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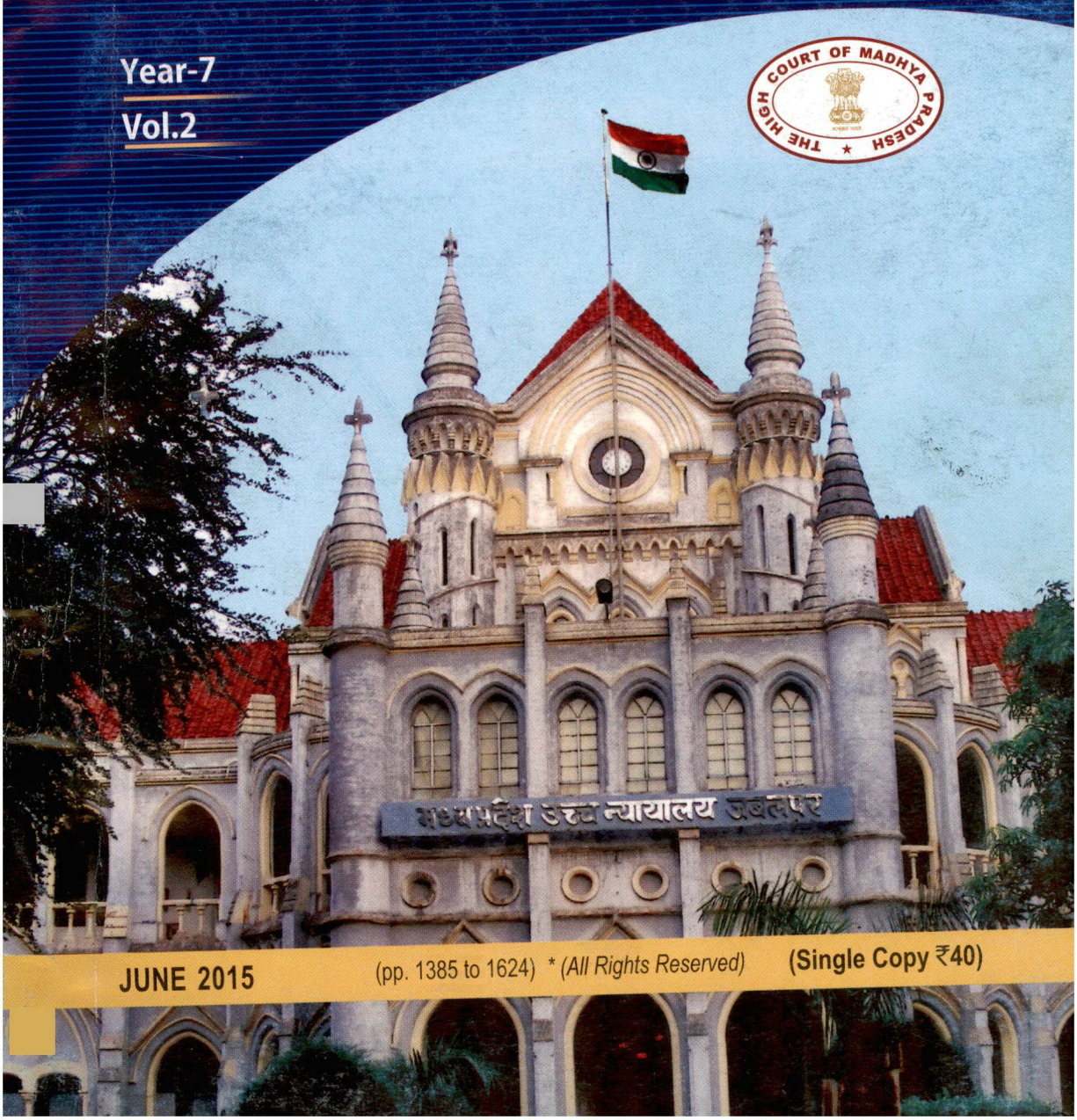

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of the officials of STF who are investigating PMT VYAPAM case shall be transferred or shall be entrusted with any other additional work – The entire material whether it is in favour of accused or against prosecution be made part of charge-sheet unless the confidentiality and privilege is claimed in respect of any confidential document – STF shall record the statement of every petitioner who is interested in getting their statements recorded – STF to keep close watch on print and electronic media. [Digvijay Singh Vs. State of M.P.] (DB)...1230

संविधान – अनुच्छेद 226 – सी.बी.आई. को जांच अंतरित की जाना – विशेष अन्वेषण दल गठित किया गया है जिसमें अध्यक्ष के रूप में उच्च न्यायालय के भूतपूर्व न्यायाधीश और भूतपूर्व आई.पी.एस. जो ए.डी.जी. पुलिस के पद से निम्नतर नहीं तथा भूतपूर्व आई.टी., व्यवसायी शामिल हैं – एस.आई.टी., पी.एम.टी. –व्या.प.मं. से संबंधित सभी आपराधिक प्रकरणों के अन्वेषण का पर्यवेक्षण करेगी – एस.आई.टी., एस.टी.एफ. के प्रमुख को अनुदेश जारी कर सकती है – एस.टी.एफ. को सौंपे गये अन्वेषण के संबंध में कोई जानकारी या अभ्यावेदन, एस.आई.टी. के अध्यक्ष को प्रस्तुत किया जायेगा, जो सम्यक् संविक्षा के पश्चात् आगे आवश्यक कार्यवाही करेंगे जिसमें एस.टी.एफ प्रमुख को अनुदेश जारी किये जाना शामिल है – एस.आई.टी. को राज्य द्वारा सभी लौजिस्टिक सहायता उपलब्ध कराई जायेगी – पी.एम.टी. व्या.प.मं. प्रकरण का अन्वेषण कर रहे एस.टी.एफ. के किसी भी कर्मचारी/अधिकारी को स्थानांतरित नहीं किया जायेगा या कोई अन्य अतिरिक्त कार्य नहीं सौंपा जायेगा – संपूर्ण सामग्री, भले ही अभियुक्त के पक्ष में है अथवा अभियोजन के विरूद्ध, आरोप–पत्र का हिस्सा बनाया जाये जब तक कि किसी गोपनीय दस्तावेज के संबंध में गोपनीयता एवं विशेषाधिकार का दावा नहीं किया जाता – एस.टी.एफ. प्रत्येक याची का कथन अभिलिखित करेगी जो अपना कथन अभिलिखित करने का इच्छुक है – एस.टी.एफ., मुद्रण और इलेक्ट्रानिक प्रसार माध्यमों पर कड़ी नजर रखेगी। (दिग्विजय सिंह वि. म.प्र. राज्य) **(DB)...1230**

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

Criminal Procedure Code, 1973 (2 of 1974), Section 302 – Permission to conduct prosecution – **There is no provision for bringing on record the legal representative of a party in a criminal proceeding but as the penal offence is committed by a person unless from the nature of it is personal to the complainant is an offence against the society and has to be prosecuted – Section 302 authorizes the Magistrate to permit any person to conduct the prosecution on behalf of the complainant. [Virendra Narayan Mishra Vs. Ashok] ...1586**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 302 – अभियोजन संचालित करने के लिये अनुमति – दाण्डिक कार्यवाही में किसी पक्षकार के विधिक प्रतिनिधि को अभिलेख पर लाये जाने के लिये कोई उपबंध नहीं है किंतु जैसा कि व्यक्ति द्वारा कारित किया गया दण्डात्मक अपराध, जब तक कि उसकी प्रकृति शिकायतकर्ता के लिये व्यक्तिगत न होकर, समाज के विरूद्ध अपराध है और उसे अभियोजित किया जाना चाहिये – धारा 302 मजिस्ट्रेट को किसी व्यक्ति को शिकायतकर्ता की ओर से अभियोजन संचालित करने हेतु अनुमति देने के लिये प्राधिकृत करती है। (वीरेन्द्र नारायण मिश्रा वि. अशोक) ...1586

Criminal Procedure Code, 1973 (2 of 1974), Section 313 – Accused Statement – **If circumstances appearing against the accused of a particular nature or otherwise, were not put to the appellant in his statement under Section 313, then they must be completely excluded from consideration, because accused did not have any chance to explain them. [Ashok Prajapati Vs. State of M.P.] (DB)...1352**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 313 – अभियुक्त का कथन – यदि अभियुक्त के विरूद्ध प्रकट हो रही किसी विशिष्ट स्वरूप या अन्यथा परिस्थितियों को अपीलार्थी के धारा 313 के अंतर्गत उसके कथन में नहीं पूछा गया तब उन्हें विचारण से संपूर्ण रूप से अपवर्जित किया जाना चाहिये क्योंकि, अभियुक्त को उन्हें स्पष्ट करने का कोई अवसर नहीं मिला था। (अशोक प्रजापति वि. म.प्र. राज्य) (DB)...1352

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

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Penal Code (45 of 1860), Section 457 – Lurking House Trespass **– Incident alleged to have taken place at 2 a.m. – First Informant lodged the report at 2:20 a.m. which could not have been lodged under the facts and circumstances of case – In F.I.R. it was mentioned that incident has been witnessed by various persons but no independent witness of the locality was examined – Injured witness could not identify the culprits – Prosecution witnesses could not attribute any motive for breaking open the doors of house – There is enemity between the first informant and appellants – In absence of any motive with appellants to do house breaking and as the evidence of witnesses is not reliable beyond doubt that they could see or they saw the appellants and in absence of any source of light in the street, none of the appellants can be convicted under Section 457 of I.P.C. – Appeal allowed. [Suresh Kumar Soni Vs. State of M.P.]** ...1531

दण्ड संहिता (1860 का 45), धारा 457 – प्रच्छन्न गृह–अतिचार – अभिकथित रूप से घटना रात के 2 बजे घटी – प्रथम सूचना देने वाले ने रात 2:20 बजे रिपोर्ट दर्ज की जोकि प्रकरण के तथ्य एवं परिस्थितियों में दर्ज नहीं की जा सकती थी – प्रथम सूचना रिपोर्ट में यह उल्लिखित किया गया था कि विभिन्न व्यक्ति घटना के साक्षी थे परंतु किसी स्थानीय स्वतंत्र साक्षी का परीक्षण नहीं किया गया – आहत साक्षी अपराधियों की पहचान नहीं कर सके – अभियोजन साक्षीगण मकान का दरवाजा तोड़कर खोलने के लिये कोई हेतु नहीं बता सके – प्रथम सूचना देने वाले और अपीलार्थीगण के बीच वैमनस्यता है – गृह भेदन करने के लिये अपीलार्थीगण के पास किसी हेतु की अनुपस्थिति और चूंकि साक्षीगण का साक्ष्य कि उन्होंने अपीलार्थीगण को देखा था या देख सकते थे, संदेह से परे विश्वसनीय नहीं तथा मार्ग पर रोशनी के किसी स्त्रोत की अनुपस्थिति में किसी भी अपीलार्थी को भा.दं. सं. की धारा 457 के अंतर्गत दोषसिद्ध नहीं किया जा सकता – अपील मंजूर। (सुरेश कुमार सोनी वि. म.प्र. राज्य) ...1531

Penal Code (45 of 1860), Section 459 – Causing grievous hurt whilst committing lurking house trespass **– Assault of causing grievous hurt or attempt to cause death should be done in the course of commission of offence of lurking house trespass or house breaking – If assault has been caused after entering in the house, then provision of Section 459 would not be applicable – As injured were assaulted after entering in the house, no offence under Section 459 of I.P.C. is made out. [Suresh Kumar Soni Vs. State of M.P.]** ...1531

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स्टाम्प अधिनियम (1899 का 2), धारा 48बी – 5 वर्ष की परिसीमा – करार 100 रू. के स्टाम्प पर 30/12/2002 को निष्पादित – स्टाम्प शुल्क से बचने का अभिकथन करते हुए 12/9/2008 को शिकायत प्रस्तुत की गई – स्टाम्प शुल्क कलेक्टर ने रू. 60,529/– शुल्क एवं रू. 20,000/– की शास्ति अधिरोपित की – राजस्व मंडल ने स्टाम्प शुल्क कलेक्टर के आदेश की पुष्टि की – करार 30/12/2002 को निष्पादित किया गया जबकि शिकायत 12/09/2008 को की गई थी – शिकायत समय वर्जित थी जिस पर राजस्व मंडल द्वारा ध्यान नहीं दिया गया – राजस्व मंडल को मामला प्रतिप्रेषित किया गया। (बैंक ऑफ राजस्थान लि. वि. म.प्र. राज्य) ...*16

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उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का 14), धारा 2(1) एवं पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 85 – पंचायत कर्मी – नियुक्ति – ग्राम पंचायत का संकल्प – कम गुणवान अभ्यर्थी को नियुक्त किया गया – कलेक्टर द्वारा नियुक्ति अपास्त – अपील में आयुक्त द्वारा अभिपुष्ट – राज्य मंत्री ने पुनरीक्षण में ग्राम पंचायत के संकल्प को मान्य ठहराया – अभिनिर्धारित – कलेक्टर एवं आयुक्त के आदेश प्रक्रियात्मक रूप से त्रुटिपूर्ण – मान्य ठहराया गया, क्योंकि न्यायसंगत निर्णय की ओर ले जाता है – अपील खारिज – एकल न्यायाधिपति के आदेश की पुष्टि की गई। (ओमप्रकाश मीना वि. म.प्र. राज्य) (DB)...1142

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

JOURNAL SECTION

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

THE HIGH COURT OF MADHYA PRADESH (CONDITIONS OF PRACTICE) RULES, 2012.

[Published in Madhya Pradesh Gazette, (Extra-ordinary) dated 7 June, 2012, page no. 531 to 532(5)]

High Court of Madhya Pradesh, Jabalpur

Jabalpur, dated 4 /14 May 2012

ANNEXURE–A

PREAMBLE

No.C-15.–In exercise of the powers conferred by Section 34(1) of the Advocates Act, 1961 (Act No. 25 of 1961), the High Court of Madhya Pradesh hereby makes following Rules laying down the conditions subject to which an advocate shall be permitted to practice in the High Court and the Courts sub-ordinate thereto.

1. **Nomenclature.**–These rules shall be called "The High Court of Madhya Pradesh (Conditions of Practice) Rules, 2012".

2. **Commencement.**– These rules shall come into force on the date on which they are published in the Official Gazette.

3. **Definitions.**–In these rules unless there is anything repugnant in the subject or context:–

(1) "**Advocate**" shall include a partnership or a firm of advocates.

(2) Other words and phrases shall respectively carry the same meaning as assigned to them under the Advocates Act, 1961, the Code of Civil Procedure, 1908 or the High Court of Madhya Pradesh Rules, 2008.

4. Vakalatnama or Memorandum of Appearance.–Save as otherwise provided for in any law for the time being in force, no advocate shall be entitled to appear, act or plead for any person in any Court in a:–

(1) civil case, unless the advocate files an appointment in writing in either form I-A or I-B appended to these Rules, called Vakalatnama, signed by such person, his recognized agent or by some other person, duly authorized by or under a power of attorney to make such appointment and signed by the advocate, signifying acceptance thereof; except with the leave of the Court granted on an application made for the purpose along with a memorandum of appearance, or

(2) criminal case, unless the advocate files a vakalatnama or memorandum of appearance in the form prescribed by the High Court (Form No. 2 of the Appendix to the High Court of Madhya Pradesh Rules, 2008):

Provided that notwithstanding anything in clauses (1) above, an advocate appointed for representing the Central Government or the Government of Madhya Pradesh may appear, act and plead on the strength of a memorandum of appearance in form No. 2 of the High Court of Madhya Pradesh Rules, 2008, signed by himself:

Provided that where an advocate has already filed a Vakalatnama in a case and a party or the advocate engages another advocate to appear in that case merely for the purposes of pleading, it shall be sufficient for such advocate to file a memorandum of

appearance. However, such advocate may make a prayer of adjournment even without filing a memorandum of appearance:

Provided further that an advocate can act, appear and plead on behalf of a party in all such matters, as are mentioned in clause (3) of rule 4 of order III of the Code of Civil Procedure, 1908 (Madhya Pradesh amendment dated 18-10-1968) provided that he had filed vakalatnama for such party in the proceeding out of which such matter has arisen. However, in such a case, he shall file a memo of appearance in Form No. 1 of the Appendix to the High Court of Madhya Pradesh Rules, 2008, expressing that he had filed vakalatnama at any stage of the case:

Provided further that nothing herein contained shall apply to an advocate who has been requested by the court to assist the court as *amicus curie* in any case or proceeding:

Provided further that where an advocate has been appointed by the High Court Legal Services Committee or District Legal Services Authority to defend an accused person in a criminal case and the accused desires to replace him with an advocate of his own choice, he shall file a vakalatnama duly executed in favour of such advocate or a memorandum of appearance in lieu of Vakalatnama, if so permitted by the Court.

Explanation.–(1) A separate appointment or a memorandum of appearance shall be filed in each of the several connected proceedings, notwithstanding that the same advocate is retained for the party in all the connected proceedings.

(2) In this rule terms "Civil Case and Criminal Case" for the purpose of the High Court, shall respectively have the same meaning as has been assigned to them in rule 4(2) and (3) of the High Court of Madhya Pradesh Rules, 2008.

5. **Outside Advocate not to Appear without a Local Advocate.**– An advocate who is not ordinarily practicing in a particular court shall not appear, act or plead in such Court unless he files a Vakalatnama or a memo of appearance as the case may be, along with a local advocate.

6. **Joint Vakalatnama or Memorandum of Appearance.**– Where in a case, a party is represented by more than one advocate; they may file a joint vakalatnama or memo of appearance, as the case may be.

7. **Address of Advocate on Vakalatnama shall be the Address for the Purpose of Service.**–The address, furnished by an advocate at the time of acceptance of his appointment in accordance with rule 5(3) of chapter VIII of the High Court of Madhya Pradesh Rules, 2008, shall be the address for service within the meaning of rule 5 of Order III of the Code of Civil Procedure, 1908:

8. **Extent of Vakalatnama and Memorandum of Appearance in Civil Cases.**– (1) The vakalatnama of an advocate in civil cases, unless otherwise restricted, shall be deemed to be in force to the extent provided in that behalf by clause (3) of rule 4 of order III of the Code of Civil Procedure, 1908, (Madhya Pradesh amendment dated 18-10-1968).

(2) In civil cases, the memorandum of appearance of an advocate shall be deemed to be in force:–

(a) under rule 8 of chapter VIII of the High Court of Madhya Pradesh Rules, 2008, read with clause (3) of rule 4 of order III of the Code of Civil Procedure, 1908, (Madhya Pradesh amendment dated 18-10-1968); till the proceeding in which it is filed, is over and

(b) under order 3 rule 4(5) of the Code of Civil Procedure, 1908, till the event for which the advocate was authorized, is over.

(3) Without prejudice to the generality of the foregoing sub-rule (1) and (2) above, a Vakalatnama filed in a writ petition from which a writ appeal lies, shall continue in force till conclusion of proceedings of the writ appeal unless the Vakalatnama is replaced by a fresh Vakalatnama in favour of another advocate.

9. **Extent of Vakalatnama in Criminal Cases.**–The

vakalatnama of an advocate, in Criminal Cases, unless otherwise restricted, shall be deemed to be in force in following proceedings as well:–

(1) every inquiry, trial or proceeding before a Criminal Court whether instituted on a police report or otherwise,

(2) an application for bail or reduction, enhancement of amount or cancellation of bail in the case in the same Court where such Vakalatnama or memorandum of appearance was filed;

(3) an application for transfer of the case from one Court to another;

(4) an application for leave to appeal against an order of acquittal in a case;

(5) an appeal or petition for revision against any order or sentence passed in a case;

(6) a reference arising out of a case;

(7) An application to correct a clerical or arithmetical error in a judgment or final order.

(8) An application for making concurrent, the sentences awarded in the case or in an appeal, reference or revision arising out of the case.

(9) an application relating to or incidental to or arising in or out of any appeal, reference or revision arising in or out of the case,

(10) an application or act for obtaining copies of documents or for the return of articles or documents produced or filed in the case or in any of the proceedings;

(11) an application or act for withdrawal, refund or payment;

(12) an application for the custody of or return, restitution or restoration of the property forfeited or confiscated in the case or an appeal, reference or revision arising

from the case as per the final order;

(13) an application for expunging remarks or observations on the record of or made in the judgment in the case or any appeal, reference, revision or review arising out of the case, and

(14) an application or proceeding for sanctioning prosecution under Chapter XIV of the Code of Criminal Procedure, 1973, or any appeal or revision arising from and out of any order passed in such an application or proceeding:

Provided that where the venue of the case or the proceedings is shifted from one Court to another (subordinate or otherwise) except by way of transfer within the same sessions division, the advocate filing the Vakalatnama referred to in sub-rules (1) and (2) above in the former court shall not be bound to appear act or plead in the later Court unless he files or has already filed a memorandum signed by him in the later court that he has instructions from his client to appear, act and plead in that Court.

10. **Cessation of Vakalatnama or Memo of Appearance.**–The vakalatnama or memo of appearance, as the case may be, of an advocate, unless otherwise restricted, shall be deemed to be in force until.–

(1) determined with the leave of the Court, on an application signed by the party or the advocate, as the case may be, and filed in Court or

(2) the party or the advocate dies or

(3) the advocate is suspended or disbarred or

(4) all proceedings in that civil or criminal case have ended so far as regards the party.

11. **Advocates not to appear, Act or Plead in Certain Circumstances.**–(1) An advocate who has, at any time, advised in connection with subject matter of a case, civil or criminal; or has drawn pleadings, or

acted for a party shall not act, appear or plead for the opposite party, in that case:

Provided that on receiving such information, the concerned advocate may withdraw from the case, failing which, on proof of such conduct, the Court may not allow the advocate to appear in the case.

(2) An advocate who is not supposed to appear before a Judge for any reason, shall not–

(a) file a Vakalatnama or memorandum of appearance or

(b) appear act or plead with or without a Vakalatnama,

in a case in which an advocate is already appearing for the party and

(i) which is known to be likely to be listed,

(ii) hearing therein is about to commence or

(iii) has already commenced

-before such Judge.

12. **Frivolous, vexatious or motivated application or prayer for recusal/transfer.**–No advocate shall make a frivolous, vexatious or motivated application or prayer for –

(1) recusal made to a bench on judicial side or

(2) transfer of a case or a class of cases from a bench to the Chief Justice on administrative side.

13. **Acceptance of Appointment by a Firm or a Partnership of Advocates.**–(1) The acceptance of a Vakalatnama or memo of appearance, as the case may be, on behalf of a firm or partnership of advocates shall be indicated by a partner affixing his own signature and specifying that it is in his capacity as a partner of that firm or partnership of advocates.

(2) No such firm or partnership shall be entitled to appear, act or plead in any Court unless at least one of the partners thereof is entitled to appear, act or plead in such Court in conformity with rule 5 above

(3) The vakalatnama of a firm shall not be filed in any Court unless

accompanied by a separate sheet certified by the partner of the firm who has filed the Vakalatnama and containing the names and such other particulars as are required in a Vakalatnama in respect of all partners of the firm.

(4) In every case where a partner of firm of advocates signs any document or writing on behalf of the firm he shall do so in the name of the partnership and shall authenticate the same by affixing his own signatures as partner.

(5) Neither the firm of advocates nor any partner thereof shall advise a party or appear, act or plead on behalf of a party in any matter or proceeding where the opposite party is represented by any other partner of the firm or by the firm itself.

14. **Advocate not to file Vakalatnama or Memorandum of Appearance in a Case in which an Advocate is already on Record.**– (1) No advocate shall be permitted to file a vakalatnama or memorandum of appearance in any proceeding in which another advocate is already on record of the case for the same party save with the consent of the former advocate already on record of the case or with the leave of the Court unless the former advocate has ceased to practice or has by reason of infirmity of mind or body or otherwise become unable to continue to act.

(2) The former advocate on record of the case may signify his consent for allowing the latter advocate to file a vakalatnama or memorandum of appearance for the same party, in the margin of the vakalatnama or memorandum of appearance.

(3) Where the former advocate refuses or neglects to accord such consent, the party or the latter advocate may file an application, for leave of the Court concerned to replace the former advocate and to take the vakalatnama or memorandum of appearance, as the case may be, on record.

(4) Such an application, where filed, shall be placed before the Court concerned, which may, in its discretion, allow or reject the same.

15. **Disbarred or Suspended Advocate not to Act as a Recognized Agent.**–No advocate who has been disbarred or suspended or whose name has been struck off the role of advocates, shall be permitted to act, as a recognized agent of any party within the meaning of order III of the Code of Civil Procedure, 1908.

16. **Advocate Guilty of Criminal Contempt of Court not to**

Appear, Act or Plead in a Court.–(1) No advocate who has been found guilty of criminal contempt of the High Court of Madhya Pradesh or of any Court subordinate thereto shall appear, act, or plead in the High Court and any Court of District where the contempt was committed:–

(a) if the contempt is of a nature which is capable of being purged, unless he has purged himself of contempt.

(b) if the contempt is of a nature which is not capable of being purged, for a period of 6 months from the date on which he is convicted of the contempt.

(2) An order, holding that an advocate–

(a) is guilty of contempt of Court; or

(b) has purged himself of the contempt;

-shall be placed before the Chief Justice for its circulation amongst the Judges of the State and the State Bar Council.

17. **Repeal and savings.**–(1) On coming into force of the Rules, the Rules framed by the High Court of Madhya Pradesh under section 34(1) of the Advocates Act, 1961, and published in M.P. Rajpatra, Pt. 4(ga), dated 23rd August, 1968, P. 69 by Notfn. No. 1546-III-I-5-57 Ch. 18 dated 28th February, 1967; shall stand repealed.

(2) Notwithstanding that these Rule have come into force and repeal under sub-rule (1) has taken effect–

(a) anything duly done or suffered; or

(b) any right, obligation or liability; accrued, imposed or incurred; or any proceedings taken or to be taken, in respect of such right, obligation or liability;

-under the repealed Rules, before such enforcement, shall not be affected.

18. **Removal of Difficulties.**–If any difficulty arises in giving effect to the provisions of the Rules, the Chief Justice may, by notification, make such provisions, as may appear necessary and expedient for removing such difficulty.

APPENDIX 1-A

FORMAT OF VAKALATNAMA

[Rule 4(1) of the Rules framed under the Advocates Act, 1961]

Case/Proceedings No. .....

..... Plaintiff/Appellant/Claimant
/Petitioner/Applicant

Versus

..... Defendant/Respondent/
Non-applicant

I/ We the *Plaintiff/ Appellant/ Claimant/ Petitioner/ Appellant or Defendant / Respondent/ Non-applicant named below do hereby appoint, engage and authorize advocate (s) named below to appear, act and plead in aforesaid case/ proceedings, which shall include applications for restoration, setting aside of ex-parte orders, corrections, modifications, review and recall of orders passed in these proceedings, in this Court or in any other Court in which the same may be tried/ heard/ proceeded with and also in the appellate, revisional or executing Court in respect of proceedings arising from this case/ proceedings as per agreed terms and conditions and authorize him/ them to sign and file pleadings, appeals, cross objections, petitions, applications, affidavits, or other documents as may be deemed necessary or proper for the prosecution/ defence of the said case in all its stages and also agree to ratify and confirm acts done by him/ them as if done by me/us:

In witness whereof I/ we do hereunto set my/ our hand to these presents, the contents of which have been duly understood by me/us, this ..... day of ..... 201.....

Particulars (in block letters) of each Party Executing Vakalatnama

Name & Father's/ Husband's Name (1)	Registered Address (2)	E-Mail Address (if any) (3)	Telephone Number (if any) (4)	Status in the Case (5)	Full Signature/ **Thumb Impression (6)
(1)					
(2)					
(3)					
(4)					
(5)					

Accepted:

Particulars (in block letters) of each Party Executing Vakalatnama

Full name & Enrollment No. in State Bar Council (1)	Address for Services (2)	E-Mail Address (if any) (3)	Telephone Number (if any) (4)	Full Signature (5)
(1)				
(2)				
(3)				
(4)				
(5)				

* Score out whichever is not applicable

** The thumb impression shall be attested by a literate person giving above particulars.

AMENDMENTS IN THE HIGH COURT OF MADHYA PRADESH RULES, 2008

[Published in Madhya Pradesh Gazette, (Extra-ordinary) dated 7 June, 2012, page no. 532 (7) to 532 (10)]

ANNEXURE–B

In the High Court of Madhya Pradesh Rules, 2008, the following amendments are made:–

(1) Rule 2 (7) (d) (2) of chapter IV is deleted.

(2) In rule 2(7) (h) of chapter IV, between words "bodies;" & "and" following is inserted:–

"where the value of tender/contract is Rs. 50,00,000/ - or above;"

(3) Rule 2(7) (f) of chapter IV is substituted by the following:–

"(f) in the nature of habeas corpus where a person is in detention by or under the orders of the State or Central Government or their officers:"

(4) In rule 45 (2) of Chapter X; after the words "impugned judgment or order" the following is added:–

"and that of the judgment or order of the Court of first instance where the impugned judgment or order was passed in an appeal or a revision. Provided that the Court may dispense with the requirement of filing certified copy of the order of the Court of first instance at the stage of admission if a true copy thereof is filed on affidavit or a copy thereof is certified as true by the Counsel."

(5) (a) In rule 6(1) of Chapter XVIII, words and figures "6,7 and 9" are substituted by figure and letter "1(a)" and letter "I" is substituted by letter "II".

(b) in rule 7(1) of chapter XVIII, word "additional" is deleted.

(c) In rule 7 (3) (b) of Chapter XVIII, word "will" is substituted by word "shall" and words "ordinary rate" are substituted by words and figures "prescribed respectively under rule 14 of chapter 18"

(6) In rule 25 of chapter X,–

(a) after words "as the case may be" following words and figures are added:–

"The advocate who has been so served shall acknowledge receipt of the same by endorsement on the original petition, writing his full name below the signature. Such acknowledgement together with a declaration in following format shall be filed with the petition.

DECLARATION

(Under rule 25 chapter X)

The copies, as required by rule 25 of chapter X of the High Court of Madhya Pradesh Rules, 2008, have been served upon ..... (the person upon whom the copies have been served) at ..... (time) on ..... (date) in .....(place).

Advocate for the Petitioner

(b) Between words "such acknowledgement" and "name of the advocate" following is inserted: "and declaration".

(c) After words " published in the cause list.", following new paragraph is added:–

"No petition shall be accepted in the Filing Centre without such acknowledgement and declaration

except where the counsel for a party certifies under his signature that the counsel for the opposite party has refused to sign the acknowledgment."

(7) After sub-rule 2 of rule 30 of Chapter X, following sub-rule 3 are inserted:–

"(3) Provisions of rule 25 shall apply to the writ petitions under article 227 (1) of the Constitution of India also."

(8) In rule 11 of chapter II, between words "any proceeding" and "shall be registered" following words are inserted: "or an application for enlargement of time".

(9) In rule 5(3) of Chapter XII,–(a) word "four" is deleted.

(b) Clauses (a), (b), (c), (d) and (e) are substituted respectively by the following clauses:–

(a) Cases in which personal appearance has been ordered by the Court for that date;

(b) Cases in which that date has been fixed specifically by a judicial order of the Court other than on a Mention slip;

(c) Not reached cases;

(d) Fresh matters (with or without application for interim relief); and

(e) Interim matters (including consideration of interlocutory applications);

(c) after clause (e) the following clauses are added:–

(f) Miscellaneous matters (such as default matters and matters listed for further orders);

(g) After notice matters;

(d) In the paragraph after clause (e) word "However" is substituted by words "Provided that" and words" "Not reached" cases shall be included at the top under respective sub heads." are deleted.

(e) At the end the following proviso is added:–

"Provided further that "Final hearing at motion stage" matters shall be taken up only on Tuesdays and Thursdays before regular final hearing matters."

(10) In rule 24 of chapter X,–(a) after words " the name" & " address of" word "and" is deleted.

(b) after words " the name" & " address and" word "office" is inserted.

(c) after words " address name" & " of the advocate" words "phone numbers" are inserted.

11 In rule 34 of chapter X, at the end the following proviso is added:–

" Provided that if it is certified by the counsel for the appellant in writing in the memo of appeal that no reliance would be placed on all or any of the aforesaid documents, the writ appeal may be accepted by the office without inclusion of those documents in the paper book referred to above, however, if it appears during the hearing that reference to all or any of the documents referred above but not included in the paper book is necessary, the Court may direct the appellant to comply with the requirement of the aforesaid rule."

(12) Following new codes are added to the Subject Category Code.

New Subject	Service relating to		
(1)	Central Govt. (2)	State Govt. (3)	Other Authorities (4)
Cancellation of Caste Certificate	17053	17153	17253
Charge	17054	17154	17254
Medical Reimbursement	17055	17155	17255
Joining	17056	17156	17256
Posting	17057	17157	17257
Against the Order of Armed Forces Tribunal	17058	-	-

New Subject (1)	Subject category codes (2)
Right to Information Act, 2005	20300
Jan Shiksha Adhiniyam, 2005	20400

Old Main Subject (1)	New Category to be added (2)	New Category Code (3)
Family matters	Domestic Violence Act	13227
Panchayat	MNREGA	15524
Education	Declaration of Result	12731
	Issuance of Mark Sheet	12732
	Admission to PG Course of In-service candidates	12733

SUBHASH KAKADE
Registrar General,
High Court of Madhya Pradesh,
Jabalpur (M.P.).
28-4-2012.

NOTES OF CASES SECTION

Short Note

**(16)*

Before Mr. Justice N.K. Mody

W.P. No. 8708/2013 (Indore) decided on 31 July, 2013

BANK OF RAJASTHAN LTD. ...Petitioner

Vs.

STATE OF M.P. & anr. ...Respondents

***Stamp Act (2 of 1899), Section 48B - Limitation of 5 years* - Agreement executed on 30/12/2002 on stamp of Rs. 100/- - Complaint filed on 12/09/2008 alleging evasion of stamp duty - Collector of Stamps imposed duty of Rs. 60,529/- and penalty of Rs. 20,000/- - Board of Revenue upheld the order of Collector Stamps - Agreement was executed on 30/12/2002 whereas complaint was made on 12/09/2008 - Complaint was barred by time which was not taken note of by Board of Revenue - Matter remitted back to BOR.**

स्टाम्प अधिनियम (1899 का 2), धारा 48बी – 5 वर्ष की परिसीमा – करार 100 रू. के स्टाम्प पर 30/12/2002 को निष्पादित – स्टाम्प शुल्क से बचने का अभिकथन करते हुए 12/9/2008 को शिकायत प्रस्तुत की गई – स्टाम्प शुल्क कलेक्टर ने रू. 60,529/– शुल्क एवं रू. 20,000/– की शास्ति अधिरोपित की – राजस्व मंडल ने स्टाम्प शुल्क कलेक्टर के आदेश की पुष्टि की – करार 30/12/2002 को निष्पादित किया गया जबकि शिकायत 12/09/2008 को की गई थी – शिकायत समय वर्जित थी जिस पर राजस्व मंडल द्वारा ध्यान नहीं दिया गया – राजस्व मंडल को मामला प्रतिप्रेषित किया गया।

Rishi Tiwari, for the petitioner.

Sudarshan Joshi, P.L. for the respondent no.1/State.

Short Note

**(17)*

Before Mr. Justice N.K. Mody

W.P. No. 9546/2012 (Indore) decided on 3 July, 2013

OM AADESH ENTERPRISES ...Petitioner

Vs.

INDORE MUNICIPAL CORPORATION & ors. ...Respondents

***Constitution - Article 226 - Contract - Blacklisting and forfeiture of earnest money* - Tender of petitioner was found lowest and work order was issued - Petitioner thereafter expressed his inability to execute work due to hike in price - Mayor-in-council passed resolution**

and forfeited the earnest money and also black-listed the petitioner - Held - Show cause notice of 30 days as per clause 3 of terms and conditions of tender is mandatory - No show cause notice was issued before black listing the petitioner - Order of black listing quashed.

संविधान – अनुच्छेद 226 – संविदा – काली सूची में नाम डालना और अग्रिम धन का समपहरण – याची की निविदा न्यूनतम पाई गई और उसे कार्यादेश जारी किया गया – तत्पश्चात् याची ने कीमतों में बढ़ोत्तरी के कारण कार्य निष्पादित करने में अपनी असमर्थता व्यक्त की – महापौर ने संकल्प पारित किया और अग्रिम धन का समपहरण किया और साथ ही याची को काली सूची में डाल दिया – अभिनिर्धारित – निविदा के खंड 3 के निबंधन और शर्तों के अनुसार 30 दिनों का कारण बताओ नोटिस आज्ञापक है – याची को काली सूची में डालने से पूर्व कोई कारण बताओ नोटिस जारी नहीं किया गया – काली सूची में डालने का आदेश अभिखंडित।

Pramod Nair, for the petitioner.
Satish Tomar, for the respondents.

Short Note
****(18)***
Before Mr. Justice Prakash Shrivastava
W.P. No. 5357/2014 (Indore) decided on 17 November, 2014

PATIDAR STONE CRUSHER (M/S.) ...Petitioner
Vs.
M.P. VIDYUT VITARAN COMPANY LTD. & ors. ...Respondents

A. Constitution - Article 226 and Electricity Act (36 of 2003), Section 135 - Theft of electricity **- Whether the issue relating to theft of electricity can be assailed in writ jurisdiction - Held - The writ court has no jurisdiction to pass any writ and the remedy lies somewhere else.**

क. संविधान – अनुच्छेद 226 एवं विद्युत अधिनियम (2003 का 36), धारा 135 – विद्युत की चोरी – क्या विद्युत की चोरी से संबंधित विवाद्यक को रिट अधिकारिता में चुनौती दी जा सकती है – अभिनिर्धारित – रिट न्यायालय को कोई रिट पारित करने की अधिकारिता नहीं और उपचार कहीं और उपलब्ध है।

B. Electricity Act (36 of 2003), Section 135 - Theft of electricity **- Petition for restoration of electricity connection - Amount not deposited as per final assessment order - Disconnection of electricity supply - Held - If Petitioner deposits requisite sum in terms of third proviso to Section 135(1A) of the Act, electricity supply be restored - Writ Petition dismissed.**

ख. विद्युत अधिनियम (2003 का 36), धारा 135 – विद्युत की चोरी – विद्युत संयोजन के पुनः स्थापन के लिये याचिका – अंतिम निर्धारण आदेश के अनुसार रकम जमा नहीं की गई – विद्युत आपूर्ति का विच्छेदन – अभिनिर्धारित – यदि याची अधिनियम की धारा 135(1ए) के तृतीय परंतुक की शर्तों के अनुसार अपेक्षित रकम जमा करता है, विद्युत आपूर्ति पुनः स्थापित की जावे – रिट याचिका खारिज।

Cases referred :

(2006) 8 SCC 629, W.P. No: 972/2001 (Indore) decided on 18 May, 2001.

S.M. Bangur, for the petitioner.
D.S. Panwar, for the respondents.

Short Note
****(19) (DB)***
Before Mr. Justice Rajendra Menon & Mr. Justice S.K. Gangele
W.P. No. 3848/2012 (Jabalpur) decided on 22 January, 2015

UNION BANK OF INDIA ...Petitioner
Vs.
RAJENDRA WADHWA & ors. ...Respondents

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002), Rule 8(2) - Publication of notice in two news papers within seven days **- Possession notice is to be published in leading newspapers not later than seven days from the date of taking possession - Use of word "shall" makes the provision mandatory - Tribunal rightly set aside the Sale as the notice was not published within seven days.**

वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन अधिनियम (2002 का 54), नियम 8(2) – सात दिनों के भीतर दो समाचार–पत्रों में नोटिस का प्रकाशन – प्रमुख समाचार–पत्रों में कब्जे के नोटिस का प्रकाशन कब्जा लेने की तिथि से सात दिनों के उपरांत नहीं किया जाना चाहिये – शब्द "किया जायेगा" का प्रयोग उपबंध को आज्ञापक बनाता है – अधिकरण ने विक्रय को उचित रूप से अपास्त किया क्योंकि नोटिस को सात दिनों के भीतर प्रकाशित नहीं किया गया था।

The order of the Court was delivered by : S.K. GANGELE, J.

Cases referred :

(2009) 8 SCC 366, (2007) 10 SCC 448, AIR 2009 Orissa 147, AIR 1961 SC 1480, AIR 1961 SC 751.

Abhijeet C. Thakur, for the petitioner.
Atul Choudhary, for the respondent nos. 1 to 3.
N.K Salunke, for the intervener.

Short Note
****(20)***
Before Mr. Justice Sanjay Yadav
Civil Rev. No. 430/2009 (Jabalpur) decided on 26 March, 2014

VIDYA BAI (SMT.) ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Land Acquisition Act (1 of 1894), Sections 12 & 18 - Limitation **- Notice u/s 12(2) of Act was served without accompanying the copy of award - Applicant filed application for obtaining certified copy of award and after receiving the same, application for reference u/s 18 was filed within a period of six months - Held - Application for reference was filed within six months from the date of receipt of copy of award and also there is no proof that copy of award was sent along with notice u/s 12(2) - Reference Court committed manifest error in rejecting the reference on the ground of limitation - Matter remitted back for adjudication on merit.**

भूमि अर्जन अधिनियम (1894 का 1), धाराऐं 12 एवं 18 – परिसीमा – अधिनियम की धारा 12(2) के अंतर्गत नोटिस को अवार्ड की प्रति संलग्न किये बिना तामील किया गया – आवेदक ने प्रमाणित प्रति अभिप्राप्त करने हेतु आवेदन प्रस्तुत किया और उसे प्राप्त करने के पश्चात् 6 माह की अवधि के भीतर धारा 18 के अंतर्गत निर्देश हेतु आवेदन प्रस्तुत किया गया – अभिनिर्धारित – अवार्ड की प्रति प्राप्त करने की तिथि से 6 माह के भीतर निर्देश हेतु आवेदन प्रस्तुत किया गया था और इसका भी प्रमाण नहीं कि अवार्ड की प्रति को धारा 12(2) के अंतर्गत नोटिस के साथ प्रेषित किया गया था – निर्देश न्यायालय ने परिसीमा के आधार पर निर्देश अस्वीकार करने में प्रकट रूप से त्रुटि कारित की – गुणदोषों पर न्यायनिर्णयन हेतु मामला प्रतिप्रेषित किया गया।

Cases referred :

(2010) 3 SCC 545, (2012) 5 SCC 250.

Sameer Seth, for the applicant.
S.S. Bisen, G.A. for the non-applicant nos. 1 & 2.

I.L.R. [2015] M.P., 1385
SUPREME COURT OF INDIA
Before Mr. Justice Sudhanshu Jyoti Mukhopadhaya &
Mr. Justice S.A. Bobde
Cr.A. No. 318/2011 decided on 29 October, 2014

SRIKANT ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. ***Penal Code (45 of 1860), Section 304-B - Dowry death - Basic essentials*** **- The death of a woman was caused by any burn or bodily injury or otherwise than under normal circumstances; such death has occurred within 7 years of her marriage; and soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband. (Para 11)**

क. दण्ड संहिता (1860 का 45), धारा 304–बी – दहेज मृत्यु – मौलिक अनिवार्यताऐं – महिला की मृत्यु किसी जलने से या शारीरिक चोट से या सामान्य परिस्थितियों के अन्यथा से कारित हुई हो; उक्त मृत्यु उसके विवाह से 7 वर्षों के भीतर हुई हो; और उसकी मृत्यु से तुरंत पहले उसके साथ उसके पति या उसके पति के किसी रिश्तेदार द्वारा क्रूरता का व्यवहार किया गया या उत्पीड़ित किया गया था।

B. ***Evidence Act (1 of 1872), Section 113-B - Presumption to dowry death - Ingredients to be established*** **- (i) Accused had committed the dowry death of a woman; (ii) The woman was subjected to cruelty or harassment by her husband or his relatives; (iii) Such cruelty or harassment was for or in connection with any demand of dowry and (iv) The woman was subjected to cruelty or harassment soon before her death. (Para 13)**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 113–बी – दहेज मृत्यु की उपधारणा – स्थापित करने के लिये घटक – (i) अभियुक्त ने महिला की दहेज मृत्यु कारित की; (ii) महिला के साथ पति या उसके रिश्तेदारों द्वारा क्रूरता का व्यवहार किया गया या उत्पीड़ित किया गया था; (iii) वह क्रूरता या उत्पीड़न दहेज की किसी मांग से संबंधित थी और (iv) महिला के साथ क्रूरता का व्यवहार या उत्पीड़न उसकी मृत्यु के तुरंत पहले किया गया था।

C. ***Evidence Act (1 of 1872), Section 113-B - Soon before her death*** **- Deceased harassed 5-6 months prior to the death - Justifies the harassment for or in connection with dowry. (Para 20)**

ग. साक्ष्य अधिनियम (1872 का 1), धारा 113–बी – उसकी मृत्यु के तुरंत पहले – मृतिका को मृत्यु के 5–6 माह पूर्व उत्पीड़ित किया गया – दहेज के लिये या उसके संबंध में उत्पीड़न सही सिद्ध होता है।

D. Evidence Act (1 of 1872), Section 32 - Dying declaration - Nature **- Not recorded in question and answer form - Members of deceased's in-laws present - Possibility of influencing her - Not voluntary declaration. (Paras 25 & 26)**

घ. साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – स्वरूप – प्रश्नोत्तर प्रारूप में अभिलिखित नहीं – मृतिका के ससुराल के सदस्य उपस्थित – उसे प्रभावित करने की संभाव्यता – स्वैच्छिक कथन नहीं।

E. Evidence Act (1 of 1872), Section 32 - Dying declaration - Reliability **- Two dying declarations - Contrary to each other - Not reliable. (Para 28)**

ङ. साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – विश्वसनीयता – दो मृत्युकालिक कथन – एक दूसरे के विपरीत – विश्वसनीय नहीं।

F. Penal Code (45 of 1860), Section 304-B - Dowry death **- Proof that death occurred otherwise than normal circumstances - Death caused by burn or bodily injury - Comes within otherwise than normal circumstances. (Para 32)**

च. दण्ड संहिता (1860 का 45), धारा 304–बी – दहेज मृत्यु – मृत्यु सामान्य परिस्थितियों के अन्यथा कारित होने का सबूत – मृत्यु जलने या शारीरिक चोट से कारित होना – सामान्य परिस्थितियों के अन्यथा होने में आता है।

Cases referred :

AIR 2003 SC 3828, (2005) 9 SCC 769, (2004) 4 SCC 470.

(Supplied: Paragraph numbers)

ORDER

1. This appeal has been preferred by the accused-appellant against the judgment dated 15 th December,2009, passed by the High Court of Judicature Madhya Pradesh at Jabalpur in Criminal Appeal No.7 of 1991. By the impugned judgment, the High Court dismissed the appeal preferred by the appellant there by affirming the sentence passed by the Additional Session Judge, Dindori in Session Case No. 10 of 1990, for an offence punishable

under Sections 498-A and 304-B of the Indian Penal Code, 1860 (IPC).

2. The facts leading to the conviction of the appellant are as follows:

The deceased, Mamta Bai, was married to the appellant Srikant in the year 1986 in the collective Marriage Conference held at Jabalpur. The case of the prosecution is that at that time, no dowry was settled but afterward the appellant started demanding dowry of Rs. 15,000/- and used to harass her and subjected her to cruelty on account of not fulfilling the demand. Badri Prasad Gupta, PW-17, the brother of Mamta, who was a Sub-Engineer in Irrigation Department at Baikunthpur, managed to help the appellant to open a hotel at Baikunthpur.The said hotel was run by him for 2½ months only. However, the appellant could not run the hotel properly hence it was closed. Thereafter, the appellant had gone to Bhopal for business purposes but on failure, he returned to Baikunthpur and intended to start a stationery business at Vikrampur for which Badri Prasad Gupta, PW-17, gave Rs. 2,500/- to the appellant. Thereafter, the appellant persisted his demand and got the letters written by his wife Mamta (now deceased) and brother Ramakant, but the parents and brothers of the deceased failed to meet the same. For the said reason, the appellant continued to harass his wife. On 25th July, 1989, Mamta, poured kerosene over herself and on her daughter, Ruby aged about 2 years, and set herself ablaze on account of which both of them sustained burn injuries.

3. On the information of Guljari Lal, PW-7, at the outpost of Vikrampur, report was written in Rojnamcha Sanha (Ex.P-33C) by Ravishanker (PW-37). Sarada Makhan Singh (PW-35),Principal of Government Higher Secondary School,Vikrampur, recorded her dying declaration (Ex.P-26). Mamta and her daughter Ruby were sent to Primary Health Centre, Dindori,where they were admitted. Dr. S.K. Khare(PW-11) intimated the concerned police for recording her dying declaration and, therefore, at the request of the concerned police, Mr.C.L. Yadav (PW-8), Naib Tahsildar and Executive Magistrate recorded her dying declaration (Ex.P-6). Subsequently, on 26th July,1989,at 3.05a.m., Mamta died and her daughter Ruby also died.Marg Intimation No. 0/89 was registered at police station, Dindori, from where it was sent to Police Station Shahpur, where the Marg Intimation No.15/89 under Section 174 of Code of Criminal Procedure, 1973, was registered. After preparing Panchanama of the dead body of Mamta, postmortem examination was conducted by Dr. S.K. Khare (PW-11) and Dr. R.M. Mishra (PW-29). The doctors opined that the cause of death was shock as a result

of extensive burn. However, Viscera and articles were preserved for further chemical and histopathological examination. The articles were seized and on the basis of inquiry of Marg Intimation, crime no.81/89 under Section 306 of IPC was registered at Police Station, Shahpur. The statement of witnesses were recorded during the course of investigation and seized articles were forwarded to F.S.L., Sagar, for chemical examination. After completion of the investigation , the charge sheet was filed in the Court of J.M.F.C. , Dindori, who committed the case to the Sessions Court for trial.

4. The appellant was charged under Sections 498-A and 304 B or in alternative under Section 306 IPC. He denied the guilt and claimed innocence contending that he has not committed any offence. On behalf of the prosecution altogether 37 witnesses were examined and no witnesses were examined on behalf of the defence. After appreciation of the evidence, the trial Court held the appellant guilty under Sections 498-A and 304 B IPC and sentenced him with rigorous imprisonment for 3 years under Section 498-A and for rigorous imprisonment for 10 years for the offence punishable under Section 304B. Both the sentences were directed to run concurrently.

5. Mr. Fakhruddin, learned Senior counsel, appearing on behalf of the appellant, mainly placed reliance on the dying declaration of the deceased, which was recorded by Mr. C.L.Yadav, Naib Tahsildar and Executive Magistrate, Dindori. It was contended that it was an accidental death, as accepted by the deceased, Mamta, herself in her dying declaration. It was further contended that the trial court mainly erred in law in discarding the two prompt dying declarations made by the deceased. It was also contented that the trial court failed to appreciate that there was no cogent evidence as to the torture and dowry harassment and that much less harassment was for or in connection with dowry soon before the death . He placed reliance on some of the decisions of this Court, which will be discussed at an appropriate stage.

6. We have heard rival contentions made on behalf of the parties and also perused the record.

7. Mamta died on 26 th July, 1989 at 3.05a.m. The Panchanama of the dead body was prepared and postmortem examination was conducted by Dr. S.K. Khare (PW-11) and Dr.R.M. Mishra (PW-29). According to their opinion, the cause of death was shock as a result of extensive burns.The postmortem examination report is Ex.P-14 which contains the signatures of both the autopsy surgeons.

8. It is not in dispute that the appellant married to the deceased, Mamta, in the year 1986 and the death took place on 26th July, 1989. Therefore, the prosecution could prove that the deceased died within 7 years of her marriage and died due to burn injuries.

9. Mamta died on account of extensive burns and keeping in view the evidence of the autopsy report, the question arises as to whether it can be recorded as an accidental death, as contended on behalf of the appellant. But before discussing the said issue it is desirable to notice whether the prosecution had proved all the ingredients beyond reasonable doubt against the appellant to draw the presumption under Section 113B of the Indian Evidence Act, 1872, as to whether the appellant caused dowry death.

10. Section 304 IPC relates to dowry death and reads as follows:

> "304B. Dowry death--(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death."

11. The basic essentials required to be established u/s 304B IPC are: (i) The death of a woman was caused by any burns or bodily injury or otherwise than under normal circumstances; (ii) Such death have occurred within seven years of her marriage; and (iii) Soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband.

12. Section 113B of the Indian Evidence Act reads as follows:

> "113 B. Presumption as to dowry death.- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for , or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death."

13. The presumption shall be raised only on the proof of the following essentials:

(i) The question before the Court must be whether the accused had committed the dowry death of a woman;

(ii) The woman was subjected to cruelty or harassment by her husband or his relative;

(iii) Such cruelty or harassment was for or in connection with , any demand for dowry; and

(iv) The woman was subjected to cruelty or harassment soon before her death.

14. In this connection, we may refer the decision of this Court in the case of *Kaliyaperumal and Anr. Vs. State of Tamil Nadu* (AIR 2003 SC 3828).

15. Ram Dayal Gupta (PW-23) is the father of the deceased, Mamta. Ravishankar Gupta (PW-7), Badri Prasad Gupta (PW-17) and Purshottam Lal Vaisya (PW-23) are her brothers. They have given evidence that the appellant demanded Rs.15,000/-.Letters were also received demanding Rs. 15,000/- from the in-laws of the deceased. They have denied that the appellant demanded such money for doing the business.

16. Ram Dayal Gupta (PW-22) has deposed that Rs. 7,000/- was given at the time of marriage but the appellant demanded Rs. 15,000/- at the time of 'Bidai'. His daughter used to tell him that the appellant used to demand money. She told the aforesaid facts 3-4 times and lastly 5-6 months before the incident. Due to financial constraints, he failed to meet the demand. His daughter wrote a letter/Article-B to him which was seized by the police. In the cross examination he has stated that he did not lodge the report regarding the demand of dowry because he wanted the relation to be maintained.

17. Ravishankar Gupta (PW-7) had also given evidence that the appellant demanded Rs.15,000/- but he did not provide the same. He also received letter/Article-D written by the brother of the appellant.

18. Badri Prasad Gupta (PW-17) in his statement deposed that the appellant demanded Rs. 15,000/-. He also stated that the appellant used to harass his sister and, therefore, he took his sister to Baikunthpur where he was serving. The appellant also reached there.He managed to open a hotel for the appellant but it was closed after 2 ½ months.

19. Similar was the statement made by Purushottam Lal Vaishya (PW-23)

that subsequent to the marriage of his sister he had gone to Vikrampur where the appellant demanded Rs. 15,000/-, but he refused.Thereafter, he demanded Rs.3,000/- or Rs. 4,000/- but he expressed his inability to give the same .He also stated that his sister used to tell him that the appellant harassed her on account of not giving the dowry.

20. The aforesaid evidences corroborate each other and it is clearly proved that the appellant harassed his wife, deceased Mamta for and in connection with dowry. The appellant harassed the deceased 5-6 months prior to the death of the deceased also justifies the stand taken by the prosecution that the harassment for or in connection with dowry was soon before her death.

21. From the aforesaid evidence on record it is clear that the deceased Mamta died due to burn injuries, the death took place within 7 years of her marriage, she was subjected to cruelty and harassment by her husband, such cruelty and harassment was for and in connection with dowry and such harassment was soon before her death .The prosecution having proved all the essential against the appellant, the presumption under Section 113B of the Indian Evidence Act certainly goes against the appellant.

22. The learned counsel appearing on behalf of the appellant submitted that the death was incidental and , therefore, could not be termed to be a death due to burns caused due to harassment for or in connection with dowry soon before the death . He placed reliance on the dying declaration of Mamta dated 25th July, 1989, when she was admitted in Primary Health Centre, Dindori.

23. The dying declaration (Ex.P-6) was recorded by Mr.C.L.Yadav (PW-8), Naib Tahsildar and Executive Magistrate , Dindori. The certificate that she was fit to give statement was obtained from Dr. S.K. Khare (PW-11). Mr. C.L. Yadav has given his statement that he recorded the dying declaration of the deceased Mamta and she gave her statement and that she remained conscious during the recording of the statement.This witness has also stated that at the time of recording of the statement no other person, except Dr. Khare, was there as all others were sent out.

24. On perusal of the statement of PW-8, it reflects that he has given the evidence before the Court in a very slipshod manner. He had not given the evidence in detail as to what the deceased stated in her dying declaration.

25. The Court also failed in its duty to record the statement of the said

witness properly. It is evident that the dying declaration was not recorded in the question and answer form and the members of her in-laws family were there when she was admitted in the Primary Health Centre, Dindori. Therefore, the possibility of her in-laws influencing her in giving her statement could not be ruled out.

26. The trial court and the High Court both ruled that the dying declaration given was not voluntary. The theory of accidental fall of kerosene container due to the act of child and catching of fire had been negatived in view of the evidence of autopsy surgeons Dr. S.K. Khare (PW-11) and Dr. R.M. Mishra (PW-29), who have clearly deposed that the smell of kerosene was coming out from the body of the deceased which can only be possible by pouring the kerosene over the body and setting the fire. Dr.R.M. Mishra had clearly opined that it was not the case of accidental fire. Therefore, it is not proved that Mamta gave dying declaration voluntarily. Another dying declaration was recorded on the same date , i.e. 25.7.1989, by Sardar Makhan Singh (PW-35), who was examined as PW-35. He was posted as Principal of Government Higher Secondary School, Vikrampur. He stated that at about 3-4 p.m., the S.H.O. sent a constable to him who narrated the incident and told him that the S.H.O. had invited him to record the statement because he was a gazetted officer. Then he went to the residence of the accused person with the policeman and saw that a woman aged 22-23 years old was lying on the cot. The woman was in burnt condition and was gabbing. A child was lying there,who was also in burnt condition. The child was lying inside the house. He subsequently stated that he did not feel the smell of anything, including kerosene. The said woman told him to teach her daughter properly and he promised that he would teach her properly. When he asked the woman about the said state of affairs, she told him that she was cooking food in the kitchen and the container of oil got overturned on her dress which caught fire.

27. The aforesaid statement was recorded by PW-35, which was signed by two proper witnesses and marked as Ex.P-29.However, the said dying declaration was first recorded by the Principal and then the two witnesses put their signature.

28. In *State of Punjab Vs. Parveen Kumar* (2005) 9 SCC 769 this Court while dealing with different versions of the incident in the several dying declaration held that such dying declaration may create doubt about their truthfulness. Having noticed that three dying declaration made by the deceased

woman, first before her uncle, second before Executive Magistrate and third before Sub Inspector of Police, one contrary to the other, this Court held that the dying declarations being inconsistent with each other as versions disclosed were quite different and as a role of the accused was differently described, held that those were not reliable.

29. In the present case, we find that two versions have been recorded in two dying declarations one in which the kerosene container fell on her and the other in which daughter accidentally overturned kerosene container over her, contrary to each other. Therefore both the trial Court and the High Court discarded the dying declarations.

30. Learned counsel appearing for the appellant relied on the decision of *State of A.P. Vs. Raj Gopal Asawa and Another* (2004) 4 SCC 470. In the said case having noticed the provision of Sections 498A, 304B IPC and Section 113 B of the Evidence Act, this Court held:

> *"A conjoint reading of Section 113-B of the Evidence Act and Section 304-B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the 'death occurring otherwise than in normal circumstances'.The expression 'soon before' is very relevant where Section 113-B of the Evidence Act and Section 304-B IPC are pressed into service.Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by prosecution.'Soon before' is a relative term and it would depend upon circumstances of each case and no strait-jacket formula can be laid down as to what would constitute a period of soon before the occurrence.*
>
> *It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113-B of the Evidence Act. The expression 'soon before her death' used in the substantive Section 304-B IPC and Section 113-B of the Evidence Act is*

present with the idea of proximity test.No definite period has been indicated and the expression 'soon before' is not defined. A reference to expression 'soon before' used in Section 114. Illustration (a) of the Evidence Act is relevant. It lays down that a Court may presume that a man who is in the possession of goods 'soon after the theft, is either the thief has received the goods knowing them to be stolen , unless he can account for his possession. The determination of the period which can come within the term 'soon before' is left to be determined by the Courts, depending upon facts and circumstances of each case. Suffice,however, to indicate that the expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effect of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence."

31. It was contended on behalf of the learned counsel for the appellant that prosecution while succeeded in proving that the woman died due to burns, they failed to prove that the burns was not due to accident and it was otherwise than in normal course. However, such submission cannot be accepted in view of Section 304B IPC, wherein it is stipulated that where the death of a woman is caused by burn or bodily injury or occurs otherwise then under normal circumstances within 7 years of marriage and when it is shown that soon before her death she was subject to cruelty or harassment by her husband or any relative of her husband for or in connection with any demand for dowry such death shall be called dowry death or such husband or relative should have been deemed to cause her death.

32. The cause of death u/s 304B can be burns or bodily injury which is specified under Section 304B. If death occurs otherwise then normal circumstances it is a third category u/s 304B, which is non-specific unlike burns, or bodily injury, though burn and bodily injuries also comes within the meaning of otherwise then under normal circumstances. Therefore, if one of the essential ingredients is proved that the death of the woman is caused by burns, it is not necessary for the prosecution to prove that death occurs

otherwise then normal circumstances, as death due to burns comes under otherwise then under normal circumstances. If all the four essential ingredients are proved beyond all reasonable doubt by the prosecution, the presumption under Section 113B will go against the accused, who in his turn may prove that the death of the woman was accidental and was not due to harassment of husband or relative of the husband for or in connection with dowry and no such harassment was made soon before the death. In the present case the appellant has failed to prove the same.

33. The prosecution being successful in proving all, the essentials of Section 304B of IPC and the appellant having failed to rebut the evidence by placing evidence on record that death was accidental death, we find no ground to interfere with the conviction made by the trial court as affirmed by the High Court.However, taking into consideration the nature and circumstances of the case, while we affirm the conviction of appellant-Srikant, S/o Ram Charan Gupta under Section 498A and 304B IPC and sentence of rigorous imprisonment for 3 years for the offence under Section 498A, as held by trial court and affirmed by High Court, we reduce the sentence to rigorous imprisonment for 7 years for the offence under Section 304B IPC. Both the sentences shall run concurrently. The appeal is dismissed.

34. The appellant be taken to custody to serve the remaining period of sentence and his bail bonds stands cancelled.

Appeal dismissed.

I.L.R. [2015] M.P., 1395
SUPREME COURT OF INDIA
Before Mr. Justice J. Chelameswar & Mr. Justice S.A. Bobde
Civil Appeal No. 10778/2014 decided on 5 December, 2014

MSP INFRASTRUCTURE LTD. (M/S.) ...Appellant
Vs.
M.P. ROAD DEVL. CORP. LTD. ...Respondent

Arbitration and Conciliation Act (26 of 1996), Sections 34 & 16(2) - Jurisdiction **- Objection with regard to the jurisdiction was not raised in defence statement - It was also not raised at any time before Tribunal - After suffering the Award and after 2 years of filing of petition u/s 34, objection was raised by amendment - Held - Section 16(2) provides that an objection to jurisdiction must be raised at the stage of**

submission of defence statement - Since the ground raised by amendment application is contrary to law - Amendment application should not have been allowed by High Court - Impugned order set-aside - Appeal allowed. (Paras 14, 16 & 18)

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराऐं 34 एवं 16(2) – अधिकारिता – बचाव कथन में अधिकारिता से संबंधित आक्षेप नहीं उठाया गया – अधिकरण के समक्ष भी किसी भी समय पर इसे नहीं उठाया गया – अवार्ड सहन करने के पश्चात् तथा धारा 34 के अंतर्गत याचिका प्रस्तुत करने के दो वर्ष पश्चात्, संशोधन द्वारा आक्षेप उठाया गया – अभिनिर्धारित – धारा 16(2) उपबंधित करती है कि अधिकारिता का आक्षेप बचाव कथन प्रस्तुत करने के प्रक्रम पर उठाया जाना चाहिये – चूंकि संशोधन आवेदन द्वारा उठाया गया आधार विधि के विपरीत है – उच्च न्यायालय द्वारा संशोधन आवेदन को मंजूर नहीं किया जाना चाहिये था – आक्षेपित आदेश अपास्त – अपील मंजूर।

Case referred :

(2011) 5 SCC 532.

JUDGMENT

The Judgment of the Court was delivered by : **S.A. Bobde, J. :-** Leave granted.

2. The question that has arisen in this appeal is : whether a party to an arbitration proceeding may be permitted to raise objections under Section 34 of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act, 1996"), with regard to the jurisdiction of the Arbitral Tribunal (for short "the Tribunal") after the stage of submission of the written statement.

3. M/s M.S.P. Infrastructure (Appellant) and the M.P. Road Development Corporation (Respondent) entered into a contract on 04-04-2002 for the development and upgradation of the *Raisen-Rahatgarh* road (a stretch of about 100 Kms.) in the State of Madhya Pradesh.

4. Upon a dispute arising between the parties in respect of the work carried out by the Appellant, the Respondent Corporation terminated the said contract and encashed the bank-guarantee. Thereafter, the Appellant filed a Civil-Suit being C.S. No. 63 of 2003 before the Calcutta High Court challenging the termination of the Agreement as well as the encashment.

5. The Calcutta High Court disposed of the suit on 22-05-2003 by

recording "Terms of Settlement" between the parties, whereby it was decreed that the dispute would be referred to arbitration in terms of the contract dated 04-04-2002 within a period of 30 days, under the provisions of the Arbitration Act, 1996.

6. The Tribunal made an award on 27-11-2006. By the said award, the Tribunal partly allowed the claims of the Appellant and accordingly awarded a sum of approximately Rs. 6.90 crores as well as the release of Fixed Deposit Receipts which had been deposited as security with the Respondent.

7. Aggrieved by the award dated 27-11-2006, the Respondent filed a petition on 09-01-2007 for setting aside the award under Section 34 of the Arbitration Act, 1996. The Respondent assailed the award as being in contravention of clause (b) of sub-section (2) of Section 34 of the Arbitration Act, 1996.

8. Subsequently, on 28-02-2009 the Respondent moved an application to amend the original petition under Section 34 to add additional grounds of objection. The Additional District & Sessions Judge, Bhopal (Madhya Pradesh) vide order dated 26-08-2009 rejected the said amendment application. The learned Additional District & Sessions Judge observed that it was absolutely unjust and unfair to file such objections after two years of the filing of the petition under Section 34 of the Arbitration Act, 1996. Aggrieved, the Respondent preferred a Petition under Article 227 before the High Court of Madhya Pradesh at Jabalpur. The Madhya Pradesh High Court without going into the tenability of the amendment application at the stage at which it was moved, i.e., beyond the time permitted by Section 16 of the Arbitration Act, 1996, simply allowed the amendment by observing that they are not deciding the merits of the case and that they were simply considering the amendment application.

9. On 18-02-2010, the High Court allowed the Respondent's petition and set aside the order of the District Court, thus allowing the amendment application.

10. Aggrieved by the allowing of the amendment application, the Appellant has moved this Court. We must at once notice that the main challenge to the order allowing the amendment is that it allows the Respondent to raise an objection to jurisdiction contrary to Section 16 of the Arbitration Act, 1996, which provides that an objection to jurisdiction shall not be raised later than

the submission of the statement of defence. The grounds allowed to be raised by the order allowing the amendment application are as follows:

> *"I-A That the Indian Council of Arbitration, New Delhi had no jurisdiction to appoint any Arbitral Tribunal of private persons to entertain and decide the dispute between the parties as it related to a works contract between a contractor and a/Govt. Undertaking.*
>
> *I-B That the dispute being a dispute between a contractor and a Govt. Undertaking arising out of a works contract of more than Rs.50,000/- the Arbitration Tribunal Constituted by the State Govt. of M.P. had the exclusive jurisdiction to decide the said dispute on being submitted to it under sub section 1 of, Section 7 of the M.P. Madhyastham Adhikaran Adhiniyam, 1983 and none else. As such, the impugned award passed by the Arbitral Tribunal constituted-by the Indian Council of Arbitration, New Delhi having no jurisdiction to entertain and/or decide the dispute, the impugned award is a total nullity and non-est in the eye of law."*

11. According to the Appellant, the Tribunal under the Arbitration Act, 1996 was fully empowered to enter into and decide the dispute submitted to it, since the dispute was referred in pursuance of an arbitration clause contained in the Concession Agreement, which reads as follows:

> *"39.1 Any dispute, which is not resolved amicably as provided in Clause 39.1 and 39.2 shall be finally decided by reference to arbitration by a Board of Arbitrators appointed as per the provision of the Arbitration and Conciliation Act, 1996 and any subsequent amendment thereto. Such Arbitration shall be held in accordance with the Rules of Arbitration of the Indian Council of Arbitration and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996 and as amended from time to time thereafter."*

12. The Appellant further contends that the aforesaid clause covers any dispute which is not resolved amicably and is intended to cover the present

dispute which arises under the contract formed and concluded by the agreement which contains this very arbitration clause. The Appellant further contends that this agreement was entered into by the parties in the year 2002, being fully aware of the existence of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 (for short "the M.P. Act of 1983"). Not only this, the parties reiterated this agreement before the Calcutta High Court when they specifically agreed vide Clause 'C' of the consent terms that if the Appointing Authority fails to appoint and constitute the Tribunal in terms of the Concession Agreement dated 04-04-2002 within a period of 30 days, the parties shall be at liberty to apply to the Madhya Pradesh High Court for appointment and constitution of the Tribunal under the provisions of the Arbitration Act, 1996. Thus, on two occasions, the parties asserted and consented that the dispute between them would be resolved by Arbitration under the provisions of the Arbitration Act, 1996. Therefore, according to the Appellant, there is no merit whatsoever in the ground introduced by the amendment application. Even otherwise, the Appellant contended that the provisions of the Arbitration Act, 1996, being a Parliamentary Statute would have precedence over the M.P. Act of 1983, which is a State Act on the same subject. Above all, it was contended that the introduction of the ground that the Tribunal did not have jurisdiction is grossly belated and impermissible in view of Section 16(2) of the Arbitration Act, 1996.

13. It is clear from the circumstances, that in the event it is found that the newly added ground could not have been raised at this stage, i.e. the stage at which it was allowed to be raised, it is not necessary to go into the wider question as to which Act will prevail, the Central Act or the State Act. Thus, the only question that falls for consideration at this stage is whether, having regard to Section 16 of the Arbitration Act, 1996, the Respondent was entitled to introduce the ground that the Arbitration Tribunal constituted under the M.P. Act of 1983 would take precedence over the Tribunal constituted under the Arbitration Act, 1996, that too by way of an amendment to the petition under Section 34.

14. Section 16(2) of the Arbitration Act, 1996 reads as follows:

> *"Section 16(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely*

because that he has appointed, or participated in the appointment of, an arbitrator."

On a plain reading, this provision mandates that a plea that the Tribunal does not have jurisdiction shall not be raised later than the submission of the statement of defence. There is no doubt about either the meaning of the words used in the Section nor the intention. Simply put, there is a prohibition on the party from raising a plea that the Tribunal does not have jurisdiction after the party has submitted its statement of defence. The intention is very clear. So is the mischief that it seeks to prevent. This provision disables a party from petitioning an Tribunal to challenge its jurisdiction belatedly, having submitted to the jurisdiction of the Tribunal, filed the statement of defence, led evidence, made arguments and ultimately challenged the award under Section 34 of the Arbitration Act, 1996. This is exactly what has been done by the Respondent Corporation. They did not raise the question of jurisdiction at any stage. They did not raise it in their statement of defence; they did not raise it at any time before the Tribunal; they suffered the award; they preferred a petition under Section 34 and after two years raised the question of jurisdiction of the Tribunal. In our view, the mandate of Section 34 clearly prohibits such a cause. A party is bound, by virtue of sub-section (2) of Section 16, to raise any objection it may have to the jurisdiction of the Tribunal before or at the time of submission of its statement of defence, and at any time thereafter it is expressly prohibited. Suddenly, it cannot raise the question after it has submitted to the jurisdiction of the Tribunal and invited an unfavourable award. It would be quite undesirable to allow arbitrations to proceed in the same manner as civil suits with all the well-known drawbacks of delay and endless objections even after the passing of a decree.

15. Shri Divan, the learned senior counsel for the Respondent vehemently submitted that a party is entitled under the law to raise an objection at any stage as to the absence of jurisdiction of the Court which decided the matter, since the order of such a Court is a nullity. It is not necessary to refer to the long line of cases in this regard since, that is the law. But, it must be remembered that this position of law has been well settled in relation to civil disputes in Courts and not in relation to arbitrations under the Arbitration Act, 1996. Parliament has the undoubted power to enact a special rule of law to deal with arbitrations and in fact, has done so. Parliament, in its wisdom, must be deemed to have had knowledge of the entire existing law on the subject and if it chose to enact a provision contrary to the general law on the subject, its wisdom cannot be doubted. In the circumstances, we reject the submission on behalf of the Respondent.

16. It was next contended on behalf of the Respondent by Shri Divan, that Section 16 undoubtedly empowers the Tribunal to rule on its own jurisdiction and any objections to it must be raised not later than the submission of the statement of defence. However, according to the learned senior counsel, objections to the jurisdiction of a Tribunal may be of several kinds as is well-known, and Section 16 does not cover them all. It was further contended that where the objection was of such a nature that it would go to the competence of the Arbitral Tribunal to deal with the subject matter of arbitration itself and the consequence would be the nullity of the award, such objection may be raised even at the hearing of the petition under Section 34 of the Act. In support, the learned senior counsel relied on clause (b) of sub-section (2) of Section 34 which reads as follows:-

> *"34(2) An arbitral award may be set aside by the Court only if –*
>
> *(a)* .....
>
> *(b) the Court finds that –*
>
> *(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or*
>
> *(ii) the arbitral award is in conflict with the public policy of India.*

It is not possible to accept this submission. In the first place, there is nothing to warrant the inference that all objections to the jurisdiction of the Tribunal cannot be raised under Section 16 and that the Tribunal does not have power to rule on its own jurisdiction. Secondly, Parliament has employed a different phraseology in Clause (b) of Section 34. That phraseology is "the subject matter of the dispute is not capable of settlement by arbitration." This phrase does not necessarily refer to an objection to 'jurisdiction' as the term is well known. In fact, it refers to a situation where the dispute referred for arbitration, by reason of its subject matter is not capable of settlement by arbitration at all. Examples of such cases have been referred to by the Supreme Court in the case of *Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and Ors.*[1] This Court observed as follows:-

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1. (2011) 5 SCC 532

> *"36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grants of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes."*

The scheme of the Act is thus clear. All objections to jurisdiction of whatever nature must be taken at the stage of the submission of the statement of defence, and must be dealt with under Section 16 of the Arbitration Act, 1996. However, if one of the parties seeks to contend that the subject matter of the dispute is such as cannot be dealt with by arbitration, it may be dealt under Section 34 by the Court.

17. It was also contended by Shri Divan, that the newly added ground that the Tribunal under the Arbitration Act, 1996 had no jurisdiction to decide the dispute in question because the jurisdiction lay with the Tribunal under the M.P. Act of 1983, was a question which can be agitated under sub-clause (ii) of clause (b) of sub-section (2) of Section 34 of the Arbitration Act, 1996. This provision enables the court to set-aside an award which is in conflict with the public policy of India. Therefore, it is contended that the amendment had been rightly allowed and it cannot be said that what was raised was only a question which pertained to jurisdiction and ought to have been raised exclusively under Section 16 of the Arbitration Act, 1996, but in fact was a question which could also have been raised under Section 34 before the Court, as has been done by the Respondent. This submission must be rejected. The contention that an award is in conflict with the public policy of India cannot be equated with the contention that Tribunal under the Central Act does not have jurisdiction and the Tribunal under the State Act, has jurisdiction to decide upon the dispute. Furthermore, it was stated that this contention might have been raised under the head that the Arbitral Award is in conflict with the public policy of India. In other words, it was submitted that it is the public policy of India that arbitrations should be held under the appropriate law. It was

contended that unless the arbitration was held under the State Law i.e. the M.P. Act that it would be a violation of the public policy of India. This contention is misconceived since the intention of providing that the award should not be in conflict with the public policy of India is referable to the public policy of India as a whole i.e. the policy of the Union of India and not merely the policy of an individual state. Though, it cannot be said that the upholding of a state law would not be part of the public policy of India, much depends on the context. Where the question arises out of a conflict between an action under a State Law and an action under a Central Law, the term public policy of India must necessarily understood as being referable to the policy of the Union. It is well known, vide Article 1 of the Constitution, the name 'India' is the name of the Union of States and its territories include those of the States.

18. We have thus no hesitation in coming to the conclusion that the amendment application raised a ground which was contrary to law and ought not to have been allowed by the High Court. We accordingly set aside the judgment and order of the High Court. There shall be no order as to costs.

Order accordingly.

I.L.R. [2015] M.P., 1403
SUPREME COURT OF INDIA
Before Mr. Justice V. Gopala Gowda & Mr. Justice C. Nagappan
Cr. A. No. 1451/2009 decided on 9 December, 2014.

UMA SHANKAR GAUTAM ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. Penal Code (45 of 1860), Sections 147, 149 & 302 - Appeal on the ground of parity - **Two other accused persons acquitted - Appellant named in F.I.R. and presence established by ocular evidence - Names of acquitted accused were not there in F.I.R. and could have been a case of false implication - Held - Role of appellant is distinguishable from other acquitted accused persons, principle of parity not available - Appeal dismissed. (Paras 11 & 14)**

क. दण्ड संहिता (1860 का 45), धाराऐं 147, 149 व 302 — समानता के आधार पर अपील — दो अन्य अभियुक्तगण दोषमुक्त — अपीलार्थी प्रथम सूचना रिपोर्ट में नामित और चक्षुदर्शी साक्ष्य द्वारा उसकी उपस्थिति स्थापित — दोषमुक्त अभियुक्तों के नाम प्रथम सूचना रिपोर्ट में नहीं और मिथ्या आलिप्त किये जाने का

प्रकरण हो सकता है – अभिनिर्धारित – अपीलार्थी की भूमिका अन्य दोषमुक्त अभियुक्तगण से भिन्न है, समानता का सिद्धांत उपलब्ध नहीं – अपील खारिज।

***B. Evidence Act (1 of 1872), Section 3 - Evidence of prosecution* - Major portion deficient - Some accused persons acquitted - Residue sufficient - Held - Duty of Court to separate grain from the chaff and open to Court to convict an accused on basis of residue portion.** **(Para 12)**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3 – अभियोजन का साक्ष्य – मुख्य भाग में कमियां – कुछ अभियुक्तगण दोषमुक्त – पर्याप्त अवशेष – अभिनिर्धारित – भूसे से धान अलग करना न्यायालय का कर्त्तव्य है और अवशेष भाग के आधार पर न्यायालय अभियुक्त को दोषसिद्ध कर सकता है।

Case referred :

(2002) 8 SCC 381.

JUDGMENT

The Judgment of the Court was delivered by : **C. NAGAPPAN, J. :-** This appeal is preferred against the judgment and order dated 12.8.2008 passed by the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No.1537 of 1998.

2. The appellant herein is accused no.1 and he along with five other accused were tried in Sessions case no.193/1995 on the file of Sessions Judge, District Shahdol and the trial court convicted them for the commission of offences under Section 147 and Section 302 read with Section 149 IPC and sentenced each of them to undergo rigorous imprisonment for one year for the first offence and each of them to undergo imprisonment for life for second offence. Aggrieved by the same all the accused preferred Criminal Appeal no.1537 of 1998 to the High Court of judicature at Jabalpur. During the pendency of appeal appellant no.2/accused no.2 Ramashankar died and the appeal preferred by him stood abated. The High Court confirmed the conviction and sentence of accused no.1 Umashankar, accused no.3 Shivashankar and accused no.4 Gaurishankar and at the same time acquitted accused no.5 Vasudev and accused no.6 Gyandev by allowing the Criminal Appeal in part. Challenging his conviction and sentence, accused no.1 Umashankar has preferred the present appeal.

3. Briefly the case of the prosecution is narrated as follows : PW7 Savitri Bai is the mother of Kalua @ Ramnath and PW9 Usha Bai is his wife. On 19.7.1995 at about 8-8.30 a.m. the appellant herein/accused no.1 along with five other accused had gone to the house of Nan @ Lakhan situated at village Dindori Tola Bamhani and were hurling abuses in the courtyard. Nan was not in the house at that time and upon hearing the noise Kalua @ Ramnath went to Nan's house. Accused no.3 Shivashankar armed with barchhi, accused no.4 Gaurishankar armed with farsa and accused nos.1,2,5 and 6 armed with lathis attacked Kalua with the said weapons and inflicted injuries on him. PW7 Savitri Bai tried to save his son Kalua and she was also beaten up. PW9 Usha Bai and PW2 Shiv Kumari, mother of Nan, also witnessed the occurrence. After sometime accused no.1Umashankar and accused no.4 Gaurishankar again came to the occurrence place on motorcycle and accused no.1 Umashankar kicked Kalua and they went away. PW9 Usha Bai went to PW12 Sarpanch Bhaiya Lal and narrated the occurrence. He along with PW4 chowkidar Bisahu Yadav came to the occurrence place and Exh.P-6 intimation report was sent through PW4 Bisahu Yadav to Police Station Anuppur. On receipt of information PW14 sub-Inspector Raghvendra Baghel went to the occurrence place and received Exh.D1 complaint given by PW9 Usha Bai and took up the investigation. He conducted inquest on the body of Kalua and sent it for post mortem examination. He prepared Exh.P-7 map and seized blood stained earth and plain earth from the occurrence place and examined PW2 Shiv Kumari, PW7 Savitri Bai, PW9 Usha Bai, PW12 Bhaiya Lal and some other witnesses and recorded their statements.

4. PW13 Dr. P.C. Joshi conducted autopsy on the body of Kalua at 11.45 a.m. on 19.7.1995 and found following injuries :

i) There was a compound fracture at the 1/3rd part of left forearm, which was attached to the skin only.

ii) There was compound fracture on the joint of right wrist which was attached with skin only.

iii) Stab injuries on right forearm 4cm x 3cm which were bone deep.

iv) On the right partial part of the head incised wound 4cm x 2cm on the outer side of ear.

v) One stab wound on the right side of chest.

vi) 6 wounds on the left thigh wherein one wound was 4cm x 3 cm, second 6cm x 4cm, 3rd 7cm x 3cm, 4th 5cm x 3cm, 6th 6cm x 2cm and last 4cm x 3cm and all these wounds were muscle deep.

vii) 3 stab wounds on the front side of right leg which were muscle deep.

viii) Stab wound on the right shoulder 4.5cm x 3cm x muscle deep.

ix) One stab wound on left infrascapular region 6.5cm x 4cm x muscle deep.

x) One stab wound on lumber region 3cm x 2cm x muscle deep.

He expressed opinion that homicidal death has occurred due to hemorrhage from external and internal injuries and issued Exh.P-31 post-mortem report.

5. PW14 sub-Inspector seized the blood stained clothes of the deceased and sent them for chemical examination. On 22.7.1995 PW14 sub-Inspector arrested all the accused and inquired them and on the information furnished by accused no.3 Shivashankar, barchhi came to be recovered and on the information furnished by accused no.4 Gaurishankar, farsa came to be recovered and on the information furnished independently by the other accused, lathis were recovered by him. He sent the recovered weapons to chemical analysis and after obtaining the Forensic Laboratory report he filed the charge sheet against the accused.

6. The prosecution examined PWs 1 to 14 and marked the documents. The accused were questioned under Section 313 Cr.P.C. and their answers were recorded. DWs 1 to 5 were examined on the side of defence. The trial court found all the accused guilty of the charges and sentenced them as stated above. On appeal by the accused, the High Court confirmed the conviction and sentence of accused nos.1,3 and 4 and acquitted accused nos.5 and 6. Challenging his conviction and sentence accused no.1 Umashankar has preferred the present appeal.

7. Mr. Mahabir Singh, learned senior counsel appearing for the appellant, contended that the eye witnesses have not stated that the appellant/accused no.1 caused injury on the hands of deceased Kalua with lathi and the High

Court had given the benefit of doubt to accused nos.5 and 6 as no injury of lathi has been found on the person of deceased and on the ground of parity the appellant also deserves to be acquitted. We also heard the similar submission made by Amicus Curiae Ms. Aakriti Dawar on behalf of appellant. Mr. Samir Ali Khan, learned counsel appearing for the respondent State, contended that the presence of the appellant and his overt act against the deceased stood established by ocular testimony and also intimation report in Exh.P-6 and the High Court in the impugned judgment has elaborately considered the same and has confirmed his conviction and the same is sustainable.

8. We carefully considered the rival submissions and perused the record.

9. Kalua @ Ramnath suffered 10 injuries in the occurrence as evident from Exh.P-31 post mortem report and injuries no.1 and 2 mentioned therein are compound fracture on the left forearm and on the right wrist respectively and the other 8 injuries are stab and incised wounds. PW13 Dr. P.C. Joshi, who conducted autopsy, had opined that homicidal death has occurred due to hemorrhage from external and internal injuries in the post-mortem report. Exh.P-33 Query Memo was sent to him on 21.9.1995 with respect to the compound fracture injuries on the hands and report he has opined that the compound fracture could have been caused by hard and blunt object besides a sharp edged weapon. In his testimony before court as PW13 he has reiterated the said opinion.

10. The eye witnesses to the occurrence are PW2 Shiv Kumari, mother of Nan, PW7 Savitri Bai, mother of the deceased and PW9 Usha Bai, wife of the deceased. All of them have testified that accused no.3 armed with barchhi, accused no.4 armed with farsa and accused nos.1,2,5 and 6 armed with lathis attacked Kalua with the said weapons and inflicted injuries on him. Weapons barchhi and farsa are sharp edged whereas lathi is hard and blunt. PW7 Savitri Bai has testified in her testimony in para 15 has stated that lathi injuries were caused on the leg and waist. PW9 Usha Bai has testified that appellant/accused no.1 Umashankar inflicted injury with lathi. In the cross examination she has stated in para 16 that the lathi injuries were inflicted on the legs and waist of the deceased. Referring to the above testimony the High Court has observed that the said witness has not stated that lathi injuries were caused on the hands of the deceased. As per the post mortem report both the hands of the deceased were attached with the skin only, rest of the portion found cut and

obviously the said injuries were caused by the sharp edged weapons. The fact remains that compound fractures were found on the left forearm and right wrist which as per medical opinion attributable to attack made by hard and blunt object.

11. The High Court has given benefit of doubt by acquitting accused nos.5 and 6 on the ground that no injury of lathi was found on the person of the deceased and the names of accused nos.5 and 6 were not mentioned in Exh.P-6 first intimation report and they could have been falsely implicated later on account of enmity. On the contrary as already seen, there were compound fractures indicative of attack with lathis. Be it may. The High Court had elaborately considered the role and overt act of appellant/accused no.1 Umashankar and held that his presence stood established not only by the ocular testimony but also in the first intimation in Exh.P-6 report his name is specifically mentioned and concluded that he was sharing common intention with accused nos.3 and 4, who were armed with barchhi and farsa respectively and confirmed their conviction and sentence.

12. We do not find any substance in the submission of the learned senior counsel appearing for the appellant that since accused nos.5 and 6 have been acquitted; on the ground parity the appellant herein also deserves to be acquitted. It is always open to the Court to differentiate the accused who had been acquitted from those who had been convicted. The power of the courts to distinguish the cases of one or more of the accused from the other(s) is far too well recognized to need reiteration. Still, we may notice the principle as stated in *Gangadhar Behera Vs. State of Orissa* (2002) 8 SCC 381, wherein this Court observed as follows :

> ".....Even if a major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where chaff can be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons."

13. In our view, the High Court applied the said principle in distinguishing

the role of appellant herein from that of accused no.5 and accused no.6, who have been acquitted. In other words, the High Court rightly declined to acquit the appellant herein on the principle of parity. The impugned judgment does not call for any interference under Article 136 of the Constitution of India.

14. In the result the appeal is dismissed. The bail bond shall be cancelled and the appellant is directed to surrender before the Sessions Judge, District Shahdol to serve out the remaining sentence, failing which the learned Sessions Judge is requested to take him into custody and send him to jail to serve his left over sentence.

Appeal dismissed.

I.L.R. [2015] M.P., 1409
WRIT APPEAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice J.K. Jain

W.A. No. 315/2014 (Indore) decided on 28 March, 2014

PHOENIX DEVECONS PVT. LTD. ...Appellant
Vs.
SMT. MANISHA PARIHAR & ors. ...Respondents

Constitution - Article 226 - Mandamus **- High Court can issue writ against private body or person, but only for enforcement of public duty - Directions issued to private company without considering that whether private company is amenable to writ jurisdiction or not - Impugned order set aside - Petitions restored for decision afresh by the Single Bench. (Paras 11 & 12)**

संविधान – अनुच्छेद 226 – परमादेश – उच्च न्यायालय किसी प्राइवेट निकाय या व्यक्ति के विरूद्ध रिट जारी कर सकता है, किन्तु केवल लोक कर्त्तव्य के प्रवर्तन हेतु – बिना विचारण किये कि क्या प्राइवेट कंपनी रिट अधिकारिता के अध्याधीन है अथवा नहीं प्राइवेट कंपनी को निदेश जारी किये गये – आक्षेपित आदेश अपास्त – एकल न्यायापीठ द्वारा नये सिरे से निर्णय हेतु याचिकाऐं पुनः स्थापित की गई।

Cases referred :

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

Vivek Dalal, for the appellant.

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

ORDER

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

2. This order shall govern the disposal of the W.A. No.318/14, W.A. No.319/14, W.A. No.320/14, W.A. No.321/14, W.A. No.322/14, W.A. No.323/14, W.A. No.325/14, W.A. No.328/14, W.A. No.329/14, W.A. No.330/14, W.A. No.331/14, W.A. No.332/14, W.A. No.333/14, W.A. No.334/14, W.A. No.335/14, W.A. No.336/14, W.A. No.337/14, W.A. No.338/14, W.A. No.339/14, W.A. No.340/14, W.A. No.341/14, W.A. No.342/14, W.A. No.343/14, W.A. No.344/14, W.A. No.345/14, W.A. No.346/14, W.A. No.347/14, W.A. No.348/14, W.A. No.349/14, W.A. No.350/14, W.A. No.351/14, W.A. No.352/14, W.A. No.353/14, W.A. No.355/14, W.A. No.357/14, W.A. No.358/14, W.A. No.359/14, W.A. No.361/14, W.A. No.362/14 and W.A. No.363/14 as they arise out of a common order dated 30.11.2013 passed in various writ petitions observing that the question involved in all of them are identical in nature.

3. For the sake of convenience, facts are taken from Writ Appeal No.315/14 arising out of the order passed in W.P. No.12992/13.

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

> "(i) to call for the relevant records of the case;
>
> (ii) to direct the police Authorities for registration of F.I.R. against the culprit directors/shareholders/promoters of the company;
>
> (ii) to return the amount of Rs.50,000/- along with the interest of current market rate to the petitioner or alternately Rs.16.50 crores collected by the company along with interest at current market rate to the residents Welfare Society formed by the plot owners of the Phoenix Township;
>
> (iv) to direct the statutory authority to take over the management of the company and do the development of the township which comprises thousands of residents like

petitioner;

(v) to award costs of this petition;

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

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

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

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

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

4. So far as WP No.13623/2013, 13629/2013 and 13631/2013 are concerned, the allegations are that petitioner of these petitions are cheated as the amount was received against allotment of plots in Phoenix Township but now the respondent No.6/company is offering the plots else where. In this regard suffice to say that respondent No.6/company shall fulfill the promise. Petitioner of these petitions are at liberty to take legal action in accordance with law.

5. It is informed that the plot holders who have issued cheques from time to time, were dishonoured. If the cheques are dishonoured then at the time of giving possession, it will be incumbent upon the plot holders to clear the dues for which the cheques were given. Similarly the outstanding amount which is shown in the sale deeds for which No Dues Certificate is not issued by respondent No.6/company, shall be, payable at

the time of possession. Needful shall also be done by the respondent No.6/company and its Directors for collecting the sale deeds from the Office of Sub Registrar. In case of default in compliance of any of the directions issued by this Court, upon production of copy of the order, competent authority shall take appropriate action including criminal against respondent No.6/company and its Directors in accordance with law".

6. It has been argued by the learned counsel for the appellant that the learned Single Judge has committed gross illegality in issuing impugned directions for which no relief was claimed. He submits that issuance of the aforesaid directions to the appellant-a Private Limited Company is beyond the scope of the writ jurisdiction as the appellant company is not amenable to the writ jurisdiction. The company is not discharging any public duty which can be directed to be enforced by issuance of the writ and it is not an authority under Article 12 of the Constitution. He further argued that the Commissioner's report received on the basis of the interim order passed by the learned Single Judge was in fact in favour of the company, in the circumstances, there was absolutely no necessity for issuing the impugned direction. He submits that the direction No.1 contained in the order is matter relating to the Company Law regarding which there is a complete procedure and dehors to that no such direction can be issued in writ jurisdiction. He also submits that even if there were any deficiencies noticed, the learned Single Judge should have only directed the writ petitioner to approach the State Government Authorities or any other appropriate forum for redressal of the grievance or the official respondents could have been issued some directions in accordance with law, but no directions in the nature contained in the impugned order could have been issued. He also submitted that the appellants' averments made in reply paragraph Nos.7, 8, 9 and 10 have been completely ignored by the learned Single Judge and the mention in the order that the appellant had agreed for issuance of the direction is wrong.

7. On the other hand, learned counsel appearing for the writ petitioners have supported the impugned order and have stated that on account of the lapses on the part of the company and its Directors, the writ petition was filed in which taking into consideration the Commissioner's report, the impugned directions have rightly been issued by the learned Single Judge which are well within the writ jurisdiction. In support, learned counsel for the writ petitioners

placed reliance on the judgments of the Supreme Court delivered in the cases of *Binny Ltd. and another Vs. Sadasivan and others* (AIR 2005 SC, 3202); *Babubhai Jamnadas Patel Vs. State of Gujrat and others* (2009 (9) SCC, 610) and *Shalini Shyam Shetty and another Vs. Rajendra Shankar Patil* (2010 (8) SCC, 329).

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

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

10. However, instead of passing the order in regard to the reliefs claimed, we find that the learned Single Judge has issued altogether different directions than what was prayed. The Commissioner's report also prima facie appears to have not been rightly dealt with. The learned Single Judge before issuance of the impugned direction did not consider and decide as to whether the appellant-Private Limited Company in question is amenable to writ jurisdiction, is the company in discharging any public duty which it failed to discharge. In our considered view, the learned Single Judge could not have issued impugned direction to either the individuals who are Directors of the Private Ltd. Company or to the appellant- a private limited company without firstly giving any finding about its constitution, as to whether the entire share capital of the company is held by the Government; whether its administration is in the hands of the Board of Directors appointed by the Government and whether there exists within the company deep and pervasive State control. The Writ Court before issuing the impugned direction was required to examine the factors which are required to be considered, like whether the functions carried out by the company are closely related to the governmental function. The other factors like formation of appellant's company, its objectives, functions, its management and control,

financial aids received by it, the question of its dominations by the Government as all these matters would only render it in as authority amenable to writ jurisdiction of High Court. Having failed to consider all these related issues in view of the law laid down by the Supreme Court in the case of *Balmer Lawrie & Co. Ltd. Vs. Partha Sarathi Sen Roy,* reported in 2013 (8) SCC, 345, impugned directions as also the order passed by the learned Single Judge cannot be sustained.

11. As regards the reliance of the petitioner on the judgment passed by the Supreme Court in the case of *Binny Ltd. and another Vs. Sadasivan and others* (supra), the same will not help the petitioner for the simple reason that in that case also, the Supreme Court has held that a writ of mandamus can be issued against a private body or a person, but for enforcement of public duty **(emphasis supplied)** . In the case of *Babubhai Jamnadas Patel Vs. State of Gujrat and others* (supra), the Supreme Court has held that the High Court and Supreme Court are sentinels of justice. They have been vested with extra powers of judicial review and supervision to ensure that rights of citizens are duly protected. Courts have to maintain a constant vigil against inaction of authorities in discharging their duties and obligation in the interest of citizens, for whom they exist. The Supreme Court as also the High Court have to issue appropriate writ or directions from time to time to ensure that the authorities performed at least such duties as they were required to perform under various statutes and orders passed by administration. However, in the present case, the directions which have been issued by the learned Single Judge are not to the authorities but, the same are issued to the Directors and to a private limited company without recording a finding that they are amenable to the writ jurisdiction as they failed in discharging the public duty. In the case of *Shalini Shyam Shetty and another Vs. Rajendra Shankar Patil,* again the Supreme Court has said that under the phraseology of Article 226, the High Court can issue writ to any person but, the person against whom writ will be issued must have some statutory or public duty to perform. **(Emphasis supplied).**

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

restored to its original numbers for being decided by the Single Bench afresh.

Order accordingly.

I.L.R. [2015] M.P., 1415
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 17891/2012 (Jabalpur) decided on 20 August, 2013

RAMLALA SHUKLA (DR.) & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

(Alongwith W.P. No. 17382/2012)

A. ***University Grants Commission Act, (3 of 1956), Section 12 - Functions of Commission*** **- Act has been promulgated with an object to prescribe an agency to keep a watch on the standards of higher education establishments including prescribing service conditions - If a regulation is made by UGC, after its approval by Central Government and publication in official Gazette, it will become a law - UGC Act would prevail over other enactments. (Paras 6 & 7)**

क. विश्वविद्यालय अनुदान आयोग अधिनियम, (1956 का 3), धारा 12 – आयोग के कार्य – अधिनियम को ऐसी एजेंसी विहित करने के उद्देश्य के साथ प्रवर्तित किया गया है जो उच्चतर शैक्षणिक संस्थानों के मानकों पर नज़र रखे, इसमें सेवा शर्तें विहित करना समाविष्ट है – यदि विश्वविद्यालय अनुदान आयोग द्वारा किसी विनियमन को बनाया जाता है, वह केन्द्र सरकार के अनुमोदन एवं राजपत्र में प्रकाशन के पश्चात् विधि बनेगा – अन्य अधिनियमितियों पर विश्वविद्यालय अनुदान आयोग अधिनियम अध्यारोही होगा।

B. ***Education Service (Collegiate Branch) Recruitment Rules, M.P., 1990 - Schedule III & IV - Academic Grade Pay*** **- There is no inconsistency in Regulations framed by UGC and Rules framed by State Govt. - Those who are promoted as Professors, become a full fledged Professor in State Service in Higher Education Department - Revised pay band is granted by UGC solely on the basis of post and not on the basis of pre-revised pay scale - Order reducing AGP to petitioners is bad and quashed. (Para 10)**

ख. शिक्षा सेवा (महाविद्यालयीन शाखा) भर्ती नियम, म.प्र., 1990 –

अनुसूची III व IV – अकादमिक ग्रेड–पे – विश्वविद्यालय अनुदान आयोग द्वारा विरचित विनियमन एवं राज्य सरकार द्वारा विरचित नियमों में कोई असंगति नहीं – जिन्हें प्राध्यापकों के रूप में पदोन्नत किया गया है वे राज्य सेवा में उच्चतर शैक्षणिक विभाग में पूर्णतया प्राध्यापक बनते हैं – पुनरीक्षित पे–बैंड विश्वविद्यालय अनुदान आयोग द्वारा मात्र पद के आधार पर और न कि पुनरीक्षण पूर्व के वेतनमान के आधार पर प्रदान किया जाता है – याचीगण का अकादमिक ग्रेड–पे घटाने का आदेश अनुचित अतः अभिखंडित किया गया।

C. Constitution - Article 166 - Rules of business - **Decision to grant higher AGP was taken by Cabinet of Ministers - Impugned order withdrawing higher AGP was not placed before Cabinet of Ministers - Order is a nullity.** **(Para 15)**

ग. संविधान – अनुच्छेद 166 – कार्य के नियम – मंत्रीमंडल द्वारा उच्चतर अकादमिक ग्रेड–पे प्रदान करने का निर्णय लिया गया था – उच्चतर अकादमिक ग्रेड–पे वापस लेने के आक्षेपित आदेश को मंत्रीमंडल के समक्ष नहीं रखा गया था – आदेश अकृत।

Cases referred :

(1994) Suppl. (3) SCC 516, [1963 Supp (1) SCR 112 : (AIR 1963 SC 703)], [(1987) 3 SCR 949 : (AIR 1987 SC 2034)], (2009) 4 SCC 590, (2013) 2 SCC 617, W.P. No. 52/2010 (High Court of Uttarakhand at Nainital), W.P.No. 21748/2011 , (2010) 11 SCC 374, 2001 (1) MPLJ 368, (2002) 3 MPHT 1, ILR (2013) MP 138, 2006 (1) MPHT 551 (FB).

Rajendra Tiwari with *R.K. Tripathi*, for the petitioners in W.P. No. 17891/2012.

L.C. Patne and *Abhay Pandey,* for the petitioner in W.P. No. 17382/2012.

R.D. Jain, A.G. with *Rahul Jain,* Dy. A.G., for the respondent no. 1 in W.P. No. 17891/2012 and for the respondents no.1 to 3 in W.P. No. 17382/2012.

Dharmendra Sharma, for the respondent no. 3 in W.P. No. 17891/2012 and for the respondent no. 5 in W.P. No. 17382/2012.

None for the respondent no. 2 in W.P. No. 17891/2012 and for respondent no.4 in W.P. No. 17382/2012.

ORDER

K.K. Trivedi, J. :- These two writ petitions are filed against the

order dated 14.9.2012 issued by the respondent No.1, therefore, both the writ petitions were heard together and are being decided by this order. However, the facts are taken from W.P.No.17382/2012(s).

2. The petitioner No.1 is an Association of all the Professors appointed in the Higher Education Department of Government of Madhya Pradesh. The petitioner No.1 and other petitioners in the connected writ petition are all promoted Professors working in the Government colleges of the State of Madhya Pradesh. The direct recruitment or promotion of Professors has been done under the provisions of M.P. Education Services (Collegiate Branch) (Gazetted) Recruitment Rules, 1990 (hereinafter referred to as Gazetted Rules for brevity). It is contended by the petitioners that the University Grants Commission (hereinafter referred to as UGC for brevity) has made a Scheme of revising the pay scales, prescribing the promotional prospects by way of a Career Advancement Scheme, as also the age of superannuation. The said Scheme has duly been approved by the Government of India, Ministry of Human Resources Development, Department of Higher Education, and has subsequently been formulated in the Regulations, made by the UGC. It is contended by the petitioners that since they have been given promotion on the post of Professor, the pay band revised and prescribed by the UGC in its Scheme and Regulations was duly made applicable to them by the State Government after taking a policy decision in its Cabinet of Ministers. The order in this respect was issued on 16.4.2010 and the revised pay bands were made applicable with effect from 1.1.2006. After fixation of salary of the petitioners in such manner, the benefit was extended to them. However, all of a sudden, the impugned order dated 14.9.2012 has been issued reducing the Academic Grade Pay (hereinafter referred to as the AGP for brevity) granted to the petitioners, arbitrarily without even obtaining any approval from the Cabinet of Ministers, therefore, they are required to approach this Court by way of filing present petition. It is contended by the petitioners that since UGC is the regulatory body prescribed under a Parliamentary Act, if a regulation is made by the UGC, duly approved by the Central Government and published in the Gazette of India, it would became a law and is binding on the State Government. It cannot be unilaterally changed in exercise of whatsoever power available with the State Government as the State is bound by such Parliamentary Legislation and, therefore, the order impugned is bad in law. It is contended by the petitioners in both the writ petitions that the action on the part of respondent-State is arbitrary, malafide, bias and without

any authority of law as in terms of the instructions issued by the Central Government coupled with the Regulations made by the UGC, no power was available to the State Government to reduce AGP available to the petitioners in such a manner. This being so, it is contended that the order impugned is bad in law and is liable to be quashed.

3. Per contra, by filing a return, the respondent-State has contended that the UGC norms have not been violated by the State. On the other hand, there was a mistake committed in understanding the decision taken by the Cabinet of Ministers, inasmuch as, persons like petitioners who were not entitled to the grant of AGP at a higher rate prescribed by the UGC for the post of Professor as the petitioners were not getting the salary in the pre-revised scale indicated in the appropriate table appended with the Regulations of the UGC, therefore, the mistake committed in issuing the order pursuance to the decision taken by the Cabinet of Ministers was rectified by issuing the impugned order dated 14.9.2012. It is contended by the respondents in their return that since the respondents have not changed the decision made by the Cabinet of Ministers nor have taken any steps which is not prescribed by the UGC or is in violation of the norms of the UGC, the entire stand taken by the petitioners in their petition is misconceived. It is contended that since the law is very clear on the point that the mistake committed in granting anything which is not provided by law, could be remedied at any stage, if by order dated 14.9.2012, it is directed that the petitioners would be entitled to grant of AGP @ Rs.9,000/- per month instead of Rs.10,000/- per month and excess amount paid to them is required to be recovered, no wrong is committed by the respondents. It is put-forth that in view of the settled law, such an action can always be taken by the State and no writ can be issued restraining such an action of the respondents. It is further put-forth that the petitioners cannot be treated as Professor as they are simply Assistant Professors who are getting the benefit of selection grade pay scale and any upgradation in the pay alone will not make them the full-fledged Professors. Thus, it is contended that both the petitions are based on misconceived and misleading facts and as the petitioners are harping on the wrong premises, the petitions are liable to be dismissed.

4. Heard learned Senior counsel Shri Rajendra Tiwari and Shri L.C. Patne for petitioners and Shri R.D. Jain, learned Advocate General and Shri Sanjay K. Agrawal, learned counsel for interveners and perused the record.

5. The controversy in both the petitions boils round, the question whether

the petitioners are to be treated as full fledged Professor said to be working in Higher Education Department of Government of Madhya Pradesh or not, and whether in terms of the revision of pay Scheme made by the UGC, the petitioners would be entitled to grant of a higher rate of AGP or not ? Since the Scheme was formulated by the UGC, giving benefit of revision of pay with effect from 1.1.2006, and the said Scheme has been made applicable, after its becoming a part of the Regulations of the UGC, by the State of M.P., whether the departure from the said Scheme is permissible or not ? And lastly whether the UGC has prescribed the pay bands according to the nomenclature of the posts or on the basis of pre-revised pay scales applicable to the posts?

6. First of all the effect of UGC Scheme and its regulations is to be considered. The UGC is established in terms of the provisions made in the Parliamentary Act known as University Grants Commission Act, 1956 (hereinafter referred to as UGC Act for brevity). The said Act is promulgated only with an object to prescribe an agency to keep a watch on the standards of higher education establishment of such Higher Educational Institutions, including the prescribing of service conditions of the teaching staff and other staffs in the said Colleges. The different States in the country have formulated the policies, enacted the Act for the purposes of establishing the Higher Education Institutions and Universities. To govern the services in the said institutions, Rules are made in exercise of power conferred under the proviso to Article 309 of the Constitution of India by the different States. However, a safeguard is provided in the Parliamentary Act of UGC where it is prescribed that if a Regulation is made by the UGC, after its approval by the Central Government, and publication in the Gazette of India, it will become a law to be observed and followed by all States, in the matter of keeping the standard of institutions of Higher Education as also maintaining the service conditions of the teaching and other staffs in the said institutions. This particular aspect whether the norms prescribed by the UGC are binding on the States or not has already been dealt with by the Apex Court and it has been held that the Scheme prescribed under the Regulations by the UGC would prevail on any of the laws made on the strength of concurrent list III of Seventh Schedule to the Constitution of India, by the State Legislature. For the purposes of convenience, certain pronouncement made in this respect are referred to herein after.

7. The Apex Court dealing with such a situation in the case of *University of Delhi Vs. Raj Singh and others* [(1994) Suppl.(3) SCC 516) has

categorically held considering the law laid down in the case of *Gujarat University, Ahmedabad Vs. Krishna Ranganath Mudholkar* [1963 Supp (1) SCR 112 : (AIR 1963 SC 703)] and in the case of *Osmania University Teachers Association Vs. State of Andhra Pradesh* [(1987) 3 SCR 949: (AIR 1987 SC 2034) that the legislation done in exercise of power by the Parliament, as prescribed in Seventh Schedule to the Constitution of India, List I, entry 66 will prevail over Item 25 of List III, i.e. a concurrent list where the State Legislature can legislate with respect to certain functions relating to higher education or research and scientific and technical education. It has categorically been held by the Apex Court in paras 11, 13 and 14 that the UGC legislation will prevail over the State legislation, which reads thus :-

> "11. Following up on the Mehrotra Committee report the Department of Education, Ministry of Human Resources Development, Government of India wrote to the U.G.C. on 17th June, 1987 on the subject of revision of pay-scales in Universities and colleges & and other measures for the maintenance 'of standards in higher education. The letter stated that the Government of India had, after taking into consideration the recommendations of the U.G.C. (based upon the Mehrotra Committee report) decided to revise the pay-scales of teachers of the Central Universities. To enable the same to be done in the State, separate letter had been addressed. A scheme for the revision of pay-scales was appended to the letter, which would be applicable to teachers in all the Central Universities, the colleges in Delhi and the institutions deemed to be Universities whose maintenance expenditure was met by the U.G.C. The implementation of the scheme would be subject to acceptance of all the conditions attached to the scheme. The letter stated that the Universities should be advised to amend their Statutes and Ordinances before the revised Scales became operational. For our purposes, the relevant portion of the scheme reads thus :
>
> "Only those candidates who, besides fulfilling the minimum academic qualifications described for the post of lecturer, have qualified in the comprehensive test, to be specially conducted for the purpose, will be eligible for appointment as lecturers. The detailed schemes for conducting the test including its design,

Content and administration will be worked out and communicated by the UGC."

13. In The *Gujarat University, Ahmedabad v. Krishna Ranganath Mudholkar and Others*, [1963] Supp. 1 SCR 112 (AIR 1963 SC 703), the central question was whether the Gujarat University could impose Gujarati or Hindi as the exclusive media of instruction and examination and whether State legislation authorising the Gujarat University to impose such media was constitutionally valid in view of entry 66. As it then read, entry 11 of List II empowered the States to legislate in respect of education, including Univer-sities, subject to the provisions of entries 63, 64, 65 and 66 of List I and (Item) 25 of List Ill. Entry 63 of List I, as it then read, invested Parliament with the power to enact legislation with respect to the institutions known at the commencement of the Constitution as the Banaras Hindu University, the Aligarh Muslim University and the Delhi University and other institutions declared by Parliament by law to be institutions of national importance. By reason of entry 66. Parliament was invested with the power to legislate on 'coordination and determination of standards in institutions for higher education or research and scientific and technical institutions.' Item 25 of List III conferred power upon Parliament and the State legislatures to enact legislation with respect to 'vocational and technical training on labour'. A six-Judge bench of this Court observed that the validity of State legislation on the subjects of University education and education in technical and scientific institutions falling outside entry 64 of List I as it then read (that is to say, institutions for scientific or technical education other than those financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance) had to be judged having regard to whether it impinged on the field reserved for the Union under entry 66. In other words, the validity of the State legislation depended upon whether it prejudicially affected the coordination and determination of standards. It did not depend upon the actual existence of union legislation in respect of coordination and

determination of standards which had, in any event, paramount importance by virtue of the first part of Article 254(1). Even if power under entry 66 was not exercised by Parliament, the relevant legislative entries being in the exclusive Union List, a State law entrenching upon the Union field would be invalid. Counsel for the Gujarat University submitted that the power conferred by entry 66 was merely a power to coordinate and to determine standard; that is, it was a power merely to evaluate and fix the standards of education, because the expression 'coordination' meant evaluation and "determination" meant fixation. Parliament had, therefore, power to legislate only for the purpose of evaluation and fixation of standards in the institutions referred to in entry 66. In the course of the arguments, however, it was admitted that steps to remove disparities which had actually resulted from adoption of regional media and the falling of standards might be undertaken and legislation for equalising standards in higher education might be enacted by Parliament. The Court was unable to agree with the argument. It held that entry 66 was a legislative head and in interpreting it, unless it was expressly or of necessity found conditioned by words used therein, a' narrow or restricted interpretation could not be put upon the generality of its words. Power to legislate on a subject was normally to be held to extend to all ancillary or subsidiary matters which could fairly and reasonably be said to be comprehended in that subject. Again, there was nothing either in entry 66 or elsewhere in the Constitution which supported the submission that the expression "coordination" meant, in the context in which it was used, merely evaluation. Coordination in its normal connotation meant harmonising or bringing into proper relation. In which all the things coordinated participated in a common pattern of action. The power to coordinate, therefore, was not merely a power to evaluate. It was a power to harmonise or secure relationship for concerted action. There was nothing in entry 66 which indicated that the power to legislate on coordination of standards in institutions of higher education did not include the power to legislate for preventing the occurrence of or for removal of disparities in standards. By express pronouncement

of the Constitution-makers it was a power to coordinate and, of necessity, implied therein was the power to prevent what would make coordination impossible or difficult. The power was absolute and unconditional and in the absence of any controlling reasons it had to be given full effect according to its plain and expressed intention.

14. In *Osmania University Teachers Association v. State of Andhra Pradesh,* [1987] 3 SCR 949 (AIR 1987 SC 2034), the validity of the Andhra Pradesh Commissionorate of Higher Education Act, 1986, was in question. It was enacted to provide for the constitution of a Commissionerate to advise the State Government in matters relating to higher education and to oversee its development and perform all functions necessary for the furtherance and maintenance of excellence in the Standards of higher education. The legislation was upheld by the High Court. This court on appeal held to the contrary. It observed that entry 66 of List I gave power to the Union to see that the required standard of higher education in the country was maintained. It was the exclusive responsibility of the Central Government to coordinate and determine the standards of higher education. That power included that power to evaluate, harmonise and secure proper relationship to any project of national importance. Such coordinate action in higher education with proper standards was of paramount importance to national progress. Parliament had exclusive power to legislate with regard to the matters included in List-I and the State had no power at all in regard to such matters. If the State legislated on a subject falling within List-I, the State legislation was void. The Court went on to say, 'The Constitution of India vests parliament with exclusive authority in regard to co-ordination and determination of standards in institutions for higher education. The Parliament has enacted the UGC Act for that purpose. The University Grants Commission has, therefore, a greater role to play in shaping the academic life of the country. It shall not falter of fail in its duty to maintain a high standard in the Universities. Democracy depends for its very life on high standards of

general, vocational and professional education, Dissemination of learning with search for new knowledge with discipline all round must be maintained at all costs. It is hoped that University Grants Commission will duly discharge its responsibility to the national and play in increasing role to bring about the needed transformation in the academic life of the Universities."

This particular aspect was also considered by the Apex Court in the case of *Annamalai University Vs. Secretary to Government, Information and Tourism Department and others* [(2009) 4 SCC 590] wherein it was recorded that the amplitude of the provisions of the UGC Act vis-a-vis other enactment of legislatures was no longer res integra. The law laid down in various pronouncement were considered and it was categorically held that the UGC Act having been enacted by Parliament in terms of Entry 66 of List I of Seventh Schedule to the Constitution of India would prevail over the other enactments. In the case of *Vaishno Devi Mahila Mahavidyalaya Vs. State of Uttar Pradesh and others* [(2013) 2 SCC 617], the Apex Court has considered the similar provisions made in respect of teachers training under the National Council for Teachers Education Act, 1993, and held that such norms prescribed by the Council will have the binding force and any other enactment will have to give way to the norms and regulations of such a Council.

Similar is the situation with respect to the decisions rendered by different High Courts. In Writ Petition No.52/2010, a Division Bench of High Court of Uttarakhand at Nainital in the case of *Pant University Teachers Association, Pant Nagar Vs. Chancellor, Govind Ballabh Pant University of Agriculture & Technology, Pant Nagar and others,* has categorically held that the Regulations made by the UGC would have the binding effects and the service conditions of staff more particularly the teaching staff appointed in the higher education institutions would be governed only and only by the UGC Regulations. Anything contained in any of the law made by the State Legislature or the executive Government of State repugnant to the provisions of the Regulations of the UGC would have to give way to the UGC norms. This aspect has further been considered by the High Court of Jharkhand in bunch of writ petitions decided on 10.1.2011 and the similar is the consideration done in view of the law laid down by the Apex Court. Again dealing with similar circumstances, the High Court of Judicature at Patna has also made it clear that the norms prescribed by the UGC would have the binding effect. This aspect is also considered by this Court while rejecting the application for

vacating the interim order passed in W.P.No.21748/2011, *Dr. J.S. Arora and others Vs. M.P. Pashu Chikitsa Vigyan Vishwavidyalaya & another.*

8. Now to consider other issues, it is to be examined whether the promotee Professors are to be treated as full fledged Professors for the purposes of grant of revision of pay in the pay band approved by the UGC in its Scheme duly transformed in regulation, or not ? The State Government in exercise of its power conferred under the proviso to Article 309 of the Constitution of India, has made the Rules known as M.P. Educational Service (Collegiate Branch) Recruitment Rules, 1990 (hereinafter referred to as the Gazetted Rules for brevity). The Gazetted Rules are made applicable to the services in the Collegiate Branch including the teaching staff. The constitution of the service as per the Gazetted Rules shall consist of the persons who at the commencement of the said Gazetted Rules were holding substantively or in officiating capacity the post specified in Schedule-I, including the persons recruited to the service because of emergency on adhoc basis before the commencement of the Gazetted Rules and the persons recruited to the service in accordance with the provisions of the Rules. Schedule-I of the Gazetted Rules includes posts of Professor which according to the Schedule are classified as Class-I post in the pay scale of Rs.3700-5700/- which was prevalent at that time. Schedule-II of the Gazetted Rules prescribes the manner of filling the post. For the purposes of convenience, the relevant part of the Schedule, relating to the post of Professors is reproduced which according to the Schedule indicates that 100% posts are to be filled in by direct recruitment provided that :

> "Direct Recruitment shall be made on total number of substantive posts of professors sanctioned by Government. In addition to this on account of enforcement of new U.G.C. Pay-Scales from 1.1.1986. Promotion to the post of professors shall be made on the basis of service record from amongst the Asstt. Professors of senior/selection grade pay scale after completion of prescribed period of service and prescribed qualification under provisions mentioned in Schedule-IV. These posts shall be filled up through departmental promotion committee. No definite number of these posts of professors shall be and number of these posts will vary on the basis of number of Assistant Professors having requisite seniority and qualification."

9. Schedule-III of the Gazetted Rules prescribes the qualification which is not very much in dispute, therefore, the same is not referred to. Schedule-IV of the Rules prescribes the method of promotion which reads in so far as the promotion on the post of Principal degree College and the promotion on the post of Professor is concerned, as follows :-

> "Promotion to the post of Principal degree college shall be made on the basis of merit-cum-seniority from amongst those professors having atleast two years experience. Separate seniority list shall be prepared for directly recruited professors and promotion to the post of Principal, through the departmental promotion committee. The post of Principal shall be filled up from amongst these lists in such ratio which exists between the directly recruited professor and promoted professors at the commencement of the calendar year of meeting of promotion committee. While enquiring about the eligibility for promotion, there shall be no distinction between the time bound professors and other professors. The seniority list of promoted professors shall be made on the basis of the date of their regular appointed to the post of assistant professor. The absorbed professors of the taken over colleges shall be enlisted with directly recruited professors and shall be granted seniority from the date from which their college has been taken over by the government. The seniority of directly recruited professor shall be determined on the basis of seniority mentioned in the selection list issued by the Public Service Commission.
>
> (3) Assistant Professors working in the Senior/ Selection grade pay scale shall be eligible for promotion to the post of Professors in the Pay-scale of Rs.3700-5700, if He/ She has :
>
> (a) completed 8 years of service in the senior scale, provided that the requirement of 8 years will be relaxed if the total service of the Asstt. Professor is not less than 16 years for Ph.D. and M. Phil. Holders 13 and 15 years respectively;
>
> (b) obtained Ph.D. Degree or an equivalent published work;

(c) made some mark in the areas of scholarship and research as evidence by self-assessment, reports of referees quality of publications, contribution to educational renovation, design of new courses and curricular, etc.;

(d) participated in two refresher courses/ summer institutes each of approximately 4 weeks duration of engaged in other appropriate continuing eduction programmes of comparable quality as may be specified by the UGC, after placement in the Senior Scale; and

(e) consistently good performance appraisal reports."

10. The Method of recruitment provided in Rule 6 of the Gazetted Rules, categorically prescribes that the recruitment in the service after the commencement of Gazetted Rules shall be by the following methods, namely:-

"(a) by direct recruitment by competitive examination/selection;

(b) by transfer of persons who hold in substantive capacity such posts in such service as specified in Schedule-II;

(c) by promotion of members of the service as specified in column (2) of Schedule-IV;

(d) by absorption in accordance with the procedure prescribed in rule 14, after the taken over of any college by the Government."

The direct recruitment is differently prescribes in Rule 11 of the Gazetted Rules and a specific provision is made for promotion in Rule 17 of the Gazetted Rules. The appointment is to be made in service from the select list in accordance to Rule 21 of the Gazetted Rules. This makes it clear that there is a method of recruitment by promotion prescribed for appointment on the post of a Professor. It is also trite that where the sources of recruitment are prescribed in the Service Rules and the recruitment is done according to the method prescribed, the recruited person became part of one common cadre irrespective of source of or mode of their recruitment. Thus, it has to

be seen that the promotion is a method of recruitment in the Gazetted Rules prescribed on the post of Professor in the Higher Education Department in all colleges of the State. The only condition is that the mode of recruitment should be in accordance to the provisions of the Regulations prescribed by the UGC. It is not that there is any inconsistency between the Regulations of the UGC and the Rules made by the State Government in the matter of promotion and appointment on the post of Professor. Thus, those who are promoted as Professor, become a full fledged Professor in the State services in Higher Education Department, and are not to be treated differently than a directly recruited Professor.

11. The Scheme itself has been placed on record as Annx.P/2, said to be issued under the approval of Government of India in Ministry of Human Resources Development, Department of Higher Education on 31.12.2008. It is not in dispute that this Scheme has ultimately been transformed in a Regulation made by the UGC. The conditions mentioned generally in Class-I category prescribes that there shall be only three designation of the posts in respect of teachers in Universities and Colleges, namely, Assistant Professor, Associate Professor and Professor. However, it is not made mandatory that the post of Associate Professor must be created. What is the intention that certain posts of Assistant Professor be earmarked for the purposes of grant of Senior pay scale/selection grade pay scale which according to Schedule appended to the Gazetted Rules is already available as in the Schedule-I of the Rules out of 7426 posts of Assistant Professor in Class-2 category, certain number of posts have been put in for grant of senior scale of pay to the Assistant Professor though no specific number of posts have been shown in Class-I category of the Assistant Professor in this respect. The provisions are made for grant of senior scale and selection grade pay scale in the Gazetted Rules in Schedule-IV after Note.(1) in sub clause (A) and (B) which are reproduced for the purposes of convenience :-

> "**Note**.-(1) The following qualifications will be essential for Assistant Professor, Sports Officers and Librarian for their placement in senior pay scale and selection grade pay scale :-
>
> **(A) for Senior Pay-scale.**- Asstt. Professor/ Librarian/Sports Officer will be placed in senior pay-scale of Rs.3000-5000 if he/she has (I) completed 8 years of service

after regular appointment, or completed 5 yeas or 7 years of service in case of Ph.D. Or M.Phil degree holders, respectively, (ii) participated in one orientation and one refresher course/ summer institutes, each of approximately 4 weeks duration or remained associated with appropriate continuing education programmes, or comparable quality as may be specified by UGC; and (iii) consistently satisfactory performance appraisal report.

(B) for Selection Grade Pay-scale.-Every Assistant Professor/Sports Officer/Librarian working in senior pay-scale shall be eligible for placement in the Selection Grade Pay-scale 3700-5700, provided he/she (I) has completed 8 years of service in the senior scale. The condition of 8 years shall be relaxed in case of officers who have completed atleast 16 years and for Ph.D. and M.Phil holders 13 and 15 years respectively of service on the post of Asstt. Professor/Sports Officer/Librarian, (ii) after posting in the senior scale has participated in two refreshers courses/summer institutes each of approximately 4 weeks duration, has remained associate with appropriate continuing education programmer, equivalent to standards approved by UGC; and (iii) has consistently good performance appraisal reports."

12. Now the other issue is required to be considered, whether the UGC has prescribed the pay bands for revision of pay on the basis of pre-revised pay scale or not, and whether the intention of UGC is to give a particular pay band with AGP on different rates as per the nomenclature of post or not? It is to be seen that the object of the instructions contained in the Schemes Annx.P/2 in the writ petition is fulfilled, already in advance by the State by prescribing a post which could be designated as post of Associate Professor. Why this is held so because in the Scheme of the UGC different pay scales are prescribed for different posts. The post of Assistant Professor formally known as Lecturer in the senior scale which were given the pay scale of Rs.10,000-15,200/- have been given a revised pay band of Rs.15,600-39,100/- plus AGP of Rs.7000/-. The distinction is made between the two pay scales; one which was given to those lecturers who were having less than three years of service in selection grade, which was as per pre-revised pay

scale of Rs.12,000-18,300/- and which post was also given the pay band of Rs.15,600-39,100/- with slightly higher AGP of Rs.8,000/-. This was categorically indicated in Table III. Table IV was made applicable for those readers and lecturers selection grade who were having three years of service and those who were working in the pay scale of Rs.12,000-18,300/- they were given the pay band of Rs.37,400-67,000 plus AGP of Rs.9000/-. Now these posts are to be declared or treated as Associate Professors. The specific pay scale was given to the post of Professors which according to the UGC were earlier given the pay scale of Rs.16,400-22,400/-. The revised pay band given to this post was Rs.37,400-67,000/- plus AGP of Rs.10,000/-, as was indicated in Table V. If the different pay scale mentioned in the different Tables referred to herein above are taken into consideration, those Assistant Professors, Lecturers or Readers working in the selection grade pay scale, who were given the benefit of pay scale of Rs.12,000-18,300/-, they were given the revised pay band of Rs.15,600-39,100/- with AGP of Rs.8,000/-, which was not comparable with the pay scale of the post of Professor as the post of Professor was not only independently shown, but it was further said that the pre-revised pay scale of the same was slightly higher than the pay scale of the aforesaid Readers, Lecturers and Assistant Professors. The Scheme specifically prescribes different standard for designating a Professor, but it nowhere prescribes that the said person should be working only in the pre-revised scale as mentioned in Table V, otherwise the revised pay band plus AGP would not be applicable. This leaves this Court with no option, but to accept that the post of Professor was separately designated and irrespective of the pre-revised pay scale, a pay band similar to the pay band of the Assistant Professors selection grade (or Associate Professors) with slightly higher AGP was sanctioned by the UGC to the said post. This has to be noted that in some other post, the incumbents who were working in the lesser pre-revised pay scale were given this revised pay band plus AGP as is referable from Table VI of the Scheme.

13. In view of this, if the entire Scheme is looked into, no rider was put by the UGC in its Scheme that a particular revised pay band with AGP would be applicable to a post only if the incumbent on the said post was getting the salary in the pre-revised pay scale indicated in the appropriate table appended to the Scheme. Different considerations were done by the UGC in the matter of prescribing the revised pay band, as it was categorically provided in paragraph 2 of the Scheme where the revised pay scales, Service conditions

and Career Advancement Scheme was formulated by the UGC. It was categorically said that incumbents working as Assistant Professor, herein the case of State of Madhya Pradesh which post is treated to be equivalent to the post of Reader and Lecturers selection grade and those who have completed three years of service shall be placed in the pay band of Rs.37,400-67,000 with AGP of Rs.9,000/- and shall be redesignated as Associate Professor. This was for those who were not promoted to the post of Professor and were in fact working in the selection grade pay scale. The designation or redesignation of such a post as Associate Professor, would not change the status of the persons like petitioners as they have already been promoted as per the Scheme of the Gazetted Rules long back, before even coming into force of the Scheme formulated by the UGC. It will not be out of place to mention here again that though the Scheme was made applicable with effect from 1.1.2006 by the UGC, but it was formulated only on 31.12.2008 and subsequently converted into a Regulation in the year 2010. The right of designation as full fledged Professor accrued in favour of petitioners thus was not to be affected by such a Scheme which was applicable with effect from 1.1.2006 only. It was reiterated in the entire Scheme that the pay band for the post of Professor shall be Rs.37,400-67,000/- with AGP of Rs.10,000/-. There is no restriction put by the UGC that the said benefit would be available only to the direct recruits Professors and not to the promotees. According to the law, it was rightly done so because once the recruitment is done by two different sources, the recruitees become a part of one cadre and there cannot be a distinction in the matter of grant of pay only on the basis of the source of recruitment of such incumbents. Further, it has to be seen that the UGC has not insisted on pre-revised scale for grant of specific pay band and AGP for a simple reason that there may be different pay scale prescribed by the State Governments of different States of the country looking to their financial capability, and if the post though higher in nomenclature has been given a lesser pay scale to the teaching posts in higher education institutes by a particular State in comparison to the pay scale given by the other States, an anomaly would be created in such a manner if any restriction is put for grant of revised pay band with AGP on the basis of pre-revised pay scale. If this is allowed, it would be squarely hit by Article 14, 16 and 39(d) of the Constitution of India and would be a hostile discrimination of a group within the group. A class within the class cannot be created without there being a reasonable nexus to achieve an object justifiedly. This particular aspect is also taken care of by UGC as would be clear from the memo sent by UGC to the Principal

Secretary of the department which would be referred to herein after.

14. As has been put-forth by learned counsel for the petitioners, this Scheme was taken note of by the State Government and in a Public Interest Litigation filed before this Court, a categorical statement was made that the decision is taken by the State Cabinet to implement the said Scheme and orders in this respect have been issued on 16.4.2010. Before issuing the said orders, certain policy decisions were taken by the Cabinet of Ministers, pursuance to which an affidavit was filed before the Division Bench of this Court and these facts were categorically pointed out. Since such an aspect was considered by the Division Bench and this particular aspect was also noted down, the order dated 16.4.2010 was issued. Now it is not proper for the respondent-State to say that there were no post of Associate Professor and therefore, the persons like petitioners who were in fact working in the lesser pay scale should not have been given the higher revised pay band of Rs.37,400-67,000/- plus AGP of Rs.10,000/-. It is tried to canvass by the learned Advocate General that in fact something was added in the Table appended to such an order which in fact was not prescribed by the UGC at all and, therefore, such a higher rate of AGP was not available to the persons like petitioners. This Court after examining such facts in the light of Scheme of UGC is not impressed by such submission of learned Advocate General. In fact, such note was not appended incorrectly or by mistake, but it was deliberately added because there was no distinction made by the UGC in the matter of grant of revised pay scale with higher AGP to the post of Professors, on the basis of source of their recruitment and, therefore, it cannot be said that it was a folly or a mistake crept in the order dated 16.4.2010 passed by the respondent-State. What in fact is intended by the impugned order dated 14.9.2012 is change of the AGP to the post of Professor which is not prescribed by the UGC. In terms of the specific instructions issued by the UGC, in fact such a change was not to be made as it would be completely in violation to the Scheme of revision of pay prescribed by the UGC. What in fact intended by the UGC while intimating the respondent-State vide memo dated 8.1.2010 was that a change can be made to introduce the scale of pay higher than those mentioned in the Scheme of UGC, but not to reduce the pay scale or the AGP. For the purposes of convenience, the letter sent by the UGC to the Principal Secretary of the Department of Higher Education, Government of Madhya Pradesh on 8.1.2010 is reproduced in toto, which reads thus :-

"No.F.11-37/2009-U.II

Government of India
Ministry of Human Resource Development
Department of Higher Education

New Delhi,8th January 2010

To,

The Principal Secretary,
Higher Education Department,
Government of Madhya Pradesh,
Mantralaya, Bhopal.

Subject :- Reimbursement of financial burden due to' implementation of U.G.C. Pay Scales on the basis of 6th Pay Commission recommendation to Teachers and equivalent Cadres in Universities and Colleges from 1.1.2006.

Sir,

I am directed to refer to your letter No.2558/PS/HE/09 dated 20.11.2009 requesting for re-imbursement of 80% of the additional requirement of the State Government consequent on revision of pay scales of the teachers in universities and colleges under the State Government, in pursuance of this Ministry's letter No.1-32/2006-U.II/U.1(i) dated 31.12.2008. In this context, the Notification No. F.1-124/2009/1/38 dated 29.10.2009 issued by the State Government of Madhya Pradesh has been examined. It is observed that the State Government has not implemented this Ministry's Scheme of revision of pay of teachers and equivalent cadres in universities and colleges as contained in this Ministry's letter dated 31.12.2008 as a composite package. The following modifications have been noted :-

(a) Pay Band-4 (Rs.37,400-67000) plus Academic

Grade Pay of Rs.9000 has been made applicable to teachers and equivalent positions after completing 5 years service in the Selection Grade (pre-revised scale of Rs.12000-18300). This is not in conformity with the provisions contained in this Ministry's letter No.F.1-32/2006-U.II/U.1 (I) dated 31.12.2008, wherein 3 years service has been prescribed.

(b) Designation of Associate Professor has not been mentioned for those who have been placed in Pay Bank-4 (Rs.37400-67000) with AGP of Rs.9000.

(c) The provision for special allowance of Rs.2000 and Rs.3000 to the Principals of Under-graduate and Post-graduate colleges respectively as per guidelines, has not been implemented.

(d) The State Government has also provided for pay scale of Rs.37,400-67,000 plus AGP of Rs.9,000 for the so called post of "Professors" in colleges against the pre-revised scale of Rs.12,000-18,300. No such post of Professors in the pre-revised pay scale of Rs.12,000-18,300/- was prescribed by the Ministry of Human Resource Development.

2. The applicability of the scheme has been indicated in para 8(p) (v) of this Ministry's letter dated 31.12.2008, which, inter alia, provides that the Scheme may be extended to universities, Colleges and other higher educational institutions coming under the purview of the State legislatures, provided State Governments wish to adopt and implement the Scheme subject to the following terms and conditions :

(a) Financial assistance from the Central Government to State Governments opting to revise pay scales of teachers and other equivalent cadre covered under the Scheme shall be limited to the extent of 80% (eighty percent) of the additional expenditure involved in the implemention of the revision.

(b) The State Government opting for revision of pay shall meet the remaining 20% (twenty percent) of the additional expenditure from its own sources.

(c) Financial assistance referred to as (a) above shall be provided for the period from 1.1.2006 to 31.3.2010.

(d) The entire liability on account of revision of pay scales etc. of university and college teachers shall be taken over by the State Government opting for revision of pay scales with effect from 1.4.2010.

(e) Financial assistance from the Central Government shall be restricted to revision of pay scales in respect of only those posts which were in existence and had been filled up as on 1.1.2006.

(f) State Governments, taking into consideration other local conditions, may also decide in their discretion, to introduce scales of pay higher than those mentioned in this Scheme, and may give effect to the revised bands/scales of pay from a date on or after 1.1.2006; however, in such cases, the details of modifications proposed shall be furnished to the Central Government and Central assistance shall be restricted to the Pay Bands as approved by the Central Government and not to any higher scale of pay fixed by the State Government(s).

(emphasis supplied)

(g) Payment of Central assistance for implementing this Scheme is also subject to the condition that the entire Scheme of revision of pay scales, together with all the conditions to be laid down by the UGC by way of Regulations and other guidelines shall be implemented by State Governments and Universities and Colleges coming under their jurisdiction as a composite scheme without any modification except in regard to the date of implementation and scales of pay mentioned herein above.

3. Thus as per the terms and conditions of the Ministry's letter dated 31.12.2008, the State Governments are required to implement the scheme as a composite one, including the age of superannuation (mentioned in para 8(f) of this Ministry's letter dated 31.12.2008), together with all the

conditions to be laid by University Grants Commission (UGC) by way of regulations and other guidelines. The UGC has not so far notified the Regulations in this regard. Therefore, the State Governments shall have to adopt the scheme including the regulations as may be prescribed by UGC, for being eligible for appropriate central assistance. However, it is mentioned that the various allowance applicable to teachers and equivalent cadres in State Governments shall be governed the respective State Government rules. The Central assistance of 80% covers only the additional requirements towards revision of pay and does not include any amount paid towards allowances.

4. It is provided in Para 8(p) (v) (f) of this Ministry's letter dated 31.12.2008, that the State Governments taking into consideration other local conditions may also decide in their discretion, to introduce scales of pay higher than those mentioned in this Scheme. This implies that State Governments cannot make modifications lowering the pay package prescribed by this Ministry. Also after adoption of the Central Scheme as a composite package, the State Government shall be required to furnish detailed calculations in support of its claim for central assistance, for which a proforma is being devised by this Ministry.

(emphasis supplied)

5. Release of the central assistance shall be considered by this Ministry in accordance with the provisions of the Scheme only after the State Government have adopted and implemented the scheme as a composite scheme, including adoption of the age of superannuation, and have disbursed the salary based on revised pay scales, and after scrutiny of the detailed proposal as may be received from the State Government, Necessary rectifications may be made by the State Government in its notification dated 29.10.2009, before being eligible for central assistance.

6. This issues with the approval of Secretary, Department of Higher Education.

Yours faithfully,

(Rajender Kalwani)
Under Secretary to the Government
of India"

15. With this background and the law, the controversy involved in the present petitions is to be examined. It is the case of the petitioners that the benefit of higher AGP was granted after due consideration by the State Government and the matter was finally decided by the Cabinet of Ministers. It is, thus, to be seen whether under the rules of business, such an order passed on the basis of approval of the Cabinet of Ministers was to be recalled or even modified by the respondent-State without placing the same before the Cabinet of Ministers. The rules of business of Executive Government have been made by Governor of the State in exercise of power conferred by Clause (ii) and (iii) of the Article 166 of the Constitution of India, which prescribe the matters to be placed before the Cabinet of Ministers. Rule 7 in Part-I of the Rules prescribes which cases are to be placed before the Cabinet of Ministers. It is categorically provided that in accordance with the general directions or by a special direction issued by the Chief-Minister, the Minister Incharge of the case with the consent of the Chief Minister, or the Governor under Article 167-C are to be brought before the Cabinet of Ministers. Part-II of the Rules deals with the business or the cases which are normally to be placed before the Cabinet of Ministers. Clause (iv) of the said part specifically provided that any proposal affecting the finances of the State or for re-appropriation within a grant in which the Minister Incharge of the Finance Department has not concurred, are required to be placed before the Cabinet of Ministers. Similarly Clauses (viii) and (ix) deal with the cases where the proposal to vary or reverse a decision previously taken at the meeting of the council is to be considered, or proposal involving any important change of policy and practice are to be placed before the Cabinet of Ministers. Similarly, Clause (xiv) specifically prescribes that Service Rules and their amendments when the General Administration Department has not agreed to such Rules or amendment and the concerned department deems it necessary to submit such cases before the Council, is required to be placed before the Council. Similarly Clause (xxvi) prescribes that cases where any circular embodying any important changes in the administrative system of the State is required to be issued, are to be placed before the Council for consideration. It is not in dispute as it is admitted by the respondents that the order dated 16.4.2010 was issued only after taking a policy decision by the state Government in the Cabinet of

Ministers. That being so, it was necessary on the part of respondents to place such a matter before Cabinet of Ministers. If a decision is taken without placing such a matter before the Cabinet of Ministers, it would be a nullity as has been held by the Apex Court in the case of *MRF Limited Vs. Manohar Parrikar and others* [(2010) 11 SCC 374]. The Apex Court dealing with such a situation has categorically held in paragraphs 90 and 91 of the report, which read thus :-

> "90. Before the High Court as also before us it was contended by the appellants herein, that, the Rules framed under Article 166(3) are only directory in character and failure to comply with them does not vitiate the decision taken by the State Government. The High Court after considering the various judgments cited before it has repelled the said contention to hold that the said Rules are mandatory and non-compliance thereof would be disastrous. The reasoning adopted by the High Court to arrive at such a conclusion is sound and in accordance with the constitutional mandate. The decisions of the State Government have to be in conformity with the mandate of Article 154 an 166 of the Constitution as also the Rules framed thereunder as otherwise such decision would not have the form of a Government decision and will be a nullity.
>
> 91. The Rules of Business framed under Article 166(3) of the Constitution are for convenient transaction of the business of the Government and the said business has to be transacted in a just and fit manner in keeping with the said Business Rules and as per the requirement of Article 154 of the Constitution. Therefore, if the Council of Ministers or Chief Minister has not been a party to a decision taken by an Individual Minister, that decision cannot be the decision of the State Government and it would be non-est and void ab initio. This conclusion draws support from the Judgment of this Court in the case of *Haridwar Singh Vs. Bagun Sambrui & ors* (1973) 3 SCC 889. This Court in the said case was dealing with the Business Rules of the State Of Bihar framed under Article 166 (3) of the Constitution of India and the observations of this

Court on the issue apply to the case on hand in all force. This Court observed:

> "14. Where a prescription relates to performance of a public duty and invalidate acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, such prescription is generally understood as mere instruction for the guidance of those upon whom the duty is imposed.
>
> 15. Where however, a power of authority is conferred with a direction that certain regulation or formality shall be complied with, it seems neither unjust nor incorrect to exact a rigorous observance of it as essential to the acquisition of the right or authority.
>
> 16. Further, Rule 10(2) makes it clear that where prior consultation with the Finance Department is required for a proposal, and the department on consultation does not agree to the proposal, the department originating the proposal can take no further action on the proposal. The Cabinet alone would be competent to take a decision. When we see that the disagreement of the Finance Department with a proposal on consultation, deprives the Department originating the proposal of the power to take further action on it, the only conclusion possible is that prior consultation is an essential prerequisite to the exercise of power."

Thus, it has to be held that the order passed by the respondents without obtaining the approval from the Cabinet of Ministers cannot be said to be a valid order.

16. The respondents have categorically admitted that they have issued the order impugned only to remedy the mistake committed in issuing the order dated 16.4.2010 and have further said that the order dated 14.9.2012 is not a new order making any change in the order passed by the State Government after taking a policy decision in the Cabinet of Ministers. Such a contention of the respondents cannot be accepted in view of the fact that there was a

departure from the Scheme and the Regulations made by the UGC by proposing a lesser amount of AGP to the post of Professors, which was not permissible in terms of law laid down by the Apex Court and this was done even without placing the matter before the Cabinet of Ministers. The fact remains that Section 21 of the M.P. General Clauses Act, 1957, categorically prescribes that where under any Act, a power to issue Notification, orders, rules or bye-laws is conferred then that power includes a power, **exercisable in the like manner and subject to the like sanctions and conditions,** if any, to add, to amend, vary or rescind any notifications, orders, rules or bye-laws, so issued. Admittedly, the power was exercised by the State in making a policy under the executive Rules of business. The said Rules itself prescribe making of a policy as has been discussed herein above. If there was a mistake either in making the policy or issuing the order in consonance to the policy, amendment in the said policy or the consequential order was required to be made in the like manner. The matter should have been placed before the Cabinet of Ministers indicating any such mistake if at all, crept in issuing the order dated 16.4.2010 and the Cabinet of Ministers was required to adjudicate whether there was a mistake committed in making the policy or with a purpose, the order was so issued after making of policy. It was not open to the Secretary of the department to propose something and to accept by the Minister Incharge of the department to make a change in the order so issued after making of policy. This Court has examined these aspects on number of occasions and in the case of *Rajkumar Dawar Vs. State of M.P.* [2001(1) MPLJ 368] and in the case of *A.K. Shrivastava Vs. Union of India and others* [(2002) 3 MPHT 1] and in the case of *Kishore Samrite Vs. State of M.P. and others* [I.L.R.(2013) MP 138] has categorically held that such a power could not have been exercised in any other manner to amend an orderr, notification or rule without following the same procedure as was required to be followed for issuing such order or notification and making of a rule. The Apex Court has also looked into these aspects and has categorically held that power conferred under Section 21 of the Act aforesaid is only a rule of construction and cannot be construed to widen the statutory limit or the power given by the statute. This aspect has again been considered by the Full Bench of this Court in the case of *Heavy Electrical Majdoor Trade Union Vs. State of M.P.* [2006(1) MPHT 551](FB). Thus, it is clear that at any rate, even if there was a mistake committed in issuing the order dated 16.4.2010 prescribing any higher rate of AGP to the post of Professor, within the State, any change could have been

done in the said grant of AGP after placing the same before the Cabinet of Ministers. This has already been held that there was a complete departure from the Scheme made by the UGC duly formulated in regulations, giving a particular AGP to the post of Professor. As per the law laid down by the Apex Court discussed herein above, such a departure would be *de horse* the Scheme and Regulations of the UGC, which is not permissible, specially when this fact was brought to the notice of the respondents vide letter dated 8.1.2010, referred to herein above.

17. In view of the discussions made herein above at length and in view of all these facts, that the petitioners are to be treated as Professor and that the revised pay band is granted by the UGC under its Scheme solely on the basis of post and not on the basis of pre-revised pay scale, as is generally done by the Pay Commissions, the stand taken by the respondents is to be repudiated outrightly, the writ petitions are bound to be allowed.

18. Consequently, both these writ petitions are allowed. The order impugned dated 14.9.2012 Annx.P/20, in so far as it relates to reduction of the AGP to the Professors working in the Universities and Colleges in the State of Madhya Pradesh is concerned is hereby quashed. The petitioners will get the AGP of Rs.10,000/- per month from the date the Scheme of revision of pay has come in force.

19. The writ petitions are allowed to the extent indicated herein above. There shall be no order as to costs.

Petition allowed.

I.L.R. [2015] M.P., 1441
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 11941/2012 (Jabalpur) decided on 29 August, 2013

MAMTA SHARMA (SMT.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Service Law - Terminal dues and Terminal benefits of deceased employee - Nomination - Nominee's interest*** **- Nomination in favour of second wife - First divorced wife filed application for succession certificate - It can't be a ground for delaying the payment**

to a nominated wife - Nomination will not supersede the right of inheritence and/or succession as the case may be if there is no specific Will made by the employee concerned - Nominee is only authorised to receive the terminal dues - But will not become absolute owner thereof - Other legal representatives, successors and coparceners would also be entitled to their share, if no specific Will is made by the employee - Nominee is entitled to receive terminal benefits of deceased employee - Shall retain the same for the purpose of distribution amongst all the legal heirs of the deceased employee. (Paras 4 & 5)

क. सेवा विधि – मृतक कर्मचारी के सेवांत देयक एवं सेवांत लाभ – नाम निर्देशन – नामनिर्देशिति का हित – द्वितीय पत्नी के पक्ष में नामनिर्देशन – प्रथम विवाह विच्छेदित पत्नी द्वारा उत्तराधिकार प्रमाणपत्र हेतु आवेदन प्रस्तुत किया गया – यह नामनिर्देशित पत्नी को भुगतान में विलम्ब का आधार नहीं हो सकता – विरासत एवं/या उत्तराधिकार के अधिकार को जैसा भी प्रकरण हो नामनिर्देशन अधिक्रमित नहीं करेगा यदि संबंधित कर्मचारी द्वारा कोई विनिर्दिष्ट वसीयत नहीं बनाई गई हो – नामनिर्देशिति केवल सेवांत देयकों को प्राप्त करने के लिये प्राधिकत है – परंतु उसका वह पूर्ण स्वामी नहीं बनेगा – अन्य विधिक प्रतिनिधिगण, उत्तराधिकारीगण एवं सहदायी भी उनके हिस्से के हकदार होंगे, यदि कर्मचारी द्वारा कोई विनिर्दिष्ट वसीयत नहीं बनाई गई है – नामनिर्देशिति मृतक कर्मचारी के सेवांत लाभों को प्राप्त करने का हकदार है – मृतक कर्मचारी के सभी विधिक वारिसों में विभाजित करने के प्रयोजन हेतु उसे अपने पास रखेगा।

***B. Service Law - Nomination in service record - Nature* - It is not Will - Will is executed in altogether different manner - It is to be treated as wish of the employee or his request to disburse the terminal dues to any particular person. (Para 5)**

ख. सेवा विधि – सेवा अभिलेख में नामनिर्देशन – स्वरूप – यह वसीयत नहीं है – वसीयत को पूर्णतः भिन्न ढंग से निष्पादित किया जाता है – इसे सेवांत देयकों का किसी विशिष्ट व्यक्ति को भुगतान करने की कर्मचारी की इच्छा या निवेदन माना जाना चाहिए।

***C. Hindu Succession Act (30 of 1956), Section 8 - Terminal dues* - Legally married wife and legitimate child - Has right to succeed. (Para 7)**

ग. हिंदू उत्तराधिकार अधिनियम (1956 का 30), धारा 8 – सेवांत देयक – विधिक रूप से विवाहित पत्नी और धर्मज संतान – को उत्तराधिकार का अधिकार है।

D. Service Law - Family pension - **Legally divorced wife - Not entitled for the same - Payable to a legally married spouse. (Para 8)**

घ. सेवा विधि – परिवार पेंशन – विधिक रूप से विवाह विच्छेदित पत्नी – उक्त के लिये हकदार नहीं – विधिक रूप से विवाहित जीवनसाथी को देय।

E. Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Pension - **Can charge be created - Maintenance order in favour of legitimate children born out of divorced wife - No - The pension become the estate or property of pensioner which could be inherited by her heirs and not by differently related. (Para 8)**

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – पेंशन – क्या भार सृजित किया जा सकता है – विवाह विच्छेदित पत्नी से जन्मी धर्मज संतान के पक्ष मे भरणपोषण का आदेश – नहीं – पेंशन, पेंशनभोगी की संपदा या संपत्ति होती है जो कि उसके वारिसों को न कि अन्यथा संबंधितों को विरासत में मिल सकती है।

Cases referred :

(1984) 1 SCC 424, (2000) 6 SCC 724, (2009) 9 SCC 299, (2009) 10 SCC 680.

S.A. Dharmadhikari, for the petitioner.
Lalit Joglekar, P.L. for the respondents no. 1, 2 & 3.
Ghanshyam Sharma, for the respondent no.4.

ORDER

K.K. Trivedi, J. :- This petition under Article 226 of the Constitution of India is directed against the order dated 12.07.2012, by which the petitioner, a widow of one Shri Ganesh Prasad Sharma, an Assistant Teacher who has died on 28.05.2012, has been asked to furnish a succession certificate for the purposes of grant of terminal dues of the said employee, on the ground that the petitioner was duly nominated as wife for the purposes of payment of all such claims of the said employee. This nomination was never cancelled or recalled, even modified. This being so, only the petitioner was entitled to receive the terminal benefits of her husband and there could not be any insistence for payment of such dues to the petitioner only after obtaining a succession certificate. In fact a dispute was raised by respondent No.4, who was ex-wife of said late Shri Ganesh Prasad Sharma. A suit for divorce was

filed under the Hindu Marriage Act by said Shri Ganesh Prasad Sharma in the Court of District Judge, Shahdol against the respondent No.4, which suit was decreed on 18th November, 1987. Though a decree was granted *ex parte,* but there was no step taken by respondent No.4, to get the *ex-parte* judgment and decree set aside. After obtaining the decree said Shri Ganesh Prasad Sharma got married with the petitioner herein on 27.06.1989, and made nomination of his second wife in the service record. Only because a case was filed by respondent No.4 for grant of maintenance against the husband of the petitioner under Section 125 of Cr,P.C. along with her daughter and sons, and an order was passed on such an application by the Judicial Magistrate Class-I, Janjgir on 26.11.2002, the respondent No.4 would not become entitle to claim any benefit with respect to the service dues of the husband of the petitioner ignoring the nomination already made. Thus, it is contended that the order impugned is bad in law.

2. This Court has entertained the writ petition, has issued the notices to the respondents and the return has been filed by respondents. It is contended that since there is a dispute raised, unless a succession certificate is produced, it would not be proper to released the terminal dues in favour of the petitioner only. The respondent No.4 has already approached the Civil Court seeking declaration that she is legally married wife of said Shri Ganesh Prasad Sharma, therefore, it would not be correct to say that no succession certificate could be demanded. These disputed facts are to be settled by the decisions of the Court and not by the authorities, therefore, such a claim made by the petitioner is misconceived. The respondent No.4, though has not filed any return, but has adopted the stand taken by respondents No. 1 to 3 and contended that in view of the facts as have been stated by the respondents, a succession certificate is required to be produced. It is further contended that proceedings in this respect have been initiated by respondent No.4 before the appropriate Forum and in case any direction is issued by this Court, the claim raised by respondent No.4 for grant of succession certificate would be frustrated.

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

4. It is not in dispute that there is a nomination of the petitioner as wife of the employee aforesaid Shri Ganesh Prasad Sharma duly made in the service record. This nomination has not been changed by said Shri Ganesh Prasad Sharma while he was in service. It is not in dispute further that said Shri Ganesh Prasad Sharma has died on 28.05.2012. It is also not in dispute that there

was a Civil Suit filed against the respondent No.4 by said Shri Ganesh Prasad Sharma for grant of decree of divorce under the Hindu Marriage Act, and that the said suit was decreed. It is also not in dispute that the said decree has not yet been annulled, set aside or revoked. A decree of Civil Court is not to be treated lightly. It has to be seen that if any claim contrary to the decree granted is made by the respondent No.4 without getting the said decree set aside from the competent Court, any such claim made by the respondent No.4 would be hit by principles of estoppal as by operation of law and by operation of the judgment and decree, respondent No.4 would be estopped to claim any benefit unless the decree is set aside by any higher Forum. That being so, merely because the respondent No.4 has moved an application for grant of succession certificate, it cannot be a ground delaying the payment of terminal dues of deceased employee to a nominated wife, which according to law is legally married wife.

5. The effect of nomination has to be examined. The nomination is not to be treated as a Will for a good reason that a will is executed in altogether different manner and not just mentioning a name of person in the appropriate column, prescribed in any form for submitting service details before the concerning authority. However, the nomination has to be treated as wish of the employee or his request for the purposes of disbursement of his/her terminal dues in case of death to any particular person. The nomination will not supersede the statutory provision of right of inheritance prescribed in various enactments. A nominee may be an authorised person to receive the terminal dues of an employee, but will not become absolute owner thereof. The other legal representatives, successor of the deceased employees, being coparceners in estate would also be entitled to their share if there is no specific will made by the employee concerned. The Apex Court in the case of *Smt. Sarbati Devi Vs. Usha Devi* [(1984) 1 SCC 424] has considered nominee's interest vis-à-vis 'the law of succession and has reached to the conclusion that a nominee may be entitled to receive the funds, but will retain the same as a trustee for other coparceners till their claims are decided by law in accordance to the law of succession governing them. Though the aforesaid decision is rendered in the case in respect of the claim made under the Life Insurance Act, 1938, but the statutory nomination has been considered by the Apex Court.

6. Similarly, in the case of *Vishin Kanchandani and another Vs. Vidya*

Lachmandas Kanchandani and another ((2000) 6 SCC 724], the Apex Court interpreting the non-absente clause has categorically held that a nominee is only the authorised person to receive the amount payable to the deceased and the said nominee is required to retain the said amount till the claims of other coparceners are settled in accordance to law. However, there is no requirement of producing any succession certificate in respect of grant of such benefit of payment for the purposes of discharge of duties of the holders of the amount. Again considering the effect of marriages and the provisions of the Hindu Marriage Act, the Apex Court in the case of *Chaillamma Vs. Tilaga and others* [(2009) 9 SCC 299] has specifically held that unless there is a proof of the fact that marriage was not solemnised, an objector cannot say that the benefit of payment of the estate of deceased would not be made to a particular person. Similar was the situation examined by the Apex Court in the case of *Shipra Sengupta Vs. Mridul Sengupta and others* [(2009) 10 SCC 680], where presumption regarding valid execution of a Will and the effect of nomination was taken into consideration. Again the Apex Court has categorically said that a nominee alone will not become entitled to utilise the entire amount of a person as a beneficiary and he or she has to be treated as an authorised person to receive such amount and to keep the same for the purposes of its proper distribution amongst the members of the family. In view of these pronouncement, it is clear that a nominee is entitled to receive the amount of any deceased employee from the respondent-State, but is required to retain the same for the purpose of distribution of the said amount amongst all the legal heirs of the deceased employee. This is necessary because undisputedly, there is no will executed by said deceased employee of the State Government in favour of the petitioner only.

7. Yet, another aspect is to be examined whether an ex-wife, duly divorced in terms of the law would be entitled to claim any share in the property of the deceased employee or not. Law of succession is required to be examined interpreted and the claims are required to be settled. However, there is no dispute that there were certain children out of the wedlock of the deceased Ganesh Prasad Sharma with respondent No.4 and the said children cannot be said to be illegitimate because they were born before the divorce had taken place. That being so, this aspect is required to be examined in view of the provisions of Hindu Succession Act and it has to be seen whether those persons would be granted any share in the property of the deceased Ganesh Prasad Sharma or not. This particular aspect is also required to be examined whether

if a direction is given to release the entire amount in favour of petitioner, right of such persons would be prejudicially affected or not. The law of succession gives first preference to the legally married wife. In order of succession, the legitimate child has the right to succeed. That being so, it is necessary to direct that on release of the amount, the same is not fully utilised by the petitioner or else the interest of those who are entitled to a share in the said amount would be adversely affected.

8. Now the question of grant of family pension is to be considered. Whether the family pension is also to be apportioned or not ? The provisions of grnt (sic:grant) of family pension are very clear. The family pension is payable to a legally married spouse of the deceased Govt. servant. Naturally one who has been legally divorced would not be entitled to family pension. Further, the family pension goes to the sons who have not attained the majority and unmarried daughter after the death of spouse of the deceased Govt. servant. Therefore, only the petitioner would be entitled to family pension on account of death of her husband. This pension is not to be apportioned in view of the fact that the same would become estate or property of pensioner which could be inherited by her legal heirs and not by those who are differently related to deceased Govt. servant. That being so, no charge can be laid on such a property on account of an order of grant of maintenance to the legitimate children of deceased Govt. servant through a legally divorced wife. The family pension is to be paid to the petitioner only for these reasons.

9. Keeping in view the aforesaid, it is directed that only 50% amount of terminal dues be released in favour of the petitioner and remaining 50% amount be deposited in the name of petitioner in the Nationalised Bank in a fixed deposit for a period of five years, with a stipulation that the said amount would be released only after disposal of the succession application submitted by the respondent No.4 before the Civil Court, in accordance to the orders of the Civil Court. The petitioner would be entitled to family pension which be sanctioned and paid to her within three months from the date of order.

10. The writ petition stands disposed of in terms of the aforesaid direction. There shall be no order as to costs.

Petition disposed of.

I.L.R. [2015] M.P., 1448
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 3096/2011 (Jabalpur) decided on 27 September, 2013

DULARE PRASAD RAIKWAR ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Service Law - Conditional appointment order*** **- Passing of Hindi typing test - Passing of the typing test is must. (Para 4)**

क. *सेवा विधि – सशर्त नियुक्ति आदेश* – हिंदी टाइपिंग परीक्षा उत्तीर्ण की जाना – टाइपिंग परीक्षा उत्तीर्ण करना अनिवार्य है।

B. ***Service Law - Adhoc period - Appointment order*** **- Hindi typing test be passed within 4 years - The period till passing of Hindi typing test - Adhoc period. (Para 5)**

ख. *सेवा विधि – तदर्थ अवधि – नियुक्ति आदेश* – हिंदी टाइपिंग परीक्षा 4 वर्षों के भीतर उत्तीर्ण की जानी चाहिए – हिंदी टाइपिंग परीक्षा उत्तीर्ण करने तक की अवधि – तदर्थ अवधि।

C. ***Service Law - Appointment order*** **- Increments of pay - No where prescribes that not to be released in favour of those who have not passed the Hindi typing test. (Para 5)**

ग. *सेवा विधि – नियुक्ति आदेश* – वेतनवृद्धियां – कहीं भी विहित नहीं कि उनके पक्ष में मुक्त नहीं की जा सकती जिन्होंने हिंदी टाइपिंग परीक्षा उत्तीर्ण नहीं की है ।

D. ***Service Law - Increments of pay*** **- In view of circular dated 12.05.93 & 08.01.93 - Entitled to - On successful completion of one year service. (Paras 4 & 5)**

घ. *सेवा विधि – वेतनवृद्धियां* – परिपत्र दिनांक 12.05.93 व 08.01.93 को दृष्टिगत रखते हुए – हकदारी – एक वर्ष की सेवा सफलतापूर्वक पूर्ण करने पर।

Cases referred :

2006 (3) MPHT 352, ILR 2008 MP 1869.

Sanjay Singh, for the petitioner.
Sanjeev Singh, P.L. for the respondents.

ORDER

K.K. Trivedi, J. :- The petitioner, who was initially appointed on the post of Assistant Grade III in the office of Tahsildar has approached this Court by way of filing this writ petition seeking a direction against the respondents to sanction the annual increments of pay to the petitioner for the period of initial appointment w.e.f. 1990 to 1993 and to revise and pay the arrears of salary to him. It is contended that in the order of appointment though a condition was mentioned that the petitioner would be required to pass the Hindi Typing examination within a specified period but in terms of the said appointment even if the period of initial appointment was treated as *ad hoc* period, he would be entitled to pay in terms of the circular so issued by the State Government. It is contended that in terms of the order of appointment dated 11.8.1989, the petitioner has passed the Hindi typing test and result was declared on 12.10.1993 and therefore the increments of pay for the *ad hoc* period was required to be granted and released. This has not been done, on the other hand erroneous fixation of pay has been done, therefore, petitioner is required to approach this Court seeking a direction against the respondents.

2. Initially when the claim was made by the petitioner, he has placed his reliance in the case of one *Donger Singh Pawar vs. State of M.P. and others* [2006(3) MPHT 352] but when the fact was brought to the notice that such a law would not be treated as a good law in terms of the subsequent decision rendered by Division Bench of this Court in the case of *State of M.P. and others vs. Vinod Mohan Shrivastava* (I.L.R. 2008 MP 1869), it is contended that since there is a circular issued by the State Government that for the period of *ad hoc* appointment increments of pay is required to be released, such benefit cannot be denied to the petitioner.

3. By filing the return, the respondents have contended that such a contention of the petitioner is not correct. There were circular of the State Government issued that those who are appointed as Assistant Grade III were required to pass the Hindi Typing examination. A condition was specifically mentioned in their order of appointment that till they pass the Hindi Typing examination, the period of their appointment was to be treated as *ad hoc* appointment. In terms of those instructions, the petitioner was not eligible for grant of annual increment till he has passed the aforesaid Hindi Typing examination. Since, the examination was passed by the petitioner in the year 1998, rightly the order was issued giving him benefit of increment of pay. It

cannot be said that the petitioner would be entitled to grant of benefit of increment of pay from the initial date of appointment.

4. After hearing learned counsel for the parties at length and examining the record, it is clear from the decision rendered by the Division Bench of this Court that passing of Hindi Typing Test was a must. It was the finding recorded by the Division Bench that once such a condition was prescribed, the period of initial appointment till the period of regularization after passing of the said examination cannot be treated as regular service period. However, since the said decision was given in a matter where relaxation was claimed on account of completing the age of 40 years from passing of the typing examination, it was held by the Division Bench that such a relaxation would entail the benefit of increments of pay and such a decision was required to be taken by the department. In the decision of the Division Bench circular of the State Government dated 12.5.1993 issued by the General Administration Department was not taken into consideration and the earlier circular of the Finance Department issued in this respect was already quashed by the Madhya Pradesh Administrative Tribunal. It was categorically directed by the aforesaid circular dated 12.5.1993 that since the Finance Department by issuing a latest circular on 8.1.1993 has directed to release the increments of pay for those *ad hoc* employees as well, unless there is any other bar created, the increments of pay to the *ad hoc* employees were also required to be released.

5. In context of the aforesaid direction contained in the circular of the State Government, the condition mentioned in the order of appointment is seen. It nowhere prescribes that the increments of pay would not be released in favour of those who have not passed the Hindi Typing test at the time of recruitment. Only this much was said that those who have not passed the Hindi Typing test were required to pass the said typing test within a period of 4 years and the said period was to be treated as *ad hoc* period till they pass the Hindi Typing test. No condition was mentioned that such *ad hoc* appointees will not get the regular pay. Precisely it was done because circular was issued in such a manner. If such a circular of the State Government is examined in the light of stand taken by the respondents in their return, it would be clear that the stand taken by the respondents is contrary to their own circular. Consequently, though the period of *ad hoc* appointment is not to be regularized with retrospective effect in the matter of granting seniority etc to the persons like petitioner but in terms of the circular of the State Government, petitioner

would be entitled to grant of increments of pay on successful completion of one year of service as he was appointed in a pay scale though on *ad hoc* basis which has a increment of pay, to be released every year.

6. Consequently, the writ petition is allowed. The respondents are directed to release the increments of pay to the petitioner for the period of *ad hoc* appointment, before the date of passing of the Hindi Typing test by the petitioner and revise the salary of the petitioner accordingly. All the arrears of salary after revising the pay of the petitioner be paid to him within a period of three months from the date of receipt of certified copy of the order passed today.

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

Petition allowed.

I.L.R. [2015] M.P., 1451

WRIT PETITION

Before Mr. Justice U.C. Maheshwari

W.P. No. 959/2013 (Jabalpur) decided on 1 October, 2013

SHANTI JAISWAL (SMT.) ...Petitioner

Vs.

INDRALAL ...Respondent

A. Civil Procedure Code (5 of 1908), Section 47 - Powers and duties of executing court - **Executing court has no right to go behind the decree - If there is any ambiguity in the decree with respect of the scale of measurement of the disputed land, the executing court is duty bound to ascertain the measurement of such land for which the decree was passed after calling the record of the original suit - Besides this, such court is also duty bound to hold an enquiry to ascertain the measurement of the disputed land as per procedure under Section 47 of CPC as such question is a question related to the execution of the decree - Executing court committed grave error in dismissing the execution proceeding without holding any enquiry under Section 47 of CPC - Case remitted to the executing court. (Para 6)**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 47 – निष्पादन न्यायालय की शक्तियां एवं कर्तव्य – निष्पादन न्यायालय को डिक्री का अनुसरण करने का

अधिकार नहीं – यदि विवादित भूमि के माप के पैमाने के संबंध में, डिक्री में कोई अस्पष्टता है, तब निष्पादन न्यायालय मूल वाद का अभिलेख बुलाने के पश्चात् उक्त भूमि जिसके लिए डिक्री पारित की गई है का मापन सुनिश्चित करने के लिए कर्तव्यबद्ध है – इसके अतिरिक्त, उक्त न्यायालय, सि.प्र.सं. की धारा 47 के अंतर्गत प्रक्रिया के अनुसार, विवादित भूमि का माप सुनिश्चित करने हेतु जांच कराने के लिये भी कर्तव्यबद्ध है क्योंकि उक्त प्रश्न डिक्री के निष्पादन से संबंधित प्रश्न है – निष्पादन न्यायालय ने सि.प्र.सं. की धारा 47 के अंतर्गत कोई जांच कराये बिना निष्पादन कार्यवाही खारिज करके गंभीर त्रुटि कारित की है – प्रकरण, निष्पादन न्यायालय को प्रतिप्रेषित किया गया।

B. Civil Procedure Code (5 of 1908), Section 47 - Civil Practice - Execution - **In the normal course no civil court passes any decree which could not be executed and once the executable decree is passed by the civil court, then contrary to the finding of the judgment on which the decree has been passed, the executing proceeding could not be thrown away unless such execution of such decree is barred by any provision of law.** **(Para 7)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 47 – सिविल कार्यप्रणाली – निष्पादन – सामान्य क्रम में कोई सिविल न्यायालय ऐसी किसी डिक्री को पारित नहीं करता जिसे निष्पादित न किया जा सके और एक बार जब सिविल न्यायालय द्वारा निष्पादन योग्य डिक्री पारित की जाती है, तब निर्णय के निष्कर्ष, जिस पर डिक्री पारित की गयी है, के विपरीत निष्पादन कार्यवाही खारिज नहीं की जा सकती जब तक कि उक्त डिक्री के निष्पादन को विधि के किसी उपबंध द्वारा वर्जित न किया गया हो।

C. Civil Procedure Code (5 of 1908), Section 47 - Civil Practice - Procedure to be followed when scale of measurement of property is stated in the scale of hands - **When the scale of measurement of property is stated in the scale of the hands, then measurement of the hands could be ascertained after extending an opportunity to the parties to adduce the evidence and by appreciating the same.(Para 8)**

ग. सिविल प्रक्रिया संहिता (1908 का 5), धारा 47 – सिविल कार्यप्रणाली – जब सम्पत्ति के मापन का पैमाना हाथों से माप कर दर्शाया गया हो तब अपनाई जाने वाली प्रक्रिया – जब सम्पत्ति के मापन का पैमाना हाथों से किया गया माप हो तब हाथों से किये गये माप को, पक्षकारों को साक्ष्य पेश करने का अवसर देकर उसका मूल्यांकन करने के पश्चात् सुनिश्चित किया जा सकता है।

Amod Gupta, for the petitioner.

K.S. Jha, for the respondent nos. 1, 3 & 4.
None for the respondent no. 2 & 3 though served.
(Supplied: Paragraph numbers)

ORDER

U.C. MAHESHWARI, J. :- The petitioners- decree holders have filed this petition under Article 227 of the Constitution of India being aggrieved by the order dated 11.12.2012, passed by the Civil Judge Class-II, Teonthar, district Rewa in Execution Case No. 67-A/93x97-11 whereby the execution proceeding filed by the present petitioners to execute the decree dated 14.10.1996, passed by Civil Judge, Class-II, Teonthar in COS No. 67- A/93 has been dismissed at the initial stage holding that the measurement of the encroached disputed area has been stated in the scale of hand in the annexed map with the decree and on the basis of such scale of measurement the impugned decree could not be executed.

2. The petitioners' counsel after taking me through the averments of the petition as well as papers placed on record argued that the aforesaid decree being passed by the competent court the executing court did not have any authority to dismiss the execution proceeding on the aforesaid ground. If there was any ambiguity in the decree with respect of the scale of measurement of the disputed property, then such question being related to the execution of the decree could have been considered and adjudicated by the executing court in accordance with the scheme and the procedure provided under Section 47 of the CPC. In continuation he said that in any case his execution proceeding could not be thrown away in the manner in which the same has been thrown by the executing court and prayed for setting aside the impugned order with appropriate direction to the execution court to proceed further and execute the decree by admitting and allowing this petition.

3. Shri K.S. Jha, learned appearing counsel for the respondents-judgment debtors by justifying the impugned order said that the same being based on proper appreciation of the available factual matrix in which the execution of the decree was not possible, does not require any interference at this stage. He further said that in the lack of any specific scientific scale of measurement in the impugned decree, the same could not have been executed and pursuant to that the executing court has not committed any error in passing the impugned order and prayed for dismissal of this petition.

4. Having heard the counsel, keeping in view their arguments, I have carefully gone through the papers placed on record alongwith the impugned order.

5. It is undisputed fact that in a suit filed by the predecessor in title of the present petitioners - decree holders an exparte decree for possession with respect of the disputed land bearing no. 107, Rakwa 1.75 acres was passed against the respondents- judgment debtors. Apart the aforesaid the decree to dispossess the respondents - judgment debtors from some Government land the part of a public way was also passed. Such judgment and decree is annexed with this petition as Annexure P-3. The map of the disputed land/property is also annexed with the decree as part and parcel of the same.

6. It is settled proposition of law that executing court has no right to go behind the decree. So firstly in such premises, I am of the considered view that the executing court was duty bound to ascertain the measurement of the disputed land, for which the decree was passed, after calling the record of the original suit. Besides this, such court was also duty bound to hold an enquiry to ascertain the measurement of the disputed land as per procedure under Section 47 of the CPC because the disputed question on which the executing proceeding was dismissed was directly relating to the execution of the decree and same could have been enquired by the executing court in accordance with the scheme of Section 47 of the CPC. In such premises, is it held that Executing Court has committed grave error in dismissing the execution proceeding without holding any enquiry under Section 47 of the CPC.

7. Apart the aforesaid, in the normal course no civil court passes any decree which could not be executed and once the executable decree is passed by the civil court, then contrary to finding of the judgment on which the decree has been passed the executing proceeding could not be thrown away unless such execution of such decree is barred by any provisions of law, which is not the situation in the case at hand. So in such premises, also the executing court has committed error in dismissing the execution proceeding of executable decree.

8. Beside the aforesaid, I would like to observe here that when the scale of measurement of property is stated in the scale of the hands, then measurement of the hands could be ascertained after extending an opportunity to the parties to adduce the evidence and by appreciating the same, but such process has also not been followed by the executing court.

9. In view of the aforesaid discussion, the impugned order of the executing court being perverse and contrary to law is not sustainable. The same deserves to be set aside.

10. In view of aforesaid this petition is allowed and by setting aside the impugned order, Annexure P-1, the impugned execution case is restarted and remitted back to the executing court with a direction to proceed further to execute the decree and shall also decide all the disputed questions relating to the execution, discharge and satisfaction of the decree in accordance with the scheme and procedure provided under Section 47 of the CPC. In such premises; it is also observed that the executing court shall be at liberty to extend the opportunity to the parties to adduce the evidence to ascertain the actual measurement of the disputed land described in the map annexed with the impugned decree. However the executing court is directed to take an endeavour to expedite the proceeding of the impugned execution and conclude the same on some early date, probably on or before 30th June 2014.

11. The petition is allowed as indicated above.

12. There shall be no order as to cost.

Petition allowed.

I.L.R. [2015] M.P., 1455

WRIT PETITION

Before Mr. Justice U.C. Maheshwari

W.P. No. 13554/2013 (Jabalpur) decided on 1 October, 2013

MADHUBALA JAIN (SMT.) ...Petitioner

Vs.

SARDAR DAVINDER SINGH ...Respondent

Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Amendment in Written Statement **- Trial Court allowed the application filed by the defendant to amend the written statement seeking to insert the pleadings that the plaintiff is having an alternate accommodation registered in the name of the mother-in-law of the petitioner no. 1 and mother of petitioner no. 2 - Held - It should be proved that the alternate accommodation is owned by the landlord/plaintiff - If it does not belong to the plaintiff/landlord, it cannot be treated to be alternate accommodation - The accommodation situated in the name of mother**

or mother-in-law, cannot be treated to be alternate accommodation under the provisions of section 12(1)(e) & (f) of the Act - Trial Court committed error in allowing the amendment application as the pleading sought to be inserted were not necessary or relevant as the proposed alternate accommodation does not belong to the plaintiffs - Amendment application dismissed. (Paras 5 & 6)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – लिखित कथन में संशोधन – प्रतिवादी द्वारा इस अभिवचन को शामिल करना चाहते हुए कि वादी के पास याची क्रमांक 1 की सास एवं याची क्रमांक 2 की मां के नाम से पंजीबद्ध वैकल्पिक आवास है, लिखित कथन के संशोधन का आवेदन विचारण न्यायालय द्वारा मंजूर किया गया – अभिनिर्धारित – यह सिद्ध किया जाना चाहिये कि वैकल्पिक स्थान का स्वामित्व, भूस्वामी/वादी के पास है – यदि वह वादी/भूस्वामी का नहीं है, उसे वैकल्पिक आवास नहीं माना जा सकता – आवास मां या सास के नाम है, उसे अधिनियम की धारा 12(1)(इ) व (एफ) के उपबंधों के अंतर्गत वैकल्पिक आवास नहीं माना जा सकता – संशोधन का आवेदन मंजूर करने में विचारण न्यायालय ने त्रुटि कारित की है क्योंकि अभिवचन जिन्हें शामिल किया जाना चाहा गया था वे आवश्यक व सुसंगत नहीं थे क्योंकि प्रस्तावित वैकल्पिक आवास वादीगण का नहीं है – संशोधन का आवेदन खारिज किया गया।

R.P. Khare, for the petitioner.
Sharad Gupta, for the respondent.

ORDER

U.C. MAHESHWARI, J. :- The petitioners / plaintiffs have filed this petition being aggrieved by the order dated 12.7.13 Annex.P/5 passed by the 18th ADJ, Jabalpur in COS No.10-A/11 allowing the application of respondent / defendant to amend the written statement for inserting the pleadings that the petitioners are having the sufficient alternate accommodation for the alleged need in the same town of Jabalpur in the name of mother-in-law of petitioner No.1 and mother of petitioner No.2.

3. Petitioners counsel after taking me through the papers placed on the record along with the impugned order argued that in view of the settled proposition of law that the accommodation available in the name of mother. or mother-in-law could not be treated to be the alternate accommodation for the landlord who is son or son-in-law of such mother and mother-in-law. In continuation, he said that in view of such principle , the impugned order allowing the aforesaid application of the respondent / defendant to amend the written

statement is not sustainable under the law and prayed to dismiss the aforesaid application of the respondent and set aside the impugned order by admitting and allowing this petition.

4. On the other hand, respondent's counsel, by justifying the impugned order said that the same being based on proper appreciation of the factual matrix of the matter does not require any interference at this stage. In continuation, he said that the trial of the impugned suit is at the initial stage and the plaintiffs evidence is yet to begin and, therefore, if such pleadings remains on the record even then the same shall not prejudice any right of the plaintiffs/ petitioners. He also said that at the initial stage of the amendment application, the merits or demerits of the proposed amendment could not be examined by the court. First the amendment application should be allowed and thereafter the merits of the same could be considered by the court and, in such premises, prayed for dismissal of this petition.

5. Keeping in view the arguments advanced by the counsel, I have carefully gone through the papers placed on the record including the averments of the plaint and the impugned amendment application. It is undisputed fact on record that the present petitioners have filed the impugned suit against the respondents on the grounds available under section 12(1) of the M.P. Accommodation Control Act, 1961 (in short 'the Act'). Out of such ground, the ground of bonafide genuine requirement has also been taken by the petitioners and averments of such grounds have been denied on behalf of the respondent / defendant in his written statement with the pleading that some alternate accommodation for the alleged need is available with the petitioners in the township of Jabalpur but subsequent to filing the written statement, in pendency of the suit, the impugned application was filed on behalf of respondent / defendant to insert the pleadings that the petitioners are also having alternate accommodation described in the application which are registered in the name of Smt Sudha Jain w/o Arvind Jain the mother of petitioner No.2 and in the name of Smt Shanti Bai Jain w/o Jai Kumar Jain, the mother-in-law of petitioner No.1 and on consideration such application has been allowed by the trial court.

6. Law is almost settled by the Apex Court on the question of alternate accommodation that it should be proved that the same is owned by the landlord/plaintiff. If such accommodation is not belonging to the plaintiff/ landlord then the same could not be treated to be the alternate accommodation for such plaintiff/ landlord. In such

premises, the accommodation situated in the name of mother or situated in the name of mother-in-law, could not be treated to be the alternate accommodation under the provision of section 12(1)(e) and 12(1)(f) of the Act. So, in such premises, the proposed pleadings is not relevant in the matter because the proposed alternate accommodation stated by the respondent undisputedly is not recorded or owned by any of the petitioners. So, in such premises, the impugned amendment was neither relevant with the matter nor necessary but the trial court has committed error in allowing the same. In such premises, the impugned order being perverse, is not sustainable. Consequently, by allowing this petition, the impugned order is set aside and the aforesaid application of the respondent for amendment is hereby dismissed.

7. Petition is allowed as indicated above. No cost

Petition allowed.

I.L.R. [2015] M.P., 1458

WRIT PETITION

Before Mr. Justice U.C. Maheshwari

W.P. No. 16331/2013 (Jabalpur) decided on 4 October, 2013

CHEDI ...Petitioner

Vs.

SMT. SONA BAI ...Respondent

A. Civil Procedure Code (5 of 1908), Order 7 Rule 11 - Valuation - **For the purpose of valuation of the suit and payment of Court fee, only the averments of the plaint could be considered and the objections and averments of the written statement are not relevant to decide such question. (Para 3)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 - मूल्यांकन - **वाद के मूल्यांकन एवं न्यायालय फीस के भुगतान के प्रयोजन हेतु केवल वादपत्र के प्रकथनों को विचार में लिया जायेगा और उक्त प्रश्न को निर्णीत करने के लिये लिखित कथन के आक्षेप व प्रकथन सुसंगत नहीं।**

B. Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Amendment in the plaint - Delay - **Initially the impugned suit was filed by the petitioner in the year 1998 for declaration and other relief - Petitioner was dispossessed in the year 2002 - Till 2013 no application was filed to insert the relief of possession in the suit - Amendment application filed after much delay - Held - Trial Court rightly rejected**

the application as the same has been filed after long delay and specially after starting the process for recording the evidence. (Para 5)

ख. सिविल प्रक्रिया संहिता (1908 का 5) आदेश 6 नियम 17 – वादपत्र में संशोधन – विलम्ब – आरंभिक रूप से याची द्वारा वर्ष 1998 में घोषणा एवं अन्य अनुतोष हेतु आक्षेपित वाद प्रस्तुत किया गया था – याची को वर्ष 2002 में बेकब्जा किया गया – वाद में कब्जे का अनुतोष शामिल करने के लिये 2013 तक कोई आवेदन प्रस्तुत नहीं किया गया – संशोधन का आवेदन अधिक विलम्ब के पश्चात् प्रस्तुत किया गया – अभिनिर्धारित – विचारण न्यायालय ने उचित रूप से आवेदन अस्वीकार किया क्योंकि उसे लम्बे विलम्ब के पश्चात् और विशेष रूप से साक्ष्य अभिलिखित करने की प्रक्रिया आरंभ होने के पश्चात् प्रस्तुत किया गया है।

Cases referred :

AIR 1958 SC 245; (2006) 12 SCC 1.

P.K. Saxena, for the petitioner.

(Supplied: Paragraph numbers)

O R D E R

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

1. The petitioner/ has filed this petition under Article 227 of the Constitution of India being aggrieved by the order dated 2.9.2013 (Ann. P.1) and order dated 12.7.2011 (Ann. P.3), passed by Civil Judge Class-II, Rampur District Satna in C. O. S. No. 167-A/10, whereby the issue No.6-A and 6-B regarding valuation and court fees were decided and the petitioner was directed to value to the suit on the basis of market value of the house and the shop under construction and Dharmashala and pay the court fees accordingly by the earlier order and later order his application filed under Order 6 Rule 17 of CPC to amend the suit for additional prayer for possession of the same property have been dismissed.

2. The petitioner's counsel after taking me through the papers placed on record argued that in the available circumstance of the case the petitioner has valued the suit on the basis of the land revenue of concerned land, on which the property is situated and accordingly on twenty times of land revenue the suit was valued and court fees was paid accordingly. In such premises no further valuation or court fees is required in the matter and prayed for setting aside the earlier order. In continuation he said that initially the suit was filed in

the hear 1998 subsequently in the year 2002 the petitioners were dispossess from the disputed property and that is why they have filed the impugned application of Order 6 Rule 17 of CPC in the year 2013 to insert the prayer for possession of such property and some relevant facts in that regard and the same ought to have been allowed by the trial court but the same has been dismissed under wrong premises and prayed for admission and allowing this petition.

3. Having heard the counsel keeping in view his arguments I have carefully perused the papers placed on record along with both the impugned orders. I am of the considered view that for the purpose of valuation of the suit and payment of court fees only the averments of the plaint could be considered and the objections and the averments of the written statement are not relevant to decide such question as laid down by the Apex Court in the matter of *Babu Sukhram Singh Vs. Ram Dular Singh* reported in AIR 1958 SC 245,

4. In view of such principle after going through the averments of the plaint (Ann. P.2), I am of the considered view that the trial Court has not committed any error in passing the impugned order dated 12.7.2011 directing the petitioner to value the suit on the basis of market value of the property and pay the court fees accordingly and such order does not require any interference at this stage.

5. So far other part of the order dismissing the application of the petitioner filed under Order 6 Rule 17 of CPC is concerned, it is apparent fact that the impugned suit was initially filed by the petitioner in the year 1998 for declaration and other relief but the relief of possession was not prayed and as per submission of the petitioners' counsel the petitioner was dispossess in the year 2002 and since then till 2013 no such application was filed to insert the relief for possession in the suit. So, in such premises apparently inspite having knowledge of such fact since 2002 for ten years no step was taken by the petitioner to propose the amendment in the plaint and as per principle laid down by the Apex Court in the matter of *Ajendra Prasad N. Pandey Vs. Swami Keshav Prakesh Dasji N.* reported in (2006) 12 SCC 1, the amendment application could not be allowed at later stage in the matter, specially after starting the process for recording the evidence in the matter, the same could not be allowed. So, in such premises, the remaining part of the order is also not required any interference at this stage.

6. In view of the aforesaid, I have not found any merits even for admission, consequently this petition being devoid of any merits deserves to be and is

hereby dismissed. However, in the available circumstance, the petitioner is extended a liberty to take appropriate steps to value the suit on the basis of market value of the disputed property and pay the court fees accordingly within 45 days from today, failing which the petitioner shall not be entitled to get the benefit of this order.

7. Petition is dismissed with aforesaid liberty, observation and directions.

Petition dismissed.

I.L.R. [2015] M.P., 1461
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No. 17480/2013 (Jabalpur) decided on 7 October, 2013

RAJENDRA DIXIT ...Petitioner
Vs.
STATE OF M.P. ...Respondent

A. Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Amendment of plaint - Delay - **Petitioner sought to insert the word "temple" in the relief clause and at certain other places at stage of final arguments - The same cannot be allowed unless sufficient cause is shown at such a belated stage of the suit as the same was very well in the knowledge of the party on the date of filing of initial pleading. (Para 3)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – वादपत्र में संशोधन – विलम्ब – याची ने अंतिम तर्क के प्रक्रम पर अनुतोष खंड तथा अन्य कतिपय स्थानों पर शब्द "मंदिर" प्रविष्ट करना चाहा – उक्त की मंजूरी नहीं दी जा सकती जब तक कि वाद के इतने विलम्ब के प्रक्रम पर पर्याप्त कारण नहीं दर्शाया जाता क्योंकि आरंभिक अभिवचन प्रस्तुत करने की तिथि को यह भली भांति पक्षकार को ज्ञात था।

B. Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Amendment when not to be allowed - **It is settled that no party can be permitted to amend the pleadings in consonance with the evidence which have come on record in the deposition of witnesses. (Para 3)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – संशोधन की अनुमति कब नहीं दी जा सकती – यह सुस्थापित है कि किसी पक्षकार

को ऐसे साक्ष्य के अनुरूप अभिवचनों का संशोधन करने की अनुमति नहीं दी जा सकती जो साक्षीगण के कथन में अभिलेख पर आये हैं।

Cases referred :

2006 (12) SCC-1, 2009 (3) MPLJ-122(SC), 2012 (3) MPLJ-37(SC).

Anoop Saxena, for the petitioner.

ORDER

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

The petitioners/plaintiffs No.1(A) and 1(E), have filed this petition being aggrieved by the order dated 11.9.13 (Annex.P/8) passed by the II Civil Judge-II, Nowgaon, Chhatarpur in COS No.50-A/12 whereby their application filed under Order 6 rule 17 of the CPC for amendment in the plaint to insert the additional word "temple" in the prayer clause of the plaint, has been dismissed.

2. The petitioners counsel after taking me through the averments of the IA (Annex.P/5) argued that the petitioners have filed the impugned suit for various properties including the alleged temple but due to typographical error and over sight in the prayer clause of the plaint, the word temple was not stated and accordingly, the same could not have been included in the prayer clause. He also pointed out that besides the prayer clause, at some places also, the petitioners want to implead such word in the plaint and in continuation he said that even on allowing the application at the stage of final arguments of the matter, no prejudice would be caused to the other side and prayed to allow his application by setting aside the impugned order by admitting and allowing this petition.

3. Having heard the counsel, keeping in view the arguments advanced, I have carefully gone through the aforesaid application Annex.P/5 and the impugned order Annex.P/8 so also the other papers placed on the record. True it is that the petitioner wants to insert the word "temple" in the prayer clause and also some other places of the plaint at the stage of final arguments but in view of decision of the Apex Court in the matter of *Ajendraprasadji N. Pandey and another Vs. Swami Keshavprakeshdasji N. and others*-2006(12) SCC-1, in the matter of *Vidyabai and others Vs. Padmalatha and another*-2009(3) MPLJ-122(SC) and in the matter of *J.Samuel and*

others Vs. Gattu Mahesh and others-2012(3) MPLJ-37(SC) holding that the facts which are very well in the knowledge of the party on the date of filing the initial pleading and same was not stated and, such fact is proposed to be pleaded by way of amendment application at later stage then unless sufficient cause is made out, such amendment application could not be allowed. In the case at hand, it is apparent fact that on the date filing the suit, the facts of proposed amendment was very well in the knowledge of the petitioners/ plaintiffs. Even after framing the issues on the settling date, the same was in the knowledge of the petitioners and at later stage, on recording the evidence of the petitioners as well as the respondents, the same was in the knowledge of the petitioners, inspite that, no effort was made to amend the pleadings. Only after closing the evidence of the parties when the case was fixed for final arguments, the aforesaid amendment application was filed. So, in such premises, the impugned order appears to be in consonance with law. It is also settled proposition that no party could be permitted to amend the pleadings in consonance with the evidence which have come on the record in the deposition of the witnesses. So, in such premises, the impugned order does not appear to be perverse or contrary to law. Hence, I have not found any merits in this petition even for admission. Consequently, the same deserves to be and is hereby dismissed at motion hearing stage.

Petition dismissed.

I.L.R. [2015] M.P., 1463
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 1642/2014 (Jabalpur) decided on 6 February, 2014

SHILPI MISHRA (SMT.) ...Petitioner
Vs.
STATE OF M.P. ...Respondent

A. Constitution - Article 14 & 16 - Compassionate appointment - **Challenge is made to the denial of compassionate appointment to married daughter - Petitioner also prayed for quashment of clause 2.2 of the policy as it discriminates between sons and married daughters - Held - Policy of compassionate appointment cannot be said to be violative of Article 14 and 16 of the Constitution only because it provides certain classes of dependents for appointment on**

compassionate ground. **(Paras 6, 14 & 15)**

क. संविधान – अनुच्छेद 14 व 16 – अनुकंपा नियुक्ति – विवाहित पुत्री को अनुकंपा नियुक्ति से इंकार करने को चुनौती दी गई – याची ने नीति के खंड 2.2 को अभिखंडित किये जाने की भी प्रार्थना की है क्योंकि यह पुत्रों और विवाहित पुत्रियों के बीच विभेद करता है – अभिनिर्धारित – अनुकंपा नियुक्ति की नीति को केवल इसलिये संविधान के अनुच्छेद 14 व 16 के उल्लंघन में नहीं कहा जा सकता क्योंकि वह आश्रितों के कुछ वर्गों के लिये अनुकंपा आधार पर नियुक्ति उपबंधित करती है।

***B. Service Law - Compassionate appointment* - Since there is no material on record to establish that the petitioner and her husband were dependent upon deceased govt. servant and a policy does not include a married daughter whose husband is alive - Petitioner is not eligible for appointment on compassionate ground. (Paras 17 & 18)**

ख. सेवा विधि – अनुकंपा नियुक्ति – चूंकि अभिलेख पर यह स्थापित करने के लिये कोई सामग्री नहीं कि याची एवं उसका पति मृतक शासकीय कर्मचारी पर आश्रित थे और नीति में विवाहित पुत्री जिसका पति जीवित है समाविष्ट नहीं – याची अनुकंपा आधार पर नियुक्ति के लिये पात्र नहीं।

Cases referred :

W.P. No. 11987/2012 decided on 06.12.2013 (Bombay), (1997) 8 SCC 85, (2003) 7 SCC 704, AIR 1977 SC 2279, (2001) 7 SCC 708.

Sankalp Kochar, for the petitioner.
S.S. Bisen, G.A. for the respondent/State.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- Heard on admission.

2. While seeking quashment of order dated 28.02.2013, petitioner also seeks quashment of clause 2.2 of order dated 22.01.2007.

3. Whereas, by order dated 28.02.2013 claim of the petitioner for appointment on compassionate ground in lieu of death of her father has been negatived on the ground that she does not fall in the category of person who are entitled for appointment on compassionate ground as stipulated in clause 2.2 of the circular No. C-3-7-2000-3-एक Bhopal dated 22.01.2007.

4. Clause 2.2 of the circular dated 22.01.2007 stipulates :

> "2.2 दिवंगत शासकीय सेवक का पुत्र, अथवा अविवाहित पुत्री अथवा ऐसी विवाहित पुत्री जिसके पति की मृत्यु हो चुकी हो अथवा जो तलाकशुदा हो, किन्तु शर्त यह होगी कि ऐसी अविवाहित, विवाहित अथवा तलाकशुदा पुत्री दिवंगत शासकीय सेवक की मृत्यु के समय उस पर पूर्वतः आश्रित होकर उसके साथ रह रही हो, अथवा"

5. Father of the petitioner employed as Assistant Grade - II, District Treasury Officer, Mandla died in harness on 16.11.2012. He left behind two married daughters and a widow. That the widow of the deceased employee on 06.01.2013 gave an application for appointment of her married daughter (the petitioner) on compassionate ground that she (the widow) being dependent on the petitioner daughter and the daughter's husband being unemployed. The claim was turned down on the basis that as per policy in vogue (as per clause 2.2) the petitioner is not eligible.

6. The petitioner, therefore, seeks quashment of clause 2.2 of the policy dated 22.01.2007 on the ground that the same is violation of Article 14, 15 and 16 of the Constitution of India as it discriminates between sons and married daughters. That, there is no material nexus with the object sought to be achieved in enunciating clause 2.2 of the circular dated 22.01.2007. That, the petitioner was even otherwise dependent on her father as her husband is unemployed. That, there being no opposition of other family members, non-grant of compassionate appointment is arbitrary. Petitioner has placed reliance on the decision by Division Bench of Bombay High Court *Swara Sachin Kulkarni vs. Supdt. Engineer* in writ petition No.11987/2012 decided on 06.12.2013.

7. Trite it is that compassionate appointment is an exception to the general rule that appointment to public service should be on merits and through open invitation.

8. In *Haryana State Electricity Board v. Hakim Singh* : (1997) 8 SCC 85 it is held :

> "8. The rule of appointments to public service is that they should be on merits and through open invitation. It is the normal route through which one can get into a public employment. However, as every rule can have exceptions, there are a few exceptions to the said rule also which have been evolved to meet certain

contingencies. As per one such exception belief is provided to the bereaved family of a deceased employee by accommodating one of his dependents in a vacancy. The object is to give succour to the family which has been suddenly plunged into penury due to the ultimately death of its sole bread-winner. This Court has observed time and again that the object of providing such ameliorating relief should not be taken as opening an alternative mode of recruitment to public employment."

9. In *State of Haryana vs. Ankur Gupta :* (2003) 7 SCC 704 it has been held :

"6. As was observed in *State of Haryana and Ors. v. Rani Devi* it need not be pointed out that the claim of person concerned for appointment on compassionate ground is based on the premises that he was dependent on the deceased employee. Strictly this claim cannot be upheld on the touchstone of Articles 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16. Appointment on compassionate ground cannot be claimed as a matter of right. Die-in harness scheme cannot be made applicable to all types of posts irrespective of the nature of service rendered by the deceased employee. In *Rani Devi's* case it was held that scheme regarding appointment on compassionate ground if extended to all types of casual or ad hoc employees including those who worked as apprentices cannot be justified on constitutional grounds. In *LIC of India v. Asha Ramchhandra Ambekar* it was pointed out that High Courts and Administrative Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate grounds when the regulations framed in respect thereof do not cover and contemplates such appointments. It was noted in *Umesh Kumar Nagpal v. State of Haryana* that as a rule in public service appointment should

> be made strictly on the basis of open invitation of applications and merit. The appointment on compassionate ground is not another source of recruitment but merely an exception to the aforesaid requirement taking into consideration the fact of the death of employee while in service leaving his family without any means of livelihood. In such cases the object is to enable the family to get over sudden financial crisis. But such appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased."

10. Does clause 2.2 of the policy violates Article 14 and 16 of the Constitution of India. It includes within its fold not only a son and unmarried daughter but also a widowed daughter and a divorced daughter. These class of persons, if are dependent on a government servant who die in harness, are eligible for consideration for appointment on compassionate ground. Merely because the clause does not include the married daughter whose husband is alive will not render the provision a violation of Article 14 and 16 of the Constitution of India.

11. In *R.S.Joshi v. Ajit Mills* : AIR 1977 SC 2279 it has been held :

> "10. ... A law has to be adjudged for its constitutionality by the generality of cases it covers, not by the freaks and exceptions it martyrs. ... "

12. What is prohibited under Article 14 of the Constitution of India is a "class legislation" and not "classification for the purpose of legislation".

13. In *State of A.P. vs. Nallamilli Rami Reddi* (2001) 7 SCC 708 it has been observed :

> "8. What Article 14 of the Constitution prohibits is "class legislation" and not "classification for purpose of legislation". If the legislature reasonably classifies persons for legislative purposes so as to bring them under a well-defined class, it is not open to challenge on the ground of denial of equal treatment that the law does not apply to other persons. The test of permissible classification is two fold : (i) that the classification must be founded on intelligible differentia which distinguishes

persons grouped together from others who are left out of the group, and (ii) that differentia must have a rational connection to the object sought to be achieved. Article 14 does not insist upon classification, which is scientifically perfect or logically complete. A classification would be justified unless it is patently arbitrary. If there is equality and uniformity in each group, the law will not become discriminatory, though due to some fortuitous circumstance arising out of peculiar situation some included in a class get an advantage over others so long as they are not singled out for special treatment. In substance, the differentia required is that it must be real and substantial, bearing some just and reasonable relation to the object of the legislation."

14. Thus, if the policy for appointment on a compassionate ground has been brought in vogue where certain class of dependents are recognized for consideration for appointment on compassionate grounds, the same, in the considered opinion of this Court will, not be violative of Article 14 and 16 of the Constitution of India, because it does not include certain other categories. A married daughter whose husband is alive cannot be treated to be dependent on her father merely because her husband is unemployed. In that case it is the son-in-law who would be dependent on his father-in-law rather than the daughter dependent on her father.

15. In view whereof, since clause 2.2 of the policy stand the test of reasonable classification, it does not violate Article 14 and 16 of the Constitution of India.

16. In *Swara Sachin Kulkarni* (supra) the policy as it exist in the present case is not adverted at. What has been relied upon is the government resolution dated 26th October, 1994 and dated 22nd August, 2005. And though the name of petitioner was included in the list, however, lateron her name was dropped on the ground of her being married. It was in these factual background that observation has been made that a welfare state is not expected to take a stand that a married daughter is in-eligible to apply for compassionate ground.

17. At the cost of repetition the compassionate appointment since is an exception to general rule and must be effected under a scheme which should be in consonance with Article 14 and 16 of the Constitution of India. In the case at hand there being a policy which does not include a married daughter

whose husband is alive, the observation in *Swara Sachin Kulkarni* (supra) is of no assistance to the petitioner.

18. Furthermore, there is no material on record to establish that the petitioner and her husband were dependent on deceased government servant. Thus, non-consideration of the petitioner for appointment on compassionate ground cannot be faulted with.

19. Consequently, petition fails and is dismissed. No costs.

Petition dismissed.

I.L.R. [2015] M.P., 1469
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 3118/2014 (Jabalpur) decided on 3 April, 2014

VISHUN LAL UPADHYAY ...Petitioner
Vs.
STATE OF M.P. ...Respondent

Urban Land (Ceiling and Regulation) Act (33 of 1976), Section 33 and Urban Land (Ceiling and Regulation) Repealed Act (15 of 1999), Section 4 - Maintainability of Appeal u/s 33 of Act 1976 - **Possession of land was taken pursuant to order passed under 1976 Act - Application u/s 4 of Repealed Act, 1999 was for declaring the proceedings abated was rejected by Competent Authority - Order was challenged by filing Writ Petition - Matter was remanded back and fresh order was passed on 01.09.2011 and application was once again rejected - Petitioner at whose instance earlier petition was filed did not challenge the order dated 01.09.2011 - Petitioner has no locus standi to challenge order dated 01.09.2011 as he was not a party in earlier petition - Further Addl. Commissioner was well within his right to hold that with repealing of Act 1976, forum u/s 33 of 1976 is also not available - Petition dismissed. (Paras 11,12 & 13)**

नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम (1976 का 33), धारा 33 एवं नगर भूमि (अधिकतम सीमा और विनियमन) निरसित अधिनियम (1999 का 15), धारा 4 – अधिनियम 1976 की धारा 33 के अंतर्गत अपील की पोषणीयता – अधिनियम 1976 के अंतर्गत पारित आदेश के अनुसरण में भूमि का कब्जा लिया गया – निरसित अधिनियम 1999 की धारा 4 के अंतर्गत कार्यवाहियों का उपशमन

घोषित किये जाने हेतु आवेदन सक्षम प्राधिकारी द्वारा अस्वीकार किया गया – रिट याचिका प्रस्तुत कर आदेश को चुनौती दी गई – मामला प्रतिप्रेषित किया गया और 01.09.2011 को नया आदेश पारित किया गया तथा आवेदन को एक बार पुनः अस्वीकार किया गया – याचीगण जिनके अनुरोध पर पूर्ववर्ती याचिका प्रस्तुत की गई थी, उन्होंने आदेश दिनांक 01.09.2011 को चुनौती नहीं दी – आदेश दिनांक 01.09.2011 को चुनौती देने के लिये याची को सुने जाने का अधिकार नहीं क्योंकि वह पूर्ववर्ती याचिका में पक्षकार नहीं था – इसके अतिरिक्त यह धारणा करना भली भांति अपर आयुक्त के अधिकार में था कि अधिनियम 1976 के निरसन के साथ ही 1976 की धारा 33 के अंतर्गत फोरम भी उपलब्ध नहीं – याचिका खारिज।

A.K. Tiwari, for the petitioner.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- Heard on admission.

2. Petitioner by way of present Writ Petition seeks quashment of order dated 1.9.2011 and order dated 24.1.2014 or in the alternative seeks a declaration that the proceedings in the Court of the Competent Authority under the Urban Land Ceiling Act stands abated as per section 4 Urban Land (Ceiling and Regulation) Repealed Act 1999.

3. Pleadings and Material documents on record reveals the following facts.

4. That one Bhagwat Prasad S/o. Sukhai in pursuance to the provisions of Urban Land (Ceiling and Regulation) Act 1976 filed a statement under Section 6 (1) forming subject matter of Revenue Case No. 16/अ-90(ब-9)/84-85; whereby he declared of owning land bearing Khasra No. 277 area 0.725 hectare, Khasra No. 297 area 0.129 and Khasra No. 305 area 0.170 at village Richhai and Khasra No. 196/2 area 0.376 at Village Madai. Record reveals that joint statement was filed by Bhagwat Prasad, the respective holding wherefrom was recorded in the following terms:

ग्राम	खसरा नं.	रकवा	भूमि धारक
रिछाई नं. ब. 402	277	0.725	भगवत प्रसाद बल्द सुखई सा0 देह
	297	0.129	गोपाल छैया बल्द चोखेलाल
	305	0.170	भगवत प्रसाद बल्द सुखई सा0 देह

		304	0.615	
मडइ नं. ब.		196/2	3.376	भगवत प्रसाद बल्द सुखई सा0 देह
		योग	2.015	

भूमि में हिस्से का विवरण

ग्राम	खसरा नं.	रकवा	भगवत प्रसाद	भोपाल	छैया
रिछाई	277	0.725	0.725	—	—
	297	0.129	0.065	0.032	0.032
	305	0.170	0.085	0.042	0.043
	304	0.615	0.308	0.154	0.153
मडई	196/2	3.376	3.376	—	—
योग			1.559	0.228	0.228

5. Consequently Bhagwat Prasad was held entitled for 5 units i.e. 0.750, thus 0.809 hectare was surplus (1.559-0.750=0.809 hectare) = 8093.69 sq.mt.). Gopal Prasad and Chaiyya were respectively found entitled for 1 unit each, and 0.078 hectare (=779 sq.mt.) land was found surplus respectively. A draft statement under Section 8 (1) was prepared on 11.3.1988. The objection were decided and a final statement was published on 19.7.1988,. whereby, 8093.69 sq.mt. of Khasra No. 277, 304, 297 and 305 of village Richhai and Khasra No. 196/2 of village Madai belonging to Bhagwat Prasad and 776 sq. mt. each of Gopal Prasad and Chaiyya of Khasra No. 304, 297 and 305 were declared surplus. Notices under Section 9 were issued. Notification under Section 10 (1) was issued on 2.12.1988. Since no objections were received under Section 10 (2), the declaration was sent for final publication under Section 10 (3) which was published on 23.6.1989. That after proceedings under Section 10 (6) the surplus land was taken possession of and were recorded in the name of State. The matter thus stood settled and the action of the State and its functionaries of taking possession and recording of name in revenue record was never questioned, till the advent of 1999 Act which led the legal heirs of Bhagwat Prasad (excluding the petitioner) to file application before Competent Authority to release the land.

6. Competent Authority vide order dated 9.6.2005 in Case No. 16/A-90-B-9/84-85 came to hold that the possession having been taken of surplus

land, the benefit under Section 4 of 1999 Act cannot be given.

7. The order was challenged vide Writ Petition No. 7551/2005. The petition was disposed of on 17.8.2005 with a direction to the Authority concerned to decide the matter in accordance with parameters enshrined under Section 10 of 1976 Act.

8. That a fresh decision was taken on 1.9.2011 wherein following order came to be passed:

"माननीय उच्च न्यायालय मध्यप्रदेश जबलपुर की याचिका कमांक 7551/2005 पारित आदेश दिनांक 17.08.2006 के द्वारा इस न्यायालय का पूर्व में पारित आदेश दिनांक 09.06.2005 निरस्त करते हुए निर्देशित किया गया है कि सक्षम प्राधिकारी इस तथ्य की जांच करें कि कब्जा विधी अनुसार लिया गया हे अथवा नही। माननीय न्यायालय द्वारा दिये गये निर्देशों के अनुसरण मे प्रकरण तहसीलदार पनागर जिला जबलपुर को सथल जांच हेतु भेजकर जांच प्रतिवेदन लिया गया।

तहसीलदार पनागर ने अपने प्रतिवेदन दिनांक 11.05.11 में प्रतिवेदन किया है कि मेरे द्वारा स्वयं हल्का पटवारी के साथ ग्राम रिछाई नं. बं. 402 प. ह.नं. 16 स्थित भूमि खसरा नं. 277 रकवा 0.425 हे0 का स्थल निरिक्षण किया गया। प्रश्नाधीन भूमि में रकवा 0.043 हे0 पर पक्की सडक (आम रास्ता) एवं दो मकान निर्मित है एवं 0.120 हे0 मे कडढा है जिसमे पानी भरा है तथा शेष भूमि मौके पर रिक्त है। पटवारी अभिलेख अनुसार नगरीय अतिशेष घोषित म0प्र0 शासन के नाम पर दर्ज है।

न्यायालय में आवेदकगणों की ओर से अधिवक्ता श्री पी.के. जैन ने लिखित तर्क कंडिका 01 से 10 यह छस्तावूजों सहित प्रस्तुत किये गये हैं। जो प्रकरण में संलग्न है मेरे द्वारा प्रस्तुत लिखित तर्को कंडिका 01 से 10 तथा सह दस्तावेजों का अवलोकन व अध्ययन किया गया। प्रस्तुत लिखित तर्को में ऐसा काई भी साक्ष्य नही है जिससे यह सिध्द हो सके कि तत्समय कब्जा विधिवत नहीं लिया गया है। अतः लिंखित तर्को में कोई बल न होने से अमान्य किये जाते हैं।

माननीय उच्च न्यायालय मध्यप्रदेश जबलपुर की याचिका क्रमांक 7551/2005 पारित आदेश दिनांक 17.08.2005 में दिये गये निर्देशों के अनुसरण में न्यायालयीन राजस्व प्रकरण क्रमांक 16/अ–90(ब–9)/84–85 तहसीलदार पनागर के जांच प्रतिवेदन दिनांक 11.05.11 व राजस्व निरिक्षक के स्थल जॉच प्रतिवेदन का परिक्षण एव अध्ययन किया गया। परीक्षण एव अध्ययन उपरांत उपरोक्तानुसार की गयी समीक्षा से यह स्पष्ट है कि तत्कालीन नजूल ने ग्राम रिछाई स्थित बादग्रस्त भूमि का विधिवत शासन पक्ष में कब्जा

लिया जाकर राजस्व अभिलेख दुरस्त कराया गया है। तहसीलदार पनागर के जॉच प्रतिवेदन दिनांक 11.05.11 के अनुसार वादग्रस्त भूमि पर जो अवैधानिक कब्जा है वह अतिक्रमण की श्रेणी मे आता है। जिस पर म0प्र0 भू राजस्व संहिता 1959 की धारा 238 के तहत कार्यवाही करने का उत्तरदायित्व तहसीलदार का है। प्रकरण समाप्त होकर दाखिल रिकार्ड हो। आवेदकगण/अधिवक्ता सूचित हों।"

9. That none of the petitioners in Writ Petition No. 7551/2005 at whose instance the matter was decided afresh by order dated 1.9.2011 challenged the order. Instead, the petitioner who was not a party in Writ Petition No. 7551/2005 nor before Competent Athority called in question the order dated 1.9.2011 vide Writ Petition No. 17365/2012 which was disposed of on 22.2.2013 in the following terms:

"Shri Dhanesh Kant Tiwari, learned counsel for the petitioner.

Matter pertains to an order passed in the mutation proceedings under the M.P. Land Revenue Code and against the order passed, the petitioner has a remedy of filing an appeal under Section 44 and Revision under Section 50 and therefore, a petition directly before this court by passing 3 tire statutory remedies is not maintainable.

Accordingly granting liberty to the petitioner to take recourse to the said remedy, the petition stands disposed of"

10. Against this order petitioner preferred a Writ Appeal No. 370/2013; wherein, by order dated 17.6.2013, the Division Bench declined to interfere with the order. However, on the petitioner's asking he was set at liberty to avail the remedy; wherein inadvertently it came to be mentioned as under Section 33. Whereas the fact is that with the advent 1999 Act and by virtue Section 2 read with Section 5 thereof 1976 Act stood repealed. Thus under law there exist no forum under Section 33. In fact, if the order in Writ Appeal No. 370/2013 is read in consonance with the order passed in Writ Petition No. 17365/2012, the petitioner was at liberty to avail remedy under Section 44 or 50 of the M.P. Land Revenue Code 1959. Be that as it may. The Appellate Authority by impugned order dated 24.1.2014, declined to entertain the appeal holding that the same is not tenable:

"4. मूल प्रश्न यह है कि क्या इस न्यायालय को धारा 33 नगर भूमि

(अधिकतम सीमा और विनियमन) अधिनियम 1976, जो निरसित हो चुका है, के तहत अपील सुनने की आअधिकारिता प्राप्त है ?

5. न्यायदृष्टांत म0प्र0 राज्य विरूद्ध मुन्नीबाई एवं अन्य में माननीय उच्च न्यायालय द्वारा रिट पिटिशन क्रमांक 17560/2007 में परित आदेश दिनांक 24/03/2008 में अधिनियम 1976 की धारा 33 के संबंध में यह अभिनिर्धारित किया था :–

As far as the first objection of the petitioner is concerned with regard to power exercised by the Additional Commissioner under Section 33 of the Act of 1976..... the fact remains that on 17.1.2002 the Repeal Act had come into force in the State of Madhya Pradesh and the powers of the Competent Authority and the Appellate Authority were already taken away.

..... It is clear frome (sic:from) the records that the Additional Commissioner, in the present case exercised powers of an Appellate Authority under section 44 of the MP Land Revenue Code and did not exercise the powers under section 33, rightly so because the Act of 1976 was repealed and the Additional Commissioner had no power under section 33 of the said Act.

6. माननीय उच्च न्यायालय द्वारा रिट पिटिशन में पारित उक्त आदेश दिनांक 24/03/2008 के विरूद्ध प्रस्तुत रिट अपील क्रमांक 547/2009 में माननीय उच्च न्यायालय की डिवीजन बैंच द्वारा उपर्युक्त पैरा–4 अनुसार अभिनिर्धारित स्थिति को संज्ञान में लेते हुए तथा उसे अपने आदेश में उद्धृत भी करते हुए टि पिटिशन में पारित आदेश दिनांक 24/03/2008 को यथवत् रखा।

7. मानीय (sic:माननीय) उच्च न्यायालय द्वारा रिट अपील क्रमांक 547/2009 में पारित आदेश दिनांक 17/6/13 में विधि के प्रावधानों के अनुसार विचारण करने के निर्देश हैं। उपरोक्त पैरा 4 एवं 5 में वर्णित न्यायदृष्टांत से स्पष्ट है कि नगर भूमि (अधिकतम सीमा और विनियमन) अधि ानियम 1976, जो अब निरसित हो चुका है कि धारा 33 के तहत न्यायालय अतिरिक्त कमिश्नर को कोई अपीली अधिकार प्राप्त नहीं है। अतः अपीलार्थी द्वारा अधिनियम 1976 की धारा 33 के तहत प्रस्तुत अपील इस न्यायालय के समक्ष चलनशील न होने से मोशन स्टेज पर ही आग्राह्य की जाती हैं।

8. प्रावचक आदेश का संक्षेप दायरा पंजी में दर्ज करें । प्रकरण समाप्त होकर दा0रि0 हो ।

11. The petitioner vide the petition has challenged the orders dated 1.9.2011 and 24.1.2014.

12. As to challenge to order dated 1.9.2011, the petitioner has no locus because the said order has been passed in pursuance to direction in Writ Petition No. 7551/2005 wherein the petitioner was not a party and petitioners therein having chosen not to challenge the order dated 1.9.2011, it has attained finality as would warrant any interference.

13. As regard to challenge to order dated 24.1.2014, the Additional Commissioner is well within his right in holding that with repealing of 1976 Act by the repealing Act of 1999, the forum under Section 33 of 1976 Act is not available.

14. Having thus considered, the petition being devoid of substance deserves to be and is hereby dismissed *in limine*. No costs.

Petition dismissed.

I.L.R. [2015] M.P., 1475
WRIT PETITION
Before Mr. Justice S.C. Sharma
W.P. No. 398/2004 (Indore) decided on 14 October, 2014

SUSHILA RAJE HOLKAR (SUSHRI) ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

A. Land Revenue Code, M.P. (20 of 1959), Section 172 - Locus Standi - **Order of diversion set aside on the ground that land was diverted for the "administrative purposes" but the land is being used for "educational purposes" - Appeal filed by respondent no. 2 who is running educational institution - Contravention of provision of Section 172 is penal in nature and therefore Bhoomi Swami and another person who is responsible for contravention can be punished - Respondent no. 2 had locus standi to challenge the order of SDO. (Para 12)**

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 172 – सुने जाने का अधिकार – व्यपवर्तन के आदेश को इस आधार पर अपास्त किया गया कि भूमि का

व्यपवर्तन "प्रशासनिक प्रयोजन" हेतु किया गया परंतु भूमि का उपयोग "शैक्षणिक प्रयोजन" हेतु किया जा रहा है – प्रत्यर्थी क्रमांक 2 जो शैक्षणिक संस्था चला रहा है, द्वारा अपील प्रस्तुत की गई – धारा 172 के उपबंध का उल्लंघन दण्डात्मक प्रकृति का है और इसलिये भूमि स्वामी एवं अन्य व्यक्ति जो उल्लंघन का दोषी है को दण्डित किया जा सकता है – प्रत्यर्थी क्रमांक 2 को अनुविभागीय अधिकारी के आदेश को चुनौती देने के लिये सुने जाने का अधिकार था।

***B. Constitution - Article 227 - Scope of interference limited* - No patent illegality nor any jurisdictional error in order of Board of Revenue - Petition dismissed. (Para 18)**

ख. संविधान – अनुच्छेद 227 – हस्तक्षेप की परिधि सीमित – राजस्व मंडल के आदेश में न तो कोई प्रकट अवैधता है न ही अधिकारिता की त्रुटि – याचिका खारिज।

Case referred :

2010 (8) SCC 329.

ORDER

S.C. SHARMA, J. :- The petitioner before this Court has filed this present writ petition being aggrieved by the order dated 15-01-2014 passed by the Board of Revenue in Revision No. 2566/PBR/2002 as well as order dated 18-10-2002 passed by the Additional Commissioner, Indore Division, Indore in Second Appeal No. 297/01-02 and the consequential order dated 02-05-2002 (Annexure-P-2).

02. The petitioner's contention is that she is the owner of the land bearing survey No. 60 ad-measuring 2.647 hectares situated at village Tejpur Gabari, Tehsil and District, Indore.

03. The petitioner has further stated that the petitioner being the Bhoomi Swami submitted an application for diverting of land in question as it was an agricultural land before the Sub-Divisional Officer (Revenue), Indore on 27-11-1998, for administrative purposes. The application was allowed and the land was diverted by the Sub-Divisional Officer (Revenue), in exercise of powers conferred u/s 172 of the Madhya Pradesh Land Revenue Code, 1959. The order was a conditional order. The petitioner has further stated that the Sub-Divisional Officer (Revenue), as there were certain irregularities in the order dated 08-04-1999 has sought permission from the Collector, Indore

for reviewing the order dated 08-04-1999 and the same was granted on 20-08-1999. The petitioner has further stated that the Sub-Divisional Officer thereafter sought report from the Revenue Inspector and in the report it was informed that the land is being used for educational purposes and not for administrative purposes. The Sub-Divisional Officer has cancelled the order of diversion by passing a fresh order on 02-05-2002. The respondent No.2 has preferred an appeal u/s 44 (1) of the Madhya Pradesh Land Revenue Code, 1959 before the Additional Collector challenging the aforesaid order dated 02-05-2002 and the appeal was dismissed by the learned Additional Collector vide order dated 05-08-2002. The respondent No.2 thereafter preferred an appeal u/s 44(2) of the Madhya Pradesh Land Revenue Code, 1959, before the Additional Commissioner, Indore Division Indore and the learned Additional Commissioner has allowed the appeal by passing an order dated 18-10-2002. The petitioner being aggrieved by the order passed by the Additional Commissioner has preferred a revision petition u/s 50 of the Madhya Pradesh Land Revenue Code, 1959 and the Board of Revenue has dismissed the revision petition, by order dated 15-01-2004. The petitioner is now aggrieved by the order passed by the Board of Revenue dated 15-01-2004 and the order dated 18-10-2002 passed by the Additional Commissioner.

04. Learned counsel for the petitioner has vehemently argued before this court that the diversion in respect of the land in question was carried out vide order dated 08-04-1999 on an application preferred by the petitioner and the same was cancelled by an order dated 02-05-2002 and therefore the respondent No.2 was not having a locus to file an appeal before the Collector or before the Commissioner. He has straightaway drawn the attention of this court towards the judgment delivered by the learned Single Judge in Writ Petition No. 1205/2002 decided on 20-08-2002 and his contention is that in the aforesaid case, the permission granted by the Town and Country Planning Department was revoked by an authority and the same was challenged again by the respondent No.2, who was not the Bhoomi Swami and in those circumstances, the learned Single Judge has held vide judgment dated 20-08-2002 that the petitioner therein who was not the Bhoomi Swami Col. (Retired) Anil Kak, who is the respondent No.2 in the present writ petition was not having locus to challenge the order passed by the Town and Country Planning Department.

05. Learned counsel has vehemently argued before this court that the respondent No.2 was not having locus, therefore, the order passed by the Commissioner as well as order passed by the Board of Revenue deserves to be set aside. A ground has been raised that the Additional Commissioner could not have passed any order in appeal because the present petitioner, who is a Bhoomi Swami did not prefer any appeal against the order dated 02/05/2002.

06. Another ground has been raised that the Additional Commissioner as well as Board of Revenue have committed an error apparent on the face of the record in not considering that though initially the permission for review was sought, but later-on, on a report submitted by the Revenue Inspector, as the terms and conditions of the diversion order were violated, the diversion was rightly recalled. It has been further stated that the Sub-Divisional Officer has not committed any illegality in passing the order recalling the diversion. It is also been stated that the Additional Commissioner as well as the Board of Revenue have erred in law and facts in not considering the vital fact that the lease agreement dated 11-08-1998 could not have been relied upon in absence of the registration.

07. Another ground has also been raised that the Additional Commissioner as well as Board of Revenue have committed an error apparent on the face of the record in not considering that the respondent No.2 has virtually misused inconsistently the land for the purpose it was not diverted. It has been further stated that the Additional Commissioner as well as Board of Revenue has referred to the Indore Master Plan 2005-2011 and the same was not finalized under the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973. The same could not have been looked into.

08. Another ground was raised in respect of cancellation of the site plan sanctioned by the department of Town and Country Planning, the factum which is the subject matter of another writ petition, which is pending before this court. Various other grounds have been raised and it is also been raised that the Additional Commissioner and the Board of Revenue have committed an error apparent on the face of the record in not considering certain documents which were filed during the pendency of second appeal or during the pendency of revision, without filing any application for adducing additional evidence. The petitioner has prayed for quashment of the order dated 18-10-2002 passed by the Additional Commissioner, Indore Division, Indore and the order passed by the Board of Revenue dated 15-01-2004.

09. Reply has been filed in the matter and the respondents have argued before this court that on account of lease executed in favour of the respondent No.2, the respondent No.2 is running a school in the name and style of ***'Progressive Education'***, over the land in question. As per lease agreement dated 11-08-1998, the land has been leased out on a rent of Rs. 1 lac per month for construction of school, including building and other structure, which are required for the purposes of running of the school. It has been further stated that the petitioner is closely related to the wife of the respondent No.2 and as per the terms and conditions of the lease agreement, the respondent No.2 was empowered to approach any authority in Government office for grant of any permission, whether it was in respect of construction of building or for any other purposes. It has been further stated that the petitioner has executed lease deed in respect of land ad measuring 16,000 sq. feet in respect of ***Progressive Education***, a proprietary unit and subsequently has also registered two lease deeds for thirty years of land ad-measuring 43,567 and 43,581 sq.fts on 07-12-2000 and 29-01-2001 in favour of Friends of Children Society. A suit is also pending between the parties for specific performance of contract and the same is registered as C.O.S No. 31-A of 2004. Learned counsel for the respondent No.2 has argued before this court that by virtue of the statutory provisions as contained u/s 172 of M.P. Land Revenue Code, 1959, the petitioner is certainly entitled to prefer an appeal against the order passed by the Sub-Divisional Officer dated 02-05-2002, by which the diversion was set aside. It has been vehemently argued that the permission for review was granted by the Collector only on a limited ground as reflected in the order dated 02-05-2002. The Additional Collector vide order dated 20-08-1999 has granted permission for review only on the ground that the competent authority under the Urban Land (Ceiling and Regulation) Act, 1976 has issued erroneously 'No Objection Certificate' and the matter was remanded to the Sub-Divisional Officer, only on the basis of the aforesaid permission granted by the Additional Collector/Commissioner. However it was the petitioner who has submitted an application for cancellation of a diversion and the Sub-Divisional Officer, without there being any permission granted by the Collector to review the order of diversion has set aside the order of diversion by passing an order dated 02-05-2002. The contention of the learned counsel is that judgment relied upon by the learned counsel for the petitioner, which is also on record has already been set aside by an order passed in Writ Appeal No. 790/2006 and therefore as the judgment is no longer in existence, no relief on the basis of the judgment delivered in Writ Petition No. 1205/

2002 can be granted to the petitioner. Learned counsel has lastly placed reliance upon the judgment passed by the apex court in the case of *Shalini_Shyam Shetty Vs. Rajendra Shankar Patil* reported in 2010 (8) SCC 329 and his contention is that the scope of interference by this court in Writ Petition under article 227 of the Constitution of India is quite limited and no patent illegality has been committed by the Board of Revenue nor the order can be said to be passed, without jurisdiction. He prays for dismissed of the writ petition.

10. Heard learned counsel for the parties and perused the record.

11. In the present case the undisputed fact is that the petitioner has entered into an agreement with the respondent No.2 on 11-08-1998. Thereafter, various lease deeds have been executed in favour of the respondent No.2 and the respondent No.2 is running a school in the name and style of ***'Progressive Education'*** over the land in question. It is also an admitted fact that a Civil Suit is pending between the parties for specific performance of contract that is Civil Suit No. 31-A of 2004. It has been vehemently argued before this court that the respondent No.2 was not having locus to file an appeal against the order dated 02-05-2002, by which the diversion done vide order dated 08-04-1999 has been set-aside. It is again an admitted fact that an application was preferred u/s 172 of the Madhya Pradesh Land Revenue Code, 1959. The order was passed on 08-04-1999 diverting the land from agricultural purposes to other purposes. However, page-2 of the diversion order mentions certain conditions in respect of the diversion order and Condition No.2 reflects that the land in question will be used for the administrative purposes. It is also an undisputed fact as reflected from the order dated 02-05-2002 that the Additional Collector/Commissioner has granted permission on 20-08-1999 for reviewing to the Sub-Divisional Officer and the order itself makes it very clear that on account of alleged illegality in issuance of 'No Objection Certificate' under the Urban Land (Ceiling and Regulation) Act, 1976, the matter was referred back to the Sub-Divisional Officer. The Sub-Divisional Officer has issued a notice to the respondent No.2 seeking explanation as to why the land in question is being used for educational purposes as permission was granted only for administrative purposes. Meaning thereby, it was the Sub-Divisional Officers, who has issued a show cause notice to the respondent No.2 and therefore the respondent No.2 did participate in the proceedings before the Sub-Divisional Officer and the Sub-Divisional Officer has set aside the earlier order passed by him dated 08-04-1999. The order was not set aside on the ground that allegedly some illegal 'No Objection Certificate' was

issued by the competent authority under the Urban Land (Ceiling and Regulation) Act, 1976. Meaning thereby, on some other ground, the Sub-Divisional Officer has set-aside the order. Appeal was preferred by the respondent No.2 before the Additional District Commissioner and the Additional District Commissioner has also affirmed the order passed by the Sub-Divisional Officer dated 02-05-2002. The order was passed by the Additional Commissioner on 05-08-2002. The petitioner has preferred an appeal and the learned Commissioner has allowed the appeal on 18-10-2002 and the order passed by the Sub-Divisional Officer dated 02/05/2002 has been set-aside. Against the order passed by the Commissioner, a review was preferred before the Board of Revenue by the petitioner and the same was dismissed by order dated 15-01-2004. Section 172 of the Madhya Pradesh Land Revenue Code, 1959 reads as under :-

> **"172. Diversion of land.** *(1)* [If a Bhumiswami of land held for any purpose in-
>
> (i) urban area or within a radius of five miles from the outer limits of such area;
>
> (ii) a village with a population of two thousand or above according to last census; or
>
> (iii) in such other areas as the State Government may, by notification,specify;
>
> wishes to divert his holding or any part thereof to any other purpose except agriculture, he shall apply for permission to the purpose Sub-Divisional Officer/[Competent Authority] who may, subject to the provisions of this section and to rules made under this Code, refuse permission or grant it on such conditions as he may think fit:
>
> Provided that should the Sub-Divisional Officer/[Competent Authority] neglect or omit for three months after the receipt of an application under sub-section (1) to make and deliver to the applicant an order of permission or refusal in respect thereof, and the applicant has by written communication called the attention of the Sub-Divisional Officer/ [Competent Authority] to the omission or neglect, and such omission or neglect continues for a further period of one month the Sub-

Divisional Office/[Competent Authority] shall be deemed to have granted the permission without any condition:

Second provisos applicable to M.P. Only

[Provided further that if a Bhumiswami of a land, which is reserved for a purpose other than agriculture in the development plan but is used for agriculture, wishes to divert his land or any part thereof to the purpose for which it is reserved in the development plan, a written information of his intention given by Bhumiswami to the Sub-Divisional Officer shall be sufficient and no permission is required for such diversion:

Provided also that if a Bhumiswami of a land wishes to divert his land or any part thereof which is assessed for agriculture purpose and situated in any area other than an area covered by development plan to the purpose of industry, a written information of his intention given by Bhumiswami to the Sub-Divisional Officer shall be sufficient and no permission is required for such diversion.]

Second proviso applicable to Chhattisgarh only

Provided also that if a competent authority undertakes the work of regularisation of the illegal colony, the land of which is not diverted, then the land, subject to the provisions of development plan, shall be deemed to have been diverted and such land shall be liable for premium and revised land revenue under Section 59.

Explanation:- For the purpose of this section the competent authority shall have the same meaning as assigned to it in the Madhya Pradesh Nagar Palika (Registration of Coloniser Terms and Conditions) Rules, 1998 made under the Madhya Pradesh Municipal Corporation Act, 1956 (No. 23 of 1956) and the Madhya Pradesh Municipalities Act, 1961 (No. 37 of 1961.]

Provided further that if a Bhumiswami of land situated in urban area which is reserved for a purpose other than agriculture in the development plan but is used for Agriculture wishes to divert

his land or any part thereof to the purpose for which it is reserved in the development plan, he may apply for permission to the Sub-Divisional Officer/[Competent Authority], who shall, subject to the provisions of this section grant it on such conditions as he may think fit. If the Sub-divisional Officer/ [Competent Authority], neglects or omits for two months after the receipt of an application under this proviso to make and deliver to the applicant an order of permission in respect thereof and the applicant has by written communication called the attention of the Sub-Divisional Officer/ [Competent Authority] to the omission or neglect, and such omission or neglect continues for a further period of one months, the Sub-Divisional Officer/[Competent Authority] shall be deemed to have granted the permission without any condition.]

(2) Permission to divert may be refused by the Sub-Divisional Officer/[Competent Authority] only on the ground that the diversion is likely to cause a public nuisance, or the Bhumiswami is unable or unwilling to comply with the conditions that may be imposed under sub-section (3).

(3) Conditions may be imposed on diversion for the following objects and no others, namely, in order to secure the public health, safety and convenience, and in the case of land which is to be used a building sites, in order to secure in addition that the dimensions, arrangement and accessibility of the sites are adequate for the health and convenience of occupiers or are suitable to the locality.

(4) If any land has been diverted without permission by the Bhumiswami or by any other person with or without the consent of the Bhumiswami the Sub-Divisional Officer/[Competent Authority] on receiving information thereof, may impose on the person responsible for the diversion a penalty not exceeding [twenty per centum of the market value of such diverted land] [one thousand rupees], and may proceed in accordance with the provisions of sub-section. (10 as if an application for permission to divert had been made.

(5) If any land has been diverted in contravention of an order passed or of a condition imposed under any of the foregoing sub-sections, the Sub-Divisional Officer/[Competent Authority] may serve a notice on the person responsible for such contravention, directing him, within a reasonable [period to be stated in the notice, to use the land for its original purpose or to observe the condition; and such notice may require such person to remove any structure, to fill up any excavation, or to take such other steps as may be required in order that the land may be used for its original purpose, or that the condition may be satisfied. The Sub-Divisional Officer/[Competent Authority] may also impose on such person a penalty not exceeding [twenty per centum of the market value of such diverted land [one thousand rupees} for such contravention, and a further penalty not exceeding [one thousand rupees] [one hundred rupees] for each day during which such contravention is persisted in.

(6) If any person served with the notice under sub-section (5) fails within the period stated in the notice to take the steps ordered by the Sub-Divisional Officer/[Competent Authority] may himself take such steps or cause them to be taken; and any cost incurred in so doing shall be recoverable from such person as if it were an arrear of land revenue.

[(6-a) If any land has been diverted in contravention of sub-section (6-ee) of section 165, the Sub-Divisional Officer/ [Competent Authority] in addition to taking action laid down in sub-section (5) and (6), shall also impose a penalty not exceeding five thousand rupees for such contravention and a further penalty not exceeding one hundred rupees/[five hundred rupees] for each day during which such contravention is persisted in.]

12. Proviso (4) and (5) of Section 172 makes it very clear that in case a person violates the condition of the diversion order, he shall be liable for penal action. The aforesaid section includes Bhoomi Swami as well as the person responsible for any contravention. In the present case, contravention was alleged on behalf of the respondent No.2 and, therefore, this court is of the

considered opinion that in light of the proviso, which makes any person responsible for contravention, apart from Bhoomi Swami, the respondent No.2 against whom an allegation was made in respect of contravention do have a locus to file an appeal and the same was rightly before the Additional Commissioner, Indore Division, Indore.

13. Not only this, the Sub-Divisional Officer did issue a show cause notice to the respondent No.2 and the Respondent No.2 has appeared in person before the Sub-Divisional Officer and thereafter an order was passed cancelling the diversion on 02-05-2002. Person affected by the order dated 02-05-2002 is certainly the respondent No.2 and, therefore, the respondent No.2 was having a locus to prefer an appeal in the matter.

14. The contention of the learned counsel for the petitioner is that by virtue of the judgment dated 20-8-2002 passed in the Writ Petition No. 1205/2002, the respondent No.2 does not have a locus as in similar circumstances, this court in the matter of cancellation of lay out by Town and Country Planning Department has held that the respondent No.2 does not have a locus as he he was not the Bhoomi Swami. Learned counsel appearing for the respondent No.2 has brought to the notice of this court order passed in Writ Appeal No. 790/2006 dated 02-05-2014. The Division Bench of this court has set aside the order passed by the learned Single Judge. The order passed by the Division Bench reads as under :-

> "By filing this intra court appeal, the appellant/writ petitioner has challenged the order dated 20-08-2002 passed by learned Single Judge of this court in Writ Petition No. 1205/ 2002.
>
> At the outset, it has been submitted by the learned counsel for the parties that this writ appeal may be allowed to the extent that the impugned order passed by the Writ Court may be set aside with liberty to the respondents to file their reply to the writ petition, and thereafter, the writ court may be directed to decide the writ petition, afresh on merits.
>
> Learned counsel for the parties submit that the facts stated in the writ petition needs to be clarified/denied by appropriate reply, which may not be possible to be filed in this writ appeal.

Keeping in view the aforesaid prayer made by the learned counsel for the parties, without expressing any opinion about the merits of the matter, with liberty to the parties to raise all the contentions, as may be available to them before the Writ Court, and with direction to the respondents to file reply of the writ petition, within six weeks, we allow this appeal to the extent indicated above. The respondents may file their respective replies of the writ petition within six weeks. The writ petition be restored to its original number and it be listed before the appropriate bench on 07-07-2014.

Needless to say at the cost of repetition that the writ court will be free to decide the matter on its own merits, uninfluenced by the setting aside of the order passed by the writ court in this appeal."

15. In light of the aforesaid order, no relief can be granted to the petitioner, based upon the order dated 20-08-2002. In the present case, the petitioner has argued before this court that the documents which was not in existence have been looked into by the appellate authority. The petitioner while preferring an appeal before the Board of Revenue has no where stated about any particular document, only a vague averment was made that document have not been provided and the documents have been looked into by the appellate authority i.e by the Additional Commissioner.

16. Learned counsel has brought to the notice of this court about the Indore Development Plan, 1974, which has been considered by the learned Additional Commissioner. The Indore Development Plan, 1974 is not a confidential document. It is a public document. The learned Commissioner has observed that as per the Indore Development Plan, land in question could not have been used for educational purposes and the fact remains that as per the New Master Plan, 2021, the land can be used for residential as well as commercial purposes.

17. This court is of the considered opinion that the Sub-Divisional Officer has certainly erred in law and facts by reviewing the earlier order. This court is dealing with a Writ Petition under article 227 of the Constitution of India. The apex court in the case of *Shalini_Shyam Shetty Vs. Rajendra Shankar Patil* reported in 2010 (8) SCC 329 in paragraph 49 held as under:-

"49. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:

(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.

(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.

(c) High Courts cannot, on the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restrain on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of its power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in *Waryam Singh* (supra) and the principles in *Waryam Singh* (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in *Waryam Singh* (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, `within the bounds of their authority'.

(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in the case of *L. Chandra Kumar vs. Union of India & others,* reported in (1997) 3 SCC 261 and therefore abridgement by a Constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

(l) On a proper appreciation of the wide and unfettered

power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(o) An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality."

18. This court keeping in view the aforesaid judgment is of the considered opinion that the Board of Revenue has not committed any patent illegality nor there is any jurisdictional error committed in the matter by the Board of Revenue and therefore in light of the judgment delivered in the case of *Shalini Shyam Shetty* (supra) this court does not find any reason to entertain the present Writ Petition under article 227 of the Constitution of India.

The writ petition is accordingly dismissed.

No order as to costs.

Petition dismissed.

I.L.R. [2015] M.P., 1490
WRIT PETITION

Before Mr. Justice A.M. Khanwilkar, Chief Justice
& Mr. Justice Sanjay Yadav

W.P. No. 4720/2014 (Jabalpur) decided on 8 December, 2014

SUNDER LAL SAHU ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

(Alongwith W.P. No. 5171/2014.)

A. Kerosene Dealers Licensing Order (M.P.), 1979, Order 2(k) -Hawker card holder **- Hawker cards were issued and Hawker Card Holder was supplied 200 litres of kerosene and they were to engage themselves in distributing kerosene oil in open market - Aforesaid arrangement was withdrawn and it was decided that kerosene oil will be distributed by Public Distribution System - Petitioners have failed to demonstrate their subsisting right in terms of Order 1979 or Essential Commodities Act - Communication dated 09/10/2011 which was signed by Deputy Secretary was founded on the Notification issued in the name of Governor and published in Official Gazette - Deletion of Order 2(k) is in accordance with law - Petition dismissed. (Para 7)**

क. कैरोसीन डीलर्स अनुज्ञप्ति आदेश (म.प्र.), 1979, आदेश 2(के) – फेरी (हॉकर) कार्डधारक –फेरी कार्ड जारी किये गये और फेरी कार्ड धारक को 200 लीटर कैरोसीन प्रदाय किया गया और उन्हें खुले बाजार में कैरोसिन वितरित करने के लिये खुद को संलग्न करना था – उपरोक्त व्यवस्था वापिस ली गई और यह निर्णय लिया गया कि कैरोसिन तेल सार्वजनिक वितरण प्रणाली से वितरित किया जायेगा – याचीगण आदेश 1979 या आवश्यक वस्तु अधिनियम की शर्तों के अंतर्गत अपने विद्यमान अधिकार प्रदर्शित करने में असफल रहे हैं – संसूचना दिनांक 09.10.2011 जो उप सचिव द्वारा हस्ताक्षरित थी, राज्यपाल के नाम से जारी एवं राजपत्र में प्रकाशित अधिसूचना पर आधारित थी – आदेश 2(के) को विलोपित किया जाना विधि अनुसार है – याचिका खारिज।

B. Kerosene (Restriction on use and fixation of ceiling price) Order 1993 - Order 2(i) read with Order 7 -"Parallel Marketing System" **- Other than PDS - Held - The said order does not recognizes distribution of Kerosene by mode of Hawker Card Holders. (Para 9)**

ख. कैरोसिन (उपयोग पर निर्बन्धन एवं मूल्य की अधिकतम सीमा का

निर्धारण करना), आदेश 1993 – आदेश 2(i) सहपठित आदेश 7 – "समानांतर विपणन प्रणाली" – सार्वजनिक वितरण प्रणाली के अतिरिक्त – अभिनिर्धारित – उक्त आदेश कैरोसिन का वितरण, फेरी कार्ड धारकों के माध्यम से किये जाने की मान्यता नहीं देता।

D.K. Dixit, for the petitioners.
P.K. Kaurav, Addl. A.G. for the respondents/State.

(Supplied: Paragraph numbers)

ORDER

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

2. Essentially two substantive reliefs have been claimed in these petitions as originally filed.

3. The first relief is to quash the impugned order dated 26.02.2014 (Annexure P-6) issued by the Commissioner, Food Civil Supplies and Consumer Protection, Government of M.P. The second relief is a consequential relief to issue direction to the respondents to allot kerosene to the petitioners and other hawkers possessing Hawker cards in the city of Bhopal for sale under the M.P. Kerosene Dealers Licensing Orders, 1979.

4. As regards the main relief, during the pendency of this petition, the same has become infructuous. Inasmuch as, the State Government has now issued communication dated 10.11.2014 under the signature of Deputy Secretary, Food Civil Supplies and Consumer Protection, Government of M.P. dated 10.11.2014 (Annexure A-6). As a result of that communication, the petitioner has moved application to amend the writ petition and challenge the same. We would proceed on the basis that the amendment as prayed is allowed and the petition stands amended to that effect.

5. The background in which the challenge has been set up, is that, the petitioners and several other persons have been issued Hawker Cards under the M.P. Kerosene Dealers Licensing Orders, 1979. The said Order was amended in the year 1995, pursuant to which definition of "Hawker Card Holder" came to be inserted by way of Order 2 Clause (k). The said definition envisaged that the dealer, who is not wholeseller or semi wholeseller or retail dealer is covered under the said definition. After coming into force of the said Order on 26.01.1996, Hawker Cards were issued to the persons such as petitioners throughout the State of M.P. On the basis of the said Hawker

Card, the dealers were supplied around 200 litres Kerosene, who, in turn, engaged themselves in distribution of Kerosene on retail basis in open market. However, the State Government by communication dated 26.02.2014 decided to withdraw the said arrangement and instead decided to distribute the Kerosene only through Public Distribution Scheme (PDS) operating across the State. As aforesaid, originally the said communication dated 26.02.2014 (Annexure P-6) was challenged in this petition and during the pendency of this petition, the State Government having issued instructions on 20.11.2014 to discontinue the distribution of kerosene through Hawker Card Holders and for that the Order of 1979 has also been amended by deleting Order 2 (k) defining Hawker Card Holders, even this communication is now challenged.

6. As aforesaid, we would proceed on the basis that the petitioners have amended the petition and are permitted to challenge the recently issued communication (Annexure A-6) under the signature of Deputy Secretary, Food Civil Supplies and Consumer Protection. The challenge to Annexure A-6, is, firstly, on the ground that the said communication has been issued under the signature of Deputy Secretary of the Department, whereas the amendment vide Order 2 (k) effected on 26.12.1995 and which came into force from 26.01.1996, was issued in the name of Governor. In other words, the Deputy Secretary has had no authority to issue communication to discontinue the arrangement of distribution of Kerosene by the Hawker Card Holders in force on account of amendment effected in the year 1996 by insertion of Clause 2 (k) in the year 1979. This argument is completely in ignorance of the Notification issued in the Official Gazzette (sic:Gazette) in the name of Governor dated 09.10.2014 (Annexure A-5). The communication, Annexure A-6, is, essentially, founded on the said Notification. That notification has been issued in the name of Governor, whereby Clause 2 (k), which was inserted in the Order of 1979 came to be deleted. As a result of that deletion, the class of Kerosene distributors operating as Hawker Card Holders has been abolished. That is the effect of the said decision taken by the Governor to delete Order 2 (k) defining Hawkers Card Holders. In that case, the petitioners and similarly placed persons cannot claim any right in the matter of distribution of kerosene as Hawker Card Holders any more. No such class of distributor exists in terms of Order of 1979.

7. To get over this position, Shri Dixit, learned counsel for the petitioners contends that the delegation of authority in terms of Section 3 of the Essential Commodities Act, 1955, is circumscribed; and in terms of Section 3 (2) (d)

the authority to be delegated to the State Government can be only for regulating by licenses, permits or otherwise the storage, transport, distribution, disposal, acquisition, use of consumption of, any essential commodity. He submits that by virtue of Section 5 (3) of the said Act, this limited power can be delegated to the State Government. He has then invited our attention to Order No S.O. 681 (E) dated 30th November, 1974 issued by the Central Government and which is referred to in the Notification dated 09.10.2014 issued by the State Government. According to him, it is not open to the State Government to interdict the scheme enunciated by the Central Government regarding distribution of Kerosene in the State; and further the State Government is obliged to distribute kerosene to all the Ration Card Holders. The fact that such right exists in the Ration Card Holders in the State with corresponding obligation of the State to ensure distribution of Kerosene to those persons, as per their entitlement and the scheme enunciated by the Central Government cannot create any right in favour of the petitioners, who have claimed reliefs in the present writ petition on the assertion that they are entitled to receive specified quantity of Kerosene from the State Government as Hawker Card Holders. As aforesaid, the dispensation of distribution of Kerosene through the Hawker Card Holders has been completely abolished by the State Government; and, more particularly, as a consequence of Notification dated 09.10.2011, Annexure A-5, and the consequential communication issued by the Deputy Secretary on 10.11.2014, Annexure A-6. The petitioners are not in a position to demonstrate that they have a subsisting right in terms of any other provision either under the Act of 1995 or Orders issued thereunder by the Central Government from time to time.

8. Indeed, the counsel for the petitioners made a feeble attempt in pointing out the Order issued titled - "The Kerosene (Restriction On Use and Fixation of Ceiling Price) Order, 1993. While referring to the definition of parallel marketing system in Order 2 (i) of this Order read with Order 7, it was argued that the State Government is obliged to allow distribution of kerosene through mode other than Public Distribution System and for which reason the reliefs as claimed by the petitioners deserve to be accepted. We fail to understand as to how these provisions in the Order of 1993 will come to the aid of the petitioners to substantiate their reliefs, unless it is pointed out that the same recognizes distribution of Kerosene by the mode of Hawker Card Holders. Hence, even this submission does not commend to us.

9. The definition of parallel marketing system does not recognize distribution of kerosene by the mechanism of Hawker Card Holders; but, is a completely different dispensation. Suffice it to observe that the petitioners have no subsisting right whatsoever so as to direct the State Government to continue to supply kerosene to the petitioners as Hawker Card Holders and to authorize them to engage in retail sale of Kerosene in open market in the concerned area. In absence of any legal right, the question of entertaining these petitions much less to grant any relief to the petitioners in exercise of writ jurisdiction under Article 226 of the Constitution of India does not arise. Hence, none of the reliefs claimed by the petitioners can be taken forwarded.

10. It may be apposite to now deal with the argument of the petitioners that the State Government had no authority to delete the entry of Hawkers Card Holder as inserted in the Order of 1979 - as it would be in the teeth of the distribution scheme envisaged by the Central Government. If this argument is taken to its logical end, it would necessarily follow that even the amendment of 1996 whereby the definition of Hawkers Card Holder came to be inserted will have to be treated as without authority of law. In which case, the petitioners cannot succeed in getting reliefs as prayed - sans any subsisting right to engage in the business of retail sale of kerosene.

11. Shri Dixit, learned counsel for the petitioners was at pains to persuade us to take the view that discontinuation of the dispensation of retail sale of Kerosene through Hawker Card Holders would severely impact the distribution of Kerosene within the State and that the petitioners in public interest are entitled for a direction against the State to ensure that the State Government distributes Kerosene quota allotted to the State by the Central Government, in its entirety to the Ration Card Holders.

12. We do not intend to venture into this area in absence of any material facts, that the State Government is abdicating its duty in distribution of kerosene to the Ration Card Holders. As and when that position is substantiated, appropriate relief against the State can be considered by this Court.

13. Taking any view of the matter, therefore, these petitions must fail and are hereby dismissed.

14. The interim relief granted by this Court is vacated forthwith.

Petition dismissed.

I.L.R. [2015] M.P., 1495
WRIT PETITION

Before Mr. Justice A.M. Khanwilkar & Mr. Justice K.K. Trivedi
W.P. No. 18381/2014 (PIL) (Jabalpur) decided on 12 December, 2014

CHINTAMANI SINGH ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 91 and Panchayat (Appeal and Revision) Rules, M.P. 1995, Rule 3 - Maintainability of W.P. **- Challenge is made to the order passed by the Collector providing reservation made only in respect of one Gram Panchayat as against the process for the entire Janpad Panchayat - Held - Section 91 of the Act and Rule 3 of Rules 1995 provides that against the order passed by Gram Panchayat and other authority appeal or revision lies before the specified authority and superior authority respectively - Petition is disposed of with liberty to avail appropriate remedy permissible in law. (Paras 5, 6 & 7)**

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 91 एवं पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995, नियम 3 – रिट याचिका की पोषणीयता – कलेक्टर द्वारा केवल एक ग्राम पंचायत के संबंध में आरक्षण उपलब्ध कराये जाने के आदेश को संपूर्ण जनपद पंचायत हेतु प्रक्रिया के विरूद्ध होने के नाते चुनौती दी गई – अभिनिर्धारित – नियम 1995 का नियम 3 व अधिनियम की धारा 91 उपबंधित करती है कि ग्राम पंचायत एवं अन्य प्राधिकारी द्वारा पारित किये गये आदेश के विरूद्ध अपील या पुनरीक्षण, क्रमशः विनिर्दिष्टित प्राधिकारी तथा उच्चतर प्राधिकारी के समक्ष पेश होगी – विधि में अनुज्ञेय समुचित उपचार का अवलम्ब लेने की स्वतंत्रता के साथ याचिका का निपटारा किया गया।

Cases referred :

W.P. No. 17253/2014, 2001 (2) MPHT 242 (FB).

Siddharth Singh, for the petitioner.
P.K. Kaurav, Addl. A.G. for the respondents/State.
Siddharth Seth, for M.P. State Election Commission.

(Supplied: Paragraph numbers)

ORDER

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

2. In this petition the challenge is to the reservation specified in respect of Gram Panchayat Sendaha in Janpad Panchayat, Gangeo. As held in companion cases [in W.P. No.17253/2014 (*Sadashiv Gadhekar v. State of M.P. and others*)], in absence of challenge to the Notification providing for reservation for the entire Janpad Panchayat the relief sought cannot be entertained. For, setting aside of reservation of one Gram Panchayat may affect the ratio of reservation of the entire Janpad Panchayat under the same Notification.

3. To oppose the preliminary objection regarding maintainability of the petition taken by the counsel for the State, reliance is placed on the decision of the Full Bench of this Court in *Chandrabhan Singh vs. State of M.P. and others* – 2001(2) MPHT 242 (FB). That decision takes the view that election petition can be filed after issuance of notification. For, cause of action to file election petition arises only after issuance of notification and more so because the relief will be directed against the returned candidate. There can be no quarrel with the proposition that writ petition to question the action preceding the notification to commence election process, the bar does not operate. But, as aforesaid the challenge to reservation in respect of one Gram Panchayat as against the process for the entire Janpad Panchayat cannot be countenanced. Further, the ground to challenge the election because of non-compliance of provisions of the Act and the Rules is available against the returned candidate. It is for that reason, in companion cases this Court has observed that, it will be open to the writ petitioner to pursue remedy of election petition/dispute after the conclusion of the impending election process.

4. In any case, this argument does not deal with the preliminary objection taken by the State and which has been accepted by us today in companion cases about availability of remedy by way of appeal under Section 91 of the Adhiniyam read with Rule 3 of the M.P. Panchayat (Appeal and Revision) Rules, 1995 against the decision of the Collector providing for reservation, being an order passed by the Collector in exercise of powers referable to the provisions of the M.P. Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993 read with M.P. Panchayat Nirvachan Rules, 1995.

5. With reference to that preliminary objection, the argument of the petitioner, is that, Section 91 of the Adhiniyam is attracted only in respect of proceedings and

orders of the Panchayat; and that the expression "other Authorities" occurring in Section 91 must be read in that context. Even this submission does not commend to us. It is founded on complete misreading of Section 91. Section 91, in our opinion, envisages that remedy of appeal or revision is provided against the order or proceedings of a Panchayat as much as against the orders passed by "other Authorities under the Act" in exercise of powers under the Adhiniyam. The two are independent and mutually exclusive. This position is reinforced, on a bare reading of Rule 3 of the Appeal and Revision Rules of 1995. For, the said Rules segregate the orders passed by "other Authorities" such as Sub Divisional Officer, Collector and Commissioner and remedy of appeal against their decisions is provided before the superior Authority as per Rule 3 (a) to (c). Whereas, the remedy of appeal against the order of the Panchayat is before the specified Authority as given in the Table as per Rule 3 (d), which is ascribable to the first part of Section 91 (1) of the Adhiniyam.

6. Counsel for the petitioner then contended that the impugned order passed by the Collector, is not an order under the Adhiniyam as such. This argument clearly overlooks the statutory provision regarding the mechanism to be followed for providing reservation and the duty cast on the Collector to determine the reservation before the notification is issued by the State Election Commission to ignite the election process. Inasmuch as, Section 17 of the Adhiniyam, 1993 deals with the election of Sarpanch and Upsarpanch and for reservation of seats for Scheduled Caste and Scheduled Tribe in the Gram Panchayat within the block. In the same manner, Section 25 provides for the mechanism to be followed for election of President and Vice President of Janpad Panchayat and reservation for the Scheduled Caste and Scheduled Tribe in the District. This provisions if read with Rules 6 and 7 of the M.P.Panchayat Nirvachan Rules, 1995 which have been framed in exercise of powers conferred under Section 95 (1) read with Section 43 of the Adhiniyam, 1993, are a self-contained code regarding the reservation of seats to be done by the prescribed Authority. A priori, the impugned order of the Collector in the matter of reservation of seats during the impending elections, nevertheless, is an order passed under the Adhiniyam - for the purposes of Section 91 of the said Adhiniyam. Therefore, the said order is amenable to remedy of appeal and revision.

7. Taking any view of the matter, therefore, we find no reason to depart from the view taken in the companion cases for disposing of the writ petition with liberty to the concerned petitioner to take recourse to other appropriate remedy as may be permissible in law. All questions will have to be decided by

the Competent Authority without being influenced by the observations made in the present order with regard to the merits of the controversy.

8. Disposed of accordingly.

Petition disposed of.

I.L.R. [2015] M.P., 1498
COMPANY PETITION
Before Mr. Justice Alok Aradhe
Comp. Pet. No. 15/1999 (Jabalpur) decided on 12 November, 2014

ALPHA PACKAGING LTD. (M/S.) ...Petitioner
Vs.
M/S. SOM DISTELLERIES LTD. ...Respondent

Companies Act (1 of 1956), Section 433(e) - Winding up **- Unable to pay the debt - Whether ground under Section 433(e) of the Act - No averment nor any document of commercially insolvent - Bonafide dispute - Absence of reconciliation of the accounts - Amount due not crystalized - Held - No case for winding up of respondent Company made out as there is bonafide dispute, amount due not crystalized and no insolvency condition exist - Company Petition dismissed. (Paras 8 to 13)**

कम्पनी अधिनियम (1956 का 1), धारा 433(इ) – परिसमापन – ऋण का भुगतान करने में असमर्थ – क्या अधिनियम की धारा 433(इ) के अंतर्गत आधार है – वाणिज्यिक रूप से दिवालिया होने का न तो कोई प्रकथन है और न ही कोई दस्तावेज – वास्तविक विवाद – लेखों के मिलान का अभाव – देय रकम निश्चित नहीं की गई – अभिनिर्धारित – प्रत्यर्थी कंपनी के परिसमापन का प्रकरण नहीं बनता क्योंकि वास्तविक विवाद है, देय रकम निश्चित नहीं की गई है और दिवालिया होने की स्थिति विद्यमान नहीं है – कंपनी याचिका खारिज।

Cases referred :

(2005) 13 SCC 86, 1991 Company Cases (Vol. 70) 459, 1998 (Vol 91) 646, AIR 1971 SC 2600, 1989 Company Cases (Vol. 65) 396, (2010) 10 SCC 553, 2001 Company Cases (Vol. 104) 254, AIR 1997 Andhra Pradesh 13, 1995 Company Cases (Vol. 82) 74, 1967 Company Cases (Vol. 37) SC 108, (1965) 35 Com Cas 456 (SC), 1991 (70) Com Cas 459 (Bombay), 1998 (91) Com Cas 646 (Kar.).

Girish Shrivastava, for the petitioner.
Prem Francis, for the respondent.

ORDER

ALOK ARADHE, J. :- This petition under Section 439 read with Section 434 of the Companies Act, 1956 has been filed seeking winding up of respondent Company.

2. The facts, leading to filing of this petition in nutshell, are that the petitioner is a company registered under the provisions of the Companies Act, 1956 (hereinafter referred to as 'the Act') which deals in manufacture sale of pet bottles. The respondent is also registered as a Company under the provisions of the Act and deals in the business of manufacture and sale of liquor. The business transactions between the parties started in the year 1996-97, when the respondent placed a purchase order with the petitioner for supply of pet bottles. The respondent opened a current account in their books of accounts in the petitioner's name. The payments were made by issuance of cheque and against such payments the supplies were made.

3. As per the case of the petitioner the respondent vide communication dated 11.12.1997 acknowledged its' liability to pay a sum of Rs.32,09,813. On 31.1.1999 an amount of Rs.27,12,437 was due and payable by the respondent. The petitioner thereupon sent notices dated 18.2.1999 and 22.6.1999 demanding payment, however, the amount due to the petitioner was not paid by the respondent. It is pertinent to mention here that the respondent filed a complaint before the Judicial Magistrate First Class, Raisen for offences punishable under Sections 120B, 420, 467 and 506 of the Indian Penal Code for making forged entries in the ledger against the petitioner. Thereafter the petitioner filed this petition on 25.10.1999 on the ground that the respondent should be wound up as it is unable to pay the debt which is due and payable by it.

4. Learned counsel for the petitioner submitted that the respondent by communication dated 11.12.1997 admitted its' liability to pay a sum of Rs.32,09,813 to the petitioner. It is further submitted that as on 31.1.1999 an amount of Rs.27,12,437/- was due and payable by the respondent and the respondent did not pay the same despite notices dated 18.2.1999 and 22.6.1999. It is also submitted that defence set up by the respondent is mala fide and was motivated to delay the genuine claim of the petitioner. In support of his submissions, learned counsel for the petitioner has placed reliance on the decision of the Supreme Court in the case of *Electron Industries Ltd. Mambai v. Soham Polymers Pvt. Ltd., Mumbai*, (2005) 13 SCC 86.

5. On the other hand, learned counsel for the respondent submitted that before a debt can be termed as debt, it must be crystallized and if the same is not crystallized, it cannot be termed as debt. It is further submitted that in reply to notice dated 8.7.1997, the respondent has seriously disputed the claim of the petitioner and has questioned genuineness of the entries in the books of accounts. It is also submitted that the petitioner has failed to prove that the respondent is commercially insolvent. It is pointed out that the respondent is a profit making solvent company which is evident from the statements of accounts on record and there is a bona fide dispute with regard to its' liability to pay the amount in question to the petitioner. It is urged that winding up proceeding is not an alternative for recovery of money and the petitioner is guilty of suppression of material facts. Lastly it is urged out that mere entries in books of accounts are not sufficient to charge a person with liability. In support of the aforesaid submissions, reference has been made to the cases in *ITC Ltd. v. Forento Resorts and Hotels Ltd*. [1991 Company Cases (Vol. 70) 459], *Kanchanga Chemicals Industries v. Mysore Clipboards Ltd* . [1998 (Vol 91) 646, *Madhusudan Gordhandas v. Madhu Woolen Industries Pvt. Ltd*. AIR 1971 SC 2600, *Narendra Glasses Works (P) Ltd. v. M.P. Beer Products (P) ltd,* [1989 Company Cases (vol. 65) 396], *IBA Health (India) Pvt. Ltd. v. Info Drive Systems SDN,* (2010) 10 SCC 553, *N.N. Construction Pvt. Ltd. v. Khatema Fibres Ltd* . [2001 Company Cases (Vol. 104) 254], *Multimetals Ltd. v. Suryatronics Pvt. Ltd* . AIR 1997 *Andhra Pradesh 13], Rainbow Enterprises v. India Brewery and Distillery Ltd* . [1995 Company Cases (vol.82) 74] and *Chandradhar Goswami and Others v. Gauhati Bank Ltd.* , [1967 Company Cases (Vol. 37) SC 108].

6. Before dealing with the rival submissions made across the Bar, I deem it appropriate to refer to the well settled legal principles with regard to winding up of a company. In the case of *Amalgamated Commercial Traders (P) Ltd., Vs. A.C.K. Krishnaswami*, (1965) 35 Com Cas 456 (SC), it was held by the Supreme Court that if a debt is not paid on account of a bonafide dispute, the same cannot be treated as inability to pay the debt. Similarly, in the case of *M/s. Madhusudan Gordhandas and Co. Vs. Madhu Woolen Industries Private Ltd.*, AIR 1971 SC 2600, it was held that the relief of winding up cannot be granted in a case where the debt is bonafide disputed and the defence is substantial one. It was further held that the principles on which the Court while dealing with the petition for winding up of the company bears in mind are that the defence of the company is in good faith and one of

substance and the defence is likely to succeed in point of law and the company adduces prima-facie proof of the facts on which the defence depends. In the case of *I.T.C. Ltd., Vs. Fomento Resorts and Hotels Ltd.*, 1991 (70) Com Cas 459 (Bombay), it has been held that the creditor in order to seek winding up of a company must proove (sic:prove) that the debt is clear and unimpeachable in law and the debt must have crystalized. It has further been held that if the accounts are not settled, the debt cannot be said to have crystalized.

7. In the case of *Kanchanaganga Chemical Industries Vs. Mysore Chipboards Ltd.,* 1998(91) Com Cas 646 (Kar.), it has been held that to raise a presumption of a company's inability to pay its debts it is not enough merely to show that the company has omitted to pay the debt despite service of statutory notice, it must be further shown that the company omitted to pay without reasonable excuse and conditions of insolvency in the commercial sense exist. In the case of *IBA Health (India) Private Limited Vs. Info-Drive Systems SDN. BHD.* , (2010) 10 SCC 553, it has been held by the Supreme Court that where there is a bonafide dispute as to the liability to pay the amount of debt, it is the duty of the Court to ascertain the cause for refusal to pay the debt and invocation of Section 433(e) and (f) of the Act is impermissible.

8. In the backdrop of the aforesaid well settled principles of law, the question whether ground under Section 433(e) of the Act is made out, may be examined. In reply to legal notice dated 8.7.1997, the respondent has seriously disputed the claim of the petitioner with regard to authenticity of the entries and has sought reconciliation of the accounts. Even the petitioner in its application for taking additional documents on record have stated that the accounts are yet to be reconciled. Thus, the accounts remain unreconciled as on today and in the absence of reconciliation of the accounts, the liability in question cannot be termed as debt. In other words, the liability to pay the amount in question has not been crystalized.

9. It is noteworthy that the respondent has stated that it has never received materials allegedly supplied vide ledger entries dated 7.6.1997, 20.6.1997, 21.6.1997, 25.6.1997, 27.6.1997 and 29.6.1997. The petitioner has also failed to account for the payments made on 28.11.1998, 8.11.1998, 15.11.1998, 18.12.1998, 28.12.1998, 24.4.2000 and 30.4.2000 totalling to Rs.9,06,475/-. The respondent has filed a criminal complaint before the Court of Judicial Magistrate First Class, Raisen for offences punishable under

Sections 120-B, 420, 467 and 506-B of the I.P.C. on 5.2.1999 in respect of making forged entries in the ledger account. It is also worth mentioning that the aforesaid criminal complaint was filed prior to filing of the instant petition. Thus, there exists a bonafide dispute with regard to liability to pay the amount in question which requires examination of the evidence and documents.

10. In the instant case, the petitioner has neither made any averment nor has placed any document on record to demonstrate that the respondent is commercially insolvent. On the other hand, from the documents on record, it is evident that the respondent is a profit making solvent company and is in a position to meet its debt as and when it arises. The petitioner has failed to show that the respondent has omitted to pay the debt without reasonable excuse and conditions of insolvency in the commercial sense exist.

11. The Company Court exercises in equitable jurisdiction. It is well settled in law that a winding up petition is not legitimate means of seeking to enforce for payment of dues which is bonafide disputed by the respondent.

12. In view of the preceding analysis, it is evident that the amount due in the instant case has not crystalized and there is a bonafide dispute with regard to liability of the respondent to pay the amount in question to the petitioner. The petitioner has also failed to prove that the condition of insolvency in the commercial sense in respect of respondent exists. For the reasons aforementioned, no case for winding up of the respondent is made out.

13. In the result, the Company Petition fails and is hereby dismissed.

Petition dismissed.

I.L.R. [2015] M.P., 1502
APPELLATE CIVIL
Before Mr. Justice Alok Aradhe
M.A. No. 1403/2007 (Jabalpur) decided on 28 April, 2015

M.P. STATE AGRO INDUSTRIES DEVELOPMENT CORPN. LTD. ...Appellant
Vs.
SURESH GUPTA ...Respondent

Arbitration and Conciliation Act (26 of 1996), Sections 4, 11 & 34 - Arbitrator **- As per Arbitration Clause Managing Director was the arbitrator - Court in exercise of power under Section 11 appointed**

Managing Director as Arbitrator - Managing Director in its turn delegated the powers to a retired officer who ultimately passed an award - Held - As per the arbitration clause and order of Court, Managing Director was required to perform his duties as Arbitrator - Neither the appellant nor the respondent had any authority to give consent expressly or impliedly to continue with the proceeding which was initiated by an Arbitrator who had no authority in law - Provisions of Section 4 have no application - Even otherwise, in case of patent lack of jurisdiction, the jurisdiction cannot be assumed by Arbitrator on the basis of acquiescence of parties - Award quashed - Managing Director directed to adjudicate the dispute between the parties.(Paras 6 to 10)

माध्यस्थम् और सुलह अधिनियम (1996 का 26) धाराएँ 4, 11 व 34–मध्यस्थ – माध्यस्थम् खंड के अनुसार प्रबंध निदेशक मध्यस्थ था – न्यायालय ने धारा 11 के अंतर्गत शक्ति का प्रयोग करते हुए प्रबंध निदेशक को मध्यस्थ के रूप में नियुक्त किया था – प्रबंध निदेशक ने अपने बदले में एक सेवानिवृत्त अधिकारी को शक्तियां प्रत्यायोजित की जिसने अंततः अवार्ड पारित किया – अभिनिर्धारित – माध्यस्थम खंड एवं न्यायालय के आदेशानुसार प्रबंध निदेशक को मध्यस्थ के रूप में अपने कर्त्तव्यों का पालन करना अपेक्षित था – कार्यवाहियां, जिन्हें ऐसे मध्यस्थ द्वारा आरंभ किया गया था जो विधि अंतर्गत प्राधिकृत नहीं था, जारी रखने के लिये प्रकट रूप से या विवक्षित रूप से सहमति देने का न तो अपीलार्थी न ही प्रत्यर्थी को कोई प्राधिकार था – धारा 4 के उपबंध लागू नहीं होते – अन्यथा भी, अधिकारिता के स्पष्ट अभाव के प्रकरण में, पक्षकारों की सहमति के आधार पर मध्यस्थ द्वारा अधिकारिता ग्रहण नहीं की जा सकती – अवार्ड अभिखंडित – प्रबंध निदेशक को पक्षकारों के बीच का विवाद न्यायनिर्णीत करने हेतु निदेशित किया गया।

Cases referred :

2005 (2) ARBLR 106 Cal, (2005) 1 CALLT 457 HC, 2004 (10) SCC 504, AIR 2008 Raj. 108, (1994) 3 SCC 521.

Shobha Menon with *Rahul Choubey,* for the appellant.
None for the respondent.

ORDER

ALOK ARADHE, J. :- In this appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act, 1996'), the appellants have assailed the validity of the order dated 16.10.2006 passed by the trial Court by which the objection preferred by the appellants under

Section 34 of the Act, has been rejected. The relevant facts which need mention, are stated infra.

2. The appellants invited tenders for ploughing and levelling work of the agricultural land of the farmers belonging to Scheduled Castes/Scheduled Tribes and persons living below the poverty line (BPL) under the "Swarnajayanti Grameen Rojgar Yojna"of the State Government. The tender of the respondent was accepted and an agreement was executed between the parties on 24.3.2003. Clause 11 of the agreement contained an arbitration clause, which reads as under:-

> "यह कि, इस अनुबंध पत्र को संपादित करने में होने वाला समस्त व्यय पक्ष कं.2 वहन करेगा। यदि अनुबंध पत्र के सम्पादन पश्चात् लेन देन बावत् कोई विवाद की स्थिति बनती है तो पक्षकार कं.1 के प्रबंध संचालक आबीट्रेटर के रूप में विवाद का निराकरण करेंगे जो उभय पक्षों को मान्य करना होगा और उभय पक्ष कों एक दूसरे के विरूद्ध किसी भी प्रकार की न्यायालयीन कार्यवाही करने का अधिकार नहीं होगा। न्यायिक क्षेत्राधिकार शहर भोपाल होगा।"

3. A dispute arose between the parties. The respondent filed an application under Section 11(6) of the Act before the trial Court, which was allowed vide order dated 1.8.2005 by which the Managing Director of the appellant-Corporation was appointed as an Arbitrator in terms of Clause 11 of the agreement. The aforesaid order attained finality. However, the Managing Director of the appellant-Corporation, who was appointed as an Arbitrator by the trial Court vide order dated 1.8.2005, delegated his authority to one R.K. Gupta, a retired officer. The parties appeared before the aforesaid Arbitrator and filed their statement of claims. The Arbitrator appointed by the Managing Director of the appellant-Corporation passed an Award on 23.1.2006 by which the claim of the respondent was decreed.

4. Being aggrieved by the aforesaid Award, the appellants filed an application under Section 34 of the Act. The Award passed by the Arbitrator was challenged on several grounds. The trial Court by an order dated 16.10.2006 dismissed the application preferred by the appellants under Section 34 of the Act. In the aforesaid factual background, the appellants have approached this Court.

5. Learned senior counsel for the appellants submitted that as per the terms and conditions of the agreement and in view of the order dated 1.8.2005

passed on the application under Section 11(6) of the Act, the Managing Director of the appellant-Corporation alone had the authority to act as an Arbitrator and the trial Court grossly erred in rejecting the objection preferred by the appellant-Corporation with regard to the authority of the Arbitrator on the ground that the appellants had not raised any objection to the authority of the Arbitrator appointed by the designated Arbitrator. It is further submitted that the Arbitrator who was nominated by the parties under the agreement and was appointed by the order of the Court had no jurisdiction to delegate his authority to Mr. R.K. Gupta and, therefore, the Award passed by the Arbitrator is *per se* without jurisdiction. However, aforesaid aspect of the matter has not been appreciated by the trial Court. In support of aforesaid submission, reliance has been placed on decision of the Calcutta High Court in the case of *Union of India (UOI) vs. Surendranath Kanungo and Anr.* 2005(2) ARBLR 106 Cal, (2005) 1 CALLT 457 HC, as well as decision in the case of *Union of India and another Vs.M.P. Gupta*, 2004(10) SCC 504 and in the case of *Murari Lal Khandelwal Vs. Rajasthan State Seeds Corporation and others* , AIR 2008 Raj. 108.

6. I have considered the submissions made by learned senior counsel for the appellants. Section 4 of the Act, 1996, deals waiver of right to object, which reads as under:

> "4. Waiver of right to object:- A party who knows that -
>
> (a) any provisions of this Part from which the parties derogate, or
>
> (b) any requirement under the arbitration agreement,
>
> has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."

Thus, from perusal of Section 4 of the Act, it is evident that any party who was aware of any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection shall waive the right to raise an objection in this regard.

7. In the instant case, admittedly, under clause 11 of the agreement, the dispute between the parties has to be adjudicated by the Managing Director of the appellant- Corporation. By an order dated 1.8.2005 passed by the trial Court in exercise of power under Section 11(6) of the Act, the Managing Director of the appellant-Corporation was appointed as an Arbitrator. Thus, under the order of the Court as well as in view of the agreement executed between the parties, the Managing Director of the appellant-Corporation was required to perform his duties as an Arbitrator. His authority could be terminated only in contingencies mentioned in Sections 14 and 15 of the Act. The Arbitrator could not have abdicated his duty to act as an Arbitrator.

8. Neither the appellant nor the respondent had any authority to give consent expressly or impliedly to continue with the proceeding which was initiated by an Arbitrator who had no authority in law, to do so in violation of the express provision contained in the arbitration agreement as well as the order passed by the trial Court which had attained finality, that too without abrogating the arbitration agreement. Therefore, in the fact situation of the case, the provisions of Section 4 of the Act have no application.

9. Even otherwise, it is well settled in law that in case of patent lack of jurisdiction, the jurisdiction cannot be assumed by the Arbitrator on the basis of acquiescence of parties. See: *Tarapore & Co., Vs. State of M.P.*, (1994) 3 SCC 521. The Award passed by the Arbitrator has no sanctity in the eye of law. The trial Court, therefore, grossly erred in rejecting the objection preferred by the appellants with regard to the Award of the Arbitrator to adjudicate the dispute between the parties, merely because the parties have not raised any objection in the proceeding before the Arbitrator.

10. In view of preceding analysis, the impugned order dated 1.8.2005 as well as the Award dated 23.1.2006 passed by the Arbitrator are hereby quashed. The Managing Director of the appellant-Corporation is directed to adjudicate the dispute between the parties and to conclude the same expeditiously, in accordance with law, preferably within a period of six months from the date of production of copy of this order before him.

In the result, the appeal succeeds and is hereby allowed.

Appeal allowed.

I.L.R. [2015] M.P., 1507

APPELLATE CRIMINAL

Before Mr. Justice Ajit Singh & Mr. Justice C.V. Sirpurkar

Cr.A. No. 1645/2003 (Jabalpur) decided on 28 November, 2014

GAJRAJ SINGH ...Appellant

Vs.

STATE OF M.P. ...Respondent

(Alongwith Cr.A. No. 1885/2003 & Cr.A.No. 18/2004)

A. Penal Code (45 of 1860), Sections 302 & 436 - Murder - Evidence of Prosecution witnesses - **Major contradiction, omission & improvement - No eye-witness - Held - Such discrepancies cannot be brushed aside lightly, accused entitled to benefit of doubt - Conviction and sentence set aside - Appeal of accused allowed. (Para 11)**

क. दण्ड संहिता (1860 का 45), धाराऐं 302 व 436 – हत्या – अभियोजन साक्षीगण का साक्ष्य – गंभीर विरोधाभास, लोप एवं सुधार – चक्षुदर्शी साक्षी नहीं – अभिनिर्धारित – उक्त विसंगतियों को हल्के रूप में लेकर नजरअंदाज नहीं किया जा सकता, अभियुक्त संदेह के लाभ का हकदार – दोषसिद्धि एवं दंडादेश अपास्त – अभियुक्त की अपील मंजूर की गई।

B. Penal Code (45 of 1860), Sections 302 & 436 - Murder - Voice identification - **No ocular evidence available - Reliability of voice identification of accused - Held - It is a very weak piece of evidence and cannot be relied upon without independent corroboration. (Paras 12 to 14)**

ख. दण्ड संहिता (1860 का 45), धाराऐं 302 व 436 – हत्या – आवाज़ की पहचान – कोई चाक्षुष साक्ष्य उपलब्ध नहीं – अभियुक्त की आवाज़ की पहचान की विश्वसनीयता – अभिनिर्धारित – यह साक्ष्य का बहुत कमजोर अंश है और बिना स्वतंत्र अभिपुष्टि के विश्वास नहीं किया जा सकता।

C. Evidence Act (1 of 1872), Section 32 - Dying declaration - **Recording by Medical Officer - Magistrate not available - Deceased suffered 98% burn injuries - Physical and mental condition - Held - Dying declaration cannot be relied upon without independent corroboration. (Paras 16 to 25)**

ग. साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – चिकित्सा अधिकारी द्वारा अभिलिखित किया जाना – मजिस्ट्रेट उपलब्ध नहीं – मृतक

ने 98% जलने की क्षतियां सहन की – शारीरिक और मानसिक अवस्था – अभिनिर्धारित – मृत्युकालिक कथन पर बिना स्वतंत्र अभिपुष्टि के विश्वास नहीं किया जा सकता।

D. Evidence Act (1 of 1872), Section 21 - Extra judicial confession - **Confession by accused to a stranger - Held - It is a weak piece of evidence and it cannot be relied without further corroboration. (Paras 27 to 30)**

घ. साक्ष्य अधिनियम (1872 का 1), धारा 21 – न्यायिकेतर संस्वीकृति – अभियुक्त द्वारा अपरिचित व्यक्ति को संस्वीकृति – अभिनिर्धारित – यह साक्ष्य का कमजोर अंश है और बिना अतिरिक्त अभिपुष्टि के विश्वास नहीं किया जा सकता।

Cases referred :

AIR 2009 SC 1012, (2011) 4 SCC 143, (2002) 6 SCC 710, (1999) 9 SCC 562, 2006 (1) ANJ SC 305, (1992) 2 SCC 474, (2001) 5 SCC 254, AIR 2012 SC 2435.

Rajneesh Jain, for the appellant.

Brahm Datt Singh, G.A. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : **C.V. SIRPURKAR, J. :-** Criminal Appeals No. 1645/2003,1885/2003 & 18/2004 arose from the same judgment dated 28.08.2003 passed by Shri Mohammad Shameem, Additional Sessions Judge, Ashta, District-Sehore in Sessions Trial No. 186/2002 (*State Vs Gajraj Singh*), whereby learned Additional Sessions Judge has convicted the appellant Gajraj Singh under Section 302 of I.P.C. on four counts and on each count, has imposed a sentence of rigorous imprisonment for life and a fine in the sum of Rs. 20,000/- in default whereof, he was directed to undergo further rigorous imprisonment for a term of 2 years; and under Section 436 of I.P.C. and imposed a sentence of rigorous imprisonment for a period of 10 years and a fine in the sum of Rs. 10,000/-, in default whereof he was directed to undergo further imprisonment for a period of one year.

2. Criminal Appeals No. 1645/2003 & 1885/2003 have been preferred under section 374 (2) of the Code of Criminal Procedure, 1973, by accused Ambaram (sic:Gajraj Singh) against the conviction and sentence; whereas criminal appeal no. 18/2004 under section 377, has been preferred by the

State for enhancement of sentence. Since, both these criminal appeals arose from the same judgment, they are being decided by this common judgment.

3. In nutshell, the prosecution case may be stated thus: Deceased Ambaram was Sarpanch of Village-Khachrod, P.S.- Siddikganj, District-Sehore. He was on inimical terms with accused Gajraj Singh, who was a neighbour, on account of the fact that some lands in possession of accused Gajraj Singh, were allotted to other persons and accused Gajraj Singh held deceased Ambaram responsible for the same. At around 2.00 am on 08.06.2002, Ambaram was sleeping in a room with his wife Soram Bai and two minor children Rahul and Narendra. First inofrmant Shaitanbai, who is mother of the deceased Ambaram, was in adjoining room. As she was unable to sleep, she sat on her cot. At that time, she heard a sound of foot-falls in the Veranda. Suddenly, there was smell of oil and a bright light in the room in which Ambaram was sleeping. Shaitanbai got up and tried to open the door of her room but it was bolted from outside. In the adjoining room, her son Ambaram, daughter in law Sourambai and grandchildren Rahul and Narendra were screaming " Bachao Bachao" ("save us, save us.). At that time, accused Gajraj Singh called out from the veranda: " Jalo, tum logo ko koi nahi bacha sakta hai." (Burn, nobody can save you people.). Then, there was sound of his running away from the place. By that time, people from neighourhood had gathered and they opened the door of the Shaitanbai's room from outside. Shantanibai came out and saw that the adjoining room was locked from outside. Mansingh, Badri, Bheema and Narayan broke open the lock and brought Ambaram, Sourambai, Narendra and Rahul out in burnt condition. There was very strong smell of petrol emanating from the room, in which Ambaram and his family were sleeping. Bedding clothes and documents were also burnt in the fire. By that time, someone had brought Jeep of Rajesh Jat. They took deceased Ambaram, Souram Bai and their children to the hospital at Ashta.

4. Shaitan Bai lodged Dehati Nalishi of the incident at around 6.40 am in her home. In the hospital at Ashta, deceased Ambaram made a dying declaration to the doctor, to the effect that accused Gajraj Singh set his house afire by using petrol. Though he did not see the accused Gajraj Singh doing it; yet, he heard him say "Jal Jao". Subsequently, deceased Ambaram and his family members were taken to Hamidia Hospital, Bhopal where they succumbed their injuries. During investigation, evidence was collected regarding procurement of kerosene from Fair Price Shop by appellant Gajraj

Singh. At his instance, key to the lock used for locking the door of the room of Ambaram was recovered. Before his arrest and after the incident, accused Gajraj Singh made a extra judicial confession to one Ramesh Chandra. Subsequently, charge-sheet was filed under sections 436 and 302 of I.P.C.

5. Learned trial Court framed the charge for aforesaid offences. against the accused appellant. The appellant abjured guilt and claimed to be tried. In his examination under Section 313 of Cr.P.C., he stated that he has been falsely implicated in the case. He belonged to a prosperous family and studied at Sehore; therefore, witnesses were envious of him. He further stated that he had quarrel with Bherulal and Hemraj, who were god brothers of deceased Ambaram and also contended that both Gopilal and Madhosingh are cousins of deceased Ambaram; therefore, they did tell lies.

6. After trial, learned Additional Sessions Judge concluded that the prosecution was able to prove the guilt of the appellant/accused beyond reasonable doubt and convicted and sentenced him, as stated above. The learned Additional Sessions Judge concluded that the prosecution was able to prove that the death of deceased Ambaram, Souram Bai, Narendra and Rahul was homicidal in nature; they succumbed to the burn injuries sustained by them when their room was set afire by accused Gajraj Singh. Learned trial Court also concluded that the guilt of the accused was proved on the basis of the facts that Shaitan Bai (PW-1) saw accused Gajraj Singh pouring kerosene/ petrol in the room in which Ambaram was sleeping with his family and setting it on fire. The learned trial Court also concluded that the prosecution was able to prove that deceased Ambaram made a dying declaration to the effect that he heard accused Gajraj Singh saying "Jal Jao" (burn). Learned trial Court also recorded a finding that it was proved that key to the lock used for locking the door of the room of Ambaram from outside, was recovered at the instance of accused Gajraj Singh and it was further proved that accused made an extra-judicial statement before prosecution witness Ramesh Chandra Parmar, confessing to the crime.

7. The conviction of accused Gajraj Singh under section 436 and 302 of the Indian Penal Code was assailed mainly on the ground that as per prosecution case, Shaitan Bai (PW-1) was not an eye-witness to the incident. She had only identified the accused on the spot on the basis of his voice; whereas, in the Court she turned into an eyewitness. As such, her statement cannot be given any credence. It has also been contended that deceased Ambaram had

suffered 98% burns in the incident, as such, it was highly unlikely that he would be in a position to make a reliable dying declaration. As per prosecution story, he to is said to have identified accused Gajraj Singh on the basis of his voice. As per defence, identification of voice alone is not a reliable piece of evidence. It has also been argued that alleged recovery of the key at the instance of accused Gajraj Singh was not supported by Panch witnesses. In any case, it was recovered from a place which was outside the house of Gajraj Singh. It has also been contended that extra-judicial confession is a very weak piece of evidence and it is highly unlikely that any person would confess to having committed four murders to a rank stranger.

8. Now the Court shall deal with each argument one by one.

9. The main ground against the prosecution case taken by the accused/ appellant Gajraj Singh is that there are serious contradictions and omissions in the Court statement of Shaitan Bai (PW-1) vis-a-vis her police statement. It has also been argued that Shaitan Bai being mother of deceased Ambaram, had proceeded to Bhopal with injured persons and stayed there for next two days. As such, she could not have lodged the Dehati Nalishi at Khachrod at the time at which it was said to have been recorded. It has also been argued that identification of the accused merely on the basis of his voice was highly unsafe and therefore could not have been relied upon.

10. In the light of aforesaid arguments, we shall first examine as to whether any ocular evidence is available in the case? In her Court statement Shaitan Bai has stated that her sleep was disturbed because her goat was crying; therefore, she was awake. She heard accused Gajraj Singh's voice. Gajraj Singh bolted the door of her room and that of her son Ambaram from outside. She saw accused Gajraj Singh scale the wall of Ambaram's room. When accused was scaling the wall she shouted loudly for about an hour. She saw Gajraj Singh remove tiles from above the tin sheet forming the roof of Ambaram's room. She saw him pour oil in the room of Ambaram from a can. She also saw Gajraj Singh setting the room on fire. Shaitan Bai also claimed that by that time 15-20 people from the neighbourhood had gathered on the spot. They also saw Gajraj Singh atop the room of Ambaram. They shouted and asked Gajraj Singh as to what he was doing? Whereafter accused jumped down and ran away from the spot. In paragraph No.17 of her cross-examination Shaitan Bai (PW- 1) has also stated that she actually saw accused lit a match stick and throwing it in the room. She has also stated that after

climbing down from the roof of Ambaram's room, he entered the room and poured oil upon Ambaram, Souram Bai and their children Rahul and Narendra while they were sleeping and set them afire with a match stick. After that he ran away. She saw accused pouring oil on four injured persons from a distance of about 4-5 steps.

11. Thus, we see that there are dramatic improvements and wild exaggerations in the evidence of Shaitan Bai before the Court over her statement as given to the police. When asked to explain these improvements and omissions, she simply stated that she had told these facts to the police as well. However, the fact that Shaitan Bai actually saw accused pouring oil in the room of Ambaram and setting the room a fire, that is to say, she was really an eyewitness to the entire incident are missing from Dehati Nalishi and her statement under section 161 of the Cr.P.C. When she was asked that in her statement to the police she merely stated that she had identified the accused only from his voice. She stated that she did not identify accused from his voice but she actually saw accused performing all those acts. The aforesaid contradictions and omissions have converted Shaitan Bai from a witness of voice identification to an ocular witness. Such discrepancies cannot be brushed aside lightly. Thus, there are material omissions amounting to contradictions that go to the root of the matter. Therefore, we do not share the view of the learned trial Court that aforesaid contradictions are not material. These omissions and contradictions shake the credibility of the statement of Shaitan Bai (PW-1). In these circumstances, Shaitan Bai can not be treated as an eyewitness because it was never the prosecution story that she saw the accused on the spot. Since she denied before the Court that she had identified the accused on the spot by his voice, she cannot even be treated as a witness of identification of accused by his voice.

12. If we assume for the sake of argument that she had identified accused by his voice, even as per the prosecution case, there was no conversation between this witness and the accused. The accused is said to have uttered only one sentence during the entire incident and that was "Burn, nobody can save you." With regard to voice identification, Supreme Court in the case of *Inspector of Police, T.N. vs. Palanisamy @ Selvan*, (AIR 2009 SC 1012) has observed that where the witnesses were not closely acquainted with the accused and claimed to have identified the accused from short replies given by him, evidence of identification by voice is not reliable. Supreme Court has also observed in the case of *Nilesh Dinkar Paradkar vs. State of*

Maharashtra, [(2011) 4 SCC 143 at page 153] that evidence of voice identification is at best suspect, if not wholly unreliable. Accurate voice identification is much more difficult than visual identification. Though, this observation was made by Supreme Court with reference to identification of voice on the basis of recorded conversation; yet, the principles apply with slightly less force to the identification of live voice as well.

13. In the case at hand, witness Shaitan Bai was locked inside her room, had no opportunity to actually see the accused. There is no evidence to the effect that there was something like a window or a ventilator through which she could see or hear the accused. There was no conversation between the accused and the witness. Accused is said to have shouted only one sentence. So. at best, Shaitan Bai might have heard the perpetrator shouting a solitary sentence, wherefrom she deduced that it was accused Gajraj Singh who perpetrated the crime, rest of her statements consist clearly of her imagination. The identification by voice, if there was any, is in fact a very weak piece of evidence, which in the opinion of this Court, cannot be relied upon in the circumstances of the case, without some independent corroboration.

14. Now we shall examine whether any independent corroboration is forthcoming? Shaitan Bai (PW-1) had stated in her cross-examination that at least 15-20 persons had gathered on the spot and they saw the accused atop of the roof of Ambaram's room. Prosecution has examined eight witnesses namely PW-5 Jagannath, PW-9 Bhim Singh, PW-10 Badrilal, PW-11 Narayan, PW-12 Man Singh, PW-14 Hemraj Singh, PW-28 Gopilal and PW-29 Madho Singh who had heard the cries emanating from the house of deceased and had gathered on the spot. Badrilal (PW-10) and Man Singh (PW- 12) admitted that night was very dark. None of them claimed that they actually saw or even heard the voice of accused on the spot. It is clear from their statements that perpetrator of the crime had escaped from the scene before their arrival. In these circumstances, it is obvious that none of the witnesses including first informant Shaitan Bai was an eyewitness in the real sense. Nobody actually saw accused pouring petrol/kerosene in the room of deceased and set it on fire. Thus, no independent corroboration of the voice identification by Shaitanbai is available.

15. In this connection, there is one more circumstance that goes against the prosecution. Dehati Nalishi (Ex.P/1) is said to have been recorded at 6:40 a.m. on 8.6.2002, that is about 4 hours 40 minutes after the incident, at

the residence of PW-1 Shaitan Bai; however, Shaitan Bai has admitted in her cross-examination that she had accompanied her injured family members in the tractor from Kachrod to Ashta and from Ashta to Bhopal. It was most natural for to have done so. Dying declaration of Ambaram (Ex. P-24) was recorded at Ashta at 4.55 a.m. Thus it is clear that the party must have left Khachrod before 4.00 a.m. Shaitanbai further stated that she had lodged the report of the incident after returning from Bhopal in police station Siddikganj District Ashta. As per murg intimation (Ex.P/45), Ambaram expired at around 7:20 a.m. and his wife Souram Bai expired on 1:45 p.m. on the on 8.6.2002 in Hamidiya hospital, Bhopal. It is highly improbable that Shaitanbai would leave bedside of her son and the daughter-in-law while they were still struggling for life and would rush back to to Kachrod to lodge Dehati Nalishi. The Court can also take note of the fact that the entry regarding time of lodging of Dehati Nalishi in Ex.P/1 "8-6-02 ke 06=40 baje" is in different ink; though, in the handwriting of the same person. These circumstances bring Dehati Nalishi, wherein the accused was said to have been named for the first time, under the realm of suspicion, as being ante-timed. and throws further doubt on the prosecution case.

16. The second piece of evidence which is adduced by the prosecution against the accused is the dying declaration made by deceased Ambaram. In this regard, Dr. G.D. Soni, Medical Officer of Civil Hospital, Ashta (PW-24) has stated that he had examined deceased Ambaram at around 4:55 a.m. on 8.6.2002. Keeping in view the health status of Ambaram, he had advised recording of a dying declaration. However, since the Magistrate was not available and the condition of deceased Ambaram was very serious, he proceeded to record the dying declaration (Ex.P/24) himself. He had recorded the statement in question-answer form. Ambaram had told him that Gajraj Singh had burnt him. When he asked Ambaram whether he actually saw Gajraj Singh doing it, Ambaram answered by saying 'no' but added that he said "Jal Jao". He also stated that Gajraj Singh poured petrol on his house and set it afire. In the dying declaration Ambaram also disclosed that Gajraj did it on account of old enmity relating to the post of Sarpanch. PW-24 Dr.G.D.Soni had also stated that since Ambaram was unable to sign the dying declaration or affix his thumb impression thereto, no signatures or thumb impression could be taken. The witness further stated that he recorded the dying declaration as per the statement made by Ambaram. Thereafter, he had informed police station Ashta by an intimation (Ex.P/25) regarding recording of dying declaration.

17. The aforesaid dying declaration has been assailed by appellant Gajraj Singh on several grounds. The first exception taken to the dying declaration is that Ambaram had suffered 98% of burns. Therefore, it was impossible for him to have made a dying declaration.

18. A perusal of dying declaration (Ex.P/24) reveals that there is no certificate of the examining doctor appended thereto stating that at the time of making the dying declaration, the deceased was in a fit state of mind and body; however, Dr. G.D.Soni (PW-24) has stated in paragraph No.10 of his deposition that deceased Ambaram was understanding the questions being put to him and was answering those questions. Dr. G.D. Soni has further stated that at that point of time Ambaram was capable of making a statement.

19. A constitution bench of the Supreme Court in the case of *Laxman vs. State of Maharashtra, [*(2002) 6 SCC 710] affirming the full bench judgment of the Supreme Court in the case of *Koli Chunnilal Savji vs. State of Gujarat,* (1999) 9 SCC 562 held that if the person recording the dying declaration is satisfied that the declarant was in fit mental condition to make the dying declaration then such dying declaration would not be invalid solely on the ground that doctor had not certified as to the condition of the declarant to make the dying declaration.

20. Dr. G.D.Soni is an independent witness. He had no motivation to tell a lie or concoct evidence. In these circumstances, there is no reason to disbelieve the fact that deceased Ambaram made a dying declaration as recorded in the document (Ex.P/24).

21. However, the question remains whether the information disclosed in the dying declaration can be believed and it can form basis of conviction of accused?

22. Apex Court in the case of *Ravi Kumar vs. State of Tamilnadu,* (2006(1) ANJ SC 305), *Paniben vs. State of Gujarat* [(1992) 2 SCC 474], *Uka Ram vs. State of Rajasthan,* [(2001) 5 SCC 254] and many other cases has held that the Court has always to be on guard to ensure that the dying declaration was not a product of imagination. The Court has also to ensure that the declarant had opportunity to observe and identify the assailant. Normally; therefore, in order to satisfy itself that the deceased was in a fit mental condition to make the dying declaration, the Court has to look for medical opinion.

23. When we examine the prosecution evidence on the point in the light of aforesaid principles, we find that prosecution witnesses Bherulal (PW-4), Jagannath (PW-5), Hemraj (PW-14), Gopilal (PW- 28) and Madho Singh (PW-29) are said to have been present when the dying declaration was made. There are some discrepancies as to the exact spot in the premises of the hospital at Ashta at which the dying declaration was made; however, even if we ignore these discrepancies, we find that Shaitan Bai has admitted in her cross-examination that Ambaram, Souram Bai, Rahul and Narendra had died even before reaching Ashta. It is true that they did not die before reaching Ashta but the fact remains that they had become so serious before reaching Ashta that Shaitan Bai believed that they had actually died. Bherulal had stated that all the four persons were badly burnt, however, they were in their senses till Ashta. This fact has been corroborated by Jagannath (PW-5) and Badrilal (PW-10). Narayan (PW-11) had stated that they made Ambaram and kids drink some water, which brought them to senses and they started writhing in pain. The witness has further stated that Ambaram was shouting a lot and was getting up and running away. Rajesh (PW-13) had stated that Ambaram was unable to speak. At that time he was merely shouting because of the burning sensation. Whatever he was shouting was not intelligible. Hemraj (PW-14) had stated that Ambaram was very restless.

24. In view of the aforesaid prosecution evidence, it is obvious that Ambaram was in a very poor physical and mental condition. Even if he was able to understand questions and make rational answers, his mental equilibrium must have been disturbed.

25. At the time of incident, deceased Ambaram was sleeping peacefully with his wife and children. He had no idea as to what was in store for him. Suddenly at 2:00 p.m., a mixture of petrol and kerosene was poured into his room and the room was set on fire. The door of the room was locked from outside so he had no escape route. As a result he was burnt to the extent of 98%. In these circumstances, it was very difficult for him to identify accused on the basis merely of his voice. As per Ambaram, he did not see Gajraj Singh but only heard him saying "Jal Jao". The aforesaid stated principles of voice identification also apply to the voice identification said to have been made by Ambaram. In fact the evidence of voice identification is further weakened in the case of Ambaram because he was not available to the defence for cross-examination. Moreover, he claims to have identified accused Gajraj Singh

only on the basis of aforesaid two words uttered by him. In the aforesaid circumstances, even if we assure that he was not consciously telling a lie, it is clear that he was in no position to observe and identify the accused properly. The possibility that he was imagining the role of accused in the incident on the basis of previous enmity, cannot be ruled out. Thus, in the facts and circumstances of the case, it is probable that the dying declaration was a product of deceased's imagination. Thus, in the absence of independent corroboration, this piece of evidence against the accused can also not be relied upon.

26. Now we come to the extrajudicial confession alleged to have been made by accused to PW-17 Ramesh Chandra Parmar. He has stated in his deposition that he was acquainted with deceased Ambaram. On the day next to the incident, he was returning to his village Buranakhedi from Siddikganj. When he reached river Parvati, accused Gajraj Singh motioned him to stop. The accused came near him. At that time, accused had shaved his head clean and was in a frightened state of mind. The accused told him that he wanted to meet Gopilal, Sarpanch of village Govindpura. He asked the accused, where does he live? The accused replied that he is resident of Kachrod and his name is Gajraj; whereupon, the witness asked the accused that in Kachrod Sarpanch Ambaram was burnt the previous night, the accused replied that he was author of the incident. The accused further asked what happened? Whether they were saved or not ? To which the witness replied that he had heard that all of them had died. When the witness asked accused as to why he did it, the accused replied that he had not thought that all would die. Thereafter, the accused said that he wanted to meet Gopilal, whereon the witness told him that Gopilal had gone to Nanukheda.

27. Now the question arises whether any reliance can be placed upon the extrajudicial confession alleged to have been made by accused to PW-17 Ramesh Chandra ? Ramesh Chandra has admitted in his cross-examination that accused had met him at about 12:00 p.m. on the date of the incident. He has further admitted that before the incident he was not acquainted with accused Gajraj Singh. On his visit to Siddikganj he had learnt that accused Gajraj Singh had killed Ambaram by burning him and that he was absconding. He had also learnt as to how Gajraj Singh looked; yet, after meeting the accused in person, he did not take the accused to police station, nor did he inform the police immediately. The witness stated that two hours after the

incident the head constable of Ashta police who is a Sikh, had met him with another policeman. He disclosed the fact of extrajudicial confession to those two policemen. Before that he had made a telephone call to the police station but the station house officer was not available only a constable was available; therefore, he did not deliberately disclose aforesaid fact to the constable.

28 . The Supreme Court in the case of *Sahadevan and anr. vs.State of Tamilnadu* – AIR 2012 SC 2435 has laid down following principles for considering whether an extrajudicial confession is admissible in evidence and capable of forming basis of conviction:

(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the Court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law.

29. Thus, it is clear that extrajudicial confession is inherently a weak piece of evidence. In the case at hand, Ramesh Chandra (PW- 17) has admitted that he was not previously acquainted with the accused. The extrajudicial confession is usually made either to a close confident to relieve the mental burden and seek advise or to an influential person or a person in authority to solicit help. It is highly improbable that a person who is alleged to have murdered four persons of a family, including two children by setting their house on fire, would confess to having committed such a crime to a rank stranger who had met him by the road side. In any case the accused had nothing to gain from making confession to this witness. The credibility of this witness is further weakened by the fact that he did not immediately inform the police either about the factum of extrajudicial confession or regarding whereabouts of the accused, though, he very well knew that accused was on the run after having committed such a heinous crime. He disclosed the same to police only

two hours later, when policemen came to him. Had the police not come to him, he would probably have taken longer still, to disclose the fact to police.

30. In this regard reference may be made to the case of *Inspector of Police, T.N. vs. Palanisamy @ Selvan* (supra) wherein the former President of village Panchayat, to whom the extrajudicial confession was made a week after the incident, had informed about the confession to the police after many hours; therefore, the confession was not held to be reliable. In somewhat similar circumstances in this case also the extrajudicial confession said to have been made by accused to Ramesh Chandra (PW-17) cannot be said to be reliable.

31. The last circumstance relied upon by the prosecution against the accused is that the lock used to confine Ambaram and his family to his room at the time of incident and which was broken open by the witnesses to secure release of the deceased and his family members from his room, was recovered pursuant to information given by accused to police in custody under section 27 of the Evidence Act.

32. In this regard, prosecution witnesses Bhim Singh (PW-9), Badrilal (PW-10) and Narayan (PW-11) had stated that when they reached the spot, the room in which Ambaram was sleeping with his family was locked from outside. They broke open the lock and released Ambaram and his family members. Investigating Officer Sub Inspector M.S.Jat (PW-32) has stated that he had seized a broken lock which was lying outside Ambaram's room at around 4:30 p.m. on 8.6.2002 and had prepared a seizure memo (Ex.P/5). Investigating Officer M.S.Jat has further stated that he had arrested the accused on 11.6.2002 and had prepared the arrest memo on 13.6.2002. Accused Gajraj Singh had disclosed in the presence of witnesses and in custody of police that the key to the lock which was put on the door of room of Sarpanch was hidden by him in a pit hole in the alley way behind his house. On the basis of information disclosed by the accused he had prepared a memo under section 27 of the Evidence Act (Ex.P/7). Thereafter, he had seized a key at the instance of accused and had prepared seizure memo (Ex.P/8). Ambaram (PW-6) who is said to be a panch witness to the memorandum under section 27 of the Evidence Act and seizure memo of the lock has completely turned hostile and stated that he was called to the police station and asked to sign the documents Ex.P/7 and P/8. In his presence, the accused gave no information to the police nor any seizure was made. Bherulal (PW-4) has also turned

hostile and stated that in his presence, accused Gajraj Singh had given no information to the police regarding any article. He has also specifically denied that any key was recovered from behind the house of Gajraj Singh. As such, the recovery of any key at the instance of accused Gajraj Singh becomes doubtful. Moreover, investigating Officer M.S.Jat (PW-32) has categorically admitted in his cross-examination that he did not ensure during investigation that key recovered at the instance of accused was connected with the lock seized from outside Ambaram's room. In these circumstances, not much weight can be attached to alleged seizure of a key at the instance of accused Gajraj Singh.

33. The prosecution have examined witness to demonstrate that prior to the occurrence, accused had purchased kerosene and petrol; however, these being articles of daily use, no significance can be attached to purchase of kerosene and petrol in a moderate quantities and it can not be presumed that kerosene and petrol were purchased in order to facilitate perpetration of the crime.

34. The prosecution also examined witnesses Nazir (PW-19) and Tulsiram (PW-23) who have stated that they were landless labourers and the land earlier in possession of accused Gajraj Singh, was allotted to them; however, they have categorically stated in their cross-examination that they had no dispute or quarrel with regard to the allotment of land with the accused. Moreover, a Sarpanch is not competent to allot land. In any case, mere enmity or motive, in the absence of cogent evidence that accused has committed the crime carries no meaning.

35. On the basis of aforesaid discussion, this Court is of the view that prosecution has failed to prove beyond reasonable doubt that it was accused-appellant Gajraj Singh who had set the room of deceased Ambaram on fire after pouring oil therein. The trial Court failed to properly appreciate and analyze the evidence available on record and glossed over many facts and circumstances which dented the prosecution story and raised several doubts with regard to guilt of the accused. The benefit of those doubts must go to the accused. It is true that this is a case of heinous murder of 4 persons including 2 minor children by burning; however, in the absence of cogent evidence, the Court cannot allow itself to be swayed by gravity of the offence and refrain from critically analyzing the evidence.

36. As such, Gajraj Singh is entitled to benefit of doubt and the conviction

and sentence of accused-appellant for the offence under sections 436 and 302 (on four counts) of the I.P.C. cannot be sustained.

37. Consequently, **Criminal Appeals No. 1645/2003 & 1885/2003** are allowed and conviction and sentence of appellant/accused Gajraj Singh under sections 436 and 302 (on four counts) of the I.P.C. and the sentence imposed upon him is set aside.

38. In the result, **Criminal Appeal No.18/2004** for enhancement of sentence filed by the State fails and is hereby dismissed.

39. The appellant Gajraj Singh be set at liberty forthwith, if not required in connection with any other case.

Order accordingly.

I.L.R. [2015] M.P., 1521
APPELLATE CRIMINAL
Before Mr. Justice N.K. Gupta
Cr.A. No. 970/1997 (Jabalpur) decided on 30 January, 2015

GOPE SINGH @ GOPE & anr. ...Appellants
Vs.
STATE OF M.P. ...Respondent

(Alongwith Cr.A. No. 1095/1997)

A. Evidence Act (1 of 1872), Section 9 - Test Identification Parade - **Person conducting test identification parade not examined - In memo it is mentioned that 54 persons were mixed, however, no description is given in memo about those 54 persons - An explanation was required from the person who conducted T.I.P. that whether stature of persons mixed in the line of identification was similar to the appellants or not - Age group of accused persons was different and therefore, it was to be shown that persons who were mixed with appellants had similarity in their faces and appearance - Appellants were arrested on 23-6-1989 and T.I.P. was held on 5-8-1989 - No reason shown by T.I. as to why the T.I.P. was not arranged within the reasonable time - T.I.P. inspires no confidence. (Paras 8 & 12)**

क. साक्ष्य अधिनियम (1872 का 1), धारा 9 – पहचान परेड – पहचान परेड संचालित करने वाले व्यक्ति का परीक्षण नहीं किया गया – ज्ञापन में उल्लिखित

है कि 54 व्यक्तियों को मिश्रित किया गया था किंतु उन 54 व्यक्तियों के बारे में ज्ञापन में कोई विवरण नहीं दिया गया – उस व्यक्ति से स्पष्टीकरण अपेक्षित था जिसने पहचान परेड संचालित की थी कि क्या पहचान की पंक्ति में मिलाये गये व्यक्तियों का कद अपीलार्थीगण के समान था अथवा नहीं – अभियुक्त व्यक्तियों का आयु वर्ग भिन्न था और इसलिये यह दर्शाना चाहिये था कि जिन व्यक्तियों को अपीलार्थीगण के साथ मिलाया गया था उनके चेहरों एवं रंगरूप में समानता थी – अपीलार्थीगण को 23–06–1989 को गिरतार किया गया और पहचान परेड 05–08–1989 को की गई – टी.आई. द्वारा कोई कारण नहीं दर्शाया नहीं गया कि पहचान परेड युक्तियुक्त समय के भीतर क्यों नहीं कराई गई थी – पहचान परेड विश्वास उत्पन्न नहीं करती।

B. Penal Code (45 of 1860), Section 395 - Dacoity - **Incident took place in the early part of night - In F.I.R., the first informant had expressed suspicion upon her brother-in-law and her son - If the victims had identified the assailants then would have known that culprits were not her brother in law and her son - Suspicion expressed in F.I.R. indicates that none of the witness could identify the assailants.**

(Paras 9 to 11)

ख. दण्ड संहिता (1860 का 45), धारा 395 – डकैती – घटना रात के प्रारंभिक पहर में घटित हुई थी – प्रथम सूचना रिपोर्ट में प्रथम सूचना देने वाले ने अपने देवर और अपने बेटे पर संदेह प्रकट किया था – यदि पीड़ितों ने हमलावरों को पहचाना होता तब उन्हें पता चलता कि अपराधी उसका देवर और उसका बेटा नहीं थे – प्रथम सूचना रिपोर्ट में प्रकट किया गया संदेह दर्शाता है कि कोई भी साक्षी हमलावरों को नहीं पहचान सका।

C. Evidence Act (1 of 1872), Section 9 - Identification of article - **No other ornament was mixed at the time of Test Identification of seized ornaments - Person conducting Identification not examined - Independent witnesses of seizure not supported prosecution case - Seizure and identification of ornaments not proved. (Paras 15 & 16)**

ग. साक्ष्य अधिनियम (1872 का 1), धारा 9 – वस्तु की पहचान – जब्तशुदा आभूषणों की पहचान कराते समय कोई अन्य आभूषण नहीं मिलाया गया था – पहचान परेड संचालित करने वाले व्यक्ति का परीक्षण नहीं किया गया – जब्ती के स्वतंत्र साक्षियों ने अभियोजन प्रकरण का समर्थन नहीं किया – आभूषणों की जब्ती एवं पहचान साबित नहीं।

Cases referred :

1995 (II) MPWN Note 208, AIR 1981 SC 1392, AIR 2010 SC 762.

Surendra Singh with *Sankalp Kochar,* for the appellants in Cr.A. No. 970/1997.

Surendra Singh with *A.K. Dubey,* for the appellant in Cr.A. No. 1095/1997.

G.S. Thakur, P.L. for the respondent/State.

JUDGMENT

N.K. GUPTA, J. :- Both the criminal appeals arise from a common judgment of a common trial, therefore instant criminal appeals are decided by the present judgment.

2. The appellants have preferred the aforesaid appeals being aggrieved with the judgment dated 30.4.1997 passed by the third Additional Sessions Judge, Sagar camp at Rehli in ST No.149/1991 whereby each of the appellant has been convicted of offence under Section 395 of IPC and sentenced to five years' RI with fine of Rs.2000/-, in default of payment of fine, additional imprisonment for one year.

3. The prosecution's case, in short, is that the complainant Lilawati (PW-2) was resident of Village Kheri (Police Station Garhakota District Sagar). She was residing in her house along with her daughter Kiran (PW-11), her nephew Bhagwat Singh (PW-3) and Laxmirani (PW-6), wife of Bhagwat Singh. Triveni Bai (PW-1), sister of witness Bhagwat Singh was also residing in Lilawati's house as a guest at the time of incident. In the night of 7/8.4.1989 at about 4:00 AM some culprits entered into the house of Lilawati. Four of them surrounded the victim Triveni Bai (PW-1) and robbed of her silver payal and silver *kamarbandh.* They also took her ornaments from her box kept in the room. Witnesses Lilawati, Bhagwat Singh etc. had tried to save Triveni Bai, but their rooms were also closed from outside, and therefore they could not help. On the other hand they left the house from backside to save themselves and thereafter the culprits robbed the ornaments of Laxmirani as well as Lilawati kept in the boxes in their respective rooms. Lilawati (PW-2) had lodged a written report (FIR) Ex.P-1 at Police Station Garhakota on 8.4.1989. The case was registered on 23.6.1989. Accused Hari Singh, Kalyan Singh, Gope

Singh, Pancham and Rajendra Singh were arrested and on getting their memo under Section 27 of the Evidence Act, some of the silver ornaments were recovered from them. The test identification parade was also arranged on 5.8.1989 in which witnesses had identified the appellants and other accused persons. Thereafter other accused persons were arrested from time to time and recovery was made from them. Their test identification parade was also arranged. After due investigation a charge sheet was filed before the concerned Magistrate and the case was committed to the Court of Sessions, and ultimately it was transferred to the third Additional Sessions Judge, Sagar.

4. The appellants abjured their guilt. They did not take any specific plea, but they have stated that they were falsely implicated in the matter. However, no defence evidence was adduced.

5. The learned Additional Sessions Judge, Sagar after considering the prosecution evidence acquitted the accused Hari Singh, Dhaniram, Kishun, Karan, Laxmi Narayan, Pancham, Narayan Singh, Mardan Singh and Roop Singh, but convicted the appellants of offence under Section 395 of IPC and sentenced as mentioned above.

6. I have heard the learned counsel for the parties at length.

7. The learned senior counsel for the appellants has pointed out that there was no possibility for the witnesses to identify the culprits and the identification parade memo Ex.P-2 was not duly proved, because the witness who conducted the test identification parade was not examined. In this connection a reliance has been placed upon the judgment passed by the Single Bench of this Court in the case of "*Suresh Vs. State of MP*", [1995(II) MPWN Note 208]. It is also submitted that the description of dacoits was not given by the witnesses as no identification mark was informed, no stature of accused is given whether they were fat or thin or of fair colour or dark in colour. On the contrary some of the witnesses have accepted that the culprits had closed their mouths by clothes, and therefore the identification of such accused persons is highly doubtful. Reliance has been placed on the judgment of Hon'ble the Apex Court in the case "*Wakil Singh Vs. State of Bihar*", (AIR 1981 SC 1392). It is also submitted that the test identification parade was arranged after a gap of 2 ½ months, and therefore the same looses its evidentiary value. In this respect, reliance has been placed on the judgment of Hon'ble the Apex Court in the case of "*Musheer Khan @ Badshah Khan Vs. State of MP*" (AIR 2010 SC 762). It is also submitted that the ornaments

shown to be recovered from the appellants are of common nature and no identification mark was shown by the witnesses, therefore identification of ornaments is of no importance. Hence, the Additional Sessions Judge has committed an error in convicting the appellants.

8. After considering the submissions made by the learned senior counsel for the appellants, if the evidence of the case is examined, then it would be apparent that in the FIR Ex.P-1 a suspicion is created by witness Lilawati (PW-2) that one of the culprits was similar to her brother-in-law Raju and one culprit was similar to her son Guddu. Hence the case is dependent upon the test identification parade arranged by the Naib Tahsildar concerned against the appellants and identification of the appellants done by the witnesses. The case is also dependent upon the recovery of ornaments and their identification. First of all if the identification memo Ex.P-2 is examined, then it would be apparent that the concerned Naib Tahsildar-cum-Executive Magistrate was not examined before the trial Court. In the light of the judgment of the Single Bench of this Court in the case of *Suresh (supra)*, such conduction of identification parade comes in the cloud of doubt. It is possible that the Executive Magistrate who was transferred to a distant place could not be called for his examination, and therefore the memo relating to identification parade cannot be discarded only by the reason that the person who conducted the test identification parade was not examined. However, if the memo Ex.P-2 is considered, then in that memo it is mentioned that Lilawati identified the appellant Rajendra Singh and Kalyan Singh. Kiran could not identify any of the appellants. Triveni Bai had identified Kalyan Singh, Gope Singh and Rajendra Singh, whereas Bhagwat Singh could not identify any of the appellants. In the memo it is also mentioned that 54 persons were mixed for the identification of these appellants along with other six accused persons. However, no description is given in the memo Ex.P-2 about those 54 persons, who were mixed with the appellants. Under such circumstances, an explanation was required from the person, who conducted the test identification parade that whether stature of the persons mixed in the line of the identification was similar to the appellants or not. Age group of the accused persons was different. Some of the accused were in age group of 25-30 years and some of them were in age group of 35-40 years, and therefore it was to be shown that the persons who were mixed with the appellants during the identification had similarity in their faces and appearance. However, such questions could not be asked to the Executive Magistrate-cum-Naib Tahsildar, because he was

not examined. Hence in the light of order passed by the Single Bench of this Court in the case of *Suresh (supra)*, the identification memo Ex.P-2 inspires no confidence and by such identification the appellants could not be held guilty of the alleged offence.

9. Also it would be apparent that the appellants are the persons, who surrounded Triveni Bai and removed her silver *payal* and *kamarbandh*. In this context Triveni Bai (PW-1) has accepted that there was no arrangement of light in the room and the incident took place at 4:00 AM in the night. She claimed that she saw the faces of the appellants in the light of torch held by Rajendra Singh. If the robbery was done in the light of torch, then it was not possible for the culprits to flash light on the faces of the culprits. Triveni Bai has accepted that light of the torch was flashed on her face and leg from where her *payal* was removed. It is also stated by Triveni Bai that the torch was kept by the appellant Rajendra Singh. Under such circumstances, a person who carried a torch could not flash light on his own face unnecessarily, and therefore identification of Rajendra Singh was not possible by Triveni Bai or other witnesses.

10. Bhagwat Singh (PW-3) and Laxmi Rani (PW-6) have claimed that they saw the culprits from a gap in the wooden strip of the gate between their room and room of Triveni Bai, but in such a gap in the absence of appropriate light, it was not possible for them to see the culprits. It should be noted that except Triveni Bai, no other witness could identify the appellant Gope Singh. Similarly, when torch was held by Rajendra Singh, there could no possibility of light on the face of Rajendra Singh so that he could be identified. Similarly, Lilawati has stated that she and her daughter saw the culprits from a distance of 15 ft. Lilawati has accepted that thereafter she left the house and left her daughter Kiran to the house of one Arjun. Under such circumstances, when Lilawati was interested to save her daughter Kiran, it was not possible for her to remain standing in Dehlan in front of Triveni's room for a longer period to identify the culprits.

11. Also witnesses Kiran (PW-11) and Laxmi (PW-6) have accepted that all the culprits had closed their faces by clothes. Under such circumstances, it was impossible for the witnesses to identify the actual culprit in the test identification parade. In this connection the FIR Ex.P-1 is an important piece of evidence with the fact that the complainant Lilawati had shown her suspicion upon her brother-in-law Raju and her son Guddu, who were residing with her

divorced husband. If any of the witnesses would have identified the culprits in the light of the torch, then they would have known that the culprits were not Raju and Guddu, and therefore there was no possibility for the complainant to show a suspicion on her brother-in-law Raju and Guddu. The suspicion shown in the FIR Ex.P-1 indicates that none of the witnesses could identify and see the faces of the culprits, and therefore identification of the appellants in the test identification parade appears to be doubtful.

12. Also these appellants were arrested on 23.6.1989 and the test identification parade was arranged on 5.8.1989. There is no reason shown by the Investigation Officer Ashok Bhardwaj (PW-7) as to why the test identification parade was not arranged within the reasonable period. Hence in the light of the judgment of Hon'ble the Apex Court in the case of *Musheer Khan* (supra), the evidentiary value of the test identification parade goes away.

13. Also the witnesses did not give any evidence relating to identification mark or stature of the accused persons as to whether they were fat or thin or were fair or dark in complexion. In the dark night, only by the light of torch held by one culprit, such stature could not be observed by the witnesses. The witnesses have claimed that when the culprits were going from their house and the witnesses had hidden near a well, then they saw the culprits. However, such claim was not made in their case diary statements, and therefore such claim is nothing, but an after thought. Hence when the witnesses could not observe the stature of the culprits, then there was no basis for them to identify the culprits.

14. On the basis of the aforesaid discussion, it would be apparent that the witnesses Lilawati, Bhagwat Singh, Kiran and Laxmi Rani had no opportunity to see the appellants and the appellants were with Triveni Bai in her room when other witnesses left the spot. Witness Triveni Bai could not identify the culprits because they had covered their faces by clothes and also one of the culprits had a torch and there was no other source of light available in the room at the time of incident which took place in the night. Hence it was not possible for Triveni Bai to see the faces of the culprits because it was not necessary for the culprits to flash the torch on their own faces. Under such circumstances, when the person who conducted the test identification parade is not examined, the description of persons, who were mixed in the test identification parade was not given in the document Ex.P-2 and the test identification parade was arranged after 2½ months, the memo relating to test

identification parade Ex.P-2 is doubtful and it is not proved beyond doubt that the appellants were duly identified by the witnesses either in the test identification parade or in the dock.

15. It is alleged that the robbed property was recovered from the appellants. The robbed property was also recovered from the various accused persons from time to time. According to the documents Ex.P-4 to Ex.P-12, the various ornaments were recovered from the appellants Kalyan Singh and Gope Singh on 23.6.1989, whereas various ornaments were recovered from appellant Rajendra Singh on 2.7.1989. witnesses Prem Singh (PW-4) and Shyam Sundar (PW-5) relating to memo under Section 27 of the Evidence Act and consequential recovery from Kalyan Singh and Gope Singh have turned hostile. If the independent witnesses are turned hostile, then certainly the testimony of the Investigation Officer is to be considered with caution. The Investigation Officer had an interest in his case, and therefore he could show recovery of various ornaments from the appellants. In relation to seizure memo Ex.P-8 and Ex.P-11 in respect to Kalyan Singh and Gope Singh, the testimony of the Investigation Officer Ashok Bhardwaj comes in the cloud of doubt, because both the independent witnesses Prem Singh and Shyam Sundar have accepted that they were sitting in the hotel in front of the police station by way of their daily routine and they were taken as witnesses in so many cases. The statements of these witnesses indicate that those were pocket witnesses of the police. Sub Inspector Ashok Bhardwaj did not take any independent witness, hence he was not fair in recovery. Consequently, his testimony also comes in the cloud of doubt, and therefore it was not proved beyond doubt that any ornament was recovered from either Gope Singh or Kalyan Singh. Similarly, Murari (PW-9) and Veer Singh (PW-10) witnesses of document Ex.P-26 a seizure memo of recovery of ornaments from the appellant Rajendra Singh have turned hostile. The seizure was done by the Sub Inspector Ashok Bhardwaj, whose interestness is considered while considering the genuineness of the seizure memo Ex.P-8 and P-11. Hence the testimony of Ashok Bhardwaj cannot be believed when the independent witnesses have turned hostile, and therefore it was not proved beyond doubt that any ornament was recovered from the appellant Rajendra Singh.

16. So far as the identification of ornaments is concerned, by the document Ex.P-17 one *payal* was identified by witnesses Lilawati, Kiran, Laxmi Rani, Bhagwat Singh that *payal* was of Laxmi Rani. However, it is not shown by the

police as to whether the silver payal which was allegedly identified by the witnesses was recovered from whom. It appears that the *payal* which was shown to the witnesses by Tahsildar concerned, was recovered from accused Hari Singh, who is acquitted by the trial Court, and therefore the identification memo Ex.P-17 is not relevant to the present appellants. The document Ex.P-18 is also proved by various witnesses that they identified their ornaments before the Tahsildar. In the document Ex.P-18, 16 silver ornaments were identified by various witnesses. If the document Ex.P-18 is perused, then it would be apparent that the Tahsildar did not mention in the memo that similar ornaments were mixed with the silver ornaments which were identified. The ornaments were stolen from the boxes of Lilawati, Triveni Bai and Laxmi Rani, and therefore Lilawati, Laxmi Rani and Triveni Bai would have identified these ornaments with specification that out of Item No.1 to 16 which was of Triveni Bai, which was of Lilawati or which was of Laxmi Rani. The items shown in the document Ex.P-18 are the ornaments of such nature which were the ordinary silver ornaments being used by the women villagers in common, and therefore when no other ornaments were mixed in the ornaments kept for identification, it was easy for the witnesses to claim and identify the various ornaments. Since the person who conducted the identification proceeding of ornaments was not examined before the trial Court to show as to why he did no mix other ornaments, the evidentiary value of the identification proceeding as depicted in the Ex.P-18 goes away. Also hostile witness Shyam Sundar (PW-5) has stated that when he signed the document Ex.P-4 to P-15, witnesses Triveni Bai and Lilawati were present at the police station. No challenge was given by the prosecution to that statement given by Shaym Sundar (PW-5). Hence it is also established that the witnesses have already seen all the ornaments at the time of seizure and identification of ornaments becomes doubtful and it is not proved beyond doubt by the prosecution that the alleged ornaments were recovered from the appellants or those were of Triveni Bai, Lilawati or Laxmi Rani.

17. When there was no named FIR against the appellants, their identification proceeding was also doubtful. The presumption under Section 114-A of the Evidence Act can be drawn if any robbed property is recovered from the culprits. But unfortunately the prosecution could not prove beyond doubt that any ornament was recovered from any of the appellants or those ornaments were of the victims. Hence there is no basis to draw any presumption under Section 114-A of the Evidence Act against the appellants.

Therefore, there was no reason to convict the appellants of offence under Section 395 of IPC or any inferior offence for similar nature.

18. It is also important to note that in the FIR Ex.P-1 a report of theft was lodged with the allegation that four persons were entered in the house and robbed the ornaments. It is strange that the police has implicated as many as 12 accused persons in the case, but the trial Court acquitted nine of the accused persons in the case. The witnesses have claimed that they saw 12 persons in all, when they were going back and passing through a road near to a well where witnesses could see them, but if the witnesses would have seen 12 persons, then such fact would have been mentioned in the FIR Ex.P-1, thus it concludes that the robbery was caused by only four persons. An accused can be convicted of offence under Section 395 of IPC, when it is a case of dacoity done by five or more persons. In the present case, it could not be proved beyond doubt that five or more persons were involved in the crime, therefore the appellants could not be convicted of the offence under Section 395 of IPC. They could be convicted of offence under Section 392 of IPC if their guilt was found to be proved by the trial Court.

19. On the basis of the aforesaid discussion, there was no named FIR against the appellants. It was not proved beyond doubt that they were identified by the witnesses in the test identification parade. On the contrary, it appears that the witnesses were not in position to view the faces of the culprits at the time of incident. It is not proved beyond doubt that any robbed property was found recovered from the appellants, and therefore the appellants could not be held guilty of offence under Section 395 of IPC or any inferior offence of similar nature. Under these circumstances, both the criminal appeals filed by the appellants are hereby allowed. Their conviction as well as sentence imposed by the trial Court of the offence under Section 395 of IPC are hereby set aside. They are acquitted from all the charges appended against them.

20. At present appellants are on bail, and therefore their presence is no more required, therefore it is directed that their bail bonds shall stand discharged.

21. A copy of this judgment be sent to the concerned trial Court with its record for information.

Appeal allowed.

I.L.R. [2015] M.P., 1531
APPELLATE CRIMINAL
Before Mr. Justice N.K. Gupta
Cr.A. No. 2412/1997 (Jabalpur) decided on 12 February, 2015

SURESH KUMAR SONI & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

A. Penal Code (45 of 1860), Section 459 - Causing grievous hurt whilst committing lurking house trespass - **Assault of causing grievous hurt or attempt to cause death should be done in the course of commission of offence of lurking house trespass or house breaking - If assault has been caused after entering in the house, then provision of Section 459 would not be applicable - As injured were assaulted after entering in the house, no offence under Section 459 of I.P.C. is made out. (Para 7)**

क. दण्ड संहिता (1860 का 45), धारा 459 – प्रच्छन्न गृह–अतिचार कारित करते समय घोर उपहति कारित की जाना – घोर उपहति कारित करते हुए हमला या मृत्यु कारित करने का प्रयत्न, प्रच्छन्न गृह–अतिचार या गृह भेदन का अपराध कारित करने के दौरान किया गया होना चाहिए – यदि हमला मकान में प्रवेश करने के पश्चात् कारित किया जाता है तब धारा 459 का उपबंध लागू नहीं होगा – चूंकि आहत पर हमला मकान में प्रवेश करने के पश्चात् किया गया, भा.दं. सं. की धारा 459 के अंतर्गत अपराध नहीं बनता।

B. Penal Code (45 of 1860), Sections 459, 323, 324, 326 & 325 and Criminal Procedure Code, 1973 (2 of 1974), Section 222 - Lesser Offence - **Offence under Sections 323, 324 cannot be considered as an inferior offence of same nature relating to charge under Section 459 of I.P.C. - Charges under Section 323, 324 of I.P.C. should have been separately framed. (Para 8)**

ख. दण्ड संहिता (1860 का 45), धाराएं 459, 323, 324, 326 व 325 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 222 – लघुतर अपराध – धारा 323, 324 के अंतर्गत अपराध को भा.दं.सं. की धारा 459 के अंतर्गत आरोप के संबंध में समान स्वरूप के निम्न अपराध के रूप में नहीं माना जा सकता – भा.दं. सं. की धारा 323 व 324 के अंतर्गत आरोपों को पृथक रूप से विरचित किया जाना चाहिए।

C. *Penal Code (45 of 1860), Section 457 - Lurking House Trespass* - Incident alleged to have taken place at 2 a.m. - First Informant lodged the report at 2:20 a.m. which could not have been lodged under the facts and circumstances of case - In F.I.R. it was mentioned that incident has been witnessed by various persons but no independent witness of the locality was examined - Injured witness could not identify the culprits - Prosecution witnesses could not attribute any motive for breaking open the doors of house - There is enemity between the first informant and appellants - In absence of any motive with appellants to do house breaking and as the evidence of witnesses is not reliable beyond doubt that they could see or they saw the appellants and in absence of any source of light in the street, none of the appellants can be convicted under Section 457 of I.P.C. - Appeal allowed.

(Paras 10 to 18)

ग. दण्ड संहिता (1860 का 45), धारा 457 – प्रच्छन्न गृह–अतिचार – अभिकथित रूप से घटना रात के 2 बजे घटी – प्रथम सूचना देने वाले ने रात 2:20 बजे रिपोर्ट दर्ज की जोकि प्रकरण के तथ्य एवं परिस्थितियों में दर्ज नहीं की जा सकती थी – प्रथम सूचना रिपोर्ट में यह उल्लिखित किया गया था कि विभिन्न व्यक्ति घटना के साक्षी थे परंतु किसी स्थानीय स्वतंत्र साक्षी का परीक्षण नहीं किया गया – आहत साक्षी अपराधियों की पहचान नहीं कर सके – अभियोजन साक्षीगण मकान का दरवाजा तोड़कर खोलने के लिये कोई हेतु नहीं बता सके – प्रथम सूचना देने वाले और अपीलार्थीगण के बीच वैमनस्यता है – गृह भेदन करने के लिये अपीलार्थीगण के पास किसी हेतु की अनुपस्थिति और चूंकि साक्षीगण का साक्ष्य कि उन्होंने अपीलार्थीगण को देखा था या देख सकते थे, संदेह से परे विश्वसनीय नहीं तथा मार्ग पर रोशनी के किसी स्त्रोत की अनुपस्थिति में किसी भी अपीलार्थी को भा. दं.सं. की धारा 457 के अंतर्गत दोषसिद्ध नहीं किया जा सकता – अपील मंजूर।

Cases referred :

AIR 1927 Allahabad 536, (2006) 8 SCC 566.

Satish Chaturvedi, for the appellants.
Ajay Tamrakar, P.L. for the respondent/State.

JUDGMENT

N.K. GUPTA, J. :- The appellants have preferred the present appeal being aggrieved with the judgment dated 24.10.1997 passed by the Second Additional Sessions Judge, Satna in S.T.No.53/1988, whereby appellants

No.1, 4 and 6 have been convicted of offence punishable under Section 457 of IPC and sentenced to 2 years rigorous imprisonment with fine of Rs.500/-, whereas the appellants No.2, 3 and 5 have been convicted of offence under Section 459 of IPC and sentenced to 3 years rigorous imprisonment with fine of Rs.500/-. One month simple imprisonment was imposed on each of the appellants, in default of payment of fine.

2. The prosecution's case, in short, is that, on 12.4.1986, at about 2.10 a.m., Madhav Prasad (P.W.4) went to the Police Station Ucchehra and lodged an FIR, Ex.D/3 in Rojnamacha that some culprits were breaking the doors of his shop and therefore, SHO Shri R.S.Tripathi and his companions immediately left for the spot. However, Madhav Prasad (P.W.4), who went to the spot had found that doors of his shop were broken and his nephew Sudama and his mother Makhaniya (P.W.3) had sustained injuries. It is also found that some boxes kept in the shop were found thrown out of the shop. SHO, Police Station Ucchera registered a case and investigated the matter. On the basis of evidence given by eye witnesses, a charge-sheet was filed before the JMFC, Nagod, who committed the case to the Court of Sessions and ultimately, it was transferred to the Second Additional Sessions Judge, Satna.

3. The appellants abjured their guilt. They took a plea that there was a dispute of house between the parties and therefore, they were falsely implicated in the matter due to enmity. However, no defence evidence was adduced.

4. Second Additional Sessions Judge, after considering the prosecution evidence, convicted the appellants No.2, 3 and 5 i.e. Bhagwandas, Shivdas and Lalai @ Lalan Singh of offence under Section 459 of IPC and sentenced as mentioned above, whereas remaining appellants were acquitted from the charge of offence under Section 459 of IPC but, convicted for offence under Section 457 of IPC and sentenced as mentioned above.

5. I have heard the learned counsel for the parties at length.

6. After considering the peculiar factual position of this case, where the trial Court did not distinguish between offence under Sections 459 and 457 of IPC and convicted the appellants of such different offences on the basis that the appellants against whom it was found that they assaulted the victims, were convicted of offence under Section 459 of IPC and the appellants who did not assault anyone have been convicted of offence under Section 457 of IPC. Looking to the peculiar circumstances of the case, first of all, it is to be

decided that what is the scope of discussion relating to offences in the present case.

7. Offence under Section 459 of IPC is a peculiar offence, in which act of assault should be done during the act of house breaking or lurking house trespass. Provision of Section 459 of IPC is reproduced as under:-

> *459. Grievous hurt caused whilst committing lurking house trespass or house-breaking.—Whoever, whilst committing lurking house-trespass or house-breaking, causes grievous hurt to any person or attempts to cause death or grievous hurt to any person, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

In this provision, expression "Whilst" prefixed to the words committing lurking house trespass or house breaking has given rise to a cleavage of judicial opinion and in case of *"Syed Ahmed Vs. Emperor"*, [AIR 1927 Allahabad 536] , it was held by Allahabad High Court that if assault has been caused after entering in the house then, provision of Section 459 of IPC shall not be attracted. Such assault of causing grievous hurt or attempt to cause death should be done in the course of commission of offence of lurking house trespass or house breaking. In the present case, out of the injured witnesses, Sudama Prasad had expired during the pendency of the trial and he could not be examined before the trial Court, whereas second injured Makhaniya Bai (P.W.3) has stated in her evidence that the culprits entered in the house by breaking the door pans and thereafter, they threw Sudama her grand child out of the house and assaulted the victim Makhaniya. Hence, it is very much clear by the statement of sole injured witness that the culprits did not assault anyone while committing offence of house breaking. Hence, offence under Section 459 of IPC was not made out against any of the appellants from very beginning.

8. The trial Court did not frame charge of offence under Sections 324 or 323 of IPC relating to victims Sudama Prasad or Makhaniya. It is also to be decided whether the appellants can be convicted for such offences under the head of charge of offence under Section 459 of IPC or not. In this context, provision of Section 222 of the Cr.P.C. is very much clear. Also, in case of *"Tarkeshwar Vs. State"* [(2006) 8 SCC 566] , it is held by the Apex Court

that where the accused is charged with a major offence and said charge is not proved, the accused may be convicted of the minor offence of the same nature, though initially he was not charged with it. In the light of aforesaid judgment, if facts of the present case are examined then, it would be apparent that the culprits could be convicted of offence under Section 459 of IPC, if they assaulted the victims or tried to cause grievous injury to them whilst house breaking. They could be convicted for any of the offences under Sections 326, 325, 324 or 323 of IPC as the case may be in the head of charge under Section 459 of IPC, if house breaking was not complete. They could be convicted of offence under Section 457 of IPC or lesser offence of the same nature, if the ingredients of assault whilst house breaking were not proved but, if the culprits had assaulted the victims after completion of house breaking then, such subsequent assault does not fall within the purview of offence under Section 459 of IPC and therefore, for voluntarily causing hurt or causing hurt by penetrating object, charges of offence under Sections 324 or 323 of IPC should have been framed separately because such overt-act of causing voluntarily hurt was not done during the act of house breaking or lurking house trespass. Hence, in the present case, offence under Sections 324 or 323 of IPC cannot be considered as an inferior offence of the same nature relating to charge under Section 459 of IPC. The trial Court has simply framed the charge under Section 459 of IPC against all the appellants but, no separate charge under Section 324 or 323 of IPC was framed by the trial Court. The State has not preferred any counter appeal for addition of such charges or conviction of the appellants for such charges and therefore, in the scope of present discussion, overt-acts of the appellants causing hurt to Makhaniya and Sudama Prasad shall not be discussed. Such an act shall be discussed only for corroboration of guilt of house breaking.

9. As discussed above, it is apparent that the appellants did not assault anyone whilst alleged house breaking and therefore, prima facie no offence under Section 459 of IPC is constituted against any of the appellants. Also, no discussion is required relating to offence under Sections 324 or 323 of IPC and therefore, discussion is limited upto offence of house breaking or lurking house trespass in the night. In the present case, Ramsakha (P.W.2), Makhaniya (P.W.3), Madhav Prasad (P.W.4) and Laxmi Prasad (P.W.5) were examined as eye witnesses. Munni (P.W.6) and Premwati (P.W.7) were also examined as eye witnesses but, no opportunity of cross-examination of these two witnesses was available to the appellants and therefore, the trial Court

has discarded their evidence. Ramsakha, Madhav Prasad, Makhaniya and Laxmi Prasad have stated that the appellants have broken the door of the shop of Madhav Prasad and entered in the shop. It is stated that Laxmi Prasad (P.W.5) was an independent witness. However, Laxmi Prasad has accepted in para 4 that he had also lodged some cases against some of the appellants and therefore, he had an interest against the appellants. Also, he has accepted in para 7 of his statement that when he reached to the spot, he saw the culprits running away from the spot. When he saw them for the first time, they were 15 feet away from him. He could not say about the articles kept by the appellants in their hands while running away from the spot. It is also pertinent to note that the incident took place on 13.4.1986, whereas Laxmi Prasad came forward to give his statement to the police after 5 days of the incident. It is also important that such a grave house breaking was done by the culprits in an urban area of the township but, no independent witness was examined in support of the interested witnesses.

10. In the present case, there are 2-3 defects in the evidence of the eye witnesses and such defects create a doubt about their testimony. First defect is that the witnesses could not prove that there was any arrangement of light to see the culprits or the incident on whole. Madhav Prasad claimed that he saw the culprits when they were breaking the doors of the shop and therefore, he immediately, rushed to the Police Station in the same locality and informed about the commission of crime to the police and thereafter, an FIR, Ex.P/4 was lodged. If FIR, Ex.P/4 is examined then, it is a document which was prepared ante time. According to the prosecution's story, Madhav Prasad went to the Police Station at 2.10 a.m. and informed that some culprits were breaking the doors of his shop. Intimation, Ex.D/3 was recorded by the police in Rojnamachasana. However, Madhav Prasad in his cross-examination has refused that he had lodged such an FIR. Entry in Rojnamcha Ex.D/3 is a document of prosecution itself and by mere denial, its existence cannot be discarded. In document Ex.D/3, Madhav Prasad did not mention the name of anyone at the first instance. If there was availability of street light in the street then, as claimed by Madhav Prasad that he could see the culprits from terrace where he and his family members were sleeping then, certainly, he could give the names of the culprits in his first report, Ex.D/3. Looking to his conduct and text of Rojnamcha, Ex.D/3, it would be apparent that Madhav Prasad could not identify any of the culprits, before he reached to the Police station for the first time.

11. The FIR, Ex.P/4 is shown to be lodged at 2.20 a.m. and interpolation is visible in the time of FIR mentioned in the document. If the text of the document, Ex.P/4 is perused then, it is mentioned that the incident took place at 2 a.m. and FIR, Ex.D/3 was lodged at 2.20 a.m. According to the document, Ex.D/3, Madhav Prasad went to the Police Station at 2.10 a.m. Thereafter, immediately he left for his house and police party has also followed him. The entire incident took place, in which Makhaniya and Sudama Prasad sustained injuries. In the text of document, Ex.P/4, it is mentioned that Madhav Prasad had brought the injured Makhaniya and Sudama to the Police Station Ucchera at the time of lodging the FIR, Ex.P/4. Hence, when Madhav Prasad had lodged a report, Ex.D/3 at 2.10 a.m. thereafter he went to the spot and according to him, the incident was going on. Thereafter, when the culprits left the spot, he took the injured persons to the police station by Ricksaw and thereafter, FIR, Ex.P/4 was lodged. Hence, that FIR could not be lodged by Madhav Prasad within 10 minutes of his previous FIR, Ex.D/3 and therefore, FIR, Ex.P/4 is nothing but, a document prepared ante time and therefore, it loses its evidentiary value as an FIR.

12. In FIR, Ex.P/4, it was mentioned that various citizens of the locality had arrived at the spot at the time of incident. However, Madhav Prasad had denied that. He had mentioned the portion "D" to "D" in the FIR, Ex.P/4 about arrival of various other persons. However, not a single such person was examined in support of interested witnesses. According to Madhav Prasad and Ramsakha, they were sleeping on the terrace alongwith their family members and the injured witnesses Makhaniya and Sudama were sleeping in the shop. Out of these two injured witnesses, Sudama Prasad could not be examined because he had expired during the trial, whereas Makhaniya has accepted that she was suffering from cataract and she could not see anything by one of her eye and she could see partially by another eye. She has claimed that there was light in the shop but, she did not state that whether lights in the shop were on while she was sleeping. Even in the Court see could not identify the culprits in the broad day light because the culprits were standing in the accused dock, which was 7-8 feet away from the witness box and she has claimed that she had seen the culprits from a distant place. Hence, it is highly doubtful that witness Makhaniya was in a position to identify the culprits in the absence of any light specially when she was suffering from cataract in her eyes.

13. So far as evidence of Madhav Prasad is concerned, looking to the contradictions between his previous statement i.e. first FIR, Ex.D/3 and second FIR Ex.P/4 and also with statement under Section 161 of the Cr.P.C., that when Madhav Prasad immediately left for the Police Station and according to the document, Ex.D/3, he could not see the culprits before leaving his house then, it was not possible for him to come back and fight with the culprits and therefore, it appears that he went back to his house, when incident was already over and he has given his statement on the basis of his presumptions. Hence, testimony of Madhav Prasad cannot be accepted beyond doubt.

14. The witness Ramsakha has stated that he was sleeping on terrace and he had heard the sound of bomb blast and firing. However, no fire arm could be recovered by the police from any of the appellants. There is no document to show that police found remains of any bomb on the road. It appears that Ramsakha has exaggerated about the incident to implicate the appellants in a particular manner. When he was asked as to how he could see the incident from the terrace, he claimed that he went to the staircase and he saw the culprits. However, Ramsakha did not sustain any injury and therefore, he did not try to save the victim during the incident. It is not proved that any of the light was illuminated in the shop at the time of incident then, if the witness Ramsakha came to the stair case then, still he could not see the actual culprits and therefore; the statement of the witness Ramsakha also depends upon his own presumptions.

15. The most unnatural portion of the allegation is that there was enmity between Madhav Prasad Soni and appellant Bhagwandas relating to dispute of possession of a particular house. It is not alleged against the appellants that in the same incident, they tried to occupy the house, which was under dispute. It is alleged against the appellants that they had broken the doors of the house, in which there was a shop of Madhav Prasad Soni and therefore, purpose of house breaking was not to take possession of the disputed house. Second question arises as to whether the purpose of house breaking was robbery? The answer could be "Negative". The appellants were the citizens, who were known to the victims and were residing in the same locality and therefore, it was not possible for the appellants to commit robbery in the house of victims, otherwise, immediately, a named FIR would have been lodged against them and they could be held for the offence of robbery and various ornaments kept in the shop could be recovered from the appellants. If text of FIR, Ex.P/4 is

examined then, there is no allegation that any robbery was committed by the appellants. Some of the witnesses have stated that the appellants had thrown some boxes kept in the shop on the road but, such fact has not been mentioned in the FIR, Ex.P/4 and the statements of the witnesses relating to that fact is nothing but, an after thought. Hence, looking to the text of FIR, Ex.P/4, it is not established that house breaking was done for the purpose of robbery or burglary.

16. If the appellants had an enmity with the complainant and his companions then, they could not do the house breaking in the night unless they had a particular object behind it. As discussed above, it is proved that the appellants did not want to commit any robbery. They did not want to encroach upon any portion of the property, where they committed the crime of house breaking, therefore, only purpose could be to teach a lesson to Madhav Prasad and Ramsakha. If that was the purpose of the appellants then, after breaking the house of the complainant, they had no reason to assault Makhaniya or Sudama Prasad. Makhaniya was an old person, whereas Sudama Prasad was a handicapped person. The witnesses did not say that the culprits tried to come on terrace to assault Ramsakha or Madhav Prasad. If the appellants would have entered in the house in the mid night to teach a lesson to Madhav Prasad and Ramsakha then, certainly they should have tried to assault these two persons.

17. If evidence of Ramsakha (P.W.2) is perused then, in para 4 of his statement, he has stated that place of incident was his shop of silver and golden jewelery and the culprits took the boxes from the shop containing some silver and golden ornaments alongwith the instruments used in making of such ornaments and threw that outside the shop. Again in the cross-examination, he has accepted that in his case diary statement, Ex.D/1, he has stated that his ornaments were taken by the culprits and hence, the purpose of house breaking was robbery. However, the investigation officer was not examined and no document is proved before the trial Court to show that any ornament was seized from any of the appellants or any box was seized out of the shop. Hence, it appears that Ramsakha has tried to establish a case of robbery or burglary but, in FIR, no such case was alleged. After considering the evidence of Madhav Prasad, Ramsakha and Makhaniya, it appears that there was no object with the appellants to do alleged house breaking. There is no allegation of robbery or burglary. It is not proved beyond doubt that there was any arrangement of light, so that the witnesses could see the culprits,

Ramsakha and Madhav Prasad were not in a position to see culprits, where Makhaniya was not able to see properly because she was suffering from cataract. She had lost the sight of one eye completely and lost partial sight of another eye. As discussed above, the appellants have no object to do the house breaking in the night and if they have done so, they would have tried to reach upto Ramsakha and Madhav Prasad to teach a lesson to them. Hence, it appears that some culprits have tried to cause burglary in the shop of Ramsakha and Madhav Prasad and after breaking the doors of shop and assaulting the victims Makhaniya and Sudama, a crowd of citizens was gathered and also police had arrived at the spot on the report lodged by Madhav Prasad and therefore, they could not take anything from the shop and ran away. Thereafter, Madhav Prasad and Sudama have thought to take advantage of the incident to implicate the appellants falsely.

18. On the basis of the aforesaid discussion, there was no object with the appellants to do house breaking. Evidence given by Ramsakha, Madhav Prasad and Makhaniya is not reliable beyond doubt that they could see or they saw the appellants that they committed house breaking. It is not proved beyond doubt that there was any source of light in the street. In the spot map, Ex.P/2, no arragement of light has been shown by the investigation officer on the street. Since Makhaniya and Sudama were sleeping in the shop, there was no possibility that source of light was illuminated in the shop during sleep and thereafter, there was no possibility that Makhaniya or Sudama had switched on the source of light. It is highly doubtful that the appellants were the persons, who entered in the shop of the complainant Madhav Prasad or Ramsakha. As discussed above, the culprits did not assault anyone during entry into the shop and therefore, prima facie no offence under Section 459 of IPC was made out against any of the culprits. Under such circumstances, none of the appellants can be convicted of offence under Section 459 or 457 of IPC or any inferior offence of the similar nature. They are entitled to get the benefit of doubt. Consequently, appeal filed by the appellants is hereby allowed. Conviction and sentence for offence under Section 459 of IPC imposed against the appellants No.2, 3 and 5 as well as conviction and sentence of offence under Section 457 of IPC imposed against the appellants No.1, 4 and 6 are hereby set aside. The appellants are acquitted from all the charges. The appellants would be entitled to get the fine amount back, if they have deposited the same before the trial Court.

19. The appellants are on bail. Their presence is no more required before this Court and therefore, their bail bonds shall stand discharged.

20. Copy of the judgment be sent to the trial Court alongwith its record for information.

Appeal allowed.

I.L.R. [2015] M.P., 1541
APPELLATE CRIMINAL
Before Mr. Justice Rajendra Menon
Cr.A. No. 752/1996 (Jabalpur) decided on 26 February, 2015

SURENDRA KUMAR ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. Evidence Act (1 of 1872), Section 3 - Witnesses - **In criminal cases, witnesses can be placed in three categories i.e., firstly wholly reliable, secondly wholly unreliable and thirdly who neither wholly reliable nor wholly unreliable - For a witness of third category, his statement cannot be accepted until and unless there is corroborative evidence to support the statement. (Para 25)**

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्षीगण – दाण्डिक प्रकरणों में साक्षीगण को तीन श्रेणियों में रखा जा सकता है अर्थात् प्रथमतः पूर्णतः विश्वसनीय, दूसरे पूर्णतः अविश्वसनीय और तीसरे जो न तो पूर्णतः विश्वसनीय है और न ही पूर्णतः अविश्वसनीय – तीसरी श्रेणी के साक्षी हेतु, उसके कथन को तब तक स्वीकार नहीं किया जा सकता जब तक कि कथन के समर्थन में पुष्टिकारक साक्ष्य नहीं है।

B. Penal Code (45 of 1860), Section 304(II) - Culpable Homicide not amounting to murder - **Eight persons were tried and seven were acquitted holding that the evidence of prosecution witnesses is not reliable in respect of acquitted persons - Evidence of P.W. 3 was treated as partly credit worthy for convicting the appellant and partly uncredit worthy for acquitting the other accused persons - Knife was alleged to have been seized from the possession of appellant but presence of blood was not established - Out of five eye witnesses, the Trial Court disbelieved four eye witnesses and partly relied upon the evidence of P.W. 3 - In absence of any corroborative evidence to support**

the statement of P.W. 3, he cannot be believed - Appellant acquitted - Appeal allowed. (Paras 27 to 31)

ख. दण्ड संहिता (1860 का 45), धारा 304(II) – हत्या की कोटि में न आने वाला आपराधिक मानव वध – आठ व्यक्तियों का विचारण किया गया और सात को यह धारणा करते हुए दोषमुक्त किया गया कि दोषमुक्त व्यक्तियों के संबंध में अभियोजन साक्षीगण का साक्ष्य विश्वसनीय नहीं – अ.सा. 3 के साक्ष्य को अपीलार्थी की दोषसिद्धि के लिये आंशिक रूप से विश्वसनीय माना गया और अन्य अभियुक्तगण की दोषमुक्ति के लिये आंशिक रूप से अविश्वसनीय माना गया – अभिकथित रूप से अपीलार्थी के कब्जे से चाकू जब्त किया गया था परंतु रक्त की उपस्थिति स्थापित नहीं की गई – पांच प्रत्यक्षदर्शी साक्षीगण में से विचारण न्यायालय ने चार प्रत्यक्षदर्शी साक्षीगण का अविश्वास किया तथा अ.सा. 3 के साक्ष्य पर आंशिक रूप से विश्वास किया – अ.सा. 3 के समर्थन में किसी पुष्टिकारक साक्ष्य की अनुपस्थिति में उस पर विश्वास नहीं किया जा सकता – अपीलार्थी दोषमुक्त – अपील मंजूर।

Cases referred :

AIR 1957 SC 614, AIR 2009 SC 1110, AIR 1975 SC 1962, AIR 1976 SC 2263, AIR 1994 SC 1251, AIR 1954 SC 15.

Surendra Singh with *A.K. Dubey*, for the appellant.
D.K. Bohrey, P.L. for the respondent/State.

JUDGMENT

RAJENDRA MENON, J. :- In this appeal under section 374(2) of the Code of Criminal Procedure, the appellant calls in question his conviction for offence under section 304(II) of the Indian Penal Code and sentence of rigorous imprisonment for 7 years in Sessions Trial No. 86/1995 recorded by the 1st Additional District Judge, Khurai, District Sagar vide his judgment dated 18.4.1996.

2. Appellant alongwith seven other co-accused persons were prosecuted for offence under sections 147, 148, 302/149 and 307/149 of the Indian Penal Code. All the eight accused, including the appellant, have been acquitted of all the offences including the offence under section 302, but the appellant alone is convicted for an offence under section 304(II) of the IPC for having caused a solitary knife injury on the person of deceased – one Dhirendra Parihar, therefore, this appeal.

3. It is the case of the prosecution that on 6.11.1994, at about 10.00

PM – Bhupendra Singh (injured person) met Dhirendra Parihar (since deceased) and was proceeding to his house to pay regards to his elder brother. While they were so going and when they reached Jhanda Chowk, Khurai and were near to the shop of one Mulayam Chand – one of the acquitted co-accused, the shop of Mulayam Chand was partly closed by shutter. It is said that the appellant and other seven co-accused persons, who were already waiting there, namely Dharmendra Khaddar, Surendra Khaddar, Sandeep Khaddar, Manoj Singhai, Sandeep, Mahesh @ Rajjan Rokhadia and Alok were armed with weapons like lathi and knife. It is said that on seeing Bhupendra Singh – PW/3 with Dhirendra Parihar, all of them came out and assaulted them. It is said that co-accused persons Alok and Mulayam Chand incited all the persons to commit the assault. Mahesh, Sandeep and Manoj are said to have assaulted both Bhupendra Singh and Dhirendra Parihar with knives; Mulayam Chand and Manish assaulted both of them with lathi and it is stated that present appellant caused a solitary knife injury on the person of Dhirendra Parihar. It is stated that they were rushed to the Hospital where Dhirendra Parihar succumbed to the injury. Bhupendra Singh was treated and thereafter he was discharged. First Information Report – Ex.P/6 was lodged by Bhupendra Singh while he was in the Hospital. His case diary statement was also recorded by the police authorities in the Hospital vide Ex.D/1. That apart, it is said that a dying declaration of this person was also recorded as Ex.D/2 by the Naib Tehsildar. In support of the case, various witnesses were examined. In all there are five eye-witnesses to the incident. They are PW/3 Bhupendra Singh – injured eye-witness; PW/4 Ikram; PW/5 Karan Singh; PW/6 Nitiraj Singh; and, PW/10 Rajendra Singh. Knife with which the appellant is said to have caused the injury on the person of deceased Dhirendra Parihar was also seized and it was sent for forensic examination.

4. Based on the evidence and material that came on record, the learned Court found that statement of PW/4 Ikram, PW/5 Karan Singh; PW/6 Nitiraj Singh and PW/10 Rajendra Singh – the four eye-witnesses, is not credit worthy, they are trying to falsely implicate the accused persons, particularly the seven acquitted persons and did not put much credence on their statement. Infact the statement of all these four witnesses have been rejected by the learned court below for various reasons as are indicated in the judgment. However, the statement of PW/3 Bhupendra Singh was accepted by the court in part. For the purpose of considering the offence committed by the seven other co-accused persons, the trial court has found that the statement of Bhupendra

for the purpose of these accused persons cannot be accepted. However, for the purpose of convicting the present appellant for offence under section 304(II) IPC, the court below believed the statement of Bhupendra Singh – PW/3 and based on his solitary statement the appellant herein has been convicted for the offence and sentenced to undergo rigorous imprisonment for 7 years.

5. Shri Surendra Singh, learned Senior Advocate for the appellant, took me through the judgment and reasoning given by the trial court with regard to analysis of the statement of the four eye-witnesses namely - PW/3 Bhupendra Singh – injured eye-witness; PW/4 Ikram; PW/5 Karan Singh; PW/6 Nitiraj Singh; and, PW/10 Rajendra Singh. Learned Senior Advocate referred to the findings recorded by the trial court in paragraph 26, 41, 49 and 59, with regard to the veracity and genuineness of the statement made by these witnesses and says that the trial court has rejected the statement of all these witnesses for the reasons indicated therein. The trial court having done so, thereafter placed heavy reliance on the statement of PW/3 Bhupendra Singh only for the purpose of holding the appellant to have committed the offence. As far as the statement of PW/3 Bhupendra Singh with regard to the commission of offence by the other co-accused persons are concerned, learned Senior Advocate invites my attention to the analysis of the statement of these witnesses made by the trial court from paragraph 9 onwards, to say that the statement of Bhupendra Singh with regard to the other seven accused is rejected by the trial court on the ground that it is not reliable and he seems to have been falsely implicated the seven co-accused persons. It was emphasized by learned Senior Advocate that if the statement of PW/3 Bhupendra is disbelieved by the trial court for the purpose of acquitting co-accused persons, then there is no reason as to why statement of such witness should be relied upon for convicting the present appellant. Learned Senior Advocate further submits that if statement of all a witness is not at all credit worthy with respect to some accused, then for accused it cannot be credit worthy; it cannot be treated credit worthy for one accused and not credit worthy for other accused. In the matter of statement of PW/3 Bhupendra Singh, learned Senior Advocate took me through the statement given by him in the form of FIR – Ex.P/6 and points out that it is nowhere stated in the FIR that it is appellant Surendra Kumar who had caused the knife injury on the person of Dhirendra Parihar. Thereafter, learned Senior Advocate took me through the statement of this witness again recorded as the case diary statement – Ex.D/1 to say that the solitary knife

injury caused on the person of Dhirendra Parihar is caused by the appellant. That apart, learned Senior Advocate invites my attention to the so-called dying declaration of PW/3 Bhupendra Singh recorded as Ex.D/2 and points out that in this he speaks about a third person as having caused injury on the person of Dhirendra Parihar.

6. Accordingly, Shri Surendra Singh – learned Senior Advocate, argues that there are serious discrepancy in the statement of PW/3 Bhupendra Singh recorded in the Court and the version given by him in the FIR – Ex.P/6, the case diary statement – Ex.D/1; and, the socalled dying declaration – Ex.D/2. It is stated that taking note of these discrepancy in the statement and the manner in which the learned court below has rejected the statement of PW/3 for the purpose of acquitting the other accused persons, similar benefit should have been granted to the appellant and the statement of Bhupendra Singh – PW/3 should be discarded for all purposes and if the said statement goes, then there is no evidence against the appellant to show that he had caused the injury on the person of Dhirendra Parihar.

7. Shri Surendra Singh, learned Senior Advocate, thereafter took me through the material available on record to say that even though a knife has been recovered from the person of the present appellant; and the knife has been sent for forensic examination, but neither the report of the forensic laboratory has been exhibited or proved in evidence nor is there anything available on record to show that the knife was stained with human blood. Learned Senior Advocate refers to the seizure memo – Ex.P/27 to say that in this document there is nothing to say that the knife is stained with blood marks, of human. Learned Senior Advocate also refers to the finding recorded by the trial court in this regard in paragraph 104, to argue that the trial court found that the knife was seized and thereafter referred to the Forensic Science Laboratory, Sagar, but in the report submitted in evidence, nothing has been proved by the prosecution to say that the knife was stained with human blood. Taking note of all these circumstances, learned Senior Advocate argues that conviction of the appellant is not sustainable.

8. Learned Senior Advocate further invites my attention to the principle of law laid down by the Supreme Court in the case of *Vadivelu Thevar Vs. The State of Madras,* AIR 1957 SC 614; followed in the case of *Vithal Pundalik Zendge Vs. State of Maharashtra,* AIR 2009 SC 1110, to say that witnesses in a criminal case are of three category. A witness who is wholly

reliable; a witness who is wholly unreliable; and, a witness neither wholly reliable nor wholly unreliable. Learned Senior Advocate points out that for a witness of the third category, it is held that statement of such a witness cannot be accepted until and unless there is corroborative evidence to support the statement of such a witness, which falls in the third category. According to Shri Surendra Singh – learned Senior Advocate, if the statement of PW/3 Bhupendra Singh is analysed in the backdrop of this requirement of law then for accepting the statement of this witness, falling in the third category, in the absence of there being any corroborative evidence to support the case as put forth by him, it is argued that the statement of Bhupendra Singh cannot be accepted.

9. Further reliance is placed with regard to the same principle as laid down by the Supreme Court in the case of *Balaka Singh and others Vs. State of Punjab,* AIR 1975 SC 1962, and in the case of *Lakshmi Singh Vs. State of Bihar*, AIR 1976 SC 2263. Accordingly, in the backdrop of the aforesaid submissions, learned Senior Advocate submits that the case of the prosecution has not been proved with regard to appellant Surendra Kumar, therefore, it is a fit case where the appeal should be allowed and he should be acquitted of the offence.

10. Smt. D.K. Bohrey, learned Panel Lawyer appearing for the State, refuted the aforesaid and placed reliance on the statement of PW/3 Bhupendra Singh with regard to the incident as narrated by him in the Court and also invited my attention to the statement of PW/6 Nitiraj Singh and PW/10 Rajendra Singh to say that there is corroborative evidence in the form of statement given by these two witnesses to say that the knife injury found on the person of Dhirendra Parihar was caused by the present appellant Surendra Kumar. Accordingly, Smt. Bohrey argues that from the material available on record, the allegation against the present appellant Surendra Kumar is proved. She further invites my attention to the statement of PW/1 Dr. B.B.S. Chouhan, who had submitted the post-mortem report – Ex.P/1 and the injuries sustained by deceased Dhirendra Parihar, and argued that death was caused by the solitary injury sustained in his stomach and as this injury is found to be caused by appellant Surendra Kumar, it is submitted by learned Panel Lawyer that the learned trial court has not committed any error.

11. Learned Panel Lawyer further argued that the trial court having analysed the statement of the witnesses meticulously and having convicted the appellant

only for an offence under section 304(II) IPC, no infirmity is there in the judgment of the trial court nor is it erroneous warranting reconsideration now in this appeal.

12. I have heard learned counsel for the parties at length and perused the records.

13. It is a fact that in all eight persons, including the present appellant, were put to trial in S.T. No.86/95 in the Court of Additional Sessions Judge, Khurai District Sagar for offence under sections 147, 148, 302/149 and 307/149 of the Indian Penal Code. All the seven co-accused persons namely Dharmendra Khaddar, Surendra Khaddar, Sandeep Khaddar, Manoj Singhai, Sandeep, Mahesh @ Rajjan Rokhadia and Alok have been acquitted of all the charges levelled against them. Even though the present appellant Surendra Kumar has been acquitted of all the charges originally levelled under sections 147, 148, 302/149 and 307/149 IPC, but finding him to have caused an injury by use of a knife on the stomach of deceased Dhirendra Parihar, he has been convicted under section 304(II) IPC.

14. That being so, the only consideration to be made now by this Court in this appeal is with regard to the conviction of the present appellant Surendra Kumar for the offence as indicated hereinabove, as the State has not filed any appeal against the acquittal of the other co-accused persons nor is any appeal filed by the State with regard to acquittal of this appellant for offence under sections 302/149 or 307/149 of the IPC.

15. The story of the prosecution as has been narrated hereinabove would show that the incident took place on 6th November, 1994 at about 10 P. M. in the night near Jhanda Chowk Khurai, Distt. Sagar.

16. PW-3 Bhupendra Singh and Dhirendra Parihar are said to have been attacked by 8 accused persons with knife and lathi and both are said to have sustained various injuries as are testified by PW-1 Dr. D. B. S. Chouhan and PW-2 Dr. Anand Singhai.

17. As far as Dhirendra Parihar is concerned, he succumbed to the injury and died and in the post-mortem report Annexure P-6, death is said to have been caused because of a knife injury caused on his stomach. All the other co-accused persons have been acquitted of all the charges and it is only the present appellant Surendra Kumar who is convicted for an offence U/s 304

(Part II) on the basis of the statement of the injured eye-witness Bhupendra Singh PW-3.

18. There are 5 eye-witnesses to the incident, they are PW-3 Bhupendra, the injured witness and 4 independent witnesses namely PW-4 Ikram Khan, PW-5 Karan Singh, PW-6 Nitiraj Singh and PW-10 Rajendra Singh. All these witnesses speak about the accused persons having attacked both Dhirendra Parihar and Bhupendra Singh with lathis and knife. The learned trial Court has found that except the part statement of Bhupendra Singh PW-3, the complete statement of all other four eye-witnesses are not creditworthy and they cannot be relied upon and, therefore, the learned trial Court has rejected the statement of all the four eye-witnesses.

19. From paragraph 20 onwards, the learned trial Court discusses the statement of PW-4 Ikram Khan and in para 26 records a finding that there are serious infirmities and discrepancies in the statement of this witness and the manner in which he has narrated the story goes to show that his statement is not at all reliable. Having held so, in para 26, the learned Court refuses to rely on the statement of PW-4 and completely rejects it. There is no challenge to this part of the trial Court's finding. Thereafter, in para 27, the learned trial Court discusses the statement of PW-5 Karan Singh upto para 40 and in para 40 after analyzing the statement of this witness again finds serious defects in his statement and finally, comes to the conclusion that the statement of this witness is unreliable in as much as it is doubtful as to if PW-5 Karan Singh even witnessed the incident as narrated by him. Accordingly, witnessing of the incident by PW-5 Karan Singh itself being doubtful, his evidence is rejected by the learned trial Court. Again there is no challenge to this finding of the trial Court.

20. Thereafter, from paragraph 42 onwards, the learned trial Court discusses the statement of PW-6 Nitiraj Singh and in para 49 records a finding to say that his statement is not reliable. It is held that this witness seems to have not seen the incident at all and, therefore, his statement cannot be accepted. Finally, from paragraph 50 onwards, the learned Court below discusses the statement of PW-10 Rajendra Singh and in paragraph 59 records a conclusion to say that the statement of this witness is not at all credit-worthy. He is speaking a lie and his evidence cannot be accepted and his presence on the spot is doubtful. The learned trial Court has rejected the evidence of the 4 eye-witnesses by saying that they are not credit-worthy and even their presence at

the spot is doubtful.

21. That being so, the only eye-witness to the incident is Bhupendra Singh PW-3. With regard to this witness, the learned trial Court says that his statement is unreliable with regard to implication of 7 co-accused persons and cannot be believed. However, the learned Court below on the basis of the solitary statement of this witness Bhupendra PW-3 had convicted the appellant. Accordingly, it is seen that the conviction of the present appellant Surendra Kumar is based only on the basis of statement of PW-3 Bhupendra.

22. If the statement of Bhupendra Singh – PW/3 recorded in the Court is taken note of, it is seen that he speaks about the appellant Surendra Kumar assaulting Dhirendra Parihar with a knife on his stomach. From paragraph 3 onwards, he narrates as to how he has sustained the injury due to assaulting by the other co-accused persons and also says that the appellant Surendra Kumar caused a single knife injury on the stomach of deceased Dhirendra Parihar. However, if the F. I. R. lodged by Bhupendra Ex. P/6 is taken note of, it is seen that as per the story in the F. I. R. the incident took place at 10.00 P. M. in the night, Bhupendra was brought to the hospital around 10:30 P. M. and immediately on 10:30 P. M. when he was undergoing treatment, the FIR was registered based on his statement and thereafter his case diary statement Ex. D/1 was also recorded. In both these i.e. Ex. P/6 and Ex. D/1, he does not say that the appellant Surendra Kumar caused the injury on the person of Dhirendra Parihar with a knife on his stomach.

23. In his cross-examination, when specific questions were put to his about this omission to say about the appellant Surendra causing injury with a knife, in the FIR - Ex.P/6 and Ex.D/2, he only says that he does not know as to how this omission has occurred. It is a case where there are serious discrepancy in the statement of Bhupendra PW-3 as recorded in the case diary statement Ex. D/1 and the FIR - Ex.P/6. In the statement under Section 161 available in the case diary i.e. Ex. D/1 and the FIR - Ex.P/6, a different story is narrated than the one given in the Court. That apart, Bhupendra also says that when he was undergoing treatment in the hospital after the incident in the night, the Tehsildar came to the hospital and a dying declaration was also recorded (Ex. D/2) and in the dying declaration Ex. D/2, he says that the incident took place sometimes back in the night, at Jhanda Chowk when he and Dhirendra Parihar were assaulted by the accused persons. He gave the names of the accused persons but he makes a specific statement in the portion marked 'P to P' of

this statement Ex. D/2 to say that the co-accused Dharmendra assaulted deceased Dhirendra Parihar with a knife. Accordingly, in Ex. D-2 Bhupendra comes out with a case that the injury on the person of Dhirendra Parihar is caused by the co-accused Dharmendra, he does not say in this statement (D/2) that the knife injury on the stomach of the deceased is caused by the appellant Surendra. It is surprising to note that the trial Court for the purpose of considering the commission of offence by the 7 co-accused persons holds the statement of Bhupendra as unreliable and discards it completely but when it comes to conviction of the present appellant for the offence in question, only on the basis of statement of Bhupendra Singh (PW/3), the conviction is recorded. Even though, Bhupendra Singh PW-3 narrates the story implicating the applicant in the statement recorded in the Court but the statement recorded in the Court is different from the one put forth by him initially while recording the FIR - Ex.P/6. Similarly in the case diary statement Ex. D/1 and in the dying declaration Ex. D/2 also a different story is narrated than the one as stated in the Court, this vital discrepancy in the statement of this witness clearly shows that his statement is wholly unreliable.

24. If the statement of Bhupendra Singh PW-3 is left out, it would be seen that there is no evidence and material available against the present appellant Surendra Kumar with regard to commission of the offence. Even though, a knife is said to have been seized from the appellant but as already indicated hereinabove and based on the findings of the learned trial Court in paragraph 104 of the aforesaid judgment, it is clear that the existence of human blood in the knife is not proved. That being the position based on the evidence available on record, at this stage, the legal question as argued by Shri Surendra Singh, learned Senior Advocate, may be considered.

25. As far back as in the year 1957, the Hon'ble Supreme Court in the case of *Vadivelu Thevar Vs. The State of Madras*, AIR 1957 SC 614, has laid down the principle to say that based on the nature of evidence given by a person, the same can be categorized into three; namely witnesses who are wholly reliable, witnesses who are wholly unreliable and lastly neither wholly reliable nor wholly unreliable. As far as the first two categories of witnesses are concerned, the Hon'ble Supreme Court says that there is no difficulty in accepting or rejecting the statement of such witnesses. If the statement of witnesses is wholly reliable, it can be accepted but if the statement of witnesses is wholly unreliable, it can be rejected but the problem arises when the statement of witnesses falls in the third category i.e. partly reliable and partly unreliable.

It is said that the statement of this category of witness can be accepted only if any corroborative evidence is available. The matter is again considered by the Supreme Court in the case of *Vithal Pundalik Zendge Vs. State of Maharashtra* AIR 2009 SC 1110 and in para 8, the matter has been so dealt with by the Supreme Court in the following manner :-

> "8. In *Vadivelu Thevar vs. The State of Madras* (AIR 1957 SC 614) this Court had gone into this controversy and divided the nature of witnesses in three categories, namely, wholly reliable, wholly unreliable and lastly, neither wholly reliable nor wholly unreliable. In the case of the first two categories this Court said that they pose little difficulty but in the case of the third category of witnesses, corroboration would be required. The relevant portion is quoted as under:
>
> '11. ... Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:
>
> (1) Wholly reliable.
>
> (2) Wholly unreliable.
>
> (3) Neither wholly reliable nor wholly unreliable.
>
> 12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way - it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subordination. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses.'

(Emphasis supplied)

26. Again in the case of *Jagdish Prasad and others Vs. State of MP*, AIR 1994 SC 1251, it has been held by the Supreme Court as a general rule that for the purpose of convicting a person, testimony of a single witness is sufficient enough provided it is reliable. It is said that there is no legal impediment in accepting the statement of a single witness for the purpose of convicting a person. The Court is not much concerned with the quantity of the evidence but it is the quality of the evidence and its material which is of importance for proving or disproving a fact. Thereafter, the Supreme Court indicates that if the testimony of a single witness is credit-worthy and trust-worthy, it can be relied upon for convicting a person. Similar principles have been considered and laid down in the case of *Lakshmi Singh and others Vs. State of Bihar* AIR 1976 SC 2263 also. In the case of *Balaka Singh & others Vs. State of Punjab* AIR 1975 SC 1962, it has been held by the Supreme Court after following the principles laid in the case of *Zwinglee Ariel* (supra) that in a criminal case while analyzing the statement of the witness, the Court should make an attempt to separate the grain from the chaff, the truth from the false-hood, this could only be possible when the truth is separable from the false-hood but when the grain cannot be separated from the chaff and the truth cannot be separated from the false-hood, then the statement of the witness should not be relied upon. The matter has been so dealt with by the Supreme Court in paragraph 8:-

> "8. It is true that, as laid down by this Court in *Zwinglee Ariel v. State of Madhya Pradesh* AIR 1954 SC 15, and other cases which have, followed that case, the Court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply."

27. If the facts of the present case and the credit-worthiness of the

statement of Bhupendra PW-3 is analyzed in the backdrop of the principle as discussed hereinabove, it is clear that the statement of Bhupendra Singh PW-3 has been treated by the learned trial Court to be partly credit-worthy that is for the purpose of convicting the present appellant and partly uncredit-worthy in as much as the learned trial Court has not believed the statement and has acquitted the seven co-accused persons.

28. That being so, the statement of Bhupendra PW-3 falls in the third category as laid down by the Supreme Court in the case of *Vithal Pundalik Zendge* (supra) and if that be so, then by relying on such a statement which is partly credit-worthy and partly uncredit-worthy, there should be corroborative evidence. Now, the only form of corroborative evidence available is seizure of the knife from the appellant and the non-existence of human blood on the same. In this case, even though a knife has been seized from the person of the appellant but from the documents available on record Ex. P-27 and the analysis of the same from paragraph 104 onwards, it is seen that the examination of the knife for the purpose of commission of offence or the existence of human blood is not established. Infact, there is no corroborative evidence to support the statement of Bhupendra, once the statement of the other four eye-witnesses are discarded.

29. If the statement of PW/3 Bhupendra Singh is analysed in the backdrop of the principle laid down in the case of *Zwinglee Ariel* (supra), it would be seen that part of his statement is found to be false so far as it pertains to the role assigned to seven co-accused with regard to the incident. Now, if the statement with regard to involvement of the appellant in the incident is analysed in the back drop of the statement of PW/3 Bhupendra Singh, particularly in the matter of discrepancy and difference in the story put forth in the Court and earlier in the FIR, the dying declaration and the case diary statement, it is very difficult for this Court to separate the truth from the falsehood with regard to the statement of this witness and record a finding. The statement of this witness in its totality cannot be accepted and it is not possible for this Court to separate the statement and place it into different compartments for the purpose of finding out as to which part is correct and which part is false. As such, it is very dangerous to rely on the statement of such a witness and convict the appellant.

30. That apart, if the entire story of the prosecution is considered, it is seen that 8 persons were prosecuted with regard to occurrence of the same

incident. Five eye-witnesses were available. The statement of four eye-witnesses is found to be untrustworthy and rejected. The statement of fifth eye-witness is believed in part. It is believed for convicting one accused i.e. the appellant herein, that also for a lesser and it is rejected in the case of seven co-accused and they were acquitted of all the offences.

31. It is a case where the same evidence, which is found untrustworthy for convicting seven accused persons is found to be creditworthy for convicting one person. This in the considered view of this Court is unsustainable.

32. Accordingly, this appeal is allowed. The conviction of the appellant for offence under section 304 (II), of the Indian Penal Code, and sentence of rigorous imprisonment for 7 years is set aside. He is acquitted of the charges. His bail bond be released and his sureties discharged. The appellant be set free, if not required in any other matter.

33. With the aforesaid, the appeal stands allowed.

Appeal allowed.

I.L.R. [2015] M.P., 1554
APPELLATE CRIMINAL
Before Mr. Justice Rajendra Menon
Cr.A. No. 609/1996 (Jabalpur) decided on 3 March, 2015

PRAMOD KUMAR JAIN @ PRADIP KUMAR JAIN ...Appellant
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Sections 100, 304 Part II - Culpable homicide not amounting to murder - Right of private defence **- Various persons were playing Holi and were meeting with each other - Deceased along with his friends came on a scooter and started drinking liquor and dancing - Appellant also came there and started meeting with persons by shaking hands and hugging - Some arguments and discussion took place between the deceased and appellant - While this was going on, deceased took out a bottle and started assaulting appellant - Appellant took out a knife and assaulted deceased on his left thigh - Deceased ultimately succumbed to the injuries - Held - For Right of private defence there must be no more harm inflicted than is necessary - In the present**

case, a solitary injury was caused on the left thigh - There was a reasonable apprehension of danger to the body as deceased had taken out a broken bottle and assaulted the appellant on his head and as the appellant exercised his right of private defence only after deceased started assaulting the appellant - Appellant cannot be said to have been exceeded his right of private defence - Appellant acquitted - Appeal allowed. (Para 9)

दण्ड संहिता (1860 का 45), धाराऐं 100, 304 भाग II – हत्या की कोटि में न आने वाला आपराधिक मानव वध – प्राइवेट प्रतिरक्षा का अधिकार – विभिन्न व्यक्ति होली खेल रहे थे और एक दूसरे से मिल रहे थे – मृतक अपने मित्रों के साथ स्कूटर पर आया और मदिरा पी कर नाचने लगा – अपीलार्थी भी वहां आया और लोगों से हाथ मिलाकर और गले लगाकर मिलने लगा – मृतक और अपीलार्थी के बीच कुछ बहस एवं वाद विवाद हुआ – जब यह चल रहा था तब मृतक ने एक बोतल निकाली और अपीलार्थी पर हमला शुरू किया – अपीलार्थी ने चाकू निकाला और मृतक की बायीं जांघ पर प्रहार किया – अंततः क्षतियों से मृतक की मृत्यु हुई – अभिनिर्धारित – प्राइवेट प्रतिरक्षा के अधिकार हेतु पहुंचाई गई अपहानि आवश्यकता से अधिक नहीं होनी चाहिए – वर्तमान प्रकरण में एकमात्र चोट बांयी जांघ पर कारित की गई – शरीर को खतरे की युक्तियुक्त आशंका थी क्योंकि मृतक ने टूटी हुई बोतल निकाली थी और अपीलार्थी के सिर पर हमला किया था और चूंकि अपीलार्थी ने अपने प्राइवेट प्रतिरक्षा के अधिकार का प्रयोग केवल मृतक द्वारा अपीलार्थी पर हमला करने के पश्चात् किया था – यह नहीं कहा जा सकता कि अपीलार्थी प्राइवेट प्रतिरक्षा के अपने अधिकार से परे गया था – अपीलार्थी दोषमुक्त – अपील मंजूर।

Cases referred :

1973 MPLJ page 122, AIR 1997 SC 3907, AIR 1971 SC 1208.

S.C. Datt with *Siddarth Datt,* for the appellant.
S.K. Shrivastava, P.L. for the respondent/State.

JUDGMENT

RAJENDRA MENON, J. :- This is a appellant's appeal under section 374(2) of the Code of Criminal Procedure calling in question his conviction for an offence punishable under section 304 Part-II of IPC and sentencing him to undergo 5 years R.I. and fine of Rs.2000, in default further imprisonment of one year.

2. The case of the prosecution is that on 03-03-1988, a day when holy

festival was being celebrated, at about 11.30 in the night in a place near Satish Dairy under Police Station Kotwali Jabalpur, various persons were playing holy and meeting with each other. In the process of celebration, certain persons were also dancing and certain persons present in the area were in the state of intoxicated condition. At that point of time, one scooter came to the place of the incident which was being driven by Dheeru Mishra , deceased Vivek Dixit and his brother Vinay Bhushan also came in the same scooter. Vivek and Vinay were sitting as a pillion rider and Dheeru Mishra was driving the scooter. It is said that Vivek was carrying liquor bottle in his hand. All the three persons came to the place started drinking liquor and dancing. At that point of time in another vehicle namely a Bajaj Scooter, accused Pramod Kumar Jain came to the spot, he was a friend of Dhirendra Mishra. After reaching the spot, it is said that accused Pramod Kumar Jain started meeting with persons by shaking of hands and hugging, at that point of time, it is reported that some arguments and discussion took place between deceased Vivek Dixit and accused Pramod Kumar Jain and while this was going on, all of a sudden Vivek took out a bottle and started assaulting accused Pramod Kumar Jain. It is said that at that point of time, Pramod Kumar Jain took out a knife and assaulted deceased Vivek on his left thigh. Thereafter Vikek started bleedings heavily. He was taken to hospital where he ultimately succumbed to the injury.

3. Investigation was done, challan was filed and Pramod Kumar Jain and one another person namely Vinay, brother of deceased Vivek were prosecuted for offence under section 307 of IPC in two different trials Even though in trial conducted Vinay has been acquitted of all the charges, the present appellant Pramod Kumar Jain has been convicted for offence under section 304-II of IPC finding him to have exceeded his right of private defence.

4. In fact on the allegation that Vinay brother of deceased Vivek Dixit had assaulted appellant Pramod Kumar Jain with knife and thereby committed an offence, he was also put to trial but as he has been acquitted, Criminal Revision No.526/96 has been filed separately seeking conviction of respondent Vinay. This revision is being heard and decided alongwith this appeal also today.

5. Shri S.C. Datt, learned Senior Counsel for the appellant took me through the provision of Section 100 of IPC, the ingredients necessary to constitute a case of private defence and the circumstances by which it can be said to have exceeded to the extent of causing death. First and second proviso

of this provision is relevant to argue that in the facts and circumstances of the case, it cannot be said that the appellant exceeded his right of private defence, as a result his conviction is said to be unsustainable. Referring to the statement of PW-7 Dr. A.K.Yadu who examined the deceased, the injuries sustained by him, the statements of eye witnesses PW-8 Dhirendra Kumar Mishra, PW-10 Gudda alias Satish Satish Yadav and PW-15 Jitendra Yadav, Shri Datt, learned Senior counsel for the appellant tired to demonstrate that it was the deceased who was more aggressive and caused injuries on the person of the accused , as a result the solitary injury caused by the present appellant cannot be termed as use of his right of private defence in excess so as to warrant his conviction. Further taking me through the statement of DW-3 Dr.J.K.Tandon, the Doctor from Medical College, Jabalpur, who examined the present appellant Pramod Kumar, the injuries sustained by present appellant which is said to be grievous, Shri Datt tried to emphasize that in the facts and circumstances of the case, it cannot be said that the appellant exceeded his right of private defence . Placing reliance on the judgment rendered by a Bench of this court in the case of *Saitua and another Vs. State of Madhya Pradesh*, 1973 MPLJ, page122 and the judgment of the Supreme Court in the case of *Smt. Rukma and others Vs. Jala and others* , AIR 1997 SC 3907, Shri Datt, learned senior counsel emphasized that in the facts and circumstances of the case, it cannot be said that the appellant has exceeded his right of private defence. On the contrary the circumstances do show that the appellant has exercised his right of private defence in accordance to the requirement of law and therefore, it was a fit case where he should be acquitted.

6. Shri S.K.Shrivastave, learned Pandel (sic:Panel) Lawyer appearing for the State took me through the reasonings given by the learned trial court in its judgment from para 7 onwards particularly the observations made from para 26 to emphasize that as the right of private defence is found to be use in excess of the requirement , the conviction of the appellant is unsustainable. It was emphasized by Shri S.K.Shrivastava that a knife 10 cm. long and 4x1 cm wide was used by the appellant and he caused a grievous injury in a vital portion i.e. left thigh of deceased Vivek, causing rupture in his femoral vein, which resulted in over loss of the blood, it is argued by Shri Shri S.K.Shrivastava that in the facts and circumstances of the case a reasonable approach adopted by the trial court does not call for any interference.

7. I have considered the rival contentions made and have also gone

through the material available on record. From the medical evidence available on record particularly the statement of PW-7 Dr.A.K.Yadu, it is seen that deceased Vivek had sustained only one injury on his left thigh, it was in front of his thigh about 8 cm towards the left and 7 cm below the femoral vein. The size of injury was 4x1, 1/2x10cm. It is said that because of this injury, the femoral vein of the deceased got ruptured and as a result of which he died. However, in his statement in para-5 this witness makes an important admission to say that there was only one injury on the person of deceased and a prudent man will not have knowledge of the fact that infliction of a knife injury in this area would cause death of a person nor will a common man be aware of the fact that a important vein like 'femoral' exists in this area. Accordingly, from the statement of this witness, it is clear that the deceased has sustained only one injury on his left thigh caused by knife blow given by the appellant. In comparison to the same, if the injury sustained by the present appellant is taken note of, it would be seen that he had sustained 5 injuries. The appellant was examined by DW-3 Dr.J.K.Tandon, Professor of Surgery in the Medical College, Jabalpur, according to this Doctor, he had examined the appellant on 04-03-1988, he was admitted in the hospital upto 09-03-1988 when he was discharged, his medical report Ex.D-8 has been proved by this Doctor. According to this witness, Pramod Kumar Jain had one rupture on his mandible area, there was an injury in the front side, it was a punctured wound , he had one lacerated wound on his left hand, he had one punctured wound on his left region of the chest. According to this Doctor, the appellant had 5 injuries on his person. Now if the manner in which the incident took place is analyzed based on the statements of eye witnesses, the following scenario comes out.

8. PW-8 Dhirendra Kumar Mishra is an eye witness to the incident and according to his statement when all the persons as indicated in the story of prosecution had assembled to celebrate the holy festival and when accused Pramod Kumar Jain and the deceased were having certain discussions and arguments with each other, it is said that all of a sudden deceased Vivek took out a bottle and started assaulting appellant Pramod Kumar Jain on his head. It is said by this witness that after the initial assault was given by deceased Vivek on the person of Pramod Kumar Jain , appellant Pramod Kumar Jain took out a knife which was available with him and caused injury to deceased. Inspite of this deceased Vivek continued to assault appellant Pramod Kumar Jain by giving him 2-3 more blow with the the glass bottle. Similarly PW-10 Gudda alias Satish Yadav, who is also an eye witness gave narration of the

story in the similar fashion as has been made by PW-8 Dhirendra Kumar Mishra, From the statements of these witnesses, it is established that it was Vivek, who initially took out the bottle and assaulted the appellant on his head and thereafter continued to do so, even after he sustained one injury. Similar is the statement of PW-15 Jitendra Yadav, who is also an eye witness. A complete reading of the aforesaid statements goes to show that while all the persons present were celebrating the holy festival, a hot talk and discussion had taken placed between Vivek and Pramod Kumar Jain and all of a sudden Vivek assaulted appellant Pramod Kumar Jain with a glass bottle and caused injuries as indicated by DW-3 Dr.J.K.Tandon and in the process appellant Pramod Kumar Jain had caused one injury on the person of deceased Vivek.

9. If the aforesaid facts and the manner in which the solitary injury was caused by appellant Pramod Kumar Jain on the person of deceased Vivek is analyzed in the backdrop of requirement of Section 100 IPC, it would be seen that Section 100 contemplates that the right of private defence of the body extends, under the restrictions mentioned in the last part of the section, i.e. if the offence which occasions the exercise of the right is of any descriptions enumerated therein, namely:- first such an assault as may be reasonable cause the apprehension that death will otherwise be the consequence of such assault, secondly such an assault as may be reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault. If the manner in which the appellant caused injury on the deceased is analyzed in the backdrop of the aforesaid provisions, it cannot be said that the appellant would have apprehended that the assault may reasonably cause death as a consequence thereof or that it may cause such grievous hurt. It is a case where the deceased seems to be more aggressive and he was person who initiated the assault. The appellant only caused one injury on the person of deceased i.e. by assaulting him on the left thigh. From the statement of PW-7 Dr. A.K.Yadu, it is clear that the injury which was caused by the appellant on the deceased could not be such nature where a normal prudent human would have apprehension that it would cause serious grievous hurt and that would ultimately result in death, It is a case where if totality of the circumstances is taken note of, it would be clear that it was deceased Vivek who was more aggressive, who had assaulted the appellant with the bottle on his head and on other part of the head region whereas the appellant had caused only one injury on his left thigh and it cannot be said that the appellant has exceeded the right of private defence. In the case of *Saitua and another Vs. State of Madhya Pradesh,* 1973 MPLJ 122, the principle of private defence has been explained and if various judgments

with regard to the legal position as detailed from para 21 onward is analyzed it would be seen that the injury inflicted by the appellant in the facts and circumstances of the case cannot be said to be more than one necessary for the purpose to his defence, merely because the injury was caused by the weapon available with him which was of knife or that the injury resulted in death, it can not be said that the appellant has exceeded his right of private defence.. In the case of *Saitua*(supra) a case of *Dominee Vs. state of Kerala* AIR 1971 SC 1208 has been refereed to and it has been held by the Supreme Court in the aforesaid case that the right of private defence rests on three ideas, first, there must be no more harm inflicted than is necessary for the purpose of defence. In the present case only one injury has been caused by the appellant on the left thigh of the deceased , that being so, it cannot be said that the harm caused is more than what is necessary for the purpose of self defence. Secondly, the judgment says that there must be reasonable apprehension of danger to the body from the attempt or threat to commit some offence, In this case deceased Vivek had taken out a broken bottle and assaulted the appellant on his head, that being so there can be a reasonable apprehension in the mind of the appellant about danger to his body from the attempt or threat to commit some offence by Vivek. Finally the judgment las (sic:lays) down a third principle to say that the right does not commence till there is reasonable apprehension. If the statements of three witensses PW-8, PW-10 and P-15 are read in totality, it would be seen that the appellant has exercised his right of private defence only after Vivek started assaulting him with the bottle on his head. That being so, in the present case the facts and circumstances clearly demonstrate all the three ingredients necessary as laid down by the Supreme Court in the case of *Dominee*(supra), so also the principles laid down in the judgment referred to in the case of *Saitua*(supra), accordingly it cannot be said that the appellant has exceeded his right of private defence. The judgment of the trial court and the reasons given by the trial court is to say that the appellant has exceeded his right of private defence as contained in para-30 onwards is clearly unsustainable. In fact learned trial court has convictged (sic:convicted) the appellant on the ground that he has exceeded his right of private defence only on the basis of the size of the knife and the size of the injury caused but while doing so totally ignored the principles of law and the facts of the case which indicates that aggressive attitude of the deceased was result of the appellant acting in the manner done.

10. Taking note of all the facts and circumstances, this court is of the opinion that this is a fit case where it cannot be said that right of private defence has exercised, it cannot be said that the appellant has exceeded his right of private.

defence and therefore, the trial court has committed an error in sentencing the appellant as the appellant has acted correctly in the right of his private defence, therefore, conviction of the appellant cannot be upheld.

11. Accordingly, this appeal is allowed. The conviction of the appellant is set aside. The appellant is on bail his bail bonds are discharged. He be set free, if not required in any other matter.

Appeal allowed.

I.L.R. [2015] M.P., 1561
ARBITRATION CASE
Before Mr. Justice Prakash Shrivastava
Arb. Case No. 6/2011 (Indore) decided on 19 December, 2014

P.D. AGRAWAL INFRASTRUCTURE LTD. ...Applicant
Vs.
M.P. RURAL ROAD DEVELOPMENT AUTHORITY & anr. ...Non-applicants

***Arbitration and Conciliation Act (26 of 1996), Section 11(6) and Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Section 7 - Appointment of Arbitrator* - Application u/s 11(6) of 1996 Act was filed seeking appointment of independent arbitrator - Held - As per Section 7 of the Madhyastham Adhikaran Adhiniyam party to the Works Contract is required to refer the dispute to the Madhyastham Adhikaran - Application filed u/s 11(6) of 1996 Act by the applicant is not maintainable. (Paras 6 & 9)**

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) एवं माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 7 – मध्यस्थ की नियुक्ति – स्वतंत्र मध्यस्थ की नियुक्ति चाहते हुए अधिनियम 1996 की धारा 11(6) के अंतर्गत आवेदन प्रस्तुत किया गया – अभिनिर्धारित – माध्यस्थम् अधिकरण अधिनियम की धारा 7 के अनुसार कार्य संविदा के पक्षकार से माध्यस्थम अधिकरण को विवाद निर्दिष्ट करना अपेक्षित है – आवेदक का अधिनियम 1996 की धारा 11(6) के अंतर्गत प्रस्तुत किया गया आवेदन पोषणीय नहीं।

Cases referred :

(2011) 13 SCC 261, 2012 (II) MPWN 70, AIR 2012 SC 1228, (2008) 7 SCC 487.

Piyush Mathur with *M.S. Dwivedi*, for the applicant.
Prakash Verma, for the non-applicant.

ORDER

PRAKASH SHRIVASTAVA, J. :- This arbitration case under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short "the Act") has been filed for appointment of an independent arbitrator for resolution of dispute between the parties.

2. In brief, the case of the applicant is that he was awarded contract for construction/upgradation of rural roads and Work Orders dated 29.12.2005 and 6.2.2006 were issued and the agreement dated 8.2.2006 was executed. There was delay in execution of the contract, therefore, time was extended on four occasions vide orders dated 27.3.2007, 7.5.2007, 9.8.2007 and 2.1.2008 but the fifth extension was granted on 24.2.2009 by imposing 5% penalty as liquidation charges. The work was completed and the completion certificate was issued on 9.8.2010. The dispute has arisen between the parties on the issue of imposition of penalty as liquidated damages. Applicant had submitted dispute- reference on 11.5.2009 to the Chief Executive Officer which was not decided within the specified time. The applicant, then, addressed its reference/dispute to Secretary to the State Government on 10.11.2009 and the applicant was informed by communication dated 30.3.2010 that there is no provision of appeal. The applicant gave the statutory notice dated 27.7.2010 for appointment of arbitrator, which was replied by the Chief Executive Officer on 6.8.2010 requiring the petitioner to approach the Madhyastham Tribunal, therefore, the applicant has filed the present application.

3. Reply has been filed by the respondents raising the plea that the proper remedy available to the applicant is to approach the Arbitration Tribunal under the M.P. Madhyastham Adhikiran Adhiniyam.

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

5. Clause 24.1 of the agreement provides for dispute redressal system and Clause 25 provides for arbitration. Clauses 24 and 25 read as under :-

"24. Dispute Redress System

24.1 If any dispute or difference of any kind what-so-ever

shall arise in connection with or arising out of this Contract or the execution of Works or maintenance of the Works there under, whether before its commencement or during the progress of Works or after the termination, abandonment or breach of the Contract, it shall, in the first instance, be referred for settlement to competent authority, described along with their powers in the Contract Data, above the rank of the Engineer. The competent authority shall, within a period of forty five days after being requested in writing by the Contractor to do so, convey his decision to the Contractor. Such decision in respect of every matter so referred shall, subject to review as hereinafter provided, be final and binding upon the Contractor. In case the Works is already in progress, the Contractor shall proceed with the execution of the Works, including maintenance there pending receipt of the decision of the competent authority as aforesaid, with due diligence.

25. Arbitration

25.1 Either party will have the right of appeal, against the decision of the competent authority, nominated under Clause 24, to the Madhya Pradesh Arbitration Tribunal constituted under Madhya Pradesh Madhyastham Adhikiran Adhiniyam 1983 provided the amount of claim is more than Rs.50,000/-."

6. In the present case, there is no dispute between the parties that the contract awarded to the applicant was Works Contract. Undisputedly the amount of claim is also more than Rs.50,000/-. Under Section 7 of the M.P. Madhyastham Adhikiran Adhiniyam., 1983 (for short "Madhyastham Adhiniyam") a party to the Works Contract irrespective of the fact; whether the agreement contains an arbitration clause or not, is required to refer the dispute to the Madhyastham Tribunal (Tribunal constituted under the 'Madhyastham Adhiniyam'). The applicant instead of approaching the Madhyastham Tribunal, has filed the present application under Section 11(6) of the Arbitration and Conciliation Act, 1996 since the Supreme Court in the matter of *VA TECH ESCHER WYASS FLOVEL LIMITED Vs. MADHYA PRADESH STATE ELECTRICITY BOARD AND ANOTHER,* reported in (2011) 13 SCC 261 had held that the Madhyastham Act only applies where

there is no arbitration clause, but it stands impliedly repealed by the Arbitration Act 1996 where there is an arbitration clause.

7. The Supreme Court in a subsequent judgment in the matter of *Ravikant Bansal Vs. M.P. Rural Road Development Authority,* reported in 2012(II) MPWN 70 has distinguished its earlier judgment in the matter of *VATECH* (supra) and held that if the arbitration clause itself mentions that the arbitration will be done by the Madhyastham Tribunal, then the arbitration has to be done by the Tribunal.

8. This aspect of the matter has been examined in detail by the Supreme Court in another judgment in the matter of *M.P. Rural Road Development Authority and Another Vs. M/s. L.G. Chaudhary Engineers & Cont.*, reported in AIR 2012 SC 1228, whereby the learned judges of the Supreme Court have held the decision in the matter of *VATECH* (supra) as per incurium since while rendering the decision in *VATECH* (supra), the earlier decision of the coordinate Bench in the matter of *State of M.P. and Another Vs. Anshuman Shukla* [(2008) 7 SCC 487] and the provisions of Section 2(4) of the Arbitration and Conciliation Act, 1996 were not noticed. The Supreme Court has held that the Madhyastham Act would operate in the State of Madhya Pradesh in respect of certain specified types of arbitrations which are covered under the Madhyastham Act of 1983. The difference of opinion between the Hon'ble judges of the Supreme Court in the matter of L.G. Chaudhary (supra) is only on the issue of invoking Section 7 of the Madhyastham Adhiniyam in case of dispute pertaining to termination, cancellation or repudiation of Works Contract, because one of the Hon'ble judge has taken the view that the dispute arising out of cancellation or termination of contract would not fall within the jurisdiction of Madhyastham Tribunal but the said difference of opinion is not relevant for the present matter, since in this case the dispute does not arise out of cancellation or termination of the contract.

9. Hence, keeping in view the judgment of the Supreme Court in the matter of *Ravikant Bansal* (supra) and *L.G. Chaudhary* (supra), I am of the opinion that the application under Section 11(6) filed by the applicant is not maintainable and the proper remedy available to the applicant is to approach the Madhyastham Tribunal under the M.P. Madhyastham Adhikiran Adhiniyam., 1983.

Order accordingly.

I.L.R. [2015] M.P., 1565
CIVIL REVISION
Before Mr. Justice K.K. Trivedi
Civil Rev. No. 771/2004 (Jabalpur) decided on 23 October, 2013

MUNNA KHAN @ ABID ...Applicant
Vs.
SHAHENA BANO ...Non-applicant

***Civil Procedure Code (5 of 1908), Section 115 and Muslim Women (Protection of Rights on Divorce) Act (25 of 1986), Section 3* - Family Court entertained and decided an application filed u/s 3 of the 1986 Act claiming Meher - Same was called in question on the ground of jurisdiction - Held - Family Court was not having the jurisdiction to entertain an application seeking 'Meher' under section 3 of the 1986 Act as the same is not included in the explanation appended to the provisions of Section 7 of the Family Court Act, 1984 - Revision is allowed. (Para 4)**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 115 एवं मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम (1986 का 25), धारा 3 – कुटुम्ब न्यायालय ने अधिनियम 1986 की धारा 3 के अंतर्गत पेश किये गये मेहर के दावे के आवेदन को ग्रहण कर निर्णीत किया – अधिकारिता के आधार पर उक्त को चुनौती दी गई – अभिनिर्धारित – कुटुम्ब न्यायालय के पास अधिनियम की धारा 3 के अंतर्गत मेहर चाहने के आवेदन को ग्रहण करने की अधिकारिता नहीं क्योंकि कुटुम्ब न्यायालय अधिनियम 1984 की धारा 7 के उपबंधों के साथ संलग्न स्पष्टीकरण में यह शामिल नहीं है – पुनरीक्षण मंजूर।

Ishtiyaque Hussain, for the applicant.
A.K. Singh, for the non-applicant.

(Supplied: Paragraph numbers)

ORDER

K.K. TRIVEDI, J. :- This revision is directed against the order dated 24.05.2004, passed in Criminal Case No.71/2003, by Family Court, Rewa.

2. The challenge is on the ground that the Family Court at Rewa was having no jurisdiction to try such an application filed by the respondent in view of the fact that there is no such provision made under Section 7 of the Family Courts Act, 1984 (hereinafter referred to as "1984 Act") and such

applications, if are required to be made under Section 3 of the Muslim Women (Protection of Rights of Divorce) Act, 1986 (hereinafter referred to as "1986 Act") are required to be made before the competent Court having jurisdiction i.e. the Court of Judicial Magistrate. The revision was entertained, notices were issued to the respondent and an interim protection was granted.

3. The record of the Court below indicates that the respondent made an application claiming certain amount of *'Meher'* from the applicant herein, under Section 3 of the 1986 Act. The said Act prescribe making of such an application before the Judicial Magistrate First Class. However, such an application was made before the Family Court at Rewa, which has been entertained and decided by the said Court.

4. The jurisdiction of the Family Court is specifically prescribed under Section 7 of the 1984 Act. It is specifically prescribed in the said section that a Family Court shall have and exercise all the jurisdiction exercisable by any district Court or by any subordinate civil Court under the law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation and be deemed for the purposes of exercising such jurisdiction under such law, to be a district Court or, as the case may be, such subordinate civil Court for the area to which the jurisdiction of the Family Court extends. The explanation contained the categories of the proceedings which are to be taken in the Family Court. A proceedings by divorcee Muslim woman for claim of *'Meher'* is not included in the explanation appended to the provision of Section 7 of the 1984 Act. That being so an application made under Section 3 of the 1986 Act is required to be made only and only before the competent Court as prescribed under the said Act and not before the Family Court. Since the Family Court was having no jurisdiction, the impugned order passed by the Family Court is nonest in the eye of law.

5. Accordingly, the revision is allowed. The order dated 24.05.2004, passed in Criminal Case No.71/2003 by the Family Court, Rewa is hereby set aside. However, the respondent would be at liberty to make appropriate claim before the appropriate Court in accordance to the 1986 Act, which will be decided on its own merit without being influenced by this order passed in this revision.

6. The revision is allowed to the extent indicated herein above. There shall be no orders as to cost.

Revision allowed.

I.L.R. [2015] M.P., 1567
CIVIL REVISION
Before Mr. Justice C.V. Sirpurkar
Civil Rev. No. 123/2014 (Jabalpur) decided on 5 January, 2015

SAROJ ...Applicant
Vs.
INDERCHAND NAHTA & ors. ...Non-applicants

Civil Procedure Code (5 of 1908), Order 7 Rule 3 & 11 - Rejection of Plaint **- Petitioner/defendant filed an application for rejection of plaint on the ground that the public drain which is the subject matter of the suit has not been adequately described in the plaint and mandatory provision of Order 7 Rule 3 has not been complied with - Trial Court after finding that the description of public drain is not proper, directed the plaintiff to incorporate clear averments in the plaint for complying with provisions of Order 7 Rule 3 C.P.C. - Held - It is the duty of the Court to pass a definite and executable decree, in order to attain aforementioned objective, Court may direct the plaintiff to furnish missing particulars with regard to identification of disputed immovable property - Failure to adequately comply with provision of Order 7 Rule 3 of C.P.C., must not, in all cases, lead to automatic rejection of plaint - Revision dismissed.** **(Para 13)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 3 व 11 – वादपत्र को अस्वीकार किया जाना – याची/प्रतिवादी ने वादपत्र को अस्वीकार करने हेतु आवेदन को इस आधार पर प्रस्तुत किया कि सार्वजनिक नाली जोकि वाद की विषय वस्तु है, को वादपत्र में पर्याप्त रूप से वर्णित नहीं किया गया है तथा आदेश 7 नियम 3 के आज्ञापक उपबंध का अनुपालन नहीं हुआ है – विचारण न्यायालय ने इस निष्कर्ष के पश्चात् कि सार्वजनिक नाली का विवरण उचित नहीं है, वादी को सि.प्र. सं. के आदेश 7 नियम 3 के उपबंधों का अनुपालन करने के लिये वादपत्र में स्पष्ट प्रकथनों को सम्मिलित करने हेतु निदेशित किया – अभिनिर्धारित – यह न्यायालय का कर्त्तव्य है कि सुस्पष्ट एवं निष्पादित किये जाने योग्य डिक्री पारित करे, उपरोक्त उद्देश्य की प्राप्ति के लिये न्यायालय वादी को विवादित अचल संपत्ति की पहचान के संबंध में अनुपस्थित विशिष्टियों को प्रस्तुत करने के लिये निदेशित कर सकता है – सि.प्र.सं. के आदेश 7 नियम 3 के उपबंध का पर्याप्त रूप से अनुपालन करने में विफलता से सभी प्रकरणों में वादपत्र को स्वतः अस्वीकार नहीं किया जाना चाहिये – पुनरीक्षण खारिज।

Cases referred :

(2003) 1 SCC 557, 1996 (1) MPWL 72, 2005 (2) MPLJ 10, 2000 (1) MPLJ 79, AIR 2003 SC 643, AIR 1976 Patna 2.

Jagtendra Prasad, for the applicant.

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 02.09.2013 passed by First Civil Judge Class-I, Balaghat in civil suit No. 61-A/2013, whereby the learned Court below has rejected the application filed by the revision petitioner/ defendant under Order 7 Rule 11 of the Code of Civil Procedure praying for rejection of plaint on the ground that the drain in question has not been adequately described in the plaint and mandatory provision of Order 7 Rule 3 of the Code of Civil Procedure has not been complied with.

2. The facts giving rise to this civil revision may briefly be stated thus: The respondent/plaintiff had purchase his house by registered sale deed on 29.07.1978 and has been in possession thereof as owner, ever since. The revision petitioner/defendant has purchased the plot of land to south adjacent to plaintiff's plot, by a registered sale deed on 04.07.2006. There is a common, public drain ("nali") located between the two plots of land. Waste water has been flowing uninterrupted through this drain for past many years. The petitioners/defendants have started construction on their plot and have constructed columns on both the sides of the drain. They have filled up this drain with garbage in order to encroach upon it. As a result, the drain has been obstructed and waste water is spilling onto the plaintiff's plot. It had been pleaded by the respondent that if the obstruction is not removed, the drain water would accumulate over the entire plot of the respondent, rendering it uninhabitable; therefore, it has been prayed that permanent mandatory injunction against the petitioners be issued directing them to remove encroachment made by them across and in the drain and keep it free from any obstruction. The evidence of the plaintiff/respondent has been recorded in the suit.

3. The petitioner/defendant filed an application under Order 7 Rule 11 of the Code of Civil Procedure submitting that the respondent/plaintiff has not filed any authorized map drawn to scale, of the alleged encroachment along

with the plaint. The plaintiff has also not filed any demarcation report prepared by the authorities. He has also not filed any map or positive evidence to demonstrate as to exactly on which portion of land of which survey number, have the defendants encroached upon. As such, the plaintiff has not complied with the mandatory provision of Rule 3 of Order 7; therefore, plaint is liable to be rejected under Order 7 Rule 11 of the Code of Civil Procedure.

4. The learned trial Court by impugned order dated 02.09.2013 has observed that the plaintiff has shown the common drain existing on the disputed site in the map filed with the plaint, in red ink, marked as A, B, C and D but has not disclosed the exact area of encroachment, identifying the property by means of records relating to land settlement or survey. Nor has plaintiff shown the boundaries of the disputed land in all four directions. It has further been observed that merely marking encroached area of disputed drain by ABC and D in red ink in the map appended to the plaint, is not sufficient to accurately identify the property. As such, plaintiff has not complied with mandatory provision of Rule 3 of Order 7. However, learned trial Court held that mere non-compliance with provisions of Order 7 Rule 3 in the plaint, should not necessarily lead to rejection of the plaint; therefore, the plaintiff was directed to incorporate clear averments in the plaint for complying with the provisions of Rule 3 of Order 7, failing which further orders might be passed in the suit.

The impugned order has been assailed in the civil revision on the grounds that learned trial Court had exceeded its jurisdiction by directing the plaintiff to incorporate the averments in the plaint to accurately identify the land said to have been encroached. It has been submitted that learned trial Court has failed to take into account and properly appreciate the authorities cited in this regard on behalf of the defendant. In fact the authorities cited by the petitioner/defendant have not even been mentioned in the impugned order. Learned trial Court over stepped its jurisdiction by directing the plaintiff to fill up the lacuna existing in the plaint. It has also been contended that non-compliance with Rule 3 of Order 7 ought to have resulted in automatic rejection of the plaint under Order 7 Rule 11 of the Code of Civil Procedure; therefore, it has been prayed that the impugned order be set aside and the suit of the plaintiff/respondent be dismissed with costs throughout.

5. Having heard the learned counsel for the petitioner and perused the record, following questions arises for consideration in this civil revision:-

(i) Whether inadequate compliance with Order 7 Rule 3 of the Code of Civil Procedure should result in automatic rejection of the plaint under Order 7 Rule 11 thereof?

(ii) Whether the trial Court, in a fit case, has inherent jurisdiction to direct the plaintiff to incorporate the averments in the plaint sufficient to accurately identify the encroached immovable property?

(iii) Rule 3 of Order 7 reads as follows: -

3. ***Where the subject-matter of the suit is immovable property.*** - *where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in record of settlement or survey, the plaint shall specify such boundaries or numbers.*

6. Learned counsel for the applicant has invited attention of the Court to the law laid down by the Supreme Court in the case of *Saleem Bhai Vs. State of Maharashtra,* (2003) 1 SCC 557. He has also cited the case of *Vasudev Nehla Vs. Chandrashekhar Sabtode,* 1996 (1) MPWL 72, *Shyamlal and Others Vs. Phuliabai and Others,* 2005 (2) MPLJ 10 and *Lakshman Singh Vs. Jagannath,* 2000 (1) MPLJ 79.

7. *Vasudev's case* (supra) is a short note and has not been presented before the Court. In the case of *Saleembhai* (supra), it has been observed that for the purpose of deciding an application under Order 7 Rule 11 Clause (a) (d), the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at this stage; therefore, a direction to file written statement without deciding application under Order 7 Rule 11, is a procedural irregularity touching exercise of jurisdiction by the High Court. There is no dispute in this case on the aforesaid point; hence, the principle laid down in the case of *Saleembhai* does not help the applicant in any manner.

8. So far as law laid down by the High Court in the case of *Shyamlal* (supra) and *Lakshman Singh* (supra) are concerned it was laid down in second appeals and in the circumstances of those cases, the Court held that where immovable property was not adequately identified, no executable decree can be passed and hence the decrees passed by the Courts below were set aside

and the suits were dismissed for non-compliance with Rule 3 of Order 7.

9. However, be it noted that the circumstances in the case at hand are different inasmuch as civil suit is still pending before the trial Court and the question before this Court is that whether learned trial Court was within its jurisdiction to direct incorporation of averments in the plaint sufficient to correctly identify the encroached land, in order to pass an executable decree?

10. It is evident from the perusal of the impugned order that learned trial Court has unambiguously held that the encroached portion of the drain situated between the properties of plaintiff on one hand and defendant on the other, has not been properly identified in the plaint. In other words if necessary amendments in the plaint are not incorporated, it would not be possible to pass an executable decree for removal of encroachment and obstruction to the drain. Thus, the only question that arises for consideration is, what were the option open before the trial Court in such a situation. Should it have straightaway rejected the plaint or it was open to it to direct rectification of defect in the pleadings? It is pertinent to note that failure to provide sufficient particulars in the plaint for accurate identification of portion of land or drain in dispute, is not a defect related to merits of the case. It might merely be an inadvertent mistake not giving rise to any right in favour of the opposite party. In this situation, there is no reason as to why it should not be allowed to be rectified, particularly where the suit is still in the stage of evidence.

11. In this regard following observations made by the Supreme Court in the case of *Pratibha Singh v. Shanti Devi Prasad,* AIR 2003 SUPREME COURT 643 may profitably be referred to: In paragraph no.15 of the said judgment it has further been observed that:

"Having perused the revenue survey map of the entire area of R.S. Plot No. 595 and having seen the maps annexed with the registered sale deeds of the defendant-judgment-debtors we are clearly of the opinion that the Sub-Plots 595/I and 595/II were not capable of being identified merely by boundaries nor by numbers as sub-plot numbers do not appear in records of settlement or survey. The plaintiffs ought to have filed map of the suit property annexed with the plaint. If the plaintiffs committed an error the defendants should have objected to promptly. The default or carelessness of the parties does not absolve the trial Court of its obligation which should have, while scrutinizing the plaint, pointed out the omission on the part of the plaintiffs and should have insisted on a map of the

immovable property forming subject-matter of the suit being filed."

It is clear from aforesaid observations that the trial Court does not only have power but also has a duty to get the disputed immovable property properly identified in the plaint.

It has further been observed in the judgment that:

When the suit as to immovable property has been decreed and the property is not definitely identified, the defect in the Court record caused by overlooking of provisions contained in O. 7, R. 3 and O. 20, R. 3 of the C.P.C. is capable of being cured. After all a successful plaintiff should not be deprived of the fruits of decree. Resort can be had to S. 152 or S. 47 of the C.P.C. depending on the facts and circumstances of each case which of the two provisions would be more appropriate, just and convenient to invoke. Being an inadvertent error, not affecting the merits of the case, it may be corrected under S. 152 of the C.P.C. by the Court which passed the decree by supplying the omission. Alternatively, the exact description of decretal property may be ascertained by the Executing Court as a question relating to execution, discharge or satisfaction of decree within the meaning of S. 47, C.P.C. A decree of a competent Court should not, as far as practicable, be allowed to be defeated on account of an accidental slip or omission

As may be seen from the aforesaid passage, the Court may ascertain the exact description of decretal property, even at the stage of execution.

12. In the case of *Nagar Khan Vs. Gopi Ram,* AIR 1976 Patna 2 also, Patna High Court has observed that it is the duty of the Court to pass only such decree which can be executed under the machinery by Order 21 of the Code of Civil Procedure with all precision and without any confusion or embarrassment either to the executing Court or to any other person. However, on this ground a suit cannot be dismissed, nor a plaint rejected, and in such cases the Court may call upon the plaintiffs to furnish more particulars, even to the extent of allowing the amendment of the plaint.

13. In the light of aforesaid pronouncements, in the opinion of this Court, it is the duty of every Court to pass clear definite and executable decree. In order to attain the aforementioned objective, Court may direct the plaintiff to furnish missing particulars with regard to identification of disputed immovable property by way of amendment in the plaint or by calling for maps etc. The

failure to adequately comply with the provision of order 7 rule 3, must not, in all cases, lead to automatic rejection of plaint.

14. Thus, in the opinion of this Court, learned trial Court can neither be said to have exercise jurisdiction not vested in it by law nor can it be said to have acted in the exercise of its jurisdiction illegally or with material irregularity; therefore, no interference with the impugned order is warranted.

15. Consequently, the impugned order is upheld and this civil revision is dismissed in limine.

Revision dismissed.

I.L.R. [2015] M.P., 1573
CRIMINAL REVISION
Before Mr. Justice Sushil Kumar Gupta
Cr. Rev. No. 660/2014 (Gwalior) decided on 19 November, 2014

RAGHUVEER & ors. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 228 - Framing of charges - **Held that, at the time of framing of charge the material and quality of evidence cannot be gone into - All that has to be looked into is whether there was existence of prima facie case. (Para 8)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 228 – आरोप विरचित किये जाना – अभिनिर्धारित किया गया कि आरोप विरचित करते समय सामग्री एवं साक्ष्य की गुणवत्ता को विचार में नहीं लिया जा सकता – केवल यह देखा जाना चाहिये कि क्या प्रथम दृष्ट्या प्रकरण विद्यमान था।

B. Penal Code (45 of 1860), Section 306 - Abetment of suicide - **Deceased went to field to prepare cattle food, the applicants came there, abused her - When sister of deceased objected to it, obscene words were used - Both the sisters returned home and closed the door - Applicants followed them and kicked the door - Deceased thereafter committed suicide - Trial Court rightly framed charge u/s 306/34 of IPC. (Paras 2,3 & 9)**

ख. दण्ड संहिता (1860 का 45), धारा 306 – आत्महत्या का दुष्प्रेरण – मृतिका खेत में पशुओं का चारा तैयार करने के लिये गई थी, आवेदकगण वहां

आये, उसे अपशब्द कहे – जब मृतिका की बहन ने इसका विरोध किया, अश्लील शब्दों का प्रयोग किया गया – दोनों बहनें घर लौटी और दरवाजा बंद किया – आवेदकगण ने उनका पीछा किया और दरवाजे को ठोकर मारी – तत्पश्चात् मृतिका ने आत्महत्या कारित की – विचारण न्यायालय ने उचित रूप से भा.दं.सं. की धारा 306/34 के अंतर्गत आरोप विरचित किया।

Cases referred :

(2011) 3 SCC 626, (2010) 1 SCC 750, AIR (2002) SC 1998, 2002 (2) MPLJ 322, (2000) 1 SCC 138, (1996) 4 SCC 659.

Rajeev Upadhyay, for the applicants.
Chitra Saxena, P.L. for the non-applicant/State.

ORDER

S.K. Gupta, J. :- By this Criminal Revision under Section 397 read with 401 of IPC petitioners have challenged the order dated 25.07.2014 passed by learned Additional Sessions Judge, Pichhore District Shivpuri in S.T.No.117/2014 whereby the charges of offence under Sections 306/34 and 323 (three counts) of IPC were framed against the petitioners.

2. The case of the prosecution is that, on dated 13.01.2014 at about 10 AM when deceased Ramdevi went to field for preparing cattle food at that time petitioners/accused and co-accused Phool Singh were abused her. On hearing outcry, Muneshbai (sister of the deceased) reached on the spot and objected not to abuse. Petitioners/accused and co-accused started abusing to Muneshbai also and told obscene words "यह भैंस भी जवान हो गई है यह भी फरेगी इसे फराना है" to deceased Ramdevi to outrage her modesty. When both sisters were returning to their home then petitioners/accused and co-accused followed them. When they entered into the house and closed the door then petitioners/accused and co-accused kicked the door. After this incident, on the act of using the obscene words by the petitioners against her, deceased had committed suicide by consuming some poisonous substance. After registration of Marg and enquiry the police registered the case against the petitioners/accused and co-accused person under Section 306 read with 34 of IPC. After completion of the investigation challan has been filed.

3. Learned Additional Sessions Judge, Pichhore District Shivpuri has framed the charge under Section 306 read with Section 34 and 323 (three counts) of IPC by order dated 25.07.2014.

4. Learned counsel for the petitioners submitted that ingredient for the offence under Section 306/34 of IPC is not made out and the deceased was herself responsible for committing suicide. He further submitted that petitioners/ accused have falsely been implicated by the prosecution. It is also argued that there is no iota of evidence present on record to implicate the petitioners. He also submitted that learned Court below has not considered the ingredients of Section 107 of IPC and there is no instigation or abatement to commit suicide, therefore, the offence under Section 306 of IPC is not made out. He further submitted that only allegation is that when the quarrel was taken place they were present on the spot and they abused to Muneshbai. Hence, he prays that the charges framed against the petitioners be set aside and discharged from the charges.

5. Learned counsel for the petitioners relied upon the citation of *M. Mohan Vs. State Represented by the Deputy Superintendent of Police* reported in (2011) 3 SCC 626, *Gangula Mohan Reddy Vs. State of Andhra Pradesh* reported in (2010) 1 SCC 750 and *Sanju @ Sanjay Singh Sengar Vs. State of M.P.* reported in AIR (2002) SC1998.

6. Per contra, learned Panel Lawyer for the respondent has fully supported the impugned order of Lower Court and submitted that the witnesses Muneshbai (sister of the deceased) and her husband Vakil @ Ramraja have categorically stated about the occurrence. Muneshbai was not only present on the spot but eye witness of the incident, in whose presence, petitioners/accused and other co-accused used obscene words to outrage the modesty of the deceased and also slapped to Muneshbai. Moreover, learned PL also submitted that there is ample evidence on record against the petitioners/accused. Hence, she prays for dismissal of the petition.

7. Considering the above submissions, it appears that there is prima facie evidence available on record by the statement of Muneshbai as well as Vakil @ Ramraja for framing the charges against the petitioners/ accused under Section 306/34 of IPC. The order of framing the charge is based on sound appreciation of material available on record and cogent reasons. No infirmity can be found with the impugned order of the Trial Court for framing the aforesaid charge the petition is premature and it would not be proper to stifle the prosecution at this stage.

8. Moreover, it is trite to state that at the time of framing of charge the material and quality of evidence cannot be gone into. This Court is well aware

about the limitation of the court while exercising the revisional jurisdiction, which does not empower to intervene at an interlocutory stage. Moreover, all that has to be looked into at the time of framing of the charge is that whether there was existence of *prima facie* case. So also it would be profitable to rely on *State of M.P. Vs. S.B. Johari and others* reported in 2002 (2) MPLJ 322, whereby the Court held thus:

> It is settled law that at the stage of framing the charge, the Court has to *prima facie* consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a *prima facie* case is made out for proceeding further, then a charge has to be framed.

Umar Abdul Sakoor Sorathia Vs. Intelligence Officer, Narcotic Control Bureau reported in (2000) 1 SCC 138 whereby the Court held thus:

> It is well settled that at the stage of framing charge the Court is not expected to go deep into the probative value of the materials on record. If on the basis of materials on record that Court could come to the conclusion that the accused would have committed the offence the Court is obliged to frame the charge and proceed to the trial.

State of Maharashtra and others Vs. Som Nath Thapa and others reported in (1996) 4 SCC 659 whereby the Court held thus:

> The aforesaid shows that if on the basis of materials on record, a Court could come to the conclusion that commission of the offence is probable consequence, a case for framing of charge exists. To put it differently, if the Court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage.

Therefore, no infirmity, irregularity or illegality are found in the impugned

order passed by learned Additional Sessions Judge.

10. Accordingly, this revision petition is devoid of merits and hereby dismissed at this stage. It is made clear that nothing observed herein above shall prejudice the case of the petitioners/accused persons at the trial.

Revision dismissed.

I.L.R. [2015] M.P., 1577
INCOME TAX APPEAL

Before Mr. Justice Rajendra Menon & Ms. Justice Vandana Kasrekar

I.T.A. No. 77/2010 (Jabalpur) decided on 28 November, 2014

AALOK KHANNA ...Appellant

Vs.

COMMISSIONER OF INCOME-TAX, BHOPAL ...Respondent

Income Tax Act (43 of 1961), Sections 68 & 260-A - Appeal - Genuineness of the gift-deed - **Two persons are not related to the assessee - They are residing in two different countries - No business relation or any other blood relation between the assessee and donors - No witnesses are there to identify the execution of the "gift-deed" in accordance with law - Transaction to be a "gift" is doubtful and genuineness of the transaction in the form of a "gift" is not established - Transaction is not genuine - No substantial question of law arises for consideration - Appeal dismissed. (Paras 8, 10, 15 & 16)**

आयकर अधिनियम (1961 का 43), धाराऐं 68 एवं 260–ए – अपील – दान विलेख की वास्तविकता – दो व्यक्ति निर्धारिती से संबंधित नहीं – वे दो भिन्न देशों में निवासरत हैं – निर्धारिती एवं दाताओं के बीच कोई कारोबारी या कोई अन्य रक्त संबंध नहीं – विधि के अनुसरण में "दान विलेख" का निष्पादन किया जाना परिलक्षित करने के लिये कोई साक्षीगण नहीं – संव्यवहार का "दान" होना संदेहास्पद है और "दान" के रूप में संव्यवहार की वास्तविकता स्थापित नहीं की गई – संव्यवहार वास्तविक नहीं – विचारण के लिये विधि का कोई सारवान प्रश्न उत्पन्न नहीं होता – अपील खारिज।

Cases referred :

(2007) 210 CTR (SC) 20, (2008) 215 CTR (Del) 272, (1994) 121 CTR (Cal) 20.

A.K. Shrivastava and *Abhijeet Shrivastava*, for the appellant.

Sanjay Lal, for the respondent/revenue.

ORDER

The Order of the Court was delivered by : RAJENDRA MENON, J. :- This is assessee's appeal under section 260-A of the Income Tax Act, calling in question tenability of an order dated 5.1.2010, passed by the Income Tax Appellate Tribunal, Bench Indore in the matter of disallowing a sum of Rs.1,52,67,939/- , which the assessee claims has to be exempted from payment of tax on the ground that it is a 'gift' received by the assessee from non -resident Indians

2. The only question of law proposed in this appeal is as to whether the order of the Tribunal upholding the aforesaid addition made by the Assessing Officer (hereinafter referred to as 'AO') under section 68 of the Income Tax Act, is a perverse and arbitrary finding

3. Facts which are necessary for deciding the issue in question goes to show that for the financial year 2001- 2002, the assessee filed a return of income showing the income received from M/s Narmada Enterprises- a proprietary concern, owned by the assessee. The assessee showed deriving income from salary, house, business and shares. It was stated that the assessee's proprietary concern is engaged in manufacturing tin containers, tin components and also carries on C&F Agencies. During the year in question, the assessee declared a gross profit of Rs. 1,07,23,593/- against a turnover of Rs. 27,43,13,559/-. During the course of assessment, the AO found that the assessee had received 'gifts' from two non-resident Indians namely–one Shri M. Musa from Dubai; and, another Shri V. Balan from Singapore. The amount of 'gift' received from these persons were Rs.66,88,753/- and Rs.85,79,186/-respectively. The AO requested the assessee to prove the genuineness of the said 'gift'. Even though the assessee proved the genuineness of the donors so also the credit-worthiness of the donor, but as the genuineness of the 'gift' was not established, the AO disallowed the entry and subjected the 'gift' for payment of tax. On an appeal being filed, the Commissioner (Appeals) allowed the same and held that once the assessee has proved the genuineness of the donor and the credit - worthiness of the transaction, it was not necessary to do anything more and, therefore, deleted the entry. Aggrieved thereof, an appeal was filed before the Appellate Tribunal by the Revenue and the Tribunal having interfered into the matter, doubting the genuineness of the

'gift' made and having made the addition, this appeal by the assessee under section 260-A of the Act.

4. Shri A.K. Shrivastava, learned Senior Advocate appearing for the appellants, took us through the orders passed by the AO, the Commissioner (Appeals) and the Appellate Tribunal and tried to emphasize that once the genuineness of the donors and the credit-worthiness of the donor is established by the assessee, then the requirement of section 68 of the Income Tax Act is fulfilled and the AO and the Appellate Tribunal committed error in interfering with the matter.

5. Per contra Shri Sanjay Lal, learned counsel for the respondent/ department, took us through the findings recorded by the Appellate Tribunal, from paragraph 8 onwards, wherein the Appellate Tribunal has doubted the genuineness of the 'gift' made and tried to argue that as the 'gift' is not found to be made genuinely by the donors and as the 'gift' deed itself was not proved in accordance to the requirement of law, the reasonable justification given by the Tribunal for doubting the genuineness of the 'gift' itself is a reasonable finding and it should not be interfered with.

6. In support of his contention, Shri Sanjay Lal invited out (sic:our) attention to a judgment of the Supreme Court in the case of *Commissioner of Income Tax Vs. P. Mohanakala and others*, (2007) 210 CTR (SC) 20, relied upon by the Tribunal and two other judgments– one of the Delhi High Court, in the case of *Rajeev Tandon Vs. Assistant Commissioner of Income Tax,* (2008) 215 CTR (Del) 272; and, another judgment of the Calcutta High Court in the case of *Commissioner of Income Tax Vs. Precision Finance Private Limited,* (1994) 121 CTR (Cal) 20, in support of his contention.

7. We have heard learned counsel for the parties at length and we have gone through the orders passed by all the three authorities namely–the Assessing Officer, the Commissioner (Appeals); and, the Income Tax Appellate Tribunal.

8. It is found by the AO and the Appellate Tribunal that even though the identity of the creditor is established, the credit worthiness of the creditor is also established, but the genuineness of the transaction in the form of a 'gift' is not established.

9. The Commissioner (Appeals), however, found that once the identity

of the creditor is established and the credit worthiness of the creditor is also established then nothing further remains to be done and the 'gift' should have been accepted.

10. We have considered the rival contentions and we find on going through various judgments with regard to the ingredients necessary for making out the requirement of Section 68, that three things are necessary. One– the identity of the creditor; secondly–the genuineness of the transaction; and, thirdly– credit worthiness of the creditor. If all these three are present together then the provision of Section 68 may become applicable and the assessee may get benefit of the said provision. In the said case, the AO and the Income Tax Appellate Tribunal have found that even though identity of the creditors and his credit- worthiness are established, but the genuineness of the transaction is doubtful. The Income Tax Appellate Tribunal has gone into details with regard to genuineness of the transaction and from paragraph 8 onwards, has discussed at length as to why the transaction becomes doubtful. The assessee claims to have received 'gift' from two persons, the Tribunal found that these two persons are not related to the assessee. They are residing in two different countries – one in Dubai and the other in Singapore. There is no business relation or any other blood - relation between the assessee and these donors and there is no explanation as to why these two unknown persons, who are infact strangers, would give such a huge amount to the assessee as 'gift'. It is also found by the Tribunal that it is not in dispute that a simple 'gift-deed' on a plain paper has been placed on record and under normal circumstances such a 'gift - deed' can be accepted. However, on going through the 'gift-deed', the Tribunal found that no witnesses are there to identify the execution of the 'gift - deed' in accordance with law. The execution of the 'gift - deed' is not established in accordance to the requirement of law as may be applicable in the countries where the 'gift - deed' is executed. That apart, it is also found by the Tribunal on going through the Bankers Certificate in respect of these two persons that originally in the transaction there is no mention of the word 'gift', but thereafter the word 'gift' has been added by way of interpolation. From paragraph 8, the learned Tribunal has given various reasons for doubting the very nature of the transaction to be a 'gift' and consequently holding that the transaction to be a 'gift' is doubtful, and for so holding reliance is placed on the judgment of the Supreme Court in the case of *Mohanakala* (supra).

11. We have meticulously gone through the findings recorded in paragraph 8, which runs to more than three pages, and we find that the Tribunal has

subjectively analysed the nature of the transaction and has recorded a positive finding to the effect that the transaction being a 'gift' is doubtful. This finding recorded by the Tribunal is based on due appreciation of the material and evidence available on record and if this is a finding of fact, duly arrived at by two authorities namely – the AO and the Appellate Tribunal, it can be interfered with us only if it is wholly perverse or it can be said that a question of law arises only if we can classify the said finding as a perverse and arbitrary finding unsupported by any material or evidence available on record and a prudent man's approach has not been adopted by the Tribunal.

12. In this regard, if the principle of law laid down by the Supreme Court in the case of *Mohanakala* (supra) is taken note of, it is found that from paragraphs 19 to 22, the Supreme Court has analysed somewhat similar situation and found that if the findings of the Tribunal are based on the material available on record and is not based on conjectures and surmises nor are they imaginary, then a reasonable finding arrived at, based on proper appreciation of facts and material in the surrounding circumstances, which create a doubt with regard to the nature of transaction itself. This is a finding which cannot be termed as a perverse finding and on such a finding no question of law, much less a substantial question of law, arises for consideration by the High Court in a proceeding under section 260 - A of the Act.

13. If the findings recorded by the Tribunal as detailed in paragraph 8 is analysed in the backdrop of the requirement of law, as laid down by the Supreme Court in the case of *Mohanakala* (supra), we have no doubt that it is a reasonable finding based on the totality of the facts and circumstances and the material available, and on the same we find no substantial question of law arising for consideration.

14. That apart, the Delhi High Court in the case of *Rajeev Tandon* (supra), considered a transaction identical in nature and relied upon the judgment of the Supreme Court in the case of *Mohanakala* (supra), to hold that if the two donors, who are involved in the said case, had absolutely no connection with the assessee and if they had made the 'gift' which is found to be doubtful in nature, then the only assumption that can be drawn is that money has been transferred to help the assessee and not as a 'gift'. It has been held that such a transaction by a stranger by way of 'gift' would not normally be made and if such a transaction is found to be unnatural, the taxing authorities are entitled to look into the surrounding circumstances and hold that the transaction is not

genuine. The principle laid down by the Delhi High Court in the case of *Rajeev Tandon* (supra) also supports the aforesaid finding arrived at by the Appellate Tribunal.

15. We have already held hereinabove that for the purpose of applying the provisions of Section 68 of the Income Tax Act, apart from there being a proper identity of the creditor and his credit- worthiness, the genuineness of the transaction should also be established. As in the present case, genuineness of the transaction is not established, we see no error in the order passed by the Assessing Officer and the Income Tax Appellate Tribunal, in rejecting the claim of the appellant. This is a case where the Income Tax Appellate Tribunal has given cogent reasons for disbelieving the transaction and for holding that the transaction does not amount to a 'gift' and for doing so, as all attending circumstances have been taken note of and it is a reasonable finding . As such, no substantial question of law arises for consideration now in the proceedings.

16. Accordingly, finding no ground to interfere, the appeal stands dismissed.

Appeal dismissed.

I.L.R. [2015] M.P., 1582

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Jarat Kumar Jain

M.Cr.C. No. 8936/2011 (Indore) decided on 19 November, 2014

RAJENDRA SINGH ...Applicant

Vs.

RAGHVENDRA SINGH ...Non-applicant

***Penal Code (45 of 1860), Sections 166, 500, 504 & 506 - Complaint* - Complaint filed by the applicant was dismissed by Trial Judge after enquiry as there was no ground to proceed against non-applicant - Order of Trial Judge was also affirmed by Session Judge in revision - Same is called in question - Held - Actual words uttered by the non-applicant are missing in the complaint and also in the statement of the applicant - Complainant simply said that some insulting words were spoken by the non-applicant - Non-applicant being Collector was hearing the grievance of the public and during that proceeding he got annoyed, threw the papers and used some rude words - This is a trivial issue and will not be punishable under IPC - No illegality in the order - Petition is dismissed. (Paras 7 to 9)**

दण्ड संहिता (1860 का 45), धाराऐं 166, 500, 504 व 506 – शिकायत – आवेदक द्वारा प्रस्तुत की गयी शिकायत को विचारण न्यायाधीश द्वारा जांच के पश्चात् खारिज किया गया क्योंकि अनावेदक के विरूद्ध कार्यवाही के लिये आधार नहीं था – विचारण न्यायाधीश के आदेश की पुष्टि सत्र न्यायाधीश द्वारा भी पुनरीक्षण में की गई – उक्त पर प्रश्न उठाया गया है – अभिनिर्धारित – अनावेदक द्वारा उच्चारित वास्तविक शब्द शिकायत और आवेदक के कथन से भी लापता है – शिकायतकर्ता ने साधारण रूप से कहा है कि अनावेदक द्वारा कुछ अपमानजनक शब्द कहे गये – अनावेदक, कलेक्टर होने के नाते जनता की शिकायत की सुनवाई कर रहा था और उस कार्यवाही के दौरान वे नाराज़ हो गये, दस्तावेज फेंक दिये और कुछ कठोर शब्दों का प्रयोग किया – यह एक मामूली मुद्दा है और भा.दं.सं. के अंतर्गत दण्डनीय नहीं होगा – आदेश में कोई अवैधता नहीं – याचिका खारिज।

Cases referred :

(2010) 6 SCC 243, AIR 1983 SC 64, ILR (2008) M.P. Note 49, AIR 1966 SC 1773.

R.D. Sonwane, for the applicant.

ORDER

J.K. JAIN, J. :- This petition has been filed under section 482 Cr.P.C. against the order dated 16.09.2011 passed by Sessions Judge, Indore in Cr.Rev.No.601/2011 whereby the order passed by JMFC, Indore in Cr.case No.0/10 on 9.05.2011 was affirmed.

2. Brief facts of the case are that on 2.11.2010, Non-applicant, Collector was hearing the grievances of public in a "Jansunwai" Meeting. At that time the Applicant/complaint (sic:complainant) made his grievance in respect of non delivery of possession of land by the Tahsildar as he had purchased the land in public auction and deposited the auction price. During hearing the grievance of Applicant, the Non-applicant in the presence of many officers and people, threw the papers of the Applicant and Spoke insulting words to the Applicant. Applicant is a social worker and has a good reputation in the society therefore he filed a complaint against the Non-applicant for the offence under sections 166, 504, 506 and 500 IPC. Learned JMFC after enquiry dismissed the complaint u/s 203 Cr.P.C. as there is no ground to proceed against the Non-applicant. The Applicant preferred a revision before the Sessions Judge, Indore. Learned Sessions Judge vide order dated 16.09.2011 dismissed the revision and while affirming the order observed that without the sanction u/s 197 Cr.P.C., Non-applicant cannot be prosecuted. Being

aggrieved with this order the applicant has filed this petition u/s 482 Cr.P.C.

3. Learned counsel for Applicant submits that there is ample evidence that Non-applicant has intentionally harmed the reputation of the Applicant, thus there is sufficient ground for taking cognizance for an offence u/s 500 of IPC. But learned courts below have considered the probable defence of the Non-applicant, which cannot be considered at the stage of taking cognizance. For this purpose he relied upon the judgment of Hon. Apex Court in the matter of *Jeffrey J.Diermeir Vs. State of West Bengal and another,* (2010) 6 SCC 243.

4. Learned counsel for applicant further submits that at the stage of taking cognizance it was not required for the Sessions Judge to consider as to whether for prosecution sanction u/s 197 Cr.P.C. is necessary. Even otherwise also the offence committed by the Non-applicant has no nexsus with his official duty, therefore Non-applicant cannot get protection u/s 197 Cr.P.C.. He relied upon the judgment of Hon. Apex Court in the case of *B.S.Sambhu Vs. T.S.Krishnaswamy,* A.I.R 1983 SC 64.

5. After hearing learned counsel for the applicant, I have gone though (sic:through) the record.

6. For examination of facts of this case it would be useful to refer the relevant portion of the statement of the Applicant recorded under Section 200 Cr.P.C. which reads as under :-

> "इस पर कलेक्टर श्री राघवेन्द्र सिंह भडक गये और अभद्र भाषा का प्रयोग करतें हुए मेरे हाथ से दस्तावेज छीनकर पैरों के पास पटक दिये और मुझे हाथ से बाहर निकलने का आदेश करते हुए कहा कि आप को कब्जा नही मिलेगा जब मैने इसका कारण पूछा कि मैने विधि अनुसार सारी प्रक्रिया पूरी की तो मुझे कब्जा क्यो नही मिलेगा तो कलेक्टर राघवेन्द्र सिंह ने पुनः अपशब्दों का प्रयोग करते हुए कहा कि तुझ पर इतने मुकदमें लगाउंगा कि कब्जा लेना भूल जायेगा। मुझे धौंस देते हुए ओर धमकी देते हुए बाहर जाने को कहा।
>
> जब मे बाहर निकल रहा था तो वहा पर उपस्थित मिडिया कर्मी मेरे पास आये और मुझसे पूछने लगे कि क्या मामला है जब में उन्हे अपनी पीडा बता रहा था तब कलेक्टर राघवेन्द्र सिंह पुनः अपनी कुर्सी से उठ कर आये ओर धक्का देते हुए ओर उनके अधिनस्थ भी धक्का देकर धमकाते हुए अभद्र एवं अपमानजनक भाषा का प्रयोग करते हुए मुझे जनसुनवाई केंप से बाहर कर दिया। उस समय केंप मे तमाम गणमान्य नागरिक प्रशासन के अधिकारी और पत्रकार वर्ग उपस्थित थे।
>
> इस घटना से मुझे गहरा मानसिक आघात लगा और मेरा घोर अपमान

हुआ। और मुझे जो जान से मारने की उन्होंने धमकी दी और जेल मे सडाने की धमकी दी और उलझाने की धमकी दी।"

7. With the aforesaid statement of applicant it is clear that the Applicant has not stated the actual words used by the Non-applicant. But stated that Non-applicant has used some insulting words. In the complaint also the actual words used by the Non-applicant are missing. This court in the case of *Rajesh Nandini Singh Vs. Rakesh Khare*, 2008 I LR Note 49 quashed the complaint as the complaint did not contain the actual words alleged to have been constitute defamation by spoken words.

8. From the above referred statement, the case of complainant comes under section 95 of the IPC as the offence is a trivial character. For this purpose, I would like to refer the judgment of Hon. Apex Court in the case of *Mrs. Veeda Menezes Vs. Yusuf Khan,* AIR 1966 SC 1773 wherein it was held as Under:-

> "The next question is whether, having regard to the circumstances, the harm caused to the appellant and to her servant Robert was so light that no person of ordinary sense and temper would complain of such harm. Section 95 in intended to prevent penalisation of. negligible wrongs or of offences of trivial character. Whether an act which amounts to an offence is trivial would undoubtedly depend upon the nature of the injury, the position of the parties, the knowledge or intention with which the offending act is done, and other related circumstances. There can be no absolute standard or degree of harm which may be regarded as so slight that a person of ordinary sense and temper would not complain of the harm."

9. In the light of the judgment of Hon. Apex Court, I have examined the facts of this case. In this case, Non-applicant being Collector of the District, hearing the grievances of the public and during that proceedings if the Collector annoyed and threw the papers of the Applicant and used some rude words even with the intention to harm the reputation of the Applicant, but that is a trivial issue and will not be punishable under the Indian Penal Code. In such circumstance, I do not find any illegality in the order passed by the courts below, thus the petition u/s 482 Cr.P.C. is hereby dismissed in limine.

Petition dismissed.

I.L.R. [2015] M.P., 1586
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Sushil Kumar Gupta
M.Cr.C. No. 9586/2013 (Gwalior) decided on 20 November, 2014

VIRENDRA NARAYAN MISHRA & anr. ...Applicants
Vs.
ASHOK ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 302 - Permission to conduct prosecution **- There is no provision for bringing on record the legal representative of a party in a criminal proceeding but as the penal offence is committed by a person unless from the nature of it is personal to the complainant is an offence against the society and has to be prosecuted - Section 302 authorizes the Magistrate to permit any person to conduct the prosecution on behalf of the complainant. (Para 7)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 302 – अभियोजन संचालित करने के लिये अनुमति – दाण्डिक कार्यवाही में किसी पक्षकार के विधिक प्रतिनिधि को अभिलेख पर लाये जाने के लिये कोई उपबंध नहीं है किंतु जैसा कि व्यक्ति द्वारा कारित किया गया दण्डात्मक अपराध, जब तक कि उसकी प्रकृति शिकायतकर्ता के लिये व्यक्तिगत न होकर, समाज के विरूद्ध अपराध है और उसे अभियोजित किया जाना चाहिये – धारा 302 मजिस्ट्रेट को किसी व्यक्ति को शिकायतकर्ता की ओर से अभियोजन संचालित करने हेतु अनुमति देने के लिये प्राधिकृत करती है।

Cases referred :

AIR 1981 Cal.P. 118 (D.B.), 1990 (1) Crimes 156.

S.K. Sharma, for the applicants.
Devendra Sharma, for the non-applicant.

ORDER

Sushil Kumar Gupta, J. :- This petition has been preferred by the petitioner under Section 482 of Code of Criminal Procedure, 1973 against the order dated 22.11.2012 passed by the Judicial Magistrate First Class, Chanderi in Criminal Case No.404/2010 and the order dated 4.4.2013 passed by the Additional Sessions Judge Mungaoli, District Ashoknagar in Criminal Revision No.124/2012, by which the order passed by the Judicial Magistrate First Class Chanderi was confirmed.

2. Brief facts of the case are that one Arjun Singh had filed a complaint against the petitioners for commission of offence punishable under section 420 of IPC. During the pendency of the complaint, the complainant Arjun Singh had died. After the death of Arjun Singh, the respondent had filed an application under section 302 of Cr.P.C. for giving permission to conduct the complaint which was allowed by the Judicial Magistrate First Class by the impugned order dated 4.4.2013.

3. Learned counsel for the petitioner submitted that the impugned order is against the law and is liable to be set aside. The respondents cannot be permitted to conduct the case under section 302 of Cr.P.C. He also submitted that the respondent cannot be substituted as a complainant in place of complainant Arjun Singh. He further submitted that though the respondent may be permitted to conduct the prosecution under section 302 of Cr.P.C., but he cannot take place of the complainant and cannot be impleaded as a complainant in the complaint.

4. Learned counsel for the respondent opposed and controverted the submission advanced by the learned counsel for the petitioner and submitted that there is no illegality in allowing the application under section 302 of Cr.P.C. by the learned Magistrate. He also submitted that this second revision is not maintainable under section 397 (3) of Cr.P.C. in the garb of section 482 of Cr.P.C. where the first revision petition No.124/2012 has been dismissed by the Additional Sessions Judge Mungaoli and prays for dismissal of this petition. Section 302 of the Cr.P.C. reads as under:

> "302. Permission to conduct prosecution :-(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of inspector, but no person, other than the Advocate-General, or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:
>
> Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.
>
> (2) Any person conducting the prosecution may do so personally or by a pleader.

5. I have heard learned counsel for the parties and also gone through the impugned orders of both the Courts below.

6. From bare reading of section 302 of the Cr.P.C., it is clear that Magistrate has jurisdiction to permit any person to conduct the case. Learned Magistrate has invoked its jurisdiction by giving the permission to respondents to conduct the case after death of Arjun Singh.

7. It is true that there is no provision for bringing on record the legal representatives of a party in criminal proceedings but as the penal offence committed by a person unless from the nature of it is personal to the complainant is an offence against the society and has to be prosecuted in accordance with the provisions of law till its final disposal. Section 302 of Cr.P.C. authorizes the Magistrate to permit any person to conduct the prosecution on behalf of the complainant. A Division Bench of Calcutta High Court in *Smt. Mayabati Haldar v. Rent Controller, Calcutta* AIR 1981 Cal.P.118 (D.B.) dealt with the matter and held :

> "The view that Section 247 also applies to the non-appearance of the complainant because of his death presupposes by necessary implication that Section 247 is a provision dealing with the consequence of the death of a complainant. In repelling such view, the learned Judge has placed reliance on a decision of the Supreme Court in *Ashwin v. State of Maharashtra* . In that case, the complainant died at the committal stage under Chapter XVIII of the Code, the question that came to be considered by the Supreme Court was whether the complainant's mother could be substituted as the fit and proper complainant as prayed for by her or whether the proceedings has ipso facto come to an end on the death of the complainant. While overruling the contention of the accused that the proceedings terminated on the death of the complainant, the Supreme Court observed: The Criminal Procedure Code provides only for the death of an accused or an appellant but does not expressly provide for the death of complainant. The Code also does not provide for abatement of inquiries and trials although it provides for the abatement of appeals on the death of the accused in appeals under Sections 411A(2) and 417 and on the death of an appellant in all appeals except an

appeal from a sentence of fine. Therefore, what happens on the death of a complainant, in a case started on a complaint has to be inferred generally from the provisions of the Code."

The same view has been taken in the case of *Ashok Kumar Vs.Abdul Latif and others*, 1990 (1) Crimes 156.

8. In view of the aforesaid discussion, in my opinion both the Courts below have not committed any illegality, impropriety or irregularity in passing the impugned orders and there is no scope for any interference by this Court and therefore, this Court has not inclined to interfere in the matter by invoking the inherent powers under section 482 of Cr.P.C.

9. Consequently, this petition under section 482 of Cr.P.C. stands dismissed.

Petition dismissed.

I.L.R. [2015] M.P., 1589

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Sushil Kumar Gupta

M.Cr.C. No. 189/2013 (Gwalior) decided on 21 November, 2014

RAJVEER SINGH ...Applicant

Vs.

STATE OF M.P. & ors. ...Non-applicants

Excise Act, M.P. (2 of 1915), Section 34(2) and Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Quashing of F.I.R. - **Two accused persons were found transporting country-made liquor without valid license - One of the accused made confessional statement that the said liquor was purchased from the shop of applicant - Held - Applicant is not named in FIR - He was not present on the spot - Confessional statement is not admissible - No other evidence against the applicant - FIR and investigation quashed. (Paras 2, 6, 12 & 13)**

उत्पाद–शुल्क अधिनियम, म.प्र. (1915 का 2), धारा 34(2) एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – प्रथम सूचना रिपोर्ट अभिखंडित की जाना – दो अभियुक्त बिना वैध अनुज्ञप्ति के देसी मदिरा का परिवहन करते पाये गये – एक अभियुक्त ने संस्वीकृति कथन किया कि उक्त मदिरा आवेदक की दुकान से क्रय की गई थी – अभिनिर्धारित – प्रथम सूचना रिपोर्ट में आवेदक का नाम नहीं – वह मौके पर उपस्थित नहीं था – संस्वीकृति कथन ग्राह्य नहीं – आवेदक के विरूद्ध

कोई अन्य साक्ष्य नहीं – प्रथम सूचना रिपोर्ट एवं अन्वेषण अभिखंडित।

Cases referred :

ILR (2011) M.P.300, 1994 (II) MPWN 72, 2012 (4) MPHT 116, (2005) 1 SCC 122, AIR 1960 SC 866, 1992 Supp (1) SCC 335.

H.K. Shukla, for the applicant.
R.S. Sharma, P.L. for the respondent no. 1/State.
None, for the respondents no. 2 & 3 though served.

ORDER

SUSHIL KUMAR GUPTA, J. :- The petitioner has filed this petition under Section 482 of the Code of Criminal Procedure, 1973 for quashing the FIR as well as Criminal Case No.1898/2012 in respect of Crime No.39/12 registered at police Station, Rithorakalan, Distt. Morena, for the offence punishable under Section 34(2) of the Excise Act.

2. The brief facts of the case are that ASI Kamlesh Kumar was on patrolling duty. He saw a Maruti Car bearing registration No.J5FF/2751 coming from the side of National Highway. On being given signal to stop the car, the driver of the vehicle did not stop the car and tried to run away. The police chased the car. In front of Teekari the highway was closed. The car dashed from the soil and stopped, then driver of the vehicle fled away and another person who was sitting in the car also tried to run away, but he was caught hold by the police. On asking, he disclosed his name as Balveer @ Balle and the name of driver who ran away as Rishikesh @ Rishi. On being searched the car, 18 boxes of Masala country-made liquor and 5 boxes of plain country-made liquor were found for which there was no valid licence or permit. Thereafter, offence under Section 34(2) of the Excise Act was registered against Balveer @ Balle and Rishikesh @ Rishi. During investigation, driver Rishikesh in his statement under Section 27 of the Evidence Act disclosed that he and co-accused Balveer were carrying the liquor in the car for selling it in their village and the said liquor was purchased from the liquor shop of petitioner Rajveer Yadav and on this disclosure statement petitioner Rajveer Singh was made an accused.

3. Learned counsel for the petitioner submitted that petitioner is not named in the FIR, even he was not present in the car at the time of seizure of the said liquor. Learned counsel further submitted that petitioner has been made accused

only on the basis of disclosure statement of the co-accused under Section 27 of the Evidence Act. He further submitted that there is no evidence available on record against the petitioner except the confessional statement of the co-accused so as to implicate him in this case. It is further submitted that the petitioner has nothing to do with the seized liquor or with the vehicle from which the liquor was seized. The cognizance taken by the police against the petitioner is absolutely illegal. In support of the arguments, learned counsel for the petitioner placed reliance on single Bench decision of this Court in *Ashok Nanda & Anr. Vs. State of M.P. & Anr.*, I.L.R. (2011) M.P.300 and submits that FIR as well as criminal Case No.1898/12 deserves to be quashed.

4. Per contra, learned Panel Lawyer for respondent No.1 opposed the petition as well as the arguments advanced by learned counsel for the petitioner and prayed for dismissal of the petition.

5. I have heard learned counsel for the petitioner and also perused the FIR as well as the documents filed by the prosecution.

6. From the perusal of the FIR, it is evident that present petitioner was not named in the FIR, even he was not present on the spot at the time of seizure of car as well as liquor. Present petitioner has been implicated as an accused only on the basis of disclosure statement of co-accused Rishikesh @ Rishi under Section 27 of the Evidence Act that the liquor was purchased from the liquor shop of the petitioner. It is also clear that the name of present petitioner is not mentioned in the statement of Dharmendra Singh and Head Constable Rajpal Singh who were present at the time of alleged seizure.

7. Except the aforesaid disclosure statement, there is no other evidence available on record which may establish that illegal liquor was belonging to the petitioner. It is also not the case of the prosecution that vehicle in which the illegal liquor was being transported was that of the petitioner. So far as the evidence of memorandum given by the co-accused person under Section 27 of the Evidence Act is concerned, his confessional statement to police which is also hit by Section 25 of the Evidence Act cannot be accepted as a legal evidence against the petitioner in absence of any other incriminating piece of evidence.

8. This Court in *Ashok Nanda* (Supra) para 12 has observed as under :-

> "12. As far as the evidence of memoranda given by the co-accused persons under Section 27 of the Evidence Act is concerned, their confessional statements to police cannot be accepted as legal evidence against petitioners in the absence of any other incriminating piece of evidence. Except the above circumstances, absolutely no other evidence has been collected and produced by the prosecution prima facie to indicate that petitioners hatched conspiracy with other accused persons to commit murder of complainant Rajendra Agal."

9. This Court in *Prakash Singh v. State of M.P.*, 1994(II) MPWN 72 has held as under :-

> "The statement admissible under section 27 of the Evidence Act are the statements which could be used as evidence against the maker and not against any other person. Under section 27 only portions of information given by an accused which are admissible are those which relate distinctly to the facts discovered thereby. Consequently statements by an accused which do not relate to aforesaid facts but involve other accused are inadmissible under Section 27 against the later."

10. This Court in *Raghu Thakur v. State of M.P.*, 2012(4) M.P.H.T. 116 has observed in para 6 as under :-

> "6. A plain reading of Section 27 of Indian Evidence Act indicates that the statement under Section 27 of Indian Evidence Act is an exception to the ban imposed upon the Courts to utilize the confessional statement made under Sections 25 and 27 of Indian Evidence Act, so as to protect a person making disclosure from being falsely implicated by the police in whose custody that person remains at the time of making disclosure. The provision of Section 27 of Indian Evidence Act further indicates that the facts disclosed under Section 27 of Indian Evidence Act can be used only against the person making disclosure and not against any other person. "

11. So far as invoking the powers under Section 482 of Cr.P.C. for quashing

the criminal proceeding is concerned, the Apex Court in the case of *Zandu Pharmaceutial Works Ltd. and others Vs. Mohd. Sharaful Haque and another,* (2005)1 SCC 122, in great detail considered the scope of powers under Section 482 of the Code of Criminal Procedure for quashing the criminal proceeding relying on the earlier decision rendered by the Apex Court in the Case of *R.P. Kapur Vs. State of Punjab -AIR 1960 SC 866 and State of Harayna Vs. Bhajan Lal,* 1992 Supp (1) SCC 335, in which it was held:

> *"9.In R.P. Kapur v. State of Punjab* this Court summarized some categories of cases where inherent power can and should be exercised to quash the proceedings.
>
> (i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;
>
> (ii) where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;
>
> (iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge."

12. In view of the aforesaid and considering the legal position and in view of the fact that no evidence is available against the petitioner except the disclosure statement under Section 27 of the Evidence Act of co-accused Rishikesh @ Rishi, FIR as well as Criminal Case No.1898/2012 in respect of Crime No.39/12 registered at police Station, Rithorakalan, Distt. Morena, for the offence punishable under Section 34(2) of the Excise Act, so far as it relates to the petitioner, deserves to be quashed.

13. Consequently, the petition is allowed and the FIR as well as Criminal Case No.1898/2012 in respect of Crime No.39/12 registered at police Station, Rithorakalan, Distt. Morena, for the offence punishable under Section 34(2) of the Excise Act, so far as it relates to the petitioner, is hereby quashed.

Copy of the order be sent to the trial Court for information and compliance of the order.

Petition allowed.

I.L.R. [2015] M.P., 1594
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Alok Verma
M.Cr.C. No. 799/2014 (Indore) decided on 8 December, 2014

RAJENDRA MUNDRA ...Applicant
Vs.
KAILASH JAIN ...Non-applicant

***Evidence Act (1 of 1872), Section 45 and Negotiable Instruments Act (26 of 1881), Section 138 - Handwriting expert* - Applicant alleged that although the cheque bears his signature however entries were made subsequently by complainant - Matter can be referred to handwriting expert to ascertain the age of entries - Application allowed.**

(Paras 2,6 & 7)

साक्ष्य अधिनियम (1872 का 1), धारा 45 एवं परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – हस्तलेख विशेषज्ञ – आवेदक का अभिकथन है कि यद्यपि चेक पर उसके हस्ताक्षर हैं किन्तु प्रविष्टियां पश्चात्वर्ती रूप से शिकायतकर्ता द्वारा की गई थी – प्रविष्टियों की आयु सुनिश्चित करने के लिये मामला हस्तलेख विशेषज्ञ को निर्दिष्ट किया जा सकता है – आवेदन मंजूर।

Cases referred :

(2009) 14 SCC 677, (2008) 5 SCC 633.

Manohar Dalal, for the applicant.
Nilesh Dave, for the non-applicant.

ORDER

ALOK VERMA, J. :- This application under section 482 of Cr.P.C. is directed against the order passed by the learned Judicial Magistrate First Class in Criminal Complaint Case No.6477/2011 dated 17.12.2013 and order passed by the learned Additional Sessions Judge in Criminal Revision No.06/2014 dated 17.01.2014.

2. The facts relevant for disposal of this application are that the respondent filed a complaint under section 138 Negotiable Instrument Act against the present applicant on the dishonor of two cheques allegedly issued by the present applicant in favour of the respondent for the total sum amounting to Rs.6,00,000/-. At the stage of defence evidence, an application was filed by

the present applicant for examination of the disputed cheques by the handwriting expert and also calling witness Pappu Patodi as defence witness. It is alleged by the present applicant that the respondent was working as an employee in his establishment. As a business practice, blank cheques with signature of the present applicant were given to third party as a security for the amount that due against them. One such cheque was returned by the third party Pappu Patodi S/o Ratan Patodi. The cheque was returned back to the respondent who misused the cheque and had returned his own name and other writing on the cheque and filed the present complaint committing fraud and mischief.

3. The learned Judicial Magistrate by the impugned order dismissed the application on the ground that no question was asked during the cross-examination of the complainant Kailash Jain in respect of writing on the cheques. No suggestion was given to him during cross-examination. The signatures were admitted by the present applicant and nowhere it is mentioned that he wanted to prove that remaining entries on the cheque were filled by somebody else. The Revisional Court in his order dated 17.01.2014 observed that once signature on the cheque is admitted then inference can be drawn that the cheque was issued validly by the person signing the cheque. Even if remaining entries were filled up by some other person the presumption shall be drawn that cheque was issued by the person by whom the cheque was purported to have been signed. If the present applicant wanted to prove that cheque was issued for some other transaction then he could have adduce evidence for this purpose. The learned Revisional Court deserved that the application was filed only to cause delay and, therefore, he dismissed the revision and the order passed by the learned Judicial Magistrate was confirmed.

4. Against this, the present applicant placed reliance on judgment of Hon'ble Supreme Court in *G.Someshwar Rao Vs. Samineni Nageshwar Rao* (2009) 14 SCC 677. It was observed therein by the Hon'ble Apex Court that right of the accused to lead evidence in his defence is not absolute such right has to be used only for furthering the cause of justice but not subverting it. The Hon'ble Court observed that it shows the intention of accused to delay disposal of the matter. However, the Hon'ble Court granted opportunity to examine expert at the cost of the appellant. The second judgment of Hon'ble Supreme Court relied on by the present applicant is *T.Nagappa Vs. Y.R. Muralidhar* (2008) 5 SCC 633. The facts of this case were similar to the facts of the present case. The contention of the appellant in that case was that in the year 1999, he handed over the cheque as security for a hand loan of

Rs.50,000/- and instead of returning the cheque, the person to whom the cheque was handed over as a security misused the cheque by entering a huge amount which was not owned by the appellant to that person. The prayer was to examining the handwriting expert to determine the age of the signature on the cheques as the remaining entries were in different handwritings. The Hon'ble Court observed that in para 12 of the judgment that : -

> 12. However, it is not necessary to have any expert opinion on the question other than the following:
>
> "Whether the writing appearing in the said cheque on the front page is written on the same day and time when the said cheque was signed as 'T. Nagappa' on the front page as well as on the reverse, or in other words, whether the age of the writing on Ext. P-2 on the front page is the same as that of the signature 'T. Nagappa' appearing on the front as well as on the reverse of the cheque, Ext. P-2 ?"

5. For that limited purpose, examination of the cheque was allowed by the Hon'ble Court. As against this the respondent cited the judgment of Hon'ble Punjab and Hariyana High Court in *Darshan Lal Vs. Arjun Singh,* in which the examination of the cheque by the handwriting expert was not found necessary.

6. Reverting back to the present case, here also the case of the present applicant is that the writing on the cheque is different then that of his own. According to him, the remaining entries on the cheque were filled subsequently and in this case also the age of the signature and age of the remaining entries are crucial to decide whether the averments by the present applicant are true or false. This apart the main objection of the respondent was that in the reply of the notice given by the present applicant such plea was taken that the other entries on the cheque were filled by the respondent. However, going through the averments in para 2 and 3 of the reply which is filed as Annexure A/4 with the present application, it is clear that according to the present applicant the cheques were blank when they were signed by the present applicant and the remaining entries were filled subsequently in a different handwriting allegedly by the respondent.

7. Taking all the facts and circumstances of the case into consideration, the present application deserves to be allowed and is accordingly allowed.

The impugned orders are set aside. It is directed that the cheque may be sent for examination by the handwriting expert at the cost of the present applicant to answer the query whether the writing appear in the said cheque on the front page is written on the same day and time when the said cheque was signed on the front page, in other words whether the age of the writing on the cheque on the front page is same as of the signature of the present applicant. Also the applicant is allowed to examine the said person Pappu Patodi S/o Ratan Patodi as defence witness.

8. With this direction and observation, this application is allowed.

Application allowed.

I.L.R. [2015] M.P., 1597

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Alok Verma

M.Cr.C. No. 8062/2014 (Indore) decided on 12 December, 2014

CHARAL SINGH (DR.) ...Applicant

Vs.

DR. SANJAY GOYAL ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 451 & 457 & Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, (57 of 1994), Section 30 - **Application of ad-interim custody of Sonography machine, seized under Act 1994 - Held - On undertaking that machine would not be used in violation of provisions and rules of Act, 1994 - On supurdnama of Rs. 5,00,000/- and prior intimation to Collector/appropriate authority - Machine may be handed over. (Paras 2 & 5)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 451 व 457 एवं गर्भधारण पूर्व और प्रसव पूर्व निदान तकनीक (लिंग चयन का प्रतिषेध) अधिनियम, (1994 का 57), धारा 30 – अधिनियम 1994 के अंतर्गत जब्त की गई सोनोग्राफी मशीन की अंतरिम अभिरक्षा का आवेदन – अभिनिर्धारित – इस वचनबंध पर कि मशीन का उपयोग, अधिनियम 1994 के उपबंध और नियमों के उल्लंघन में नहीं किया जायेगा – रू. 5,00,000/– के सुपुर्दनामे पर एवं कलेक्टर/समुचित प्राधिकारी को पूर्व सूचना से – मशीन को सुपुर्द किया जा सकता है।

K.C. Raikwar, for the applicant.

B.L. Yadav, for the non-applicant.

ORDER

ALOK VERMA, J. :- This application under Section 482 Cr.P.C. is directed against the order passed by the learned Chief Judicial Magistrate, Ratlam in Criminal Case No.2270/2014 dated 01.07.2014 and the order passed by First Additional Sessions Judge in Criminal Revision No.137/2014 dated 27.09.2014.

2. The necessary facts are that the present applicant is running an Ultra Sound Sonography Center in the name and style of 'Gyan Sono Center' at Ratlam. On 01.05.2014, a team constituted by the District Collector and the appropriate authority under Pre-Conception & Pre-Natal Diagnostic Act, 1994 (hereinafter referred to as P.C. & P.N.D.T. Act) made an inspection in the Ultra Sound Sonography Center of the applicant and seized one sonography machine. It was alleged that the machine was purchased by the center and an intimation was given on 19.04.2010 to the appropriate authority. However, for installation and number of machine was not intimated and that is a violation of rule 13 of Pre- Conception & Pre-Natal Diagnostic Rules (hereinafter referred to as 'the Rules') and punishable under section 23 of P.C. & P.N.D.T. Act. The applicant filed an application under section 451 r/w section 30 of P.C. & P.N.D.T. Act before the learned Chief Judicial Magistrate. The application was dismissed by the Chief Judicial Magistrate on the ground that the machine was subject matter of evidence. The case would be disposed of quickly and, therefore, there is no need to hand over ad-interim custody of the machine to the present applicant. Against this order, revision was filed by the present applicant. It was decided by First Additional Sessions Judge, Ratlam. In its order, the learned Sessions Judge observed that the machine was not a subject matter of a complaint filed by the appropriate authority under section 23 of the Act of P.C. & P.N.D.T. Act and the machine was also not listed as one of the documents in the complaint filed by the appropriate authority. On such a premise, the learned Additional Sessions Judge observed that provision of sections 451 and 457 of Cr.P.C. are not applicable in this case and as such, the Magistrate had no jurisdiction to grant ad-interim custody of the machine.

3. I have gone through the various documents and the complaint filed by the appropriate authority before the learned Chief Judicial Magistrate, Ratlam. It is apparent that not intimating the installation and number of

machine by the present applicant is violation of rule 13 of the Rules and as such punishable under section 23. It is however, true that in the list of documents the seizure memo of the machine is not listed, however, such a fault on the part of the complainant would not take away the jurisdiction vested in the Magistrate under sections 451 and 457 of Cr.P.C. The machine is an electronic equipment which requires continues maintenance, if kept locked and unattended, the value of the machine may deteriorate. If, in view of the learned Chief Judicial Magistrate, some evidence is to be extracted from the memory chip of the machine, same can be done immediately. The print out may be taken with help of experts and thereafter, the machine may be handed over to the applicant. After fulfilling the formalities, as provided by the act, use of ultra sound sonography machine is not prohibited, only it is controlled by the provisions of the Act and the Rules.

4. Accordingly, I find that the learned Magistrate and the Revisional Court erred while dismissing the application filed by the present applicant under sections 451 and 457 of Cr.P.C.

5. In this view of the matter, the impugned order passed by the Chief Judicial Magistrate in Criminal Case No.2270/2014 dated 01.07.2014 and the order passed by the learned First Additional Sessions Judge in Criminal Revision No.137/2014 dated 27.09.2014 are hereby set aside. The application filed by the applicant for ad-interim custody of the machine is hereby allowed. It is directed that if the applicant files an undertaking that the machine would not be used in violation of provisions of the P.C. & P.N.D.T. Act and the Rules, including without licence/ permission from appropriate authority and a 'Supurdnama' for Rs.5,00,000/- the machine may be handed over to the applicant. It is further made clear that if in opinion of the learned Chief Judicial Magistrate, Ratlam, it is necessary to extract any information which is necessary for disposal of the complaint filed by the appropriate authority, he is at liberty to do so with help of experts in this field and after giving notice to the present applicant before releasing the machine to the present applicant. The learned Magistrate shall send an intimation to the Collector/appropriate authority before handing over the machine to the applicant.

6. With this observations and directions, the application is disposed of.

Application disposed of.

I.L.R. [2015] M.P., 1600

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice A.M. Khanwilkar, Chief Justice & Mr. Justice Sanjay Yadav

M.Cr.C. No. 19371/2014 (Jabalpur) decided on 18 December, 2014

SUDHIR SHARMA ...Applicant

Vs.

STATE OF M.P. & ors. ...Non-applicants

(Alongwith M.Cr.C. No. 19373/2014.)

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 439, Penal Code (45 of 1860), Sections 420, 467, 468, 471 & 120-B, Information Technology Act, 2000 (21 of 2000), Sections 65 & 66 and Recognised Examinations Act, M.P. (10 of 1937) (also referred to as 'Manyataprapt Pariksha Adhiniyam, M.P. 1937'), Sections 3-D(1), 2 & 4 - Bail - VYAPAM examination scam* - Applicant, a racketeer - Serious offence punishable with life imprisonment - Charge-sheet not filed - Applicant resourceful person - Shortly statement u/s 164 of Cr.P.C. of co-accused to be recorded - Held - Looking to complexity of investigation, multiple players involved - Applicant cannot be released on bail until filing of charge-sheet - Petition dismissed. (Para 27)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439, दण्ड संहिता (1860 का 45), धाराऐं 420, 467, 468, 471 व 120–बी, सूचना प्रौद्योगिकी अधिनियम, 2000 (2000 का 21), धाराऐं 65 व 66 एवं मान्यताप्राप्त परीक्षा अधिनियम, म.प्र. (1937 का 10), धाराऐं 3–डी(1), 2 व 4 – जमानत – व्यापम परीक्षा घोटाला – आवेदक एक ठग गिरोह का सदस्य है – गंभीर अपराध जो आजीवन कारावास से दंडनीय है – आरोप–पत्र प्रस्तुत नहीं – आवेदक उपाय कुशल व्यक्ति – जल्द ही सह–अभियुक्त का द.प्र.सं. की धारा 164 के अंतर्गत कथन अभिलिखित किया जाना है – अभिनिर्धारित – अन्वेषण की जटिलता को देखते हुए, अनेक खिलाड़ी शामिल हैं – आरोप–पत्र प्रस्तुत किये जाने तक आवेदक को जमानत पर नहीं छोड़ा जा सकता – याचिका खारिज।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 439, Penal Code (45 of 1860), Sections 420, 467, 468, 471 & 120-B, Information Technology Act (21 of 2000), Sections 65 & 66 and Recognised Examinations Act, M.P. (10 of 1937) (also referred to as 'Manyataprapt Pariksha Adhiniyam, M.P. 1937'), Sections 3-D(1), 2 &

4 - Applicant, a racketeer - Helped candidates passed Constable Recruitment Examination 2012 - Memorandum statement of co-accused - Seriousness of offence - Term of sentence - Charge-sheet filed on 15th October, 2014 - Further investigation still going on - Supplementary charge-sheet to be filed in 1st Week of January, 2015 - Potential to influence investigation of the crime - Held - Applicant cannot be released on bail until filing of supplementary charge-sheet - Petition dismissed. (Para 28)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439, दण्ड संहिता (1860 का 45), धाराऐं 420, 467, 468, 471 व 120–बी, सूचना प्रौद्योगिकी अधिनियम (2000 का 21), धाराऐं 65 व 66 एवं मान्यताप्राप्त परीक्षा अधिनियम (1937 का 10), धाराऐं 3–डी(1), 2 व 4 – आवेदक एक ठग गिरोह का सदस्य है – आरक्षक भर्ती परीक्षा 2012 उत्तीर्ण करने के लिये अभ्यर्थियों को सहायता दी – सह–अभियुक्त का मेमोरेंडम कथन – अपराध की गंभीरता – दण्डादेश की अवधि – आरोप–पत्र 15 अक्टूबर, 2014 को प्रस्तुत – आगे अन्वेषण अभी जारी है – अनुपूरक आरोपपत्र जनवरी 2015 के प्रथम सप्ताह में प्रस्तुत किया जाना है – अपराध के अन्वेषण को प्रभावित करने की क्षमता – अभिनिर्धारित – अनुपूरक आरोप–पत्र प्रस्तुत किये जाने तक आवेदक को जमानत पर नहीं छोड़ा जा सकता – याचिका खारिज।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 439 - Conditions* - Grant or non-grant of bail - Court not to decline grant of bail, unless exceptional circumstances, like offence punishable with death or imprisonment for life. (Para 32)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 – शर्तें – जमानत प्रदान की जाना या नहीं की जाना – न्यायालय जमानत प्रदान करने से इंकार नहीं करेगा जब तक कि अपवादात्मक परिस्थितियां न हो, जैसे कि मृत्युदण्ड या आजीवन कारावास से दंडनीय अपराध।

***D. Criminal Procedure Code, 1973 (2 of 1974), Sections 439 & 167 - Formal arrest of accused* - Filing of charge-sheet - Bail - Held - For the purpose of Section 167 of Cr.P.C., the statutory period for filing of charge-sheet would commence from the date of formal arrest. (Para 38)**

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 439 व 167 – अभियुक्त की औपचारिक गिरफ्तारी – आरोप–पत्र प्रस्तुत किया जाना – जमानत – अभिनिर्धारित – दं.प्र.सं. की धारा 167 के प्रयोजन हेतु, आरोप–पत्र प्रस्तुत करने की

कानूनी अवधि औपचारिक गिरफ्तारी की तिथि से आरंभ होगी।

***E. Criminal Procedure Code, 1973 (2 of 1974), Sections 41 & 41B* - Crime No. 18/2013 - Formal arrest made on 06/11/2014 - Crime No. 17/2013 - Formal arrest not made - Held - Investigating agency can take a different stand on the basis of material collected, in two crimes on the factum of need to arrest the suspect. (Para 40)**

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 41 व 41बी – अपराध क्रमांक 18/2013 – औपचारिक गिरफ्तारी 06/11/2014 को की गई – अपराध क्रमांक 17/2013 – औपचारिक गिरफ्तारी नहीं की गई – अभिनिर्धारित – दो अपराधों में, संदिग्ध की गिरफ्तारी की आवश्यकता के तथ्य पर अन्वेषण एजेंसी एकत्रित की गई सामग्री के आधार पर भिन्न दृष्टिकोण अपना सकती हैं।

Cases referred :

2012 (1) SCC 14, 2011 (1) SCC 694, (1992) 3 SCC 141, 2014 (4) MPHT 103 (DB), (2012) 4 SCC 134, (1978) 1 SCC 118.

Harin P. Raval, Rajendra Tiwari with *Ajay Gupta, Shiv Mangal Sharma, Anando Mukherjee & Akshat Anand,* 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. :- These applications for grant of regular bail have been filed on 3rd December, 2014, in Crime No.17/2013 and Crime No.18/2013 registered with S.T.F. Police Station, Bhopal respectively, in connection with offences commonly known as VYAPAM examination scam cases.

2. These applications were listed before the Court for the first time on 11.12.2014. On that day, the counsel for the applicant pointed out the order passed by the Supreme Court dated 01.12.2014 in S.L.P.(Crl.) Nos.8154-8156/2014. In the context of the time frame given by the Hon'ble Supreme Court, the Court noted that the applicant after filing of the applications should have taken steps for listing of the matters immediately, but was content with its listing on the 5th Court working day after removal of office objections, as per the date assigned by CMIS. The Court acceded to the request of the counsel for the prosecution to give time to get complete instructions. As a

result, the matters were ordered to be listed on 15.12.2014. On that day when the matter was called out in the first round, it was kept back due to non-availability of the counsel. The matter, however, reached at the end of the day, when the arguments commenced. The argument of the counsel for the applicant remained inconclusive as a result of which the same was ordered to be listed on the next day to be proceeded as overnight part-heard case. The request of the applicant's counsel for taking up the matter on 18.12.2014 was turned down, in view of the limited time frame. Accordingly, the matter was notified as Item No.1 on 16.12.2014. The arguments were heard at length and then deferred for pronouncement of order on 18.12.2014.

3. As aforesaid, these two bail applications are filed in respect of separate crimes in which the applicant has been named as an accused. However, we are disposing of both these applications together by this common order considering the overlapping arguments canvassed by the parties.

4. In view of the liberty granted to the parties in terms of order dated 11.12.2014, the applicant has filed interim applications for taking additional documents on record, which are part of the charge-sheet already filed against the applicant in Crime No.18/2013. These applications are allowed.

5. Reverting to the argument of the applicant, the thrust of the argument was that the Investigating Agency was indulging in protracting the custody of the applicant by citing one or the other reason. The conduct of the Investigating Agency was nothing short of hoodwinking and red herring to somehow keep the applicant in jail in connection with the alleged offences.

6. Shri Raval, learned Senior Advocate took us through the chronology of events and also the documents reflecting the stand taken by the Investigating Agency from time to time. He pointed out that the offences registered as Crime No.17/2013 and Crime No.18/2013 have been registered on 23.11.2013 for offences punishable under Sections 420, 467, 468, 471, 120-B of I.P.C., Sections 65 and 66 of the Information Technology Act and Section 3 (d) (1), 2/4 of M.P. Manayataprapt Pariksha Adhiniyam, 1937, in connection with the irregularities in examination for selection of Police Sub-Inspector/ Subedar/ Platoon Commander conducted by VYAPAM. The applicant had joined the investigation and in fact was interrogated for almost 4 hours on 23.12.2013. Once again, applicant appeared before the Investigating Officer and was interrogated for almost 10 hours on 13.3.2014. Inspite of this grueling enquiry, nothing incriminatory was found against the applicant and, therefore,

he was not arrested.

7. The applicant, however, apprehending his arrest in connection with the aforesaid two crimes, moved applications for grant of anticipatory bail under Section 438 of Cr.P.C. before the Sessions Judge, Bhopal on 21.06.2014. These applications were opposed by the prosecution and resultantly the same were dismissed on 26.06.2014.

8. Thereafter, the applicant approached this Court by way of anticipatory bail applications under Section 438 of the Code, being M.Cr.C.Nos.9567/2014 and 9568/2014. However, both these applications were rejected by this Court on 09.07.2014 by a speaking order.

9. The applicant has relied on the stand taken by the prosecution to oppose the anticipatory bail applications, to buttress his argument that misleading pleas were taken by the Investigating Agency to oppose the same.

10. The applicant thereafter approached the Supreme Court by way of S.L.P.(Crl.) Nos.5435/2014 and 5372/2014 and questioned the order dated 09.07.2014 passed by the High Court for rejecting his anticipatory bail applications. Those Special Leave Petitions were dismissed on 22.07.2014. It is stated that in the said proceedings, the Investigating Agency represented to the Supreme Court that custodial interrogation of the applicant was imperative.

11. After rejection of the Special Leave Petitions by the Supreme Court, the applicant immediately surrendered before the Chief Judicial Magistrate, Bhopal on 25.07.2014 by taking out applications to take him in custody in connection with both the crimes (i.e. Crime Nos.17/2013 and 18/2013). The Investigating Agency, however, in the reply to oppose these applications, took a specific stand that Crime No.17/2013 was still under investigation and only after collection of sufficient evidence appropriate action can be taken against the applicant. According to the applicant, the surrender by the applicant ought to have been reckoned in respect of both the crimes but the applicant was shown arrested only in connection with Crime No.18/2013. The Trial Court finally rejected the application preferred by the applicant to take him in custody even in respect of Crime No.17/2013 vide order dated 26.07.2014.

12. The applicant thereafter on 25.08.2014 moved an application for regular bail under Section 439 of Cr.P.C. in Crime No.17/2013 before the

Trial Court. That application was rejected on the ground that the applicant was yet to be arrested in connection with Crime No.17/2013 and that his custody in Crime No.18/2013 cannot be related to Crime No.17/2013.

13. After that order, the applicant moved another application before the Trial Court on 02.09.2014 for grant of anticipatory bail under Section 438 of Cr.P.C. in Crime No.17/2013 and more particularly in the context of the stand taken by the Investigating Agency while opposing the earlier application that his custody was not required in the said crime. In response, the S.T.F. objected to the grant of anticipatory bail on the grounds stated in the report submitted to the Trial Court on 08.09.2014. *Inter-alia,* on the ground that applicant is a proclaimed offender. According to the applicant, no judicial order to declare the applicant as proclaimed offender was in force much less passed by any Court of competent jurisdiction. That anticipatory bail application filed by the applicant in Crime No.17/2013 was, however, rejected on 10.09.2014, by the Trial Court. One of the reason, weighed with the Trial Court was that the anticipatory bail application was rejected by the High Court as well as by the Supreme Court.

14. Being dissatisfied, the applicant directly approached the Supreme Court by way of S.L.P. (Crl.) No.8154-56/2014 challenging the three orders passed by the Trial Court dated 26.07.2014 (rejecting application for taking into custody in Crime No.17/2013), 25.08.2014 (rejecting regular bail in Crime No.17/2013) and lastly, 10.09.2014 (rejecting another anticipatory bail application in Crime No.17/2013). That Special Leave Petition is still pending.

15. The applicant also moved regular bail application before the Trial Court in Crime No.18/2013 on 13th September, 2014. That application was resisted by the prosecution by filing report on 15th September, 2014. It was, *inter alia*, contended that the investigation of subject crime was underway. The said application for regular bail in Crime No.18/2013 was rejected on 15th September, 2014 by the Sessions Judge, Bhopal. Since the applicant's Special Leave Petitions referred to above challenging the three orders passed in Crime No.17/2013 were pending, the applicant was advised to directly file Special Leave Petition in the Supreme Court against the order rejecting regular bail by the Trial Court in Crime No.18/2013. That Special Leave Petition is registered as SLP (Criminal) No.8158/2014.

16. The aforesaid Special Leave Petitions were initially listed on

17.10.2014 when notice was issued to the respondent/State. The notice was served on the standing counsel for the respondent/State on 18.10.2014. The applicant apprehending his arrest in Crime No.17/2013 moved an application before the Supreme Court on 28.10.2014. According to the applicant, the Investigating Agency to render the appeals filed by the applicant against the three orders passed by the Trial Court infructuous, was hastening the process to arrest him in connection with Crime No.17/2013. As apprehended by the applicant, on 29.10.2014, S.T.F. moved an application before the Trial Court in Crime No.17/2013 to permit formal arrest of the applicant in connection with that crime. On the same day, the Trial Court granted that permission. Notwithstanding the permission, no arrest was effected in relation to that crime till 06.11.2014. The Investigating Agency for the reasons best known to it chose to formally arrest the applicant only on 06.11.2014 and more so when it had full knowledge that the matter before the Supreme Court was slated to be heard on 07.11.2014. This action of the Investigating Agency smacks of lack of bonafides and of having attempted to hoodwink even the highest Court of the land. The matter did not end at that but the applicant was shown as formally arrested in connection with Crime No.17/2013 and his police custody was taken from the Court only on 12.11.2014 upto 17.11.2014. Till 17.11.2014 no attempt to interrogate the applicant was made by the Investigating Officer and he was merely made to sit in the office of the Investigating Officer for six days. The applicant was not even confronted with any other accused or co-accused. On the other hand, in the reply filed to oppose the Special Leave Petitions filed by the applicant, the Investigating Agency raised objection about entertaining the Special Leave Petition directly against the order of the Trial Court and by-passing the High Court and also that the Special Leave Petitions filed by the applicant have become infructuous. Notwithstanding these objections, the Supreme Court on 01.12.2014 deferred the hearing of the said Special Leave Petitions and passed the following order which reads thus :-

"SLP (Crl.) No (s).8154-8156/2014 and SLP (Crl) No.8158/2014

We defer these matters for two weeks to facilitate the petitioner(s) to approach the High Court seeking anticipatory bail/regular bail. If such an applicat ion is filed, the High Court shall consider the same on its merits, uninfluenced by any observation made in the earlier

orders, and dispose of the same within two weeks of filing the application.

List these matters after two weeks."

17. As per the liberty granted by the Supreme Court, the applicant has once again approached this Court for grant of regular bail under Section 439 in both the crimes (i.e. Crime Nos.17/2013 and 18/2013). As aforesaid, the thrust of the argument of the applicant is that the Investigating Agency was playing foul not only with the applicant for the reasons best known to them but also attempting to overreach the Court.

18. With reference to Crime No.17/2013, on merits, he submits that, there is no legal evidence to indicate complicity of the applicant in the commission of the alleged offence. Primarily, reliance is placed on the charge-sheet filed against co-accused in the said crime to buttress this submission. For, no charge-sheet has been filed against the applicant in Crime No.17/2013. The applicant has been arrested in connection with that crime only on 06.11.2014 and the investigation qua him was still in progress - as has been stated by the counsel for the prosecution. However, the applicant asserts that his custody since 25.07.2014 should be reckoned even for Crime No.17/2013 and as such the Investigating Agency must explain as to what prevented them from filing charge-sheet against the applicant thus far in the said crime, much less within the statutory period. It is submitted that the plea of the Investigating Agency, that the investigation is still incomplete and no charge - sheet has been filed against the applicant should not come in the way for granting bail to the applicant. Further, there is hardly any legal evidence forthcoming to disclose the role of the applicant in the commission of alleged crime registered as Crime No.17/2013.

19. With reference to Crime No.18/2013, relying on the material appended to the charge-sheet, it was argued that the statement given by the concerned persons who have been named as co-accused and purportedly recorded under Section 27 of the Evidence Act, even if it is accepted as it is, does not disclose the involvement of the applicant in the commission of the said crime. In that, Dr. Pankaj Trivedi refers to the roll numbers of six candidates allegedly given by the applicant for increasing the marks to secure place in the list of successful candidates. The name of one of those candidates is Sudhir Kumar Sharma (Roll No.143848). Whereas, in the statement of Nitin Mohindra, he refers to

the fact of Dr. Pankaj Trivedi having given him offer of big amount for committing the fraud. Further, there was no money transaction in connection with the names given by his friend Bharat Mishra as those candidates were poor. The statement also refers to the role of the applicant having given the names and Roll numbers of candidates as spoken by Dr. Pankaj Trivedi, with a note that he (Nitin Mohindra) did not get money from those persons also. He has further stated that he did not know the applicant (Sudhir Sharma). It is in this backdrop the Investigating Agency is trying to rope in the applicant in the alleged offence in particular, being one of the conspirator in fraudulently getting the students passed in Constable Recruitment Examination, 2012. It is submitted that the statement of the co-accused under Section 27, even if taken at its face value cannot be the basis to proceed against the co-accused, not being admissible in evidence. There is no other admissible evidence to indicate complicity of the applicant.

20. It is then submitted that bail is a rule and jail an exception, more so, because the applicant comes from a respectable background and that he is willing to abide by any strict conditions that may be imposed by this Court, including not to enter the State of M.P. It is submitted that the prosecution has not produced any tangible material to indicate that the applicant is likely to flee from the ends of the justice or for that matter, influence the prosecution witnesses in any manner. The role of the applicant at best is only that of a facilitator and having recommended the names of stated candidates to Dr. Pankaj Trivedi. The material accompanying the charge-sheet by no standards or even remotely suggest that the applicant is the kingpin or racketeer. It is submitted that even after filing of the charge-sheet against the applicant in Crime No.18/2013, the prosecution cannot be heard to say that investigation against the applicant is still not complete or take that as a plea to deny bail to the applicant. It is submitted that there is no evidence that any money transaction took place in which the applicant was involved. If it is so, the matter may have to be viewed very differently qua the applicant. The applicant is questioning the bonafides of the Investigating Agency for having taken a stand that the investigation is not complete even in respect of Crime No.18/2013 qua the applicant. The counsel for the applicant explained the circumstances in which the applicant was advised to directly approach the Supreme Court as the Trial Court was bound by the order of rejection of bail by the High Court and at the same time the Trial Court as well as this Court would be bound by the earlier orders rejecting applicant's prayer for bail and also because the applicant

had already filed Special Leave Petitions against the three orders passed in Crime No.17/2013 and that appeal was still pending. In other words, the applicant directly approached the Supreme Court on legal advise. To buttress the above submissions the applicant has relied on the decisions of the Apex Court in *Sanjay Chandra Vs. C.B.I.* [1], *Siddharam Satlingappa Mhetre Vs. State of Maharashtra and others* [2] and *Central Bureau of Investigation, Special Investigation Cell-I, New Delhi vs. Anupam J. Kulkarni* [3].

21. Per contra, the learned counsel for the respondent/State submits that both the bail applications filed by the applicant deserve to be dismissed. According to the prosecution, he submits that the role of the applicant in the commission of the two crimes is that of a racketeer and not of middleman or facilitator as is sought to be contended. He submits that the investigation of Crime No.17/2013 is at an advance stage and in all probability charge-sheet will be filed against the applicant in that case by the first week of January, 2015. Even with regard to Crime No.18/2013, further investigation against the applicant is in progress and the Investigating Officer is inclined to file supplementary charge-sheet against the applicant in connection with Crime No.18/2013 by the first week of January, 2015. The reason why supplementary charge-sheet will be necessary in Crime No. 18/2013 has been brought to our notice by way of a compilation of the materials gathered during the further investigation and likely to be made part of the supplementary charge-sheet. It is stated that the Investigating Officer has reason to believe that very shortly one of the co- accused would come forward to give his statement under Section 164 of the Cr.P.C. If bail is granted to the applicant that opportunity may be lost as the possibility of applicant influencing such person(s) cannot be completely ruled out. Because, the applicant is a resourceful person. It would have been a different matter, if final charge-sheet is already filed against the applicant in both the crimes, only then it would be open to the applicant to urge that the investigation having been completed, no fruitful purpose would be served by keeping him in jail. Only after the investigation is complete in all respects, it will be possible for the Investigating Agency to establish the link of the applicant and other co-accused involved in the large scale conspiracy. Regarding the grievance made by the applicant that the Investigating Agency is playing foul with the applicant has been rubbished by the counsel for the prosecution. It is submitted that the said argument is founded on complete

1. 2012(1)SCC 14 2. 2011(1)SCC 694
3. (1992)3 SCC 141

misreading of replies/reports filed by the prosecution before the Trial Court or for that matter before the High Court and the Supreme Court. The stand of the Investigating Agency has always been consistent that the arrest of the applicant in connection with Crime No.17/2013 would be meaningful and legally permissible only after gathering sufficient evidence in that behalf keeping in mind the mandate of Section 41 and recently inserted Section 41B of Cr.P.C. There was no attempt whatsoever to mislead the Court as projected by the applicant.

22. As regards Crime No.17/2013, admittedly, charge-sheet is yet to be filed against the applicant and that the argument of the applicant founded on the charge-sheet filed against other accused cannot be the basis to examine the case of the applicant. On the other hand, there was enough material already gathered by the Investigating Agency indicating the complicity of the applicant in commission of the alleged offences registered as Crime No.17/2013. The Investigating Agency was still in the process of gathering further evidence to establish the link of the applicant, whose role according to the prosecution is one of the racketeer and not as middleman or facilitator. One of the candidate recenly arrested has divulged the link of co-accused, who had interacted with the applicant. To buttress this submission, reliance was placed by the counsel for the prosecution on the material given in the form of compilation with reference to Crime No.17/2013 as well as Crime No.18/2013, in sealed envelope for perusal of the Court. That, however, does not form part of the charge-sheet already filed against the applicant in Crime No.18/2013. It is stated that the Investigating Agency is still in the process of verification of information received from the candidates and also analyzing the documentary evidence. The learned counsel for the prosecution has relied on a note handed over to the Court in sealed cover to explain the circumstances, which delayed the arrest of the applicant in connection with Crime No.17/2013. It is submitted that taking anyview of the matter, the prayer for bail in Crime No. 17/2013 ought not to be entertained, as that would affect the further investigation of that case and especially because even preliminary charge-sheet is yet to be filed against the applicant, which will be presented by the Investigating Officer by the first week of January, 2015.

23. As regards Crime No.18/2013, learned counsel for the prosecution has countered the argument of the applicant that the material gathered by the Investigating Agency and presented along with the charge-sheet already filed against the applicant on 15.10.2014 does not indicate complicity of the

applicant in the said crime. It is submitted that the prosecution is not only relying on the statements of the co-accused recorded under Section 27 of the Evidence Act but other material in the form of information collected from the computer hard disk recovered from Nitin Mohindra, mapping valuation sheet of VYAPAM, analyses of OMR sheet, matching mobile call details of the applicant with the accused Ramshesh Sharma etc. The involvement of the applicant will no doubt have to be established on the basis of admissible evidence to be produced before the Court during the trial but material already produced discloses complicity of the applicant and that further material will be produced along with the supplementary charge-sheet to be filed against the applicant in connection with Crime No.18/2013 by the first week of January, 2015.

24. It is submitted that the investigation has become complex because of multiple actors in the commission of the offence both in Crime Nos.17/2013 and 18/2013. Further, it is not a case of no evidence against the applicant at all and more importantly because if the charge against the applicant is established, it will be punishable with life sentence. The role of the applicant being that of a racketeer and that the applicant and other co-accused being involved in huge money transactions including the applicant having sponsored candidates and the applicant having been found involved in more than one crime of similar type and is likely to be named as accused in atleast two more criminal cases, as has been discerned from the investigation done in connection with those cases and more particularly the investigation of the two cases on hand is of large scale conspiracy which is still incomplete. Taking overall view of the matter it may not be just and proper to release the applicant on bail at this stage, more so, because the applicant is a resourceful person. In support, the prosecution has placed reliance on the decision of this Court in the case of *Dr. Vinod Bhandari Vs.State of M.P.*[4] decided on 11.08.2014, who is also involved in the commission of similar offences and whose role is somewhat similar to the role of the applicant. Counsel for the prosecution, in all fairness, stated that the said decision is subject matter of appeal before the Supreme Court, which he believes is still pending.

25. Before we proceed to analyze the rival submissions, we deem it useful to reproduce paragraph 32 of the reported decision in the case of *Dipak Subhashchandra Mehta vs. CBI & another*[5], which is as under :-

4. 2014 (4) MPHT 103 (DB) 5. (2012) 4 SCC 134

"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 merits 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. The Court granting bail has to consider among other circumstances, the factors such as *(a) the nature of accusation and 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; and (c) prima facie satisfaction of the Court in supported of the charge. In addition to the same, the Court while considering a petition for grant of bail in a non-bailable offence, apart from the seriousness of the offence, likelihood of the accused fleeing from justice and tampering with the prosecution witnesses, have to be noted."*

(emphasis supplied)"

26. The legal position expounded in this decision has consistently been followed. We shall advert to the decisions relied upon by the counsel for the applicant, a little later. Suffice it to observe that the Court is expected to exercise its discretion in a judicious manner and not as a matter of course while considering prayer for bail. Although the thrust of the argument of the applicant is that the Investigating Agency has throughout played foul with the applicant, however, we may examine that plea at the appropriate stage only after recording our satisfaction on relevant materials to be reckoned for considering prayer for bail.

27. First dealing with the bail application in respect of Crime No.17/2013, it is indisputable that no charge-sheet has been filed, as of now. The applicant has been arrested in connection with the said case only on 6th November, 2014. The Investigating Agency has assured the Court that appropriate Police Report under Section 173 of Cr.P.C. will be filed against the applicant in connection with that crime by first week of January, 2015. The question is : what is the role ascribed to the applicant in the said crime. According to the

prosecution, the applicant is a racketeer. He had sponsored candidates and those candidates appeared in the concerned examination conducted by VYAPAM. They were selected because of the marks secured by them in the said examination. Since no charge-sheet has been filed against the applicant, so far, in this crime, it may not be appropriate to analyze the material, which has already been gathered by the Investigating Agency indicating complicity of the applicant as being party to the conspiracy. That material has been placed before us in the form of compilation tendered in a sealed cover for our perusal. It is undeniable that the investigation in this crime is a complex one; and, more particularly, becomes challenging on account of charge of conspiracy, which will have to be established on the basis of evidence, which may not be necessarily direct evidence. We have been informed that the Investigating Agency is in the process of recording statement under Section 164 of the Code of one of the co-accused. Considering the complexity of the investigation because of the multiple players involved in the commission of offence, in our opinion, it may not be just and proper to release the applicant on bail by adverting to the material filed along with the charge sheet filed against the co-accused. For, the nature of accusation against the applicant is of having acted as a racketeer. The offence, if proved, against the applicant will visit him with life sentence. The supporting evidence for establishing the guilt of the applicant, as aforesaid, has been gathered in part and the process of gathering further evidence and including verification of the evidence and the material already gathered is in progress. Although one of the factor to be borne in mind by the Court is whether there is likelihood of accused fleeing from the ends of justice and tampering with the prosecution witnesses. In a matter of such serious offence, granting bail would, inevitably, slow down the investigation and may entail in denying a fair opportunity to the Investigating Agency of recording statement of co-accused under Section 164 of the Code. That evidence would certainly be admissible and help the prosecution in establishing the guilt of the concerned accused, who were members of the conspiracy. The role ascribed to the applicant is not of an ordinary beneficiary or facilitator having acted as conduit between the beneficiary and the middleman. According to the prosecution, the applicant is one of the kingpin and not only involved in Crime No.17/2013, but, has already been named as accused in another Crime No.18/2013, which is of the same type. As per the confidential note presented to us, it seems that the applicant is likely to be named as accused, at least, in two more offences of the same type after due verification of his role from the material gathered in the said crimes. For all these reasons, we are more than

satisfied that the applicant cannot be released on bail, at least, until filing of the charge-sheet in Crime No.17/2013.

28. Reverting to bail application filed in Crime No.18/2013, the argument on merits, essentially, was relying on the statement of co-accused recorded under Section 27 of the Code. However, that does not appear to be the correct approach in analyzing the role of the applicant. The role of the applicant is, no doubt, mentioned by the co-accused – Dr. Pankaj Trivedi, who was Controller In-charge in VYAPAM at the relevant time. He has disclosed the names of six candidates sponsored by the applicant for increasing their marks to secure place in the list of successful candidates. Those candidates have also been proceeded against by the Investigating Agency. Another co-accused – Nitin Mohindra has also confirmed about the role of the applicant and has disclosed the names of candidates sponsored by the applicant, as has been indicated by co-accused – Dr. Pankaj Trivedi. Co-accused – Nitin Mohindra was working as Programmer, at the relevant time, in M.P. Professional Examination Board at Bhopal. He has stated that the names were given to him through one Sanjeev Saxena. The fact that this co-accused does not personally know the applicant, cannot extricate the applicant if other materials filed along with the charge-sheet against the applicant were to be accepted as it is. The applicant has been named as one of the conspirators and having helped the stated candidates in fraudulently passing the Constable Recruitment Examination 2012. The charge-sheet already filed against the applicant in this crime on 15th October, 2014, not only discloses the role of the applicant, but, also refers to the material, which will be relied by the prosecution during the trial. The allegations against the applicant in the charge-sheet reads thus :-

> "नाम आरोपी : – सुधीर कुमार शर्मा पिता श्री विशम्भर दयाल शर्मा उम्र –26 वर्ष निवासी ग्राम पाली थाना फूप जिला भिन्ड (म0 प्र0)
>
> आरोपी का कृत्य :–आरोपी ने आरक्षक भर्ती परीक्षा 2012 का ऑन लाइन फार्म भरा था आरोपी ने उक्त फार्म में अपना मो0 नं0 7566687334 लेख किया था। परीक्षा में उस का रोल नं0 –143848 था। इस लिखित परीक्षा में आरोपी को 82 अंक दिये गये थे, जिस से आरोपी लिखित परीक्षा उत्तीर्ण हुआ था। आरोपी की व्यापम से जप्त शुदा ओएमआर शीट एवं उसकी मैपिंग तथा प्रश्नास्पद प्रलेख शाखा पुलिस मुख्यालय भोपाल से परीक्षण उपरान्त प्राप्त रिपोर्ट तथा नमूना ओ0 एम0 आर0 शीट पर विश्लेषण अनुसार अभ्यर्थी आरोपी द्वारा ओ0 एम0 आर 0 शीट में सेट ए में एक ही इंक से विभिन्न क्रमो में गोले भरे गये है । एवं सेट ए से भिन्न रिक्त खाली गोलों को सेट बी में दूसरी इंक से भरा गया है । जो कि सेट बी के सभी गोले सही होना

पाये गये है । इसी प्रकार ओ0 एम0 आर0 शीट में दर्ज अलग अलग इंक्स (स्याही) के उत्तरो के क्रमों को देखने पर भी यह स्पष्ट होता है कि आरोपी द्वारा अपने पेन से भरे गये प्रश्नों के उत्तरों के बीच–बीच में जो उत्तर छोड दिये गये थे । उनको व्यापम के अधिकारी आरोपीगणों द्वारा भरा गया है । यह आरोपीगणों के अपराध करने का तरीका भी स्पष्ट करता है । तथा इस तथ्य की पुष्टि भी करता है कि व्यापम के अधिकारी आरोपीगणों द्वारा अभ्यर्थियों को दलाल आरोपीगणों के माध्यम से यह संदेश भिजवाया गया था, कि जितने प्रश्नों के उत्तर बनें उतने ही करना बाकी प्रश्न खाली छोड देना। उपलब्ध मैचिंग काल डिटेल अन्य आरोपियों के मैमोरेन्डम व डी0 एफ0 एस गुजरात से प्राप्त रिट्रीव डाटा की एक्सल शीट में दर्ज प्रविष्टी से भी आरोपी का कृत्य स्पष्ट होता है । इस प्रकार आरोपी द्वारा अपने दलाल आरोपी पंकज त्रिवेदी के माध्यम से व्यापम के अन्य अधिकारी आरोपीगणों के साथ मिलकर एक सलाह होकर एक चैन के रूप में सुनियोजित तरीके से षडयंत्र पूर्वक अपनी ओएमआर शीट में अवैध तरीके से कूट रचना करवाकर एक संगठित गिरोह के सदस्य के रूप में कार्य कर लिखित परीक्षा उत्तीर्ण कर अन्तिम रूप से चयनित होकर अवैध लाभ अर्जित करके अपराधिक कृत्य निष्पादित किया गया है । जिससे अन्य योग्य उम्मीदवार चयन से वंचित हो गये है।

आरोपी के विरूद्ध उपलब्ध साक्ष्यः–

1 – आरोपी का स्वयं का मेमोरेन्डम।

2 – आरोपी नितिन मोहिन्द्रा के कम्प्यूटर की जप्त हार्ड डिस्क के रिट्रिव डाटा की शीट जिस में आरोपी, बिचौलिये एवं प्राप्त राशि का उल्लेख है ।

3 – व्यापम की मैपिग वैल्यूएशन शीट ।

4 – अन्य आरोपियों के मेमोरेण्डम।

5 – नमूना ओ0 एम0 आर0 शीट पर विश्लेषण।

6 – आरोपी सुधीर कुमार शर्मा से आरोपी रामशेष शर्मा की मैचिग काल डिटेल।

7 – साक्षीगणों के कथन ।"

29. From the above, it is noticed that besides the memorandum under Section 27 of the co-accused, the prosecution will be relying on hard-disk data recovered from co-accused Nitin Mohindra, mapping valuation sheet, analysis of OMR sheet, matching telephone calls of the applicant with that of co-accused Ramshesh Sharma etc. This material, itself, is sufficient to indicate the complicity of the applicant in the commission of Crime No.18/2013, if proved. The question of admissibility of this evidence will have to be tested at the trial. But, this material is certainly relevant for recording *prima facie*

satisfaction about the involvement of the applicant in the alleged crime. Further, it has been stated across the Bar that after filing of the charge-sheet on 15th October, 2014, against the applicant in Crime No.18/2013, further investigation has been done and the Investigating Agency has been able to unravel additional material establishing complicity of the applicant in the commission of that crime. That material has been placed before us in a sealed cover for our perusal. Since it is yet to be placed on record along with the supplementary charge-sheet, we do not deem it appropriate to dilate on that material - as that may prejudice the investigation and also, inevitably, result in disclosure of the further material gathered by the Investigating Agency. That must be eschewed. The fact that there is some doubt about the money transactions in respect of some of the candidates would make no difference at this stage. Sufficeit to mention that additional material will form part of the supplementary charge-sheet/Police Report to be filed before the concerned Court against the applicant in Crime No.18/2013 by first week of January, 2015. Considering the role of the applicant, being a racketeer in the commission of the alleged offence, which is a serious offence and would entail in punishment of life sentence and because of the complexity of the investigation, the prayer for grant of bail even in Crime No.18/2013 cannot be entertained at this stage.

30. As noted earlier, the applicant is a resourceful person and that very shortly the Investigating Agency is likely to record statement of co-accused under Section 164 of Cr.P.C. Therefore, it may not be advisable to release the applicant on bail, at this stage, which, inevitably, would impair the quality of further investigation.

31. The argument of the applicant that there is no material produced by the prosecution to even remotely suggest that the applicant is likely to flee from the ends of justice or to tamper with the prosecution witnesses, cannot be the sole basis to grant bail. The Court has to consider the totality of the circumstances and if, *prima facie*, satisfied about the involvement of the accused in the commission of the alleged crime and the role of the accused, which is a serious offence, it would be appropriate to accede to the request of the Investigating Agency to reject the prayer for bail, at least, until filing of the final charge-sheet against the applicant in the stated crime, more particularly keeping in mind the background and the standing of the accused in the society having potential to influence the investigation of the crime.

32. Learned counsel for the applicant relied on the decision of the Apex

Court in the case of *Sanjay Chandra* (supra). He read out that judgment extensively from paragraph 14 onwards up to paragraph 43. In the first place, this decision does not take a view different from the settled legal position expounded in the case of *Dipak Subhashchandra Mehta* (supra). Secondly, the observations on which emphasis has been placed have been made in the context of the factual position of that case. In that case, investigation was not only complete in all respects, but, the Trial Court had also framed charge against the accused, as can be discerned from the statement of facts recorded in paragraph 19 of the said judgment. In that backdrop, the Court examined the argument of the accused that now that the charge has been framed against the accused, he was entitled for grant of bail; whereas the Trial Court and the High Court rejected his application merely on the finding of seriousness of the charge; the nature of the evidence in support of the charge; the likely sentence to be imposed upon conviction; the possibility of interference with the witnesses; the objection of the prosecuting authorities and the possibility of absconding from justice. The argument of the appellant in that case was the prosecution had not placed any material in support of the allegation that there was possibility of the appellant attempting to tamper with the witnesses. Indeed, in this judgment, reference is made to several other decisions including the judgment in the case of *Gurucharan Singh vs. State (Delhi Admn.)*[6], wherein the Apex Court has noted that unless exceptional circumstances are brought to the notice of the Court which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person, who is not accused of an offence punishable with death or imprisonment for life. In the present case, we have already recorded our satisfaction that the offence is not only punishable with life, but, have also referred to the fact that further investigation in Crime No.18/2013 is in progress and charge-sheet is yet to be filed in Crime No.17/2013 against the applicant, as of now; moreover, the Investigating Agency is in the process of recording statement of one of the co-accused under Section 164 of Cr.P.C. Thus, release of the applicant at such a crucial stage of the investigation may defeat the process of proper and fair investigation.

33. In the reported judgment relied by the applicant, in paragraph 43, the Court has noted that seriousness of the charge, no doubt, is one of the relevant considerations for considering prayer for bail, but, that is not the only test or the factor. For, the other factors also require the Court to examine as to the extent of punishment that could be imposed after trial and conviction, under

6. (1978) 1 SCC 118

the relevant penal laws. In that case, the accused was arrested and was in jail for quite some time until the framing of the charge and in that context in paragraph 39 of the decision, the Court analyzed the justness of the two grounds, which had weighed with the Trial Court and the High Court to refuse bail to the appellant. The primary ground was that the offence was a serious one involving deep-rooted planning in which, huge financial loss is caused to the State exchequer. The second ground was that of the possibility of the accused persons tampering with the witnesses, whereas the charge framed against the appellant was of cheating and dishonestly inducing delivery of property and forgery for the purpose of cheating using as genuine a forged document and the punishment for that offence was imprisonment for a term which may extend to seven years only. In the present case, however, the investigation of both the crimes is still incomplete leave alone framing of charge against the applicant. Moreover, if the applicant is convicted, may suffer punishment of imprisonment of life sentence.

34. The next decision relied by the counsel for the applicant -*Siddharam Satlingappa Mhetre* (supra), is also inapposite to the fact situation of the present case. In that case, the core issue was regarding the principles to be borne in mind while considering prayer for grant of anticipatory bail. In the present case, we are considering the prayer for regular bail.

35. Learned counsel for the applicant has then relied on the decision in the case of *Anupam J. Kulkarni* (supra). This judgment deals with the principle to be borne in mind while considering the application of Section 167 of Cr.P.C. Emphasis was placed on paragraphs 10 and 11 of this decision. This decision will be of no avail to the applicant in the fact situation of the present case. In the first place, the situation referred to in Paragraph 11 of the reported judgment is in connection with the same accused committing several offences in one occurrence and his arrest is shown in connection with only one or two offences therefrom. In the present case, the Trial Court in its order dated 25-08-2014 has opined that applicant is proceeded for two separate occurrences resulting in the commission of offences in Crime No.17/2013 and Crime No.18/2013.

36. Be that as it may, this decision has been pressed into service at the end of the argument by way of rejoinder. It was argued that it is well established position that when the accused appears before the Court and applies for surrender, in law, the accused is in judicial custody and once he is in judicial custody, the provisions of Section 167 must come into play. This argument is

in the context of the applicant having made a formal application on 25.07.2014 to permit him to surrender in Crime No.17/2013. That application was, however, rejected by the Trial Court for the reasons recorded in the order dated 26.07.2014. Where after, the applicant moved application for grant of anticipatory bail in Crime No.17/2013. After rejection of that application, the applicant applied for grant of regular bail in Crime No.17/2013 on 25.08.2014, which was rejected by the Trial Court on 25.08.2014 itself. The applicant thereafter moved an application for grant of anticipatory bail in Crime No.17/2013 on 02.09.2014 which came to be rejected on 10.09.2014. The applicant, no doubt, has challenged these orders before the Supreme Court by way of SLP (Crl.) Nos.8154-56/2014 and it is still pending. The present application, however, is simplicitor for grant of regular bail under Section 439 of Cr.P.C. on the basis of his arrest in connection with Crime No.17/2013 on 06.11.2014. The Investigating Agency has offered justification as to why the formal arrest was effected on 06.11.2014, pursuant to the order passed by the Trial Court on 29.10.2014. Notably, the formal arrest of the applicant was made only on 06.11.2014 and the police custody of the applicant was given between 12.11.2014 till 17.11.2014 pursuant to the order passed by the Trial Court in that behalf.

37. The correctness of the orders dated 26.07.2014, 25.08.2014 and 10.09.2014 is a matter pending before the Supreme Court. Therefore, it is not open for this Court to assume that the applicant be deemed to be in custody even in connection with Crime No.17/2013 w.e.f. 25.07.2014.

38. While considering the regular bail application as has been filed before us, we will have to proceed on the assumption that the arrest of the applicant has been effected only on 06.11.2014 in connection with Crime No.17/2013; and the period for filing of the charge-sheet in Crime No.17/2013 would commence from that date. In view of the liberty given by the Supreme Court vide order dated 01.12.2014, the applicant has now advisedly approached this Court with a prayer for grant of regular bail under Section 439 of Cr.P.C. We have, therefore, confined our discussion to the prayer for regular bail in Crime No.17/2013. Thus understood, the decision pressed into service will be of no avail. For, these are not applications for release on bail on account of default in filing of the charge-sheet within the statutory period against the applicant in Crime No.17/2013. Notably, this argument has been raised at the fag end when the Court was about to close the arguments. Further, the

argument was canvassed without raising a specific plea in the application with reference to Section 167 of Cr.P.C., as filed before us - except a vague ground taken in the form of paragraph 5.23 (d) that the applicant was not required in connection with any interrogation in FIR No.17/2013 as his police custody was sought only between 12.11.2014 to 17.11.2014. There was no hurry or urgency for having police custody of the applicant for interrogation and the applicant was not required in connection with any interrogation in Crime No.17/2013. As a result, we need not examine this aspect any further.

39. Having said this, we may now revert to the grievance of the applicant that the Investigating Agency has been playing foul with the applicant all throughout. For that, emphasis was placed on the stand taken by the Investigating Agency in the replies filed before the Trial Court, High Court and the Supreme Court.

40. In reply to the application for grant of anticipatory bail filed by the applicant in Crime No.17/2013, the stand taken by the Investigating Agency was that the question of arrest of the applicant will be considered only after collection of sufficient evidence. According to the applicant, in subsequent proceedings, however, a different stand was taken. This argument does not commend to us. Instead, we find merits in the submission of the learned counsel for the prosecution that the Investigating Agency could legitimately take a different stand in two crimes on the factum of need to arrest the suspect. That cannot be considered as inconsistent approach nor can it be said to be contradictory in any manner. In that, the requirement of the custody of the applicant in Crime No.18/2013 stood on a different footing because of the nature of material already collected till then. Unlike, in Crime No.17/2013, the process of verification of the material showing involvement of the applicant was underway. Similarly, the fact that the applicant had joined the investigation on earlier occasion and was not arrested would also make no difference. As the question of arresting the accused would arise only if the Investigating Agency is in a position to justify the arrest, keeping in mind the provisions of Section 41 and newly inserted Section 41B of Cr.P.C. That situation was present in Crime No.18/2013 at the relevant time and not in respect of Crime No.17/2013.

41. Much emphasis was placed by the learned counsel for the applicant on the reply filed by S.T.F. in Crime No.17/2013 dated 08.09.2013. In the said reply it has been stated that proclamation has been issued against the

applicant. According to the applicant, no such proclamation was in force and the statement so made was false to the knowledge of the Investigating Agency. This argument stands belied from the order passed under Section 82 of Cr.P.C. qua this applicant produced before us. First, we deem it apposite to reproduce the reply filed by the Investigating Agency dated 08.09.2014 in Crime No.17/2013. The same reads thus :-

"कार्यालय उपपुलिस अधीक्षक एस 0टी0 एफ0 मध्यप्रदेश भोपाल

7वी वाहिनी वि.स.बल. भोपाल के बगल में, जहॉगीराबाद, भोपाल– 462 008,
फोन – 0755– 2573802

कमांक –उपुअ/एस टी एफ/2014–(एचक्यू–) भोपाल, दिनांक.–08/09/2014

प्रति,
श्रीमान् संत्र न्यायाधीश महोदय,
सत्र न्यायालय, भोपाल(म0 प्र 0)

विषयः – आवेदक/आरोपी सुधीर शर्मा द्वारा प्रस्तुत जमानत आवेदन पत्र कमांक 4573/14 के सम्बंध में।

सन्दर्भः – माननीय न्यायालय के आदेश के पालन में।

विषयान्तर्गत लेख कर निवेदन है कि आवेदक/आरोपी द्वारा प्रस्तुत जमानत आवेदन पत्र का सम्बध थाना एस.टी.एफ.,जिला भोपाल के अपराध कमांक 17/13 धारा–420,467,468,471,120– बी,भा.द.वि.,65,66 आई.टी.एक्ट तथा 3(घ) 1,2,/4 मध्यप्रदेश मान्यता प्राप्त परीक्षा अधिनियम–1937 से है । जिसमें आवेदक /आरोपी द्वारा मध्यप्रदेश व्यावसायिक परीक्षा मण्डल भोपाल द्वारा आयोजित पुलिस उप निरीक्षक भर्ती परीक्षा वर्ष 2012 में बिचौलियों, दलालों के माध्यम से व्यापम के अधिकारियों से उन्हें लाखों रूपये देकर उनके द्वारा अपनी उत्तर पुस्तिकाओं में खाली छोडें गये गोलों को भरवाकर फर्जी तरीके से पुलिस सूबेदार / उपनिरीक्षाक/प्लाटून कमाण्डर भर्ती परीक्षा वर्ष 2012 में सफलता प्राप्त की है । जिसके सबन्ध में प्रकरण विवेचनाधीन है। आवेदक – आरोपी द्वारा प्रस्तुत अग्रिम जमानत आवेदन निरस्त किये जाने हेतु निवेदन इस प्रकार हैः –

आवेदक /आरोपी द्वारा व्यापम के तत्कालीन नियंत्रक डॉ. पंकज त्रिवेदी के माध्यम से कई अभ्यर्थियों का चयन फर्जी तरीके से चयन पुलिस सूबेदार/ उपनिरीक्षक /प्लाटून कमाण्डर भर्ती परीक्षा वर्ष 2012 में कराया गया है । जिस में आरोपी के विरूध प्रकरण विवेचनाधीन होकर साक्ष्य संकलन किया जा रहा है । आरोपी की गिरफतारी शेष है ।

यह कि पूर्व में आरोपी का अग्रिम जमानत का आवेदन पत्र माननीय

न्यायालय से लेकर माननीय सर्वोच्च न्यायालय तक निरस्त किया जा चुका है ।

यह कि आरोपी/आवेदक इस प्रकरण में गिरफतार नहीं है फिर भी आवेदक ने अतंर्गत धारा 439 दण्ड प्रकिया संहिता के अर्न्तगत आवेदन पत्र प्रस्तुत कर दिनांक 25.07.2014 को इस प्रकरण में सी.जे.एम.महोदय के न्यायालय में सरेण्डर किये जाने एवं उक्त दिनांक से ही न्यायिक निरोध में मानकर श्रीमान जी के न्यायालय में प्रस्तुत किया था, जो विचारोपरांत श्रीमान जी द्वारा उक्त जमानत आवेदन कमांक 4587/2014 दिनांक 25.08.2014 को निरस्त किया गया है ।

आवेदक /आरोपी के विरूद्ध थाना एम.टी.एफ.के अपराध कमांक 18/13 धारा 420,467,468,471,120 बी भा. द . वि.,65,66 आई. टी. एक्ट,3 (घ) 1 ,2 ,/4 म0 प्र0 मान्यता प्राप्त परीक्षा अधिनियम–1937 में दिनांक 20.06.2014 को उद्घोषणा जारी की गई थी तथा दिनांक 21.07.2014 तक न्यायालय में उपस्थित होने का आदेश पारित किया गया है किन्तु आरोपी के उपस्थित नहीं होने पर धारा–83 दण्ड प्रकिया संहिता के अंर्तगत कार्यवाही हेतु दिनांक 28.07.2014 नियत किये जाने पर माननीय सर्वोच्च न्यायालय द्वारा अग्रिम जमानत आवेदन पत्र निरस्त किये जाने पर विवश होकर दिनांक 25.07.2014 को अपराध कमांक 18/13 धारा 420,467,468,471, 120 – बी भा.द.वि., 65,66 ,आइ .टी. एक्ट,3 (घ) 1,2,/4 म0 प्र0 मान्यता प्राप्त परीक्षा अधिनियम–1937 में सर्मपण किये जाने पर उक्त प्रकरण में गिरफतार किया गया था जो कि न्यायिक निरोध में जेल में निरूद्ध है ।

यह कि आवेदक / आरोपी जो कि अपराध कमांक 17/13 में नामजद आरोपी है किन्तु प्रकरण पूर्णतः तकनीकी डाटा एवं सीडीआर विश्लेषण से संबंधित है जिसके संबंध में तकनीकी साक्ष्य संकलित की जा रही है । उक्त साक्ष्य संकलन में काफी समय की आवश्यकता है जिस कारण से साक्ष्य संकलन पश्चात ही आरोपी को गिरफतार कर उनकी तस्दीक की जा सकेगी। यह कि अगर आवेदक /आरोपी को अग्रिम जमानत पर रिहा किया जाता है तो वह अपने प्रभाव का प्रयोग कर साक्ष्य संकलन में बाधा उत्पन्न करेगा साथ ही गवाहों को डरा–धमकाकर साक्ष्य से रोकेगा एवं स्वयं भी पूर्व की भांति फरार हो जाएगा जिससे प्रकरण की विवेचना एवं न्यायलयीन कार्यवाही में बाधा उत्पन्न होगी।

अतः माननीय न्यायालय से निवेदन है कि उपरोक्त तथ्यों को दृष्टिगत रखते हुये आवेदक /आरोपी सुधीर शर्मा का अग्रिम जमानत आवदेन पत्र निरस्त करने की कृपा करें,जो न्यायहित में होगा।

संलग्न–केस डायरी अप. कमांक 17/13

उप पुलिस अधीक्षक
एस.टी.एफ. ,
म.प्र.,भोपाल"

42. On a bare reading of this reply, we are in agreement with the submission canvassed on behalf of the prosecution that it refers to the fact that proclamation has been issued against the applicant in Crime No.18/2013 and not in Crime No.17/2013. The fact that such proclamation was issued is reinforced from the order passed by the concerned Magistrate on 20.06.2 014, under Section 82 of the Code. The same reads thus :-

"न्यायालयः—मुख्य न्यायिक मजिस्ट्रेट,भोपाल(म0 प्र0)
अभियुक्त व्यक्ति का हाजिरी की अपेक्षा करने वाली उदघोषणा
(अंतर्गत धारा 82 द0प्र0सं0)

मेरे समक्ष परिवाद किया गया है कि आप अभियुक्त सुधीर शर्मा पिता विदयाराम शर्मा, उम्र48 वर्ष निवासी डी 55 आकृति गार्डन , नेहरू नगर,थाना कमला नगर भोपाल ने थाना एस टी एफ भोपाल के अप0 क्रं 018 / 13 धारा 420,467,468,471,120 बी भा0 द0 सं0 एवं म0 प्र 0 मान्यता प्राप्त परीक्षा अधिनियम 1937 की धारा 3(घ),1,2 / 4 एवं धारा 65,66 आईटी एक्ट के अधीन दण्डनीय अपराध किया है और आरक्षी केन्द्र एस टीएफ भोपाल द्वारा अभियुक्त के फरारी पंचनामा को यह लिखकर प्रस्तुत किया गया है कि अभियुक्त अपने निवास स्थान पर काफी समय से दिखाई नहीं दिया है तथा उसके निवास स्थान पर ताला लगा है फरार हो गया है मिल नहीं रहा है और मुझे समाधानप्रद रूप से यह दर्शित कर दिया गया है कि आप अभियुक्त सुधीर शर्मा पिता विदयाराम शर्मा, फरार हो गया है तथा मामले में तामील से बचने के लिये अपने आप को छिपा रहे हैं ।

इसलिये यह उदघोषणा की जाती है कि अभियुक्त सुधीर शर्मा पिता विदयाराम शर्मा, उम्र 48 वर्ष निवासी डी 55 आकृति गार्डन,नेहरू नगर,थाना कमला नगर भोपाल से अपेक्षा की जाती है कि वह इस न्यायालय के समक्ष उस परिवाद के उत्तर देने के लिये जिला न्यायालय स्थित न्यायालय—मुख्य न्यायिक दंडाधिकारी,भोपाल में दिनांक 21.07.14 को या उसे पूर्व हाजिर हो अन्यथा आपके विरूद्ध अन्य विधिक कार्यवाही की जावेगी।

तारीख 20.06.14

स्थान : —भोपाल, म0 प्र 0

पंकज सिंह माहेश्वरी
मुख्य न्यायिक मजिस्ट्रेट
भोपाल, म0प्र 0"

43. We accept the argument of the prosecution that that stand was taken in Crime No.17/2013 to persuade the Court for not granting anticipatory bail

to the applicant against whom proceedings under Section 82 of the Code were already resorted to in connection with another crime. Hence, in our opinion, the grievance made by the applicant is not only misplaced but is only a subterfuge.

44. That takes us to the argument that the applicant may be granted bail in both the crimes and is willing to abide by any strict conditions that may be imposed by the Court including to keep himself away from the State of M.P. We have already dealt with this aspect in the earlier part of the judgment and having recorded the finding that since the investigation qua the applicant in both the crimes is still in progress and taking totality of the circumstances into account, releasing the applicant on bail is not advisable, atleast, till filing of the charge-sheet in Crime No.17/2013 and final charge-sheet in Crime No.18/2013.

45. Accordingly, both these applications must fail and are, therefore, **dismissed.**

46. We direct the Registry to retain copies of the compilations containing the materials gathered by the Investigating Agency during the further investigation after filing of the charge-sheet in Crime No.18/2013 and in relation to the investigation in Crime No.17/2013 as well as the copies of the note indicating the reasons for time taken to arrest the applicant till 06.11.2014 in Crime No.17/2013 inspite of the order dated 29.10.2014, to be kept in sealed cover in the safe custody of the Registrar (Judicial) until the disposal of the Special Leave Petitions filed by the applicant.

Applications dismissed.