreme Court in the case of *Mirajkar* (supra) is per-incuriam and that the decision in the case of Supreme Court in the case of *Radheshyam* (supra) is also per-incuriam for the same reason, we are afraid we cannot entertain this contention as the law laid down in *Mirajkar's* case (supra) as well as in the case of *Radheshyam* (supra) binds us under Article 141 of the Constitution of India. [See: *Suganthi Suresh Kumar vs. Jagdeeshan,* (2002) 2 SCC 420].

21. Similarly, the contention of the petitioner that writ petition has already been entertained by this Court is concerned, the same only deserves to be stated to be rejected. The order dated 05.3.2015 reads as under:-

*"05.03.2015*

*Petitioner- Satya Pal Anand appears in person.*

*Smt.Shobha Menon, Senior Advocate wi th Ms.Ankita Khare, Advocate for the respondent no.2.*

*The principal grievance of the petitioner is that objection filed by him on 16th March, 2013 has remained undecided and the Executing Court hastened to pass final orders first on 23rd April, 2014 which later on was recalled and again on 16th May, 2014.*

*According to the petitioner, the order dated 16th May, 2014 does not deal with the written objection f iled by the petitioner on 16th March, 2013. According to the petitioner, not deciding the objection has vitiated the order dated 16th May, 2014.*

*Issue notice to the respondents.*

*Respondents to deal with this contention specifically and place on record relevant documents as may be advised along with the affidavit to be filed before 10th March, 2015.*

*Rejoinder, if any, be filed before 12th March, 2015.*

*List on* ***13th March, 2015.***

*The advance copy of reply-affidavit be made available to the petitioner.*

*At this stage, petitioner submits that the respondents may hasten with the execution of the decree and for which reason interim protection be granted.*

*Counsel for the respondents submits that the returnable date given by the Executing Court is 23rd Marcy, 2015.*

*In that case, in our opinion, no interim order is required at this stage. In the event, the matter pending before this Court cannot be decided before 23rd March, 2015, the Court may consider request for grant or nongrant*

*of interim relief.*

*C.C. today."*

Thus, it is evident that while issuing notice this Court has not dealt with the issues of maintainability of the writ petition. It is also noteworthy that despite opportunity being granted the petitioner has not filed any rejoinder affidavit.

22. The petitioner had lastly submitted that he may be given some more time to prepare as he may have to raise constitutional issues of some significance. In our opinion, keeping in mind the dictum of the recent Supreme Court decision directly on the point which is binding on this Court, no fruitful purpose would be served by giving further time to the petitioner, in as much as, the argument of the petitioner that the dictum of *Mirajkar's* case as well as *Radheshyam's* case is per-incuriam, if not nullity cannot be entertained by this Court as is the well established position. Hence, we reject the request of the petitioner to give further time for preparation.

23. As far as the submission made by the petitioner that the order dated 25.2.2015 should be kept in abeyance so as to enable him to approach the Supreme Court, we are not inclined to accede to the said prayer, as the petitioner is at liberty to resort to remedy prescribed by law before the Competent Court which may deal with the same in accordance with law.

24. In view of preceding analysis, we hold that writ petition as framed and filed under Article 226 of the Constitution of India is not maintainable. However, the petitioner would be at liberty to take recourse to such other remedy as may be available to him under the law. However, there shall be no order as to costs.

25. Having held that the writ petition is not maintainable, we do not deem it necessary to examine the grievance of the respondents about the frivolity of present proceedings resorted to by the petitioner with full understanding to gain some more time and to deny the respondents of the fruits of the decree operating in their favour – because of non-fulfilment of the conditions by the petitioner which were imposed as condition precedent for stay of execution of the decree.

26. In the result, the writ petition is dismissed with the liberties, as aforesaid.

*Petition dismissed.*

**I.L.R. [2015] M.P., 1788**
**APPELLATE CIVIL**
***Before Mr. Justice K.K. Trivedi***
S.A. No. 798/2000 (Jabalpur) decided on 22 November, 2013

MUHAMMAD AYOOB KHAN (SINCE DECEASED) THROUGH L.Rs. SAMSUNNISHA (SMT.) ...Appellant
Vs.
KRISHNAPRATAP SINGH & ors. ...Respondents

***Civil Procedure Code (5 of 1908), Section 100 and Transfer of Property Act (4 of 1882), Section 58 - Sale deed or Mortgage deed -*** **Document written for the purpose of executing mortgage - There was a condition that in case the loan amount is not paid by the plaintiff the mortgagee would be entitled to get a sale deed executed and the land given in the possession of the appellant - There is no evidence that the land was ever purchased by the appellant - Held - There is no perversity or illegality in recording the finding by Courts below that the respondent/ plaintiff was the owner of suit land and the document Ex.P-1 was the document of mortgage and not of sale - Courts below have rightly decreed the suit - No interference is warranted - Appeal is dismissed. (Paras 8 & 9)**

*सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 एवं सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 58 – विक्रय विलेख या बंधक विलेख* – बंधक निष्पादित किये जाने के प्रयोजन हेतु दस्तावेज लिखा गया – इसमें शर्त थी कि वादी द्वारा ऋण की रकम अदा नहीं किये जाने की स्थिति में बंधकदार विक्रय विलेख निष्पादित करवाने का हकदार होगा और अपीलार्थी को भूमि का कब्जा दिया गया – कोई साक्ष्य नहीं कि अपीलार्थी द्वारा कभी भी भूमि क्रय की गई थी – अभिनिर्धारित – निचले न्यायालयों द्वारा यह निष्कर्ष अभिलिखित करने में कोई विपर्यस्तता या अवैधता नहीं कि प्रत्यर्थी/वादी, वादभूमि का स्वामी था और दस्तावेज प्रदर्श पी.1 बंधक का दस्तावेज था और न कि विक्रय का – निचले न्यायालयों ने उचित रूप से वाद डिक्रीत किया – हस्तक्षेप की आवश्यकता नहीं – अपील खारिज।

**Cases referred :**

(2009) 2 SCC 673, AIR 1960 SC 301.

*J.L. Mishra,* for the appellant.
*Aditya Adhikari & Abhishek Gulati,* for the respondents.

## JUDGMENT

**K.K. Trivedi, J. :-** This is a second appeal under Section 100 of the CPC by the defendants against the judgment dated 12.5.2000 passed in Civil Appeal No.106-A/1997 by the Second Additional District Judge, Chhatarpur arising out of judgment and decree dated 18.7.1996 passed in Civil Suit No.18-A/1989 by the Civil Judge, Class-I, Chhatarpur.

2. The original respondent/plaintiff filed a suit alleging that the agriculture land in certain khasra numbers, as indicated in the plaint, total area 26.571 hectares situated in village Goriya, Tehsil and District Chhatarpur was owned by him. It was contended that since he was in need of money, he mortgaged the said land with the appellant/defendant on 23.9.1969. The land was never transferred as an out and out sale to the appellant/defendant, on the other hand, the same was being cultivated by the appellant as permitted by the mortgage deed. Claiming appellant/defendant himself as occupancy tenant, he moved an application before the Tehsildar for the purposes of recording of his name on the revenue entries of the said disputed land. When respondent/ plaintiff came to know about the said fact, he objected to the same, but the Tehsildar passed an order and directed transfer of the land in the name of appellant/defendant. Since the land was never transferred to the appellant, such an action on the part of the Tehsildar was bad in law. Therefore, the suit was required to be filed.

3. Upon service of the notice of the suit, a written statement was filed by the appellant denying such contentions of the respondent/plaintiff and it was contended that the land was ever since in possession of the appellant/defendant. He was cultivating the said land and, therefore, treating him as an occupancy tenant, his right was perfected under the provisions of Section 190 of the M.P. Land Revenue Code. In fact, the appellant was put in possession by the respondent/plaintiff, as they were having good relations and on 23.9.1969 some document was shown to the appellant/defendant by the respondent/ plaintiff on the pretext that it was a document to get the name of appellant mutated on the land. It was agreed that a regular sale deed would be executed. However, the appellant was in possession of the land as an occupancy tenant and therefore rightly his name was mutated in the revenue record. Since no such document of mortgage was executed, the respondent/plaintiff had no title over the land in suit. He categorically alleged that vide sale deed dated 4.11.1972 the land in suit was transferred in the name of appellant by the

original respondent/plaintiff.

4. The trial court, after framing of the issue, recorded the evidence of the parties and reached to the conclusion that in fact the document placed on record was not an out and out sale and therefore, no title was conferred on the appellant. On the other hand, the original respondent/plaintiff having the title on the land in suit, was entitled to such a declaration and the order passed by the Tehsildar, Chhatarpur for mutation of the name of the appellant in the revenue records of the land in suit dated 29.3.1984 was void and ineffective.

5. The appellant preferred an appeal against such a finding of the trial court. The lower appellate court, after marshaling the evidence available on record and after examining the documents, came to the conclusion that no error of law was committed by the court below in decreeing the suit of the respondent/plaintiff and dismissed the appeal. Hence, this second appeal. After summoning of the record, an interim protection was granted by this Court on 14.10.2000. The appeal is admitted on the following substantial questions of law:

> "(1) Whether in view of the fact that the document dated 23.9.1969 (Ex.P-1) was the mortgage deed, the suit for declaration as filed by the appellant as owner of the land in question would have been decreed by the Courts below?
>
> (2) Whether the finding regarding possession recorded by the Courts below is perverse?
>
> (3) Whether in the facts and circumstances of the case the conclusion recorded by the Courts below is justified in law?"

6. On consideration of the first question of law, if the documents said to be produced by the respondent/plaintiff are examined, it would be amply clear that Ex. P-1 was nothing but a mortgage deed. Opening of this document indicates that the same was written for the purpose of executing a usurpatory mortgage for Rs.1000/-. This particular document indicates that there was a condition that in case the amount of loan obtained by the respondent/plaintiff is not paid within a period of two years, the mortgagee would be entitled to get a sale deed executed for the property mortgaged. This particular document further indicates that the respondent/plaintiff agreed that for a period of two years the land in suit is given in possession of the appellant and from the crops

of the said land respondent/plaintiff will get nothing as the same would be payable to the appellant/defendant, the mortgagee in lieu of the interest and repayment of the amount of loan. It was further agreed that till the amount of loan is not repaid, the land mortgaged would not be transferred to any other person. The said document was executed in presence of witnesses. Yet another document is placed on record as Ex.P-2, a statement of the appellant himself recorded on affidavit wherein he admitted that the land in suit was mortgaged with him right from the year 1969 and that is how he is in possession of the said land. He further admitted that the land in suit in fact was belonging to respondent/plaintiff and it was recorded in the revenue record in the name of the respondent/plaintiff. In the objection, which was raised by the appellant in one of the proceedings for attachment of the land in suit by the revenue authorities on account of non-payment of revenue dues of the State Government, again it was admitted that the land was belonging to the respondent/plaintiff, but the appellant was put in possession of the said property. As against this evidence though some sort of sale deeds were produced to show that the land was in fact purchased by the appellant, however, there was no reference of payment of sale consideration. Further, the sale deeds were not for the entire area, which was said to be placed in mortgaged with the appellant. The area said to be sold to the appellant by the aforesaid sale deeds Ex.D-1 and D-2 was not the area or the land which was mortgaged with the appellant. Certain other documents were produced by the appellant in evidence to show that the facts were admitted by the respondent/plaintiff with respect to the execution of sale deeds, but the fact remains that description of the property said to be mortgaged and the description of the property sold under the sale deeds was not specifically proved nor tallied.

7. The respondent/plaintiff examined the witnesses to prove that there was a mortgage of the land in suit with the appellant and no out and out sale was executed. For the said purpose, the respondent/plaintiff examined the witness from the Registry Office, who categorically deposed that a document of mortgage was registered on 23.9.1969 in the office of the Registrar, Chhatarpur. One Govind Singh, as a attorney of the respondent/plaintiff, was examined as a witness, who exhibited all the relevant documents referred to hereinabove. In the extensive cross-examination of this witness, nothing material has been brought on record to show that the Ex. P-1 was not a mortgage, but an out and out sale. The other witness of the respondent/plaintiff stated that the respondent/plaintiff had given the land in possession to the

appellant. As against this evidence of the respondent/plaintiff, the appellant/ defendant examined himself and categorically deposed that no mortgage deed was executed by the respondent/plaintiff in respect of the land in suit mortgaging the same with the appellant/defendant. He further categorically contended that the respondent/plaintiff agreed to sell the land for a sum of Rs.3000/- of which some part of the amount was paid by him, but he could not point out as to why the sale deed was not executed. In paragraph-3 of his court statement, he categorically stated that the land was never mortgaged with him by the respondent. On the other hand he contended that the land was given to him as a Sikmi agriculturist. In his cross-examination, again he could not point out as to why he has not taken any step to get the sale deed executed in respect of the agreement said to be executed. He again could not disclose as to why an available document of sale of the land in his favour could not be produced by him even after obtaining a certified copy of the same from the Registrar Office. He could not depose as to why the agreement of putting the appellant as a Sikmi agriculturist could not be executed. There was nothing to show in the entire evidence of the appellant that the land was ever purchased by him in out and out sale. Likewise, the other witnesses examined by the appellant could not support the contentions of the appellant. Even DW-3 Lachchu son of Mullu stated that he was not aware whether any mortgage deed was executed in respect of the land in suit or there was an out and out sale.

8. Marshalling these evidence, if the trial court reached to the conclusion that the respondent/plaintiff had categorically proved that he was the owner of the land and that the said land was mortgaged with the appellant/defendant, it cannot be said that such a finding was erroneous. Though a counter claim was filed by the appellant, but from the facts, as have been indicated hereinabove, the learned trial court has rightly held that none of the issue framed on the counter claim of the appellant could be found proved. These evidence were marshalled by the first appellate court in appeal filed by the appellant and the learned lower appellate court also reached to the conclusion that the land in fact was mortgaged, therefore, such an order of mutation of the name of the appellant on the land in suit could not have been passed by the Tehsildar. The factum of payment of amount of loan or release of the property after the realization of the whole of the amount of loan with interest, on account of receiving the produce from the said land, was also thus found proved.

9. The law in this respect is well settled. On various occasions the courts

of law have looked into the provisions of Section 58 of the Transfer of Property Act, 1882 where the 'mortgage' is defined. A simple mortgage may be a transaction where money is paid on loan wherein a condition is agreed expressly or impliedly that in the event of failure of the mortgagor to repay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied. Similar was the wordings in the document Ex.P-1. IF this particular aspect is examined, in view of the law laid down by the Apex Court in the case of *C. Cheriathan vs. P. Narayanan Embranthiri* – (2009) 2 SCC 673, no iota of doubt is left that Ex.P-1 was nothing but a mortgage deed. The condition implied was payment of loan, receipt of the loan amount in repayment through agricultural proceeds of the suit in land, mortgaged with the appellant and therefore if a right is conferred on the respondent/plaintiff by the courts below by decreeing the suit, it cannot be said that the error of law was committed by the courts below. It is also well settled that a test of sale and mortgage by conditional sale is to be applied looking to the evidence available on record, as has been held by the Apex Court in the case of *Bhaskar Waman Joshi (deceased) and others v. Shrinarayan Rambilas Agarwal (deceased) and others* – AIR 1960 SC 301. If this test is applied in view of the specific evidence led by the parties, again nothing is left to consider whether the Ex.P-1 was a document of sale or a document of mortgage. Lastly, the appellant himself has denied such a document and has very categorically contended in his written statement as also in the court statement that the document Ex.P-1 was never executed by him. He himself could not produce any document of sale of the land in suit in his favour by the respondent/plaintiff. Even when a counter claim was made in this respect, the burden was not discharged by him. In view of this, it cannot be said that error of law is committed by the courts below in rejecting the counter claim of the appellant and decreeing the suit of the respondent/plaintiff.

10. Accordingly, there is no substance in this appeal. In fact, Ex.P-1 is a mortgage deed and as such the declaration granted by the courts below in favour of the respondent/plaintiff and the decree passed in this respect is just and proper. The substantial questions of law are answered accordingly. The appeal fails and is hereby dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

*Appeal dismissed.*

**I.L.R. [2015] M.P., 1794**
**APPELLATE CIVIL**
***Before Mr. Justice K.K. Trivedi***
S.A. No. 546/2002 (Jabalpur) decided on 4 December, 2013

SAHEED KHAN (SINCE DEAD)
THROUGH LRs. & anr. ...Appellants
Vs.
SHAREEF HUSSAIN ...Respondent

*A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(c) - Denial of title* - **Agreement to sell between erstwhile owner and appellant no. 1 (Tenant) - Subsequently, erstwhile owner sold the suit shop to the plaintiff (Landlord) - Held - Mere execution of agreement to sell does not confer title on tenant - Judgment & decree of both the Courts below u/s 12(1)(c) of the Act affirmed - Appeal dismissed. (Para 8)**

*क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(सी) – स्वत्व को अस्वीकार किया जाना* – मूतपूर्व स्वामी और अपीलार्थी क्रमांक 1 (किरायेदार) के बीच विक्रय का करार – तत्पश्चात्, भूतपूर्व स्वामी ने वादग्रस्त दुकान वादी (मकानमालिक) को विक्रय की –अभिनिर्धारित – मात्र विक्रय के करार का निष्पादन किरायेदार को स्वत्व प्रदान नहीं करता – अधिनियम की धारा 12(1)(सी) के अंतर्गत दोनो निचले न्यायालयों के निर्णय एवं डिक्री की अभिपुष्टि की गई – अपील खारिज।

*B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(b) - Sub-letting* - **Appellant no. 1 (Tenant) shifting his business - Possession handed over to appellant no. 2 - Held - Possession of appellant no. 2 neither authorised by erstwhile owner nor by the plaintiff (Landlord), so decree u/s 12(1)(b) of the Act also affirmed. (Para 10)**

*ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(बी) – उप–किरायेदारी* – अपीलार्थी क्रमांक 1 (किरायेदार) ने अपना कारोबार का स्थान परिवर्तन किया – अपीलार्थी क्रमांक 2 को कब्जा हस्तांतरित किया गया – अभिनिर्धारित – अपीलार्थी क्रमांक 2 का कब्जा न तो भूतपूर्व स्वामी द्वारा और न ही वादी (मकानमालिक) द्वारा प्राधिकृत है, अतः अधिनियम की धारा 12(1)(बी) के अतंर्गत डिक्री की भी अभिपुष्टि की गई।

**Cases referred :**

1979 MPLJ 155, AIR 1989 SC 2187, AIR 1999 SC 3584, 2006 (1) MPLJ 103.

*Akhilesh Jain,* for the appellants.
*M.P. Acharya,* for the respondent.

**JUDGMENT**

**K.K. TRIVEDI, J. :-** This second appeal by appellants/defendants/tenants under Section 100 of the Code of Civil Procedure is against the judgment and decree dated 29/7/2002 passed in Civil Appeal No.17-A/2002 by 2nd Additional District Judge, Sehore arising out of judgment and decree dated 30/8/2001 passed in Civil Suit No.84-A/1998 by 3rd Civil Judge Class-II, Sehore.

2. The respondent/plaintiff/landlord filed a suit for eviction of the appellant/defendants/tenants on various grounds as prescribed under Section 12(1) of the M.P. Accommodation Control Act, 1961 (hereinafter referred to as 'the Act'). It was contended that respondent/plaintiff has purchased the shop in suit by a registered sale deed dated 30/5/1991. Original defendant No.1 was tenant of the erstwhile owner of the shop. However, the original tenant sub-let the shop to the appellant No.2. After purchase of the shop the respondent/plaintiff gave a notice terminating the tenancy of the defendants and asked for delivery of possession of the shop as also payment of arrears of rent which was due. Such claim made by respondent/plaintiff was contested by the appellants on the ground, inter-alia, that the appellant No.2 was not a tenant of the respondent/plaintiff. It was denied that the shop was purchased by the respondent/plaintiff. It was contended that on 30th May, 1991 the original owner of the shop Tahir Ali had not remained the owner of the said shop as he has agreed to sell the same to the appellants/defendants vide agreement dated 10/2/1991. The appellants were put in possession of the shop in their capacity as intending purchaser and not as tenant, therefore, there was no relationship of landlord and tenant between the appellants and said Tahir Ali after 10/2/1991. The suit as filed by respondent/plaintiff was not maintainable and, in fact, the suit was liable to be dismissed.

3. The trial Court framed the issues and recorded the evidence of the parties. After evaluation of the evidence available on record, learned trial

Court held that the respondent/plaintiff has proved that he was the owner and landlord of the disputed shop, however, since it was found by learned trial Court that the respondent/plaintiff could not prove the fact that the rent was not paid by the appellants and that the suit shop was bona fidely required by respondent/plaintiff, the claim in that respect was rejected. The suit was decreed only on the ground that by denying the title of the respondent/ defendant on the suit shop, the appellants/tenants have made themselves liable to be evicted. The suit was partially decreed on this count only.

4. The appellants preferred an appeal before learned lower appellate Court on the various grounds. It was contended in the appeal that the trial Court has failed to see that the appellants were in possession of the suit shop on the strength of agreement to sale the shop, therefore, it was wrongly held by trial Court that the appellants were, in fact, the tenants of the respondent/ plaintiff and since they have denied the title of the respondent/plaintiff in the shop in suit, they were liable to be evicted. Learned lower appellate Court after marshalling the evidence available on record and after examining the finding recorded by the trial Court dismissed the appeal and decreed the suit of the respondent/plaintiff against the appellants on the ground of sub-letting of the suit shop also. Feeling aggrieved by the judgment and decree of the first appellate Court, this second appeal is filed which is admitted on 7/4/2003 on the following substantial question of law:

> "(i) Whether under the circumstances of the case denial of title would furnish a ground of eviction u/s 12(1 )(c) of the M.P. Accommodation Control Act?
>
> (ii) Whether the finding of sub-letting was based on no evidence ?"

5. It is vehemently contended by learned counsel for the appellants that once it was demonstrated by examining the witnesses and by producing the documents that by virtue of an agreement to sale, the appellants were put in possession of the suit shop, they were not to be treated as tenants. Even otherwise if during the continuance of such agreement to sale, erstwhile owner of the property transferred the suit shop to the respondent/plaintiff by a subsequent sale deed, the tenancy of the appellants cannot be said to be attorned automatically. It was the fact that original defendant No.1/appellant No.1 alone was tenant of said shop of Tahir Ali, the earlier owner of the suit

shop and since the suit filed against the said appellant No.1 by Tahir Ali for eviction has failed, the judgment and decree was affirmed up to the second appellate stage, ultimately suit shop was agreed to be sold to the appellants jointly. Appellant No.2 was put in possession of the shop in his capacity as prospective purchaser but he could not be treated as a tenant of Tahir Ali in any manner. At the best, he would be a licency and his right to continue in possession of the suit shop cannot be jeopardized treating him as a tenant. At the best, if the agreement was not made enforcible by the appellants, it was to be treated as a lease. The lease could be determined in terms ot Section 111 of the Transfer of Property Act, 1882 and it was, thus, to be held that the appellant No.2 was not to be treated as a tenant. If, in alternative, the agreement to sale was not be treated as a lease, appellant No.2 was in permissible possession of the suit shop and if any title accrued to the respondent/plaintiff on account of sale of suit shop, he was required to ask for decree of possession by paying ad valorem Court fee on the value of the suit shop and no tenancy suit was maintainable. This particular aspect has been lost sight by two Courts below and, therefore, the judgment and decree passed by the Courts below is bad in law. It is further contended by learned counsel for the appellants that there was no evidence available on record to show that appellant No.1 was original tenant and that he has sub-let the shop in suit to appellant No.2 and, therefore, the findings arrived at by the lower appellate Court are perverse. Such judgment and decree is, thus, liable to be set aside.

6. Per contra, it is contended by learned counsel for the respondent that burden was on the appellants to show that they were put in possession of the shop in capacity as a prospective purchaser. The nature of the agreement said to be executed in favour of the appellants by erstwhile owner of the suit shop, itself, indicates that the original landlord of the suit shop was fighting against appellant No.1 for his eviction and since he has become fed up with the litigation, ultimately he agreed to sale the shop to the appellants. However, the said agreement was never materialized nor any attempt was made by the appellants to get the agreement enforced. The right of the ownership of the Shop was not available to the appellants when the suit shop was already sold subsequently to the respondent/plaintiff, therefore, their status as a tenant was continued. In view of this, if a decree is granted by the Courts below for eviction of the appellants, it cannot be said that any wrong is committed by the Courts below. Such submissions made by learned counsel for the appellants are totally misconceived and the appeal is liable to be dismissed.

7. Heard learned counsel for the parties at length and perused the record of the Courts below.

8. First of all, it is to be seen whether any ground under Section 12(1)(c) of the Act was made out to grant any decree of eviction against the appellants/ defendants or not. The ground for eviction of tenant as prescribed under Section 12(1)(c) of the Act is that the allegation of creating any nuisance or doing any act which is inconsistent with the purpose for which the tenant is admitted to the tenancy of the accommodation or which is likely to affect adversely and substantially the interest of the landlord then on proof of such facts a decree of eviction can be granted. The allegation in this respect are required to be seen in the plaint. In paragraph -7 of the plaint allegations were made that the appellants/tenants have caused damage to the suit shop and have made it in such a condition that the same can be demolished at any time. It was alleged that when the information about transfer of suit shop was given by a notice of demand by the respondent/plainfiff, his ownership was denied by the appellants/ defendants. Such pleas raised by the respondent/plaintiff were to be replied specifically by the appellants in their written statement. Issue No.6 and 9 were framed in this respect, and finding the issue proof after appreciation of evidence adduced in this respect, learned Civil Court held that since tenancy is proved, therefore, issue No.6 and 9 are found proved and in view of this, a decree of eviction of the tenant can be granted under the provisions of Section 12(1)(c) of the act. In fact recording such finding, it was treated that an adverse affect is to be caused to the respondent/plaintiff, landlord only because a plea was raised by the appellants in their written statement that they were owner and in possession of the suit shop and they were not the tenants of the respondent/plaintiff. The evidence to this effect is also required to be examined. Admittedly, an agreement was executed in between the appellants and earlier owner of the suit shop namely Mullah Tahir Ali. The reasons for executing agreement Ex.D/1-c, itself, was that the suit was filed by said Tahir Ali against appellant No.1 for his eviction, but, that suit was dismissed and judgment and decree of trial Court was affirmed up to the second appellate stage. The landlord of appellant No.1 was fed up with the tenant and that is why he was litigating against him for his eviction. Ultimately, he succumbed to all these circumstances and agreed to sell the suit shop to the appellants. Merely because an agreement was executed in favour of the appellants, they were not become title holders of the suit shop. If they were interested in getting the said suit shop, they were required to approach the said original owner for sale of the

shop by execution of a deed of transfer. Nothing was done by them and ultimately the shop was purchased by respondent/plaintiff by a registered sale deed said to be executed on 30/5/1991 as is clear from Ex.P/10-C. This sale deed could have been objected by the appellants and they could have raised an objection that there was a prior agreement to sale the suit shop to them but, they did nothing. It appears that they were thinking that if the original landlord could not get them evicted, any subsequent purchaser would also not be entitled to get a decree of eviction. All these circumstances were considered by the Courts below and a decree of eviction was granted against the appellants. The lower appellate Court also affirmed such finding, therefore, in these circumstances, denial of title of the respondent/plaintiff amounts to serious prejudice which was going to be caused to the respondent/plaintiff and, therefore, the decree was rightly granted by the Courts below. In fact, the agreement said to be executed in favour of the appellants by the erstwhile owner of the shop in suit became in executable by lapse of time and lapses on the part of the appellants themselves. Indefinite rights were not available to the appellants to claim as if they become title holders of the suit shop because agreement was executed in their favour to sell the shop.

9. The law with respect to such disclaimer and test of bonafide claim has been well settled. In case of *Mirkhan Nathhe Khan Vs. Kutab Ali Tayab Ali* (1979 MPLJ 155) a Division Bench of this Court has held that if a land lord claims the derivatory title, then a tenant can bonafidely raise objection in that respect and the principle of estoppel would not be attracted against such a tenant. However, if such stand are seen the act of appellant cannot be said to be bonafide in view of aforesaid findings. The principle laid down in case of *Majati Subbarao Vs. PV.K. Krishna Rao (deceased)* by Lrs (AIR 1989 SC 2187) by the Apex Court would be squarely applicable in this case. Even in case of *S. Thangappan Vs. Padmavathy* (AIR 1999 SC 3584) this has been held by Apex Court that such default made by the tenant itself is a good ground for eviction of tenant treating it as a forbidden act of estoppel under Section 116 of Evidence Act. In view of these law and the findings arrived at, no interference in the judgment and findings of the Courts below is called for.

10. Now the second question would be whether the sub-letting are proved or not. Admittedly, only original appellant No.1/defendant No.1 was the tenant of the erstwhile owner of the suit shop. The moment said suit shop was purchased by the respondent/plaintiff by virtue of operation of law, the tenancy

was also attorned. As has been held herein above, the right to continue as owner of said suit shop was not conferred on the appellants for time immemorial. Since the sale deed, itself, was not got executed expeditiously pursuant to the agreement, the possession of appellant No.1/ defendant No.1 reverted back to that of a tenant. Appellant No.2 was not to be allowed to continue in possession of the suit shop after sale deed was executed in favour of the respondent/plaintiff. Thus, in fact, the ground for grant of decree of eviction under Section 12(1)(b) of the Act was also made out. The evidence available on record indicates that the original appellant No.1 had actually shifted his business to else where and was not continuing his business in the suit shop. Accordingly, if the shop was taken in possession by appellant No.2, he was required to seek permission of the respondent/plaintiff. It is not the case of the appellants that continuance of appellant No.2 was authorised by the erstwhile owner of the shop, even after expiry of the period of agreement to sale. In view of this, the finding recorded by the lower appellate Court for eviction of appellant under the provisions of Section 12(1) (b) of the Act also cannot be said to be unjustified.

11. Learned counsel for the appellants has placed reliance on judgment of this Court in the case of *Rekha Wd/o Vijay Singh Rana and others Vs. Smt. Ratnashree W/o Rajendra Kumar Jain,* 2006 (1) MPLJ103, and has contended that the document of sale produced by the respondent/plaintiff was not proved in the manner indicated in the Evidence Act. It is to be seen that the appellants have not denied the said document. They said that they have no knowledge of execution of such sale deed. In fact, they were insisting on proving of their own agreement to sale and were saying that the suit shop could not be sold to the respondent/plaintiff. There is, thus, distinction in the facts, therefore, the law laid down by this Court in the case of *Rekha* (supra), would not be attracted as a whole.

12. Lastly, it is contended by learned counsel for the appellants that in case the appeal fails, the appellants may be granted at least two years' time to vacate the suit shop. Such prayer made by learned counsel for the appellants is opposed by learned counsel for the respondent/plaintiff. It is seen that suit, itself, was filed in the year 1995. The same has remained pending before Courts for all these years and the appellants have already enjoyed the possession of the suit shop. Though the bona fide need of the respondent/ plaintiff is not proved but, since a decree of eviction is granted against the

appellants by two Courts below and the said judgment and decree is affirmed by this Court, it would not be proper to grant time to the appellants to vacate suit accommodation. Such a prayer of the appellants is, therefore, rejected. The substantial questions of law are answered accordingly.

13. In view of forgoing, this appeal fails and is hereby dismissed with cost. The appellants will bear the cost of the respondent. Counsel fee Rs.3000/-, if pre-certified.

*Appeal dismissed.*

**I.L.R. [2015] M.P., 1801**
**APPELLATE CIVIL**
***Before Mr. Justice Sanjay Yadav***
M.A. No. 317/2014 (Jabalpur) decided on 5 April, 2014

TILAK EDUCATION RESEARCH & DEVELOPMENT SOCIETY & anr. ...Appellants
Vs.
SMT. PHOOLWATI & ors. ...Respondents

***Civil Procedure Code (5 of 1908), Order 41 Rule 23A and Transfer of Property Act (4 of 1882), Section 44 - Transfer of undivided share by coparcener*** **- Respondent filed the suit for declaration of title, partition and mesne profits - Suit was decreed - Objection was filed before executing Court that appellants have purchased a part of disputed land from a coparcener - Appellate Court remanded the matter to ascertain the title of decree holder in respect of 1/2 share by collecting evidence - Held - Transferee from a co-owner would not be in a better position than the co-owner and does not have any right to exclusive possession - Appellate Court rightly remanded the case back - Appeal dismissed. (Paras 4, 7, 8 & 12)**

*सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 23ए एवं सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 44 – सहदायिक द्वारा अविभाजित हिस्से का अंतरण* – प्रत्यर्थी ने स्वत्व की घोषणा, विभाजन एवं अंतःकालीन लाभों हेतु वाद प्रस्तुत किया – वाद डिक्रीत किया गया – निष्पादन न्यायालय के समक्ष आपत्ति प्रस्तुत की गयी कि अपीलार्थीगण ने सहदायिक से विवादित भूमि का एक भाग क्रय किया – अपीली न्यायालय ने 1/2 हिस्से के संबंध में साक्ष्य एकत्रित कर डिक्रीदार के स्वत्व को अभिनिश्चित करने के लिये मामला प्रतिप्रेषित किया – अभिनिर्धारित –

सहस्वामी से अंतरिती, सहस्वामी से बेहतर स्थिति में नहीं होगा और उसे अनन्य कब्जे का कोई अधिकार नहीं है – अपीली न्यायालय ने उचित रूप से प्रकरण प्रतिप्रेषित किया– अपील खारिज।

**Cases referred :**

AIR 1973 MP 222, AIR 1997 SC 856, AIR 1998 SC 1827.

*Ravish Agrawal* with *Avinash Zargar,* for the appellants.

*(Supplied: Paragraph numbers)*

**ORDER**

SANJAY YADAV, J. :- Heard on admission.

2. This Appeal under Order 43 Rule 1(u) read with Section 100 of the Code of Civil Procedure, 1908, [for short the 'CPC'] at the instance of objectors-appellants in Execution Case No.195/2005 (sic.197/2005), is directed against judgment and decree 11.12.2013 in Regular Civil Appeal No.180/2013 by Third Additional District Judge, Bhopal, arising out of deemed judgment and decree dated 7.10.2013.

3. At the outset, it may be mentioned that, as stated in paragraph 1.11 of memorandum of appeal, the appellants confine the challenge to the impugned order in so far as it remands the matter. It is stated that, in view of documentary evidence on record, the Court below could have decided the matter on merits. The order of remand, it is stated, is an exercise in futility, inasmuch as in order to adjudicate and decide the objections raised by the appellants, could be decided without recording evidence on the basis of documentary evidence already on record.

4. The background facts giving rise to an occasion for the appellants to raise objections briefly are that a Civil Suit No.106-A/1987 was instituted by Smt. Phoolwati (first respondent) on 15.6.1987 for declaration of title, partition and mesne profits in respect of 15.24 acres of land situated at Village Barkheda Bonder Tahsil Huzar District Bhopal.

5. The suit was decreed on 18.7.1994 in the following terms -

"8. एक पक्षीय साक्ष्य के आधार पर वादी का प्रकरण सिद्ध पाए जाने से घोषित किया जाता है कि :–

(अ) उक्त 15.24 एकड़ भूमि में से आधा भाग अर्थात 7.62 एकड़ भूमि की वादिनी भूमि स्वामिनी हैं ।

(ब) वादिनी उक्त भूमि का बटवारा कराने और 7.62 एकड़ भूमि पर अलग से कब्जा पाने की अधिकारिणी है तथा उक्त भूमि पर वादिनी को कब्जा दिलाया जावे ।

(स) वादिनी वाद प्रस्तुत करने की दिनांक से 7.62 एकड़ भूमि पर अलग से कब्जा प्राप्त होने तक 400/– (चार सौं रूपये) प्रति एकड़ प्रतिवर्ष की दर से प्रति. क. 1 और प्रति. नं.9 से 11 से संयुक्त रूप से और अलग अलग मध्यवर्ती लाभ प्राप्त करने की अधिकारिणी है तथा गत तीन वर्षो के मध्यवर्ती लाभ में से एक हजार रूपये उक्त प्रतिवादीगण वादिनी को अदा करें।

(द) वादिनी प्रतिवादी क्र. 1 द्वारा दिनांक 14.6.84 व 20.6.84 को प्रतिवादी क.9, 10 और 11 के पक्ष में कराई गई बेनामा रजिस्टरी व उस के आधार पर उनके पक्ष में कराये गए नामांतरण से प्रतिबंधित नहीं है।

(ई) उभय पक्ष अपना आना वाद व्यय स्वयं वहन करें ।"

6. The decree was put to execution on 13.3.1995 whereon the appellants raised objection under Order 21 Rule 97 CPC as to land bearing Khasra No.475/2, admeasuring 0.591 hectare (1.46 acres) and Khasra No.476, 484/2 admeasuring 1.052 hectare (2.60 acres) that the land was purchased from one Ku. Anisa Khan vide sale deed dated 9.7.2009. That said Ku. Anisa had purchased the property from Col G.S. Uppal on 16.9.2007 who had purchased from Deepak Dixit on 30.3.2002. Deepak Dixit had purchased the suit property from Pannalal (in application, it is stated that he had purchased from Gulab Bai (See. Paragraph 5 of the application under Order 21 Rule 27 CPC). That, Pannalal had purchased the property from Gulab Bai vide sale deed dated 14.6.1984 i.e. prior to the partition and when the property was part and parcel of joint family property forming part of 15.24 acres.

7. The Executing Court, by order dated 7.10.2013, rejected the objections in the following terms -

"जहां तक निष्पादन न्यायालय के क्षेत्राधिकार का प्रश्न है यह न्यायालय डिक्री के बाहर नहीं जा सकता उसकी वैधानिकता का परीक्षण नहीं कर सकता यहां यह भी स्पष्ट किया जाना आवश्यक है कि जहां डिक्री किसी राजस्वभूमि के बटवारे के संबंध में है और हिस्से की घोषणा कर दी जाती है तो वहां बटवारा होने तक के लिये प्रारंभिक डिक्री को पारित किया जाना आवश्यक नहीं है ऐसी प्रकरण में अंतिम डिक्री को पारित किया जा सकता

है । उपरोक्त के आधार पर आपत्तिकर्ता के उक्त तर्क को स्वीकार नहीं किया जा सकता है ।

आपत्तिकर्ता की ओर से एक तर्क यह लिया गया है कि निर्णय में यह पारित किया गया है कि प्रतिवादी क0 1 द्वारा 14.6.84 तथा 20.6.84 को प्रतिवादी क0 9.10 एवं 11 के पक्ष में की गई रजिस्टरी तक ही रिकार्ड का संबंध है ।

इस आदेश के दौरान उपर डिक्री शर्तो का उल्लेखित किया गया है जिसमें कहा गया है कि वादिनी प्रतिवादी क0 1 द्वारा दिनांक 12.06.84 और 20.06.84 को प्रतिवादी कमांक 8,10, एवं 11 के पक्ष में किये गये वैनामें से और नामांतरण से प्रतिवाधित नहीं है अर्थात उक्त विकयपत्रों का कोई प्रमाण उसके हिस्से पर नहीं होता है ।

उपरोक्त से यह स्पष्ट है कि तर्क आपत्तिकर्ता के विद्वान अधिवक्ता श्री इंसरानी ने लिया है यह तर्क डिक्री में उल्लेखित आदेश के प्रकरण में उचित नहीं है ।

अपत्तिकर्ता तिलक एजुकेशन सोसायटी तथा कु.अनीइंग खान द्वारा जो भूमि कय की गयी है मूलतः उसका विकय गुलाब बाई प्रतिवादी क0 1 के द्वारा डिक्री होने के पश्चात किया गया है उपरोक्त स्थिति में आपत्तिकर्ता पर भी उपर किये गये विवेचना के आधार पर निर्णय बंधनकारी है ।

उपरोक्तानुसार उनकी यह आपत्ति स्वीकार किये जाने योग्य न होने से निरस्त की जाती है ।"

8. Aggrieved, the objector-appellants preferred an appeal under Section 96 of CPC before Third Additional District Judge, Bhopal. The appellate Court relying upon the provisions of Section 44 of the Transfer of Property Act, 1882 and a full Bench decision of this Court in *Ramdayal v. Manaklal* AIR 1973 MP 222 in respect of right of coparcener to alienate property before its partition and decisions in *Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal* AIR 1997 SC 856 and *Shreenath v. Rajesh* AIR 1998 SC 1827 as regards to scope of objections raised under Order 21 Rule 97 CPC, held -

"24. निर्विवादित रूप से निर्णय एवं डिक्री दिनांक 18.7.94 में वादिनी श्रीमती फूलवतीबाई सम्पूर्ण विवादित भूमि के 7.62 एकड़ का बटवारा कराकर उस पर पृथम आधिपत्य प्राप्त करने की अधिकारी हैं । प्रतिवादी कमांक–1 के केतागण के विकयपत्र से अंतरित अधिकार प्रतिवादी कमांक–1 की सम्पूर्ण विवादित भमि के 1/2 अंश की सीमा के अध्यधीन है अर्थात् प्रतिवादी

कमांक–1 गुलाबबाई के केतागण प्रतिवादी कमांक–1 के अंश की सीमा तक ही हित प्राप्त करेंगे ।

25. उपरोक्त विश्लेषण से यह प्रकट है कि अपीलार्थीगण द्वारा पन्नालाल को विकय की गई थी । पन्नालाल व्यवहार प्रकरण में पक्षकार नहीं थे। पन्नालाल के पक्ष में किया गया विकयपत्र दिनांक 14.6.84 निर्णय एवं डिकी दिनांक 18.7.94 में विवादित भी नहीं था । ऐसी स्थिति में अपीलार्थीगण का प्रतिवादी कमांक–1 के सम्पूर्ण विवादित भूमि 15.24 एकड़ के 1/2 अंश में हित अथवा अधिकार के संबंध में विनिश्चय विद्वान निष्पादन न्यायालय द्वारा ही किया जा सकता है जिसके संबंध में साक्ष्य संकलन की आवश्यकता होगी। जो प्रकरण के तथ्यों के परिपेक्ष्य में प्रभावी रूप से निष्पादन न्यायालय ही संकलित कर सकता है । अतः प्रकरण को प्रतिप्रेषित करने के अतिरिक्त अन्य विकल्प नहीं है ।

26. अतः उपरोक्त सम्पूर्ण विश्लेषण के आधार पर विद्वान निष्पादन न्यायालय द्वारा अपीलार्थीगण के संबंध में दिनांक 7.10.2013 को पारित आदेश अपास्त किया जाकर प्रकरण आदेश 41 नियम 23 ए. सी.पी.सी. के पावधान के अंतर्गत इस निर्देश के साथ प्रतिप्रेषित किया जाता है कि विद्वान निष्पादन न्यायालय अपीलार्थीगण द्वारा उनके आवेदन के संबंध में प्रस्तुत युक्तियुक्त साक्ष्य का संकलन कर तथा अन्य पक्ष को सुनवाई का विधिवत् अवसर देते हुए अपीलार्थीगण की ओर से प्रस्तुत आदेश 21 नियम 97 सी.पी. सी. के आवेदन पत्र का विधि अनुसार निराकरण करें । प्रकरण के तथ्यों के परिपेक्ष्य में उभय पक्ष अपना–अपना व्यय वहन करेंगे । अधिवक्ता शुल्क प्रमाणित होनें पर नियमानुसार देय होगा।"

9. It is this exercise of power by the Appellate Court which is being taken exception of by the appellants-objectors on the ground that the Court below ought to have decided the objections raised by the appellants on merits instead of remanding the matter to the Executing Court. That, there being sufficient material on record, the order of remand is unwarranted.

Rule 23A of Order 41 CPC stipulates -

> "Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point and the decree is reversed in appeal, and a retrial is considered necessary, the appellate Court shall have the same powers as it has under Rule 23."

10. Apparently, the resistance of execution of decree by the appellants

has been on the ground that the property purchased by them was sold out on 14.6.1984 by judgment-debtor to Pannalal from whom the property transferred to Deepak Dixit, from Deepak to Col. G.S. Uppal, from Col. G.S. Uppal to Ku. Anisa Khan & from Anisa to the appellant-Society and that the sale deed executed on 14.6.1984 and the subsequent sale deeds were not subject matter of partition suit.

11. True it may be, fact however remains that in 1984, one of the member of coparceners i.e. Gulab Bai had transferred the part of coparcenery property which though is permissible under Section 44 of the Transfer of Property Act, 1882, which stipulates -

> "Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and insofar as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred."

12. The principle which culls out from Section 44 of 1882 Act is that a transferee from a co-owner would not be in a better position than the co-owner himself and hence he would also not be entitled to claim exclusive possession of any particular part of the joint property. It assures that the transferee has right to joint possession or common enjoyment of the property but does not confer on the transferee any right to exclusive possession.

13. It is this aspect which the appellate Court having faced with has remitted the matter to be examined by the Executing Court.

14. Adjudged from the context above, the appellate Court is well within its jurisdiction to have remitted the matter to the Executing Court, as would warrant any interference.

15. In this result, the appeal fails and is dismissed in limine.

*Appeal dismissed.*

**I.L.R. [2015] M.P., 1807**
**APPELLATE CIVIL**
***Before Mr. Justice R.S. Jha***
M.A. No. 1530/2014 (Jabalpur) decided on 29 September, 2014

NEW INDIA ASSURANCE CO. LTD. ...Appellant
Vs.
SHAILESH KURMI & ors. ... Respondents

***Motor Vehicles Act (59 of 1988), Section 173*** - **Insurance Company assailed the award of pay and recover on the ground that it is illegal as the Tribunal has recorded a finding regarding breach of policy - Held - Tribunal has passed the impugned award relying on the order passed by the Supreme Court - It does not suffer from any patent illegality or perversity - Appeal dismissed. (Paras 4 & 5)**

*मोटर यान अधिनियम (1988 का 59), धारा 173* – बीमा कंपनी ने भुगतान और वसूली के अवार्ड को इस आधार पर चुनौती दी कि वह अवैध है क्योंकि अधिकरण ने पॉलिसी भंग होने के संबंध में निष्कर्ष अभिलिखित किया – अभिनिर्धारित – अधिकरण ने आक्षेपित अवार्ड को उच्चतम न्यायालय द्वारा पारित आदेश पर विश्वास करते हुये पारित किया है – वह किसी प्रकट अवैधता या विपर्यस्तता से ग्रसित नहीं – अपील खारिज।

**Case referred :**

2013 (3) ACCD 1337 (SC).

*Ashish Kumar Vaidya,* for the appellant.

*(Supplied: Paragraph numbers)*

**ORDER**

**R.S. JHA, J. :-** Heard on the question of admission.

1. The appellant has filed this appeal being aggrieved by award dated 29.4.2014 passed by the Additional Motor Accident Claims Tribunal, Sagar in Case No.13/2013, wherein an award of Rs.2,50,000/- has been passed in favour of the claimants and an order has been passed against the appellant for paying the compensation and thereafter to recover it from the owners.

2. The learned counsel for the appellant submits that the only ground on which the award is sought to be assailed is the order of pay and recover

passed by the Tribunal which is patently illegal as the Claims Tribunal has recorded a categorical finding regarding breach of policy.

3. Having heard the learned counsel for the appellant, it is observed that the present case is one of breach of policy and the Tribunal, by relying upon the decision rendered by the Supreme Court in the case of *S. E. Appan Vs. United India Insurance Company Ltd.*, 2013 (3) ACCD 1337 (SC), has passed an order of pay and recover.

4. From the aforesaid, it is clear that the order has been passed relying on the aforesaid decision of the Supreme Court which does not warrant any interference as it does not suffer from any patent illegality or perversity.

5. The appeal filed by the appellant, being meritless is accordingly dismissed. The award dated 29.4.2014 passed by the Additional Motor Accident Claims Tribunal, Sagar in Case No.13/2013 is hereby affirmed.

*Appeal dismissed.*

**I.L.R. [2015] M.P., 1808**
**APPELLATE CIVIL**
***Before Mr. Justice R.S. Jha***
M.A. No. 972/2014 (Jabalpur) decided on 7 October, 2014

RAMKALI BAI & ors. ...Appellants
Vs.
SUDHIR YADAV & anr. ...Respondents

***Motor Vehicles Act (59 of 1988), Section 163-A - Motor accident - No fault liability*** **- Proceeding u/s 163-A being a social security provision, providing for a distinct scheme, only those whose annual income is upto Rs. 40,000/- can take the benefit thereof - All other claims are required to be determined in terms of Chapter XII of the Act - Tribunal has rightly rejected the claim of the appellants - Appeal dismissed. (Para 5)**

*मोटर यान अधिनियम (1988 का 59), धारा 163–ए – मोटर दुर्घटना – बिना दोष दायित्व* – धारा 163–ए के अंतर्गत कार्यवाही, सामाजिक सुरक्षा का उपबंध होने के नाते विशिष्ट योजना उपलब्ध कराती है, जिसका लाभ केवल वे ही ले सकते हैं जिनकी वार्षिक आय रू. 40,000/– तक है – अन्य सभी दावों का निर्धारण अधिनियम के अध्याय XII की शर्तों नुसार किया जाना अपेक्षित है – अधिकरण ने उचित रूप से अपीलार्थीगण का दावा अस्वीकार किया – अपील खारिज।

**Case referred :**

(2004) 5 SCC 385.

*Kapil Patwardhan,* for the appellants.
*R.K. Jain,* for the respondent no. 2.

*(Supplied: Paragraph numbers)*

**ORDER**

**R.S. JHA, J. :-** Heard on the question of admission.

2. The appellants have filed this appeal being aggrieved by the award dated 04.12.2013 whereby the claim of the appellants for grant of compensation under the provisions of section 163 A of the Motor Vehicles Act relating to no fault liability, has been rejected on the ground that admittedly the deceased's income was Rs.500/- per day and Rs.15,000/- per month or Rs.1,80,000/- per year.

3. The learned counsel for the appellants submits that in such cases, even if, it was an admitted fact that the income of the deceased was Rs.1,80,000/- per year, the Tribunal should have restricted the income of the deceased to Rs.40,000/- per annum and should have allowed the application under section 163 A of the Act as the said provision is a social welfare legislation.

4. The learned counsel for the respondent no. 2 submits that the tribunal has dismissed the claim of the appellants relying upon the decision of the Supreme Court rendered in the case of *Deepal Girishbhai Soni and others Vs. United India Insurance Co. Ltd. Baroda* (2004) 5 SCC 385, therefore there is no error in the impugned award, warranting interference by this court.

5. Having heard the learned counsel for the parties and having perused the record of the court below, it is observed that the Supreme Court has recorded the following conclusion in para 67 of its order:-

> "(67) We, therefore, are of the opinion that *Kodala* (supra) has correctly been decided. However, we do not agree with the findings in *Kodala* (supra) that if a person invokes provisions of Section 163-A, the annual income of Rs. 40,000/- per annum shall be treated as a cap. In our opinion, the proceeding under Section 163-A being a social security

provision, providing for a distinct scheme, only those whose annual income is upto Rs. 40,000/- can take the benefit thereof. All other claims are required to be determined in terms of Chapter XII of the Act."

6. In view of the aforesaid, it is clear that the Tribunal has rightly rejected the claim of the appellants in view of the admitted fact that the deceased was earning Rs.500/- per day or Rs.1,80,000/- per annum and in view of the said admitted fact the application 163-A of the Act has rightly been rejected.

7. I do not find any illegality or infirmity in the impugned award. The appeal being meritless is accordingly dismissed.

*Appeal dismissed.*

**I.L.R. [2015] M.P., 1810**
**APPELLATE CIVIL**
***Before Mr. Justice Alok Verma***
M.A. No. 2916/2005 (Indore) decided on 12 November, 2014

MOHAMMAD AZAD @ AJJU ...Appellant
Vs.
MAHESH & ors. ...Respondents

*A. Evidence Act (1 of 1872), Section 101 - Burden to prove* **- The burden to prove that the vehicle was not involved in the accident was on driver and Tempo owner (respondent no. 1 and 2) - But they failed to discharge their burden. (Para 7)**

*क. साक्ष्य अधिनियम (1872 का 1), धारा 101 – सबूत का भार* – यह साबित करने का भार कि दुर्घटना में वाहन शामिल नहीं था, चालक एवं टेम्पो स्वामी (प्रत्यर्थी क्रमांक 1 व 2) पर था – परंतु वे अपना भार उन्मोचित करने में असफल रहे।

*B. Motor Vehicles Act (59 of 1988), Section 166 - Delay in lodging FIR* **- That delay in filing of FIR is not fatal either in criminal cases or in claim cases provided sufficient and cogent reason for delay in filing the FIR are given - According to present appellant, the delay in filing of FIR was due to the fact that he remained admitted in the hospital after the incident - On the next date of discharge, he lodged the FIR. (Para 6)**

*ख. मोटर यान अधिनियम (1988 का 59), धारा 166 – प्रथम सूचना रिपोर्ट दर्ज कराने में विलंब* – प्रथम सूचना रिपोर्ट प्रस्तुत करने में विलंब न तो आपराधिक प्रकरणों में और न ही दावा प्रकरणों में घातक है परंतु यह तब जबकि प्रथम सूचना रिपोर्ट प्रस्तुत करने में विलम्ब के लिये पर्याप्त और प्रबल कारण दिये जायें – वर्तमान अपीलार्थी के अनुसार प्रथम सूचना रिपोर्ट प्रस्तुत करने में विलंब का कारण यह तथ्य था कि दुर्घटना के पश्चात् वह चिकित्सालय में भर्ती रहा – छुट्टी मिलने की अगली तिथि को उसने प्रथम सूचना रिपोर्ट दर्ज कराई।

*Jitendra Verma*, for the appellant.
*M. Jindal*, for the respondent no.3.

**ORDER**

ALOK VERMA, J. :- Being aggrieved by award passed by the learned Motor Accident Claims Tribunal, Dhar dated 29.06.2005 in Claim Case No.48/04 whereby the learned Tribunal dismissed the application of the present appellant filed under Section 166 of Motor Vehicles Act. This miscellaneous appeal is filed by the present appellant challenging the aforesaid award.

2. The case of the present appellant before the Tribunal was that on 09.02.2014, the present appellant was going to his residence situated at Bagdun from Eisher Chauraha, Pithampur in tempo bearing registration No.MTT-7950 as paid passenger in the vehicle. The vehicle was belonging to respondent No.2, which was driven by respondent No.1. The respondent no.1 was driving the vehicle rashly and negligently due to which the vehicle overturned and the present appellant suffered injuries in his both the legs, hands and face. The appellant sustained fracture in his right leg. After the accident, he was taken to Lekhi Hospital at Pithampur. Next day i.e. on 10.02.2004 he was treated by Dr. Tiwari at Mhow and on 19.02.2004, he was admitted to Anand hospital at indore. He was discharged from Anand hospital on 20.09.2004. On being discharged from the hospital he lodged an FIR before the Police Station Pithampur where the crime was registered on 01.03.2004. Due to the injuries sustained in the accident the appellant claims the compensation of Rs.5,00,000/- from the respondents.

3. The respondent Nos.1 and 2 denied the assertion made by the present appellant. According to them, the vehicle was never involved in the accident. Some other unknown vehicle hit the appellant but as the vehicle of respondent Nos.1 and 2 normally plies on the route, registration number of the vehicle was given to the police. The respondent No.3 asserted before the Tribunal

that respondent No.1 was not having valid and effective license at the time of accident. No permanent disability was caused to the appellant. There is no liability of the Insurance Company as there was breach of conditions and the insurance policy. Accordingly, the respondent prays that the insurance company be absolved of the liability of payment of amount of compensation.

4. The learned Tribunal after hearing both the parties passed the impugned award wherein the learned Tribunal held that the vehicle bearing registration No.MTT-7950 was not involved in the accident, however, the present appellant sustained 48% permanent disability due to a road accident. The Tribunal held that it was not proved that the respondent No.1 was not having effective and valid driving license at the time of accident and further held that the present appellant is entitled to receive an amount of Rs.94,679/- and interest thereon due to the injuries suffered by him in the accident. However, since the Tribunal held that the present vehicle was not involved in the accident the Tribunal dismissed the application and no compensation was awarded to the present appellant from the present respondent.

5. Aggrieved by such findings of the Tribunal the present appeal is filed challenging the inference of the Tribunal that the vehicle was not involved in the accident. The respondent No.3 challenged the findings of the Tribunal that it was not proved before the Tribunal that the respondent No.1 was not having a valid and effective driving license at the time of accident.

6. The moot question for decision of this appeal is whether due to delay in lodging of the FIR it can be inferred that the present vehicle was not involved in the accident. It was falsely stated by the present appellant in the FIR that the vehicle belonging to respondent No.2 was involved in the accident. It is a tried law that delay in filing of FIR is not fatal either in criminal cases or in claim cases provided sufficient and cogent reasons for delay in filing the FIR are given. According to the present appellant, the delay in filing of FIR was due to the fact that he remained admitted in the hospital after the incident i.e. on 09.02.2004 and only discharged on 29.02.2004 (year 2004 was a leap year). Next day he lodged the FIR which is marked as (Ex.P/1). The vehicle was seized by the police vide seizure memo (Ex.P/2) to show that he remained admitted in Lekhi Hospital at Pithampur, the discharge ticket (Ex.P/8) is filed. A discharge ticket of Anand Hospital at Indore is (Ex.P/10) in which the date of discharge is 29.02.2004. The learned Tribunal did not find his explanation natural. According to the Tribunal he should have informed the vehicle number

of the vehicle involved to the Doctor who was treating him. The doctor also should have informed the police that he was admitted in the hospital after the road accident. The learned Tribunal also observed that the family members should have reported the matter to the police. On the basis of this, the Tribunal inferred that if the number of vehicle was known to the present appellant he would have informed the same to the doctor treating him or he could have lodged a report by post. However, I find that the learned Tribunal decided the issue on imagination and surmises throughout. It is reported in the medical papers that the present appellant was admitted after a road accident, it was duty of the doctors treating him to inform the police about the admission of the present appellant in the Nursing home. If the doctor failed to perform their duties, the appellant should not have been made to suffer due to the omission on the part of the doctors.

7. In this case, so far as, oral evidence is concerned. Rashid AW/2 was also examined. According to this witness, he was travelling along with the present appellant in the tempo bearing registration No.MTT-7950. This witness supports the evidence of the present appellant that the tempo was overturned due to rash and negligent driving by respondent No.1. This witness is himself a driver. He also asserted that all the passengers suffered injuries in the accident and his statement was recorded by the police. The learned Tribunal disbelieved both the appellants and this witness without taking into consideration that no evidence is produced by the respondent Nos. 1 and 2 or respondent No.3 to prove their assertion in their reply that the vehicle was not involved in the accident. The burden to prove that the vehicle was not involved in the accident was on the respondent Nos. 1 and 2 but they failed to discharge their burden and without taking this facts into consideration, the learned Tribunal disbelieved the appellant and his witness Rashid AW/2.

8. The appellant admittedly remained admitted in the various Hospitals till 29.02.2004. He sustained serious injuries in his right leg. In such a circumstances, expecting that he would first take care of lodging the FIR is expecting too much from an injured person. On the contrary, the respondents did not care to adduce any evidence to substantiate the pleadings. The respondent No.1 who was driving the vehicle could not muster the courage to examine himself before the Court and submit himself to cross-examination. In such a circumstances, in my opinion, the learned Tribunal erred in holding that due to delay in filing of FIR the statements of the appellant and Rashid (AW/2) that the vehicle bearing registration No.MTT7950 was involved in

the accident was unbelievable. As such, I find that the evidence of the appellant and witness Rashid AW/2 should be believed and it must be held that the vehicle was involved in the accident and, therefore, it is held accordingly.

9. The learned counsel for the respondent No.3 argues that the respondent No.1 was not having a valid and effective license at the time of accident. The learned counsel for the appellant argues that the respondent No.3 did not file any cross appeal and as such he is not entitled to agitate this issue in the appeal. However, if this issue would have decided in favour of respondent No.3 and does not affect the present status of the application of the appellant then the matter could have been agitated in appeal. However, since no evidence is adduced by the respondent No.3 before the lower court, it cannot be said that findings of the Tribunal was erroneous in this regard. Accordingly, I find that there is no force in the argument of the respondent No.3.

10. This brought me to the point of claim of compensation, the learned Tribunal held that he is entitled to receive Rs.44,679/- for expenses he incurred in getting himself treated for which he has produced various bills and cash memo, Rs.10,000/- for pain and sufferings, Rs.5,000/- for nutritious diet and for persons attending him and for Rs. 35,000/- for immediate and future loss of income. I do not find the amount of compensation as assessed by the Tribunal excessive.The Tribunal also took various counts into consideration. Accordingly, it is held that for the injuries, the appellant suffered in the accident he is entitled to receive a compensation of Rs.94,679/- as compensation.

11. Accordingly, this appeal is allowed. The findings of the Tribunal so far as it relates to issue No.1 is set aside. The application filed by the present appellant before the Tribunal under Section 166 Motor Vehicles Act is allowed. It is ordered that:-

(a) The respondents to pay as compensation to the appellant an amount of Rs.94,679/-.

(b) The amount mentioned to clause (a) shall carry an interest @ 8% per annum from the date of filing of the application till amount is deposited in the Tribunal.

(c) The respondents are jointly and severally liable for the payment of the amount.

(d) The amount of compensation shall be paid to the

appellant by an account payee cross cheque.

(e) The respondents shall bear the cost of the application, throughout Advocate fee is fixed as Rs.2,000/-.

*Appeal alowed.*

**I.L.R. [2015] M.P., 1815**
**APPELLATE CRIMINAL**
***Before Mr. Justice S.K. Gangele***
Cr.A. No. 924/1996 (Jabalpur) decided on 12 February, 2015

BITTU ...Appellant
Vs.
STATE OF M.P. ...Respondent

***Narcotic Drugs and Psychotropic Substances Act (61 of 1985) - Sections 20(k)(i) & 42 - Power of entry, search, seizure and arrest without warrant* - Cannabis plants were seized from the field of appellant - Independent witnesses turned hostile - I.O. did not say in his evidence that after taking down the information in writing in regard to cannabis plants, he had sent a copy of the same to his immediate superior official within seventy two hours - Provisions of Section 42 are mandatory - Conviction of appellant is unsustainable - Appeal allowed.**

**(Paras 13 to 16)**

*स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराऐं 20(के)(i) एवं 42 – बिना वारंट प्रवेश, तलाशी, जप्ती एवं गिरतारी की शक्ति* – अपीलार्थी के खेत से भांग के पौधे जप्त किये गये – स्वतंत्र साक्षीगण पक्ष विरोधी हो गए – अन्वेषण अधिकारी ने अपने साक्ष्य में नहीं कहा है कि भांग के पौधों के संबंध में जानकारी लेखबद्ध किये जाने के पश्चात् उसने 72 घंटों के भीतर उसकी एक प्रति अपने निकटतम उच्च अधिकारी को प्रेषित की – धारा 42 के उपबंध आज्ञापक हैं – अपीलार्थी की दोषसिद्धी कायम रखने योग्य नहीं – अपील मंजूर।

**Cases referred :**

2009 (8) SCC 539, (2013) 2 SCC 502, (2014) 5 SCC 713.

*Abhinav Dubey,* for the appellant.
*R.S. Shukla,* P.L. for the respondent/State.

## JUDGMENT

**S.K. GANGELE, J. :-** This appeal has been filed by the appellant against the judgment of conviction dated 22.5.1996, passed by Additional Sessions Judge, Gadarwara District Narsinghpur, in Special Sessions trial No.46/95. The trial Court convicted the appellant for commission of offence under Section 20 (k) (i) of Narcotics Drugs and Psychotropic Substances Act 1985 (herein after in short 'the Act 1985) and awarded sentence of R.I. three years and fine of Rs.5,000/-.

2. The prosecution story in brief is that Assistant Sub-Inspector Raghunath Singh (PW-8) on 07.05.1995 when he was on patrolling reached at village Barhata he received information from the informer that cannabis plants were planted by Mr. Bittu the present appellant in his field. On the basis of aforesaid information, he prepared Panchnama (Ex.P-5) of the information in presence of witnesses Ghasiram and Himalaya Bahadur (PW-4 and PW-5) respectively because there was likelihood that the plants may be destroyed, if he had taken search warrant from the Judicial Magistrate. Hence, he prepared the Panchnama (Ex.P.6) to conduct search. PW-8 reached on the field of appellant and searched the field. He informed the accused that whether he would like the search from a Magistrate be called for. The appellant had given his consent for search without Magistrate. Thereafter, at 3.40 PM, in front of witnesses Ghasiram and Himalaya Bahadur , the search of the field of the appellant was carried out and in the search, it was found that appellant had grown 10 plants of cannabis in between the plants of Tomato and sugarcane. A spot map was prepared. The cannabis plants were seized and the appellant was arrested.

3. The Dehati Nalishi (Ex.P.21) was prepared and thereafter, FIR was lodged. The plants were sent for chemical analysis to the Forensic Laboratory Sagar and as per report of the laboratory (Ex.P.24), it was found that there was cannabis in the trees. After investigation the charge-sheet was filed before the Court. The appellant abjured his guilt. He pleaded that he was not owner of the field and he had given the field to his son Dallu and his son had given the same on Sikami to Jasman Kourav. The appellant had not been living at village Barhata, he was living at village Bareli. After trial, the trial Court found the offence proved against the appellant beyond reasonable doubt and awarded the sentence.

4. Learned counsel appearing on behalf of the appellant has submitted that the trial Court has committed an error of law in holding that the prosecution

has proved the offence beyond reasonable doubt against the appellant. There was non-compliance of Section 42 of the Act and independent witnesses of seizure have turned hostile. The search was also not proper and the conviction of the appellant is based only on the basis of evidence of sub-Inspector Raghunath Singh (PW-8), who is an interested witness hence, the judgment of the trial Court is liable to be set aside.

5. Learned Panel Lawyer has contended that the judgment passed by the trial Court is in accordance with law. There is enough evidence to convict the appellant. The conviction of the appellant is based on the evidence of PW-8.

6. (PW-1) Ramcharan, who is witness of Panchnama (Ex.P.1) in his evidence deposed that when he was at village Barhata, police persons came there and asked him whether he knows Bittu thereafter, they had taken my signature on paper (Ex.P.1), appellant-Bittu was not there. Apart from me, they had taken signatures of Brijmohan, Himalaya Ghasiram, Satyanarayan and Ramcharan. There is no agricultural land of appellant Bittu in the village.

7. Brijmohan (PW-2) in his evidence deposed that the police persons came to his house and there were some plants in the dickey of the motorcycle. They told me that these plants are of cannabis, they had further told me that they had plucked the plants from the field of Bittu. They had taken my signature on (Ex.P- 1). Himalaya Bahadur (PW-3) in his evidence deposed that police persons came to the house of Brijmohan, and they had taken me on the land of Dallu, however, he was not there. Thereafter, they returned back and after some time, Sub-Inspector (PW-8) showed me 10 plants of cannabis and they had taken my signatures on seizure memo (Ex.P.1) and (Ex.P.4). They had also taken signatures of other persons. Same facts have been stated by Ghasiram (PW-4,) Kotwar of village Barhata. He said that the Assistant Sub-Inspector (PW-8) had told me that there was seizure and signed it, he signed the seizure and obtained my signatures on seizure memo and other documents Ex.P-1, Ex.P-4, Ex.P-4-2 and Ex.P.13.

8. PW-3 Himalaya Bahadur had also signed the papers. (PW-5) Sugandhilal, Patwari of the village, in his evidence deposed that he was posted as Patwari in 1995 in Halka No.41 tehsil Gadarwara. Village Bareli and Barhata are in his Halka. He further deposed that he had prepared the spot map and appellant- Bittu is the owner of the land of Khasara No. 204/3. PW-6 Surendra

Kumar, in his evidence deposed that police had came to him along with 10 plants of cannabis and after inspecting and smelling the plants, I found that the plants were of cannabis and I submitted my memo (Ex.P.18). PW-7 Satyanarayan in his evidence deposed that before him, the police has never searched the filed (sic:field) of the appellant, however, they had taken my signature on a Panchnama.

9. (PW-8) Raghunath Singh, in his evidence deposed that he was posted in May, 1995 at Gadarwara as Assistant Sub-Inspector. He had gone to search warrantee on 7.5.1995, when he reached at village Barhata, he received an information from the informer that appellant-Bittu had cultivated some cannabis plants in his field. He prepared the Panchnama (Ex.P-5) before witnesses Ghasiram and Himalaya Bahadur, they signed the Panchnama because the information was received on the spot, hence it was not possible to take search warrant because for that purpose he had go to Gadarwara. I prepared the Panchnama. Constable Devraj and Constable Murari were also present there. The appellant had consented for the search and the Panchnama (Ex.P.8) was prepared on the spot for the aforesaid purpose before Ghasiram and Himalaya Bahadur. I asked the appellant whether he wants to search before the Magistrate. The applicant had given his consent for search in the absence of Magistrate. I found cannabis plants in between the plants of Tomato and Sugarcane. He seized 10 cannabis plants and prepared the Panchnama (Ex.P.4) which was signed by Ghasiram and Himilaya Bahadur. I also prepared the search Panchnama (Ex.P.10) and another Panchnama (Ex.P.1) before Brijmohan, Himalaya, Ghasiram, Satyanaran and Ramcharan. The map of the spot was prepared (Ex.P.9). The appellant was arrested by arrest memo (Ex.P.13). I informed the son of the appellant about his arrest. The Dehati Nalishi (Ex.P.21) was prepared thereafter, I recorded the evidence of the witnesses. He in his examination by the Court had stated that he had written the Dehati Nalishi after arrest of the appellant at around 4.30, but due to mistake in the Dehati Nalishi, the time has been mentioned as 3 O'clock. In his examination the witnesses admitted the fact that the appellant had given written consent for search without Magistrate. However, he did not sign it, he had given oral consent. He admitted the fact that he had not mentioned anything in the panchnama (Ex.P.10) that the appellant had given oral consent for search without calling the Magistrate.

10. From the evidence on record, it is clear that the independent witnesses

of Panchnama, seizure memo and search have turned hostile. PW-8 is only witness who supported the search and seizure of cannabis. He admitted in para 12 of his cross-examination that the appellant had given his consent for search without calling Judicial Magistrate and Gazetted Officer. He also did not mention the fact that he had sent the information in regard to controlled substance cannabis to his immediate Officer or copy of information to the immediate Officer within 72 hours or even thereafter. Section 42 of the Act 1985 prescribes Power of entry, search seizure and arrest without warrant or authorization. The relevant provision which is necessary for determination of the case. Proviso to Section 42(1) and 42(2) of the Act 1985 reads as under:-

> "Provided that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.
>
> (2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."

11. The aforesaid provision has been considered by the Constitution Bench of the Supreme Court in the case of *Karnail Singh vs State Of Haryana* 2009 (8) SCC 539. The findings of the Constitution Bench have been quoted by the supreme Court in the case of *Kishan Chand vs. State of Haryana* (2013) 2 SCC 502 as under:-

> **"14.** First and the foremost, we will deal with the question of non-compliance with Section 42(1) and (2) of the Act. It is necessary for us to examine whether factually there was a compliance or non-compliance of the said provisions and, if so, to what effect. In this regard, there can be no better evidence than the statement of Investigating Officer PW7 himself. PW7, Kaptan Singh in his statement while referring to the story of the prosecution as noticed above, does not state in examination-in-chief that he had made the report immediately upon receiving the secret information and had

informed his senior officers. In his examination-in-chief, such statement is conspicuous by its very absence. On the contra, in his cross-examination by the defence, he clearly admits as under:-

> "....the distance between the place of secret information and the place of recovery is about 1½ kilometre. Secret information was not reduced into the writing so no copy of the same was sent to the higher officer. I did not ask any witness of the public in writing to join the raiding party"

**15.** The learned Trial Court in para 34 of its judgment clearly recorded that admittedly in the present case, the secret information was received against the accused. The Investigation Officer did not reduce the secret information in writing nor did he send the same to the higher officer or to the police station for registration of the case. However, stating that if this was done, there was possibility that the accused escaped, the trial court observed that if the Investigating Officer did not reduce into writing the secret information and sent the same to the superior officer, then in light of the given circumstances, it could not be said that any prejudice was caused to the accused.

**16.** We are unable to contribute to this interpretation and approach of the Trial Court and the High Court in relation to the provisions of sub-Section (1) and (2) of Section 42 of the Act. The language of Section 42 does not admit any ambiguity. These are penal provisions and prescribe very harsh punishments for the offender. The question of substantial compliance of these provisions would amount to misconstruction of these relevant provisions. It is a settled canon of interpretation that the penal provisions, particularly with harsher punishments and with clear intendment of the legislature for definite compliance, ought to be construed strictly. The doctrine of substantial compliance cannot be called in aid to answer such interpretations. The principle of substantial compliance would be applicable in the cases where the language of the provision strictly or by necessary implication admits of

such compliance.

**17.** In our considered view, this controversy is no more *res integra* and stands answered by a Constitution Bench judgment of this Court in the case of *Karnail Singh* (supra). In that judgment, the Court in the very opening paragraph noticed that in the case of *Abdul Rashid Ibrahim Mansuri v. State of Gujarat* [(2000) 2 SCC 513], a three Judge Bench of the Court had held that compliance of Section 42 of the Act is mandatory and failure to take down the information in writing and sending the report forthwith to the immediate officer superior may cause prejudice to the accused. However, in the case of *Sajan Abraham* (supra), again a Bench of three Judges, held that this provision is not mandatory and substantial compliance was sufficient. The Court noticed, if there is total non-compliance of the provisions of Section 42 of the Act, it would adversely affect the prosecution case and to that extent, it is mandatory. But, if there is delay, whether it was undue or whether the same was explained or not, will be a question of fact in each case. The Court in paragraph 35 of the judgment held as under:-

35. In conclusion, what is to be noticed is that Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

> (a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).
>
> (b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls

for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer

does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

**18.** Following the above judgment, a Bench of this Court in the case of *Rajinder Singh* (supra) took the view that total noncompliance of the provisions of sub-Sections (1) and (2) of Section 42 of the Act is impermissible but delayed compliance with a satisfactory explanation for delay can, however, be countenanced.

**19.** The provisions like Section 42 or 50 of the Act are the provisions which require exact and definite compliance as opposed to the principle of substantial compliance. The Constitution Bench in the case of *Karnail Singh* (supra) carved out an exception which is not founded on substantial compliance but is based upon delayed compliance duly explained by definite and reliable grounds.

12. The judgment of the Hon'ble Supreme Court in the case of *Kishan Chand* (supra) and the constitution Bench of Supreme Court in the case of *Karnail Singh* (supra) has clearly held that compliance of Section 42 of the Act is mandatory, however a substantial compliance may be made based upon reliable grounds.

13. In the present case, there is total non-compliance of Section 42 (2) of the Act 1985. (PW-8) Raghunath Singh, nowhere stated in his evidence that after taking down the information in writing in regard to cannabis plants, he had sent a copy of the same to his immediate official superior within seventy two hours or any time. Apart from this, all the independent witnesses of seizure memo and preparation of Panchnama have turned hostile. The conviction of the appellant is based only on the basis of evidence of (PW-8) who is an interested witness, his evidence has to be examined carefully as held by the Supreme Court in *Ashok Rai vs. State of Uttar Pradesh and others,* (2014) 5 SCC 713 in regard to evidence of interested witnesses.

> **"12.** It is argued that the prosecution case rests on evidence of interested witnesses. No independent witnesses are examined. Unless there is corroboration to the evidence of interested witnesses, their evidence cannot be accepted. We cannot accept this submission. The evidence of interested witnesses is not infirm. It would be good to have corroboration to their evidence as a matter of prudence. But corroboration is not always a must. If the evidence of interested witnesses is intrinsically good, it can be accepted without corroboration. However, as held by this Court in Raju, the evidence of interested witnesses must be scrutinized carefully. So, scrutinized, the evidence of PW1, PW2 and PW4 appears to be acceptable."

From the aforesaid judgment of the Supreme Court, it is clear that the evidence of interested witnesses be scrutinized carefully.

14. The Supreme court in the case of *Kishan Chand* (supra) has further elaborated the purpose of provision of Section 42(2) of the Act 1985 and it's compliance:-

> **"22.** The purpose of these provisions is to provide due protection to a suspect against false implication and ensure that these provisions are strictly complied with to further the legislative mandate of fair investigation and trial. It will be opposed to the very essence of criminal jurisprudence, if upon apparent and admitted non-compliance of these provisions in their entirety, the Court has to examine the element of prejudice. The element of prejudice is of some significance where provisions are directory or are of the nature admitting substantial compliance. Where the duty is absolute, the element of prejudice would be of least relevancy. Absolute duty coupled with strict compliance would rule out the element of prejudice where there is total non-compliance of the provision.

15. On the basis of aforesaid analysis and the facts that there is non-compliance of Section 42(2) of the Act 1985 and the fact that the (PW-8) has not noted the fact in the Panchnama (Ex.P.9) when, the appellant was agreed to search without calling the Magistrate or any Gazette (sic:Gazetted) Officer and the independent witnesses are hostile and conduct of Raghunath Singh

(PW-8) is also suspicious because he has not complied the mandatory provision of the Act 1985, as mentioned above. In my opinion, the conviction of the appellant is unsustainable. The prosecution has failed to prove the commission of offence against the appellant beyond reasonable doubt. The learned trial Judge has not considered the aspect of non-compliance of mandatory provision of the Act 1985 as noted above.

16. Consequently, appeal is allowed. The conviction and sentence awarded by the trial Court against the appellant is hereby set aside. Appellant is acquitted from the charge of commission of offence under Section 20 (k) (i) of the Act 1985. The bail bond furnished by the appellant is hereby discharged. The amount of fine imposed by the trial Court be returned back to the appellant.

*Appeal allowed.*

**I.L.R. [2015] M.P., 1825**
**APPELLATE CRIMINAL**
***Before Mr. Justice N.K. Gupta***
Cr.A. No. 123/1997 (Jabalpur) decided on 18 February, 2015

ARUN ...Appellant
Vs.
STATE OF M.P. ...Respondent

*A. Penal Code (45 of 1860), Section 304-B - Dowry Death* - **Deceased committed suicide by setting herself on fire - Omnibus allegation that the appellant was demanding dowry - No specification of demand given by witnesses - No allegation that deceased was subjected to cruelty in consequence of demand - Matter was never referred to Panchayat and no F.I.R. was lodged in her life time - Witnesses could not specify time and date or particular period in which such dowry demands were made - Nothing on record that deceased was subjected to cruelty soon before her death - Parents of deceased were not examined - Appellant could not be convicted of offence under Section 304-B of I.P.C. (Paras 10 to 16)**

*क. दण्ड संहिता (1860 का 45), धारा 304–बी – दहेज मृत्यु* – मृतिका ने स्वयं को आग लगाकर आत्महत्या की – सर्वग्राही आक्षेप कि अपीलार्थी दहेज की मांग कर रहा था – साक्षियों द्वारा मांग का कोई विवरण नहीं दिया गया – कोई आक्षेप नहीं कि मृतिका के साथ मांग के फलस्वरूप क्रूरता का व्यवहार किया गया

– मामला उसके जीवनकाल में कभी न पंचायत को संदर्भित किया गया न प्रथम सूचना रिपोर्ट दायर की गई – साक्षियों द्वारा समय और दिनांक या विशेष कालखण्ड जिसमें ऐसी दहेज मांगें की गई, उल्लिखित नहीं किये जा सके हैं – ऐसा कुछ भी अभिलेख पर नहीं है कि मृतिका के साथ उसकी मृत्यु के तुरंत पूर्व क्रूरता की गई – मृतिका के माता–पिता का परीक्षण नहीं किया गया – अपीलार्थी को भा.दं.सं. की धारा 304–बी के अंतर्गत दंडित नहीं किया जा सकता।

***B. Penal Code (45 of 1860), Section 306 and Criminal Procedure Code, 1973 (2 of 1974), Section 221 - Lesser Offence - Abetment of suicide* - Allegation of un-touchability appears to be hypothetical allegation which appears to be not true - Allegation of not providing proper treatment to deceased when she fell ill also appears to be hypothetical as doctor (D.W. 4) had stated that the deceased was treated by him for her illness relating to sterility and profuse bleeding during menses - Prosecution could not prove that deceased was ever illtreated and there is no allegation which falls within the purview of Sections 107 or 109 of I.P.C. No case under Section 306 of I.P.C. is made out - Appeal allowed. (Paras 17 to 21)**

*ख. दण्ड संहिता (1860 का 45), धारा 306 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 221 – लघुतर अपराध – आत्महत्या का दुष्प्रेरण* – अस्पृश्यता का अभिकथन काल्पनिक अभिकथन दिखाई देता है जो कि सच प्रतीत नहीं होता – मृतिका को जब वह बीमार पड़ी, उचित उपचार न कराये जाने का अभिकथन भी काल्पनिक प्रतीत होता है क्योंकि चिकित्सक (ब.सा. 4) ने कहा है कि मृतिका को उसके द्वारा उसके बांझपन और माहवारी के दौरान अत्याधिक रक्तस्त्राव होने की बीमारी के लिये उपचारित किया गया था – अभियोजन साबित नहीं कर सका कि मृतिका के साथ कभी दुर्व्यवहार किया गया और ऐसा कोई अभिकथन नहीं है जो भा.दं.सं. की धारा 107 और 109 की परिधि में आता हो – धारा 306 भा.दं. सं. के अंतर्गत कोई प्रकरण नहीं बनता है – अपील मंजूर।

**Cases referred :**

(2009) 16 SCC 35, (2009) 13 SCC 783, (2004) 9 SCC 157, 1994 II MPWN Note 34, (2011) 1 SCC 601.

*Sankalp Kochar,* for the appellant.
*Ajay Tamrakar,* P.L. for the respondent/State.

**J U D G M E N T**

**N.K. Gupta, J. :-** The appellant has preferred the present appeal

being aggrieved with the judgment dated 15.1.1997 passed by the Fifth Additional Sessions Judge, Jabalpur in ST. No.1089/94 whereby, he has been convicted of offence punishable under Section 304-B of I.P.C and sentenced to ten years rigorous imprisonment.

2. The prosecution's case in short is that on 11.8.1994 Tarabai, wife of the appellant, who, was residing with the appellant in his house situated at Gulaua Chowk, Jabalpur sustained burn injuries and she was admitted in Medical College, Jabalpur where she expired the same day. An intimation of her death was given to the Police Station, Madan Mahal. After registering, merg inimation (sic:intimation) Ex.P/8, the dead body of Tarabai was sent for post mortem and it was found that she sustained more than 90% burn injuries on her body and therefore, she died out of shock caused by burning. Thereafter, Police has recovered a plastic can containing some kerosene oil, two semi burnt match sticks etc. from the spot. The parents and relatives of the deceased Tarabai had stated that the appellant and his mother were habitually cruel with the deceased with respect to demand of dowry. Also she was blamed by the appellant and his mother because she was not blessed with any child. It was also alleged that the appellant and his mother had asked Tarabai to keep her utensils separately. On due investigation the charge sheet was filed before the JMFC, Jabalpur who, committed the case to the Court of Sessions and ultimately, it was transferred to the Fifth Additional Sessions Judge, Jabalpur.

3. The appellants abjured their guilt. They took a plea that at the time of funeral of Tarabai, her parents and relatives had demanded for returning of the gifts given to the deceased including her golden ornaments and when those gifts were not immediately handed over to them, a false case has been lodged against the accused persons. Tarabai was never tortured for any reason including demand of dowry. She was suffering from abdominal pain especially during the period of menses. In defence Tarakeshwar Sharma (DW1), Ramvraksha Gupta (DW2), Rajaram Kushwaha (DW3) and Dr. Shantilal Gugaliya (DW4) were examined.

4. The Fifth Additional Sessions Judge after considering the prosecution's evidence acquitted Smt. Kalawati Bai, mother of the appellant, from all the charges but, convicted the appellant for offence under Section 304-B of I.P.C and sentenced as mentioned above.

5. I have heard the learned counsel for the parties.

6. The sole contention of the learned counsel for the appellant is that the prosecution has failed to prove that the deceased Tarabai was subjected to cruelty for demand of dowry or otherwise. The evidence led by the prosecution is not cognate and therefore, the appellant would have been acquitted from the charge of Section 304-B of I.P.C. The learned counsel for the appellant has placed his reliance upon the judgment passed by the Apex Court in the case of *"Raman Kumar Vs. State of Punjab"* [(2009) 16 SCC 35], in which it is held that if prosecution has failed to establish the accusations against the appellant then accused cannot be convicted in absence of any reasons. Reliance is also placed on the judgment passed by the Apex Court in the case of *"Hazarilal Vs. State of M.P."* [(2009) 13 SCC 783] in which it is held that there is a vast difference between "could have been", "must have been" and "has been". In absence of any material, the case would fall in the category "could have been" and in such a case conviction is impermissible. Similarly reliance is placed upon the judgment passed by the Apex Court in the case of *"Kaliyaperumal and another Vs. State of Tamil Nadu"* [(2004) 9 SCC 157] in which the Apex Court has dealt with the provisions of Section 304-B of I.P.C and Section 113-B of the Evidence Act and held that to indicate that the expression "soon before" would normally implicate that the interval should not be much between the cruelty and harassment concerned and the death in question. There must be an existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not be disturb the mental equilibrium of the woman concerned, it would be of no consequence.

7. Reliance has also been placed on the judgment passed by the Division Bench of this Court in the case of *"State of M.P. Vs. Shiv Pujan Singh"* (1994 II MPWN Note 34) in which it is held that there is no clear and cognate evidence to show as to whether harassment was caused to the deceased for a particular reason, the accused cannot be convicted of offence under Section 306 of I.P.C. Unless a consistent cruelty or harassment is shown or proved this presumption cannot be raised. There may be cases where cruelty and harassment may be immediate proximate of cause of suicide and in such circumstances, the facts are required to be proved clearly.

8. If the evidence of the present case is examined in the light of aforesaid judgments then it would be apparent from the evidence given by Dr. D.K.

Sakelle (PW8) and Investigation Officer S.R. Katare (PW7), that the deceased sustained burn injuries of 90% on her body and she died due to shock caused by the burn injuries whereas, Sub Inspector S.R. Katare has stated that he had seized one plastic can containing little kerosene, burnt and semi burnt clothes of the deceased, two semi burnt match sticks etc. from the spot. Spot was not the kitchen and therefore, there was no possibility of any accident with the deceased. The Police did not allege that the deceased died due to homicidal attack done by the appellants and therefore, when the death of the deceased was neither homicidal nor accidental then certainly it was suicidal. Since the deceased Tarabai had brought the can of kerosene to the spot, the can of kerosene could not have been shifted from the spot. Seizure of can of kerosene and semi-burnt match sticks clearly prove that Tarabai sustained injuries due to her suicidal act.

9. After death of the deceased Tarabai her parents and relatives had made omnibus allegations against the appellant and his mother. Out of that Ramnaresh (PW1) uncle of the deceased, Savita Sharma(PW2), daughter-in-law of the witness Ramnaresh, Kamaljeet (PW3) brother of the deceased, Shiv Shankar Sharma (PW5) brother of the deceased and Ramawatar Sharma (PW6) brother of the deceased have been examined before the trial Court to prove the cruelty relating to dowry demand and otherwise. Out of these witnesses Shiv Shankar Sharma (PW5) has stated that the deceased Tarabai never told him about any event which might have taken place in the house of the appellant. Only for once he was intimated that the deceased Tarabai was seriously ill and when he went to the house of the appellant, he was intimated that Tarabai was admitted in the Medical College, Jabalpur and ultimately expired due to burn injuries. Shiv Shankar Sharma was not declared hostile by the prosecution and therefore, his testimony is binding upon the prosecution. Ramawatar Sharma (PW6) has accepted that he and Shiv Shankar Sharma were not the real brothers of the deceased Tarabai and therefore, testimony of the witnesses Shiv Shankar Sharma has equal weight as of the witness Ramawatar Sharma. When the deceased did not tell anything to her cousin Shiv Shankar Sharma about her problem in her husband's house then it was not possible that she would have told about her problems to Ramawatar Sharma.

10. Ramnaresh, Savita Sharma, Kamaljeet and Ramawatar have concentrated only on four issues. Firstly, that the appellant was demanding dowry from the deceased. Secondly, the behavior of un-touchability was done

with the deceased, thirdly that she was not properly treated in the appellant's house when she fell ill and fourthly that she was blamed because she was not blessed with a child.

11. The first allegation as alleged by the witnesses is examined, then it would be apparent that Ramnaresh, Savita Sharma, Kamaljeet and Shiv Shankar Sharma have stated in an omnibus manner that the appellant was demanding dowry. Kamaljeet could not tell about the article which was demanded by the appellant. Ramnaresh has stated that the deceased was continuously telling him that the appellant and his mother were demanding dowry. In the cross examination, he has stated that initially a sum of Rs.15,000/- was demanded and a sum of Rs.5000/- was given in tilak. Thereafter, the appellant was demanding for a bigger vehicle. He gave an example of bigger vehicle that the appellant was demanding a Bullet Motorcycle. Savita Sharma has stated that the appellant was demanding a Hero Honda Motorcycle whereas, Ramawatar did not state about any article of dowry in the examination-in-chief but, in the cross examination, he has stated that there was a demand of motorcycle from the side of the appellant. However, these witnesses Ramnaresh, Savita Sharma and Ramawatar Sharma when confronted with their respective case diary statements Exs.D/1, D/2 and D/4 then it was very much clear that none of them had informed the Police that the appellant was demanding for a motorcycle or he was demanding a particular item of dowry from the deceased. Had there been a demand from the side of the appellant then, the submissions of the witnesses would have been uniform. Ramnaresh states in para 8 that the appellant was demanding for a bigger motorcycle like a Bullet whereas, Savita Sharma told about a motorcycle Hero Honda whereas, Ramawatar told about motor cycle but, no specification has been given by him whereas, none of them have stated in their case diary statement about the demand of the motorcycle. In these circumstances, it would be apparent that the allegation relating to demand of motorcycle appears to be concocted which is created by these witnesses at the time of their statement before the trial Court.

12. If the appellant would have demanded any dowry from the deceased, then there must be some specification about some demand, either it would be in cash or in kind, then the witnesses would have told about a specific demand. On the other hand, the witnesses have stated in an omnibus manner that the appellant was demanding dowry but, no specification has been given by these witnesses. Since the witnesses could not say about any specific demand then

it is apparent that the alleged demand was nothing but, a suspicion raised by the witnesses otherwise, they could say about the specific demand. For commission of offence under Section 304-B of I.P.C, demand of dowry is not sufficient. It is to be established that the deceased was subjected to cruelty in consequence of the demand. The aforesaid witnesses did not state about such incident. It is not stated that the deceased Tarabai was retained in her parents house for resolution of any dispute relating to any dowry demand with her husband. No FIR was lodged in her life time. The witness Ramnaresh has accepted that in his community there is a Panchayat of Vishwakarma Samaj but, the matter was never referred to such Panchayat. Accepting that so many relatives of the appellants are residing at Jabalpur and so many relatives of the deceased are also residing at Jabalpur, if there was any dispute relating to dowry demand then the deceased would have informed the relatives who, were residing at Jabalpur but, no such instance could be established by the prosecution. On the other hand Tarakeshwar Sharma (DW1), a distant relative of the deceased Ramvraksha Gupta (DW2) and Rajaram Kushwaha (DW3), neighbors of the appellant, have stated that the deceased was kept with comfort. They denied all the allegations that the deceased was subjected to cruelty for dowry demand. There is no reason to disbelieve the testimony of the neighbors who, were residing near the house of the appellant.

13. For commission of offence under Section 304-B of I.P.C., it is to be established that the deceased was subjected to cruelty for dowry demand. There is no reason to disbelieve the testimony of the neighbors who, were residing near the house of the appellant.

14. For commission of offence under Section 304-B of I.P.C., it is to be established that the deceased was subjected to cruelty for dowry demand soon before her death. In this context Savita Sharma (PW2) has stated that when she went to the house of the appellant and talked with the deceased, she was served with snacks and when she was going back, the deceased Tarabai told her to come again so that she wanted to talk on an important issue but, Savita Sharma did not state that on that day the deceased had intimated her about any dowry demand or harassment.

15. The witnesses could not specify time and date or particular period in which such dowry demands were made. In the case of *Kaliyaperumal* (supra) the Apex Court has discussed about the expression "soon before her death" used in substantive Section 304-B of IPC and Section 113-B of the Evidence Act and

it is held that no definite period has been intimated and the expression "soon before" is not defined. It is held that the Court may consider the period of "soon before" according to the facts of that particular case. In the present case, Savita Sharma had met the deceased Tarabai, three days prior to the incident and no complaint was made by the deceased about any dowry demand or harassment. Also no witness could prove that there was any specific demand of dowry from the side of the appellant. Also it is not established that any specific cruelty or harassment was done with the deceased in consequence of the dowry demand. It is expected from a girl that she would share her problems with her parents and near relatives. It is surprising that Bhavnath, father of the deceased Tarabai was listed as a prosecution witness and he was given up when he was present to give his statement before the Court. Mother of the deceased Tarabai was not examined by the Police and her name was not shown in the witness list. Non-examination of mother and father of the deceased Tarabai creates an adverse inference against the prosecution that if Bhavnath, father of the deceased and mother of the deceased would have been examined before the Court then they would not have stated against the appellant and therefore, when own relatives are not telling against the appellant than the possibility cannot be ruled out that the other witnesses have created a false case against the appellant so that ornaments and other gifts given to the deceased could be recovered.

16. In these circumstances, the witnesses could not prove that the deceased was subjected to cruelty for dowry demand and consequently she had expired due to an unnatural death. Therefore, in the light of the judgment passed by the Apex Court in the cases of *Raman Kumar* (supra), *Hazarilal* (supra) and *Kaliyaperumal* (supra) the appellant could not be convicted of offence under Section 304-B of I.P.C. The Additional Sessions Judge has committed an error of appreciation in convicting the appellant of offence under section 304-B of I.P.C.

17. Remaining three allegations are not connected with a case of dowry death but, in case of *"Narvinder Singh Vs.State of Punjab"* [(2011) 1 SCC 601], it is held by the Apex Court that though a separate charge of offence under Section 306 of I.P.C is to be framed by the trial Court but, in the light of the provisions under Section 221 of the Cr.P.C. the accused can be held guilty of offence under section 306 of I.P.C under the head of charge of Section 304- B of I.P.C. Hence in the light of the judgment passed by the Apex Court in the case of *Narvinder Singh* (supra) the other allegations are

to be considered to examine as to whether any offence under section 306 of I.P.C. was committed by the appellant.

18. It was told by the witnesses that the appellant and his mother had directed the deceased to keep her utensils separately. However, Savita Sharma (PW2) has accepted that when she went to the house of the deceased Tarabai, Tarabai had served snacks and tea to her and she brought the utensils. Such allegations were made by the witnesses in their case diary statements but, almost all the witnesses did not allege about such allegations. The witness Ramawatar Sharma was reminded in the cross examination about such allegation in para 4 of his statement then, he repeated that allegation, he has accepted that Tarabai was residing with the appellant and her mother. Food of the entire family was cooked simultaneously and lunch and dinner was served to all of them simultaneously. He did not say that food prepared by the deceased Tarabai was not accepted by her mother-in-law or the appellant and therefore, the allegation of un-touchability appears to be hypothetical allegation, which appears to be not true as per statement given by Ramawatar Sharma (PW6) in para 4 of his statement.

19. The witnesses have alleged that when Tarabai fell ill in the house of the appellants then she was not properly treated or she was not shown to any doctor for her treatment. However, if the statements of Dr. Shantilal Gugaliya (DW4) is examined then it appears that the deceased Tarabai was shown to Dr. Gugaliya for her illness relating to sterility and profuse bleeding during menses. The witnesses have accepted in their cross examination that when Tarabai came to her parents house she never fell ill. Witness Ramnaresh has stated in para 11 in a casual manner that Tarabai might have had fever and she was not treated. However, he could not quote any specific date on which the deceased Tarabai was ill and the appellant did not arrange for her treatment. Savita (PW2) was sister-in-law of the deceased Tarabai. She did not say anything about the illness and treatment of the deceased Tarabai. On the contrary in para 6 of her statement, she denied that the deceased Tarabai fell ill in her life time. Kamaljeet did not state anything about this allegation whereas, Ramawatar Sharma who, has accepted that he was frequent visitor to the house of the appellant but, he did not allege about illness or treatment of the deceased Tarabai. Hence the allegation relating to improper treatment of the deceased Tarabai when she fell ill appears to be hypothetical.

20. Ramnaresh, Kamaljeet, Savita and Ramawatar have stated that the

appellant was blamed by the mother-inlaw that she could not be blessed with a child. There is no allegation against the appellant that he blamed his wife on that cause. On the contrary Dr. Shantilal Gugaliya (DW4) is examined to show that he treated the deceased Tarabai for her illness of sterility.

21. After considering all the allegations made against the appellant relating to harassment done on the deceased Tarabai, it appears that the prosecution could not prove any blame or allegation against the appellant which falls within the purview of Sections 107 or 109 of the I.P.C. It is true that the decease died within seven years of her marriage and therefore, presumption under section 113-A of the Evidence Act is available in favour of the prosecution but, it was for the prosecution to prove that the appellant had illtreated his wife Tarabai and therefore, she committed suicide. Under these circumstances, the appellant cannot be convicted even of Offence under Section 306 of I.P.C.

22. On the basis of the aforesaid discussion the appellant cannot be convicted of offence under section 304- B or 306 of I.P.C and therefore, appeal filed by the appellant appears to be acceptable. Consequently, it is hereby accepted. The conviction as well as the sentence imposed against the appellant for offence under Section 304-B of I.P.C. are hereby set aside. The appellant is acquitted from all the charges, appended against him.

23. The appellant is on bail. His presence is no more required before this Court and therefore, it is directed that his bail bonds shall stand discharged.

24. Copy of the judgment be sent to the trial Court along with its record for information.

*Order accordingly.*

**I.L.R. [2015] M.P., 1834**
**ARBITRATION APPEAL**
***Before Mr. Justice Rajendra Menon & Mr. Justice S.K. Gangele***
Arb. A. No. 10/2008 (Jabalpur) decided on 13 January, 2015

MACHINES INDIA (M/S.) ...Appellant
Vs.
CHIEF ENGINEER, JABALPUR ZONE ...Respondent

***Arbitration Act (10 of 1940), Section 39 and Arbitration and Conciliation Act (26 of 1996), Section 31 - Rate of interest*** - **As far as**

**pre-reference period is concerned law permits its execution by agreement between the parties and for remaining period, the arbitrator is given power under Section 31 to pass an appropriate order - Reduction of interest @ 15% to 9% by the District Judge on the ground of Economic condition and reforms seems to be correct - There is nothing to show that the reduction of interest ordered is arbitrary and illegal decision rendered without any reason being given.**

**(Paras 14 & 22)**

*माध्यस्थम् अधिनियम (1940 का 10), धारा 39 एवं माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 31 – ब्याज की दर* – जहां तक संदर्भ पूर्व अवधि का संबंध है, पक्षकारों के मध्य करार द्वारा विधि इसका निष्पादन करने की अनुमति देती है और शेष अवधि के लिये मध्यस्थ को धारा 31 के अंतर्गत समुचित आदेश पारित करने की शक्ति दी गई है – जिला न्यायाधीश द्वारा आर्थिक स्थिति और सुधारों के आधार पर ब्याज की दर 15% से घटाकर 9% किया जाना उचित प्रतीत होता है – यह दर्शाने के लिये कुछ नहीं कि ब्याज को घटाया जाना आदेशित करना मनमाना एवं अवैध निर्णय है जो बिना किसी कारण के दिया गया है।

**Cases referred :**

2005 Arb. W.L.J. 473, 2001(1) Arb. L.R. 490 (SC), AIR 2009 SC (Supp) 2032, 2005 (1) Arb. L.R. 314, 2007 (5) AIR Bom 571, 2005(1) Arb. LR 363 (J & K), AIR 2008 SC 989, 2007 AIR SCW 527, AIR 1988 SC 1520, AIR 1992 SC 732, (2003) 8 SCC 593, 2006 (4) SCALE 453, (2006) 2 Arb. LR 498(SC), (2013) SCC 747.

*V.R. Rao* with *S. Rao,* for the appellant.

*V. Bhide,* for the respondent.

**ORDER**

The Order of the Court was delivered by : **RAJENDRA MENON, J.** :- This appeal has been filed by the appellant under Section 39 of the Arbitration Act, 1940, being aggrieved by the order dated 31.01.2008 passed by the IXth Additional District Judge, Jabalpur in M.J.C. No.47/2003 by which the interest awarded by the sole Arbitrator @ 15% per annum has been reduced to 9% per annum by the Appellate Authority namely the Additional District Judge, Jabalpur.

2. The only question warranting consideration in this appeal is with regard to justification of the learned District Judge in reducing the quantum of interest

while considering the same in a proceeding held before him under Section 30 read with 33 of the Arbitration Act, 1940.

3. Shri V.R. Rao, learned Senior Advocate argued that once the Arbitrator exercising jurisdiction and in the facts and circumstances of the case had awarded interest @ 18% per annum then the learned District Judge while hearing the matter could not reduce the award of interest from 15% to 9% and only on the basis of economic condition and reforms. It is argued that a reasonable order passed awarding interest by the Arbitrator has been interfered without any justification.

4. In support of his contention to say that interest @18% could be awarded, Shri V.R. Rao, learned Senior Counsel invited our attention to the following judgments:-

1. *Bhagwati Oxygen Ltd. Vs. Hindustan Copper Ltd.* 2005 Arb.W.L.J. 473,
2. *T.P. George Vs. State of Kerala and Another* 2001(1) Arb. L.R. 490 (SC),
3. *Sayeed Ahmed & Co. Vs. State of U.P. & Ors.* AIR 2009 SC (Supp) 2032.
4. *Union of India Vs. Arctic (India) 2005(1) Arb.* L.R. 314, *State of Goa Vs. K. Hassainar* 2007(5) AIR Bom 571 and a Judgment of Jammu & Kashmir High Court in the case of
5. *Union of India Vs. Roshni Devi & Ors.* 2005(1) Arb. LR 363 (J&K).

5. It is argued by Shri V.R. Rao, learned Senior Advocate that on the basis of the aforesaid judgments, once a reasonable interest @15% p.a is awarded, there was no justification on the part of the District Judge in reducing the rate of interest. He also places reliance on another judgment of the Supreme Court in the case of *Ghulam Mohammad Dar Vs. State of J&K and Others* AIR 2008 SC 989.

6. On the contrary, Shri Bhide learned counsel for the respondent invited our attention to the judgment of the learned District Judge, the reason given for reducing the interest rate to 9% p.a. and the justification given for the

same with reference to the principle laid down by the Supreme Court in the case of *Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy & Anr.* 2007 AIR SCW 527. Shri Bhide argued that in the light of the reduced interest rate due to economic reforms the rate of interest @9% p.a. awarded by the impugned order is being in conformity with the principle laid down by the Supreme Court in the case of *Krishna Bhagya Jala Nigam Ltd.* (supra), no interference be made in the matter.

7. We have heard learned counsel for the parties and gone through the records. The only dispute warranting consideration by us is, as to whether the learned District Judge was right in reducing the rate of interest from 15% p.a., as awarded by the Arbitrator, to 9% p.a., taking note of the economic reforms that is going on and by referring to the judgments rendered in the case of *Krishna Bhagya Jala Nigam Ltd.* (supra), the interest had been reduced from 15% p.a. to 9% p.a. by the learned court below.

8. In the case of *Krishna Bhagya Jala Nigam Ltd.* (supra) also, an award was passed by the Arbitrator and by exercising powers under Section 31 (7) of the Arbitration and Conciliation Act, 1996 interest @18% for pre-arbitration, *pendente lite* and post award period was granted by the Arbitrator. However, when the matter travelled to the Supreme Court, the Supreme Court take note of the totality of facts and circumstances, the economic reforms that was going on in the country and the fact that in the backdrop of these reforms the interest regime has changed and rate of interest has substantially reduced, the interest was awarded @9% per annum.

9. In para 11, the Supreme Court has dealt with the matter in the following manner :-

> "11. ..... We do not see any reason to interfere except on the rates of interest and on the quantum awarded for letting machines of the contractor remaining idle for the periods mentioned in the Award. Here also we may add that we do not wish to interfere with the Award except to say that after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the Arbitrator at 18% for the pre-arbitration period, for the *pendente lite* period and future interest be reduced to 90%."

As the only question involved in this appeal pertains to award of interest in arbitration matters it would be appropriate to trace the development of law in this regard. When the Arbitration Act of 1940 was in force the Supreme Court reviewed the principle with regard to award of interest in the case of *Executive Engineer (Irrigation) Balimala Vs. Abhaduta Jena* AIR 1988 SC 1520 and laid down various principles to say.that the provisions of the Interest Act 1839 will not apply to arbitration proceedings. However, it was held that the Interest Act of 1978, which came into force with effect from 19.8.1981 will apply to arbitration proceedings and the arbitrator may award interest in this provisions. It was thereafter held that provisions of Section 34 CPC which provided for payment of *pendente lite* interest will not apply to arbitration before the arbitrators with regard to grant of interest by arbitrators. Various principles were laid down in the aforesaid judgment in the matter of award of interest by arbitrators when appointed in a pending suits or otherwise and also in the matter of awarding interest *pendente lite*. However, this judgment in the case of *Abhaduta Jena* (supra) was overruled prospectively with effect from 12.12.1991 by a Constitutional Bench in the case of *Secretary Irrigation Department, Government of Orissa Vs. G.C. Roy* AIR 1992 SC 732. It was held in this case that the Arbitrator has power to grant interest *pendente lite* and the principle laid down in the case of *Abhaduta Jena* (supra) with regard to award of interest for a period prior to start of proceedings i.e. for pre-reference period was not overruled in the case of *G.C. Roy* (supra) in fact the principle laid down by the Constitutional Bench in the case of G.C. Roy which is relevant for consideration in the present appeal as contained in para 43, 44 and 46 of aforesaid judgment and for the sake of convenience the said principle is reproduced hereinunder :

> "43. The question still remains whether Arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:
>
> (i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called

interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the Arbitrator as it is for the period prior to the Arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of Arbitrator.

(ii) An Arbitrator is an alternative form (sic forum) for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the Arbitrator has no power to award interest *pendente lite,* the party claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the Arbitrator. This would lead to multiplicity of proceedings.

(iii) An Arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The Arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(iv) Over the years, the English and Indian courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the Arbitrator must have the power to award interest *pendente lite*. Thawardas has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not

intended to lay down any such absolute or universal rule as they appear to, on first impression. Until Jena case almost all the courts in the country had upheld the power of the Arbitrator to award interest *pendente lite*. Continuity and certainty is a highly desirable feature of law.

(v) Interest *pendente lite* is not a matter of substantive law, like interest for the period anterior to reference (prereference period). For doing complete justice between the parties, such power has always been inferred.

44. Having regard to the above consideration, we think that the following is the correct principle which should be followed in this behalf:

Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the Arbitrator, he shall have the power to award interest *pendente lite*. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes — or refer the dispute as to interest as such — to the Arbitrator, he shall have the power to award interest. This does not mean that in every case the Arbitrator should necessarily award interest *pendente lite*. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view.

46. In view of the above discussion we hold that in two appeals namely Civil Appeal No. 1403 of 1986 and Civil Appeal No. 2586 of 1985 the Arbitrator acted with jurisdiction in awarding *pendente lite* interest and the High Court rightly upheld the award. In the result both the appeals fail and are, accordingly, dismissed but there will be no order as to costs. Even though

we have held that the decision in *Jena* case does not lay down good law, we would like to direct that our decision shall only be prospective in operation, which means that this decision shall not entitle any party nor shall it empower any court to reopen proceedings which have already become final. In other words, the law declared herein shall apply only to pending proceedings."

10. Subsequently, the provisions of the present Arbitration and Conciliation Act of 1996 came into force and Section 31(7) of the present act laid down specific provisions with regard to grant of interest by arbitral tribunal and in fact by incorporating the provisions of Section 31(7) a simplified system for award of interest was incorporated. By virtue of this provision the Arbitral Tribunal is not empowered to grant interest at the rate as it deems reasonable for certain period between the date on which cause of action arose and a date on which award is made further by sub-clause (b) of Section 31(7) it was contemplated that until and unless otherwise directed the award will carry interest @ 18% p.a. from the date of the award till payment.

11. In the case of *G.C. Roy* (supra) the Supreme Court has observed that when the person is deprived of his right to use the money to which he is legitimately entitled to he has right to compensation for deprivation of his right by whatever name it may be called, be it interest, compensation or damages. The provisions of Section 31(7)(b) and the concept of award of interest has been subject to decision in various cases and interest granted in most of the cases depending upon the contract, delay in the proceedings, the agreement between the parties and the rate of interest as may be payable by the banks and various economic and financial constraints. It is not in dispute after analysing the concept of law in this regard that payment of interest in matters relating to arbitration is now an approved system. In the case of *Pure Helium India (P) Ltd. Vs. Oil & Natural Gas Commission,* (2003) 8 SCC 593 the Arbitrator awarded interest @ 18% p.a. however looking to the long lapse of time the Supreme Court reduced the rate of interest to 6% p.a. instead of 18% p.a. as granted by the arbitrator. Similarly in the case of *Mukund Ltd. Vs. Hindustan Petroleum Corporation Ltd.* 2006 (4) SCALE 453 the Supreme Court confirmed the decision rendered by the High Court and upheld award of interest and its reduction by the High Court from 11% to 7½ % on the ground that it would be the reasonable rate of interest.

12. Similarly in the case of *Mc. Dermott International Inc. V. Burn Standard Co. Ltd.* (2006) 2 Arb. LR 498 (SC) interest awarded on a higher rate was reduced by the Supreme Court to 7½ % keeping in view the long lapse of time.

13. If the catena of judgments available in this regard are scrutinized it would be seen that it can be safely construed that subject to provisions of contract and the agreement that may be entered into between the parties awarding interest at a particular rate is matter of discretion to be executed by the arbitral tribunal, it is limited to period from which cause of action arose and till award is made. Sub Section (a) of Section 31 (7)(1) gives discretion in the matter whereas sub clause provides that mandatory interest in default of interest is awarded as its condition pre-interest based on discretion and post award period.

14. As far as pre-reference period is concerned the law permits its execution by agreement between the parties and for remaining period the arbitrator is given power under Section 31(7)(a) and under Section 31(7)(b) to pass an appropriate order.

15. Finally in the case of *P. Radhakrisna Murthy Vs. National Buildings Construction Corporation Ltd.* (2013) SCC 747 the Supreme Court after analyzing various aspects of the matter and after taking note of principle laid down in the case of *G.C. Roy* by a Constitutional Bench found that for awarding interest it is not always necessary to award interest @ 15% or 18% p.a. . it was held in the facts and circumstances of that case that the High Court can reduce interest and award of interest @ 12% p.a. based on the bank rate of interest as was existing in the year 1988 was approved by the Supreme Court reduction of the interest awarded at 16.5% to 12% by the High Court was approved by the Supreme Court in the aforesaid case.

16. In para 21 the following observations were made by the Hon'ble Supreme Court :

> The High Court has examined the rate of interest at 16.5% on the amount awarded in favour of the contractor by the civil court and has considered the contention urged on behalf of NBCC that the rate of interest awarded is excessive and also the contention that there is no contract of payment of interest on the same and alternatively contended that the interest

rate should not normally exceed 6% per annum. These contentions have been seriously contested by the appellant's counsel contending that the award of interest between 15% to 18% per annum on the basis of bank lending rates should be allowed as NBCC itself has claimed interest at the rate of 18.5% per annum on the amount claimed from the contractor. Keeping the aforesaid aspect in mind and in the absence of contract with regard to the rate of interest to be awarded in favour of the contractor and having regard to the facts and circumstances of the case, the High Court has come to the right conclusion and awarded interest at the rate of 12% on the amounts due to the contractor on the basis of the rate of interest paid by the banks to its customers on long-term deposits prevailing in 1988. The same cannot be found fault with by this Court for the reason that the High Court taking relevant aspects into consideration has rightly reduced the rate of interest to 12 % per annum from 16.5% per annum after holding that exercise of discretionary power by the arbitrator under Section 34 CPC is a discretionary power and the same cannot be interfered with by the High Court.

In the backdrop of these settled principle we may now examine the submission made in the present case.

17. In the cases relied upon by Shri V.R. Rao, learned Senior Counsel, in the case of *Bhagawati Oxygen Ltd.* (supra) interest had been awarded @ 18% per annum and if the reasons given for awarding interest @18% per annum is analyzed in the backdrop of reasons given in Para 36, it would be seen that in the dispute in question between the parties it was found that there was already an agreement between the Bhagwati Oxygen Ltd. and Hindustan Copper Ltd., the contesting parties and a loan was advanced by respondent H.C.L. to the claimant B.O.L. @18 %. It is because of this reason that interest @18% was awarded in the said case. That being so, we are of the considered view that the aforesaid principle cannot be applied in the present case.

18. In the case of *T.P. George* (supra), the only question considered was that when an award is passed by the Arbitrator in all cases where money decree is issued interest has to be granted and without referring to any principle of law or without specifying any rate at which interest is to be granted the only

principle laid down is that due to price escalation, revision of rates and interest while passing the award the Arbitrator has to award interest from the date of award. This judgment does not laid down any principle of law with regard to rate at which the interest is to be paid.

19. In the case of *Sayeed Ahmed & Co.* (supra) the Arbitrator awarded interest @18% per annum, however, at the appellate stage this was reduced to 6% p.a. and the Supreme Court interfered into the matter and directed for grant of interest @18% p.a. and held that reducing the interest to 6% p.a. was not proper. In that case, the Hon'ble Supreme Court has only observed that the Arbitrator has awarded interest @18%, 14% and 12% p.a. respectively in three categories to the claimant and the High Court without any reason has reduced it to 6% p.a. holding that the Arbitrator exercised its power under Section 31(7) (b) of the Arbitration and Conciliation Act, 1996, interference has been made in this case also except for holding that reduction of interest from 18% to 6% is illegal to the principle based on economic condition and change of interest regime as indicated by the Supreme Court in the case of *Krishna Bhagya Jala Nigam Ltd.* (supra) is taken note of.

20. Similarly in the judgment rendered by the Bombay High Court and Jammu & Kashmir High Court also this proposition should laid down that award of interest @18% or 15% as the case may be. However, in none of these cases is there any reference to the economic reforms being undertaken and the reason for reducing the interest.

21. In the case of *Krishna Bhagya Jala Nigam Ltd.* (supra), the Supreme Court has held that interest @9% p.a. has to be awarded keeping in view the economic reforms that is going on in the country and change being brought about in the interest regime and reduction of interest rate overall in all transactions.

22. Keeping in view the principle of law laid down by the Supreme Court in various cases are referred to hereinabove particularly, in the case of *Krishna Jal Nigam* (supra), exercising jurisdiction by the learned District Judge based on the aforesaid principle, seems to be correct and we see no reason to interfere in the matter, particularly when there is nothing to show that the reduction of interest ordered in the case is arbitrary and illegal decision rendered without any reason being given. That apart, this is also the legal principle that has been applied by the Supreme Court now again in the case of *P. Radhakrisna Murthy* (supra).

23. Accordingly, in the facts and circumstances of the case, we are of considered view that the learned District Judge has not committed any error in reducing the interest from 15% p.a. to 9%p.a. and as the reason given by the learned District Judge in Para 28 of his award is based on sound principle of law, approved by the Supreme Court as indicated hereinabove, we see no reason to interfere with the matter.

The appeal is accordingly dismissed.

*Appeal dismissed.*

**I.L.R. [2015] M.P., 1845**
**CENTRAL EXCISE APPEAL**
***Before Mr. Justice P.K. Jaiswal & Mr. Justice D.K. Paliwal***
CEA No. 08/2014 (Indore) decided on 27 October, 2014

PARAG FANS AND COOLINGS ...Appellant
Vs.
COMMISSIONER, CUSTOMS ...Respondent

*A. Central Excise Act (1 of 1944), Section 35-G - Small Scale Industry - Exemption* - **2 small scale industries owned by one person availed the benefit of exemption - Held - Both units have different entrances and end produce is different - However, Income Tax Account is in name of one unit - Administrative staff is one and expenses of both units are borne by unit no. 1 - Consolidated profit and loss account is prepared for both units - Income tax assessment was made jointly - Not entitled for exemption - Appeal dismissed.**
**(Paras 7 & 16)**

*क. केंद्रीय उत्पाद–शुल्क अधिनियम (1944 का 1), धारा 35–जी – लघु उद्योग – छूट* – एक व्यक्ति के स्वामित्व के दो लघु उद्योगों ने छूट के लाभ का उपभोग किया – अभिनिर्धारित – दोनों इकाईयों के प्रवेश मार्ग एवं अंतिम उत्पाद भिन्न है – यद्यपि, आयकर खाता एक इकाई के नाम पर है – प्रशासनिक स्टाफ एक ही है और दोनों इकाईयों के खर्चों का वहन इकाई क्रं. 1 द्वारा किया जाता है – दोनों इकाईयों के लिये समेकित लाभ–हानि लेखा तैयार किया गया – आयकर निर्धारण संयुक्त रूप से किया गया – छूट के लिये हकदार नहीं – अपील खारिज।

*B. Interpretation of statute - Precedent - Binding* - **Conflicting decision of Apex Court of equal number of Judges - Earlier**

**Bench decision is binding - Unless explained by the latter Bench of equal strength. (Para 14)**

*ख. कानून का निर्वचन – पूर्व न्याय – बाध्यकारी* – सर्वोच्च न्यायालय के समान संख्या के न्यायाधिपतिगणों की न्यायपीठों का परस्पर विरोधी निर्णय – पूर्ववर्ती न्यायपीठ का निर्णय बाध्यकारी – जब तक कि बाद की समान संख्याबल की न्यायपीठ द्वारा स्पष्ट नहीं किया जाता।

**Cases referred :**

2004 (170) ELT 257, 2011 (263) ELT 15 (SC), 2004 (171) ELT 155 (SC), 1998 (99) ELT 202 (SC), 2003 (1) MPHT 226 (FB).

*R.T. Thanevala,* for the appellant.
*Prasanna Prasad,* for the respondent.

**ORDER**

The Order of the Court was delivered by :
**P.K. JAISWAL, J. :-** They are heard.

By this appeal under Section 35-G of the Central Excise Act, 1944, the appellant is challenging the final order No.57136/2013 (PB) dated 18.07.2013 passed by the Customs Excise and Service Tax Appellate Tribunal, New Delhi in Central Excise Appeal No.1966/2005.

2. Brief facts of the case are that appellant M/s. Parag Fans & Cooling Systems Limited, Dewas are engaged in manufacture of FRP Fans / FRP Cooling Tower falling under Chapter Heading No.8419.20 of the Schedule to the Central Excise Tariff Act, 1985 (in short "CETA") and M/s. Parag Industries are engaged in the manufacture of CI Casting falling under Chapter Heading 7325.10 of the Schedule of CETA, 1985.

3. During the financial year 1997-98, the appellant availed Small Scale Industry Exemption under Notification No.7/97-CE dated 01.03.1997. Simultaneously, other firm M/s. Parag Industries separately and independently availed SSI Exemption during the same financial year. The Central Government issued four show cause notices on the ground that the two units are owned by one manufacturer namely the appellant / company; as a result, the small-scale industries exemption is not available to the appellant. Detailed reply has been filed by the appellant denying all the allegations contained in the show cause notice. It is not disputed that both the units are manufacturing different products

at independent factories, which had been issued separate factory licenses and Central Excise Registration.

4. The Assistant Commissioner, Central Excise, Ujjain vide order dated 31.12.1998 confirmed the demand and imposed penalty against the appellant / company by holding that clearance made by two units belong to the same manufacturer and provisions of para (iv) of the Notification No.16/97 are squarely attracted for clubbing value of the clearances of both the units.

5. The appellant preferred an appeal, which was dismissed for non-compliance of the provisions of Section 35-F of the Central Excise Act, 1944. The CESTAT vide its order dated 27.09.2004 remanded the matter to the Commissioner (Appeals) for deciding on merits, after affording an opportunity to the appellant. The Commissioner (Appeals) vide order dated 31.01.2005 allowed the appeal of the appellant by setting aside the order impugned therein with consequential relief. The Commissioner, Indore preferred an appeal against the aforesaid order before the CESTAT, New Delhi. The learned Appellate Tribunal by the impugned order dated 18.07.2013 set aside the order of the Commissioner and allowed the appeal filed by the Department.

6. It is not disputed by the learned counsel for the appellant that both the factories are near to each other within the radius of 1 kilometer and it is owned by the same owner and common balance-sheet is maintained.

7. It is true that both the factories have separate entrance; there is a passage in between and they are not complimentary to each other nor they are subsidiary to each other. The end produce is also different. They are separately registered with the Central Excise Department. The income tax account is in the name of Parag Fans and Cooling Systems Ltd. Balance-sheet of both the units is combined. The administrative staff is common and the expenditure of both the units are borne by Unit No.1. Repayment of loan had been paid by Unit No.1 on behalf of Unit No.2 or vice versa. Learned Tribunal considering the fact that operating result as well as asset and liability of both the concerns were consolidated in the financial statement (balance-sheet) of the appellant. Statement recorded from Shri Bhargav on 22.07.1997 proves that there was a consolidated profit and loss account prepared for both the units. That consolidated statement enabled the appellant to avail loan from financial institutions. The income tax assessment of both the units was jointly made because of consolidated accounts filed by the appellant before

the income tax authority. The learned Tribunal set aside the order passed by the Commissioner (Appeals) and allowed the order of adjudicating authority.

8. It is submitted by the learned counsel for the appellant that the question involved in this appeal is squarely covered by the decision of the Apex Court in the case of *Rollatainers Limited v. Commissioner of Central Excise, Delhi-III* [2004 (170) ELT 257 (SC)]. The Apex Court has held that two factories within same premises, same owner and common balance-sheet with common boundaries, but having separate staff, separate management, separate passage, separate entrance with separate Central Excise Registration and producing different end products, such factories not treatable as one and the same factory, hence are two factories separately eligible for exemption. He submitted that in view of the law laid down by the Apex Court in the case of *Rollatainers Limited v. Commissioner of Central Excise* (supra), the order of the learned Tribunal is perverse and against the statutory provisions of law and documentary evidence available on record.

9. On the other hand, learned counsel for the department has submitted that this question has been considered by the Apex Court in the case of *Parle Bisleri Private Limited v. Commissioner of Customs & Central Excise, Ahmedabad* [2011 (263) ELT 15 (SC)]. Paragraphs 12 to 15 of the decision passed in the case of *Parle Bisleri Private Limited* (surpa) reads as under:

> "12. What this Court was emphasizing in the aforesaid decision was not only the fact that Circular 6/92 has no effect upon commencement of Notification No. 1/93, but also the fact that the distinct legal nature of Companies cannot be used as eyewash to portray its independent nature. Where the companies are indeed interdependent and possibly even related through financial control and management, the value of clearances has to be clubbed together in the interests of justice. The operation of Circular 6/92 admittedly protected entities like the appellant prior to the commencement of Notification No. 1/93, but certainly not after the same. In this case, this Court has been presented with a preponderance of evidence to suggest that the companies are related not only in terms of financial control, but also through management personnel. In *Modi Alkalies & Chemicals Ltd. & Ors* (supra) this Court has held that two basic features which prima facie show

interdependence are pervasive financial control and management control. We, therefore, proceed to apply the said two tests to the facts of this case.

13. R. Chauhan, P. Chauhan, R.N. Mungale and S.K. Motani, who are the directors of the appellant herein are among those who also serve on the Board of Directors in M/s PEL Ltd. and M/s PIL Ltd. It is also a fact on record that that M/s. PEL advanced an interest-free loan of Rs. 1 crore to the appellant, which was used for purchase of raw material by the latter (As evidenced from the balance sheet). Furthermore, the flavours being manufactured by the appellant were developed by M/SPEL at their R & D Lab at Bombay, whose services were at the disposal of the appellant. They were at one point of time were manufactured by M/s. PEL and admittedly owned by them. Clearly, all this points to the inescapable conclusion that the three companies in question were intertwined in their operation and management. A careful scrutiny of the records therefore establish that both the aforesaid two basic features are overwhelmingly present in this case. Therefore it would likely seem that the purported fragmentation of the manufacturing process was but a mere ploy to avail of the SSI exemption. Piercing the corporate veil, when the notions of beneficial ownership and interdependency come into the picture, are no longer res integra. On this count, therefore, we have no hesitation whatsoever in affirming the order of the Tribunal, which was justified entirely through the precedent set by this Court.

Issue II

14. The second issue concerns the question whether the `code names' used to denote soft drink flavours manufactured by the appellant could in fact be termed as `brand names' and if so, whether they belonged to another entity. The yardstick in this regard is Explanation VIII which is pari materia in both Notifications No. 175/86 and No. 1/93 and reads as:

> Explanation VIII-"Brand name" or "trade name" shall mean a brand name or trade name, whether registered

> or not, that is to say a name or a mark, such as symbol, monogram, label, signature or invented word or writing which is used in relation to such specified goods for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark with or without any indication of the identity of that person.

We are not convinced by the argument of the appellant that this Explanation refers only to `brand names' and cannot be used to determine whether code names, as used by the appellant in the present case, fall within the said category. The mere difference in nomenclature cannot take away the import of the Explanation from its applicability to the present case. The appellant herein manufactures flavours which fall within the ambit of the `code names' and it is a fact on record that these codes are key to identifying the flavours which are commercially transferable.

15. Furthermore, it is expressly clear that the code names on the flavours indicate a connection in the course of trade between the specified goods and such person using such name or mark. The flavours in question, which were earlier manufactured by M/ s PEL Ltd. and supplied to the franchise holders, were subsequently allowed to be made by the appellant. The franchise holders were in effect buying the very same flavours from the appellant and were placing orders by referring to the same code name, as is evident from the respective purchase orders. The users of the flavours, i.e. M/s PEL Ltd., M/s PIL Ltd. and specified bottlers are all interconnected since the latter group comprises franchisees of PEL and thus there is more than an iota of evidence to prove the connection in the course of trade between the flavours and the entity using the flavours through code names. Furthermore, the ownership of the code names by M/s PEL Ltd. is clearly evidenced from the fact that these flavours were developed, researched and concocted by M/s. PEL Ltd in its research labs. That M/s. PEL Ltd. have given the brand names to the

flavours and allowed them to be manufactured by the appellant, their holding company cannot hide the fact that M/s PEL Ltd were in fact, the owner of the code/brand names. This conclusion is fortified by the fact that it was M/s PEL Ltd who transferred the right of the codes when they were sold to M/s. Coca Cola Company in November, 1993. Since the appellant was not the owner of the said brand names in question, the Tribunal was justified in holding that the appellant will not be entitled to the benefit of Notification No. 175/86 and 1/93 for the products with code names G-44T, L-33A, T-IIPC, T-IIP, R-66M and K-55T which belonged to M/s PEL Ltd."

10. He also placed reliance on the decision in the case of *Commissioner of Central Excise, New Delhi v. Modi Alkalies & Chemicals Limited* [2004 (171) ELT 155 (SC)] and the decision in the case of *Calcutta Chromotype Limited v. Collector of Central Excise, Calcutta* [1998 (99) ELT 202 (SC)] and submitted that the issue involved in this appeal is squarely covered by the aforesaid decisions and prayed for dismissal of the appeal.

11. In the case of *Commissioner of Excise v. Modi Alkalies & Chemicals Limited* (supra), the question whether there is interdependence and whether another unit is, in fact, a dummy has been adjudicated and the Hon'ble Supreme Court has held the following in paragraph 8, which reads as under:-

"8. Whether there is inter-dependence and whether another unit is, in fact, a dummy has to be adjudicated on the facts of each case. There cannot be any generalization or rule of universal application. Two basic features which prima facie show inter-dependence are pervasive financial control and management control. In the present case facts clearly show financial control. Undisputedly, the share capital of each of the three companies was Rs.200/. Though it was claimed that financial assistance was availed from the financial companies, it is on record that the unsecured loans advanced by MACL to the three companies were substantially heavy amounts as on 1.4.1998. NGCPL received an amount of Rs.1.55 crores. About 14 lakhs appeared to have been paid after the issue of show cause notice. Loans advanced to NGCPL was about

Rs.52 lakhs while to SCGCPL it was about Rs.65 lakhs. The finding of the Commissioner that the financial assistance from the financial institutions were availed with the aid and assistance of MACL has not been seriously disputed. Apart from that, the cylinders were brought on lease by MACL from another concern and were sub-leased to the three companies. The cylinders bore the name of MACL. If the three companies had separate standing as contended it could not be explained why they could not get the cylinders directly from the lessors on lease basis and the need for introducing MACL as the lessee and then the three companies becoming sub-lessees. As noted by the Commissioner, entire receipts were paid as lease amount to MACL. Here again, the under-valuation aspect assumes importance. While the supply by MACL to three companies was Rs.0.50 per unit, the sale price by the three companies was Rs.5 per unit. It is on record that accounts were kept by common staff and marketing was done under the supervision of a person who belongs to the same group of concerns. The amounts have been collected by an employee of MACL. The so-called Directors of the companies were undisputedly employees of MACL. Almost the entire financial resources were made by MACL. The financial position clearly shows that MACL had more than ordinary interest in the financial arrangements for companies. The statements of the employees/ Directors show that the whole show was controlled, both on financial and management aspects by MACL. If these are not sufficient to show inter-dependence probably nothing better would show the same. The factors which have weighed with CEGAT like registration of three companies under the sales tax and income tax authorities have to be considered in the background of factual position noted above. When the corporate veil is lifted what comes into focus is only the shadow and not any substance about the existence of the three companies independently. The circular no.6/92 dated 29.5.1992 has no relevance because it related to notification no.175/86-CE dated 1.3.1986 and did not relate to notification no.1/93. The extended period of limitation was clearly

applicable on the facts of the case, as suppression of material features and factors has been clearly established. If in reality the three companies are front companies then the price per unit to be assessed in the hands of MACL is Rs.5 and not Rs.0.50 as disclosed. The question whether there was manufacture or not was not in issue before the Commissioner. The plea that there was no manufacture has also to be rejected in view of the fact that exemption was claimed by the three companies as manufacturers to avail the benefit of Central Excise Notification no.1/93."

12. In the case of *Calcutta Chromotype Ltd. v. Collector of Central Excise, Calcutta* (supra) has held that both, manufacturer and buyer are same, it can be presumed that they have interest directly or indirectly, in the business of each other.

13. The issue involved in the present case is squarely covered by the decisions of Apex Court in the case of *Modi Alkalies & Chemicals Ltd. (supra) and Parle Bislery Pvt. Ltd.* (supra).

14. It is well settled that in case of conflict between two decisions of the Apex Court, Bench comprising of equal number of Judges, decision of earlier Bench is binding unless explained by the latter Bench of equal strength, in which case the late decision is binding.

15. The issue involved in the present case, we find that the question is fully covered by the decision of the Apex Court in the case of *Modi Alkalies & Chemicals Ltd.* (supra). In the subsequent decision of the Apex Court in *Parle Bislery Pvt. Ltd.* (supra), the view taken in earlier decision has been upheld and, thus, the above two decisions of the Apex Court are binding on us (See 2003(1) MPHT 226, FB, *Jabalpur Bus Operators Association and others vs. State of M. P. and another*).

16. For the above reasons, we are of the opinion that the view taken by the Tribunal appeard to be well founded, based on the two decisions of Apex Court (*Modi Alkalies & Chemicals Ltd.* (supra) and *Parle Bislery Pvt. Ltd.* (supra)). No substantial question of law is arising in this appeal. We dismiss the appeal. No order as to costs.

*Appeal dismissed.*

**I.L.R. [2015] M.P., 1854**
**COMPANY PETITION**
***Before Mr. Justice Prakash Shrivastava***
Company Pet. No. 19/2013 (Indore) decided on 24 July, 2014

BELL FINVEST (INDIA) LTD. (M/S), MUMBAI ...Petitioner
Vs.
M/S M.P. PROTEINS PVT. LTD., MANDSAUR ...Respondent

***Companies Act (1 of 1956), Section 433 & 434 - Winding up -*** **Application for winding up of the company - Respondent had apparently neglected to pay the sum and the deeming provision of Section 434 (1)(a) is attracted and it can be held that the respondent company is unable to pay its debt - Petitioner cannot be denied the order of winding up of the respondent company by directing it to avail alternate remedy - Petition admitted. (Paras 11 & 14)**

*कम्पनी अधिनियम (1956 का 1), धारा 433 व 434 – परिसमापन* – कंपनी के परिसमापन हेतु आवेदन – प्रत्यर्थी ने प्रकट रूप से रकम के भुगतान की उपेक्षा की और धारा 434(1)(ए) का समझा जाने वाला उपबंध आकर्षित होता है और यह अभिनिर्धारित किया जा सकता है कि प्रत्यर्थी कंपनी अपने ऋण का भुगतान करने में अक्षम है – याची को वैकल्पिक उपचार का अवलंब लेने के लिये निदेशित करते हुए प्रत्यर्थी कंपनी के परिसमापन के आदेश से इंकार नहीं किया जा सकता – याचिका स्वीकार की गई।

**Cases referred :**

(2010) 10 SCC 553, AIR 1971 SC 2600, AIR 2009 SC 1695, 2010 (2) MPLJ 333.

*R.C. Sinhal* with *D.S. Panwar,* for the petitioner.
*Rishi Tiwari,* for the respondent.
The Assistant OL also present in person.

**ORDER**

**PRAKASH SHRIVASTAVA, J. :-** Counsel for the parties have been heard on the question of admission as also on I.A. No.6018/2013 for appointment of the provisional liquidator and on I.A. No.3113/2014 questioning the maintainability of the petition.

1. This petition under Section 433 read with Section 434(1)(a) of the

Companies Act, 1956 (for short "the Act") has been filed by the petitioner seeking winding up of the respondent-company.

2. In brief, the case of the petitioner-company is that it is a Non Banking Financial Company incorporated under the Companies Act and that the respondent-company for the purpose of establishing and running an industrial unit, had obtained financial facilities from the State Bank of Bikaner and Jaipur and had committed default in repayment of loan and the outstanding amount was work out as Rs.3.45 Crores in the One Time Settlement proposal. The respondent-company had approached the petitioner to provide financial facilities by taking over the Non Performing Account from State Bank of Bikaner and Jaipur and to take possession of all securities and title deeds/ documents lying with the said bank. The petitioner then, vide letter dated 20.12.2011, had sanctioned 5 secured business loans (NPA revival) of different account and the said loan amounts were disbursed from time to time in terms of the loan agreements. The respondent had committed default in payment of the monthly installments and no payments were made after October 2012. The outstanding amount is incurring interest. According to the petitioner, the admitted liability as on 7.2.2013 is Rs.22,36,94,438/-. On 7.2.2013, the petitioner-company had given statutory notice for winding up under Section 434(1)(a) of the Companies Act which was duly received by the respondent-company but neither the notice was replied, nor any amount was paid, therefore, the petitioner had filed the present company petition.

3. The respondent has filed the reply disputing the liability of Rs.22,36,94,438/- by raising the plea that the petitioner has not adjusted the sum of Rs.6,21,73,155/- paid by the petitioner towards the repayment and advance interest and that a sum of Rs.3,15,000/- paid to Mr. Milind Satpute has also not been accounted and a sum of Rs.14,65,378/- deposited in various accounts at the direction of the petitioner-company, have also not been taken into account. The loan of Rs.23.155 Crores is disputed and it has been pleaded that Civil Suit No.005A/2013 dated 8.5.2013 has already been filed by the petitioner for recovery of a sum of Rs.26,34,81,521/- and that the petitioner has, in the Email dated 8.1.2013, mentioned the outstanding amount of Rs.19.884 Crores which within one month has increased by Rs.2.485 Crores, which is not possible and that the petitioner in the Email dated 11.8.2012 had admitted that loan amount was of Rs.11.93 Crores and in the Email dated 23.8.2012 had admitted that the loan amount for Loan No.124 disbursed to the respondent was Rs.7.98 Crores and that directors and guarantors of

respondent-company were forced to sign agreement of exaggerated amount of Rs.23.155 Crores with an assurance that it was merely for security purposes and will not be used against them and to support the disbursement of term loan amount mentioned in the agreement, Rs.17.955 Crores were transferred in the Bank account of the respondent-company as term loan and an amount of Rs.5.2 Crore of working capital loan was also transferred. Out of the amount so transferred, the respondent-company was asked to return Rs.7.403 Crores in cash to the petitioner-Company's agent and the said returned amount has not been accounted for. It has further been pleaded that the respondent-company was functioning properly till January 2013 but due to the intervention of the petitioner and non disbursement of the loan amount, the respondent-Company's business was ruined and that the respondent-company has large assets and is capable of functioning and producing marketable quality of refined oil.

4. In rejoinder, the petitioner-company has stated that as on 8.1.2013 the proposed amount of settlement was Rs.16,76,51,159/-. They have disclosed the outstanding amount on different dates and have stated that the Civil Suit has been subsequently filed after filing the present winding up petition and that the One Time Settlement was submitted by the respondent-company on 7.9.2013 offering a sum of Rs.8 Crores which belies the stand taken by the respondent-company in the reply.

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

6. Before proceeding further in the matter, the legal position in respect of the scope of consideration of such a petition and the necessary requirements need to be examined. Under Section 433(e) of the Act, a company may be wound up by the tribunal if the company is unable to pay its debt. Section 434 contains a deeming provision as to when the company is deemed to be unable to pay its debt and provides that if the company is indebted in a sum specified in Clause a of Sub-section 1 and is served by the creditor a demand in terms of the said Clause and within the stipulated period, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor, a company shall be deemed to be unable to pay its debt.

7. On the other hand it is also the settled position in law that if debt is bonafide disputed on substantial grounds, petition for winding up shall not be entertained. In such a case party seeking winding up can not be regarded as creditor of company for purpose of winding up. If the debt is bonafide disputed,

there can not be "neglect to pay" within the meaning of Section 433(1)(a) of the Companies Act and if there is no neglect, the deeming provision does not come into play.

8. The Supreme Court in the matter of *IBA Health (India) Private Limited Vs. Info-Drive Systems SDN. BHD.* reported in (2010) 10 SCC 553 has held that if the creditor's debt is bonafide disputed on substantial grounds, the Court should dismiss winding up petition and that a dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory and misconceived. The winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company and a party to the dispute should not be allowed to use the threat of winding up petition as a means of enforcing the company to pay the bona fide disputed debt and that a Company Court should act with circumspection, care and caution and examine as to whether an attempt is made to pressurise the company to pay a debt which is substantially disputed.

9. The Supreme Court in the matter of *M/s Madhusudan Gordhandas & Co. Vs. Madhu Woolen Industries Pvt. Ltd.* reported in AIR 1971 SC 2600 has held that where there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of debt is disputed, the Court will make a winding up order without requiring the creditor to quantify the debt precisely. It has further been held that the principles on which the Court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends. In the matter of *M/s Vijay Industries Vs. M/s Natal Technologies Ltd. reported* in AIR 2009 SC 1695, the Supreme Court has held that Section 433 of the Companies Act does not state that the debt must be precisely a definite sum. The Supreme Court in that matter had set aside the judgment of the High Court noting that on the date of filing of the application, dues in respect of at least a part of the debt which was more than the amount specified in Section 433 of the Companies Act was not denied and it is not the requirement of law that the entire debt must be definite and certain. The Supreme Court in the matter of *M/s Vijay Industries* (Supra) has held as under :-

> "33. Section 433 of the Companies Act does not state that the debt must be precisely a definite sum. It has not been

disputed before us that failure to pay agreed interest or the statutory interest would come within the purview of the word 'debt'. It is one thing to say that the amount of debt is not definite or ascertainable because of the bona fide dispute raised thereabout or there exists a dispute as regards quantity or quality of supply or such other defences which are available to the purchaser; but it is another thing to say that although the due as regards the principal amount resulting from the quantity or quality of supply of the goods stands admitted but a question is raised as to whether any agreement had been entered into for payment of interest or whether the rate of interest would be applicable or not. In the latter case, in our opinion, the application for winding up cannot be dismissed.

34. In *M/s. Madhusudan Gordhandas & Co.* (supra) [AIR 1971 SC 2600], this Court referred to the decision of the *Chancery Division in Re. Tweeds Garages Ltd.* [1962 Ch 406], holding :

"From those sections it appears that the only qualification which is required of the petitioners in this case is that they are creditors and about that, as I have said, there is really no dispute. Moreover, it seems to me that it would, in many cases, be quite unjust to refuse a winding up order to a petitioner who is admittedly owed moneys which have not been paid merely because there is a dispute as to the precise amount owing. If I may refer to an example which I suggested in the course of argument, suppose that a creditor obtains judgment against a company for €€ 10,000 and after the date of the judgment something is paid off. There is a genuine bona fide dispute whether the sum paid off is €10 or €20. The creditor then presents a petition to have the company wound up. Is the company to be entitled to say: "It is not disputed that you are a creditor but "the amount of your debt is disputed and you are not, therefore, "entitled to an order"? I think not. In my judgment, where there is no doubt (and there is none here) that the petitioner is a creditor for a sum which would otherwise entitle him to a winding up order, a dispute as to the precise sum which is owed to him is not of itself a sufficient answer to

his petition."

*Re. Tweeds Garages Ltd.* (supra), apart from *M/s. Madhusudan Gordhandas & Co.* (supra), has inter alia been followed by the *Bombay High Court in Pfizer Ltd. v. Usan Laboratories P. Ltd.* [(1985) 57 CC 236] holding that only because there is a dispute in regard to the rate of interest, the winding up petition cannot be thrown out on that ground alone. *Pfizer Ltd.* (supra) has been followed by the Bombay High Court in *Ispat Industries Ltd.*, in Re [(2005) 2 Comp LJ 235]. *Pfizer Ltd.* (supra) was a case of principal plus interest.

37. In this case, on the date of filing of the application, dues in respect of at least a part of the debt which was more than the amount specified in Section 433 of the Companies Act was not defined. It is not a requirement of the law that the entire debt must be definite and certain."

10. This Court also in the matter of *Sungrace Finvest Pvt. Ltd., Kolkata Vs. Maikaal Fibres Ltd., Bheelgaon* reported in 2010(2) MPLJ 333 after taking note of the various judgments, specially the judgment of the Supreme Court in the case of *M/s Madhusudan Gordhandas and Co.* (supra), had passed the order of winding up.

11. In the present case, the debt is not in dispute. It is not in dispute that the respondent had signed the loan agreement for a sum of Rs.23.155 Crores and a sum of Rs.17.955 Crores was transferred in the Bank account of the respondent-company as term loan and an amount of Rs.5.20 Crore for Working Capital Loan was also transferred in terms of the agreement, but the claim of the respondent-company is that out of this amount, a sum of Rs.7.403 Crores was returned in cash which has not been accounted for. The respondent-company has further raised the plea that certain other amounts were also repaid which have not been adjusted while arriving at the final figure of the liability. Such a defence of the Company can not be held to be bonafide dispute on substantial ground for want of cogent material. That apart, one Time Settlement proposal dated 7.9.2013 (Annexure P/20) sent by the respondent to the petitioner reveals that the respondent as on 7.9.2013 was ready to pay Rs. 8 Crores, therefore, the liability of the respondent at least to that extent is undisputed. The said amount is more than the amount mentioned in Section 434(1) (a) of the Act and inspite of receipt of the demand notice in terms of

the said Clause, the respondent had neglected to pay the sum and there is also nothing on record to contravene the petitioner's plea that after October 2012 no repayments have been made, therefore, the respondent had apparently neglected to pay the sum and the deeming provision of Section 434(1)(a) is attracted and it can be held that the respondent-company is unable to pay its debt.

12. Even otherwise the respondent-company is not disputing the debt but it is only disputing the quantum of debt and this aspect is squarely covered by the judgment of the Supreme Court in the matter of *M/s Vijay Industries* (supra), wherein it has been held that it is not the requirement of law that the entire debt must be definite and certain and Section 433 is attracted if at least a part of the debt which is more than the amount specified in Section 433 of the Act, is not denied which is also the position in the present case.

13. It is also worth noting that even as per the respondent's own showing the plant is not functioning and lying closed. It was operational from November 2012 to January 2013 i.e. only for about 3 months. No reliable material has been produced by the respondent to show how the debts of the petitioner will be paid by the respondent.

14. In view of the above, I am of the view that it is a fit case for passing an order of winding up of the respondent-company

15. Accordingly it is directed that :-

(1) In view of the above analysis, Company Petition is admitted. Let the petition be advertised in accordance with the Rules.

(2) Considering the above circumstances, it is found that the petition has been presented on the ground that is just and equitable for passing an appropriate order of winding up. Accordingly I order winding up of the respondent-Company in accordance with the provisions of the Act read with the Company Court Rules, 1949.

(3) Accordingly and with a view to enable this Court to pass a final winding up order as contemplated under Rule 282 of the Rules, Official Liquidator of this Court

who becomes a Liquidator of the Company by virtue of Section 449 of the Act, is appointed as Liquidator of the Company. The Registrar of this Court to take steps as provided under Rule 109 of the Rules so that necessary orders as required under Rule 112 onwards can be passed by this Court, on the next date of hearing.

16. In view of the above, I.A. No.2678/2014 for dismissal of the petition is found to be devoid of any merit. The I.A. is accordingly rejected.

List on 8/9/2014.

*Order accordingly.*

**I.L.R. [2015] M.P., 1861**
**CIVIL REVISION**
***Before Mr. Justice U.C. Maheshwari***
C.R. No. 176/2013 (Jabalpur) decided on 11 October, 2013

GORELAL LODHI & ors. ...Applicants
Vs.
RATAN LAL LODHI & ors. ...Non-applicants

*A.* ***Suits Valuation Act (7 of 1887), Section 8 - Suit for partition and possession of 1/7th share of ancestral agricultural land*** **- Proper valuation thereof - Respondent no. 1 filed suit for partition and separate possession of his 1/7th share in the ancestral agricultural land of his Joint Hindu Family property - The applicants have assessed twenty times of the land revenue fixed for the land and suit is valued on his 1/7th share - Held - Suit is rightly valued - A coparcener is at liberty and has a right to value the suit till the extent of his share and ratio out of the total twenty times of the land revenue and bound to pay court fee accordingly. (Paras 7 & 8)**

*क. वाद मूल्यांकन अधिनियम (1887 का 7), धारा 8 – पैतृक कृषि भूमि के विभाजन एवं 1/7 हिस्से के कब्जे हेतु वाद* – इसका उचित मूल्यांकन – प्रत्यर्थी क्रं 1 ने अपने संयुक्त हिंदू परिवार संपत्ति की पैतृक कृषि भूमि के विभाजन एवं अपने 1/7 हिस्से के कब्जे हेतु वाद प्रस्तुत किया – आवेदकगण ने भूमि के लिये निश्चित भू–राजस्व के बीस गुना निर्धारण किया और अपने 1/7 हिस्से पर वाद मूल्यांकित किया – अभिनिर्धारित – वाद उचित रूप से मूल्यांकित – सहदायिक को अपने हिस्से की सीमा तक एवं भू–राजस्व के कुल बीस गुना के अनुपात में वाद का

मूल्यांकन करने की स्वतंत्रता और अधिकार है तथा वह तद्नुसार न्यायालय फीस अदा करने के लिये बाध्य है।

***B.*** ***Hindu Law - Undivided coparcenary property - Nature of possession of coparcener*** **- Every coparcener is co-owner of the entire property till the same is partitioned in accordance to the procedure prescribed under the law and if the coparcenary property is in possession of some other coparcener, then as per settled proposition of Hindu Personal Law, the possession of such coparcener is deemed to be the possession as trustee of other coparceners till the partition of the same is carried out and the separate possession is given. (Para 8)**

*ख. हिंदू विधि – अविभाजित सहदायिकी संपत्ति – सहदायिक के कब्जे का स्वरूप* – प्रत्येक सहदायिक संपूर्ण संपत्ति का तब तक सह–स्वामी है जब तक कि विधि में विहित प्रक्रिया के अनुरूप उसका विभाजन नहीं होता और यदि सहदायिकी संपत्ति किसी अन्य सहदायिक के कब्जे में है तब हिंदू स्वीय विधि के सुस्थापित प्रतिपादन के अनुसार उक्त सहदायिक का कब्जा अन्य सहदायिकों के न्यासी के रूप में समझा जाता है जब तक कि उसका विभाजन नहीं कराया जाता और पृथक कब्जा नहीं दिया जाता।

**Cases referred :**

2007 (1) MPHT 69, 1980 MPWN Vol. 2, Note 22, 1978 Vol. II M.P. Weekly Note 331.

*Mukhtar Ahmad,* for the applicants.

**ORDER**

**U.C. Maheshwari, J. :-** The applicants - defendants nos. 1, 3 (a), 3 (b), 5 (3) and 5 (b) have filed this revision under Section 115 of CPC being aggrieved by the order dated 11.1.2013, passed by the Xth Civil Judge, Class-II, Jabalpur in Civil Suit No. 122-A/2005, whereby their application filed under Order 7, Rule 11 of CPC, for dismissal of the suit for want of proper valuation and the court fee accordingly, has been dismissed.

2. The facts giving rise to this revision in short are that the respondent no. 1 herein has filed the aforesaid suit against the applicants as well as against remaining respondents as stated in the cause title of the plaint, (Ann. P-1) for partition and some other reliefs with respect of the land described in plaint. Besides the cause title on perusing the prayer clause of the plaint, it is apparent

that the suit has been filed by the respondent no. 1 for partition and separate possession of his 1/7th share in such property alongwith the prayer for declaration to declare the family arrangements, letter dated 11.6.1984, alleged Will dated 26.6.1992 and 4.5.1994 to be ab initio void and the same are not binding against him. As per para 11 of the plaint, in view of the prayer of the respondent- plaintiff for partition and separate possession of his 1/7th share in the disputed land by assessing the twenty times of land revenue Rs.1516/- of entire land, out of which accordingly to his 1/7th share in the property, the suit is valued in that ratio for the purpose of the court fees Rs.217/- and court fee was also paid accordingly in this regard. Besides this, for the purpose of the relief of above mentioned declaration the suit is separately valued on fixed valuation of Rs.1000/- and accordingly court fee of Rs.100/- is also affixed on the pliant.

3. In the written statement of the applicant, the defendants, the averments of the plaint regarding title and interest of the respondent no. 1 in the disputed property are denied. In further averments besides the other defence, the objection that suit has not been valued in accordance with law and the court fee has also not been paid accordingly, is also taken. In pendency of the suit on behalf of the applicants, the impugned application under Order 7, Rule 11 CPC (Ann. P-3) to dismiss the suit for want of proper valuation and the court fee was filed. The averments of aforesaid IA were denied on behalf of respondent no. 1 by filing its reply, (Ann. P-4). In reply, it is stated that the suit has been filed on proper valuation and the court fee in accordance with provision of the Court Fee Act and prayer for dismissal of the application was made.

4. After extending the opportunity of hearing to the parties on consideration by holding that suit has been filed on proper valuation and the court fee, the application was dismissed by the trial court. Being dissatisfied with such order, the applicants have come to this court with this revision.

5. The applicants' counsel after taking me through the averments of the revision as well as papers placed on record alongwith the impugned order by referring, the decision of this court in the matter of *Digambar Kumar Jain Vs. Smt. Maya Bai and others* reported in 2007, (1), M.P.H.T. 69, argued that in the available factual matrix of the case when the respondent no. 1 herein has filed the impugned suit for partition and separate possession of his 1/7th share of the disputed land of joint Hindu Family, then in that

circumstances, it could not be assumed that with respect of the share claimed by the respondent no. 1 in the suit the separate land revenue has been assessed by the revenue department in accordance with the procedure prescribed under M.P. Land Revenue Code, thus, in the lack of separate assessment of the land revenue on the claimed share of the land, in view of pleadings and the prayer of the plaint, the respondent no. 1 is bound to value the suit on the market price of the property, i.e. advelorum valuation and also bound to pay the court fee accordingly and in the lack of such valuation and the court fee, the impugned suit is not entertainable but the trial court has not considered their application with proper approach and dismissed the same under the wrong premises and prayed for setting aside the impugned order and dismissing the impugned suit of respondent no. 1 by allowing his impugned application by admitting and allowing this petition.

6. Keeping in view the arguments, advanced, I have carefully gone through the papers placed on record including the pleadings of the parties as well as aforesaid IA and the impugned order so also the cited case.

7. It is undisputed fact on record that the respondent no. 1 herein has filed the impugned suit for partition and separate possession of his 1/7th share in the ancestral agricultural land of his Joint Hindi (sic:Hindu) Family property. The description of the land alongwith its land revenue fixed under M.P. Land Revenue Code has also been stated in the plaint and it appears that concerning khasra entries have also been placed on record, according to which for all the survey numbers of the land under dispute the land revenue is fixed and on the basis of such fixed land revenue, the applicants have assessed the twenty times of the total land revenue, i.e. Rs.1516 and out of them, the valuation of the suit is made in such ratio for his 1/7th share, i.e. Rs.217/- and the court fee is also paid accordingly. So firstly in such premises, such valuation of the suit and payment of the court fee accordingly on such valuation is in consonance with the provision.

8. Apart the aforesaid, the respondent no. 1 has filed the impugned suit stating himself to be the co-parcenors of the family and it is settled proposition of law that every co-parcenor is co-owner of entire property till the same is partitioned in accordance with procedure prescribed under the law and if the co-parcenory property is in possession of some other co-parcenor, then as per settled proposition of Hindu Personal Law, the possession of such coparcenor is deemed to be the possession as trustee of other co-parcenors

till the partition of the same is carried out between the co-parcenors and the separate possession is given to the co-parcenor. In such a premises by stating twenty times land revenue of the entire land for partition of 1/7th share of land without disclosing any specific part of such property in the prayer for partition and separate possession is made by the co-parcenor, then such co-parcenor is at liberty and has a right to value the suit till the extent of his share and ratio out of the total twenty times of the land revenue and he is bound to pay the court fee accordingly. It is apparent in the case at hand that after stating total sum of twenty times of land revenue out them by valuing the suit for 1/7th share of respondent no. 1, in such ratio, the suit was valued and the court fee was paid accordingly. So in such premises, also the impugned order does not require any interference. Long before in the matter of *Bhagwati Vs. Chamar Rai* reported in 1980, MPWN, Vol. 2, Note 22 such question was answered by this court, in which it was held as under:-

> "A harmonious construction of paragraphs (v) and (vi) of section 7 will show that the legislature intended that the market value of a land revenue paying land for both the clauses will be the same, that is, twenty times the land revenue as provided under clause (v). A different interpretation will create a conflict in these two clauses inasmuch as in a suit for possession simpliciter of land revenue, the plaintiff will be required to pay twenty times the land revenue, while in a suit for partition and separate possession, when plaintiff is out of possession, he will be required to pay Court- fees on the actual market value. We cannot attribute such an inconsistency to the legislative intent. *Gujabai v. Salubai and others,* 34, MPLC 98 AIR 1947, Nag. 243 relied on."

9. Apart the aforesaid such question was also answered by this court in the matter of *Patel Tejbalsingh Vs. Patel Babulal* reported in 1978, Vol. II, M.P. Weekly Note, 331 in which it was held as as under:-

> "This being a suit for partition, the plaintiff's being out of possession and their claim that they are co-owners is under challenge, the case is governed by section 7 (vi-a) (b) of the Court Fees Act (M.P. Amendment), and the suit has to be valued according to the full value of the share claimed in the properties. In the present case, the plaintiffs have claimed half

share in the joint properties. The plaintiffs have given the details of the agricultural lands to be partitioned in schedule Kh. of the plaint. The learned trial judge on perusal of the certified copies of Jamabandi and the records of settlement for the year 1923-24 found that Khasra Nos. 17, 27, 54, 31, 99, 138 and 96 have been assessed together and land revenue is fixed at Rs.150/-. Similarly Khasra Nos. 75, 78, 97 and 116 are assessed together and land revenue fixed is Rs.53.50p. Regarding Khasra Nos. 3/1 and 80/1, Malguzari Pattas have been filed and the land revenue shown is Rs.45 and Rs. 22 respectively. Under Section 15 (2) of the C.P. Tenancy Act 1920, a Malgujar had a right to fix the rent payable by an occupancy tenant in which rent has not been fixed at settlement. Under Section 45 (4) of the M.P. Abolition of Proprietary Rights (Estates, Mahals and Alienated Lands) Act 1950, the rent so payable by a tenant to the Malgulzar would be deemed to be the land revenue after the vesting of the land in the State. Khasra No. 142 is assessed to land revenue or Rs.64. Therefore, the learned trial Judge was justified in holding that these lands have been property (sic:properly) valued at 20 times the land revenue under section 7 (v) (d) of the Court Fees Act read with section 8 of the Suits Valuation Act. Revision dismissed."

10. In view of aforesaid earlier decision of this court the impugned order being in consonance with the settled proposition does not require any interference under the revisional jurisdiction of this court.

11. In view of aforesaid elaborate discussion, the case law in the matter of *Digambar Kumar Jain Vs. Smt. Maya Bai and others* (supra) cited by the applicants' counsel being distinguishable on facts, so also in view of aforesaid cited decision of this court is not helping to the applicants.

12. In view of aforesaid, I have not found any perversity, infirmity, irregularity or anything contrary to the propriety of law in the order impugned. Consequently this revision being devoid of any merit is hereby dismissed at the initial stage of motion hearing.

*Revision dismissed.*

**I.L.R. [2015] M.P., 1867**
**CIVIL REVISION**
***Before Mr. Justice S.C. Sharma***
Civil Rev. No. 205/2014 (Indore) decided on 21 November, 2014

SURENDRA KAUR (SMT.) ...Applicant
Vs.
SATINDER SINGH CHHABRA ...Non-applicant

***Land Acquisition Act (1 of 1894), Sections 30, 53 & 54 and Civil Procedure Code (5 of 1908), Section 115 - Maintainability of Civil Revision*** **- Order passed u/s 30 of the Act, 1894 is a decree - Appeal lies u/s 54 of the Act, 1894 - Order dismissing application u/o 7 rule 11 CPC is appealable - Civil Revision is not maintainable - Revision dismissed. (Paras 9 & 13)**

*भूमि अर्जन अधिनियम (1894 का 1), धाराऐं 30, 53 व 54 एवं सिविल प्रक्रिया संहिता (1908 का 5), धारा 115 – सिविल पुनरीक्षण की पोषणीयता* – अधिनियम, 1894 की धारा 30 के अंतर्गत पारित किया गया आदेश डिक्री है – अधिनियम, 1894 की धारा 54 के अंतर्गत अपील होगी – सि.प्र.सं. के आदेश 7 नियम 11 के अंतर्गत आवेदन की खारिजी का आदेश अपीलीय है – सिविल पुनरीक्षण पोषणीय नहीं – पुनरीक्षण खारिज।

**Cases referred :**

1968 MPLJ 461, 1972 MPLJ 1081, AIR 1965 MADRAS 376 (V 52 C 127) page 376, 1969 MPLJ 598.

*Vinay Saraf*, for the applicant.
*S.G. Gokhale*, for the non-applicant.

**ORDER**

**S.C. SHARMA, J. :-** The present revision has been filed under Section 115 of CPC, 1908 against the order dated 15.10.2014 passed by the Land Acquisition Officer in Case No.156/2013. The learned District Judge has allowed the application preferred by the non-applicant No.1 under Order 7 Rule 11 of CPC and has dismissed the reference petition filed by the applicant under Section 30 of Land Acquisition Act, 1894 being time barred.

2. Fact of the case reveals that the non-applicant No.1 Satinder Singh Chhabra is the son of the present applicant-Smt. Surendra Kaur. The facts

further reveal that the husband of the applicant late Shri Sardar Surjeet Singh Chhabra purchased an agricultural land bearing Survey No.175/3 admeasuring 0.340 hectare and Survey No.176/2 admeasuring 0.300 hactare of land situated at Village Pant Piplai Tehsil and Distt. Ujjain on 13.6.1988. It has further been stated that the land was purchased from the source of HUF in the name of elder son Satinder Singh Chhabra (non-applicant No.1), who was a minor having no source of income. The facts further reveals that for construction of a four lane road, a notification under section 4 read with Section 17 of the Act of 1894 was issued and thereafter an award was passed on 4.8.2009 in the name of non-applicant No.1. He was paid a sum of Rs.22,43,131/- on 2.2.2010. The said amount was distributed between the non-applicant No.1 Satinder Singh Chhabra, who is the elder brother of Tajinder Singh. It has been stated that a memorandum of Understanding was executed between the parties on 14.2.2012 that they will be dividing the compensation in a particular ratio in case it is enhanced. It has further been stated that on account of some dispute, the non-applicant No.1 has refused to accept the family arrangement and the applicant has filed an application before the court for deciding the question of apportionment and the same was dismissed by the order dated 30.10.2012 on the ground that the same should be filed before the land acquisition officer. The applicant thereafter has preferred an application under Section 30 of the Act of 1894 before the Collector-cum-Land Acquisition Officer, Ujjain and the same was registered as Land Acquisition Case No.156/13. The respondent No.1 preferred an application under Order VII Rule 11 of Code of Civil Procedure, 1908 read with Sections 30 and 53 of the Act of 1894 and a ground was raised that the application was not filed within limitation. A detailed reply has been filed by the present applicant on 1.8.2014 and the learned District Judge has allowed the application vide impugned order dated 15.10.2014 filed by the non-applicant No.1 under Order VII Rule 11 of Code of Civil Procedure read with Sections 30 and 53 of the Act of 1894.

3. The present revision arising out of the order dated 15.10.2014. A preliminary objection has been raised from the other side regarding maintainability of revision petition. Sections 30, 53 and 54 of the Land Acquisition Act, 1894 reads as under :

> "**30. Dispute as to apportionment**-When the amount of compensation has been settled under section 11, if any dispute arises as to the apportionment of the same or any part thereof or as to the persons to whom the same or any part thereof is

payable, the Collector may refer such dispute to the decision of the court.

**53. Code of Civil Procedure to apply to proceedings before the Court**-Save insofar as they may be inconsistent with anything contained in this Act, the provisions of the [Code of Civil Procedure, 1908 (5 of 1908)] shall apply to all proceedings before the Court under this Act.

**54. Appeals in proceedings before court**-Subject 10 the provisions of the Code of Civil Procedure, 1908 (5 of 1908), applicable to appeals from original decrees, and notwithstanding anything to the contrary in any enactment for the time being in force, an appeal shall only lie in any proceedings under this Act to the High Court form the award, or from any part of the award of the court and from any decree of the High Court passed on such appeal as aforesaid an appeal shall ilie (sic:lie) to l [the Supreme Court] subject to the provisions contained in section 110 of the Code of Civil Procedure, 1908, and in Order XLV thereof.}"

4. Section 54 of the Act of 1894 provides for an appeal. A Division Bench of this Court in the case of *Rishiraj Singh AndOrs. Vs. Raghubar Singh and Ors*.reported in 1968 MPLJ 461 while dealing with an order passed by the District Judge under Section 54 has held that the decision taken by the District Judge on reference under Section 30 of the Act of 1894 is a decree and an appeal therefrom is a regular first appeal on which ad-valorem court fee on the amount claimed by the appellant in an appeal is payable. Paragraphs 1, 2, 3 and 4 of the aforesaid judgment reads as under :-

"1. This is a Letters Patent appeal from an order of Shiv Dayal J. holding that an appeal preferred by the appellants before us, against a decision of the Additional District Judge, Ambikapur,under Section 30 of the Land Acquisition Act is a regular first appeal and should be registered as such and directing the appellants to state the valuation of the appeal and pay ad valorem Court fees on it accordingly.

2. The material facts are that in acquisition proceedings of certain land situated in village Patna,tahsil Baikunthpur, an

amount of Rs. 7,196,70/- was determined as compensation for the land acquired. In those proceedings a dispute arose between the parties to the appeal as regards the apportionment of the compensation. The respondents claimed that they were entitled to the full amount of the compensation and that the appellants had no claim to receive the compensation amount. The Land Acquisition Officer referred this dispute about apportionment to the Court of the Additional District Judge, Ambikanpur, under Section 30 of the Land Acquisition Act,1894 for decision. The learned Additional District Judge held that the respondents were entitled to get the entire amount of Rs.7,198,70 rejecting in toto the claim of the appellants to get any amount of the compensation. The appellants therefore, preferred an appeal in this Court in which the order before us in appeal was passed by the learned single Judge.

3. The short question that arises in this appeal is as regards the Court fee payable on the appeal preferred by the appellants. The learned single Judge, relying on *Ramchandra v. Ramchandra* held that the decision of the learned Additional District Judge on a reference under Section 30 of the Land Acquisition Act was a decree and that, therefore, the appeal preferred before him by the appellants was a regular appeal and ad valorem Court -fee was payable on the valuation of the appeal. In *Ramchandra v. Ramchandra* the Privy Council has observed:-

> " The award as constituted by statute is nothing,but an award which states the area of the land, the compensation to be allowed and the apportionment among the persons interested in the land of whose claims the Collector has information meaning thereby people whose interests are not in dispute but from the moment when the sum has been deposited in Court under Section 32(2) the functions of the award have ceased and all that is left is a dispute between interested people as to the extent of their interest.

> Such dispute forms no part of the award, and it would indeed be strange if a controversy between two people as to the nature of their respective interests in a piece of land should enjoy certain rights of appeal, which would be wholly taken away when the piece of land was represented by a sum of money paid into Court."

The decision in *Ramchandra v. Ramchandra* was explained by the Privy Council in later case, *Bhagwati v. Ram Kali,* thus:-

> " In that case some question arose as to whether any appeal lay to His Majesty in Council in a case where the determination of the Judge ended in an award and not in a decree. The Board took the view that where the matter referred was not the adequacy of the amount of compensation awarded , but a dispute between the person claiming compensation, involving it may be, difficult questions of title: the resultant decision was not an award but a decree.

4. In our Judgment, the learned single Judge rightly held that the decision of the learned Additional District Judge was a decree and that therefore, ad valorem Court-fee payable on the appeal. That apart, even under section 8 of the Court-fees Act the amount of Court- fee payable on the appeal preferred by the appellants was the amount they claimed as compensation. That provision lays down that the amount of Court-fee payable on a memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of land for public purposes shall be computed according to the difference between the amount awarded and the amount claimed by the appellant. No amount was awarded to the appellants and they have claimed some

amount in the appeal preferred by them. Consequently they should have paid ad valorem Court- fee on the amount claimed by them in the appeal."

5. The aforesaid judgment of the Division Bench makes it very clear that the order passed under Section 54 is an appealable order and a civil revision does not lie under Section 115 of Code of Civil Procedure, 1908. The Division Bench of this Court in another case i.e in the case of *Madhaorao Vs. Yashwant and Ors.* reported in 1972 MPLJ 1081 in paragraphs 6, 8, 10 and 11 has held as under :-

"6. The question that arises for consideration is whether the claim entertained by the learned Additional District Judge as far as Ramchandrarao is concerned is also tenable. It has already been pointed out that Ramchandrarao made his claim for the first time before the Additional District Judge. Sections 18,19,20 and 21 confer a special jurisdiction upon the Court and it arises out of an application made to the Land Acquisition Officer by any person interested who has not accepted the award. There can be no reference except at the instance of such a person interested under section 18 unless it be a reference of a dispute under Section 30 of the Act. Dealing with the special jurisdiction of the Court under the Act in *Prematha Nath v. Secretary of State* , it was observed by the Privy Council thus:

" There Lordship have no doubt that the jurisdiction of the Courts under this Act is a special one and is strictly limited by the terms of the section. It only arises when a specific objection has been taken to the Collector's award and is confined to a consideration of that objection."

If a party has not chosen to apply to the Collector for a reference under Section 18 and if the Collector has not referred the matter under Section 30 of the Act, then the Court hearing the reference would be powerless to entertain any fresh claim and add him as a party to the proceedings. It was, therefore, necessary to refer the question of title to compensation claimed by Ramchandrarao Waghmare and Siremal. They did not seek the assistance of the Collector in that regard. For making a

reference under Section 30 of the Act, the powers of the Collector are also not fettered by any limitation. But what they now seek to do is to be made parties in the reference proceedings and claim title to the compensation as against Madhaorao. If it is was only desired to support the reference made by Madhaorao, there could be some justification in making them parties to the proceedings. For, in that case, they would be permitted to adduce evidence as regards the value of the land. Now, Ramchandrarao could not be added as a party by Additional District Judge for determining his title to the compensation as this dispute was not referred to him under Section 30 of the Act.

8. In *Mt. Bakalbaso Kher v. Brijendra Singh* reliance was placed on section 53 of the Act which provides that the provisions of Civil Procedure Code applied to all the proceedings before the Court under the Act except and so far as they are not inconsistent with anything contained in the Act. It was, therefore, held that provisions of Order 1, rule 10 could be availed of to add new parties before the Court. With great respect to the views expressed in that case, we are inclined to hold that section 53 of the Act in itself lays down that the provisions of Civil Procedure Code would apply except and so far as they may not be inconsistent with anything contained in the Act. Now, when the Act itself lays down a special procedure for making a reference, this could not be by-passed by taking recourse to any provisions of the Civil Procedure Code. The special procedure laid down under the Act for raising disputes before Courts under section 18 and for setting title to compensation and apportionment under section 30 would prevail and if as pointed out no such dispute was before the Court,it would not be permissible to add new parties raising new disputes. We would agree with the view taken by the High Courts of Andhra Pradesh and Calcutta in the aforesaid cases. In this view of the matter, the claim of Ramchandrarao could not be considered by the Additional District Judge and his remedy, if, any, was by a civil suit.

10. Similarly, the application by Siremal who has raised

entirely a new disputed by intervening at the appellate stage cannot be entertained. Siremal, who applied to be joined as a party before the High Court,claims compensation in respect of 73 ft. by 65ft. land. This entirely new dispute was neither before the Land Acquisition Officer nor before the Additional District Judge. The scope of appeal from a decision of a reference under sections 18 and 30 of the Land Acquisition Act is limited just as the scope of reference itself is limited. The powers of the High Court under section 54 are in no way greater than the powers of the Court hearing the reference and if the reference could only be confined to matters specifically referred to it, the scope could not be enlarged in appeal. In the referring order by the Land Acquisition Officer,he indicated that there was a dispute regarding apportionment of the compensation between Madhaorao, Balkrishnarao and Gopalrao. He also indicated that these were the persons interested in the land. The order of the additional District Judge and that of the High Court in appeal, therefore, could not go beyond what was referred by the Land Acquisition Officer. We are of the opinion that for the reasons already discussed,provisions of Order 1, rule 10 of the Civil Procedure Code would not be of any assistance to Siremal for making a claim before us at this stage. We, therefore, reject the application of Siremal for consideration of his claim as to apportionment.

11. The contentions of the appellant that the claim of the legal representatives of Balkrishnarao and Gopalrao should be restricted to the compensation awarded by the Collector is without any force. When the matter as regards quantum of compensation was at large before the Court, the apportionment would undoubtedly be of the compensation finally determined as the dispute referred to by the Collector under Section 30 was for apportionment after the determination."

6. Again against an order passed on an application under Section 30, an appeal was preferred and the same was held to be maintainable.

7. Definition of decree under the Code of Civil Procedure, 1908 reads as under :-

"The term "decree" is defined in Section 2(2), Civil Procedure Code as meaning " the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matter in controversy in the suit." To constitute a decree, the decision must fulfill the following conditions:

1. The decision must be arrived in a suit.

2. The decision must have been expressed on the rights of the parties with regard to all or any of the matters in controversy in the suit.

3. The decisions must be one which conclusively determines those rights.

4. There must have been a formal expression of an adjudication."

8. Not only this, Section 53 of the Act of 1894 provides that Code of Civil Procedure, 1908 is applicable in proceeding before the Court.

9. Keeping in view the aforesaid order passed by the learned District Judge on an application under Section 30 of the Act of 1894 has to be treated as a decree. The order passed under Section 30 is certainly capable for execution under the Code of Civil Procedure, 1908 and therefore, for all practical purposes it has to be treated as a decree against which an appeal is maintainable under Section 54 of Code of Civil Procedure, 1908.

10. The Apex Court in the case of *A.M. Chengalvaraya Chetty Vs. The Collector of Madras and Ors.* reported in AIR 1965 MADRAS 376 (V 52 C 127) page 376 was dealing with a case where a reference was made under Section 18 and 31 of the Act of 1894. It was rejected by the court on the ground that compensation had already been paid out of one of the claimant, in those circumstances the Apex Court has held that appeal lies not a revision lies. Paragraph 12 of the aforesaid judgment reads as under :-

"For the reasons indicated by us earlier, we are of opinion that where there has been a valid reference to the Court, whether under Section 18, 30 or 31, any order passed by the Court finally disposing of the matter so far as it was concerned would be appealable. As an appeal would lie against the order

> complained of in the present case, we are unable to exercise our powers of revision under Section 115, CP Code. This civil revision petition fails and is dismissed. There will be no order as to costs."

11. Learned counsel for the applicant has placed reliance upon a judgment delivered by the Apex Court in the case of *Sunderlal Vs. Paramsukh Das and Ors.* reported in 1969 MPLJ 598 and his contention is that the revision is maintainable.

12. This court has carefully gone through the aforesaid judgment and the paragraph 21 of the aforesaid judgment reads as under :-

> "Mr. Desai says that at any rate direction should be given that Paramsukhdas should not be entitled to challenge the compromise entered into between Sunderlal and Khushal Singh. We are unable to accept this submission. Paramsukhdas is entitled to raise all points to protect his interests which were affected by the objections. It is also in the interest of justice that there should not be multifarious proceedings and all points arising which are not expressly barred under s. 21 should be gone into by the Court."

13. It was a case where creditor one of the parties to reference who had attached the compensation amount in execution of his decree applied for being joined as a party to the proceeding to safeguard his interest. His application was rejected before making an award, in those circumstances the Apex Court has held that the order passed by the reference court is not appealable and the revision lies, whereas in the present case on a specific application preferred under Section 30 of the Act of 1894 an order has been passed by the learned District Judge. The judgment relied upon by the learned counsel is distinguishable on facts. Resultantly, this Court is of the considered opinion that against the order passed by the District Judge under Section 30 of the Act of 1894 an appeal lies under Section 54 of the Act of 1894. Resultantly, the admission is declined with a liberty to the applicant to prefer an appropriate appeal in accordance with law. Certified copy of the impugned order be returned back to the applicant on substitution of a duly certified photocopy of the impugned order.

C.C. as per rules.

*Revision dismissed.*

**I.L.R. [2015] M.P., 1877**
**CIVIL REVISION**
***Before Mr. Justice C.V. Sirpurkar***
Civil Rev. No. 538/2014 (Jabalpur) decided on 13 January, 2015

KAMAR MOHAMMAD KHAN ...Applicant
Vs.
NAWAB MANSOOR ALI KHAN PATAUDI
& ors. ...Non-applicants

***Civil Procedure Code (5 of 1908), Section 115 & Order 9 Rule 13 - Civil Revision - Other Proceedings*** **- There is no reason to restrict the meaning of "Proceedings" akin to the suit - Proceeding under Order 9 Rule 13 would be covered by expression "other proceedings" as used in proviso to Section 115(1) - Any interlocutory order passed in such proceedings, would not be amenable to Revisional jurisdiction - Revision does not lie against the order rejecting application filed under Section 45 of Evidence Act - Revision dismissed as not maintainable. (Paras 14, 19 & 20)**

*सिविल प्रक्रिया संहिता (1908 का 5), धारा 115 व आदेश 9 नियम 13 – सिविल पुनरीक्षण – अन्य कार्यवाहियां* – वाद के समान "कार्यवाहियां" के अर्थ को सीमित करने का कोई कारण नहीं – आदेश 9 नियम 13 के अंतर्गत कार्यवाही, पद "अन्य कार्यवाहियां" द्वारा आच्छादित होगी जैसा कि धारा 115(1) के परंतुक में प्रयोग किया गया है – ऐसी कार्यवाहियों में पारित किया गया कोई अंतवर्ती आदेश पुनरीक्षण अधिकारिता के अध्यधीन नहीं होगा – साक्ष्य अधिनियम की धारा 45 के अंतर्गत प्रस्तुत किये गये आवेदन की खारिजी के आदेश के विरूद्ध पुनरीक्षण नहीं होगा – पुनरीक्षण खारिज क्योंकि पोषणीय नहीं।

**Cases referred :**

(2010) 1 MPLJ 98, 2002 (4) MPHT 200, AIR 2003 SC 3044.

*Jai Lakshmi Iyer,* for the applicant.
*Anubhav Jain,* P.L. for the non-applicant no. 4.

**ORDER**

**C.V. SIRPURKAR, J. :-** This civil revision under Section 115 of the Code of Civil Procedure, 1908 has been preferred challenging the legality, propriety and correctness of order dated 18/10/2014 passed by the 13th

Civil Judge Class-I, Bhopal in M.J.C. No. 10/2011, whereby learned court below had rejected an application under Order 19 Rule 2 of the Code of Civil Procedure for permission to cross-examine respondent No. 1 (a).

2. The facts giving rise to this civil revision may be summarized thus: The applicant and respondent No.2, who are real brother and sister, jointly filed Regular Civil Suit No. 585/2006 against respondent Nos. 1, 3 and 4, for declaration and permanent injunction in respect of the suit land. Civil Suit No. 585/2006 was decreed in favour of the applicant and respondent No.2 on 28/07/2006. About 4 ½ years after the judgment and decree, the deceased/ respondent No.1 filed an application under Order 9 Rule 13 of the Code of Civil Procedure through his power of attorney holder for setting aside the judgment and decree dated 28/7/2006. This was registered as M.J.C. No.10/ 2011. During the pendency of the Miscellaneous Judicial Case, respondent No.1 died and his legal representatives respondent Nos.1 (a), (b), (c) & (d) were brought on record.

3. The case of the revision petitioner is that during the pendency of M.J.C. No. 10/2011, power of attorney holder of the applicant, Mohammad Saeed, met respondent No. 1 (a) Sharmila Tagore, who told him that they have no right, title or interest in the suit land and they have not authorized anyone to engage counsel on their behalf nor have they signed any power in favour of any advocate. Consequently, the applicant moved an application under Section 45 of the Indian Evidence Act to get the signature of respondent No.1 (a) on Vakalatnama, examined by a handwriting expert. The reply to application under Section 45 of the Indian Evidence Act, was accompanied by an affidavit, purported to be sworn by Smt. Sharmila Tagore; therefore, the applicant moved an application before the learned trial Court praying for permission to cross-examine Smt. Sharmila Tagore. This application was dismissed by impugned order dated 18/10/2014.

4. The applicant challenged the impugned order by way of writ petition (W.P. No. 18146/2014) which was withdrawn by him on 25/11/2014 with liberty to challenge the order in civil revision. In the result, this civil revision came to be filed.

5. The question that arises for consideration herein is whether a civil revision is maintainable against an order dismissing application under Order 19 Rule 2 of the Code of Civil Procedure, filed for permission to cross-examine

the affiant, in a proceeding under order 9 rule 13, in view of the proviso appended to sub-section (1 of Section 115 of the Code of Civil Procedure?

6. It has been held by a Division Bench of this High Court in the case of *Johra Bi and others Vs. Jageshwar and others* [(2010) 1 M.P.L.J. 98] that the revisional jurisdiction under Section 115 of the Code of Civil Procedure, is available against:

(i) an order deciding finally the suit or other proceedings where no appeal is provided; and

(ii) where effect of the order in the revision would finally disposed of the suit or other proceedings.

It has further been observed that the revisional jurisdiction will not be exercised in respect of other orders " deciding a case" in the course of a suit or other proceedings; though, there may be an error or defect, irregularity or illegality in exercise of the jurisdiction, where allowing the revision would not finally disposed of the suit or other proceedings.

7. Similar proposition of law was made by a Judge of this High Court sitting singly in the case of *Sawalsingh Vs. Smt. Ramsakhi & others,* (2002 (4) M.P.H.T. 200).

8. In this regard, learned counsel for the applicant inviting attention of this Court to paragraph nos. 7 & 8 of the judgment in the case of *Sawal Singh* (Supra), has argued that the expression "other proceedings" occurring in the proviso to section 115 (1), has to be read *ejusdem generis.* Thus, as per learned counsel, the expression "other proceedings" would apply only to the proceedings that are akin to a suit. Since, a proceeding under order 9 rule 13 is not akin to a suit, the proviso to section 115 (1) would not apply to such proceedings and hence, even an interlocutory order, which made either way, would not terminate the proceedings, would be amenable to revisional jurisdiction of the High Court, if other conditions envisaged in section 115 (1), are satisfied.

9. This Court is unable to persuade itself to agree with aforesaid contention. If we carefully analyse the paragraph nos. 7 & 8 of the judgment in *Sawal Singh's* case (supra), no such intention is deductible. The paragraph no. 7 reads as follows:

*7. The proviso clearly lays a postulate that if the order which is under assail if it had been made in favour of party applying for revision, the suit or other proceedings would have been finally disposed of. The words used in this proviso which are of immense signification are "order passed in the course of a suit or other proceedings". There are certain categories of orders which come into existence in the course of hearing of the suit. To enumerate some: an order refusing/allowing an application for amendment, prayer for grant of injunction, relief seeking appointment of receiver, commission/survey knowing commission, application to file documents, application to take up an issue as preliminary one, application seeking addition of an issue and such other ancillary matters. These orders are precluded from the purview of assail as ordinarily, in a case of this nature the suit would not stand disposed of. But there are certain proceedings which are proceedings under the Code which may warrant interference because they have the status of original proceeding. To elucidate: applications under Order IX, Rule 4 and Order IX, Rule 13. These applications are filed in Court of law when the suit is not in existence or pending as the same has seen the extinction/end because of some obtaining circumstances. Hence, they are to be regarded as original proceedings. To give an example, if the Court refused to restore the suit for some reason or other and the matter travels to High Court in revision and if the revision is allowed, the said proceeding would stand terminated. Therefore, a proceeding of that nature is an independent proceeding otherwise immense hardship would be caused.*

*(Emphasis supplied)*

10. When we peruse first part of paragraph of no. 7, we find that it enumerates certain categories of orders which come into existence in the course of hearing of the suit, like an order refusing/allowing an application for amendment, prayer for grant of injunction, relief seeking appointment of receiver, application for commission/survey, application to file documents, application to take up an issue as preliminary one, application seeking addition

of an issue and such other ancillary matters. Such orders have been expressly precluded from the purview of revisional jurisdiction. There is no dispute so far as aforesaid contention is concerned.

11. The second part of the paragraph no. 7 refers to **certain proceedings under the Code of Civil Procedure, which may warrant interference because they have the status of original proceedings like those in the applications under order IX, rule 4 and order IX, rule 13.** (Emphasis supplied). Now, the question is whether aforesaid observation made in paragraph no. 7, may be construed to mean that in the proceedings like those under order 9 rule 4 or order 9 rule 13 even the orders that would not terminate those proceedings, if made in favour of the revision petitioner, are open to interference? The answer to this question has to be in the negative because of the example given in the latter part of the paragraph no. 7 itself. Learned Judge sitting singly, has observed that if the Court refused to restore the suit for some reason or other and the matter travels to High Court in revision and if the revision is allowed, the said proceeding would stand terminated. Learned Judge further observed that a proceeding of that nature is an independent proceeding otherwise immense hardship would be caused. Obviously, the hardship learned Judge was referring to could not have resulted from an interlocutory order passed in such proceeding. So, it cannot be inferred from the observation made and the example given in paragraph no. 7 that even the kind of orders, which if made in a civil suit, would not have been revisable due to the embargo contained in proviso to section 115 (1), would be revisable if made in proceedings under order IX rule 4 or rule 13 or similar proceedings.

12. Now, let us examine the import of paragraph no. 8, which is reproduced hereinbelow:

> *8. The terms "other proceedings" have wide meaning and they should not be read in a narrow compass. In the Code 'other proceedings' are not defined but in sections 24, 63, 99, 99-A, 141, 144, 146 and 147, the word 'proceedings' has been used. Under section 141, the legislation has specifically included the proceedings under Order 9 Civil Procedure Code but has excluded any proceedings u/art. 226 of the Constitution. The term proceedings cannot be confined to a civil proceeding alone. It has the comprehensive meaning so as to include within*

*it all matters coming up for judicial adjudication."*

13. A bare perusal of paragraph no. 8 reveals that it militates against assigning a restricted meaning to the expression "other proceedings" and explicitly holds that a proceeding under order 9 rule 13 would fall under the expression "other proceedings". As such, the proviso to section 115 (1), would apply even to an interlocutory order passed in a proceeding under order 9 rule 13, exposing it to the embargo contained therein.

14. In this regard, it would be useful to refer to paragraph no. 20 of the judgment in the case of *Johra Bee* (supra), wherein a Division Bench of this High Court has categorically held that:

> *"20. The question still subsist what is the meaning to be given to "other proceedings". In our opinion, there is no reason to restrict the meaning of "proceeding" akin to the suit.*

So, there is no case for reading the expression "other proceedings", *ejusdem generis* in relation to the term "suit".

15. Moreover, in respect of object of the proviso to section 115 (1), which was introduced in the Code with effect from 1-7-2002, the Supreme Court in the case of *Surya Dev Rai v. Ram Chander Rai,* (AIR 2003 SUPREME COURT 3044) has observed that:

> *"The amendment is based on the Malimath Committee's recommendations. The Committee was of the opinion that the expression employed in Section 115 CPC, which enables interference in revision on the ground that the order if allowed to stand would occasion a failure of justice or cause irreparable injury to the party against whom it was made, left open wide scope for the exercise of the revisional power with all types of interlocutory orders and this was substantially contributing towards delay in the disposal of cases. The Committee did not favour denuding the High Court of the power of revision but strongly felt that the power should be suitably curtailed. The effect of the erstwhile clause (b) of the proviso, being deleted and a new proviso having been inserted, is that the revisional jurisdiction, in respect of an interlocutory order passed in*

*a trial or other proceedings, is substantially curtailed. A revisional jurisdiction cannot be exercised unless the requirement of the proviso is satisfied".*

16. As such, it is inconceivable that the intention of the legislature would be that though, an interlocutory order passed in a civil suit or a proceeding akin to a suit would not be revisable but the same passed in other proceedings which are not akin to a suit, would be revisable.

17. It is true that the settled principle of interpretation of statutes is that a provision curtailing the jurisdiction of civil court, has to be construed strictly and while interpreting the provision, the Court should lean in favour of the view that is against curtailing the jurisdiction of civil Court. However, where the legislative mandate and the object behind it is unambiguous, the Court should not hesitate to give full effect to the same.

18. Thus, it is clear that the test prescribed in proviso to sub-section 1 of section 115, is required to be applied to every individual case and it is to be seen whether impugned order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings. If the answer is in negative, revision would not be maintainable.

19. In this view of the matter, a proceeding under order 9 rule 13, would be covered by the expression "other proceedings" as used in proviso to section 115 (1). Consequently, an interlocutory order passed in such proceedings, would not be amenable to revisional jurisdiction of the High Court at the instance of the party aggrieved thereby.

20. There is no doubt that the order impugned in this civil revision rejecting permission to cross-examine respondent No.1(a) with regard to an affidavit purported to have been sworn by her, does not fall in the category of orders which are amenable to revisional jurisdiction because even if the order had been made in favour of the revision petitioner, it would not have terminated the proceedings under Order 9 Rule 13 of the Code of Civil Procedure pending before the trial Court. As such, a civil revision against impugned order is not maintainable.

21. In the result, this civil revision, without examining the merits of the impugned order, is dismissed in limine, as being not maintainable.

*Revision dismissed.*

**I.L.R. [2015] M.P., 1884**
**CRIMINAL REVISION**
***Before Mr. Justice Alok Verma***
Cr.Rev. No. 602/2013 (Indore) decided on 10 November, 2014

NAHARSINGH ...Applicant
Vs.
JHINKIBAI ...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Maintenance amount*** **- Wife filed marks-sheet and transfer certificate of her son in which name of the present petitioner was mentioned as father of child - Her name was mentioned as wife - This document relate to the year 1997 - It is admitted that applicant has second wife - Maintenance rightly granted. (Paras 5 & 9)**

*दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरण–पोषण राशि* – पत्नी ने अपने पुत्र की अंकसूची और स्थानांतरण प्रमाणपत्र प्रस्तुत किया जिसमें वर्तमान याची का नाम बालक के पिता के रूप में उल्लिखित था – उसका नाम पत्नी के रूप में उल्लिखित था – यह दस्तावेज वर्ष 1997 से संबंधित है – यह स्वीकृत है कि आवेदक की द्वितीय पत्नी है – भरणपोषण उचित रूप से प्रदान किया गया।

*Yashpal Rathore*, for the applicant.
*S.K. Meena,* for the non-applicant.

**ORDER**

**Alok Verma, J. :-** This criminal revision is filed against the order dated 01/05/2013 passed by learned 2nd Additional Sessions Judge, Alirajpur in Criminal Revision no. 8/2013 by which the learned ASJ set aside the order dated 30/11/2012 passed by learned JMFC, Alirajpur in Misc. Criminal Case no. 12/2010 and allowed the application of respondent Jhinkibai filed under section 125 of Cr.P.C.

2. The facts relevant for disposal of this revision are that according to the respondent, she had married to petitioner Naharsingh about 30 years back. Son was borne from their wedlock. After two years of marriage, the petitioner married to another woman namely Sumitra, but the petitioner continued to maintain the respondent and her son. About 1 ½ years back, he stopped paying maintenance amount to her. Her son is married. He is a labourer and therefore, she filed an application under section 125 of Cr.P.C before the JMFC, Alirajpur for maintenance.

3. The learned JMFC passed a final order on 30/11/2012 in Misc. Criminal Case no. 12/2010 and inferred that the respondent was never married to the present petitioner and she was not entitled to maintenance under section 125 of Cr.P.C as she was not legally wedded wife of the petitioner. Against this order, the respondent went in revision before 2nd ASJ, Alirajpur. The revision was disposed of by the learned ASJ by order dated 01/05/2013 in Criminal Revision no. 08/2013. Here, the learned ASJ inferred that the respondent is a wedded wife of the present petitioner. Accordingly, the learned ASJ found that the present petitioner is liable to pay maintenance to his legally wedded wife. The revision was allowed and the order of the learned JMFC was set aside. The learned ASJ ordered the payment of Rs. 1000/- per month w.e.f 01/05/2013.

4. Against this order, the present revision is filed on the ground that the order of the lower Court was contrary to the facts and circumstances of the case and also against the evidence available on record. The marriage of respondent to the petitioner was not established. The respondent contested an election for the post of Sarpanch. She was elected also and she never mentioned in her nomination form or in election paper the name of the present petitioner as her husband. The respondent is living separately inspite of request and efforts made by the petitioner and therefore, she is not entitled for any maintenance. As such, the petitioner prays that the revision be allowed and the impugned order be set aside.

5. Contrary to this, learned counsel for the respondent argues that the present petitioner filed marks-sheet and transfer certificate of her son, in which name of the present petitioner was mentioned as father of the child. Her name was mentioned as mother of the child.

6. There is oral evidence of the respondent herself and Vinod Tomar PW-2 and also her son Raju PW-4, as against this, the present petitioner examined himself and his wife Sumitra as their witness. As documentary evidence, they produced Rashan Card prepared in the year 2006, in which Sumitra was shown as wife of the present petitioner and he had two sons and one daughter. A bank passbook is also produced which is in the name of his wife Sumitra. However, no document relating to election of the respondent as Sarpanch were filed by them.

7. Learned ASJ has taken into consideration the marks-sheet produced by the respondent which relates to the year 1997, when her son Raju PW-4

was studying in Class-VIII. In the transfer certificate also, name of his father has been written as Naharsingh i.e. the present petitioner. Similarly, in the domicile certificate Ex.-P/3-C, name of the present petitioner was written.

8. In the cross-examination of Vinod Tomar PW-2, nothing important fact emerges which makes the marriage of the respondent to the present petitioner doubtful. On the contrary, the evidence produced by the present petitioner before the Court was an admitted fact that he has second wife, with whom, he is presently living. Her name is Sumitra and therefore, in the Rashan card and in the bank passbook, it is natural that her name would appear.

9. Taking all these facts into consideration, I find that no irregularity was committed by the learned Court below. No interference using power granted to this Court under section 397, 401 of Cr.P.C is called for. As such, the present revision is devoid of merit and liable to be dismissed. Accordingly, present criminal revision is dismissed.

C c as per rules.

*Revision dismissed.*

**I.L.R. [2015] M.P., 1886**
**CRIMINAL REVISION**
***Before Mr. Justice Sushil Kumar Gupta***
Cr. Rev. No. 869/2014 (Gwalior) decided on 24 November, 2014

JOGENDRA SINGH ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Section 12 - Bail -*** **The intention of the legislature to grant bail to the juvenile irrespective of nature or gravity of the offence alleged to have been committed by him and can be defined only in the case where there appears reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release shall defeat the ends of justice - Further held, that heinousness of offence is also has no relevance while considering the bail matter of a delinquent juvenile. (Paras 7/9)**

*किशोर न्याय (बालकों की देख–रेख और संरक्षण) अधिनियम (2000 का 56), धारा 12 – जमानत* – विधायिका का आशय किशोर को जमानत प्रदान करना है, उसके

द्वारा कारित अभिकथित अपराध का स्वरूप या गंभीरता को विचार में लिये बिना और केवल ऐसे प्रकरण में परिभाषित किया जा सकता है जहां यह विश्वास करने के लिये युक्तियुक्त आधार प्रकट होते हैं कि उसे छोड़े जाने पर उसके किसी नामी अपराधी के सानिध्य में आने की संभावना है या उसे किसी नैतिक, शारीरिक या मानसिक खतरे में डालेगा या उसे छोड़े जाने से न्याय का उद्देश्य विफल होगा – आगे अभिनिर्धारित, कि किसी किशोर अपराधी की जमानत के मामले में विचार किये जाते समय अपराध की जघन्यता का भी कोई औचित्य नहीं।

**Cases referred :**

2006 (II) MPWN SN 96, 2008 (1) MPWN 94, 2004 (2) RCC 995, 2006 (1) RCC 167, 2006 (1) RCC 337, 2005 (4) Crimes 649, 2008 (1) MPWN Note 94.

*A.R. Shivhare,* for the applicant.
*Lallan Mishra,* P.L. for the non-applicant/State.

**ORDER**

**SUSHIL KUMAR GUPTA, J. :-** Petitioner has preferred this revision under section 53 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short "the Act of 2000") against the impugned order dated 17.10.2014 passed by Second Additional Sessions Judge, Gwalior in Criminal Appeal No.376/2014, whereby the rejection order of bail application filed under section 12 of the Act of 2000 dated 8.10.2014 passed by Juvenile Justice Board, Gwalior has been confirmed.

2. The facts giving rise to this revision petition in brief are that complainant has lodged a report that on 6.9.2014 four unknown perons who were covering their faces entered in the home of complainant and robbed ATM Card, Registration of Motor Cycle, one Mobile and Rs.10,000/-. Report was lodged and Crime No.719/2014 was registered at Police Station Bahodapur, District Gwalior under sections 458, 380, 395, 398 of IPC, section 11/13 of M.P.D.V.P.K. Act and section 25/27 of Arms Act. The petitioner was arrested.

3. Initially father as a natural guardian of the accused/petitioner filed the bail application for grant of his custody before the Juvenile Justice Board under section 12 of the Act, 2000 which was rejected vide order dated 8.10.2014. Against the order dated 8.10.2014 a Criminal Appeal No.376/2014 was preferred by the petitioner which has been dismissed by the impugned judgment dated 17.10.2014. Being aggrieved, this revision petition has been

preferred on the ground that the learned Juvenile Board and the learned Appellate Court committed error in rejecting the prayer of the petitioner/ accused, therefore, order of the Board and Appellate Court are liable to be set aside.

4. Learned counsel for the petitioner further submitted that the petitioner is young boy of 17 years old and if he resides in the judicial custody for long period, he may become an offender and prays for release of the petitioner. The petitioner has no criminal antecedent. Learned counsel for the petitioner submits that learned Appellate Court has rejected the appeal of the petitioner on the ground that the same has not been filed by the natural guardian i.e. father of the petitioner and only on this technical ground dismissal of appeal is not proper. Learned counsel has placed reliance on the decisions of this Court in *Udham @ Dinesh Vs. State of M.P.*, 2006 (II) MPWN SN 96 and *Raj Kuar Vs. State of M.P.*, 2008 (1) MPWN 94. Learned counsel also submitted that the gravity of offence is not a ground for rejection of bail/custody, therefore, prays to release the petitioner/accused on supurdiginama.

5. Learned Public Prosecutor appearing for the State opposes the submission and submits that there is clear allegation against the petitioner. He also submits that the allegations against the petitioner is a serious offence and if the petitioner is released, there is every likelihood that he may be exposed to moral or psychological danger.

6. I have heard the learned counsel for the petitioner and the learned Public Prosecutor.

Section 12 of the Act 2000 reads as under:

> "12 - Bail of juvenile - (1) When any person accused of a bailable or non-bailable offence, and apparently a juvenile, is arrested or detained or appears or is brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety 1 [or placed under the supervision of a Probation Officer or under the care of any fit institution or fit person] but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends

of justice.

(2) When such person having been arrested is not released on bail under sub- section (1) by the officer incharge of the police station, such officer shall cause him to be kept only in an observation home in the prescribed manner until he can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board it shall, instead of committing him to prison, make an order sending him to an observation home or a place of safety for such period during the pendency of the inquiry regarding him as may be specified in the order."

7. The language of Section 12 of the Act of 2000 conveys the intention of this legislature to grant bail to the juvenile irrespective of nature or gravity of the offence alleged to have been committed by him and can be defined only in the case where there appears reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release shall defeat the ends of justice. In this context I have also scanned through and perused the orders passed by the Courts below, FIR of the case as well as the report submitted by the Probation Officer.

8. In the matter of *Manoj Singh Vs. State of Rajasthan* (2004 (2) R.C.C. 995, *Lal Chand Vs. State of Rajasthan* (2006 (1) R.C.C. 167, *Prakash Vs. State of Rajasthan* (2006 (1) RCC 337, *Udaibhan Singh alias Bablu Singh Vs. State of Rajasthan* (2005 (4) Crimes 649 and *Rajkumar Vs. State of M.P.* 2008 (1) MPWN Note 94, it has been held by the different High Courts that if there are no allegations that release of delinquent juvenile on bail shall bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release shall defeat the ends of justice, he deserves to be released on bail and merits or nature of the offence has no relevance while considering the bail application of delinquent juvenile.

9. On going through the aforesaid citations the legal position of granting or rejecting bail to a delinquent juvenile is candidly clear. While considering the bail application to juvenile provisions of Section 12 of the Act of 2000 should be seen and provisions of bail of the Code of Criminal Procedure shall not govern juvenile's bail application. Heinousness of offence is also has no

relevance while considering the bail matter of a delinquent juvenile.

10. It is for the prosecution to bring on record such material, including the report of the Probation Officer to show that the release of the delinquent juvenile on bail is likely to bring him into the association with any known criminal or expose him to moral, physical or psychological danger or his release would defeat the ends of justice.

11. On going through the impugned order it is revealed that on the basis of Juvenile Board's order, appellate Court held that if the petitioner is released on bail it would defeat the ends of justice. No reason has been assigned by the appellate Court in the impugned order to arrive at such conclusion that if petitioner is released on bail how it will defeat the ends of justice.

12. The report of the Probation Officer reveals that the petitioner/accused's conduct is satisfactory and he belongs to a prosperous family. He has no criminal background and there is no likelihood of committing any offence.

13. As per above discussion I am of the opinion that both the Courts below erred in rejecting the petitioner's bail application. There is no possibility that if petitioner is released on bail, his release shall bring him into association with any known criminal or expose him to moral, physical or psychological danger or his release shall defeat the ends of justice. Impugned order passed by the appellate Court and the orders passed by the Juvenile Board are not sustainable in law and both the Courts below committed jurisdictional error and illegality in passing both the orders.

14. Consequently, revision petition is allowed and impugned order dated 17.10.2014 passed by Appellate Court and the order dated 6.10.2014 passed by Juvenile Justice Board in Crime No.719/2014 are hereby set aside and it is directed that petitioner Jogendra Singh be released on bail on executing a personal bond by his natural guardian father Keshav Singh in the sum of Rs.25,000/- (Rupees Twenty Five Thousand) with two solvent sureties in the like amount to the satisfaction of the concerned Juvenile Justice Board with the stipulation that on all the subsequent dates of hearing, he shall produce the delinquent juvenile before the said Board or any other Court during pendency of the inquiry and he shall keep proper lookafter of the juvenile delinquent and keep him away from the company of known criminals.

15. With the aforesaid, revision petition stands disposed of.

*Revision disposed of.*

**I.L.R. [2015] M.P., 1891**
**CRIMINAL REVISION**
***Before Mr. Justice C.V. Sirpurkar***
Cr. Rev. No. 2336/2014 (Jabalpur) decided on 19 January, 2015

NEELESH JAT & anr. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

***Penal Code (45 of 1860), Section 306 - Abetment of suicide -*** **Accused persons alleged to have assaulted and threatened deceased with life as they were annoyed at defamation of their cousin - Deceased committed suicide due to aforesaid beating and humiliation - However, applicants had no intention of instigating or goading the deceased to commit suicide - In all probability they not even dreamt that their conduct would lead to such disastrous consequence - By no stretch of imagination can it be said that the accused persons had created such a situation by their persistent conduct, where the deceased was left with no other option but to commit suicide - Deceased appears to be ultra sensitive to the beating and public humiliation - No charge under Section 306 of I.P.C. could be made out - Revision allowed - Applicants discharged.** **(Paras 13 & 14)**

*दण्ड संहिता (1860 का 45), धारा 306 – आत्महत्या का दुष्प्रेरण* – अभियुक्तगण ने अभिकथित रूप से मृतक पर हमला किया और उसे जान से मारने की धमकी दी क्योंकि वे अपनी बहन की बदनामी से क्षुब्ध थे – मृतक ने उपरोक्त मारपीट एवं अपमान के कारण आत्महत्या कर ली – यद्यपि, आवेदकगण का आशय मृतक को आत्महत्या करने के लिये उकसाने का या प्रेरित करने का नहीं था – संभवतः उन्होंने सपने में भी नहीं सोचा था कि उनके आचरण का इतना दुर्भाग्यपूर्ण परिणाम होगा – काल्पनिक रूप से यह नहीं कहा जा सकता कि अभियुक्तगण ने अपने सतत आचरण द्वारा ऐसी स्थिति निर्मित की थी जिससे मृतक के पास आत्महत्या करने के सिवाय कोई अन्य विकल्प नहीं बचा था – ऐसा प्रतीत होता है कि मृतक मारपीट और सार्वजनिक अपमान के प्रति अति संवेदनशील था – भा.दं.सं. की धारा 306 के अंतर्गत कोई आरोप नहीं बन सकता – पुनरीक्षण मंजूर – आवेदकगण को आरोपमुक्त किया गया।

**Cases referred :**

(2001) 9 SCC 618, 2010 Cr. L.J. 2110 (Supreme Court), 2008 Cr. L.J. 2569 (Supreme Court), 2000 (1) MPWN 93.

*Manish Datt* with *Nishant Datt,* for the applicants.
*Chandrakant Mishra,* G.A. for the non-applicant/State.

**ORDER**

**C.V. SIRPURKAR, J. :-** This Criminal Revision filed under section 397 read with section 401 of the Code of Criminal Procedure on behalf of applicants/ accused persons Neelesh Jat and Akash Jat, is directed against the order dated 1.10.2014 passed by the Court of I[st] Additional Sessions Judge, Narsinghpur in Sessions Trial No.253/2014, whereby the learned trial Court had framed a charge of the offence punishable under section 306 read with Section 34 of the Indian Penal Code against the applicants.

2. The facts giving rise to this criminal revision may briefly be stated thus: Deceased Anand lived with his family members in a house built on their field. Accused persons Neelesh, Akash, Aditya and Rishab are distant cousins of one Rani Jat. At around 6:00 p.m. on 13.06.2014, the accused persons came to the house of deceased Anand and alleged that he was defaming Rani by linking her name to his name. Deceased Anand protested and said that he was not spreading any such rumor and he had nothing to do with aforesaid Rani. Accused persons threatened that they would kill the deceased and his family members. They also said that they had earlier expelled the family of the deceased from the village and now they would expel them from their house as well. Accused persons were armed with rod, axe and shovel. They manhandled deceased Anand. Accused Akash sat on the chest and intimated him. Other accused persons also raised their weapons upon him. Accused Akash assaulted Kalpana, the mother of deceased, breaking her bangles. Father of accused Akash and Rao Rajendra Singh, uncle of deceased and also came to the spot. They interceded in the matter. Thereafter, deceased Anand threw his mobile phone upon her mother Kalpana and ran towards the river. Ajit and Golu ran behind him but they could not find him. On the next day at around 10:30 a.m. dead body of deceased Anand was discovered on Railway track. He apparently committed suicide by lying under a running train.

3. The police filed charge sheet against the accused persons/applicants Neelesh and Akash in the Court of J.M.F.C., Narsinghpur. Accused persons Rishab and Aditya being below 18 years of age were proceeded against before the Juvenile Justice Board. After hearing the applicants, learned 1[St] ASJ framed the charge against them, as aforesaid.

4. Inviting attention of the Court to various authorities, it has been argued on behalf of the applicants that even if all allegations made against the applicants are taken at their face value, their act and conduct would not come under the purview of abetment of suicide. Learned Government Advocate for the State on the other hand supported the impugned order.

5. The Court shall first consider whether there was sufficient material on record to proceed against the applicants, namely Neelesh and Akash?

6. A perusal of the case diary reveals that deceased Anand left no suicide note. During investigation, statements of witnesses Bhagwat, father of deceased, Kalpana, his mother, Abhay, his brother, Rao Rajendra Singh, his uncle, Pradeep, Arvind, Rani @ Aparna, Golu @ Santram and Ajit were recorded. The essence of aforesaid statements is that accused persons Neelesh, Akash, Rishabh and Aditya suspected deceased Anand of defaming their cousin Rani by spreading rumors about their relationship. On the date of incident, they went to the place where the deceased resided and manhandled him. They were armed with axe, rod and shovel. They threatened to expel the family of deceased from the house on the field, they were residing in. They also threatened the family of deceased with life. One of the accused persons assaulted Kalpana with a rod breaking her bangles. Other persons were also present on the spot. Unable to bear this public humiliation and assault, the deceased rushed towards the river. He could not be found through the night. At around 10:30 a.m. on the following day, his mutilated body was recovered on Railway track. He had apparently committed suicide by lying under a running train.

7. Now the question that arises for consideration is whether the conduct of any of the accused person as brought-forth by the statements of the witnesses, constitute abetment of suicide?

Section 306 of the Indian Penal Code reads as follows:-

> *"306. Abetment of suicide.- If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extent to ten years, and shall also be liable to fine."*

8. Term abetment has been defined under section 107 of the Indian Penal Code as follows:

*"107. Abetment of a thing.- A person abets the doing of a thing, who First-Instigates any person to do that thing; or*

*Secondly- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or*

*Thirdly-Intentionally aides, by any act or illegal omission, the doing of that thing"*

9. It has been held by the apex Court in the case of *Ramesh Kumar vs. State of Chattisgarh*, (2001) 9 SCC 618 that:

"To satisfy the requirement of instigation though it it not necessary that actual words must be used to that effect or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. *The present one is not a case where the accused had by his acts or omission or by a continued course of conduct created such circumstances that the deceased was left with no other option except to commit suicide in which case an instigation may have been inferred. A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to the instigation "*

(Emphasis supplied)

10. The Supreme Court has observed in the case of *Gangula Mohan Reddy vs. State of Andhra Pradesh,* 2010 Cr.L.J. 2110 (Supreme Court) that-

*"20. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.*

*21. The intention of the Legislature and the ratio of the cases decided by this Court is clear that in order to convict a person under Section 306, IPC there has to be a clear*

*mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he committed suicide "*

(Emphasis supplied)

11. It was observed by the Supreme Court in the case of *Sohan Raj Sharma Vs. State of Haryana,* 2008 Cr. L.J. 2569 (Supreme Court) that-

*"8. Abetment involves a mental process of instigating a person or intentionally aiding that person in doing of a thing. In cases of conspiracy also it would involve that mental process of entering into conspiracy for the doing of that thing. More active role which can be described as instigating or aiding the doing of a thing it required before a person can be said to be abetting the commission of offence under Section 306 of IPC.*

12. This Court in the ease of *Ashok Kumar Sawadiya vs. State of MP.*- 2000(1) MPWN 93 it has held that even where the accused persons had publicly beaten the deceased and deceased had left a suicide note regarding beating and public humiliation, the accused persons could not be deemed to have aided commission of suicide by the deceased.

13. Reverting back to the facts and circumstances of the case at hand, It has been established *prima-facie* that the accused persons had assaulted and threatened the deceased with life as they were annoyed at defamation of their cousin, regardless of the fact whether or not the deceased was responsible for the same. It is apparent that deceased committed suicide due to aforesaid beating and humiliation perpetrated by the applicants. However, it is equally apparent that the applicants had no intention of instigating or goading the deceased to commit suicide. In all probability they not even dreamt that their conduct would lead to such disastrous consequences. By no stretch of imagination can it be said that the accused persons had created such a situation by their persistent conduct, where the deceased was left with no option but to commit suicide. It appears that the deceased was probably ultra-sensitive to the beating and public humiliation heaped upon him by the accused persons. As much is evident by his subsequent act of taking his own life by lying under

a running train. If the deceased felt humiliated and wronged by the act and conduct of the applicants, he had option to report the matter to police, demanding action against the accused persons and even protection for himself. Unfortunately he did not exercise that option and impetuously took the extreme step lying under a running train. This clearly was an overreaction on his part but in the circumstances of the case, no abetment or *mens rea* on the part of the applicants may be inferred. The applicants could not have conceived any nexus between their act of assault and intimidation and the result thereof.

14. Thus, there is no sufficient ground to proceed against applicants Neelesh and Akash under section 306 or 306 read with section 34 of I.P.C. Consequently, they are entitled to be discharged in respect of aforesaid offence. It is for the learned trial Court to consider whether any other offence is made out in the facts and circumstances of the case on the basis of material available on record.

15. In the result, this Criminal Revision succeeds in part. Applicants Neelesh and Akash are discharged in respect of the offence punishable under section 306 read with section 34 of the I.P.C. Learned trial Court is directed to consider the matter with regard to charge afresh and after giving the accused persons an opportunity of being heard, frame such charge, other than the one under section 306 or 306 read with section 34 of the I.P.C., if any, and proceed with the matter accordingly.

*Revision partly succeeds.*

**I.L.R. [2015] M.P., 1896**
**CRIMINAL REVISION**
***Before Mr. Justice M.K. Mudgal***
Cr. Rev. No. 1986/2013 (Jabalpur) decided on 30 January, 2015

IN REFERENCE ...Applicant
Vs.
GOLU @ MOTA ...Non-applicant

***Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Section 15(3) - Period of custody in Reformatory*** - **No juvenile in conflict with law can be committed to a Reformatory for a period exceeding three years - Delinquent in conflict with law is exempted from all forms of punishment and sending to a Reformatory is a matter**

**entirely different from being sentenced to a punishment. (Para 6)**

*किशोर न्याय (बालकों की देख–रेख और संरक्षण) अधिनियम (2000 का 56), धारा 15 (3) – सुधारालय में अभिरक्षा की अवधि* – विधि के विरूद्ध किसी किशोर को सुधारालय में तीन वर्षों से अधिक की अवधि के लिये नहीं रखा जा सकता है – विधि के विरूद्ध अपराधी को सभी प्रकार के दंड से छूट है और सुधारालय भेजा जाना, किसी दण्ड से दण्डित किये जाने से संपूर्णतः भिन्न मामला है।

**Cases referred :**

2011 (13) SCC Page 744, *Jagdish Gupta Vs. State of Delhi* judgment dated 30.08.2013 (Delhi High Court).

*R.P. Tiwari,* P.P. for the applicant/State.
*None* for the non-applicant.

(Supplied: Paragraph numbers)

**ORDER**

**M.K. MUDGAL, J. :-** Reference has been made by the Registry vide order dated 25.09.2013 for consideration of whether the Principal Judge of Juvenile Justice Board (hereinafter referred to as the J.J. Board) under the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the J.J. Act) had power to commit a juvenile in conflict with law to a Reformatory Home for a period of more than three years no matter whatever the nature of crime.

2. The facts of the case in brief that have given rise to the occasion for present consideration are that a criminal case under Section 392 of the IPC was registered against a juvenile named Golu @ Mota at Police Station Jahagirabad, Bhopal and after investigation the charge-sheet was filed before the Principal Judge, J.J. Board, Bhopal at Criminal case No. 910/07. After trial the J.J. Board convicted the delinquent under Section 392 of the IPC vide judgment dated 07.04.08 and sent him to Special Reformatory Home, Seoni for a period of six years till he attained the age of majority i.e. 18 years on 07.04.2014. The delinquent or anyone on his part did not challenge the legality and properiety (sic:propriety) of the impugned judgment regarding the period of custody.

3. The matter came to light at a conference of Judicial Officers convened under the aegis of the JOTRI on 21.09.2013. Thereafter, the matter was

reported by the officers of Registry to the Hon'ble Chief Justice where from the issue was directed for academic purposes.

4. A notice was issued to the delinquent but he did not respond as he had completed the period of custody, that he was committed to the Reformatory.

5. In order to put the things in proper perspective it would be apt to reproduce the relevant provisions i.e. Section 15 & 16 of the J.J. Act which reads as under :

> **15. Order that may be passed regarding juvenile.**(1) Where a Board is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Board may, if it so thinks fit,-
>
> (a) allow the juvenile to go home after advice of admonition following appropriate inquiry against and counselling to the parent or the guardian and the juvenile;
>
> (b) direct the juvenile to participate in group counselling and similar activities;
>
> (c) order the juvenile to perform community service;
>
> (d) order the parent of the juvenile or the juvenile himself to pay a fine, if he is over fourteen years of age and earns money;
>
> (e) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety, as the Board may require for the good behaviour and well-being of the juvenile for any period not exceeding three years;
>
> (f) direct the juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behaviour and well-being of the juvenile for any period of not exceeding three years;
>
> [(g) make an order directing the juvenile to be sent to

a special home for a period of three years;

Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit.]

(2) The Board shall obtain the social investigation report on juvenile either through a probation officer or a recognized voluntary organization or otherwise, and shall take into consideration the findings of such report before passing an order.

(3) Where an order under clause (d), clause (e) or clause (f) of sub-section (1) is made, the Board may, if it is of opinion that in the interests of the juvenile and of the public, it is expedient so to do, in addition make an order that the juvenile in conflict with law shall remain under the supervision of a probation officer named in the order during such period, no exceeding three years as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the juvenile in conflict with law:

Provided that if at any time afterwards it appears to the Board on receiving a report from the probation officer or otherwise, that the juvenile in conflict with law has not been of good behaviour during the period of supervision or that the fit institution under whose care the juvenile was placed is no longer able or willing to ensure the good behaviour and well-being of the juvenile it may, after making such inquiry as it deems fit, order the juvenile in conflict with law to be sent to a special home.

(4) The Board shall while making a supervision order under sub-section (3), explain to the juvenile and the parent, guardian or other fit person or fit institution, as the case may be, under whose care the juvenile has been placed, the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to the juvenile, the parent, guardian or

other fit person or fit institution, as the case may be, the sureties, if any, and the probation officer.

**16. Order that may not be passed against juvenile.**(1) Notwithstanding anything to the contrary contained in any other law for the time being in force, no juvenile in conflict with law shall be sentenced to death 1[or imprisonment for any term which may extend to imprisonment for life], or committed to prison in default of payment of fine or in default of furnishing security:

Provided that where a juvenile who has attained the age of sixteen years has committed an offence and the Board is satisfied that the offence committed is so serious in nature or that his conduct and behaviour have been such that it would not be in his interest or in the interest of other juvenile in a special home to send him to such special home and that none of the other measures provided under this Act is suitable or sufficient, the Board may order the juvenile in conflict with law to be kept in such place of safety and in such manner as it thinks fit and shall report the case for the order of the State Government.

(2) On receipt of a report from a Board under sub-section (1), the State Government may make such arrangement in respect of the juvenile as it deems proper and may order such juvenile to be kept under protective custody at such place and on such conditions as it thinks fit:

2[Provided that the period of detention so ordered shall not exceed in any case the maximum period provided under section 15 of this Act.]

6. On bare reading of the said provisions it is manifestly clear from Sub-Section 3 of Section 15 of the J.J. Act that no juvenile in conflict with law can be committed to a Reformatory for a period exceeding that of three years. As per Section 16 (i) of the J.J. Act it is obvious that a delinquent in conflict with law is exempt from all forms of punishment for all crime committed by an adult. Being sent to a Reformatory is a matter entirely different from being sentenced to a punishment under IPC which is served in a jail whereas the

period of reform is considered as necessary to win away a juvenile in conflict with law from incipient criminal inclination. The period of reform such a juvenile is to be subjected to cannot be more than three years even according to proviso of Sub-Section 2 of Section 16 of the J.J. Act.

7. That the period of custody in reformatory has not to exceed the period of three years has been made emphatically clear in Para 19 of the judgment of the Hon'ble Apex Court in the case of *Amit Singh vs State of Maharashtra and others* 2011 (13) SCC Page 744 which reads as under :

> Apart from the aforesaid provisions of the Act as amended, and the Juvenile Justice (Care and Protection of Children) Rules, 2007 (in short "the Rules"), Rule 98, in particular, has to be read along with Section 20 of the Act as amended by the Amendment Act, 2006 which provides that even after disposal of cases of juveniles in conflict with law, the State Government or the Board could, either *suo motu* or on an application made for the purpose, review the case of a juvenile, determine the juvenility and pass an appropriate order under Section 64 of the Act for immediate release of the juvenile whose period of detention had exceeded the maximum period provided in Section 15 of the Act i.e. 3 years. All the above relevant provisions including the amended provisions of the Act and the Rules have been elaborately considered by this Court in Hari Ram.

8. Similarly, on going through another judgment passed by Delhi High Court in the case of *Jagdish Gupta vs State of Delhi* judgment dated 30.08.2013 it transpires that the period of custody in a Reformatory has not to exceed the period of three years.

9. In view of the above discussion one cannot but arrive at the conclusion that no juvenile in conflict with law cannot only be subjected to any form of sentence but also cannot be committed to a reformatory for his own good for a period of more than three years. The question referred to stands answered as above.

10. So far as the case under reference is concerned there is no need to issue any direction as the period of custody for six years which is contrary to Section 15 & 16 of the J.J. Act and for which the delinquent was committed to the custody of reformatory is already over.

*Order accordingly.*

**I.L.R. [2015] M.P., 1902**
**CRIMINAL REVISION**
***Before Mr. Justice C.V. Sirpurkar***
Cr.Rev. No. 142/2015 (Jabalpur) decided on 6 April, 2015

HARSHVARDHAN PANDEY ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Section 454 - Supurdaginama of vehicle*** **- 200 bottles of Rex Cough Syrup were being transported in an unregistered vehicle - Vehicle was purchased on 22.10.14 and was insured - Vehicle was yet to be registered in the name of the applicant but he is title holder thereof - If a vehicle is seized in connection with criminal case, it should be returned and should not be allowed to rot in unprotected condition - Court shall call a report from Police Station regarding engine and chasis numbers and if they match, the vehicle shall be released in interim custody on condition.**

**(Paras 7 to 13)**

*दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 454 – वाहन का सुपुर्दगीनामा* – रेक्स कफ सिरप की 200 बोतलों का परिवहन अपंजीकृत वाहन में किया जा रहा था – 22.10.14 को वाहन क्रय किया गया था और बीमाकृत था – वाहन का पंजीकरण अभी आवेदक के नाम से होना था परंतु वह उसका हकधारक है – यदि आपराधिक प्रकरण के संबंध में वाहन जप्त किया जाता है तब उसे वापस किया जाना चाहिये और असुरक्षित स्थिति में खराब होने नहीं दिया जा सकता – न्यायालय इंजन और चेसीस क्रमांक के संबंध में पुलिस थाने से प्रतिवेदन बुलायेगा और यदि उसका मिलान होता है, वाहन को शर्तों के साथ अंतरिम अभिरक्षा में छोड़ा जायेगा।

**Cases referred :**

2005 (2) ANJ MP 351, 2007 (1) MPHT 520, 2003 (2) MPWN Note-I.

*Sanjeev Kumar Singh,* for the applicant.
*K.S. Patel,* P.L. for the non-applicant/State.

**ORDER**

**C.V. SIRPURKAR, J. :-** This revision petition is directed against order dated 16.12.2014 passed by Special Additional Session Judge, Rewa, in crime No. 27/2014 registered by P.S.-Chaurhat, District-Rewa under Sections 8,

21 and 22 of the NDPS Act, 1985; whereby, learned Special Judge had declined to release Mahindra Scorpio vehicle seized in aforesaid case in the interim custody of applicant Harshvardhan Pandey.

2. As per prosecution case, accused persons Ratnesh and Jaheed Khan were caught transporting 1200 bottles of Rex Cough Syrup in a Mahindra Scorpio vehicle, which was without a registration number. Consequently, an offence under Sections 8, 21 and 22 of the NDPS Act was registered and both the accused persons were arrested. The Mahindra Scorpio vehicle along with contraband, was also seized.

3. It has been submitted on behalf of the applicant that he is the owner of the seized Mahindra Scorpio vehicle. He had purchased the vehicle from Star Automobile, Satna on 22.10.2014. However, on 16.11.2014 he had entrusted vehicle to his driver Ratnesh Pandey to drop his Niece at a coaching centre. He was not aware of transportation of any contraband in the vehicle. The vehicle was seized by the police and offence has been registered but he has not been named as accused in the case. The vehicle is lying in unprotected condition in the police station and due to lack of maintenance of the vehicle, it would diminished in value considerably. Since he is owner of the vehicle, he is entitled to get it released in his intrim custody.

4. Learned panel lawyer for the respondent State on the other hand oppose the application and has stated that at the time of the seizure, the vehicle was unregistered. Its engine and chasis numbers have not been recorded in the seizure memo. Thus, the vehicle seized from the possession of accused persons Ratnesh and Jahid Khan cannot be linked to the vehicle allegedly purchased by the applicant.

5. Learned trial Court has dismissed the application mainly on the ground that since the vehicle was being used for transportation of contraband, it was liable to confiscation and the proceedings for confiscation were infact proposed; therefore, learned Special Judge did not find it appropriate to release the vehicle in interim custody of the applicant.

6. It has been held by this High Court in the case of *Pandurang Kadam Vs State of M.P.*, 2005 (2) ANJ MP 351 that notwithstanding the fact that the vehicle is liable to be confiscated under Section 60 of the NDPS Act, it may be released in interim custody in appropriate cases. Thus, interim custody should not be denied to the owner of the vehicle, simply because it is liable to

be confiscated under Section 60 of the NDPS Act.

7. A co-ordinate Bench of this Court in the case of *Dashrath Prasad Vs. State of M.P.* 2007 (1) MPHT 520 has observed in paragraph No. 6 of the judgment as follows:-

*6. In case of sale/ transfer of movable property the title of the property passes to transferee as soon as the price is paid and the possession of the vehicle is delivered to transferee. The motor vehicle being movable property its sale is covered under the provisions of Sales of Goods Act. The registration of the vehicle under the provisions of Motor Vehicle Act is only for the purpose of fixing ostensible ownership for the liability of taxes etc. In the present case, since the sale letter has been issued and submitted to the Regional Transport Officer, it cannot be said that the applicant had no title of the vehicle. Since the applicant is a title holder of the vehicle, he is definitely entitled for its custody subject to other conditions imposed on him.*

8. A perusal of the documents filed along with the application reveals that the applicant had purchased the Mahindra Scorpio vehicle from Star Automobiles, Satna on 22.10.2014 for a consideration of Rs. 10,58,879/-. The chasis number of the vehicle was MATTA25JXE21122 and the engine number was SJE4J15063. It was insured with New India Assurance Company Limited for the period from 21.10.2014 to 20:10.2015. As such, it is obvious that though the vehicle was yet to be registered in the name of the applicant, he is title holder thereof. The Supreme Court in the case of *Sunderlal Ambalal Shah Vs. State of Gujarat*, 2003 (2) MPWN Note-I has held that the vehicle seized in connection with the criminal case should be return to the owner or to the person from whose custody it is seized. In no case should it be allowed to rot in unprotected condition, thereby causing national loss.

9. In aforesaid view of the matter, in the opinion of this Court, the applicant is entitled to have Mahindra Scorpio vehicle in question, released in his interim custody. So far as objection of learned panel lawyer for the respondent State regarding engine number and chasis number of the vehicle is concerned, appropriate directions in this regard may be issued and appropriate conditions may be imposed.

10. As such, learned trial Court was not justified in denying the interim custody of the vehicle to the applicant.

11. Consequently, the revision petition is allowed and impugned order is

set aside.

12. It is directed that learned trial Court shall call for a report from concerned police station regarding engine and chasis number of the seized vehicle. In case the engine number and chasis number of the seized vehicle matched with those of Mahindra Scorpio vehicle purchased by the applicant, the vehicle shall be released in interim custody of the applicant, till the disposal of the concerned criminal case on his furnishing a personal bond in the sum of Rs. 10 lacs and one solvent surety in the same amount to the satisfaction of the trial Court for complying with the following terms and conditions:-

(i). He shall not alienate the vehicle or part with the possession thereof.

(ii). He shall not in any manner alter or modify the external appearance of the vehicle.

(iii). He shall produce the vehicle before the Court as and when directed.

(iv). Within 15 days of release of vehicle in interim custody, he shall produce registration certificate of the same before the trial Court.

13. It is further directed that before releasing the vehicle in interim custody of the applicant, the S.H.O. of concerning police station shall cause to be taken 18 x12 inches photographs of the concerned vehicle from all four sides and also the photographs showing engine number and chasis number. Such photographs shall be filed in the trial Court to be kept along with the record.

Certified copy as per rules.

*Order accordingly.*

**I.L.R. [2015] M.P., 1905**
**MISCELLANEOUS CRIMINAL CASE**
***Before Mr. Justice Alok Verma***
M.Cr.C. No. 2666/2013 (Indore) decided on 10 November, 2014

ROHIT SINGHAL ...Applicant
Vs.
STATE OF M.P. & anr. ...Non-applicants

*A.* ***Penal Code (45 of 1860), Section 406 - Criminal breach of trust*** **- Machines which were supplied by respondent no. 2 were of lesser capacity - One machine was retained to compel respondent no. 2 to return the advance payment made by Company - Nature of the**

**dispute was purely civil - There was no dishonest intension on the part of the present petitioner to misappropriate the property belonging to respondent no. 2 - No case u/s 406 of IPC is made out from the averment in the FIR - Petitioner is discharged. (Para 17)**

*क. दण्ड संहिता (1860 का 45), धारा 406 – न्यास का आपराधिक भंग –* प्रत्यर्थी क्रमांक 2 द्वारा जो मशीनें प्रदाय की गई वे न्यूनतर क्षमता की थी – कंपनी द्वारा किया गया अग्रिम भुगतान वापस पाने के लिये प्रत्यर्थी क्रमांक 2 को बाध्य करने हेतु एक मशीन को रोक रखा गया – विवाद का स्वरूप शुद्ध रूप से सिविल था – वर्तमान याची की ओर से प्रत्यर्थी क्रमांक 2 की संपत्ति का दुर्विनियोजन करने का बेईमान आशय नहीं था – प्रथम सूचना रिपोर्ट के प्रकथन से भा.दं.सं. की धारा 406 के अंतर्गत प्रकरण नहीं बनता – याची को आरोप मुक्त किया गया।

***B. Penal Code (45 of 1860), Section 406 - Vicarious liability* - Petitioner is CEO/Director of the Company - No vicarious liability can be cast on the petitioner for alleged offence committed by Company - All correspondence were handled by another employee on behalf of company - The contract was also entered into by the Company and not by the petitioner in individual capacity - Therefore listing only the present petitioner as accused and without arraying the Company and other officers as accused, the vicarious liability cannot be fastened on the present petitioner - Present FIR is an abuse of judicial process - Petitioner is discharged. (Paras 18 & 19)**

*ख. दण्ड संहिता (1860 का 45), धारा 406 – प्रतिनिधिक दायित्व –* याची कंपनी का मुख्य कार्यपालक अधिकारी/निदेशक है – कंपनी द्वारा कारित अभिकथित अपराध के लिये याची पर प्रतिनिधिक दायित्व नहीं डाला जा सकता – कंपनी की ओर से एक अन्य कर्मचारी द्वारा संपूर्ण पत्राचार संभाला जा रहा था – संविदा भी कंपनी द्वारा की गई थी और न कि याची द्वारा व्यक्तिगत क्षमता में – इसलिये कंपनी और अन्य अधिकारियों को अभियुक्त के रूप में आरोपित किये बिना केवल वर्तमान याची को अभियुक्त के रूप में आरोपित किये जाने से वर्तमान याची पर प्रतिनिधिक दायित्व नहीं डाला जा सकता – वर्तमान प्रथम सूचना रिपोर्ट न्यायिक प्रक्रिया का दुरूपयोग है – याची को आरोप मुक्त किया गया।

**Cases referred :**

(2008) 5 SCC 662, (2010) 10 SCC 479, (2009) 14 SCC 696.

*A.S. Garg* with *Anuj Bhargava,* for the applicant.
*Mamta Shandilya*, P.L. for the non-applicant no.1/State.
*V.S. Parihar*, for the non-applicant no. 2

## ORDER

ALOK VERMA, J. :- This petition under section 482 of Cr.P.C is filed for quashment of FIR and the proceedings arising out of Crime no. 544/2011 dated 25/08/2011 under section 406 of IPC registered by Police Station – Chimanganj Mandi. Ujjain against the present petitioner.

2. According to the petitioner, he was a Director of Femas Construction Company Ltd ( hereinafter referred to "FCCL" for brevity ) which provides integrated Engineering, Procurement, Project Management and Construction Services in Oil, Gas, Infrastructure and Petrochemical Sectors. The FCCL was awarded a contract by M/s Gail India Ltd. ( hereinafter referred to as "GAIL" for brevity) for laying of pipeline and other associated works. For the sake of this project, the FCCL required 70 tons pipe layers ( Cranes). Respondent no. 2 contacted the FCCL and submitted a quotation on 29/04/2010 for providing two numbers of caterpillar 583 machines to the FCCL on rent. The petitioner informed respondent no. 2 who was the Manager of M/s Mideast Pipeline Products ( hereinafter referred to as " MPP " for brevity ) by e-mail dated 01/05/2010 specifying their requirement of machineries to be used for the said project. It was specifically informed to MPP that they will require the pipe layers (cranes) having lifting capacity of 70 tons. After further negotiation, in which lifting capacity of cranes was the main criteria, quotation of MPP was accepted by FCCL and work order was issued on 05/05/2010.

3. In compliance of the said work order (Annexure-P/4), MPP delivered two caterpillar machines. The brochure of which is Annexure – P/5. When the machine was received by FCCL, it was found that the machine was having lifting capacity of only 40 tons capacity and not 70 tons as required by FCCL. This fact was brought in the notice of MPP by e-mail dated 17/05/2010. As per the condition of the contract, the machine supplied by MPP was to be operated by the operator provided by MPP. However, the operator refused to operate the machine.

4. Meanwhile, in pursuance of work order issued by FCCL, an advance of Rs. 9,84,242/- was also paid by FCCL to MPP against the rent of the machine.

5. When the machine could not be utilized in the project, a dispute arose between FCCL and MPP and the matter was referred to Arbitration and Justice S.K. Kataria was appointed as sole arbitrator to adjudicate the dispute between the parties.

6. While the proceedings before the Arbitrator was pending, respondent no. 2 lodged FIR with Police Station – Chimanganj Mandi, Ujjain, which was registered at Crime no.544/2011 under section 406 of IPC, which is the subject matter of the present petition.

7. During the investigation, one machine was seized by the police from the custody of the present petitioner. It is further alleged by the present petitioner that one machine was sent back to MPP through transport.

8. Challenging the proceedings arising out of the said crime number, the present petition is filed on the ground that the FIR lodged by MPP is abuse of process of law. The proceedings have been initiated only to harass the present petitioner. The dispute is of purely civil nature and no offence under section 406 of IPC is made out. The FCCL had been asking the MPP to take their machines back and refund the deposit, but they did not take any action in this regard. Looking to the facts and circumstances of the case, there can be no *mens-rea* or *actus-reus* attributed to the present petitioner.

9. Replying the present petition, respondent no. 2 asserted that the machines were taken only after being satisfied by the engineers of both the sides and agreement was signed by them. The machines were not returned even after 20 months of the period of the contract and only one machine was returned back to him after three months. In respect of second machine, respondent no. 2 was assured that the machine would be delivered to him after sometime. However, even after one year, when he did not receive the machine, he went to the yard of the petitioner at Village – Dhabla where the machine was not seen. Security officer Omprakash Dhakad used abusive language against him, due to which, respondent no. 2 lodged a report at police station – Chimanganj Mandi, Ujjain. The police searched the yard of the present petitioner, but the machine was not there. The machine was ultimately seized from Ujjain. Accordingly, by removing the machine from the yard to Ujjain, he committed an offence under section 406 of IPC.

10. Learned counsel for the petitioner *inter-alia* argues that :

i) the present petitioner is a CEO / Director of the Company. No vicarious liability can be cast on the petitioner for the alleged offence committed by the Company under section 406 of IPC.

ii) that even if averment made in the FIR be taken as

correct in their entirety, they did not disclose any offence under section 406 of IPC.

11. To substantiate the first argument, learned counsel for the petitioner placed reliance on the judgment of Hon'ble Supreme Court delivered in the case of *S.K. Alagh Vs. State of Uttar Pradesh and others* reported in (2008) 5 SCC 662, in which, Hon'ble Supreme Court held that under section 34, 146 to 149 of IPC does not cast vicarious liability on the party, not directly charged for commission of the offence. The Hon'ble Supreme Court has observed in para 20 of the judgment as under :

> "20. We may, in this regard, notice that the provisions of the Essential Commodities Act, Negotiable Instruments Act, Employees' Provident Fund (Miscellaneous Provision) Act, 1952 etc. have created such vicarious liability. It is interesting to note that Section 14A of the 1952 Act specifically creates an offence of criminal breach of trust in respect of the amount deducted from the employees by the company. In terms of the explanations appended to Section 405 of the Indian Penal Code, a legal fiction has been created to the effect that the employer shall be deemed to have committed an offence of criminal breach of trust. Whereas a person in charge of the affairs of the company and in control thereof has been made vicariously liable for the offence committed by the company along with the company but even in a case falling under Section 406 of the Indian Penal Code vicarious liability has been held to be not extendable to the Directors or officers of the company. {See *Maksud Saiyed v. State of Gujarat and Ors.* [2007 (11) SCALE 318]}."

12. In this regard, learned counsel also cites the judgment of Hon'ble Supreme Court delivered in the case of *Maharashtra State Electricity Distribution Company Limited and Another Vs. Datar Switchgear Limited and others* reported in (2010) 10 SCC 479.

13. To substantiate the second argument, learned counsel for the petitioner has placed reliance on the judgment of Hon'ble Supreme Court delivered in the case of *Dilip Kaur and others Vs. Jagnar Singh and another* reported in (2009) 14 SCC 696, in which, it was held that ingredients of cheating, fraudulent and dishonest intention must exist from the very inception when the promise or representation was made. Non-refund of amount of advance which

results in simply a breach of contract, does not constitute cheating or criminal breach of trust.

14. As against this, learned counsel for respondent no.2 argues that the machine was unnecessarily kept by the present petitioner, even after they disclosed that the machines were of lower capacity and not of any use to them. To deceive respondent no. 2, the machine was removed from the site where, the work was going on and it was finally seized by the police from the premises of the present petitioner.

15. Counsel for the petitioner argues that they kept the machine only to make sure that the amount of the advance be returned by respondent no. 2. They have no intention of misappropriating the property.

16. Taking the second argument of learned counsel for the petitioner first into consideration, I find that from the averment made in the FIR which is Annexure-P/1, no offence under section 406 of made out. The averments made in the FIR may be reproduced below :

> "श्रीमान पुलिस उपमहानिरीक्षक महोदय उज्जैन जिला उज्जैन म.प्र. विषय :– फर्नास कन्ट्रक्शन कंपनी के मैनेजर रोहीत सिंगल द्वारा अमनात मैं खयानत किये जाने के सम्बंध में फोन नं. 01244338300 मो. नं. 09650724555, सविनय निवेदन है कि मैं विजेन्द्र सिंह मैनेजर मिडिस्ट पाईप लाईन दिल्ली में कार्यरत हुं। हमारी कंपनी की साईड बूम मशीन – 583 मात्रा – 2 को किराये फर्नास कन्ट्रक्शन कंपनी लि. ने इन मशीनों को दिनांक 8 मई, 2010 को लिया था जिसकी डिलेवरी उज्जैन में की गई थी। तथा धावला रेवाड़ी में कार्य हेतु भेजी थी। यह कि उक्त मशीनें तीन माह के लिये किराये पर दी गई थी तीन माह बाद उक्त मशीनें फार्नास कं. द्वारा मुझे वापस की जानी थी यानि दिनांक 30 सितम्बर – 2010 तक मशीन हमारे पास पहुँच जानी चाहिये थी मशीन नहीं पहुंचने पर प्रार्थी द्वारा टेलीफोन रोहीत सिंघल से चर्चा हुई। उनके द्वारा तत्काल मशीन वापस पहुंचाने का आश्वासन दिया गया और एक मशीन मुझे वापस प्राप्त हुई। दूसरी मशीन कब प्राप्त होगी, पूछने पर उन्होंने आश्वासन दिया की तत्काल उज्जैन धावला रोवाड़ी से मशीन आपके पास पहुँचवायी जाएगी परन्तु आज तक एक मशीन भी वापस नहीं आई। इस सम्बंध में पत्र व्यवहार भी किया गया था उज्जैन आकर मौके पर पाया तो मेरी मशीन नहीं दिखी और वहाँ पर उपस्थित कर्मचारीयो द्वारा मेरे साथ अभद्र व्यवहार किया गया। यह कि जब प्रार्थी धाबला रेवाड़ी, उज्जैन पहुँचकर अपनी मशीन की जानकारी ली तो मशीन मौके से गायब मिली इस तरह से अनावेदक फर्नास कंपनी के मैनेजर रोहित सिंघल द्वारा मशीन कहीं खुर्द–उर्द (अन्यंत्र किसी को बैंच दी गई है) रोहित सिंघल से बात करने पर उसने कोई स्पष्ट जवाब नहीं दे रहा है । अतः श्रीमान से निवेदन है कि अनावेदक फर्नास कंपनी के प्रोजेक्ट डारेक्टर रोहित सिंघल के

खिलाफ उचित कार्यवाही कर प्रार्थी की मशीन जप्त कर अनावेदक के खिलाफ अपराधिक प्रकरण पंजीब्ध कर उचित कार्यवाही करने की कृपा करे । इति । दिनांक 19.8.2011 उज्जैन प्रार्थी हस्ताक्षर अंग्रजी मैं विजेन्द्र सिंह पिता स्वॉ भूपेन्द्र सिंह मैनेजर सिंह मिडिस्ट पाईप लाईन प्रोडेक्स डी.–913 न्यू फ्रेण्डस कालोनी नई दिल्ली भारत।"

17. From this, it is apparent that the informant was under the impression that the machine was sold by the petitioner to someone else. However, the machine was seized, as per the property seizure memo, from the premises of FCCL, Agar Road, Police Station – Chimanganj Mandi, Ujjain. It is clear that the machine was kept in possession of the present petitioner. It is undisputed that one machine was returned back to respondent no. 2. However, second machine was kept only to compel respondent no. 2 to repay the amount of advance. Taking this factor into consideration, it is clear that the nature of the dispute was purely civil. There was no dishonest intention on the part of the present petitioner to misappropriate the property belonging to respondent no. 2. On this point the principle laid down by Hon'ble Supreme Court in the case of *Dilip Kaur and others* ( supra ) is applicable in this case and as such, no case under section 406 of IPC is made out from the averment in the FIR.

18. Coming to the first argument, it is apparent that all the correspondence were handled by one Pradip Kumar Chelar on behalf of FCCL. The contract was also entered into by the Company and not by the petitioner in individual capacity and therefore, listing only the present petitioner as accused and without arraying the Company and other officers as accused, the vicarious liability cannot be fasten on the present petitioner.

19. Accordingly, I find that the present FIR is an abuse of judicial process. The dispute between the petitioner and respondent no. 2 is of purely civil nature. As such, I find that this petition deserves to be allowed.

20. Consequently, the present petition is allowed. The FIR ( Annexure – P/1) arising out of Crime no. 544/2011 registered at Police Station - Chimanganj Mandi, Ujjain under section 406 of IPC and the proceedings arising therefrom before the Court of JMFC, Ujjain in Criminal Case no. 5090/2013 are hereby quashed. The present petitioner is discharged from the charge under section 406 of IPC.

C c as per rules.

*Petition allowed.*

**I.L.R. [2015] M.P., 1912**
**MISCELLANEOUS CRIMINAL CASE**
***Before Mr. Justice Alok Verma***
M.Cr.C. No. 8953/2014 (Indore) decided on 18 November, 2014

AJAY ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Penal Code (45 of 1860)] Sections 420, 467, 468 & 471 - Sessions Trial*** **- Amendment of first schedule of Criminal Procedure Code by Criminal Procedure Code (MP Amendment) Act, 2007 - Applicant submitted forged marks-sheet regarding his date of birth to secure employment in the army - Charge-sheet filed on 12.12.07 - The amendment came into force on 22.02.2008 - Charge-sheet was filed prior to coming in operation of the Amendment Act - The procedural law is retrospective - No statement of prosecution witness could be recorded till 28.07.14 when the JMFC chooses to commit the case to the Court of Sessions - Therefore, the trial of the case is covered by amendment introduced by the new Act - JMFC has rightly committed the case to the Court of Sessions. (Paras 2 & 9)**

*दण्ड संहिता (1860 का 45), धाराऐं 420, 467, 468 व 471 – सेशन विचारण* – दण्ड प्रक्रिया संहिता (म.प्र. संशोधन) अधिनियम, 2007 द्वारा दण्ड प्रक्रिया संहिता की प्रथम अनुसूची का संशोधन – आवेदक द्वारा सेना में नियोजन पाने हेतु अपनी जन्म तिथि के संबंध में कूटरचित अंकसूची प्रस्तुत की गई – आरोपपत्र दिनांक 12.12.07 को प्रस्तुत किया गया – संशोधन, 22.02.2008 को लागू हुआ – आरोपपत्र को संशोधन अधिनियम प्रवर्तनीय होने से पूर्व प्रस्तुत किया गया – प्रक्रियात्मक विधि भूतलक्षी है – 28.07.14 तक अभियोजन साक्षी का कोई कथन अभिलिखित नहीं किया जा सका, जब जे.एम.एफ.सी. ने प्रकरण सेशन न्यायालय को उपार्पित करने हेतु चुना – अतः प्रकरण का विचारण नये अधिनियम द्वारा पुरःस्थापित संशोधन द्वारा आच्छादित होता है – जे.एम.एफ.सी. ने उचित रूप से सेशन न्यायालय को प्रकरण उपार्पित किया है।

**Cases referred :**

I.L.R [2013] M.P. 741 (SC), 2014 (II) MPWN 128, 2008(3)MPLJ 311.

*L.S. Chandiramani*, for the applicant.

*Himanshu Joshi,* P.L. for the non-applicant/State.

**ORDER**

ALOK VERMA, J. :- Heard.

This application is filed under Section 482 of Cr.P.C. and directed against the order of committal of criminal trial bearing No.2441/2007 by learned Judicial Magistrate First Class, Mhow whereby the learned Additional Sessions Judge opined that the committal of the case was necessary in the light of law laid down by Hon'ble Apex Court in *Ramesh Kumar Soni Vs. State of Madhya Pradesh,* 2013 ILR 741 (SC).

2. The brief facts giving rise to this application are that the Crime No.29/2007 was registered against the present applicant under Sections 420, 467, 468 and 471 of IPC. It is alleged that he submitted forged mark-sheet regarding his date of birth to secure employment in the army. The charge-sheet was filed before the learned Judicial Magistrate First Class on 12.12.2007. The learned Judicial Magistrate framed charges on 15.07.2008. The case was subsequently fixed for prosecution evidence, however, till 26.06.2014, statement of no prosecution witness could be recorded. Thereafter, the learned Judicial Magistrate First Class in the light of the principles laid down by Hon'ble Supreme Court in the case of *Ramesh Kumar Soni* (supra) committed the case for trial to the Court of Additional Sessions Judge, Mhow.

3. In the light of above factual backdrop, the applicant relies on the order of coordinate Bench of this Court in *Rakesh Kumar Dubey Vs. State of M.P. and Anr.*, 2014 (II) MPWN 128 and prays that the impugned order of committal dated 28.07.2014 is not in line with the principles laid down by the Hon'ble Apex Court as well as this Court in the case of *Rakesh Kumar Dubey* (supra) and accordingly prays that the order of committal be set aside and case be remanded back to JMFC for further trial.

4. To decide the controversy, we may see the principles laid down by the Hon'ble Supreme Court in the case of *Ramesh Kumar Soni* (supra), the Hon'ble Apex Court held that the criminal procedure (Madhya Pradesh Amendment Act), 2007 came into force on its publication on 22.02.2008, therefore, it is to be seen what should be the cut of date for deciding that the provisions introduced by the Act would apply on the pending cases. Hon'ble Supreme Court held that it is the date of which charge-sheet is filed before

the Court of Judicial Magistrate which would form the cut of date to decide applicability of new provisions introduced by the Act. Hon'ble Supreme Court held that it is the date of cognizance which from the basis of institution of the case because before such date no case is pending before the Magistrate.

5. The Hon'ble Supreme Court overruled the order passed in reference case **Re: Amendment of First Schedule of Criminal Procedure Code by Criminal Procedure Code (M.P. Amendment) Act, 2007 2008 (3) MPLJ 311** pressing into service the doctrine of prospective overruling meaning thereby the Hon'ble Supreme Court held that : -

1. all the procedural law which changed forum of trial are prospective unless specifically made retrospective and,

2. that overruling of the full Bench decision of Madhya Pradesh High Court will not affect the cases that have already been tried or at advance stage before the Magistrate in the terms of said decision.

6. Coming to the order passed in the case of *Ramesh Kumar Soni* (supra), the learned Single Judge observed in para 2 of the order that : -

> "2. As per prosecution story, one written compliant was filed on 05.08.1993 to the Director General of Police, Bhopal stating therein that Umadevi W/o Rakesh Kumar Dwivedi had executed one forged and fabricated Will dated 5.1.1993 in respect to the property situated at Dabra which was under the ownership of Keshav Dayal Sharma. This Will was executed by Umadevi who is daughter-in-law of said Kesav Dayal Sharma. On the date of execution of the aforesaid Will, Keshav Dayal was stated to be ill and under treatment and the Will was allegedly executed with the help of other co-accused, namely, Shivshankar, Kaushal Kishore, Ramashankar, Narendra Nath including the present petitioner Rakesh Kumar Dubey. On the basis of complaint, Crime No.166/95 was registered at Police Station Dabra, district Gwalior for the offences punishable under sections 420, 467, 468, 471 read with section 120 B of IPC. After completion of investigation, charge-sheet was filed in the trial Court and on 6.10.1998 charge against the petitioner/accused was framed for commission of offence punishable under sections 420, 467, 468 and 120-B of I.P.C. Photocopy of the chargsheet has been enclosed with this

petition marked Annexure-P/3. Thereafter, after a period of sixteen years on 10.04.2014, the order of committal was passed by the learned Magistrate by saying that he has no jurisdiction and the offences committed are exclusively triable by the Court of Sessions. Being aggrieved by the aforesaid order, the present revision has been moved to this Court."

7. The learned Judge further observed in para 8 as under:-

"8. The answer to the aforesaid question is primarily based on the language of the amended provision in which it is couched. It is open to the Legislature to enact laws which have retrospective operation and the Courts are not supposed to ascribe retrospectivity to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of Legislature. Such retrospective effect can be given where there are express words giving retrospective effect or where the language used necessarily implies that such retrospective operation is intended. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. Here in this case, Amendment in regard to Sessions Court's jurisdiction of trial for offences punishable under sections 420, 467, 468 of IPC came into force with effect from 22.02.2008. It was not mentioned that Amendment will be applicable retrospectively. In the light of the aforesaid, the learned trial Magistrate was absolutely wrong to give implication of the Amendment Act retrospectively while committing the case to the Court of Sessions after lapse of sixteen years.

8. It may be seen that the inferences drawn by Single Judge of this Court in the case of *Rakesh Kumar Dubey* (supra) are not in line with the principles laid down by Hon'ble Supreme Court and, therefore, the case of *Ramesh Kumar Dubey* (supra) cannot be followed in other cases.

9. Following the principles as laid down by the Hon'ble Apex Court, in the present case, the charge-sheet filed on 12.12.2007. The present amendment came into force on 22.02.2008 that means in the present case,

charge-sheet was filed prior to coming in operation of the present Amendment Act as laid down by Hon'ble Supreme Court, the procedural law is retrospective and subsequently in the present case no statements of prosecution witness could be recorded till 28.07.2014 when the JMFC choses to commit the case to the Court of Sessions. I find that the learned JMFC or learned Additional Sessions Judge committed no error of law. The trial of the case is covered by the amendment introduced by the new Act and, therefore, it should have been committed to the Court of Sessions and is rightly committed by the learned JMFC.

10. In view of the matter, I find that the present application has no force and liable to be dismissed and accordingly the application is dismissed.

*Application dismissed.*

**I.L.R. [2015] M.P., 1916**

**MISCELLANEOUS CRIMINAL CASE**

***Before Mr. Justice A.M. Khanwilkar, Chief Justice & Mr. Justice K.K. Trivedi***

M.Cr.C. No. 8811/2015 (Jabalpur) decided on 29 June, 2015

VIPIN GOEL ...Applicant

Vs.

STATE OF M.P. & ors. ...Non-applicants

***Criminal Procedure Code, 1973 (2 of 1974), Section 439, Recognised Examinations Act, M.P. (10 of 1937), Sections 3(D), 1, 2 & 5 (also referred to as 'Manyataprapt Pariksha Adhiniyam, M.P. 1937') and Penal Code (45 of 1860), Sections 409, 420 & 120-B - Bail* - Applicant alleged to have acted as middleman to facilitate candidate who had appeared in examination conducted by VYAPAM for Pre P.G. Medical course - Apprehension that I.O. will be biased based on vague and unsubstantiated plea which cannot be accepted - Further the applicant has refused to accept the offer of STF of interrogation of applicant under the supervision of STF chief - While deciding anticipatory bail it has already been decided that custodial interrogation is necessary -Although applicant has rejected the offer, even then STF chief is directed to supervise the interrogation session - Application rejected. (Paras 39 to 46)**

*दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439, मान्यताप्राप्त परीक्षा*

*अधिनियम, म.प्र. (1937 का 10), धाराऐं 3(डी), 1, 2 व 5 एवं दण्ड संहिता (1860 का 45) धाराऐं 409, 420 व 120–बी – जमानत* – आवेदक ने अभिकथित रूप से उन अभ्यर्थियों को मदद करने के लिये बिचौलिये के रूप में कार्य किया जो व्यापमं द्वारा आयोजित की गई स्नातकोत्तर चिकित्सा पाठ्यक्रम पूर्व परीक्षा में सम्मिलित हुए थे – यह आशंका कि अन्वेषण अधिकारी पक्षपाती होगा, अस्पष्ट एवं अप्रमाणित अभिवाक् पर आधारित है जिसे स्वीकार नहीं किया जा सकता – इसके अतिरिक्त आवेदक ने एस.टी. एफ. प्रमुख के पर्यवेक्षण में आवेदक की पूछताछ करने के एस.टी.एफ. के प्रस्ताव को अस्वीकार किया है – अग्रिम जमानत का विनिश्चय करते समय यह पहले ही विनिश्चित किया गया है कि अभिरक्षा में पूछताछ आवश्यक है – यद्यपि आवेदक ने प्रस्ताव अस्वीकार किया है, तब भी एस.टी.एफ. प्रमुख को पूछताछ सत्र का पर्यवेक्षण करने के लिये निदेशित किया जाता है – आवेदन अस्वीकार किया गया।

**Cases referred :**

(1980) 2 SCC 565, (2012) 13 SCC 720, 2010 (12) SCC 254, (1961) 1 SCR 14, (1997) 7 SCC 187.

*Anil Khare* with *Priyankush Jain, H.S. Chhabra & Namrata Kesharwani,* for the applicant.

*P.K. Kaurav*, Addl. A.G. with *Prakash Gupta,* P.L. for the non-applicant/State.

**ORDER**

The Order of the Court was delivered by : **A.M. KHANWILKAR, C.J. :-** This is first bail application by this applicant in crime No.14/2013 registered with S.T.F. Police Station, Bhopal for offences commonly known as VYAPAM examination scam cases, punishable under Sections 409, 420, 120-B of I.P.C. and Section 3 (Gha), 1, 2/5 of M.P. Manyata Prapt Pariksha Adhiniyam, 1937.

2. The role ascribed to the applicant by the prosecution is that he acted as middleman to facilitate candidate (Dr. Prakhar Singhal). That candidate had appeared in the examination conducted by VYAPAM for Pre.P.G. Medical Course and allegedly indulged in unfair means during the said examination,in conspiracy with the racketeers involved in the crime. The applicant was called upon by the Investigating Officer vide notice dated 26.11.2014,to remain present in connection with enquiry concerning Crime No.14/2013. According to the applicant,in response to the said notice, applicant appeared before the Investigating Officer and extended full cooperation in the enquiry and disclosed

all facts within his knowledge. The applicant was questioned extensively by the Investigating Officer. It is further stated that since the Investigating Officer was convinced with the explanation and the disclosures made by the applicant,no precipitative action was taken against him. However, when the applicant apprehended that he may be arrested in connection with the said crime,applied for anticipatory bail before the Court of 9thAdditional Sessions Judge, Bhopal. That anticipatory bail was rejected on 11.02.2015.

3. The applicant then rushed to the High Court against that decision by way of bail application under Section 438 of the Code of Criminal Procedure being M.Cr.C.No.3440/2015. That application was rejected by a speaking order dated 24.03.2015. The Court accepted the argument of the prosecution that the applicant was not cooperating in the enquiry and that the Investigating Officer was convinced that the custodial interrogation of the applicant had become necessary. The Court observed thus :-

> "It is, fairly, accepted by the counsel for the State that as of today from the information gathered by the Investigating Officer, it appears that both these applicants were concerned only with Prakhar - one candidate. However, unless the investigation of Crime No.14/2013 is completed in all respects, it may not be possible to take any firm view in that regard. It is also not in dispute that pursuant to the liberty given to applicants to appear before the Investigating Officer, they had appeared in the Office of the Investigating Officer on 12 & 14th March, 2015, for 13 hours 59 minutes in aggregate in M.Cr.C.No.3441/2015 and 13 hours 44 minutes in aggregate in the case of applicant in M.Cr.C. No.3440/2015. However, according to the Investigating Officer, the interrogation with the applicants was not fruitful as no further clues have been divulged by them during the said period. In view of the attitude of the applicants during the said interrogation, the Investigating Officer is convinced that custodial interrogation of the applicants has become necessary. Besides the phone call details made between the applicants and the middleman/racketeer, the Investigating Officer would like to interrogate the applicant in M.Cr.C.No.3440/2015 with regard to the information received from the computer details recovered from Nitin Mohindra mentioning about payments by separate cheques and cash

> amount as well as on matters as to how the applicants received the question papers in advance in connection with the said examination and the source from where the same were received and in respect of matters which unfolded after receipt of the said papers. The correct information can be unraveled by the Investigating Officer only on the basis of the custodial interrogation and confronting the two applicants in the said process".
>
> (emphasis supplied)

4. Against this decision the applicant unsuccessfully carried the matter in appeal before the Supreme Court by way of S.L.P. (Cri) No.2480/2015. The said Special Leave Petition was dismissed by the Supreme Court. The Supreme Court affirmed the findings recorded by this Court that the investigating agency was convinced that custodial interrogation of the applicant was essential having regard to the totality of the facts and circumstances in which the offence was allegedly committed and that the applicant had not cooperated with the process of investigation till then. As a result, the prayer for grant of anticipatory bail pursued by the applicant was rejected right upto the highest Court. The Supreme Court vide order dated 30.03.2015,Bench of *Justice Ranjan Gogoi and Justice N.V.Ramana,* observed thus :-

> "It is submitted by Mr. Amarendra Sharan, Learned Senior counsel appearing for the petitioners that in similar matters other accused have been granted the privilege of pre-arrest bail. It is further submitted that the petitioners in the present Special leave Petitions have been interrogated for about 14 hours and therefore, custodial interrogation is not required.
>
> Upon reading the orders of the High Court, we find that according to the Investigating Agency custodial interrogation is required having regard to the totality of the facts and circumstances in which the offences are alleged to have been committed. The High Court has also recorded a finding that the petitioners have not cooperated with the process of investigation uptill now. In such circumstances, we decline to grant the privilege of pre-arrest bail to the petitioners. The mere fact that the other persons involved in the VYAPAM scam have been granted the privilege of pre-arrest bail will

not be a ground for granting pre-arrest bail to the petitioners.

The facts of each case will have to be considered and it is in the light of the said facts that we have thought it proper to dismiss both these special leave petitions. It is ordered accordingly."

(emphasis supplied)

5. Since the applicant did not respond to the Investigating Officer, action under Section 82 of the Code of Criminal Procedure was resorted to against the applicant. The Trial Court had also issued non-bailable warrants against the applicant. The applicant, however, questioned the said processes resorted to by the prosecution,which proceedings were unsuccessfully carried right upto the Supreme Court. The Supreme Court vide order dated 19.05.2015 *Bench of Justice A.K.Sikri and Justice Uday Umesh Lalit*,rejected the Special Leave Petitions filed by the applicant bearing S.L.P. (Cri.) Nos.4342–4343and 4351/2015 arising from the order passed by the High Court dated 24.04.2015 in M.Cr.C.No.3837/2015 and 05.05.2015 in M.Cr.C.No.6927/2015 respectively. The said order reads thus :-

"SLP (CRL.) NOS. 4342-4343/2015

On the facts of this case, we are not inclined to grant anticipatory bail. Since by the impugned order, the High Court has refused to set aside the order dated 27.02.2015 passed by the Magistrate, the proper course of action for the petitioner is to approach the Magistrate with appropriate application. It is stated that such an application shall be filed within two weeks. The petitioner shall not be arrested for two weeks. Subject to above, the special leave petitions are dismissed. However, we make it clear that whenever such an application is filed by the petitioner, the same shall be considered by the concerned Magistrate on its own merits and without being influenced by the orders of the High Court in the impugned order. On the petitioner's filing the bail application, the same shall also be considered expeditiously.

SLP (CRL.) No.4351 of 2015

After some arguments, Mr. P.H.Parekh, learned senior

counsel, seeks permission to withdraw this special leave petition with liberty to apply for regular bail.

Liberty, as aforesaid, granted.

The special leave petition is dismissed as withdrawn, accordingly."

(emphasis supplied)

6. Thereafter,the applicant once again approached the Trial Court by way of regular bail application under Section 439 of the Cr.P.C. The said application came to be dismissed by the Trial court on 29.05.2015. The applicant, however, could persuade the Trial Court to give protection to the applicant of not arresting him till he approached the High Court by way of regular bail application, in the light of observations in the Supreme Court order dated 19.05.2015.

7. The applicant then approached this Court on 1stJune, 2015 by way of present bail application. The interim protection granted to the applicant was continued by the Vacation Bench until the hearing of the application on 04.06.2015 by the appropriate Bench. On 04.06.2015,the concerned Bench (Vacation Court) directed placing of the matter before the regular Court on 16.06.2015, after the re-opening of the Court;and continued the interim protection to the applicant. Accordingly, the matter was placed before the regular Court (this Bench) after re-opening on 16.06.2015.

8. After hearing the counsel for the parties,the Court opined that since the application was for grant of regular bail and as that can proceed only if the applicant was already in jail or in custody of the Court,as is well established,the applicant through counsel agreed to appear before the Court on the next day. Accordingly, the matter was listed on 17.06.2015 but was ordered to be taken up for arguments on 18.06.2015. On 18.06.2015, the argument on this application proceeded. The Court noticed that subsequent to filing of this regular bail application on 01.06.2015,the applicant presented I.A.No.11502/ 2015 supported by affidavit of the applicant dated 14.06.2015. The applicant also filed further affidavit sworn on 17.06.2015,in support of his prayer for grant of regular bail.In these affidavits, entirely new plea has been taken.The applicant made serious allegations against the Investigating Officer –Shri D.S.Baghel. The Court allowed the applicant to tender those affidavits,in the

interest of justice;but thought it appropriate to give a fair opportunity to the prosecution to respond to the said allegations. The Court, however, noted that the question as to whether the applicant had knowledge about the facts stated in the said additional affidavits filed by the applicant,before 19.05.2015;and whether the applicant can be permitted to rely on those facts in the wake of Supreme Court order rejecting the appeals preferred by the applicant against the decision of this Court refusing to grant anticipatory bail and to set aside the process issued under Section 82 of Cr.P.C. and non-bailable warrant against the applicant,will be considered at the appropriate stage.The Court also noted that after considering the response of the respondents it may have to be ascertained whether the assertion made by the applicant in the additional affidavits is genuine and if so, whether it would reflect on the bonafides of the Investigating Officer. As the consideration of these matters were required to be deferred to give opportunity to the respondents to file response and as the applicant had already surrendered before the Court, the Court thought it appropriate to direct that the applicant shall remainin judicial custody at Jabalpur. Accordingly, the applicant was taken in judicial custody and detained at Jabalpur. The hearing of the application was deferred till 23.06.2015.

9. On 23.06.2015, when the matter was taken up for hearing, counsel for the applicant pointed out to the Court that the applicant has filed one more affidavit in support of the relief claimed in this application, sworn on 19.06.2015. Since the said affidavit was not circulated to the Court, hearing of the application was deferred till 24.06.2015. On 24.06.2015, the arguments proceeded and finally concluded after filing of the further affidavits by the applicant and the response filed by the respondents in the form of affidavit of Ashish Khare, A.I.G., S.T.F., Bhopal dated 22.06.2015.

10. During the hearing, emphasis was placed by the counsel for the applicant as to how the Investigating officer D.S. Baghel was biased against the applicant. The whole attempt was to persuade the Court that the applicant has been falsely implicated in Crime No.14/2013, by D.S.Baghel. Further, custodial interrogation by D. S Baghel will not be free and fair.

11. In the context of the said apprehension of the applicant, during the course of argument, the counsel appearing for the respondents had not only harped on the refutal of allegations made against the Investigating Officer – D.S.Baghel to contend that the apprehension of the applicant is misplaced

and ill-advised, but went on to voluntarily suggest, without prejudice, that to assuage the apprehension of the applicant by D. S. Baghel, custodial interrogation of the applicant can be conducted under the supervision of the Head of the STF. In the light of this submission, we called upon the counsel for the applicant at the end of the hearing, as to whether the applicant was willing to consider this option given on behalf of the respondents. The counsel for the applicant prayed for time till 26.06.2015 to take instructions in that behalf. Accordingly, even though the hearing on this bail application had concluded for all purposes, the matter was deferred till 26.06.2015 as requested by the applicant.

12. On 26.06.2015, however, counsel for the applicant on instructions submitted that the applicant was not satisfied with the option offered on behalf of the STF. Instead, the applicant would invite decision of this Court on merits of the application. In view of this stand, we directed posting of the matter on 29.06.2015 for pronouncement of the order.

13. To complete the record, it needs to be mentioned that although the applicant was ordered to be kept in judicial custody in terms of direction given by this Court vide order dated 24.06.2015, the local newspaper "Patrika" published on 25.06.2015 mentioned with photograph in support -that the applicant was having a free time in Subhash Chandra Bose Medical College, Jabalpur. The news item further mentioned as to how the applicant interacted with several visitors and that the family members of the applicant were in attendance in the separate room allocated to the applicant in the said hospital. Further, no police personnel were seen any where nearby the said room in which the applicant was seen resting along with his family members in the hospital. When our attention was drawn to this news item and counsel for the applicant was asked as to in what circumstances the applicant was shifted to the hospital as reported by the newspaper, without prior permission or for that matter any intimation to this Court, the counsel submitted that the State must explain the same. In the context of this response, the counsel for the applicant was informed that the said issue will be taken up by the Court dealing with suo moto Writ Petition No.6385/2014 (PIL) concerning VYAPAM examination scam cases and the investigation whereof is under monitoring of this Court before the Bench (to which one of us A.M.Khanwilkar, Chief Justice is a party). That matter was scheduled for hearing after the lunch –break. Appropriate directions have been issued by the said Bench (A.M.Khanwilkar, Chief Justice and Alok Aradhe, Judge) to the Head of STF, Shri Sudhir Sahi

to enquire into the said matter and submit his report in sealed cover before the next date of hearing on 02.07.2015.

14. Reverting to the grounds agitated in the original application as filed on 01.06.2015, the sum and substance is that the applicant is not involved in the commission of the alleged offence. He has been falsely implicated. In fact, STF had unequivocally denied about his involvement on affidavit dated 18.05.2015 filed in disposed of W.P.No.11695/2014 (PIL for transfer of investigation of VYAPAM related crimes to CBI). It is stated on affidavit that the applicant and his cousin nephew Dr. Prakhar Singhal had no role in the examination of Pre-P.G. That, the applicant has not been named as accused in the FIR or the charge-sheet filed by the STF till date. None of the co-accused in the statement recorded under Section 27 of the Evidence Act have disclosed about the involvement of the applicant in the commission of the alleged crime. The entire case against the applicant was based on the memorandum statement of Mr. Nitin Mohindra dated 30.10.2014; but he has not named the applicant nor his cousin nephew. That, his cousin nephew Dr. Prakhar Singhal has already been granted bail by the Supreme Court on 23.02.2015 S.L.P. (Cri.) 1020/ 2015. The allegation about any unfair means committed during the examination by his nephew is illogical and baseless, as he is a meritorious student having very good academic record. There was no evidence at all about the involvement of Dr. Prakhar Singhal in the commission of the alleged crime. The fact that Dr. Prakhar Singhal was regularly staying in the house of the applicant, it would not follow that applicant had facilitated Dr. Prakhar Singhal in commission of the alleged offence. Similarly, mere acquaintance of the applicant with Nitin Mohindra cannot be the basis to assume that the applicant, succeeded in getting admission for his cousin nephew in Medical course by conspiring with the racketeers in any manner. The applicant and other residents of their colony was in contact with Nitin Mohindra and Bharat Mishra in connection with maintenance issues in their colony. The allegation against the applicant that he had telephonic conversation with Nitin Mohindra, a day prior to the examination of Dr. Prakhar Singhal, was not based on any call details but sheer speculation-that the applicant "may" have procured the model answer key from the racketeers. Mere telephone calls between them, in any case, would not be an incriminatory circumstance to proceed. The prosecution, inspite of rejection of anticipatory bail application of the applicant, unfairly initiated action against the applicant under Section 82 of Cr.P.C. The applicant had raised concerns in that behalf in the proceedings questioning the said

process. The Supreme Court though refused to interfere has made it clear that the regular bail application be decided on merits, but the Trial Court shockingly rejected the prayer for grant of regular bail. The STF having denied the involvement of applicant on affidavit filed on 18.09.2014 in disposed of Writ Petition No.11695/2014, cannot now proceed against the applicant. Further, the Trial Court committed palpable error in observing that if any person is accused of cognizable offence and is arrested in that behalf the police can interrogate him for 24 hours and in the present case, the police did not have that opportunity of custodial interrogation. According to the applicant, custodial interrogation must be resorted to only in exceptional cases when the person accused is so influential that he cannot be interrogated by the investigating agency without his custody. The applicant, however, is a small time businessman with fair reputation. The prosecution without any rhyme or reason wants to arrest the applicant only to cause his social death and infringe his right to liberty enshrined in Article 21 and 22 of the Constitution. The applicant had appeared before the Investigating Officer whenever called upon to do so in the past, but no question relating to the offence was asked to the applicant. The applicant was merely asked about general information like PAN card, Passport details, Bank A/c details, income-tax return and his family. According to the applicant, the prosecution is insisting for custodial interrogation to explain details regarding a computer entry–which query was never put to the applicant, though he was interrogated on five times in the past by STF.

15. As aforesaid, after filing of this bail application 01.06.2015, the applicant filed application supported by affidavit dated 14.06.2015(I.A.No.11502/2015) for taking additional facts and submissions on record. In this application, for the first time, the applicant has adverted to some litigation and dispute between one S.N.Goel Contractor for Chirayu Charitable Foundation of which Dr. Ajay Goenka was Secretary and Arvind Goenka was President. Reference is made to some transaction between the said parties regarding construction work to the tune of Rs.38,85,00,000/- (Rupees Thirty Eight Crores Eighty Five Lacs) and out of which Rs.12,85,00,000/- (Rupees Twelve Crores Eighty Five Lacs) was still unpaid by Chirayu Charitable Foundation. It is stated that on account of non-payment of that amount, a dispute has arisen between the present applicant and Dr.Ajay Goenka. Notably, in this application, the applicant has admitted that he is one of the Director of M/s Raksha Buildcon which is a company incorporated under the Companies Act. Further, the father of the applicant S.N.Goel is-

also involved with the construction business and that the outstanding amount was due to them.

16. Reference is then made to the criminal case registered pursuant to the order passed by the Judicial Magistrate First Class, Bhopal, in Crime No.12/2013 dated 10.02.2012,filed by the applicant in his capacity as Director of M/s Raksha Buildcon Pvt. Ltd. against Dr. Ajay Goenka in particular. The relevant assertion in the subject application, for considering this bail application, is that, the Investigating Officer in Crime No.14/2013-D.S.Baghel, D.S.P., STF,is also the Investigating Officer in the offences registered at the instance of the applicant against Dr.Ajay Goenka. He was shielding Dr. Ajay Goenka from the said criminal case because of his close proximity with him.

17. In paragraph 15, it is stated that Investigating Officer, D.S.Baghel is in regular contact with Dr. Ajay Goenka who has been named as accused in Crime No.12/2013. At the instance of Dr.Ajay Goenka, the Investigating Officer has maliciously implicated the applicant in the subject Crime No.14/2013 registered with STF concerning VYAPAM examination scam cases. The proximity and close relations between Dr. Ajay Goenka and Investigating Officer, D.S.Baghel can be noticed from the call records between the two by calling the same from the service provider. The applicant has requested the Court to summon the relevant records of Crime No.12/2013 registered by the applicant against Dr. Ajay Goenka and others.

18. In paragraph 16 of this application, it is alleged by the applicant that a clear pattern is likely to emerge from the call records about the interaction between Dr. Ajay Goenka and Investigating Officer D.S.Baghel event wise, in connection with the criminal proceedings. According to the applicant, it is also in public domain that the investigating officer was shielding Goenka in Crime No.12/2013, in view of the news report.

19. Besides filing the aforesaid application, the applicant has filed additional affidavit dated 17.06.2015 in support of the prayer for grant of bail. In this affidavit, for the first time, he has stated that he has become privy to certain additional facts in particular about the number of telephone calls exchanged between Dr. Ajay Goenka and Investigating Officer D.S.Baghel, as much as 600 times and in particular the frequent calls on certain important events unfolding in criminal proceedings. The details of the number of calls so made on such events has been mentioned in tabular form.

20. However, as these affidavits were allowed to be tendered across the Bar on 18.06.2015, in the interest of justice; and after examining the same, as we found merits in the objection taken by the respondents. The applicant was called upon to give more specific information as to when the additional facts came to the knowledge of the applicant. As a result, the applicant has filed further affidavit sworn on 19.06.2015 giving details about the circumstances in which these additional facts came to his knowledge and purportedly about the source. This affidavit of the applicant states that suspicion arose about the proximity between the Investigating Officer, D.S.Baghel and Dr. Ajay Goenka after he obtained certified copy of the STF objection dated 29.05.2015, filed before the Trial Court on 03.06.2015. He found that in the objection reference has been made to FIR registered and pending against the deponent. That fact was within the exclusive knowledge of Dr. Ajay Goenka but has been referred to by the Investigating Officer in the objection dated 29.05.2015. That gave rise to the suspicion of the applicant about the proximity of the Investigating Officer, D.S.Baghel and Dr. Ajay Goenka. The affidavit further mentions that the applicant has been informed that D.S.Baghel and Dr. Ajay Goenka were in regular contact during the course of Investigation by STF and on 13th June, 2015, the applicant came to know that D.S.Baghel and Dr.Ajay Goenka has telephonically contacted each other for over 600 times from December 2014 to May 2015 and most of the calls coincided with the events concerning the applicant -such as arrest of his nephew Dr. Prakhar Singhal, rejection of anticipatory bail application, rejection of application for regular bail etc. Thus, for the first time disclosure was made by the applicant that he acquired this additional information about the call records on 13.06.2015, but the source from which the same has been obtained has not been disclosed.

21. The respondents have filed affidavit sworn by Ashish Khare, A.I.G., S.T.F. dated 22.06.2015. It is accompanied by a report prepared under the signature of said Ashish Khare on the same day. This report refers to the outcome of the enquiry conducted by him to ascertain the correctness of the allegations now made by the applicant about the proximity of the Investigating Officer with Dr. Ajay Goenka and that being the reason for implicating the applicant in Crime No.14/2013 concerning Vyapam Examination scam cases allegedly out of vengeance and at the behest of Dr. Ajay Goenka. The affidavit is also accompanied by the communication sent by the Investigating Officer to the affiant dated 21.06.2015, being his explanation. Similarly, communication under the signature of Dr.Ajay Goenka dated 21.06.2015,

addressed to the affiant (Ashish Khare) is also enclosed along with the said affidavit.

22. At the outset, the respondents have denied the allegations made by the applicant. It is further stated that earlier application (anticipatory bail application) filed by the applicant has been rejected right upto the Supreme Court as there was evidence already available with the Investigating Agency to indicate the complicity of the applicant including the call details between the applicant and other co-accused and other material. It is then stated that there is no correlation between the evidence available against the applicant in connection with subject Crime No.14/2013, which is independent of the factum of relationship of the Investigating Officer with Dr.Ajay Goenka. Further, the applicant has not disclosed the source from where the information referred to in the further affidavits filed by him has been gathered. The date on which he received such information has also not been disclosed. As a matter of fact, the affiant has verified with Idea Cellular Company as to whether the applicant had collected the call details of the said two persons from the company. However, the officials of the company, informally, informed in the negative. The affiant, however, has already made a request for providing necessary information officially, which is awaited.

23. Notwithstanding this affidavit filed by the respondents, the applicant has not filed any rejoinder to controvert the stand taken by the respondents or to offer further explanation but chose to proceed with the arguments on the bail application.

24. During the arguments, counsel for the applicant has relied on the averments made in the applications and affidavits filed by the applicant to contend that the applicant had no knowledge about the events till recently. The applicant started doubting about the proximity between the Investigating Officer, D.S.Baghel and Dr.Ajay Goenka after 3rd June, 2015 as the Investigating Officer had disclosed certain facts in the objection filed by him to oppose the bail application filed by the applicant before the Trial Court, which fact was within the exclusive knowledge of Dr.Ajay Goenka. The whole attempt of the counsel for the applicant was to persuade the Court to hold that there is reasonable apprehension in the mind of the applicant that the Investigating Officer D.S.Baghel will not act fairly. Emphasis was placed on the stand taken by the STF on affidavit on 18.09.2014 filed to oppose the disposed of Writ Petition 11695/2014(PIL), which according to the applicant,

gives clean chit to the applicant. It was submitted that it is cardinal principle that the investigation must be done by the Investigating Agency in a free and fair manner; and if there was even slightest of apprehension and the circumstances spelt out by the applicant were sufficient to arouse such apprehension, it must necessarily follow that the applicant has been falsely implicated in Crime No.14/2013 out of vengeance and to further the cause of Dr.Ajay Goenka.

25. Counsel for the applicant has also referred to the report prepared by Ashish Khare, appended to his affidavit dated 22.06.2015,to contend that there is clear admission of the Investigating Officer D.S.Baghel as well as Dr. Ajay Goenka about their acquaintance and proximity and that D.S.Baghel and his family members were taking medical treatment from Dr.Ajay Goenka on regular basis. Their association has been for quite sometime. Besides raising issues about the conduct of the Investigating Officer D.S.Baghel, it was contended that no fruitful purpose would be served by custodial interrogation which is the only ground for insisting to arrest the applicant and keep him in jail. The applicant cannot be forced to say what the Investigating Officer decides to record. The applicant has already revealed all information during the enquiry in the past and was interrogated for considerably long time. No new material can be obtained from the applicant. Further, since the applicant is engaged in a small time business, if he is released on bail, there is no possibility whatsoever that applicant will influence the prosecution evidence or further investigation of the crime. In support, counsel for the applicant has relied on the decisions of the Supreme Court in the case of *Shri Gurbaksh Singh Sibbia and others Vs. State of Punjab*[1] -paragraph 19, *Padmakar Tukaram Bhavnagar & anr Vs. The State of Maharashtra*[2] and *Babubhai Vs. State of Gujarat and others*[3] para 32.

26. Having perused the averments in the respective applications, further affidavits filed by the applicant, the response filed by the respondents and considering the rival submissions, we have no manner of doubt that it is not open to the applicant to contend that there is absolutely no material whatsoever to proceed against the applicant in Crime No.14/2013, much less to resist the request of the Investigating Agency to allow custodial interrogation of the applicant. For, that aspect has already been dealt with in the earlier round of applications, for grant of anticipatory bail as also petition to question the validity of the process

1. (1980) 2 SCC 565
2. (2012) 13 SCC 720
3. 2010 (12) SCC 254

issued against the applicant under Section 82 of the Cr.P.C. and for cancellation of non-bailable warrant. This Court had rejected the said contention of the applicant and which finding has been affirmed by the Supreme Court.

27. Presumably, realizing this position, the applicant has advisedly taken a plea that the applicant is being persecuted by the Investigating Officer, D.S. Baghel at the behest of Dr. Ajay Goenka, who is in close proximity with the Investigating Officer and is accused in Crime No.12/2013 registered at the instance of the applicant. Notably, in the regular bail application filed by the applicant on 1.6.2015 this specific plea has not been taken by the applicant. The averments in the bail application, however, *inter alia,* rest on the assertion that there is no tangible material to proceed against the applicant and which fact has been stated on affidavit filed on behalf of STF to oppose the disposed of W.P. No.11695/2014 (PIL praying for transfer of investigation of all VYAPAM related Scam Cases to CBI).

28. Taking that plea first, no doubt, in the reply filed by the respondents in the said writ petition, it is mentioned that allegations regarding Vipin Goel and his sister's son admitted in Pre-P.G. is denied. However, that statement is being read out of context by the applicant. The averments in Paragraph No.56 of the reply affidavit, is in response to the averments in Paragraph No.3.30 of the said writ petition. The whole paragraph will have to be considered in its totality. In Paragraph No.3.30 in the writ petition it is stated as follows:-

> "3.30 –it is further submitted that, the STF instead of working independently and impartially is working in an arbitrary manner as the STF has adopted pick and choose method which ultimately would serious affect the fate of the entire scam. The petitioner herewith brings to the notice of this Hon'ble Court certain instances which are part of final report/challan filed by the STF before the competent criminal court demonstrating that, the STF has adopted pick and choose method due to pressure casted on it by political leaders, high ranked Administrative and Police Officials.
>
> a) In FIR No.14/2013 which has been lodged in relation Pre-PG Examination, Mr. Raghvendra Singh Tomar has been made accused No.6. But till date Mr. Raghvendra Singh has not been arrested. It is alleged in the FIR that Mr. Raghvendra

Singh along with Mr. Bharat Mishra who is brother of a Senior IPS Officer Miss Sonali Mishra took students to his factory at Mandideep and provided them Model key answers which were given to them by Nitin Mahindra. It is further alleged that an amount of Rs.30, Lacs was paid to Mr.Raghvendra Singh. However, to the utter astonishment the STF in order to save him has made him a witness under the influence of his brother in law Santosh Singh Gaur who is S.P. (E.O.W) in Gwalior.

It is not out of place to mention here that, the STF miserably failed to probe into the fact of the investments made by Nitin Mahindra of the money derived from the VYAPAM scam. Raghvendra Singh Tomar who is in the business of construction has made huge investment of the money belonging to Nitin Mahindra through his company M/s Faith Builders. Nitin Mahindra has made investment of the money derived from VYAPAM scam in ash to Bharat Mishra, Raksha Builders and others. Despite being the above mentioned fact was in the notice, the STF did not probe into the investment made by Nitin Mahindra for the reason that there was likelihood of many other influential political leaders and high ranked officers to be surfaced. The STF is adopting pick and choose method which is palpably clear from the fact that Bharat Mishra was arrested but no concrete chain of connecting events to the crime was ever made out. It is important to mention here that Bharat Mishra who is brother of a Senior IPS Officer Sonali Mishra is a close friend of Nitin Mahindra. Raghvendra Singh Tomar with allegation of receiving Rs.30 Lacs has been made witness and all this have been done with a deliberate move on the part of STF as on a later stage when all memorandums would be testified in the competent criminal court. Other co-accused persons would gain benefit of the shortcomings of the prosecution and the culprits then would be acquitted. It is apt to mention here that reportedly one Vipin Goel who is owner of M/s Raksha Builders got his sister's son admitted in Pre-PG Exam through Nitin Mahindra adopting illegal means and in lieu of the same he then helped Nitin Mahindra to invest

his black money by booking duplex/flats in the housing project. It is further submitted that, the political patronage enjoyed by Nitin Mahindra is clear from the fact that, in the year 2004 a crime bearing Crime No.26/2004 was registered by the Economic Offence Wing regarding purchase of computers at VYAPAM in which one Ajay Singh and Nitin Mahindra were accused No.6 and 7 respectively. But the government refused to grant sanction in this case. It is further submitted that, it was surfaced, subsequent sanction has been accorded to the above mentioned persons and supplementary challan has been filed. The petitioner posses a question that who were the officials/ politicians and what were the reasons for refusing the sanction initially and now under peculiar circumstances the Government has decided to accord sanction. All the above mentioned circumstances command a detailed investigation as the links are connected with the VYAPAM scam however, the STF failed to focus its attention on arresting the middlemen, the beneficiaries and others. The petitioner herewith marks and encloses a copy of statements of Raghvendra Singh Tomar under section

b) It is submitted that an FIR No.17/2013 Mr. Laxmikant Sharma was found involved but he has not been impleaded as accused nor has been arrested. The students and parents from Sironj District Vidisha has deposed that they have given the roll number to the then Minister Shri Laxmikant Sharma however the STF has not made his accused in the case and challan has been filed as such. With respect to FIR No.17 the statement of one Sanjiv Kumar Mutele and his mother Pushpa Devi Mutele has been filed along with the challan. From the statements it is apparently clear that the above mentioned persons had visited Shri Laxmikant Sharma at his residence and he had taken a photocopy of entrance card. Despite being sufficient evidence, Laxmikant Sharma deliberately has not been made accused in the crime. The petitioner herewith marks and encloses a copy of statements of Sanjiv Kumar Mutele and his mother Smt. Pushpadevi Muele as Annexure P/25 and P/26."

(emphasis supplied)

29. In response to these averments the reply filed by the respondents in the writ petition sworn by Mr. Ashish Khare, AIG, STF, M.P. reads thus :-

> "56. **Re: Para 3.30**: Allegations regarding pick and chose method adopted by the STF are specifically denied. The facts mentioned in this para are being clarified as under :
>
> **Regarding Raghevendra Singh Tomar:** The allegation of any influence by Shri Santosh Singh Gour is specifically denied. Mr. Raghvendra Singh has become witness of the crime. It is not necessary to arrest him and this will facilitate the STF to proceed even against other accused persons who are key accused of the crime. It is submitted that neither Bharat Mishra nor any other person has given any concrete evidence against involvement of Raghvendra Tomar. It is the discretion exercised by the Investigating Officer that the statement under section 164 CrPC of Raghvendra Tomar will facilitate the investigating agency to ensure that the main culprits are punished. In the crime No.14/13 the statement of Raghvendra Tomar under Section 164 of CrPC was very much useful as the same has become concrete evidence of linking other accused persons to expose the entire conspiracy.
>
> Till date the entire investigation no fact has come on record to show that there was any investment made by Nitin Mohindra in the company of Raghvendra Tomar in his Faith Builders construction company. However efforts in this regard were already made any necessary interrogation was also done in this regard. It is submitted that as far as the involvement of nephew of Vipin Goel in Pre PG 2012 course is concerned, the issue is still under consideration and if it is found that Prakhar Singhal who is nephew of Vipin Goel is involved in the conspiracy a prompt action would be taken against him. Regarding allegations of non grant of sanction in EOW case No.26/2004 by the State is concerned it is submitted that the then Chairman of VYAPAM had refused the sanction against Nitin Mohindra and Ajay Sen. However, the said order has been reviewed and the sanction has been granted by the VYAPAM, in which investigation was done by EOW.

**Regarding Vipin Goel :** Allegations regarding Vipin Goel and his sister's son admitted in Pre PG is denied. The prosecution sanction in Crime No.26/04 to EOW was denied by the then Chairman of the VYAPAM. However, the said order was reconsidered and fresh sanction has been granted. So far as arrest of Lakshmikant Sharma in FIR 17/13 is concerned, when the arrest is to be made is to be decided by the investigating officer. The fact remains that Lakshmikant Sharma is already in jail.

It is submitted that petitioner is incorrectly stating that in Crime No.17/13 Lakshmikant Sharma is not accused. So far as the arrest is concerned, it will make no difference when the said person is already in jail in connection with other case and it is up to the investigating officer as to on which date he will arrest any particular person. However, it is submitted that witnesses in this case were mostly from the constituency of the ex-minister and, therefore, with the efforts of the investigating agency statement under section 164 CrPC have been recorded against him, they will prove the case against him and his arrest will also be made as and when the same is required."

(emphasis supplied)

30. With reference to the assertion concerning the applicant, Vipin Goel it is stated that the issue is still under consideration and if it is found that Dr. Prakhar Singhal nephew of Vipin Goel (applicant herein) is involved in the conspiracy, prompt action will be taken. The affidavit then denies the allegations regarding Vipin Goel and his sister's son admitted in Pre-PG course. This affidavit was filed on the basis of record available in the office of STF till 18.9.2014. However, thereafter on 26.11.2014, on the basis of material gathered by the Investigating Agency, notice was issued to the applicant for enquiry in connection with subject Crime No.14/2013. No doubt, the applicant appeared before the Investigating officer and was questioned on certain matters. However, as the investigation proceeded further on the basis of other material besides the memorandum of Nitin Mohindra recorded under Section 27 of the Evidence Act, the Investigating Agency was of the opinion that the applicant was not cooperating during further investigation and that his custodial interrogation had become necessary. That plea of the Investigating Agency

was tested by the Courts and was accepted whilst rejecting the anticipatory bail application filed by the applicant. In the first place, by the Trial Court and then by the High Court which finding was affirmed by the Supreme Court by a speaking order whilst rejecting S.L.P. (Cri) No.2480/2015 filed by the applicant vide order dated 30.3.2015.

31. Thus understood, it is not open to the applicant to raise the same plea in support of the prayer for grant of bail. The reliance placed by the applicant on the subsequent order passed by the Supreme Court on 19.5.2015, while dismissing the S.L.Ps. filed by the applicant will be of no avail to the applicant. The question whether the applicant should be arrested by the Investigating Agency and his custodial interrogation, has become final. The observations of the Supreme Court made in order dated 19.5.2015 pressed into service by the applicant are in the context of challenge to the process issued against the applicant under Section 82 of the Code and to the non-bailable warrant. The said observations are limited –to consider the prayer for regular bail by the Court expeditiously without being influenced by the order of the High Court in those proceedings. To wit, orders dated 24.4.2015 and 5.5.2015 challenged in the said Special Leave Petitions. Those observations cannot be used by the applicant to contend that the applicant cannot be arrested nor subjected to custodial interrogation, notwithstanding the rejection of successive appeals of the applicant to the Supreme Court for grant of anticipatory bail in subject Crime No.14/2013 and more particularly the explicit findings and opinion given by the coordinate Bench of the Supreme Court in its order dated 30.3.3015.

32. Suffice it to observe that the Supreme Court having asked the applicant to resort to regular bail application presupposes that the applicant should be taken in custody. It is well established position that prayer for grant of bail can be entertained only when the person applying for bail is in custody – police custody/judicial custody or surrendered before the Court. For that reason, the applicant was called upon to first surrender before this Court, before commencing the arguments on the prayer for grant of bail in connection with Crime No.14/2013. In that sense, he is already arrested in connection with Crime No.14/2013 and is in judicial custody, until final decision on this application.

33. As aforesaid, accepting the prayer for release of applicant on bail without the Investigating Agency being allowed to resort to custodial

interrogation of the applicant in connection with Crime No.14/2013, will inevitably result in denying the Investigating Agency of the said opportunity already affirmed by the Supreme Court. Therefore, until custodial interrogation is done by the Investigating Agency in Crime No.14/2013, the question of releasing the applicant on bail does not arise.

34. Presumably, realizing this position, the applicant has now been advised to take a plea to question the fairness of investigation and, in particular, custodial interrogation by Investigating Officer, D. S. Baghel with reference to the events which have now been mentioned in the further affidavits filed during the pendency of the bail application. There is force in this submission of the respondents. We have already referred to the circumstances mentioned in the further successive affidavits filed by the applicant, as the hearing of the application progressed. In the original bail application there is no reference to this aspect but other grounds have been taken which, as aforesaid, cannot be considered in view of the opinion already recorded right up to the Supreme Court that the Investigating Agency is entitled to subject the applicant to custodial interrogation in connection with Crime No.14/2013.

35. It has been faintly suggested in the application that custodial interrogation is not mandatory. This point was also argued before us. However, entertaining that argument would tantamount to circumventing the opinion already recorded right upto the Supreme Court whilst accepting the stand of the Investigating Agency that custodial interrogation of the applicant has become necessary in the fact situation of the present case. Presumably, for that reason, the applicant chose to file application for taking additional facts and submissions on record supported by his affidavit sworn on 14.6.2015. In this application, the applicant has highlighted the circumstance indicating the proximity of the Investigating Officer, D. S. Baghel and Dr. Ajay Goenka at whose behest, according to the applicant, the Investigating Officer was persecuting the applicant. Amongst others, the applicant has mentioned that as per his information said Dr. Ajay Goenka and Investigating Officer, D. S. Baghel were constantly interacting on telephone and which fact can be established from the call records between the two. In respect of telephone numbers mentioned in Paragraph No.15 of this application, however, no specifics or material facts have been mentioned about the source of information or the period between which and the number of times the telephone calls were exchanged between the two. That has been stated only after the Court gave

opportunity to the applicant for filing better affidavit, vide affidavit dated 17.6.2015. The applicant in this affidavit has, no doubt, mentioned about the number of telephone calls exchanged between the two, but has not disclosed as to when the applicant become privy to this additional information and the source from where the information has been derived. The applicant as per the liberty given by the Court has filed further affidavit sworn on 19.6.2015 to state that he became suspicious after he obtained certified copy on 3.6.2015 of the objection filed by the Investigating Officer to oppose his bail application. Assuming that the applicant has now revealed the details as to when he became suspicious against the Investigating Officer, but has not disclosed the source of information and the authenticity of the figures about the date and number of telephone calls exchanged between the two. More so, inspite of specific stand taken by the respondents to counter that plea in the response filed by the Investigating Agency on affidavit sworn by Mr. Ashish Khare, AIG, STF dated 22.6.2015, the applicant has not filed any rejoinder. On the other hand, it is noticed from the affidavit of Mr. Ashish Khare, AIG, STF that he has made enquiries with the concerned telephone company to find out whether the applicant at any point of time obtained information regarding the call details between Investigating Officer, D. S. Baghel and Dr. Ajay Goenka. The informal response received by him from the officials of the telephone company was that no such information has been given to the applicant. Moreover, a formal request has been made by him to the concerned telephone company to give response in that behalf, which is still awaited.

36. Suffice it to observe that it is not possible to accept the vague and unsubstantiated plea taken by the applicant in his further application and additional affidavits. Notably, in the context of the apprehension of the applicant that the Investigating Officer, D. S. Baghel may not act fairly, the respondents volunteered, without prejudice, that the Head of STF Shri Sudhir Sahi, DGP can be asked to supervise the custodial interrogation session of the applicant by D. S. Baghel. However, the applicant for the reasons best known to him, has rejected this offer through counsel and instead has invited the decision on merits.

37. As noted earlier, the question of releasing the applicant on bail before the Investigating Agency subjects the applicant to custodial interrogation does not arise in the fact situation of the present case. The applicant must undergo custodial interrogation as is the opinion of Supreme Court in its order dated

30.3.2015 in S.L.P. (Cri) No.2480/2015, which was filed by the applicant. It is also not possible to countenance the argument of the applicant that there is no material whatsoever before the Investigating Agency to proceed against the applicant. Even that question has been considered and answered against the applicant in the same proceeding whilst rejecting prayer for anticipatory bail. On this count alone the prayer for regular bail even before the formal arrest of the applicant by the police in connection with Crime No.14/2013 and more so custodial interrogation, cannot be countenanced. For, granting bail to the applicant will inevitably result in circumventing the earlier opinion formed by the Courts for rejecting his anticipatory bail application.

38. We may now turn to the ground urged by the applicant that he is a small time businessman and not likely to influence the ongoing investigation, prosecution evidence or witnesses, in any manner. Although, this specific plea is taken in the original bail application filed on 1.6.2015, in Paragraph No.5.18. However, from the further affidavits filed by the applicant, in particular, the averments in the application I. A. No.11502/2015, it leaves no manner of doubt that the applicant is engaged in construction business in a big way as is evident from the volume of transaction entered by the company of which the applicant claims to be the Director. That speaks volumes about the status of the applicant in the society. Further, the applicant in his application has accepted the fact that he has had fair association with the persons staying in the colony like Nitin Mohindra and Bharat Mishra, who are also residents of Eden Garden Colony. They have been named as principal conspirators in the commission of offence pertaining to VYAPAM Scam Cases.

39. The Investigating Agency, therefore, wants to rule out the possibility of involvement of applicant as middleman for other candidates in conspiracy with Nitin Mohindra and Bharat Mishra. The statement made by the Investigating Agency on 24.3.2015, that it is fairly accepted by the State that, as of today (i.e. 24.3.2015), from the information gathered by the Investigating Officer the applicant was concerned only with Dr. Prakhar Singhal–one candidate. That cannot be the basis to ignore the perception of the Investigating Agency which may have changed with the further evidence collected during the ongoing investigation. That being a continuous process till the filing of the final police report (charge sheet). Moreover, the statement clearly mentions that it was made on the basis of information available as on that date i.e. 24.3.2015. In any case, these are issues for investigation and the Investigating Agency cannot be asked to confine the investigation in a particular direction, notwithstanding

the other material becomes available to it during the ongoing investigation.

40. Be that as it may, we are not at all impressed by the stand taken by the applicant that he is a small time businessman. Firstly because of his own revelation in the further affidavit and also because it has been stated on instructions by the counsel for the respondent/State that the applicant is none else but President of the Builders Association in Indore. The status of the applicant in society has been reinforced from the news item which appeared in local newspaper "Patrika Daily"on 25.6.2015. In that, though the applicant was ordered to be kept in judicial custody, he was having free time in Subhash Chandra Bose, Medical College, Jabalpur. He was allowed to freely interact with several visitors; and his family members were in attendance throughout in the hospital, but no Police Officer was found anywhere nearby the separate room allocated to the applicant. The circumstance in which the applicant was shifted to hospital from the Jail without the permission of this Court, much less, a formal intimation to the Court, is a mystery. That issue, indeed, is being enquired into in the suo moto proceedings W.P. No.6385/2014 (PIL for monitoring the investigation of crimes related to VYAPAM Examination Scam Cases). The Division Bench (of which one of us A. M. Khanwilkar, Chief Justice) is party has already directed enquiry into that episode on 26.6.2015. The relevant extract of the order reads thus :-

> "12.One intriguing situation has been noticed very recently when another Division Bench of this Court (to which one of us was party –A. M. Khanwilkar, Chief Justice) dealing with M.Cr.C.No.8811/2015 (Vipin Goel Vs. State). The said applicant was ordered to be taken in judicial custody vide order dated 18.6.2015, to be kept at Jabalpur until further decision in that application. The said applicant was taken in judicial custody on the same day, but the local newspaper "Patrika Daily" dated 25.06.2015 has mentioned that Vipin Goel was having free time in Subhash Chandra Bose Medical College, Jabalpur. Notably, the said application is still pending in this Court. However, the newspaper report mentions that many visitors interacted with the said Vipin Goel in the stated hospital including his family members who were in attendance throughout but no police officer was found anywhere nearby the said Vipin Goel, who was seen resting in company with his

family members in a separate room allocated to him. The circumstance in which the said Vipin Goel was moved to the hospital from Jabalpur jail without the permission of this Court will have to be enquired. Further, how the said applicant was allowed to mingle with visitors, will also have to be examined. Moreover, how many visitors and the particulars of those visitors who interacted with Vipin Goel during the time he was in hospital, will also have to be ascertained. We direct the Head of STF to inquire into these matters and submit a report in a sealed cover on the next date. If any Government Officials and in particular Police Officials are found to be involved, whether the State Government has initiated any action against such officials (Doctors, Jail Authorities/Police Authorities) be placed on record in these proceedings. Further, the Head of STF must immediately visit the said hospital today before proceeding to Bhopal to ascertain whether the lobbies in the hospital have been provided with CC TV Cameras and if yes, to obtain that record, for the relevant period, when the applicant was kept in that hospital and to inquire into all relevant matters.".

41. This, direction was required to be given because of the stand taken by the applicant when called upon to explain the circumstances in which he was admitted in the hospital. Instead, he argued that the explanation should be sought from the State and not the applicant.

42. We shall now revert to the Supreme Court decision relied by the counsel for the applicant in the case of *Shri Gurbaksh Singh Sibbia and others* (supra). Relying on the exposition in Paragraph No.19 of this decision, it was contended that arrest of the accused for recording his memorandum of statement under Section 27 of the Evidence Act is not a *sine qua non*. The Supreme Court while referring to the decision of *State of U.P. Vs. Deoman Upadhyay*[4] has noted that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed to have surrendered himself to the police. It is further noted in this decision that Section 46 of Cr.P.C. does not

4. (1961) 1 SCR 14

contemplate any formality before a person can be said to be taken in custody; submission to the custody by word or action by a person is sufficient. These observations, in our opinion, will be of no avail to the applicant in the fact situation of the present case since his prayer for grant of anticipatory bail has already been rejected by the Courts right upto the Supreme Court consequent to upholding the plea of the Investigating Agency that the applicant was not cooperating in the investigation of the subject crime and his custodial interrogation has become necessary.

43. Reliance was then placed on the decision of the Supreme Court in the case of *Padmakar Tukaram Bhavnagar* (supra), in support of the argument that the applicant was not an influential person and that the decision in the case of *CBI Vs. Anil Sharma*[5] has been explained. The dictum in Para No. 6 of *Anil Kumar Sharma's* case (supra) is about the efficacy of the custodial interrogation. As aforesaid, it is not open to the applicant to contend that he cannot be subjected to custodial interrogation. Further, for the finding already recorded about the status of the applicant in the society, the observations in the case of *Padmakar Tukaram Bhavnagare* (supra) are inapposite in the case of applicant. In that case, the Court proceeded on the finding that the appellant before it was aged, rustic and uninfluential person and did not have propensity of bringing pressure on the Investigating Agency. None of this would apply to the case of the applicant, as has been noticed earlier.

44. Reliance is then placed on the decision of the Supreme Court in the case of *Babubhai* (supra),in particular Paragraph 32,to contend that the investigation of a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on the part of the accused that investigation was unfair and carried out with an ulterior motive. In the present case, however, it has been found by the Courts whilst rejecting the prayer for grant of anticipatory bail, right upto the Supreme Court, that there was fair amount of material before the Investigating Agency to proceed against the applicant in Crime No.14/2013 and also to subject the applicant to custodial interrogation. Further, we have held that the apprehension of the applicant is vague and unsubstantiated. The applicant, as the proceeding has progressed, has improvised his plea. That is an argument of desperation. Having said this, we may note that the respondents have voluntarily offered, without prejudice, whilst refuting the allegations of the applicant against the

5. (1997) 7 SCC 187

Investigating Officer, that the Head of the STF will supervise the custodial interrogation session of the applicant by D. S. Baghel (I. O.). That would meet the ends of justice and enough to dispel even the slightest of apprehension of the applicant that the Investigating Officer, D.S.Baghel will forcibly extract incriminatory statements from the applicant during his custodial interrogation. Even though the applicant has rejected that option, as was conveyed to us through counsel; and inspite of rejecting the prayer for bail, we would still ask the Head of STF, Shri Sudhir Sahi, D.G.P., to supervise the custodial interrogation session of the applicant conducted by the Investigating Officer, D.S.Baghel in connection with Crime No.14/2013. This, however, will not be treated as a precedent. For, we are doing this in the facts of the present case only to assuage the misplaced apprehension of the applicant.

45. As a matter of fact, there is no need to show this indulgence, considering the fact that the investigation of crimes related to VYAPAM examination scam cases is being monitored by the High Court for which even a Special Investigation Team of experts (headed by former Judge of this Court and a former high ranking Police Official (IPS) and also a former high ranking official of NIC as IT expert) has been constituted to assist the High Court,who in turn, analyse the investigation reports on case to case basis. Indeed, the scope of monitoring of those cases also encompasses as to whether Investigating Agency is following the exposition of the Supreme Court while carrying on the investigation of the concerned crime. For, it is the duty of the investigating officer to conduct fair investigation and avoid any kind of mischief and harassment to any of the accused.

46. For the aforesaid reasons, the applicant's prayer for bail is rejected, at this stage. In view of the dismissal of this bail application, the interlocutory applications are also **disposed of.**

47. As the bail application is rejected, the applicant who has been directed to be taken in judicial custody at Jabalpur during the pendency of this application, the Investigating Agency (STF) is free to take custody of the applicant forthwith and to proceed with the investigation including custodial interrogation of the applicant. In connection with Crime No.14/2013, in accordance with law.

*Application rejected.*