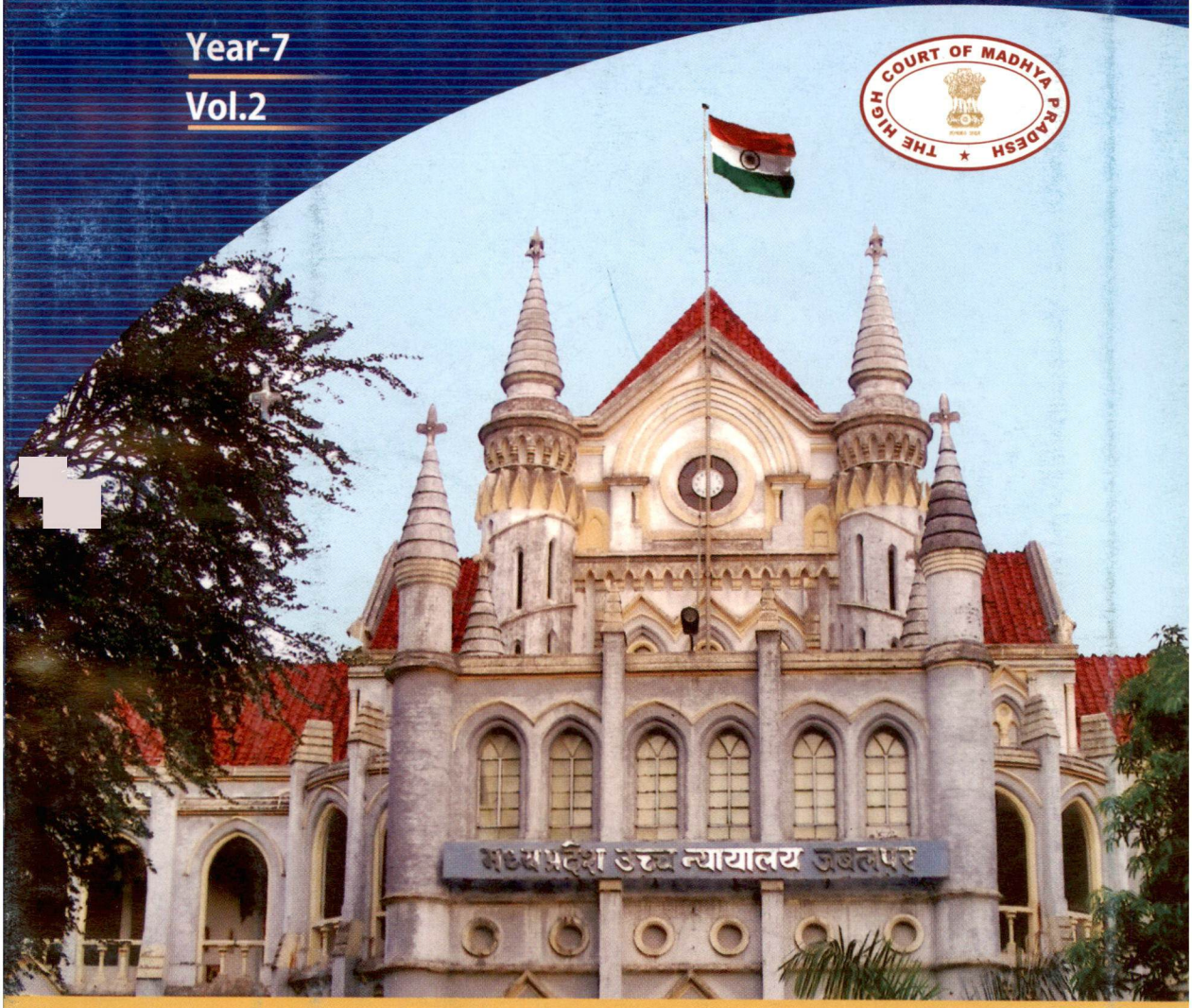
THE INDIAN LAW REPORTS

M.P. SERIES

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

Year-7

Vol.2



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करने में प्रयोग किया गया विवेकाधिकार अनुचित एवं मनमाना है, जो कि या तो किसी साक्ष्य पर आधारित नहीं है या ऐसी सामग्री पर आधारित है जो पूर्णतः असंगत या अग्राह्य है। (मधुसूदन तिवारी वि. श्याम सुंदर) ...1379

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Building permission – Date of consideration – **The object of Act of 1973 is not only the development but the control of building – For constructing building three applications are required to be made (i) for grant of permission from Development Authority under the Land Development Rules (ii) Grant of permission from Colonizer Authority (iii) Application for grant of building permission – Petitioner was granted permission for development under Rules, 1984 – An application for grant of building permission was filed, however, the said application remained pending and Rules 2012 came into force – Petitioner was directed to submit revised plan as per the Rules, 2012 – Held – No vested right had accrued in favour of petitioner to claim grant of building permission only under the provisions of Land Development Rules, 1984 – As the application was pending and Rules 2012 have come into force therefore, the application was to be considered only and only under the provisions of Rules, 2012 – Opinion of the building sanction authority that the petitioners were not to be granted FAR of 2.5 but a lesser FAR as per the Rules, 2012, is in accordance with law – Petition dismissed. [Ashish Kumar Vs. State of M.P.]** ...*3

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराऐं 2, 30 व 293, नगर तथा ग्राम निवेश अधिनियम, म.प्र., (1973 का 23), धारा 2 (सी), भूमि विकास नियम, म. प्र., 1984, नियम 2 एवं भूमि विकास नियम म.प्र., 2012, नियम 2, 13 व 105 – भवन निर्माण की अनुमति हेतु आवेदन – विचारण की तिथि – 1973 के अधिनियम का उद्देश्य केवल विकास नहीं परंतु भवन निर्माण का नियंत्रण है – भवन निर्माण हेतु तीन आवेदन किये जाना अपेक्षित है (i) भूमि विकास नियम के अंतर्गत विकास प्राधिकरण से अनुमति प्रदान किये जाने हेतु (ii) उपनिवेशक प्राधिकारी से अनुमति प्रदान किये जाने हेतु (iii) भवन निर्माण की अनुमति प्रदान किये जाने हेतु आवेदन – याची को नियम 1984 के अंतर्गत विकास हेतु अनुमति प्रदान की गई – भवन निर्माण की अनुमति प्रदान किये जाने के लिये आवेदन प्रस्तुत किया गया किन्तु उक्त आवेदन लंबित रहा और नियम 2012 प्रभावी हुआ – याची को नियम 2012 के अनुसार पुनरीक्षित प्लान प्रस्तुत करने के लिये निदेशित किया गया – अभिनिर्धारित – केवल भूमि विकास नियम 1984 के उपबंधों के अंतर्गत भवन निर्माण की अनुमति प्रदान किये जाने का दावा करने के लिये याची के पक्ष में कोई निहित अधिकार प्रोद्भूत नहीं हुआ – चूंकि आवेदन लंबित था और नियम 2012 प्रभावी हुआ है इसलिये, आवेदन का विचार केवल और केवल नियम 2012 के उपबंधों के अंतर्गत किया जाना था – भवन निर्माण मंजूरी प्राधिकारी का अभिमत कि याचीगण को 2.5 का तल क्षेत्र अनुपात (एफ.ए.आर.) प्रदान नहीं किया जाना था बल्कि विधिनुसार नियम 2012 के अनुसार निम्नतर तल क्षेत्र अनुपात (एफ.ए.आर.) – याचिका खारिज। (आशीष कुमार वि. म.प्र. राज्य) ...*3

प्रतिकर की रकम एक माह के भीतर जमा नहीं की गई यद्यपि कर्मचारी को कर्तव्य के निर्वहन में क्षति कारित हुई – अवार्ड को इस आधार पर चुनौती दी गई कि आयुक्त ने अधिनियम की धारा 10(1) व 22ए के अंतर्गत नोटिस दिये बिना शास्ति अधिरोपित करने में गंभीर त्रुटि कारित की – अभिनिर्धारित – जैसा कि अधिनियम की धारा 4ए उपबंधित करती है, यह नियोक्ता का कानूनी दायित्व है कि जैसे ही प्रतिकर देय हो जाता है वह उसका भुगतान करे – चूंकि अपीलार्थी एक माह के भीतर प्रतिकर जमा नहीं किये जाने के लिये कोई उचित कारण देने में असफल रहा है, आयुक्त ने उचित रूप से ब्याज एवं शास्ति अधिरोपित की है। (एग्जीक्यूटिव इंजीनियर, एम.पी.पी.के.व्ही.व्ही.सी.एल. वि. श्रीमती मालती बाई) ...1332

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

JOURNAL SECTION

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

AMENDMENTS IN THE HIGH COURT OF MADHYA PRADESH RULES, 2008

[Notification published in Madhya Pradesh Gazette, (Extra-ordinary) dated 30th July, 2010, page no. 801 to 802(3)]

High Court of Madhya Pradesh, Jabalpur
Jabalpur, the 21st July 2010

No. A-2144.- Hon'ble the Chief Justice has been pleased to direct that the following amendments in the High Court of Madhya Pradesh Rules, 2008, shall come into force from the 10th day of August, 2010.

(1) In Chapter IV, rule 16 shall be substituted by the following :

16. (1) Tied up matters -

Whenever a Judge -

(a) is elevated to Supreme Court,

(b) is transferred to other High Court,

(c) demits office,

or

(d) is transferred to other Bench or Principal Seat of the High Court,

(e) is not available for any other reason and in the opinion of the Chief Justice, the application, looking to the urgency in the matter, it cannot wait for such Judge to resume work;

all matters tied up to him in a -

(i) single bench (except a review petition, which shall be listed before regular division bench), shall be listed before the regular bench.

(ii) division bench or full bench, shall be listed before a bench of which the available judge (s) shall necessarily be a member (s).

(2) Where none of the Judges comprising the bench to which any matter is tied up, is available in terms of sub-rule (1), such matter shall be listed before the regular bench.

(2) **In chapter X, rule 23 (2) (b) shall be substituted by the following:**

"(b) be supported by an affidavit verifying the facts relied on and annexures filed therewith."

(3) **In chapter X, after sub-rule (2) in rule 30 following sub-rule (3) shall be inserted:**

"(3) The petition shall be supported by an affidavit verifying the facts relied on and annexures filed therewith."

(4) **After chapter XIII, the following chapter shall be inserted:**

CHAPTER XIII A

PUBLIC INTEREST LITIGATION

LETTER PETITIONS

1. (a) Letter petitions, addressed to the Chief Justice and directed by him to be registered as a writ petition or a revision, shall be so registered.

(b) Letter petitions, addresed to a Judge of the High Court, may be

forwarded by him to the Chief Justice for consideration.

2. There shall be a Letter Petition Cell in the High Court, headed by the Registrar (Judicial) comprising such Officers of the Registry as members as may, from time to time, be nominated by the Chief Justice.

3. All letter petitions other than those mentioned in rule 1 above, shall be forwarded to the Registrar (Judicial) in original, who may mark it to a member of the Letter Petitions Cell for scrutiny. The member shall scrutinize the same, in the light of the guide lines contained in rules 9,10 and 11 of this Chapter. Thereafter the letter petition shall be submitted to the Chief Justice or a Judge or committee of Judges, nominated for the purpose, by the Chief Justice.

4. The Chief Justice or the Judge or the committee of Judges, nominated by the Chief Justice under rule 3, may either direct that the letter petition be registered as a writ petition or a revision or may pass such other order as may be deemed fit :

Provided that where a Judge or the committee of Judges, nominated by the Chief Justice, directs registration of a writ petition or a revision, he or it shall send the matter back to the Chief Justice for placing before the regular bench or such other bench, as may be nominated by him, for hearing.

5. No letter petition shall be heard on judicial side unless registered as a writ petition or a Civil or criminal revision on an express order made by the Chief Justice or a Judge or the committee of Judges nominated under rule 3 by the Chief Justice.

6. No one shall have a right to be heard by the Chief Justice or the Judge or the committee of Judges nominated by the Chief Justice in respect of a letter petition before its registration.

7. The High Court shall not be obligated to maintain a record of every letter petition; nor shall the Chief Justice or the Judge or the committee of Judges, nominated by the Chief Justice, be bound to assign or communicate reasons for any order made under rule 4 of this Chapter.

8. No correspondence shall be entertained in respect of any letter petition.

9. Ordinarily, no letter petition espousing individual/personal cause shall be entertained as a writ petition filed in public interest except as hereinafter indicated-

(1) matters pertaining to bonded labourers;

(2) matters pertaining to neglected children;

(3) Petitions from jails-

(a) complaining of harassment;

(b) for pre-mature release;

(c) for release on probation;

(d) seeking release after having completed 14 years in jail;

(e) in respect of death in prison;

(f) seeking transfer of a prisoner from one jail to another;

(g) praying for release on personal bond; and

(h) seeking speedy trial as a fundamental right;

(4) Petitions against police-

(a) complaining harassment/atrocities by police; and

(b) in respect of death in police custody.

(5) Petitions against atrocities on women, in particular harassment of bride, bride burning, rape, murder, kidnapping, child marriage etc.

(6) Petitions complaining of harassment or torture of or atrocities upon members of Scheduled Castes or Schedule Tribes by persons belonging to upper class or police;

(7) Petitions for preservation and maintenance of heritage, culture or antiques;

(8) Petitions for conservation of forest and wild life;

(9) Petitions by riot-victims;

(10) Petitions for Family Pension ;

10. Ordinarily, letter petitions falling under the following categories shall not be registered as writ petition or revision.

(1) landlord-tenant matters;

(2) service matters including those pertaining to retiral benefits; and

(3) the following matters-

(a) complaints against central/state government departments/ officers; Government Departments and Local Bodies except those relating to Item Nos. (1) to (10) above.

(b) matters relating to admission to educational courses;

(c) petitions for early hearing of case pending in High Courts and subordinate courts;

(d) petitions alleging civil contempt of court;

(e) petitions seeking relief for which a main case other than a writ petition under article 226 of the Constitutin of India or a revision is maintainable;

(f) a petition seeking transfer of a case from a Bench to the Principal seat of the High Court or from one subordinate court to another;

(4) petitions concerning maintenance of wife, children and parents;

(5) individual complaints against advocates.

11. Ordinarily, a letter petition shall not be directed to be registered simply because the petitioner lacks financial resources to prosecute the remedy available to him under the law.

In such cases, appropriate direction to High Court Legal Services Committee or the State Legal Services Authority may be made by the Chief Justice or the Judge or the committee of Judges.

12. Nothing in this Chapter shall be deemed to restrict the powers of

the Chief Justice or a Judge or the committee of Judges nominated by the Chief Justice under rule 3 to register a letter petition in his or its discretion.

Regular public interest Litigation

13. Regular public interest litigation may be initiated by a registered or recognized social action group or an individual having social public standing/professional status and public spirited antecedents or any other person or a group acting *pro bono publico.*

14. A writ petition shall disclose-

(1) petitioner's social public standing/professional status and public spirited antecedents;

(2) source of petitioner's finances for meeting the expenditure of the P.I.L;

(3) source of the information on which the averments are based;

(4) facts constituting the cause;

(5) nature of injury caused to the public and

(6) nature and extent of the personal interest of the petitioner involved in the cause, if any.

15. All substantive allegations/averments in a writ petition shall, as far as practicable, be supported by prima facie evidence/material. Such allegations/averments and evidence/material shall be substantiated by an affidavit of the petitioner.

16. A writ petition shall contain a statement/declaration that a thorough research has been conducted in the matter and shall be accompanied by all such relevant material, where necessary.

17. A writ petition shall contain a statement/declaration of the petitioner that to the best of his knowledge, the issue, raised, was not dealt with or decided and that a similar or identical petition was not filed earlier by the petitioner or by any other person and in case such an issue was dealt with or a similar or identical petition was filed earlier, its status or the result thereof.

18. The Court may require a petitioner to deposit such security as deemed fit.

19. Where the Court, after hearing of the matter is of the view that the petitioner was not genuinely interested in espousing a public cause, it may, in its discretion, impose exemplary cost on the petitioner.

20. The petitions; involving larger public interest, gravity and urgency, shall be given priority over other petitions.

(5) In chapter XXI, sub-rules (1), (2) and (3) of rule 1 shall be deleted.

(6) In chapter XXI, sub-rule (4) of rule 1 shall be substituted by the following:

> "(4) A party desiring to appeal to the Supreme Court may apply orally for a certificate in terms of article 134-A of the Constitution of India immediately after the pronouncement of the judgment by the Court and the Court may, as soon as may be, after hearing the parties or their counsel grant of refuse the same to the party on such oral application."

(7) In chapter XXI, rules 2 shall be deleted.

(8) In chapter XXI, rule 3 shall be substituted by the following:

> "3. Upon the Court directing grant of certificate, *suo motu* or otherwise the Registrar shall issue a certificate for fitness to appeal in Form No. 30 or 31."

(9) In chapter XXI, sub-rule (1) of rule 3 shall be deleted.

(10) In chapter XXI, sub-sule (4) of rule 6 shall be substituted by the following:

> "(4)(a) for making deposit for the costs of transmission of the original record; or
>
> (b) the preparation of transcript of the record in English and for its transmission; or
>
> (c) for the preparation and transmission of the printed or photocopied transcript of the record."

(11) In chapter XXI, sub-rules (1), (2) and (3) of rule 22 shall be deleted.

(12) In chapter XXI sub-rule (4) of rule 22 shall be substituted by the following:

"(4) A party desiring to appeal to the Supreme Court may apply orally for a certificate in terms of article 134-A of the Constitution of India immediately after the pronouncement of the judgment by the Court and the Court may, as soon as may be after hearing the parties or their counsel grant or refuse the same to the party on such oral application.

(13) In chapter XXI, rule 23 shall be deleted.

(14) In chapter XXI, rule 24 shall be substituted by the following:

24. Upon the Court directing grant of certificate, the Registrar shall issue a certificate for fitness to appeal, shall be issued in Form No. 30.

(15) In the appendix, Form no. 29 shall be deleted.

C.V. SIRPURKAR
Secy.
High Court Rule Committee.
21-7-2010

[Notification published in Madhya Pradesh Gazette, (Extra-ordinary) dated 17th February, 2011]

High Court of Madhya Pradesh, Jabalpur

No. G-4 Jabalpur, the 9th February, 2011

ANNEXURE-A

Rule -2(7)(d)(1) of Chapter- IV of the High Court of the Madhya Pradesh Rules, 2008, shall be deleted.

SUBHASH KAKAKDE, Registrar General

NOTES OF CASES SECTION

Short Note

**(1)*

Before Mr. Justice Jarat Kumar Jain

M.Cr.C. No. 382/2013 (Indore) decided on 9 December, 2014

ADITYA SINGH SENGAR ...Applicant

Vs.

STATE OF M.P. ... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Penal Code (45 of 1860), Sections 420, 406, 409, 467 & 468 - Quashing of F.I.R. **- In enquiry it was found that Gram Panchayat fraudulently registered attendance of four dead persons in muster roll - Applicant was posted as Sub-Engineer - Only allegation against him is that he issued completion certificate - Duties of the applicant are in regard to technical advise and supervision of work and not to verify the muster roll - No allegation that any money was entrusted to applicant which he has misappropriated or has committed any forgery - F.I.R. liable to be quashed qua the applicant.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं दण्ड संहिता (1860 का 45), धाराऐं 420, 406, 409, 467 व 468 – प्रथम सूचना रिपोर्ट को अभिखंडित किया जाना – जांच में यह पाया गया कि ग्राम पंचायत ने चार मृत व्यक्तियों की उपस्थिति कपटपूर्वक गिनती–पंजी में दर्ज की – आवेदक उप–अभियंता के रूप में पदस्थ था – उसके विरूद्ध केवल यह अभिकथन है कि उसने पूर्णता प्रमाणपत्र जारी किया – आवेदक का कर्त्तव्य तकनीकी परामर्श एवं कार्य के पर्यवेक्षण से संबंधित है और न कि गिनती–पंजी के सत्यापन से – कोई अभिकथन नहीं कि आवेदक को कोई रकम सौंपी गई थी जिसका उसने दुर्विनियोजन किया या कोई कूटरचना कारित की – आवेदक के संबंध में प्रथम सूचना रिपोर्ट अभिखंडित किये जाने योग्य।

Case referred :

2013 Cri. L. J. 411 (SC).

Short Note

**(2)*

Before Mr. Justice K.K. Trivedi

C.R. No. 88/2010 (Jabalpur) decided on 11 November, 2013

ASHA PRAJAPATI (SMT.) ...Applicant

Vs.

CHHIDAMILAL & anr. ...Non-applicants

Civil Procedure Code (5 of 1908), Section 152 - Correction in

decree - **Applicant filed suit for specific performance of contract - In relief clause of plaint although area in words was rightly mentioned as "0.19" but in figures, it was wrongly mentioned as "0.10" - Area was rightly mentioned in entire plaint - Held - It was not necessary for Trial Court to take area only from figures but could have been ascertained from its description in words also - Trial Court should have allowed the application for correction of decree - Petition allowed.**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 152 – डिक्री में सुधार – आवेदक ने संविदा के विनिर्दिष्ट पालन हेतु वाद प्रस्तुत किया – यद्यपि वादपत्र के अनुतोष खंड में क्षेत्रफल को शब्दों में उचित रूप से **"0.19"** उल्लिखित किया गया परन्तु अंकों में उसे गलत रूप से **"0.10"** उल्लिखित किया गया – संपूर्ण वादपत्र में क्षेत्रफल को उचित रूप से उल्लिखित किया गया – अभिनिर्धारित – विचारण न्यायालय के लिये केवल अंकों से क्षेत्रफल विचार में लेना आवश्यक नहीं था बल्कि उसे शब्दों से भी सुनिश्चित किया जा सकता था – विचारण न्यायालय को डिक्री में सुधार हेतु आवेदन मंजूर करना चाहिये था – याचिका मंजूर।

Case referred :

AIR 2008 SC 225.

Girish Shrivastava, for the applicant
Lalji Kushwaha, for the non-applicant no.1.
Ashok Chourasiya, for the non-applicant no. 2.

Short Note

****(3)***

Before Mr. Justice K.K. Trivedi

W.P. No. 2281/2013 (Jabalpur) decided on 31 October, 2014

ASHISH KUMAR & ors. ...Petitioners

Vs.

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

Municipal Corporation Act, M.P. (23 of 1956), Sections 2, 30 & 293, Nagar Tatha Gram Nivesh Adhiniyam, M.P., (23 of 1973), Section 2 (c), Land Development Rules, M.P., 1984, Rule 2 and Land Development Rules M.P., 2012, Rules 2, 13 & 105 - Application for Building permission **- Date of consideration - The object of Act of 1973 is not only the development but the control of building - For constructing building three applications are required to be made (i) for grant of permission from Development Authority under the Land Development**

Rules (ii) Grant of permission from Colonizer Authority (iii) Application for grant of building permission - Petitioner was granted permission for development under Rules, 1984 - An application for grant of building permission was filed, however, the said application remained pending and Rules 2012 came into force - Petitioner was directed to submit revised plan as per the Rules, 2012 - Held - No vested right had accrued in favour of petitioner to claim grant of building permission only under the provisions of Land Development Rules, 1984 - As the application was pending and Rules 2012 have come into force therefore, the application was to be considered only and only under the provisions of Rules, 2012 - Opinion of the building sanction authority that the petitioners were not to be granted FAR of 2.5 but a lesser FAR as per the Rules, 2012, is in accordance with law - Petition dismissed.

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराऐं 2, 30 व 293, नगर तथा ग्राम निवेश अधिनियम, म.प्र. (1973 का 23), धारा 2 (सी), भूमि विकास नियम, म.प्र., 1984, नियम 2 एवं भूमि विकास नियम म.प्र., 2012, नियम 2, 13 व 105 – भवन निर्माण की अनुमति हेतु आवेदन – विचारण की तिथि – 1973 के अधिनियम का उद्देश्य केवल विकास नहीं परंतु भवन निर्माण का नियंत्रण है – भवन निर्माण हेतु तीन आवेदन किये जाना अपेक्षित है (i) भूमि विकास नियम के अंतर्गत विकास प्राधिकरण से अनुमति प्रदान किये जाने हेतु (ii) उपनिवेशक प्राधिकारी से अनुमति प्रदान किये जाने हेतु (iii) भवन निर्माण की अनुमति प्रदान किये जाने हेतु आवेदन – याची को नियम 1984 के अंतर्गत विकास हेतु अनुमति प्रदान की गई – भवन निर्माण की अनुमति प्रदान किये जाने के लिये आवेदन प्रस्तुत किया गया किन्तु उक्त आवेदन लंबित रहा और नियम 2012 प्रभावी हुआ – याची को नियम 2012 के अनुसार पुनरीक्षित प्लान प्रस्तुत करने के लिये निदेशित किया गया – अभिनिर्धारित – केवल भूमि विकास नियम 1984 के उपबंधों के अंतर्गत भवन निर्माण की अनुमति प्रदान किये जाने का दावा करने के लिये याची के पक्ष में कोई निहित अधिकार प्रोद्भूत नहीं हुआ – चूंकि आवेदन लंबित था और नियम 2012 प्रभावी हुआ है इसलिये, आवेदन का विचार केवल और केवल नियम 2012 के उपबंधों के अंतर्गत किया जाना था – भवन निर्माण मंजूरी प्राधिकारी का अभिमत कि याचीगण को 2.5 का तल क्षेत्र अनुपात (एफ.ए.आर.) प्रदान नहीं किया जाना था बल्कि विधिनुसार नियम 2012 के अनुसार निम्नतर तल क्षेत्र अनुपात (एफ.ए.आर.) – याचिका खारिज।

Cases referred :

(2001) 8 SCC 397, (2011) 6 SCC 570, (2011) 9 SCC 286.

R.K. Verma with *Saurabh Shrivastava,* for the petitioners.
Rajesh Tiwari, G.A. for the respondent no.1.
Anshuman Singh, for the respondent nos. 2 & 3.

NOTES OF CASES SECTION

Short Note

**(4)*

Before Mr. Justice Prakash Shrivastava

Company Petition No. 35/2013 (Indore) decided on 1 October, 2014

CITIBANK N.A. LONDON BRANCH ...Petitioner

Vs.

M/S. PLETHICO PHARMACEUTICALS LTD. ...Respondent

A. Companies Act (1 of 1956), Section 439 (1)(b) - Applications for winding up - Locus Standi - **Petitioner trustee being a creditor is also entitled to file the petition for winding up the Company.**

क. कम्पनी अधिनियम (1956 का 1), धारा 439 (1)(बी) – परिसमापन हेतु आवेदन – सुने जाने का अधिकार – याची न्यासी, एक लेनदार होने के नाते कम्पनी के परिसमापन हेतु याचिका प्रस्तुत करने का भी हकदार।

B. Companies Act (1 of 1956), Section 433 - Winding up - **Maturity date of bond not extended, restructuring of bond not done - Almost two years have passed after the maturity date and nothing concrete has been proposed by Company - Debt is unsecured debt and default has already triggered - Respondent has already expressed inability to honour the liablility and redeem the bond - Company's only defence that it is commercially solvent does not constitute a stand alone for setting aside a notice under Section 434 (1)(a) - Undisputed debt has to be paid and in absence of any genuine and substantial ground for refusal to pay, it should not be able to avoid the statutory demand - Refusal to pay is not the result of any bonafide inability to pay - Fit case for admission of the winding up petition.**

ख. कम्पनी अधिनियम (1956 का 1), धारा 433 – परिसमापन – बंधपत्र की परिपक्वता तिथि को बढ़ाया नहीं गया, बंधपत्र को नया रूप नहीं दिया गया – परिपक्वता तिथि के पश्चात् करीब दो वर्ष बीत चुके हैं और कंपनी द्वारा कोई ठोस प्रस्ताव नहीं दिया गया – ऋण एक अप्रतिभूत ऋण है और व्यतिक्रम पहले ही आरंभ हो चुका है – प्रत्यर्थी ने पहले ही दायित्व को पूरा करने एवं बंधपत्र का मोचन करने में अक्षमता प्रकट की है – कंपनी का केवल बचाव कि वह वाणिज्यिक रूप से ऋणशोधक्षम है, केवल यह धारा 434 (1)(ए) के अंतर्गत नोटिस अपास्त करने हेतु आधार गठित नहीं करता – अविवादित ऋण अदा करना होगा और भुगतान से इंकार के किसी वास्तविक एवं सारवान आधार की अनुपस्थिति में, उसे कानूनी मांग से बचने नहीं दिया जाना चाहिए – भुगतान से इंकार करना, भुगतान के लिए किसी वास्तविक अक्षमता के फलस्वरूप होना नहीं है – परिसमापन याचिका स्वीकार करने के लिये उचित प्रकरण है।

Cases referred :

Company Petition No. 971/2009 (Bombay High Court), Appeal No. 344/2013 (Company Petition No. 28/2012) (Bombay High Court) by order dated 02/09/2013, 1965 (35) Company Cases 456(SC), 1971 (3) SCC 632, 1994 (79) Company Cases 835 (Supreme Court), 2005 (7) SCC 42, 2009 (3) SCC 527, ILR (1975) II Delhi 901, Company Petition No. 558/2012 (Delhi High Court) dated 17.07.2013, 2010 (155) Company Cases 308 (P & H), 1998 (93) Company Cases 296 (Delhi), 1999 (96) Company Cases 841 (Gujarat), 2001 (104) Company Cases 533 (Gujarat), 2002 (112) Company Cases 174 (Bombay).

B.L. Pavecha with *Aditya Thakkar & Nitin Phadke*, for the petitioner.
J.P. Kama with *B. Somani & Ajay Bagadiya,* for the respondent.

Short Note (DB)

**(5)*

Before Mr. Justice Shantanu Kemkar & Mr. Justice Jarat Kumar Jain

I.T.A No. 347/2007 (Indore) decided on 2 April, 2014

COMMISSIONER OF INCOME TAX-I ...Appellant
Vs.
M/S. M.P. FINANCIAL CORPORATION ...Respondent

***Income Tax Act (43 of 1961), Section 254(2) - Rectification of order* - Income Tax Appellate Tribunal can always correct a mistake while exercising its power of rectification under the Act - No substantial question of law arises - Appeal dismissed.**

आयकर अधिनियम (1961 का 43), धारा 254(2) – आदेश की परिशुद्धि – आयकर अपीली अधिकरण, अधिनियम के अंतर्गत परिशोधन की अपनी शक्ति का प्रयोग करते समय सदैव गलती सुधार सकता है – विधि का कोई सारवान प्रश्न उत्पन्न नहीं होता – अपील खारिज।

The Order of the Court was delivered by : SHANTANU KEMKAR, J.

Case referred :

(2007) 292 ITR 488 (MP).

R.L. Jain with *Veena Mandlik,* for the appellant.
D.S. Kale, for the respondent.

NOTES OF CASES SECTION

Short Note (DB)

**(6)*

Before Mr. Justice Rajendra Menon & Ms. Justice Vandana Kasrekar

W.P. No. 12126/2013 (Jabalpur) decided on 3 December, 2014

EKTA SHIKSHA PRASAR SAMITI, CHHATARPUR ...Petitioner

Vs.

DR. HARISINGH GAUR UNIVERSITY ...Respondent

Vishwavidyalaya Adhiniyam, M.P. (22 of 1973), Sections 2 and 4 & Central Universities Act, 2009, Section 6 and Vishwavidyalaya Sanshodhan Adhiniyam M.P., 2011, Section 3 - Affiliation **- Petitioner running B.Ed. courses however, affiliation was not granted by University on the ground that it has now become Central University by virtue of Act, 2009 - New University has been constituted under Sanshodhan Adhiniyam, 2011 however, the same has not become functional - Even after formation of Central University, Dr. Harisingh Gaur University granted affiliation to institutions - State Govt. had also requested authorities of Dr. Hari Singh Gaur University to make some interim arrangements - Refusal to grant affiliation to Petitioner bad in law - University directed to pass order of affiliation within 30 days if the petitioner found to have fulfilled all conditions - Result of students who were admitted and whose examination has been taken shall be released - Petition allowed.**

विश्वविद्यालय अधिनियम, म.प्र. (1973 का 22), धाराऐं 2 व 4 एवं केन्द्रीय विश्वविद्यालय अधिनियम, 2009, धारा 6 एवं विश्वविद्यालय संशोधन अधिनियम, म. प्र. 2011, धारा 3 – संबद्धता – याची बी.एड. पाठ्यक्रम चला रहा था, जबकि विश्वविद्यालय द्वारा इस आधार पर संबद्धता प्रदान नहीं की गई कि अब वह अधिनियम 2009 के प्रभाव से केन्द्रीय विश्वविद्यालय बन गया है – नये विश्वविद्यालय को संशोधन अधिनियम 2011 के अंतर्गत गठित किया गया है अपितु वह क्रियाशील नहीं हुआ है – केन्द्रीय विश्वविद्यालय निर्मित किये जाने के पश्चात् भी डॉ. हरिसिंह गौर विश्वविद्यालय ने संस्थाओं को संबद्धता प्रदान की – राज्य सरकार ने डॉ. हरिसिंह गौर विश्वविद्यालय के प्राधिकारियों से कुछ अंतरिम व्यवस्था करने का भी निवेदन किया था – याची को संबद्धता प्रदान करने से इंकार किया जाना विधि अंतर्गत अनुचित – विश्वविद्यालय को संबद्धता का आदेश 30 दिनों के भीतर पारित करने के लिये निदेशित किया गया यदि पाया जाता है कि याची सभी शर्तों को पूरा करता है – अभ्यर्थीगण जिन्हें प्रवेश दिया गया था और जिनकी परीक्षा ली गई थी, उनके परिणाम घोषित किये जायें – याचिका मंजूर।

NOTES OF CASES SECTION

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

D.K. Dixit, for the petitioner.
Kumaresh Pathak, Dy.A.G. for the State Government.
Shobha Menon with *Rahul Choubey*, for the respondent no. 1.

Short Note

**(7)*

Before Mr. Justice Rohit Arya

S.A. No. 512/2010 (Gwalior) decided on 5 May, 2014

KALLU KHAN ...Appellant

Vs.

WAKF INTAJAMIYA COMMITTEE & anr. ...Respondents

***Civil Procedure Code (5 of 1908), Order 7 Rule 11 and Wakf Act (43 of 1995), Sections 83(1)(2) & 85 - Wakf property - Maintainability of suit* - Appellant filed suit seeking declaration that he is a tenant of defendant - Wakf Board has already held that the plaintiff/appellant is not a tenant and is an encroacher and has also passed the order for vacating premises - Appeal filed by appellant also dismissed by Tribunal - Held - Wakf Act has been enacted for better administration and supervision of Wakf properties - Tribunal is a Civil Court and has all powers of Civil Court - Bar created by Section 85 applies - Civil Suit not maintainable.**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7, नियम 11 एवं वक्फ अधिनियम (1995 का 43), धारा 83(1)(2) व 85 – वक्फ संपत्ति – वाद की पोषणीयता – अपीलार्थी ने यह घोषणा चाहते हुए वाद प्रस्तुत किया कि वह प्रतिवादी का अभिधारी है – वक्फ बोर्ड ने पहले ही अभिनिर्धारित किया है कि वादी/अपीलार्थी अभिधारी नहीं है और अतिक्रमणकारी है तथा वाद परिसर खाली करने का आदेश भी पारित किया है – अपीलार्थी द्वारा प्रस्तुत की गई अपील भी अधिकरण द्वारा खारिज की गई – अभिनिर्धारित – वक्फ अधिनियम को वक्फ संपत्तियों के बेहतर प्रशासन एवं पर्यवेक्षण हेतु अधिनियमित किया गया है – अधिकरण एक सिविल न्यायालय है और उसे सिविल न्यायालय की सभी शक्तियां प्राप्त हैं – धारा 85 द्वारा सृजित वर्जन लागू होगा – सिविल वाद पोषणीय नहीं।

S.B. Mishra with *A.K. Nirankari*, for the appellant.

NOTES OF CASES SECTION

Short Note (DB)

****(8)***

Before Mr. Justice Rajendra Menon & Ms. Justice Vandana Kasrekar

F.A. No. 28/1997 (Jabalpur) decided on 4 December, 2014

KAMAL SINGH SISODIA ...Appellant

Vs.

SMT. RAMA SISODIA ... Respondent

Hindu Marriage Act (25 of 1955), Section 13(b) - Divorce - Irretrievable break down **- Petition for divorce filed by appellant on the ground of cruelty dismissed by Trial Court - In appeal, the wife did not appear inspite of publication of notice in news paper - Husband and wife residing separately for the last 18 years - In such circumstances, it shows that the marriage between the parties is irretrievably broken down - Appellant entitled to get a decree of divorce.**

हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(बी) – विवाह विच्छेद – असुधार्य विफलता – अपीलार्थी द्वारा विवाह–विच्छेद हेतु क्रूरता के आधार पर प्रस्तुत की गई याचिका विचारण न्यायालय द्वारा खारिज की गई – अपील में, समाचार.पत्र में नोटिस प्रकाशित किये जाने के बावजूद पत्नी उपस्थित नहीं हुई – पति–पत्नी पिछले 18 वर्षों से अलग–अलग निवास कर रहे हैं – उक्त परिस्थितियों में यह दर्शित होता है कि पक्षकारों के मध्य विवाह असुधार्य रूप से विफल हुआ है – अपीलार्थी विवाह विच्छेद की डिक्री प्राप्त करने का हकदार।

The Judgment of the Court was delivered by : VANDANA KASREKAR, J.

Case referred :

(2013) 5 SCC 226.

Amit Verma, for the appellant.

None for the respondent.

Short Note

****(9)***

Before Mr. Justice U.C. Maheshwari

W.P. No.16060/2013 (Jabalpur) decided on 20 September, 2013

KAMLESH JAIN (SMT.) ...Petitioner

Vs.

SMT. KUSUM BAI ...Respondent

Civil Procedure Code (5 of 1908), Order 26 Rule 9 - Appointment

of Commissioner for demarcation **- Demarcation report carried out by revenue officer already on record - While passing the impugned order Trial Court has considered all probable aspects - Order is passed under the vested discretionary jurisdiction - Same could not be interfered with - Every concerning party is bound to prove his case on his own legs - He has no right to use the procedure of the Court as an agency to collect the evidence as demarcation report by revenue authority is already on record - No perversity and illegality in the order - Petition is dismissed.**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 26 नियम 9 – सीमांकन हेतु कमिश्नर की नियुक्ति – राजस्व अधिकारी द्वारा किया गया सीमांकन प्रतिवेदन पहले से अभिलेख पर है – आक्षेपित आदेश पारित करते समय विचारण न्यायालय ने सभी संभावित पहलुओं को विचार में लिया – निहित विवेकाधिकार की आधिकारिता के अंतर्गत आदेश पारित किया गया – उक्त में हस्तक्षेप नहीं किया जा सकता – प्रत्येक संबंधित पक्षकार अपना प्रकरण स्वयं साबित करने के लिये बाध्य हैं – उसे न्यायालय की प्रक्रिया का उपयोग साक्ष्य एकत्रित करने की एजेंसी के रूप में करने का कोई अधिकार नहीं क्योंकि राजस्व प्राधिकारी का सीमांकन प्रतिवेदन पहले से अभिलेख पर है – आदेश में कोई विपर्यस्तता एवं अवैधता नहीं – याचिका खारिज।

Cases referred :

2011(2) MPLJ 576, AIR 1973 SC 76.

Ashok Lalwani, for the petitioner.

Short Note

****(10)***

Before Mr. Justice Sanjay Yadav

S.A. No. 1175/2011(Jabalpur) decided on 24 February, 2014

KISHANLAL & ors. ... Appellants

Vs.

ABDUL WAHID & ors. ... Respondents

Accommodation Control Act, M.P. (41 of 1961), Section 12 - Destruction of suit premises **- Decree of eviction passed against appellant - Suit house collapsed during the pendency of the appeal - House in question was leased out and not the land - Therefore, no cause of action survives with the collapsing of suit premises - Second Appeal dismissed.**

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12 – वाद परिसर को नष्ट

किया जाना – अपीलार्थी के विरूद्ध निष्कासन की डिक्री पारित की गई – अपील लंबित रहने के दौरान वादग्रस्त मकान ढह गया – प्रश्नगत मकान पट्टे पर दिया गया था और न कि भूमि – इसलिये वादग्रस्त परिसर के ढह जाने के साथ ही कोई वाद कारण नहीं बचता – द्वितीय अपील खारिज।

Case referred :

(2001) 1 SCC 564.

Jagtendra Prasad, for the appellants.
Akhilesh Kumar Jain, for the respondents.

Short Note

****(11)***

Before Mr. Justice Sanjay Yadav

W.P. No. 15114/2012 (Jabalpur) decided on 12 March, 2014

MAHESH RAWAT ...Petitioner

Vs.

RAJ KUMARI & ors. ...Respondents

***Civil Procedure Code (5 of 1908), Order 21 Rule 16 - Application for execution* - Decree for eviction was passed against the petitioner - During the pendency of the Second Appeal, the decree holder transferred the suit premises - Application for execution of decree filed by original decree holder - Held - It is the decree holder who has sought execution of the decree - In absence of any statutory prohibition, he cannot be prevented from executing the same merely because the suit property has been transferred by registered sale deed.**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 16 – निष्पादन हेतु आवेदन – याची के विरूद्ध बेदखली की डिक्री पारित की गई थी – द्वितीय अपील लंबित रहने के दौरान डिक्रीदार ने वाद परिसर को अंतरित किया – मूल डिक्रीदार द्वारा डिक्री के निष्पादन हेतु आवेदन प्रस्तुत किया गया – अभिनिर्धारित – वह डिक्रीदार है जिसने डिक्री का निष्पादन चाहा है – किसी कानूनी प्रतिषेध की अनुपस्थिति में उसे उक्त के निष्पादन से मात्र इसलिये रोका नहीं जा सकता कि वाद संपत्ति को पंजीकृत विक्रय विलेख द्वारा अंतरित किया गया है।

Case referred :

AIR 1965 CAL 450.

June Chaudhary with *Jayalakshmi Aiyer,* for the petitioner.
Dinesh Agarwal, for the respondent nos. 1 to 11.

NOTES OF CASES SECTION

Short Note

**(12)*

Before Mr. Justice S.C. Sharma

W.P. No. 4564/2011 (Indore) decided on 26 September, 2014

MANSINGH RAJPOOT ...Petitioner

Vs.

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

(Alongwith W.P. No. 4565/2011 & W.P. No. 6574/2011).

Constitution - Article 226 & Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 9, 9A, 74-A and Narcotic Drugs and Psychotropic Substances (Madhya Pradesh) Rules, 1985, Rule 37-M, proviso of clause (c) **- Petitioner's license of poppy straw is over and not renewed - State Government issued order to destroy the remaining stock - Quantity of remaining stock is unreasonably large - No case of interference - Petition dismissed.**

संविधान – अनुच्छेद 226 एवं स्वापक औषधि और मन:प्रभावी पदार्थ अधिनियम (1985 का 61), धाराऐं 9, 9ए, 74–ए व स्वापक औषधि और मन:प्रभावी पदार्थ (मध्यप्रदेश) नियम, 1985, नियम 37–एम, खण्ड (सी) का परंतुक – याची की पॉपी स्ट्रा की अनुज्ञप्ति समाप्त हो गई और नवीनीकरण नहीं किया गया – राज्य सरकार ने शेष भंडार नष्ट करने के लिये आदेश जारी किया – शेष भंडार की मात्रा अयुक्तियुक्त रूप से अधिक है – हस्तक्षेप का प्रकरण नहीं – याचिका खारिज।

Case referred :

2002 (4) MPLJ 179.

Piyush Mathur with *M.S. Dwivedi*, for the petitioner.

M. Ravindran, G.A. for the respondents/State.

Short Note (DB)

**(13)*

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

W.P. No. 5253/2014 (Indore) decided on 1 September, 2014

NIHARIKA SINGH ...Petitioner

Vs.

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

Education - Admission - NRI Quota - Certificate from Indian Embassy **- Petitioner was denied admission under NRI quota as she**

had failed to produce certificate issued by Indian Embassy - Father of petitioner is residing in India but working in Merchant Navy - Definition of NRI as given in Income Tax Act cannot be imported as when the intention of Rule making body is not to include a case like petitioner, who's father is permanently residing in India, but is treated to be NRI for Income Tax Act, as he is offshore for the period of more than 182 days - Petition dismissed.

शिक्षा – प्रवेश – एन.आर.आई कोटा – भारतीय दूतावास का प्रमाणपत्र – याची को एन.आर.आई कोटे के अंतर्गत प्रवेश से मना किया गया क्योंकि वह भारतीय दूतावास द्वारा जारी प्रमाणपत्र प्रस्तुत करने में असफल रही – याची के पिता भारत में निवासरत परंतु वाणिज्यिक नौसेना में कार्यरत – एन.आर.आई. की परिभाषा जैसे कि आयकर अधिनियम में दी गई है के अर्थ में नहीं ली जा सकती क्योंकि जब नियम बनाने वाली निकाय का आशय याची जैसे प्रकरण को समाविष्ट करना नहीं है जिसके पिता स्थाई रूप से भारत में निवासरत हैं परंतु आयकर अधिनियम हेतु एन.आर.आई माना जाता है क्योंकि वह 182 दिनों से अधिक की अवधि के लिये अपतट रहते हैं – याचिका खारिज।

The Order of the Court was delivered by : **M.C. Garg, J.**

Cases referred :

(2005) 1 SCC 754, 2002 5 SCC 440.

Sunil Jain with *Amol Shrivastava*, for the petitioner.
Mini Ravindran, Dy. G.A. for the respondents/State.

Short Note
****(14)***
Before Mr. Justice Rajendra Mahajan
Cr. Rev. No. 2646/2014 (Jabalpur) decided on 28 January, 2015

PRADUMNA ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Section 12 and Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 20 - Heinousness or seriousness **- Bail to a Juvenile can be rejected only on the ground that it appears reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to any moral, physical or psychological danger or its release would defeat the ends**

of justice - Heinousness or seriousness, gravity of offence is no ground to reject bail - No case is pending against juvenile under NDPS Act - Applicant entitled to be released on bail.

किशोर न्याय (बालकों की देख–रेख और संरक्षण) अधिनियम (2000 का 56), धारा 12 एवं स्वापक औषधि और मन:प्रभावी पदार्थ अधिनियम (1985 का 61), धारा 20 – जघन्यता या गंभीरता – किशोर की जमानत सिर्फ इस आधार पर अस्वीकार की जा सकती है जबकि यह विश्वास करने के लिये समुचित आधार हो कि रिहाई से उसके किसी ज्ञात अपराधी के संपर्क/संगति में आने की संभावना हो या उसे कोई नैतिक, भौतिक या मनोवैज्ञानिक भय प्रकट होता हो या उसकी रिहाई से न्याय का उद्देश्य विफल होता हो – अपराध की जघन्यता या गंभीरता, गुरूत्वता जमानत अस्वीकार करने का कोई कारण नहीं है – किशोर के विरूद्ध एन.डी.पी.एस. अधिनियम के अंतर्गत कोई प्रकरण लंबित नहीं है – आवेदक जमानत पर छोड़ेजाने का हकदार।

Case referred :

(2011) (4) MPHT 2486.

Ajay Mishra, for the applicant.
V.K. Pandey, P.L. for the non-applicant.

Short Note

****(15)***

Before Mr. Justice Jarat Kumar Jain

M.A. No. 1683/2014 (Indore) decided on 4 December, 2014

SAYED AKHTAR ALI (M/S.) & anr. ...Appellants

Vs.

GENERAL MANAGER, WESTERN RAILWAY & ors. ...Respondents

A. Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 - Temporary injunction - Prima facie case - **Appellant was awarded contract for the amount of Rs. 2.44 Crores - Contract was terminated due to inability of the appellant to supply the material - Respondents already forfeited the security amount of Rs. 14.42 lakhs and also threatened to recover some more amount from other contracts - Held - No show cause notice was issued prior to deducting the amount - Respondents have unilaterally determined recoverable amount and forfeited security amount - Claim of respondents not admitted by appellant - Dispute yet to be decided by Court - There is a prima facie case in favour of appellant.**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अस्थाई व्यादेश – प्रथम दृष्टया प्रकरण – अपीलार्थी को रू. 2.44 करोड़ की रकम की संविदा प्रदान की गयी – सामग्री प्रदान करने में अपीलार्थी की असमर्थता के कारण संविदा समाप्त की गई – प्रत्यर्थीगण ने पहले ही रू. 14.42 लाख की प्रतिभूति रकम समपहृत की है और अन्य संविदाओं से कुछ और रकम वसूल करने की धमकी दी है – अभिनिर्धारित – रकम घटाने से पूर्व कारण बताओ नोटिस जारी नहीं किया गया – प्रत्यर्थीगण ने एकपक्षीय रूप से वसूली की रकम का निर्धारण किया और प्रतिभूति रकम समपहृत की – प्रत्यर्थीगण का दावा अपीलार्थी द्वारा अस्वीकार किया गया – विवाद अभी न्यायालय द्वारा निर्णीत किया जाना है – अपीलार्थी के पक्ष में प्रथम दृष्टया प्रकरण है।

B. Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 - Temporary injunction - Balance of Convenience **- Respondents have already forfeited security amount of Rs. 14.42 lakhs - Some other works are also going on between the parties - Respondents can recover the amount after proper adjudication - Balance of convenience is in favour of appellant.**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अस्थाई व्यादेश – सुविधा का संतुलन – प्रत्यर्थीगण ने पहले ही प्रतिभूति की रकम रू. 14.42 लाख समपहृत की है – पक्षकारों के मध्य कुछ अन्य कार्य भी चल रहे हैं – प्रत्यर्थीगण उचित न्याय निर्णयन के पश्चात् रकम वसूल सकते हैं – सुविधा का संतुलन अपीलार्थी के पक्ष में है।

C. Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 - Temporary injunction - Irreparable loss - Security amount already forfeited **- If respondents recovered some more money from other works contract, it would certainly affect the business of appellant - Appellant would suffer irreparable loss - Temporary injunction granted - Respondents restrained from recovering any amount from the running bills of appellants from other works contract or from security/earnest money deposited or performance guarantee given by appellant in other works contract.**

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अस्थाई व्यादेश – अपूरणीय हानि – प्रतिभूति की रकम पहले ही समपहृत – यदि प्रत्यर्थीगण ने अन्य कार्य संविदा से कुछ और रकम वसूली तब यह निश्चित रूप से अपीलार्थी के कारोबार को प्रभावित करेगा – अपीलार्थी अपूरणीय हानि सहन करेगा – अस्थाई व्यादेश प्रदान किया गया – प्रत्यर्थीगण को अन्य कार्य संविदा से अपीलार्थी के चालू बिलों से या जमा की गई प्रतिभूति/अग्रिम धन से या अन्य कार्य संविदा में अपीलार्थी द्वारा दी गई संपादन गारंटी से वसूल करने से रोका गया।

Cases referred :

AIR 1974 SC 1265, 1998 SAR (Civil - 491).

I.L.R. [2015] M.P., 1111
SUPREME COURT OF INDIA
Before Mr. Justice T.S. Thakur, Mr. Justice V. Gopala Gowda & Mr. Justice C. Nagappan
Civil Appeal No. 3498/2008 decided on 6 August, 2014

STATE OF M.P. & anr. ...Appellants
Vs.
ANSHUMAN SHUKLA ...Respondent

Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Section 19 and Limitation Act (36 of 1963), Sections 5, 29(2) and 4 to 24 - Condonation of delay - **Time barred revision u/s 19 of Act of 1983 - Section 29(2) provides that sections 4 to 24 of the Limitation Act shall be applicable to any Act which prescribes a special period of limitation, unless they are expressly excluded by that special law - Delay can be condoned - Appeal allowed. (Paras 26 & 40)**

माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 19 एवं परिसीमा अधिनियम (1963 का 36), धाराऐं 5, 29(2) व 4 से 24 – विलम्ब के लिए माफी – अधिनियम 1983 की धारा 19 के अंतर्गत समय वर्जित पुनरीक्षण – धारा 29(2) उपबंधित करती है कि परिसीमा अधिनियम की धाराऐं 4 से 24 किसी भी ऐसे अधिनियम को लागू होगी जो परिसीमा की विशेष अवधि विहित करता है, जब तक कि उस विशेष विधि द्वारा वे स्पष्ट रूप से विवर्जित नहीं – विलम्ब माफ किया जा सकता है – अपील मंजूर।

Cases referred :

2004 (II) MPJR SN 55, 2004 MLJ 374, 2004 (II) MPJR SN 374, (1995) 5 SCC 5, (1974) 2 SCC 133.

JUDGMENT

The Judgment of the Court was delivered by : **V. GOPALA GOWDA, J. :-** Civil Appeal No.3498 of 2008 arises out of order dated 30.6.2005 in C.R.No.1330 of 2003 passed by the Division Bench of the Madhya Pradesh High Court at Jabalpur relying on the judgment and order dated 13.4.2005 passed by the Full Bench of the Madhya Pradesh High Court in C.R.No.633 of 2003 etc. The connected Civil Appeal No.1145 of 2009 arises out of judgment and order dated 4.7.2006 passed by the Division Bench of the Madhya Pradesh High Court at Jabalpur in C.R.No.1

of 2006.

2. Civil Appeal No.3498 of 2008 was heard by a Division Bench of this Court, wherein by way of judgment dated 12.05.2008, it was opined that the case of *Nagar Palika Parishad, Morena v. Agrawal Construction Company*[1] was not correctly decided and, thus, the matter required consideration by a larger bench. It was further opined that the record of the case be placed before the Hon'ble the Chief Justice of India for constituting an appropriate Bench. That is how this matter has come up for consideration before us.

3. As both the appeals are identical, for the sake of convenience, we would refer to the necessary facts of C.A.No.3498 of 2008 which are stated hereunder:

The respondent filed a petition under Section 7 of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 (hereinafter referred to as "the Act of 1983") raising certain claims about the works contract executed between the parties. The petition was partly allowed by the Madhya Pradesh Arbitration Tribunal vide its award dated 18.6.2003. An amount of Rs.6,05,624/- with interest @12% per annum was awarded from 24.04.1998 till the date of realisation.

4. Being aggrieved, the appellants filed a Civil Revision No.1330 of 2003 before the High Court of Madhya Pradesh under Section 19 of the Act of 1983, along with an application under Section 5 of the Limitation Act, 1963 (hereinafter referred to as the "Limitation Act") to condone the delay in filing the revision.

5. The High Court observed in its order dated 07.05.2004 in the Revision that the view expressed by the Division Bench of the High Court in *Nagar Palika Parishad, Morena v. Agrawal Construction Company* [2] required consideration by a larger Bench on the question of:

> "Whether Provision of Section 5 of the Limitation Act is applicable to revision filed under Section 19 in the High Court?"

6. After the reference was made, the matter in *Nagarpalika Parishad, Morena* (supra) came up for consideration before a division bench of this

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1. 2004 (II) MPJR SN 55
2. 2004 MLJ 374

Court. While dismissing the petition at the threshold, it was observed in an order dated 27.08.2004[3]:

> ".....In our view there is no infirmity in the impugned judgment. The authority in the case of *Nasiruddin and Ors. v. Sita Ram Agarwal* (2003) 2 SCC 577 has been correctly followed. Same view has also been taken by this Court in the case of *Union of India v. Popular Construction Co.* (2001) 8 SCC 470.
>
> The Special Leave Petition stands dismissed with no order as to costs."

7. The full bench of the High Court in the order dated 13.04.2005, held that the dismissal of a special leave petition at the threshold stage by the Supreme Court is a binding precedent, and must be followed by the courts below. It was however also observed that no specific time limit can be fixed for exercising the *suo motu* revisional power under Section 19 of the Act of 1983. It was further held that the power has to be exercised within reasonable time which depends upon the nature of the order to be revised and other facts and circumstances of the case. The full bench of the High Court directed to place the revision petition before the appropriate bench for consideration in accordance with law.

8. The Civil Revision No. 1330 of 2003 which was barred by time of 80 days was dismissed by the High Court for the reasons given by the Full Bench in its order dated 13.04.2005.

9. Being aggrieved by the order of the High Court, the appellants filed a special leave petition before this Court against the dismissal of revision. The Division Bench of this court vide order dated 12.05.2008 was of the opinion that the case of *Nagar Palika Parishad, Morena* (supra) had been incorrectly dismissed at the threshold and that the same requires consideration by a larger Bench and further directed that the records of the case be placed before the Hon'ble the Chief Justice of India for constituting an appropriate Bench. Thus, the matter came before us for consideration.

10. First of all, in order to appreciate rival legal submissions, it would be necessary to consider Section 19 of the Act of 1983, which relates to revision and its limitation, which reads as under :-

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3. 2004(II) MPJR SN 374

*"19. **High Court's power of revision** –(1)- The High Court may suo motu at any time or on an application made to it within three months of the award by an aggrieved party, call for the record of any case in which an award has been made under this Act by issuing a requisition to the Tribunal, and upon receipt of such requisition the Tribunal shall send or cause to be sent to that Court the concerned award and record thereof.*

(2) If it appears to the High Court that the Tribunal –

(a) has exercised a jurisdiction not vested in it by law; or

(b) has failed to exercise a jurisdiction so vested; or

(c) has acted in exercise of its jurisdiction illegally, or with material irregularity; or

(d) has misconducted itself or the proceedings; or

(e) has made an award which is invalid or has been improperly procured by any party to the proceedings,

the High Court may make such order in the case as it thinks fit.

(3) The High Court shall in deciding any revision under this section exercise the same powers and follow the same procedure as far as may be, as it does in deciding a revision under Section 115 of the Code of Civil Procedure, 1908(No.5 of 1908).

(4) The High Court shall cause a copy of its order in revision to be certified to the Tribunal.

Explanation.-For the purposes of this section, an award

shall include an "interim" award."

11. Following submissions were made by the learned counsel for the parties in support of their claim.

12. Learned counsel on behalf of the appellants contended that the High Court failed to consider that the revision petition has been preferred under Section 19 of the Act of 1983 and the delay of 80 days should have been condoned by it.

13. It was further contended by the learned counsel on behalf of the appellants that the High Court should have considered that provision of Section 5 of the Limitation Act, would be applicable while entertaining a revision petition under Section 19 of the Act of 1983. There was also failure on the part of the High Court for having not exercised the suo motu revisionary powers under the Act in the circumstances of the case.

14. It was further contended that the judgments referred in the Full Bench order before the High Court are not applicable in the circumstance of the case.

15. Regarding Section 19 of the Act of 1983, it was contended by the learned counsel that the proviso to Section 19 was added only in the year 2005 though the issue is concerned with the pre-amendment provision, when such proviso, specifically conferring power to condone delay was not there.

16. It was also contended that the question - whether the Arbitral Tribunal constituted under the Act is a "Court" or not, need not be decided as Section 19(3) of the Act of 1983 provides that while exercising the power of revision, the High Court will exercise the same powers and will follow the same procedures as it does in deciding a revision under Section 115 of the Civil Procedure Code.

17. It was further contended by the learned counsel appearing on behalf of the appellants that the order in the case of *Nagarpalika Parishad, Morena* (supra) does not lay down the correct legal position. The order was passed *sub-silentio* and is *per incurium* as it neither considers the aforesaid legal issues and submissions nor does it take into account the relevant legal provisions and the Scheme of the Act or various case laws on the point. The judgments relied on by this Court in the case of *Nagarpalika Parishad, Morena* (supra) are not applicable to the issues arising here and are distinguishable on facts.

18. On the other side, in the counter affidavit filed by the respondents in the connected C.A. No. 1145 of 2009, it is stated that the appellants have been trying to mislead this Hon'ble Court by stating that the Application was preferred under Section 5 of the Limitation Act. However, by a bare perusal of the application for the condonation of delay, it can be seen that the application was preferred under the amended provisions of Section 19 of the Act. The benefit of the amended Section 19 of the Act could not be given to the appellants as the provisions were not made with retrospective effect. The amendment came into effect on 29.08.2005, much after the expiry period to prefer an application under Section 19 of the Act. The High Court has very rightly held that the Revision was time barred. Since no such provision existed on the date of filing of application for condonation of delay, the appellants were not entitled to get the delay condoned.

19. We have heard the learned counsel for the parties and with reference to the above factual and rival legal contentions urged on behalf of the parties the following points would arise for our consideration:

1) Whether the provisions of Limitation Act are applicable to the provisions of Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983?

2) What Order?

Answer to Point No.1

20. The Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 came into force with effect from 01.03.1985. It was enacted to provide for the establishment of a Tribunal to arbitrate on disputes to which the State Government or a Public Undertaking (wholly or substantially owned or controlled by the State Government), is a party and for matters incidental thereto or connected therewith.

21. The Arbitral Tribunal is constituted in terms of Section 3 of the Act of 1983, for resolving all disputes and differences pertaining to works contract or arising out of or connected with execution, discharge or satisfaction of any such works contract.

22. Section 7 of the Act provides for reference to Tribunal. Such reference may be made irrespective of whether the agreement contains an arbitration clause or not. Section 7-A of the Act provides for the particulars on the basis

whereof the reference petition is to be filed.

23. Section 19 of the Act confers the power of revision on the High Court. It provides that the aggrieved party may make an application for revision before the High Court within three months of the date of the award. This Section was amended in 2005, to confer the power on the High Court to condone the delay. Since this dispute pertains prior to 2005, thus, the provision of the unamended Act shall apply in the present case.

24. The Limitation Act, 1963 is the general legislation on the law of limitation.

25. Section 5 of the Limitation Act provides that an appeal may be admitted after the limitation period has expired, if the appellant satisfies the court that there was sufficient cause for delay.

26. Section 29 of the Limitation Act is the saving section. Sub-section (2) reads as follows:

> *"(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."*

Sub section (2) thus, provides that Sections 4 to 24 of the Limitation Act shall be applicable to any Act which prescribes a special period of limitation, unless they are expressly excluded by that special law.

27. This Court in the case of *Mukri Gopalan v. Cheppilat Puthanpuravil Aboobacker*[4] examined the question of whether the Limitation Act will apply to the Kerala Buildings (Lease and Rent) Control Act, 1965. While holding that the appellate authority under the Kerala Act acts as a Court, it was held that since the Act prescribes a period of limitation, which is different from the period of limitation prescribed under the Limitation Act, and there is no express

4. (1995) 5 SCC 5

exclusion of Sections 4 to 24 of the Limitation Act, in the above (Lease & Rent) Control Act, thus, those Sections shall be applicable to the Kerala Act.

While examining the provisions of Section 29(2) of the Limitation Act, it was observed:

> *"8. A mere look at the aforesaid provision shows for its applicability to the facts of a given case and for importing the machinery of the provisions containing Sections 4 to 24 of the Limitation Act the following two requirements have to be satisfied by the authority invoking the said provision:*
>
> *(i) There must be a provision for period of limitation under any special or local law in connection with any suit, appeal or application.*
>
> *(ii) The said prescription of period of limitation under such special or local law should be different from the period prescribed by the schedule to the Limitation Act."*

28. It was further held that if the two above conditions are satisfied, then the following implications would follow:

> *"9. If the aforesaid two requirements are satisfied the consequences contemplated by Section 29(2) would automatically follow. These consequences are as under:*
>
> *(i) In such a case Section 3 of the Limitation Act would apply as if the period prescribed by the special or local law was the period prescribed by the schedule.*
>
> *(ii) For determining any period of limitation prescribed by such special or local law for a suit, appeal or application all the provisions containing Sections 4 to 24(inclusive) would apply insofar as and to the extent to which they are not expressly excluded b y such special or local law."*
>
> *[emphasis laid by this Court]*

29. Further, in the case of *Hukumdev Narain Yadav v. Lalit Narain Mishra*[5], a three judge Bench of this court, while examining whether the

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5. (1974)2 SCC 133

Limitation Act would be applicable to the provisions of Representation of People Act, observed as under:

> "17. ....but what we have to see is whether the scheme of the special law, that is in this case the Act, and the nature of the remedy provided therein are such that the Legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our view, even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation."

30. According to *Hukumdev Narain Yadav* (supra), even if there exists no express exclusion in the special law, the court reserves the right to examine the provisions of the special law, and arrived at a conclusion as to whether the legislative intent was to exclude the operation of the Limitation Act.

31. Section 19 of the Act of 1983 prescribes a period of limitation of three months. This limitation period finds no mention in the schedule to the Limitation Act. Further, Section 19 does not expressly exclude the application of Sections 4 to 24 of the Limitation Act, 1963.

32. We now turn our attention to the case of *Nasiruddin and Ors.* (supra), on which reliance was placed by this court in the case of *Nagarpalika Parishad, Morena* (supra), while dismissing the Special Leave Petition. The issue in that case was whether the deposit of rent under section 13(4) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 by a tenant is an application for the purpose of Section 5 of the Limitation Act.

33. While examining the nature of the deposit by tenant, it was held:

> *"46. ...the deposit by the tenant within 15 days is not an application within the meaning of Section 5 of the Limitation Act, 1963. Since the deposit does not require any application, therefore, the provisions of Section 5 cannot be extended where*

the default takes place in complying with an order under Sub-section (4) of Section 13 of the Act."

34. Further, explaining as to why Section 5 of the Limitation Act is not applicable, the Court observed:

> *"The provisions of Section 5 of the Limitation Act must be construed having regard to Section 3 thereof. For filing an application after the expiry of the period prescribed under the Limitation Act or any special statute a cause of action must arise. Compliance of an order passed by a Court of Law in terms of a statutory provision does not give rise to a cause of action. On failure to comply with an order passed by a Court of Law instant consequences are provided for under the statute. The Court can condone the default only when the statute confers such a power on the Court and not otherwise. In that view of the matter we have no other option but to hold that Section 5 of the Limitation Act, 1963 has no application in the instant case."*
>
> [emphasis laid by this Court]

It is evident on a plain reading of the judgment in that case, that the reason why Section 5 of the Limitation Act was said to be inapplicable to the Rajasthan Act, Section 13(4), was because of the nature of the specific provision in question. It was held that Section 5 of the Limitation Act is not applicable to Section 13(4), as the deposit of rent by the tenant cannot be said to be an application for the purpose of Section 5 of the Limitation Act. This case cannot be said to be relevant to the facts of the present case, as Section 5 of the Limitation Act has got application for the purpose of Section 19 of the Act of 1983, and the cause of action accrued to the appellant when the Tribunal passed the award.

35. We now direct our attention to the second case i.e. *Union of India v. Popular Construction* (supra)on which reliance was placed by this Court while dismissing the Special Leave Petition in the case of *Nagarpalika Parishad, Morena* (supra). The issue therein was whether Sections 4 to 24 of the Limitation Act would be applicable to Section 34 of the Arbitration Act, 1996.

36. The wording of Section 34(3) of the Arbitration Act, 1996, reads

thus:

> *"34. (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:*
>
> *Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."*
>
> [emphasis laid by this Court]

While examining the provision of Section 34, the Court in *Popular Construction case* (supra) observed as under:

> *"8. Had the proviso to Section 34 merely provided for a period within which the Court could exercise its discretion, that would not have been sufficient to exclude Sections 4 to 24 of the Limitation Act because "mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applicability of Section 5."*
>
> [emphasis laid by this Court]

While holding that Section 5 is not applicable to Section 34(3), it was held that the presence of the words "but not thereafter" operate as an express exclusion to Section 5 of the Limitation Act.

> *"12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are 'but not thereafter' used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of section 5 of that Act. Parliament did not need to go further. To hold that the Court could entertain an application to set aside the Award beyond the extended period*

under the proviso, would render the phrase 'but not thereafter' wholly otiose. No principle of interpretation would justify such a result."

(Emphasis laid down by the Court)

37. Section 19 of the Act of 1983, does not contain any express rider on the power of the High Court to entertain an application for revision after the expiry of the prescribed period of three months. On the contrary, the High Court is conferred with *suo moto power,* to call for the record of an award at any time. It cannot, therefore, be said that the legislative intent was to exclude the applicability of Section 5 of the Limitation Act to Section 19 of the Act of 1983.

38. In our opinion, it is unnecessary to delve into the question of whether the Arbitral Tribunal constituted under the Act is a Court or not for answering the issue in the present case, as the delay in filing the revision has occurred before the High Court, and not the Arbitral Tribunal.

Answer to Point No.2

39. In light of the reasons recorded above, we are of the opinion that the case of *Nagar Palika Parishad, Morena* (supra) was decided erroneously. Section 5 of the Limitation Act is applicable to Section 19 of the Act of 1983. No express exclusion has been incorporated therein, and there is neither any evidence to suggest that the legislative intent was to bar the application of Section 5 of the Limitation Act on Section 19 of the Act of 1983. The cases which were relied upon to dismiss the Special Leave Petition, namely *Nasiruddin* (supra) and *Popular Construction* (supra) can be distinguished both in terms of the facts as well as the law applicable, and thus, have no bearing on the facts of the present case.

40. For the reasons stated supra, we answer the points framed by us in the affirmative in favour of the appellants. The impugned judgments and orders are set aside and both the appeals are allowed. The delay in filing revision petitions is condoned and the cases are remanded to the High Court to examine the same on merits. We request the High Court to dispose of the cases as expeditiously as possible.

Appeal allowed.

I.L.R. [2015] M.P., 1123
SUPREME COURT OF INDIA
Before Mr. Justice V. Gopala Gowda & Mr. Justice Adarsh Kumar Goel
Cr. A. No. 2358/2010 decided on 16 September, 2014

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

A. Penal Code (45 of 1860), Sections 376 & 450 - Rape and house tresspass - **Major discrepancies in evidence of the prosecutrix and her husband - Though corroboration not necessary in sexual offences - Benefit of doubt given to the accused - Conviction set aside.**

(Paras 4, 5 & 6)

क. दण्ड संहिता (1860 का 45), धाराऐं 376 व 450 – बलात्कार एवं गृह अतिचार – अभियोक्त्री एवं उसके पति के साक्ष्य में भारी विरोधाभास – यद्यपि लैंगिक अपराधों में अभिपुष्टि आवश्यक नहीं – अभियुक्त को संदेह का लाभ दिया गया – दोषसिद्धि अपास्त।

B. Evidence Act (1 of 1872), Section 114A and Penal Code (45 of 1860), Section 376 - **Presumption operates even in absence of injuries or absence of raising alarm or delay in FIR - Statement of prosecutrix - Inherent infirmities - Doubtful - Same may not be acted upon.** **(Para 7)**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 114ए एवं दण्ड संहिता (1860 का 45), धारा 376 – चोटों की अनुपस्थिति या हल्ला मचाने के अभाव में या प्रथम सूचना रिपोर्ट में विलंब से भी उपधारणा प्रवर्तनीय रहती है – अभियोक्त्री का कथन – अंतर्निहित कमियां – संदेहास्पद – उक्त पर कार्यवाही नहीं की जा सकती।

Cases referred :

(1983) 3 SCC 217, (1990) 1 SCC 550, (1996) 2 SCC 384.

J U D G M E N T

The Judgment of the Court was delivered by : **Adarsh Kumar Goel, J. :-** This appeal has been preferred against the conviction and sentence of the appellant for offences under Sections 450 and 376 of the Indian Penal Code (IPC) for which the appellant stands sentenced to undergo rigorous imprisonment for seven years under both heads but the

sentences are to run concurrently, apart from being sentenced to pay fine.

2. Case of the prosecution as per FIR is that on 19th April, 1993, when the prosecutrix (PW 1) was sleeping in her house at 1.00 A.M., the appellant along with co-accused Sahab Singh @ Mutta entered the house of the prosecutrix and both of them committed rape on the prosecutrix and then fled away. They were carrying knife which was shown to the prosecutrix to threaten her if she raised alarm. The prosecutrix narrated the incident to her husband and lodged First Information Report at the Police Station on the next day. After investigation both the accused were sent up for trial. The prosecutrix did not support the version against coaccused Sahab Singh @ Mutta. Accordingly, he was acquitted by the trial Court. Relying upon her version supported by her husband Balkishan (PW 2) and Kotwar of the village Manaklal (PW 3), the trial Court convicted and sentenced the appellant which has been confirmed by the High Court.

3. We have heard learned counsel for the parties.

4. Learned counsel for the appellant has pointed out that there are major discrepancies in the version of the prosecution which create doubt about the veracity of the prosecution case against the appellant. The discrepancies pointed out are as follows :

(i) Though initially, two persons were named and it was alleged that both threatened the prosecutrix with a knife, version at the trial was different and only the appellant has been named.

(ii) The prosecutrix gave affidavit dated 23th April, 1993 three days after the lodging of the FIR, disowning the version and exonerating the appellant. The said affidavit was duly acted upon by the trial Court, as the prosecutrix appeared in Court and supported the contents of the affidavit, for granting the accused anticipatory bail vide Order dated 29th April, 1993. The order of anticipatory bail reads as under:

"Affidavit of the complainant perused. According to which Village Patel Shiv Kumar had put pressure upon the complainant and got a false report registered. Additional Public Prosecutor has not

objected the bail application.

Bail of accused Mutta is already granted on this ground hence this accused is also being granted benefit of bail and it is ordered that if in this case applicant is arrested then he should be released on bail bond of Rs.5,000/- and surety."

(iii) PW 3 has admitted that husband of the prosecutrix had enmity with the appellant. The medical report inter alia read as follows :

"……..No signs of injury anywhere…….. One cream color petticoat on which there no stains of looking like Semenal stains present……"

(iv) The statement of the prosecutrix has also contradictions, as at one place she states that she had seen the accused only when he was escaping and not before, while at the other place she gave a different statement. Similarly her husband PW 2 has contradicted the prosecutrix about the presence of the accused when PW 2 arrived. According to PW 2, accused was still at the house and ran away only when he opened the door while according to prosecutrix the accused had ran away before arrival of her husband.

5. We find that the above discrepancies are supported by the record.

6. We are conscious that testimony of the prosecutrix is almost at par with an injured witness and can be acted upon without corroboration as held in various decisions of this Court. Reference may be made to some of the leading judgments.

In *Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat* [1], this Court held as under :

"9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape

1. (1983) 3 SCC 217

or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical.

10. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault ..... The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because (1) A girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours. (3) She would have to brave the

whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition-bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, acts as a deterrent."

In *State of Maharashtra vs. Chandraprakash Kewalchand Jain*[2], this Court held as under :

"15. It is necessary at the outset to state what the approach of the court should be while evaluating the prosecution evidence, particularly the evidence of the prosecutrix, in sex offences. Is it essential that the evidence of the prosecutrix should be corroborated in material particulars before the court bases a conviction on her testimony ? Does the rule of prudence demand that in all cases save the rarest of rare the court should look for corroboration

2. (1990) 1 SCC 550

before acting on the evidence of the prosecutrix ? Let us see if the Evidence Act provides the clue. Under the said statute 'Evidence' means and includes all statements which the court permits or requires to be made before it by witnesses, in relation to the matters of fact under inquiry. Under Section 59 all facts, except the contents of documents, may be proved by oral evidence. Section 118 then tells us who may give oral evidence. According to that section all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Even in the case of an accomplice Section 133 provides that he shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. However, illustration (b) to Section 114, which lays down a rule of practice, says that the court 'may' presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. Thus under Section 133, which lays down a rule of law, an accomplice is a competent witness and a conviction based solely on his uncorroborated evidence is not illegal although in view of Section 114, illustration (b), courts do not as a matter of practice do so and look for corroboration in material particulars. This is the conjoint effect of Sections 133 and 114, illustration (b).

16. A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured

complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. For the above reasons we think that exception has rightly been taken to the approach of the High Court as is reflected in the following passage:

"It is only in the rarest of rare cases if the court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary."

With respect, the law is not correctly stated. If we may say so, it is just the reverse. Ordinarily the evidence of a

prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony if there is independent evidence lending assurance to her accusation.

17. We think it proper, having regard to the increase in the number of sex violation cases in the recent past, particularly cases of molestation and rape in custody, to remove the notion, if it persists, that the testimony of a woman who is a victim of sexual violence must ordinarily be corroborated in material particulars except in the rarest of rare cases. To insist on corroboration except in the rarest of rare cases is to equate a woman who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her story of woe will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. Ours is a conservative society where it concerns sexual behaviour. Ours is not a permissive society as in some of the western and European countries. Our standard of decency and morality in public life is not the same as in those countries. It is, however, unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. An Indian woman is now required to suffer indignities in different forms, from lewd remarks to eve-teasing, from molestation to rape. Decency and morality in public life can be promoted and protected only if we deal strictly with those who violate the societal norms. The standard of proof to be expected by the court in such cases must take into account the fact that such crimes are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity."

Similar observations were made in *State of Punjab vs. Gurmit Singh* [3] , as under :

> *".....The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some*

3. (1996) 2 SCC 384

injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

7. Thus, while absence of injuries or absence of raising alarm or delay in FIR may not by itself be enough to disbelieve the version of prosecutrix in view of the statutory presumption under Section 114A of the Evidence Act but if such statement has inherent infirmities, creating doubt about its veracity, the same may not be acted upon. We are conscious of the sensitivity with which heinous offence under Section 376, IPC has to be treated but in the present case the circumstances taken as a whole create doubt about the correctness of the prosecution version. We are, thus, of the opinion that a case is made out for giving benefit of doubt to the accused.

8. Accordingly, we allow this appeal, set aside the conviction of the appellant and acquit him of the charge.

Appeal allowed.

I.L.R. [2015] M.P., 1133
SUPREME COURT OF INDIA
Before Mr. Justice Vikramajit Sen & Mr. Justice Shiva Kirti Singh
Civil Appeal No. 3906/2009 decided on 27 November, 2014

M.P. SINGH BARGOTI ... Appellant
Vs.
STATE OF M.P. & anr. ... Respondents

Service Law - Promotion - Non-consideration **- Earlier the State Administrative Tribunal directed for preparation of Combined Gradation List of Inspectors - Combined Gradation List was not prepared at proper time and when it was prepared it was never acted upon - Appellant had retired in the year 1998 whereas the Rules were amended in the year 2000 - As the appellant has retired, notional promotion to the post of Dy. S.P. be given and will be deemed to have superannuated on that post and shall be given all retirement benefits by re-calculating the same on the premise that he held the post of Dy.S.P. (Paras 9 & 10)**

सेवा विधि – पदोन्नति – विचार में नहीं लिया जाना – पूर्व में राज्य प्रशासनिक अधिकरण ने निरीक्षकों की संयुक्त पदक्रम सूची तैयार किये जाने हेतु निदेशित किया था – उचित समय पर संयुक्त पदक्रम सूची तैयार नही की गई और जब उसे तैयार किया गया उसके अनुसार कभी कार्यवाही नहीं की गई – अपीलार्थी वर्ष 1998 में सेवानिवृत्त हुआ था जबकि नियमों को वर्ष 2000 में संशोधित किया गया – चूंकि अपीलार्थी सेवानिवृत्त हो चुका है, उप–पुलिस अधीक्षक के पद पर काल्पनिक पदोन्नति दी जाये और उसी पद से उसे निवृत्त माना जायेगा तथा इस आधार पर कि वह उप पुलिस अधीक्षक पद पर था, पुर्नगणना करते हुए सेवानिवृत्ति के सभी लाभ दिये जायेंगे।

JUDGMENT

The Judgment of the Court was delivered by : SHIVA KIRTI SINGH, J. :- This appeal is directed against final judgment and order dated 15.10.2007 passed in Writ Petition No.4449 of 2001 whereby the High Court of Madhya Pradesh dismissed the writ petition of the appellant and declined to interfere with order of the M.P. Administrative Tribunal (hereinafter referred to as 'the Tribunal') dated 26.02.2001 passed in O.A.No.1122 of 2000.

2. The simple case of the appellant is that he has been deprived of benefits of timely consideration and promotion from the post of Inspector to the post of Deputy Superintendent of Police although there was a direction of the Tribunal in cases filed by others and disposed of on 15.06.1993 and 03.11.1997 and also in a case filed by the appellant along with 29 others bearing O.A. No.893 of 1997 allowed on 11.03.1998 for preparation of a Combined Gradation List for promotion to the post of Deputy Superintendent of Police and to include in it the names of all who were petitioners before the Tribunal.

3. Since the order of the Tribunal dated 11.03.1998 was not challenged by any one and attained finality, the case of the appellant deserves to be considered on the basis of facts noted in paragraph 1 of that order and the relief granted in paragraphs 8 and 9 of that order. They are as follows :

> "The applicants in this case are inspectors in the Finger Print Branch of the Police Department, which is an executive Branch of the said department. The applicants have averred that for promotion to the next higher post of Deputy Superintendent of Police the respondents have from time to time issued a combined gradation list of inspectors of the executive branches of the department. The applicants' contention is that the combined gradation list issued for the year 1996 does not include their names in it. In this connection they have submitted that all the persons belonging to the finger print branch have not been included in the combined gradation list. The applicants' contention is that the non-inclusion of their names in the combined gradation list is in violation of the provisions of Madhya Pradesh Police (Gazetted Officers) Recruitment Rules 1987 – '1987 Rules' for short – and also the directions of the Tribunal given in order dated 15.6.1993 passed in O.A.No.93/92 placed at Annexure A-1, as also order dated 3.11.1997 passed in O.A.No.834/93. The applicants' submission is that meeting of the departmental promotion committee is going to be held shortly on the basis of a combined gradation list excluding their names and they will therefore, thus be deprived of consideration for promotion illegally. The applicants have, therefore, prayed for a direction to the respondents to include their names as also names of other inspectors of the Finger

Print Branch in the combined gradation list of inspectors of the executive branches and to consider the cases of their promotions on the basis of such a combined gradation list. By way of interim relief it was directed by the Tribunal that the meeting of the departmental promotion committee for considering promotion to the post of Deputy Superintendent of Police may be held but no orders promoting anyone out of the select list so prepared shall be issued till the disposal of this case.

....

....

8. In view of the above discussion the petition deserves to be allowed. The applicants shall be included in the combined gradation list of Inspectors for consideration of their cases for promotion to the post of Deputy Superintendent of Police in accordance with the inter-se seniority position which may be assigned to them in such a list. If a meeting of the Departmental Promotion Committee has been held already without considering the claims of the applicants then the recommendations of that departmental promotion committee shall not be acted upon and a fresh meeting of the departmental promotion committee shall be held keeping in view the directions given herein.

9. Cost of the petition amounting to Rs.1500/- shall also be paid to the applicants by the respondents."

4. It is also not in dispute that there was a subsequent adjudication by the Tribunal of a similar dispute wherein there was an opposition to preparation of Combined Gradation List for Inspectors of other disciplines like Finger Print, Motor Transport etc. The appellant and other beneficiaries of order of the Tribunal dated 11.03.1998 were not parties to those cases when such subsequent order dated 22.06.1999 was passed. In paragraph 13 of this order, the Tribunal re-affirmed the correctness and validity of the earlier order of the Tribunal dated 11.03.1998, upheld the Combined Gradation List under challenge and examined various new aspects raised in the subsequent case leading to issuance of additional directions to amend the Rules. The Madhya

Pradesh Police (Gazetted Officers) Recruitment Rules 1987 were amended by the State Government on 26.05.2000 and in view of the amended rules, fresh Gradation List was prepared which was admittedly only for Inspectors who were still in service and were required to be governed by the amended Rules of 2000. It is also not in dispute that the appellant did not challenge the Gradation List of the year 2000 because his claim was only on the basis of unamended rules which as per final judicial pronouncement noticed earlier, required publication of a Combined Gradation List for promotion to the post of Deputy Superintendent of Police. Admittedly, appellant retired on 31.03.1998 while holding the post of Inspector.

5. The appellant preferred a Misc. Application bearing No.113 of 1998 before the Tribunal which was heard along with another O.A. bearing No.1122/2000 filed by other Inspectors. The Tribunal dismissed the applications vide order dated 26.02.2001 by holding that the appellant failed to show that the order of the Tribunal dated 11.03.1998 had been ignored or violated. The Tribunal further took a technical stand that no person was impleaded as a party whose promotion could cause a grievance to the appellant. The appellant challenged the order of the Tribunal dated 26.02.2001 through a writ petition which has been dismissed by the order under appeal dated 15.10.2007. The High Court relied upon the observations of the Tribunal and came to an opinion that in the absence of any allegation regarding nonconsideration in the Departmental Promotion Committee, supersession by juniors as well as absence of any challenge to the orders of the Tribunal passed in O.A.Nos.817 and 818 of 1998, the writ petition deserved to be dismissed as misconceived and meritless.

6. In the course of hearing of this appeal, on 25.06.2014, we noted the submissions advanced by learned counsel for the appellant. The order runs as follows :

> "We have heard arguments in *extenso*.
>
> Learned counsel for the appellant's submission is that despite the directions passed on 15.6.1993 and 3.11.1997, a combined list was not prepared. Meanwhile, persons junior to the petitioner were promoted, such as Mr. V.N. Dubey at serial no.42 in Annexure P9 before the writ court who had been promoted with effect from 29.5.1997. It is prayed that even though the petitioner has superannuated on 31.1.1998, he

would at least be entitled to pensionary benefits computed from the date on which the persons junior to him in the service were promoted and to simplify this determination, the Appellant has referred to Mr. V.N. Dubey.

It is in these circumstances that learned counsel for the respondent prays for an adjournment to obtain instructions on the veracity of Annexure P9.

Re-notify for this purpose only on 7th August, 2014 for further hearing."

7. The date of superannuation of the appellant suffered from a typographical error in the aforesaid order. That date is 31.03.1998. Annexure P9 available before the writ court showed that appellant was at serial no.12, much higher to Mr. V.N. Dubey at serial no.42. The reason for not promoting the appellant and some others like him appointed on the post of Inspector on 29.05.1981 was indicated to be non-inclusion in the Combined Gradation List. Mr. V.N. Dubey appointed on the post of Inspector in 1983 has been admittedly promoted w.e.f. 29.05.1997 and on that date the appellant was still in service.

8. When the matter was listed for further hearing on 18.11.2014, the learned counsel for the respondents confirmed that Annexure P9 is an authentic document and the particulars noted above on its basis are not under dispute. However, learned counsel for the respondents again sought to defend the stand of the State on the ground that Mr. Dubey belonged to another Section and not to Finger Print Section and, therefore, his promotion made subsequently after the superannuation of the appellant but from an earlier date cannot furnish any cause of action to the appellant for claiming that if not actual promotion, he should be given benefit of notional promotion to that post at least for the purpose of pensionary benefits.

9. We have carefully considered the rival contentions, the relevant facts and the prevailing rules governing promotion at the relevant time. There is no dispute that despite directions passed since 15.06.1993 by the Tribunal and lastly reiterated in the case of the appellant on 11.03.1998, a Combined Gradation List was not prepared at the appropriate time and ultimately when it was prepared to show compliance with the order of the Tribunal, it was never acted upon because the subsequent directions of the Tribunal for

amendment of rules was preferred by the State and the claim of the appellant was never considered by the Departmental Promotion Committee till he was in service or even thereafter when person like Mr. V.N. Dubey who was junior to the appellant in the Combined Gradation List was considered allegedly on the basis of another subsequent gradation list and promoted with effect from a date when the appellant was still in service.

10. In the aforesaid circumstances, in our considered view, the Tribunal and the High Court erred in law as well as on facts in denying relief to the appellant. The position would have been different if appellant's junior had been promoted from a date subsequent to his superannuation. Then appellant would have suffered only on account of passage of time or innocuous delay but in the present facts he has suffered hostile and arbitrary discrimination vis-à-vis a junior. The order under appeal is therefore set aside. Since the appellant was in service only till 31.03.1998, he is held entitled to notional promotion to the post of Deputy Superintendent of Police w.e.f. 29.05.1997 till 31.03.1998. He will be deemed to have superannuated on that post and shall be given all the post retirement benefits by recalculating the same on the premise that he held the post of Deputy Superintendent of Police from 29.05.1997 till his superannuation on 31.03.1998. The revised pensionary benefits as well as arrears on that account should be made available to the appellant at the earliest and in any case within three months from the date of this order. The appellant is held entitled to a consolidated cost of Rs.50,000/- which should also be paid along with other benefits within the time indicated above. The appeal is allowed to the aforesaid extent.

Appeal allowed.

I.L.R. [2015] M.P., 1138
WRIT APPEAL
Before Mr. Justice Shantanu Kemkar & Mr. Justice J.K. Jain
W.A. No. 375/2014 (Indore) decided on 28 March, 2014

SANJAY MOURYA @ S.K. MOURYA ...Appellant
Vs.
UNION OF INDIA & ors. ...Respondents

A. ***Constitution - Article 226 - Transfer - Review* - Interim order was passed on the statement of petitioner that he will proceed on transfer after completion of academic session of his child - Petition was dismissed as respondent had deferred the order till end of academic session - Review**

sought on merits - Held - Having taken advantage of interim order without demur, not open to make grievance. (Paras 13 & 14)

क. संविधान – अनुच्छेद 226 – स्थानांतरण – पुनर्विलोकन – याची के इस कथन पर कि वह अपने बालक का शैक्षणिक सत्र पूरा होने के पश्चात् स्थानांतरण पर चला जायेगा, अंतरिम आदेश पारित किया गया – याचिका खारिज की गई क्योंकि प्रत्यर्थी ने शैक्षणिक सत्र के अंत तक आदेश स्थगित किया था – गुणदोषों पर पुनर्विलोकन चाहा गया – अभिनिर्धारित – बिना आपत्ति अंतरिम आदेश का लाभ लेने पर, शिकायत करने के लिये स्वतंत्र नहीं।

***B. Constitution - Article 226 - Review - Decision on merits for other question* - Not necessary - When other questions stood waived and limited prayer was made. (Para 14)**

ख. संविधान – अनुच्छेद 226 – पुनर्विलोकन – अन्य प्रश्न हेतु गुणदोषों पर निर्णयन – आवश्यक नहीं – जब अन्य प्रश्न अधित्यक्त हुए हैं और सीमित प्रार्थना की गयी थी।

***C. Service law - Transfer - Stigmatic* - Mere mention of "vigilance directive" in the order can't be construed as pending enquiry transfer was made. (Para 15)**

ग. सेवा विधि – स्थानांतरण – कलंकपूर्ण – आदेश में "सतर्कता निदेश" के मात्र उल्लेख का यह अर्थ नहीं लगाया जा सकता कि जांच लंबित रहते स्थानांतरण किया गया था।

Piyush Mathur with *M.S. Dwivedi,* for the appellant.
Sunil Jain, for the respondents.

ORDER

The Order of the Court was delivered by : SHANTANU KEMKAR, J. :- This intra-court appeal under Section 2 (1) of the M.P Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 is filed against the order dated 07.10.2013 passed by the learned Single Judge of this Court in W.P. No.10211/2013 and the order dated 17.01.2014 passed in Review Petition No.16/2014.

2. There is a delay of 74 days in filing the appeal and as such I.A. No.1813/14, an application seeking condonation of delay has been filed.

3. Respondents have filed reply to the said application opposing the prayer.

4. We have heard the learned counsel for the parties on application for condonation of delay.

5. On due consideration and taking into account the reasons stated in the application, we are satisfied that sufficient cause for condonation of delay of 74 days is made out. In the result, we condone the delay in filing the appeal.

6. Heard on the question of admission.

7. Briefly stated, the appellant, who is working on the post of Senior Superintendent (Fire) at Indore under the employment of Airport Authority of India had challenged his order of transfer issued on 30.07.2013 by which he was transferred by the General Manager (H.R.) A.A.I., Mumbai (W.R) from Indore to Bhavnagar in W.P. No.10211/2013.

8. When the said writ petition came up for hearing on the prayer for interim relief, the learned Single Judge on the statement made on behalf of the petitioner by the learned counsel for the petitioner that he is willing to proceed on transfer after completion of academic session of his child passed the interim order on 27.08.2013 in favour of the appellant/writ petitioner staying the operation of the transfer order dated 30.07.2013. Thereafter, when the matter came up for hearing on 07.10.2013, it was informed on behalf of the respondents that in light of the petitioner's prayer, his transfer has been deferred vide order dated 10.09.2013 and he has been permitted to continue at his present place of posting till the end of academic session of his children i.e. 31.03.2014.

9. It was specifically pointed out to the Writ Court by the learned counsel for the respondents that accepting the petitioner's prayer, an office order was issued on 10.09.2013 deferring the petitioner's transfer order on account of his children's education till 31.03.2014. Taking into consideration this fact, the learned Single Judge vide order dated 07.10.2013 dismissed the writ petition as infructuous.

10. When the matter stood thus, the appellant/writ petitioner after lapse of about 3 months filed review petition No.16/14 seeking review of the order dated 07.10.2013 passed in W.P. No.10211/13 on the ground that his writ petition should have been decided by the learned Single Judge on merits.

11. The review petition was dismissed by the learned Single Judge vide order dated 17.01.2014 taking note of all the aforesaid facts.

12. Upon dismissal of the writ petition, the appellant/writ petition has filed this intra-court appeal on 22.03.2014 apparently at the fag end of the period for which the interim protection was granted by the learned Single Judge and the order dated 10.09.2013 passed by the respondents.

13. We fail to understand as to when on the first date itself before the Writ Court the only prayer was made by the writ petitioner to allow him to continue upto the end of academic session and taking into consideration the stand taken by his counsel that the petitioner is willing to proceed on transfer after completion of academic session of his child, the learned Single Judge had granted the relief by extending sympathy towards the appellant, how the petitioner can turn round and make a grievance that his writ petition should have been decided on merits. What more was left to be decided on 07.10.2013 when the writ petition was finally disposed of in terms of the appellant's own prayer and the respondents had accommodated him and passed the order dated 10.09.2013 deferring his transfer order on account of his children's education till 31.03.2014.

14. Keeping in view the aforesaid, in our considered view, the appellant/ writ petitioner having taken advantage of the interim order without any demur, it was not open for him to make a grievance having enjoyed the fruits of the order, equally it was not at all necessary for the Writ Court to have decided the other questions which stood waived in the light of petitioners limited prayer.

15. Even otherwise, we find no merits in the contention of the appellant/ writ petitioner that the order of transfer is stigmatic. Mere mention of as per 'vigilance directive' in the transfer order the same cannot be construed that there is any vigilance enquiry pending against him and, therefore, he was transferred. We are satisfied with the reason disclosed by the respondents before us for transferring the appellant which is to avoid the involvement of the officers who are posted for more than 5 years in the rivalry to two groups of contractors to hold that the appellant/writ petitioner's transfer is purely an administrative transfer order. The petitioner undisputedly has remained posted at Indore for about 8 years which is beyond the normal tenure of posting which is for 3 years as per the policy of the respondents. It is also not in dispute that in the previous year also the appellant was accommodated and on his request his transfer order dated 27.07.2012 was deferred for one year.

16. Having regard to the aforesaid, we find no error in the order passed

by the learned Singe Judge warranting interference in the same in this intra-court appeal.

17. The writ appeal fails and is hereby dismissed.

Appeal dismissed.

I.L.R. [2015] M.P., 1142
WRIT APPEAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice Jarat Kumar Jain
W.A. No. 229/2012 (Indore) decided on 2 May, 2014

OMPRAKASH MEENA ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

A. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P. 2005 (14 of 2006), Section 2(1) and Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 85 - Panchayat Karmi - Appointment **- Resolution by Gram Panchayat - Less meritorious candidate appointed - Appointment set aside by the Collector - Confirm in Appeal by the Commissioner - State Minister in Revision upheld the Resolution of Gram Panchayat - Held - Orders of Collector and Commissioner erroneous procedurally - Upheld, as leading to just decision - Appeal dismissed - Order of Single Judge upheld. (Paras 6 & 7)**

क. 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।

B. Constitution - Article 226 & 227 - Orders of Collector & Commissioner erroneous procedurally **- High Court to see advancement of Justice and not to pick any error of law through academic angle. (Para 7)**

ख. संविधान – अनुच्छेद 226 व 227 – कलेक्टर एवं आयुक्त के आदेश

प्रक्रियात्मक रूप से त्रुटिपूर्ण – उच्च न्यायालय न्यायदान देखेगा और न कि शैक्षणिक दृष्टिकोण द्वारा विधि की कोई त्रुटि निकालेगा।

C. Interpretation of statute - **Even if any order is wrong procedurally, but if it is leading to a just decision than it has to be upheld.** **(Para 7)**

ग. कानून का निर्वचन – भले ही कोई आदेश प्रक्रियात्मक रूप से गलत है, परंतु न्याय संगत निर्णय की ओर ले जा रहा हो तब उसे मान्य ठहराया जाना चाहिए।

Cases referred :

W.P. No. 6542/2002 (Jabalpur) decided on 29.10.2004, AIR 1989 SC 1972, AIR 2002 SC 33.

Piyush Mathur with *Kamlesh Mandloi*, for the appellant.
Sudarshan Joshi, P.L. for the respondent nos.1,2 & 3/State.
None, for the respondent no. 4.
Nidhi Bohra, for the respondent no. 5.
O.P. Sharma, for the respondent no. 6.

ORDER

The Order of the Court was delivered by : **SHANTANU KEMKAR, J. :-** By filing this intra court appeal, the appellant has challenged the order dated 13.04.2012 passed by the learned Single Judge of this Court in Writ Petition No.14469/2010, by which the learned Single Judge has set aside the order dated 16.11.2010 passed by the State Minister in revision and restored the order dated 07.04.2010 passed by the Collector and the order dated 16.04.2010 passed by the Commissioner.

2. Undisputedly, the appellant's appointment on the post of Panchayat Karmi was not made by the Gram Panchayat on the basis of merit and the resolution was passed in his favour, ignoring merits of all the other candidates. It is also undisputed that there were candidates available, who acquired more marks in the 10th Standard Examination than the present appellant. The Collector, Dewas, after noticing the aforesaid and also many other irregularities in passing the resolution for the appointment, cancelled the resolution by which the appellant was appointed and directed the Gram Panchayat to take necessary steps for making appointment on the post of Panchayat Karmi, in accordance with rules. In appeal, the order passed by the Collector was

maintained by the Commissioner. However, the State Minister vide orders dated 16.11.2010 set aside the order passed by the Collector as also the Commissioner.

3. The order of the State Minister, on being challenged in writ petition, the learned Single Judge vide impugned order set aside the order passed by the State Minister, taking into consideration the fact that the appointment of the appellant was being made by the Gram Panchayat, ignoring the merits of the candidates, who had applied for the post and noticing the fact that the appellant, who was less meritorious, was illegally appointed by the Gram Panchayat.

4. Learned Senior Counsel for the appellant has argued that the Collector could not have ordered for cancellation of the resolution and the appointment. According to him, under Section 85 (2) of the MP Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993, it was only for the State Government, or the officer nominated by the State Government, to have taken appropriate decision on the order of the Collector on being forwarded to it. On the other hand, learned counsel appearing for respondent No.5 and 6 have supported the impugned order.

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

6. Admittedly, the resolution for appointment of the appellant was passed by the Gram Panchayat, ignoring the merits of the other candidates, who had better claim. In the circumstances, even assuming that the Collector had committed error in cancelling the resolution of the appellant's appointment and also in issuing directions to the Gram Panchayat for making fresh appointment, the fact remains that the learned Single Judge, in exercise of his jurisdiction under Article 226 of the Constitution of India, by quashing the order of the Minister had restored the order of the Collector and the Commissioner, which led to just result. The order passed by the learned Single Judge is for advancement of justice, and as such, this Court in intra court appeal will not interfere in the order passed by the Writ Court, which has led to rendering justice.

7. It has now been well settled that even if any wrong order is passed, but if it is leading to a just decision or has rendered justice, it has to be upheld. (See Writ Petition No.6542/2002 *State of MP & others v. Shriram*

Raghuvanshi decided on 29.10.2004 by Principal Seat, *Jabalpur and Council of Scientific & Industrial Research v. K.G.S. Bhatt* AIR 1989 SC 1972). Here, in the present case, the orders of the Collector and the Commissioner may be said to be erroneous procedurally, but they had led to a just decision, and as such, the same were rightly restored by the learned Single Judge by quashing the order of the Minister. The Supreme Court in the case of *Roshan Deen v. Preeti Lal* AIR 2002 SC 33 had observed that the power conferred on the High Court under Articles 226 and 227 of the Constitution of India is to advance justice and not to thwart it. The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the byproduct of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law.

8. Having regard to the aforesaid position of law, in our considered view, no fault can be found in the order of the learned Single Judge, as it has led to setting aside of an unjust appointment, which was made ignoring the merits of the other more meritorious candidates.

9. Thus, no case for interference in the order passed by the learned Single Judge is made out. The appeal fails and is hereby dismissed.

C. c. within three days.

Appeal dismissed.

I.L.R. [2015] M.P., 1145
WRIT APPEAL

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

W.A. No. 873/2008 (Indore) decided on 28 August, 2014

INDORE DEVELOPMENT AUTHORITY ... Appellant
Vs.
BURHANI GRIH NIRMAN SAHAKARI SANSTHAN MARYADIT & ors. ... Respondents

A. Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973), Sections 50 & 54 - Publication of final scheme - Lapse of scheme -

Fails to implement nor substantial steps taken towards implementation of final scheme within 3 years - Held - Final Scheme will lapse and in turn land acquisition proceedings will also stand vitiated - Appeal dismissed. (Paras 24 to 27)

क. नगर तथा ग्राम निवेश अधिनियम (1973 का 23), धाराऐं 50 व 54 – अंतिम योजना का प्रकाशन – योजना व्यपगत हो जाना – क्रियान्वित करने में विफल और न ही अंतिम योजना का क्रियान्वयन 3 वर्षों के भीतर करने की ओर सारभूत कदम लिये गये – अभिनिर्धारित – अंतिम योजना व्यपगत होगी और परिणामतः, अर्जन कार्यवाही भी दूषित होगी – अपील खारिज।

***B. Land Acquisition Act (1 of 1894), Section 5A - Hearing of objection* - Collector himself deciding the objection instead of sending the report to the Government - Held - Collector has no jurisdiction to decide the objections - Issuance of notification under section 6 of the Act is invalid - Land acquisition proceedings stands totally vitiated, as Competent Authority had neither decided the objections nor were communicated. (Paras 21 & 30)**

ख. भूमि अर्जन अधिनियम (1894 का 1), धारा 5ए – आक्षेप की सुनवाई – कलेक्टर ने प्रतिवेदन को सरकार को भेजने की बजाय स्वयं आक्षेप को निर्णीत किया – अभिनिर्धारित – आक्षेपों को निर्णीत करने की कलेक्टर को अधिकारिता नहीं – अधिनियम की धारा 6 के अंतर्गत अधिसूचना जारी की जाना अवैध – भू–अर्जन कार्यवाहियां पूर्णतः दूषित होती हैं, क्योंकि सक्षम प्राधिकारी ने न तो आक्षेपों को निर्णीत किया न ही संसूचित किया।

***C. Land Acquisition Act (1 of 1894), Sections 4 & 6 - Acquisition of land* - Release of huge and big chunk of land out of total land - Land of respondents not released - Held - Amounts to hostile discrimination - Like should be treated alike. (Paras 23 & 31)**

ग. भूमि अर्जन अधिनियम (1894 का 1), धाराऐं 4 व 6 – भूमि का अर्जन – कुल भूमि से विशाल एवं बड़ा टुकड़ा मुक्त किया जाना – प्रत्यर्थीगण की भूमि को मुक्त नहीं किया गया – अभिनिर्धारित – प्रतिकूल विभेद की कोटि में आता है – एक जैसे के साथ समान व्यवहार होना चाहिए।

***D. Words & Phrases* - Meaning of 'fails to implement' and 'Hostile discrimination' explained. (Paras 14 & 23)**

घ. शब्द और वाक्यांश – "क्रियान्वित करने में विफल" एवं "प्रतिकूल विभेद" का अर्थ स्पष्ट किया गया।

Cases referred :

2014 AIR SCWN 3388, AIR 1991 MP 72, 1987 (2) MPWN Short Note - 15, (1996) 2 SCC 26.

Shekhar Bhargava with *Sudarshan Joshi*, for the appellant.

A.S. Kutumbale with *Vandana Kasrekar,* for the Burhani Grih Nirman Sahakari Sanstha.

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

A.K. Sethi with *Rishab Gupta, K.L. Hardia & S.P. Joshi* for the respondent.

ORDER

The Order of the Court was delivered by :

M.C. GARG, J. :- This order shall dispose of the aforesaid writ appeal as well as other 33 connected writ appeals being W.A.Nos.850, 851,852, 853, 854, 855, 856,857,858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884 and 902 of 2008, as the facts in all these cases are identical and arises out of common order dated 10.12.1998. For the sake of convenience, the facts are taken from W.A.No.873/2008.

2. These writ appeals have been filed by the IDA aggrieved of the common order dated 10.12.1998 delivered by the learned Single Judge whereby the learned Single Judge decided all the 37 writ petitions filed by the respondents against finalization of the scheme under Section 50 of the Nagar Tatha Gram Nivesh Adhiniyam, 1973 (for short referred to as the Adhiniyam) and subsequent land acquisition proceedings which have been undertaken by the State of M.P. under Section 4 and 6 of the Land Acquisition Act, 1894 (for short referred to as L.A.Act).

3. According to the respondents, who were writ petitioners, the challenge to the aforesaid proceedings were two fold i.e.

(i) It was the submission that since the Scheme formed by the appellant under Section 50(7) of the Adhiniyam was not implemented within three years, it stood lapsed, by virtue of Section 54 of the Adhiniyam.

(ii) The notification issued under Section 6 was not in accordance with law inasmuch as the objections invited under Section 5-A were not

decided by the Competent Authority. There was also a plea of hostile discrimination inasmuch various parcels of lands were released from acquisition indiscriminately.

4. In some of the writ petitions, proceedings were filed prior to publication of the award and in other proceedings the petitioners have filed the petition after the award. The writ petition filed by the first respondent was registered as M.P.No.268/1991 and it is this order in which the impugned order has been delivered.

5. The writ petitions were heard together and were allowed by the learned Single Judge on 10/12/1998. Vide impugned order, the learned Single Judge quashed the Scheme framed by the I.D.A. as well as the land acquisition proceedings initiated by the State Government mainly on 3 grounds namely:-

(i) The objections invited under Section 5-A of the L.A.Act were not decided by the Competent Authority i.e. State Government.

(ii) There was hostile discrimination with the respondents by the appellant and the State of Madhya Pradesh inasmuch as the various parcels of land owned by several other persons and the societies forming part of the same scheme were released by the appellant violating the fundamental rights of the respondents as guaranteed under Article 14 of the Constitution of India.

(iii) That in view of Section 54 of the Adhiniyam, the Scheme lapsed as it was not implemented within three years of the date of its publication as provided under Section 54 of the Adhiniyam.

6. Before us it has also been submitted by the respondents that a New Act has come into operation known as The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 w.e.f. 1/1/2014. This Act repeals the earlier Land Acquisition Act, 1894.

As per section 24(2) of the new Act, all land acquisition proceedings initiated under the repealed Act of 1984 in which awards were passed five years or more prior to commencement of the new Act and that the physical possession of the land has not been taken or the compensation has not been paid, the land acquisition proceedings under the old Act shall be deemed to have lapsed. In the present case, the award was passed in the year 1991 and the physical possession of the land is admittedly with the answering respondent and that no compensation has been paid or deposited by the I.D.A. or the

State Government. In such circumstances, all the land acquisition proceeding initiated under that old Act stands repealed in view of the judgment of the Apex Court in case of *Union of India vs. Shivraj and others* reported in 2014 AIR SCWN 3388.

7. For the sake of reference, the provisions of Section 24(2) of the New Act is reproduced hereunder:-

> "24. (1) Notwithstanding anything contained in this Act, in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894, -
>
> a) Where no award under section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply; or
>
> b) Where an award under said section 11 has been made, then such proceedings shall continue under the provisions of the said Land Acquisition Act, as if the said Act has not been repealed.
>
> (2) Notwithstanding anything contained in sub-section (1), in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894, where an award under the said section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid he said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act."
>
> Provided that where an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under section 4 of the said Land Acquisition Act, shall be entitled to compensation in accordance with the provisions of this Act.

This argument has been rebutted on behalf of the appellant on the plea that in these matters there were stay orders passed by the Writ Court almost in every

case prohibiting taking of possession by the appellant and therefore this new Act would be of no help to the case of the appellant. As far as this aspect of the matter, we shall deal with the same after disposing of the grounds taken in the appeal by the appellant.

8. In these appeals, the appellants have submitted that the judgment given by the learned Single Judge is not tenable in law as well as on facts. It is stated that for the purpose of framing Scheme No.97 the IDA had passed a resolution dated 13.03.1981, under Section 50 (1) of the Adhiniyam. After completion of various formalities as required under the Adhiniyam, the final declaration of the scheme under Section 50(7) of the said Adhiniyam was published on 01.05.1984. Thus, on the publication of the Scheme under Section 50(7) of the Adhiniyam, it became final. After the said declaration the IDA set about trying to obtain possession of as much land as possible by agreement. Since it is never possible to acquire all lands by mutual consent or agreement, the IDA approached the State Government for compulsorily acquiring the remaining land under provisions of the L.A.Act. i.e. the land available for acquisition for the Scheme after deducting therefrom the lands acquired by mutual consent, lands released from the Scheme and land belonging to the State Government. Thus, it is submitted that the appellants took effective steps for implementation of Scheme within three years of the publication of Scheme and as such it is not a case where Scheme would fail under Section 54 of the Adhiniyam.

9. It is also the case of the appellant that the objections under Section 5-A of the Act were invited, heard and considered by the Collector and a report was submitted to the appropriate Government. After following the due procedure prescribed under the L.A.Act and after recording the satisfaction that the land included in the scheme was required for public purposes, the State Government proceeded to issue the necessary declaration under Section 6 of the L.A.Act. Accordingly, the Collector who was and is an Ex-Officio Deputy Secretary to the State Government of M.P., issued the necessary declaration under Section 6 of the Act in the name, and on behalf of the Government of Madhya Pradesh. The said declaration was published in the official gazette on 07.10.1988, in the local newspaper on 07.02.1989 and 10.02.1989 and by affixture at public places in the locality on 07.03.1980.

10. It is further submitted that after the above proceedings, the award was prepared by the Land Acquisition Officer on 02/03/1991 and was approved by the Collector on 04.03.91 and as per the requirement of Section 11 of the

L.A.Act, the award was sent for approval to the Commissioner who approved the said award on 06.03.1991 and sent it back to the Collector. It was on 11.03.91 that the said award was declared. It has also been submitted by the appellants that the writ petitions were filed by the respondents from time to time. Some of the writ petition was filed even prior to issuance of notification under Section 6, whereas others were filed after delivery of the award. In these proceedings, the learned Single Judge has been pleased to pass interim orders in favour of the respondents restraining the appellant to take possession of the property sought to be acquired.

11. It is also stated that the impugned order disposing of the writ petitions together, it has been observed by the learned Single Judge that in so far as the process followed by the appellant and the State Government with respect to issuance of notification under Section 4 and 6 of the L.A.Act, the learned Single Judge in para 32 of the order has observed as under :-

> "32. Thus, on consideration of the aforesaid judgments and on critical examination of the same, it is clear that the petition cannot be allowed on the ground of non-adherence of the respondents to the time Schedule as prescribed under the Act. Thus, this ground of the petitioner fails and, is, hereby negatived."

12. According the appellant, this observation takes away the objections of the respondent even on the question of hearing objections under Section 5-A of L.A.Act by the Collector.

According to the appellant there was also no hostile discrimination as held by the learned Single Judge in this case.

13. We have heard the learned counsel for the parties and have perused the record. The arguments have been rebutted on behalf of the respondents who have reiterated that on all the three grounds the acquisition of the Scheme published by the IDA as well as the acquisition proceedings undertaken by the State Government fails.

14. The appellant did not argue the matter when the case was called for hearing but filed written arguments. According to them, the observation made by the learned Single Judge regarding the scheme of the IDA having lapsed on the ground that it was not implemented by the IDA within three years from

the date of finalization of the scheme and therefore it lapsed under Section 54 of the Adhiniyam is not sustainable. It is the submission of the appellant that the observation of the learned Single Judge in this regard were without considering the totality of the aspects involved in the matter. In this regard, it is submitted that though the learned Single Judge has noticed the judgment of this Hon'ble Court reported in AIR 1991 MP 72 *(Sanjay Gandhi Grih Nirman Sahakari Sanstha Vs. State of M.P.),* it has been wrongly relied upon it to hold in favour of the writ petitioners. It is submitted that the said judgment is in favour of the appellants only and on the basis of the ratio of the said case, the learned Single Judge ought to have held in favour of the appellants only. They have relied upon the following passage i.e.

> "20. A Division Bench of this Court in the case of *Laxmichand v. The Indore Development Authority, Indore* (M.P. No. 390 of 1980 decided on 14-12-81) in which a similar argument was advanced that after the expiry of three years if the scheme is not implement ed it lapsed, has held that Section 54 does not appear to apply when substantial steps have been taken within three years to implement the scheme. The Court had also taken into consideration Sections 56, 57 and 58 of the Adhiniyam and has taken a view that the words 'fails to implement' would mean failure to take any substantial steps for the implementation of the scheme and if no such step is taken within three years the scheme will lapse. If substantial steps have been taken within three years though the scheme is not fully implemented within that period the scheme would not lapse and proceedings for acquisition of land under the scheme is a substantial step towards its implementation. We are in respectful agreement with the aforesaid view taken by a Division Bench of this Court and hold that the word 'implement' occurring in Section 54 of the Adhiniyam cannot be construed to mean that even if a substantial step has been taken by the authority towards the implementation of the scheme then also the scheme shall lapse after the expiry of three years because of its non-completion within that period."

15. It has been submitted that **even though it was true that the appellant wrote a letter to the State Government four days prior to the expiry of three years it acquired the land,** it would still constitute a substantial step

and this step having been taken within three years of the finalization of the Scheme under Section 50 (7) of the Adhiniyam, it cannot be said that the appellant had not taken the substantial step. It is further submitted that while holding as above the learned Single Judge has not only wrongly applied the principle of 'substantial steps' but has also failed to appreciate the true facts and to also notice the other relevant provisions of the Adhiniyam. It is submitted that though the above letter written by the appellant by itself constituted a substantial step, the learned Single Judge failed to notice not only the other steps taken by it (i.e.Appellant)but also the relevant provisions of the Adhiniyam having a bearing on the above question. It is submitted that as required by the Adhiniyam, the appellant's aforesaid letter had been preceded by efforts made for acquiring the lands in question by the process of mutual agreement. The appellant submits that though the learned Single Judge noticed the above fact, but he brushed aside the same on the irrelevant ground/basis that the said effort "did not create any bar to getting the scheme implemented under the Adhiniyam." The appellant submits that in not considering as substantial steps the appellant's efforts to acquire the lands for scheme no.97 by mutual agreement as followed by the appellant's aforesaid letter to the State Government to compulsorily acquire the said lands under the L.A.Act the Hon'ble Single Judge erred both factually and legally. Infact, had the Hon'ble Single Judge considered the other relevant provisions (particularly section 56) of the Adhiniyam, it would have been apparent to him that after publication of the final scheme under Section 50 of the Adhiniyam, a statutory period of three years is available to the Authority to acquire the lands in question by agreement and it is only on such failure, that the authority is required to approach the State Government for compulsory acquisition of such lands under the L.A.Act. It is submitted that since the law itself provides for a period of three years for acquiring lands for or scheme by mutual agreement it could not have been held by the learned Single Judge that the request made by the appellant to the State Government to acquire the said lands under the L.A.Act (though made within the period prescribed by the statute) yet did not constitute a substantial step only because the said request had been made just 4 days before the said prescribed period was to expire.

16. Coming to the ground of hostile discrimination it has been argued that the said ground was also not available to the writ petitioners inasmuch as in some cases, the land have been released from acquisition whereas in other cases, it has not been so done. On this issue it is the case of the appellant that

neither the factual nor the legal basis was laid out in the petition for seeking quashment of the scheme on the said ground. It is submitted that merely because the lands belonging to some other persons were released from the scheme would not constitute hostile discrimination. It is submitted that neither the factual nor the legal basis was laid out in the petition for seeking quashment of the scheme on the said ground. It is submitted that the petitioners constitute an entirely different class from those persons whose lands were released from the scheme by the State Government and/or its instrumentalities in exercise of their statutory power under the Adhiniyam. The appellant submits that while it is not even clear from the petition averments whether the respondents at all sought release of their land and under which provision or provisions of the Adhiniyam, the appellant had clearly shown that most, if not all, the decisions to release the lands from the scheme had been taken by the State Government in exercise of its statutory powers, particularly under Section 51 and 52 of the Adhiniyam. Since such decisions taken by the State Government in exercise of its statutory powers are binding on the Authority, it is apparent that no question of the petitioner respondents being subjected to hostile discrimination arose in the facts and circumstances of the cases. Besides, the petitioner-respondents were also not able to show that they belonged to the same class as the persons whose lands had been released from the scheme. Infact it does not appear that all or anyone of the petitioner respondents had even sought release of his/her/their lands from the scheme and that such release was refused. That no such request was made or refused is also evident from the fact that the alleged refusal to release was not challenged in any of the petitions.

17. It is also submitted by the appellant that in some of the areas residential colonies had already been developed and hence releasing colonies had already been developed and hence releasing colonies had already been developed and hence releasing them was the only legal and practical solution, more so as the scheme (i.e.scheme no.97) for which the land would have been acquired provided for the development of the land for residential use only. It would also not be out of place to mention here that in all the petitions which have been decided by the common order, the land involved fell in either Part II or Part IV of the Scheme No.97, the main object of the said parts being to develop the said lands into residential plots. It may also be stated that since some of the lands which were initially included for residential use in scheme no.97 could not have been put to the said use as under the Master Plan the same had been earmarked for their uses, like agriculture, regional park, industry

etc., the appellant had no choice but to exclude such lands from the scheme. It is submitted that the said exclusion has also not adversely impacted the implementation of Scheme no.97. Similarly, the learned Single Judge also failed to notice that the State Government had as a matter of its policy, also released the lands belonging to such cooperative societies which had either developed or started development of a colony or had acquired the title of the land or had obtained exemption under Section 20 of the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as the Urban Ceiling Act.) before publication of the final scheme under Section 50(7) of the Adhiniyam. However, so far as the respondent, Burhani Grih Nirman Sahakari Sanstha Maryadit is concerned, it cannot even be treated as a society belonging to the same class. It is submitted that the exemption under Section 20 of the Urban Ceiling Act was granted to Burhani Grih Nirman Sahakari Sanstha Maryadit on 30.09.1988 only, i.e. much after the final declaration of the scheme under Section 50(7) of the Adhiniyam and also after the publication of notification u/s Section 4 of the L.A.Act. It may also be mentioned here that the Burhani Grih Nirman Sahakari Sanstha Maryadit had purchased the land by a registered sale deed on 3.10.1988 only, i.e after publication of notification under Section 4 of the L.A.Act. Infact as per the law laid down by the Hon'ble Apex Court, such a transfer/sale is void. However, be that as it may, it is submitted that being in a separate class, no case of hostile discrimination was made out by the Burhani Grih Nirman Sahakari Sanstha Maryadit. Besides, the learned Single Judge also failed to notice the conduct of the Burhani Grih Nirman Sahakari Sanstha Maryadit and 3 others. It is submitted that the same clearly dis entitled them to any relief on the ground of hostile discrimination or on such other similar constitutional ground. It is submitted that since Burhani Grih Nirman Shahakari Sanstha had entered into the agreement for purchase of land much after the publication of the final scheme under Section 50(7) of the Adhiniyam, it was not even entitled to prefer the writ petition. The petition filed by respondent no.1 was not at all maintainable as the respondent no.1 Burhani Grih Nirman Sahakari Sanstha Maryadit had no locus standi to file the present case as held in the case of *Dashmesh Enterprises Vs. State of M.P. and others* reported in 2006 (4) MPLJ 553, wherein it was held that if at the time of publication of final declaration, the agreement was not in existence, the petitioner would have no locus standi to challenge the scheme. The appellant's above submission is also strengthened by another judgment delivered by Hon'ble Apex Court in the case of *Kashta Niwarak Grih Nirman Sahakari Sanstha Vs. President, Indore Development Authority* and reported in 2006

(2) Vidhi Bhaskar. Copies of the aforesaid judgments alongwith the copy of the application with which the same were filed are already on the record.

18. Regarding the order of the learned Single Judge holding that the objections were not decided by the L.A.Act it is submitted that in reaching to the above conclusion the learned Single Judge has not only taken a very hyper technical and strict view of the law (including the orders/notifications by which the power was delegated) but it has also erred on merits and decided the said point wrongly. It has been inter alia held by the Hon'ble Single Judge that since the notification / order purporting to delegate power of the State Government under section 5-A of the LA Act on the Collector, makes no mention of the said section, the said power cannot be treated as having been delegated to him. According to the Hon'ble Single Judge, the power which was delegated to the Collector by the Hon'ble Minister's order was the power under section 4, 5, 6 and 17 of the LA Act and not the power under section 5-A of the said Act. Accordingly, he could not have exercised the power of the State Government under section 5-A of the AL Act. The appellant submits that the aforesaid view / interpretation of the Minister's order takes an unduly narrow and strict view of the above order. **It is submitted that reference to section 5 of the LA Act in the Minster's order would need to be read as reference to section 5-A of the LA Act so as to give the said order its intended meaning and effect. It is submitted that reference to section 5 has to be read as reference to section 5-A of the LA Act, as no question of delegating any power under section 5 arises.** It is submitted that the said section deals with "Payment of Damages" and does not provided for delegation of powers. Therefore, section 5 in the Minister's order being clearly a typographical mistake, the same ought to be read as Section 5-A only. Similarly, the learned Single Judge has also wrongly held in the context of exercise of the State Government's power by the Collector that a decision of the Appropriate Government can be said to be final only when the same has been taken by the Appropriate Government and then communicated to the affected party. As regards the learned Single Judge's observation that the decision under section 5-A should also have been communicated to the affected party in order that it may become final, it is submitted that the State Government's decision under section 5-A of the Act is not required to be communicated to the affected party or to anyone else. It is submitted that the only requirement for the State Government to arrive at a decision under section 5-A of the LA Act is that it ought to apply its mind to the recommendations of

the Collector and the record of the proceedings. It is further submitted that it is the report under section 5-A of the LA Act which forms the basis for the State Government's declaration under section 6 of the said Act. Thus, from the above discussion, it is also clear that the learned Single Judge has erred in holding that Section 5- A and Section 6 of the Act cannot be read conjointly. Infact, it is an axiomatic principle of statutory interpretation that the statute has to be read as a whole and the sections have to be read harmoniously.

19. We have also perused the written arguments filed by both sides. As observed earlier the learned Single Judge disposed of the writ petitions and quashed the proceedings undertaken by the appellant as well as the State Government interalia by observing:-

(i) That there was no proper delegation of powers to the Collector with regard to Section 5-A of the L.A.Act in conformity with the provisions of Article 166 of the Constitution of India.

(ii) That the scheme had lapsed under Section 54 of the Adhiniyam inasmuch as the appellant had failed to implement the same within the prescribed period of three years.

Admittedly, in this case the appellant wrote a letter to the State Government for acquiring the land just before 4 days before expiry of three years from the date of finalization of the Scheme which they considered having taken substantial step in the matter, but according to the learned Single Judge it is not so.

(iii) That the scheme stood vitiated by reason of violation of the petitioners' fundamental right under Article 14 of the Constitution of India inasmuch as they had been subjected to hostile discrimination in the matter of release of lands of other landowners from the Scheme. According to the petitioners, the release of land of some of the landowners from the Scheme amounted to hostile discrimination against them.

20. The learned Single Judge has dealt with all the three issues separately and elaborately. The first ground on which the land acquisition proceedings were quashed is about the jurisdiction of the Collector to hear objections under section 5-A of the Land Acquisition Act, 1894. The said section 5-A of the Land Acquisition Act reads as under:-

"5-A Hearing of objections- (1) Any person interested in

any land which has been notified under section 4, sub-section (1), as being needed or likely to be needed for a public purpose or for a company may, [within thirty days from the date of the publication of the notification], object to the acquisition of the land or of any land in the locality, as the case may be;

(2) Every objection under sub-section (1) shall be made to the Collector in writing, and the Collector shall give the objector an opportunity of being heard [in person or by any person authorised by him in this behalf] or by pleader and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, [either make a report in respect of the land which has been notified under section 4, sub-section (1), or make different reports in respect of different parcels of such land, to the appropriate Government, containing his recommendations on the objections, together with the record of the proceedings held by him, for the decision of that Government]. The decision of the [appropriate Government] on the objections shall be final.

(3) For the purposes of this section, a person shall be deemed to be interested in land who would be entitled to claim an interest in compensation if the land were acquired under this Act."

21. As per the reading of the said section, it clear that the objections are to be decided by the Government and the Collector had no jurisdiction to decide the objections under section 5-A. In the present case, the Collector himself has decided the objections instead of sending the report to the appropriate authority. The learned judge in para 44 of the judgment held as under :-

"There is no difficulty with regard to Rules of Business, as framed by the State Government and the Business Allocation Rules. They have been framed for effective functioning of the State Government. There is also no dispute to the fact that the provisions of Article 166 of the Constitution are directory, but, as has been mentioned above, there is no delegation at all with regard to section 5-A of the Act to the Collector. Thus, the proceeding of the land acquisition would stand totally vitiated."

22. It is pertinent to mention here that the State Government had not preferred any appeal against the quashing of the proceedings under Land Acquisition Act and therefore that part of the judgment in having quashed the land acquisition proceedings attains finality between the parties, whereas there was no valid land acquisition proceedings. The appeal filed by the I.D.A. becomes without any substance and deserves to be dismissed only on this short ground.

23. The second ground on which the writ petition has been allowed is the ground of hostile discrimination. In this case, the various land owned by several other persons and the Society's forming part of the same Scheme were released by the I.D.A., which amounts to hostile discrimination against the petition and violates fundamental right of the respondents guaranteed under Article 14 of the Constitution of India. A bare reading of para 47 of the impugned order clearly goes to show that as many as 261.796 of the lands were released by respondents with the direction of the State Government. This will not justify releasing the land of some and not releasing the land of others and would certainly constitute the ground of hostile discrimination. The said paragraph reads as under:-

> 47. Counsel for respondent/IDA has given following details with regard to the lands which have been released either by State Government or by I.D.A., eversince, the Scheme was framed in the year, 1981 till date.
>
> | | |
> |---|---|
> | (i) The total area of the Scheme No.97 consisting of Pt.I,Pt.II,Pt.III and Pt.IV comes to | 562.145 h |
> | (ii) Excluding the lands of Pt.I and Pt.III, as there are no petitions with regard to these two parts | 30.717 |
> | (iii) Balance land available with regard to Pt.II and Pt.IV. | 531.428 |
> | (iv) Total lands released from 1981 upto date | 261.796 |
> | Balance | 269.532 |

The aforesaid data would show that the total of 261.796 hectares have been released by the respondents from time to time.

Taking note of the quantum of the land released, the learned Single Judge thus observed as under:-

"49. Thus, it is clear that a huge and big chunk of land out of the total land sought to be acquired by the respondents has been released. The aforesaid data is indicative of the fact that lands have been released in favour of various persons and Societies. This alone is sufficient to hold that there has been discrimination against the petitioner. There is nothing on record to show as to how such a discrimination can be said to be justified by the Respondents. Thus, on the touch stone of Art.14 of the Constitution, I hold that such an action of the Respondents amounts to hostile discrimination against the petitioner.

50. The guarantee of equal protection embraces the entire realm of 'State action'. It extends not only when an individual is discriminated against in the matter of exercise of his rights or in the matter of imposing liabilities upon him but also in the matter of granting privileges. In all cases, principle is the same, that there should be no discrimination between one person an another, if both are similarly situated. The action of the State must not be arbitrary but must be based on valid principle, which itself must not be irrational or discriminatory. It is too well settled that like should be treated alike.

51. It may also be mentioned here, that it is not the case of respondents that despite release of huge land admeasuring 261.796 hectares, the respondents shall still be in a position to implement the scheme as it is. Had this been the case of the respondents, even, then, the Court would have thought twice before holding the respondents guilty of discrimination. Thus, on this ground, I hold that respondents are not justified in not releasing the lands of the petitioner. In fact, the purpose for which the scheme was framed has been defeated to a very great extent. If the scheme

itself fails, the question of acquisition for implementation of the scheme does not arise."

So on this ground also, it has been observed that whether before the learned Single Judge the scheme fails.

24. On the third ground the learned Single Judge had taken note of various dates which are relevant for the purpose of leading to a conclusion regarding lapse of scheme as per Section 54 of the L.A.Act, which reads as under:-

> **"54. Lapse of Scheme-** If the Town and Country Development Authority fails to implement the town development scheme within a period of three years from the date of publication of the final scheme under Section 50 it shall, on the expiration of the said period of three years, lapse".

In paragraph 53 of the order the learned Single Judge held as under:-

> "53. Final publication of the Scheme under S.50(7) of the Adhiniyam was made on 1.5.1984. It was published in the Official Gazette on 8.6.1984. **Thus, the period of 3 years has to be computed from this date.** Letter to the Collector was sent by respondent no.2 for the first time on 4.6.1987 i.e. just four days before expiry of period of limitation."

25. It was held that as per section 54, if the development authority fails to implement the scheme framed u/s 50 within a period of three years from the date of publication of the final scheme u/s 50 it shall lapse after completion of three years from the date of notification. In this present case, the scheme was finally published u/s 50(7) of the said Adhiniyam on 01/05/1984 which was published in official gazette on 08/06/1984. Thus, it was incumbent for the appellant to implement the scheme within period of 3 years i.e. before 04/06/1987 but admittedly the Scheme was not implemented during that period nor any substantial steps towards implementation of the scheme has been taken by the present appellant. The Single Judge in such circumstances has relied on the judgment of the Supreme Court in case of *Sanjay Gandhi Grah Nirman Sahakari Sanstha Maryadit vs. State of M.P. and others* reported in AIR 1991 MP 72 wherein the Apex Court has held that if the development authority fails to implement the scheme or fails to take substantial steps towards implementation of scheme within a period of three years from the date of publication of final notification, the land acquisition proceedings would lapse.

Another judgment on the same point delivered is in case of *Raipur Development Authority Vs. Upendra Nath* reported in 1987 (2) MPWN Short Note – 15.

26. In para 61 of the impugned judgment, the learned Judge has given a categoric finding that the appellant has failed to demonstrate that any substantial steps for implementation of the scheme was taken within three years. Paragraphs 61 and 62 reads as under:

> "61. Writing a letter to the Collector, just four days before the expiry of period of limitation, would not clothe the IDA to contend that substantial steps were taken to implement the Scheme. Such type of approach and conduct of the Development Authority is likely to defeat the purpose of the Scheme. In some big Schemes, the same may not be completed, even within a period of 10 years, but, unless the Development Authority has taken substantial and constructive steps to implement the same, the effect of this provision would be that the Scheme shall stand lapsed.
>
> 62. Thus, the irresistible conclusion in the matter is that IDA has failed to implement the Scheme within a period of three years from the date of final publication. Thus, on this ground also, the Scheme lapse and stands vitiated."

27. In view of the aforesaid, the learned Single Judge finally observed as under:-

> "64. Thus, looking it from all angles, in my considered opinion, the Scheme would lapse on account of not taking of substantial steps to get the same implemented within a period of three years."

28. It is true that while the learned Single Judge has held that except for technical irregularity, notification under Section 4 and 6 of the L.A.Act awarded cannot be rendered invalid, the learned Single Judge has very specifically observed that four steps are required to be contemplated in exercising powers under Section 5-A of the Act i.e.:-

> "(i) Objections are to be invited by the land owners or persons interested in the land sought to be acquired. The same are to

be filed before the Collector;

(ii) Collector has, then, to give notice of hearing and to hear all of them, who have preferred objections, to make further inquiry as he may deem fit;

(iii) To make a report to the State Government, mentioning therein his recommendations to the acquisition and;

(iv) The Collector has, then, to submit his report alongwith his record of proceedings for the decision of the State Government. The decision of the State Government shall, then, be final;"

29. Learned Single Judge has also taken note of the judgment of Hon'ble Supreme Court in the case of *Gulabrao Keshavrao Patil Vs. State of Gujarat* reported in (1996) 2 SCC 26 wherein the scope of Article 166 of the Constitution of India has also been considered. Paragraphs 16,17 and 18 of the aforesaid judgment reads as under:-

16. In *Kedar Nath Bahl Vs. State of Punjab* [AIR 1979 SC 220] a Bench of three Judges held that expression of the order in the name of the Governor as required by Article 166 of the Constitution and communication thereof to the party affected thereby are conditions precedent for the order to bind the Government. It that case the order though initially was made by the Minister, the order of confirmation was cancelled by the Chief Minister before it was communicated. This Court upheld the order to be legal.

17. The same view was reiterated in *State of Kerala Vs. A.Lakshmikutty* [AIR 1987 SC 331]. It would thus be clear that before an order or action can bind the Government it must be drawn in the name of the Governor as envisaged in Article 166 [1] and [2] read with the Business Rules and must be communicated to the affected person. Until then, the action of the Government is not final. Before it is duly done, Chief Minister has power to call for any file and would have it re-examined and decision taken.

18. It would thus be seen that the decision of the Revenue Minister on July 6, 1973 is not final because the Urban

> Development Department did not accept or agree to the decision taken by the Minister for Revenue. As stated earlier, when the matter was brought by the Ministry of Urban Development and Housing Department to the notice of the Chief Minister, who holds ultimate responsibility and duty to report to the Governor and accountable to the people, the Chief Minister, in light of instruction 10, should place the decision necessarily before the Council or the Cabinet, as the case may be, and then may be decided by the Chief Minister. It is seen that no decision has been taken by the Chief Minister under instruction 10. Therefore, under Section 5-A(2), no decision was taken to proceed further under Section 6 or to drop the acquisition proceedings. The High Court, therefore, was right in rejecting the writ petition as being not proper for interference.

30. Thus, the aforesaid discussion had by the learned Single Judge very clearly goes to show that in the present case the objections under Section 5-A of the L.A.Act which is essentially to be called for after issuance of notification under Section 4 were neither decided by the Competent Authority nor communicated, the issuance of notification under Section 6 cannot be held valid. This takes away the entire land acquisition proceedings and require quashing of the notification issued.

31. Coming to the issue of hostile discrimination by the appellant in having released some portion of the property sought to be acquired in exclusion of the other. In this regard details were supplied by the respondents with respect to the lands which have been excluded and deleted from the purview of Scheme. In so far as the allegations made by the respondents, the appellant even though denied the same, but before the learned Single Judge on 2.09.1994 admitted that the land of number of Societies and individuals have been deleted from the operation of the scheme.

32. We have gone through the record and the rival contentions of the learned counsel for the parties. We find that the learned Single Judge has discussed all the three issues raised by the respondents elaborately and passed a speaking order.

33. Having considered the submission of both the sides and having perused the record we find no infirmity in the approach of the learned Single Judge and consequently, dismiss the appeals.

34. One more point which was discussed in favour of the respondent was the factum of coming into force of the New Act in the form of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. On this issue it is submitted by the appellant that the said objection is entirely misconceived and misplaced as Section 24(2) would have no application to the land acquisition proceedings in question. As is apparent from the very opening words of sub-section (2) of the said provision, the applicability thereof is postulated on the existence of a valid award made 5 years on more prior to the commencement of the new Act. It is submitted that in the present matters no such award is in existence as the same was specifically quashed by the learned Single Judge in para 67 of the impugned judgment. Infact, should this Hon'ble Court allow the appellant's appeal, the acquisition of land for scheme no.97 would need to be proceeded with as provided in Section 24(1) of the New Act.

35. Since we have dismissed the appeals filed by the appellants and confirm the order of the learned Single Judge, the issue confronted by the respondents about the applicability of New Act does not come for our consideration in these proceedings as if the appellant wish to proceed with the acquisition afresh they are certainly bound by the New Provisions.

With these observations the writ appeals are disposed of. A copy of the order be kept in each of the file.

C.C.as per rules.

Order accordingly.

I.L.R. [2015] M.P., 1165
WRIT APPEAL
Before Mr. Justice M.C. Garg & Mr. Justice Sheel Nagu
W.A. No. 561/2010 (Gwalior) decided on 9 December, 2014

ABHILASHA SHARMA (SMT.) ... Appellant
Vs.
SMT. SAROJ DEVI & ors. ... Respondents

(Along with Writ Appeal No.664/2010)

***Service Law - Anganwadi worker - Service conditions - Place of residence* - Post of Anganwadi worker is not a Statutory Post - Post of Anganwadi is created under a scheme - Requirement of residence in**

a particular village where the Anganwadi is situated cannot be said to be unconstitutional. **(Para 7)**

सेवा विधि – आंगनवाड़ी कार्यकर्ता – सेवा शर्तें – निवास का स्थान – आंगनवाड़ी कार्यकर्ता का पद कानूनी पद नहीं है – आंगनवाड़ी कार्यकर्ता का पद स्कीम के अधीन सृजित किया गया है – किसी विशिष्ट ग्राम जहां आंगनवाड़ी स्थित है में निवास की आवश्यकता को असंवैधानिक नहीं कहा जा सकता।

Cases referred :

W.A. No. 421/2007 decided on 11.07.2007, 2003 (4) MPLJ 106, 2002 SCC (L&S) 935, 2012 (1) MPHT 101, (2007) 11 SCC 681.

Anil Sharma, for the appellant in W.A. No. 561/2010 and *D.S. Raghuvanshi,* for the appellant in W.A. No. 664/2010.

D.S. Raghuvanshi, for the respondent no. 1 in W.A. No. 561/2010.

B. Raj Pandey, G.A. for the respondent nos. 2 to 4/State in W.A. No. 561/2010 & for respondent nos. 1 to 3/State in W.A. No. 664/2010.

J U D G M E N T

The Judgment of the Court was delivered by : **M.C. Garg, J. :-** Both the writ appeals raise common question as to whether, the selection for the Anganwadi worker can be based on geographical residence of the appellant or that only on account of the place of residence, as the appointment cannot be refused has been held by learned Single Judge vide impugned order dated 5th October, 2010 which precisely has been challenged before us by way of these writ appeals, one filed by Smt. Abhilasha Sharma and other by Smt. Neelam Singh Sikarwar. For the sake of reference, we first take the writ appeal filed by Smt. Abhilasha Sharma.

2. The facts necessary for deciding this writ narrated in para 2 of the impugned order are reproduced as under:

> "The respondent no.1 Saroj Devi/(petitioner) was appointed as Anganwadi Worker vide order dated 30.10.2007. She was posted at Anganwadi Center, Sakatpur. The aforesaid order was kept in abeyance vide an order dated 02.11.2007. It was mentioned in the order that due to some clerical mistake the order of appointment of the petitioner was issued. Against the aforesaid order, the petitioner filed a writ petition before this court, which was registered as Writ Petition 5272/2007 (S).

This Court vide order dated 05.03.2008 allowed the petition and quashed the order. The Court also granted liberty to respondents to conduct any inquiry against the petitioner. In pursuance to the aforesaid order the appeal, filed by respondent No.4 was dismissed by the Collector vide order dated 22.04.2008. Then, respondent No. 4 filed review petition which was disposed of vide order dated 25.02.2009 passed in M.C.C. No.255/2008. This Court passed the following observation in the aforesaid petition:-

As per the petitioner, she is the affective party and she was not made as a party in the petition. The petitioner has filed an appeal which is pending before the Collector, Shivpuri. However, it is clear from the order dated 5.3.2008 that this Court quashed the order Annexure P/1, dated 2.11.2007 on the ground that the aforesaid order was passed without hearing the petitioner. It has clearly been observed in the order that the authorities are free to pass any order after giving opportunity of hearing to the petitioner. In such circumstances, the appellate authority is free to pass appropriate order in accordance with law. This Court has already given opportunity to the respondents to pass an order after inquiry. If the petitioner has filed any appeal and which is pending, the appellate authority may decide the same in accordance with law as early as possible.

With the aforesaid observation, this review petition is disposed of. No order as. to cost."

Thereafter, the Collector had decided the appeal filed by respondent No. 4 vide order dated 18.03.10. The Collector allowed the appeal and set aside the order of appointment of the petitioner dated 30.10.2007. Against the order passed by the Collector, petitioner preferred a petition before this Court, which was registered as Writ Petition. No.1439/2010(S). This Court disposed of the aforesaid petition vide order dated 30.03.2010 with the following directions :-

"Keeping in view the totality of the circumstances, this Court does not find any reason to interfere in the impugned

order dated 18th March 2010 however as the petitioner is continuing to work on the post of Aangwanwadi Worker she shall be permitted to continue as such for a period of sixty days or till a final order is passed in the matter by the competent authority as directed by the Collector district Shivpuri whichever is earlier. It is needless to mention that the competent authority shall positively decide the matter in issue directed by the Collector district Shivpuri by the impugned order dated 18th March 2010 positively within a period of sixty days from the date of receipt of a certified copy of this order.

With the aforesaid, writ petition stands disposed of. No order as to cost.

Certified copy as per rules."

In accordance with the directions issued by this Court the Collector passed the impugned order. In the impugned order, the Collector has observed that although the name of the petitioner has been mentioned in the voters' list of village Sakatpur and she was residing at village Sakatpur in a rented house, however, she is a resident of Gram Panchayat Bhadera and she is not a resident of village Sakatpur. Hence, she is not entitled to be appointed as Anganwadi Worker and respondent No.4 is entitled to be appointed as Anganwadi Worker.

In regard to the condition of resident of same village of an Anganwadi Worker, the Division Bench of this Court has considered the matter in the case of *Smt. Sadhana v. the State of M.P. And others,* Writ Appeal No. 421 of 2007, decided on 11.07.2007 and held that name of the Anganwadi candidate should find place in the voters' list of the village is 'in accordance with law and passed the following order:-

"We have considered the aforesaid submission and we find that in the Policy for appointment of Aaganwadi Workers contained in order dated 27.05.06 of Government of M.P. Women and Child Welfare Department, one of the conditions for appointment of Aaganwadi Worker was that the name of woman candidate should find place in the voter

list of village. Yet another condition in the order dated 27.05.06 of the Government of M.P., for appointment of Aaganwadi Worker is that the woman candidate should be a resident of the Village or Ward for which she is being considered as Aaganwadi Worker.

The appointment of the appellant has been set aside by the Collector and because she was not a resident of Village or Ward but because her name did not find place in the voter list. Hence the contention of Mr. Raghuvanshi that place of residence cannot be the basis for appointment as Aaganwadi Worker because of the bar under Article 16 (2) of the Constitution does not arise for decision in the case. Since inclusion in the voter list was the requirement for appointment as Aaganwadi Worker in policy of the Government of M.P., we do not find any infirmity in the order passed by the Collector in setting aside the appointment of the appellant as Aaganwadi Worker. Mr. Raghuvanshi further submitted that the appellant has made an application for inclusion of her name in the voter list. In the enquiry ordered by the Collector, this aspect may be considered by the concerned authority."

It is clear from the afore quoted judgment of the Division Bench passed in Writ Appeal No. 421/07,. *Smt. Sadhana v. the State of M.P. And others* (supra) that if name of the candidate finds place in the voters list of the village, she is entitled to be appointed as Anganwadi Worker.

The Women and Child Development Department issued a policy with regard to appointment of Aaganwadi Worker, copy of the policy has been filed as Annexure P/3 dated 27.5.2006. In the aforesaid policy the eligibility criteria for appointment has also been mentioned. One of the eligibility criteria is the name of the woman must be recorded in the voter list of the same village and ward. Subsequently the department issued another policy / circular dated 10.7.2007 for appointment with regard to Aaganwadi Worker. In the aforesaid policy, it has been mentioned with regard to eligibility criteria for appointment that the applicant must be resident of

same Village and ward".

3. As per conditions of service for Anganwadi workers, the name of Anganwadi worker must find place in the voters list in the village for which, there is a requirement and such requirement is in accordance with law. In this regard, a Division Bench of this Court has passed such an order in the case of *Smt. Sadhana* (Supra), however, the learned Signle Judge discarded the aforesaid requirement taking into consideration the *Savirti Singh Vs. State of Madhya Pradesh and others* reported in 2003 (4) M.P.L.J 106 wherein, it was held :-

> "After hearing the learned counsel for both the sides, this Court is of the opinion that the view taken by the Commissioner, Rewa, on the basis of the circular of the State Government is illegal. Recently in *Kailash Chand Sharma vs. State of Rajasthan,* AIR 2002 SC 2877 it has been held by the Supreme Court that residence within a District or rural areas of that District could not be a valid basis for classification for the purpose of public employment. The argument in favour of such reservation which has the overtones of parochialism is liable to be rejected on the plain terms of Article 16 (2) and in the light of Article 16 (3). An argument of this nature flies in the fact of the peremptory language of Article 16 (2) and runs counter to our constitutional ethos founded on unity and integrity of the nation. Residence by itself - be it be within a State, region District or lesser area within a District- cannot be a ground to accord preferential treatment or reservation save as provided in Article 16 (3). It is not possible to compartmentalize the State into Districts with a view to offer employment to the residents of that District on a preferential basis.
>
> In view of the above legal position, the circular dated 27.5.1996 on which reliance has been placed by the Commissioner, suffers from constitutional infirmity. The instructions contained in this circular that a person of the same village should be appointed as Aanganwadi Worker is legally not sustainable. It is against the provision, in Article 16 (2) of the Constitution of India. The petitioner could not be

> discriminated on the ground that she is resident of village Bharhut and not of village Dadari. As far as public employment is concerned, the classification on the basis of residence in a region or locality or village is constitutionally impermissible.

Relying upon, the aforesaid judgment of the Hon. Apex Court in the case of *Kailash Chand Sharma* 2002 SCC (L&S) 935, learned Single Judge has held that a condition which makes the residence of the incumbent in a particular locality i.e.. on the basis of geography is violative of Article 15 and 16 of the Constitution of India and therefore, allowed the petition filed by respondent no. 1 Smt. Saroj Devi. This order affects appointment of respondent no.1 Smt. Abhilasha Sharma (in that case) who is appellant before us and who has filed this writ appeal.

4. It has been argued on behalf of the appellant that the aforesaid view taken by the learned Single is not correct, in view of the judgment of this court in 'Writ Appeal No.637 of 2012 decided on 12th October, 2012. In this case in respect of the appointment of Angwanwadi. a Division Bench has taken a view that since the appointment of Anganwadi workers requires residence of the local village wherein, the Anganwadi is to be looked after, it was said that such appointment cannot be said to be arbitrary. The observation made are reproduced herein below:-

> "On perusal of the record, it is apparent that the Commissioner by passing the order in the matter of appointment of Aanganwadi Worker found that the condition of local resident of a village, wherefrom the appointment is directed cannot be said to be arbitrary.
>
> Learned counsel appearing on behalf of the appellant has raised an objection before the writ court that such condition is arbitrary in the matter of appointment.
>
> The learned Single Judge referring the Division Bench judgment passed in Writ Appeal No421/2 007 *(Smt. Sadhana Vs. State of M.P. and others)* and also referring the judgment in the case of *Upma Singh vs. Commissioner, Rewa,* 2011 (4) MPLJ 501 directed that in the matter 'of appointment of Aanganwadi Worker the condition so imposed of a local resident cannot be said to be arbitrary in the terms and

conditions of the employment and looking to the work which is to be discharged by such persons.

Shri Sharma, learned counsel appearing on behalf of the petitioner has strenuously urged that the residence of the appellant is not too far but it is nearby to the village for which the appointment has been directed. In such circumstances the condition of local resident though of a different village but it is nearby the petitioner cannot be denied appointment while she is in merit.

After hearing learned counsel appearing on behalf of the parties and looking to the finding so recorded appreciating the provisions of law and two Division Bench judgments of this Court, we are of the -considered opinion that the condition so imposed for the post of Aanganwadi Worker of a Local resident is not arbitrary. In such circumstances, the arguments so advanced by the learned counsel for the petitioner is devoid of any substance.

In view of the foregoing, we do not find any substance in this appeal, hence it is dismissed".

5. As the similar view has also been taken by another Bench of this Court in the case of *Smt. Basanti Suryawanshi Vs. State of M.P. And Others* 2012 (1) MPHT 101. The relevant discussion is as under:

"10. Integrated Child Development Project has been formulated by the Government of India and the same is being implemented through the State Government. The said project has been formulated with an object to ensure development of the children belonging to underprivileged" class of the society in rural area and to provide employment to women.of local area living below the poverty line. The job of an 'Aanganwadi" worker is not a full-time employment, but is a part-time one on a fixed honorarium basis. An "Aanganwadi' worker who is possessed of matriculation pass certificate is entitled to receive a fixed honorarium of Rs. 400/- per month whereas a non-matric 'Aanganwadi' worker is entitled to receive a sum of Rs. 350/- per month. The object of imposing the restriction

contained in clause (3) of the instructions dated 27.5.1996 is to employ a woman living below the poverty line, as she would be more conversant with the culture and behavioural aspect of the children belonging to underprivileged class of the society. Clause (3) of the instructions ensure that while providing employment to a woman living below the poverty line, object of the scheme is fulfilled that is to say to provide free access to the children belonging to weaker sections of the society to 'Aanganwadi' centre and at the same time, the financial condition of the family of such a woman is ameliorated. Thus, there is an intelligible differentia which distinguishes the persons that are grouped together from others which are left out of the group i.e. the candidates who have their near relatives in Government service or in the employment of the local bodies and those whose near relatives are not employed either in Government service or in any local bodies. **The intelligible differentia has a reasonable nexus with the object sought to be achieved i.e. to provide free access to children belonging to weaker sections of the society to 'Anganwadi' centre. The requirement in clause (3) of the instructions dated. 27.5.1996 (Annexure P-12) has been incorporated by taking into account the requirements of particular employment and peculiarities of societal sectors and, therefore, the same cannot be said to be either discriminatory arbitrary or violative of Articles 14 and 16 of the Constitution of India."**

It will be appropriate to take notice of the judgment of the Apex Court in *State of Karnataka and Others Vs. Ameerbi and others* reported in (2007) 11 SCC 681, where it had the occasion to consider the question as to whether, the Anganwadi worker functioning under the scheme floated by the State of Karnataka which is similar to the scheme prevailing in the State of M.P. Are holders of civil post or not.

6. The Apex Court in paragraph 13 and more emphatically in paragraphs 20 and 38 of its judgment has answered the question in negative.

7. For convenience and ready reference, the said three paragraphs in the decision of *Ameerbi* (Supra) are reproduced herein below:

> '13. The posts of Anganwadi workers are not statutory posts. They have been created in terms of the scheme. It is one thing to say that there exists a relationship of employer and employee by and between the state and Anganwadi worker but it is another thing to say that they are holders of civil post.
>
> 20. Anganwadi workers, however, do not carry on any function of the state. They do not hold post under a statute. Their posts are not created. Recruitment rules ordinarily applicable to the employees of the state are not applicable in their case. The State is not required to comply wtth the constitutional scheme of equality as adumbrated under article 14 and 16 of the Constitution of India. No process of selection for the purpose of their appointment within the Constitutional schemes exists. We do no think that the said decisions has any application in the instant case.
>
> 38. It is also not a case where the doctrine of parity of employment can be invoked. It is true that nomenclature of a term of payment is not decisive but the substance is as was held in Jaya Bachchan Vs. Union of India but the question has to be determined having regard to the issue invoived. We are concerned herewith with only one question viz. Whether, the respondents are holders of any civil post. We are, having regard to the materials on record, of the view that they are not."

In view of the aforesaid, it cannot be said that the requirement of residence in a particular Village where the Anganwadi is situated, is unconstitutional. Thus, the order of learned Single Judge holding that for appointment of Anganwadi worker, requirement of his/her having residence in a specific village is contrary to Article 15 and 16 of the Constitution of India cannot be upheld for the simple reason that requirement of such person would depend upon the residence of the applicant in a village where, there is requirement of Anganwadi worker. As such, the writ appeal is allowed and the impugned order dated 5.10.2010 is hereby set-aside with no orders as to the costs.

8. Now, coming to the case of *Smt. Neelam Singh Sikarwar*, we find that so far as the said appellant is concerned, for the reasons stated above, while holding that the condition to appoint a person resident of the local village where the Anganwadi is required to be looked after, the judgment delivered in

Writ Petition No.4490 of 2009 (S) that is the case of *Smt. Neelam Singh Sikarwàr*, is also set-aside. However, in that case, since it was the case of the appellant that the appellant was resident of the local village where, the Anganwadi was o to be situated before her marriage and she after her marriage with Balram on 11th May, 2004 has started residing in the same village.

9. Consequently, the writ appeal filed by the Smt. Neelam Singh Sikarwar being Writ Appeal No. 664 of 2010 is also allowed and the impugned order by learned Single Judge in Writ Petition No. 4490 of 2009 (S) is set-aside. The Collector will passed appropriate orders with respect to the appointment of Aanganwadi worker in both the cases as observed above.

Order accordingly.

I.L.R. [2015] M.P., 1175
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No. 4004/2013 (Jabalpur) decided on 27 September, 2013

BEENA DEHARIYA ...Petitioner
Vs.
VIMAL DEHARIYA ...Respondent

*A. **Hindu Marriage Act (25 of 1955), Section 24 - Interim alimony and litigation expenses*** - **Petition u/s 9 of the Act has been filed by the respondent - Petitioner by filing the counter claim has prayed to declare the alleged marriage as ab initio void on account of impotency of the respondent - She also filed the impugned application u/s 24 of the Act - Held - Provision of Section 24 of the Act does not exclude the spouse to get the interim alimony on account of filing of counter claim to declare the marriage as ab initio void. (Paras 2 & 6)**

क. हिंदू विवाह अधिनियम (1955 का 25), धारा 24 – अंतरिम निर्वाह व्यय एवं वाद व्यय – अधिनियम की धारा 9 के अंतर्गत प्रत्यर्थी ने याचिका प्रस्तुत की – याची ने प्रतिदावा प्रस्तुत करते हुये प्रत्यर्थी की नपुंसकता के कारण अभिकथित विवाह को प्रारंभ से शून्य घोषित करने की प्रार्थना की – उसने अधिनियम की धारा 24 के अंतर्गत भी आक्षेपित आवेदन प्रस्तुत किया – अभिनिर्धारित – विवाह को प्रारंभ से शून्य घोषित किये जाने हेतु प्रस्तुत प्रतिदावा के आधार पर अधिनियम की धारा 24 का उपबंध जीवनसाथी को अंतरिम निर्वाह व्यय प्रदान करने से अपवर्जित नहीं करता।

***B. Hindu Marriage Act (25 of 1955), Section 24* - Since petitioner did not possess any source of income and residing separately she is entitled to get Rs. 3,000/- per month as interim alimony, Rs. 5,000/- as expense of litigation and Rs. 200/- as travelling expense for every date of hearing - Since husband is a healthy and able bodied person, he could not escape from his liability to pay the interim alimony. (Paras 8 to 11)**

ख. हिंदू विवाह अधिनियम (1955 का 25), धारा 24 – चूंकि याची के पास आय का कोई स्त्रोत नहीं है एवं पृथक निवासरत है वह रू. 3,000/– प्रतिमाह अंतरिम भरणपोषण, रू. 5,000/– वाद व्यय एवं प्रत्येक सुनवाई की तिथि पर रू. 200/– यात्रा व्यय पाने की हकदार है – चूंकि पति स्वस्थ एवं सक्षम शरीर का व्यक्ति है, वह अंतरिम निर्वाह व्यय अदा करने के अपने दायित्व से नहीं बच सकता।

Awadhesh Gupta, for the petitioner.
Saroj Daheria, for the respondent.

ORDER

U.C. MAHESHWARI, J. :- The petitioner/defendant (wife of respondent) has filed this petition under Article 227 of the Constitution of India, being aggrieved by the order dated 6.2.2013 (Annexure-P-1) passed by the IInd Upper District Judge, Chhindwara in Civil Original Suit No.18-A/2012, whereby, her application filed under Section 24 of the Hindu Marriage Act (In short 'the Act') for appropriate direction to the respondent/husband to pay her interim alimony and litigation expenses, has been dismissed.

2. Petitioner's counsel after taking me through the papers placed on the record along with the impugned order argued that the respondent herein has filed the petition against her under Section 9 of the Act for restitution of conjugal rights. In response of such petition, by filing the written statement, she has also filed the counter-claim to declare the alleged marriage as ab-initio void on account of impotency of the respondent. In pendency of the petition, she has filed the impugned application under Section 24 of the Act, contending that under compulsion she is residing with her parental family and did not possess any source of income for her livelihood and to meet the expenses of the impugned litigation and prayed to direct the respondent to pay her Rs. 3,000/- per month as interim alimony and Rs.5,000/- as expenses to defend the petition. He further said that, in response of such application no documentary evidence was filed on behalf of the respondent/husband to show

that the petitioner/wife has any source of income to meet such expenses, the same has also been observed by the trial Court in the impugned order. But inspite that by holding that the petitioner being working as Guest Teacher in some institute, has a source of income, dismissed her application under the wrong premises. Such application has also been dismissed on the ground that she has filed the counter claim to declare the alleged marriage abinito void on the ground of impotency of the respondent. With these submissions by saying that the impugned order being contrary to record and the existing legal position, deserves to be set aside and prayed to set aside the same by allowing the application by admitting and allowing this petition.

3. On the other hand, responding the aforesaid arguments, Smt. Daheria by justifying the impugned order said that, the same being based on proper appreciation of the factual matrix of the case is in conformity with law. The same does not require any interference at this stage. She also said that the respondent did not have regular source of income to pay the sum of the interim alimony or for the litigation expenses to the petitioner. She also said that in view of the counter-claim filed by the petitioner on the ground of impotency of the respondent, she is not entitled to get any interim alimony from him and prayed for dismissal of this petition.

4. Having heard the counsel at length, keeping in view their arguments, I have carefully gone through the papers placed on record along with the impugned application and the order.

5. It is undisputed fact between the parties that they got married with each other in accordance with Hindu rites and rituals and subsequently, on account of their matrimonial dispute or the physical problem, they are residing separately. True it is that the respondent herein filed the impugned petition under Section 9 of the Act for restitution of conjugal rights while by filing the counter claim in the same matter, the petitioner has prayed to declare the alleged marriage as abinito void on account of impotency of the respondent.

6. Mere perusal of Section 24 of the Act, it is apparent that such provision does not exclude the spouse to get the interim alimony on account of filing of counter claim to declare the marriage as abinito void on account of impotency or any other grounds. Such provision is enacted by the legislature to grant the interim alimony for livelihood of the spouse, if he/she did not possess any sufficient source of income to maintain the expenses of the litigation. So, on the basis of counter-claim, the spouse cannot be discriminated and deprived

to extend the benefit of such provision.

7. It appears from the papers available on the record that in response of the impugned application of the petitioner the respondent herein has not filed any single document to show that the petitioner/wife is working regularly in some institute either as Teacher or in other capacity and out of such employment, she is getting any monthly income. In the lack of such material document, it could not be assumed that the petitioner has any source of income. So, in such premises, the approach of the trial Court being contrary to the provision and the existing factual matrix of the case, is not sustainable and deserves to be and is hereby set aside.

8. In view of the aforesaid, prima facie it is revealed that the petitioner did not possess any source of income and residing separately with her parental family. So, in such premises, I am of the considered view that the petitioner being spouse of the respondent, is entitled to get sum of the interim alimony from him to meet the regular expenses of livelihood and of litigation. Thus, the impugned application deserves to be allowed.

9. Coming to consider the quantum of the monthly interim alimony is concerned, looking to the current price index of the food stuffs and other domestic things necessary for the human life, I am of the view that to meet out the day to-day expenses of maintenance Rs.3000/-per month is required as interim alimony. Besides this, the petitioner is also entitled to get Rs.5,000/- expenses to defend the impugned case. The same are ordered.

10. Besides the aforesaid, the petitioner has to come from Parasia to Chhindwara to attend the Court on the date of hearing, so in that respect for every date of hearing, she is entitled Rs.200/- as traveling and other expenses to come and attend the case at Chhindwara, the same is ordered.

11. So far as the arguments of the respondent's counsel that he does not have any source of income to pay the interim alimony and the expenses to respondent is concerned, it is settled proposition of law, if the spouse like husband is a healthy and able bodied person, then he could not escape from his liability to pay the interim alimony and the expenses to the wife like present petitioner on account of his unemployment or in the lack of source of income. In any case, he is bound to pay the sum of the interim alimony and other expenses to the petitioner. I have not found any document or the circumstance on record to show that the respondent is not in a position to carry out the

work for earning. In such premises, the arguments advanced by the respondent's counsel in this regard is hereby failed.

12. In view of the aforesaid, by allowing this petition the impugned order dated 6.2.2013 (Annexure-P-1) is hereby set aside and by allowing the application of the petitioner filed under Section 24 of the Act, the respondent is directed to pay her Rs.3,000/- (Rs. Three thousand) per moth as interim alimony till disposal of the impugned proceedings/petition. Besides this, interim alimony he will also pay Rs.5,000/- (Rs. Five thousand) in five equal monthly installments. In this regard, the first installment shall be payable between 01.11.2013 to 05.11.2013. On supplying the Bank account number by the petitioner to the respondent, such sum shall be deposited in her Bank account. Apart this, on every date of hearing before the trial Court, the respondent shall pay her Rs.200/- (Rs. Two hundred) as traveling and other expenses as she has to come from Parasia to Chhindwara to attend the impugned case.

13. Petition is allowed as indicated above.

14. There shall be no order as to the costs.

15. However, the trial Court is directed to take an endeavour to expedite the hearing of the impugned case and conclude the same **within six months** from the date of receiving the copy of this order under intimation to this Court.

Certified copy as per rules.

Petition allowed.

I.L.R. [2015] M.P., 1179
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 10505/2013 (Jabalpur) decided on 30 September, 2013

R.B. DUBEY (DR.) ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

***Civil Services (Pension) Rules, M.P. 1976, Rules 3(p) & 42 - Qualifying service* - Petitioner was initially appointed on adhoc basis and was regularly appointed on the post of Asstt. Professor - Application for voluntary retirement was accepted by including the period of adhoc service - Subsequently the qualifying service for pension was reduced and period of adhoc service was reduced - Petition filed by petitioner**

was allowed and period of adhoc service was directed to be counted - However in Writ Appeal, Division Bench granted liberty to respondents to decide the application for voluntary retirement afresh and in case if it is not decided within 90 days the directions of Single Judge should be given effect to - Decision was not taken within 90 days - Order passed in earlier Writ Petition had attained finality and should have been implemented - Further as per rules, 1976, a period of 5 years can be added for computing pension - State directed to evolve a policy to extend the period of qualifying service - Petition allowed. (Paras 8 & 10)

सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 3(पी) एवं 42 – अर्हक सेवा – याची को प्रारंभ में तदर्थ रूप से नियुक्त किया गया और बाद में सहायक प्राध्यापक के पद पर नियमित नियुक्ति की गई – तदर्थ सेवा की अवधि को शामिल करते हुए स्वैच्छिक सेवा निवृत्ति के आवेदन को स्वीकार किया गया – तत्पश्चात् पेंशन के लिये अर्हक सेवा को घटाया गया एवं तदर्थ सेवा अवधि कम की गई – याची द्वारा प्रस्तुत याचिका मंजूर की गई एवं तदर्थ सेवा की अवधि की गणना हेतु निदेशित किया गया – किन्तु रिट अपील मे, डिवीजन बेंच ने प्रत्यर्थी को स्वैच्छिक सेवा निवृत्ति के लिये आवेदन को नये सिरे से निर्णीत करने की स्वतंत्रता दी एवं यदि इसे 90 दिवस में निर्णीत नहीं किया जाता है तो एकल न्यायाधीश के निदेश प्रभावी होंगे – 90 दिवस में निर्णय नहीं किया गया – पूर्ववर्ती रिट याचिका में पारित आदेश अंतिमता प्राप्त कर चुका है उसे लागू किया जाना चाहिये थां – इसके अतिरिक्त नियम 1976 के अनुसार पेंशन की गणना के लिये 5 वर्ष की अवधि को जोड़ा जा सकता है – अर्हक सेवा की अवधि में वृद्धि के लिये राज्य को नीति विकसित करने के लिये निदेशित किया गया – याचिका मंजूर।

Cases referred :

2007 (2) MPLJ 339, W.P. No. 14155/2003 (OA No. 2644/1999) decided on 5.9.2012.

Anurag Dubey, for the petitioner.
Rahul Jain, G.A. for the respondents.

ORDER

K.K. Trivedi, J. :- The petitioner being aggrieved by the orders dated 30.10.2012 and 17.4.2013 has approached this Court by way of filing this writ petition under Article 226 of the Constitution of India. It is put forth by the petitioner that he was initially appointed on ad-hoc basis w.e.f. 1.8.1980 to 18.9.1986 on the post of Assistant Professor in Law. Thereafter he was regularly appointed on the said post. By an application dated 27.1.2003, the

petitioner sought voluntary retirement under the provisions of Rule 41(1)(a) of M.P. Civil Services (Pension) Rules, 1976 (hereinafter referred to as '1976 Rules'). Such a notice of the petitioner was accepted counting the period of ad-hoc services of the petitioner and he was allowed to voluntary retire by order dated 16.7.2003, w.e.f. 10.5.2003. However, while fixing the retiral benefits, ad-hoc period of the services of the petitioner was excluded and an order was issued. This order was called in question in WP No.3549/2004, which was finally disposed of vide order dated 28.2.2011. The respondents were directed to reconsider the matter taking into consideration the period of ad-hoc services of the petitioner and to release the retiral benefits. The respondents preferred a writ appeal against the said order and with the liberty of the Writ Appellate Court, they were required to pass the appropriate order. However, in complete violation of their own stand and completely ignoring the law and the rules, treating the period of 16 years 7 months 21 days service as qualifying service for the purposes of voluntary retirement, the impugned order dated 30.10.2012 is passed. For the said reasons, not only the order impugned was liable to be quashed, but since only for the aforesaid period of 16 years 7 months 21 days the pension is being sanctioned to the petitioner by the impugned order dated 17.4.2013, both the orders are bad in law. In fact, if this aspect was considered by the respondents that the voluntary retirement of the petitioner was not to be accepted at all because of the fact that he had not completed the qualifying services, they should have rejected the notice of voluntary retirement of the petitioner. It is contended that the issue in this respect has already been looked into by this Court and since such an act is held to be invalid, the petitioner is entitled to the relief claimed. On the basis of these allegations, the petitioner has claimed the following relief:

> "(i) Hon'ble Court be pleased to quash the impugned order dated 30.10.2012 and the consequential order dated 17.4.2013.
>
> (ii) Hon'ble Court be pleased to direct the respondent to reinstate the petitioner to the post of Assistant Professor with all consequential benefits for all purposes.
>
> (iii) Any other suitable relief deemed fit in the facts and circumstances of the case may also kindly be granted together with the cost of this petition."

2. By filing a return, the respondents have opposed the claim f the petitioner and have contended that in the writ appeal filed by the respondents

against the order of this Court passed in earlier writ petition of the petitioner a liberty was granted by the Court to reconsider the issue. The only rider put was that no detrimental order to the interest of the petitioner should be issued. After examining the entire facts, it was found by the respondents that the ad-hoc service period of the petitioner was not to be counted for the purpose of counting qualifying service for the purpose of permitting voluntary retirement of the petitioner. This particular aspect was taken note of that since now the petitioner has voluntary retired, though on account of a mistake committed by the respondents-State, therefore, the case of the petitioner was to be treated as a special case and for the said purpose it was decided to treat the regular services of the petitioner as qualifying service only for the purpose of granting permission to the petitioner to voluntary retire. This has been done as a special case and therefore, if such a relaxation is granted by the State, it cannot be said that any act done by the respondents or any order passed by them is violative of any statutory rules. It is put forth that such power of relaxation is always available with the State Government as it is the competent authority to make rules and, therefore, the order passed by the respondents are just and proper. It is put forth that on account of petitioner's own application, since the voluntary retirement was granted to him, he cannot be permitted to withdraw the said application after such a long time and since the voluntary retirement already granted to the petitioner is required to be regularized, rightly the orders have been issued by the respondents. It is contended that the petition being misconceived and based on misleading facts, is liable to be dismissed. The rejoinder is nothing but an explanation of whatever stated by the petitioner in his writ petition. The only attempt made by the petitioner is to shift the burden on the respondents for the purpose of verification of the facts whether the voluntary retirement of the petitioner could have been allowed or not.

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

4. To decide the controversy involved, the provisions of voluntary retirement, as prescribed in Rule 42(1)(a) of the 1976 Rules aforesaid, are required to be examined. Not only this, the definition clauses for the particular provision are to be taken into consideration. Rule 42 of the Rules aforesaid is reproduced for ready reference:

> **"42. Retirement on completion of [20/25 years] qualifying service.** - [(1) (a) Government servant may retire at any time after completing 20 years qualifying service, by giving a notice in form 28 to

the appointing authority at least one month before the date on which he wishes to retire or on payment by him of pay and allowances for the period of one month or for the period by which the notice actually given by him falls short of one month:

Provided that this sub-rule shall not apply to the Government servants mentioned in brackets against each of the following departments, until they have not completed 25 years qualifying service:-

(a) Public Health & Family Welfare Department (Medical, Paramedical & Technical Staff);

(b) Medical Education Department (Teaching Staff, Paramedical & Technical staff):

Provided further that such Government servant shall not be allowed to retire from service without prior permission in writing of the appointing authority under the following circumstances:-

(i) Where the Government servant is under suspension;

(ii) Where it is under consideration of the appointing authority to institute disciplinary action against the Government servant;

Provided also that if the appointing authority has not taken the decision under clause (ii) of the second proviso, within six months from the date of notice given by the Government servant with regard to such disciplinary action it shall be deemed that the appointing authority has allowed to such Government servant to retire from service on the date after expiry of the period of six months.]

(b) The appointing authority may in the public interest require a Government servant to retire from service at any time after he has completed 20 years qualifying service or he attains the age of 50 years whichever is earlier with the approval of the State Government by giving him three months notice in Form 29:

Provided that such Government servant may be retired forthwith and on such retirement forthwith and on such retirement the Government

servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rate at which he was drawing immediately before his retirement or, for the period by which such notice falls short of three months, as the case may be.

NOTE-1.- Before a Government servant service notice of retirement under clause (a) above, he should satisfy himself by means of a reference to the appointing authority that he has in fact, completed [20 or 25 years] qualifying service, as the case may be, for pension. Similarly, the appointing authority, while giving notice of retirement to a Government servant under clause (b), above, should also satisfy itself, that the Government servant has, in fact completed 20 years qualifying service or he attains the age of 50 years.

NOTE-2.- The period of notice of [one month or three months] as the case may be, shall be reckoned from the date on which it is signed and put in communication under registered post. Where the notice is served personally, the period shall be reckoned from the date of receipt thereof.

NOTE-3.- The Government servant, on submission of an application shall be granted such leave during the period of notice to which he is entitled according to rules:

NOTE-4.- The payment of pension for the period for which pay and allowances have been paid to a Government Servant in lieu of notice, shall be regulated by the provision of sub-rule (2) of rule 33 of these rules.

(2) A Government servant who has elected to retire under clause (a) of sub-rule (1) and has given the necessary intimation to that effect to the appointing authority, shall be precluded from withdrawing his election subsequently except with the specific approval of such authority on consideration of the circumstances of the case to withdraw the notice given by him:

Provided that the request for withdrawal shall be prior to the intended date of his retirement.

(3) Where the notice of retirement has been served by appointing

> authority on the Government servant, it may be withdrawn, if so desired for adequate reasons, provided that the Government servant concerned is agreeable.]"

5. Much emphasis is placed on the word 'qualifying service'. The qualifying service is defined in Rule 3(p) of the 1976 Rules which reads thus:-

> **"3(p)** "Qualifying service" means the period between the date of joining pensionable service under the State Government and retirement therefrom which shall be taken into account for purpose of the pension and gratuity admissible under these rules and includes the period which qualifies under any other order or rule for the time being in force."

A plain and simple reading of the definition will make it clear that there is no distinction in the nature of appointment whether it is ad-hoc, temporary or permanent for the purposes of counting the same for fixation of pension. This Court in the case of *Chandrakanta w/o Manaklalji Sharma v. State of M.P. And others*-2007 (2) M.P.L.J. 339 had categorically held that the effective point of start of qualifying service is the day of joining on the post on which the employee is first appointed either substantively, officiating or temporary basis. It is not the case that ad-hoc appointment of the petitioner was not something which was not authorizing the petitioner to officiate on the post of Assistant Professor which post is admittedly a pensionable post. Even on ad-hoc basis he had officiated on the said post and therefore that period was required to be counted. Rule 12 of the Rules also prescribes the commencement of qualifying service, interpretation of which has been done in the case of *Chandrakanta* (supra) and it has been held that from the day the Government servant joins on any pensionable post, the qualifying service starts from the date of joining. This being so, it is required to be seen whether on the basis of liberty granted by the Division Bench of this Court, the case of the petitioner was properly examined or not.

5. In the earlier writ petition, when the order was passed by this Court, the aspects were mentioned and it was recorded by this Court that the ad-hoc services of the petitioner were to be counted for the purposes of granting him permission to voluntary retire from service. For the purposes, the order passed in W.P.No.3549/2004 on 28.2.2011 is required to be examined. In the operative part, after taking note of the submissions made by the learned

counsel for the parties, it was specifically directed by this Court to consider the case of the petitioner in the following manner:-

> "In the matter of State of *West Bengal & ors. vs. Dr. Subhash Chandra Partihar* , 2003 SC-SLR 817 this aspect of the case has been taken into consideration by the Hon'ble Apex Court. Otherwise also while benefit of voluntary retirement scheme was given to the petitioner the period of service between 01.08.1980 to 18.09.1986 was taken into consideration as the services were rendered by the petitioner. If this period would not have been taken into consideration then petitioner was not entitled for the benefit of voluntary retirement scheme.
>
> After taking into consideration all the facts and circumstances of this case the petition filed by the petitioner is disposed of with a short direction that the competent authority shall release retiral benefit after taking into consideration the services rendered by the petitioner on adhoc basis within a period of two months.
>
> With the aforesaid, petition stands disposed of."

7. This was the order which was challenged in W.A.No.999/2011 by the respondents. The contentions raised by the parties were considered by the Division Bench and the Division Bench of this Court had granted the liberty by its order dated 3.9.2012 in the following manner:-

> "In view of the aforesaid contentions, we grant limited liberty to the appellants to re-examine the matter and in case it is found that the application of the respondent for voluntary retirement under Rule 42(1)(a) was premature then to pass an appropriate order but not prejudicial to the interest of the respondent.
>
> With the aforesaid liberty this appeal is finally disposed of. The appellants shall take a final decision in this regard within a period of 90 days from today failing which the appellant shall give effect to the order passed by the Single Bench, as passed in W.P.No.3549/2004 dated 28.2.2011. No order as to cost."

8. A perusal of the liberty granted by this Court and the specific order passed by the Division Bench make it clear that the ultimate direction was to give effect to the order passed by the learned Single Judge in the writ petition

in case the matter is not decided within a period of 90 days, from the date of order. Admittedly matter was not decided within the aforesaid period therefore there was no question of treating, that the ad-hoc period of service rendered by the petitioner was not to be counted for the purpose of authorizing voluntary retirement. The recourse to Rule 15 of the Rules, as has been taken by the respondents was not available. The provisions of Rule 15 which have been quoted by the respondents are not at all attracted. It appears that something which was not provided under the said Rules was taken note of. Even there was certain breaks in service that were required to be condoned and not to ignore the entire period of service. The qualifying service of the petitioner was to be counted and calculated from the date of his ad-hoc appointment. There was no question of granting any relaxation in the matter and treating the period of 16 years 7 months and 21 days as qualifying service for the purpose of granting voluntary retirement to the petitioner. This was not the order passed by this Court in the writ petition of the petitioner and therefore the order dated 30.10.2012 runs contrary to the order passed by this Court. If the respondents were not willing to comply with the said part of the order, they were not required to obtain liberty from the Division Bench of this Court in their writ appeal. If they were not satisfied with the liberty granted or the directions issued by the Division Bench for giving effect to the order passed by the Single Bench in writ petition against the respondents, they were required to approach the Apex Court for seeking an order in that respect. The Division Bench has not upset the order passed by the learned Single Judge on the other hand has endorsed the same while granting liberty to the respondents, who were appellants in the said appeal and has categorically directed them to keep in mind the order passed by the learned Single Judge. Therefore, the order impugned dated 30.10.2012 (Annexure P-5) is not sustainable in the eyes of law. The liberty granted by the Division Bench is not to be interpreted in the manner as has been interpreted by the respondents and therefore the order impugned is liable to be quashed. Consequently, the order passed for grant of pension to the petitioner only for such period which has been treated as qualifying period as a special case is also not sustainable.

10. Learned counsel for the petitioner has placed reliance in case of *Premlata Goutam v. State of M.P.* – W.P. No.14155/2003 (OA No.2644/1999) decided on 5.9.2012 and has contended that in fact if the application for voluntary retirement was itself not maintainable it was not to be allowed at all. It is contended that ad-hoc period was not counted and therefore such a

claim of the petitioner in the said case was considered and it was directed that the said petitioner be reinstated in service with 40% back wages. It is contended that petitioner would also be entitled to reinstatement in service and would be entitled to payment of salary for the period of service after reinstatement. There is distinction between the two. Here in the case in hand the case of the petitioner is treated to be a special case by the respondents-State while granting him permission to voluntary retire whereas in the case of *Premlata Goutam* (supra) this was not the situation. Even otherwise, the factual aspect in the present case is totally different as the consideration as directed by this Court in the earlier writ petition of the petitioner is based on different aspects and not as in the case of *Premlata Goutam* (supra). Yet another aspect is that though certain provisions have been added subsequently by an amendment made in the 1976 Rules w.e.f. 7.4.2006, but similar would be the provisions for seeking the addition of period to the qualifying service for the purpose of voluntary retirement. By the aforesaid provisions, it is prescribed by the State Government that maximum a period of 5 years of service would be added for the computation of pension. If at all, it was the case that any period fall short for granting permission to voluntary retirement to the petitioner, this mode could have been adopted by the respondents as a special case rather than reducing the period of qualifying service, which naturally caused a financial loss to the petitioner. Therefore, it would be proper for the respondents to take note of such a provision and evolve a policy to extend the period of qualifying service of the petitioner, if at all they come to the conclusion that ad-hoc period of service of the petitioner is not to be counted for the purpose of computing the qualifying service. At any rate reduction of the period of qualifying service was not permissible in view of the specific finding recorded by this Court in the earlier writ petition of the petitioner and in writ appeal filed by the respondents.

11. Consequently the impugned order dated 30.10.2012 (Annexure P-5) and order dated 17.4.2013 are hereby quashed. Let a final decision be taken by the respondents in the matter of fixation of retiral claims of the petitioner in terms of the directions already issued, as has been quoted hereinabove in light of the observations made in this order within a period of three months from the date of receipt of certified copy of the order passed today.

12. The writ petition is allowed to the extent indicated hereinabove. There

shall be no order as to costs.

Petition allowed.

I.L.R. [2015] M.P., 1189
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 2210/2014 (Jabalpur) decided on 7 February, 2014

SANJAY KU. SAHU ...Petitioner
Vs.
STATE OF M.P. ...Respondent

Service Law - Experience - **Experience gained before acquiring requisite educational qualification cannot be taken into consideration while determining the period of experience. (Para 10)**

सेवा विधि – अनुभव – अनुभव की अवधि निर्धारित करते समय आवश्यक शैक्षणिक अर्हता अर्जित करने से पूर्व प्राप्त अनुभव को विचार में नहीं लिया जा सकता।

Cases referred :

(1984) 2 SCC 141, (2001) 2 SCC 362.

N.S. Ruprah, for the petitioner.
S.S. Bisen, G.A. for the respondent/State.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- Heard on admission.

2. Non consideration of petitioner's candidature for the post of District Data Manager, in the office of Chief Medical and Health Officer, Dindori is cause for the present writ petition.

3. Applications were invited for various posts including District Data Manager, vide advertisement issued in November 2012 on contractual basis at District Surveillance Unit : Integrated Disease Surveillance Project .

4. The requisite qualification and experience prescribed for appointment of Data Manager at District Head Quarters was:

"Post Graduate Qualification in Computer Science as

B.E in IT/Electronics with minimum 3 years experience preference will be given to those who have worked in Health or Social Sector."

5. Petitioner a Post Graduate (Master of Arts), Post Graduate Diploma in Computer Application in December 2011 and since he did not possess three years experience after acquiring Post Graduate Diploma, has not been considered for appointment.

6. Contention on behalf of the petitioner is that, prior to his acquiring Post Graduate Diploma he has the experience to work on Computer of six months (Annexure P/5). Thereafter since 11.4.2007, he is working on contract basis as Data Entry Operator in the office of Chief Medical and Health Officer, therefore, the experience gained on the post ought to have been taken into consideration.

7. Question is whether when post graduate qualification in Computer Science or B.E in IT/Electronics with minimum three years experience is prescribed as an essential qualification an experience gained prior to acquiring the said qualification can be taken into consideration?

8. In *P.K. Ramachandra Iyer and others v. Union of India and others*: (1984) 2 SCC 141, it has been held:

"30.... ....And we do not subscribe to the view that the period spent in preparing thesis for M.Sc.- mark not Ph.D. - counts towards required experience. It is well-settled that experience to be of value and utility must be acquired after the educational qualification is obtained and not while acquiring the postgraduate qualification. ...."

9. In *Indian Airlines Ltd. and others v. S. Gopalakrishnan* [(2001) 2 SCC 362] it is observed:

"4. The respondent has obtained the ITI certificate in June 1994 and he had about five years of experience after obtaining the certificate and diploma in Mechanical Engineering was obtained in April 1996. In any event, it is clear that the experience obtained by him falls short of the requisite qualification. This Court in *N. Suresh Nathan and another v. Union of India and others* 1992 Supp.(1) SCC : 584; *Gurdial*

Singh v. State of Punjab 1995 (3) SCC : 333 and *Anil Kumar Gupta v. Municipal corporation of Delhi* : 2000(1) SCC128, has explained the necessity to obtain experience after obtaining the requisite qualification.

5. When in addition to qualification, experience is prescribed, it would only mean acquiring experience after obtaining the necessary qualification and not before obtaining such qualification. ...."

10. In the case at hand since the 3 years experience is clubbed with the Post Graduate Qualification in Computer Science or B.E in IT/Electronics, the experience gained prior to acquiring such qualification will be of no avail.

11. Therefore, since the petitioner does not has to his credit the three years experience after acquiring Post Graduate Qualification in Computer Science, his candidature for the post of Data Managers, in the considered opinion of this Court has rightly been rejected.

12. In view whereof petition fails and is dismissed in limine. No costs.

Petition dismissed.

I.L.R. [2015] M.P., 1191
WRIT PETITION
Before Mr. Justice S.C. Sharma
W.P. No. 5625/2012 (Indore) decided on 15 July, 2014

SNEH FARMS & AGRO PRODUCTS LTD, INDORE.& anr. ...Petitioners
Vs.
PANKAJ AGRAWAL & anr. ...Respondents

A. ***Stamp Act (2 of 1899), Section 33 - Impounding of document - Stage thereof*** **- The moment a document is produced before an authority and is insufficiently stamped, the same has to be mandatorily impounded. (Paras 8 &11)**

क. स्टाम्प अधिनियम (1899 का 2), धारा 33 – दस्तावेज को परिबद्ध करना – इसका प्रक्रम – जिस क्षण प्राधिकारी के समक्ष दस्तावेज प्रस्तुत किया जाता है और अपर्याप्त रूप से स्टाम्पित है, उसे आज्ञापक रूप से परिबद्ध किया जाना चाहिये।

B. ***Stamp Act (2 of 1899), Section 33 - Impounding of insufficiently stamped document*** **- When it is to be impounded - The**

moment it is produced before an authority or when the document is tendered in evidence - Held - It is mandatory for an authority to impound a document produced before him or which comes before him in the performance of his function. (Para 13)

ख. स्टाम्प अधिनियम (1899 का 2), धारा 33 – अपर्याप्त रूप से स्टाम्पित दस्तावेज को परिबद्ध करना – इसे कब परिबद्ध किया जाना चाहिये – उस क्षण जब इसे प्राधिकारी के समक्ष प्रस्तुत किया जाता है या जब साक्ष्य में वह दस्तावेज पेश किया जाता है – अभिनिर्धारित – प्राधिकारी के लिये इसे परिबद्ध करना आज्ञापक है जब एक दस्तावेज उसके समक्ष प्रस्तुत किया जाता है या जो उसके कर्त्तव्यों के पालन में उसके समक्ष पेश किया जाता है।

Cases referred :

AIR 2000 Allahabad 344, AIR 2008 SC 1640, (2009) 2 SCC 532, AIR 1989 Kerala 248, AIR 1961 SC 787, AIR 1997 Kerala 345.

(Supplied: Paragraph numbers)

ORDER

S.C. SHARMA, J. :- The petitioner before this Court has filed this present writ petition being aggrieved by the order dt. 16/3/2012, passed by 21st Addl. District Judge, Indore in Civil Suit No. 19-A/2011 (Pankaj Agrawal Vs. Shri Shyam Kuril and two others). The learned Addl. District Judge has dismissed the application preferred u/S. 33 of the Indian Stamp Act, 1899 filed by the present petitioner (defendant No.2).

2. Facts of the case reveal that plaintiff Pankaj Agrawal -respondent No.2 in the present Writ Petition, has filed a suit for grant of declaration and injunction under Order 7 Rule 11 of the Code of Civil Procedure, 1908, as stated in the plaint, based upon an agreement dated 15/4/2011. The petitioner has preferred an application u/S. 33 of the Indian Stamp Act, 1899 stating therein that the document dated 15/4/2011 has not been properly stamped and, therefore, in the light of the statutory provisions as contained u/S. 33 of the Indian Stamp Act, 1899, the same be impounded and sent to the Collector of Stamps for adjudication. The learned trial Court after hearing the arguments on the application preferred by the defendants, has dismissed the application. The present Writ Petition is arising out of aforesaid order passed by the trial Court dated 16/3/2012.

3. Learned counsel for the petitioner has drawn attention of this Court

towards Section 33 and 35 of the Indian Stamp Act, 1899 and he has also placed reliance upon the judgment delivered in the case of *Smt. Dilawati Devi Vs. Commissioner, Varanasi* reported in AIR 2000 ALLAHABAD 344, *Government of Andhra Pradesh and others Vs. Smt. P. Laxmi Devi* reported in (AIR 2008 SC 1640), and in the case of *Avinash Kumar Chouhan Vs. Vijay Krishna Mishra* reported in (2009) 2 SCC 532 and contention of the learned counsel is that a document the moment it is produced before an Authority, as mentioned in Section 33, if it is not duly stamped, the Authority has to impound the same.

4. On the other hand, learned counsel for the respondent – plaintiff has argued before this Court that by virtue of statutory provisions as contained u/S. 33 of the Indian Stamp Act, 1899, the stamp duty is required to be paid only when a document is tendered in evidence. He has placed reliance upon a judgment delivered by the Kerala High Court in the case of *Varghese Vs. State of Kerala and others* reported in (AIR 1989 Kerala 248). He has also placed reliance upon a judgment delivered in the case of *Government of Uttar Pradesh and others Vs. Raja Mohammad Amir Ahmad Khan* reported in (AIR 1961 SC 787). He has also placed reliance upon a judgment delivered in the case of *Avinash Kumar Chauhan Vs. Vijay Krishna Mishra* (supra) and lastly he has placed reliance upon a judgment delivered by the Kerala High Court in the case of *Uthuppan Abraham Vs. State of Kerala and others* reported in (AIR 1997 Kerala 345).

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

6. In the present case, it is an admitted fact that the plaintiff Pankaj Agrawal has filed a Civil Suit claiming declaration and injunction based upon a document dated 15/4/2011. It is also an admitted fact, not disputed by the parties, that the document is not sufficiently stamped. An application was preferred u/S. 33 of the Indian Stamp Act, 1899 by the defendants (petitioners) for impounding the same. The trial Court has dismissed the application by an order dated 16/3/2012.

7. The statutory provisions as contained in Section 33 and 35 of the Indian Stamp Act, 1899 reads as under :

33. Examination and impounding of instruments. -

(1) Every person having by law or consent of parties authority to receive evidence and every person in charge of a public

office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions shall if it appears to him that such instrument is not duly stamped, impound the same.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in [India] when such instrument was executed or first executed:

Provided that—

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898.);

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purposes of this section, in cases of doubt,--

(a) the [State Government] may determine what offices shall be deemed to be public offices; and

(b) the [State Government] may determine who shall be deemed to be persons in charge of public offices.

35. Instruments not duly stamped inadmissible in evidence, etc.,- No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped;

Provided that -

(a) any such instrument shall, be admitted in

evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him, on payment of a penalty of one rupee by the person tendering it;

(c) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(d) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1989;

(e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government or where it bears the certificate of the Collector as provided by Section 32 or any other provision of this Act.

8. Section 33 categorically states that any person having authority to receive an evidence is duty bound to impound a document when it is insufficiently stamped.

9. The Allahabad High Court in the case of *Smt. Dilawati Devi Vs. Commissioner, Varanasi* (supra) in paragraph 2, has held as under :

2. The submission of Mr. A. B. Singh does not appear to be sound so far as the Sections 33 and 47A are concerned. In as much as Section 33 does not require that the document is to be produced in evidence. A plain reading of Section 33 of

the Indian Stamp Act shows that every person having by law or consent of parties authority to receive evidence, or every person in charge of a public office, except a police Officer, before whom any instrument, chargeable with duty is produced or comes in the performance of his functions, he may impound the same if it appears to him that such instrument is not duly stamped which in his opinion is required to be stamped. Thus, it is not clear that the document is not required to be produced in evidence but it is necessary who is capable of receiving the document in evidence or a person in charge of a public office before whom a document comes in discharge of his function of such office, he has the authority to impound such document.

10. The Allahabad High Court in the aforesaid case has held that by virtue of Section 33, when an instrument is produced chargeable with duty, has to be impounded by the Authority who receives such instrument.

In the case of *Government of Andhra Pradesh Vs. Smt. P. Laxmi Devi* (supra), the apex Court in paragraph 15, 16, 17 and 19 has held as under :

15. Section 33(1) of the Stamp Act states :

"Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance in his functions shall, if it appears to him that such instrument is not duly stamped, impound the same".

16. A perusal of the said provision shows that when a document is produced (or comes in the performance of his functions) before a person who is authorized to receive evidence and a person who is in charge of a public office (except a police officer) before whom any instrument chargeable with duty is produced or comes in the performance of his functions, it is the duty of such person before whom the said instrument is produced to impound the document if it is not duly stamped. The use of the word 'shall' in Section 33(1) shows that there is no discretion in the authority mentioned in Section 33(1) to impound a document or not to do so. In our opinion, the word

'shall' in Section 33(1) does not mean 'may' but means `shall'. In other words, it is mandatory to impound a document produced before him or which comes before him in the performance of his functions. Hence the view taken by the High Court that the document can be returned if the party does not want to get it stamped is not correct.

17. In our opinion, a registering officer under the Registration Act (in this case the Sub-Registrar) is certainly a person who is in charge of a public office. Section 33(3) applies only when there is some doubt whether a person holds a public office or not. In our opinion, there can be no doubt that a Sub-Registrar holds a public office. Hence, he cannot return such a document to the party once he finds that it is not properly stamped, and he must impound it.

19. It is well settled that stamp duty is a tax, and hardship is not relevant in construing taxing statutes which are to be construed strictly. As often said, there is no equity in a tax vide Commissioner of Income Tax vs. Firm Muar AIR 1965 SC 1216. If the words used in a taxing statute are clear, one cannot try to find out the intention and the object of the statute. Hence the High Court fell in error in trying to go by the supposed object and intendment of the Stamp Act, and by seeking to find out the hardship which will be caused to a party by the impugned amendment of 1998.

11. The apex Court in the aforesaid case has held that stamp duty is a tax and hardship is not relevant in construing taxing statutes which are to be construed strictly. It was also held that in the light of Sec. 33(1), the moment a document is produced before an Authority and is insufficiently stamped, the same has to be mandatorily impounded.

12. The apex Court in the case of *Avinash Kumar Chauhan Vs. Vijay Krishna Mishra* (supra), in paragraphs 22 and 24 has held as under :

22. We have noticed heretobefore that Section 33 of the Act casts a statutory obligation on all the authorities to impound a document. The court being an authority to receive a document in evidence is bound to give effect thereto. The unregistered deed

of sale was an instrument which required payment of the stamp duty applicable to a deed of conveyance. Adequate stamp duty admittedly was not paid. The court, therefore, was empowered to pass an order in terms of Section 35 of the Act.

24. In this case, by reason of the statutory interdict, no transfer at all is permissible. Even transfer of possession is also not permissible. [See *Pandey Oraon v. Ram Chander Sahu* 1992 Supp (2) SCC 77 and *Amrendra Pratap Singh v. Tej Bahadur Prajapati and Others* (2004) 10 SCC 65]

The Registration Act, 1908 provides for such a contingency in terms of the proviso appended to Section 49 thereof, which reads as under :-

"49. Effect of non-registration of documents required to be registered.-

No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall--

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument."

13. Keeping in view the aforesaid judgments, this Court is of the considered opinion that it is mandatory for an Authority to impound a document produced before him or which comes before him in the performance of his functions.

14. This Court has already dealt with the judgment delivered in the case of

Avinash Kumar (supra) and the same has also been relied upon by the learned counsel for the respondent. Learned counsel for the respondent has placed reliance upon a judgment delivered in the case of *Varghese Vs. State of Kerala* (supra), which is of Kerala High Court and again upon a judgment delivered by the Kerala High Court in the case of *Uthuppan Abraham* (supra). The judgment relied upon by the learned counsel for the respondent are of no help to the respondent, as the issue in question has already been clarified by the apex Court in the case of *Avinash Kumar* (supra).

15. Resultantly, the Writ Petition is allowed. The impugned order dated 8/10/2013 is hereby set aside. The application preferred by the present petitioner u/S. 33 of the Indian Stamp Act, 1899 stands allowed and the learned trial Judge is directed to proceed further in accordance with law by impounding the documents and thereafter by sending it to the Collector of Stamps for adjudication. No order as to costs.

Petition allowed.

I.L.R. [2015] M.P., 1199
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice Mool Chand Garg
W.P. No. 6022/2014 (Indore) decided on 19 August, 2014

SANTOSH CHOUBEY (DR.) (MS.) ... Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Education Service (Collegiate Branch) Recruitment Rules, M.P., 1990, Rule 8(1)(a) - Vires of - Fixation of cut-off date - Hardship **- Even if employee or petitioner looses his chance narrowly it would not render rule invalid - Action can be struck down only if it is found arbitrary - Petition dismissed. (Paras 5 & 6)**

शिक्षा सेवा (महाविद्यालयीन शाखा) भर्ती नियम, म.प्र., 1990, नियम 8(1)(a) – की शक्तिमत्ता – अंतिम तिथि का निर्धारण – कठिनाई – यदि कर्मचारी या याची ने थोड़े अंतर से अवसर गंवा दिया तब भी इससे नियम अवैध नहीं होगा – कार्यवाही को केवल तभी अभिखंडित किया जा सकता है जब उसे मनमाना पाया जाता है – याचिका खारिज।

Case referred :

(2009) 3 SCC 35.

L.C. Patne, for the petitioner.

ORDER

The Order of the Court was delivered by : **SHANTANU KEMKAR, J. :-** By filing this petition under Article 226 of the Constitution of India, the petitioner has challenged the vires of Rule 8 (1) (a) of Madhya Pradesh Education Service (Collegiate Branch) Recruitment Rules, 1990 (for short, Rules of 1990) so far as it fixes the first day of January next following date of commencement of the examination / selection, as the date for determining the eligibility of the candidates with respect to his / her age.

2. For better understanding, Rule 8 (1) of the Rules of 1990 is extracted below: -

> **"8. Conditions of eligibility of direct recruits. -** In order to be eligible to complete at the examination / selection a candidate must satisfy the following conditions, namely: -
>
> **(i) Age.** - (a) The candidate must have attained the age as specified in column (4) of the Schedule III and not attained the age as specified in column (5) of the said schedule on the first day of January next following the date of commencement of the examination / selection:
>
> (b) The upper age limit shall be relaxable upto a maximum of 5 years if a candidate belongs to a Schedule Caste or a Scheduled Tribe;
>
> (c) The upper age limit will also be relaxable in respect of candidates who are or have been employees of the Madhya Pradesh Government to the extent and subject to the conditions specified below: -
>
> (i) A candidate who is a permanent Government Servant should not be more than 38 years of age.
>
> (ii) A candidate holding a posts temporarily and applying for another post should not be more than 38 years of age. This concession shall also be admissible to the teachers appointed on emergency basis, contingency paid employees. Work charged employees and employees

working in the Project Implementation Committees.

(iii) A candidate who is retrenched Government servant will be allowed to deduct from his age the period of all temporary service previously rendered by him up to a maximum limit of 7 years even if it represents more than one spell provided that the resultant age does not exceed the upper age limit by more than three years.

Explanation. - The term "retrenched Government servant" denotes a person who was in temporary Government service of this State or of any of the constituent units, for a continuous period of not less six months and who was discharged because of reduction in establishment not more than three years prior to the date of his registration at the employment exchange or of application made otherwise for employment in Government Service.

(iv) A candidate who is an ex-serviceman will be allowed to deduct from his age the period of all defence service previously rendered by him provided that the resultant, age does not exceed the upper age limit by more than three years.

Explanation. - The term "ex-serviceman" denotes a person who belonged to any of the following categories and who was employed under the Government of India for a continuous period of not less than six months and who was retrenched or declared surplus as a result of the recommendation of the Economy Unit or due to normal reduction in establishment not more than three years before the date of his registration at any employment exchange or of application made otherwise for employment in Government Service: -

(1) Ex-servicemen released under

mustering out concessions;

(2) Ex-servicemen enrolled for the second time and discharged on -

(a) completion of short term engagement,

(b) fulfilling the conditions of enrollment;

(3) Ex-personal of Madras Civil Units;

(4) Officers (Military and Civil) discharged on completion of their contract (including short service Regular Commissioned Officers);

(5) Officers discharged after working for more than six months continuously against leave vacancies;

(6) Ex-servicemen invalidated out of service;

(7) Ex-servicemen discharged on the ground that they are unlikely to become efficient soldiers;

(8) Ex-servicemen who are medically boarded out on account of gun-shot, wounds etc.

(d) The upper age limit shall be relaxable up to 38 years of age in respect of candidates who are employees of Madhya Pradesh State Corporations / Boards.

(e) The general upper age limit shall be 35 years in respect of widow destitute and divorced women candidates.

(f) The upper age limit shall be relaxable upto maximum of 2 years in respect of those candidates

who are holding Green Card under the Family Welfare Programme.

(g) The general upper age limit shall be relaxed upto 5 years in respect of awarded superior cast partner of a couple under the Inter Caste Marriage incentive programme of the Tribal, Harijan and Backward Classes Welfare Department.

(h) The upper age limit shall also be relaxed upto 5 years in respect of "Vikram Award" holder candidates.

(i) The upper age limit shall be relaxed in the case of voluntary Home Guards and non-commissioned officers of Home Guards for the period of service rendered so by them subject to the limit of 8 years but in no case their age should exceed 38 years.

Note.- Candidates who are admitted to the examination / selection under the age concessions mentioned in rule 8(c) (i) and (ii) above will not be eligible for appointment if after submitting the application, they resign from service either before of after taking the examination. They will, however, continue to be eligible if they are retrenched from the service or post after submitting the applications. In no other case will these age limits be relaxed. Departmental candidates must obtain previous permission of the appointing authority to appear for the examination."

3. According to the learned counsel for the petitioner, the eligibility of the candidate is required to be taken into consideration with reference to the last date of submission of application form and it cannot be left to be decided on the basis of fortuitous circumstance of commencement of the date of examination / selection. He submits that on account of the aforesaid illegal and arbitrary rule, the petitioner, who is qualified to be appointed on the post of Assistant Professor, as on the last date of submission of application form,

shall be disqualified for appointment, if her maximum age is determined with reference to 01.01.2015 in pursuance to the aforesaid impugned rule.

4. Having considered the submissions made by the learned counsel for the petitioner and having gone through Rule 8 (1) (a) of Rules of 1990, we find that there is no illegality or arbitrariness in fixation of the cut-off date.

5. It has now been settled that the State is entitled to fix a cut-off date. In the Rules of 1990, if the minimum and maximum age limit has been fixed and cut-off date by which the petitioner has to satisfy the prescribed eligibility qualification of age has also been fixed, in our considered view, it cannot be termed to be arbitrary, because for some candidates like the petitioner, it is not suitable.

6. True, it is that there exists Court's power of judicial review in this behalf, but is limited in the sense that the action can be struck down only if it is found to be arbitrary. Merely because of fixation of a cut-off date in the rule, the employee looses his / her chance very narrowly, that would not render the rule to be invalid or arbitrary. Such hazards would be there in all the services. Only because it causes hardship to a few persons, it will not itself be a good ground for invalidating the fixation of cut-off date. [See (2009) 3 SCC 35 *Council of Scientific & Industrial Research and others v. Ramesh Chandra Agrawal & another]*

7. In view of the aforesaid legal position, in our considered view, no case for quashment of the impugned Rule 8 (1) (a) of the Rules of 1990 is made out.

8. The petition fails and is hereby dismissed.

Petition dismissed.

I.L.R. [2015] M.P., 1204
WRIT PETITION
Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice Shantanu Kemkar
W.P. No. 13806/2014 (PIL) (Jabalpur) decided on 14 October, 2014

ANKUR TRIVEDI ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Cooperative Societies Act, M.P. 1960 (17 of 1961),

Sections 49 (7-AA), 53 & 57 - Completion of term of Board of Directors **- The term of office of outgoing Board of Directors was expired on 27.05.2014 - Election to install newly elected Board was not conducted within the specified time and the same was extended beyond 27.05.2014 by virtue of notification dated 07.07.2012 and 24.01.2013 issued by the competent authority u/s 49(7-AA) - Held - The provision contained under section 49(7-AA) was deleted by amending Act of 2013 - The State Government could not have exercised any power with reference to the said provision after 05.02.2013 - Therefore, notifications will have no application. (Paras 7,8 & 9)**

क. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धाराऐं 49 (7–एए), 53 व 57 – निदेशक बोर्ड का कार्यकाल पूर्ण होना – जाने वाले निदेशक बोर्ड के कार्यकाल की अवधि 27.05.2014 को समाप्त हुई – नव निर्वाचित बोर्ड अधिष्ठापित करने के लिये विनिर्दिष्ट समय के भीतर चुनाव आयोजित नहीं किये गये और उक्त को धारा 49(7–एए) के अंतर्गत सक्षम प्राधिकारी द्वारा जारी की गई अधिसूचना दिनांक 07.07.2012 एवं 24.01.2013 के आधार पर 27.05.2014 से आगे बढ़ाया गया – अभिनिर्धारित – धारा 49(7–एए) के अंतर्गत समाविष्ट उपबंध को 2013 के संशोधन अधिनियम द्वारा विलोपित किया गया था – राज्य सरकार 05.02.2013 के पश्चात् उक्त उपबंध के संदर्भ में किसी शक्ति का प्रयोग नहीं कर सकती थी – इसलिए, अधिसूचनाओं की प्रयोज्यता नहीं होगी।

B. Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 53 **- Registrar, Co-operatives can exercise the powers conferred u/s 53 of the Act of 1960 as amended, for supersession of the existing Board of Directors in accordance with law by giving opportunity to all concerned - Existing Board should be superseded by replacing other person(s) and State Co-operative Election Authority shall forthwith commence the process of conducting the election for installation of new Board of Directors within two weeks. (Para 16)**

ख. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 53 – विद्यमान निदेशक बोर्ड को अधिक्रमित करने हेतु पंजीयक, सहकारिता विधिनुसार सभी संबंधितों को अवसर प्रदान करते हुए, यथासंशोधित 1960 के अधिनियम की धारा 53 के अंतर्गत प्रदत्त शक्तियों का प्रयोग कर सकता है – विद्यमान बोर्ड को अन्य व्यक्ति(यों) के प्रतिस्थापन द्वारा अधिक्रमित किया जाना चाहिए और राज्य सहकारिता निर्वाचन प्राधिकारी दो सप्ताह के भीतर नया निदेशक बोर्ड अधिष्ठापित करने हेतु चुनाव आयोजित करने की प्रक्रिया को अविलम्ब आरंभ करेगा।

Cases referred :

Civil Appeal No. 4691/2013 decided by Supreme Court on May 16, 2013.

R.N. Singh with *Anshuman Singh,* for the petitioner.
Samdarshi Tiwari, G.A. for the respondent nos. 1 to 4/State.
Praveen Dubey, for the respondent nos. 5 & 6.
Akash Choudhary, for the respondent no. 7.
Paritosh Gupta, for the respondent no. 10.
Shashank Shekhar, for the respondent no. 11.
None for the respondent nos. 12 & 13.
None for the respondent no. 14 though served.
Sanjay K. Agrawal, for the respondent no. 15.
Greeshm Jain, for the respondent no. 16.
Pushpendra Yadav, for the respondent no. 17.

ORDER

The Order of the Court was delivered by :
A.M. KHANWILKAR, C.J. :- This petition is filed as Public Interest Litigation firstly to cancel the decision dated 26/27-8-2014 passed by the respondent No.2 and essentially to declare that respondents No.6 to 18 have rendered themselves ineligible to remain as Members of the Board of Directors due to expiry of the term of the existing Board of Directors, on 27.05.2014.

2. The respondent No.5-Society is a District Cooperative Central Bank and governed by the provisions of Madhya Pradesh Cooperative Societies Act, 1960 as amended from time to time. The existing Board of Directors was elected in the year 2007. The first meeting of the Board was convened on 16.10.2007. As per the provisions of Section 49 of the Act of 1960, ordinarily, the term of office of the outgoing Board was till 15.10.2012. However, the Board was superseded by an order dated 30.09.2011, which order became the subject matter of challenge and culminated with the decision of Apex Court in favour of the Board in Civil Appeal No.4691/2013 decided by the Supreme Court on May 16, 2013 in the case of *State of M.P. and Others vs. Sanjay Nagayach and Others.* As per the directions issued by the Supreme Court in the said decision, the Board of Directors was reinstated in office and could continue till 27th May, 2014 being extended term of that Board by virtue of Section 49(7-A)(i) proviso. These are indisputable facts and admitted by

both the sides.

3. The matter in issue arises on account of expiry of the term of the outgoing Board on 27.05.2014. According to the petitioners, as the election to install newly elected Board of Directors was not conducted within the specified time, only option was to supersede the said Board by appointing Administrator to look after the affairs of the Society.

4. This grievance of the petitioner has been noticed even by the Commissioner respondent No.2 whilst examining the claim of the private respondents, who in the said proceeding had asserted that their term is deemed to have been extended further beyond 27th May, 2014 by virtue of Notifications dated 07.07.2012 and 24.01.2013.

5. Those Notifications, admittedly, have been issued by the Competent Authority in exercise of powers under Section 49(7-AA) of the Act of 1960. That plea of the private respondents commended to the respondent No.2 - Commissioner. Having said that, the Commissioner opined that the term of the present Board of Directors would, therefore, continue till expiry of the extended period specified in the aforesaid two notifications.

6. The correctness of this finding is the subject matter of this petition. The question is: whether the said Notifications will be of any avail to the fact situation of the present case. The answer is an emphatic 'No'. Inasmuch as, those Notifications, admittedly, have been issued in exercise of powers under Section 49(7-AA), which provision has been deleted by Amending Act of 2013 w.e.f. 05.02.2013. In the first place, the said Notifications were for specific purpose as stated in the respective Notification and, therefore, for specific period ascribable thereto. The Notification unambiguously mentioned that because of the impending Monsoon (to wit, of 2012 and at best of 2013), the holding of elections in the specified Cooperative Societies may not be feasible and for which reason the period of term of Board of Directors of the respective Societies, whose term was to expire during such interregnum period, would stand deferred and extended for the period specified in the said Notifications.

7. Admittedly, the term of the present Board of the Directors of the respondent No.5 Society would, and has, come to an end on 27.05.2014. That itself was an extended term, as mentioned hitherto. As the said Notifications were issued under Section 49(7AA) with reference to specific

period (of impending Monsoon), following the said Notification. For that reason, the said Notifications had lived its life only till the period referred to therein and not thereafter. Understood thus, the said Notifications could not be reckoned after April, 2013. Whereas, the term of the existing Board of Directors of respondent No.5 Society, came to end on 27.05.2014.

8. A priori, the said Notifications can have no application to the case on hand. In any case, with the deletion of the principal provision, namely, Section 49(7-AA), the State Government could not have exercised any power with reference to the said provision after 05.02.2013. In other words, as on 27.05.2014, the provisions in vogue were as amended on 05.02.2013, which amendment was necessitated because of the amendment to the provisions of the Constitution providing for according autonomy to the Cooperative Societies.

9. Having said this, it would necessarily follow that the principle stated by the respondent No.2 in his order dated 27.08.2014 is, to say the least, untenable. That cannot be countenanced. As a result, the order passed by the Commissioner deserves to be set aside.

10. The next question is: what will be the effect of non-holding of elections before expiry of the term of the outgoing Board of Directors, in this case on 27.05.2014? For that, the provisions, which are applicable consequent to the amendment of 2013, are Sections 49, 53 and 57 and provisions contained in Chapter - VA of the Act, providing for conduct of elections to Cooperative Societies. The earlier dispensation as envisaged in sub-section (8) of Section 49 of the Act of 1960, cannot be referred to as the said provision stood deleted on 05.02.2013 and corresponding amendment not only to Section 49 but also Section 53 and insertion of Chapter VA by the Act of 2013 was effected. These provisions, therefore, ought to govern the controversy brought before us.

11. The relief claimed in this petition is to issue a writ of *quo warranto* against the Members of the outgoing Board of Directors. That relief could be considered and taken forward only if there was no mechanism specified in the Act of 1960, as amended from time to time, to deal with the situation. No doubt, the tenure of the existing Board of Directors expired on 27.05.2014. But, in absence of any express provision to continue or take over the affairs of the Society without any semblance of inquiry whatsoever by any Authority, the only other option, which is expressly provided in the Act is to resort to action under amended Section 53 of the Act of 1960 to supersede the Board

of Directors and to appoint any person or persons as Board of Administrators. In the wake of such express mechanism provided in the Act itself, it would not be appropriate for this Court to examine the matter further, much less on the disputed facts, about the allegations of misappropriation and maladministration of the Society. Those are "additional" matters relevant for inquiry under Section 53 of the Act, which the Competent Authority ought to resort to if the situation so warrants.

12. Needless to mention that during the inquiry of proceedings under Section 53, whether by way of interim arrangement, it is open to the competent Authority to supersede the Board of Directors and appoint any person(s) to manage the affairs of the Society for a specified period, is also a matter to be considered by the said Authority. We do not intend to explore that area in this petition. All relevant questions in respect of proceedings under Section 53 are kept open to be resorted to by the competent Authority forthwith.

13. At the same time, it is noticed that Chapter - VA has been incorporated by way of amendment. The provisions under the heading 'Conduct of Elections to Cooperative Societies' are of some relevance. It is indisputable that the Madhya Pradesh State Cooperative Election Authority (hereinafter called the "Authority"), empowered to conduct elections has already been constituted by the State Government. Section 57-D obligates that Authority to conduct elections of all the Cooperative Societies registered under the Act in the prescribed manner. The outgoing Committee of every Cooperative Society is obliged to send written request for conducting such elections four months prior to expiry of their term. In the present case, that request has been sent on 18.01.2014. If this fact is correct, it should necessarily follow that the said Authority has failed to discharge its statutory obligation in conducting elections immediately thereafter to ensure installation of newly elected Board of Directors on or before 28.05.2014.

14. We may proceed on the assumption that, perhaps, even the said Authority was misled in believing that the tenure of the existing Board of Directors is still continuing and would come to an end only in February, 2015, on account of the extended period in the Notifications dated 07.07.2012 and 24.01.2013. As aforesaid, those Notifications have no application to the fact situation of the present case, much less on the day when the election of respondent No.5-Society had become due for installation of a newly elected Board of Directors.

15. Further, we may notice the expansive authority bestowed on the said Authority, by virtue of the proviso to sub-section (3) of Section 57-D of the Act. It enables the said Authority to conduct the election of concerned Society even *suo motu.* In view of the finding that the term of the present Board of Directors has come to end on 27.05.2014 coupled with the fact that the outgoing Board of Directors on 18.01.2014 had requested the said Authority to conduct elections, we direct the said Authority to commence the process of holding elections for installing new elected Board of Directors of the respondent No.5-Society forthwith and, in any case, not later than two weeks from receipt of copy of this decision and to take that election process to its logical end as per the time frame specified in the Amended Act of 1960. In case of any obstructive attitude from any quarter, the said Authority may approach this Court for appropriate directions as may be necessary. This shall be done irrespective of initiation or pendency of action by the Registrar, Cooperative Societies under Section 53. For, these measures are mutually exclusive and ought to proceed on expiry of the term of the Board of Directors so as to ensure installation of the newly elected Board of Directors at the earliest opportunity. That is so because, as per the amended provisions of the Act, the Board of Directors, whose term has expired, cannot remain in the office - until the newly elected members of the Board take over the affairs of the Society, unlike was the situation before the amendment of the Act, w.e.f. 05.02.2013.

16. Accordingly, we dispose of this petition with the following order:-

(i) The Registrar, Cooperative Societies is free to forthwith exercise the powers under Section 53 of the Act of 1960 as amended, for supersession of the existing Board of Directors and that proceedings will have to be taken to its logical end in accordance with law by giving opportunity to all concerned. Whether by way of interim arrangement, the existing Board should be superseded forthwith and replaced by any other person(s) may be considered on its own merits.

(ii) Further, irrespective of institution or pendency of proceedings under Section 53 of the Act, the State Cooperative Election Authority shall forthwith "commence the process of conducting the elections"

for installation of new Board of Directors of respondent No.5-Society *suo motu* and, in any case, not later than two weeks from the receipt of copy of this decision and take that election process to its logical end expeditiously within the time frame specified in the amended provisions of the Act of 1960.

(iii) The State Cooperative Election Authority shall submit compliance report about the status of election process on or before 21.11.2014. The said Authority is at liberty to approach this Court prior to that date in case it encounters any difficulty in taking the election process forward as per Rules.

17. Subject to above, the petition be treated as disposed of. However, the petition be notified under caption **"Directions"** for consideration of compliance report on the above matters by the concerned Authorities, on **24.11.2014.**

Petition disposed of.

I.L.R. [2015] M.P., 1211
WRIT PETITION
Before Mr. Justice S.C. Sharma
W.P. No. 10152/2012 (Indore) decided on 14 October, 2014

MADHVENDRA ...Petitioner
Vs.
SECRETARY, UNION OF INDIA ...Respondent

Central Civil Services (Classification, Control and Appeal) Rules, 1965, Rule 19 - Compulsory Retirement **- Petitioner was convicted u/s 489 of IPC - He was dismissed from service on account of his conviction - Later on petitioner was acquitted by Appellate Court - Respondents converted the order of dismissal into compulsory retirement - No departmental enquiry was conducted and no reasons were assigned while passing the order of compulsory retirement - Order quashed - Petitioner directed to be reinstated - Pension already paid to petitioner shall be adjusted towards back wages and employer is entitled to recover other terminal dues paid to petitioner. (Paras 3, 12 & 13)**

केन्द्रीय सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, 1965, नियम 19 – अनिवार्य सेवानिवृत्ति – भारतीय दंड संहिता की धारा 489 के अंतर्गत याची दोषसिद्ध – उसकी दोषसिद्धि के फलस्वरूप वह सेवा से बर्खास्त – बाद में याची अपीली न्यायालय द्वारा दोषमुक्त – प्रत्यर्थीगण ने बर्खास्तगी आदेश को अनिवार्य सेवानिवृत्ति में परिवर्तित किया – अनिवार्य सेवा निवृत्ति का आदेश पारित करते समय विभागीय जांच संचालित नहीं की गई और न ही कारण बताये गये – आदेश अभिखंडित – याची को पुनः बहाल किये जाने हेतु निदेशित किया गया – याची को भुगतान की जा चुकी पेंशन पिछले वेतन में समायोजित की जावे एवं नियोक्ता, याची को भुगतान किये जा चुके सेवांत देयकों की वसूली का हकदार।

Cases referred :

(2008) 3 SCC 272, 2002 (5) MPLJ 11, 2009 (1) MPHT 401.

Parties through their counsel.

(Supplied: Paragraph numbers)

ORDER

S.C. SHARMA, J. :- The petitioner, before this Court, has filed this present petition being aggrieved by order dated 13/02/2010 (Annexure A-8) and 12/10/2010 (Annexure A-15), by which a punishment of compulsory retirement has been inflicted upon the petitioner and the appeal against the same has also been dismissed.

2. The facts of the case reveal that the petitioner was working on the post of Examiner at Bank Note Press, Dewas. A criminal case was registered against him under Section 489 of IPC being criminal case No.274/1999. The petitioner was convicted vide judgment of conviction dated 16/04/2005 passed by 1st Additional Sessions Judge, Dewas, and a punishment of 6 years rigorous imprisonment was inflicted upon him. The petitioner, thereafter preferred an appeal before the High Court of Madhya Pradesh.

3. The petitioner's contention is that after his conviction, a notice was issued on 26/05/2005 under Rule 19 of Central Civil Services (Classification Control and Appeal) Rules 1965, and the petitioner did not submit a reply to the show cause notice. The respondents have finally passed an order on 22/06/2005, removing the petitioner from services. The petitioner was lateron acquitted by this Court in Cr.A.No.967/2005, decided on 15/07/2008 and thereafter on a representation was submitted by the petitioner, the respondents have issued an order on 13/02/2010, confirming the dismissal into compulsory

retirement. The petitioner's appeal has also been dismissed by the authorities.

4. Learned counsel for the petitioner has placed reliance upon a judgment delivered by the Apex Court in the case of *State of Madhya Pradesh Vs. Hazarilal* reported in (2008)3 SCC 272 and his contention is that even in a case of conviction, the order of dismissal was held to be a harsh punishment. He has also placed reliance upon a judgment delivered in the case of *Ramratan Tiwari Vs. State of M.P.* reported in 2002 (5) MPLJ 11, and again his contention is that the petitioner is entitled for reinstatement in service on account of his acquittal. Learned counsel has placed reliance upon a judgment in the case of *Ram Abhilash Shukla Vs. State of M.P. And others* reported in 2009(1) MPHT 401, and his contention is that keeping in view the aforesaid judgment again the order of punishment deserves to be set aside.

5. Learned counsel submitted that in the light of the aforesaid judgments delivered in the aforesaid cases, the petitioner is entitled for reinstatement.

6. A detailed and exhaustive reply has been filed in the matter and the respondents have stated that the petitioner was initially dismissed from service on account of conviction in a criminal case. It has also been stated that as the integrity of the petitioner was doubtful and as he was involved in supplying counterfeit bank notes he was arrested by Dewas police and he was rightly convicted by learned Sessions Judge and the respondents after taking into account the judgment of acquittal have punished the petitioner and have passed an order of retiring the petitioner compulsorily under Rule 19 of Rules 1965. The respondents have prayed for dismissal of the writ petition.

7. Heard the learned counsel for the parties and perused the record. In the present case, it is an admitted fact that the petitioner was dismissed from service on account of his conviction in a criminal case by an order dated 22/06/2005. He was acquitted by the High Court vide judgment in Cr.A.No.967/2005, on 15/07/2008. The respondents have thereafter passed an order in exercise of powers conferred under Rule 19 of 1965 on 13/02/2010, compulsorily retiring the petitioner. The appeal of the petitioner has also been dismissed.

8. Rule 19 of Central Civil Services(Classification Control and Appeal) Rules,1965, reads as under :-

19. Special procedure in certain cases--

Notwithstanding anything contained in Rule 14 to Rule -

(i) where any penalty is imposed on a Government Servant on the ground of conduct which has led to his conviction on a criminal charge, or

(ii) where the disciplinary authority is satisfied for reason to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these rules, for (sic:or)

(iii) where the President is satisfied that in the interest of the security of the State, it is not expedient to hold any inquiry in the manner provided in these rules, the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit:

Provided that the Government Servant may be given an opportunity of making representation on the penalty proposed to be imposed before any order is made in a case under clause (i):

Provided further that the Commission shall be consulted where such consultation is necessary, before any orders are made in any case under this rule.

9. The aforesaid statutory provision of law empowers the Disciplinary Authority to impose a punishment upon a government servant on the ground of conviction in a criminal case. In the present case the conviction of the petitioner was set aside. No reason has been recorded in writing as to why departmental enquiry is not possible in case of the petitioner and the fact remains that no departmental enquiry was conducted by any of the authority before passing the order of compulsorily retirement and therefore in the light of the statutory provisions as contained under Rule 19 of 1965 the impugned orders have to pave the path of extinction.

10. The Apex Court in the case of *State of M.P. Vs. Hazarilal* in case of dismissal on account of conviction, in paragraph 3,5,7,8, and 16 has held as under :-

"3. The respondents thereafter filed an original application before the State Administrative Tribunal, Gwalior. The Tribunal

by an order dated 25/11/2002 allowed the said application holding:

> "However, the applicant succeeds on the ground that the punishment of removal from service is grossly excessive because the punishment was only under Section 323 IPC and the High Court has clarified that the punishment does not involve any moral turpitude; every power vested in a public authority has to be exercised fairly, justly and reasonably. The respondents should have applied their mind to the penalty which should be appropriately imposed in the circumstances of the case, Please see *Shankar Dass v. Union of India.* This does not seem to have been done.".

A writ petition filed thereagainst by the appellants before the High Court has been dismissed by reason of the impugned judgment.

5. The case in hand appears to be a gross one. This Court is unable to appreciate the attitude on the part of the appellant herein which ex facie appears to be wholly reasonable. The respondent had not committed any misconduct within the meaning of the provisions of the Service Rules. He was not even sent to prison. Only a sum of Rs.500 was imposed upon him as fine.

7. By reason of the said provision, thus "the disciplinary authority has been empowered to onsider (sic:consider) the circumstances of the case where any penalty is imposed on a government servant on the ground of conduct which has led to his conviction on a criminal charge", but the same would not mean that irrespective of the nature of the case in which he was involved or the punishment which has been imposed upon him, asn (sic:an) order of dismissal must be passed. Such a construction, in our opinion, is not warranted.

8. An authority which is conferred with a statutory discretionary power is bound to take into consideration all the attending facts and circumstances of the case before imposing

an order of punishment. While exercising such power, the disciplinary authority must act reasonably and fairly. The respondent occupied the lowest rank of the cadre. He was merely a contingency peon. Continuation of his service in the department would not bring a bad name to the State. He was not convicted for any act involving moral turpitude. He was not punished for any heinous offence.

16. For the reasons aforementioned there is no merit in this appeal which is dismissed with costs. Counsel fee is quantified as Rs.25,000/-."

11. In the aforesaid case the applicant was convicted in a criminal case where in the present case petitioner has been acquitted by this Court and therefore in the light of the aforesaid judgment again the order of dismissal is bad in law. This Court in the case of *Ramratan Tiwari*(supra) has directed reinstatement on account of acquittal by Division Bench of this Court. In the case of *State of MP. Vs. Hazarilal* .(supra) workman was terminated on account of involvement in a criminal case though he was acquitted and his reinstatement was ordered by the Labour Court, the same has been upheld.

12. Resultantly, this Court is of the considered opinion as the order of punishment is not based upon any departmental enquiry, and as no reason has been recorded by any Disciplinary Authority under 19 of 1965, the impugned order which has been passed even after acquittal of the petitioner, is bad in law.

13. Resultantly, order dated 13/02/2010 (Annexure A-8) and order dated 12/10/2010 (Annexure A-15) are hereby set aside.The respondents are directed to reinstate the petitioner forthwith in service. So far as the amount of backwages are concerned, as the petitioner is already receiving the pension, this Court is of the opinion that the amount paid towards pension shall be adjusted towards back wages, however other terminal dues other then pension shall be recovered by the employer from the petitioner. The petitioner shall be entitle to all consequential benefits except back wages. The period during which petitioner was under suspension and the period during which the petitioner was not in job, shall be treated period as spent on duty for all purposes, except for payment of salary. He shall be entitled for notional fixation of salary.

14. With the aforesaid petition stands allowed. No order as to costs.

Petition allowed.

I.L.R. [2015] M.P., 1217
WRIT PETITION
Before Mr. Justice S.C. Sharma
W.P. No. 7772/2014 (Indore) decided on 28 October, 2014

DINESH KADAM ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

Service Law - Police Regulations, M.P., Regulations 238 & 241 **-Termination on basis of conviction - Petitioner employee of police department as head constable - Terminated from service due to conviction under Section 388 of IPC - Conviction suspended in Criminal Appeal - Held - Criminal Appeal is still pending - No interference on the order of dismissal - Admission declined. (Paras 3, 4, 11 & 14)**

सेवा विधि – पुलिस विनियमन, म.प्र., विनियम 238 व 241 – दोषसिद्धि के आधार पर सेवा समाप्ति – याची प्रधान आरक्षक के रूप में पुलिस विभाग का कर्मचारी – भा.दं.सं. की धारा 388 के अंतर्गत दोषसिद्धि के कारण सेवा समाप्त की गई – दाण्डिक अपील में दोषसिद्धि स्थगित की गई – अभिनिर्धारित – दाण्डिक अपील अभी भी लम्बित – सेवा समाप्ति के आदेश में कोई हस्तक्षेप नहीं – ग्रहण करने से इंकार किया गया।

Cases referred :

(1995) 2 SCC 513, (2007) 1 SCC 673, 2000 (2) MPLJ 100, 2003 (1) MPLJ 296, (2004) 4 SCC 697.

L.C. Patne, for the petitioner.
Mukesh Parwal, Dy. G.A. for the respondent/State.

ORDER

S.C. Sharma, J. :- The petitioner before this Court is an employee of the Police Department who was serving on the post of Head Constable was convicted by an order dated 30.03.2009 by the II Additional Sessions Judge, Khargone for commission of an offence under Section 388 of IPC. He has been sentenced to undergo R.I. for 5 years with a fine of Rs.10,000/-.

2. In the criminal case, the facts reveal that a demand of bribe was made by the present petitioner to the tune of rs.25,000/-. A person was threatened by the petitioner that he will be involved in a criminal case of rape in case he

does not pay sum of Rs.25,000/-. The person who was threatened ultimately committed suicide on account of the pressure exerted by the present petitioner as stated in the order dated 14.05.2009, Annexure P-4. In these circumstances, he has been convicted by the learned trial Court.

3. The petitioner has preferred an appeal against the order of conviction Cr.A.No.397/2009 and on 16.04.2009 suspension has been stayed. On 29.06.2009, this Court on hearing the matter on I.A.No.2940/2009 has held that because suspension has been stayed application for staying the conviction also deserves to be allowed and the same has been allowed.

4. Shri Patne learned counsel has also drawn the attention of this Court towards the order dated 13.05.2010 passed in the writ petition preferred by the petitioner against the order dated 14.05.2009 by which the petitioner has been dismissed on account of his conviction. In the aforesaid writ petition which was finally disposed of, the respondents were directed to decide the petitioner's representation against the termination keeping in view the order staying the conviction. The respondents have passed an order dated 09.07.2010 Annexure P-7 and Superintendent of Police has observed that as the petitioner has been dismissed on account of conviction, he cannot be reinstated back in service.

5. Shri Patne vehemently argued before this Court that once conviction has been stayed, necessary consequences of reinstatement back in service is inevitable. He places reliance upon a judgment of the Apex Court in the case of *Rama Narang Vs. Ramesh Narang* reported in (1995) 2 SCC 513. The aforesaid case was a case relating to Section 120-B, 420 read with Section 114 of IPC and it was on account of some dispute in respect of a Company incorporated under the Companies Act, 1956. Paragraph 19 of the aforesaid judgment reads as under:-

> 19. That takes us to the question whether the scope of Section 389(1) of the Code extends to conferring power on the Appellate Court to stay the operation of the order of conviction. As stated earlier, if the order of conviction is to result in some disqualification of the type mentioned in Section 267 of the Companies Act, we see no reason why we should give a narrow meaning to Section 389(1) of the Code to debar the court from granting an order to that effect in a fit case. The appeal under Section 374 is essentially against the order of conviction

because the order of sentence is merely consequential thereto; albeit even the order of sentence can be independently challenged if it is harsh and disproportionate to the established guilt. Therefore, when an appeal is preferred under Section 374 of the Code the appeal is against both the conviction and sentence and therefore, we see no reason to place a narrow interpretation on Section 389(1) of the Code not to extend it to an order of conviction, although that issue in the instant case recedes to the background because High Courts can exercise inherent jurisdiction under Section 482 of the Code if the power was not to be found in Section 389(1) of the Code. We are, therefore, of the opinion that the Division Bench of the High Court of Bombay was not right in holding that the Delhi High Court could not have exercised jurisdiction under Section 482 of the Code if it was confronted with a situation of there being no other provision in the Code for staying the operation of the order of conviction. In a fit case if the High Court feels satisfied that the order of conviction needs to be suspended or stayed so that the convicted person does not suffer from a certain disqualification provided for in any other statute, it may exercise the power because otherwise the damage done cannot be undone; the disqualification incurred by Section 267 of the Companies Act and given effect to cannot be undone at a subsequent date if the conviction is set aside by the Appellate Court. But while granting a stay of(sic or) suspension of the order of conviction the Court must examine the pros and cons and if it feels satisfied that a case is made out for grant of such an order, it may do so and in so doing it may, if it considers it appropriate, impose such conditions as are considered appropriate to protect the interest of the shareholders and the business of the company.

6. The contention of the learned counsel is that this Court is competent to stay the conviction also and once the conviction has been stayed by this Court, the reinstatement of the petitioner is inevitable. He has also placed reliance on another judgment of the Apex Court in the case of *Ravikant S. Patil Vs. Sarvabhouma S.Bagali* (2007) 1 SCC 673. His contention is that the Apex Court in the aforesaid case has held that once the conviction is

stayed the disqualification arising out of conviction would also cease to operate and therefore once conviction is stayed by this Court, the petitioner should be reinstated back in service.

7. Learned counsel has also placed reliance on a judgment in the case of *Jamuna Prasad Mool Chandra Jaisani Vs. Shikha Dubey, Collector, Harda* 2000 (2) MPLJ 100 wherein this Court while dealing with a contempt petition held that in case conviction is stayed, necessary consequences follow. The last judgment over which reliance has been placed upon is in the case of *Jamna Prasad Vs. State of M.P. and others* reported in 2003 (1) MPLJ 296. Paragraph 8 of the aforesaid judgment reads as under:-

> "What emerges out of the aforesaid discussion is that Appellate Court and Revisional Court can, in exercise of power under Sections 389(1)/482, Code of Criminal Procedure, 1973, stay the execution of sentence or order capable of execution but stay of conviction can be passed in exceptional cases after Court carefully examines the conduct of accused, facts of the case and possible ramifications or avoiding irretrievable consequences. However, in both the cases, the conviction and sentence cannot be effaced. It is the irretrievable consequence in the former case and execution of sentence in the latter case which can be stayed. With regard to Government servant, competent authority can terminate the services after conviction by criminal Court. Stay of execution of sentence will not debar it from doing so unless conviction is also stayed in exercise of power in light of principles laid down by the Apex Court in *K.C.Sareen's* case (Supra). Further, on termination order having been passed, master and servant relationship terminates and filing of appeal and stay of execution of sentence do not revive it. He cannot be taken to be under suspension from the date of termination following conviction by trial Court till the date of judgment by the Appellate Court. Therefore, he would not be entitled to claim subsistence allowance for this period."

8. This Court has carefully gone through the aforesaid judgment. It is true that in some of the cases conviction has been stayed by the Apex Court and by some of the High Courts. In the present case the petitioner's services

were put to an end as he was involved in a criminal case and has been sentenced by the trial Court. He was certainly involved in a heinous offence which allegedly resulted in death of a person who paid the bribe partially and did not make the full payment and on account of conviction the petitioner was dismissed from service by order dated 14.05.2009. The order passed in Cr.A.No.397/2009 dated 29.06.2009 reads as under:-

> "Shri Vivek Singh, Advocate appears for the appellant.
>
> Respondent by Shri Mukesh Parwal Panel Lawyer.
>
> Heard on I.A.No.2940/2009, which is an application for suspension of conviction.
>
> Learned counsel for the appellants submits that the appellants are government servant and the jail sentence has already been suspended by this Court vide order dated 16.04.2009. Hence, the application is allowed. Accordingly, keeping in view the facts and circumstances of the case conviction of appellants is also suspended.
>
> C.C.as per rules.
>
> (N.K.Mody)
> Judge

9. This court has carefully gone through the order suspending the conviction. However, the fact remains that the petitioner's termination was prior to the aforesaid order.

10. The Apex Court in the case of *Deoraj Vs. State of Maharashtra and others* (2004) 4 SCC 697 in paragraph 12 has held as under:-

> "12. Situations emerge where the granting of an interim relief would tantamount to granting the final relief itself. And then there may be converse cases where withholding of an interim relief would tantamount to dismissal of main petition itself; for, by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the petitioner though all the findings may be in his favour. In such cases the availability of a very strong prima facie case ___ of a standard much higher than just prima facie case, the considerations of balance

> of convenience and irreparable injury forcefully tilting the balance of case totally in favour of the applicant may persuade the Court to grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional cases. The Court would grant such an interim relief only if satisfied that withholding of it would prick the conscience of the Court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing, and at the end the Court would not be able to vindicate the cause of justice. Obviously such would be rare cases accompanied by compelling circumstances, where the injury complained of is immediate and pressing and would cause extreme hardship. The conduct of the parties shall also have to be seen and the Court may put the parties on such terms as may be prudent."

11. In the light of the aforesaid judgment, the present case is certainly not an exceptional case, nor it is a rare case in which termination can be stayed. In the matter of termination, the relationship of employer and employee comes to an end and the question of grant of interim relief does not arise. In the present case the Criminal Appeal is still pending. He was dismissed from service on account of his conviction and the criminal appeal has not been decided so far and therefore this Court is of the considered opinion that the Superintendent of Police was certainly justified in passing the order dated 14.05.2009, keeping in view the peculiar facts and circumstances of the case.

12. The statutory provisions governing the service conditions of employees serving under the Police Department are subject to Police Regulations which is having a statutory force. Regulations 238 and 241 reads as under:-

> **"238. Conviction in criminal offence.–** When a Police officer has been sentenced by the Trial Court to rigorous imprisonment upon conviction of a criminal offence, he shall be dismissed from the force:
>
> Provided that if his offence was not of a serious or disgraceful nature, and the imprisonment has not been so prolonged as to be of itself degrading, it shall be in the discretion of the Inspector– General to allow his retention in the force.
>
> **241 Cases of acquittal.-** When a police officer has been tried

and acquitted by a criminal court, he must as a rule be reinstated. He may not be punished departmentally when the offence for which he was tried constitutes the sole ground of punishment. If, however the acquittal, whether in the court of original jurisdiction or of appeal, was based on technical grounds, or if the facts established at the trial show that his retention in Government service is undesirable, the Superintendent may take departmental cognizance of his conduct, after obtaining the sanction of the Inspector– General."

13. The aforesaid Regulations make it very clear that in case the police officer is convicted, he has to be dismissed from service. The aforesaid statutory provisions of law also makes it very clear that in case of acquittal, reinstatement cannot be done in a mechanical manner and discretion is given to the Superintendent of Police to take proper action, keeping in view the nature of acquittal.

14. Resultantly, this Court does not find any reason to interfere with the order of dismissal as well as the order dated 14.05.2009 passed by Superintendent of Police. The admission is accordingly declined.

However, it is made clear that in case the petitioner is acquitted in the criminal case, he shall be free to approach the employer by filing an appropriate application.

C.C.as per rules.

Order accordingly.

I.L.R. [2015] M.P., 1223
WRIT PETITION
Before Mr. Justice Alok Aradhe
W.P. No. 309/2014 (Jabalpur) decided on 28 October, 2014

PREM NARAYAN PATIDAR & ors. ... Petitioners
Vs.
MUNICIPAL CORPORATION, BHOPAL & ors. ... Respondents

(Alongwith W.P.No.311/2014, W.P.No.657/2014, W.P.No.710/2014, W.P.No. 943/2014, W.P.No. 1112/2014, W.P.No. 1164/2014, W.P.No. 1407/2014, W.P.No.1506/2014, W.P.No. 2855/2014, W.P.No. 6306/2014, W.P.No. 8075/2014 & W.P.No. 8491/2014)

Constitution - Article 300-A - Municipal Corporation Act, M.P. (23 of 1956), Sections 305 & 306 and Bhumi Vikas Niyam, M.P. 2012, Rule 61 - Power to regulate line of buildings **- Demolition of buildings without initiating acquisition proceedings and without payment of compensation - Petitioners not ready and willing to surrender their lands in favour of Corporation therefore, reliance placed by respondents on Rule 61 of Rules 2012 is misplaced - Corporation cannot be permitted to take possession of properties of petitioner unilaterally - Power of Eminent Domain can be exercised only after payment of compensation - Corporation cannot be permitted to take possession without acquiring the property and payment of compensation - Petition allowed.** **(Para 9)**

संविधान – अनुच्छेद 300–ए – नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराऐं 305 व 306 एवं भूमि विकास नियम, म.प्र. 2012, नियम 61 – भवनों की सीमारेखा विनियमित करने की शक्ति – अर्जन कार्यवाही आरंभ किये बिना और प्रतिकर का भुगतान किये बिना भवनों को तोड़ा जाना – याचीगण अपनी भूमि को निगम के पक्ष में अभ्यर्पित करने के लिये तैयार और रजामंद नहीं है इसलिये, प्रत्यर्थीगण द्वारा नियम 2012 के नियम 61 पर किया गया विश्वास गलत है – याची की संपत्तियों का एकपक्षीय रूप से कब्जा लेने की निगम को अनुमति नहीं दी जा सकती – सर्वोपरि अधिकार की शक्ति का प्रयोग केवल प्रतिकर अदा करने के पश्चात् ही किया जा सकता है – संपत्ति का अर्जन किये बिना और प्रतिकर का भुगतान किये बिना निगम को कब्जा लेने की अनुमति नहीं दी जा सकती – याचिका मंजूर।

Cases referred :

(2004) 4 SCC 79, (1998) 2 SCC 343, (2011) 10 SCC 404, (2013) 1 SCC 353, AIR 1988 SC 1487.

Sanjay Agrawal, Vivek Rusia, Sidharth Gupta, K.L. Gupta and *Ashish Giri,* for the petitioners.

Vijay Pandey, Rajneesh Upadhyay and *Aditya Khandekar,* for the respondents.

ORDER

ALOK ARADHE, J. :- In this bunch of writ petitions the sole issue which arises for consideration is whether the action of Municipal Corporation, Bhopal in taking possession of the lands and demolishing the buildings of the petitioners without acquiring the same and without even making payment of compensation to them, can be sustained in the eye of law, therefore, the writ petitions were heard analogously and are being decided by this common order

In this bunch of writ petitions, the petitioners inter alia have assailed the validity of the action of the Municipal Corporation, Bhopal (in short 'the Corporation') in demolishing, dismantling and taking action against the lands and buildings, of which the petitioners are owners. The petitioners also seek a direction to the Corporation to resort to the land acquisition proceeding in accordance with law. In order to appreciate the grievance of the petitioners, few facts need mention which are stated infra.

2. Under the Jawaharlal Nehru National Urban Renewal Mission, the Central Government has sanctioned a scheme called as Bus Rapid Transit System for improvement of public transport system to avoid hazardous traffic in the city of Bhopal. The Central Sanctioning and Monitoring Committee (in short 'the committee') constituted under the Ministry of Department of Urban Development Central Government in its 14th meeting dated 10.11.2006 sanctioned a sum of Rs.237.76 crores for the city of Bhopal for construction of Bus Rapid Transit System from Bairagarh to Misrondh. Thereafter the committee in its subsequent meetings which were held on 1.7.2011 and 20.9.2013 revised and enhanced the sanctioned amount by Rs.121.50 Crores and Rs.82.76 Crores, respectively. It is not in dispute that for the purpose of implementation of the scheme in question, the Corporation is working as nodal agency. After sanction of the scheme by the committee of the Ministry of Urban Development, the National Highway Authority of India entered into an agreement with the Municipal Corporation, Bhopal on 22.9.2009 and handed over the part of road which is covered by the proposed Bus Rapid Transit System corridor.

3. The Corporation carried out survey of the road in Bhopal city scientifically and proposed complete route rationalization plan which was duly approved by the State Government and the routes were notified as per the said plan by the State Transport Authority. The petitioners are residents of Bhopal and are owners of the lands/houses which are situate adjoining the National Highway Number 12 which connects Bhopal to Hoshangabad. The officers of the Corporation on or about 4.1.2013 visited the lands/houses of the petitioners along with bulldozers and JCB machines and started digging the lands and demolishing the various structures standing parallel to National Highway Number 12 starting from Habibganj Naka. The aforesaid exercise was undertaken by the officers of the Corporation without acquiring the lands of the petitioners. In the aforesaid factual backdrop, the petitioners have approached this Court.

4. Learned counsel for the petitioners submitted that the Corporation has no authority in law to take possession of the lands/ houses belonging to the petitioners forcibly, without even taking recourse to acquisition proceeding. It is further pointed out that Sections 55 and 56 of the M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 (in short 'the 1973 Act') contains the provisions for acquisition of the lands for public purpose. It is further submitted that the impugned action of the respondents in forcibly dispossessing the petitioners from their properties is violative of Article 300-A of the Constitution of India. It is also urged that rule 61 of the M.P. Bhumi Vikas Niyam, 2012 (in short 'the 2012 Rules') applies to a case where the owner surrenders the land/plot on his own volition and in the instant case, the petitioners are not willing to surrender their properties on their own volition. In support of their submissions, learned counsel for the petitioners have placed reliance on the decision of the Supreme Court in *R.L. Jain v. DDA and Others,* (2004) 4 SCC 79.

5. On the other hand, learned counsel for the respondents submitted that no objection was preferred by the petitioners with regard to the draft development plan which was prepared sometime in the year 2005. It is further submitted that the proposed width of the road is 60 metres and at the time of preparation of development plan, objections and suggestions were invited from the aggrieved persons. However, the petitioners failed to submit any objection therefore, they have no locus to submit any objection at this point of time. Learned counsel for the respondents while referring the Sections 305 and 306 of the M.P. Municipal Corporation Act, 1956 (in short 'the 1956 Act') submitted that the Corporation is ready and willing to compensate the petitioners in terms of rule 61 of the 2012 Rules by allowing the additional floor area calculated twice the area of the plots in question. In support of their submissions, learned counsel for the respondents have placed reliance on the decision in *Mayank Rastogi v. V.K. Bansal and Others* (1998) 2 SCC 343.

6. I have considered the respective submissions made by learned counsel for the parties. Section 55 of the 1973 Act provides that the land needed for the purpose of town development scheme shall be deemed to be a land needed for a public purpose within the meaning of the Land Acquisition Act, 1894. Section 56 of the 1973 Act deals with acquisition of land for town and country development authority and provides that the authority may at any time after the date of publication of the final town development scheme under Section 50 but not later than three years therefrom proceed to acquire by agreement the land required for the implementation of the scheme and on its failure so to

acquire, the State Government may, at the request of the authority proceed to acquire such land under the provisions of the Land Acquisition Act, 1894 and on payment of compensation awarded under the Act and any other charges incurred by the State Government in connection with the acquisition, the land shall vest in the Authority subject to such terms and conditions as may be prescribed. Section 305 (1) of the 1956 Act reads as under:

> " 305. Power to regulate line of buildings: - (1) If any part of a building projects beyond the regular line of a public street, either as existing or as determined for the future or beyond the front of immediately adjoining buildings the Corporation may-
>
> (a) if the projecting part is a verandah, step or some other structure external to the main building, then at any time, or
>
> (b) If the projecting part is not such external structure as aforesaid, then whenever the greater portion of such building or whenever any material portion of such projecting part has been taken down or burned down or has fallen down,
>
> require by notice either that the part or some portion of the part projecting beyond the regular line or beyond the front of the immediate adjoining building, shall be removed, or that such building when being rebuilt shall be set back to or towards the said line or front; and the portion of land added to the street by such setting back or removal shall henceforth be deemed to be part of the public street and shall vest in the Corporation:
>
> Provided that the Corporation shall make reasonable compensation to the owner for any damage or loss he may sustain in consequence of his building or any part thereof being set back."

Sub-sections (1) and (2) of Section 306 of the 1956 Act read as under:

> "306.Compensation: - (1) No compensation shall be claimable by an owner for any damage which he may sustain in consequence of the prohibition of the erection of any building.
>
> (2) The Corporation shall make reasonable compensation to the owner for damage or loss which he may sustain in

consequence of the prohibition of the re-erection of any building or part of a building except in so far as the prohibition is necessary under any rule or byelaw:

Provided that the Corporation shall make full compensation to the owner for any damage he may sustain in consequence of his building or any part thereof being set back unless for a period of three years or more immediately preceding such notice the building has by reason of its being in a ruinous or dangerous condition become unfit for human habitation or unless an order of prohibition issued under Section 286 has been and still is in force in respect of such building." .

7. Thus, even under the provisions of the 1956 Act, the Corporation is under an obligation to make reasonable compensation to the owners for any damages or loss which may be sustained by them in consequence of their buildings or any part thereof being set back. Note (1) appended to rule 61 of the 2012 Rules is reproduced below for the facility of reference:

"(1) In case where the owner surrenders a portion of his plot/ land and vests its ownership in the Government/Authority for public purpose, an additional floor area calculated adding twice the area of plot/land surrendered by him may be allowed in the remaining area of the plot/land in lieu of the monetary compensation."

8. In *State of Haryana v. Mukesh Kumar and Others,* (2011) 10 SCC 404, the Supreme Court has held that right to property is not only the constitutional or statutory right but also a human right. Similarly, the Supreme Court in the case of *Tukaram Kana Joshi v.. Maharashtra Industrial Development Corporation and Others,* (2013) 1 SCC 353 has held that even after right to property ceased to be a fundamental right, possession of the property of a citizen can be taken only in accordance with law as per the mandate contained in Article 300-A of the Constitution of India. In *Coffee Board, Karnataka, Bangalore v. Commissioner of Commercial Taxes, Karnataka and Others,* AIR 1988 SC 1487 it has been held that power of eminent domain can be exercised upon making just compensation.

9. In the instant case, admittedly, the respondent Corporation has neither initiated any proceeding for acquisition of the land/property of the petitioners

nor has paid any compensation to them. Reliance placed by learned counsel for the respondents on rule 61 of the 2012 Rules is misplaced as the same applies to the case of a person who on his own volition surrenders the property to the Authority. In the present case, the petitioners are not ready and willing to surrender their lands/properties in favour of the Corporation therefore, by unilaterally invoking rule 61 of the 2012 Rules the Corporation cannot be permitted to take possession of the properties of the petitioners which would tantamount to violation of Article 300-A of the Constitution of India. The power of 'Eminent Domain' is in the nature of compulsory purchase of the property of the citizen for the purpose of applying to the public use. [See: Advanced Law Lexicon, 3rd Edition by R. Ramanatha Aiyar] This power can be exercised subject to payment of compensation as has been held in the case of *Coffee Board* (supra). For this reason in all the relevant provisions of law i.e. the 1973 Act, 1956 Act as well as the 2013 Act, provisions for making payment of compensation to the person whose property is being acquired, have been incorporated. Therefore, the Corporation cannot be permitted to take possession of the lands in question without acquiring the same and without making payment of compensation. The Corporation has no right to take possession of the lands/houses of the petitioners, save by authority of law. A democratic polity like ours is governed by Rule of Law and the State cannot be allowed to deprive a citizen of his property without adhering to Law. The deprivation of immovable property would amount to violation of Article 21 of the Constitution of India. The decision in *Mayank. Rastogi* (supra) on which reliance has been placed by the respondents is of no assistance to them in the present fact situation as the same deals with the issue whether a person who has not submitted any objection to the change of land use can subsequently be permitted to raise an objection in this regard. Admittedly, the Corporation has not initiated any proceeding for acquisition of lands/houses in question therefore, it is not necessary for this Court to deal with the issue whether the acquisition should take place under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 or under the provisions of the M.P. Municipal Corporation Act, 1956. However, the respondents are restrained from taking possession of the land/ houses of the petitioners without acquiring the same in accordance with law.

10. Accordingly, the writ petitions are disposed of on above terms.

Petition disposed of.

I.L.R. [2015] M.P., 1230
WRIT PETITION

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

W.P. No. 11695/2014 (PIL) (Jabalpur) decided on 5 November, 2014

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

(Alongwith W.P. No. 12196/2014 (PIL), W.P. No. 12386/2014 (PIL), W.P. No. 12392/2014 (PIL), W.P. No. 12431/2014 (PIL), W.P. No. 13475/2014 (PIL), W.P. No. 13868/2014 (PIL) & W.P. No. 6385/2014).

A. Constitution - Article 226 and Advocates Act, (25 of 1961), Section 30 - Common Advocate - **One Lawyer appearing for all the wings of State namely, State Government, Home Department, STF and VYAPAM - There is no conflict of interest among the four wings - Appearance of common Advocate in no way affects the merits of investigation done by STF or its impartiality and independence - Performance of Advocate in the Court is also proper - Merely because one law officer is appearing would not necessarily lead to a presumption that he would share the vital information pertaining to investigation of cases to persons from other department - Objection rejected. (Paras 64 to 72)**

क. संविधान – अनुच्छेद 226 व अधिवक्ता अधिनियम (1961 का 25), धारा 30 – समान अधिवक्ता – राज्य के सभी अंग नामतः, राज्य सरकार, गृह विभाग, एस.टी.एफ. एवं व्या.प.मं. के लिये एक अधिवक्ता उपस्थित हो रहा है – चारों अंगों में हितों का परस्पर विरोध नहीं – समान अधिवक्ता की उपस्थिति किसी प्रकार से एस.टी.एफ. द्वारा की जा रहे अन्वेषण के गुणदोष या उसकी निष्पक्षता एवं स्वतंत्रता को प्रभावित नहीं करती – न्यायालय में अधिवक्ता का प्रदर्शन भी उचित – मात्र इसलिये कि एक विधिक अधिकारी उपस्थित हो रहा है, यह उपधारणा आवश्यक नहीं कि प्रकरण की जांच से संबंधित महत्वपूर्ण जानकारी को वह अन्य विभाग के व्यक्तियों के साथ बांटेगा – आक्षेप अस्वीकार किया गया।

B. Constitution - Article 226 - Transfer of investigation to CBI - **Special Investigation Team constituted consisting of a former High Court Judge as Chairman and former IPS not below the rank of A.D.G. Police and former IT professionals - SIT shall supervise the investigation of all criminal cases concerning PMT-VYAPAM - SIT**

can issue instructions to Head of STF - Any information or representation regarding investigation entrusted to STF shall be submitted to the Chairman SIT who after due scrutiny may take necessary follow up action including issue of instructions of Head of STF - All logistic support to SIT shall be provided by the State - None 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. **(Para 99)**

ख. 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।

C. Constitution - Article 226 - Transfer of investigation to CBI - Maintainability of Writ Petition **- No further communication, representation, Public Interest Litigation, application or writ petition can be filed or will be entertained by Court concerning investigation of PMT VYAPAM examination scam criminal cases assigned to STF unless routed through SIT.** **(Para 99)**

ग. संविधान – अनुच्छेद 226 – सी.बी.आई. को अन्वेषण अंतरित किया जाना – रिट याचिका की पोषणीयता – एस.टी.एफ. को सौंपे गये पी.एम.टी. व्या.प.मं. परीक्षा घोटाले के आपराधिक प्रकरणों के अन्वेषण से संबंधित आगे किसी संसूचना, अभ्यावेदन, लोकहित वाद, आवेदन या रिट याचिका प्रस्तुत नहीं की जा सकेगी या न्यायालय द्वारा ग्रहण नहीं की जायेगी, जब तक कि एस.आई.टी. के माध्यम से भेजी न गई हो।

Cases referred :

(2011) 5 SCC 79, (2014) 2 SCC 687, (1998) 1 SCC 226, (2013) 10 SCC 37, 2014 (6) SCALE 593 = (2014) 8 SCC 768, (2012) 10 SCC 603, (2008) 4 SCC 409, (2013) 5 SCC 277.

K.T.S. Tulsi, Rajendra Tiwari with *Varun K.Chopra, Arpit Kumar Tiwari & Kuber Boddh,* for the petitioner in W.P. No.11695/2014(PIL).

M.K. Verma and Vinod Sisodia, for the petitioner in W.P. No. 12196/2014 (PIL).

Indira Jaisingh with *Sumeer Sodhi, Sonakshi Malhan & Bhoopesh Tiwari,* for the petitioner in W.P. No. 12386/2014 (PIL).

Vivek K. Tankha with *Vaibhav Shrivastava & Arpit Kumar Tiwari,* for the petitioner in W.P. No. 12392/2014 (PIL).

Shekhar Sharma and *Sanjay Kumar Patel,* for the petitioner in W.P. No. 12431/2014 (PIL).

Siddharth Seth and *Shailendra Kumar Pandey,* for the petitioner in W.P. No. 13475/2014 (PIL).

Adwait Fouzdar, for the petitioner in W.P. No. 13868/2014 (PIL).

L. Nageshwar Rao, R.D. Jain, A.G. with *Samdarshi Tiwari,* G.A., *Swapnil Ganguly,* Dy. G.A., *Saurabh Mishra & Shivraj G.,* for the respondent/State & STF.

Abhinav Kumar Shukla and *Aditya Khandekar,* for the respondent - Professional Examination Board.

Ravindra Kumar Gupta, for the proposed interveners in W.P. No. 11695/2014 (PIL), W.P. No. 12386/2014 (PIL) and W.P. No. 12431/2014 (PIL).

ORDER

The Order of the Court was delivered by :

A.M. KHANWILKAR, J. :- This common judgment is rendered in all these matters, as similar points arise for consideration. Except the *suo motu*

proceedings, Writ Petition No.6385/2014, all other petitions are filed by private persons as Public Interest Litigation, inter alia, praying for a direction to withdraw the investigation of the criminal cases commonly known as PMT VYAPAM Examination Scam cases from the Special Task Force (hereinafter referred to as the "STF") constituted by the State of Madhya Pradesh; and instead entrust the same to an independent Investigating Agency, namely, Central Bureau of Investigation (hereinafter referred to as the 'CBI"). This very relief was considered by the Division Bench of this Court (one of us, namely, Justice A.M. Khanwilkar, Chief Justice was member of that Bench), in Writ Petition 15186/2013 (Awashesh Prasad Shukla vs The State of Madhya Pradesh and others) and other companion matters, which were disposed of by a common judgment dated 16th April, 2014. In that judgment, the Division Bench rejected the prayer for transferring the investigation of subject cases to CBI, whereas it found that the investigation of those cases was entrusted by the State Government to STF keeping in mind the sensitivity and the gravity of the issues. Further, although STF was part of the Home Department of the State Government, yet the officials of the STF dealing with the investigation of those cases were not only experienced and well qualified persons, but, also having a track record of being independent officers. The Court further found that the investigation already done by the STF of those cases was proper and was proceeding in right direction. Nevertheless, the Court to re-assure itself, in larger public interest, deemed it proper to monitor the investigation. That judgment deals with every singular criticism made by the petitioners about the manner in which the cases were entrusted to STF and also the ability of the STF to handle investigation of such serious cases.

2. We have been informed across the Bar by the counsel appearing for the respective parties in these new set of petitions filed as Public Interest Litigation that the said decision has not been assailed by anyone before the Supreme Court. In that sense, it may not be possible for us to examine the same issues or factual aspects, which were subject matter of earlier proceedings; as the findings of this Court on those matters have attained finality. Rather, the findings recorded in the previous judgment will bind this Court and it may not be open for us to disregard the same in absence of any request for review of the said decision or for reconsideration of the legal principles stated therein merely because these fresh set of writ petitions have been filed. Thus understood, the scope for examining the self same relief for transfer of investigation to another independent Investigating Agency, namely, CBI, can

be considered only if the petitioners are in a position to substantiate inertia or acts of commission and omission of the STF during the investigation of the stated cases subsequent to the earlier decision.

3. Realizing this position, counsel appearing for the petitioners, essentially, adverted to the matters, which unfolded after April 16, 2014, to impress upon us that now the time has come to transfer the investigation to independent Investigating Agency, namely, CBI.

4. Notably, the petitioner in the first petition (Writ Petition No. 11695/2014) had first addressed a communication dated 1st July, 2014, to the Chief Justice of this Court. That was listed before the Court on 7th July, 2014, as a Letter Petition. It was disposed of with liberty to the petitioner to file a formal petition, if so advised. Accordingly, he has elected to file this petition on 30/7/2014, which is within three months after the earlier judgment was rendered on April 16, 2014. Indeed, the last amongst the writ petitions filed by the private persons was filed on 4/9/2014. Further, these petitions have been filed by persons, who are in public life and are actively associated with one or the other political party, opposed to the ideology of the political party in power in the State. But, as these petitions have been filed in public interest; and, more particularly because the Court itself has decided to monitor the investigation by STF in public interest, without giving much significance to the status and the intention of the petitioners before us, in larger public interest, we would not mind examining the issues raised by them to ascertain - whether the credibility of the STF has shaken or has become doubtful because of the subsequent acts of commission and omission of its officials in any manner, as mentioned by these petitioners.

5. We may now advert to the submissions made by the counsel for the respective petitioners. The arguments were opened by Shri K.T.S. Tulsi, learned Senior Advocate. Incidentally, he had argued the leading writ petition even in the first round of Public Interest Litigations disposed of by common judgment dated 16th April, 2014. He was, therefore, conscious of the fact that it was not open for him to reagitate the same issues in the present set of petitions filed as Public Interest Litigation, merely because the petitioners are different. He first relied on the order passed by VYAPAM dated 6th May, 2014 (Annexure P/34, in Writ Petition No.11695/2014 at page 358) and contended that VYAPAM did not take action against two candidates and excluded roll numbers of those two candidates. This was done because the

candidates were none other than the children of Member of Legislative Assembly of Bhartiya Janata Party (BJP). He invited our attention to the schedule appended to the said order to buttress his submission.

6. Learned counsel then relied on the news item dated 29th June, 2014 (Annexure P/14) in W.P. No.11695/2014 at page 232), published in newspaper 'Nation'. The headline of the said news item reads - "Cops, RSS offer different reasons to give 'clean chit' to Sudarshan, Soni". This news item refers to the statement given by the Police of Madhya Pradesh. According to him, when the Court was monitoring the investigation, STF ought to have eschewed from giving any such information or opinion, which inevitably undermines the authority of the Court. In any case, until filing of final charge-sheet and completion of the investigation, it was not open to STF to give clean chit to anyone involved in the offence. Further, it is intriguing that even though the DGP was not part of the STF team, yet he could give the reported statement. That pre-supposes that the officials of STF were reporting to their superiors in the Home Department/Police Department. Thus, the investigation of subject cases by STF was not fully insulated. Besides, there was possibility of pressure being exerted on STF officials from their higher-ups outside STF. Further, it is possible that the investigation done by STF was controlled by the superiors in the Home Department/Police Department of the State.

7. It was contended that considering the fact that the crime was a serious one and the possibility of involvement of someone from the office of the Chief Minister and the Governor, the present and former Minister of the State or the Minister at the Centre cannot be ruled out at this stage. Hence, it may not be in public interest to allow the STF to continue with the investigation of such matters. He then invited our attention to the memorandum of statement dated 27th November, 2013 (Annexure P/14 at page 231, in Writ Petition No.11695/2014), of one Mihir Kumar Choudhary named as an accused in Crime No.15/2013 recorded under Section 27 of the Evidence Act. According to the learned counsel, the aforesaid statement indicates complicity of Shri Sudarshan in the commission of the alleged offence. Inspite of that, the STF and the DGP have gone on record to give a clean chit to that person, even before the conclusion of investigation of that crime.

8. It was then urged that the recent incident of death of one Dr. D.K. Sakalle, Dean of Netaji Subhash Chandra Bose Medical College, Jabalpur in suspicious circumstances was a part of the larger conspiracy in commission

of crime concerning VYAPAM examination scam cases investigated by the STF. Nevertheless, the State Government thought it appropriate to accord consent for investigation only into that episode by CBI. That fact has been published in newspaper "M.P. Online News" (Annexure P/13 at Page 227, in W.P. No.11695/2014). Shri Tulsi argued that if the suspicious circumstances, in which the death had occurred, is a part of larger conspiracy and was to be investigated by CBI, it is preposterous that STF is allowed to investigate the theory of larger conspiracy. In the context of this submission, we had called upon the learned Advocate General to ascertain whether the said Dr. Sakalle, Dean of Netaji Subhash Chandra Bose Medical College, Jabalpur was either a witness or a suspect in any of the crimes investigated by STF so as to enable us to appreciate the argument of Shri Tulsi, learned Senior Advocate that the suspicious circumstances of death of Dr. Sakalle was a part of larger conspiracy in the crimes known as PMT VYAPAM examination scam cases. The unambiguous response given, is that, Dr. Sakalle was neither a witness nor a suspect in any of the crimes investigated by STF.

9. Shri Tulsi, learned Senior Advocate then relied on the communication sent by CBI dated 10th September, 2014 (Annexure P/14 at page 111, of the return). It mentions that the CBI examined the matter and found that no criminal case has been registered in respect of death of Late Dr. D.K. Sakalle, Dean, Netaji Subhash Chandra Bose Medical College, Jabalpur. The said communication further notes that only proceeding under Section 174 of Cr.P.C. has been resorted to by the local police. Relying on these observations, Shri Tulsi, learned Senior Advocate argued that inspite of the seriousness of the case, neither the local police nor the STF or for that matter the State Government was keen to take initiative to register FIR. Instead, the Authorities were content by resorting to inquest proceeding enquiry under Section 174 of Cr.P.C. This reinforces the apprehension about the lack of sincerity and commitment of the respondents and STF, in particular, in the investigation of the subject crimes.

10. Shri Tulsi, learned Senior Advocate then relying on the averments made in paragraph 48 of the Return contended that STF not only played trick on the public and resorted to sharp practice, but, also misled this Court and Paragraph 48 of the Return explains why the FIR was not registered in connection with the incident of death of Dr. Sakalle.

11. Relying on paragraph 49 of the Return and the observation in the

previous judgment dated 16th April, 2014, Shri Tulsi, learned Senior Advocate submitted that on the earlier occasion the Court was assured that investigation of all the cases concerning examinations conducted by VYAPAM would stand transferred to STF, but, without permission of the Court, merely supervision of investigation of those cases has been entrusted to STF. To that extent, respondents have overreached the Court and have failed to fulfil their commitment given to the Court.

12. Shri Tulsi, learned Senior Advocate then relied on Press Release issued through the Public Relation Officer (PRO) of the Police Headquarter, Madhya Pradesh Jan Sampark Kaksha (at page 112, 113 and 114 of the Return, Annexure R/5, R/6 and R/7). This document read with the concerned news item would, according to Shri Tulsi, reveal that there was gross interference with the investigation by the STF from the superiors in Police Headquarter. Moreover, when the investigation by STF was underway, the Police Headquarter could not have given a clean chit to Chief Minister's office; and if the statement as released was on the basis of information given by the STF, then it would necessarily follow that STF was sharing vital information relating to investigation of the subject crimes, that too without taking prior permission of the Court. That was a serious matter and would certainly undermine the fairness and impartiality of such investigation.

13. Shri Tulsi learned Senior Advocate relying on the averments in paragraphs 25 (d), 50 and 52 of the Return would contend that it is more than clear that STF was part and parcel of the State and was accountable to superiors in Police Headquarter and the Home Department. Thus, it was not an independent Investigating Agency. He further submits that situation has been made worst by filing a common Return to oppose these writ petitions, by different wings of the State having conflict of interest. It is further damaged by one common counsel representing them. There was intrinsic conflict of interest between the stand of the State Government and the STF, at least, in relation to the question of impartial investigation of the subject crimes by STF. According to him, therefore, it was eminently a fit case to transfer the investigation to independent Investigating Agency, namely, CBI so as to instil confidence in the public mind about the fairness and credibility of the investigation of the crimes in question.

14. He then submits that the principle of insulation of the investigation to make it independent, has been compromised. He submits that the DGP whose

statement has been mentioned in the Press Release be directed to file affidavit to state whether the STF gave him access to the record of investigation of the subject crimes or that he has not seen the same. Depending on the nature of affidavit, the Court may have to initiate contempt action against the officials of STF as well as others who have interfered with the administration of justice.

15. He further submits that the excel-sheet filed along with the charge-sheet in the concerned crimes refers to 73 candidates. But, the Investigating Agency has resorted to pick and choose attitude by naming only 20 candidates as accused, 23 as witnesses and leaving out 30 others without giving any explanation whatsoever. This is nothing short of perversity on the part of Investigating Agency, reflecting on their credibility.

16. To buttress the above submissions, he placed reliance on the decisions in the case of *Narmada Bai vs State of Gujarat* [1], *Shahid Balwa vs. Union of India and others*[2], *Vineet Narain vs. Union of India and another*[3] and *Asharam Bapu vs. Union of India and others*[4].

17. Ms Indira Jaisingh, learned Senior Advocate addressed us in Writ Petition No.12386/2014 for the petitioner. She did not pursue the extreme stand taken by Shri Tulsi. However, according to her, the reference made to CBI to investigate the case of death of Dr. D.K. Sakalle in suspicious circumstances, was only a farce. It was necessary for the State Government to issue Notification under Section 6 of the Delhi Police Act before making such reference. She then picked up the thread of the last argument made by Shri Tulsi about the intrinsic conflict of interest of the different wings of the State Government and yet having filed a common affidavit and that they were illadvised to be represented by one Law Officer – Shri P.K. Kaurav, Additional Advocate General. By this, she submits, it was not only a case of collapsing of personalities of different entities who had hostile stand against each other but also giving opportunity to share the vital information including about the contents of the investigation through common Advocate. In a matter of this nature, it would certainly undermine the fairness and independence of the Investigating Agency (STF). According to her, the Investigating Agency should have engaged its own Advocate to completely insulate itself from the other wings of the

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1. (2011) 5 SCC 79 (paras 58 to 64)
2. (2014) 2 SCC 687 (paras 29 and 30)
3. (1998) 1 SCC 226 (paras 1, 3, 8, 49 and 50)
4. (2013) 10 SCC 37

State. She invited our attention to the reply-affidavit filed by VYAPAM in the previous set of writ petitions, being Writ Petition No.15186/2013, to substantiate that even in those proceedings common Law Officer appeared for the respondents. In that, the affidavit filed on behalf of VYAPAM was drawn and filed by Advocate P.K. Kaurav. He also appeared for the State and the STF. She submits that as has been done by the Supreme Court in cases of national importance, in public interest, even this Court ought to appoint an independent Public Prosecutor/Advocate to represent STF (Investigating Agency), since the Court is already monitoring the investigation of the crimes in question.

18. She, however, in all fairness stated that she was not opposed to monitoring of the investigation by the Court in camera, if it was necessary to do so while analyzing the contents of the investigation. But, as a rule, the hearing of the suo-motu petition must be in open Court, as is the practice followed even by the Supreme Court in such matters.

19. She submits that by filing of common affidavit for the different wings of the State – Home Department, Police Headquarter; STF and VYAPAM – the personalities of these entities have collapsed even though their interests are hostile to each other. Further, from the tenor of the common reply filed by the respondents, it would appear that different wings of the State were wearing the same hat and taking the same position.

20. It was pointed out that in the reply-affidavit filed in Writ Petition No.15404/2013, VYAPAM had taken a stand on merits regarding the scam and the matters which were engaging the attention of the Court concerning those crimes. The officials of VYAPAM were under scanner and their activities were under investigation by STF. It was also evident that the superiors in Police Headquarter and Home Department were instructing STF. Thus, all of them took a common stand to defend their separate actions. In law, on the face of it, there was conflict of interest between these entities. She further submits that filing of such common affidavit inspite of hostile interest of the different wings of the State was nothing short of interference with the administration of justice; and, more so, when this Court was monitoring the investigation. It was also urged that the Investigating Agency must be responsible only to the Court and none else and the Home Department of the State could not have issued any instructions to the Investigating Agency.

21. She submits that since the Court was monitoring the investigation, the STF should neither have interacted with any other wing of the Government nor shared the information concerning the investigation to anyone, much less without the permission of the Court.

22. She further submits that although the decision in the previous round of Public Interest Litigation has neither been challenged nor review thereof has been sought, even so, it was open to her to contend that the Court should not have disposed of those matters. Indeed, if those matters were kept alive, the petitioners in those matters could have rendered meaningful assistance to the Court, to point out the infirmities in the investigation and/or infirmities bordering on doubting the credibility of the Investigating Agency. The registration of *suo motu* proceeding pursuant to the same judgment was not enough. For, there was no party appearing before the Court except the respondents who had conflict of interest and yet were represented by a common Advocate. Moreover, the position became still difficult as the Court was hearing those proceedings in camera. For that reason, the Court ought to, at least, appoint an *amicus curiae* to assist the Court and also to hear *suo motu* proceedings in open Court.

23. She further contended that since the issue regarding the credibility of STF was in public domain, the Court should not have gagged the media from publishing the proceedings.

24. In her concluding submission, however, she contends that the best option in the present fact situation is to transfer the investigation of all the criminal cases under monitoring of this Court to CBI; and that the Investigating Agency should be ordered to be represented by an independent Advocate of eminence, to be appointed by the Court or, at best, by the Investigating Agency itself and not the Law Officer of the State. She submits that the Court may direct appointment of a Special Public Prosecutor; and, lastly, to appoint an *amicus curiae* to assist the Court in monitoring the investigation. She submits that even if the investigation was not transferred to CBI, she would be content with investigation done by STF (existing Investigating Agency), but, under monitoring of the Court and by appointing an *amicus curiae* to assist the Court during such monitoring. She has reiterated that she is not opposed to in camera hearing of the proceedings when the Court wants to analyze the contents of the investigation record or to seek clarification in that behalf from the Investigating Agency. She, however, prays that the petitions may not be finally

disposed of on this occasion, but, should be kept pending for the just outcome of the case.

25. To buttress the above submissions, she has relied on the decisions in the case of *Subrata Chattoraj Vs. Union of India and others*[5] and *Sahara India Real Estate Corporation Limited and others Vs. Securities and Exchange Board of India and another*[6].

26. Shri Vivek K. Tankha, learned Senior Advocate appearing for the petitioner in Writ Petition No.12392/2014, submitted three written notes to point out the fatal discrepancies in the investigation of the concerned cases already done by the STF. These notes have been prepared on the basis of the material culled out from the charge-sheets already filed by the STF in the concerned crime against the named accused. The material, amongst others, would indicate that the name of the Minister was not mentioned in the excel-sheet, however, no investigation has been done to ascertain who the Minister was. He further points out that although the name of Ms Uma Bharti (who is presently Cabinet Minister at the Centre) appears in the material already available with the Investigating Agency, however, she has not been named as an accused in any of these cases. Moreover, the Investigating Agency is adopting the policy of pick and choose, as it mentions some of the candidates as accused and some as witness. Those who spoke against the heavy weights have been made accused and those who have not spoken about them have been made witnesses. At least, this approach of the STF is noticeably consistent and is a clear scar on the credibility of the Investigating Agency. He further points out that the record indicates that VYAPAM furnished information to the Investigating Agency within two days. The material placed on record along with the charge-sheet filed, makes no reference as to how VYAPAM could furnish such voluminous information within two days from the date of requisition. While adopting the arguments of the previous counsel, Shri Tankha, learned Senior Advocate submits that the credibility of the Investigating Agency is under scanner and, therefore, in the larger public interest, it would be proper to transfer the investigation to an independent Investigating Agency like CBI. Further, the investigation to be done by the newly appointed Investigating Agency should be monitored by the Court. He has joined in the submission of the previous counsel that Special Public Prosecutor to represent the

5. 2014 (6) SCALE 593 = (2014) 8 SCC 768 (para 31)
6. (2012) 10 SCC 603

Investigating Agency must be appointed by the Court, who is not a Law Officer of the State; and, further, the Court must appoint someone as *amicus curiae* to assist the Court during the monitoring. He has placed reliance on the decision of the Supreme Court in the case of *Vineet Narain* (supra).

27. Shri Rajendra Tiwari, learned Senior Advocate appearing for the petitioner in Writ Petition No.11695/2014 has adopted the arguments of earlier counsel and has additionally pointed out paragraph 49 and the affirmation clause of the return to contend that the facts stated in the return are not properly affirmed and cannot be looked at and from the common affidavit filed, it is amply clear that the State, STF and VYAPAM were acting hand in glove. It is submitted that there is no mention in the affidavit that it was being filed in consultation with all the wings of the State. Notably, this return affidavit has been sworn by Ashish Khare, AIG, STF, Bhopal and Officer-in-Charge, who is part of the STF team. This argument, in our opinion, would have been of some significance if the affidavit was sworn by official from the other wing of the State and if he had stated that he was filing the affidavit on the basis of information derived from the record, which would mean that he has seen the record in the office of the Investigating Agency. That is not the case on hand. Moreover, the defect in the affirmation clause of the return, is a curable defect.

28. As regards other matters on merits, Shri Tiwari, learned Senior Advocate invited our attention to the memorandum statement of Mihir Choudhary, which was pointed out by Shri Tulsi, learned Senior Advocate as well. He further invited our attention to the contents of the FIR in Crime No.20/2013, which refers to the involvement of Ms Uma Bharti, but, she has neither been named as an accused nor any investigation has progressed qua her so far. The STF was going slow on that investigation for reasons best known to it. According to him, since such high dignitary was involved, to instil public faith in the investigation and to uphold the majesty of law, it was essential to transfer the investigation to an independent Investigating Agency such as CBI. That was also necessary because the subject criminal cases have inter State ramifications, inasmuch as, it is matter of record that the students who appeared in the examination were not only from the State of Madhya Pradesh, but, also from the neighbouring States like Uttar Pradesh, Rajasthan and including Himachal Pradesh etc. That being the case, investigation by CBI would be most appropriate and desirable. He also invited our attention to Annexure P/5 (in Writ Petition No.12431/2014, at page 24), to point out that the stand

taken by the respondents that Shri Sudarshan had died on 12th September, 2012 and had no concern with the examination, is belied from the contents of Annexure P/5. It is noticed that the application forms were required to be submitted before 26th June, 2012 and the examination was actually conducted on 7th October, 2012. The death of Shri Sudarshan on 12th September, 2012, therefore, would not rule out his involvement in the commission of the crime. This aspect has been completely glossed over by the Investigating Agency before giving a clean chit to Shri Sudarshan. He further pointed out that the material already available with the Investigating Agency would indicate that the telephone calls were made from Chief Minister's official residence. Even this aspect has not been investigated by the STF.

29. Shri Manish Verma, learned counsel appearing for the petitioner in Writ Petition No.12196/2014, relied on the proceeding in Writ Petition No.9781/2014 and Writ Petition No. 9783/2014 before the Single Bench, to contend that the possibility of manipulation of cut off higher marks for the open category cannot be totally ruled out, but, no investigation in that behalf has been done.

30. Shri Siddharth Seth, learned counsel appearing for the petitioner in Writ Petition No.13475/2014, who, incidentally, appeared in the first round of litigation reiterated his argument of the doctrine of State obligation to discharge the role of *parens patriae*. He submits that he has personal knowledge about the public outcry due to the scam and disillusionment of common man because of the lackadaisical approach of the Investigating Agency. He adopted the arguments of the previous counsel. Similarly, Shri Adwait Fouzdar, Advocate for the petitioner appearing in Writ Petition No.13868/2014 adopted the arguments of the previous counsel.

31. *Per contra*, Shri Nageshwar Rao, Additional Solicitor General of India appearing for the respondents-State and STF handed in a brief note in sealed cover for the perusal of the Court, with reference to the three written notes submitted by Shri Tankha, Senior Advocate on factual matters, explaining the same. After perusing the said note, we asked Shri Rao to clarify as to on what date the STF wrote to M.P. Online for furnishing the information concerning certain candidates - whose data was not available with VYAPAM; and further whether M.P. Online has responded in that behalf. We also asked him to find out whether STF has done any investigation in respect of the stand taken by VYAPAM about non-availability of data of the concerned candidates and

what follow up action has been taken in that behalf. After taking instructions, in response to our queries, it was clarified by him that M.P. Online has since submitted the information and follow up action on that basis is being taken by STF. He further informed the Court that as regards non-availability of data with VYAPAM, even that matter was inquired into by STF and it has been found that data of large number of candidates was not available. The non-availability of data was not specific to the candidates mentioned by the petitioners in the written note, submitted by Shri Tankha. However, now, in view of the information received from M.P. Online the investigation is proceeding independently against all concerned. In other words, non-availability of VYAPAM data was no impediment in the progress of investigation, on the basis of that information.

32. He then submitted that the petitioners have essentially raised grounds in the context of the death of Dr. Sakalle in suspicious circumstances and the Press notes released by the Public Relation Officer of M.P. Police, mentioning about STF giving a clean chit to named persons and lastly about the appearance of Shri Kaurav, Additional Advocate General to espouse the cause of the four wings of the State, namely, State of Madhya Pradesh, Home Department, Police Headquarters and the STF. On that basis, the credibility of STF is being questioned. He first took us through the facts noted in the earlier judgment, which mention about how the STF came into the picture and the steps taken by STF thereafter till the decision was rendered by this Court on 16th April, 2014. It is the same STF, which, essentially, started with the investigation of ten cases assigned to it and during the course of that investigation, registered new cases on the basis of material gathered by it - not only against the beneficiaries (candidates) but also against the middleman and the racketeers and including against persons in high position in Government and public life. After the judgment was rendered and until now, the STF has done investigation of in all 55 cases. Out of that, 10 cases pertain to VYAPAM officials, Government Officials and persons in public life. The other 45 cases, ostensibly are individual offences of impersonation of the original candidate. During the investigation of these 45 impersonation cases, it has been noticed that those offences were committed in an organized manner at specific examination centres and not across the State.

33. As regards 10 cases which are of recent period, involving VYAPAM and Government Officials, it is submitted that the investigation has reached at

an advanced stage. As a matter of fact, charge-sheets have been filed in those 10 cases and in two cases the STF is committed to file final charge-sheet before end of March, 2015, because of complexity of the investigation and involvement of large number of accused. In 45 cases concerning impersonation which were pending for quite some time and investigated by the local police stations, after taking over supervision thereof, further investigation has been advised and which is in progress. Further, final charge-sheets even in those 45 cases will be filed before end of March, 2015. He highlighted the achievements of the STF after the judgment in the earlier round of litigation since April, 2014. He submits that the STF, because of monitoring by the Court, has been successful in identifying and arresting more than 1000 persons and 1427 in all. This arrest includes arrest of high officials and persons in public life.

34. He submits that although the respondents have raised preliminary objections about the *locus* of the petitioners and that the petitions filed by them being politically motivated - as each of these petitioners belong to political party, which is in opposition in the State and also at the Centre; and further that the writ petitioners in W.P. No.12386 and 12392 of 2014 have not disclosed the material fact that those petitioners are facing prosecution for having committed serious criminal offences; even so, the respondents are duty bound to satisfy this Court about the quantitative and qualitative progress made in the investigation by STF. On the basis of the averments in the return filed by the respondents, he submits that it is amply clear that STF has investigated the concerned crimes with utmost dispatch and has left no stone unturned. The sincerity and commitment of the officials of the STF should neither be undermined nor doubted in any manner. According to him, these petitions are based on misplaced assumptions without there being any substance in any of the issue raised therein.

35. Regarding the question of death of Dr. Sakalle on 04.07.2014, he pointed out that Dr. Sakalle was due to retire on 30th September, 2014 as Dean of Medical College, Jabalpur. He was expected to submit his report about the incident of impersonation during the concerned examinations, which were conducted when Dr. Guha was the Officer-in-charge. Dr. Sakalle had submitted the report in the year 2011 on the basis of which two criminal cases were eventually registered by Dr. Guha. Notably, Dr. Sakalle was neither an accused nor a witness in any of the cases assigned to STF. He submits that

the State Government in its wisdom took a political decision to request CBI to inquire into the incident of the death of Dr. Sakalle in suspicious circumstances, even though merely an enquiry under Section 174 Cr.P.C. was registered. He submits that without the report of medical experts about the cause of death, the question of registering FIR by the local police did not arise. It is in that context, the CBI has mentioned that the inquiry initiated is yet to be registered as FIR. That, however, does not reflect upon the bonafides of the local police or for that matter, independence of STF. In absence of clear information about the cause of death, the local police could not have taken the matter forward. Further, the State Government under compelling circumstances, because of the call given by the Indian Medical Council to go on strike, which would have affected the working of all the hospitals across the State causing untold misery and problem to the patients undergoing treatment in the hospitals, took a political decision to request CBI to take over the inquiry, as insisted by the Indian Medical Council. That decision has no bearing on the fairness or independence of the on-going investigation of PMT VYAPAM examination scam cases by STF.

36. He further submits that from the communication sent by CBI dated 15.09.2014, if the same is read as a whole, in its proper perspective, it would be amply clear that CBI has also mentioned that the death of Dr. Sakalle has nothing to do with inter-State repercussion and that the local police is capable of investigating the same. For that reason, CBI did not act upon the request of the State Government. The first sentence appearing in the said communication, therefore, cannot be read in isolation, lest to give a distorted meaning. He submits that the first circumstance pressed into service by the petitioners, therefore, is completely devoid of merits and further it has no bearing on the outcome of the ongoing investigation of PMT VYAPAM examination scam cases by STF. That investigation is proceeding in right direction and in most effective manner, which is being monitored by the Court periodically.

37. He then submits that the argument advanced on behalf of the petitioners that the State Government should not have sent request in absence of any Notification issued under the provisions of the Delhi Police Act is founded on misunderstanding of the facts as well as the settled legal position. He relies on Supreme Court decision in the case of *Balkrishna Reddy Vs. Director Bureau of Investigation, New Delhi*[7]. In para-71 of this decision the argument under

7. (2008) 4 SCC 409

consideration, according to him, has been dealt with and rejected. He submits that the fact that the State Government acceded to the request of Indian Medical Council to refer the inquiry concerning the death of Dr. Sakalle in suspicious circumstances, is, in no way, concerned with the crimes arising from PMT VYAPAM Examination Scam cases under investigation by STF. For the same reason, the incident of death of Dr. Sakalle cannot be treated as part of the larger conspiracy theory in the said crimes, as is contended on behalf of the petitioners and that the said argument is fallacious and ill-advised.

38. With reference to the Press notes released by the Public Relation Officer (PRO) of Public Relation Department, Government of Madhya Pradesh, it is submitted that if the same is examined in its correct perspective, was only in response to the misleading Press news published in the local media to create confusion in the minds of the common man. In any case, the Press release neither refers to any matter of substance of the investigation nor even remotely suggests that the same has been shared by STF with higher Authorities in the Police Headquarters or the Home Department of the State. The information which has been divulged is limited to the status of the records - whether the same have gone missing, as mentioned in the Press news or otherwise. Thus, the Press Release as issued, is without disclosing or sharing the details of the investigation. He submits that limited information was provided by STF in good faith and in larger public interest to assuage the misgiving and misinformation generated by the news publication. That should not be the basis to doubt the credibility and fairness of the investigation done by STF. He fairly submits that STF could have avoided such criticism, but, then it does not mean that the integrity of officials of STF, who are senior officials and by far known to be independent police officers, having vast experience, can be doubted. He submits that the officials of STF have already established their impartiality and independence, by not only registering fresh crimes involving high officials and also by arresting large number of middlemen and racketeers including high Government officials and persons in public life in connection with criminal cases under monitoring.

39. He further submits that the Press Release mentioning of having given a clean chit to the named persons also cannot be the basis to doubt the credibility of STF or the investigations under monitoring. He submits that the crimes concerning Samvida Shala Shikshak are not the subject matter of monitoring by this Court. The subject matter of monitoring is only about the

offences commonly known as PMT VYAPAM Examination Scam cases for admission to Undergraduate and Postgraduate Courses in Medical Colleges. The named persons are in no way involved in any of those cases. He then submits that the stated Press Release concerns the criminal cases registered pertaining to Transport Department, which are entirely different set of criminal cases and not subjected to monitoring by this Court. He further submits that the investigation of those cases is proceeding as per law and will be taken to its logical end. At the same time, he fairly contends that if the matter is pending investigation, the Investigating Agency should eschew from issuing any statement on factual matters until filing of the charge-sheet in the concerned Court in those cases.

40. With reference to the argument of the petitioners that the Investigating Agency has not made any attempt to collect the call records of Nitin Mohindra and Pankaj Trivedi etc., he submits that the same is devoid of merits, as the call records of the concerned persons are already part of the charge-sheet filed in the PMT VYAPAM examination scam cases. He submits that the points urged by the petitioners are essentially based on miscommunication and misreading of the material facts. Further, the petitioners have failed to substantiate any circumstance that would lead to doubting the credibility of STF much less giving rise to even a reasonable apprehension about the fairness of the investigation of PMT VYAPAM examination scam cases by STF.

41. As regards the argument that Shri Kaurav, Additional Advocate General should not represent all the wings of the State, he submits that that was not impermissible. As a matter of fact, there was no conflict of interest between different wings of the State on the matters in issue. In that, the stand of the State, as is noticed in the earlier judgment, also even now, is that, the investigation of all these matters has been assigned to special investigation team (i.e. STF), which is proceeding with the investigation of those cases independently and was not required to take instructions from any superior Authority, outside the structure of STF.

42. As regards the stand of the Home Department, even though STF may be part of the Home Department, that does not mean that the Investigating Officers of the STF were not independent. The Police Headquarter has also taken the same stand. The fact that he also represented VYAPAM, would make no difference inasmuch as VYAPAM was taking the same stand against its erring officials and was the complainant, which had led to the registration

of crimes even against the erring officials of VYAPAM. It is not a case where the same Advocate was appearing for the complainant as well as the accused. He submits that in any case there was no conflict of interest between the different wings of the State on the matters in issue, who were represented by the Additional Advocate General in his capacity of a Law Officer. There is no bar in law, for the Law Officer, to appear for the investigating agency and other Agencies and Departments who were working in tandem to proceed against the high officials. The matter of propriety or desirability cannot be raised to the level of conflict of interest. He further submits that Shri Kaurav, Advocate has been appearing in this Court not only in the public interest litigation filed for transferring of the investigation to CBI but also in other cases to defend the actions of VYAPAM against the candidates, who may be incidentally named as accused in the offence registered and investigated by STF. It would have been a different matter if the Court were to notice any or slightest of unworthy conduct of the Advocate in any of the appearances made before the Court. So long as the Court has confidence on the conduct of the Advocate, the question of Law Officer withdrawing from the case or not to appear for all the wings of the State, in absence of conflict of interest on the matters in issue, does not arise. He has placed reliance on the decision of the Supreme Court in the case of *Deepak Agarwal vs. Keshav Kaushik and others*[8], in particular, paragraph 100 to buttress the above submission.

43. At the end, however, he submits on instructions of Shri Kaurav, that Shri Kaurav was willing to withdraw from the proceedings, if the Court opines that there is conflict of interest between the different wings of the State in the matter of investigation of the subject crimes by STF. He submits that whether the Court should appoint an *amicus curiae* to assist it or not, is the prerogative of the Court. There is no hard and fast rule that in every public interest litigation; and even if commenced *suo motu* by the Court, it was imperative to nominate an a*micus curiae* from the Bar.

44. It was urged that the issue pertaining to hearing of the proceedings whether in open Court or in camera is also a matter of judicial discretion. However, when it is concerning the on-going investigation, it is but appropriate that the hearing should be in camera, lest it would be fraught with the danger of divulging material information to the accused, who in turn may take undue advantage to scuttle the investigation or deviate the focus of the Investigating

8. (2013) 5 SCC 277 (para 100)

Agency. He submits that the respondents would abide by all the directions that may be given by the Court to do substantial justice and in public interest.

45. At the outset, we may recapitulate the decision of the Division Bench of this Court in the earlier round of litigation on the same subject. The Court after analysing many precedents, some of which are relied even now, restated the well established legal position about the plenitude of the power under Article 226, which requires great caution in its exercise and must be used sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where such an order may be necessary for doing complete justice and for enforcing the fundamental rights. The Court thoroughly examined the diverse arguments of the said petitioners, who attempted to persuade the Court that *prima facie* case was made out calling for investigation by an independent agency. That relief was negatived by a speaking judgment. We need not burden this judgment by adverting to the findings on the factual matters considered in that judgment to negative the same relief claimed. The Court relying on the decision of the Apex Court held that merely because the crime has generated immense amount of public interest, or in other words, a public outcry and that in a manner a public demand has been made towards transference of the investigation to independent agency, alone cannot be the legal basis to exercise powers under Article 226. The Court is obliged to record a clear finding that it has become "necessary" to provide credibility and to instil confidence in the investigation assigned to STF or that the transfer of investigation to some other agency is essential for doing complete justice in enforcing the fundamental rights.

46. In paragraph 19 of the said decision, the Court adverted to the background in which STF was constituted and was assigned the investigation of the criminal cases concerning PMT VYAPAM examination scam. The Court held that STF is a "separate unit" in the Home Department, headed by the ADGP (Additional Director General of Police) and consists of experienced and independent IPS officers with unblemished record. The Court unambiguously rejected the grievance of the said petitioners that the STF was incapable of handling the investigation of the offences in question or had shown any inertia in the investigation after it came on the scene. Instead, the Court found that STF swung into action without wasting any time. The Court also found that none of the petitioner(s) had attributed any motives to any official(s) of STF. On the contrary, there was enough material to indicate that the officials of STF were acting fairly and independently and were not taking

instructions from their higher-ups in the State administration. For, during investigation of the assigned crimes, they proceeded to register fresh cases, mentioning about the possible involvement of high Government officials and political leaders including of the ruling party. That reinforced their resolve to proceed against one and all involved in the commission of stated offences impartially and independently. The Court held that taking any other view would result in demoralizing the officials of STF and questioning their sincerity and integrity in absence of any tangible material in that behalf merely on the basis of misplaced and unsubstantiated apprehensions of the said petitioners.

47. In paragraph 44 of the judgment, while rejecting the arguments of the petitioner(s), the Court pointedly held that even though STF is one of the wing of the State Government, that does not mean that it will not investigate the matters independently and impartially or will act on the instructions from higher Authorities outside STF. Even the premier Investigating Agency, CBI, was, as of now, one of the wing of the Union of India and not an independent or autonomous Agency. Notably, it has been found that the structure of STF nowhere indicates that STF is required to report to any other Authority outside STF about the investigation carried out by it. Further, there was nothing to suggest that information regarding the stage of investigation or the contents of the material were being divulged or reported to the Minister Incharge by the STF. On the contrary, like any other investigation, the investigating officers of STF, of the concerned crimes, were in complete control of the investigation and that the superior officer(s) in the STF (IPS Officer(s) including the rank of A.D.G.P., who is the head of the STF), were only supervising the investigation to ensure that it was progressing in the right direction and properly. The Court also found that it was nobody's case that superior officers in the Home Department were directly or indirectly associated with the investigation done by STF or that the officials of STF were in contact with other high officials outside STF or political leaders and had ever divulged any matter of substance regarding the investigation of the stated cases. Even after having said this, the Court decided to monitor the investigation of the stated cases itself, in larger public interest; and to instil confidence in the investigation by STF.

48. As per the operative order passed by the Division Bench of this Court, for the purpose of monitoring, the Registry was directed to register *suo motu* proceedings, which was registered as Writ Petition No.6385/2014. The said writ petition was listed for hearing on different dates, inter alia, as under:-

S.No.	Date	Coram
01	25-04-2014	Hon'ble the Chief Justice & Hon'ble Shri Justice K.K. Trivedi
02	02-05-2014	Hon'ble the Chief Justice & Hon'ble Shri Justice K.K. Trivedi
03	06-05-2014	Hon'ble the Chief Justice & Hon'ble Shri Justice K.K. Trivedi
04	13-05-2014	Hon'ble the Chief Justice & Hon'ble Shri Justice K.K. Trivedi
05	20-05-2014 **(During Summer Vacation)**	Hon'ble the Chief Justice & Hon'ble Shri Justice Sanjay Yadav
06	13-06-2014 **(During Summer Vacation)**	Hon'ble the Chief Justice & Hon'ble Shri Justice Sanjay Yadav
07	30-06-2014	Hon'ble the Chief Justice & Hon'ble Shri Justice Alok Aradhe
08	18-07-2014	Hon'ble the Chief Justice & Hon'ble Shri Justice Alok Aradhe
09	01-08-2014	Hon'ble the Chief Justice & Hon'ble Shri Justice Alok Aradhe
10	26-08-2014	Hon'ble the Chief Justice & Hon'ble Shri Justice Alok Aradhe

49. Initially, for first four hearings, the *suo motu* matter was heard in open Court, but, having realized that for making deeper enquiry about the nature and quality of progress limited to monitoring of the investigation, it was necessary to seek explanation from the Investigating Officer(s) about the contents of the material collected during the investigation on case to case basis and to obviate disclosure of the contents of the investigation in open Court which would have given clue to persons watching the proceedings, who may be incidentally interested in the accused named in those crimes, it was deemed appropriate to hear the matter in camera. As a result, the Court on the subsequent dates was monitoring the progress of the investigation in Chamber (in camera), where the officials supervising the investigation of the concerned crime along with the Head of the STF remained present and participated in that process. The order-sheets in the *suo motu petition* of the respective dates, mention about the amount of time spent (on an average around two hours each hearing) by the Division Bench for monitoring of PMT VYAPAM examination scam cases investigated by STF. However, after institution of second set of writ petitions, which are the subject matter of this common judgment; and, in particular, because of the vehement submission made by the counsel for the petitioners on 4th September, 2014, that the Court is obliged to monitor the investigation in open Court and also about the objection to the appearance of Shri P.K. Kaurav, Additional Advocate General, the said *suo motu* petition was listed in open Court along with the present writ petitions for considering the said objection. We have already adverted to the arguments of the petitioners in this behalf in the earlier part of this judgment.

50. This Bench (A.M. Khanwilkar, Chief Justice & Alok Aradhe,J) has been monitoring the investigation from 30/06/2014. As during the earlier hearing in Chamber, even after 30/06/2014, the compilations furnished by the officials of STF disclosing the progress of investigation, on case to case basis, was considered and then ordered to be kept in sealed cover. We have no hesitation in going on record that the performance of the officials of STF and, in particular, of the Investigating Officers and the progress of investigation was never found wanting. Rather, they were open to correction and to improvise the quality of investigation. As has been rightly noted in the return filed by the respondents that after the Court started monitoring, the working strength of STF was not only strengthened, but, its independence has also been ensured. Moreover, the number of arrests caused to be made by the Investigating Team including of high Government officials and former Minister speaks volumes about the

achievements of STF. The STF has succeeded in not only making significant arrests concerning the crimes investigated by them, but, also in taking the investigation to its logical end by filing charge-sheets in most of the cases under monitoring. Suffice it to observe that we did not notice any inertia of STF in the progress of investigation, both on the scale of quantity and quality thereof. On each of these hearing, we were *prima facie* convinced that the investigation of the concerned cases was proceeding in right direction and in a proper manner. However, as the present set of writ petitions came to be filed and new facts unfolded after the judgment dated 16th April, 2014, were brought to our notice, it became necessary for us to examine the same in public interest notwithstanding the fact that each of these petitions have been filed by the persons, who are actively associated with political parties in opposition, both in the State as well as at the Centre.

51. We may now deal with the new points, which have been urged before us in support of the relief for transfer of investigation to CBI. We must do that also because the Court has taken the responsibility to monitor the investigation of stated cases, in public interest; and to re-assure that the truth does not become casualty.

52. Let us now turn to the circumstances pressed into service by the petitioners. Shri Tulsi, learned senior counsel had relied on the order passed by VYAPAM dated 6th May, 2014, Annexure P/34 and schedule thereto (in Writ Petition No.11695/2014) and had contended that VYAPAM did not take action against two candidates referred to therein, as they were sons of member of Legislative Assembly of Bhartiya Janata Party. In this connection, suffice it to mention that the said decision of VYAPAM was because of the fact that the roll number(s) data of the concerned candidates - (not limited to the two named candidates) – were found to be unaltered and no change was noticed. In other words, VYAPAM did not proceed against all the candidates, whose roll numbers were found to be unaltered and no change was noticed. It was not limited to two candidates (sons of Member of Legislative Assembly belonging to Bhartiya Janata Party), as is alleged. Notably, in the present proceedings, we are not concerned with the correctness of that decision taken by VYAPAM. That, however, in no way can reflect on the performance or impartiality of STF. Further, we find that STF has not based its investigation of the subject crimes purely on the material supplied by VYAPAM, but is exploring all possible angles to unravel the crime. Besides this nothing more is

required to be said, as that may prejudice the pending trial of those cases.

53. Shri Tulsi then invited our attention to Annexure P/31, which is a news item published in newspaper Nation, titled, "Cops, RSS offer different reasons to give 'clean chit' to Sudarshan, Soni". The argument proceeds that when the Court was monitoring the investigation, STF should not have given such Press Release. We may now turn to the contents of the said Press news. It mentions that RSS in Nagpur and the Police Headquarter in Bhopal tried to give a clean chit to RSS Chief - Late Shri K. Sudarshan and Joint General Secretary – Shri Suresh Soni, concerning the examination and recruitment scam in Madhya Pradesh. It further mentions that the reasons given were strikingly pernicious. What has been found objectionable, is that, the M.P. Police denied the very existence of the controversial document. The news item also mentions about the police statement that the hard-disk recovered from Madhya Pradesh Professional Examination Board (MPPEB) provides no clue or information about the two RSS leaders of having made any recommendation. Further, the Police had said that Shri Sudarshan was unwell for a long time and died in Raipur on September, 15, 2012, while the examination (cleared by Shri Sudarshan's aide Mihir Kumar Choudhary) was held on October 7, 2012, and the result was declared on October, 18, 2012. The M.P. Police also refuted the allegations calling them untrue. The M.P. Police PRO's office also denied that any phone calls have been made from the Chief Minister's House to the accused.

54. Indisputably, this news item refers to the VYAPAM examination scam concerning Junior Food Civil Supply Officer. The investigation of that case is not the subject matter of monitoring by this Court. For, monitoring is only in respect of PMT – VYAPAM examination scam cases. Thus understood, this news item cannot be made the basis to question the investigation of PMT - VYAPAM examination scam cases by STF, which is being monitored by this Court. Moreover, the news item does not mention that the statement given by M.P. Police or the Police PRO's office was given on the basis of information furnished by any official of STF, much less, the Investigating Officer investigating the said crime. Notably, the said Mihir Kumar Choudhary, who has named the two RSS leaders, has been arrested by STF. That belies the apprehension that STF will not proceed against him or any other person involved in the commission of that offence. The fact that the news item was given on the basis of release from the PRO's office of M.P. Police, by itself, does not mean that STF was reporting about the substance of the investigation to

superiors in Home Department or Police Department, much less, about the investigation concerning PMT - VYAPAM examination scam cases. Suffice it to note that the submission founded on this news item that the investigation of PMT - VYAPAM examination scam cases monitored by this Court, is directly or indirectly controlled by the superiors in Home/Police Department of the State, is misplaced and untenable. For the same reason, even the apprehension of the petitioner that the Investigating Agency may go slow on the investigation of PMT scam cases because of the possible involvement of someone from the Office of the Chief Minister or the Governor of the State in connection with other crimes, is misplaced. In other words, the involvement of someone from the Office of the Head of the State in connection with criminal cases other than PMT - VYAPAM examination scam cases, will be of no avail. Suffice it to note that in these proceedings, we are not called upon to consider the justness of investigation of those cases (other than PMT VYAPAM examination scam cases).

55. Shri Tulsi has then invited our attention to the memorandum of statement of the said accused – Mihir Kumar Choudhary in Crime No.15/2013, to contend that the said document discloses complicity of Shri Sudarshan in the commission of the alleged offence, but, no action has been taken in that behalf; and, instead, a clean chit has been given to him even before conclusion of the investigation of that case. For the reasons already noted while dealing with the earlier submission, we are not impressed by the contention under consideration. Notably, this statement has not been recorded after the decision of the Division Bench of this Court dated 16th April, 2014, but, anterior thereto i.e. on 22nd November, 2013. Moreover, the statement of accused recorded under Section 27 of the Evidence Act has been made part of the charge-sheet in the concerned crime. That has no causal connection with PMT VYAPAM examination scam cases under monitoring of this Court. It is not as if the said statement has been omitted from the charge-sheet. It is also noticed that the former Minister – Laxmikant Sharma has already been arrested by STF in connection with the stated crime. This reassures the credibility and impartiality in the investigation by STF.

56. That takes us to the next point urged by Shri Tulsi in connection with the incident of suicide by Dr. D.K. Sakalle, Dean of Netaji Subhash Chandra Bose Medical College, Jabalpur. The argument proceeds that the suicide was the cause of a larger conspiracy concerning PMT – VYAPAM examination

scam cases investigated by STF. Further, being part of the larger conspiracy which was likely to be investigated by CBI on the basis of consent given by the State, investigation of all the PMT - VYAPAM examination scam cases must be entrusted to CBI. This argument is founded on two assumptions. Firstly, that the death of Dr. D.K. Sakalle was the cause of a larger conspiracy concerning PMT – VYAPAM examination scam cases. This argument is misplaced and unsubstantiated. The fact, however, is that, Dr. Sakalle was in no way concerned with the PMT –VYAPAM examination scam cases either directly or indirectly. He was neither a witness in those cases nor named as an accused. Whether the death of Dr. Sakalle was on account of suicide or otherwise was being enquired into and further action would depend on the opinion to be given by the medical experts. The second assumption, is that, the enquiry about the death of Dr. Sakalle has already been entrusted to CBI. No doubt, the State Government expressed its intent to handover the investigation of that incident to CBI, but, the CBI, in turn, has opined that it was not a case for it to take over that enquiry, as it had no national or international ramification and that the State Police was capable of handling the same. The decision of the State Government to give consent it has been stated, was under compelling circumstances. However, whether that decision of the State was appropriate or otherwise, need not detain us. Suffice it to observe, that none of the aforesaid two assumptions are well founded. As a result, this argument cannot take the matter any further for considering the relief of transfer of investigation of PMT – VYAPAM examination scam cases to an independent agency - CBI.

57. Shri Tulsi relying on the communication sent by CBI dated 10th September, 2014, (Annexure R/4, at page 111 of the return), argued that it was a clear case of inertia of the State Police in not registering FIR, inspite of the information about the unnatural death of Dr. Sakalle and only be content with the registration of inquest proceeding under Section 174 of Cr.P.C. This argument, plainly, overlooks the procedure that is usually followed by any Police in the country, when such incident is reported. In absence of specific information about the overt acts resulting in death of a person, the Police would commence the enquiry first by registering inquest proceeding under Section 174 of the Code; and dependent on the opinion of the medical experts about the cause of death, proceed further by recording FIR, if it is a case of homicidal or suicidal death, as the case may be. If it is a case of suicidal death and on account of abetment by someone, the offence can be registered as

FIR. We are not impressed by the argument that immediately after receiving information about the death of Dr. Sakalle, the local Police was obliged to register FIR under Section 154 of Cr.P.C. and not resort to inquest proceeding under Section 174 of Cr.P.C.

58. The next argument of Shri Tulsi, with reference to averments in paragraph 48 of the return, is another shade of the same argument already dealt with hitherto. According to the petitioners, non-registration of FIR in connection with the incident of death of Dr. Sakalle was a trick played by the STF not only on the public, but, also resorting to sharp practice by misleading this Court. In our opinion, there is no force in this criticism. As aforesaid, FIR in relation to the said incident can be registered only after opinion of the medical experts is made available. There is nothing wrong with the registration of Inquest enquiry at the initial stage by the local Police. Similarly, the fact that the State Government decided to give consent to CBI to enquire into that incident, also does not take the matter any further considering the fact that Dr. Sakalle was neither a witness nor an accused in connection with any of the PMT VYAPAM examination scam cases under monitoring by this Court.

59. Shri Tulsi then contended that on the earlier occasion this Court was assured that investigation of all criminal cases pertaining to PMT examinations conducted by VYAPAM registered since the year 2000 would stand transferred to STF. However, only supervision of investigation of those cases is taken over by STF. No doubt, this Court has noted that STF will take over the investigation of all those cases. The fact that the STF has decided to merely supervise investigation of those cases instead of taking over actual investigation, does not mean that those cases are not being properly investigated. It is a different matter that STF should have taken clarification from the Court for mere supervision of investigation by local police of those cases, instead of taking over the investigation of the concerned offences. At the same time, it is significant to mention that, it is only after STF took over the responsibility of supervision of investigation of those 45 cases, the investigation in those cases has made perceptible headway by arrests of most of the absconding accused and also by filing of further chargesheet/ police report under Section 173 (8) of the Code. The supervision by STF also made it possible to unravel the pattern or the modus operandi in all those cases and to collate information, which has helped them in investigating PMT VYAPAM examination scam cases entrusted to it by the State Government and monitored by this Court. This Court is already monitoring the further investigation of even those cases

supervised by STF.

60. Shri Tulsi had then relied on the Press Release issued through PRO of Police Headquarter. According to him, the contents of this news item go to show that there has been gross interference by the superiors in Police Headquarter in the investigation by STF. The first Press Release, Annexure R/5 to the return, issued under the signature of one Arun/Pradeep Bhatia, PRO Police Headquarter, pertains to the selection process of Transport Inspectors. There is nothing in this Press Release, which even remotely refers to the investigation of PMT - VYAPAM examination scam cases, which is the subject matter of monitoring by this Court. The news item is founded on this Press Release and for which reason it can have no bearing on the matter under consideration. As regards the Press Release, Annexure R/6-2 to the return, even this Press Release concerns the selection process of Samvida Shala Shikshak and has nothing to do with the PMT – VYAPAM examination scam cases, even though, Controller – Dr. Pankaj Trivedi and Principal System Analyst – Nitin Mohindra may be common in all these criminal cases. Viewed thus, even this Press Release will be of no avail to question the fairness, independence and impartiality of STF in investigation of PMT – VYAPAM examination scam, which are being monitored by this Court.

61. It was argued that assuming that the fact referred to in this Press Release is ascribable to some other criminal case (other than PMT VYAPAM examination scam cases), but, the Press Release reinforces the apprehension of the petitioner(s) that STF was sharing details of the investigation, to its superiors outside STF. Else, there was no occasion to give the Press Release mentioning about the facts emerging from the documents available with the STF, to assert that the earlier news item published was false and misleading. The argument though attractive at the first blush, on deeper scrutiny, does not indicate that the documents collated by STF during the investigation of PMT - VYAPAM examination scam cases or for that matter selection examination of Samvida Shala Shikshak-- were made available to the superiors in Police Headquarter or to the PRO of Police, who issued the Press Release. So long as the information shared was limited to the description or availability of the document and not substance of the investigation, the efficacy and impartiality of investigation of those cases cannot be doubted. Similarly, the Press Release, Annexure R/5 to the Return, is in response to the news item in the Print as well as Electronic Media about the recommendation made by RSS Chief -

Shri K. Sudarshan and Shri Suresh Soni. This news item and the Press Release was concerning the selection process of Food Inspectors – 2012, registered as Crime No.15/2013. The chargesheet in the said case has already been submitted on 20th March, 2014. As a result, even this Press release cannot be made the basis to question the fairness, independence and impartiality of investigation by STF in relation to PMT – VYAPAM examination scam cases, which are being monitored by this Court. As and when the investigation done by STF in those cases is questioned, that will have to be dealt with appropriately. Suffice it to observe that this document or the circumstances emanating from this document, by no stretch of imagination, can be the basis to assume or for that matter entertain a reasonable apprehension that the investigation by STF of PMT – VYAPAM examination scam cases is tainted, impartial or not independent. It is also not possible to persuade ourselves to accept the apprehension of the petitioner(s) that STF was sharing vital information concerning the investigation of PMT – VYAPAM examination scam cases to superiors in Police Headquarter/Home Department, so as to protect high Government officials or Heads of the State.

62. Shri Tulsi then invited our attention to paragraph 25(d) of the return to contend that STF was under the Wings of the State and was accountable to superiors in Police Headquarter and Home Department. Similar argument has been considered by the earlier Division Bench and negatived in paragraph 19 onwards and, in particular, paragraph 44 of the decision dated 16th April, 2014. The Court opined that the fact that STF is one of the wing of the State Government, does not mean that it will not investigate the cases independently and impartially or will act on the instructions from higher-ups outside STF. Further, even CBI was under control of the Union of India and not an independent or autonomous Agency as such. So long as no allegation is made about the inertia of any STF official, or of having acted under political influence and taking instructions from higher Authorities, it is too much to argue that STF will not do its job well, as per law, especially when it is manned by high ranking experienced IPS Officers and by far known to be independent. Shri Tulsi had placed reliance on the dictum of the Supreme Court in paragraph 29 and 30 in *Shahid Balwa's case* (supra). Those observations have been made in the fact situation of that case. Moreover, the doubts raised in the previous Public Interest Litigations about the impartiality and integrity of the STF has been considered threadbare and came to be negatived. The petitioners in the present set of petitions have not been able to point out any acts of commission

and omission of the officers of STF, that would raise doubt about their impartiality in investigation of PMT VYAPAM examination scam cases. For the same reason, reliance placed on the dictum of the Apex Court in the case of *Vineet Narain* (supra) will be of no avail.

63. Relying on the averments in paragraph 50 of the Return, it was contended that it does not lie in the mouth of the STF to disown its acts of commission and omission of having shared the details of investigation to higher-ups and, in particular, to PRO of Police Headquarter, inasmuch as, the common return filed by the respondents asserts that the Press Release was necessitated due to unwanted hype created by Print/Electronic media regarding the involvement of Shri Sudarshan and Shri Soni. We have already dealt with this aspect in the earlier part of this judgment and hence do not deem it necessary to dilate any further. For, the said news item and the Press Release pertain to cases other than PMT–VYAPAM examination scam cases and also because none of these Press Releases disclose the details or substance of the investigation or give slightest of impression about sharing of the contents of investigation by the STF to other Authorities outside STF. It is one thing to mention about the material fact unravelled during the investigation, but, mere disclosure about the possession of the document as denial of the press news – (referred to as missing from STF investigation record in the Press news), by itself, does not mean that the line of investigation or that the contents of the material evidence gathered by STF have been shared. Nor does it follow that the STF has completely ruled out the naming of persons mentioned in the document, until filing of final charge sheet in those cases in the concerned court. If the Press Releases were to give any further justification or details of the investigation, that would have been objectionable. Moreover, that would be relevant to the investigation of those cases and not to PMT – VYAPAM examination scam cases.

64. Relying on paragraph 52 of the common return, it was argued that appearance of one Additional Advocate General for all the wings of the State, namely, State Government, Home Department, STF and VYAPAM was impermissible, inasmuch as, there was intrinsic conflict of interest between their stand and, at least, in relation to the factum of independence of investigation of those cases by STF.

65. Before dealing with the submission with regard to conflict of interest, we deem it apposite to refer to the expression 'conflict of interest' as

understood in common parlance. The term 'conflict of interest' is used in connection with public officials and fiduciaries and their relationship to matters of private interest or gain to them. A conflict of interest arises when a government employee's personal or financial interest conflicts or appears to conflict with his official responsibility. [See Black's Law Dictionary – Sixth Edition; and Advanced Law Lexicon by P. Ramanatha Aiyar - 3rd Edition Reprint [2007].

66. On closer scrutiny of the stand of the respondents, we find merit in the argument of Shri L. Nageshwar Rao, Additional Solicitor General that appearance of common Advocate for all the wings of the State in no way affects the merits of the investigation done by STF or its impartiality and independence. It would have been a different matter if the same Advocate were to appear for the accused as well as the complainant. In all the PMT cases, the complainant is either STF or VYAPAM itself. There is no conflict of interest between them. As a matter of fact, both VYAPAM as well as the concerned Departments of the State are taking appropriate action against the officials of the concerned wing of the State involved in the commission of the alleged crime. The erring officials – be they howsoever high - are being prosecuted by STF as well as are being proceeded by the concerned Departments of the State by way of departmental enquiry and action of dismissal. There is nothing to even remotely suggest that officials of STF had passed on any benefit to any official of VYAPAM or any other Department of the State. On the contrary, the material shows that STF has proceeded against one and all – be he the high Government official or person in public life. Accordingly, we find no merit in the submission that STF is not properly insulated, which, in turn, is affecting its independence in any manner. Shri Tulsi, no doubt, concluded with the submission that the DGP whose statement has been mentioned in the Press Release be called upon to file affidavit to state whether STF gave him access to the record of investigation of the subject crimes or that he has not seen the same. However, as noted earlier, the statement of the DGP in the Press Release is concerning offences other than PMT – VYAPAM examination scam cases, which are not the subject matter of monitoring by this Court. As a result, we have no intention to expand the scope of enquiry about those matters in the present petitions, being a non-issue.

67. That takes us to the argument of Ms. Indira Jaisingh. According to

her, consent for enquiry by CBI in connection with the death of Dr. D.K. Sakalle given by the State was only a farce. Such consent could not have been given without issuance of a Notification under Section 6 of the Delhi Police Act. This argument has been rightly refuted by the learned counsel for the Respondents relying on the exposition in the case of *Balkrishna Reddy* (supra). Section 6 of the Delhi Police Act, 1946, which speaks of consent of the State Government neither refers to Notification nor order. Therefore, Notification under Section 6 of the Act is not required to be issued for grant of consent by the State Government under the Act. We have already dealt with the circumstances in which that consent was given. Ms Jaisingh had invited our attention to the other part of the same judgment, which, however, does not take the matter any further for deciding the argument under consideration. In that, issuance of a Notification under Section 6 of the Act is not envisaged for entrusting the investigation to CBI on the basis of consent given by the State Government. Accordingly, the point under consideration deserves to be answered against the petitioner.

68. So far as submission of Ms. Indira Jaisingh about intrinsic conflict of interest of different wings of the State, the same deserves to be stated to be rejected as we have accepted the argument of the respondents that there is no conflict of interest amongst the four wings of the State with regard to the subject matter of these petitions.

69. The enquiry that needs to be confined in these petitions is : whether STF was impartially and independently investigating the stated PMT – VYAPAM examination scam cases and not likely to be influenced from any quarter. In the earlier round of Public Interest Litigation, this contention has already been negatived and answered in favour of STF with the finding that it is an independent unit created for investigation of specified cases of serious nature having wide ramifications for the State and that the officials of STF are not expected to report to their superiors in the Home Department or the Police Headquarter concerning the contents or details of the investigation done by them. The head of the STF unit is none else, but, a high IPS official of the rank of A.D.G.P. having vast experience and is known for his impartiality and fairness in the investigation. Since there is no conflict of interest qua the subject matter in issue, there is nothing wrong if one Law Officer of the State appears for all the wings of the State. Suffice it to observe that we are not impressed by the submission of merger of personalities of different wings of the State

and having propensity to affect the fairness and independence of the Investigating Agency because of filing of common Return or for that matter to be represented by one Law Officer. The fact that one Law Officer has appeared for the different wings of the State, does not necessarily lead to a presumption, in fact or in law, that he would share the vital information pertaining to investigation of the stated cases to persons from other Department. This apprehension is founded on a figment of imagination of the petitioner(s), without any tangible basis therefor. If the petitioners are able to substantiate commission of such misconduct by the Advocate concerned, must approach the proper forum. Inasmuch as, the factum of professional misconduct by any Advocate can be made subject matter of an enquiry before the Bar Council, which has the exclusive prerogative in that behalf.

70. In our opinion, there is nothing in law that can prevent the Law Officer from appearing for different parties in the same proceedings, which according to his wisdom, has no conflict of interest. Reliance has been justly placed on paragraph 100 in the case of *Deepak Agarwal* (supra), which reads thus :

> "100. An advocate has a two-fold duty: (1) to protect the interest of his client and pursue the case briefed to him with the best of his ability, and (2) as an officer of the Court. Whether full-time employment creates any conflict of duty or interest for a Public Prosecutor/Assistant Public Prosecutor? We do not think so. As noticed above, and that has been consistently stated by this Court, a Public Prosecutor is not a mouth- piece of the investigating agency. In our opinion, even though Public Prosecutor/Assistant Public Prosecutor is in full-time employ with the government and is subject to disciplinary control of the employer, but once he appears in the court for conduct of a case or prosecution, he is guided by the norms consistent with the interest of justice. His acts always remain to serve and protect the public interest. He has to discharge his functions fairly, objectively and within the framework of the legal provisions. It may, therefore, not be correct to say that an Assistant Public Prosecutor is not an officer of the court. The view in Samarendra Das to the extent it holds that an Assistant Public Prosecutor is not an officer of the Court is not a correct view."

71. Speaking about Shri P.K. Kaurav, we have observed his performance whilst he was defending the STF for opposing grant or non-grant of anticipatory bail or regular bail to the concerned accused named in the criminal cases - investigation whereof is being monitored by this Court. Not only that, he has been appearing for VYAPAM as well as the State in all the cases where VYAPAM had taken action against the candidates, who are incidentally named as accused by the STF. The assistance given by him in all those cases has been of high order. Not even once, it appeared to us that he had mixed up the causes of different wings of the State. It is very easy for the petitioners to raise a bogey - merely on the basis of their apprehension, but, accepting such unsubstantiated and flimsy plea would, inevitably, entail in recording a finding of that Advocate having committed professional misconduct, which is not within our domain and which we must eschew.

72. Since, we have had the occasion to observe the performance of Shri Kaurav on regular basis in series of petitions/applications arising from PMT - VYAPAM examination scam cases, almost on daily basis, since the matters have reached this Court, appearing jointly or separately for one wing or the other, we do not find any merit in the argument under consideration. For the same reason, the argument of Ms. Indira Jaisingh that, in public interest, this Court ought to appoint an independent Public Prosecutor to represent STF in this proceedings for monitoring the investigation of STF in the stated cases, does not commend to us. The prayer is not to appoint Public Prosecutor to represent STF during the trial. Even that prayer cannot be examined behind the back of already appointed Public Prosecutor(s) in the respective 55 cases. The scope of monitoring of investigation cannot be enlarged in this behalf, unless we were to record a finding that the trials are not being properly handled by the existing Public Prosecutor(s) in the respective criminal cases.

73. We, however, appreciate the fair stand taken by Ms. Indira Jaisingh that she is not opposed to in camera monitoring of the investigation by the Court, if the situation so warrants. If the monitoring involves scrutiny of the substance of the investigation, it must necessarily be in camera. But otherwise, it must be in open Court. We have no difficulty in accepting this submission. But, as aforesaid, for the last few dates noted earlier, this Bench has been analyzing the quality of investigation already done by the STF, which, most of the times, involved discussion about the substance of the investigation. To avoid disclosure of those matters in open Court, the hearing was conducted

in camera, in Chamber. Henceforth, if the enquiry in the process of monitoring is of a general nature, we can always take up the matter in open Court. Notably, even though in camera monitoring of investigation was resorted to in the past, the order-sheets of the concerned date, mentions about the presence of the officers of STF and the documents produced by them. That fact is already in public domain and placed on the official website of the High Court. It is evident from the said order-sheets that the monitoring in Chamber was done for sufficiently long time on case to case basis, spread over for almost over or about two hours on the given dates. As aforesaid, we have no difficulty in following the same method and as suggested by Ms. Indira Jaisingh.

74. Ms. Indira Jaisingh then relying on the common affidavit filed by the different wings of the State, contended that their entities have merged even though they have conflict of interest. We have already dealt with this contention, which was also raised by Shri Tulsi and negatived the same. It was also argued that from the reply-affidavit filed by VYAPAM in Writ Petition No.15404/2013, it is noticed that VYAPAM had taken a stand on merits regarding the scam and about the matters which were engaging the attention of the Court concerning those crimes notwithstanding the fact that officials of VYAPAM were under scanner and their activities were being investigated by STF. This argument would have been relevant in the earlier round of writ petitions, which were disposed of by common judgment dated 16th April, 2014. Secondly, it is in ignorance of the fact that the said affidavit of VYAPAM was not filed by any of the officials of VYAPAM, who are under investigation. On the other hand, the stand of VYAPAM, plainly, was that as the unholy activities have been unearthed indicating involvement of its officials, it would proceed against those officials, in accordance with law. It is, therefore, wrong to contend that VYAPAM had hostile interest or had defended STF on any question of investigation done by STF. To put it differently, there was no conflict of interest between VYAPAM and STF on matters concerning investigation of the offences under monitoring. For the same reason, we reject the argument that filing of such common affidavit by different wings of the State entailed in interference with administration of justice. We also reject the argument that the Investigation Agency (STF) had disclosed any vital information about the contents or substance of the investigation to any other Authority outside STF or was taking instructions from them in connection with the investigation of the stated cases.

75. The next argument of Ms. Indira Jaisingh, is that, the Court on the earlier occasion should not have disposed of the Public Interest Litigations

filed by the private persons. In our opinion, if this argument is entertained it would inevitably result in undertaking review of the said decision, which is not the scope of the present proceedings. Except this, nothing more is required to be observed. In any case, disposal of those petitions has not come in the way of the present petitioners to file fresh petitions and, more so, when the same have been entertained to the limited extent of considering the subsequent developments and actions of STF.

76. The argument that no other party was appearing in the *suo motu* proceeding except the official respondents and that those respondents have common interests also, does not commend to us. For, in the *suo motu* proceedings, the limited issue is about monitoring of the investigation by STF of the stated PMT – VYAPAM examination scam criminal cases. In that context, only the State of Madhya Pradesh and STF would be relevant parties. Indeed, STF is one of the wing of the State, but, as observed earlier, is a separate unit in the Home Department of the State and, more particularly, the investigation of the stated cases have been completely insulated and progressing in right direction. Going by the criminal jurisprudence, ordinarily, after registration of offences until filing of the charge-sheet/police report (under Section 173 of the Code), the Investigating Officer is in complete control and it is his wisdom, which guides him to investigate the matter. Along with the charge-sheet, the Investigating Officer has to place on record complete material collated by him during the investigation. The Court after perusal of the charge-sheet and the accompanying record, can call upon the Investigating Officer to explore further investigation on certain matters, which it may deem appropriate. Further, during the trial, the Court has ample power to issue direction to examine someone as court witness as also to proceed against any person, who is found to be involved in the commission of the crime tried by it, if the evidence brought on record discloses that fact.

77. Suffice it to observe that the scope of monitoring of investigation by Court is very limited to surveillance. It is to ensure that the Investigating Agency conducts the investigation in a free, fair and time bound manner without any external interference. Thus understood, non-presence of any other party, much less public spirited person in such proceeding would make no difference nor can it be said to be inappropriate. The third party such as the petitioners before this Court, no doubt, can always bring certain vital facts to the notice of the Court to throw light on the laxity or inertia in the investigation or for that matter facts revealing investigation being controlled by external forces.

Indubitably, there is no legal provision, at least brought to our notice, which mandates appointment of an *amicus curiae* to assist the Court for monitoring of the investigation. The monitoring of investigation by the Court, in itself, is an exceptional situation. If the Court takes the responsibility of monitoring and finds it difficult in discharging that role, certainly it is open to the Court to appoint an Advocate of eminence as amicus curiae to assist the Court at any stage. That will be a matter of prudence.

78. The next argument canvassed by Ms. Indira Jaisingh that *suo motu* proceedings should be heard in open Court, has already been answered in the earlier part of this judgment. Inasmuch as, the *suo motu* proceedings were initially heard in open Court, but, when the Court found that without proper analysis of the material already gathered by the Investigating Agency, the monitoring of the investigation may be futile and that the analysis of the evidence in open Court would have, inevitably, entailed in discussion of the nature and the substance of the material so collected, it was deemed appropriate to opt for in camera hearing. Even Ms. Indira Jaisingh, in her usual fairness, concedes that if it is a matter involving discussion of the substance of the material collected by the Investigating Agency, it may not be appropriate to discuss it in open Court hearing; and to avoid revelation of such material, which may give advantage to the accused sooner or later, in camera hearing may be most suited.

79. Ms Indira Jaisingh had also relied on the decision of the Supreme Court in the case of *Subrata Chattoraj* (supra), in particular, para 31 therein. The observations in the said reported decision are in the backdrop of the fact situation of that case inter alia involving inter State ramifications. Hence, this decision will be of no avail. For, in these cases, we have already negatived the apprehensions of the petitioners about the possibility of laxity or impartiality in the investigation by STF, for the reasons already noted hitherto.

80. Ms. Indira Jaisingh then contended that the Court should not have gagged the media from publishing the proceedings. As the PIL's filed by the private parties are now being finally disposed of, it is a non-issue. We, therefore, refrain from examining the same except to observe that the order passed was to desist from publication "of the deliberations in the Court Room" on the given dates and nothing more. Therefore, it is not necessary for us to dilate any further on the exposition in the cases of *Sahara India Real Estate Corporation Limited* (supra) and *Asharam Bapu* (supra).

81. A priori, we reject the submissions of Ms. Indira Jaisingh to transfer the investigation of the stated PMT – VYAPAM examination scam cases to CBI, and to appoint Special Public Prosecutor to represent STF or to direct the STF to appoint another Advocate to espouse its cause instead of the Law Officer of the State. We may, however, accede to her submission that the Court should continue to monitor the investigation of those cases. For the reasons already recorded, as of now, we do not deem it necessary to appoint *amicus curiae* to assist the Court during such monitoring. Similarly, her submission that the hearing of *suo motu* proceedings should be in open court as held earlier, would depend on the matters to be considered in the process of monitoring of the investigation by the Court and not necessarily in open Court. We also do not accept her submission that the present PIL's filed by the private parties should be kept pending. In our opinion, there is no reason to multiply the proceedings for the same cause. Moreover, keeping these set of petitions pending, will be inviting further distraction to the process of monitoring of investigation by the Court. That would be antithesis to public interest and would impair the objective of monitoring. Inasmuch as, due to the objections taken by these petitioners, that *suo motu* proceedings should not be heard in Chamber and to injunct Mr. Kaurav from appearing for STF, the monitoring of the cases has virtually been in suspended animation from 12/09/2014. In the later part of the judgment, however, we would provide for a mechanism, which can assuage the apprehensions of these petitioners and persons similarly situated.

82. That takes us to the argument of Shri Tankha, Senior Advocate, who had relied on three notes prepared by him with the assistance of his colleagues on the basis of information culled out from the charge-sheets filed in the concerned criminal cases by STF. He pointed out that there were discrepancies in the investigation. According to him, the material reveals that the name of the Minister was not mentioned in the excel-sheet, but, the STF did not investigate that aspect and, more particularly, made no attempt to ascertain the name of the Minister. He then pointed out that although the name of Ms. Uma Bharti appears in the material filed along with the charge-sheet, however, she has not been named as an accused in any criminal case investigated by STF. Further, the Investigating Agency was adopting a policy of pick and choose by naming some of the candidates as accused and some as witnesses. Those who spoke about the facts convenient to STF, were made witnesses and those who named heavyweights as being party to the conspiracy, have

been named as an accused.

83. To re-assure ourselves, we called for explanation from STF on those facts in sealed cover. Suffice it to observe that the explanation offered by STF in sealed cover for the perusal of the Court not only refutes the above noted points raised by the petitioners, but, also gives sufficient reason to justify the charge-sheet as filed by the Investigating Agency. We do not deem it appropriate to disclose the said explanation in this judgment, which has been handed over in a sealed cover to us by the STF. For, any observation in that behalf may affect the fair trial of those cases. As is noted earlier, the legal position is well established that the Investigating Agency is obliged to place the entire material - be it for or against the prosecution - as has been collected during the investigation of the case along with the police report/charge sheet. Further, it is then open to the Trial Court to summon any person as court witness or to be named as an accused on the basis of the evidence that comes on record during the trial. Besides this, we do not deem it appropriate to make any further observation at this stage. We, however, restate the opinion already recorded that, as of now, we do not find any inertia or inaction on the part of the Investigating Agency in investigation of the stated PMT – VYAPAM examination scam criminal cases. Rather, we find that the investigation of these cases, assigned to STF, are proceeding in right direction and in a fair, impartial and independent manner. Therefore, reliance placed on the dictum of *Vineet Narain* (supra) is of no assistance to the petitioners, in the fact situation of these cases.

84. Shri Tankha referring to the fact that VYAPAM had furnished information to STF in only two days' time after receiving the requisition from STF, notwithstanding the fact that the material to be analyzed by VYAPAM was humongous task. We are not impressed even by this argument. In the first place, that argument was available in the first round of Public Interest Litigation and, in fact, has been dealt with in the said judgment. Secondly, the information furnished by VYAPAM was based on computer generated data analyzed by the technical experts of VYAPAM, which could be generated by few computer commands. Thirdly, the investigation by STF is in respect of all the relevant matters and not limited to the information furnished by VYAPAM, though the same was found to be relevant information. In any case, the credibility of the Investigating Agency (STF) is not shaken in any manner because of receiving such information from VYAPAM.

85. The next argument advanced by Shri Tankha, that the Court should continue to monitor the investigation has already been dealt with. Similarly, his argument that the Court should appoint Special Public Prosecutor and Advocate of eminence as *amicus curiae* to assist the Court during the monitoring, has also been answered by us in the negative while dealing with the submission of Ms. Indira Jaisingh.

86. Reverting to the argument of Shri Rajendra Tiwari, Senior Counsel, who had additionally referred to paragraph 49 of the common return to contend that the affirmation clause of the return is not proper. We have already observed that the same is a curable defect and the affiant can be asked to swear a proper affirmation clause. We have also rejected the argument that the common return filed discloses that the different wings of the State are hand-in-glove or that it could not have filed such common return in view of the conflict of interest. His argument that there is no mention in the affidavit that the same was being filed in consultation with all the wings of the State, in our opinion, contradicts the argument that a common return could not have been filed on behalf of different wings of the State. As noted earlier, the return has been sworn by Ashish Khare, AIG, ATF, Bhopal and OIC in his capacity as official of STF. That return, cannot be discarded whilst examining the question as to whether the investigation of STF is free, fair, impartial and without pressure from Authorities outside STF. It would have been a different matter, if the common return was filed by official(s) from other Department. That could have given rise to an inference that vital details collected during the investigation have been divulged or shared with the said official(s).

87. As regards, FIR in Crime No.20/2013, which refers to the involvement of Ms Uma Bharti without naming her as an accused, we have already noted that the said offence pertains to Samvida Shala Shikshak and has nothing to do with the PMT – VYAPAM examination scam cases, which are being investigated by STF and are subject matter of monitoring by the Court. Needless to observe that the Investigation Agency is obliged to proceed against all persons found to be involved in the commission of the said offence. Further, the Court dealing with the said criminal cases will be in a position to analyze the material submitted by the Investigating Officer along with the police report and proceed against all concerned found to be involved in the commission of the said offence. Besides this, nothing more is required to be observed.

88. The argument of Shri Tiwari that PMT –VYAPAM examination scam

cases have inter State ramifications, also does not commend to us. The fact that some of the scorers/impersonators were brought from other States, does not make it a case of inter State ramifications. The offence has been planned and executed within the State of Madhya Pradesh. The main accused are officials of VYAPAM. The manipulation of official record was done by the officials of VYAPAM. The racketeers and even middlemen, who arranged for the scorers/impersonators were, essentially, from Madhya Pradesh. The question is : whether STF is capable of investigating the crime in which scorers and impersonators from other States have also participated. We have no hesitation in taking the view that STF is in a position to investigate even that aspect of the crime and, in fact, have succeeded in arresting large number of scorers/impersonators and for that matter middlemen from other States also. Understood thus, the question of entrusting the investigation to CBI on this argument does not arise; and, more so, on the finding that the investigation done so far by STF of the stated offences has been free, fair and impartial. It would have been a different matter if STF was not in a position to proceed at all against the scorers/impersonators coming from other States. Hence, there is no substance even in this submission.

89. The next argument of Shri Tiwari founded on Annexure P/5 (in Writ Petition No.12431/2014) that a clean chit has been given to Shri Sudarshan reflects on the impartiality of STF, clearly overlooks that Shri Sudarshan has not been named either as an accused or a witness in any of the criminal case arising out of PMT VYAPAM examination scam, but, it pertains to some other offence, which is not the subject matter of monitoring by this Court. Similarly, the argument about the involvement of someone from the Chief Minister's official residence will be of no avail to criminal cases arising out of PMT VYAPAM examination scam. We have already dealt with these aspects quite elaborately in the earlier part of this judgment. Suffice it to observe that the apprehensions expressed by the petitioner(s) represented by Shri Tiwari, Senior Counsel, are based on miscommunication and misunderstanding of the issues relevant to ascertain whether the investigation done by STF in relation to PMT - VYAPAM examination scam matters is free, fair and impartial.

90. That takes us to the argument of Shri Siddhartha Seth, who reiterated his argument as was canvassed by him in the earlier round of Public Interest Litigation, about the *parens patriae* obligation of the State and about public outcry due to the scam and the disillusionment of the common man. That

argument has already been considered and rejected in the earlier judgment. The petitioner for whom he is appearing has not pointed out any specific subsequent development, which can mar the credibility of the STF. Hence, no further elaboration is necessary.

91. As regards the argument of Shri Manish Verma that there was possibility of cut off higher marks for the open category having been manipulated and that has not been investigated, also does not commend to us. For, if any such clue is revealed during the investigation, the STF will be obliged to investigate even that aspect thoroughly. Suffice it to observe that until filing of the final charge sheet in all the PMT VYAPAM examination scam cases, entertaining such grievance is premature.

92. Having dealt with each of the arguments raised by the counsel for the respective petitioner(s), we may now examine the scope of enquiry in the present set of writ petitions. As aforesaid; the question regarding the integrity and credibility of the investigation by STF will have to be tested on the basis of subsequent developments after the judgment in the first round of Public Interest Litigations. We have already dealt with each of those points raised by the concerned petitioner(s) and found it to be flimsy, baseless, untenable and replete with misinformation, if not disinformation. As a result, there is no reason to depart from the view already expressed by the earlier Division Bench of this Court about the independence of STF and also about the quality of investigation of the stated offences concerning PMT – VYAPAM examination scam by the said Agency. We find that even after the judgment dated 16th April, 2014, investigation by the STF in all the criminal cases and fresh registered cases concerning PMT – VYAPAM examination scam is proceeding in the right direction and is being done in a proper manner. This Court has closely monitored the investigation since the commencement of *suo motu* proceedings, and did not find any infirmity, much less of the order to doubt the credibility of the investigation. For the aforementioned reasons, the decision rendered in the case of *Narmadabai* (supra) has no application to the facts of these cases.

93. We have no hesitation in placing on record that on each date of hearing for monitoring of investigation, the Court had to spend substantial time, almost about or over two hours on every occasion, to understand the progress made on case to case basis. The status reports submitted on every occasion by the concerned officials of STF have already been kept in sealed cover, which

testify the amount of labour put in by the Investigation Agency. It has come on record that the Investigation Agency has succeded in arresting more than 1000 accused since monitoring by Court and the process of arrest of absconding accused is also being pursued in right earnest on case to case basis. Besides the number of arrests, including of all the high Government officials and persons in public life, who were found to be involved in the commission of the said offences, each of them have been proceeded against by STF. The principal accused or the brain behind the conspiracy and most of the racketeers and middlemen have been arrested and put in jail. The bail applications filed by them have been effectively opposed at the level of the Trial Court as well as High Court. We have no hesitation in observing that there is no legal basis to transfer the investigation to another Investigation Agency, and moreso because of the fact that the investigation in each of these 55 criminal cases by STF has reached at an advanced stage. In most of the criminal cases, charge-sheet has since been filed against the concerned accused without committing any default; and in remaining cases further investigation is in progress. The STF has assured this Court that it would ensure that final charge-sheets will be filed almost in all the cases very shortly, except in two cases by March, 2015 because of the complexity of the investigation and involvement of large number of accused in those cases. Notably, the STF after taking over the supervision of 45 cases concerning impersonation registered from year 2000, was able to crack the whip against concerned accused, which cases were not effectively pursued by the local police.

94. In our opinion, as we find that the investigation of criminal cases, arising out of PMT – VYAPAM examination scam, done by STF so far is proceeding in right direction and is being done properly, therefore, at this advanced stage of investigation, it would be against the public interest to transfer the same. However, if some deficiency in the investigation is noticed during the monitoring of the investigation, it is always possible for the STF to take corrective steps and also for the Court to ensure that such issues are addressed by STF in right earnest. That option would be meaningful and in public interest, than the knee jerk reaction of transferring the investigation of all the 55 cases to new Investigation Agency. The latter may give rise to uncertainty, confusion and most importantly delay in bringing the offenders to book and to put them on trial at the earliest.

95. Indubitably, on the basis of some flimsy apprehensions, which are,

essentially, founded on misinformation, miscommunication and misunderstanding of the real facts and, if we may say so, presented only to confuse and obfuscate the real issues, cannot be the basis to lightly undermine the sincerity, commitment and, more importantly, integrity and credibility of an institution especially created by the State to investigate such serious offences. It would have been a different matter, if the petitioners were able to demonstrate that the officials investigating the stated offences were biased or incompetent. If that case was to be made out, the Court could have passed appropriate order including to keep those officials at bay from STF and with the investigation of these cases. However, it is neither fair nor permissible or in public interest to question the integrity and credibility of the entire organization of STF on unsubstantiated apprehensions, if not unstatable. That approach would be counter productive and inevitably weaken the democratic values. It would entail in creating an environment of mistrust qua this premier organisation/ institution of the State. It is cardinal to uphold and respect the integrity of the institution such as STF by one and all and more so by public spirited persons, as it is inextricably linked to democratic values and independent functioning of such institutions. Any attempt to undermine the integrity of the institution must be eschewed. As observed by the Apex Court, public outcry alone cannot be the basis to transfer the investigation of the criminal cases to another Investigation Agency. But, something more and palpable should be brought to the notice of the Court to issue such a drastic direction.

96. It is noteworthy that Section 39 of the Code of Criminal Procedure, 1973, mandates that every person aware of the commission of or of intention of any other person to commit any offence punishable under the Sections of the Indian Penal Code mentioned therein, shall in absence of any reasonable excuse, forthwith give information to the nearest Magistrate or Police Officer of such commission or intention. Further, non-furnishing of such information without any reasonable excuse is in itself an offence punishable under Section 176 of the Indian Penal Code. A fortiori, it is the duty of the petitioners and similarly placed public spirited persons to report about any infirmity or illegality noticed by them and which is capable of being corrected by the Head of the Institution/Organization such as STF. We have no manner of doubt that if the petitioners had approached the Head of the STF, he would have been able to deal with the points raised by them in an objective manner and, in turn, could have instructed the concerned officials to deal with the matter appropriately. The petitioners, therefore, ought to first share the information available with

them concerning any case under the monitoring of this Court or any other case investigated by the STF, to the Head of the STF, if they so desire. We refrain ourselves from observing anything further.

97. Be that as it may, although, we have neither found any infirmity in the investigation nor could discern any laxity or inertia in the investigation by STF in the stated criminal cases, but, keeping in mind the issues raised by the petitioners in the present set of petitions that the Court must appoint Public Prosecutor to espouse the cause of STF and in addition the Court must nominate an *amicus curiae* to assist the Court in hearing of the *suo motu* proceedings and further the hearing of *suo motu* proceedings should be conducted in open Court coupled with the fact that the matter has aroused public interest, we deem it appropriate to provide a dispensation, by creating one more effective level for filtering of information concerning the quantitative and qualitative progress of investigation by STF before the same is brought to the notice of the Court. That would further the cause of free, fair, independent and impartial investigation by STF. For that, we intend to appoint a broad based Special Investigation Team (SIT), consisting of experienced judicial mind, IPS officer having indepth knowledge of the nuances of the investigation and an experienced I.T. professional – (as the evidence that will be presented in the concerned criminal cases will also be electronic evidence). This team would not only act as a watch dog Committee of the Court, but, would also be in a position to filter the information and inputs that would come to its knowledge through different sources and found to be relevant for ensuring free, fair and impartial investigation by STF. This team will also be entrusted with the task of overall supervision of the investigation of criminal cases concerning PMT – VYAPAM examination scam assigned to STF, on case to case basis. It may be open to this Team to give instructions to the Head of the STF concerning the investigation of the stated offences and to ensure that those instructions are carried out in right earnest. All future representations or information concerning the investigation of the stated offences, by any interested person, hereafter, will have to be first addressed to the Chairman of the Special Investigation Team. The Team after processing the said information, within a reasonable time after its receipt, may issue instructions to the Head of the STF and call upon him to submit compliance report within specified time. On failure to comply with such instructions, SIT may forward a report of the Chairman, bringing it to the notice of the Court, forthwith. Under this arrangement the petitioners or any other interested person, hereafter, will be

free to submit their representations /information to the Chairman of the SIT and on receipt thereof, the SIT may compile such information and submit the same to the Court with its remarks and action taken thereon.

98. For assisting the SIT to present its case before the Court, it would be open to it to appoint an Advocate of its choice. The State Government shall be obliged to provide for the logistical support to the SIT appointed in terms of this order and shall also be responsible for the emoluments and expenses (including the expenses and professional fees of the Advocate to be appointed by SIT), to be paid to the members of SIT. We are of the considered opinion that such arrangement would not only create one more level for monitoring the investigation of stated cases by STF, but, it would also assuage the apprehensions or, if we may say so, the mis-apprehensions of the petitioners and similarly placed persons about the impartiality of the investigation by STF. If this dispensation is put in place, the argument of the petitioners that the Court must appoint *amicus curiae* to assist the Court or for that matter issue direction to the STF to engage its own Public Prosecutor to espouse the cause of STF or the objection to the appearance of one Law Officer for all the wings of the State, will stand redressed.

99. Accordingly, we proceed to pass the following common order in these petitions:

1. Writ Petition Nos. 11695/2014 (PIL); 12196/2014 (PIL); 12386/2014 (PIL);12392/2014 (PIL);12431/2014 (PIL); 13475/2014 (PIL); and 13868/2014 (PIL) are disposed of with the above observations with no order as to costs.

2. *Suo motu* proceedings shall continue. However, the same be now listed on 7th November, 2014, in Open Court for nominating the members of SIT and for determining their emoluments.

3. We hereby appoint a broad based Special Investigation Team (SIT) consisting of (a) former High Court Judge as Chairman of SIT; (b) former IPS Officer not below the rank of Additional Director General of Police having indepth experience of investigation; and (c) former experienced I.T. professional.

4. The Special Investigation Team is appointed to supervise the investigation of all criminal cases concerning PMT – VYAPAM examination scam entrusted to STF, on case to case basis. Further,

the SIT can issue instructions to the Head of the Special Task Force concerning the investigation of those cases, if any, with further instructions to file compliance report within the time frame specified by it. For any reason, STF fails to comply with those instructions within the given time frame, that fact may be brought to the notice of the Court by the Chairman of the SIT through his report submitted in a sealed cover.

5. Any information or representation regarding the investigation of the stated criminal cases entrusted to STF, by any interested person, hereafter, shall be submitted to the Chairman of the SIT, who, after due scrutiny thereof, may take necessary follow up action and including issue instructions to the Head of the STF in that behalf. The representation/information received between the two dates of hearing of the *suo motu* proceedings before this Court, be compiled and presented by the Chairman of the SIT with his remarks and follow-up action, if any, in a sealed cover. In other words, no further communication, representation, Public Interest Litigation, application or writ petition can be filed or will be entertained by the Court concerning the investigation of PMT VYAPAM examination scam criminal cases assigned to STF (save and except involving issues of violation and infringement of fundamental rights of any person), unless routed through SIT.

6. The State Government is directed to, forthwith, provide complete logistical support to SIT and shall also be liable to pay all the expenses and including professional fees of the Advocate of SIT and emoluments of the Members of the SIT as and when due and payable, to be determined on the next date of hearing of *suo motu* petition. The Chief Secretary and the Secretary, Home Department, Government of Madhya Pradesh shall be personally responsible to ensure compliance of these directions in its letter and spirit.

7. The State Government is directed to ensure that none of the officials of STF, who are investigating the stated criminal cases, which are being monitored by this Court, should be transferred from STF Unit to any other Department/Organization or shall be entrusted with any other additional work other than investigation of the criminal cases entrusted to STF, without prior permission of this Court.

8. We further direct that no official of STF shall take instructions from any other Authority outside the STF nor shall divulge any information directly or indirectly or share the material collected during the investigation of the stated crimes to any third party or other Government official or higher ups outside the STF, without prior permission of this Court.

9. The STF officials investigating the concerned offences under monitoring of this Court, shall ensure that entire material collected during the investigation – be it in favour of or against the prosecution - be made part of the charge sheet/police report to be filed before the concerned court unless the confidentiality and privilege is claimed in respect of any confidential document. If such confidentiality and privilege is claimed in respect of any official document and for which reason the same has not been made part of the charge-sheet, that fact should be contemporaneously brought to the notice of this Court in sealed cover whilst filing the charge-sheet in the concerned court.

10. The State Government is further directed to ensure that if STF unit requires any expansion because of the increase in workload, timely decision on such proposal/request, after receiving it from STF, should be taken, in any case not later than two weeks from its receipt. In case it is not possible to do so, the Chief Secretary of the State must move a formal application giving justification for the delay or refusal to accede to the request so made within one week thereafter. The Chief Secretary shall be personally responsible to ensure strict compliance of this direction. For ensuring timely compliance, STF must mark one copy of the requisition to the Chief Secretary in addition, for information and necessary action, contemporaneously whilst sending it to the concerned Department.

11. We further direct STF to record the statements of each of the writ petitioner(s), who are interested in getting their statement recorded with regard to the stated cases, which are being investigated by the STF and whose writ petitions have been disposed of by this common judgment; or any other person interested in recording his statement concerning the investigation of the stated PMT examination scam criminal cases and such statement should be made part of the charge-sheet/police report to be filed before the concerned court. Further,

any relevant information disclosed in such statement must be thoroughly investigated and that should be made part of the charge-sheet/police report.

12. We further direct the Head of the STF to cause to keep close watch on print and electronic media reports, in particular, mentioning about the deficiencies in the investigation of the stated criminal cases and to take immediate steps in that regard including by recording statement of the persons responsible for dissemination of such news item. If the information divulged is found to be relevant, the Head of the STF must issue necessary instructions to the Investigating Officer to investigate the same and to be made as part of the charge-sheet.

13. The explanatory note handed over by Mr. Nageshwar Rao, Additional Solicitor General is ordered to be kept in a sealed cover bearing the date of this order, in *suo motu* proceedings.

14. The abovesaid directions have been issued in *suo motu* proceedings, bearing Writ Petition No.6385/2014, which is kept pending and will be heard separately on 7th November, 2014.

15. In case of any urgency or difficulty in complying with any direction given in terms of this order or any further direction to be given in pending *suo motu* proceedings, the Chairman of SIT or the Head of STF is free to approach this Court for appropriate direction.

Order accordingly.

I.L.R. [2015] M.P., 1280
WRIT PETITION
Before Mr. Justice Alok Aradhe
W.P. No. 14628/2014 (Jabalpur) decided on 5 November, 2014

SAQIB KHAN ... Petitioner
Vs.
RAVINDRA SURI ... Respondent

***A. Civil Procedure Code (5 of 1908), Section 10 - Stay of suit* - Filing of written statement is not sine qua non for deciding the application under Section 10 of C.P.C. - Trial Court directed to decide the application on merits. (Para 6 & 8)**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 10 – वाद पर रोक – सि.प्र.सं. की धारा 10 के अंतर्गत आवेदन के विनिश्चय हेतु लिखित कथन प्रस्तुत करना अनिवार्य नहीं – विचारण न्यायालय को गुण–दोषों पर आवेदन निर्णित करने के लिये निदेशित किया गया।

***B. Accommodation Control Act, M.P. (41 of 1961), Section 13(6) - Sub-tenant* - There is no privity of contract between the landlord and sub-tenant - There is no liability on sub-tenant to deposit the rent - Section 13(1) of Act does not include sub-tenant.** **(Para 7)**

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 13(6) – उप–भाड़ेदार – भूमि स्वामी और उप–भाड़ेदार के बीच कोई संविदात्मक संबंध नहीं – उप–भाड़ेदार पर भाड़ा जमा करने का दायित्व नहीं – अधिनियम की धारा 13(1) में उप–भाड़ेदार समाविष्ट नहीं।

Cases referred :

(1999) 1 MPLJ 497, (1998) 2 MPLJ 610, (1999) JLJ 197, (2002) 3 SCC 375, (2007) 3 MPLJ 340, 1961 MPLJ 1447, 1963 MPLJ SN 228, 1978 (1) MPWN Note - 17, AIR 1962 SC 27, (2004) 6 SCC 756, (2005) 2 SCC 256, (2013) 4 SCC 333.

Siddharth Gupta, for the petitioner.
Ashish Shroti, for the respondent.

ORDER

ALOK ARADHE, J. :- This petition under Article 227 of the Constitution of India arises from the orders dated 8.8.2014, 30.9.2014 and 16.7.2014 passed in Civil Suit No.419-A/2014.

2. The facts, giving rise to filing of the petition, briefly stated, are that one Ranjit Shah filed a civil suit, namely, C.S. No.483-A/2011 against the petitioner and the respondent seeking the reliefs of possession and damages on the basis of title on the ground that the petitioner and the respondent are encroachers. Thereafter, the present respondent along with his brother filed Civil Suit No.822-A/2012 on 27.7.2012 against the aforesaid Ranjit Shah seeking the relief of specific performance of contract. Thereafter, aforesaid Ranjit Shah filed civil suit, namely, C.S. No.443-A/2014 against the petitioner as well as respondent and other persons for eviction on the grounds enumerated under Section 12 (1) (a), (b), (c), (e) and (f) of the Act. It is

noteworthy that in the aforesaid civil suit, in paragraph 5 of the plaint, the respondent has been described as tenant whereas the petitioner has been shown to be a subtenant. Thereafter the respondent filed the suit, namely, 419-A/2014 against the petitioner for eviction on the ground enumerated under Section 12 (1) (a) of the Act.

3. The respondent filed an application under Section 13 (6) of the Act on the ground that the defendant has failed to tender the arrears of rent from March, 2013 to March, 2014. The aforesaid application was allowed by the trial Court vide order dated 8.8.2014 and the petitioner was directed to deposit the rent, failing which his defence to the eviction proceeding would be struck out. However, the petitioner did not deposit the rent and, therefore, vide order dated 29.9.2014, the defence of the petitioner to the proceeding for eviction was struck out. The petitioner also filed an application under Section 10 of the Code of Civil Procedure which was rejected by the trial Court by order dated 16.7.2014 on the ground that the application is premature as the petitioner has not filed the written statement. In the aforesaid factual backdrop, the petitioner has approached this Court.

4. Learned counsel for the petitioner submitted that the application under Section 10 of the Code of Civil Procedure preferred by the petitioner has been rejected by the trial Court in a mechanical manner without application of mind. It is further submitted that filing of the written statement is not sine qua non for deciding the application under Section 10 of the Code of Civil Procedure. It is also submitted that order dated 8.8.2014 is contrary to the provision of Section 13 (3) of the Act inasmuch as the trial Court ought to have appreciated that there is dispute with regard to entitlement to receive the rent between respondent and Ranjit Shah. In support of the aforesaid submissions, learned counsel for the petitioner has placed reliance on the decisions in *Sankatha Devi v. Jagdish Singh*, (1999) 1 MPLJ 497, *Sabiha Masood v. Tahabbur Ali Khan*, (1998) 2 MPLJ 610, *Mohanlal v. Bhartiya Red Cross Society and Manaram v. Omprakash & Others*, (1999) JLJ 197, *Sheela v. Firm Prahlad Rai and Others*, (2002) 3 SCC 375 and *Punam Chand v. Moorti Madan Mohan Ji and Others*, (2007) 3 MPLJ 340.

5. On the other hand, Mr. Ashish Shroti, learned counsel for the respondent with his usual fairness submitted that the application under Section 10 of the Code of Civil Procedure ought to have been dealt with by the trial Court on merits however, while defending the order dated 8.8.2014, learned

counsel for the respondent invited the attention of this Court to paragraph 5 of the plaint in Civil Suit No.443-A/2014 and has pointed out that in the aforesaid civil suit the respondent has been described as tenant whereas the petitioner has been mentioned as subtenant. While placing reliance on the decisions in *Daryanumal v. Sohanlal*, 1961 MPLJ 1447, *Kanhaiyalal v. Ganeshbai*, 1963 MPLJ SN 228 and *Vitthaldas v. Kalabai and another*, 1978 (1) MPWN Note – 17, learned counsel for the respondent submitted that a subtenant is not required to comply with the provision of Section 13 of the Act. The petitioner has entered into an agreement of tenancy with the respondent on 1.4.2011 but had paid the rent up to March, 2013 only. Therefore, the trial Court was justified in directing the petitioner to comply with the provisions of Section 13 (1) of the Act.

6. I have considered the respective submissions made by learned counsel for the parties. The provisions of Section 10 of the Code of Civil Procedure are clear, definite and mandatory. The court in which subsequent suit is filed is prohibited from proceeding with the trial in certain specified circumstances. [See: *Manoharlal v. Seth Hiralal*, AIR 1962 SC 27] The essential ingredients to be fulfilled for application of Section 10 of the Code of Civil Procedure, are namely, (i) the matter in issue in second suit is directly and substantially in issue in first suit; (ii) the parties in both the suits are common; (iii) the court in which the first suit is instituted is competent to grant the relief in subsequent suit; and (iv) whether the judgment in previous suit would operate as res judicata. The scope and ambit of Section 10 of the Code of Civil Procedure has been considered by the Supreme Court in the cases of *Gupte Cardiac Care Centre and Hospital v. Olympic Pharma Care (P) Ltd.*, (2004) 6 SCC 756, *National Institute of Mental Health and Neuro Sciences v. C. Parameshwara,* (2005) 2 SCC 256 and *Aspi Jal v. Khushroo Rustom and Dadyburjor*, (2013) 4 SCC 333. In the instant case, the trial Court while deciding the application under Section 10 of the Code of Civil Procedure has not dealt with the application on merits but has rejected the same simply on the ground that the petitioner has not filed the written statement. The filing of the written statement is not sine qua non for deciding the application under Section 10 of the Code of Civil Procedure. For the aforementioned reasons, the impugned order dated 16.7.2014 cannot be sustained in the eye of law.

7. Admittedly, in paragraph 5 of the plaint filed in C.S.No.443-A/2014, the respondent has been described as tenant whereas the petitioner is shown to be a subtenant. Section 13 (1) of the Act casts a duty on the tenant to

tender rent in the manner prescribed therein. Thus, Section 13 (1) of the Act envisages privity of contract between the parties to the suit. There is no privity of contract between the landlord and the subtenant. therefore, there is no liability on subtenant to deposit the rent. For the purposes of Section 13 (1) of the Act, tenant does not include subtenant. [See: *Daryanumal* (supra), *Kanhaiyalal* (supra) and *Vitthaldas* (supra)] The petitioner, therefore, is not required to deposit rent in C.S. No.443-A/2014. The petitioner has entered into an agreement of tenancy with the respondent and has paid rent to the respondent till March, 2014. Therefore, in the facts of the case, there is no dispute with regard to entitlement to receive the rent. Consequently, Section 13 (3) of the Act has no application to the fact situation of the case. However, vide order dated 8.8.2014, the defence of the petitioner to the proceeding for eviction has been struck out therefore, I deem it appropriate to grant opportunity to the petitioner to deposit the arrears of rent.

8. In view of the preceding analysis, the impugned orders dated 16.7.2014 and 29.9.2014 are hereby quashed. However, the petitioner is granted two months' time to deposit the entire amount of rent, failing which the defence of the petitioner to the eviction proceeding would be struck out by the trial Court. The trial Court is directed to decide the application filed by the petitioner under Section 10 of the Code of Civil Procedure afresh on merits.

9. Accordingly, the writ petition is disposed of.

Petition disposed of.

I.L.R. [2015] M.P., 1284
WRIT PETITION
Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice Shantanu Kemkar
W.P. No. 4792/2005 (PIL) (Jabalpur) decided on 6 January, 2015

RAJENDRA KUMAR VERMA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Constitution - Articles 19(1)(a), 21 & 51A(g) - Noise pollution*** **- Authorities are under obligation to ensure strict compliance of restrictions prescribed for noise levels. (Paras 14 to 16)**

क. संविधान – अनुच्छेद 19(1)(ए), 21 व 51 A(जी) – ध्वनि प्रदूषण – प्राधिकारीगण ध्वनि के स्तर हेतु विहित निर्बन्धनों का कठोर पालन सुनिश्चित करने के लिये बाध्यताधीन है।

***B. Noise Pollution (Regulation and Control) Rules, 2000, Rule 5 - Kolahal Niyantran Adhiniyam M.P., 1985 (1 of 1986), Section 13* - Validity of Section 13 of Act, 1985 - Rules 2000 being central rules framed under Central enactment, will prevail - Exemption provided u/s 13, Act, 1985 is ex facie in conflict with outer limit specified by Rule 5(3), Rules 2000 - To that extent section 13(1) of Act, 1985 is declared ultra vires. (Paras 19 to25)**

ख. ध्वनि प्रदूषण (विनियमन और नियंत्रण) नियम, 2000, नियम 5 – कोलाहल नियंत्रण अधिनियम म.प्र., 1985 (1986 का 1), धारा 13 – अधिनियम 1985 की धारा 13 की विधिमान्यता – नियम 2000 केन्द्रीय अधिनियमिती के अंतर्गत विरचित केन्द्रीय नियम होने के नाते, अध्यारोही होंगे – अधिनियम 1985 की धारा 13 के अंतर्गत उपबंधित छूट, पूर्व दृष्टया नियम 5(3), नियम 2000 द्वारा विनिर्दिष्टित बाहरी सीमा के विरूद्ध है – उस सीमा तक अधिनियम 1985 की धारा 13(1) को अधिकारातीत घोषित किया गया।

***C. Noise Pollution (Regulation and Control) Rules, 2000, Rule 5(3) - Exemption - Use of loudspeakers at any religious place* - Sound level restrictions provided by Central Legislation will have to be adhered to without any exception. (Para 29)**

ग. ध्वनि प्रदूषण (विनियमन और नियंत्रण) नियम, 2000, नियम 5(3) – छूट – किसी धार्मिक स्थान पर ध्वनि विस्तारक यंत्र का उपयोग – केन्द्रीय विधान द्वारा उपबंधित ध्वनि स्तर निर्बन्धन का बिना अपवाद के दृढ़ता से पालन करना होगा।

***D. Noise Pollution (Regulation and Control) Rules, 2000, Rule 5(3) - Installation of Pandals* - Govt. Authorities must entertain application for installation of Pandals on public street keeping in mind the statutory provisions/restrictions but also dictum of Apex Court - If any authority comes across any unauthorized Pandal on a busy street, must remove the same by following due process. (Paras 31 & 32)**

घ. ध्वनि प्रदूषण (विनियमन और नियंत्रण) नियम, 2000, नियम 5(3) – पंडाल खड़े करना – सरकारी प्राधिकारियों को सार्वजनिक मार्ग पर पंडाल खड़े करने हेतु आवेदन को न केवल कानूनी उपबंध/ निर्बन्धन ध्यान में रखते हुए बल्कि सर्वोच्च न्यायालय के आदेश को ध्यान में रखते हुए ग्रहण करना चाहिए – यदि

किसी प्राधिकारी द्वारा व्यस्त मार्ग पर कोई अनाधिकृत पंडाल पाया जाता है, उसे सम्यक् प्रक्रिया के पालन द्वारा हटाया जाना चाहिए।

Cases referred :

(1991) 1 SCC 598 = AIR 1991 SC 420, AIR 1999 Cal. 15 = 1998 SCC Online Cal. 73, (2000) 7 SCC 282, (2005) 5 SCC 733, (2005) 8 SCC 794, (2009) 2 SCC 442, (2005) 8 SCC 796, (2009) 15 SCC 351, (2004) 13 SCC 61, M.A. No. 168/2013 & M.A. No. 169/2013 (CZ) in O.A. No. 18/2013 decided on 21.2.2014.

Shobha Menon with *Rahul Choubey,* for the petitioner.
Swapnil Ganguly, Dy.G.A. for the respondent nos. 1 to 4/State.

ORDER

The Order of the Court was delivered by :
A.M. KHANWILKAR, J. :- The petitioner asserts that he is a well-known social worker and actively associated with many NGOs fighting for the cause of human dignity, civil liberty and social justice. He has filed this public interest petition for direction to the State Authorities to prevent the environmental noise pollution caused during the festive seasons, religious and social ceremonies spread over the year, by use of various sound amplifiers and other devices besides the noise pollution by factories, trains and aeroplanes. Further direction is sought to prevent other atrocities committed on the society in the name of religious festivals such as (a) traffic hazards by putting *Pandals* on busy streets (the number proliferating each year) in an indiscriminate manner, (b) theft of electricity with impunity for lighting and decoration of *Pandals,* resulting in loss to public exchequer and (c) extortion and intimidation of public by unscrupulous elements in the name of donation for the *Pandals.*

2. According to the petitioner, the citizens have a right to a decent environment and to live peacefully which includes right to sound sleep at night, to leisure and free locomotion during the day time. These are essential ingredients of the right to life guaranteed under Articles 19(1)(a) and 21 of the Constitution of India. The petitioner asserts that the mandate of Article 51A(g) obligates every citizen to protect and improve the environment. Reliance is placed on the exposition of the Apex Court in *Subhash Kumar v. State of Bihar and others*[1]. In Paragraph 7, the Court held that right to live is a

1. (1991) 1 SCC 598 = AIR 1991 SC 420

fundamental right under Article 21 and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. It is contended that the use of various sound amplifiers during the festivals, social and cultural gatherings and, more particularly, if unregulated, inevitably causes health hazards and nuisance to the public. It entails in infringment of basic human rights and also fundamental rights of the captive listeners in the concerned locality. The petitioner has then placed reliance on the decision of the Calcutta High Court in the case of *Moulana Mufti Syed Md. Noorur Rehman Barkati v. State of West Bengal*[2] wherein the issues raised by the petitioner have been squarely dealt with in the context of right to practice and propagate one's own religion. After analysing the gamut of decisions, it is held that right does not give licence to anyone to create noise pollution and muchless force the captive listeners to suffer the same. That, none can claim an absolute right to suspend others rights or disturb their basic human rights and fundamental rights. The petitioner has also placed reliance on another decision of the Apex Court in *Church of God (Full Gospel) in India v. K.K.R. Majestic Colony Welfare Association and others*[3] wherein it is held that sleep is restorative time of life and sound night's sleep is crucial to good health. The Court held that no religion prescribes that prayers should be performed by disturbing the peace of others nor does it preach that they should be through voice amplifiers or beating of drums. Further, in a civilised society in the name of religion, actitvities which disturb old or infirm persons, students or children having their sleep in the early hours or during daytime or other persons carrying on other activities cannot be permitted. Rights of others are also required to be honoured. The Court also highlighted that the problem of noise has become a very serious issue – having many evil effects including danger to health. It may cause interruption of sleep, affect communication, loss of efficiency, hearing loss or deafness, high blood pressure, depression, irritability, fatigue, gastro-intestinal problems, allergy, distraction, mental stress and annoyance etc. It also affects animals alike. Sometimes it lead to serious law and order problem. Further, in a civilised society, rights are related with duties towards others including neighbours.

3. To buttress the argument that noise pollution should not be countenanced, the petitioner has placed reliance not only on Article 21 but also Articles 48A and 51A(g) of the Constitution of India. The petitioner has also placed reliance on the provisions of the Air (Prevention and Control of

2. AIR 1999 Cal. 15 = 1998 SCC Online Cal. 73
3. (2000) 7 SCC 282

Pollution) Act, 1982 (in short *"the Act of 1982"*) and the Noise Pollution (Regulation and Control) Rules, 2000 (hereinafter referred to as "the Central Rules of 2000"). These Rules oblige the State Authorities to take certain measures for enforcement of the restrictions specified therein. Rule 3 prescribes for the ambient air quality standards in respect of noise for different areas/ zones, which are specified in the Schedule annexed to these Rules. Rule 4, read with Rules 5 and 8 obliges the State Authorities to ensure that the restrictions on the use of loud speakers/public address system are observed without any exception.

4. Reference is also made to the provisions of Indian Penal Code. Section 268 of IPC makes noise pollution an actionable cause as 'public nuisance'. Section 290 of IPC provides for punishment for such public nuisance. Section 133 of the Criminal Procedure Code empowers the Magistrate to make conditional order requiring the person causing nuisance including that of noise to remove such nuisance. Section 30 of the Police Act, 1861 (hereinafter referred to as "the Act of 1861") provides for Authorities to specify Rules for conduct of all assemblies or processions on public road or public streets. This provision also requires prior procurement of licence/permission before organizing the event. The Police Authorities are competent to exercise power of stopping, dispersion or declaring the assemblies or processions as unlawful, which violate the conditions of licence, by virtue of Section 30-A of that Act of 1861. Section 32 of the said Act provides for penalty upon conviction for the violation of licence conditions or breach of any provision of Law governing the subject.

5. The petitioner has also referred to the provisions of the Motor Vehicles Act, 1939 and, in particular, Section 20, 21J, 41, 68, 68I, 70, 91 and 111A, which empowers the State Government to frame Rules to regulate equipment and maintenance of motor vehicles and trailers. Section 70(2)(i) of the said Act provides for reduction of noise emitted or caused by vehicles while Section 70(2)(k) prohibits the carrying of appliances likely to cause annoyance or danger; whereas Section 70(2)(l) envisages periodical testing and inspection of vehicles by prescribed Authorities and Section 70(2)(n) of the said Act deals with the use of trailers with motor vehicles. According to the petitioner, the provisions of the Motor Vehicle Rules framed by various States do not contain any effective control measures in relation to noise pollution except to certain extent, use of horns and silencers. The petitioner has also adverted to the provisions of the Motor Vehicles Act, 1988, which in turn, had repealed

the Motor Vehicles Act, 1939. Referring to Section 110 and 190 of the Act of 1988 and the provisions in the Central Motor Vehicles Rules, 1989 it is asserted that the issue of noise pollution caused due to vehicles has been redressed to some extent.

6. Reliance is then placed on the provisions of Madhya Pradesh Kolahal Niyantran Adhiniyam, 1985 (in short "the Adhiniyam of 1985"). According to the petitioner, this enactment envisages mechanism for dealing with complaints relating to noise pollution caused *inter alia* due to loud speakers and other such appliances. However, the provisions in this Adhiniyam are not only negation of fundamental rights of the common man and the citizen but also against the spirit of the Noise Pollution (Regulation and Control) Rules, 2000. In that, Section 13 of the Adhiniyam of 1985 exempts the control of use of loudspeakers during the festivals adumbrated under that Section. Thereby, it grants unfettered and untrammeled right in the hands of few religious fanatics so as to interfere with the rights of the residents in the locality to have noise free environment during festivals. Accordingly, it is asserted that that Section is *ultra vires* the Central Rules of 2000.

7. By amending this petition, the petitioner has specifically articulated grounds on which Section 13 of the Adhiniyam of 1985 should be declared *ultra vires* the Constitution as well as the Central Rules of 2000. The petitioner has accordingly prayed for the following reliefs:

> "I. to issue a writ of mandamus to respondents to restrict:-
>
> (a) installation of religious Pandals only to open areas/ exhibition grounds to eliminate traffic hazards and ease of control;
>
> (b) Decibel level of the sound systems in accordance with the schedule to the Noise Pollution (Regulation and Control) Rules, 2000. For ease of execution, it is prayed that use of horn type loudspeakers be banned and only box type speakers be allowed within Pandals subject to decibel levels prescribed by the aforementioned Central Rules of 2000.
>
> (c) Theft of electricity by Pandals, by making it mandatory to use Meters at the site earmarked. It is further prayed

that use of opulent decorative lamps be banned.

(d) Anti-social elements running the Pandals by placing each under the charge of elected representatives of Local Bodies, such as Municipal Councilors and Panchayat Members.

(e) This Honourable Court be pleased to declare section 13 of the M.P. Kolahal Adhiniyam, 1985 as *ultra vires* for violating the fundamental rights of the petitioner.

II. to grant any other relief as deemed fit and proper in the facts and circumstances of the case."

8. While adverting to the incalculable inconvenience, nuisance and obstruction caused to the public because of installation of *Puja Pandals,* the petitioner asserts that it is obligatory for the State Administration to regulate the same so as to ensure that *Pandals* are not installed in congested areas and further do not become the source for extortion from the public. Moreover, the *Puja Pandals* permitted by the Authorities should not be allowed to use free electricity and to cause loss to public exchequer. This can be ensured by providing disqualification for anti-social elements/history-sheeters from being member of *Pandal* Committees or to act as agents of the *Pandal* Committees. Instead, the Pandals should be permitted and must be under the complete control of the elected Representatives such as Municipal Councillors/ Corporators/ Panchayat Members etc. These persons should ensure that donation from public is not collected by way of intimidation, but, is purely voluntary.

9. During the pendency of this petition, Division Bench of this Court had granted interim relief vide order dated 01.07.2005, which reads, thus:

> "There shall be an interim direction to the respondents 1 to 4 to ensure that the following conditions are specified while granting permission/licence for erecting ***Pandals*** for any religious festivals or for marriage or other functions:
>
> (a) If loud-speakers are used, the noise levels by use of such loud-speakers (either horn type or box type) shall not exceed the limits prescribed in the Schedule to the Noise Pollution (Regulation and Control) Rules, 2000.

(b) No part of the ***Pandal*** shall be erected in a manner obstructing traffic. No part of the Road shall be closed for erecting ***Pandals***.

(c) A temporary connection with meter shall be taken for electricity supply to each ***Pandal***."

10. The respondents have filed return, which, however, is not to oppose the writ petition but to place on record steps taken by the Authorities in furtherance of the enactments requiring regulation of noise pollution. To wit, the circulars issued on 18.02.2005 and 24.11.2005 by the Chief Secretary to all the duty-holders for ensuring strict implementation and taking action against persons found to be violating the provisions of the Adhiniyam of 1985. The same have been placed on record.

11. The Pollution Control Board has filed a separate return and has adverted to the relevant provisions concerning the prohibition of noise pollution and the mechanism for dealing with the complaints in that regard. It is stated that the Pollution Control Board has no authority to take any action against the person/Institution/Society/Association responsible for installation of Pandals and causing noise pollution. It is for the other Authorities such as District Magistrate, Police Commissioner or any other Officer designated for that purpose to ensure proper maintenance of ambient quality in respect of the noise levels under the concerned Rules.

12. The Electricity Board in its return has stated that the Board is not providing any free electricity to Pandals installed with or without permission. Any person interested in installing Pandal, even for a short duration, is required to apply for temporary connection to the Electricity Board through its Committee and pay for the actual electricity consumed during such period as per the meter reading.

13. During the course of argument, counsel appearing for the respective parties have more or less reiterated the stand taken in the petition/affidavit, as filed.

14. Regarding the issue of noise pollution due to loudspeakers or public address system and its impact on the basic human rights and the fundamental rights guaranteed by the Constitution of India to the persons in the neighbourhood and captive listeners, has been lucidly expounded in the decision of *Noise Pollution (V), in RE with Forum, Prevention of Environmental*

& Sound Pollution v. Union of India and Another[4]. It may be apposite to refer to the directions issued by the Apex Court in the case of *Noise Pollution (V), in RE* (supra).

"XII. Directions

It is hereby directed as under:-

(i) Firecrackers

174. (1). On a comparison of the two systems i.e. the present system of evaluating firecrackers on the basis of noise levels, and the other where the firecrackers shall be evaluated on the basis of chemical composition, we feel that the latter method is more practical and workable in Indian circumstances. It shall be followed unless and until replaced by a better system.

2. The Department of Explosives (DOE) shall undertake necessary research activity for the purpose and come out with the chemical formulae for each type or category or class of firecrackers. The DOE shall specify the proportion/ composition as well as the maximum permissible weight of every chemical used in manufacturing firecrackers.

3. The Department of Explosives may divide the firecrackers into two categories-. (i) sound-emitting firecrackers, and (ii) colour/light-emitting firecrackers.

4. There shall be a complete ban on bursting sound-emitting firecrackers between 10 p.m. and 6 a.m. It is not necessary to impose restrictions as to time on bursting of colour/light-emitting firecrackers.

5. Every manufacturer shall on the box of each firecracker mention details of its chemical contents and that it satisfies the requirement as laid down by DOE. In case of a failure on the part of the manufacturer to mention the details or in cases where the contents of the box do not match the chemical formulae as stated on the box, the manufacturer may be held liable.

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4. (2005) 5 SCC 733

6. Firecrackers for the purpose of export may be manufactured bearing higher noise levels subject to the following conditions: (i) the manufacturer should be permitted to do so only when he has an export order with him and not otherwise; (ii) the noise levels for these firecrackers should conform to the noise standards prescribed in the country to which they are intended to be exported as per the export order; (iii) these firecrackers should have a different colour packing, from those intended to be sold in India; (iv) they must carry a declaration printed thereon something like "not for sale in India" or "only for export to country AB" and so on.

(ii). Loudspeakers

175. 1. The noise level at the boundary of the public place, where loudspeaker or public address system or any other noise source is being used shall not exceed 10 dB(A) above the ambient noise standards for the area or 75 dB(A) whichever is lower.

2. No one shall beat a drum or tom-tom or blow a trumpet or beat or sound any instrument or use any sound amplifier at night (between 10 p.m. and 6 a.m.) except in public emergencies.

3. The peripheral noise level of privately owned sound system shall not exceed by more than 5 dB(A) than the ambient air quality standard specified for the area in which it is used, at the boundary of the private place.

(iii) Vehicular Noise

176. No horn should be allowed to be used at night (between 10 p.m. and 6 a.m.) in residential areas except in exceptional circumstances.

(iv) Awareness

177. 1. There is a need for creating general awareness towards the hazardous effects of noise pollution. Suitable chapters may be added in the text-books which teach civic

sense to the children and youth at the initial/early-level of education. Special talks and lectures be organised in the schools to highlight the menace of noise pollution and the role of the children and younger generation in preventing it. Police and civic administration should be trained to understand the various methods to curb the problem and also the laws on the subject.

2. The State must play an active role in this process. Residents Welfare Associations, Service Clubs and societies engaged in preventing noise pollution as a part of their projects need to be encouraged and actively involved by the local administration.

3. Special public awareness campaigns in anticipation of festivals, events and ceremonial occasions whereat firecrackers are likely to be used, need to be carried out.

The abovesaid guidelines are issued in exercise of power conferred on this Court under Articles 141 and 142 of the Constitution. These would remain in force until modified by this Court or superseded by an appropriate legislation.

(v) Generally

178. 1. The States shall make provision for seizure and confiscation of loudspeakers, amplifiers and such other equipments as are found to be creating noise beyond the permissible limits.

2. Rule 3 of the Noise Pollution (Regulation and Control) Rules, 2000 makes provision for specifying ambient air-quality standards in respect of noise for different areas/zones, categorization of the areas for the purpose of implementation of noise standards, authorizing the authorities for enforcement and achievement of laid down standards. The Central Government/State Governments shall take steps for laying down such standards and notifying the authorities where it has not already been done."

(emphasis supplied)

In the subsequent order passed by the same Bench on 3rd October, 2005, in *Noise Pollution (VI), in RE*[5], noticing that Rule 5, as amended, continues to remain in operation but the State Governments were feeling difficulty in enforcing the Rule and also exercise of power conferred under Sub-Rule (3) of Rule 5 of the Central Rules of 2000 to that extent the matter was reopened.

15. In the recent decision, the Apex Court in *Farhd K. Wadia v. Union of India and Others*[6] dealt with the question about the exemption from restriction on the use of loud-speakers and whether such exemption can apply to silence zone/areas. It will useful to reproduce relevant extract from this decision – which answers the main issue raised even in this petition. The same reads thus :-

> "21. Contention that the State Government has not declared the said zone as a silence zone, in our opinion, is besides the point. The High Court, while passing its interim order dated 25.09.2003, did not state that silence zone was required to be declared, but passed the order of restraint in respect of silence zone, as "defined and discussed in the Rules". The parties thereto and particularly the State of Maharashtra understood the said order in that light.
>
> 22. Interference by the court in respect of noise pollution is premised on the basis that a citizen has certain rights being "necessity of silence", "necessity of sleep", "process during sleep" and "rest", which are biological necessities and essential for health. Silence is considered to be golden. It is considered to be one of the human rights as noise is injurious to human health which is required to be preserved at any cost. [See *Noise Pollution, Laws & Remedies by Justice Bhagabati Prosad Banerjee]*
>
> 23. The Calcutta High Court in several judgments and in particular in *Om Birangana Religious Society v. State* (1996) 100 CWN 617) issued various directions, some of them being:
>
> "(a) There will be complete ban on the use of horn type loud-

5. (2005) 8 SCC 794
6. (2009) 2 SCC 442

speakers within city residential areas and also prohibit the use of playback of pre-recorded music etc. through such horn type loud- speakers unless used with sound limiter.

(b) In cultural functions which are live functions, use of such pre-recorded music should not be used excepting for the purpose of announcement and/or actual performance and placement of speaker boxes should be restricted within the area of performance facing the audience. No sound generating devise should be placed outside the main area of performance.

(c) Cultural programmes in open air may be held excepting at least before three days of holding Board/Council Examinations to till examinations are completed in residential areas or areas where educational institutions are situated.

(d) The distance of holding such functions from the silence zones should be 100 meters and in so far as schools, colleges, universities, Courts are concerned, it will be treated as silence zones till the end of the office hours and/or the teaching hours. Hospitals and some renowned and important Nursing Homes will be treated as silence zones round the clock."

[See Noise Pollution, Laws & Remedies by Justice Bhagabati Prosad Banerjee, pages 327-328]

24. This Court has also taken suo motu cognizance as regards noise pollution. It passed various orders from time to time in Noise Pollution (I), In re-[(2005) 5 SCC 727], Noise Pollution (II), In re -[(2005) 5 SCC 728], Noise Pollution (III), In re [(2005) 5 SCC 730], Noise Pollution (IV), In re-[(2005) 5 SCC 731]. A detailed judgment was rendered by a Division Bench of this Court in the said writ petition, which has since been reported in Noise Pollution (II), In re-[(2005) 5 SCC 733]. Several guidelines had been issued therein by this Court in exercise of its jurisdiction under Articles 141 and 142 of the Constitution of India. Therein, the decision of the Calcutta High Court in *Om Birangana Religious Society v. State* [(1996) 100 CWN 617] has been taken note of. As regards loudspeakers and amplifiers, it was directed: [Noise Pollution

(V) case – (2005) 5 SCC 733), SCC p. 781, para 171]

> *"171.* Loudspeakers and amplifiers or other equipment or gadgets which produce offending noise once detected as violating the law, should be liable to be seized and confiscated by making provision in the law in that behalf."

25. The matter again came up before this Court and an order passed therein has been reported in *Noise Pollution (VII), In re-* [(2005) 8 SCC 796]. The validity of the statutory rules framed by the Central Government and in particular Rule 5 amended by notification bearing No. S.O. 1088 (E) dated 11.10.2002 was taken note of. The decision rendered by this Court in *Noise Pollution (V),* In re was clarified. This Court noticed that the constitutional validity of sub-rule (3) of Rule 5 of the Rules had been upheld by the Kerala High Court by an order dated 14.03.2003 whereagainst an appeal was filed. The hearing of the civil appeal was, therefore, directed to be reopened. An interim order was passed that until further orders, Rule 5 of the Rules, as reproduced therein, would continue to remain in operation. The said appeal was thereafter taken up for hearing by a Bench of this Court. It was disposed of on 28.10.2005. This Court held that the Rules framed by the Central Government were not unreasonable, stating: [Noise Pollution (VII) case, SCC pp. 800-01, para 8].

> "8.....The power to grant exemption is conferred on the State Government. It cannot be further delegated. The power shall be exercised by reference to the State as a unit and not by reference to districts, so as to specify different dates for different districts. It can be reasonably expected that the State Government would exercise the power with due care and caution and in the public interest. However, we make it clear that the scope of the exemption cannot be widened either by increasing the number of days or by increasing the duration beyond two hours. If that is attempted to be done, then the said sub-rule (3) conferring power to

grant exemption may be liable to be struck down as violative of Articles 14 and 21 of the Constitution. We also make it clear that the State Government should generally specify in advance, the number and particulars of the days on which such exemption will be operative. Such specification would exclude arbitrariness in the exercise of power. *The exemption, when granted, shall not apply to silence zone areas.* This is only as a clarification as, this even otherwise is the position of law.

(emphasis supplied)

26. The State Government is bound also by the order of this Court besides the order passed by the High Court. If any order of relaxation and/or modification is required to be passed, it is only to be passed by this Court and the Bombay High Court in the aforementioned two writ petitions. A separate writ petition, in our opinion, thus, was not maintainable."

(emphasis supplied)

16. Considering the exposition of the Apex Court in the aforesaid decisions, it is unnecessary to underscore the imperativeness of regulating noise pollution and the obligation of the concerned Authorities to ensure strict compliance of the restrictions prescribed for noise levels.

17. Thus, prayer clause 7(b) need not detain us. We have no hesitation in accepting the said relief to the extent of the legal exposition in the aforesaid decisions and following that we direct the concerned Authorities to ensure strict compliance of the restrictions and to take all precautionary measures to prohibit violation of any of the provisions of the Central Legislation, Central Rules or State Regulations on the subject.

18. However, in the context of relief in prayer clause 7(e), we may have to consider the question: as to whether the provisions of the Adhiniyam of 1985 are *ultra vires* the Constitution and/or the Central enactment on the subject and, in particular, the Central Rules of 2000? Going by the principles restated by the Apex Court in the aforesaid decisions, right to make unregulated noise inheres in no one. Rather, there are ample provisions in the Central Legislation as well as the Rules framed thereunder and including the Adhiniyam of 1985,

which provide for restriction on the use of amplifiers and other electronic devices to the extent of permissible limits. It must be presumed that the noise level upto those limits are within the tolerable limits and therefore, permissible. If the noise limit specified by law is exceeded or breached, that would be an actionable cause.

19. Reverting to the moot question, we deem it apposite to reproduce the provision in the Adhiniyam regarding exemption. The same reads, thus:

> **"13. Provisions.** – (1) Nothing in this Act shall apply to,-
>
> (i) the occasions of National and Social functions and religious Festivals mentioned below:-
>
> 1. Republic Day (26th January);
> 2. Basant Panchami;
> 3. Maha Shivratri;
> 4. Holi and Rangpanchami;
> 5. Guripadhva;
> 6. Chaitti Chand;
> 7. Ramnawami;
> 8. Baishakhi;
> 9. Mahavir Jayanti;
> 10. Dr. Ambedkar Jayanti;
> 11. Buddha Poornima;
> 12. Nagpanchami;
> 13. Id-ul-Fiter;
> 14. Rakshabandhan;
> 15. Independence Day (15th August);
> 16. Shri Krishna Janmashtami;
> 17. Ganesh Chaturthi to Anant Choudas;
> 18. Sarva Pitrimiksha Amavasya;
> 19. Gandhi Jayanti (2nd October);
> 20. Durga Padhva to Dashahara;

21. Deepavali;
22. Bhai Dooj;
23. Guru Nanak Jayanti;
24. Milad-un-nabi;
25. Guru Ghasidas Jayanti;
26. Christmas Day;
27. Moharrum from 1 to 10;
28. Id-uz-Zuha;
29. Good Friday; and

(ii) the use of loud speaker at any religious place or premises where it is being made as a tradition.

(2) The prescribed authority may, on application in writing made to him, grant exemption from the provisions of sections 4, 5, 6 and 7 for such period, as such occasions and in such areas as may be specified in the permission."

20. We may now advert to the provisions in the Central Rules of 2000. The said Rules were framed in exercise of powers under the enabling provisions in the Environment (Protection) Act, 1986 read with Environment (Protection) Rules, 1986 by the Central Government, titled as the Noise Pollution (Regulation and Control) Rules, 2000. The same have come into force on the date of publication in the Official Gazette on 11.02.2000 and amended in the same year by Amended Rules (on 22.11.2000) and further amended in 2010 (on 11.01.2010).

21. Rule 3 of the Central Rules of 2000 specifies the ambient air quality standards in respect of noise for different areas/zones. The same reads, thus:

"3.AMBIENT AIR QUALITY STANDARDS IN RESPECT OF NOISE FOR DIFFERENT AREAS/ ZONES:-

(1) The ambient air quality standards in respect of Noise for different areas/zones shall be such as specified in the Schedule annexed to these rules.

(2) The State Government shall categorize the areas into

industrial, commercial, residential or silence areas/zones for the purpose of implementation of noise standards for different areas.

(3) The State Government shall take measures for abatement of noise including noise emanating from vehicular movements, (blowing of horns, bursting of sound emitting free crackers, use of loud speakers or public address system and sound producing instruments) and ensure that the existing noise levels do not exceed the ambient air quality standards specified under these rules.

(4) All development authorities, local bodies and other concerned authorities while planning developmental activity or carrying out functions relating to town and country planning shall take into consideration all aspects of noise pollution as a parameter of quality of life to avoid noise menace and to achieve the objective of maintaining the ambient air quality standards in respect of noise.

(5) An area comprising not less than 100 meters around hospitals, educational institutions and courts may be declared as silence area/zone for the purpose of these rules."

(emphasis supplied)

Rule 4 of the Central Noise Pollution Rules of 2000 imposes responsibility on the stated Authority to enforce noise pollution control measures within the limits of the ambient air quality standards, as specified in the schedule. The Schedule specifies limits Area/Zone wise, during the day time and night time. The "day time" has been specified from 6.00 A.M. to 10.00 P.M and "night time" as 10.00 P.M. to 6.00 A.M. Rule 5 provides for restrictions on the use of loud speakers/public address system and sound producing instruments. The same reads, thus:

"5. RESTRICTIONS ON THE USE OF LOUD SPEAKERS/PUBLIC ADDRESS SYSTEM AND SOUND PRODUCING INSTRUMENTS:-

(1) A loud speaker or a public address system shall not be used except after obtaining written permission from the

authority.

(2) A loud speaker or a public address system or any sound producing instrument or a musical instrument or a sound amplifier shall not be used at night time except in closed premises for communication within, like auditoria, conference rooms, community halls, banquet halls or during a public emergency.

(3) Notwithstanding anything contained in sub-rule (2), the State Government may subject to such terms and conditions as are necessary to reduce noise pollution, permit use of loud speakers or [public address systems and the like during night hours] (between 10.00 p.m. to 12.00 midnight) on or during any cultural or religious festive occasion of a limited duration not exceeding fifteen days in all during a calendar year.] [The concerned State Government shall generally specify in advance, the number and particulars of the days on which such exemption would be operative].

(4) The noise level at the boundary of the public place, where loudspeaker or public address system or any other noise source is being used shall not exceed 10 dB(A) above the ambient noise standards for the area or 75 dB(A) whichever is lower.

(5) The peripheral noise level of a privately owned sound system or a sound producing instrument shall not, at the boundary of the private place, exceed by more than 5 dB(A) the ambient noise standards specified for the area in which it is used."

(emphasis supplied)

22. As the argument is confined to the noise pollution caused on account of loud speakers and public address system used during the religious and social gatherings, we may not burden the judgment with the other provisions in the Rules of 2000.

23. Be that as it may, the validity of Section 13 of the Adhiniyam of 1985 will have to be tested in the context of Rule 5 of the Central Noise Pollution Rules of 2000. No doubt, the Central Noise Pollution Rules of 2000 have

come into force much after the Adhiniyam of 1985 was introduced. At the same time, being Central Rules framed under the Central enactment, will have to prevail. Indisputably, the entire subject regarding the use of loudspeakers and public address system and sound producing instruments is now regulated by Rule 5 of the Central Rules of 2000. Besides the time limits for use of such devices is specified in Rule 5, even the sound level generated by the loud speakers/public address system and sound producing instrument has been restricted.

24. The only relaxation in that behalf can be noticed from Sub-Rule (3) of Rule 5 of Central Rules of 2000 subject to the outer limit of duration not exceeding 15 days in all "during a calendar year" and which the State Government is obliged to specify in advance. In *Noise Pollution (VII) case*[7] the Apex Court in para 8 has expounded that the power to grant exemption confered on the State Government cannot be further delegated. That power must be exercised by reference to the State as a unit and not by reference to districts, so as to specify different dates for different districts. Further, the power must be exercised with due care and caution in the public interest and that it is not open to widen the exemption by increasing the number of days or by increasing the duration beyond two hours. The State Government, must specify the exemption in advance. In any case, no exemption can be granted to silence zone areas.

25. The exemption to use of loud speakers or public address system and the like during night hours between 10.00 P.M. to 12.00 midnight on or during any cultural or religious festival, must, therefore, be limited to 15 days in all "during a calendar year". Whereas, Section 13(1) of the Adhiniyam of 1985 refers to 29 days in a calendar year for social and religious festivals; and at any religious place or premises where it is being made as a tradition. The exemption so provided in the Adhiniyam of 1985 is *ex facie* in conflict with the outer limit specified by Sub-Rule (3) of Rule 5 of the Central Noise Pollution Rules of 2000. To that extent, Sub-section (1) of Section 13 of the Adhiniyam of 1985 will have to be declared as *ultra vires* being repugnant to the Central Noise Pollution Rules of 2000 on the same subject. We are concious of the fact that the opening part of Sub-section (1) of Section 13 of the Adhiniyam of 1985 overrides only the provisions contained in that Adhiniyam. However, the number of days referred to in Section 13 (1) (i) and (ii), far exceed the

7. (2005) 8 SCC 796

outer limit of in all fifteen days during a calendar year specified by Rule 5 (3) of the Central Rules. It is not open to save the said provision by an interpretative process. To do so, would require us not only to rewrite that provision but inevitably preempt the State Government from identifying the fifteen days in a calendar year, which, according to the State Government, can be reckoned for granting stated exemption. As observed by the Apex Court in *Noise Pollution (VII)* (supra), the power has to be exercised by reference to State as a unit and not by reference to districts.

26. Indeed, Sub-section (2) of Section 13 of the Adhiniyam of 1985 gives power to the prescribed Authority to grant exemption from the provisions of Section 4 to 7 for such period, occasions and in such areas, as may be specified in the permission. However, that exemption cannot be de hors the restriction specified by Rule 3 read with Rule 5 of the Central Noise Pollution Rules of 2000. Any infringement of those restrictions or non-adherence by the Authority must be viewed seriously – not only as violation of statutory restrictions but as abridgement of basic human rights and also the Fundamental Rights of the residents in the concerned locality. It can also give rise to an actionable claim against the law breakers as also against the officials of the State for having failed to discharge their duty to stop the public nuisance caused, by resorting to civil as well as criminal action. In addition, the officials responsible to prevent such unauthorized activity, can be proceeded by way of departmental action for misconduct and dereliction of duty.

27. Since the substantive exemption provision, Section 13 (1) as a whole, cannot be preserved or saved, for the same reasons, even the procedural provision in the form of Section 13 (2) of the Adhiniyam cannot be saved. For, the exemption must be by reference to the State as a unit and not left to the discretion of the prescribed Authority by reference to districts. For that, the State Government may have to specify in advance, which of the fifteen days in a calendar year must be reckoned for grant of exemption, at the beginning of the calendar year for the entire State. A priori, the petition must succeed in terms of prayer Clause I (e) – to declare Section 13 of the Adhiniyam as *ultra vires*.

28. Indubitably, sound producing devices having potential to produce sound noise in excess of the limit specified in Rule 3 read with Rule 5 of the Central Rules cannot be used by anyone unilaterally. Prior permission in writing of the appropriate Authority is a must - even on the excepted days. Section 4 of the

Adhiniyam of 1985 prohibits production of loud music between 10.00 P.M. to 6.00 A.M., which timing is consistent with the night time specified in the Schedule to Central Noise Pollution Rules of 2000. Section 5 of the Adhiniyam of 1985 also provides for restriction against the use of loud speakers between 10.00 P.M. to 6.00 A.M., which again is consistent with the Central Rules. Section 6 of the Adhiniyam of 1985 provides for restrictions on the use of horn-type loud speaker and Section 7 about the operation of loud speaker. None of these provisions are in conflict with the timing, place or the noise limits specified in the Central enactment and Rules framed thereunder.

29. As regards the use of loudspeakers at any religious place or premises where it is being used as a tradition, the sound level restrictions provided under the Central Legislation will have to be adhered to without any exception. The noise level at the boundary of the public place, where loud speakers or public address system or any other noise source is being used, has been specified as not exceeding 10 dB(A) above the ambient noise standards for the area or 75 dB(A), whichever is lower. Whereas, the peripheral noise level of a privately owned sound producing system or instrument has been specified as not exceeding more than 5 dB(A) at the boundary of the private place above the ambient noise standards specified for the area in which it is so used. The State Authorities are, therefore, obliged to adhere to these norms without any exception in future. The Commissioner of Police/Superintendent of Police and the Collector of the concerned District shall be personally responsible to regulate these matters. The State Authorities, however, shall not grant permission/licence for use of sound producing instruments beyond the permissible limits and also ensure that any violation of the Central Rules of 2000 should be proceeded strictly and in accordance with law.

30. Notably, the legal position about the right to use of sound producing system for religious activities has already been considered by the Apex Court in the case of *Church of God (Full Gospel) in India* (supra). It is held that no religion prescribes that the prayers are required to be performed through voice amplifiers and by beating of drums. This judgment also addresses the issue about causing of obstructions to public thoroughfare and public roads for any religious activities.

31. That takes us to the issue regarding traffic hazards caused due to permitting *Pandals* on busy streets during the festival season, in particular. As aforesaid, the issue has been dealt with by the Apex Court in the case of

Church of God (Full Gospel) in India (supra) and also in *A. Abdul Farook Vs. Municipal Council, Perambalur and others*[8] as well as *K. K. Road Merchants, E.A.R.W.A., T.N. Vs. District Collector, T. N. And another*[9]. We may, therefore, observe that the officials – be it Police, Revenue, Municipal or Local Government Authorities – must entertain application/request for installation of *Pandals* on public streets not only keeping in mind the statutory provisions and restrictions but also the dictum of the Apex Court in the aforesaid decisions. Thus, when any application for permission to put up a *Pandal* on a busy street is received, that must be considered with utmost circumspection and should not be granted mechanically. The competent Authority, before granting permission, must keep in mind the extant Regulations and must consider all aspects including the period for which the *Pandal* will be put up, the likelihood of any inconvenience to public and in particular obstruction to smooth traffic flow and also about the security and safety of the nearby residents, pedestrians and vehicle operators. The competent Authority must be fully satisfied about all these and related matters before accepting the request for installation of *Pandal* on a busy street. It would be appropriate for the competent Authority to notify the locations for putting up *Pandals* on public places in advance, by issuing public notice. In the event, grant of permission for any other public place or a busy public street is unavoidable, utmost care should be taken to adhere to the restrictions specified under the extant Regulations. In any case, that permission should be for a limited duration on strict conditions and including under vigilance of the local police so as to minimize the inconvenience to the public. As far as possible, such permission should be granted well in advance, preferably not less than one week in advance of the proposed event. In addition, sufficient publicity of permission granted in area other than the notified area must be put up on the official website contemporaneously, so that any person, aggrieved by such permission, will be free to take recourse to remedy, as may be permissible in law. In those proceedings the justness of such permission can be examined.

32. Be that as it may, if any Authority (duty holder) comes across any unauthorised *Pandal* on a busy street, must immediately move into action and remove the same by following due process forthwith – lest face action of dereliction of duty.

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8. (2009) 15 SCC 351
9. (2004) 13 SCC 61

33. Reverting to the grievance of theft of electricity with impunity for lighting and decoration in the *Pandals* permitted by the Authorities and which results in loss to public exchequer, the Electricity Board in its return has denied of any such incidents within its knowledge. The Electricity Board in its return has asserted that when permission to install *Pandal* is given, contemporaneously, application for temporary electricity connection is made to the Electricity Board through the Committee Members and that request is accepted on condition of installation of temporary meter for the relevant period. In that case, the Committee will be obliged to pay the actual electricity consumed during the relevant period as per the meter reading. However, if any specific instance of noninstallation of temporary meter or tampering of the temporary meter or otherwise comes to the notice of the officials of the Electricity Board, immediate action of disconnecting the illegal connection should be resorted to. In addition to that, the officials of Electricity Board must not only recover the loss suffered due to such illegal connection but also register criminal action against the members of the Committee for drawing electricity without proper electricity connection given by the Electricity Board and take those proceedings to its logical end.

34. The relief claimed by the petitioner to direct the respondents to make the elected representatives of local bodies in-charge of the *Pandals*, which are permitted by the competent Authority, in our opinion, cannot be coutenanced. For, it would tantamount to interference with the rights of the registered Society to administer its own affairs within the frame work of the concerned Regulations. The autonomy of registered Societies or the rights of Association of persons cannot be interfered with, in absence of any reasonable restriction imposed by a law made by the legislature in that behalf. It is, however, open for the duty-holders to form a joint broad based Committee to act as a watchdog for enforcement of the Environmental laws in which the elected representatives can play a significant role. Besides this, we do not wish to dilate any further on this issue and make it amply clear that we may not be understood to have expressed any final opinion in that behalf. In fact, this relief was not seriously pressed during the arguments advanced before us and the arguments essentially were to persuade the Court to strike down Section 13 of the Adhiniyam of 1985 as *ultra vires*.

35. We may also observe that if violation of noise levels is brought to the notice of the police, Revenue or Municipal Authorities, they must report that matter to the Electricity Board with recommendation to disconnect the

electricity connection forthwith. In any case, all the duty-holders must work in tandem to ensure that the nuisance caused on account of such noise pollution or because of theft of electricity is not ignored, but proceeded against the members of the Committee individually and vicariously in accordance with law - for recovery of damages /compensation for such unauthorized activity, in addition to criminal action.

36. As regards the grievance of petitioner regarding extortion and intimidation of public by unscrupulous elements in the name of donation for the *Pandals*, even that is a matter which must be brought to the notice of the local administration – be it police or Revenue or Municipal officials, who in turn must take immediate corrective action to redress such complaints. It may be desirable for all the duty-holders to provide for one common telephone helpline to ensure immediate response for redressal of such complaints or receiving online complaint and to deal with such complaints in accordance with law including by registration of criminal action against the persons indulging in such unauthorized activity of intimidating the public to force them to donate involuntarily for the installation of *Pandals* for arranging functions.

37. Our attention was invited to the order passed by the National Green Tribunal, Central Zonal Bench, Bhopal in *Neel Choudhary vs. State of M.P. and others*[10]. This order has adverted to the directions given by the Principal Bench of NGT at New Delhi in its judgment of Supreme Court *Group Housing Society vs. All India Panchayat Parishad and others* decided on 18th December, 2012. Paragraph 9 of the said decision, reads, thus:

> "In compliance with our directions, it appears a detailed Action Plan has been prepared in the meeting conveyed by the Divisional Commissioner, Delhi, the decisions taken, modalities adopted and duties assigned to various departments which attended the meeting. On perusal of this Action Plan, we feel that by and large it should be able to reduce/mitigate noise pollution. However, to make it more effective, few modifications have been suggested by us and modified Action Plan is placed below: -
>
> (a) To establish and run a call centre where the complaints

10. M.A.No.168/2013 & M.A. No.169/2013 (CZ) in O.A. No.18/2013 decided on 21.2.2014.

related to noise pollution can be lodged 24 x 7 hours by the citizen.

(b) To draw a detailed action plan/standard operating procedure (SOP) regarding control of noise pollution in industrial, hospitals and educational/ institutional areas including monitoring mechanism and surveillance system.

(c) To draw a detailed action plan / standard operating procedure (SOP) to implement ban or use of generator sets of capacity of 5 KVA and above in the residential area between 10 p.m. to 6 a.m.

(d) To examine and issue notification regarding inclusion of provisions for compounding of offences of noise pollution.

(e) To examine in details the requirement of use of decibel meters and to prepare a detailed standard operating procedure in this respect including maintenance and upkeep of sound decibel meters.

(ii) **Actions to be taken by Transport Department: -**

(a) Inclusion of status of pressure horn in the vehicle at the level of issuing pollution control certificate.

(b) To issue notifications with respect to increase of fine amount, ban on manufacturing / distribution / sale of pressure horn and ban on modification of vehicular silencers in the NCT of Delhi.

(c) To check and prohibit the entry of heavy vehicles fitted with pressure horn and to arrange for awareness in the form of pamphlets / slips etc. in association with DCs and Traffic Police.

(d) To conduct Information Education and Communication (IEC) programmes in association with Education Department and the DCs.

(iii) **Actions to be taken by the Traffic Police:-**

(a) Mandatory Challan and prosecutions of noise polluting vehicles

(b) Strict implementation of the acts/ rules/directions.

(iv) **Actions to be taken by the Delhi Police: -**

(a) The complaints so forwarded by the call centre be attended immediately by the Area SHO and confiscation and seizure of the amplifiers and other noise pollutants. Production of the case before the area SDM within 24 hours of such seizure.

(b) To assist the area SDM in survey of the religious places causing noise pollution and provide necessary infrastructure to remove noise causing instruments and gadgets.

(c) To provide full support to the executing agencies as and when required.

(v) **Action to be taken by the Office of the Deputy Commissioner:-**

(a) SDMs to hear the cases and file prosecutions.

(b) SDMs to complete survey of religious places causing noise pollution and take steps to remove such installations.

(c) DCs to chalk out modalities in consultation with Transport Department for checking the vehicles fitted with pressure horn at the borders of Delhi with neighbouring states.

(d) To conduct Information Education and Communication (IEC) programmes in association with Education Department and the Transport Department.

(iv) **Actions to be taken by the Education Department, GNCT of Delhi:-**

(a) To incorporate education materials in the curriculum

of the schools with respect to control of noise pollution.

(b) To organize the IEC activities amongst the students and youth in consultation with the DCs."

We direct the respondents to "additionally" follow these norms which may go a long way to assuage the complaints about noise pollution caused on account of use of sound producing instruments and vehicle pressure horns.

38. While parting, we appreciate the initiative taken by the petitioner for bringing the cause of noise pollution to the fore by filing this PIL. We also appreciate the able assistance given by the counsel appearing for the parties and not treating it as an adverserial proceedings.

39. We, accordingly, dispose of this petition with the above observations.

Petition disposed of.

I.L.R. [2015] M.P., 1311
WRIT PETITION
Before Ms. Justice Vandana Kasrekar
W.P. No. 8663/2012 (Jabalpur) decided on 27 February, 2015

ROOP SINGH BHIL ...Petitioner
Vs.
STATE OF M.P. ...Respondent

***Service Law - Adverse confidential remarks - Communication* - ACRs. were communicated after a period of three months - ACRs quashed - Adverse remarks directed to be expunged - Respondents directed to convene review DPC - Petition allowed. (Paras 6 to 9)**

सेवा विधि – प्रतिकूल गोपनीय टिप्पणियां – संसूचना – वार्षिक गोपनीय प्रतिवेदनों को तीन माह की अवधि के पश्चात् संसूचित किया गया – वार्षिक गोपनीय प्रतिवेदन अभिखंडित – प्रतिकूल टिप्पणियां निकाल देने के लिये निदेशित किया गया – प्रतिवादीगण को पुनर्विलोकन विभागीय पदोन्नति समिति बुलाने के लिये निदेशित किया गया – याचिका मंजूर।

Cases referred :

2012 (4) MPHT 19, 2005 (3) MPLJ 313.

D.K. Dixit, for the petitioner.
Piyush Jain, P.L. for the respondent nos. 1 & 2.

Rajendra Gupta, for the respondent no.3.

ORDER

Ms. Vandana Kasrekar, J. :- The petitioner was appointed as an Assistant Engineer on 01/01/1986 and was posted at Shivpuri. The petitioner was thereafter promoted to the post of Executive Engineer in the year 2001 and was posted at Jhabua. He was again promoted to the post of Superintending Engineer vide order dated 14/7/2006 and was posted on deputation with the Narmada Valley Development Authority at Indore. Respondent No.1 issued a seniority list of the Superintending Engineers (Civil) wherein the name of the petitioner is at serial No.44 and the names of respondents No.3 and 4 are at serial No. 45 and 47, however, the respondents No.3 and 4 are the juniors to the petitioner.

2. The petitioner thereafter was repatriated to his parental department from N.V.D.A., however, all of sudden, he was served with the adverse remark to his annual confidential report for the period from 01.01.2009 to 31/03/2009 vide letter dated 18/3/2011. Again the petitioner was served with adverse remark to his ACR for the year ending March, 2010 vide letter dated 29/3/2011, the petitioner, therefore, submitted an application for grant him some time, as he has applied for the necessary documents vide his letter dated 13/4/2011 which was granted to him vide letter dated 3/5/2011. The petitioner thereafter submitted his representation against the said ACRs on 26/5/2011. The representation submitted by the petitioner was rejected vide order dated 2/3/2012. In the meanwhile, DPC was held and respondents No.3 and 4 were promoted to the post of Chief Engineer, however, the case of the petitioner was not considered for promotion due to the said adverse remarks.

3. Learned counsel for the petitioner submits that as per the circular issued by the State Government dated 29/11/1984, the adverse ACRs are required to be communicated within a period of three months. If the ACRs are communicated after the period of three months, the same will be treated as *nonest*. He submits that in the present case, ACR of the year 2009 was communicated to the petitioner in the year 2010 and the ACR of the year 2010 was communicated to him in the year 2011 i.e. after expiry of period of three months. He further submits that the order dated 2/3/2012 by which the respondents have rejected the representation submitted by the petitioner against his adverse ACRs is also non-speaking order and deserves to be set aside. He, therefore, prays that these ACRs may be expunged and the respondents

may be directed to consider his case for promotion along with his juniors. For the said purpose, learned counsel for the petitioner has relied upon the two judgments passed by this Court in the case of *Rajesh Kumar Saxena Vs. State of M.P. & another,* reported in 2012(4) MPHT 19 and *Ramesh Kumar Rusia Vs. State of M.P.and others,* reported in 2005(3) MPLJ 313.

4. Learned Panel Lawyer for respondents No.1 and 2 submits that respondents No.1 and 2 have filed their reply and stated that after obtaining the report from the assessing authority, the remarks were communicated to the petitioner. He further submits that the integrity of the petitioner was doubted and, therefore, comments of Shri R.S. Julania, Member (Rehabilitation), NVDA were called for and on the basis of the comments of Shri R.S. Julania, the representation of the petitioner has been rejected. It is also contended that the allegation of consumption of liquor on duty hours, a departmental enquiry is proposed to be held against him. Initiating authority, despite observing the careless attitude and conduct of the petitioner did not mention anything while initiating the ACRs with his comments, however, the assessing authority has made specific remarks that the assessment of the petitioner mentioned by the initiating authority are not based upon the facts whereas the petitioner is habitual drinker. Accordingly, a remark of "Below Average (Gha)" was awarded in the ACR of the year 2009. Learned Panel Lawyer further submits that looking to the service record of the petitioner, these ACRs were communicated to him and his representation is rejected by taking into consideration of all the facts and, thus, no illegality is committed by the respondents in rejection the representation submitted by the petitioner.

5. The petitioner has also filed rejoinder denying the allegations made by the respondents in their reply. Respondents No.3 and 4 have also filed their reply stating that they have rightly been promoted to the higher post and, therefore, their promotion be upheld.

6. I have heard learned counsel for the parties and perused the record. As per circular issued by the State Government, the respondents are required to communicate the ACRs within a period of three months. The object of writing the confidential reports and making entries in them is to give an opportunity to a public servant to improve excellence. Article 51-A(j) enjoins upon every citizen the primary duty to constantly endeavour to prove excellence, individually and collectively, as a member of the group. Given an opportunity, the individual employee strives to improve excellence and thereby

efficiency of administration would be augmented and if the ACRs are communicated at the belated stage, then the object of communicating the ACRs will be frustrated. From perusal of the record, it appears that the ACRs from 01/01/2009 to 31/03/2009 were communicated to the petitioner vide letter dated 18/3/2011 i.e. after a period of three months and the ACRs of March, 2010 were communicated to the petitioner vide letter dated 21/3/2011 i.e. also after a period of three months. The petitioner submitted a representation against the adverse remarks of the said ACRs which was dismissed vide order dated 2/3/2012 by a non-speaking order and without considering the grounds raised by the petitioner in his representation.

7. This Court in the case of *Rajesh Kumar Saxena* (supra) in para-6 has held as under :

> "6. The object of writing of Annual Confidential Report is well known in the service jurisprudence. The Confidential reports of an employee is to be written only for the purposes of adjudging his service abilities. If an employee of department, who was having the excellent service record or satisfactory service record, started showing downfall in performance or discharge of his duties, the entries are required to be made in the Annual Confidential Report. Such entries whether adverse or not, are required to be shown to the said employee to apprise him or her with respect to performance of duties so that he or she may improve the working in future. The object of recording of Annual Confidential Report would be frustrated in case it is not timely communicated. This being the reason, the State Government has issued the circular time and again directing as to how the adverse part of the Annual Confidential Reports are to be communicated, within which period the said communication is to be made and within which period the representation, if any made against such entry, is required to be decided. This has been reiterated in the circular dated 9th March, 1992, wherein all the circulars previously issued right from 1979 upto 1990 have been referred. The State Government has very categorically provided a time mechanism for writing of confidential report. The initiation of Annual Confidential Report is to be done by 15th April. The Reviewing Officer is required to give his comments by 1st of May. The

approving authority is required to record his comments by 15th May. If any adverse entry is recorded, the same is to be communicated within 30 days from the aforesaid final date mentioned in the circular. If any representation is made against the said adverse entry, the same is to be decided within a month. If any inquiry is required to be conducted with respect to the representation made against the adverse entry, that has to be completed within a period of three months. This indicates that intention of the State Government is to apprise the employee concerned against whom the adverse entry is recorded, with respect to such adverse entry and to complete the process of finalising the representation etc. made against such entry within the stipulated period so that nobody may face any prejudice or inconvenience in case of promotion. That being so, it was necessary on the part of the respondents to communicate the adverse entry to the petitioner timely.

8. Similarly, this Court in the case of *Ramesh Kumar Rusia* (supra) has held that the representation made by the petitioner against the adverse remarks in Annual Confidential Report, then the authority was duty bound to decide the representation by passing a speaking order. In the present case, as the representation is rejected by the respondents by a non-speaking order, therefore, the order rejecting the representation deserves to be set aside.

9. In view of forgoing discussions and keeping in view the facts as have come on record, this writ petition deserves to be and is hereby allowed. The order dated 2/3/2012 rejecting the representation submitted by the petitioner against the adverse remarks in Annual Confidential Reports is hereby quashed. The respondents are commanded to expunge the adverse entries recorded in the ACRs of the petitioner for the year 2009 and 2010 (Annexure-P/2 and P/3). The respondents are directed to convene the review DPC and to consider the case of the petitioner for promotion to the post of Chief Engineer along with his juniors and if the petitioner found fit, then the respondents are directed to promote him from the date when his juniors were promoted along with all consequential benefits. The aforesaid exercise be completed within a period of four months from the date of receipt of certified copy of this order.

Petition allowed.

I.L.R. [2015] M.P., 1316
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
S.A. No. 908/2012 (Jabalpur) decided on 16 January, 2014

MADHU JANIYANI ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. Urban Land (Ceiling and Regulation) Act (33 of 1976), Section 6(1) - Return by recorded Bhumi Swami filed after appointed day **- Objection dismissed - Land declared as surplus - Notification issued u/s 10(1) of the Act - Notice of surplus land served - Ceiling proceedings never challenged before Appellate authority or any other Court - Proceedings attained finality - State becomes 'Bhumi Swami' - State has every right to allot and dispose of such land as per the procedure prescribed. [Para 6(A)]**

क. नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम (1976 का 33), धारा 6(1) – अभिलिखित भूमि स्वामी द्वारा नियोजित तिथि के पश्चात् विवरणी प्रस्तुत – आक्षेप खारिज – भूमि को अधिशेष घोषित किया गया – अधिनियम की धारा 10(1) के अंतर्गत अधिसूचना जारी की गई – अधिशेष भूमि का नोटिस तामील किया गया – अधिकतम सीमा की कार्यवाही को अपीली प्राधिकारी या किसी अन्य न्यायालय के समक्ष कभी चुनौती नहीं दी गई – कार्यवाही ने अंतिमता प्राप्त की – राज्य "भूमि स्वामी" बना – राज्य को उक्त भूमि को विहित प्रक्रिया के अनुसार आबंटित करने या व्ययन करने के संपूर्ण अधिकार है।

B. Civil Procedure Code (5 of 1908), Section 11 - Res judicata - Ceiling proceedings under Urban Land (Ceiling and Regulation) Act,1976 **- Disputed land - Already declared as surplus on previous occasion by competent authority - Proceedings not challenged - It attained finality - Again return or objection to ceiling proceedings filed by original recorded Bhumi Swami - Barred by the principle of Res judicata - Section 11 - Code of Civil Procedure - Same issue between same party - Not entertainable. [Para 6(B)]**

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व न्याय – नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम, 1976 के अंतर्गत अधिकतम सीमा की कार्यवाही – विवादित भूमि – सक्षम प्राधिकारी द्वारा पूर्ववर्ती अवसर पर पहले ही अधिशेष घोषित की गई है – कार्यवाही को चुनौती नहीं दी गई – उसने अंतिमता

प्राप्त की – मूल अभिलिखित भूमि स्वामी द्वारा अधिकतम सीमा की कार्यवाही का पुनः जवाब या आक्षेप प्रस्तुत किया गया – पूर्व न्याय के सिद्धांत द्वारा वर्जित – धारा 11 – सिविल प्रक्रिया संहिता – समान पक्षकारों के बीच समान विवाद्यक – ग्रहण करने योग्य नहीं।

C. Urban Land (Ceiling and Regulation) Act (33 of 1976), Section 5 - Transfer of land after appointed day - **Land already declared surplus - Subsequent purchaser has no right or authority on the basis of sale deed - Contrary to provisions of section 5 - Transaction is ab initio void.** **[Para 6(C)]**

ग. नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम (1976 का 33), धारा 5 – नियोजित तिथि के पश्चात् भूमि का अंतरण – भूमि पहले से अधिशेष घोषित – पश्चात्वर्ती क्रेता को विक्रय विलेख के आधार पर कोई अधिकार या प्राधिकार नहीं – धारा 5 के उपबंधों के विपरीत – संव्यवहार आरंभ से शून्य।

D. Civil Procedure Code (5 of 1908), Section 100 - Substantial question of law - **Concurrent findings on the question of possession - It is a finding of fact - Cannot be interfered under section 100 of CPC - No substantial question of law arises.** **[Para 6(E)]**

घ. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – विधि का सारवान प्रश्न – कब्जे के प्रश्न पर समवर्ती निष्कर्ष – यह तथ्य का निष्कर्ष है – सि.प्र.सं. की धारा 100 के अंतर्गत हस्तक्षेप नहीं किया जा सकता – विधि का कोई सारवान प्रश्न उत्पन्न नहीं होता।

E. Civil Procedure Code (5 of 1908), Section 9 and Limitation Act (36 of 1963), Article 58 - Suit for declaration and injunction - Ceiling proceedings - **Possession taken by the State in the year 1992 - Notification under section 10(1) of the Act of 1976 issued on 08/04/85 - Suit filed in the year 2009 - Limitation period - Three years - Suit barred by the time.** **[Para 6(F)]**

ङ. सिविल प्रक्रिया संहिता (1908 का 5), धारा 9 एवं परिसीमा अधिनियम (1963 का 36), अनुच्छेद 58 – घोषणा एवं व्यादेश हेतु वाद – अधिकतम सीमा की कार्यवाही – राज्य द्वारा वर्ष 1992 में कब्जा लिया गया – 1976 के अधिनियम की धारा 10(1) के अंतर्गत अधिसूचना 08.04.85 को जारी की गई – वाद वर्ष 2009 में प्रस्तुत – परिसीमा अवधि – तीन वर्ष – वाद समय वर्जित।

F. Land Revenue Code, M.P. (20 of 1959), Section 117 - Khasra entries - **Purpose - Fiscal - Recovery of land revenue - Entries does not**

give any right or title in the property to any person. [Para 6(F)]

च. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 117 – खसरा प्रविष्टियां – प्रयोजन – वित्तीय – भू–राजस्व की वसूली – प्रविष्टियां किसी व्यक्ति को संपत्ति में कोई अधिकार या हक नहीं देती।

Naman Nagrath with *Himanshu Mishra,* for the appellant.
Sharda Dubey, P.L. for the respondent.

ORDER

U.C. MAHESHWARI, J. :- This Appeal is directed by the appellant/ plaintiff being aggrieved by the judgment and decree dated 18.5.12 passed by the Addl. District Judge to the Court of Ist Addl.District Judge, Bhopal in Regular Civil Appeal No.76-A/11 affirming the judgment and decree dated 04.02.11 passed by XII Civil Judge Class-I Bhopal in Civil Original Suit No.149-A/09 dismissing her suit filed against the respondent/authority for declaration and perpetual injunction with respect of the land bearing survey No.234/2 area 0.27 acer situated at village Laukhedi, Tehsil Huzur, District Bhopal.

2. The facts giving rise to this appeal in short are that the appellant herein filed a suit against the respondent contending that the land in dispute bearing Khasra No.234/2 area 0.27 acre situated at village Laukhedi, Tehsil Huzur, District Bhopal was the land of Late Hajari Lal S/o Hira Lal R/o Laukhedi along with some other land described in the plaint. The same was recorded in his name on the appointed date notified under the Urban Land (Ceiling and Regulation) Act, 1976 (in short 'the Act). As per further pleadings, aforesaid Hajari Lal had filed a return under section 6 of the Act before the competent authority constituted under the Act, on which, a Case No.195/1988-89 was registered and on consideration, vide order dated 11.01.1990 (Annex.P/1), the entire land of Late Hajarilal, by holding that the same is not urban land, was released from the purview of the aforesaid Act. In view of such order of releasing the land from the purview of the Act, the appellant had purchased the land in dispute area 0.27 acre from the aforesaid Bhumi Swami Late Hajari Lal through registered sale deed dated 29.3.1990 and on the strength of the same she got mutated her name as Bhumi Swami in the revenue records. Subsequent to mutation, she had applied before the SDO Huzur for diversion of such land, on which, a Case No.93-A-2/90-91 was registered and on consideration, vide order dated 1.2.91, the purpose of land was diverted and

accordingly since the date of the registered sale deed, the appellant is coming in possession of the land in dispute as Bhumi Swami. It is further stated that Late Hajari Lal, besides the appellant also sold his such other land in different part to 13-14 different persons through registered sale deed and on the strength of such sale deeds they are also coming in peaceful possession of their respective parts of such lands. It is further stated that on 17.5.2009, the appellant and aforesaid other purchasers of the land from Late Hajari Lal, decided to sell the same jointly and approached the revenue authorities for obtaining the copies of the revenue record in this regard, on which, they came to know that such land, after declaring to be the surplus land under the Act, has been recorded in the name of the respondent/state as Bhumi Swami. It is further stated that the Repealing Act of 1999, whereby aforesaid Act of 1976 was repealed, has come into force with effect from 17.2.2000 and according to the provision of aforesaid Repealing Act of 1999, after publication of the notification under section 10(3) of the Act if the possession of surplus land has already been taken-over by the authority before coming into force the Repealing Act then such land shall be deemed to be "government land" and if such notification is not issued or in case after issuing the notification the possession of the land was not taken before coming into force the Repealing Act,1999 then such land shall be deemed to be the "released land" from the aforesaid Ceiling Act and no steps to take the possession of the same could be taken by the authority. It is also stated that vide order dated 11.1.90 the disputed land was released from the purview of the Ceiling Act by the authority and even after declaring the same to be the surplus land under section 10(3) of the Act, such land was neither notified nor the possession of the same was taken-over till coming into force the aforesaid Repealing Act. Inspite that the name of the State was recorded in the revenue record as ceiling land. With these pleadings, the suit is filed declaring the appellant to be the Bhumi Swami of such land with a consequential prayer for issuing ad interim injunction restraining the respondents from interfering in her possession of the disputed land.

3. In the written statement of the respondent, it is stated that subsequent to coming into force the aforesaid Urban Ceiling Act, in the light of the notified appointed day under such Act, the then Bhumi Swami Late Hajari Lal had filed his return under section 6(1) of the Act in the year 1979 before the competent authority constituted under such Act. Such return was filed by Late Hajari Lal on behalf of his family. Considering such return, in accordance

with the provisions of the aforesaid Ceiling Act, along with the other land, including the disputed land, was declared to be surplus and, pursuant to it, under section 10(1) of the Act, a notification dated 8.4.1985 was issued and the notice to this effect under section 10(3) of the Act was also served on Late Hajari Lal and the Tehsildar Nazul, Bhopal was directed to take possession of such land, including the disputed land, on 26.2.92 under section 10(5) of the Act. In such premises, from the date of notification of surplus land including the disputed land had become the "State Land" and has also come in possession of the State. It is further stated that subsequent to the appointed day, if the recorded Bhumi Swami had transferred such land in favor of the other persons like the appellant then such transfer, by virtue of section 5 of the Act being ab initio void, did not confer any right or title to the appellant in the disputed land and, in such premises, it is stated that by virtue of aforesaid sale deed dated 29.3.90 or of some other date subsequent to the appointed day, had not given any right or title to the appellant and, in such premises, the sale deed is not binding in any manner against the respondents. It is further stated that if Late Hajari Lal after filing the return again under section 6(1) of the Act before the competent authority, after passing the aforesaid order by the competent authority in that regard in earlier proceeding and has got the order dated 11.1.90 in case No.195/1988-89 releasing the land from the purview of the Ceiling Act then such order being obtained by practicing the fraud and concealing the earlier order of the competent authority had not conferred any right or title in favor of Hajarilai with respect of the disputed land along with the other land and such subsequent order is not binding against the respondents because long before vide dated 8.4.1985 such land was already declared to be the surplus land by the competent authority in the earlier case and, pursuant to such earlier order, the possession was also taken in accordance with the procedure in the year 1992 as stated above and, in such premises, when Late Hajari Lal from whom the appellant had purchased the land, did not have any right as Bhumi Swami to sell the land then the appellant also did not acquire any right or title in such land. After vesting the land and taking over the possession by the State, it was the only authority to allot the land to any one in accordance with the procedure prescribed under the Act. Besides this, the prayer to dismiss the suit being barred by limitation is also made in the written statement.

4. In view of the aforesaid pleadings of the parties, the issues were framed and their evidence was recorded. On appreciation of the same, the trial court

dismissed the suit by holding that the appellant/ plaintiff has neither acquired the title nor in possession of the disputed land. On challenging such judgment and decree by the appellant before the appellate court, on consideration, by affirming such judgment and decree of the trial court, the same was dismissed, on which, appellant has come to this court with this appeal.

5. Shri Naman Nagrath, learned Senior Advocate assisted by Shri Himanshu Mishra learned counsel for the appellant, after taking me through the record of both the courts below along with the impugned judgments, argued that the appellant purchased the aforesaid part of the land in dispute as bonafide purchaser relying on the order dated 11.1.90 passed by the competent authority in Case No.195/1988-89 under the Ceiling Act releasing the status of the suit land in favor of the owner and being free from the ceiling proceedings, had attained finality and subsequent to it, purchased the same through registered sale deed. Appellant had also got mutated the same in her name and on that basis the SDO, Bhopal considering the application of the appellant had diverted such land long before and, in such premises, the appellant's suit ought to have been decreed by the courts below but the same has been dismissed under wrong premises. In continuation he said that in any case, for the sake of arguments, if it is deemed that initially on the first occasion, after filing the return by the owner Hajarilal in the year 1979 under section 6 of the Act if the land including the disputed land was declared to be surplus under section 10(1) of the Act and the same was notified vide dated 8.4.85 and also the notice of section 10(3) for taking over the possession with a direction to the Tehsildar Nazul under section 10(5) of the Act was given even then till coming into force the aforesaid Repealing Act of 1999 repealing the Ceiling Act of 1976, the actual possession of the land was not taken-over by the authority from the appellant and undisputedly after execution of the sale-deed dated 29.3.90 by Hajari Lal in favor of the appellant, the appellant was in possession of the land and in the year 1992 without giving any notice to the appellant, the possession of such land could not have been taken by the authorities of the respondents. He also challenged the panchnama prepared by the revenue authorities in presence of the witnesses for taking the possession of such land saying that such panchnamas being not in accordance with the law and procedure has no legal sanctity. So far the objection of the respondent/ state that the impugned suit was filed barred by limitation is concerned, he argued that on 17.5.09 when the appellant accompanied with other persons who purchased other part of the land from Hajarilal, decided to sell such land

jointly and for that purpose approached the revenue authorities for obtaining the copy of the revenue record then they came to know with respect of the aforesaid mutation and other proceedings on which immediately they filed the suit and they being in long possession of the property, their suit could not have been dismissed by the courts below as barred by time. He also said that in the light of the revenue record in which the revenue authorities on the strength of her sale-deed had mutated the land in her name and also diverted the same and such entry was remained for years together in such record and, in such premises also the suit of the appellant ought to have been decreed by the trial court. He also said that the subordinate court had decreed the suit of some purchaser of the land situated in the similar circumstances, while the suit of the appellant has been dismissed. With these submissions he prayed for admission of this appeal on the substantial questions of law proposed in the appeal memo.

6. Having heard the counsel, keeping in view the arguments, I have carefully gone through the records of the courts below along with the impugned judgments. I have also perused the substantial questions of law proposed by the appellant in the appeal memo. On such perusal, in the following circumstances, I have not found any scope as per requirement of section 100 of the CPC for admission of this appeal.

(a) There is concurrent finding of both the courts below based on the proceedings carried out by the competent authority that subsequent to coming into force the Act of 1976, in the light of the appointed day the then recorded Bhumi Swami of the land Hajari Lal filed the return under section 6(1) of the Act in the year 1979 before the competent authority. Subsequent to it, on consideration, such authority after dismissing the objection of such Bhumi Swami had declared the land described in the plaint as surplus under the provision of such Act and in this regard by virtue of section 10(1) of the Act, a notification dated 8.4.85 was also issued and the notice of surplus land was served on the aforesaid Hajarilal and it is apparent fact on record that such order of the competent authority was never challenged before the appellate authority or before any other superior court either by the Hajarilal or under his right by some other person including the appellant and, in such premises, such order declaring the land including the disputed land to be surplus and the notification issued in this regard had attained finality and pursuant to such order by virtue of section 10(3) a notice for taking over the possession was issued under section 10(5) of the Act by the competent authority and the Tehsildar Nazul, Bhopal was directed to take over the possession of such land on dated

26.2.92. Pursuant to such orders and the directions, the concerning Nazul Tehsildar, Bhopal, with the assistance of other revenue authorities by preparing the panchnama in presence of the witnesses, had taken the possession of the surplus land including the disputed land. So, in such premises, the same was mutated in the name of the respondent in the revenue record and as per further provision of the Ceiling Act, after taking the possession of such surplus land the State became the Bhumi Swami and, in such premises, the State was having every right to allot and dispose of such land in accordance with the procedure prescribed in that regard. So, in the lack of any appeal or other proceedings against the order passed in the initial proceedings of the competent authority declaring the land in dispute to be surplus land and taking over the possession of the same in such proceedings, I have not found any circumstances giving rise to any substantial question of law for admission of this appeal.

(B) It is apparent fact on record that after deciding the aforesaid earlier ceiling case either by practicing a fraud or otherwise, Late Hajarilal had filed some subsequent return of the same land in the office of the competent authority in the year 1988-89. The same was neither permissible nor entertainable, inspite that after registering the same as Case No.195/1988-89 was considered without taking into consideration the aforesaid earlier ceiling proceedings and the order, whereby declaring the alleged land to be surplus the case was finally decided on merits and the land including the disputed land was released from the purview of the Act of 1976. So, firstly in view of the principle of resjudicata defined under section 11 of the CPC, such subsequent matter between the same party with respect of same issue was neither entertainable nor could be decided again on merits by such authority contrary to the earlier order. So, in such premises I have not found any circumstance giving rise to frame any substantial question of law.

(C) It is also apparent and undisputed fact on record that the impugned sale-deed dated 29.3.1990 was executed by Late Hajari Lal in favor of the appellant after the appointed day and by virtue of section 5 of the Act of 1976, subsequent to appointed day if any land has been transferred by the then recorded Bhumi Swami and if such land in ceiling proceedings is found to be surplus land then the person like the appellant, who purchased the land from the recorded Bhumi Swami subsequent to appointed day has no right or authority to defend the case on the strength of such sale deed which itself was executed contrary to the mandatory provision of section 5 of the aforesaid Act. As such, according to such section the transaction subsequent to appointed

day, without intervention or permission of the competent authority constituted under the Act of 1976 has been deprecated. In fact, the same is ab initio void. So, in such premises, suit of the appellant being filed on the strength of the sale deed executed subsequent to the appointed day was neither entertainable nor could be decreed by any of the courts below. In such premises also I have not found any circumstance which could be interfered under section 100 of the CPC by framing substantial question of law in this appeal.

(D) It is also apparent on record that the Bhumi Swami Hajari Lal whose name was recorded in the revenue record on the appointed day has neither challenged the aforesaid earlier order of the ceiling case declaring the land surplus nor filed any civil suit and such Hajari Lal or his legal representatives have also not been impleaded in the present suit by the appellant. So, in the lack of necessary parties in the impugned suit, is not entertainable and, on examining the matter from this angle also, I have not found any circumstance to admit this appeal by framing the substantial question of law.

(E) Apart the aforesaid, there is a concurrent findings of both the courts below based on the record of earlier ceiling case that the possession of the surplus land had taken over by the Tehsildar Nazul with the assistance of the other revenue officials in the year 1992 by preparing the panchnama in presence of the witnesses in compliance of the notification and order of the competent authority. Thus in view of settled proposition that the concurrent findings on the question of the possession being finding of fact could not be interfered under section 100 of the CPC. So, in such premises also, there is no scope in this appeal for admission.

(F) It is also apparent fact that if a person like the appellant wanted to challenged the order of any authority including the competent authority under section 9 of the CPC or any other provision permissible under the law then such suit for declaration ought to have been filed within the period prescribed under Article 58 of the schedule of the Limitation Act in which limitation of three years has been prescribed and it is apparent fact that the possession of the land including the disputed land was taken over by the State in the year 1992 and the initial order in this regard was passed in the earlier ceiling case in the year 1985 and the suit has been filed in the year 2009 which is hopelessly barred by time. So, on such question also, I have not found any fault in the findings of the appellate court. So, on the question of limitation, also there is no scope in the matter to frame any substantial question of law.

(F) It is settled proposition of law that the Khasra entries are prepared by the revenue authorities for the fiscal purposes to recover the land revenue and such entries does not give any right or title in the property to any person. For the sake of the arguments if it is deemed that on the basis of the aforesaid ab inito void sale deed if any mutation was carried out by the revenue authorities contrary to the law and such land was also diverted on the basis of such ab initio void mutation then such mutation is also not helping to the appellant in his suit and on such question also there is no scope to frame any substantial question of law.

7. In view of the aforesaid elaborate discussion, I have not found any material substance or circumstance giving rise to any question of law rather substantial question of law as per requirement of section 100 of the CPC. Consequently, this appeal being devoid of any merit deserves to be and is hereby dismissed at the stage of admission.

Appeal dismissed.

I.L.R. [2015] M.P., 1325
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
S.A. No. 347/2013 (Jabalpur) decided on 16 January, 2014

MAKSOOD AHMAD (RUI WALE) ...Appellant
Vs.
SMT. SHARIFUNNISHA & ors. ...Respondents

A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(a) - Arrears of rent - Demand notice - **Non service of notice on tenant before filing of the suit - Decree u/s 12(1)(a) could not have been passed - Decree u/s 12(1)(a) set aside. (Para 7)**

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ए) – माड़े का बकाया – मांग नोटिस – वाद प्रस्तुत करने से पूर्व अभिधारी को नोटिस तामील नहीं की जाना – धारा 12(1)(ए) के अंतर्गत डिक्री पारित नहीं की जा सकती – धारा 12(1)(ए) के अंतर्गत डिक्री अपास्त।

B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(e) - Bonafide requirement for residential purpose - **Relationship of landlord and tenant - Tenant not filing written statement and adducing any evidence - Pleadings and evidence of the landlord unrebutted - Trial Court**

ought to have passed decree u/s 12(1)(e) of the Act on the basis of unrebutted pleadings & evidence - Decree u/s 12(1)(e) of the Act of lower Appellate Court affirmed - Appeal by tenant dismissed. (Para 8)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41) धारा 12(1)(इ) – निवास के प्रयोजन हेतु वास्तविक आवश्यकता – भूमि स्वामी और अभिधारी का संबंध – अभिधारी ने कोई लिखित कथन प्रस्तुत नहीं किया और न ही कोई साक्ष्य प्रस्तुत किया – भूमि स्वामी के अभिवचन एवं साक्ष्य अखंडित – विचारण न्यायालय को अखंडित अभिवचन एवं साक्ष्य के आधार पर अधिनियम की धारा 12(1)(इ) के अंतर्गत डिक्री पारित करनी चाहिए थी – अधिनियम की धारा 12(1)(इ) के अंतर्गत निचले अपीली न्यायालय की डिक्री अभिपुष्ट – अभिधारी की अपील खारिज।

C. Accommodation Control Act, M.P. (41 of 1961), Section 13(6) - Pendency of the suit **- Neither arrears of rent nor recurring monthly rent deposited by tenant - Defence to defend the case u/s 12(1)(e) of the Act liable to be struck off. (Para 8)**

ग. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 13(6) – वाद का लम्बन – अभिधारी द्वारा न तो भाड़े का बकाया न ही आवर्ती मासिक भाड़ा जमा किया गया – अधिनियम की धारा 12(1)(इ) के अंतर्गत प्रकरण के बचाव का प्रतिवाद खंडित किये जाने योग्य।

D. Accommodation Control Act, M.P. (41 of 1961), Sections 12(1)(a) & 12(1)(e) and Civil Procedure Code (5 of 1908), Section 100 - Substantial question of law **- Decree of eviction passed u/s 12(1)(a) and 12(1)(e) - Admission of appeal - Appeal could not be admitted for final hearing even on establishing that decree on ground of Section 12(1)(a) of the Act is not sustainable because the decree has been passed on the ground of section 12(1)(e) of the Act also - Appeal dismissed. (Para 10)**

घ. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ए) व 12(1)(इ) एवं सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – विधि का सारवान प्रश्न – धारा 12(1)(ए) और 12(1)(इ) के अंतर्गत बेदखली की डिक्री पारित – अपील की ग्राह्यता – यह स्थापित किये जाने पर भी की अधिनियम की धारा 12(1)(ए) के आधार पर डिक्री कायम रखने योग्य नहीं, क्योंकि अधिनियम की धारा 12 (1)(इ) के आधार पर भी डिक्री पारित की गई है, अपील को अंतिम सुनवाई हेतु ग्रहण नहीं किया जा सकता – अपील खारिज।

E. Interpretation of statutes **- Relationship of landlord &**

tenant - Unrebutted pleadings and evidence of landlord - It is a finding of fact - No substantial question of law arises. (Para 10)

ङ. *कानूनों का निर्वचन* – भूमि स्वामी और अभिधारी का संबंध – भूमि स्वामी के अखंडित अभिवचन एवं साक्ष्य – यह तथ्य का निष्कर्ष है – विधि का कोई सारवान प्रश्न उत्पन्न नहीं होता।

Tawrej Khan, for the appellant.

ORDER

U.C. MAHESHWARI, J. :- The appellant -defendant has filed this appeal under Section 100 of Code of Civil Procedure being aggrieved by the judgment and decree dated 16.2.2013, passed by 15th Additional District Judge, Jabalpur in Civil Regular Appeal No. 4-A/11, whereby allowing the appeal of the respondents - plaintiffs by setting aside judgment dated 25.7.2011, passed by 4th Civil Judge, Class -I, Jabalpur in Civil Original Suit No. 101-A/09, dismissing the suit of the respondents filed for eviction on the grounds of Sections 12 (1) (a) and 12 (1) (f) of M.P. Accommodation Control Act 1961, in short "The Act", such suit of the respondents has been decreed on aforesaid both the grounds against the appellant.

2. The facts giving rise to this appeal in short are that the predecessor in title of respondents - plaintiffs namely Smt. Sharifunnisha had filed the impugned suit against the appellant for eviction, arrears of rent, mesne profit with some other reliefs in respect of the tenanted premises bearing house no. 32- P.P. Colony, Gwarighat Road, Jabalpur contending that on dated 25.1.1988, the husband of the principal plaintiff, namely Mohd. Yakub had taken such house under the hire purchase agreement from the M.P. Housing Board, during subsisting such hire purchase agreement, he passed away, on which after depositing the entire consideration in accordance with such higher purchase agreement, a registered sale deed of the premises was executed by the Housing Board in favour of principle plaintiff and the respondents, on dated 27.5.2006. Such house is comprising with one hall, open courtyard, kitchen, lat bath alongwith some open land. In the life time of Mohd. Yakub, Smt. Jainab bi, mother of the appellant was his monthly tenant @ Rs.300/- per month for residential purpose. She passed away on dated 8.12.2008 and since then the appellant being tenant of the respondents on the same terms is in occupation of such house. Subsequent to death of Jainab bi, the appellant became defaulter in payment of the monthly rent and inspite making

the demand by the respondents, the same was not paid. Apart from this, the principal plaintiff, (since deceased) was also in bonafide genuine need of such premises for the residence of her sons (respondents) and their family for which she did not possess any other accommodation of her own in such town. Besides this, the premises was not being used for the purpose for which it was taken by the appellant's family and the same has been kept in locked condition for more than seven months, on which the principle plaintiff through her counsel sent the quit notice dated 7.3.2009, the principle defendant by making the demand of outstanding rent, intimated to vacate the premises, but the same was not served because the house was found to be locked. With these pleadings, the impugned suit was filed.

3. After service of the summons of the suit, the appellant himself appeared before the trial court on 19.5.2010 and took adjournment to engage the counsel and to file WS but on subsequent dated 6.7.2010, no one appeared on behalf of the appellant and WS was also not filed, on which the case was proceeded exparte against him and posted for recording exparte evidence. Before recording such evidence, an application under Order 9, Rule 7 of CPC for setting aside exparte order was filed on behalf of appellant on 7.12.2010, the same was replied and opposed by the respondents. On consideration, vide order dated 25.1.2011, such application was allowed and after setting aside the exparte order, the appellant was extended further opportunity to file the WS. Subsequent to it, even on extending the various dates, the WS was not filed. Then on 12.5.2011 again the suit was proceeded exparte against the appellant and after recording the exparte evidence of the respondents on appreciation, the trial court by holding that the respondents could not prove the relationship of the landlord and tenant between the parties dismissed the suit. Such dismissal was challenged by the respondents before the appellate court, after extending opportunity of hearing to the parties, on consideration the appellate court in the lack of any pleadings and evidence in rebuttal on behalf of appellant, taking into consideration the unrebutted pleadings and evidence of the respondents allowed the appeal and by setting aside the judgment and decree of the trial court by holding the relationship as landlord and tenant, decreed the suit on the grounds of arrears of rent and the bonafide genuine requirements of the premises to the respondents for their residence under Section 12 (1) (a) and 12 (1) (e) of the Act. Being dissatisfied with this judgment of the Appellate Court, the appellant has come to this court with this appeal.

4. The appellant's counsel after taking me through the record of the courts below alongwith the impugned judgments argued that although on behalf of the appellant neither the WS was filed nor any evidence was adduced in the matter but even then on the basis of available pleadings and the evidence of respondents, the approach of the trial court for dismissal of the suit was correct and the same could not be interfered in the appeal but contrary to the record and settled propositions by relying on untrustworthy pleadings of the suit and exparte evidence of respondents, the appellate court has committed error in holding the relationship between the parties as landlord and tenant and setting aside the judgment and decree of the trial court dismissing the suit and decreeing the suit of the respondents on the aforesaid grounds of arrears of rent and bonafide genuine requirement enumerated under Sections 12 (1) (a) and 12 (1) (e) of the Act. In continuation, he said that in any case in the lack of cogent and reliable evidence proving the relationship of landlord and tenant between the respondents and appellant, the impugned suit could not have been decreed by the appellate court. In any case, the decree passed by the appellate court on the grounds of arrears of rent under Section 12 (1) (a) is not sustainable because undisputedly demand notice of such arrears was never served on the appellant - defendant and in the lack of such service of the notice, the decree of eviction on this ground could not be passed. With these submissions, he prayed to admit this appeal by framing the substantial questions of law, proposed in the appeal memo.

5. Having heard, keeping in view the arguments advanced, I have carefully gone through the records of both the courts below alongwith the impugned judgment.

6. True it is that on appreciation, the trial court had dismissed the suit of the respondents but the appellate court taking into consideration the available unrebutted pleadings and evidence of the respondents, by setting aside the judgment and decree of the trial court, decreed the suit on the ground of arrears of rent and benafide (sic:bonafide) genuine requirement of the premises to the respondents for the residence of the members of their family.

7. It is apparent from the pleadings of the plaint and available record of the trial court that the demand notice of arrears of rent sent by the predecessor in title of respondents- the principle plaintiff through counsel to the appellant was not served on him before filing the impugned suit on the ground of arrears of rent also. As per settled proposition in the lack of service of such demand

notice of arrears of rent on the tenant like appellant, the decree on such ground under section 12 (1) (a) of the Act could not have been passed by the appellate court. So on this count, the impugned judgment of the appellate court being contrary to the existing law requires interference, but even on framing the substantial questions of law on such count in this appeal, no fruitful purpose would be served because unless the circumstances for framing the substantial questions of law regarding existence of relationship of the tenant and landlord between the parties and on the ground of Section 12 (1) (e) of the Act are found in the matter. In view of the following discussion, I have not found any material circumstance in the matter to frame any substantial question of law on such grounds.

8. As per available record of the trial court on behalf of appellant neither the Written Statement was filed nor any evidence in rebuttal of the evidence of the respondents has been adduced. It is settled proposition of law that in the lack of the pleadings the evidence, if adduced, then the same could not be read to adjudicate the matter. So in such premises, the trial court could not have held contrary to the available unrebutted evidence of the respondents that relationship of landlord and tenant between the respondents and the appellant has not been proved. On the contrary, in view of unrebutted pleadings and the evidence of respondents, the trial court ought to have held that there was relationship as landlord and tenant between the parties. Pursuant to it, the trial court, on the basis of such unrebutted pleadings and the evidence was also bound to pass the decree of eviction against the appellant on the ground of bonafide genuine requirement of the disputed accommodation to the respondents- plaintiffs for the residence of their family members for which they are not in possession any other accommodation of their own in the township of Jabalpur. As such, by holding the relationship as landlord and tenant, the decree of eviction ought to have been passed under Section 12 (1) (e) in favour of the respondents. It is also apparent that in pendency of the suit neither the arrears of rent nor the recurring monthly rent of the disputed accommodation was deposited by the appellant. So in such circumstance, no defence was available to the appellant to defend the case on the ground of eviction enumerated under Section 12 (1) (e) of the Act. But such aspect was also not considered by the trial court with proper approach. In such premises, on going through the judgment of the appellant court, I have found that considering the unrebutted pleadings and the evidence of the respondents alongwith the aforesaid legal position of the Act, the appellate court has decided the appeal on right dimension and has not committed any error in holding the relationship of landlord

and tenant between the parties and decreed the suit against the appellant for eviction on the ground of bonafide genuine requirement alongwith the sum of outstanding rent.

9. As such the findings of the appellate court till the extent of decreeing the suit for eviction on the ground of arrears of rent under Section 12 (1) (a) of the Act is neither correct nor sustainable.

10. In view of aforesaid, the findings of the appellate court based on unrebutted pleadings and evidence of the respondents holding the relationship between the parties as landlord and tenant being finding of fact is not giving rise to any substantial question of law as per requirement of Section 100 of the CPC and in such premises, the approach of appellate court decreeing the suit on the ground of bonafide genuine requirement of the disputed accommodation to the respondent and regarding sum of the arrears of rent are also not faulted and the same are not giving rise to any question of law rather than substantial questions of law requiring any interference under Section 100 of CPC. Hence, this appeal could not be admitted for final hearing even on establishing the case that decree of the appellate court on ground of Section 12 (1) (a) of the Act is not sustainable because of even on admission of the appeal on such ground, the impugned decree could not be set aside because the decree has been passed on the ground of Section 12 (1) (e) of the Act also.

11. Apart the aforesaid, the appellant has proposed the substantial question of law on the ground that the impugned decree being passed by the appellate court in a matter in which the regular trial was not held by the trial court is not sustainable, is concerned, the argument advanced by the counsel in this regard has not appealed me because it is apparent from the proceeding of the trial court as stated in earlier part of this order while dictating the facts that inspite extending various opportunities to the appellant to file WS, neither the W.S. was filed nor any evidence was adduced by the appellant. In such premises, I have not found any circumstance to frame the substantial question of law on this ground.

12. Although it is a case in which the trial court has dismissed the suit of the respondents and the appellate court has decreed the same but mere on the ground of reversal of the judgment, appeal could not be admitted unless substantial grounds as per requirement of Section 100 of CPC to frame the substantial questions of law is found in the matter. In view of aforesaid

discussion, I have not found any such circumstance. So merely on account of reversal of the judgment by the appellate court this appeal could not be admitted.

13. In view of aforesaid discussion, in the lack of substantial circumstance giving rise to any substantial questions of law this appeal being devoid of any merits deserves to be and is hereby dismissed at the stage of motion hearing.

14. Before parting with the matter, I would like to mention here that on winding up the arguments, by the appellant's counsel, I asked him that on dismissing this appeal at motion hearing stage, the appellant wants some breathing period to vacate the disputed premises, on which he had submitted that at the instance of the appellant a suit for specific performance with respect of the disputed premises is pending against the respondents and in such premises, he does not want to make any such prayer in this appeal. In view of such submission, no time is being extended to the appellant to vacate the premises.

15. There shall be no order as to cost.

Order accordingly.

I.L.R. [2015] M.P., 1332
APPELLATE CIVIL
Before Mr. Justice Sanjay Yadav
M.A. No. 2835/2013 (Jabalpur) decided on 24 January, 2014

EXECUTIVE ENGINEER, M.P.P.K.V.V.C.L. ...Appellant
Vs.
SMT. MALTI BAI ...Respondent

A. Workmen's Compensation Act (8 of 1923), Sections 30, 10(1) & Section 22A - **Penalty - Workman died within 24 hours of sustaining injuries - Compensation amount was not deposited within one month though the employee sustained injury in discharge of duty - Award is assailed on the ground that the Commissioner committed grave error in imposing penalty without causing notice u/s 10(1) and 22A of the Act - Held - As provided u/s 4A of the Act it is the statutory liability of the employer to pay compensation as soon as it falls due - Since appellant has failed to give any justification for not depositing the compensation within one month, Commissioner has rightly imposed the interest and penalty. (Para 9)**

क. कर्मकार प्रतिकर अधिनियम (1923 का 8), धाराऐं 30, 10(1) व धारा 22ए – शास्ति – क्षतियां कारित होने के 24 घंटों के भीतर कर्मकार की मृत्यु हुई – प्रतिकर की रकम एक माह के भीतर जमा नहीं की गई, यद्यपि कर्मचारी को कर्तव्य के निर्वहन में क्षति कारित हुई – अवार्ड को इस आधार पर चुनौती दी गई कि आयुक्त ने अधिनियम की धारा 10(1) व 22ए के अंतर्गत नोटिस दिये बिना शास्ति अधिरोपित करने में गंभीर त्रुटि कारित की – अभिनिर्धारित – जैसा कि अधिनियम की धारा 4ए उपबंधित करती है, यह नियोक्ता का कानूनी दायित्व है कि जैसे ही प्रतिकर देय हो जाता है वह उसका भुगतान करे – चूंकि अपीलार्थी एक माह के भीतर प्रतिकर जमा नहीं किये जाने के लिये कोई उचित कारण देने में असफल रहा है, आयुक्त ने उचित रूप से ब्याज एवं शास्ति अधिरोपित की है।

***B. Workmen's Compensation Act (8 of 1923), Sections 10(1) and 22A - Statement regarding fatal accident and further deposit in cases of fatal accident* - Appellant has failed to establish the applicability of these provisions in the case in hand - Employer having due notice of the accident and death having preceded the payment of compensation - Provisions of Section 10(1) and 22A are not attracted. (Para 10)**

ख. कर्मकार प्रतिकर अधिनियम (1923 का 8), धाराऐं 10(1) व 22ए – घातक दुर्घटना के संबंध में कथन एवं घातक दुर्घटना के प्रकरणों में अतिरिक्त जमा – अपीलार्थी वर्तमान प्रकरण में इन उपबंधों की प्रयोज्यता स्थापित करने में असफल रहा – नियोक्ता को दुर्घटना की सम्यक् सूचना होते हुए और प्रतिकर के भुगतान से पहले मृत्यु हो जाने से – धारा 10(1) व 22ए के उपबंध आकर्षित नहीं होते।

Cases referred :

2005 (104) FLR 618 : M.A.No. 1585/2002 decided on 27.09.2004, AIR 1976 SC 222, AIR 1999 SC 3502, 2012 (134) FLR 1064.

Rajendra Puranik, for the appellant.
Ravish Deolia, for the respondent.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- Heard on admission.

Perused the record.

1. This is employer's appeal, under Section 30 of the Workmen's Compensation Act, 1923 (hereinafter referred to as 'Act of 1923') against

the order dated 26.7.2013; whereby, an application under Section 4A of the Act of 1923 filed by respondent has been allowed.

2. Kanchhedi Lal, husband of the respondent, employed as Helper with Madhya Pradesh Poorva Khestra Vidyut Vitaran Company Ltd. (referred to as the 'Employer') detailed at Distribution Centre, Gotegaon on 19.7.2011 sustained injuries in the process of finding fault in the electrical line between Bailhigh and Maila-dafan A.V. Switch situated outside of 33/11 K.V. Sub-Station Gotegoan. He succumbed to the injuries and as per doctor, who conducted the autopsy, cause of death was "due to hemorrhagic shock resulting from injury to vital organ inside chest cavity leading to death within 24 hours of examination". The employer categories the death as non-electrical accident due to shock resulted from the injuries sustained. Be that as it may.

3. The death since was arising out of and during course of employment, led the employer to deposit Rs.3,06,180/- on 8.12.2011 and Rs.3,06,180/- on 22.3.2012.

4. Since compensation under the Act of 1923 as assessed under Section 4A is to be paid as soon as it falls due and in the case at hand, there was default in paying the compensation i.e. compensation being not deposited within one month from its failing due, the respondent, widow of the deceased-workman, filed an application under Section 4A of Act of 1923 for interest on delayed payment and for penalty. Employer justified their action stating that there was no deliberate delay in depositing the amount of compensation and the delay was due to administrative reasons as the sanction required to be given is only after ascertaining the fact that the death of a workman is in due course of employment and is arising out of it.

5. Commissioner, Workmen's Compensation, while discarding the explanation tendered found the delay unjustified because from day one, the Employer was aware of the fact that the deceased was detailed on the duty and that he succumbed the injuries sustained, in discharge of his duties. Accordingly, while awarding interest @ 12% from 18.12.2011 till 22.3.2012, awarded 50% penalty i.e. Rs.3,06,180/-.

6. Aggrieved, the Employer has preferred the appeal under Section 30 of the Act of 1923 on the ground that Commissioner, Workmen's Compensation committed grave error in imposing the penalty without causing any notice under Section 10(1) or following the provisions laid down under Section 22A of the

Act of 1923. And, that had the said provisions were taken recourse, the employer could have explained the reasons for causing delay in depositing the amount of compensation. That, the employer could have explained that due to their unawareness of computing enhanced salary for the purpose of compensation that there was some delay after completion of required official formalities. It is urged that the Commissioner, Workmen's Compensation was not justified in imposing the penalty. Reliance is placed on the Division Bench Judgment in *General Manager, SECL and Anr. v. Gajanan Wadnekar* : 2005 (104) FLR 618 : Misc. Appeal No.1585/2002 decided on 27.9.2004.

7. Before dwelling on the issue raised, it would be appropriate to first set the record, because though the appellant had adverted to various facts in the memo of appeal i.e. salary enhancement, payment of ex *gratia* amount and extension of medical facilities to justify the delay. These facts were, however, not brought before Commissioner, Workmen's Compensation, when the appellant was noticed on an application under Section 4A of the Act of 1923. It was stated in reply -

> (1) यह कि आवेदिका के पति कंछेदीलाल की मृत्यु 19.07.2011 को हुई है अवोदिका की मृत्यु संबंधित दस्तावेज विद्युत मण्डल कार्यालय के समक्ष जब पेश किये गए तब उन्हे अविलंब मण्डल कार्यालय रामपुर जबलपुर की ओर अग्रेषित कर दिया गया था ।
>
> (2) यह कि आवेदिका द्वारा अपने पति के मृत्यु दावे संबधी समस्त दस्तावेज प्रस्तुत किए जाने पर मण्डल कार्यालय जबलपुर द्वारा दिनांक 8.12.2011 को रू.306108/– एवं दिनांक 22.3.2012 को रू.306108/– कुल राशि रू.612360/– जमा कर दिये गये थे, जो आवेदिका को प्राप्त हो चूके है ।
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> (3) यह कि मृत्यु दावा से संबंधित समस्त भुगतान मण्डल कार्यालय द्वारा किया जाता है जब आवेदिका द्वारा अपने पति के मृत्यु दावा संबंधी समस्त दस्तावेज वि.म. कार्यालय के समक्ष ज़मा किए तब मण्डल कार्यालय द्वारा बिना अनावश्यक विलंब किए आवेदिका को विभिन्न दिनांकों पर रू.612360/– का भुगतान किया जा चुका है ।
>
> (4) यह कि मृत्यु दावा में 12% प्रतिवर्ष की दर से ब्याज दिलाये जाने का प्रावधान है न कि 50% की दर से एवं ब्याज बीमाकर्ता द्वारा देय है न कि नियोक्ता द्वारा एवं आवेदिका द्वारा प्रकरण में बीमा कम्पनी को पक्षकार नहीं बनाया है ।

(5) यह कि उपरोक्त वर्णित परिस्थितियों के प्रकाश में आवेदिका द्वारा प्रस्तुत आवेदन न्यायिक प्रावधानों के विपरित है विद्युत मण्डल कार्यालय द्वारा आवेदिका द्वारा समस्त दस्तावेज उपलब्ध कराये जाने पर मृत्यु दावा का भुगतान आवेदिका को किया गया है एवं विभाग द्वारा किसी प्रकार का अनावश्यक विलंब या त्रृटि स्पष्ट नहीं होती है ।

8. Thus, apparently, the onus was shifted on the appellant that only when she had furnished the documents that the employer took the action. But a different stand is taken in this Appeal which being not before the Commissioner, cannot be allowed to raise for the first time.

Be that as it may. Section 4A of 1923 Act stipulates -

"4A. Compensation to be paid when due and penalty for default.- (1) Compensation under section 4 shall be paid as soon as it falls due.

(2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.

(3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall -

(a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and

(b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent of such amount by way of penalty :

Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed."

9. Thus, mandatory it is that compensation under Section 4A shall be paid as soon as it falls due. The statutory liability thereon rests on the employer to facilitate such payment. In case it is not accomplished within one month from the date it fell due (the expression "fell due" has been interpreted to be the date of accident, See. *Pratap Narain Singh Deo v. Shrinivas Sabata* AIR 1976 SC 222; *Kerala State Electricity Board v. Valsala K.* AIR 1999 SC 3502 and *Oriental Insurance Co. Ltd. v. Siby George* : 2012(134) FLR 1064), failing which the statutory consequences, as delineated in sub-section (3) of Section 4A, ensues. The appellant having failed to give any justification for delay as, on being noticed, apparent it is from the reply, they shifted the onus on the claimant, the Commissioner acted well within his jurisdiction in imposing the interest as also the penalty. The decision in *Gajanan Wadnekar* (supra) is distinguishable in the given facts o f the present case.

10. Furthermore, though the appellant has relied on the provisions of Section 10 and 22A of the Act of 1923 that the same being not adhered to, has vitiated the proceedings before the Commissioner. However, the appellant fails to establish the applicability of these provisions in the case at hand, wherein the workman having died within 24 hours of sustaining the injuries and the employer having knowledge of the death being during course and arising out of the employment depositing the compensation, though belatedly. Whereas, Section 10 (notice and claim) and Section 22A (power of the Commissioner to require further deposit in cases of fatal accident) operates under different sets of facts as contemplated therein, In other words, in the case at hand, the Employer having due notice of the accident and that the death having preceded the payment of compensation, the provisions of Sections 10 and 22A of Act of 1923 are not attracted.

11. Having thus considered, no substantial question of law arises for adjudication.

Consequently, the appeal is dismissed in *limine*. No costs.

Appeal dismissed.

I.L.R. [2015] M.P., 1338
APPELLATE CRIMINAL
Before Mrs. Justice S.R. Waghmare
Cr.A. No. 363/1997 (Indore) decided on 16 September, 2014

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

A. Penal Code (45 of 1860), Sections 376(1), 341 & 506 Part-II - Sole testimony of prosecutrix - **Rape at 10 a.m. on a busy culvert - No external injuries on body of prosecutrix - Pregnancy of seven months - Major discrepancies in evidence of the prosecutrix - Held - Testimony of prosecutrix is wholly unreliable - Appeal allowed - Accused acquitted. (Para 6)**

क. दण्ड संहिता (1860 का 45), धाराऐं 376(1), 341 व 506 भाग -II – अभियोक्त्री की एकमात्र साक्ष्य – व्यस्त पुलिया पर दिन के 10 बजे बलात्कार – अभियोक्त्री के शरीर पर कोई बाह्य चोट नहीं – सात माह का गर्भ – अभियोक्त्री के साक्ष्य में महत्वपूर्ण फर्क – अभिनिर्धारित – अभियोक्त्री की परिसाक्ष्य संपूर्ण रूप से अविश्वसनीय – अपील मंजूर – अभियुक्त दोषमुक्त।

B. Penal Code (45 of 1860), Section 376 - Testimony of prosecutrix - **To be classified as - (1) Reliable - (2) Unreliable - (3) Partially reliable - Then only conviction or acquittal to be based. (Para 6)**

ख. दण्ड संहिता (1860 का 45), धारा 376 – अभियोक्त्री की परिसाक्ष्य – का वर्गीकरण इस प्रकार किया जाना चाहिये– (1) विश्वसनीय – (2) अविश्वसनीय – (3) आंशिक रूप से विश्वसनीय – केवल तब दोषसिद्धि या दोषमुक्ति आधारित की जानी चाहिये।

Cases referred:

AIR 2009 SC 858, AIR 2013 SC 2207, (2002) 7 SCC 317.

P.K. Saxena with *Sunil Verma*, for the appellant.
C.R. Karnik, G.A. for the respondent/State.

J U D G M E N T

MRS. S.R. WAGHMARE, J. :- By this criminal appeal under Section 374 of the Cr.P.C. appellant Gopal has challenged the judgment dated

11.4.1997 passed by the Additional Sessions Judge, Shajapur in S.T. No.180/1997 whereby the appellant has been convicted for offence under Sections 376(1), 341 and 506 Part- II of the IPC and sentenced to undergo 10 years of R.I. with fine of Rs.1,000/-, 1 month's of R.I. and one year's R.I. with fine of Rs.500/- respectively. In case of failure to pay the fine, the accused was to undergo an additional sentence of six months' and three months' R.I. respectively. The sentences were directed to run concurrently.

2. Brief facts of the prosecution case are that the prosecutrix on 4/5/1995 at 10 a.m. in the morning was returning after giving water to the cattle, when she reached near a culvert *(nallah)* she saw the accused Gopal Harijan and Kamal Baba. Accused Gopal caught hold of her hand and stopped her and asked Kamal to keep watch and then accused Gopal tried to molest her. She tried to shout, but he threatened to kill her and thereafter he raped her. She shouted for help, but nobody had come. Thereafter the accused ran away from the spot along with accused Kamal. On returning home she narrated the incident to the lady members of the house. The male members of the house had gone to another village for performing some custom. Upon returning the male members of the house in the evening, she narrated the story to her husband Murlidhar Patidar and her brother in-law Durgashankar. On 4/5/1995 i.e. on the same day at 11 p.m. in the night the incident was reported at police station Moman Badodiya and case was registered for offence under Sections 341, 376 and 506/34 of the IPC at crime No. 46/95. The spot map was prepared at Ex.P/5. The prosecutrix was sent to the District hospital, Shajapur for her medical examination and she has been examined by Dr. (Smt.) Asha Pandit. The medical report is Ex.P/2-A and the accused were duly arrested vide arrest memo Ex.P/6 & P/7. Accused Gopal was also examined. The underskirt of the prosecutrix and two slides of her vaginal discharge were collected and sent to the laboratory for the F.S.L.in Indore. The report is Ex.P/10. The prosecution was launched. The accused were duly committed to their trial.

3. The accused abjured their guilt and stated that they have been falsely implicated in the matter. However, they did not examine anybody in their defence. On considering the evidence, the Trial Court has acquitted co-accused Kamal Baba from the offences, but accused Gopal has been convicted and sentenced as hereinabove indicated. Hence the present appeal.

4. Counsel for the appellant has vehemently urged the fact that it was a case of false implication. Counsel also vehemently urged the fact that the FIR

Ex.P/3 was delayed by 14 hours and since the police station is 10 minutes away from the victim and Counsel submitted that it was filed only after deliberation by family members at 11 p.m. in the night. The Judgment of the conviction is also challenged by Counsel since it was based on the sole testimony of the prosecutrix; whereas she has changed her version several times. In impugned para 12 of the judgment the prosecutrix has stated that accused Gopal did not utter a single word then how can this be treated as evidence of threat. Similarly the prosecutrix has stated that the rape has been committed at the culvert at 10.30 am in the morning when there is a lot of hustle and bustle around. Similarly she has stated that there was a scuffle between her and the accused and she had shouted yet he had thrown her on the floor. It was also unbelievable because her statement is not supported by the medical report available on record. P.w.2 Dr. (Smt.) Asha Pandit examined the prosecutrix and she has stated in the medical report that the prosecutrix was 32 years of age and there were no external injuries found on the body of the prosecutrix. She was habituated to sex as her hymen was ruptured and wide enough to easily allow two fingers. The F.S.L. report also did not help giving any concrete opinion regarding the rape. Counsel submitted that in a place like culvert, the prosecutrix's version is considered then she should have received some injuries, which has not been indicated in the medical report. And although the prosecutrix had told the story to her sister-in-law Rukmabai and her mother-in-law Pushpa Bai, they have not been examined in Court. It was only when the male members returned home she narrated the story, but both the male members Babulal and Durgashankar have not been examined in Court. There was no corroboration in the statement of any independent witness. Counsel also pointed out impugned para 22 of the judgment that although the prosecutrix stated that she did not know accused Gopal, she knew that accused Gopal was a resident of Harijan Colony and she had seen him and she has also knew his name. Counsel submitted that there was a false implication and accused Gopal used to graze the cattle in the neibhourhood village and he was known to the prosecutrix. It was an affair of heart and she had sexual relations with the accused and on that day had been caught in the act by co-accused Kamal and hence raised a false alarm. Whereas accused Gopal in his statement under Section 313 of the Cr.P.C. has submitted that there was rivalry between the accused and the husband of the prosecutrix regarding electricity and it was a case of false implication.

Considering the testimony of p.w. 4 Murlidhar, husband of the

prosecutrix, he has categorically stated that his wife named accused Gopal and she knew his name since he used to come in the neighbourhood to graze cattle. He had also admitted that he had returned home at 7 p.m. yet the report was lodged only in the night at 11 pm, which is unbelievable. No other witness has been examined in Court. Under these circumstances, Counsel prayed that the impugned judgment be set aside and the accused be acquitted from all the offences.

To bolster his submissions, Counsel for the appellant placed reliance on *Rajoo and others vs. State of M.P.* AIR 2009 SC 858 whereby the Court has held that although the evidence of the prosecutrix is at par with injured witness, her evidence cannot always be accepted as truth. The accused must also be protected against the possibility of false implication particularly where a large number of accused are involved.

Undoubtedly Counsel submitted that the matter pertains to the case of gang rape. However, the ratio laid down clearly indicated that if evidence of the prosecutrix is unreliable then the accused must not be convicted. Counsel further relied on *State of Rajasthan vs. Babu Meena* AIR 2013 SC 2207 whereby the Court has held that there was a contradiction at the time of offence. Plea that she shouted not supported by landlord of place of offence. The medical and FSL report also not supporting the allegation of rape then the acquittal of accused is proper. The Apex Court held that it was not liable to be interfered in appeal against acquittal and refusal to grant leave to appeal was justified.

Counsel submitted that in the said case the medical evidence on record by the doctor as well as the FSL did not support the allegation of rape and the testimony of the prosecutrix was not at all reliable and would have to be considered in the light of classification of the testimony of the prosecution to either be wholly reliable, wholly unreliable or neither wholly reliable nor wholly unreliable. And in the present case the testimony of the prosecutrix was wholly unreliable. Hence, Counsel prayed for acquittal of the accused.

5. Counsel for the respondent/State, on the other hand, has vehemently opposed the submissions put forth by the Counsel for the appellant. He has submitted that there was perfectly valid and cogent reasons for the report FIR Ex.P/3 having been recorded so late. All the male members of the house had gone to another village to perform some ritual custom and only on their return the incident has been narrated by the prosecutrix. Moreover, the medical

evidence did not support the prosecution case primarily because the victim is a married lady and she was also seven months' pregnant, according to the report of Dr. Asha Pandit, p.w.2. Hence it cannot be said to be a case of consent. Counsel submitted that the trial Court had properly observed that a pregnant lady would not unnecessarily raise allegation that she was raped by the accused. Counsel prayed that merely because there was some discrepancies in the statement of the prosecutrix, her entire testimony could not be discarded. In the statement of the prosecutrix she has stated that co-accused Kamal was keeping watch and preventing people from coming there. Besides the recovery of the knife and the fact that the prosecutrix was pregnant are all indicative of the fact that the prosecutrix was not lying about the incident. Counsel prayed that the appeal is without merit and the same be dismissed as such. The FSL, the medical report and the evidence of the prosecutrix all established beyond doubt that the accused committed rape of the prosecutrix and the impugned judgment did not call for any interference.

6. On considering the above submissions and on perusal of the record, I find that the sole question that arises for consideration in this appeal is whether the conviction can be based on the sole testimony of the prosecutrix p.w.3 and it is in accordance with the provisions of law?

Placing reliance *Babu Meena* (supra), I find that oral testimony of the prosecutrix has to be classified first,(1) whether it is reliable, (2) unreliable or (3) partially reliable? I find that there are certain instances narrated by the prosecutrix, which are unreliable. Firstly the fact that she was raped by accused Gopal in a culvert, which is a common way used by the whole villagers. Secondly the prosecutrix has stated that she was subjected to rape at 10 am in the morning, which is the time of busy activities in a village. And thirdly more important that even in the medical evidence available on record indicates that she did not have a single abrasion on her body and since she was subjected to rape in the culvert, which is full of stones and other material, it must have caused damage to the skin of her body and more so she was seven months pregnant as evident from the doctor's report at Ex.P/2-A. Similarly if it is considered in juxta position of her statement that she did not know the name of the accused, whereas her husband Murli has categorically stated that the accused was known to his wife as he always came in the vicinity of village to graze the cattle. Lastly the important fact that cannot be marginalized is that the defence to the accused, is of false implication. The unnatural conduct of the prosecutrix, the delay in filing of the FIR Ex.P/3 and the fact that the time

that she was subjected to rape at 10 am in the morning are all instances which lead to the inevitable conclusion that the testimony of the prosecutrix is wholly unreliable. And to base the conviction on such scanty evidence would result in miscarriage of justice since it would be based on conjecture and surmise and in view of the glaring infirmities in the prosecution case and hence the conviction cannot be sustained. Placing reliance on (2002) 7 SCC 317 *Ashish Batham vs. State of M.P.* this Court had categorically held that in the administration of criminal law and justice delivery system the innocence of the accused is of prime importance and is to be presumed unless the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeccable evidence and hence mere suspicion however, strong or probable cannot take the place of proof. And therefore, it would be crucial to convict the appellant of the aforesaid offences under these circumstances.

7. In this light, I find that the appeal needs to be allowed and it is hereby allowed. The impugned judgment of the lower Court is set aside and accused Gopal is acquitted from all the aforesaid offences. He is on bail; his bail bond and surety bond are hereby discharged.

Appeal allowed.

I.L.R. [2015] M.P., 1343
APPELLATE CRIMINAL

Before Mr. Justice Rajendra Menon & Mr. Justice C.V. Sirpurkar
Cr.A. No. 344/2014 (Jabalpur) decided on 11 November, 2014

CHAITU SINGH GOND ...Appellant
Vs.
STATE OF M.P. ...Respondent

*A. **Evidence Act (1 of 1872), Section 3 - Witness - Criminal Procedure Code, 1973 (2 of 1974), Section 161 - Non-recording of statement by police** - **Prosecutrix who is aged about 5 to 6 years was examined for the first time in Court - I.O. has given an explanation that her statement could not be recorded as she was giving answers only by nodding her head - Entire prosecution case is based on the statement of her mother and Grand mother - Under such circumstances it cannot be said that as the appellant could not effectively cross examine the prosecutrix and thus has suffered prejudice.** **(Paras 7 to 11)**

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्षी – दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161 – पुलिस द्वारा कथने अभिलिखित न किया जाना – अभियोक्त्री जिसकी आयु लगभग 5 से 6 वर्ष की है का पहली बार न्यायालय में परीक्षण किया गया – जांचकर्ता अधिकारी ने स्पष्टीकरण दिया कि वह उत्तर केवल सिर हिलाकर दे रही थी अतः उसका कथन अभिलिखित नहीं किया जा सका – संपूर्ण अभियोजन प्रकरण उसकी माता एवं दादी के कथन पर आधारित – उक्त परिस्थितियों के अंतर्गत यह नहीं कहा जा सकता कि अपीलार्थी अभियोक्त्री का प्रभावी रूप से प्रतिपरीक्षण नहीं कर सका और उसने प्रतिकूल प्रभाव सहन किया।

***B. Penal Code (45 of 1860), Section 376(2)(F) and Protection of Children from Sexual Offences Act, (32 of 2012), Section 4* - No mention of penetration of any part of appellant's body in the Vagina of prosecutrix either in F.I.R. or in police statement - Evidence in Court that the appellant was inserting his finger not trustworthy - No offence under Section 376(2)(f) of I.P.C. or under Section 4 of Act, 2012 made out. (Paras 18 to 20)**

ख. दण्ड संहिता (1860 का 45), धारा 376(2)(एफ) एवं लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 4 – पुलिस कथन में या प्रथम सूचना प्रतिवेदन में अभियोक्त्री की योनी में अपीलार्थी के शरीर के किसी भाग के प्रवेशन का उल्लेख नहीं – न्यायालय में यह साक्ष्य कि अपीलार्थी ने अपनी अंगुली प्रविष्ट की थी विश्वसनीय नहीं – भा.दं.सं. की धारा 376(2)(एफ) के अंतर्गत या अधिनियम 2012 की धारा 4 के अंतर्गत अपराध नहीं बनता।

***C. Protection of Children from Sexual Offences Act, (32 of 2012), Sections 7 & 8* - Appellant took the prosecutrix inside his house, removed her slacks and panty, lifted her onto the cot - Appellant guilty committing offence defined under Section 7 and punishable under Section 8 of Act, 2012. (Paras 19 & 20)**

ग. लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धाराऐं 7 व 8 – अपीलार्थी अभियोक्त्री को घर के अंदर ले गया, उसकी सलवार एवं चड्डी उतारी, उसे चारपाई पर लिटाया – अपीलार्थी अधिनियम 2012 की धारा 7 के अंतर्गत परिभाषित एवं धारा 8 के अंतर्गत दंडनीय अपराध के लिये दोषी।

Cases referred :

AIR 1977 SC 1936, 2007 Cr.L.J. 3265, 2004 Cr.L.J. 2001.

Surendra Patel, for the appellant.
Rahul Jain, Dy. A.G. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : **C.V. SIRPURKAR, J. :-** This Criminal Appeal under section 374 (2) of the Code of Criminal Procedure, 1973 has been preferred against the judgment dated 31.12.2013 passed by Shri R.G.Singh, Additional Sessions Judge, Dindori, in Sessions Trial No.89 of 2013, whereby the learned Additional Sessions Judge has convicted appellant Chaitu Singh under section 376(2)(f) of the Indian Penal Code and section 4 of the Protection of Children from Sexual Offences Act, 2012 and for each offence has imposed imprisonment for life and a fine in the sum of Rs.2000/-. The appellant was also directed to undergo rigorous imprisonment for a period of two months in default of payment of fine for each offence.

2. The facts giving rise to this appeal may be summarized as hereunder:

Prosecutrix was a 5 or 6 year old girl. Complainant Bhagwati Bai (PW-1) is her grandmother, Savita (PW-5) is her mother and Manoj (PW-4) is her father. She lived with her parents grandmother and siblings in village Gorakhpur, P.S. Bajag, District Dindori. Her grandmother Bhagwati Bai worked as a peon in Gorakhpur branch of Central Bank of India. Appellant Chaitu Singh is their neighbour.

At around 2:00 p.m. on 24th of May, 2013, Bhagwati Bai was on her duty in the Bank. Manoj being ill, was relaxing in his house. Prosecutrix, her brother Kuldeep and sister Somiya were playing besides their house. At that time, appellant Chaitu Singh took the prosecutrix inside his home on the pretext of giving her money. He shut the door and removed her panty and slacks. The appellant tried to make her lie on the cot. The frightened prosecutrix cried out. Hearing her cries, Savita rushed inside and asked the prosecutrix as to what happened. Appellant Chaitu Singh ran away from the room and lay in other room. Savita took the prosecutrix to her house and informed Manoj regarding the incident. She also informed her mother-in-law Bhagwati on telephone, who came back and inquired about the incident from Savita and the prosecutrix. Thereafter, she rejoined her duty in the Bank and returned at about 5:00 p.m.

Thereafter, Bhagwati took the prosecutrix to police outpost Gadasarai and lodged the report of the incident at about 6:00 p.m., the same day. Subsequently, the prosecutrix was sent to Dindori for medical examination.

The medical report indicated redness and swelling around vagina. Consequently, a case under section 376 read with section 511 of the Indian Penal Code and section 8 of the Protection of Children from Sexual Offences Act was registered.

3. Learned trial Court framed a charge under section 376 of the Indian Penal Code and section 4 of the Protection of Children from Sexual Offences Act. Appellant abjured the guilt and claimed to be tried. In his examination under section 313 of the Code of Criminal Procedure, he stated that witnesses are telling a lie due to enmity and he has been falsely implicated.

4. After trial, learned Additional Sessions Judge concluded that the prosecution was able to prove the guilt of the appellant beyond reasonable doubt and convicted the appellant as stated above.

5. The sum and substance of the prosecution evidence is that the prosecutrix was playing with her siblings besides the road near her home. Appellant Chaitu Singh took her inside his house on the pretext that he wanted the prosecutrix to fetch *bidis* from nearby shop. Once inside the house, the appellant removed her panty and slacks and made her lie on the cot and mounted her. The appellant inserted his finger in her private part. At that time, her mother Savita was informed by her sister Somiya that accused had taken the prosecutrix inside his house and was doing something. Savita twice called out for the prosecutrix but she did not respond; whereupon, she entered house of the appellant. Seeing her the appellant put the prosecutrix down. She was trying to put her clothes back and was weeping. Savita slapped her daughter. The prosecutrix told her that appellant had mounted her and was inserting his finger into her vagina. At that time, her panty was wet and there was redness on both of her thighs. Appellant Chaitu Singh covered himself with a sheet and slept. Thereafter, she informed her motherin- law Bhagwati Bai and husband Manoj as also their neighbours Ramvati (PW-2), Durga Bai (PW-6) and Urmila (PW-7).

6. Legality and propriety of the finding of guilt and the sentence imposed by the learned trial Court has been assailed in this appeal on the grounds hereinafter adverted to:

7. The first ground taken by the appellant is that no statement of the prosecutrix either under section 161 or 164 of the Code of Criminal Procedure was recorded; therefore, no credence can be lent to her statement before the

Court.

8. It is true that no statement of the prosecutrix during investigation was recorded. As such, the first official statement she made regarding the incident, was in the Court. In this regard, the Investigating officer Assistant Sub Inspector Ramesh Singh (PW-9) has explained in paragraph 4 of his cross-examination that prosecutrix was unable to speak. She was telling as to where she was sitting and where the appellant took her, only by nodding her head. However, the fact remains that the prosecutrix has given statement in the Court about 6 months after the incident and has stated in paragraph 6 of her cross-examination that she could speak as much at the time of incident as she was doing at the time of statement in the Court.

9. Now the question arise whether the statement of the prosecutrix should be disbelieved solely on the ground that her statement during investigation was not recorded ? The Apex Court in the case of *Ram Lakhan vs. State of U.P.*-AIR 1977 SC 1936 has held that it would be difficult to give credence to a statement which was given for the first time in the Court after about a year of the occurrence because the accused was entitled to know his earlier version to the police and was naturally deprived of an opportunity of effective cross-examination. However, in that case, the witness was not named in the charge sheet which is not the case here. In the case of *Dayal Singh Vs. State of Maharashtra* (2007 Cr.L.J. 3265), the Supreme Court ignored the fact that investigating officer did not record the statement of a witness who was merely present during recording of dying declaration. A Division Bench of this Court in the case of *Gabbu B Lodhi vs. State of Madhya Pradesh* (2004 Cr.L.J. 2001) observed that though it is not mandatory to record statement of witnesses during the course of investigation, however, where the witness was available and cited in the charge sheet, the prosecution has to explain as to why his statement was not recorded.

10. In the instant case, the Court can take notice of the fact that at the time of incident the witness was merely 5 or 6 year old girl and was studying in Class III. She came from a rustic background and must have been under a great deal of mental trauma during the course of investigation. That apart, it has come on record that immediately after the incident, she was scolded and slapped by her mother for accompanying the appellant inside his house. She was subjected to sexual assault and was seen by her mother in that condition. In such circumstances, even an outspoken woman would be tongue tight due

to embarrassment.

11. Other than that in this case, the entire prosecution story was based upon the statements of Savita and Bhagwati Bai. Savita was also eyewitness to a part the incident. Statement of Bhagwati Bai was based upon the information supplied by the prosecutrix and her mother Savita. In these circumstances, the appellant cannot claim that he was not aware of the version of the prosecutrix and was taken by surprise. In aforementioned backdrop, in the opinion of this Court, the appellant cannot be said to have been deprived of the opportunity to effectively cross-examine the prosecutrix and was thereby prejudiced in any manner.

12. In any case, even if assuming for the sake of argument that the Investigating Officer was negligent or was not tactful enough in eliciting a statement from the prosecutrix, the benefit of such negligence or ineptitude on his part in the facts and circumstances of the case, cannot be extended to the appellant.

13. The second point raised on behalf of the appellant is that father of the prosecutrix Manoj (PW-4) has admitted in paragraph 7 of his cross-examination that house of the appellant comprises two rooms, where he lived along with his wife Rajeshwari, brother Panku, kids Aman and Khushi and father Jagat. He has further stated that elder brother Panku lived in one room along with his father. The prosecutrix has admitted in paragraphs 3 & 5 of her statement that when she had gone to appellant Chaitu Singh's house, Aman and Khushi were already there and she has also admitted that when appellant made her lie on the cot; Aman, Khushi and Jagat were also there. It has been argued on behalf of the appellant that it is highly inconceivable that a person would try to rape a minor in the presence of his father, nephew and niece. However, the prosecutrix herself in paragraph 3 of her cross-examination has explained that there are two cots in appellant Chaitu Singh's house. On one of them, his father Jagat was sleeping. She has also stated in paragraph 5 that Aman and Khushi are younger than her, which means that these kids were below 5 years of age. Moreover, Savita (PW 5) in her paragraph 7 of her deposition has stated that the appellant's father was no inside the room in which the incident took place. He was sleeping in the *Parchhi* (veranda) outside. It does not sound improbable for man to sexually assault a child of tender age with his father sleeping in the next room and two small children moving around in a mid-summer afternoon. As such, this argument is not sustainable either.

14. The next argument advanced on behalf of the appellant is that the prosecutrix has admitted in paragraphs 3 & 4 of her cross-examination that no sooner she entered the house of the appellant her mother followed and slapped her, so she could not bring *bidis* for the appellant. On the basis of this admission, it has been contended that there was no opportunity for the appellant to commit any sexual assault upon the prosecutrix. It may be noted that the prosecutrix was a girl barely 5 year old. She could not be expected to be precise with regard to timing of the sequence of events. What she probably meant was that her mother entered after a short while. Therefore, this admission on her part is inconsequential.

15. The next contention advanced by the learned counsel for the appellant is that mother of prosecutrix, Savita (PW-5) has stated in paragraph 5 of her cross-examination that at the behest of her neighbour Ramvati (PW-2) she had bathed the prosecutrix and had also washed and dried her panty and slacks as they had got soiled. It is true that Savita had stated in her examination-in-chief that panty of the prosecutrix had got wet after the incident but the fact that panty and slacks were not produced before the investigating officer or were not seized during the investigation does not benefit the defence in the least, since it is not the case of the prosecution that the accused had ejaculated during the incident; therefore, no forensic evidence was sought to be adduced. The prosecution case is based entirely on the oral evidence supported by medical evidence. Thus, even this argument does not in any manner dent the prosecution case.

16. One more point raised by the learned counsel for the appellant is that grandmother of the prosecutrix, Bhagwati Bai (PW-1), has admitted in paragraph 7 of her statement that after the incident, she had returned back to her Bank and stayed there till 5:30 p.m. but she did not narrate the incident to any of the employees of the Bank nor did she tell it to any customer, though hundreds of customers visited the Bank and some of them were her acquaintances. In the opinion of this Court, the nature of incident was such that no prudent grandmother would like to publicize it. Thus, this omission on the part of Bhagwati Bai does not make her statement any less believable.

17. Though, the prosecutrix is a child witness being only 5 or 6 years of age, she has asserted at more places than one during her cross-examination that she was not tutored by her grandmother or her parents to implicate the accused. Throughout her cross-examination she remained faithful to her version

of the incident. Her version has been corroborated by mother Savita, who was eyewitness to a part of the incident. Her grandmother Bhagwati Bai has also supported the prosecution case to the fullest extent. The prosecution story has also got some support from Ramvati (PW-2), Manoj (PW-4) and Durga Bai (PW-6).

The appellant had stated in his examination under section 313 of the Code of Criminal Procedure that he has been falsely implicated in this case due to previous enmity. In this regard suggestion had been made to Bhagwati (PW1) that the relations between the two families were inimical due to illicit relations between appellant's wife and her son Manoj. However, it has been suggested to Manoj (PW-4) in his cross-examination that there was no ill-feeling between the two families prior to incident. Manoj has also stated that there were family relations between the two sides. Savita (PW-5) has also deposed in paragraph 4 of her cross-examination that her children and those of the appellant used to visit the house of each other unannounced. It shows that there was no previous enmity between the two families, which could prompt the family members of the prosecutrix to falsely implicate the appellant in a grave case like the present one. Thus, the Court concludes that the core of the prosecution story has remained unscathed and there is no reason to believe that the appellant has been falsely implicated in this case. The prosecution case is also fortified by the presumption available to it under section 29 of the Protection of Children from Sexual Assault Act, as the appellant has advanced no credible defence.

18. Now we come to the crucial point in this appeal. Prosecutrix (PW-10) has stated in paragraph No.1 of her examination-in-chief that appellant mounted her and was inserting his finger in her vagina. Her mother Savita Bai (PW-5) has deposed that the prosecutrix told her that the appellant had mounted her and was inserting finger in her vagina. Savita has also stated that there was redness on bother of her thighs and her panty was wet. Bhagwati Bai (PW-1) has stated that she was informed both by the prosecutrix and her mother that appellant was inserting finger in the private part of the prosecutrix. Dr. Manglesh Paraste (PW-8) has stated that he had found slight swelling and redness on external examination of the vagina, which was indicative of an attempt at sexual assault. However, it has never been the prosecution case that any penetrative sexual assault was made upon the prosecutrix. There is no mention of penetration of any part of appellant's body in the vagina of the prosecutrix, either in the first information report or in the police statements of

Bhagwati Bai or Savita. Even the fact that the appellant had mounted the prosecutrix is conspicuous by its absence in aforementioned documents. This part of the story has been revealed for the first time in the Court. It may be noted that Bhagwati Bai (PW-1) has stated in paragraph No.8 of her deposition that prosecutrix had informed her about insertion of finger at home and she had told the police regarding the same at the time of lodging the report. She specifically denied the suggestion that this fact was disclosed by the prosecutrix for the first time at the time of medical examination, after lodging of the first information report, the next day. On the contrary Savita (PW-5) has stated the fact regarding insertion of finger was to her by the prosecutrix 3 days after the incident at the time of medical examination. Dr. Manglesh Paraste (PW-8) has also stated that there was no bleeding from the vagina. In these circumstances, the part of the prosecution evidence regarding insertion of finger in the vagina does not appear to be credible and is consequently disbelieved. It also appears to be improbable that the accused had actually mounted the prosecutrix.

19. On the basis of aforesaid discussion, this Court is of the view that the prosecution has been able to prove only the following facts beyond reasonable doubt:

(i) The accused took the prosecutrix inside his house.

(ii) He removed her slacks and panty.

(iii) He lifted her onto the cot.

(iv) At that point of time, Savita made her entry, prompting the appellant to put her down.

(v) By virtue of section 30 of the Protection of Children from Sexual Offences Act, it may be presumed that the assault was made with a sexual intent.

20. On the foundation of aforesaid facts, no offence punishable either under section 376 of the Indian Penal Code [rape] or under section 4 of the Protection of Children from Sexual Offences Act [Penetrative Sexual Assault] or an attempt at any of those offences is made out. Thus, learned trial Court erred in convicting the appellant Chaitu Singh under section 376(2)(f) of the Indian Penal Code and section 4 of the Protection of Children from Sexual Offences Act, 2012. However, the prosecution has been able to prove the

offence of sexual assault defined under section 7 of the Protection of Children from Sexual Offences Act, which is punishable under section 8 thereof, beyond reasonable doubt.

21. Consequently, this appeal is partly allowed. Conviction of the appellant is altered from one under sections 376(2)(f) of the Indian Penal Code and 4 of the Protection of Children from Sexual Offences Act, 2012 to one under section 8 of Protection of Children from Sexual Offences Act, 2012.

22. His sentence of rigorous imprisonment for life on two counts is reduced to rigorous imprisonment for a period of 4 (Four) years and the fine amount is enhanced from Rs.4000/- (in all) to Rs.10,000/- (Rs. Ten Thousand), payable for the benefit of the prosecutrix in accordance with the provisions of section 357 (1) of the Code of Criminal Procedure. In default of payment of fine, the appellant shall undergo further rigorous imprisonment for a period of 6 (Six) months.

Appeal partly allowed.

I.L.R. [2015] M.P., 1352
APPELLATE CRIMINAL
Before Mr. Justice Ajit Singh & Mr. Justice N.K. Gupta
Cr.A. No. 2170/2010 (Jabalpur) decided on 15 December, 2014

ASHOK PRAJAPATI ... Appellant
Vs.
STATE OF M.P. ... Respondent

A. Criminal Trial - Prosecution Documents - **Prosecution document, if it is in favour of the accused, then it can be read in his favour without its actual proof. (Para 8)**

क. आपराधिक विचारण – अभियोजन दस्तावेज – अभियोजन दस्तावेज, यदि वह अभियुक्त के पक्ष में हैं तब उसके वास्तविक प्रमाण के बिना उसे उसके पक्ष में पढ़ा जा सकता है।

B. Evidence Act (1 of 1872), Section 32 - Dying Declaration - **Conviction can be safely placed on dying declaration provided the said dying declaration is free from vice of infirmities - If the dying declaration is recorded under suspicious circumstances, then it cannot be acted upon without corroborative evidence. (Paras 10 to 12)**

ख. *साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन* – मृत्युकालिक कथन पर सुरक्षित रूप से दोषसिद्ध किया जा सकता है परंतु तब जब उक्त मृत्युकालिक कथन कमियों के दोष से मुक्त है – यदि मृत्युकालिक कथन संदेहास्पद परिस्थितियों में अभिलिखित किया गया है तब बिना पुष्टिकारक साक्ष्य के उस पर कार्यवाही नहीं की जा सकती।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 32 - Dying Declaration - Certificate by Doctor **- Doctor who had certified that victim is in fit state of mind to give statement not examined - In view of the statement of the Executive Magistrate that he got the certificate of the duty doctor, then non-examination of duty doctor is not fatal. (Para 15)**

ग. *दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 32 – मृत्युकालिक कथन – चिकित्सक का प्रमाणपत्र* – चिकित्सक जिसने प्रमाणित किया है कि पीड़ित कथन करने के लिये उपयुक्त मनःस्थिति में है, उसका परीक्षण नहीं किया गया – कार्यपालिक मजिस्ट्रेट के कथन को दृष्टिगत रखते हुए कि उसने कर्तव्यस्थ चिकित्सक से प्रमाणपत्र लिया, तब कर्तव्यस्थ चिकित्सक का परीक्षण नहीं किया जाना घातक नहीं।

D. 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. (Para 16)**

घ. *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।

E. Criminal Procedure Code, 1973 (2 of 1974), Section 161 - Spot Map **- Spot map comes in the category of statement under Section 161 of Cr.P.C. - Such cannot be proved as a substantive piece of evidence - This document should be considered for the purpose of contradiction and omission. (Para 18)**

ङ. *दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161 – घटनास्थल*

नक्शा – घटनास्थल नक्शा, दं.प्र.सं. की धारा 161 के अंतर्गत कथन की श्रेणी में आता है – उक्त को साक्ष्य के सारभूत अंश के रूप में साबित नहीं किया जा सकता – इस दस्तावेज को विरोधाभास एवं लोप के प्रयोजन हेतु विचार में लिया जाना चाहिए।

F. Penal Code (45 of 1860), Section 302 - Murder **- Place of incident - Appellant is alleged to have poured kerosene oil on the deceased and thereafter set her on fire while she was in the kitchen - No attempt was made to get the sample of kerosene from the floor by rubbing a cotton swab as kerosene oil would spill on the floor - Witnesses who reached immediately after the incident have stated that they found injured/deceased in the courtyard of house - Semi burnt clothes were also found in Courtyard - Possibility cannot be ruled out that incident did not take place in kitchen but it might have taken place in verandah or courtyard. (Paras 18 &19)**

च. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – घटना का स्थान – अपीलार्थी ने अभिकथित रूप से मृतिका पर किरोसिन तेल उड़ेला और तत्पश्चात् उसे आग लगा दी जब वह रसोईघर में थी – कपास के फाहे को रगड़कर फर्श से किरोसिन तेल का नमूना लेने का कोई प्रयास नहीं किया गया जो कि फर्श पर छलका होगा – साक्षीगण जो घटना के तुरंत पश्चात् पहुँचे, उनका कथन है कि उन्होंने आहत/मृतिका को मकान के आंगन में पाया – अधजले कपड़े भी आंगन में पाये गये थे – संभावना को नकारा नहीं जा सकता कि घटना रसोईघर में नहीं घटी थी बल्कि हो सकता है बरामदा या आंगन में घटी हो।

G. Evidence Act (1 of 1872), Section 32 and Penal Code (45 of 1860), Section 302 - Dying Declaration **- No one was present in the house at the time of incident - Dying declaration was made by injured to two witnesses who reached on the spot immediately that she sustained burn injuries by chulha - No motive for appellant to kill his wife - No mention in M.L.C. that whether smell of kerosene oil was found on the body or not - Mother and maternal uncle of the deceased were present when the second dying declaration was recorded by Executive Magistrate - Second dying declaration appears to have been given under the influence of mother and maternal uncle - Deceased died within 2 months of marriage and there was no demand of dowry - Second dying declaration not trustworthy - Appellant acquitted. (Paras 21 to 28)**

छ. साक्ष्य अधिनियम (1872 का 1), धारा 32 व दण्ड संहिता (1860 का 45), धारा 302 – मृत्युकालिक कथन – घटना के समय मकान में कोई उपस्थित नहीं था –

आहत द्वारा मृत्युकालिक कथन दो साक्षियों को दिया गया जो घटनास्थल पर तुरंत पहुँचे थे, कि उसे चूल्हे द्वारा जलने से क्षतियां कारित हुई – अपीलार्थी के पास अपनी पत्नी की हत्या करने का कोई हेतु नहीं – एम.एल.सी. में उल्लेख नहीं कि क्या शरीर पर किरोसिन तेल की गंध पायी गई अथवा नहीं – कार्यपालिक मजिस्ट्रेट द्वारा द्वितीय मृत्युकालिक कथन अभिलिखित किये जाते समय मृतिका की मां और मामा उपस्थित थे. – द्वितीय मृत्युकालिक कथन मां और मामा के असर में दिया जाना प्रतीत होता है – मृतिका की मृत्यु विवाह के 2 माह के भीतर हुई और दहेज की कोई मांग नहीं थी – द्वितीय मृत्युकालिक कथन विश्वसनीय नहीं – अपीलार्थी दोषमुक्त।

Cases referred :

AIR 1994 SC 129, AIR 1983 SC 164, AIR 1965 SC 939, 2005 SCC (Cri) 1050, AIR 2001 SC 2124, AIR 1976 SC 1994, AIR 1974 SC 332, AIR 2014 SC 2486, AIR 1954 SC 15, AIR 1984 SC 1622, JT 2007 (8) SC 638.

S.C. Datt with *Siddharth Datt*, for the appellant.
Bramhadatt Singh, P.L. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by:
N.K. GUPTA, J. :- The appellant has preferred the present appeal being aggrieved with the judgment dated 30.9.2010 passed by the Eighth Additional Sessions Judge, Bhopal in S.T.No.713/2009, whereby the appellant has been convicted of offence under Section 302, 498-A of IPC and sentenced to life imprisonment with fine of Rs.2,000/- and 1 year rigorous imprisonment with fine of Rs.200/-. Default sentence of 3 months and 7 days was also imposed respectively in lieu of payment of fine.

2. The prosecution's case, in short, is that, deceased Manisha Prajapati was married to the appellant on 28.6.2009. On 28.8.2009, an intimation was received at Police Station Gunga that in the house of the appellant, a gas cylinder had exploded. Head Constable Ramashray Yadav (P.W.10) therefore alongwith Constable Ramkrishna Tiwari went to the house of the appellant, situated at village Nipaniya. Head Constable Ramashray Yadav found that there was no incident of explosive of gas cylinder but, Manisha Bai had sustained burn injuries and she was taken to Hamidiya Hospital, Bhopal by an emergency ambulance No.108. Since other family members of the appellant were not present in the house at that time, Kamalrani @ Bhagwati Bai (P.W.2), wife of cousin of the appellant alongwith Ramesh (P.W.1) took the deceased

Manisha to the hospital. There Manisha disclosed to these witnesses that she had sustained burn injuries due to the flames of Chulha (Earthen stove). Dr.Chourasiya recorded the MLC report, Ex.P/1 and Manisha was admitted in the hospital for treatment. On 29.8.2009, Executive Magistrate Shantaram Umhare (P.W.11) recorded the dying declaration, Ex.P/12, in which Manisha stated that the appellant had poured kerosene on her and set fire. Simultaneously, SHO Police Station Gunga Shri Alok Shrivastava (P.W.13) had recorded a Dehati Nalshi (FIR of the spot), Ex.P/20 and registered a case. On 31.8.2009, Manisha Bai died due to the burn injuries. Dr.Geetarani (P.W.9) had performed the post-mortem on the body of the deceased Manisha Bai and found that she died due to complications of burn injuries. Dr.D.K.Sharma (P.W.1), Senior Scientist Officer of Forensic Science Mobile Unit, Bhopal had also visited the spot on 28.8.2009 and he gave a spot inspection report, Ex.P/24 alongwith spot map, Ex.P/25. After due investigation, a charge-sheet was filed before the Additional Chief Judicial Magistrate, Bairasiya, who committed the case to the Sessions Court and ultimately, it was transferred to Eighth Additional Sessions Judge, Bhopal.

3. The appellant abjured his guilt. He did not take any specific plea but, he has stated that he was falsely implicated in the matter. However, no defence evidence was adduced.

4. Eighth Additional Sessions Judge, Bhopal, after considering the prosecution's evidence, convicted and sentenced the appellant as mentioned above.

5. We have heard the learned counsel for the parties at length.

6. In the present case, there is no eye witness to the incident. When incident takes place within the premises of a closed house then, there is no possibility to get any eye witness, unless any family member volunteers. In the present case, Manisha was residing in the her marital house alongwith appellant, his parents and sister. However, according to her dying declaration, Ex.P/12, she was all alone in the house and therefore, there was no possibility of any eye witness, who would have witnessed the entire incident.

7. The entire case depends upon the dying declaration given by Manisha. There are two sets of dying declarations available on record. Firstly, the oral dying declaration of Manisha proved by witnesses Ramesh (P.W.1) and Kamalrani @ Bhagwati Bai (P.W.2) alongwith entry relating to history of incident in MLC report, Ex.P/1. Second set of the dying declarations comprises

of Ex.P/12 recorded by the Executive Magistrate Shantaram Umhare (P.W.11), Dehati Nalshi, Ex.P/20 and case diary statement of Manisha recorded by SHO Shri Alok Shrivastava (P.W.13) as well as oral dying declaration witnessed by Bhagwati (P.W.6) mother and Munna @ Dhaniram (P.W.7), maternal uncle of Manisha. In the first set of dying declaration, a history is given that Manisha Bai sustained burn injuries when she was working on Chulha to prepare a cup of tea. According to own version of Manisha, in her statement recorded by the Executive Magistrate, she was all alone in the house and Kamalrani came to her house after hearing her cries and managed to take her to the hospital by an emergency ambulance alongwith witness Ramesh.

8. Ramesh and Kamalrani are independent witnesses. Appellant's relation with Ramesh could not be established, thus there is no possibility of a false statement by Ramesh. The statement of witness Ramesh and Kamalrani are given in the natural course. Kamalrani was the person, who first met Manisha, soon after the incident and the story as told to her by Manisha was disclosed by Ramesh to the doctor, who recorded the MLC report, Ex.P/1. Though the prosecution did not examine Dr.Chourasiya to prove the MLC report, Ex.P/1 but, it is a prosecution document and if it is in favour of the accused then, it can be read in his favour without its actual proof. However, witness Ramesh had proved his signature appended on the document, Ex.P/1. Looking to the entries of document, Ex.P/1, it would be apparent that initially an information was given to the doctor that Manisha sustained burn injuries while she was working on Chulha. It is possible that in the case history, this fact was mentioned in the document, Ex.P/1 and it might not be given by Manisha herself and such history was given by Ramesh to the doctor and therefore, by entry of that case history, it cannot be said that, that entry was a dying declaration of Manisha. However, the oral dying declaration of Manisha made before witnesses Ramesh and Kamalrani is very much available on record. Both the witnesses have stated the same thing in the Court which they had earlier stated to the police. It is also brought on record that when nobody was in the house, Kamalrani had called Maan Singh (P.W.5), Sarpanch of the village. Maan Singh also visited the hospital with Kamalrani and Ramesh but, he did not say contrary to the evidence of Ramesh and Kamalrani. In the cross-examination, Maan Singh (P.W.5) has stated that Manisha was telling that she committed suicide and the appellant was not present in the house, whereas he was sitting at a tea shop in the market. Similarly, Prakash (P.W.3) and Chandan Singh (P.W.4), residents of same locality did not support the prosecution case that

the appellant killed his wife.

9. The testimony of Ramesh and Kamalrani could not be rebutted by the prosecution. They took the stand from very beginning which is visible in MLC report, Ex.P/1. There is no evidence that any family member of the appellant or the appellant was present in the house to manipulate the dying declaration given by Manisha Bai to these witnesses. Also, the statement of Kamalrani and Ramesh is corroborated by Prakash (P.W.3), Chandan Singh (P.W.4) and Maan Singh (P.W.5). Hence, the oral dying declaration which was the declaration given by Manisha soon after the incident appears to be believable and which is not in favour of the prosecution.

10. The trial Court has based its conviction upon dying declaration, Ex.P/2 recorded by the Executive Magistrate, Shantaram Umhare (P.W.11), in which Manisha stated that the appellant poured kerosene on her and then set her on fire. Simultaneously SHO Police Station Gunga, Shri Alok Shrivastava (P.W.13) recorded Dehati Nalshi, Ex.P/20 and also recorded the document, Ex.P/23, statement of Manisha Section 161 of the Cr.P.C. Dying declaration recorded by the Executive Magistrate is same as it was recorded by Shri Alok Shrivastava, SHO Police Station Gunga in the form of FIR and case diary statement. Dying declaration recorded by Executive Magistrate has much evidentiary value in the case. It is expected that the Executive Magistrate cannot be over powered by family members of the deceased or the accused and his relatives. Hon'ble Apex Court in case of *"State of Uttar Pradesh Vs. Shishupal Singh"*, [AIR 1994 SC 129] has held that conviction can be safely placed on dying declaration provided the said dying declaration is free from vice of infirmities and if that dying declaration commands acceptance at the hands of the Court. In the case of *"Ramawati Devi Vs. State of Bihar"*, (AIR 1983 SC 164) it is held by Hon'ble the Apex Court that there is no requirement of law that such a statement must necessarily be made to a Magistrate. What evidentiary value or weight has to be attached to such statement, must necessarily depend on the facts and circumstances of each particular case. In a proper case, it may be permissible to convict a person only on the basis of a dying declaration in the light of their testimony in the Court. Similarly, in the case of the *"Thurukanni Pompiah & another Vs. State Of Mysore"* (AIR 1965 SC 939) Hon'ble the Apex Court has held that the Court must be satisfied that the declaration is truthful where the Court finds that the declaration is not wholly reliable and a material and integral portion of the deceased's version of the entire occurrence is untrue, the Court

may, in all the circumstances of the case, consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration.

11. In this context the learned senior counsel for the appellant has placed his reliance upon the judgment of Hon'ble the Apex Court in the case of *"Raja Ram Vs. State of Rajasthan"* [2005 SCC (Cri) 1050] that if the dying declaration passes the test of scrutiny, it can be relied on as the sole basis of conviction. Similarly, he has placed his reliance upon the judgment of Hon'ble the Apex Court in the case of *"Arvind Singh Vs. State of Bihar"* (AIR 2001 SC 2124) in which Hon'ble the Apex Court disbelieved the oral dying declaration as suggested by the mother of the deceased where according to the mother of the deceased, such declaration was given by the deceased few minutes before her death and no evidence was received about her physical fitness to give such declaration, and therefore such declaration was not believed.

12. Also in the case of *"K. Ramachandra Reddy Vs. Public Prosecutor"*, (AIR 1976 SC 1994) it is held that the Court has to scrutiny the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. Also the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. Similarly, in the case of *"Rasheed Beg Vs. State of Madhya Pradesh"*, (AIR 1974 SC 332) it is held that if the dying declaration recorded under suspicious circumstances, then it cannot be acted upon without corroborative evidence.

13. In the light of the aforesaid judgments of Hon'ble the Apex Court it is to be seen whether the dying declaration recorded by the Executive Magistrate was believable without any corroboration or not. A dying declaration recorded by the Police Officer may be doubtful to get success in the case, but not when it is recorded by an Executing Magistrate. The Executive Magistrate cannot be won over by either party and therefore if the Executive Magistrate has recorded a dying declaration carefully that he assured that the deceased was in a fit condition to give dying declaration, then it can only be brushed aside when the deceased was found tutored by someone else or was under influence of some one, before giving such a declaration otherwise such dying declaration should be believed.

14. In the present case the learned senior counsel for the appellant has

invited attention of this Court to the evidence of Bhagwati (PW-6) mother of Manisha specially in para 8 to 12 in which she has admitted that Manisha remained unconscious till her death, therefore she could not give any dying declaration before the Executive Magistrate or the Police Officer or to witness Bhagwati. If the evidence of Bhagwati is considered in whole, then it would be apparent that when she went to the hospital on the date of incident, she was not permitted to meet Manisha, because she was unconscious. On the next day morning, she again went to meet Manisha and she gave oral dying declaration to her. In this context, if the evidence of SHO Alok Shrivatava (PW-13) is considered, then it would be clear that he had sent a request letter to the Executive Magistrate to record dying declaration of Manisha on 28.8.2009, but when the Executive Magistrate Rajendra Singh Thakur reached the hospital, the duty doctor informed that she was not in a position to give any statement, because she was unconscious and thereafter again a request letter was sent to the Executive Magistrate on the second day when Manisha was conscious. The document Ex.P-12 was recorded by the Executive Magistrate Shantaram Umhare (PW-11). On that document, Dr. Sudesh Sharda gave a certificate before recording the dying declaration that Manisha was fit to give her statement and after conclusion of recording the dying declaration he further gave a certificate that she was in a fit condition even after recording of the dying declaration.

15. The learned senior counsel for the appellant has also submitted that the doctor who gave the certificate on document Ex.P-12 was not examined by the prosecution before the trial Court. However, if the duty doctor has given the certificate and it is stated by the Executive Magistrate Shantaram Umhare before the Court that he got the certificate of the duty doctor that the deceased was fit to give her dying declaration, then non-examination of said doctor is not fatal. In this context, the judgment of Hon'ble the Apex Court in the case of *"Amar Singh Yadav Vs. State of UP"*, (AIR 2014 SC 2486) may be perused, in which it is observed that mere fact that the doctor who had endorsed declaration was not examined does not affect its evidentiary value. Also the learned senior counsel for the appellant has submitted that the Executive Magistrate did not take the thumb impression of Manisha on document Ex.P-12,and therefore the possibility cannot be ruled out that such statement was prepared on the basis of *Dehati-Nalishi* etc. at the office of the Executive Magistrate.Such contention may not be accepted,because soon after recording dying declaration, the SHO Alok Shrivastava recorded the Dehati-Nalishi Ex.P/20 at the Hamidiya Hospital, Bhopal wherein impression

of right thumb of Manisha was taken. In this connection, the statement of the Executive Magistrate in para 5 may be considered that this was the first and last chance for him to record the dying declaration of anyone, and therefore he could have committed a mistake of not taking a thumb impression of Manisha on document Ex.P-12.Under these circumstances,it cannot be said that Manisha remained unconscious till her death. The execution of dying declaration Ex.P-12 appears to be proper. The doctor has certified that Manisha was in a fit condition to give dying declaration and thereafter the Executive Magistrate Shantaram Umhare had recorded the dying declaration.

16. The learned senior counsel for the appellant has submitted that the prosecution could not prove the presence of kerosene anywhere involved in the incident. It is further submitted that even the place of occurrence was not correctly established by the prosecution. It is submitted that the various articles sent to the Forensic Science Laboratory (in short "**FSL**") were not duly sealed and the contents of FSL report were not placed before the appellant while recording his statement under Section 313 of Cr.P.C. In support of his contention, he has placed his reliance upon the judgment of Hon'ble the Apex Court in the case of *"Zwinglee Ariel Vs. State of Madhya Pradesh"*, (AIR 1954 SC 15), *"Sharad Biridhichand Sarda Vs. State of Maharashtra"*, (AIR 1984 SC 1622) and *"Ajay Singh Vs. State of Maharashtra"* [JT 2007 (8) SC 638] in which it is held that if circumstances appearing against the accused of a particular nature or otherwise were not put to the appellant in his statement under Section 313 of Cr.P.C., then they must be completely excluded from consideration, because the accused did not have any chance to explain them. In the light of the aforesaid judgments, if the present case is considered, then it would be apparent that the Additional Sessions Judge prepared the question No.47 regarding sending of various articles to the FSL but thereafter the accused was not questioned relating to the FSL repot document Ex.P-19, and therefore the document Ex.P-19 i.e. the report of the FSL should be excluded from consideration as directed by the Apex Court.

17. However, the report of the FSL was not of much importance in the present case, because according to it, kerosene was found in semi burnt clothes of Manişha and also in a plastic can sent to the FSL. To prove the presence of kerosene, it is not required that chemically also it be proved that kerosene was present in such remains. If the evidence is given that there was a smell of kerosene found in such remains by the witnesses, then presence of kerosene may be accepted, and therefore if the report of FSL is excluded from the present case, then still the evidence of other witnesses can be considered and

accepted and the conclusion drawn by the FSL can be obtained otherwise.

18. The submission of the learned senior counsel for the appellant appears to be correct that the prosecution could not finally establish the actual place of incident and some manipulations have been done while investigation in collecting the various articles. According to Alok Shrivastava, who prepared the spot map Ex.P-22, he has shown that the incident took place in a kitchen whereas the semi burnt clothes of the deceased were found in the verandah outside the kitchen. He has shown that at place No.4, a can of kerosene was kept. If the document Ex.P-22 is compared with the document Ex.P-3, then it would be apparent that all the articles found in the kitchen and verandah were already recovered by the ASI VP Gaud (PW-14) vide seizure memo Ex.P-3 on 29.8.2009 at about 12:45 PM whereas SHO Alok Shrivastava had prepared the spot map Ex.P-22 on 29.8.2009 at about 3:50 PM. When all the articles were taken by ASI Gaud, then Shri Alok Shrivastava could not have found the position of such articles unless he has mentioned the position of such articles on the statement given by others. Therefore, the spot map Ex.P-22 comes in the category of statement under Section 161 of Cr.P.C. and it cannot be proved as a substantive piece of evidence. Such document should be considered for the purpose of contradiction and omission. In this connection the report Ex.P-24 and connected map Ex.P-25 prepared by Dr. D.K. Sharma (PW-15)-Senior Scientist Officer of the FSL Unit Bhopal is also important. In his spot map Ex.P-25, he gave the description in the following manner:-

R- Room (place of incident)

C- Chulha

G- Gas cylinder

Gs- Gas Chulha

Bcp- Semi burnt clothes

D- Door

In this map Dr. Sharma did not find any can of kerosene on the spot. According to his report Ex.P-24, he inspected the spot on 29.8.2009 at about 12:30 PM whereas the seizure document Ex.P-7 was prepared on 28.9.2009 at about 12:45 PM, and therefore Dr. Sharma went to the spot prior to the seizure of the articles. It is a mystry why Dr. Sharma did not find any can of kerosene on the spot. He did not mention in the spot map about for presence of kerosene smell in the semi burnt clothes. However, when he prepared the report Ex.P-24 on 30.8.2009 he did mention that smell of kerosene was

coming from the semi burnt clothes found in the verandah. Absence of can of kerosene in the report Ex.P- 24 creates a doubt in the investigation done by the ASI VP Gaud (PW-14) that he seized a can of kerosene from the spot.

19. The contention of learned senior counsel for the appellant is also acceptable on that point that no exact spot of incident was established by the prosecution. If the incident took place in the kitchen, then on pouring of kerosene upon Manisha, some kerosene must have also spilled on the floor, and therefore it was for the Senior Scientist Officer Dr. Sharma to advice the investigation Officer to get the sample of such kerosene from the floor by rubbing a cotton swab for sending it to the FSL, but no such suggestion was given. Kamalrani @ Bhagwati Bai (PW-2) and Ramesh (PW-1) were the persons who reached to the spot soon after the incident. They did not say that the incident took place in the kitchen. Kamalrani found Manisha in the courtyard of the house. Even no questions were asked by the Investigation Officer to Kamalrani or Ramesh that before taking Manisha to the hospital, whether her semi burnt clothes were taken away and kept in the verandah or her dress was changed. Under these circumstances, the possibility cannot be ruled out that the incident did not take place in the kitchen, but it might have taken place in the verandah or courtyard.

20. Munna @ Dhaniram (PW-7) has stated that the appellant had confessed about the incident before him, however he did not inform about this fact to the police in his case diary statement Ex.D-1, and therefore his evidence relating to extra judicial confession cannot be accepted. On the contrary, it appears that Munna @ Dhaniram was bent upon to implicate the appellant in the crime. Though the prosecution has failed to prove beyond doubt that kerosene was used in the crime or the semi burnt clothes found in the verandah were smelling with kerosene. But the there was no possibility that the deceased would have sustained burn injuries caused by any other reason like dry flame of Chulha or gas stove. There is no dispute to the fact that one gas burner/cylinder was found in the kitchen. One chulha was also found in the kitchen, but if it was used at the time of incident then, certainly some remains of fire wood and ashes must have been found by the police in that Chulha. It is not the story of Ramesh and Kamalrani that Manisha caught fire from the gas burner. If she had caught fire by the flame of gas burner or Chulha and fire must have started from lower to upper side, Manisha would not have sustained so much burn injuries on her upper portion. The entire description of burn injuries is depicted by Dr. Geeta Rani (PW-9) in the postmortem report Ex.P-9. In that document she had also shown the places

of burn injuries found on the body Manisha by sketch. Though there was a case of 25% burns only, but looking to the spots of burn on the body of Manisha, it appears that the burn injuries were caused due to some inflammable liquid otherwise by catching fire from the flame of gas burner or Chulha, such injuries could not be caused Manisha, and therefore there is a possibility that some inflammable liquid was used in the crime. Hence the incident is not an accidental. It could be homicidal or suicidal.

21. However, in the document Ex.P-1 the MLC report the concerned doctor did not mention that any smell of kerosene was coming from the body of Manisha. Dr. Geeta Rani, who performed the postmortem did not give any opinion as to whether smell of kerosene was found on the body or not. The opinion of Dr. Geeta Rani was not so important, because Manisha was treated for 2-3 days and specially chemicals and ointments might have been applied on her burnt portion of body, and therefore smell of kerosene could not be found after 3 days of the incident at the time of postmortem. But looking to the entire injuries, it appears that some inflammable liquid was used in committing the crime.

22. If the credibility of dying declaration Ex.P-12 is considered by assessment of circumstances in the case, then the following negative circumstances are present. Firstly that no one was present in the house from the side of the appellant when Manisha was taken to the hospital and undoubtedly she made an oral dying declaration before Ramesh and Kamalrani that she sustained burn injuries by Chulha. There was no one in the house to pressurize Manisha to give such a statement, then as to why she gave such a statement. The possibility cannot be ruled out that Manisha attempted to commit suicide, and then to save herself, she gave a wrong information to witnesses Kamalrani or Ramesh. Hence the first oral dying declaration, which is almost admitted evidence in the eyes of law is contrary to the dying declaration given by Manisha before the Executive Magistrate. Secondly, no motive really exists for the appellant to kill Manisha. According to the dying declaration Ex.P-12 and oral dying declaration proved by Bhagwati and Munna @ Dhaniram, the appellant demanded some amount from Manisha so that he could consume liquor but such amount was not given, and therefore he set fire on her. It is also admitted that the marriage of Manisha took place with the appellant two months back. It is not proved that Manisha was earning member or the appellant was giving his earning to her, and therefore he was demanding some money from her to consume liquor. There was no possibility that the appellant would have demanded money from Manisha, who was recently married to

him. If he was an employeed person, he must have sufficient sum in his pocket or he would have asked for the same from his father. There was no need to the appellant to demand money from Manisha.

23. In this connection the statement given by Bhagwati is also relevant. She has stated that two days back the appellant and Manisha came to her house and on demand of the appellant she gave a sum of Rs.10,000/-. However, such statement was not given by Bhagwati to the police at the time of recording of case diary statement. But if it is accepted to be true, then if the appellant had sum of Rs.10,000/- two days back, then he had sufficient money to consume liquor for months. And there was no need for the appellant to demand any amount from Manisha to consume liquor.

24. Bhagwati and Munna @ Dhaniram did not allege that the appellant demanded any dowry at the time of marriage or thereafter. The police did not make the case under Section 304-B of IPC, and therefore the sum was not required by the appellant as dowry. If he would have demanded any amount from Manisha, then certainly the appellant would have given some time to her so that she could bring that amount from her mother. Then he could not kill Manisha immediately on non-fulfilling the demand. Under these circumstances, the motive of murder as alleged by the witnesses as oral dying declaration as well as recorded in the document Ex.P-12 and P-20 does not appear to be natural and such motive did not exist.

25. In this connection, the statements given by Bhagwati and Munna @ Dhaniram (PW-7) are important that soon before the incident the appellant contacted Munna @ Dhaniram on telephone that a quarrel took place between Manisha and the appellant and the appellant requested witness Munna @ Dhaniram to visit his house for resolving the dispute, but Munna @ Dhaniram could not go to the house of the appellant because he was sufferings from fever. If the appellant was so fair that he contacted Munna @ Dhaniram, maternal uncle of Manisha so that he would participate in the resolution of dispute between him and Manisha, then certainly looking to the conduct of the appellant, it was not possible that he would have demanded some amount from her to consume liquor or set fire upon her. Though some of the witnesses have turned hostile, but they have stated about the incident that the appellant was not present in the house.

26. If the conduct of Manisha as depicted by the entire evidence collected by the prosecution is considered, then it appears that the marriage of the appellant took place with Manisha two months prior to the incident. There

was no dowry demand from the side of the appellant and quarrel took place between the appellant and Manisha and thereafter the appellant left his house. He tried to seek intervention of maternal uncle of Manisha, but he could not succeed in doing so. Thereafter Manisha was found with burnt injuries and while she was taken to the hospital, she had no influence of the family members of the appellant. To save herself, she informed the various witnesses that she caught fire from Chulha, and therefore possibility cannot be ruled out that she tried to commit suicide. If the appellant had poured kerosene on Manisha and set her on fire, she would not have hesisted in telling this fact to witnesses Kamalrani, Ramesh and others like Sarpanch Mansingh from very beginning.

27. Thereafter it appears that the police recorded the *Dehati-Nalishi* by taking the version of Manisha and the dying declaration of Manisha was recorded by the Executive Magistrate. It is also admitted that at the time of recording of dying declaration, Bhagwati-mother and Munna @ Dhaniram-maternal uncle of Manisha were also present with her and the dying declaration was recorded before them. Therefore, the possibility of tutoring by Bhagwati and Munna @ Dhaniram cannot be ruled out. Appellant had requested Munna @ Dhaniram to come and resolve the conflict between him and Manisha, but he denied on a pretext that he was suffering from fever, but in the same evening he visited the hospital along with his sister Bhagwati. Under these circumstances, where Manisha did not give her dying declaration telling such a fact at the first opportunity before Kamalrani and Ramesh, it appears that the dying declaration Ex.P-12 which was recorded by the Magistrate was given by her under the influence of Bhagwati and Munna @ Dhaniram. Manisha sustained burn injuries within two months of her marriage and there was no dowry demand from the side of the appellant and within two months no such cruelty could be shown so that Manisha would have committed suicide, and therefore the witnesses must have thought that the case should be converted into a crime of murder, and possibly Manisha was tutored accordingly. There was not much bounding between the appellant and Manisha because her marriage took place with the appellant two months back and on the date of incident quarrel took place between them, hence Manisha was annoyed with the appellant and in a position to state against him according to tutoring of her mother and maternal uncle. Under these circumstances, when the entire evidence is considered, then in the light of the aforesaid judgments of Hon'ble the Apex Court specially in case of *K. Ramchandra Reddy* (supra), it appears that the dying declaration Ex.P-12, *Dehati Nalishi* Ex.P-20, as well as the case diary statement along with the oral dying declaration as informed by

Bhagwati and Munna @ Dhaniram are not trustworthy. A doubt is also created that such statements were given by Manisha under the influence of her mother Bhagwati and maternal uncle Munna @ Dhaniram whereas the appellant had no motive to kill her, the conduct of the appellant clearly indicates that he tried to call Munna @ Dhaniram to resolve the dispute and dispute was not of demanding any amount to consume liquor, the place of incident could not be ascertained by the prosecution, no can of kerosene was found at the alleged spot by Dr. Sharma, Senior Scientist, FSL Unit Bhopal, but it was seized by the Investigation Officer and Manisha had an opportunity to give such dying declaration soon after the incident, but she gave a different dying declaration at that time. Hence possibility cannot be ruled out that Manisha herself would have attempted to commit suicide. In the light of the aforesaid judgments of Hon'ble the Apex Court, the second dying declaration which implicates the appellant is not trustworthy beyond doubt. Therefore, on the basis of that dying declaration, no conclusion can be drawn.

28. The dying declaration Ex.P-12 and similar dying declaration as recorded by Shri Alok Shrivastava and oral dying declaration to Bhagwati and Munna @ Dhaniram, cannot be believed. Under these circumstances, the chain of circumstantial evidence is broken against the appellant. When a doubt is created that Manisha had attempted to commit suicide, because she was not happy with the appellant and within two months of her marriage, she had such a quarrel with the appellant which could not be resolved, then the appellant cannot be held guilty of offence under Section 302 of IPC. The learned Additional Sessions Judge has committed an error of law in convicting the appellant for the aforesaid offence.

29. So far as the offence under Section 498-A of IPC is concerned, the marriage of Manisha and the appellant took place two months prior to the incident. Bhagwati, Ramesh and Munna @ Dhaniram have accepted that they did not hear anything against the appellant that the appellant inflicted any cruelty with some reason and the act of cruelty committed on the day of incident was not proved beyond doubt, and therefore when there is no evidence against the appellant relating to cruelty towards Manisha within two months after the marriage, then the appellant cannot be convicted of offence under Section 498-A of IPC. The learned Additional Sessions Judge has committed an error of law in convicting the appellant for that offence.

30. On the basis of the aforesaid discussion, the present criminal appeal filed by the appellant appears to be acceptable. Consequently, it is hereby

allowed. The conviction as well as the sentence imposed by the trial Court of offence under Sections 302 and 498-A of IPC are hereby set aside. The appellant is acquitted of all the charges appended against him by giving him benefit of doubt.

31. At present the appellant is in jail, and therefore the Registry is directed to arrange for his release without any delay.

32. A copy of this judgment be sent to the trial Court along with its record for information and compliance.

Appeal allowed.

I.L.R. [2015] M.P., 1368
CIVIL REVISION
Before Mr. Justice K.K. Trivedi
Civil Rev.No. 69/2013 (Jabalpur) decided on 11 November, 2013

DEEDAR SINGH DHILLAN & anr. ...Applicants
Vs.
PREETPAL SINGH CHADDA ...Non-applicant

A. ***Guardians and Wards Act (8 of 1890), Section 25 and Family Courts Act (66 of 1984), Section 7(1)(g) - Jurisdiction*** **- After the constitution of Family Court, District Court, Bhopal has no jurisdiction to entertain application u/s 25 of Act, 1890 seeking custody of child - Only Family Court has jurisdiction to entertain the said application - District Court directed to return the application for its presentation before Family Court, Bhopal. (Paras 8 & 11)**

क. संरक्षक और प्रतिपाल्य अधिनियम (1890 का 8), धारा 25 एवं कुटुम्ब न्यायालय अधिनियम (1984 का 66), धारा 7(1)(जी) – अधिकारिता – कुटुम्ब न्यायालय के गठन के पश्चात् जिला न्यायालय, भोपाल को अधिनियम 1890 की धारा 25 के अंतर्गत बालक की अभिरक्षा चाहने के आवेदन को ग्रहण करने की कोई अधिकारिता नहीं – उक्त आवेदन को ग्रहण करने की अधिकारिता केवल कुटुम्ब न्यायालय को है – कुटुम्ब न्यायालय, भोपाल के समक्ष प्रस्तुत किये जाने हेतु जिला न्यायालय को आवेदन वापस करने के लिये निदेशित किया गया।

B. ***Guardians and Wards Act (8 of 1890), Section 25 - Custody of child - Territorial jurisdiction - Ordinarily resides*** **- Natural Guardian/Father residing at Bhopal - If child is shifted temporarily to another place even on the basis of consent of respondent, it cannot be**

held that Court at Bhopal has no jurisdiction - Such a question is required to be decided only after recording of evidence. (Para 9)

ख. संरक्षक और प्रतिपाल्य अधिनियम (1890 का 8), धारा 25 – बालक की अभिरक्षा – क्षेत्रीय अधिकारिता – सामान्य रूप से निवास – नैसर्गिक संरक्षक/पिता भोपाल में निवासरत – प्रत्यर्थी की सहमति के आधार पर भी यदि बालक को अस्थाई रूप से अन्य स्थान पर ले जाया जाता है, यह अभिनिर्धारित नहीं किया जा सकता कि भोपाल के न्यायालय को अधिकारिता नहीं – उक्त प्रश्न को केवल साक्ष्य अभिलिखित किये जाने के पश्चात् निर्णीत किया जाना अपेक्षित है।

Cases referred :

AIR 2004 Karnataka 321, AIR 2007 Allahabad 13, AIR 2008 Himachal Pradesh 38, AIR 2009 SC 2821, 2011 (3) MPLJ 642, AIR 1988 Gauhati 22, AIR 1989 Orissa 151.

Sankalp Kochar, for the applicants.
Ashish Shroti, for the non-applicant.

ORDER

K.K. TRIVEDI, J. :- This revision is directed against the order dated 11.10.2012 passed in M.J.C. No.2/2012 by the XIV Additional District Judge, Bhopal whereby the application submitted by the applicants under Section 9 of the Guardians and Wards Act, 1890 (herein after referred to as '1890 Act') read with Order 7 Rule 11 of the Code of Civil Procedure has been dismissed. It is contended that the applicants are the maternal-grand parents of the minors, who are in their custody. The respondent has moved an application under Section 25 of the 1890 Act seeking custody of the minor children against the applicants before the District Court at Bhopal. Such an application is not maintainable before the District Court in terms of the provisions of Section 7(1)(g) of the Family Courts Act, 1984 (herein after referred to as '1984 Act') and since there is no scope of interference in respect of the custody of the minor children, as such application is also not maintainable in view of the provisions of Section 9 of the 1890 Act, such an application of the respondent was liable to be dismissed but instead the application submitted by the applicants has been rejected, therefore, the revision is required to be filed.

2. Brief facts giving rise to filing of this revision are that the respondent was married to the daughter of the applicants, namely Amardeep Kaur. Their marriage was solemnized on 26.11.2008. Out of the wedlock, late Amardeep Kaur gave birth to triplet sons on 31.03.2011. However, because of the post-

delivery problem, she succumbed to death and the respondent was keeping the minor children with him. As contended in the application, the minors are residing at Nagpur and thus an application was made by the applicants for grant of custody of the minor children to them under the provisions of 1890 Act. However they were served with a notice of application submitted under Section 25 of the 1890 Act filed by the respondent in the Court of District Judge, Bhopal. Upon service of the notice, they submitted an objection with respect to the maintainability of the application in the District Court at Bhopal on the ground that the minor children were living at Nagpur and since the territorial jurisdiction of the Court where the minor children are ordinarily residing would be attracted in case of grant of custody of the minors, such an application submitted by the respondent before the District Court at Bhopal was not maintainable. However, this objection has been rejected in cryptic manner without looking to the law laid-down by the Apex Court in appropriate manner, therefore, this revision is required to be filed.

3. This revision was entertained, interim stay was granted and notice was served. Heard learned Counsel for the parties at length and perused the record.

4. Undisputedly the respondent is the natural father of the minors and is entitled to claim the custody of the minors. Section 25 of the 1890 Act specifically prescribes title of guardian to custody of ward. Provisions of Section 25 are materially important, therefore, they are quoted herein below:

> **"25. Title of guardian to custody of ward.--** (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.
>
> (2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882 (10 of 1882).
>
> (3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship."

The only restriction put by the 1890 Act in respect of jurisdiction of the Court is prescribed in Section 9 of 1890 Act, which reads thus:

> **"9. Court having jurisdiction to entertain application.--** (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.
>
> (2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.
>
> (3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction."

5. It is contended by learned Counsel for the applicants that In the case of *Abraham G. Karimpanal and others vs. Nil,* AIR 2004 Karnataka 321, the Division Bench of Karnataka High Court has taken note of the word 'ordinarily resides' and in paragraphs 11, 12, 13 and 14 interpretation has been done, which reads thus:

> "11. For our purpose, Sub-section (1) of Section 9 is material. As per sub-section (1) of Section 9, where the application is in respect to the guardianship of a person of the minor, it is to be filed at the Court under whose territorial jurisdiction the minor ordinarily resides. In order to give the Court jurisdiction for the purpose of appointment of guardian under sub-section (1) of Section 9 and for passing orders under Section 25 of the Act, the minor must ordinarily be resident within the local limits of the Court's jurisdiction. If the minor does not ordinarily reside within the territorial jurisdiction of the District Court concerned, such District Court will have no jurisdiction to proceed under the Act. It is true, the mere fact that a minor is found actually residing at a place at a time when an application for guardianship is made under

Section 7 of the Act does not determine the jurisdiction of the Court. It must be proved whether the minor ordinarily resides as laid down in Sub-section (1) of Section 9. It is the ordinary place of residence of the minor which determines the jurisdiction of the particular District Court to entertain application for guardianship of the minor. Such jurisdiction cannot be taken away by temporary residence elsewhere at the date of presentation of the petition under Section 7 of the Act. The words "ordinarily resident" have a different meaning than 'residence at the time of the application'. Both may be identical or may be different. That would depend on the facts of each particular case. To interpret the words "where the minor ordinarily resides" to mean "where the minor actually resides at the time of the application" may in some cases amount to rendering nugatory of the provisions of the Act. We say this because, if persons who have absolutely no right may remove a minor forcibly from his ordinary place of residence and keep him at a distant place where the application is made, objection can be taken that the application is not entertainable. The residence of a child does not and cannot depend upon the machinations of recalcitrant persons who apply for guardianship and/or custody of a minor. The latter residence, whether for a long period or for a short period, will also not make the residence of the minor the ordinary place of residence. All relevant attendant circumstances, the intention with which the minor had been removed, the person with whom the minor has been living and other relevant factors have to be taken into consideration. The words 'ordinarily resides' obviously mean more than temporary residence, even though such residence is spread over a long period.

12. The term 'residence' is an elastic word of which an exhaustive definition cannot be given; it is differently construed according to the purpose for which enquiry is made into the meaning of the term; the sense in which it should be used is controlled by reference to the object. 'Residence' means dwelling in a place for some continuous time. The words 'ordinarily resides' in sub-section (1) of Section 9 of the Act mean more than a temporary residence even though the period of such temporary residence may be considerable. Residence may be transitory or permanent. The former is residence simpliciter or causal residence. The latter

connotes the place where for the practical purposes a person is expected to be ordinarily found. That is the place where he is said to ordinarily reside. Generally speaking, residence is a matter of fact, and not a matter of presumption.

13. The words 'ordinarily resides' fell for interpretation of the Apex Court and High Courts in large number of cases under various statutes. In *Smt. Jeewanti Pandey's* case (AIR 1982 SC 3) (supra), the Supreme Court, dealing with a situation where jurisdiction of a Court was based on 'the ground of residence' has observed in paragraph-12 as under:

> "12. In order to give jurisdiction on the ground of 'residence', something more than a temporary stay is required. It must be more or less of a permanent character, and of such a nature that the court in which the respondent is sued, is his natural forum. The word 'reside' is by no means free from all ambiguity and is capable of a variety of meanings according to the circumstances to which it is made applicable and the context in which it is found. It is capable of being understood in its ordinary sense of having one's own dwelling permanently, as well as in its extended sense. In its ordinary sense 'residence' is more or less of a permanent character. The expression 'resides' means to make an abode for a considerable time; to dwell permanently or for a length of time; to have a settled abode for a time. It is the place where a person has a fixed home or abode. In Webster's Dictionary, 'to reside' has been defined as meaning 'to dwell permanently or for any length of time', and words like 'dwelling place' or 'abode' are held to be synonymous. Where there is such fixed home or such abode at one place the person cannot be said to reside at any other place where he had gone on a casual or temporary visit, e.g. for health or business or for a change. If a person lives with his wife and children, in an established home, his legal and actual place of residence is the same. If a person has no established home and is compelled to live in hotels, boarding houses or houses of others, his actual and physical habitation is the place where he actually or personally resides."

14. Having construed the word 'residence' in paragraph-12, the

Apex Court proceeded to hold further in paragraph-13 thus:

> "It is plain in the context of Clause (ii) of Section 19 of the Hindu Marriage Act, 1955 that the word 'resides' must mean the actual place of residence and not a legal or constructive residence, it certainly does not connote the place of origin. The word 'resides' is a flexible one and has many shades of meaning, but it must take its colour and content from the context in which it appears and cannot be read in isolation. It follows that it was the actual residence of the appellant at the commencement of the proceedings, that had to be considered for determining whether the District Judge, Almora had jurisdiction or not."

6. Relying in the case of *Dr Vinay Samuel Arawattigi vs. Principal Judge, Family Court, Kanpur Nagar and another,* AIR 2007 Allahabad 13, again it is contended that the word 'ordinarily resides' has been interpreted and it has been held that in view of the specific pleadings it has to be held that the Court where at the time of commencement of the proceedings the minor was residing, will have the jurisdiction to entertain such an application. In the case of *Himanshu Mahajan v. Rashu Mahajan & others,* AIR 2008 Himachal Pradesh 38, referring to certain paragraphs of the report it is contended by learned Counsel for the applicants that in view of the specific averments made in the application submitted by the respondent it is clear that the minors were not residing at Bhopal on the date when application was filed and the proceedings were commenced for seeking their custody, therefore, as per the provisions of Section 9 of the 1890 Act, such an application would not be maintainable. Referring to the law laid-down by the Apex Court in the case of *Smt. Anjali Kapoor vs. Rajiv Baijal,* AIR 2009 SC 2821, it is contended by learned Counsel for the applicants that since the minors were residing at Nagpur along with the applicants, any application seeking their guardianship should have been filed before the appropriate Court at Nagpur and not otherwise. Further placing reliance in the case of *Ruchi Majoo vs. Sanjeev Majoo,* 2011 (3) MPLJ 642, learned Counsel for the applicants would contend that the ordinary residence of the minors was at Nagpur and such an application of the respondent was not maintainable before the Court at Bhopal and these aspects if are taken into consideration, the order passed by the Court below is liable to be set aside. Yet another ground is raised by learned Counsel for the applicants that Parliament has enacted the Family Courts Act, 1984 wherein specific provisions are made for exclusion of jurisdiction in Chapter III of the

1984 Act. It is contended that as per Section 7 of the 1984 Act, the application submitted by the respondent before the District Court was not maintainable as a suit or proceeding in relation to guardianship of the person or the custody or access to, any minor, was required to be filed only before the Family Court at Bhopal. The 1984 Act being special Act, will have the overriding effect over the general law of jurisdiction of the Court and even otherwise the same being a subsequent enactment of Parliament with specific provisions, the same would have the overriding effect on the provisions of 1890 Act. It is, thus, contended that at any rate the application submitted by the respondent before the District Court at Bhopal was not maintainable and was thus liable to be rejected. However, this aspect is also not considered by the Court below and the application submitted by the applicants has been rejected erroneously.

7. Per contra it is contended by learned Counsel appearing for the respondent that if an application is submitted raising objection for dismissal of the application filed by the respondent, it has to be treated to be one under Order 7 Rule 11 of the Code of Civil Procedure. Even if certain provisions are quoted, since the provisions of Code of Civil Procedure are applicable in the proceedings under the 1890 Act, the application of the applicants was required to be considered under the provisions of the Code of Civil Procedure only. It was rightly considered by the Court that the respondent was the natural father, as was demonstrated by him in his application, illegally the applicants have taken the minors mischievously with an intention to retain them in their custody to Nagpur and, therefore, it has to be held that the ordinary residence of the minors was at Bhopal where the application has rightly been made by the respondent for grant of custody of minors. It was not necessary for the respondent, natural guardian, to rush to the Courts at Nagpur to seek custody of his sons. The applicants are aged persons and since the paramount consideration is the welfare of the minors, it is required to be seen by the Court at Bhopal whether the applicants would be in a position to look after and take care of minors in adequate manner or not. This being so, it is contended that hard and fast interpretation of the rules is not permissible. Further placing reliance in the case of *Amal Saha vs. Smt. Basana Saha,* AIR 1988 Gauhati 22, it is contended by learned Counsel for the respondent that if illegally the minors are removed from the ordinary residence, it cannot be said that Bhopal Court will have no jurisdiction to entertain application for restoration of custody of minors to natural guardian. It is contended that similar law is reiterated by the Orissa High Court in the case of *Konduparthi Venkateswarlu and others vs. Ramavarapu Viroja Nandan and others,* AIR 1989 Orissa 151, wherein

considering such aspects the Court has held that the ordinary residence of minors would be at the place where their legal guardian is residing legally. It is contended that one son is already with the respondent and, thus, removal of two sons from his custody illegally by the applicants has compelled him to move the application for grant of custody of his minor sons. It is contended that since application submitted by the applicants for dismissal of the application is required to be considered under Order 7 Rule 11 of the Code of Civil Procedure, only the pleadings made in the application submitted by the respondent before the Bhopal Court are required to be seen. Further, no defence has been put by the applicants by filing any reply to such an application and, therefore, their application for dismissal of the application of the respondent was rightly rejected by the Court below. Taking this Court to the pleadings made in the application under Section 25 of the 1890 Act, learned Counsel for the respondent has contended that these facts have not been denied by filing any reply by the applicants before the Court below and, therefore, if such pleadings of the respondent are accepted to be correct prima facie and the Court has rejected the application of the applicants for dismissal of the application of the respondent, no wrong is committed by the Court below. It is lastly contended that in case it is held that application under Section 25 of the 1890 Act was not maintainable in District Court at Bhopal, the same can be transferred. to the Family Court having jurisdiction to try such application in view of provisions of sub-section (3) of Section 9 of 1890 Act.

8. After considering the rival submissions of learned Counsel for the parties, one thing is clear that under 1984 Act the District Court at Bhopal was having no jurisdiction to try the application submitted by the respondent under Section 25 of 1890 Act. Such an application ought to have been filed before the Family Court at Bhopal if at all the respondent was of the view that the said Court would have the jurisdiction to try the application. There is a clear bar of jurisdiction created under Section 7 of the 1984 Act, which prescribes that if a Family Court is constituted under the Act aforesaid in a particular place, the Family Court only will exercise the jurisdiction exercisable by any District Court or any subordinate Civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation. Explanation (g) of Section 7 of 1984 Act specifically contains that a suit or proceeding in relation to the guardianship of the person or custody of, or excess to, any minor would be tried by a Family Court if constituted. Therefore, if a bar is created under the Act, with respect to the jurisdiction, and specific cases are conferred within the jurisdiction of the Family

Court, the District Court at Bhopal was having no jurisdiction to entertain the application submitted by the respondent under Section 25 of the 1890 Act.

9. Now the question is whether the Court at Bhopal will have the jurisdiction to entertain any such application made under Section 25 of the 1890 Act or not. The provisions of Section 9 of the 1890 Act are clear. There is no doubt that the ordinary residence of the minors would be at Bhopal where their natural guardian, the father, was residing. The objection with respect to maintainability of such an application at Bhopal Court raised by the applicants is based on the interpretation of the words "ordinarily resides". In fact the entire submission made by learned Counsel for the applicants is that since the minors are residing at Nagpur along with the applicants, an application was required to be made for grant of their custody only and only in the Court at Nagpur and not otherwise. For the aforesaid purpose, analysis done by the Division Bench of the Karnataka High Court has been shown in respect of interpretation of the words "ordinarily resides". Had it not been a case that the minors are taken away by the applicants even with the consent of the respondent, they would have resided only and only with the respondent at Bhopal. If for any reason they have been shifted temporarily, even on the basis of the consent, as alleged by the applicants, it cannot be said that they be treated as ordinarily residing at the place where the applicants are residing. Such an interpretation would be against the interpretation done by the Karnátaka High Court in the case of *Abraham G. Karimpanal* (supra) and will not be proper in the context that the Court at Nagpur alone would have jurisdiction to entertain an application under Section 25 of the 1890 Act. If the law laid-down by the Apex Court in the case of *Ruchi Majoo*(supra) is examined, it will be clear that such a question need to be decided only after recording the evidence whether the minors were taken away by the applicants with the consent of the respondent or not. The objection raised by the applicants with respect to maintainability of the proceedings at Bhopal Court cannot be looked into without specific reply of the application under Section 25 of the 1890 Act. If such an objection is to be considered at preliminary stage in terms of Section 9 of the 1890 Act, the same has to be decided in accordance to the provisions of Order 7 Rule 11 of the Code of Civil Procedure. It is trite that while deciding such an application under Order 7 Rule 11 of the Code of Civil Procedure, only the pleadings in the plaint or application are required to be seen. Specifically when there is no such denial of such specific pleading, it cannot be said that such allegations, as have been specifically made in the application under Section 25 of the 1890 Act by the

respondent, are false, frivolous, malicious or vaxacious. Therefore, the submission made by learned Counsel for the applicants that only Nagpur Court would have jurisdiction to entertain application under Section 25 of the 1890 Act cannot be accepted.

10. Now as has already been held, if there is a bar created by the Act with respect to the exercise of jurisdiction by particular Courts in particular case and with respect to grant of particular relief, at least the District Court at Bhopal will have no jurisdiction to entertain the application under Section 25 of the 1890 Act, filed by the respondent. If that would have been examined by the Court below in appropriate manner, in fact the Court should have acted in accordance to the provisions of Section 9(3) of the 1890 Act read with Order 7 Rule 10 of the Code of Civil Procedure and the application should have been returned to the respondent for its presentation before the Family Court at Bhopal. Having failed to do so, at least the District Court, Bhopal cannot be allowed to continue with the proceedings on application under Section 25 of the 1890 Act made by the respondent.

11. It is pointed out by the learned Counsel for the respondent that since both the parties are represented before this Court looking to such a claim made by the respondent in his application under Section 25 of the 1890 Act, it would be proper for this Court to exercise the power and to direct the District Court to return the application of the respondent to him for its presentation before the Family Court at Bhopal and further to direct both the parties represented before this Court to remain present before the said Family Court on the date when the same is required to be presented by the respondent. It is seen that the provisions of Order 7 Rule 10 of the Code of Civil Procedure are relating to return of the plaint but not fixing a date of appearance before the Court having jurisdiction to try such a claim. However, Order 7 Rule 10-A of the Code of Civil Procedure confers such power on the Court, upon an application to be made by the plaintiff before the Trial Court, for return of the plaint and to fix a date of appearance before the Court of competent jurisdiction for the purpose of presentation of claim. Therefore, it would be appropriate, for this Court to fix a date of appearance before the Family Court, Bhopal by the parties for the purposes of presentation of the application of the respondent under Section 25 of the 1890 Act.

12. In view of this, it is directed that the District Court, Bhopal will return the application under Section 25 of the 1890 Act filed by the respondent bearing M.J.C. No.2/2012 to the respondent for its presentation before the

Family Court on 2nd **December, 2013.** On this date, the applicants and the respondent herein will remain present before the Family Court, Bhopal. The applicants would be at liberty to file their written reply to the application of the respondent raising all such grounds which they require to raise. The Family Court, Bhopal will decide such application in the manner prescribed under the 1890 Act expeditiously.

13. The revision is disposed of finally with the aforesaid direction. However, there shall be no order as to costs of this proceeding.

Revision disposed of.

I.L.R. [2015] M.P., 1379
CRIMINAL REVISION
Before Mr. Justice C.V. Sirpurkar
Cr.Rev. No. 487/2011 (Jabalpur) decided on 19 November, 2014

MADHUSUDAN TIWARI ...Applicant
Vs.
SHYAM SUNDER & ors. ...Non-applicants

A. ***Criminal Procedure Code, 1973 (2 of 1974), Section 204 - Issuance of Process - Sufficient ground*** **- Sufficient ground means prima facie case is made out against person accused and does not mean sufficient ground for purpose of conviction - Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of allegations - However, there is a thin line of demarcation between probability of conviction and establishment of prima facie case against accused. (Paras 7 & 8)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 204 – प्रोसेस जारी किया जाना – पर्याप्त आधार – पर्याप्त आधार का अर्थ है आरोपित व्यक्ति के विरूद्ध प्रथम दृष्ट्या प्रकरण बनता है और न कि दोषसिद्धि के प्रयोजन हेतु पर्याप्त आधार – मजिस्ट्रेट शिकायत में प्रत्यक्षतः दिखाई देने वाली या अभिकथनों के समर्थन में शिकायतकर्ता द्वारा प्रस्तुत साक्ष्य में प्रतीत होने वाली अंतर्निहित असंभावनाओं को विचार में ले सकता है – किन्तु दोषसिद्धि की संभाव्यता एवं अभियुक्त के विरूद्ध प्रथम दृष्ट्या प्रकरण स्थापित किये जाने के बीच बहुत पतली सीमा रेखा है।

B. ***Criminal Procedure Code, 1973 (2 of 1974), Section 204 - Issuance of Process - Quashment*** **- Order issuing process can be**

quashed, *firstly*, where absolutely no case is made out from the complaint or statement of complainant - *Secondly*, where the allegations in complaint are patently absurd and inherently improbable, *thirdly*, the discretion exercised by Magistrate in issuing process is capricious and arbitrary having based either on no evidence or on materials which are wholly irrelevant or inadmissible. (Para 8)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 204 – प्रोसेस जारी किया जाना – अभिखंडित किया जाना – प्रोसेस जारी करने का आदेश अभिखंडित किया जा सकता है, प्रथमतः, जब शिकायत से या शिकायतकर्ता के कथन से कोई प्रकरण आत्यंतिक रूप से नहीं बनता – दूसरे, जब शिकायत के अभिकथन प्रत्यक्ष रूप से असंगत एवं अंतर्निहित रूप से असंभाव्य है, तीसरे, मजिस्ट्रेट द्वारा प्रोसेस जारी करने में प्रयोग किया गया विवेकाधिकार अनुचित एवं मनमाना है, जो कि या तो किसी साक्ष्य पर आधारित नहीं है या ऐसी सामग्री पर आधारित है जो पूर्णतः असंगत या अग्राह्य है।

Cases referred :

2010 CRI.L.J. 3827 SC, AIR 1976 SC 1947, AIR 1998 SC 128.

Anoop Saxena, for the applicant.
None for the non-applicant nos. 1 & 2.
Mohammad Ali, for the non-applicant no. 3.

ORDER

C.V. SIRPURKAR, J. :- This revision petition is directed against order dated 01.01.2011 passed by the Court of Shri Vijay Kumar Agrawal, First Additional Sessions Judge, Tikamgarh in Criminal Revision No. 148/2009, whereby the revision preferred by the respondent Nos. 1 to 3 has been allowed by setting aside the order dated 08.04.2009 registering private complaint against respondents, passed by Judicial Magistrate First Class, Niwari, District-Tikamgarh in complaint case No. 254/2009.

2. The facts necessary for disposal of this criminal revision may be summarized as hereunder:

Applicant/complainant Madhusudan Tiwari worked as Assistant Accountant for a period of about six months in a factory by the name of "Eastern Minerals" belonging to accused No.7 P.C. Jain. Accused No.6 Sanjay Jain is son of aforesaid P.C. Jain and accused Nos. from 1 to 5 were Officers and Officials of the said factory. Accused Nos. from 8 to 11 were Officers and Officials of the Revenue or Police Departments of the State Government.

A complaint was made by the office of Collector, to S.P. Tikamgarh to the effect that Ms. Eastern Minerals forged bank challans whereby the amount of advance royalty for mining was shown to have been deposited in the State Bank of India, in the year 2002; whereas no such amount was in fact deposited by the Factory. Pursuant to the complaint P.S. Niwari registered crime no. 138/2002 under Sections 420, 467, 468 & 471 of I.P.C.

3. It has been alleged in the private complaint filed by the complainant/ applicant Madhusudan that the factory management colluded with officers of Police department and on 16.06.2002, accused Nos. 1 to 5 went to the house of complainant located in Village- Kudar and told him that accused Sanjay Jain wants to see him urgently. Accused Nos. 1 to 5 took complainant to the premises of factory, where accused Sanjay Jain alleged that complainant Madhusudan had committed a defalcation of Rs. 1,60,000/- by forging challans. Complainant Madhusudan was threatened, intimidated and was made to sign certain papers. He was also compelled to verify an affidavit on stamp paper before a notary in the factory premises. Thereafter, on 17.06.2002, accused persons P.C. Jain and Sanjay Jain lodged F.I.R. against complainant Madhusudan; whereon, crime no. 137/2002 was registered by P.S. Niwari. The complainant was arrested by P.S. Niwari on 05.07.02 and was tortured. The complainant lodged report of aforesaid incident with P.S. Sendri and sent copies of the same to Police and Revenue Authorities. P.S. Niwari has registered two offences namely crime nos. 137 and 138 of 2002 against complainant for the same offence. However, due to conspiracy hatched between accused Nos. 6 and 7 on one hand and police officers on the other, the name of accused no.7 P.C. Jain was not included in the charge-sheet filed in Crime No. 138/2002. Subsequently, on an application under Section 319 of the Code of Criminal Procedure filed by the complainant, the Court of Judicial Magistrate First Class got P.C. Jain impleaded in the case as accused.

4. As the police did not take any action, complainant Madhusudan Tiwari filed this private complainant in the Court of Judicial Magistrate First Class, Niwari on 07.08.2003, who, by order dated 08.04.2009, issued processes against accused persons Shyam Sunder, U. Nee Kurk and Sanjay Jain (respondents in this revision) under Sections 342, 323 and 468 of the I.P.C. The aforesaid accused persons challenged the order dated 08.04.2009 in Criminal Revision No. 148/2009 before First Additional Sessions Judge, Tikamgarh. Learned Additional Sessions Judge, by impugned order dated 01.01.2011, set aside the order issuing processes, passed by Learned Judicial Magistrate and directed that the private complaint be dismissed. This order

has been challenged in the present revision.

5. Learned counsel for the applicant has contended that private complaint made by applicant/complainant was supported by statements made under Section 200 of the Code of Criminal Procedure and certified copies of relevant documents. After going through the record, learned Magistrate, being satisfied prima facie that there was sufficient ground to proceed against present applicants Shyam Sunder, U.Nee Kurk and Sanjay Jain, registering private complaint against them under sections 342, 323 and 468 of the I.P.C. However, in criminal revision, learned A.S.J exceeded his jurisdiction by calling for the record of criminal case no. 479 of 2006, which arose from crime no. 138 of 2002. It has also been contended that on consideration of this extraneous material and by carefully sifting and weighing the evidence, which he was not required to do at this stage, learned A.S.J. decided on merits that the complaint has been filed for harassing the accused persons and for creating a defence for the complainant, in criminal case no. 479 of 2006.

6. On the other hand, learned counsel for the respondent no. 3 has argued that the complainant was entrusted with the responsibility of depositing amount of royalty in the bank by way of challans. He embezzled the amount to the tune of Rs. 1,60,000/- and when caught, has filed this false private complainant for creating pressure on the management of the factory.

7. This Court has carefully weighed the rival contentions. It is settled law that at the stage of issuing processes in a private complaint, the defence of the accused cannot be considered. All that the Court has to see is whether there are enough grounds for proceeding in the matter and not whether there are sufficient grounds for conviction. The Supreme Court in the case of *Shivjee Singh v. Nagendra Tiwary,* (2010 CRI. L. J. 3827 SUPREME COURT), has held that Expression "sufficient ground" means satisfaction that prima facie case is made out against person accused and does not mean sufficient ground for purpose of conviction.

8. Regarding the scope of consideration by the Magistrate at the time of registration of complaint the Supreme Court in the case of *Nagawwa v. Veeranna Shivalingappa Konjalgi,* (AIR 1976 SUPREME COURT 1947) has observed that it is true that in coming to a decision as to whether a process should be issued, the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of a prima facie case

against him. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. Once the Magistrate has exercised his discretion it is not for the High Court, or even the Supreme Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These considerations are totally foreign to the scope and ambit of an inquiry under Section 202 which culminates into an order under Section 204. Thus in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside:

(1) Where the allegations made in the complaint or the statement of the witness recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible;

9. Having said that, it is also the duty of every Court to ensure that its processes are not abused. The apex Court in the case of *Pepsi Foods Ltd., M/s. v. Special Judicial Magistrate,* AIR 1998 SUPREME COURT 128 has observed that summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion.

10. The main contention of learned counsel for the applicant is that the learned A.S.J. should not have called for and considered the record of criminal case no. 479 of 2006. However, the facts taken into consideration by learned A.S.J while allowing revision petition, were already brought on record by the complainant himself by filing certified copies of 8 documents including the report made by Collector to S.P., affidavit of the complainant and report made by the complainant to the S.H.O., P.S. Sendri.

11. In the backdrop of aforesaid material on record, the Court has to assess whether there exist sufficient grounds to proceed further in the matter? The affidavit purportedly sworn by the complainant on 16.6.2002 reveals

that he was entrusted with the responsibility of depositing the royalty in the bank through challans and he deposited various amounts on 15 different occasions on behalf of the factory in the bank. It is alleged that coercion was practiced upon the complainant to obtain this affidavit. In this regard it may be observed that the affidavit has not merely been signed by the complainant but it is in fact in the handwriting of the complainant. This fact may be verified by comparing the handwriting in the report dated 16-6-2002 admittedly written by the complainant to the S.H.O., P.S. Sendri, with that found in the affidavit. Moreover, admittedly, it was sworn in the presence of a notary. If the complainant was indeed compelled to swear the affidavit in the presence of the notary, the notary should also have been impleaded in the complaint as a co-conspirator and accused..Further, it appears from the contents of the affidavit that it is not in the nature of confession by complainant to police but in the nature of explanation of his conduct to his employees, which in the circumstances seems to be voluntary.

12. It may further be noted that though learned Magistrate had registered the complaint under sections 323 and 342, there are no allegations either in the complaint, or in the statements under section 200 Cr.P.C. or in the report dated 18-6-2002 that the complainant was assaulted or confined in any manner by aforesaid respondents. Thus there was absolutely no legal basis for issuing processes under those two provisions. It has only been averred that the complainant was threatened with life and pressurized into signing the affidavit. The complainant is an educated persons. It appears to be inherently improbable that he could be compelled to execute an affidavit in this manner, in the presence of a notary.

13. Further, the first report made in this regard by the complainant was 2 days after the incident, when he realized that the contents of the affidavit might go against him. This private complainant was filed more than one year after the incident. In these circumstances, it is plain as day that the complainant was filed with a view to create a defence for the complainant in the criminal case against him and to exert pressure on the factory management. Issuing process on such a complainant would be abuse of process of Court. Learned Magistrate lost sight of this aspect of the case, while issuing the process.

14. In aforesaid view of the matter, there is no ground to interfere with the impugned order.

15. Consequently, this revision petition is dismissed.

Revision dismissed.