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Arbitration Act (10 of 1940), Section 30 – Opportunity of hearing **– Proceedings before arbitrator commenced on 29.11.1998 – On 23.09.2000, the arbitrator proceeded ex parte and passed ex parte award – From scrutiny of order sheets of proceedings, it is evident that the appellant adopted all possible tactics to linger on the proceeding before the arbitrator and on several occasions neither any officer nor counsel for the appellant appeared before arbitrator – Therefore, action of arbitrator in closing the right of the appellant to adduce evidence by taking into account the time limit fixed by the Court for delivery of award, was justified. [Jawahar Lal Nehru Krishi Vishwavidyalaya, Jabalpur Vs. J.H. Kotecha]** ...2998

माध्यस्थम् अधिनियम (1940 का 10), धारा 30 – सुनवाई का अवसर –

मध्यस्थ के समक्ष कार्यवाही 29.11.1998 को प्रारंभ हुई – 23.09.2000 को मध्यस्थ द्वारा एकपक्षीय कार्यवाही की गयी तथा एकपक्षीय अवार्ड पारित किया गया – कार्यवाही के आदेश–पत्रों की संवीक्षा से यह सुस्पष्ट है कि मध्यस्थ के समक्ष कार्यवाही को लंबा खींचने के लिए अपीलार्थी ने सभी संभावित युक्तियां अपनाई तथा विभिन्न अवसरों पर न तो कोई अधिकारी न ही अपीलार्थी की ओर से कोई अधिवक्ता मध्यस्थ के समक्ष उपस्थित हुआ – अतः, अवार्ड देने के लिये न्यायालय द्वारा दी गयी समय–सीमा को ध्यान में रखते हुए मध्यस्थ द्वारा अपीलार्थी का साक्ष्य प्रस्तुत करने के अधिकार को समाप्त करने की कार्यवाही न्यायसंगत थी। (जवाहर लाल नेहरू कृषि विश्वविद्यालय जबलपुर वि. जे.एच. कोटेचा) ...2998

Arbitration Act (10 of 1940), Section 34 – Scope of Judicial Review **– Court can interfere with the award only on the grounds set out in Section 30 i.e. whereas an arbitrator has misconducted himself or the proceeding, where an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceeding has become invalid and where an award has been improperly procured or is otherwise invalid – An award cannot be set aside merely on the ground that in the opinion of the Court award passed by the arbitrator would have been otherwise. [Jawahar Lal Nehru Krishi Vishwavidyalaya, Jabalpur Vs. J.H. Kotecha]** ...2998

माध्यस्थम् अधिनियम (1940 का 10), धारा 34 – न्यायिक पुनर्विलोकन का क्षेत्र – न्यायालय धारा 30 में दिए गए आधारों पर ही अवार्ड हस्तक्षेप कर सकता है, अर्थात् जब मध्यस्थ ने स्वयं अवचार किया हो अथवा कार्यवाही का कुसंचालन किया हो, जहां माध्यस्थम् का अधिक्रमण करते हुए न्यायालय द्वारा जारी किए गए आदेश के पश्चात् अवार्ड दिया गया हो अथवा जब माध्यस्थम् कार्यवाही अन्यथा अविधिमान्य हो गयी हों तथा जब कोई अवार्ड अनुचित तरीके से प्राप्त किया गया हो अथवा अन्यथा अविधिमान्य है – एक अवार्ड केवल इस आधार पर अपास्त नहीं किया जा सकता कि न्यायालय के अभिमत में मध्यस्थ द्वारा अवार्ड अन्यथा पारित किया होगा। (जवाहर लाल नेहरू कृषि विश्वविद्यालय, जबलपुर वि. जे.एच. कोटेचा) ...2998

Arbitration Act (10 of 1940), Section 39 – Appeal – New Ground **– Raising a new ground in appeal for which no foundation was laid down in application for setting aside award is not permissible. [Jawahar Lal Nehru Krishi Vishwavidyalaya, Jabalpur Vs. J.H. Kotecha]** ...2998

माध्यस्थम् अधिनियम (1940 का 10), धारा 39 – अपील – नवीन आधार – अपील में एक नवीन आधार उठाना जिसके लिए अवार्ड अपास्त करने के लिए दिये

गये आवेदन में कोई आधार प्रस्तुत नहीं किया गया अनुज्ञेय नहीं है। (जवाहर लाल नेहरू कृषि विश्वविद्यालय, जबलपुर वि. जे.एच. कोटेचा) ...2998

Central Excise Rules, Rule 57-A & 57-G(1) – MODVAT Credit – Entitlement – **Assessee entitled u/r 57-A – Merely because of the time frame fixed in making entries in Part II of RG-23-A and because of some error in making entry, benefit cannot be denied. [Bharat Heavy Electricals Ltd. (M/s.) Vs. C.E.C., Bhopal]** **(DB)...3089**

केंद्रीय उत्पाद–शुल्क नियम, नियम 57-ए व 57-जी(1) – एम.ओ.डी.वी.ए.टी. जमा–पात्रता–नियम 57–ए के अंतर्गत निर्धारिती पात्र है–मात्र इसलिये कि आर जी–23–ए के भाग II में प्रविष्टियां करने की समयसीमा निश्चित है और इसलिये कि प्रविष्टि करने में कोई त्रुटि हुई है, लाभ से वंचित नहीं किया जा सकता। (भारत हैवी इलेक्ट्रिकल्स लि. (मे.) वि. सी.ई.सी., भोपाल) **(DB)...3089**

Central Excise Rules, Rule 57-A & 57-G(1) – MODVAT Scheme **– Receipt of input mentioned in Part-I of a single comprehensive RG-23 – Evidence of crystallization of right to MODVAT credit – On the basis of inconsistency in Part II – Right to credit accrued already cannot be denied. [Bharat Heavy Electricals Ltd. (M/s.) Vs. C.E.C., Bhopal]** **(DB)...3089**

केंद्रीय उत्पाद–शुल्क नियम, नियम 57-ए व 57-जी(1)– एम.ओ.डी.वी.ए.टी. योजना – एकल व्यापक आर.जी–23 के भाग-I में उल्लिखित निविष्टि की प्राप्ति – एम.ओ.डी.वी.ए.टी. जमा पर अधिकार की प्रबलता का साक्ष्य – भाग II में असंगतता के आधार पर – पहले से ही उपार्जित जमा के अधिकार से इंकार नहीं किया जा सकता। (भारत हैवी इलेक्ट्रिकल्स लि. (मे.) वि. सी.ई.सी., भोपाल) **(DB)...3089**

Central Excise Rules, Rule 57-A & 57-G(1) – MODVAT Scheme – Right to Credit – Accrued to the assessee **– On the date of payment of tax on raw material or inputs and the right get crystallized to them on receiving the inputs in factory. [Bharat Heavy Electricals Ltd. (M/s.) Vs. C.E.C., Bhopal]** **(DB)...3089**

केंद्रीय उत्पाद–शुल्क नियम, नियम 57–ए व 57-जी(1)– एम.ओ.डी.वी.ए.टी. योजना – निर्धारिती को जमा का अधिकार – कच्चे माल अथवा निविष्टियों पर कर के भुगतान की तिथि को प्रोद्भूत होता है तथा कारखाने में निविष्टियां प्राप्त करने पर वह अधिकार प्रबलता प्राप्त कर लेता है। (भारत हैवी इलेक्ट्रिकल्स लि. (मे.) वि. सी.ई.सी., भोपाल) **(DB)...3089**

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Central Excise Rules, Rule 57-A & 57-G(1) – Ultravires – **Notification issued u/r 57-G prescribing time limit for taking the credit – Right to avail credit conferred u/r 57-A and Rule 57-G provides the procedure – Thus, Central Govt. cannot curtail any right conferred by substantive provision of Rule 57-A – The notification is ultra vires. [Bharat Heavy Electricals Ltd. (M/s.) Vs. C.E.C., Bhopal] (DB)...3089**

केंद्रीय उत्पाद–शुल्क नियम, नियम 57-ए व 57-जी (1) – अधिकारातीत – नियम 57–जी के अंतर्गत जारी अधिसूचना जमा राशि लेने के लिये समय सीमा निर्धारित करती है – नियम 57–ए जमा राशि प्राप्त करने का अधिकार प्रदत्त करता है तथा नियम 57–जी प्रक्रिया उपबंधित करता है – अतः, नियम 57–ए के सारभूत उपबंध द्वारा प्रदत्त किसी भी अधिकार को केंद्र सरकार घटा नहीं सकती – अधिसूचना अधिकारातीत है। (भारत हैवी इलेक्ट्रिकल्स लि. (मे.) वि. सी.ई.सी., भोपाल) **(DB)...3089**

Civil Procedure Code (5 of 1908), Section 115 – Civil Revision – Restoration – **Civil Revision dismissed due to non compliance of the peremptory order to file four different Civil Revisions – If any common order is passed by the subordinate court in identical cases of the different parties then such parties have a right to file common and joint proceeding before the superior court against such order and after making the payment of deficit court fees of three revisions by the applicant in the common the same ought to have been restored. [Jamila Bi Vs. Smt. Nazma Afzal] ...3099**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 115 – सिविल पुनरीक्षण – पुनःस्थापन – चार अलग–अलग सिविल पुनरीक्षण प्रस्तुत करने के अलंघनीय आदेश का अनुपालन न करने के कारण सिविल पुनरीक्षण खारिज – यदि अधीनस्थ न्यायालय द्वारा भिन्न पक्षकारों के समान प्रकरणों में कोई सामान्य आदेश पारित किया जाता है तब ऐसे पक्षकारों को ऐसे आदेश के विरूद्ध उच्चतर न्यायालय के समक्ष सामान्य तथा संयुक्त कार्यवाही प्रस्तुत करने का अधिकार है तथा आवेदक द्वारा तीन पुनरीक्षणों की न्याय शुल्क में कमी का सामान्य रूप से भुगतान करने पर उसे पुनःस्थापित कर दिया जाना चाहिए था। (जमीला बी वि. श्रीमती नजमा अफजल) **...3099**

Civil Procedure Code (5 of 1908), Order 1 Rule 10 – Necessary Party –**Petitioners/plaintiffs herein have claimed declaratory decree against the respondents with respect of the disputed property stating themselves to be the co-owners with the proposed defendant who executed the alleged sale deed in favour**

of respondents No. 1 to 9 – Therefore, the said defendant is a necessary Party – So far the purchasers of the part of suit property from 1 to 9 is concerned, they shall be bound by the decree which would be passed in the suit by virtue of Section 52 of the Transfer of Property Act – In the present case since after execution of sale deed by respondents No. 1 to 9 in favour of the proposed defendants No. 1 & 2 the petitioners/plaintiffs want the decree of declaration against them also and thus the subsequent purchasers subject to the limitation of Section 52 of T.P. Act are also necessary parties. [Champa Rai (Smt.) Vs. Nafeesa Bi] ...2854

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10 – आवश्यक पक्षकार – याचीगण/वादीगण ने विवादित संपत्ति के संबंध में प्रत्यर्थीगण के विरूद्ध यह कहते हुए घोषणात्मक डिक्री का दावा किया है कि वे प्रस्तावित प्रतिवादी के साथ सह–स्वामी है जिसने प्रत्यर्थीगण क्रमांक 1 से 9 के पक्ष में अभिकथित विक्रय–विलेख निष्पादित किया – अतः उक्त प्रतिवादी आवश्यक पक्षकार है – जहां तक वाद संपत्ति के भाग के क्रेता 1 से 9 का संबंध है, वे उस डिक्री से बाध्य होंगे जो कि संपत्ति अंतरण अधिनियम की धारा 52 के आधार पर वाद में पारित होगी – वर्तमान प्रकरण में चूंकि प्रत्यर्थी क्रमांक 1 से 9 के द्वारा प्रस्तावित प्रतिवादी क्रमांक 1 और 2 के पक्ष में विक्रय–विलेख निष्पादित करने के पश्चात् याची/वादी उनके विरूद्ध भी घोषणा की डिक्री चाहते हैं तथा इस प्रकार संपत्ति अंतरण अधिनियम की धारा 52 की परिसीमा के अधीन, पश्चात्वर्ती क्रेता भी आवश्यक पक्षकार है। (चम्पा राय (श्रीमती) वि. नफीसा बी) ...2854

Civil Procedure Code (5 of 1908), Order 5 Rule 12 – Service of summons to the defendant **– It is no where mentioned that if the summons/notice is addressed giving the location of residence, the same can only be served at the residence and not at any other place – Hence, service to the petitioner at his shop is not illegal. [Manish Kumar Sharma Vs. Jagdish] (DB)...2951**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 5 नियम 12 – प्रतिवादी को समन की तामीली – यह कहीं भी उल्लिखित नहीं है कि यदि समन/नोटिस में निवास स्थान का पता दिया हो उक्त को केवल निवास पर तामील किया जा सकता है एवं किसी अन्य स्थान पर नहीं – अतः याची को उसकी दुकान पर तामीली अवैध नहीं। (मनीष कुमार शर्मा वि. जगदीश) (DB)...2951

Civil Procedure Code (5 of 1908), Order 9 Rule 9 & Order 17

Rule 3 – Restoration of Civil Suit – Maintainability **– Application under Order 17 Rule 1 C.P.C. was dismissed and the suit was dismissed under Order 17 Rule 3 although the Evidence was not recorded and Plaintiff and his witnesses were absent – As suit was dismissed under Rule 17 Rule 3, the only remedy lies to the applicants to file an appeal against the said order – Although the Trial Court had no power to proceed under Order 17 Rule 3 and acted erroneously in doing so, but application under Order 9 Rule 9 was not maintainable and only remedy available is to file an appeal – Revision dismissed. [Har Prasad Vs. Maniram] ...3067**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 9 व आदेश 17 नियम 3 – सिविल वाद का पुनःस्थापन – पोषणीयता – सि.प्र.सं. के आदेश 17 नियम 1 के अंतर्गत आवेदन निरस्त किया गया तथा आदेश 17 नियम 3 के अंतर्गत वाद निरस्त किया गया यद्यपि साक्ष्य अभिलेखित नहीं किया गया तथा वादी और उसके साक्षी अनुपस्थित थे – चूंकि आदेश 17 नियम 3 के अंतर्गत वाद निरस्त किया गया तो आवेदकों के समक्ष उक्त आदेश के विरूद्ध अपील प्रस्तुत करने का एकमात्र उपचार उपलब्ध है – यद्यपि विचारण न्यायालय को आदेश 17 नियम 3 के अंतर्गत कार्यवाही करने की शक्ति प्राप्त नहीं थी और ऐसा करने में उसने गलती की है, परंतु आदेश 9 नियम 9 के अंतर्गत आवेदन पोषणीय नहीं था तथा अपील प्रस्तुत करना ही एकमात्र उपचार उपलब्ध है – पुनरीक्षण खारिज। (हरप्रसाद वि. मनीराम) ...3067

Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 10(i) to (iv) & Rule 12(2)(a) & (b) – Suspension Order **– Challenged on the ground of competency of Commissioner despite there being a delegation of power under Rule 12(2)(a) & (b) – Held – As per notification except Director all Class I Government Servant posted under the control of Commissioner and since the petitioner does not hold the post of Director, Commissioner being a disciplinary authority is empowered to place the petitioner under suspension. [K.K. Tamrakar Vs. State of M.P.] ...2874**

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 10 (i) से (iv) व नियम 12(2)(ए) व (बी) – निलंबन आदेश – नियम 12(2)(ए) व (बी) में शक्ति का प्रत्यायोजन होने के बावजूद आयुक्त की सक्षमता के आधार पर चुनौती दी गयी – अभिनिर्धारित – अधिसूचना के अनुसार संचालक के अतिरिक्त आयुक्त के नियंत्रण के अधीन पदस्थ सभी प्रथम श्रेणी शासकीय सेवक और चूंकि याची द्वारा संचालक का पद धारित नहीं किया गया है, आयुक्त एक अनुशासनात्मक प्राधिकारी

होने के नाते याची को निलंबित करने के लिए सशक्त है। (के.के. ताम्रकार वि. म. प्र. राज्य) ...2874

Constitution – Article 16 – See – Educational Service (School Branch) Recruitment and Promotion Rules, M.P. 1982, Rule 11-B **[Gazetted Headmasters Pradeshik Sangh, Madhya Pradesh Vs. State of M.P.] (DB)...2888**

संविधान – अनुच्छेद 16 – देखें – शैक्षिक सेवा (विद्यालय शाखा) भर्ती तथा पदोन्नति नियम, म.प्र. 1982, नियम 11–बी (गजटेड हेडमास्टर्स प्रादेशिक संघ, मध्यप्रदेश वि. म.प्र. राज्य) **(DB)...2888**

***Constitution – Article 226 – Assessment by DPC* – High Court cannot sit in appeal over the assessment made by DPC – If assessment made by DPC is perverse or not based on record or proper record has not been considered by DPC, it is open to High Court to remit the matter back to DPC for recommendation but it cannot assess the merit on its own. [H.S. Sidhu Vs. Devendra Bapna] (SC)...2819**

संविधान – अनुच्छेद 226 – विभागीय पदोन्नति समिति द्वारा निर्धारण – विभागीय पदोन्नति समिति द्वारा किये गये निर्धारण पर उच्च न्यायालय अपील नहीं सुन सकता – यदि विभागीय पदोन्नति समिति द्वारा किया गया निर्धारण अनुचित है अथवा अभिलेख पर आधारित नहीं है अथवा विभागीय पदोन्नति समिति द्वारा उचित अभिलेख पर विचार नहीं किया गया है तब उच्च न्यायालय मामले को अनुशंसा के लिये विभागीय पदोन्नति समिति को वापस भेज सकता है परंतु वह स्वयं गुणदोष का निर्धारण नहीं कर सकता। (एच.एस. सिद्धू वि. देवेन्द्र बापना) (SC)...2819

***Constitution – Article 226 – Disputed question of fact* – Whether writ jurisdiction under Article 226 can be invoked – Held – No. [Ram Swaroop Chaturvedi Vs. State of M.P.] (DB)...2921**

संविधान – अनुच्छेद 226 – तथ्य का प्रश्न विवादित – क्या अनुच्छेद 226 के अंतर्गत रिट अधिकारिता का अवलंब लिया जा सकता है – अभिनिर्धारित – नहीं। (राम स्वरूप चतुर्वेदी वि. म.प्र. राज्य) **(DB)...2921**

***Constitution – Article 226 – Writ Petition – Necessary Party* – Allegation of malafide against appointing authority – Held – Concerned authority against whom malafides are levelled is a necessary party by name in the proceedings. [Ram Swaroop Pandre Vs. State of M.P.] (DB)...2850**

संविधान – अनुच्छेद 226 – रिट पिटीशन – आवश्यक पक्षकार – नियुक्ति प्राधिकारी के विरूद्ध कदाशय का अभिकथन – अभिनिर्धारित – संबंद्ध प्राधिकारी जिसके विरूद्ध कदाशय आरोपित है, कार्यवाहियों में नाम से आवश्यक पक्षकार है। (राम स्वरूप पांद्रे वि. म.प्र. राज्य) (DB)...2850

***Constitution – Article 227* – Scope of interference of High Court in the order passed by the trial court under its vested discretionary jurisdiction – Impugned order passed by the trial court under its vested discretionary jurisdiction – It is settled law that such orders passed by the sub-ordinate courts under the vested discretionary jurisdiction of such courts, should not be interfered at the stage of revision or writ petition under Article 227. [Gajadhar Prasad Vs. Smt. Shakuntala Mishra]** ...2859

संविधान – अनुच्छेद 227 – विचारण न्यायालय द्वारा उसमें निहित वैवेकिक अधिकारिता में पारित आदेश में उच्च न्यायालय के हस्तक्षेप की व्याप्ति – विचारण न्यायालय द्वारा पारित किया गया आक्षेपित आदेश उसमें निहित वैवेकिक अधिकारिता के अंतर्गत है – यह सुस्थापित विधि है कि अधीनस्थ न्यायालयों द्वारा उनमें निहित वैवेकिक अधिकारिता के अंतर्गत पारित किये गये ऐसे आदेशों में पुनरीक्षण या अनुच्छेद 227 के अंतर्गत रिट याचिका के प्रक्रम पर हस्तक्षेप नहीं किया जाना चाहिये। (गजाधर प्रसाद वि. श्रीमती शकुन्तला मिश्रा) ...2859

Court Fees Act (7 of 1870), Section 7(iv)(c) – See – Suits Valuation Act, 1887, Section 8 **[Manoj Kushwah Vs. Chhotelal]** ...3063

न्यायालय फीस अधिनियम (1870 का 7), धारा 7(iv)(सी) – देखें – वाद मूल्यांकन अधिनियम, 1887, धारा 8 (मनोज कुशवाह वि. छोटेलाल) ...3063

Criminal Procedure Code, 1973 (2 of 1974), Section 157 **– See –** ***Penal Code, 1860, Section 302*** **[Ramu Vs. State of M.P.] (DB)...3045**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 157 – देखें – दण्ड संहिता, 1860, धारा 302 (रामू वि. म.प्र. राज्य) (DB)...3045

***Criminal Procedure Code, 1973 (2 of 1974), Section 216 and Penal Code (45 of 1860), Section 505(2)(1) – Alteration of charge* – Objectionable literatures and pamphlets were found in possession of applicant – However, to prima facie make out a case u/s 505(2)(1), there should be publication and circulation – No permission was granted u/s 196 of Cr.P.C. for offence u/s 505(2)(1)– Prima facie offence u/s**

505(2)(1) of I.P.C. not made out – Order altering the charge set aside. [Abdul Rashid Vs. State of M.P.] ...3127

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 216 एवं दण्ड संहिता (1860 का 45), धारा 505(2)(1) – *आरोप का परिवर्तन* – आवेदक के कब्जे में आपत्तिजनक साहित्य एवं पुस्तिकाएं पाई गई – किंतु, धारा 505(2)(1) के अंतर्गत प्रथम दृष्ट्या प्रकरण बनाने के लिये प्रकाशन एवं वितरण होना चाहिये – धारा 505(2)(1) के अंतर्गत अपराध के लिये दं.प्र.सं. की धारा 196 के अंतर्गत कोई अनुमति प्रदान नहीं की गई थी– भा.दं.सं. की धारा 505(2)(1) के अंतर्गत अपराध के लिये प्रथम दृष्ट्या आरोप नहीं बनता – आरोप परिवर्तन का आदेश अपास्त। (अब्दुल राशिद वि. म.प्र. राज्य) **...3127**

Criminal Procedure Code, 1973 (2 of 1974), Section 311 – Recall of witness **– Accused filed application for recalling some witnesses for further cross-examination as applicant had not cross-examined them on some points – Held – Object underlying 311 Cr.P.C. is that there may not be failure of justice on account of mistake of either party – The determinative factor is whether it is essential to just decision of the case – Grant of fairest opportunity to accused to prove his innocence is the object of every fair trial – Discovery of truth is the essential purpose of any trial – Merely because mistake was committed, should not result in the accused suffering a penalty totally disproportionate to the gravity of error committed by his lawyer – Application for recall of witnesses allowed. [Jaidev Vs. State of M.P.] ...3084**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 – साक्षी को वापस बुलाया जाना – अभियुक्त ने कुछ साक्षियों के अतिरिक्त प्रतिपरीक्षण हेतु उन्हें वापस बुलाने के लिए आवेदन प्रस्तुत किया क्योंकि आवेदक ने कुछ बिंदुओं पर उनका प्रतिपरीक्षण नहीं किया था – अभिनिर्धारित – दं.प्र.सं. 311 का अंतर्निहित उद्देश्य यह है कि किसी भी पक्ष की भूल के कारण न्याय विफल नहीं होना चाहिये – निर्धारक कारक यह है कि क्या यह प्रकरण के उचित निर्णय के लिए आवश्यक है – अभियुक्त को अपनी निर्दोषिता सिद्ध करने के लिए उचित अवसर प्रदान करना प्रत्येक निष्पक्ष विचारण का उद्देश्य है – किसी भी विचारण का मुख्य उद्देश्य सत्य की खोज है – केवल इसलिये कि गलती कारित की गई, इसके परिणामस्वरूप अभियुक्त को अधिवक्ता द्वारा कारित त्रुटि की गंभीरता से पूर्ण रूप से अननुपातिक दंड नहीं दिया जायेगा – साक्षी को वापस बुलाने के लिए दिया गया आवेदन मंजूर। (जयदेव वि. म.प्र. राज्य) **...3084**

Criminal Procedure Code, 1973 (2 of 1974), Sections 315, 317 – To produce defence evidence – **Accused was permitted to appear as a defence witness u/s 315 of Cr.P.C. – His examination in chief was recorded and cross examination was deferred – On next day, he could not appear due to ill health and application u/s 317 was allowed and case was adjourned – On adjourned date the trial court closed the right of accused – Held – There is no reason on record for refusal to produce defence evidence particularly cross examination of applicant – To deny a litigant an opportunity is against criminal justice delivery system – Every party has right to be allowed sufficient opportunity to put up his case as well as his defence – Order of trial court set aside. [Mahendra Kumar Patel Vs. Sindh Hardware Store]** ...3133

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 315, 317 – बचाव साक्ष्य प्रस्तुत करने हेतु – दं.प्र.सं. की धारा 315 के अंतर्गत अभियुक्त को बचाव साक्षी के रूप में उपस्थित होने की अनुमति दी गई – उसका मुख्य परीक्षण अभिलिखित किया गया एवं प्रतिपरीक्षण आस्थगित किया गया था – अगले दिन, वह खराब स्वास्थ्य के कारण उपस्थित नहीं हो सका एवं धारा 317 के अंतर्गत आवेदन मंजूर किया गया एवं प्रकरण स्थगित किया गया – स्थगन दिनांक को विचारण न्यायालय ने अभियुक्त का अधिकार समाप्त कर दिया – अभिनिर्धारित – बचाव साक्ष्य प्रस्तुत करने से इंकार का कोई कारण अभिलेख पर नहीं विशेष रूप से आवेदक का प्रतिपरीक्षण – वादकारी को अवसर देने से इंकार करना आपराधिक न्याय व्यवस्था के विरूद्ध है – प्रत्येक पक्षकार का अधिकार है कि उसे अपने बचाव के साथ ही अपना प्रकरण प्रस्तुत करने का पर्याप्त अवसर मंजूर किया जाये – विचारण न्यायालय का आदेश अपास्त। (महेन्द्र कुमार पटेल वि. सिन्ध हार्डवेयर स्टोर) ...3133

Criminal Procedure Code, 1973 (2 of 1974), Section 340 – Procedure in cases mentioned in Section 195 – **Applicant filed a civil suit and filed interpolated documents – After dismissal of his application under Order 39 Rule 1 & 2, C.P.C., he filed Misc. Appeal – Two applications were filed u/s 340 of Cr.P.C. before the Trial Court as well as Appellate Court – Appellate Court rejected the application on the ground that enquiry is being done by the Trial Court – Subsequently, Civil Suit was dismissed in default however, the application filed u/s 340 of Cr.P.C. remained unconsidered – Trial Court directed to complete the enquiry and to proceed depending upon the outcome of the enquiry. [Anil Kumar Chouhan @ Anil Singh Chouhan Vs. State of M.P.]** ...3105

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 340 – धारा 195 में उल्लिखित प्रकरणों में कार्यवाहियां – आवेदक ने एक सिविल वाद प्रस्तुत किया एवं अंतर्वेशित दस्तावेज प्रस्तुत किये – सि.प्र.सं. के आदेश 39 नियम 1 एवं 2 के अंतर्गत उसके आवेदन को खारिज किये जाने के उपरांत उसने विविध अपील प्रस्तुत की – दं.प्र.सं. की धारा 340 के अंतर्गत विचारण न्यायालय के साथ ही अपीली न्यायालय के समक्ष दो आवेदन प्रस्तुत किये गये – अपीली न्यायालय ने आवेदन इस आधार पर अस्वीकार किया कि विचारण न्यायालय द्वारा जांच की जा रही है – तत्पश्चात्, सिविल वाद व्यतिक्रम में खारिज किया गया था यद्यपि दं.प्र.सं. की धारा 340 के अंतर्गत प्रस्तुत आवेदन पर विचार करने से रह गया – विचारण न्यायालय को जांच पूर्ण करने हेतु एवं जांच के निष्कर्ष पर निर्भर रहते हुये आगे कार्यवाही करने के लिये निदेशित किया गया। (अनिल कुमार चौहान उर्फ अनिल सिंह चौहान वि. म.प्र. राज्य) ...3105

Criminal Procedure Code, 1973 (2 of 1974), Section 482 – For quashment of F.I.R. – **Cognizance taken by Magistrate on the letter issued by District Magistrate for offence u/s 188 of IPC – Held – Without complaint cognizance could not be taken – F.I.R. and proceedings before Magistrate quashed – Applicant discharged u/s 188, IPC. [Ashok Agrawal Vs. State of M.P.]** ...3130

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – प्रथम सूचना प्रतिवेदन का अभिखंडन – जिला मजिस्ट्रेट द्वारा जारी किये गये पत्र पर मजिस्ट्रेट द्वारा भा.दं.सं. की धारा 188 के अंतर्गत अपराध के लिये संज्ञान लिया गया – अभिनिर्धारित – शिकायत के बिना संज्ञान नहीं लिया जा सकता – प्रथम सूचना प्रतिवेदन एवं मजिस्ट्रेट के समक्ष कार्यवाहियां अभिखंडित – भा.दं.सं. की धारा 188 के अंतर्गत अपीलार्थी को आरोपमुक्त किया गया। (अशोक अग्रवाल वि. म.प्र. राज्य) ...3130

Criminal Procedure Code, 1973 (2 of 1974), Section 482 – See – Prevention of Corruption Act, 1988, Section 19 **[Ajita Bajpai Pande (Smt.) Vs. State of M.P.]** (DB)...3113

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 –देखें –भ्रष्टाचार निवारण अधिनियम, 1988, धारा 19 (अजिता बाजपेयी पांडे (श्रीमती) वि. म.प्र. राज्य) (DB)...3113

Educational Service (School Branch) Recruitment and Promotion Rules, M.P. 1982, Rule 11-B, Panchayat Adhyapak Samvarg (Employment & Conditions of Service) Rules M.P. 2008, Rule 5 and Constitution – Article 16 – **Eligibility for recruitment to the post of Area Education Officer – Upper Division Teacher, Head Master of**

Middle Schools and 'Adhyapaks' of local body cadre who have 5 years of overall teaching experience must be considered to be eligible to appear in examination – 5 years teaching experience on their "Respective Posts" for appointment on the post of Area Education Officer is quashed. [Gazetted Headmasters Pradeshik Sangh, Madhya Pradesh Vs. State of M.P.] (DB)...2888

शैक्षिक सेवा (विद्यालय शाखा) भर्ती तथा पदोन्नति नियम, म.प्र. 1982, नियम 11–बी, पंचायत अध्यापक संवर्ग (नियोजन तथा सेवा की शर्तें) नियम म.प्र. 2008, नियम 5 एवं संविधान – अनुच्छेद 16 – क्षेत्रीय शिक्षा अधिकारी के पद पर भर्ती के लिये पात्रता – उच्च श्रेणी शिक्षक, माध्यमिक शालाओं के प्रधान अध्यापक तथा स्थानीय निकाय संवर्ग के 'अध्यापक' जिन्हें कुल 5 वर्ष का शिक्षण अनुभव है, को परीक्षा में बैठने की पात्रता हेतु विचार किया जाना चाहिए – क्षेत्रीय शिक्षा अधिकारी के पद पर नियुक्ति के लिए उनके "संबंधित पदों" पर 5 वर्ष के शिक्षण अनुभव को अभिखंडित किया जाता है। (गजटेड हेडमास्टर्स प्रादेशिक संघ, मध्यप्रदेश वि. म.प्र. राज्य) **(DB)...2888**

Electricity Act (36 of 2003), Sections 135 & 154 – Demand Notice – Civil Liability **– Complaint was filed for theft of Electricity – Special Court after full trial acquitted the petitioner – Special Court is bound and under statutory duty to determine civil liability – After the acquittal, the authorities have no power to assess the civil liability – Provisional assessment cannot be pressed into service against petitioner – Petition allowed. [Baijanti Bai (Smt.) Vs. M.P. Kshetriya Vidyut Vitran Co. Ltd.] ...2882**

विद्युत अधिनियम (2003 का 36), धाराऐं 135 व 154 – मांग का सूचना पत्र – सिविल दायित्व – विद्युत चोरी की शिकायत प्रस्तुत की गई थी – विशेष न्यायालय ने संपूर्ण विचारण पश्चात् याची को दोषमुक्त किया – विशेष न्यायालय, सिविल दायित्व का निर्धारण करने के लिये बाध्य है एवं कानूनी कर्त्तव्यबद्धता के अधीन है – दोषमुक्ति के पश्चात्, प्राधिकारियों के पास सिविल दायित्व निर्धारण की शक्ति नहीं है – अनंतिम निर्धारण को याची के विरूद्ध उपयोग में नहीं लाया जा सकता – याचिका मंजूर। (बैजंती बाई (श्रीमती) वि. एम.पी. क्षेत्रीय विद्युत वितरण कं. लि.) **...2882**

Evidence Act (1 of 2872), Section 32 – See – Penal Code, 1860, Section 302 **[Guddi Bai @ Sahodara Bai Vs. State of M.P.] (DB)...3054**

साक्ष्य अधिनियम (1872 का 1), धारा 32 – देखें – दण्ड संहिता, 1860, धारा 302 (गुड्डी बाई उर्फ सहोदरा बाई वि. म.प्र. राज्य) **(DB)...3054**

Evidence Act (1 of 1872), Section 114(e) – Presumption regarding judicial acts – **It was argued that examination of the witness was carried out in absence of the counsel though his presence is marked, in the lack of the affidavit of the concerning advocate such version is not reliable – The court is bound to presume that the deposition of said witness was recorded in the presence of the petitioner's counsel in view of the provision of presumption enumerated u/s 114(e). [Gajadhar Prasad Vs. Smt. Shakuntala Mishra]** ...2859

साक्ष्य अधिनियम (1872 का 1), धारा 114(ई) – न्यायिक कार्यों से संबंधित उपधारणा – यह तर्क दिया गया कि साक्षी का परीक्षण अधिवक्ता की अनुपस्थिति में किया गया, यद्यपि उसकी उपस्थिति अंकित की गई है, संबंधित अधिवक्ता के शपथ–पत्र के अभाव में उक्त कथन विश्वसनीय नहीं है – धारा 114(ई) के अंतर्गत दिये गये उपधारणा के उपबंध को दृष्टिगत रखते हुए न्यायालय उपधारणा करने के लिये बाध्य है कि उक्त साक्षी के अभिसाक्ष्य याची के अधिवक्ता की उपस्थिति में दर्ज किये गये थे। (गजाधर प्रसाद वि. श्रीमती शकुन्तला मिश्रा) ...2859

Evidence Act (1 of 1872), Section 116 – See – *Accommodation Control Act, M.P., 1961, Section 12(1)(c)* **[Sunil Kumar Vs. Dilip]** ...2965

साक्ष्य अधिनियम (1872 का 1), धारा 116 – देखें – स्थान नियंत्रण अधिनियम, म.प्र., 1961, धारा 12 (1)(सी) (सुनील कुमार वि. दिलीप) ...2965

Evidence Act (1 of 1872), Section 137 & 154 – Declaring a witness as hostile and permitting to cross examine him – **Affidavit under Order 18 Rule 4 C.P.C. was filed on 23.11.12 and witness was cross-examined on 03.09.2013 – No prayer was made either to declare him hostile or sought permission for re-examination – After 16 days, an application was filed for declaring the witness as hostile – Held – Permission could be given by the court till the witness is under examination in witness box and not at a later stage – Application rightly rejected. [Gajadhar Prasad Vs. Smt. Shakuntala Mishra]** ...2859

साक्ष्य अधिनियम (1872 का 1), धारा 137 व 154 – साक्षी को पक्षद्रोही घोषित किये जाने एवं उसका प्रतिपरीक्षण किये जाने की अनुमति – सि.प्र.सं. के आदेश 18 नियम 4 के अंतर्गत 23.11.12 को शपथ–पत्र प्रस्तुत किया गया एवं 3.9.2013 को साक्षी का प्रतिपरीक्षण किया गया – न तो उसे पक्षद्रोही घोषित किये जाने की प्रार्थना की गई न ही पुनः परीक्षण की अनुमति चाही गयी – सोलह दिनों बाद, याची को पक्षद्रोही घोषित किये जाने हेतु एक आवेदन प्रस्तुत किया गया –

अभिनिर्धारित – साक्षी के कटघरे में परीक्षणाधीन रहने तक न्यायालय द्वारा अनुमति दी जा सकती है एवं बाद के प्रक्रम पर नहीं – आवेदन उचित रूप से अस्वीकार किया गया। (गजाधर प्रसाद वि. श्रीमती शकुन्तला मिश्रा) ...2859

Explosive Substances Act (6 of 1908), Section 4 & 5 and Ammonium Nitrate Rules, 2012, Rule 3 – **Ammonium Nitrate was seized on 09.04.2009, Rules 2012 came into force on 11.07.2012 – Prior to that Ammonium Nitrate was not an explosive – No license was required before 11.07.2012 – Applicant cannot be prosecuted u/s 4 & 5 of Act, 1908 as no license was required – Application allowed. [Sharad Kumar Agrawal Vs. State of M.P.]** ...3102

विस्फोटक पदार्थ अधिनियम (1908 का 6), धारा 4 व 5 एवं अमोनियम नाइट्रेट नियम, 2012, नियम 3 – 09.04.2009 को अमोनियम नाइट्रेट अभिगृहीत किया गया था, नियम 2012, 11.07.2012 में प्रभावी हुए – इसके पहले तक अमोनियम नाइट्रेट एक विस्फोटक नहीं था – 11.07.2012 के पहले अनुज्ञप्ति अपेक्षित नहीं थी – अनुज्ञप्ति अपेक्षित नहीं होने के कारण अधिनियम 1908 की धारा 4 एवं 5 के अंतर्गत आवेदक को अभियोजित नहीं किया जा सकता – आवेदन मंजूर। (शरद कुमार अग्रवाल वि. म.प्र. राज्य) ...3102

Fisheries (Gazetted) Service Recruitment Rules, M.P. 1987, Rule 15 – Preparation of list of suitable officers – **Appellant and respondent No. 1 were officiating as Joint Directors – Appellant was junior to respondent No. 1 – Rule 15(3) postulates that any junior officer who in opinion of DPC is of exceptional merit and suitable can be assigned higher place in list than that of officer senior to him – Promotion of appellant temporarily to officiate as Director was in accordance with Rules – Order of High Court set aside. [H.S. Sidhu Vs. Devendra Bapna]** (SC)...2819

मत्स्य उद्योग (राजपत्रित) सेवा भर्ती नियम, म.प्र. 1987, नियम 15 – उपयुक्त अधिकारियों की सूची तैयार करना – अपीलार्थी तथा प्रत्यर्थी क्रमांक 1 संयुक्त संचालक के रूप में कार्यरत थे – अपीलार्थी, प्रत्यर्थी क्रमांक 1 से कनिष्ठ था – नियम 15(3) यह प्रावधान करता है कि कोई भी कनिष्ठ अधिकारी जो कि विभागीय पदोन्नति समिति की राय में असाधारण रूप से योग्य तथा उपयुक्त है तो उसे सूची में अपने वरिष्ठ अधिकारी से उच्चतर स्थान दिया जा सकता है – अपीलार्थी को संचालक के रूप से अस्थायी रूप से कार्य करने के लिये दी गयी पदोन्नति नियमों के अनुसार थी – उच्च न्यायालय का आदेश अपास्त। (एच.एस. सिद्धू वि. देवेन्द्र बापना) (SC)...2819

Hindu Marriage Act (25 of 1955), Section 13(1)(ia) – Cruelty – **Appellant levelled allegations against the sister of husband that she is of shady character – She also filed various complaints u/s 498-A of I.P.C. and Protection of Women from Domestic Violence Act – She also filed various revisions against the orders granting bail – Appellant was guilty of inflicting cruelty upon her husband – Decree of divorce rightly granted – Appeal dismissed. [Mamta Bhardwaj Vs. Madhusudan Bhardwaj]** **(DB)...2977**

हिन्दू विवाह अधिनियम (1955 का 25), धारा 13 (1)(iए) – क्रूरता – अपीलार्थी ने अपने पति की बहन पर आरोप लगाया कि वह संदिग्ध चरित्र की है – उसने भा.दं.सं. की धारा 498–ए तथा घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम के अंतर्गत भी विभिन्न शिकायतें दर्ज करायी – उसने जमानत आदेशों के विरूद्ध भी विभिन्न पुनरीक्षण प्रस्तुत किये – अपीलार्थी अपने पति पर क्रूरता करने की दोषी थी – विवाह–विच्छेद की डिक्री उचित रूप से प्रदान की गयी – अपील खारिज। (ममता भारद्वाज वि. मधुसूदन भारद्वाज) **(DB)...2977**

Hindu Marriage Act (25 of 1955), Section 13(1)(ia) – Cruelty – **To constitute cruelty, the conduct complained should be grave and weighty so as to make cohabitation virtually unendurable – Human mind is extremely complex – What is cruelty in one case may not be a cruelty in another case – There can never be any straight jacket formula or fixed parameters for determining mental cruelty in matrimonial matter. [Mamta Bhardwaj Vs. Madhusudan Bhardwaj]** **(DB)...2977**

हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(iए) – क्रूरता – क्रूरता संस्थापित करने के लिए जिस आचरण की शिकायत की गयी है वह गंभीर तथा वजनदार होना चाहिए जिससे सहवास लगभग असहनीय हो जाए – मानव मस्तिष्क अत्यंत जटिल है – एक प्रकरण में जो क्रूरता है वह दूसरे प्रकरण में क्रूरता नहीं भी हो सकती – वैवाहिक मामलों में मानसिक क्रूरता निर्धारित करने के लिये कभी भी कोई निश्चित सूत्र अथवा निश्चित मापदंड नहीं हो सकते। (ममता भारद्वाज वि. मधुसूदन भारद्वाज) **(DB)...2977**

Hindu Succession Act (30 of 1956), Sections 8, 9 & 11 – See – Motor Vehicles Act, 1988, Section 166(1)(c) **[Proprietor Eastern Minerals Co. Ltd. Vs. Smt. Nisha Tomar]** **...3016**

हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धाराऐं 8, 9 व 11 – देखें – मोटर यान अधिनियम, 1988, धारा 166(1)(सी) (प्रोप्राईटर ईस्टर्न मिनिरल्स कं. लि.

वि. श्रीमती निशा तोमर) ...3016

Interpretation – "Liable to be rejected" and "shall be rejected" – **Expression used in the document must be interpreted in the context it is executed. [Anuj Associates (M/s.) Vs. National Mineral Development Corporation Ltd.] (DB)...2914**

निर्वचन – "निरस्त करने योग्य" तथा "निरस्त किया जायेगा" – दस्तावेज में प्रयुक्त की गयी अभिव्यक्ति का निर्वचन उस संदर्भ में किया जाये जिसमें वह निष्पादित की गयी। (अनुज एसोसिएटस् (मे.) वि. नेशनल मिनिरल डव्हेलपमेन्ट कारपोरेशन लि.) (DB)...2914

Interpretation of Statute – Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 74-A – Order under – Word "shall" – **Raises presumption – Its imperative – Presumption is rebuttable by other consideration such as object and scope of enactment and the consequence flowing therefrom – Central Govt. having control over sale, purchase etc. of N.D.P.S., to ensure that the State Govt. do not deviate from basic object the word "shall" used – The provision is mandatory – State Govt. cannot deviate from order issued by Central Govt. [Man Singh Rajpoot Vs. State of M.P.] (DB)...2826**

कानून का निर्वचन – स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 74–ए – आदेश अंतर्गत – शब्द "करेगा" – उपधारणा करता है – अनिवार्य है – अन्य विचार द्वारा जैसे कि अधिनियमिती का उद्देश्य और विस्तार तथा उससे निकलने वाले परिणाम से उपधारणा खंडनीय है – केंद्र सरकार का स्वापक औषधि और मनःप्रभावी पदार्थों के क्रय–विक्रय आदि पर नियंत्रण है, यह सुनिश्चित करने के लिए कि राज्य सरकार अपने मूल उद्देश्य से विचलित न हो शब्द "करेगा" प्रयुक्त किया गया है – यह उपबंध आज्ञापक है – केंद्र सरकार द्वारा जारी किए गए आदेश से राज्य सरकार विचलित नहीं हो सकता। (मान सिंह राजपूत वि. म.प्र. राज्य) (DB)...2826

Interpretation of Statutes – **Principle governing local resident criteria in the matter of appointment of 'Aanganwadi Karyakarta' cannot be applied in the case of 'Panchayat Karmi'. [Raghvendra Singh Vs. State of M.P.] (DB)...2845**

कानूनों का निर्वचन – आंगनवाड़ी कार्यकर्ता की नियुक्ति के मामले में स्थानीय निवासी मानदंड का प्रभावी सिद्धांत पंचायत कर्मी के प्रकरण में लागू नहीं

किया जा सकता। (राघवेन्द्र सिंह वि. म.प्र. राज्य) (DB)...2845

Limitation Act (36 of 1963), Section 5 – Condonation of delay – **Delay of 6 years and 86 days for filing the application for restoration – No proper explanation for delay – Application filed in very casual manner by stating some emotional grounds rather than the ground permissible under the law – Whenever and wherever under prescribed period the requisite proceeding under the right is not filed by a party then after expiration of such period a valuable right is created in favour of other party and such right could not be curtailed on the basis of any flimsy or insufficient ground – Appliction dismissed. [Usha Bai (Smt.) Vs. State of M.P.]** ...3096

परिसीमा अधिनियम (1963 का 36), धारा 5 – विलंब के लिए माफी – पुनःस्थापन हेतु आवेदन प्रस्तुत करने में 6 वर्ष तथा 86 दिन का विलंब – विलंब के लिए कोई उचित स्पष्टीकरण नहीं – विधि के अंतर्गत अनुज्ञेय आधारों के स्थान पर कुछ भावनात्मक आधार देते हुए अनौपचारिक रूप से आवेदन प्रस्तुत किया गया – जब भी और जहॉ कहीं किसी पक्षकार के द्वारा अधिकार के अंतर्गत अपेक्षित कार्यवाही विहित अवधि के अधीन प्रस्तुत नहीं की जाती है तब ऐसे अवधि के अवसान के पश्चात् अन्य पक्षकार के पक्ष में एक मूल्यवान अधिकार सृजित हो जाता है तथा ऐसे अधिकार को किसी भी कमजोर एवं अपर्याप्त आधार पर घटाया नहीं जा सकता – आवेदन खारिज। (उषा बाई (श्रीमती) वि. म.प्र. राज्य) ...3096

Minor Mineral Rules, M.P. 1996, Rule 7 – Grant of trade quarry – Sand Mining – **Whether the expression "for 2 years" must be construed as "Minimum 2 years" as per clause (2) of Rule 7 of the Rules 1996 – Held – No, the expression "for 2 years" in case of trade quarry means as upto 2 years or the time period as specified in the auction notice issued as per Form 15 – Petition disposed of. [Ram Swaroop Chaturvedi Vs. State of M.P.]** (DB)...2921

गौण खनिज नियम, म.प्र. 1996, नियम 7 – व्यापार खदान का प्रदान किया जाना – रेत खनन – क्या नियम 1996 के नियम 7 के खंड (2) के अनुसार अभिव्यक्ति "दो वर्ष के लिये" का "न्यूनतम 2 वर्ष के लिये" निर्वचन किया जाना चाहिये?–अभिनिर्धारित–नहीं, व्यापार खदान के संबंध में अभिव्यक्ति "दो वर्ष के लिये" का अर्थ है 2 वर्ष तक अथवा फॉर्म 15 के अनुसार, जारी की गयी नीलामी सूचना में विनिर्दिष्ट समयावधि–याचिका निराकृत। (राम स्वरूप चतुर्वेदी वि. म.प्र. राज्य) (DB)...2921

Minor Mineral Rules, M.P. 1996, Rule 22 – Period of quarry

lease – **Whether the provisions of Rule 22 is applicable on grant of trade quarry – Held – No, the provision of Rule 22 is applicable for duration of grant of quarry lease and not for grant of trade quarry. [Ram Swaroop Chaturvedi Vs. State of M.P.] (DB)...2921**

गौण खनिज नियम, म.प्र. 1996, नियम 22 – खदान पट्टा की अवधि – क्या नियम 22 के उपबंध व्यापार खदान के प्रदान पर लागू होते हैं – अभिनिर्धारित – नहीं, नियम 22 का उपबंध खदान पट्टा के प्रदान की अवधि पर लागू होता है और न कि व्यापार खदान के प्रदान पर। (राम स्वरूप चतुर्वेदी वि. म.प्र. राज्य) (DB)...2921

Minor Mineral Rules, M.P. 1996, Rule 37 – Agreement – Clause 26 – Arbitration Clause – **Dispute as to whether amenable to writ jurisdiction – Held – As there is Arbitration Clause in the agreement and efficacious and alternate remedy is available to the petitioner, so remedy of writ jurisdiction under Article 226 of the Constitution is not available for relief regarding refund of the amount deposited by the petitioner. [Ram Swaroop Chaturvedi Vs. State of M.P.] (DB)...2921**

गौण खनिज नियम, म.प्र. 1996, नियम 37 – करार – खंड 26 – माध्यस्थम् खंड – क्या विवाद रिट अधिकारिता के अध्यधीन है – अभिनिर्धारित – चूंकि करार में माध्यस्थम् खंड दिया गया है तथा याची को प्रभावशाली एवं वैकल्पिक उपचार उपलब्ध है, अतः याची द्वारा जमा की गई धनराशि की वापसी के संबंध में अनुतोष के लिये संविधान के अनुच्छेद 226 के अंतर्गत रिट अधिकारिता का उपचार उपलब्ध नहीं है। (राम स्वरूप चतुर्वेदी वि. म.प्र. राज्य) (DB)...2921

Motor Vehicles Act (59 of 1988), Sections 147, 166 – Liability of Insurance Company – **Appellant failed to prove that deceased was its employee and was travelling in dumper in prosecution of his job – Claims Tribunal rightly held that deceased was a passenger – As there was a violation of Insurance Policy, Insurance Company is not liable to pay compensation. [Proprietor Eastern Minerals Co. Ltd. Vs. Smt. Nisha Tomar] ...3016**

मोटर यान अधिनियम (1988 का 59), धाराऐं 147, 166 – बीमा कम्पनी का दायित्व – अपीलार्थी यह सिद्ध करने में असफल रहा है कि मृतक उसका कर्मचारी था तथा अपने कार्य के दौरान वह डंपर में यात्रा कर रहा था – दावा अधिकरण ने यह सही अभिनिर्धारित किया कि मृतक एक यात्री था – चूंकि बीमा पॉलिसी का उल्लंघन हुआ था, इसलिये बीमा कंपनी प्रतिकर का भुगतान करने के लिये दायी

नहीं है। (प्रोप्राईटर ईस्टर्न मिनिरल्स कं. लि. वि. श्रीमती निशा तोमर) ...3016

Motor Vehicles Act (59 of 1988), Section 166(1)(c) and Hindu Succession Act (30 of 1956), Sections 8, 9 & 11 – Legal Representatives (Claimants) **– Legal Representative would be a person who represents the Estate of the deceased – Claim Petition filed by brothers, and father was made non-applicant who is alive – According to Section 9 and 11 of Act, 1956, in absence of Class I heir, property would devolve amongst heirs of Category II of Class II – As deceased was not survived by Class I heirs, therefore, so long as father is alive, brothers of deceased cannot file claim petition as they are not successors of deceased. [Proprietor Eastern Minerals Co. Ltd. Vs. Smt. Nisha Tomar]** ...3016

मोटर यान अधिनियम (1988 का 59), धारा 166(1)(सी) एवं हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धाराऐं 8, 9 व 11 – विधिक प्रतिनिधि (दावेदार) – विधिक प्रतिनिधि वह व्यक्ति होगा जो कि मृतक की संपदा का प्रतिनिधित्व करता है – दावा याचिका भाइयों द्वारा प्रस्तुत की गयी तथा पिता को अनावेदक बनाया गया जो कि जीवित है – अधिनियम 1956 की धारा 9 तथा 11 के अनुसार वर्ग I के वारिस की अनुपस्थिति में संपत्ति, वर्ग II की श्रेणी II के वारिसों के मध्य हस्तांतरित होगी – चूंकि मृतक अपने पीछे वर्ग I के वारिस नहीं छोड़ गया है, अतः जब तक कि पिता जीवित है, मृतक के भाई दावा याचिका प्रस्तुत नहीं कर सकते क्योंकि वे मृतक के उत्तराधिकारी नहीं हैं। (प्रोप्राईटर ईस्टर्न मिनिरल्स कं. लि. वि. श्रीमती निशा तोमर) ...3016

Motor Vehicles Act (59 of 1988), Section 166(1)(c) – Non-Applicant **– Legal representative of deceased was joined as non-applicant in claims petition – If a person is joined as non-applicant and if it is found that he is entitled to get compensation, it is not required that he should file claim petition to pay for his portion of compensation – Father of deceased who was joined as non-applicant is entitled to get compensation. [Proprietor Eastern Minerals Co. Ltd. Vs. Smt. Nisha Tomar]** ...3016

मोटर यान अधिनियम (1988 का 59), धारा 166(1)(सी) – अनावेदक – दावा याचिका में मृतक के विधिक प्रतिनिधि को अनावेदक के रूप में जोड़ा गया था – यदि किसी व्यक्ति को अनावेदक के रूप में जोड़ा जाता है तथा यदि यह पाया जाता है कि वह प्रतिकर पाने का हकदार है तो यह आवश्यक नहीं है कि वह अपने हिस्से के प्रतिकर के भुगतान हेतु दावा याचिका प्रस्तुत करे – मृतक का पिता जिसे

अनावेदक के रूप में जोड़ा गया था, प्रतिकर पाने का हकदार है। (प्रोप्राईटर ईस्टर्न मिनिरल्स कं. लि. वि. श्रीमती निशा तोमर) ...3016

Motor Vehicles Act (59 of 1988), Section 173 – Compensation – **Deceased age 33 years – Earning Rs. 3000 per month – Dependency Rs. 2000/- per month – Multiplier of 16 applied – Total compensation of Rs. 4,01,500/- and interest @ 6% p.a. from the date of application. [Vidhya Bai (Smt.) Vs. Kailashchandra]** ...2972

मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर – मृतक आयु 33 वर्ष – आय रू. 3000 प्रतिमाह – आश्रितता रू. 2000/– प्रतिमाह – 16 का गुणक लागू किया गया – कुल प्रतिकर रू. 4,01,500/– तथा आवेदन की तिथि से 6% प्रतिवर्ष की दर से ब्याज। (विद्या बाई (श्रीमती) वि. कैलाशचन्द्र) ...2972

Motor Vehicles Act (59 of 1988), Section 173 – Compensation – **Offending vehicle (Truck) was parked at the middle of road – Evidence for parking of truck supported by three witnesses including cleaner of truck – No evidence in rebuttal by Insurance Company – Finding of Tribunal that deceased was negligent as he was coming from back side of truck not proper. [Vidhya Bai (Smt.) Vs. Kailashchandra]** ...2972

मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर – वाहन जिससे दुर्घटना कारित हुई (ट्रक) सड़क के मध्य खड़ा किया गया था – ट्रक को खड़े किये जाने का साक्ष्य तीन साक्षीगण, जिसमें ट्रक का क्लीनर भी शामिल है, द्वारा समर्थित है – बीमा कंपनी द्वारा इसके खंडन में कोई साक्ष्य नहीं – अधिकरण का यह निष्कर्ष कि मृतक उपेक्षापूर्ण था क्योंकि वह ट्रक के पीछे से आ रहा था, उचित नहीं है। (विद्या बाई (श्रीमती) वि. कैलाशचन्द्र) ...2972

Motor Vehicles Act (59 of 1988), Section 173 – Dependency –**Claims Tribunal deducted 1/3 of annual income of deceased towards his personal expenses – Appellant/mother was given 1/3 of income of deceased and 1/3 of amount to wife of deceased – Wife has already remarried and remained ex-parte – Giving of 1/3 amount to wife of deceased not proper. [Vidhya Bai (Smt.) Vs. Kailashchandra]** ...2972

मोटर यान अधिनियम (1988 का 59), धारा 173 – आश्रितता – दावा अधिकरण ने मृतक के व्यक्तिगत खर्चों के मद में उसकी वार्षिक आय में से 1/3

माग की कटौत्री की – अपीलार्थी/मां को मृतक की 1/3 आय का हिस्सा दिया गया तथा मृतक की पत्नी को धनराशि का 1/3 हिस्सा दिया गया – पत्नी ने पहले ही पुनर्विवाह किया है और एकपक्षीय रही है – मृतक की पत्नी को 1/3 धनराशि दी जाना उचित नहीं है। (विद्या बाई (श्रीमती) वि. कैलाशचन्द्र) ...2972

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8 & 74-A – Order/direction – Issued by Central Government – Mandatory – State Government to comply. [Man Singh Rajpoot Vs. State of M.P.] (DB)...2826

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराऐं 8 व 74–ए – आदेश/निदेश – केंद्र सरकार द्वारा जारी – आज्ञापक – राज्य सरकार अनुपालन करे। (मान सिंह राजपूत वि. म.प्र. राज्य) (DB)...2826

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8(c) & 21-B – Rexcof Cough Syrup – As per notification dated 14.11.1985, a preparation containing not more than 100 mgs of Codeine Phosphate per dosage unit with the concentration of not more than 2.5% in undivided preparation is exempted from application of Section 21 of the Act, 1985 – As per report of Laboratory, each 5 ml Syrup containing 9.825 mg. Codeine Phosphate which is permissible – Merely because Syrup bottles in bulk were seized would not make it punishable in absence of any express penal provision – Applicant discharged. [Rohit Chadha Vs. State of M.P.] ...3079

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराऐं 8(सी) व 21-बी – रैक्सकॉफ कफ सीरप – अधिसूचना दिनांक 14.11.1985 के अनुसार ऐसी तैयार दवा जिसमें प्रति खुराक 100 मि.ग्रा. से अधिक कोडीन फॉस्फेट नहीं है, के साथ अविभाजित तैयार दवा जिसमें 2.5% से अधिक सांद्रता को 1985 के अधिनियम की धारा 21 के अनुप्रयोग से छूट दी गयी है – प्रयोगशाला के प्रतिवेदन के अनुसार प्रति 5 मि.ग्रा. सीरप जिसमें 9.825 मि.ग्रा. कोडीन फॉस्फेट मौजूद है जो कि अनुज्ञेय है – केवल इसलिये कि सीरप की बोतलें बहुलता में जब्त की गयी थी किसी अभिव्यक्त दंड के उपबंध की अनुपस्थिति में उसे दण्डित नहीं किया जा सकता – आवेदक उन्मोचित। (रोहित चडढा वि. म.प्र. राज्य) ...3079

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 9 & Art. 22 – Single convention – Cultivation of Poppy – By cultivator on behalf of Government – Cultivator has right only on seed – Rest of the plant and product belongs to Government. [Man Singh

Rajpoot Vs. State of M.P.] **(DB)...2826**

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 9 अनुच्छेद 22 – एकल कन्वेन्शन– अफीम की खेती – शासन की ओर से कृषक द्वारा – कृषक का केवल बीज पर अधिकार है – बचा हुआ पौधा और उत्पाद शासन का होता है। (मान सिंह राजपूत वि. म.प्र. राज्य) **(DB)...2826**

***Narcotic Drugs and Psychotropic Substances Rules, M.P., 1985, Rule 37-M & Art. 22-25 of Single convention – Destruction of poppy straw* – After cancellation or determination of license poppy straw which remained un-utilized has to be destroyed. [Man Singh Rajpoot Vs. State of M.P.]** **(DB)...2826**

स्वापक औषधि और मनःप्रभावी पदार्थ नियम, म.प्र., 1985, नियम 37–एम व एकल कन्वेन्शन के अनुच्छेद 22–25 – अफीम के भूसे का विनष्टीकरण – अनुज्ञप्ति के निरस्तीकरण अथवा निर्धारण के पश्चात् बचे हुये अप्रयुक्त अफीम के भूसे का विनष्टीकरण किया जाना चाहिए। (मान सिंह राजपूत वि. म.प्र. राज्य) **(DB)...2826**

***Panchayat Adhyapak Samvarg (Employment & Conditions of Service) Rules M.P. 2008, Rule 5 – See – Educational Service (School Branch) Recruitment and Promotion Rules, M.P. 1982, Rule 11-B* [Gazetted Headmasters Pradeshik Sangh, Madhya Pradesh Vs. State of M.P.]** **(DB)...2888**

पंचायत अध्यापक संवर्ग (नियोजन तथा सेवा की शर्तें) नियम म.प्रं. 2008, नियम 5 – देखें – शैक्षिक सेवा (विद्यालय शाखा) भर्ती तथा पदोन्नति नियम, म.प्र. 1982, नियम 11–बी (गजटेड हेडमास्टर्स प्रादेशिक संघ, मध्यप्रदेश वि. म.प्र. राज्य) **(DB)...2888**

***Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 69, 70 – Panchayat Karmi/Panchayat Secretary – Appointment* – Whether a candidate belonging to a different Area other than the village for which the appointment of Panchayat Karmi/ Panchayat Secretary is to be made is eligible for seeking appointment to the post – Held – Yes, the requirement of scheme is only directory in nature and not mandatory as it is policy of State Government to transfer Panchayat Karmi/Secretary from one village to another in the same District – Appeal dismissed. [Raghvendra Singh Vs. State of M.P.]** **(DB)...2845**

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 69, 70– पंचायत कर्मी / पंचायत सचिव – नियुक्ति – ऐसा अभ्यर्थी जो उस ग्राम जहां पर पंचायत कर्मी / पंचायत सचिव की नियुक्ति होनी है के अतिरिक्त किसी अन्य स्थान का निवासी है तो क्या वह उस पद पर नियुक्ति के लिये पात्र है – अभिनिर्धारित – हां, योजना की अपेक्षा केवल निदेशात्मक स्वरूप की है और न कि आज्ञापक क्योंकि राज्य शासन की नीति एक ही जिले में एक ग्राम से दूसरे ग्राम में पंचायत कर्मी / सचिव के स्थानांतरण की है – अपील खारिज। (राघवेन्द्र सिंह वि. म.प्र. राज्य) **(DB)...2845**

Payment of Gratuity Act (39 of 1972), Section 3(A) **– Grant of interest on account of delayed payment – Controlling Authority while granting gratuity also directed payment of interest on a finding that the employer was guilty of delayed payment – Appellate Authority set-aside order of grant of interest – Held – Since petitioner tendered resignation on 04.11.1998 and he approached respondent for grant of gratuity on 09.02.2009 which was paid on 16.03.2009 – There is no delay in payment – Delayed payment is due to the employee's own fault – Interest is not payable – Petition is dismissed. [Leeladhar Puria Vs. General Manager WCL] ...2869**

उपदान संदाय अधिनियम (1972 का 39), धारा 3(ए) – विलंबित भुगतान के फलस्वरूप ब्याज प्रदान करना – नियंत्रणकर्ता प्राधिकारी ने उपदान देते समय इस निष्कर्ष के आधार पर कि नियोक्ता विलंबित भुगतान का दोषी था, ब्याज के भुगतान का भी निदेश दिया – अपीलीय प्राधिकारी ने ब्याज प्रदान करने के आदेश को अपास्त किया – अभिनिर्धारित – चूंकि याची ने 04.11.1998 को त्यागपत्र दिया तथा उसने उपदान के प्रदाय के लिए प्रत्यर्थी से 09.02.2009 को संपर्क किया जिसका उसे 16.03.2009 को भुगतान किया गया – भुगतान में कोई विलंब नहीं है – विलंबित भुगतान कर्मचारी की स्वयं की गलती के कारण हुआ है – ब्याज देय नहीं है – याचिका खारिज। (लीलाधर पूरिया वि. जनरल मेनेजर डब्ल्यूसीएल) ...2869

Penal Code (45 of 1860), Section 302 and Criminal Procedure Code, 1973 (2 of 1974), Section 157 – Copy of FIR to Magistrate **– Two eye witnesses who are son and brother of deceased have admitted their inimical relation with accused – Their evidence is full of contradictions and not in conformity with medical evidence – Their presence on spot doubtful – When presence of witnesses on spot at the time of incident and lodging of FIR is doubtful, the mandatory provisions of Section 157 Cr.P.C. have to be complied with by prosecution – Prosecution failed**

to prove that copy of FIR was sent to Magistrate – Prosecution also failed to prove blood stains on seized weapons – Appeal allowed. [Ramu Vs. State of M.P.] (DB)...3045

दण्ड संहिता (1860 का 45), धारा 302 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 157 – मजिस्ट्रेट को प्रथम सूचना प्रतिवेदन की प्रति – दो चक्षुदर्शी साक्षी जो मृतक के पुत्र एवं भाई हैं उन्होंने स्वीकार किया कि अभियुक्त के साथ उनके संबंध वैमनस्यतापूर्ण थे – उनके साक्ष्य विरोधाभास से परिपूर्ण एवं चिकित्सीय साक्ष्य से भी पुष्टि नहीं – घटनास्थल पर उनकी उपस्थिति संदेहास्पद – जब घटना के समय घटनास्थल पर एवं प्रथम सूचना प्रतिवेदन दर्ज कराते समय साक्षियों की उपस्थिति संदेहास्पद हो, दं.प्र.सं. की धारा 157 के आज्ञापक उपबंधों का अभियोजन द्वारा अनुपालन करना होगा – अभियोजन यह साबित करने में असफल रहा कि प्रथम सूचना प्रतिवेदन की प्रति मजिस्ट्रेट को भेजी गई – अभियोजन जब्त आयुधों पर रक्त के धब्बे साबित करने में भी असफल रहा – अपील मंजूर। (रामू वि. म.प्र. राज्य) **(DB)...3045**

Penal Code (45 of 1860), Section 302 and Evidence Act (1 of 1872), Section 32– Multiple dying declarations **– In first dying declaration, the deceased stated that she got burnt accidentally – Second dying declaration was got recorded on the saying of Mahila Mandal and Chairman of Zila Panchayat – No smell of kerosene oil was found – Second dying declaration implicating the appellant not trustworthy – In order to test the reliability of a dying declaration the court has to keep in mind, the circumstances like the opportunity of the dying man for observation and that it has been made at the earliest opportunity and was not the result of tutoring by interested parties – Appeal allowed. [Guddi Bai @ Sahodara Bai Vs. State of M.P.] (DB)...3054**

दण्ड संहिता (1860 का 45), धारा 302 एवं साक्ष्य अधिनियम (1872 का 1), धारा 32 – बहुविध मृत्युकालिक कथन – प्रथम मृत्युकालिक कथन में मृतिका ने कथन किया कि वह दुर्घटनावश जल गयी – दूसरा मृत्युकालिक कथन महिला मंडल तथा जिला पंचायत अध्यक्ष के कहने पर दर्ज किया गया – मिट्टी तेल की कोई गंध नहीं पायी गयी – अपीलार्थी को अपराध में आलिप्त करने वाला दूसरा मृत्युकालिक कथन विश्सवसनीय नहीं है – मृत्युकालिक कथन की विश्वसनीयता की जांच हेतु न्यायालय को ऐसी परिस्थितियों को ध्यान में रखना चाहिए जैसे कि मरते हुए व्यक्ति को मिला पर्यवेक्षण का अवसर और यह कि वह यथाशीघ्र अवसर पर दिया गया हो तथा किसी हितबद्ध पक्षकार द्वारा सिखाने के परिणामस्वरूप नहीं था – अपील मंजूर। (गुड्डी बाई उर्फ सहोदरा बाई वि. म.प्र. राज्य) **(DB)...3054**

Penal Code (45 of 1860), Section 304-B – Acquittal – The judgment of the acquittal should not be disturbed unless the conclusion drawn on the basis of evidence brought on record is found to be grossly unreasonable or manifestly perverse or palpably unsustainable – Further, if two views are possible then the view in favour of accused should be taken into consideration. [Dileep Vs. State of M.P.] (DB)...3036

दण्ड संहिता (1860 का 45), धारा 304–बी – दोषमुक्ति – दोषमुक्ति के निर्णय को तब तक नहीं छेड़ा जा सकता जब तक कि अभिलेख में आए साक्ष्य के आधार पर निकाला गया निष्कर्ष अत्यंत अनुचित अथवा प्रकट रूप से विकृत या सुस्पष्ट रूप से अपोषणीय पाया जाता है – आगे, यदि दो दृष्टिकोण संभावित हैं तो अभियुक्त के पक्ष वाले दृष्टिकोण पर विचार किया जाना चाहिए। (दिलीप वि. म. प्र. राज्य) (DB)...3036

Penal Code (45 of 1860), Section 304-B – Soon before death – Father of deceased was present at the time of autopsy but did not allege against appellant – Allegations were made after 2-3 months of incident – No evidence that deceased was subjected to cruelty soon before her death – Other accused already acquitted as evidence of witnesses were not found trustworthy – Appellant entitled to be acquitted – Appeal allowed. [Dileep Vs. State of M.P.] (DB)...3036

दण्ड संहिता (1860 का 45), धारा 304–बी – मृत्यु के शीघ्र पूर्व – मृतक के पिता शव परीक्षण के समय उपस्थित परंतु अपीलार्थी के विरूद्ध अभिकथन नहीं – घटना के 2–3 माह पश्चात् अभिकथन किये गये – कोई साक्ष्य नहीं कि मृत्यु के तुरंत पहले मृतक के साथ क्रूरता का व्यवहार किया गया – अन्य अभियुक्त पहले ही दोषमुक्त क्योंकि साक्षियों के साक्ष्य विश्वसनीय नहीं पाये गये – अपीलार्थी दोषमुक्ति का हकदार है – अपील मंजूर। (दिलीप वि. म.प्र. राज्य) (DB)...3036

Penal Code (45 of 1860), Section 306 – Abetment of Suicide – Applicant after the death of her husband was having illicit relations with deceased – She financed the deceased for opening a medical store – Later on, she started pressurizing the deceased to return the money, she had invested in the medical store – Held – Deceased was ultrasensitive to the situation and chose to end his life – Commission of suicide by deceased was sheer exercise in escapism for which the applicant cannot be held to be legally liable because by no stretch of imagination, it can be said that the

applicant had succeeded in creating such a situation for the deceased that he was left with no option but to commit suicide – Charges set aside – Applicant discharged. [Mamta Rai (Smt.) Vs. State of M.P.] ...3072

दण्ड संहिता (1860 का 45), धारा 306 – आत्महत्या का दुष्प्रेरण – प्रार्थिनी के अपने पति की मृत्यु के पश्चात् मृतक के साथ अवैध संबंध थे – उसने मृतक को मेडिकल स्टोर खोलने हेतु आर्थिक सहायता दी – बाद में, वह रकम वापस करने हेतु मृतक पर दबाव डालने लगी जो उसने मेडिकल स्टोर में निवेश की थी – अभिनिर्धारित – मृतक इस परिस्थिति के प्रति अतिसंवेदनशील था तथा उसने अपने जीवन का अंत करना चुना – मृतक द्वारा आत्महत्या करना सरासर पलायन का कदम था जिसके लिए प्रार्थिनी को कानूनी तौर पर जिम्मेदार नहीं ठहराया जा सकता क्योंकि किसी भी तरह से यह कल्पना नहीं की जा सकती तथा यह कहा जाये कि प्रार्थिनी मृतक के लिए ऐसी परिस्थिति उत्पन्न करने में सफल रही कि उसके पास आत्महत्या कारित करने के अलावा कोई विकल्प शेष नहीं था – आरोप अपास्त – प्रार्थिनी आरोपमुक्त। (ममता राय (श्रीमती) वि. म.प्र. राज्य) ...3072

Penal Code (45 of 1860), Section 307 – Attempt to murder – Against acquittal **– Complainant alleged in FIR that he had received gun shot injury in calf of left leg and in Court evidence it was stated that he had received gun shot injury in the calf of right leg – Doctor found only abrasion in calf of left leg and no gun shot injury was found – FIR also lodged after 3 1/2 hours – Trial court rightly acquitted the respondents – Appeal dismissed. [Shiv Singh Vs. Harnarayan] (DB)...3051**

दण्ड संहिता (1860 का 45), धारा 307 – हत्या का प्रयत्न – दोषमुक्ति के विरुद्ध – शिकायतकर्ता ने प्रथम सूचना प्रतिवेदन में यह अभिकथित किया कि उसके बायें पैर की पिंडली पर पिस्तौल की गोली से चोट लगी एवं न्यायालयीन साक्ष्य में यह कथित किया कि पिस्तौल की गोली से उसके दांयें पैर की पिंडली पर चोट लगी – चिकित्सक ने बांये पैर की पिंडली पर केवल खरोंच का निशान पाया एवं पिस्तौल की गोली की चोट नहीं पाई गई थी – प्रथम सूचना प्रतिवेदन भी 3½ घंटे बाद दर्ज की – विचारण न्यायालय ने उचित रूप से प्रत्यर्थियों को दोषमुक्त किया – अपील खारिज। (शिव सिंह वि. हरनारायण) (DB)...3051

Penal Code (45 of 1860), Section 376 – Rape **– According to prosecutrix, she was thrown on the ground – However, no external or internal injury was found – Investigating Officer has also admitted that during investigation, it was found that report of rape**

was false and prosecutrix was in habit of lodging false report – Appellant acquitted – Appeal allowed. [Ghanshyam Singh Raghuvanshi Vs. State of M.P.] (DB)...3032

दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – अभियोक्त्री के अनुसार उसे जमीन पर पटक दिया गया था – किंतु बाह्य या आंतरिक चोट नहीं पाई गई थी – अन्वेषण अधिकारी ने भी स्वीकार किया कि अन्वेषण के दौरान यह पाया गया था कि बलात्कार की रिपोर्ट मिथ्या थी एवं अभियोक्त्री मिथ्या रिपोर्ट करने की आदी थी – अपीलार्थी दोषमुक्त – अपील मंजूर। (घनश्याम सिंह रघुवंशी वि. म.प्र. राज्य) **(DB)...3032**

***Penal Code (45 of 1860), Sections 420, 467, 468 & 471 – Cheating* – Society sold Plot No. 344 – It is alleged that the applicant/purchaser made interpolation in the sale deed and added Plot No. 344-A however, no such plot is in existence as per lay out – Applicant is also alleged to have taken possession of Plot No. 345 – Applicant could not produce original documents in respect of Plot Nos. 344, 344-A before the police when matter was being investigated in compliance of order u/s 156(3) of Cr.P.C. – Allegations are required to be enquired upon – Application u/s 482 for quashing the proceedings dismissed. [Anil Kumar Chouhan @ Anil Singh Chouhan Vs. State of M.P.] ...3105**

दण्ड संहिता (1860 का 45), धाराऐं 420, 467, 468 व 471 – छल – सोसाइटी ने भूखंड क्रमांक 344 विक्रय किया – यह अभिकथित किया गया है कि आवेदक/क्रेता ने विक्रय विलेख में अंतर्वेशन किया एवं भूखंड क्रमांक 344–ए जोड़ दिया जबकि, अभिन्यास के अनुसार ऐसा कोई भूखंड अस्तित्व में नहीं है – यह भी अभिकथित किया कि आवेदक भूखंड क्रमांक 345 का कब्जा ले चुका है – दं.प्र.सं. की धारा 156(3) के अंतर्गत आदेश के पालन में जब मामले का अन्वेषण किया जा रहा था, आवेदक भूखंड क्रमांक 344, 344–ए के संबंध में पुलिस के समक्ष मूल दस्तावेज प्रस्तुत नहीं कर सका – अभिकथनों की जांच की जाना अपेक्षित – धारा 482 के अंतर्गत कार्यवाहियां अभिखंडित किये जाने के लिये आवेदन खारिज। (अनिल कुमार चौहान उर्फ अनिल सिंह चौहान वि. म.प्र. राज्य) ...3105

***Penal Code (45 of 1860), Section 505(2)(1)* – See – *Criminal Procedure Code, 1973, Section 216* [Abdul Rashid Vs. State of M.P.] ...3127**

दण्ड संहिता (1860 का 45), धारा 505(2)(1) – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 216 (अब्दुल राशिद वि. म.प्र. राज्य) ...3127

Police Regulations, M.P., Regulations 10, 12, & 232 – Departmental Enquiry – Appointment of Enquiry Officer – **Whether Superintendent of Police is the only authority to appoint the Enquiry Officer to conduct departmental enquiry against the Inspector of Police – Held – No, as per Regulation 10 read with Regulation 12, Inspector General of Police, being a Superior Officer than S.P. is also competent to exercise power of appointing Enquiry Officer to conduct the departmental enquiry. [Ram Swaroop Pandre Vs. State of M.P.]** **(DB)...2850**

पुलिस विनियमन, म.प्र., विनियमन 10, 12, व 232 – विभागीय जांच – जांचकर्ता अधिकारी की नियुक्ति – क्या केवल पुलिस अधीक्षक ही पुलिस निरीक्षक के विरूद्ध विभागीय जांच के संचालन हेतु जांचकर्ता अधिकारी नियुक्त करने के लिये प्राधिकारी है? – अभिनिर्धारित – नहीं, विनियम 10 सहपठित विनियम 12 के अनुसार पुलिस महानिरीक्षक भी, पुलिस अधीक्षक से उच्चाधिकारी होने के नाते विभागीय जांच संचालन के लिये जांचकर्ता अधिकारी की नियुक्ति हेतु शक्ति का प्रयोग करने के लिये सक्षम है। (राम स्वरूप पांद्रे वि. म.प्र. राज्य) **(DB)...2850**

Practice – **Court can permit a person who calls a witness to put question to him which might be put in the cross-examination at any stage of the examination of witness – However, such permission could be given by the Court till the witness is under examination in the witness box and not at later stage. [Gajadhar Prasad Vs. Smt. Shakuntala Mishra]** **...2859**

पद्धति – न्यायालय ऐसे व्यक्ति को जो किसी साक्षी को बुलाता है, साक्षी के परीक्षण के किसी भी प्रक्रम पर उससे ऐसा प्रश्न पूछने के लिये अनुमति दे सकता है जो कि उसके प्रतिपरीक्षण में पूछा जा सकता हो – किंतु न्यायालय द्वारा उक्त अनुमति साक्षी के कटघरे में परीक्षण के अधीन रहने तक दी जा सकती है और न कि बाद के प्रक्रम पर। (गजाधर प्रसाद वि. श्रीमती शकुन्तला मिश्रा) **...2859**

Prevention of Corruption Act (49 of 1988), Section 19 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Sanction – **Observations were given by the trial Court while deciding Special case pending against co-accused person observing that the prosecution agency shall be at liberty to file fresh charge-sheet against the petitioner after obtaining the requisite sanction from the competent authority u/s 19 of Prevention of Corruption Act – Held – It could not be said that the sanction of the competent authority dated 10.07.2013**

was influenced by any observation made by the trial Court in the impugned judgment – Petition did not have any question which requires any consideration on merit for which this petition could be admitted for final hearing – Applicaion dismissed. [Ajita Bajpai Pande (Smt.) Vs. State of M.P.] (DB)...3113

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 19 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – मंजूरी – विचारण न्यायालय द्वारा सह अभियुक्त के विरूद्ध लंबित विशेष प्रकरण को निर्णीत किये जाते समय इस टिप्पणी के साथ समुक्तियां दी गई कि अभियोजन एजेंसी, भ्रष्टाचार निवारण अधिनियम की धारा 19 के अंतर्गत सक्षम प्राधिकारी से अपेक्षित मंजूरी अभिप्राप्त करने के पश्चात्, याची के विरूद्ध नये सिरे से आरोप–पत्र प्रस्तुत करने के लिए स्वतंत्र होगी – अभिनिर्धारित – यह नहीं कहा जा सकता कि सक्षम प्राधिकारी की मंजूरी दिनांक 10.07.2013, विचारण न्यायालय द्वारा आक्षेपित निर्णय में दी गई किसी समुक्ति से प्रभावित थी – याचिका में कोई ऐसा प्रश्न नहीं जिसके गुणदोष पर कोई विचार किया जाना अपेक्षित हो जिसके लिये यह याचिका अंतिम सुनवाई हेतु स्वीकार की जा सके – आवेदन खारिज। (अजिता बाजपेयी पांडे (श्रीमती) वि. म.प्र. राज्य) **(DB)...3113**

***Representation of the People Act (43 of 1951), Section 33* – Filing of certified copy of Electoral Roll, where the candidate is enrolled – Mandatory provision. [Vanshmani Prasad Verma Vs. Rajendra Kumar Meshram] ...2932**

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 33 – निर्वाचक नामावली की प्रमाणित प्रति प्रस्तुत करना, जहां प्रत्याशी सूचीबद्ध है – आज्ञापक उपबंध। (वंशमणी प्रसाद वर्मा वि. राजेन्द्र कुमार मेश्राम) **...2932**

***Representation of the People Act (43 of 1951), Section 33(5)* – Certified copy of Electoral Roll not filed by candidate – Mere mentioning of serial number as elector in nomination form is not compliance of mandatory provision. [Vanshmani Prasad Verma Vs. Rajendra Kumar Meshram] ...2932**

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 33(5) – प्रत्याशी द्वारा निर्वाचक नामावली की प्रमाणित प्रति प्रस्तुत नहीं – नामांकन प्रपत्र में केवल निर्वाचक की क्रम संख्या का उल्लेख किया जाना आज्ञापक उपबंध का पालन नहीं है। (वंशमणी प्रसाद वर्मा वि. राजेन्द्र कुमार मेश्राम) **...2932**

***Representation of the People Act (43 of 1951), Section 33(5)* –**

Onus/Burden of Proof of filing of certified copy of Electoral Roll is on the returned candidates (respondent) – As respondent failed to prove that he had filed certified copy of Electoral Roll, his nomination paper was wrongly accepted by returning officer. [Vanshmani Prasad Verma Vs. Rajendra Kumar Meshram] ...2932

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 33(5) – निर्वाचक नामावली की प्रमाणित प्रति प्रस्तुत किया जाना साबित करने का भार/दायित्व निर्वाचित प्रत्याशियों (प्रत्यर्थी) पर है – चूंकि प्रत्यर्थी यह सिद्ध करने में असफल रहा कि उसने निर्वाचक नामावली की प्रमाणित प्रति प्रस्तुत की थी, निर्वाचन अधिकारी द्वारा उसका नामांकन पत्र गलत रूप से स्वीकार किया गया था। (वंशमणी प्रसाद वर्मा वि. राजेन्द्र कुमार मेश्राम) ...2932

***Representation of the People Act (43 of 1951), Section 33(5)* – Stages of filing of certified copy of Electoral Roll – Firstly at the time of filing of nomination paper – Secondly at the time of screening. [Vanshmani Prasad Verma Vs. Rajendra Kumar Meshram]** ...2932

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 33(5) – निर्वाचक नामावली की प्रमाणित प्रति प्रस्तुत करने के प्रक्रम – प्रथमतः नामांकन पत्र प्रस्तुत करते समय – द्वितीयतः जांच के समय। (वंशमणी प्रसाद वर्मा वि. राजेन्द्र कुमार मेश्राम) ...2932

***Representation of the People Act (43 of 1951), Sections 33(5), 36(2)(b) – Non-compliance of Section 33(5) – Fatal* – Candidate ineligible to contest election – Nomination liable to be rejected – Election set-aside. [Vanshmani Prasad Verma Vs. Rajendra Kumar Meshram]** ...2932

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 33(5) व 36(2)(बी) – धारा 33(5) का अननुपालन – घातक – प्रत्याशी चुनाव लड़ने के लिये अपात्र – नामांकन अस्वीकार किये जाने योग्य – निर्वाचन अपास्त। (वंशमणी प्रसाद वर्मा वि. राजेन्द्र कुमार मेश्राम) ...2932

***Representation of the People Act (43 of 1951), Sections 33(5) & 36(7) – Proof of Elector* – Copy of Electoral Roll or relevant part thereof or certified copy of relevant entries of such roll – Filed at the time of filing nomination form. [Vanshmani Prasad Verma Vs. Rajendra Kumar Meshram]** ...2932

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 33(5) व 36(7) – निर्वाचक का सबूत – निर्वाचक नामावली की प्रति या उसका सुसंगत खंड या उक्त नामावली की सुसंगत प्रविष्टियों की प्रमाणित प्रति –नामांकन प्रपत्र प्रस्तुत करते समय प्रस्तुत करना चाहिये। (वंशमणी प्रसाद वर्मा वि. राजेन्द्र कुमार मेश्राम) ...2932

***Representation of the People Act (43 of 1951), Section 87(1) & Vidhan Mandal Sadasya Nirhata Nivaran Adhiniyam, M.P., (16 of 1967), Section 3(1) – Removal of certain disqualifications* – Respondent was holding office of profit as President, District Co-operative Bank, Damoh – Disqualification – Held – Though, the respondent was holding the office of Profit on date of filing the nomination but said disqualification has been removed as per Section 3 of the Act of 1967 as District Co-operative Bank is registered under the Co-operative Societies Act and is engaged in performing Banking functions – Election Petition dismissed. [Pushpendra Singh Hazari Vs. Lakhan Lal]** ...2942

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 87(1) एवं विधान मंडल सदस्य निर्हता निवारण अधिनियम, म.प्र.,(1967 का 16), धारा 3(1) – कतिपय अनर्हताओं को दूर करना – प्रत्यर्थी द्वारा जिला सहकारी बैंक, दमोह के अध्यक्ष के रूप में लाभ का पद धारण किया गया था – अनर्हता – अभिनिर्धारित – यद्यपि, नामांकन भरने की तिथि को प्रत्यर्थी लाभ का पद धारित किये हुआ था, परंतु उक्त अनर्हता को 1967 के अधिनियम की धारा 3 के अनुसार हटा दिया गया है, क्योंकि जिला सहकारी बैंक, सहकारी समिति अधिनियम के अंतर्गत पंजीकृत है तथा बैंकिग कार्य करने में संलग्न है – निर्वाचन याचिका खारिज। (पुष्पेन्द्र सिंह हजारी वि. लखनलाल) ...2942

***Representation of the People Act (43 of 1951), Section 87(1) – Cause of Action* – Non-disclosure of pending criminal cases by respondent in nomination paper – Proforma Part II Serial No. 5 requires disclosure of criminal cases wherein charges have been framed – Held – Respondent has made disclosure of criminal case though charges have not been framed in it, so it cannot be said that election of petitioner materially affected – Election Petition dismissed. [Pushpendra Singh Hazari Vs. Lakhan Lal]** ...2942

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 87(1) – वाद हेतुक – नामांकन पत्र में प्रत्यर्थी द्वारा लंबित दांडिक प्रकरणों को प्रकट नहीं किया जाना –

प्रोफार्मा भाग II अनुक्रमांक 5 में ऐसे दांडिक प्रकरण, जिनमें आरोप विरचित किये गये हैं, प्रकट किया जाना अपेक्षित है – अभिनिर्धारित – प्रत्यर्थी ने दांडिक प्रकरण को प्रकट किया है यद्यपि उसमें आरोप विरचित नहीं किये गये हैं, अतः यह नहीं कहा जा सकता कि याची का निर्वाचन तात्विक रूप से प्रभावित हुआ – निर्वाचन याचिका खारिज। (पुष्पेन्द्र सिंह हजारी वि. लखनलाल) ...2942

Representation of the People Act (43 of 1951), Section 87(1) – Objection **– Alteration in affidavit and non-filling of certain columns in nomination paper – Held – Alteration in the affidavit are endorsed by small initials of respondent and important column in nomination paper has not been left blank, such non-compliance has not materially affected election of petitioner. [Pushpendra Singh Hazari Vs. Lakhan Lal]** ...2942

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 87(1) – आपत्ति – शपथपत्र में संशोधन तथा नामांकन पत्र के कुछ स्तंभों का रिक्त छोड़ा जाना – अभिनिर्धारित – शपथपत्र के संशोधनों को प्रत्यर्थी के लघु हस्ताक्षर से पृष्ठांकित किया गया है तथा नामांकन पत्र के महत्वपूर्ण स्तंभे को रिक्त नहीं छोड़ा गया है, उक्त अननुपालन ने याची के निर्वाचन को तात्विक रूप से प्रभावित नहीं किया है। (पुष्पेन्द्र सिंह हजारी वि. लखनलाल) ...2942

Representation of the People Act (43 of 1951), Sections 87(1), 86 & 81(3) r/w Order 7 Rule 11 & r/w Section 151 C.P.C. – Objections **– Proper attestation of petition and its Annexures are not there – Signatures of the petitioner in petition and its annexures – Held – As the petition as well as the annexures bears signature of the petitioner so it amounts to sufficient attestation as per the provisions of Section 81(3) of the Act of 1951. [Pushpendra Singh Hazari Vs. Lakhan Lal]** ...2942

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराऐं 87(1), 86 व 81(3) सहपठित आदेश 7 नियम 11 व सहपठित धारा 151, सि.प्र.सं. – आपत्तियां – याचिका तथा उसके अनुलग्नकों का उचित सत्यापन नहीं किया गया – याचिका तथा उसके अनुलग्नकों में याची के हस्ताक्षर – अभिनिर्धारित – चूंकि याचिका तथा उसके अनुलग्नकों में याची के हस्ताक्षर हैं अतः यह अधिनियम 1951 की धारा 81(3) के उपबंधों के अनुसार पर्याप्त सत्यापन की कोटि में आता है। (पुष्पेन्द्र सिंह हजारी वि. लखनलाल) ...2942

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(2)(v) – Caste Certificate not filed **– Prosecution failed to prove the caste of prosecutrix. [Ghanshyam**

Singh Raghuvanshi Vs. State of M.P.] (DB)...3032

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(2)(v) – जाति प्रमाणपत्र प्रस्तुत नहीं किया गया – अभियोजन अभियोक्त्री की जाति साबित करने में असफल रहा। (घनश्याम सिंह रघुवंशी वि. म.प्र. राज्य) (DB)...3032

***Service Law – Appointment* – Petitioner on being examined found fit for the post of Constable – Medical Admit Card for medical examination was issued to him – However same was received by him after the examination – Therefore, he could not participate in the medical examination – On being approached respondent declined him to undergo medical examination – Held – Since there is no denial of the fact that the letter issued for medical examination was delivered to the petitioner after the scheduled date of medical examination, denial of an opportunity for medical examination is not justified – Respondent shall give one opportunity and thereafter shall consider him for appointment on the basis of his performance. [Ajay Kumar Sahu Vs. Union of India]** ...2879

सेवा विधि – नियुक्ति – याची परीक्षण उपरांत आरक्षक के पद हेतु उपयुक्त पाया गया – चिकित्सकीय परीक्षण हेतु उसे चिकित्सा प्रवेश पत्र जारी किया गया – किंतु उसे वह परीक्षण के पश्चात् प्राप्त हुआ – अतः, वह चिकित्सकीय परीक्षण में शामिल नहीं हो सका – संपर्क करने पर प्रत्यर्थी ने उसका चिकित्सकीय परीक्षण करवाने से इंकार कर दिया – अभिनिर्धारित – चूंकि इस तथ्य को अस्वीकार नहीं किया गया है कि चिकित्सकीय परीक्षण हेतु जारी किया गया पत्र याची को चिकित्सकीय परीक्षण के लिये नियत तिथि के पश्चात् प्राप्त हुआ था, चिकित्सकीय परीक्षण के अवसर को अस्वीकार करना न्यायसंगत नहीं है – प्रतिवादी एक अवसर प्रदान करेगा तथा तत्पश्चात् उसके प्रदर्शन के आधार पर नियुक्ति हेतु उसका विचार करेगा। (अजय कुमार साहू वि. यूनियन ऑफ इंडिया) ...2879

***Service Law – Appointment – Qualification* – Petitioners although hold Diploma/Degree in Pharmacy but not registered with M.P. Pharmacy Council – Only registered Pharmacist can compound, prepare, mix or dispense any medicine on the prescription of a medical practitioner – Advertisement has to be considered in the stipulation contained in Pharmacy Act – Petitioners were rightly not considered – Petition dismissed. [Brijesh Shukla Vs. State of M.P.]** ...2864

सेवा विधि – नियुक्ति – अर्हता – याचीगण यद्यपि फार्मेसी में डिप्लोमा/डिग्री धारक हैं किंतु म.प्र. फार्मेसी परिषद् के साथ पंजीकृत नहीं हैं –चिकित्सा व्यवसायी के औषधि संबंधी लिखित परामर्श पर केवल पंजीकृत फार्मासिस्ट ही किसी औषधि का सम्मिश्रण, निर्माण, मिश्रण या वितरण कर सकता है – फार्मेसी अधिनियम में अंतर्विष्ट शर्तों के अनुसार विज्ञापन पर विचार किया जाना चाहिए – याचीगण को उचित रूप से विचार में नहीं लिया गया – याचिका खारिज। (ब्रजेश शुक्ला वि. म. प्र. राज्य) ...2864

Service Law – Termination – Natural Justice **– Petitioner applied for appointment on the post of Samvida Shala Shikshak Grade III – Although the petitioner failed to secure 40% marks in entrance examination as required under Rule 6 of M.P. Panchayat Samvida Shala Shikshak (Appointment and Conditions of Contract) Rules, 2001, but by mistake treating 42.64 marks as percentage obtained by petitioner, permitted her to participate in counseling and also granted an appointment – Subsequently her services were terminated – Held - No show cause notice is required to be issued as no useful purpose would have been served as issuance of such notice would be a useless formalities – If undisputed facts are involved, non issuance of notice to employee is not fatal – Petition dismissed. [Rekha Pandey (Smt.) Vs. State of M.P.]** ...2927

सेवा विधि – सेवा समाप्ति – नैसर्गिक न्याय – याची ने संविदा शाला शिक्षक श्रेणी तीन के पद पर नियुक्ति के लिये आवेदन किया – यद्यपि याची म.प्र. पंचायत संविदा शाला शिक्षक (नियुक्ति एवं संविदा की शर्तें) नियम, 2001 के नियम 6 के अंतर्गत प्रवेश परीक्षा में अपेक्षित 40% अंक अर्जित करने में असफल रहा, किंतु त्रुटिवश याची द्वारा अर्जित 42.64 अंकों को प्रतिशत मानते हुए उसे परामर्श में भाग लेने की अनुमति दी गई एवं नियुक्ति भी प्रदान की गई – तत्पश्चात् उसकी सेवायें समाप्त की गई – अभिनिर्धारित – कारण बताओ नोटिस जारी करना अपेक्षित नहीं, क्योंकि उक्त नोटिस जारी करना कोई उपयोगी प्रयोजन सिद्ध नहीं करता केवल निरर्थक औपचारिकता होगी – यदि अविवादित तथ्य शामिल हैं, कर्मचारी को नोटिस जारी नहीं किया जाना घातक नहीं है – याचिका खारिज। (रेखा पांडे (श्रीमती) वि. म.प्र. राज्य) ...2927

Suits Valuation Act (7 of 1887), Section 8 and Court Fees Act (7 of 1870), Section 7(iv)(c) – Valuation of Suit **– Plaintiff filed suit for declaration that sale-deed is void – Plaintiff not party to sale-deed – Suit valued on the basis of land revenue and not on the basis of**

consideration amount – Held – That the value for the purpose of jurisdiction of the suit shall be dependent upon the value to be determined for computation of court fees – Plaintiff is required to pay fix court fee – Trial Court has not committed any illegality in accepting the valuation done by plaintiff – Revision dismissed. [Manoj Kushwah Vs. Chhotelal] ...3063

वाद मूल्यांकन अधिनियम (1887 का 7), धारा 8 एवं न्यायालय फीस अधिनियम (1870 का 7), धारा 7(iv)(सी) – *वाद का मूल्यांकन* – वादी ने विक्रय–विलेख को शून्य घोषित करने हेतु वाद प्रस्तुत किया – वादी विक्रय–विलेख का पक्षकार नहीं है – वाद का मूल्यांकन भू–राजस्व के आधार पर किया गया न कि प्रतिफल की राशि के आधार पर – अभिनिर्धारित – यह कि वाद के क्षेत्राधिकार के उद्देश्य के लिये मूल्य न्यायालय शुल्क की गणना के लिये निर्धारित किये जाने वाले मूल्य पर निर्भर करेगा – वादी द्वारा निश्चित न्याय शुल्क अदा करना अपेक्षित है – विचारण न्यायालय द्वारा वादी द्वारा किये गये मूल्यांकन को स्वीकृत करने में कोई गलती नहीं की गई है – पुनरीक्षण खारिज। (मनोज कुशवाह वि. छोटेलाल) ...3063

Tender – Estoppel **– Bidder participated – Cannot challenge its terms and conditions. [Man Singh Rajpoot Vs. State of M.P.] (DB)...2826**

निविदा – विबंधन – बोलीदाता ने भाग लिया – उसके निबंधन तथा शर्तों को चुनौती नहीं दे सकता। (मान सिंह राजपूत वि. म.प्र. राज्य) **(DB)...2826**

Tender – NIT prescribed filing of experience certificate alongwith tender form – Non submission – Fatal – Form is defective **– Should be rejected at threshold – The requirement is mandatory. [Anuj Associates (M/s.) Vs. National Mineral Development Corporation Ltd.] (DB)...2914**

निविदा – एन.आई.टी. द्वारा निविदा प्रपत्र के साथ अनुभव प्रमाणपत्र प्रस्तुत करना विहित किया गया – अप्रस्तुतीकरण – घातक – प्रपत्र त्रुटिपूर्ण – प्रारंभ में ही निरस्त किया जाना चाहिए – यह आवश्यकता आज्ञापक है। (अनुज एसोसिएटस् (मे.) वि. नेशनल मिनिरल डव्हेलपमेन्ट कारपोरेशन लि.) **(DB)...2914**

Tender – Requirement in NIT – To file experience certificate – Alongwith tender form – Whether Mandatory **– Yes, because its the proof of experience which touches the issue of eligibility and the same is highlighted by bold letters to attract the attention of all concern. [Anuj Associates (M/s.) Vs. National Mineral Development Corporation Ltd.]** **(DB)...2914**

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THE INDIAN LAW REPORTS M.P. SERIES, 2015 (VOL-4)

JOURNAL SECTION

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

[Published in the Gazette of India (Extraordinary) Part II, Section 3 Sub-Section (ii), dated 29-09-2015, page no. 6 to 11]

MINISTRY OF FINANCE

(Department of Revenue)

(CENTRAL BOARD OF DIRECT TAXES)

NOTIFICATION

New Delhi, the 29th September, 2015

(INCOME-TAX)

S.O. 2663(E).- In exercise of the powers conferred by section 295 read with section 197A of the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby makes the following rules further to amend the Income-tax Rules, 1962, namely:-

1. (1) These rules may be called the Income-tax (14th Amendment) Rules, 2015.

(2) They shall come into force on the 1st day of October, 2015.

2. In the Income-tax Rules, 1962 (hereafter referred to as the said rules), for rule 29C, the following rule shall be substituted, namely:-

"29C. Declaration by person claiming receipt of certain incomes without deduction of tax.– (1) A declaration under sub-section (1) or under sub-section (1A) of section 197A shall be in Form No. 15G and declaration under

sub-section (1C) of section 197A shall be in Form No. 15H.

(2) The declaration referred to in sub-rule (1) may be furnished in any of the following manners, namely:-

(a) in paper form;

(b) electronically after duly verifying through an electronic process in accordance with the procedures, formats and standards specified under sub-rule (7).

(3) The person responsible for paying any income of the nature referred to in sub-section (1) or sub-section (1A) or sub-section (1C) of section 197A, shall allot a unique identification number to each declaration received by him in Form No. 15G and Form No. 15H respectively during every quarter of the financial year in accordance with the procedures, formats and standards specified by the Principal Director-General of Income-tax (Systems) under sub-rule (7).

(4) The person referred to in sub-rule (3) shall furnish the particulars of declaration received by him during any quarter of the financial year along with the unique identification number alloted by him under sub-rule (3) in the statement of deduction of tax of the said quarter in accordance with the provisions of clause (vii) of sub-rule (4) of rule 31A.

(5) The person referred to in sub-rule (3) shall furnish the statement of deduction of tax referred to in rule 31A containing the particulars of declaration received by him during each quarter of the financial year along with the unique identification number allotted by him under sub-rule (3) in accordance with the provisions of clause (vii) of the sub-rule (4) of rule 31A irrespective of the fact that no tax has been deducted in the said quarter.

(6) Subject to the provisions of sub-rules (4) and (5), an income-tax authority may, before the end of seven years from the end of the financial year in which the declaration referred to in sub-rule (1) has been received, require the person referred in sub-rule (3) to furnish or make available the declaration for the purposes of verification or any proceeding under the Act in accordance with the procedures, formats and standards specified by Principal Director General of Income-tax (Systems) specified under sub-rule (7).

(7) The Principal Director General of Income-tax (Systems) shall specify the procedures, formats and standards for the purposes of furnishing and

verification of the declaration, allotment of unique identification number and furnishing or making available the declaration to the income-tax authority and shall be responsible for the day-to-day administration in relation to the furnishing of the particulars of declaration in accordance with the provisions of sub-rules (4) and (5).

(8) The Principal Director General of Income-tax (Systems) shall make available the information of declaration furnished by the person referred to in sub-rule (3) to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner to whom the Assessing Officer having jurisdiction to assess the person who has furnished the declaration under sub-section (1) or under sub-section (1A) or under sub-section (1C) of section 197A is subordinate.".

3. In Appendix-II of the said rules, for Form No. 15G and Form No. 15H, the following Forms shall respectively be substituted, namely:-

"FORM NO. 15G

[See section 197A(1), 197A(1A) and rule 29C]

Declaration under section 197A (1) and section 197A(1A) to be made by an individual or a person (not being a company or firm) claiming certain incomes without deduction of tax.

PART I

<table>
<tr><td colspan="2">1. Name of Assessee (Declarant)</td><td colspan="2">2. PAN of the Assessee[1]</td></tr>
<tr><td>3. Status[2]</td><td colspan="2">4. Previous year(P.Y.)[3] (for which declaration is being made</td><td>5. Residential Status[4]</td></tr>
<tr><td>6. Flat/Door/Block No.</td><td>7. Name of Premises</td><td>8. Road/Street/Lane</td><td>9. Area/ Locality</td></tr>
<tr><td>10. Town/City/ District</td><td>11. State</td><td>12. PIN</td><td>13. Email</td></tr>
<tr><td>14. Telephone No. (with STD Code) and Mobile No.</td><td colspan="3">15. (a) Whether assessed to tax under the Income-tax Act, 1961[5] : Yes ☐ No ☐
(b) If yes, latest assessment year for which assessed.</td></tr>
</table>

16. Estimated income for which this declaration is made	17. Estimated total income of the P.Y. in which income mentioned in column 16 to be included[6]

18.Details of Form No. 15G other than this form filed during the previous year, if any[7]	
Total No. of Form No. 15G filed	Aggregate amount of income for which Form No. 15G filed

19. Details of income for which the declaration is filed

Sl. No.	Identification number of relevant investment/ account, etc.[8]	Nature of income	Section under which tax is deductible	Amount of income

.....

Signature of the Declarant[9]

Declaration/Verification[10]

*I/We.....do hereby declare that to the best of *my/our knowledge and belief what is stated above is correct, complete and is truly stated. *I/We declare that the incomes referred to in this form are not includible in the total income of any other person under sections 60 to 64 of the Income-tax Act, 1961. *I/We further declare that the tax *on my/our estimated total income including *income/incomes referred to in column 16 * and aggregate amount of *income/incomes referred to in column 18 computed in accordance with the provisions of the Income-tax Act, 1961, for the previous year ending on.....relevant to the assessment year.....will be nil. *I/We also declare that *my/our *income/ incomes referred to in column 16 *and the aggregate amount of *income/ incomes referred to in column 18 for the previous year ending on.....relevant to the assessment year..... will not exceed the maximum amount which is not chargeable to income-tax.

Place: ....

Date: ..... Signature of the Declarant[9]

PART II

[To be filled by the person responsible for paying the income referred to in column 16 of Part I]

1. Name of the person responsible for paying		2. Unique Identification No.[11]
3. PAN of the person responsible for paying	4. Complete Address	5. TAN of the person responsible for paying
6. Email	7. Telephone No. (with STD Code) and Mobile No.	8. Amount of income paid[12]
9. Date on which Declaration is received (DD/MM/YYYY)	10. Date on which the income has been paid/credited (DD/MM/YYYY)	

Place:. .....

Date: .....

.....

Signature of the person responsible for paying the income referred to in column 16 of Part I

*Delete whichever is not applicable.

[1]As per provisions of section 206AA(2), the declaration under section 197A(1) or 197A(1A) shall be invalid if the declarant fails to furnish his valid Permanent Account Number (PAN).

[2]Declaration can be furnished by an individual under section 197A(1) and a person (other than a company or a firm) under section 197A(1A).

[3]The financial year to which the income pertains.

[4]Please mention the residential status as per the provisions of section 6 of the Income-tax Act, 1961.

[5]Please mention "Yes" if assessed to tax under the provisions of Income-tax Act, 1961 for any of the assessment year out of six assessment years preceding the year in which the declaration is filed.

[6]Please mention the amount of estimated total income of the previous year for which the declaration is filed including the amount of income for which this

declaration is made.

[7]In case any declaration(s) in Form No. 15G is filed before filing this declaration during the previous year, mention the total number of such Form No. 15G filed along with the aggregate amount of income for which said declaration(s) have been filed.

[8]Mention the distinctive number of shares, account number of term deposit, recurring deposit, National Savings Schemes, life insurance policy number, employee code, etc.

[9]Indicate the capacity in which the declaration is furnished on behalf of a HUF, AOP, etc.

[10]Before signing the declaration/verification, the declarant should satisfy himself that the information furnished in this form is true, correct and complete in all respects. Any person making a false statement in the declaration shall be liable to prosecution under section 277 of the Income-tax Act, 1961 and on conviction be punishable-

(i) in a case where tax sought to be evaded exceeds twenty-five lakh rupees, with rigorous imprisonment which shall not be less than six months but which may extend to seven years and with fine;

(ii) in any other case, with rigorous imprisonment which shall not be less than three months but which may extend to two years and with fine.

[11]The person responsible for paying the income referred to in column 16 of Part I shall allot a unique identification number to all the Form No. 15G received by him during a quarter of the financial year and report this reference number along with the particulars prescribed in rule 31A(4)(vii) of the Income-tax Rules, 1962 in the TDS statement furnished for the same quarter. In case the person has also received Form No. 15H during the same quarter, please allot separate series of serial number for Form No. 15G and Form No. 15H.

[12]The person responsible for paying the income referred to in column 16 of Part I shall not accept the declaration where the amount of income of the nature referred to in sub-section (1) or sub-section (1A) of section 197A or the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the previous year in which such income is to be included exceeds the maximum amount which is not chargeable to tax. For deciding

the eligibility, he is required to verify income or the aggregate amount of incomes, as the case may be, reported by the declarant in columns 16 and 18.;

FORM NO. 15H

[See section 197A(1C) and rule 29C]

Declaration under section 197A(1C) to be made by an individual who is of the age of sixty years or more claiming certain incomes without deduction of tax.

PART I

<table>
<tr><td colspan="2">1. Name of Assessee (Declarant)</td><td colspan="2">2. PAN of the Assessee[1]</td><td>3. Date of Birth[2] (DD/MM/YYYY)</td></tr>
<tr><td colspan="2">4. Previous year (P.Y.)[3] (for which declaration is being made)</td><td colspan="2">5. Flat/Door/. Block No</td><td>6. Name of Premises</td></tr>
<tr><td>7. Road/Street/Lane</td><td>8. Area/Locality</td><td>9. Town/City/ District</td><td colspan="2">10. State</td></tr>
<tr><td>11. PIN</td><td colspan="2">12. Email</td><td colspan="2">13. Telephone No. (with STD Code) and Mobile No.</td></tr>
<tr><td colspan="5">14 (a) Whether assessed to tax[4] : Yes ☐ No ☐
(b) If yes, latest assessment year for which assessed</td></tr>
<tr><td colspan="2">15. Estimated income for which this declaration is made</td><td colspan="3">16. Estimated total income of the P.Y. in which income mentioned in column 15 to be included[5]</td></tr>
<tr><td colspan="5">17. Details of Form No. 15H other than this form filed for the previous year, if any[6]</td></tr>
<tr><td colspan="2">Total No. of Form No. 15H filed</td><td colspan="3">Aggregate amount of income for which Form No. 15H filed</td></tr>
<tr><td colspan="2"></td><td colspan="3"></td></tr>
</table>

18. Details of income for which the declaration is filed				
Sl. No.	Identification number of relevant investment/ account, etc.[7]	Nature of income	Section under which tax is deductible	Amount of income

.....

Signature of the Declarant

Declaration/Verification[8]

I.....do hereby declare that I am resident in India within the meaning of section 6 of the Income-tax Act, 1961. I also hereby declare that to the best of my knowledge and belief what is stated above is correct, complete and is truly stated and that the incomes referred to in this form are not includible in the total income of any other person under sections 60 to 64 of the Income-tax Act, 1961. I further declare that the tax on my estimated total income including *income/incomes referred to in column 15 *and aggregate amount of *income/incomes referred to in column 17 computed in accordance with the provisions of the Income-tax Act, 1961, for the previous year ending on .....relevant to the assessment year .....will be nil.

Place: ....

Signature of the Declarant

Date: .....

PART II

[To be filled by the person responsible for paying the income referred to in column 15 of Part I]

1. Name of the person responsible for paying		2. Unique Identification No.[9]
3. PAN of the person responsible for paying	4. Complete Address	5. TAN of the person responsible for paying
6. Email	7. Telephone No. (with STD Code) and Mobile No.	8. Amount of income paid[10]
9. Date on which Declaration is received (DD/MM/YYYY)		10. Date on which the income has been paid/credited (DD/MM/YYYY)

Place: ....

Signature of the person responsible for paying the income referred to in column 15 of Part I

Date: .....

*Delete whichever is not applicable.

[1]As per provisions of section 206AA(2), the declaration under section 197A(1C) shall be invalid if the declarant fails to furnish his valid Permanent Account Number (PAN).

[2]Declaration can be furnished by a resident individual who is of the age of 60 years or more at any time during the previous year.

[3]The financial year to which the income pertains.

[4]Please mention "Yes" if assessed to tax under the provisions of Income-tax Act, 1961 for any of the assessment year out of six assessment years preceding the year in which the declaration is filed.

[5]Please mention the amount of estimated total income of the previous year for which the declaration is filed including the amount of income for which this declaration is made.

[6] In case any declaration(s) in Form No. 15H is filed before filing this declaration during the previous year, mention the total number of such Form No. 15H filed along with the aggregate amount of income for which said declaration(s) have been filed.

[7]Mention the distinctive number of shares, account number of term deposit, recurring deposit, National Savings Schemes, life insurance policy number, employee code, etc.

[8]Before signing the declaration/verification, the declarant should satisfy himself that the information furnished in this form is true, correct and complete in all respects. Any person making a false statement in the declaration shall be liable to prosecution under section 277 of the Income-tax Act, 1961 and on conviction be punishable-

(i) in a case where tax sought to be evaded exceeds twenty-five lakh rupees, with rigorous imprisonment which shall not be less than six months but which may extend to seven years and with fine;

(ii) in any other case, with rigorous imprisonment which shall not be less than three months but which may extend to two years and with fine.

[9]The person responsible for paying the income referred to in column 15 of Part I shall allot a unique identification number to all the Form No. 15H received by him during a quarter of the financial year and report this reference number along with the particulars prescribed in rule 31A(4)(vii) of the Income-tax Rules, 1962 in the TDS statement furnished for the same quarter. In case the person has also received Form No. 15G during the same quarter, please allot separate series of serial number for Form No. 15H and Form No. 15G.

[10] The person responsible for paying the income referred to in column 15 of Part I shall not accept the declaration where the amount of income of the nature referred to in section 197A(1C) or the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the previous year in which such income is to be included exceeds the maximum amount which is not chargeable to tax after allowing for deduction(s) under Chapter VI-A, if any, or set off of loss, if any, under the head "income from house property" for which the declarant is eligible. For deciding the eligibility, he is

required to verify income or the aggregate amount of incomes, as the case may be, reported by the declarant in columns 15 and 17.".

[Notification No. 76/2015/F. No. 133/50/2015-TPL]

R. LAKSHMI NARAYANAN, Under Secy. (TPL)

Note : The principal rules were published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii) vide notification number S.O. 969(E), dated the 26th March, 1962 and last amended vide notification No. S.O. 2604(E), dated the 23/09/2015.

MADHYA PRADESH ACT

NO. 19 OF 2015

THE MADHYA PRADESH AUDHYOGIK SURAKSHA BAL ADHINIYAM, 2015

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MADHYA PRADESH ACT

NO. 19 OF 2015

THE MADHYA PRADESH AUDHYOGIK SURAKSHA BAL ADHINIYAM, 2015

[Received the assent of the Governor on the 24th August, 2015; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 14th September, 2015, page no. 754(9) to 754(16)]

An Act to provide for the constitution and regulation of an armed force of the State for protection and security of industrial establishments, industrial undertakings, private industrial undertakings or institutions, commercial and financial institutions, power generating stations,

refineries, places of religious importance, archaeological and heritage sites airports and helipads, National or State Highways, Government buildings, metro network, autonomous bodies, Government installations, Central and State institutions and to provide technical consultancy services to industrial establishments in the private sector and for matters connected therewith and ancidental thereto.

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

1. **Short title, extent and commencement.** (1) This Act may be called the Madhya Pradesh Audyogik Suraksha Bal Adhiniyam, 2015.

(2) It extends to whole of Madhya Pradesh.

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

2. **Definitions.** In this Act, unless the context otherwise requires, -

(a) "autonomous body" means an institution acting independently or having the freedom to do so;

(b) "cognizable offence" has the meaning assigned to it in clause (c) of Section 2 of the Code of Criminal Procedure, 1973 (No. 2 of 1974);

(c) "Director General" means the Director General of the Force appointed under Section 4;

(d) "enrolled member of the Force" means any subordinate officer, under officer or any other member of the Force of a rank not lower than that of an under officer;

(e) "Force" means the State Industrial Security Force constituted under Section 3;

(f) "Government" means the State Government;

(g) "industrial establishment' means an industrial undertaking or a company as defined under Section 3 of the Companies Act, 2013 (No. 18 of 2013) or a firm registered under Section 59 of the Indian

Partnership Act, 1932 (No. 9 of 1932), which is engaged in any industry or in any trade, business or service;

(h) "industrial undertaking" means an undertaking pertaining to a scheduled industry and includes an undertaking engaged in any other industry or in any trade, business or service which may be regulated by law made by the Parliament or Legislature of the State;

(i) "industrial undertaking in public sector" means an industrial undertaking owned, controlled or managed by -

(i) a Government company as defined in clause (45) of Section 2 of the Companies Act, 2013 (No. 18 of 2013);

(ii) a corporation established by or under a State Act, which is controlled or managed by the Government.

(j) "joint venture" means a venture jointly undertaken by the State Government with a private industrial undertaking;

(k) "Managing Director" in relation to an industrial undertaking means, the person (whether called a Managing Agent, General Manager, Manager, Chief Executive Officer or by any other name) who exercises control over the affairs of that undertaking;

(l) "member of the Force" means a person appointed to the Force under this Act;

(m) "place of deployment" means industrial establishments, industrial undertakings, private industrial undertakings or institutions, commercial and financial institutions, power generating stations, transmission and distribution company, refinery, places of religious importance, archaeological and heritage sites, airports and helipads, National or State Highways, Government buildings,

metro network, autonomous bodies, Central and State institutions, strategic vital installations etc. for whose protection and security the Force may be deployed under the provisions of this Act;

(n) "prescribed" means prescribed by rules made under this Act;

(o) "private industrial undertaking" means an industry owned, controlled or managed by a person other than the Central or State Government or any industrial undertaking in public sector;

(p) "scheduled industry" means any industry engaged in the manufacture or production of the articles mentioned in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951);

(q) "strategic and vital installation" means all such essential and vulnerable points or areas requiring special protection, as may from time to time be specified by the Government;

(r) "subordinate officer" means a person appointed to the Force as an Inspector, a Sub-Inspector or an Assistant Sub-Inspector;

(s) "supervisory officer" means any officer appointed under Section 4 and includes any other officer appointed by the State Government as a supervisory officer of the Force;

(t) "Under Officer" means a person appointed to the Force as a Head Constable or Constable.

3. **Constitution of the Force.** (1) There shall be constituted and maintained by the State Government an armed force to be called the State Industrial Security Force for the protection and security of place of deployment and to perform such other duties as may be entrusted to it by the State Government.

(2) The Force shall consist of such number of supervisory officers

and enrolled members who shall receive such pay and other remuneration as may be prescribed:

Provided that nothing in this sub-section apply to the pay, allowances and other service conditions of members of the Indian Police Service.

(3) The headquarters of the Force shall be at Bhopal or at such other place as may be specified by the Government from time to time.

4. Appointment and powers of supervisory officers. (1) The Government shall appoint a person to be the Director General of the Force and may also appoint other supervisory officers such as Additional Director General, Inspector General, Deputy Inspector General, Assistant Inspector General, Commandant, Deputy Commandant and Assistant Commandant as considered necessary.

(2) The Director General and every other supervisory officer so appointed, shall exercise such powers and perform such duties as may be prescribed.

5. Appointment of enrolled members of the Force. The Director General or such other supervisory officers as may be authorized by the Government shall enrol members of the Force in such manner as may be prescribed.

6. Certificates of members of the Force. (1) Every enrolled member of the Force shall receive on his appointment a certificate in the form prescribed, under the seal of the Director General or such other supervisory officer as the Director General may specify in this behalf and the person holding such certificate shall be vested with the powers of an enrolled member of the Force.

(2) Such certificate shall automatically expire whenever the person in whose favour it is issued, ceases for any reason, to be an enrolled member of the Force.

7. Superintendence and administration of the Force. (1) The Director General shall be the principal administrative officer of the Force subject to overall control of the Government. He shall exercise such powers and perform such duties as may be prescribed.

(2) Subject to the provisions of sub-section (1), the administration

of the Force within such local limits as may be prescribed, shall be carried on by the Additional Director General, Inspector General, Deputy Inspector General, Assistant Inspector General or Commandant, Deputy Commandant and Assistant Commandant in accordance with the provisions of the Act and rules made thereunder and every supervisory officer placed in charge of the protection and security of places of deployment in the State, shall function on such terms and conditions as may be prescribed and shall subject to any direction that may be given by the Government or the Director General in this behalf, discharge his functions in co-ordination with the authority in charge of such place of deployment.

8. **Duties of members of the Force.** It shall be the duty of every officer and member of the Force :-

(i) to obey and execute all orders lawfully issued to him by his superior officer;

(ii) to protect and safeguard the premises, their establishments and assets of the place of deployment and any installations attached thereto;

(iii) to protect and safeguard the employees and officers of the place of deployment as referred to in clause (ii);

(iv) to do any other act conducive to the protection and security of the place of deployment referred to in clause (ii) and the employees and officers referred to in clause (iii);

(v) to aid and assist the local police force, on its arrival consequent to a law and order situation in and around the place of deployment.

9. **Deployment of the Force.** (1) Subject to any general direction of the Government and the recovery of charges of the force on such terms and conditions as may be prescribed, it shall be lawful for the Director General on a request received in this behalf from the authority in charge of the place of deployment showing the necessity thereof, to deploy such number of the members of the Force as the Director General may consider necessary for the protection and security thereof and any installations attached thereto and the member of the Force so deployed shall be under the charge of such

officer or authority as specified by the Director General or any other officer on his behalf:

Provided that in the case of an establishment, institution, autonomous body, undertaking, strategic or vital installation controlled or managed by a Company in which the State Government does not have an interest, no such request shall be considered without the approval of the Government.

(2) If the Director General is of the opinion that the circumstances necessitating the deployment of the members of the Force in relation to a place of deployment under sub-section (1) have ceased to exist, he may withdraw the members of the Force so deployed without assigning any reason therefor.

(3) Every member of the Force while discharging his functions during the period of deployment in an establishment, institution, autonomous body, undertaking, strategic or vital installation controlled or managed by a Company in which the Government does not have an interest, shall exercise the same powers and be subject to the same responsibilities, discipline and penalties under this Act as he would have been, if he had been discharging those duties in relation to an establishment, an institution, an autonomous body and industrial undertaking or strategic and vital installations of the Government.

10. Power to arrest without warrant (1) Any member of the Force may without a warrant, arrest any person :-

(i) who voluntarily causes hurt to or attempts voluntarily to cause hurt to, or wrongfully restrains or attempts wrongfully to restrain or assaults, or threatens to assault, or uses, or threatens or attempts to use criminal force to any employee or officer referred to in clause (iv) of Section 8, or to him or any other member of the Force in discharge of his duty as such employee or in execution of his duty as such member, as the case may be or with intent to prevent or to deter him from discharging his duty as such member or in consequence of anything done or attempted to be done by him in the lawful discharge of his duty as such member;

(ii) who has been concerned in, or against whom a

reasonable suspicion exists of his having been concerned in commission of a cognizable offence or who is found taking precautions to conceal his presence under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence which relates to property belonging to, or existing in the place of deployment;-

(iii) who commits or attempts to commit a cognizable offence which involves or which is likely to involve danger to the life of any person engaged in carrying on any work relating to the place of deployment.

(2) If any person is found trespassing on the premises of the place of deployment he may, without prejudice to any other proceedings which may be taken against him, be removed from such premises by any member of the Force.

11. Power to search without warrant. (1) Whenever any member of the Force, has reason to believe that any such offence as is referred to in Section 10 has been or is being committed in the place of deployment and that a search warrant cannot be obtained without affording the offender an opportunity of escaping or concealing evidence of the offence, he may detain the offender and search his person and belongings forthwith and if he thinks proper, arrest any person whom he has reason to believe to have committed the offence.

(2) The provisions of the Code of Criminal Procedure, 1973 (No. 2 of 1974) relating to searches shall apply to searches under this section.

12. Procedure to be followed after arrest. Any member of the Force making an arrest under this Act immediately make over the person so arrested to a police officer and in the absence of a police officer, take such person or cause him to be taken to the nearest police station together with a report of the circumstances occasioning the arrest.

13. Provision for technical consultancy services to industrial establishments. (1) Subject to any general direction which may be issued by the Government, it shall be lawful for the Director General on a request received from the Managing Director of any industrial establishment in the

private sector or any other person authorized by him in this behalf, to direct the members of the Force to provide technical consultancy services relating to security, to such industrial establishment in such manner and on payment of such fee as may be prescribed.

(2) The fee received under sub-section (1) shall be credited to the Consolidated Fund in such manner as may be prescribed.

14. Members of the State Industrial Security Force to have same privileges and liabilities as a police officer. Every member of the State Industrial Security Force shall upon his appointment and as long as he continues to be a member thereof, be deemed to be a police officer and subject to any terms conditions and restrictions as may be prescribed, to have and be subject to, in so far as they are not inconsistent with any provision of this Act or any rules made thereunder, all the privileges and protection and all the liabilities, penalties, punishments as a police officer duly enrolled is by virtue of the Police Act, 1861 (V of 1861), or any other law for the time being in force while discharging or purporting to discharge his duties under this Act and the rules made thereunder.

15. Protection of action taken in good faith. No suit or prosecution shall be entertained by any Court against the Force or against any officer or member thereof or against any person acting under the order or direction of the Force of any officer or member thereof for anything which is in good faith done or intended to be done under this Act or any rules made thereunder.

16. Cognizance of offence. No court shall take cognizance of an offence against any member of the Force with regard to any act done by him while discharging or purporting to act in the discharge of his duty except with the prior sanction of the Government.

17. Members of the force to be considered always on duty and liable to be employed anywhere in the State and outside also. (1) Every member of the Force shall be considered to be always on duty and shall, at any time, be liable to be employed at any place within the State of Madhya Pradesh and outside also.

(2) No member of the Force shall engage himself in any employment or office other than his duties under this Act.

18. Punishments and appeals. Subject to the provisions of article 311 of the Constitution and to such rules as the State Government may make under this Act, supervisory officer may -

(i) dismiss, remove, order compulsory retirement or reduce in rank any enrolled member of the Force, whom he thinks remiss or negligent in the discharge of his duty, or unfit for the same; or

(ii) award any one or more of the following punishments to any enrolled member of the Force who discharges his duty in a careless or negligent manner, or who by any act of his own renders himself unfit for the discharge thereof, namely :-

(a) fine, which may extend to any amount not exceeding seven days' pay or reduction in pay scale:

Provided that the supervisory officer may, for special reasons to be recorded in writing, impose a fine exceeding seven days' pay;

(b) drill, extra guard, fatigue or other duty;

(c) removal from any office of distinction or deprivation of any special emolument;

(d) withholding of increment of pay with or without cumulative effect;

(e) withholding of promotion;

(f) censure.

Any enrolled member of the Force aggrieved by an order made under clause (i) or (ii) of this section may, within thirty days from the date on which the order is communicated to him, prefer an appeal against the order to such authority as may be prescribed. In disposing of an appeal, the prescribed authority shall follow such procedure as may be prescribed:

Provided that the prescribed authority may entertain the appeal after the expiry of the said period of thirty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

19. Restrictions respecting right to form associations etc. (1) No member of the Force shall without the previous sanction in

writing of the Government or of the prescribed authority:

(a) be a member of, or be associated in any way with any trade union, labour union, political party, or with any association or confederation of trade unions, labour unions or political parties; or

(b) be a member of, or be associated in any way with, any other society, institution, association or organization that is not recognized as part of the Force or is not of a purely social, recreational or religious nature; or

Explanation.- If any question arises as to whether any society, institution, association or organization is of purely social, recreational or religious nature under clause (b) of this sub-section, the decision of the Government thereon shall be final.

(c) communicate with the press or publish or cause to be published any book, letter or other document except where such communication or publication is in the bonafide discharge of his duties or is of a purely literary, artistic or scientific character.

(2) No member of the Force shall participate in or address, any meeting or take part in any demonstration for any political purpose.

20. Responsibilities of member of the Force during suspension. A member of the Force shall not by reason of his suspension from office, cease to be a member of the Force and he shall, during that period, be subject to the same responsibilities, discipline and penalties as he would have been, if he was on duty.

21. Surrender of certificate, arms etc. by persons ceasing to be members of the Force. (1) Every person who for any reason ceases to be an enrolled member of the Force, shall forthwith surrender to any supervisory officer empowered to receive the same, his certificate of appointment, the arms, accoutrements, clothing and other articles which had been furnished to him for the performance of his duties as an enrolled member of the Force.

(2) Any person who wilfully neglects or refuses to surrender the articles as required by sub-section (1) shall be liable for forfeiture

of financial benefits and prosecution under the law.

(3) Nothing in this section shall be deemed to apply to any article which under the orders of the Director General, has become the property of the person to whom the same was furnished.

22. Application of Act No. 22 of 1922 to the members of the Force. The Police (Incitement to Disaffection) Act, 1922 (No. 22 of 1922) shall apply to members of the Force as it applies to members of the Police Force.

23. Certain Acts not to apply to the members of the Force. Nothing contained in the Payment of Wages Act, 1936 (No. 4 of 1936) or the Industrial Disputes Act, 1947 (No. 14 of 1947) or the Factories Act, 1948 (No. 63 of 1948), except the provisions thereof relating to health and safety, shall apply to members of the Force.

24. Power to make rules. (1) The State Government may, by notification in the official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for,-

(a) regulating the classes, ranks, grades, insignia, pay and remuneration of members of the Force and their conditions of service;

(b) regulating the powers and duties of members of the Force authorized to exercise any function by or under this Act;

(c) fixing the period of service for members of the Force;

(d) prescribing the description and quantity of arms, accoutrements, clothing and other necessary articles to be furnished to the members of the Force;

(e) prescribing the places of residence of members of the Force;

(f) institution, management and regulation of any fund for any purpose connected with the administration of the

Force;

(g) regulating the punishments and prescribing authorities to whom appeals may be preferred from orders of punishment, or remission of fines or other punishments and the procedure to be followed for the disposal of such appeals;

(h) the terms and conditions subject to which members of the Force may be deployed under section 9 and the charges therefore;

(i) prescribing the guidelines for use of fire arms;

(j) prescribing the norms to maintain relationship with hiring institutions.

(3) Every rule made under this section shall, as soon as may be after it is made, be laid before the Legislative Assembly of the State.

25. Power to remove difficulties. If any difficulty arises in giving effect to the provisions of this Act, the State Government may, by order not inconsistent with the provisions of this Act, remove the difficulty:

Provided that no such order shall be made after the expiry of a period of two years from the date of commencement of this Act.

I.L.R. [2015] M.P., 2819
SUPREME COURT OF INDIA
Before Mr. Justice Dipak Misra & Mr. Justice Prafulla C. Pant
Civil Appeal Nos. 6505-6506/2009 decided on 9 September, 2015

H.S. SIDHU ...Appellant
Vs.
DEVENDRA BAPNA & ors. ...Respondents

(Alongwith Civil Appeal Nos. 7308/2009 & 7950/2015)

A. Fisheries (Gazetted) Service Recruitment Rules, M.P. 1987, Rule 15 - Preparation of list of suitable officers - **Appellant and respondent No. 1 were officiating as Joint Directors - Appellant was junior to respondent No. 1 - Rule 15(3) postulates that any junior officer who in opinion of DPC is of exceptional merit and suitable can be assigned higher place in list than that of officer senior to him - Promotion of appellant temporarily to officiate as Director was in accordance with Rules - Order of High Court set aside. (Paras 9 to 11)**

क. मत्स्य उद्योग (राजपत्रित) सेवा भर्ती नियम, म.प्र. 1987, नियम 15 – उपयुक्त अधिकारियों की सूची तैयार करना – अपीलार्थी तथा प्रत्यर्थी क्रमांक 1 संयुक्त संचालक के रूप में कार्यरत थे – अपीलार्थी, प्रत्यर्थी क्रमांक 1 से कनिष्ठ था – नियम 15(3) यह प्रावधान करता है कि कोई भी कनिष्ठ अधिकारी जो कि विभागीय पदोन्नति समिति की राय में असाधारण रूप से योग्य तथा उपयुक्त है तो उसे सूची में अपने वरिष्ठ अधिकारी से उच्चतर स्थान दिया जा सकता है – अपीलार्थी को संचालक के रूप से अस्थायी रूप से कार्य करने के लिये दी गयी पदोन्नति नियमों के अनुसार थी – उच्च न्यायालय का आदेश अपास्त।

B. Constitution - Article 226 - Assessment by DPC - **High Court cannot sit in appeal over the assessment made by DPC - If assessment made by DPC is perverse or not based on record or proper record has not been considered by DPC, it is open to High Court to remit the matter back to DPC for recommendation but it cannot assess the merit on its own. (Para 13)**

ख. संविधान – अनुच्छेद 226 – विभागीय पदोन्नति समिति द्वारा निर्धारण – विभागीय पदोन्नति समिति द्वारा किये गये निर्धारण पर उच्च न्यायालय अपील नहीं सुन सकता – यदि विभागीय पदोन्नति समिति द्वारा किया गया निर्धारण अनुचित है अथवा अभिलेख पर आधारित नहीं है अथवा विभागीय पदोन्नति समिति

द्वारा उचित अभिलेख पर विचार नहीं किया गया है तब उच्च न्यायालय मामले को अनुशंसा के लिये विभागीय पदोन्नति समिति को वापस भेज सकता है परंतु वह स्वयं गुणदोष का निर्धारण नहीं कर सकता।

Case referred :

(2014) 14 SCC 370,

JUDGMENT

The Judgment of the Court was delivered by : **DIPAK MISRA, J. :-** Leave granted in the Special Leave Petition (C) No.28755 of 2009.

2. The present appeals, one preferred by the aggrieved officer, H.S. Sidhu and the other by the State, call in question the legal vulnerability of the judgment and order dated 24.03.2009 passed by the Division Bench of the High Court of Madhya Pradesh at Jabalpur, in Writ Appeal Nos. 370, 371,411 and 442 of 2008 whereby it has concurred with the view expressed by the learned Single Judge vide order dated 04.03.2008 in Writ Petition No.23798 of 2003 and W.P.S. No.1119 of 2005.

3. It is seemly to state that the grievance is common in all the appeals. The facts, on a perusal of the order passed by the learned Singe Judge as well as by the Division Bench appear to be complex but they are actually not so. Complexity has been created with ingenious artificiality. Reference to certain dates, the factual position admitted at the Bar, and the relevant rules would suffice the narration. It is not in dispute that the appellant, H.S. Sidhu, and the 1st respondent, Devendra Bapna, were initially appointed as Assistant Directors as direct recruits through the Public Service Commission and their service conditions are governed by the Madhya Pradesh Fisheries (Gazetted) Service Recruitment Rules, 1987 (for brevity, 'the 1987 Rule') with certain incorporation from the Madhya Pradesh Services (General Conditions of Service) Rules, 1961 (For short, 'the 1961 Rules'). There is no cavil over the fact that they were promoted to the post of Deputy Directors and in that cadre Devendra Bopana was treated as senior to the appellant H.S. Sidhu.

4. The question of filling up the post of Joint Director, which is a promotional post from the cadre of Deputy Director, arose in the year 1996. At that juncture, a list of officers who had come within the zone of consideration for the promotion to the post of Joint Director was drawn up and in the said

list, the name of Devendra Bopna appeared at serial no.3 and that of H.S. Sidhu at serial no.5. When the matter was placed before the Departmental Promotion Committee (DPC), it referred to the seniority and gradation list, the rule application for promotion, and took into consideration the ACRs and accordingly placed H.S. Sidhu at serial no.1 and Devendra Bapna at serial no.3 in the select list. The DPC for drawing the selection list in the aforesaid manner, ascribed the following reason:

> "As per M.P. Fisberies (Gazetted) Service Recruitment Rules, 1987 of Sub rule 15(3) DPC found exceptional merit and suitable to Shri Harpal Singh Sidhu and given higher place against the senior officers."

5. It is apt to note here that as there were four posts available in the cadre of Joint Director, both H.S. Sidhu and Devendra Bapna were allowed to officiate as Joint Directors. However, as H.S. Sidhu was treated senior to Devendra Bapna, he preferred OA No.927 of 1997 assailing the determination of seniority in the cadre of Joint Director. After abolition of the State Administrative Tribunal, the matter stood transferred to the High Court of Madhya Pradesh at Jabalpur which was registered as W.P. No.23798 of 2003. At this juncture, it is necessary to note that while both of them were officiating as Joint Directors, the post of Director fall vacant and both of them were considered. The DPC, considering the merit and suitability of H.S Sidhu, recommended him to be promoted to the post of Director. The said exercise was carried out during the pendency of the writ petition no.23798 of 2003 where the cavil related to the fixation of seniority.

6. After the appellant was promoted temporarily to officiate as the Director, the same was also challenged by the 1st respondent herein in Writ Petition No.1119 of 2005. The learned Single Judge dealt with both the writ petitions together and came to hold that the writ petitioner should have been treated as senior to the appellant herein and, accordingly, directed as follows:

> "In view of the aforesaid, respondents are directed to re-fix the petitioner's seniority above to respondent no.2/4 on the post of Joint Director and then to hold a review DPC of 6.8.2004 to consider the case of the petitioner, respondent no.2/4 and other persons those who were within the zone of consideration when the original DPC met on 6.8.04. The

review DPC shall take place within a period of two months from the date the petitioner furnishes certified copy of this order to the respondents and the review DPC shall apply the same criteria which was applied by the original DPC to consider the case of the petitioner for his promotion on the post of Director."

7. The aforesaid order was assailed by the aggrieved officer as well as by the State. There was an order directing stay of the directions issued by the learned Single Judge. The Division Bench by the impugned judgment, as it appears to us, has gone transient and without proper scrutiny of the rule position agreed with the view expressed by the learned Single Judge on a different score altogether. In fact, it has, if we permit ourselves to say so, has exercised the appellate jurisdiction over the proceedings of the DPC apart from taking note of seniority on an erroneous perception.

8. We have heard Mr. Subramonium Prasad, learned senior counsel along with Mr. Prashant Kumar, learned counsel for the appellant in the appeals preferred by H.S. Sidhu, Mr. Ankit Lal, learned counsel for the State in the appeals preferred by the State and Mr. Anirudhha P. Mayee on behalf of the 1st respondent, Devendra Bapna.

9. To appreciate the controversy, we may refer with profit to Rule 15 of the 1987 Rules. It reads as follows:

"15. Preparation of list of suitable officers--(1) The Committee shall prepare a list of such persons who satisfy the conditions prescribed in. rule 14 above and as are held by the committee to be suitable for promotion/transfer to the service. The list shall be sufficient to cover the anticipated vacancies on account of retirement and promotion during the course of one year from the date of preparation of the select list. A reserve list consisting of 25% of the number of persons included in the said list shall also be prepared to meet the unforeseen vacancies occurring during the course of the aforesaid period.

(2) The selection for inclusion in such list shall be based on merit and suitability in all respects with due regard to seniority.

(3) The names of the officers included in the list shall be

arranged in order of seniority in the service or posts as specified in column (2) of Schedule IV, at the time of preparation of each select list:

Provided that any junior officer who in the opinion of the Committee is of exceptional merit and suitability may be assigned in the list a higher place than that of officer senior to him.

Explanation--A person, whose name is included in a select list but who is not promoted during the validity of the list shall have no claim to seniority over those considered in a subsequent selection, merely by the fact of his earlier selection.

(4) The list so prepared shall be reviewed and revised every year.

(5) If in the process of selection, ref ew (sic:review) or revision, it is proposed to supersede any member of the Service, the committee shall record its reasons for the proposed supersession."

10. On a perusal of the aforesaid Rule, it is clear to us that proviso to sub-rule. (3) of Rule 15 postulates that any junior officer who in the opinion of the DPC is of exceptional merit and suitable can be assigned a higher place in the list than that of the officer senior to him. On a scrutiny of the ACRs, and the other materials, the DPC had found that the appellant had received more marks than the 1st respondent. The DPC after due evaluation of the ACRs and consideration of the merit by ascribing reasons had prepared the merit list.

11. On a close scrutiny of the judgment and orders passed by the learned Single Judge which has been accepted by the Division Bench, we find that they have not appreciated the tenor and content of Rule 15(3), especially, the proviso thereof. As it seems, they have been guided by the principle of seniority-cum-fitness, but the proviso to Rule 15(3) states the position differently laying emphasis on exceptional merit and suitability.

12. Mr. Mayee, learned counsel for the 1st respondent would submit that as both of them are officiating as Joint Directors, he could not have been ranked as junior in the said cadre. To bolster the said submission, he has

drawn our attention to Rule 12(b) and 12(c) of the 1961 Rules which read as under:

"(b) Promoted Government Servant. -

a promoted Government servant shall count his seniority from the date of his confirmation in the service to which he has been promoted and shall be placed in the gradation list immediately before the last confirmed member of that service but above all the probationers:

Provided that where two or more promoted Government servants are confirmed with effect from the same date, the appointing authority shall determine their inter se seniority in the service in which they are confirmed, with due regard to the order in which they were included in the merit list, if any, prepared for determining their suitability for promotion and their relative seniority in the lower service from which they have been promoted.

(c) Officiating Government Servant. -The inter se seniority of Government servant promoted to officiate in a higher service or a higher category of posts shall, during the period of their officiation, be the same as that in their substantive service or grade irrespective of the dates on which they began to officiate in the higher service or grade:

Provided that-

(i) If they were selected for officiation from a list in which the names of Government servants considered suitable for trial in a promotion, to the Higher service or grade were arranged in order of merit, their inter se seniority shall be determined in accordance with the order of merit in such list;

(ii) The seniority of a permanent Government servant appointed to officiate in another service or post by transfer shall be determined ad hoc by the appointing authority.

Provided that the seniority proposed to be assigned to such Government servant shall be determined and intimated to him

in the order of appointment,

(iii) Where a permanent Government servant is reduced to a lower service, grade or category of posts, he shall rank in the gradation list of the latter service, grade or category of posts above all the others in that gradation list, unless the authority ordering such reduction by a special order indicates a different position in the gradation list for such reduced Government servant.

(iv) Where an officiating Government servant is reverted to his substantive service or post, he shall revert to his position in that gradation list relating to his substantive appointment which he held before he was appointed to officiate in the other service or post."

13. Be it clarified that neither the appellant nor the 1st respondent was confirmed and, therefore, the rules relating to seniority as far as the confirmed employees are concerned, do not apply. The Rule that really applies is Rule 12(c) which deals with seniority of Government Servant. The proviso to Rule 12(c) makes it quite vivid that if an officer has been selected for officiation from a list in which he is considered suitable for trial in a promotion and the said list has been arranged in order of merit, their inter se seniority shall be determined in accordance with the order of merit. In such a situation, there can be no scintilla of doubt that when the DPC had drawn the list on the basis of *inter se* merit, the fixation of seniority could not be found fault with. It needs no special emphasis to state that while exercising the power under Article 226 of the Constitution, the High Court cannot sit in appeal over the assessment made by the DPC. In *Union of India v. S.P. Nayyar*[1], it has been stated that if the assessment made by the DPC is perverse or not based on record or proper record has not been considered by the DPC, it is open to the High Court under Article 226 of the Constitution to remit the matter back to the DPC for recommendation, but it cannot assess the merit on its own on perusal of the service record of one or the other employee. Thus, analysed the view expressed by the High Court in the impugned order is wholly unsustainable.

14. The controversy does not rest there. We have been apprised that the

1. (2014) 14 SCC 370

first respondent has retired holding the post of Director after a review DPC was directed to be held by the Division Bench. Regard being had to the fact that he has already retired on 31.10.2010, he shall be treated to have retired from the post of Director and shall get the pensionary benefits. As far as the appellant is concerned, by virtue of the order passed by the Division Bench, he continued in the post of Director till 5.2.2010 and thereafter he was reverted to the post of Joint Director. As he was already selected as a Director because of his seniority which has been erroneously set aside by the High Court, we direct the State Government to pay the arrears of salary commencing 05.02.2010 to 31.08.2010. That apart, he shall also reap the benefits of the post of Director. We will be failing in our duty if we do not state that there was serious opposition by Mr. Mayee, learned counsel for the State but the said resistance is absolutely inconsequential in view of the findings recorded by us.

15. Resultantly, the appeals are allowed and the judgment and orders passed by the learned Single Judge as well as by the Division Bench of the High Court are set aside. There shall be no order as to costs.

Appeal allowed.

I.L.R. [2015] M.P., 2826
WRIT APPEAL
Before Mr. Justice P.K. Jaiswal & Mr. Justice D.K. Paliwal
W.A. No. 759/2014 (Indore) decided on 8 October, 2014

MAN SINGH RAJPOOT ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

(Alongwith W.A. No. 760/2014 & W.A. No. 761/2014)

***A. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8 & 74-A - Order/direction* - Issued by Central Government - Mandatory - State Government to comply. (Para 8)**

क. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराऐं 8 व 74ए – आदेश/निदेश – केंद्र सरकार द्वारा जारी – आज्ञापक – राज्य सरकार अनुपालन करे।

B. Interpretation of Statute - Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 74-A - Order under - Word "shall" -

Raises presumption - Its imperative - Presumption is rebuttable by other consideration such as object and scope of enactment and the consequence flowing therefrom - Central Govt. having control over sale, purchase etc. of N.D.P.S., to ensure that the State Govt. do not deviate from basic object the word "shall" used - The provision is mandatory - State Govt. cannot deviate from order issued by Central Govt. (Para 8)

ख. कानून का निर्वचन – स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 74–ए – आदेश अंतर्गत – शब्द "करेगा" – उपधारणा करता है – अनिवार्य है – अन्य विचार द्वारा जैसे कि अधिनियमिती का उद्देश्य और विस्तार तथा उससे निकलने वाले परिणाम से उपधारणा खंडनीय है – केंद्र सरकार का स्वापक औषधि और मनःप्रभावी पदार्थों के क्रय–विक्रय आदि पर नियंत्रण है, यह सुनिश्चित करने के लिए कि राज्य सरकार अपने मूल उद्देश्य से विचलित न हो शब्द "करेगा" प्रयुक्त किया गया है – यह उपबंध आज्ञापक है – केंद्र सरकार द्वारा जारी किए गए आदेश से राज्य सरकार विचलित नहीं हो सकता।

***C. Tender - Estoppel* - Bidder participated - Cannot challenge its terms and conditions. (Para 8)**

ग. निविदा – विबंधन – बोलीदाता ने भाग लिया – उसके निबंधन तथा शर्तों को चुनौती नहीं दे सकता।

***D. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 9 & Art. 22 - Single convention* - Cultivation of Poppy - By cultivator on behalf of Government - Cultivator has right only on seed - Rest of the plant and product belongs to Government. (Para 10)**

घ. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 9 अनुच्छेद 22 – एकल कन्वेन्शन– अफीम की खेती – शासन की ओर से कृषक द्वारा – कृषक का केवल बीज पर अधिकार है – बचा हुआ पौधा और उत्पाद शासन का होता है।

***E. Narcotic Drugs and Psychotropic Substances Rules, M.P., 1985, Rule 37-M & Art. 22-25 of Single convention - Destruction of poppy straw* - After cancellation or determination of license poppy straw which remained un-utilized has to be destroyed. (Para 11)**

ङ. स्वापक औषधि और मनःप्रभावी पदार्थ नियम, म.प्र., 1985, नियम 37–एम व एकल कन्वेन्शन के अनुच्छेद 22–25 – अफीम के भूसे का विनष्टीकरण – अनुज्ञप्ति के निरस्तीकरण अथवा निर्धारण के पश्चात् बचे हुये अप्रयुक्त अफीम के भूसे का विनष्टीकरण किया जाना चाहिए।

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

ORDER

The Order of the Court was delivered by :
P.K. JAISWAL, J. :- Heard on the question of admission.

2. This order shall govern disposal of Writ Appeals No.759, 760 and 761 of 2014, as common questions are involved in all the three writ appeals and by common order all the three writ petitions have been disposed of. For the sake of convenience, the facts are borrowed from W.A.No.759/2014.

3. Brief facts of the case are that appellant Man Singh Rajpoot in Writ Appeal No.759/2014 was granted PS-II Licenses for sale and purchase of poppy straw for the financial year 2010-11 for group District Mandsaur.

4. In exercise of powers conferred by Sections 8, 10, 71 and 78 of the Narcotic Drugs & Psychotropic Substances Act, 1985, the State Government had made Rules namely Narcotics Drugs & Psychotropic Substances (Madhya Pradesh) Rules, 1985 providing for issuance of licenses for the purpose of sale and purchase of poppy straw. Rule 37-D provides for issuance of wholesale (PS-II) and retail license (PS-III) for medical or scientific purpose. Rule 37-M provides for disposal of balance of poppy straw left with a licensee holding a license after cancellation or determination of his license.

5. By order dated 13.5.2011 passed by the respondent no.3, whereby the petitioner has been called upon to destroy 17015.60 quintals of poppy straw as per directions issued by the Union of India, in accordance with law. He aggrieved by the aforesaid order and filed Writ Petition No.4564/2011.

6. The writ court by order dated 11.8.2004, dismissed the writ petition and directed the authorities to ensure that the entire poppy straw available with the appellant shall be destroyed within a period of 10 days and the Collector Mandsaur is directed to ensure the compliance of his own order as well as order passed by this Court, as expeditiously as possible preferably within a period of 10 days, from today.

7. The appellant being aggrieved by the aforesaid order passed by the learned writ court filed intra court appeal by the Writ Appeal No.687/2014. The order was challenged on the ground that the learned single judge while passing the impugned order has not taken into consideration the provisions of

Rule 37M of the Narcotic Drugs and Psychotropic Substances (Madhya Pradesh Rules, 1985). The Division Bench was of the view that the learned writ court while deciding the writ petition has not taken into consideration Rule M of the Rules and the effect of the circular and, therefore, set aside the order dated 11.8.2014 and remitted the matter to the writ court for deciding the writ petition a fresh.

8. After considering the provisions of Section 37 M of the Rules and the effect of the Circular, the learned writ court dismissed the writ petition on 26.9.2014. Para 7 to 33 are relevant which reads as under :

> *"07. This court has carefully gone through the writ petition as well as the relevant statutory provisions governing the field. In the present case, the Central Government, by virtue of statutory provisions issued under the NDPS Act is permitting cultivation of poppy by the Cultivators and it is done under the control, supervision and permit, by the Central Government as well as the State Government. Section 9 of the NDPS Act, 1985 governing the field reads as under :-*
>
> *"9. Power of Central Government to permit, control and regulate.*
>
> *(1) Subject to the provisions of Section 8, the Central Government may, by rules-*
>
> *(a) Permit and regulate-*
>
> *(i) The cultivation, or gathering of any portion (such cultivation or gathering being only on account of the Central Government) of coca plant, or the production, possession, sale, purchase, transport, import inter-State, export inter-State, use or consumption of coca leaves;*
>
> *(ii) The cultivation (such cultivation being only on account of Central Government) of the opium poppy;*
>
> *(iii) The production and manufacture of opium and production of poppy straw;*
>
> *(iv). The sale of opium and opium derivatives from the*

Central Government factories for export from India or sale to State Government or to manufacturing chemists;

(v) The manufacture of manufactured drugs (other than prepared opium,) but not including manufacture of medicinal opium or any preparation containing any manufactured drug from materials which the maker is lawfully entitled to possess;

(vi). The manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption or use of psychotropic substances;

(vii) The import into India and export from India and transhipment of narcotic drugs and psychotropic substances;

(b) Prescribe any other matter requisite to render effective the control of the Central Government over any of the matters specified in clause (a).

(2) In particular and without prejudice to the generality of the foregoing power, such rules may-

(a) Empower the Central Government to fix from time to time the limits within which licenses may be given for the cultivation of the opium poppy;

(b) Require that all opium, the produce of land cultivated with the opium poppy, shall be delivered by the cultivators to the officers authorised in this behalf by the Central Government;

(c) Prescribe the forms and conditions of licences for cultivation of the opium poppy and for production and manufacture of opium; the fees that may be charged therefor; the authorities by which such licences may be granted, withheld, refused or cancelled and the authorities before which appeals against the orders of withholding refusal or cancellation of licences shall lie;

(d) Prescribe that opium shall be weighed, examined and

classified according to its quality and consistence by the officers authorised in this behalf by the Central Government in the presence of the cultivator at the time of delivery by the cultivator;

(e) Empower the Central Government to fix from time to time the price to be paid to the cultivators for the opium delivered;

(f) Provide for the weighment, examination and classification, according to the quality and consistence, of the opium received at the factory and the deductions from or additions (in any) to the standard price to be made in accordance with the result of such examination; and the authorities by which the decisions with regard to the weighment, examination, classification, deductions additions shall be made and the authorities before which appeals against such decisions shall lie;

(g) Require that opium delivered by a cultivator, if found as a result of examination in the Central Government factory to be adulterated, may be confiscated by the officers authorised in this behalf;

(h) Prescribed the forms and conditions of licences for the manufacture of manufactured drugs, the authorities by which such licences may be granted and the fees that may be charged therefor;

(i) Prescribe the forms and conditions of licences or permits for the manufacture, possession, transport, import interstate, export inter-State, sale, purchase, consumption or use of psychotropic substances, the authorities by which such licences or permits may be granted and the fees that may be charged therefor;

(j) Prescribe the ports and other places at which any kind of narcotic drugs or psychotropic substances may be imported into India or exported from India of transshipped; the forms and conditions of certificates, authorisations or

permits, as the case may be, for such import, export or transhipment; the authorities by which such certificates, authorisations or permits may be granted and the fees that may be charged therefor.

9A. Power to control and regulate controlled substances

[1][9-A. Power to control and regulate controlled substances

(1) If the Central Government is of the opinion that having regard to the use of any controlled substance in the production or manufacture of any narcotic drug or psychotropic substance, it is necessary or expedient so to do in the public interest, it may, by order, provide for regulating or prohibiting the production, manufacture, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the power conferred by subsection (1), and order made thereunder may provide for regulating by licences, permits or otherwise, the production, manufacture, possession, transport, import interstate, export interstate sale, purchase, consumption, use, storage distribution, disposal or acquisition of any controlled substance."

08. It is also pertinent to note that the relevant statutory provisions in respect of cultivation of poppy and in respect of other issues relating to cultivation of poppy's are based upon various international conventions called as the Single Convention on Narcotic Drugs, 1961 and the SAARC Convention for Narcotics Drugs and Psychotropic Substances, 1990 drawn by the United Nations in order to stop illegal trafficking of drugs. Article 22 and 25 of the Single Convention on Narcotic Drugs, 1961 reads as under :-

"Article 22

SPECIAL PROVISION APPLICABLE TO CULTIVATION

1. Whenever the prevailing conditions in the country or a territory of a Party render the prohibition of the cultivation of the opium poppy, the coca bush or the cannabis plant the most suitable measure, in its opinion, for protecting the public health and welfare and preventing the diversion of drugs into the illicit traffic, the Party concerned shall prohibit cultivation.

2. A Party prohibiting cultivation of the opium poppy or the cannabis plant shall take appropriate measures to seize any plants illicitly cultivated and to destroy them, except for small quantities required by the Party for scientific or research purposes.

Article 25

CONTROL OF POPPY STRAW

1. A Party that permits the cultivation of the opium poppy for purposes other than the production of opium shall take all measures necessary to ensure:

a) That opium is not produced from such opium poppies; and

b) That the manufacture of drugs from poppy straw is adequately controlled.

2. The Parties shall apply to poppy straw the system of import certificates and export authorizations as provided in article 31, paragraphs 4 to 15.

3. The Parties shall furnish statistical information on the import and export of poppy straw as required for drugs under article 20, paragraphs 1 d) and 2 b)."

09. Based upon the aforesaid provisions, various statutory provisions have been framed in order to ensure that no illegal trafficking take place and it also mandates destruction of the excess quantity. Section 74-A of the Narcotic Drugs and Psychotropic Substances Act, 1985 reads as under :-

"74A. Powers of Central Government to give directions

[1][74-A. Powers of Central Government to give directions

The Central Government may give such directions as it may deem necessary to a State Government regarding the carrying into execution of the provisions of this Act, and the State Government shall comply with such direction.]"

10. In light of the aforesaid statutory provisions, the Government of India has framed guidelines dated 30-11-2009 (Annexure-P-9) and the same provides for destruction of poppy plant retained by a person beyond his licence period. State Government of Madhya Pradesh has also framed N.D.P.S. Rules, 1985 and Rule 37-M specifically provides for disposal of balance poppy straw. It also provides for a procedure for destroying the poppy straw retained by the licensee beyond the licence period.

11. The State Government in exercise of powers conferred under Sections 8, 10, 65, 71 and 78 of the Narcotic Drugs and Psychotropic Substances Act, 1985 has framed the rules known as Narcotic Drugs and Psychotropic Substances Rules, 1985.

12. The contention of the petitioner is that Rule 37-M of the Rules of 1985 provides for a method of disposing of the balance poppy straw left with the licencee holding a license after the cancellation or determination of his license. Rule 37-M reads as under :-

***"37M. Disposal of balance-** The following conditions shall apply to the disposal of valance (sic:balance) of poppy straw left with a licensee holding a licence under this Chapter after cancellation or determination of his licence:*

(a) If the licensee has obtained a new licence for the same article which is to come into force immediately on the expiry of the old licence and is granted for the same place

or premises, he may retain his balance of stock of poppy straw for the purposes of the new licence;

(b) If the licensee's new licence is for different place or premises he shall on the expiry of the old licence forthwith deposit has stock of poppy straw with such person as the District Excise Officer may, by general or special order appoint for the purpose and shall not remove it thence to the new shop except under a permit granted by an Excise Officer not below the rank of Sub-Inspector;

(c) If the licensee has been granted no other licence he shall deposit his balance of poppy straw provided in clause (b) and with the prior sanction of the District Excise Officer may dispose it of in lump sum to any other licensee of the poppy straw. The stock shall then be transported to the place or premises of such licensee under a permit granted by an Excise Officer not below the rank of Sub-Inspector. In the event of the former licensee being unable to dispose of his balance of poppy straw within 30 days from the date of expiry of his stead or if no such new licence has been granted any licensee of the poppy straw may be required, under penalty of forfeiting his licence to purchase the article at such price as the District Excise Officer may, fix and in any quantity not exceeding that which the District Excise Officer may determine to be ordinarily saleable by him in two months:

Provided that if the poppy Straw is unfit for use the whole of it or, if the quantity is unreasonably large the excess may be destroyed under the orders of the District Excise Officer. The licensee shall not be entitled to any compensation for any loss suffered in consequence of action taken under this rule."

13. In the present case, Clause-A and B are certainly not applicable. Keeping in view the provisions of law, it is clear that the petitioner was not granted licenses for the next year i.e. 2011- 2012.

14. The balance quantity, which is left with the petitioner is 17015.60 quintal. Proviso to Clause-C of Rule 37-M provides that in case quantity left is unreasonably large, the excess may be destroyed under the order of District Excise Officer.

15. Rule 37-M(b) provides for a disposal of poppy-straw within 30 days by the licensee after expiry of the license period in the manner and method dealt in Section 37-M(a) 3(b) and after a period of 60 days no such disposal can be done. In the present case, the most important issue is in respect of the quantity left with the licensee after expiry of the license.

16. In the present case, the impugned order Annexure-P/8 and the reply filed by the State of Madhya Pradesh makes it very clear that balance quantity is 17015.60 quintal. The same is certainly unreasonably large quantity of poppy straw. A similar matter also come up before this Court in the case of Devendra Kumar State of M.P. reported in 2002 4 MPLJ 179 and in the aforesaid case a license was granted under rule 37-D of the Rules of 1985, which expired on 31.2.2001. The petitioner therein was in possession of unreasonably large quantity of poppy-straw. He was in possession of 265 quintal, 31 kg and 500 grms. He did submit an application for renewal of his license but his license was not renewed and in those circumstances, this Court has held that the Provision to Rule 37-M(c) confers power on the District Excise Officer to destroy the poppy straw, if the quantity unreasonably large. This Court in the case of Devendra (supra) in paragraph 6 and 7 has held as under :-

"6. .....Rule 37-M(c) of the Rules is pertinent. On a scanning of the said rule it is quite vivid that if a licensee who has been granted no other licence is under an obligation to deposit the balance of poppy-straw provided in clause(b) of the said Rules and he may dispose of the same with the prior sanction of the District Excise

Officer in lump sum to any other licensee of the poppy-straw. Thereafter the provision lays down the procedure with regard to transportation of the stock. The consequences are provided if the licensee does not do it within 30 days. The proviso is of immense relevance as that confers powers on the District Excise Officer to destroy the poppy-straw if it becomes unfit for use the whole of it or, if the quantity is unreasonably large.

7. It is not disputed that the term of the licence expired on 31.3.2001. The petitioner might have applied for renewal as contemplated under Rule 37-R of the Rules. In this case, I am not concerned, whether licence should be granted or not. It is discernible that filing of an application for renewal does not enable the petitioner to get away from the mischief of the Rule as provided under Rule 37-MC (c). The said rule applies in full force. Hence submission of Mr. Manish Datt on that score is repelled."

The quantity in the aforesaid case which was only 265 quintal was treated to be as unreasonably large quantity and in the present case the quantity is 17015.60 quintal. It is certainly unreasonably large quantity and the same has to be destroyed.

17. It is true that the State Government is granting licenses under the provisions of Narcotic Drugs and Psychotropic Substances Rules, 1985. The rules have been framed by virtue of Section 10 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The rules relate to possession, transportation, purchase and sale of poppy straw.

18. Section 74(A) of Narcotic Drugs and Psychotropic Substances Act, 1985 empowers the Central Government to give direction to the State Governments regarding carrying into execution of the provisions of the Act and it is mandatory on the part of the State Governments to comply with the orders passed by the Central Government under Section 74-

A. The Law Makers have used the word 'shall' in the aforesaid statutory provision and it has been categorically mentioned that the State Governments shall comply with such directions issued by the Central Government under Section 74-A. The Central Government in exercise of power conferred under Section 74-A of the Narcotic Drugs and Psychotropic Substances Act, 1985 after constituting an expert committee consisting of Drug Controller of India, Narcotics Commissioner, Doctors, from all India Medical Sciences, Post Graduate Medical & Research Institute Chandigarh, Ram Manohar Lohiya Hospital, Representatives of States has taken a policy decision on the basis of report submitted by the expert committee. The State Governments have been categorically directed to issue license for purchase and sale of poppy straw and it has also been directed that the licences shall specify the quantity that can be purchased or sold.

19. Clause-(i) of the order dated 30th November, 2009 issued by the Government of India in exercise of powers conferred under Section 74-A of the NDPS Act, 1985 reads as under :-

"I) All poppy straw which remains unutilised shall be destroyed and a certificate to the effect and an annual report for every callander year as at ANNEX to this order shall be sent by the nodal officer of the State to the Narcotics Commissioner, 19, the Mall. Morar, Gwalior (M.P.)474006 (Fax:0751-2368111) by June of the following year."

20. The aforesaid order issued by the Central Government makes it very clear that all poppy-straw which remains unutilised shall be destroyed and a certificate to the effect and an annual report for every calendar year shall be forwarded to the Narcotics Commissioner of India. The aforesaid order of the Government of India is binding upon the State Governments and there can be no deviation from the order passed by the ***Central*** *Governments. The entire world, not only India is struggling with the misuse*

of Narcotic Drugs and Psychotropic Substances and most of the fundings to various terrorist organizations are being done through out the globe from the money received on account of illegal trading of Narcotic Drugs and Psychotropic Substances, including opium. The abuse of opium is a cause of worry to the entire international community and various international conventions are being held from time to time. The United Nation has also issued various guidelines in respect of the illicit trafficking of drugs, which is going on throughout the globe and in order to ensure that the Narcotic Drugs and Psychotropic Substances are not being misused including opium, various measures have been taken by the State Governments as well as the Government of India.

21. Shri Piyush Mathur, learned Sr. Counsel has vehemently argued before this Court that the order passed by the Government of India is not having a statutory force as it has not been issued in the name of the President of India.

22. Section 8 of the Narcotic Drugs and Psychotropic Substances Act, 1985 reads as under :-

***8. Prohibition of certain operations**. -No person shall (a) cultivate any coca plant or gather any portion of coca plant; or*

(b) cultivate the opium poppy or any cannabis plant; or

(c) produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance, except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorization also in accordance with the terms and conditions of such licence, permit or

authorization:

Provided that, and subject to the other provisions of this Act and the rules made thereunder, the prohibition against the cultivation of the cannabis plant for the production of ganja or the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter-State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the Official Gazette, specify in this behalf:

1[Provided further that nothing in this section shall apply to the export of poppy straw for decorative purposes.]

23. The aforesaid statutory provision of law makes it very clear that the prohibition has been imposed upon various activities relating to Narcotic Drugs and Psychotropic Substances and its cultivation and other activities are subject to the prohibitions under the Act or Rules or Orders issued from time to time. Section 8 read with section 74 of certainly empowers the Government of India to issue orders and the order issued by the Government of India though it is certainly not a notification, is certainly an order passed by the Government of India that too by a competent authority.

14. Hon'ble Shri Justice G.P. Singh has dealt with the mandatory and directory provisions in his most famous Principles of Statutory Interpretation. Chapter-V deals with Subsidiary Rules. Under Chapter-V Synopsis 6 (e) the use of shall, may, must and should have been considered by his Lordship. In the word of Hon'ble Shri Justice G.P. Singh, the use of word 'shall' raises a presumption that the particular provision is imperative, however this prima-facie inference may be rebutted by other consideration such as object and scope of the enactment and the consequences

flowing from such construction. In the present case Narcotic Drugs and Psychotropic Substances Act, 1985 is a Central Act and the Government of India is infact having control over the sale, purchase etc., of Narcotic Drugs and Psychotropic Substances. The Law Makers in order to ensure that the State Governments which are empowered to make rules do not deviate from the basic object of the Act have placed Section 74-A on the statute book and Section 74-A uses the word 'shall' and therefore, keeping in view the meaning of the word 'shall' in a particular statute in light of its interpretation as given by Hon'ble Shri Justice G.P. Singh, the statute in question is certainly a directory provision and by no stretch of imagination, the State Governments can deviate from an order issued by the Government of India under the provisions of Narcotic Drugs and Psychotropic Substances Act, 1985.

24. Ms. M. Ravindran, learned GA has drawn the attention of this Court towards Clause 25 of the terms and conditions of the tender notice and the same reads as under :-

25- "अन्य व्यवस्थायें– पॉपीस्ट्रा के थोक एवं फुटकर विकय के लायसेंस/लायसेंसों के समूह के टेण्डर द्वारा निष्पादन एवं निश्चित वार्षिक लायसेंस फीस पर, पॉपीस्ट्रा के फुटकर विकय के पी.एस–3 लायसेंस की स्वीकृति एवं ऐसे लायसेसों के संचालन के संबंध में, जिन व्यवस्थाओं के संबंध में उल्लेख अथवा/अन्यथा पृथक् से निर्देशित नहीं किया गया है, वे सभी व्यवस्थाएं वर्ष 2009–10 में प्रचलित व्यवस्था अनुसार पूर्ववत/यथावत लागू रहेंगी."

25. She has also drawn the attention of this Court towards the terms and conditions which were applicable for the year 2009 and 2010 and the same is on record in Writ Appeal No.6867/2014. The terms and conditions for the year 2009 and 2010 mentioned in Clause 20.6 reads as under :-

20.6 "वर्ष 2008–09 में संग्रहित एवं दिनांक 31–3–2009 को अवशेष पॉपीस्ट्रा स्कंध का निराकरण नियमानुसार किया जाएगा तथा यह सुनिश्चित

किया जायेगा कि नियत अवधि में अवशेष पॉपीस्ट्रा का व्ययन न होने पर अयुक्तियुक्त रूप से अधिक संग्रहित पॉपीस्ट्रा को नियमानुसार नष्ट करा दिया जाये. पॅपीस्ट्रा के पूर्व वर्षो के अवशेष पॉपीस्ट्रा स्कंध को नियमानुसार नष्ट करने की कार्यवाही भी सुनिश्चित की जायेगी."

26. Meaning thereby that the terms and conditions of the tender document itself reflects that the balance poppy straw has to be destroyed after the license period is over. The petitioner once has participated in the tender process is estopped from challenging the terms and conditions of the tender. Not only this, it has been stated in the open court that trading in Poppy-husk after 2015 has been stopped in all states by the Government of India and there will be no licenses issued by the Government of India or by the state government for the next year.

27. The petitioner in the present case was granted a licence for the year 2010-2011 and the same expired on 31-03-2011. The petitioner has also submitted an undertaking, which is on record as Annexure-R-1 and as per the undertaking submitted by the petitioner the poppy straw which is available with the petitioner after expiry of licence period i.e 31-03-2011 has to be destroyed.

28. Keeping in view the totality of the facts and circumstances of the case, this court is of the considered opinion that the State Government is justify in enforcing the statutory provisions under the NDPS Act and the NDPS Rules, 1985 as well as statutory directions issued by the Government of India. Petitioner whose licence period come to an end has not been able to place any statutory provisions of law on record which permits the petitioner to retain the poppy straw stock and to continue with sale and purchase of poppy straw stock available with him, even though he does not have a licence. This Court is of the considered opinion that State Governments do not have a choice except to follow the directions issued by the Government of India. Otherwise also as in all of the writ petitions as the quantity is unreasonably large, no case for

interference in the matter is made out.

*29. In **WP No.4565/2011**, the quantity, which is required to be destroyed is 6178.27 quintal and therefore, again the respondents have rightly passed the impugned order to destroy the quantity left which is unreasonably high. The quantity of poppy-husk which is left has to be destroyed in light of the Rule 37-M. Other wise also in light of the order issued by the Government of India dated 30th November, 2009 under Section 74 of Narcotic Drugs and Psychotropic Substances Act, 1985, no case for interference in the matter is made out.*

*30. In **WP No.6574/2011** the balance poppy straw available with the petitioner is 6210 quintal and the same again is unreasonably high quantity and it has to be destroyed in light of the Rule 37-M of Narcotic Drugs and Psychotropic Substances Rules, 1985.*

31. Resultantly, this court does not find any reason to interfere with the order passed by the Collector, District Mandsaur and the authorities are directed to ensure that the entire poppy straw available with the petitioner is destroyed within a period of ten days from today and the Collector Mandsaur is directed to ensure compliance of his own order as well as this order, as expeditiously as possible, preferably within a period of ten days, from today.

32. The entire poppy straw stock shall be destroyed in presence of a Committee constituted by the Collector. The Collector Mandsaur shall constitute a committee for destruction of poppy straw and the learned Collector shall ensure that in the committee beside other members, the following officers shall also be included :-

(a) An officer, not below the rank of Dy. Commissioner Narcotics,

(b) An Officer from the Indian Police Services, not below the rank of Superintendent of Police/Additional

Superintendent of Police,

(c) An office from the State Excise Department, not below the rank of Dy. Commissioner Excise/Assistant Commissioner.

The learned Collector shall monitor the destruction of the entire stock and shall direct the authorities to forward a comprehensive report to Narcotics Commissioner of India and to all other authorities as required under the law.

33. The writ petition is dismissed and other identical writ petitions are also dismissed."

9. It is submitted that the learned writ court has materially erred in not considering that the directives of the Central Government. He further submits that directions under Section 74A of the Central Government is not binding on the State Government. The appellant cannot be deprived of his right to transfer the balance stock of poppy straw as per Rule 35(M) of the M.P. NDPS Rules, 1985.

10. It is not in dispute that poppy straw is grown by the cultivators on behalf of the Central Government under the control, supervision and permit of the Central Government and State Government. The cultivation of the poppy is on behalf of the Government and the cultivator has the right over the seed only, rest of the entire plant and its product is of the Government and any sale or transfer of any of its product except seed is illegal and accordingly punishable under the NDPS Act.

11. Article 25 of the single convention of 1961 provided for control of poppy straw and further Article 22 mandates to destroy. Section 74A of NDPS Act empowers the Central Government to issue mandatory directions regarding carrying into execution of the provisions of the NDPS Act. By direction dated 30th November, 2009, the Central Government specifically directed to destroy all poppy straw, which remains un-utilized. Rule 37-M specially provide for disposal of the balance of poppy straw and in case the licensee is not able to utilize the same during his licence period, the same has to be destroyed.

12. In the present case, license granted to the appellant was for the year 2010-11, which expired on 31.3.2011. At the time of issuance of license the appellant gave an undertaking / consent that he shall abide by all the rules,

conditions and restrictions laid down by the State Government. As per proviso to Clause (c) of Rule 37-M, if the quantity is unreasonably large the excess may be destroyed under the orders of District Excise Officer and the licensee shall not be entitled to any compensation for any loss suffered in consequence action taken under this Rule.

13. In view of the aforesaid, we are of the view that learned writ court has not committed any legal error in dismissing the writ petition and directing the Collector to monitor the destruction of the entire stock. Writ Appeal No.759/2014, Writ Appeal 760/2014 and Writ Appeal No. 761 of 2014, are accordingly, dismissed.

14. However, Collector is also directed to maintain the whole record and prepare the C.D. while destroying the excess quantity of poppy straw and submit its compliance report to the Principal Registrar of this Court.

Appeal dismissed.

I.L.R. [2015] M.P., 2845
WRIT APPEAL
Before Mr. Justice Rajendra Menon & Mr. Justice S.K. Gangele
W.A. No. 44/2015 (Jabalpur) decided on 8 April, 2015

RAGHVENDRA SINGH ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 69, 70 - Panchayat Karmi/Panchayat Secretary - Appointment* - Whether a candidate belonging to a different Area other than the village for which the appointment of Panchayat Karmi/ Panchayat Secretary is to be made is eligible for seeking appointment to the post - Held - Yes, the requirement of scheme is only directory in nature and not mandatory as it is policy of State Government to transfer Panchayat Karmi/Secretary from one village to another in the same District - Appeal dismissed. (Paras 2, 7 & 8)**

क. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 69, 70– पंचायत कर्मी/ पंचायत सचिव – नियुक्ति – ऐसा अभ्यर्थी जो उस ग्राम जहां पर पंचायत कर्मी/पंचायत सचिव की नियुक्ति होनी है के अतिरिक्त किसी

अन्य स्थान का निवासी है तो क्या वह उस पद पर नियुक्ति के लिये पात्र है – अभिनिर्धारित – हां, योजना की अपेक्षा केवल निदेशात्मक स्वरूप की है और न कि आज्ञापक क्योंकि राज्य शासन की नीति एक ही जिले में एक ग्राम से दूसरे ग्राम में पंचायत कर्मी / सचिव के स्थानांतरण की है – अपील खारिज।

B. ***Interpretation of Statutes*** **- Principle governing local resident criteria in the matter of appointment of 'Aanganwadi Karyakarta' cannot be applied in the case of 'Panchayat Karmi'. (Para 6)**

ख. *कानूनों का निर्वचन* – आंगनवाड़ी कार्यकर्ता की नियुक्ति के मामले में स्थानीय निवासी मानदंड का प्रभावी सिद्धांत पंचायत कर्मी के प्रकरण में लागू नहीं किया जा सकता।

Cases referred :

2015(1) MPLJ 297, 2011(2) MPLJ 392, AIR 2002 SC 2877.

A.M. Trivedi with *S. Patel* for the appellant.
A.P. Singh, G.A. for the respondent/State.
Sanjay K. Agrawal with *S. Sharma,* for the respondent No.7.

J U D G M E N T

The Judgment of the Court was delivered by : **Rajendra Menon, J. :-** Seeking exception to an order dated 9.1.2015 passed by the Writ Court in W.P. No.7986/2011(s), this Writ Appeal has been filed under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyay Peeth Ko Appeal), Adhiniyam, 2005.

2. The only legal question involved in this appeal is as to whether a candidate who belongs to a different area other than the village for which the appointment of Panchayat Secretary/ Panchayat Karmi is to be made is eligible for seeking appointment to the post? According to the appellant the post of Panchayat Karmi and post of Panchayat Secretary can be filled up only by a local resident living in a village and not by an outsider. This objection having been overruled by the Writ Court, this writ appeal has been filed.

3. Facts in brief goes to show that process of appointment on the post of Panchayat Karmi/ Panchayat Secretary to the Village in question was undertaken and in the said process both the respondent No.7 and appellant were the candidates. Respondent No.7 was at Srl. No.1 of the select list and was appointed as Panchayat Karmi as he was more meritorious and was

found eligible for appointment. This appointment was challenged on various grounds, mainly on the ground that respondent No.7 is an outsider. Even though the first Appellate Authority, the Collector upheld the appointment and said that appointment of a more meritorious candidate is proper, the Commissioner, Sagar having interfered with the appointment on the ground that even if, petitioner (Dinesh Kumar Ahirwar) is more meritorious, being an outsider to the village appointment on the post of Panchayat Karmi cannot be given to him in view of the scheme for appointment. Matter came to the Writ Court at the instance of respondent No.7 Dinesh Kumar Ahirwar and the Writ Court having allowed the writ petition and approved his appointment over-ruling the objection with regard to his resident, this Writ Appeal has been filed.

4. Shri A. M. Trivedi, learned Senior Counsel took us through the scheme and the advertisement issued wherein it is stipulated that as far as possible preference may be given to a local candidate and tried to emphasize that in the scheme for appointment of Panchayat Karmi as a local candidate has to be given more weightage and preference, the Writ Court has committed an error in granting appointment to a person who is not a local resident of the village. Referring to a Division Bench judgment of this Court in the case of *Neelam Singh Sikarwar Vs. State of M.P. and others* -. 2015(1) MPLJ 297 in the matter of appointment of Aanganwadi Karyakarta and the principles laid down in the said case with regard to a Aanganwadi Karyakarta being a resident of the local village, Shri A. M. Trivedi, learned Senior Counsel argued that the learned Writ Court has committed an error in rejecting the claim of the appellant. It was argued that when under the Panchayat Karmi Yojna and Scheme there is a stipulation to the following effect :

"ऐसा उम्मीदवार यथासंभव स्थानीय अथवा संबधित पंचायत क्षेत्र में निवासरत हो, इससे कार्य करवाने में आसानी होगी "

The Writ Court has committed an error in rejecting the objection of the petitioner. It is argued that appointment of Panchayat Karmi and Aaganwadi Karyakarta are based on schemes. Panchayat Karmis are not civil post holders and in view of the law laid down in the case of *Neelam Singh Sikarwar* (supra), learned Court has committed an error.

5. Shri A. P. Singh and Shri S. K. Agrawal, learned counsel for the respondents, refuted the aforesaid and invited our attention to a judgment by

learned Single Bench of this Court in the case of *Jai Prakash Batham Vs. State of M.P. and ors.* - 2011(2) MPLJ 392 to say in the matter of appointment of Panchayat Karmi in the aforesaid case after considering the principles laid down by the Supreme Court in the case of *Kailash Chand Sharma Vs. State of M.P.* - AIR 2002 SC 2877 and various other cases, the question has been decided and in doing so, no error has been committed. It was argued by Shri Sanjay K. Agrawal that even if the Panchayat Karmi are not civil post holders their appointment is made under the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993, that statutory rules are framed for controlling their service condition and now a Panchayat Karmi and Panchayat Secretary is a District Cadre Officer, his services are liable to be transferred anywhere in a District and therefore, requirement of person being a local resident, cannot be applied and learned Court in relying on the judgment of *Jai Prakash* (supra) has not committed any error in allowing the matter.

6. We have considered the rival contentions and we find that petitioner is solely relying in the judgment in the case of *Neelam Singh Sikarwar* (supra) which lays down the principle for appointment of Aanganwadi Karyakarta and requirement to such appointment is entirely different. An aganwadi karyakarta is not appointed in accordance to any statutory rules or provisions, this appointment and the scheme for setting up of Aanganwadi Centres are not governed by any statutory Rules or regulations. Appointment of Aanganwadi Karyakarta is done on the basis of a executive scheme formulated and the requirement and the work of a Aanganwadi Karyakarta is entirely different. That being so, the principle governing local resident criteria in the matter of appointment of Aanganwadi Karyakarta cannot be applied in the case of Panchayat Karmi. In the case of *Neelam Singh Sikarwar* (supra) the principle laid down with regard to residence is based on the peculiar nature of duties to be performed by the Aanganwadi Karyakarta and requirement of the scheme which cannot be applied in the case of Panchayat Karmi.

7. In the case of Panchayat Karmi the matter has been considered by a Writ Court in the case of *Jai Prakash* (supra) and after taking note of the judgment of Supreme Court in the case of *Kailash Chand Sharma* (supra) the principles have been laid down. In the case of *Kailash Chand Sharma* (supra) decided by the Supreme Court, matter pertains to appointment of Teachers in the State of Rajasthan by the Janpad Panchayat under the statutory rules governing the panchayat system in the State of Rajasthan and provision

for granting bonus marks based on a residence of a person with regard to appointment of Teacher by the Gram Panchayat was quashed by the Supreme Court. In the case of *Kailash Chand Sharma* (supra), the policy of the State Government was quashed as it was found to be in violation to the requirement of Article 14 and 16 of the Constitution. A Coordinate Bench of this Court in W.A. No.421/2007 - *Smt. Sadhana Vs. State of M.P. and others* decided by Hon'ble Chief Justice Shri A. K. Patnaik (as he then was), has held that merit should be the sole criteria for appointment in the Panchayat and a meritorious candidate cannot be superseded and denied appointment on the ground that he is not resident of local locality / village. Such an action is found to be in contravention to the requirement of Article 16(2) of the Constitution. In the case of *Smt. Sadhana* (supra) also the law laid down by the Supreme Court in the case of *Kailash Chand Sharma* (supra), has been relied upon. We find that in the matter of appointment of Panchayat Karmi, the scheme is formulated is by virtue of the powers available with the State Government under the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993. Panchayat Secretary is a post in District cadre and their services are transferable from one Panchayat to another within the same District. Once the appointment is made to a post where an employee being of whichever locality or village is liable to be transferred to another Panchayat in a village within the District. The question of appointment of Panchayat Karmi or Panchayat Secretary being a local resident of the panchayat will not apply. Once a cadre is formulated districtwise and an employee borne in the said cadre is liable to be transferred from one village to another, it can never be the intention of the executive authorities to have a Panchayat Karmi who is resident of a local authority. It is common ground and judicial notice can be taken of a fact that Panchayat Secretary and Panchayat Karmi are being regularly transferred from one Panchayat to another in the same District as a policy of the State Government and if such a transfer policy is implemented, it is clear intention of the rule maker that requirement of a person being a local resident is not at all mandatory in nature. That apart, the provision of the scheme as reproduced herein above only indicates that it is directory in nature and not mandatory. If a more meritorious candidate is available, his candidature cannot be rejected or he cannot be denied appointment only on the ground that he is not resident of local village where the Panchayat is situated. Such a reason for denying his appointment will be in violation of the requirement of Article 14 and 16 of the Constitution, which could not be the intention of rule makers. All these aspects

have been considered by the learned Writ Court while rejecting the contention of the appellant and we find no reason to take a different view.

8. Accordingly, finding no merit, the appeal is rejected.

Appeal rejected.

I.L.R. [2015] M.P., 2850
WRIT APPEAL
Before Mr. Justice A. M. Khanwilkar, Chief Justice &
Mr. Justice K.K. Trivedi
W.A. No. 165/2015 (Jabalpur) decided on 25 June, 2015

RAM SWAROOP PANDRE ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

A. Police Regulations, M.P., Regulations 10, 12, & 232 - Departmental Enquiry - Appointment of Enquiry Officer - **Whether Superintendent of Police is the only authority to appoint the Enquiry Officer to conduct departmental enquiry against the Inspector of Police - Held - No, as per Regulation 10 read with Regulation 12, Inspector General of Police, being a Superior Officer than S.P. is also competent to exercise power of appointing Enquiry Officer to conduct the departmental enquiry. (Paras 5 to 9)**

क. पुलिस विनियमन, म.प्र., विनियमन 10, 12, व 232 – विभागीय जांच – जांचकर्ता अधिकारी की नियुक्ति – क्या केवल पुलिस अधीक्षक ही पुलिस निरीक्षक के विरूद्ध विभागीय जांच के संचालन हेतु जांचकर्ता अधिकारी नियुक्त करने के लिये प्राधिकारी है? – अभिनिर्धारित – नहीं, विनियम 10 सहपठित विनियम 12 के अनुसार पुलिस महानिरीक्षक भी, पुलिस अधीक्षक से उच्चाधिकारी होने के नाते विभागीय जांच संचालन के लिये जांचकर्ता अधिकारी की नियुक्ति हेतु शक्ति का प्रयोग करने के लिये सक्षम है।

B. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P. 2005 (14 of 2006), Section 2 - **Whether questions of fact can be allowed to be urged for the first time during the arguments of an intra-Court appeal, if not agitated while arguing the writ petition - Held - No. (Para 10)**

ख. उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का 14), धारा 2 – क्या किसी अंतर्न्यायालयीन अपील में, तर्क के दौरान तथ्य

के प्रश्नों को पहली बार उठाने की अनुमति दी जा सकती है यदि वे रिट याचिका में तर्क के दौरान न उठाये गये हों? – अभिनिर्धारित – नहीं।

C. Constitution - Article 226 - Writ Petition - Necessary Party - **Allegation of malafide against appointing authority - Held - Concerned authority against whom malafides are levelled is a necessary party by name in the proceedings. (Para 10)**

ग. संविधान – अनुच्छेद 226 – रिट पिटीशन – आवश्यक पक्षकार – नियुक्ति प्राधिकारी के विरूद्ध कदाशय का अभिकथन – अभिनिर्धारित – संबंद्ध प्राधिकारी जिसके विरूद्ध कदाशय आरोपित है, कार्यवाहियों में नाम से आवश्यक पक्षकार है।

Devendra Kumar Tripathi, for the appellant.
Samdarshi Tiwari, Dy. A.G. for the respondents/State.

ORDER

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

The only ground raised before the learned Single Judge, which has been considered and rejected in terms of order impugned in this appeal dated 09.03.2015 passed in W.P.No.930/2015 was that the Inspector General of Police was not competent to appoint the Enquiry Officer. That could be done only by the Superintendent of Police. As a matter of fact, the Superintendent of Police, Dindori was himself obliged to conduct the departmental enquiry against the petitioner.

2. This argument, however, did not find favour with the learned Single Judge, as can be discerned from the impugned decision. The same argument is reiterated before us but on this occasion reliance is placed on the provisions of M.P. Police Regulations in particular Regulation 232 in support of this contention.

3. The argument though attractive at the first blush will have to be stated to be rejected because this provision cannot be interpreted to mean that it prohibits any other Superior Authority to exercise power of appointing Enquiry Officer to continue with departmental enquiry against the Inspector of Police as is the case of the petitioner.

4. In the present case, it is seen that the Inspector General Zone Shahdol

who is, admittedly, a Superior Officer than the Superintendent of Police Dindori, has exercised the power of appointing the Superintendent of Police Shahdol as Enquiry Officer for administrative reasons.

5. The moot question is: whether the Inspector General of Police, Zone Shahdol was competent to appoint the Enquiry Officer. For that, we may usefully refer to Regulation 10 read with Regulation 12 of the M.P. Police Regulations. No doubt, the petitioner had initially placed reliance on the provisions of M.P. Civil Services (Classification, Control & Appeal) Rules, 1966, but keeping in mind the provisions of the said Rules and in particular the express provision in the Rules of 1966 that the Control & Appeal Rules will not apply to the Class-III (Non-ministerial) post in the Police Department, which, however, will be governed only by the M.P. Police Regulations, the argument about application of Rules 1966 was not pressed further.

6. Therefore, the consideration of the issue rests on the sweep of Regulation 10 read with Regulation 12 conjointly read with Regulation 232. Regulation 232, in our opinion, is a directory provision and cannot be interpreted to mean that the Superintendent of Police of the district in which the concerned Inspector of Police facing departmental enquiry is working alone, is competent to appoint Enquiry Officer to conduct the departmental enquiry. This interpretation is reinforced from the expression "ordinarily" found in Regulation 232. It is not as if the Superintendent of Police of the same district himself should appoint the Enquiry Officer or hold the departmental enquiry as is contended.

7. On the other hand, Regulation 10 read with Regulation 12, leaves no matter of doubt that the Inspector General of Police, Range Shahdol, is the Head for the administrative purposes of the concerned Range and being a Superior Officer than the Superintendent of Police, would be competent to exercise power of appointing Enquiry Officer to conduct the departmental enquiry against the Inspector of Police working in his Range. Notably, no express provision has been brought to our notice that the Enquiry Officer can be appointed only by the Superintendent of Police and none-else.

8. Be that as it may, we find that Regulation 223 empowers the Zonal Inspector General of Police or any Police Officer equivalent to the rank of Inspector General of Police to not only suspend the officer of the rank of Inspector pending enquiry but also to inflict punishment specified in Regulation 214 and 215. Understood thus, it is unfathomable to countenance the argument

of the appellant that the Zonal Inspector General of Police is not competent to appoint an Enquiry Officer to conduct the departmental enquiry against the Inspector of Police working under him, even though for all administrative purposes, he is treated as Head of the Police of the concerned Zone.

9. For the aforesaid reasons, we find no infirmity in the conclusion reached by the learned Single Judge for having dismissed the challenge to the order issued by the Inspector General of Police to appoint an Enquiry Officer.

10. Counsel for the appellant would then contend that the Inspector General of Police, Zone Shahdol is biased against the appellant. However, from the order under appeal we find that this plea was not taken before the learned Single Judge. Indeed, counsel for the appellant submits that the plea has been specifically taken in the writ petition. Assuming that such plea is taken, it does not follow that the appellant had pressed that plea while arguing the writ petition. Moreover, from the cause title of the appeal as well as writ petition, it is noticed that the concerned Inspector General of Police against whom allegation of *mala fide* are now levelled across the Bar is not named as respondent by name in the proceedings. For that reason also, it is not open to the Court to inquire into the facts constituting bias qua him. Moreover, the grievance of the appellant, essentially, is a question of fact which ought to have been agitated before the learned Single Judge in the first instance and cannot be allowed to be urged across the Bar for the first time during the arguments of an intra-Court appeal that too at such belated stage when the Court is about to pass the order of dismissing the appeal. Further, from the grounds of appeal also, this argument now pressed into service has not been specifically incorporated. Indeed, the learned counsel for the appellant has invited our attention to ground (F) in the appeal memo. However, that ground does not disclose any material facts to constitute malafide exercise of power by the Inspector General of Police as such. It is a vague ground to question the authority of the respondent No.3 to appoint the Enquiry Officer. Thus, it is not necessary for us to examine this argument any further.

11. Nevertheless, to assuage the apprehension of the appellant, he is free to make representation to the Director General of Police who is the highest Authority in police establishment, within one week from today and on receipt thereof, as is assured across the Bar by the counsel for the State, the said representation be decided on its own merits by the Director General of Police within one week therefrom. Dependent on the decision of Director General

of Police, the departmental enquiry against the appellant can proceed further in accordance with law thereafter. We make it clear that the representation will have to be decided uninfluenced by any observations made in this order.

12. Appeal **disposed** of accordingly.

Appeal disposed of.

I.L.R. [2015] M.P., 2854
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No. 13398/2013 (Jabalpur) decided on 22 October, 2013

CHAMPA RAI (SMT.) & anr. ...Petitioners
Vs.
NAFEESA BI & ors. ...Respondents

Civil Procedure Code (5 of 1908), Order 1 Rule 10 - Necessary Party **-Petitioners/plaintiffs herein have claimed declaratory decree against the respondents with respect of the disputed property stating themselves to be the co-owners with the proposed defendant who executed the alleged sale deed in favour of respondents No. 1 to 9 - Therefore, the said defendant is a necessary Party - So far the purchasers of the part of suit property from 1 to 9 is concerned, they shall be bound by the decree which would be passed in the suit by virtue of Section 52 of the Transfer of Property Act - In the present case since after execution of sale deed by respondents No. 1 to 9 in favour of the proposed defendants No. 1 & 2 the petitioners/plaintiffs want the decree of declaration against them also and thus the subsequent purchasers subject to the limitation of Section 52 of T.P. Act are also necessary parties. (Paras 10 &11)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10 – आवश्यक पक्षकार – याचीगण/वादीगण ने विवादित संपत्ति के संबंध में प्रत्यर्थीगण के विरूद्ध यह कहते हुए घोषणात्मक डिक्री का दावा किया है कि वे प्रस्तावित प्रतिवादी के साथ सह–स्वामी है जिसने प्रत्यर्थीगण क्रमांक 1 से 9 के पक्ष में अभिकथित विक्रय–विलेख निष्पादित किया – अतः उक्त प्रतिवादी आवश्यक पक्षकार है – जहां तक वाद संपत्ति के भाग के क्रेता 1 से 9 का संबध है, वे उस डिक्री से बाध्य होंगे जो कि संपत्ति अंतरण अधिनियम की धारा 52 के आधार पर वाद में पारित होगी – वर्तमान प्रकरण में चूंकि प्रत्यर्थी क्रमांक 1 से 9 के द्वारा प्रस्तावित प्रतिवादी क्रमांक

1 और 2 के पक्ष में विक्रय–विलेख निष्पादित करने के पश्चात् याची/वादी उनके विरूद्ध भी घोषणा की डिक्री चाहते हैं तथा इस प्रकार संपत्ति अंतरण अधिनियम की धारा 52 की परिसीमा के अधीन, पश्चात्वर्ती क्रेता भी आवश्यक पक्षकार है।

Case referred :

1976 JLJ 84.

Saket Agrawal, for the petitioners.
R.P. Khare, for the respondent Nos. 1 to 9.
Sheetal Dubey, G.A. for the respondent No.10/State.

ORDER

U.C. MAHESHWARI, J. :- Petitioners-plaintiffs have filed this petition under article 227 of the Constitution of India being aggrieved by the order dated 12.3.2013 passed by II Civil Judge, Class II, Raisen in Civil Original Suit No.45-A/2005 whereby their application filed under Order 1 Rule 10 of CPC to implead Smt. Meera Bai and Smt. Savita Bai the purchasers of the part of the disputed property from respondents No.1 to 9, in pendency of the impugned suit, and also one Ramesh Chandra Rai as alleged co-parcener/co-owner of the disputed property, who had transferred the impugned property in favour of respondents No.1 to 9, as necessary parties, has been dismissed.

2. Having heard the learned counsel of the parties at length, I have carefully gone through the papers placed on record along with impugned order.

3. It is undisputed fact that impugned civil suit is pending before the trial Court in the second inning, in the light of the Judgment dated 29.11.2012 passed by this Court in Second Appeal No.610/2007 whereby setting aside the earlier judgment, the case has been sent to the trial Court with some directions to decide afresh.

4. It is also apparent from the aforesaid judgment of the remand that besides the other directions the parties were also extended liberty to amend their pleadings if necessary.

5. After remanding the matter and pendency of the same before the trial Court the aforesaid application under Order 1 Rule 10 of CPC was filed on behalf of petitioners to implead the above mentioned persons as defendants in the matter, *inter alia,* in such application it is stated that after purchasing the part of disputed property by respondents No.1 to 9 from proposed

defendant Ramesh Chandra Rai through registered sale deed on their turn, they have transferred the same to proposed defendants No. 1 & 2. So in such premises, such subsequent purchasers and said Ramesh Chandra Rai who executed the sale deed in favour of respondents No. 1 to 9 are necessary parties in the matter and the prayer to implead them is made.

6. The averments of aforesaid I.A. are disputed on behalf of respondents by filing the reply contending that such application has been filed at a very belated stage after years together from the date of filing the suit as the same was filed in the year 1993. It is also apparent that in earlier inning of litigation said alleged co-owner Ramesh Chandra Rai was not impleaded as party either in the trial Court or before this Court in the Second Appeal. In such premises also the petitioners are not entitled to implead him as party in the matter at this stage.

7. In oral arguments, Shri R.K.Khare, learned counsel, submits that in view of the principles of doctrine of *lis pendens* defined under section 52 of the Transfer of Property Act, the aforesaid subsequent purchasers are neither necessary nor proper parties in the matter because they shall be bound with the decree which would be passed at the final stage of the matter.

8. On consideration the trial Court dismissed the aforesaid application mainly on the ground that in the lack of any specific direction of this Court in the aforesaid judgment passed in Second Appeal permitting the petitioner to file such application the same has been dismissed.

9. The question involved in this petition requires consideration in the light of the Full Bench decision of this Court in the matter of *Panna and another Vs. Jeewanlal and another* reported in 1976 JLJ 84 in which the categories of necessary party and the proper parties have been defined, the same is as under:

> 5. The forequoted sub-Rule (1) relates to the addition of parties as plaintiffs only and therefore it is not relevant in the instant case. The only relevant: provision for answering the question before us is sub-rule (2). In the forequoted sub-rule (2) the two expressions (i) "who ought to have been joined" and (ii) "whose presence before the Court may be necessary" indicate that there are two categories of parties : (a) necessay (sic:necessary) party as indicated by the expression "whose

presence before the Court may be necessary", The Court has no jurisdiction or power to add a person as a party who is neither a necessary party nor a proper party. We have therefore to examine whether the applicants fall in either of these categories.

8. The Allahabad High Court in a Full Bench decision in the Benaras Bank v. Bhagwandas [2]. had laid down the tests for determining the question as to who is a necessary party to a proceeding which were approved by their Lordship of the Supreme Court in Deputy Commissioner v. Ram Krishna [3], and these tests are as under:

(i) There must be a right to some relief against such party in respect of the matter involved in the proceedings in question.

(ii) It should not be possible to pass an effective decree in the absence of such a party.

Thus bearing in mind the aforesaid tests, discussed hereinabove the irresistible conclusion is that the applicants are not the necessary parties for the reasons to follow.

10. It is undisputed fact that petitioners-plaintiffs herein have claimed declaratory decree against the respondents with respect of the disputed property stating themselves to be the co-owners with Ramesh Chandra Rai, the aforesaid proposed defendant who executed the alleged sale deed in favour of respondents No. 1 to 9 and in such premises, Ramesh Chandra Rai was necessary party in the impugned suit, from the initial stage and in such premises, I am also of the view that in the absence of Ramesh Chandra Rai the effective decree would not be passed in the present matter either for dismissal of the suit or to decree the suit. So in such premises, it is held that Ramesh Chandra Rai is necessary party in the impugned suit.

11. So far the other proposed defendants are concerned, it is undisputed fact that they are the purchasers of the part of the suit property from the respondents No.1 to 9 and in such premises by virtue of section 52 of the Transfer of Property Act they shall be bound by the decree which would be passed in the suit between the petitioners and respondents No.1 to 9 and said Ramesh Chandra Rai, but in view of the proposition laid by the Apex Court taking into consideration the provisions of Order 1 Rule 10 and Order 22

Rule 10 of CPC and section 52 of Transfer of Property Act that after transferring the suit property by a party of the suit normally the seller did not have interest to prosecute or defend the matter or to look after such litigation but the interest of the purchasers of such property remain under dispute in the suit, although such purchasers did not have right to take a different defence on filing the separate written statement but in any case in such a situation in order to defend the suit and to avoid the multiplicity of the litigations such purchaser should be permitted to join the pending suit and the proceedings. But in the case at hand, after execution of the sale deed by respondents No. 1 to 9 in favour of proposed defendants No. 1 and 2 the petitioners plaintiffs want the decree of declaration against them also and in such a situation to decide the dispute raised in the plaint by the existing parties of the suit and the proposed defendants No.1 and 2 the subsequent purchasers subject to limitation of section 52 of Transfer of Property Act are appeared to be necessary parties in the matter. The same is held.

12. In the aforesaid premises, the approach of the trial Court dismissing the aforesaid application of the petitioner is not sustainable. Consequently, by allowing this petition the impugned order is set aside and by allowing the impugned application filed under Order 1 Rule 10 CPC, the petitioners are permitted to implead the proposed persons as defendants No.12 to 14. Such correction be carried out before the trial Court within one month from today. Pursuant to it, the existing respondents/defendants are also extended a liberty to amend their pleadings in the light of the aforesaid impleadment of the parties. Such exercise be carried out within further fifteen days from the date of incorporating the names of the aforesaid proposed defendants in the suit. The trial Court is directed that on filing such application for amendment within the aforesaid period the same be considered in compliance of the aforesaid direction in accordance with the procedure prescribed under the law. It is needless to say that impleading the aforementioned proposed defendants on record may be at liberty to file their written statements in the matter but subject to limitation and provision of section 52 of the Transfer of Property Act.

13. On perusing the aforesaid earlier judgment of this Court passed in Second Appeal, it is apparent that on remanding the matter the parties were extended liberty to amend their pleadings and to adduce their defence but neither of the parties was extended any liberty to implead any person as party in the suit, but in view of the aforesaid elaborate discussion so also the

circumstances of the matter and in the light of the aforesaid Full Bench decision of this Court the proposed persons *prima facie* are found to be necessary parties in the impugned suit and therefore, in addition to the aforesaid earlier judgment passed by this Court in Second Appeal by allowing this petition in the aforesaid manner the petitioners are permitted to implead the proposed persons as additional defendants in the suit.

14. Petition is allowed with the aforesaid observations directions and liberty.

Petition allowed.

I.L.R. [2015] M.P., 2859
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No. 17969/2013 (Jabalpur) decided on 22 October, 2013

GAJADHAR PRASAD ...Petitioner
Vs.
SMT. SHAKUNTALA MISHRA ...Respondent

A. ***Evidence Act (1 of 1872), Section 137 & 154 - Declaring a witness as hostile and permitting to cross examine him*** **- Affidavit under Order 18 Rule 4 C.P.C. was filed on 23.11.12 and witness was cross-examined on 03.09.2013 - No prayer was made either to declare him hostile or sought permission for re-examination - After 16 days, an application was filed for declaring the witness as hostile - Held - Permission could be given by the court till the witness is under examination in witness box and not at a later stage - Application rightly rejected. (Paras 5 & 6)**

क. साक्ष्य अधिनियम (1872 का 1), धारा 137 व 154 – साक्षी को पक्षद्रोही घोषित किये जाने एवं उसका प्रतिपरीक्षण किये जाने की अनुमति – सि.प्र.सं. के आदेश 18 नियम 4 के अंतर्गत 23.11.12 को शपथ–पत्र प्रस्तुत किया गया एवं 3.9.2013 को साक्षी का प्रतिपरीक्षण किया गया – न तो उसे पक्षद्रोही घोषित किये जाने की प्रार्थना की गई न ही पुनः परीक्षण की अनुमति चाही गयी – सोलह दिनों बाद, याची को पक्षद्रोही घोषित किये जाने हेतु एक आवेदन प्रस्तुत किया गया – अभिनिर्धारित – साक्षी के कटघरे में परीक्षणाधीन रहने तक न्यायालय द्वारा अनुमति दी जा सकती है एवं बाद के प्रक्रम पर नहीं – आवेदन उचित रूप से अस्वीकार किया गया।

B. ***Evidence Act (1 of 1872), Section 114(e) - Presumption***

regarding judicial acts **- It was argued that examination of the witness was carried out in absence of the counsel though his presence is marked, in the lack of the affidavit of the concerning advocate such version is not reliable - The court is bound to presume that the deposition of said witness was recorded in the presence of the petitioner's counsel in view of the provision of presumption enumerated u/s 114(e). (Para 8)**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 114(ई) – न्यायिक कार्यों से संबंधित उपधारणा – यह तर्क दिया गया कि साक्षी का परीक्षण अधिवक्ता की अनुपस्थिति में किया गया, यद्यपि उसकी उपस्थिति अंकित की गई है, संबंधित अधिवक्ता के शपथ–पत्र के अभाव में उक्त कथन विश्वसनीय नहीं है – धारा 114(ई) के अंतर्गत दिये गये उपधारणा के उपबंध को दृष्टिगत रखते हुए न्यायालय उपधारणा करने के लिये बाध्य है कि उक्त साक्षी के अभिसाक्ष्य याची के अधिवक्ता की उपस्थिति में दर्ज किये गये थे।

C. Constitution - Article 227 **- Scope of interference of High Court in the order passed by the trial court under its vested discretionary jurisdiction - Impugned order passed by the trial court under its vested discretionary jurisdiction - It is settled law that such orders passed by the sub-ordinate courts under the vested discretionary jurisdiction of such courts, should not be interfered at the stage of revision or writ petition under Article 227. (Para 9)**

ग. संविधान – अनुच्छेद 227 – विचारण न्यायालय द्वारा उसमें निहित वैवेकिक अधिकारिता में पारित आदेश में उच्च न्यायालय के हस्तक्षेप की व्याप्ति – विचारण न्यायालय द्वारा पारित किया गया आक्षेपित आदेश उसमें निहित वैवेकिक अधिकारिता के अंतर्गत है – यह सुस्थापित विधि है कि अधीनस्थ न्यायालयों द्वारा उनमें निहित वैवेकिक अधिकारिता के अंतर्गत पारित किये गये ऐसे आदेशों में पुनरीक्षण या अनुच्छेद 227 के अंतर्गत रिट याचिका के प्रक्रम पर हस्तक्षेप नहीं किया जाना चाहिये।

D. Practice **- Court can permit a person who calls a witness to put question to him which might be put in the cross-examination at any stage of the examination of witness - However, such permission could be given by the Court till the witness is under examination in the witness box and not at later stage. (Para 6)**

घ. पद्धति – न्यायालय ऐसे व्यक्ति को जो किसी साक्षी को बुलाता है, साक्षी के परीक्षण के किसी भी प्रक्रम पर उससे ऐसा प्रश्न पूछने के लिये अनुमति दे सकता है जो कि उसके प्रतिपरीक्षण में पूछा जा सकता हो – किंतु न्यायालय द्वारा

उक्त अनुमति साक्षी के कटघरे में परीक्षण के अधीन रहने तक दी जा सकती है और न कि बाद के प्रक्रम पर।

Cases referred :

AIR 1964 SC 1563, AIR 1973 SC 76, AIR 2011 SC 1353.

Kamlesh Dwivedi, for the petitioner.

(Supplied: Paragraph numbers)

ORDER

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

2. The petitioners/ defendants have filed this petition under Article 227 of the Constitution of India being aggrieved by the order dated 25.9.2013 passed by 1st Civil Judge Class-I, Churhat District Sidhi in C. S. No.91-A/ 2013, whereby their application filed under Section 154 of Evidence Act r/w Section 151 of CPC declaring their witness Shivnath to be hostile and permitting them to cross-examine him by placing the leading questions, has been dismissed.

3. The petitioners' counsel after taking me through the papers placed on record along with the impugned order including the deposition of the aforesaid witness Shivnath (Ann. P.2), argued that the affidavit of such witness under Order 18 Rule 4 of CPC was filed on behalf of the petitioners on 23.11.2012 and such witness was cross-examined on behalf of the private respondents on 3.9.2013. As alleged in such cross examination he has stated the fact contrary to his in chief stated in the aforesaid affidavit. Thereafter, the impugned application under Section 154 of Evidence. Act r/w Section 151 of CPC to declare such witness to be hostile and permitting them to cross examine him by leading questions was filed on 19.9.2013, but the same has been dismissed by the trial Court without considering the averments of the affidavit of such witness as well as the version of cross-examination. He further said that in view of the provision of Section 137 of Evidence Act and of settled position of law, if the witness of the party at any stage of his deposition states contrary to the earlier statements in chief or against the interest of the party, who called him then on making the request to declare such witness to be hostile and permit such party to cross examine such witness then the Court is bound to declare such witness to be hostile and permit the party like the petitioners to

cross-examine such witness. In support of his contention he also placed his reliance on a decided case of the Apex court in the matter of *Dahyabhai Chhaganbhai Thakkar Vs. State of Gujrat* reported in AIR 1964 SC 1563. He also argued that the examination of such witness Shivnath was carried out in the absence of the counsel of the petitioners, so in such premises aforesaid prayer could not be made on the same day. With these submission he prayed to allow his application by setting aside the impugned order by admitting and allowing this petition.

4. Having heard the counsel keeping in view his arguments, I have perused the papers placed on record along with the impugned order.

5. True it is, that the examination in-chief of witness Shivnath was submitted in the shape of the affidavit under Order 18 Rule 4 of CPC on 23.11.2012 and thereafter he was cross-examined on behalf of the respondents on 3.9.2013. It is apparent fact that after recording the cross-examination of such witness no prayer to declare this witness to be hostile was made on the same day. Even it was also not pointed out that any ambiguity has come in the cross-examination, for which re-examination of the witness is necessary. But near about after sixteen days from the date of cross examination the impugned application was filed. Before proceeding further, I would like to reproduce the relevant part of the aforesaid case of the Apex Court cited by the petitioners counsel. The same is read as under :-

> "8 .....The Court, therefore, can permit a person, who calls a witness, to put question to him which might be put in the cross-examination at any stage of the examination of the witness....."

6. In view of the aforesaid verdict of the Apex Court, it is apparent that Court can permit a person who calls a witness to put question to him which might be put in the cross-examination at any stage of the examination of the witness. In such premises such permission could be given by the Court till the witness is under examination in witness box and not at later stage. In the case at hand it is apparent that on 19.9.2013 the date of filing the impugned application the witness was not under examination in the witness box because his deposition was already recorded on 3.9.2013. Therefore, in view of aforesaid dictum of the Apex Court the impugned application could not have been allowed by the trial Court, because at appropriate stage neither such

objection was taken nor any prayer to declare such witness to be hostile was made. It is also apparent from the deposition sheet of the witness that after completion of his examination no prayer to ask any question in re-examination was made on behalf of the petitioners.

7. Section 154 of Evidence Act also provides that the Court may permit a party like petitioner who calls the witness to put question to him which might be put in the cross-examination of the adverse party, it does not speak to recall the witness to declare him to be hostile and permit the party, who called him to cross-examine him.

8. So far the arguments advanced by the petitioners' counsel that examination of such witness was carried out in the absence of the counsel of the petitioners is concerned, firstly in the lack of any affidavit of concerning advocate such version is not reliable, secondly as per proceeding of the trial court the presence of the counsel on behalf of the petitioners has been marked and in view of provision of presumption enumerated under Section 114 (e) of Evidence Act, which says that all the judicial or official act are presumed to be correct unless the contrary is proved, mere on oral argument such proceedings of the trial Court could not be disbelieved. The Court is bound to presume that the deposition of said witness was recorded in the presence of the petitioners' counsel. Hence, such argument of the counsel is failed.

9. In the aforesaid premises, it is apparent that the trial Court has not committed any error in passing the impugned order and dismissing the aforesaid application of the petitioners. Even otherwise the impugned order being passed by the trial Court under its vested discretionary jurisdiction could not be interfered in view of the settled proposition that when subordinate court passes any order under it's vested discretionary jurisdiction then same could not be interfered by the High Court either under the revisional jurisdiction vested under Section 115 of CPC or under the superintendent jurisdiction of this court vested under Article 227 of the Constitution of India. Such principle has been laid down by the Apex court in the matter of *Managing Director (MIG) Hindustan Aeronautics Ltd. Balanagar Hydrabad and another Vs. Ajit Prasad Tarway Manager (Purchase & Store) Hindustan Aeronautics Ltd. Balanagar Hydrabad* reported in AIR 1973 SC 76 and in the matter of *Kokkanda B. Poondacha Vs. K. D. Ganpathi* reported in AIR 2011 SC 1353,.

10. Apart the aforesaid it is apparent from the available record that after closing the evidence of both the parties the case is fixed for final argument. So in such premises it appears that the petitioner has filed the impugned application and after dismissal of the same this petition only to cause delay in disposal of the case. So, in such premises also this petition could not be entertained.

11. In view of the aforesaid discussion, I have not found any irregularity, illegality or any thing against the propriety of law in the order impugned. Consequently, this petition being devoid of any merits deserves to be and is hereby dismissed.

Petition dismissed.

I.L.R. [2015] M.P., 2864
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 2015/2014 (Jabalpur) decided on 6 February, 2014

BRIJESH SHUKLA & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

Service Law - Appointment - Qualification **- Petitioners although hold Diploma/Degree in Pharmacy but not registered with M.P. Pharmacy Council - Only registered Pharmacist can compound, prepare, mix or dispense any medicine on the prescription of a medical practitioner - Advertisement has to be considered in the stipulation contained in Pharmacy Act - Petitioners were rightly not considered - Petition dismissed. (Paras 4, 11 to 15)**

सेवा विधि – नियुक्ति – अर्हता – याचीगण यद्यपि फार्मेसी में डिप्लोमा / डिग्री धारक हैं किंतु म.प्र. फार्मेसी परिषद् के साथ पंजीकृत नहीं हैं –चिकित्सा व्यवसायी के औषधि संबंधी लिखित परामर्श पर केवल पंजीकृत फार्मासिस्ट ही किसी औषधि का सम्मिश्रण, निर्माण, मिश्रण या वितरण कर सकता है – फार्मेसी अधिनियम में अंतर्विष्ट शर्तों के अनुसार विज्ञापन पर विचार किया जाना चाहिए – याचीगण को उचित रूप से विचार में नहीं लिया गया – याचिका खारिज।

Cases referred :

(2003) 9 SCC 519, 2007(9) SCC 192, AIR 1997 SC 2131.

K.C. Ghildiyal, for the petitioners.

S.S. Bisen, G.A. for the State/respondent on Advance Notice.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- Heard on admission.

2. Communication dated 30.11.2013 by the Chief Medical & Health Officer, Rewa; whereby, the petitioners have been informed as to reasons why they are not eligible for being appointed as Pharmacist (contractual) has been assailed. The petitioners also seek quashment of select list dated 31.07.2013 and for direction to consider the candidature of the petitioners for appointment as Pharmacist (contractual).

3. Relevant facts in nutshell are that the applications were invited on 26.12.2012 for appointment as Pharmacists, Data Entry Operators and Support Staff on contract basis in National Rural Health Mission from the persons having requisite qualification. The last date for submitting the applications was 15.01.2013.

4. The petitioners though Diploma/Degree in Pharmacy were not registered with the Madhya Pradesh Pharmacy Council prior to 15.01.2013 were not considered which led the petitioners to challenge the select list dated 31.07.2013, vide writ petition No.13858/2013 on the ground that the registration with the Madhya Pradesh Pharmacy Council was not prescribed as necessary qualification in the advertisement and by clarification it was provided that the incumbent shall produce registration at the time of signing the agreement as such the rejection of their candidature on the ground that they were not having registration as on 15.01.2013 was per se illegal.

5. The writ petition was disposed of on 16.09.2013 in the following terms :

> "Having heard the learned counsel for the parties it is observed that the question as to what are the requisite, necessary qualifications for which marks had been given to each individual candidate for possessing the same, whether or not candidate possesses the qualification as on the cut off date prescribed, whether registration with the Pharmacy Council was an essential qualification or not and whether candidates have wrongly been awarded extra marks for diploma in Pharmacy, Degree in B.

Pharma and M. Pharma, are all questions which are required to be looked into by the appointing and selecting authority concerned. It is also observed that this court in W.P. No. 12417/2013 by order dated 31.07.2013 directed the authorities concerned to look into the grievance of the petitioners therein and pass a reasoned order and if necessary, also give an opportunity to those candidates who are adversely effected and the exercise is yet to be undertaken by the authorities.

In the circumstances and in the line of the order passed in W.P. No. 12417/13, the present petition is also disposed of with similar direction to the effect that in case the petitioners as well as the respondents no. 6 to 11, if so advised, file a representation before the authority concerned within 15 days from today bringing to his notice their grievance, the authority concerned shall consider and decide the same in accordance with law by passing a reasoned order and if so required, shall also give an opportunity to those candidates whose name is required to be removed from the select list in exercise of the aforesaid process undertaken by the respondents/authorities.

Let the aforesaid exercise be completed within six weeks.

It goes without saying that appointment if any, made, pursuant to the impugned order and select list dated 31.07.2013 and 14.08.2013 would be subject to the ultimate decision taken by the authorities."

6. It was in pursuant to the direction in writ petition No.13858/2013, the claim of the petitioners has been considered and since the petitioners were not registered with M.P. Pharmacy Council as on 15.1.2013, the last date for accepting the application, they have been informed vide impugned communication.

7. The question is whether in the given facts petitioners' non consideration for appointment warrants any interference.

8. The petitioners does not dispute that the cut off date for considering the eligibility criteria was 15.1.2013. This aspect is also in consonance with the principle of law laid down in *Shankar K. Mandal v. State of Bihar*:

(2003) 9 SCC 519 wherein it has been:

> "5. ... The principles culled out from the decisions of this Court (See *Ashok Kumar Sharma and ors. v. Chander Shekhar and Anr.* (1997 (4) SCC 18, *Bhupinderpal Singh v. State of Punjab* (2000(5) SCC 262 and *Jasbir Rani and ors. v. State of Punjab and Anr.* (2002 (1) SCC 124) are as follows:
>
> (1) The cut off date by reference to which the eligibility requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules.
>
> (2) If there is no cut off date appointed by the rules then such date shall be as appointed for the purpose in the advertisement calling for applications.
>
> (3) If there is no such date appointed then the eligibility criteria shall be applied by reference to the last date appointed by which the applications were to be received by the competent authority."

9. It is also a trite proposition that the determination of eligibility, if mistaken, may be corrected [see : *State of Punjab v. Swaran Kaur* 2007 (9) SCC 192].

10. The principle of law is settled that it is within the domain of the appointing authority to lay down requisite qualifications for recruitment to Government Service. [See *The Commissioner, Corporation of Madras v. Madras Corporation Teachers Mandram* (AIR 1997 SC 2131]. In The *Commissioner, Corporation of Madras* (supra) it has been held :

> "4. ... It is well settled legal position that it is the legal or executive policy of the Government to create a post or to prescribe the qualifications for the post. The Court or Tribunal is devoid of power to give such direction. ... "

11. Furthermore, Section 42 of the Pharmacy Act provides for that:

> "42. On or after such date as the State Government may by notification in the Official Gazette appoint in this behalf, no person other than a registered pharmacist shall compound,

prepare, mix, or dispense any medicine on the prescription of a medical practitioner.

Provided that this sub- section shall not apply to the dispensing by a medical practitioner of medicine for his own patients, or with the general or special sanction of the State Government, for the patients of another medical practitioner.

Provided further that where no such date is appointed by the Government of a State, this sub- section shall take effect in that State on the expiry of a period of 4[eight years] from the commencement of the Pharmacy (Amendment) Act, 1976."

12. Thus, it is only a registered Pharmacist who can compound, prepare, mix or dispense any medicine on the prescription of a medical practitioner.

13. The advertisement, in the considered opinion of this Court has to be interpreted and understood in the context of the stipulations contained in the Pharmacy Act, 1948 and the Rules framed thereunder.

14. In the case at hand as apparent from the advertisement that an incumbent must have diploma/degree in Pharmacy (अर्हकारी परीक्षा – फार्मेसी डिप्लोमा/डिग्री परीक्षा). The appointment since is on the post of pharmacist in National Rural Health Mission, it can safely be presumed that on appointment he has to compound, prepare, mix or dispense any medicine on the prescription of a medical practitioner, which as per statute can only be by a registered pharmacist. Such a qualification, i.e. having a registration is implicit in the qualification desired vide advertisement, learned counsel for the petitioner though has relied on a clause in the advertisement i.e.

"फार्मासिस्ट के पद पर मध्यप्रदेश फार्मेसी काउंसिल में पंजीयन का उल्लेख विज्ञापन में नही था अतः संविदा नियुक्ति के आदेश में यह उल्लेख किया जाये कि अभ्यर्थी अनुबंध हस्ताक्षर करने के पूर्व पंजीयन का अभिलेख प्रस्तुत करें।"

- to substantiate the submissions that the registration after cut off date till the date when agreement was to be entered. Close reading of the clause relied upon by the learned counsel however does not support the contention. The clause only suggest that since the stipulation about the registration with pharmacy council was not mentioned in the advertisement, the same must be ascertained at the time when appointment. Thus there is no extension of cut off date to acquire a registration.

15. In view whereof, the decision arrived at by the respondents that since on the cut-off date i.e. 15.1.2013, the petitioners were not registered as pharmacist, were not eligible cannot be faulted with.

Consequently, the petition, being not worth admitting, is dismissed in limine. No costs.

Petition dismissed.

I.L.R. [2015] M.P., 2869
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 12927/2009 (Jabalpur) decided on 17 June, 2014

LEELADHAR PURIA ...Petitioner
Vs.

GENERAL MANAGER WCL & ors. ...Respondents

***Payment of Gratuity Act (39 of 1972), Section 3(A)* - Grant of interest on account of delayed payment - Controlling Authority while granting gratuity also directed payment of interest on a finding that the employer was guilty of delayed payment - Appellate Authority set-aside order of grant of interest - Held - Since petitioner tendered resignation on 04.11.1998 and he approached respondent for grant of gratuity on 09.02.2009 which was paid on 16.03.2009 - There is no delay in payment - Delayed payment is due to the employee's own fault - Interest is not payable - Petition is dismissed. (Paras 3 & 9)**

उपदान संदाय अधिनियम (1972 का 39), धारा 3(ए) – विलंबित भुगतान के फलस्वरूप ब्याज प्रदान करना – नियंत्रणकर्ता प्राधिकारी ने उपदान देते समय इस निष्कर्ष के आधार पर कि नियोक्ता विलंबित भुगतान का दोषी था, ब्याज के भुगतान का भी निदेश दिया – अपीलीय प्राधिकारी ने ब्याज प्रदान करने के आदेश को अपास्त किया – अभिनिर्धारित – चूंकि याची ने 04.11.1998 को त्यागपत्र दिया तथा उसने उपदान के प्रदाय के लिए प्रत्यर्थी से 09.02.2009 को संपर्क किया जिसका उसे 16.03.2009 को भुगतान किया गया – भुगतान में कोई विलंब नहीं है – विलंबित भुगतान कर्मचारी की स्वयं की गलती के कारण हुआ है – ब्याज देय नहीं है – याचिका खारिज।

S.K. Dubey, for the petitioner.
Anoop Nair, for the respondents.

(Supplied: Paragraph numbers)

ORDER

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

2. Order dated 14.10.2009 passed by the Appellate Authority under Payment of Gratuity Act, 1972 to the extent it modifies the order dated 11.06.2009 passed by the controlling Authority under Payment of Gratuity Act, 1972 of granting interest on the gratuity is being assailed vide present writ petition.

3. Employed as Senior Technical Inspector with respondent Western Coal Fields ltd. petitioner tendered his resignation from services on 04.11.1998 and contested Madhya Pradesh State Assembly Election and elected as member of legislation Assembly. The petitioner was prosecuted by the Central Bureau of Investigation under Section 420, 468 read with Section 120 B of the Indian Penal Code and Section 5 (1)(d) read with Section 5(2) of Prevention of Corruption Act, 1947. The prosecution ended in acquital on 26.10.2007. During all these years i.e. from 1998 the petitioner did not apply for service gratuity. The application for gratuity vide form-I was filed on 09.02.2009 whereon the respondents prepared a cheque of Rs.1,58,470/- vide cheque No.412427 dated 16.03.2009. The petitioner, however, preferred an application before the Controlling Authority under Section 7(4) of 1972 Act. The Controlling Authority while affirming the entitlement of the petitioner of an amount of Rs. 1,58,470/- towards gratuity also directed for payment of Rs.166394/- interest @ 10% per annum from 04.11.1998 till 07.05.2009 on a finding that the employer was guilty of delayed payment. The reason find mention in the conclusion arrived at by the Controlling Authority vide order dated 11.06.2009 in the following terms :

> " दोनों पक्षों द्वारा प्रस्तुत किए गए अभिलेख एवं साक्ष्य के अवलोकन से स्पष्ट है कि कामगार के सेवाकाल, ग्राह्यता आदि के संबंध में कोई विवाद नहीं है । उक्त ग्रेज्युटी धनरशि सेवा समाप्ति की दिनांक 4/11/1998 के प्रभाव से देय हो जाती है । सेवायोजक द्वारा प्रस्तुत किए गए लिखित कथन के पेरा 2 के अनुसार आवेदक के विरूद्ध कोइ केस लंबित होने के कारण भुगतान नहीं किया गया। जबकि आवेदक के पत्र दिनांक 4/8/08 के अवलोकन से स्पष्ट है कि स्वयं सेवायोजक द्वारा कोई केस लंबित होने के कारण उपादान रिाश का भुगतान न किए जाने की सलाह दी गयी थी। इसके अतिरिक्त आवेदक को सेवायोजक द्वारा 6/6/82 से 20/9/83 तक निलंबित रखा गया तथा दिनांक 20/9/83 के प्रभाव से उक्त निलंबन समाप्त

किया गया । सेवायोजक द्वारा आवेदक का त्यागपत्र स्वीकार करते हुए दिनांक 4/11/1998 के प्रभाव से सेवामुक्त किया गया ।उपादान संदाय अधिनियम 1972 के प्रावधान के अंतर्गत देय उपादान राशि सेवा सामाप्ति की दिनांक से देय हो जाती है । सेवायोज द्वारा उक्त उपादान धनराशि के भुगतान में किए गए विलंब के संबंध में कोर्ट केस लंबित होने को आधार बनाया गया है परंतु इस संबंध में उनके द्वारा कोर्ट का कोइ आदेश प्रस्तुत नहीं किया गया । इसके अतिरिक्त सेवायोजक के द्वारा आवेदक को देय उपादन राशि नियंत्रण प्राधिकारी के समक्ष जमा किए जाने अथवा संबंधित न्यायालय द्वारा उपादान राशि रोके जाने के संबंध में कोई आदेश न होने पर भी कामगार को भुगतान न किए जाने के संबंध में कोइ कारण प्रस्तुत नहीं किये गया । इसके अतिरिक्त यह भी उल्लेखनीय है कि उपादान संदाय अधिनियम 1972 की धारा 13 के अंतर्गत किसी सिविल, रेवेन्यु अथवा किमिनल कोर्ट को उपादन धनराशि रोकने के संबंध में अधिकारं प्राप्त नहीं है । अतः उपादन राशि के भुगतान में हुए विलंब के लिए स्वयं सेवायोजक उत्तरदायी है क्योंकि उनके द्वारा कामगार को गलत सलाह दी गयी कि कोर्ट केस लंबित होने के कारण ग्रेज्युटी राशि का भुगतान नहीं किया जा सकता है ना ही उनके द्वारा कोई विवाद होने की स्थिति में यह धनराशि नियंत्रण प्राधिकारी के समक्ष जमा की गयी । सेवायोजक द्वारा उक्त धनराशि दिनांक 7/5/09 को चेक कमांक 412427 दिनांक 16/3/09 के माध्यम से भुगतान हेतु प्रस्तुत की गयी। अतः आवेदक ग्रेज्युटी राशि रूपये 158470/– पर दिनांक 4/11/1998 से दिनांक 7/.5/09 तक 10 प्रतिशत वार्षिक की दर से साधारण ब्याज रूपये 1,66,394/– भी प्राप्त करने के अधिकारी हैं । "

4. This order of grant of interest has been set aside by the Appellate Authority vide impugned order on the finding that the claimant did not apply in prescribed form for payment of gratuity within the time stipulated under statutory Rules.

5. The order is being assailed on the ground that the Appellate Authority committed grave error in holding that the petitioner is not entitled for the interest on the gratuity. Reliance is placed on the decision by a Division Bench judgment in Mohanlal S/o Nannomal v. Appellate Authority under Payment of Gratuity Act.

6. Respondents on their turn have supported the order passed by the Appellate Authority contending inter alia that the petitioner having not applied for gratuity under the Rules cannot but has to blame himself for non-entitlement of interest. In respect of the decision in *Mohanlal* (supra), it is contended that in the said case the issue was non grant of gratuity for not applying within

time and not as regard to interest on gratuity. It is contended that since the petitioner applied for gratuity after ten years, he is rightly been held not entitled for interest.

7. Considered the rival submissions.

8. Section 7 of 1972 Act makes provisions regarding determination of the amount of gratuity. Sub-Section (1) of Section 7 stipulates that a person who is eligible for payment of gratuity under the Act or any person authorized in writing to act on his behalf shall sent a written application to the employer, within such time and in such form as may be prescribed for payment of such gratuity. True it is that because of sub-section (2) and (3) an employee does not get disentitled for gratuity even if an application as referred to in sub-section (1) is not sent. It is sub-section (3A) which comes into operation in a case of delayed payment for grant of interest. It stipulates :

> "(3A) If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify :
>
> Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground."

9. Thus, where the fault is attributed to the employee and when established beyond doubt that the delayed payment is because of the employees own fault, no interest is payable.

10. In the case at hand having tendered resignation on 04.11.1998, petitioner contested and won the assembly elections. Thereafter he was proceeded against for an offence under Section 420, 468 read with Section 120 B of the Indian Penal Code and Section 5 (1)(d) read with Section 5(2) of Prevention of Corruption Act, 1947. It is only after his acquittal that he approached respondents on 09.02.2009 for gratuity which was paid on

16.03.2009. Thus from the date of sanction there was no delay in payment but the unexplained delay in raising the demand for gratuity being attributed to the petitioner, the Appellate Authority rightly disentitles him of interest.

11. The decision in *Mohanlal* (supra) relied by the petitioner turn on its own facts as in the said case the claimant was denied the gratuity on the ground of delay in raising the claim. This aspect is borne out from the facts narrated in prargraph 2 of the judgment, that, because of belated application the claim was denied holding that controlling Authority has no jurisdiction to entertain time barred claim. It was in the realm of these facts that an interpretation to section 7 and the Rules framed thereunder was caused, holding:

> " 5-A. It is wrongly held in the impugned order that Controlling Authority has no jurisdiction to accept belated filing of the annexures as that holding ignores vesting by the relevant Rule itself jurisdiction in Controlling Authority to act to the contrary and accept a belated application or for that matter belated filing of annexures to complete an application filed within time.
>
> 6. We revert to the other ground which prevailed with the Appellate Authority in golding that the claim petition was not maintainable because application filed with the employer by the employee under Rule 7(1) was time barred. That has a short and also a long answer. Sub-rule (5) of Rule 7 effectively rebuffs that contention. It provides that on the sole ground that gratuity was claimed late and application was not made within specified period to the employer the claim shall not be treated invalid. However, the same provision also contemplates that if there is any dispute and if there is any controversy in regard to belated application that shall be resolved by the Controlling Authority. Evidently, for the first time in appeal, the ground was urged to deprive the Controlling Authority of its jurisdiction envisaged under Rule 7(5) to deal and decide the controversy. That apart, it has been rightly urged by Shri Lahoti, appearing for the petitioner/employee, that neither Section 7(1) nor Rule 7(1) is mandatory. That is made clear not only by Sub-rule (5) of Rule 7, but by the other parts of

the parent provisions contained in Section 7. Sub-section (2) makes it employer's duty to determine the amount of gratuity and to give notice in writing to the employee of the gratuity payable "whether an application referred to in Sub-section (1) has been made or not". Sub-section (3) obligates the employer to arrange payment of the gratuity within the time prescribed and by Sub-rule (4) he is required to deposit with the Controlling Authority such amount as he admits to be payable by him against gratuity. It is noteworthy that neither Clause (a) of Sub-section (4) nor the explanation appended to it prescribes any period of limitation for making application to the Controlling Authority for deciding dispute of non-payment of gratuity."

12. The judgment in *Mohanlal* (supra) as apparent therefrom is not on the issue of grant of interest and is therefore not a precedent qua sub-section (3A) of Section 7 of 1972 Act, as would render any assistance to the petitioner.

13. Having thus considered, petition deserves to be and is hereby dismissed. No costs.

Petition dismissed.

I.L.R. [2015] M.P., 2874
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 8471/2014 (Jabalpur) decided on 19 June, 2014

K.K. TAMRAKAR ...Petitioner
Vs.
STATE OF M.P. & anr.. ...Respondents

***Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 10(i) to (iv) & Rule 12(2)(a) & (b) - Suspension Order* - Challenged on the ground of competency of Commissioner despite there being a delegation of power under Rule 12(2)(a) & (b) - Held - As per notification except Director all Class I Government Servant posted under the control of Commissioner and since the petitioner does not hold the post of Director, Commissioner being a disciplinary authority is empowered to place the petitioner under suspension. (Paras 15, 16)**

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 10

(i) से (iv) व नियम 12(2)(ए) व (बी) – निलंबन आदेश – नियम 12(2)(ए) व (बी) में शक्ति का प्रत्यायोजन होने के बावजूद आयुक्त की सक्षमता के आधार पर चुनौती दी गयी – अभिनिर्धारित – अधिसूचना के अनुसार संचालक के अतिरिक्त आयुक्त के नियंत्रण के अधीन पदस्थ सभी प्रथम श्रेणी शासकीय सेवक और चूंकि याची द्वारा संचालक का पद धारित नहीं किया गया है, आयुक्त एक अनुशासनात्मक प्राधिकारी होने के नाते याची को निलंबित करने के लिए सशक्त है।

Case referred :

AIR 1988 SC 959.

Rajendra Tiwari with *Sanjayram Tamrakar*, for the petitioner.
R.N. Singh with *Swapnil Ganguly*, Dy. G.A. for the respondent/State.

(Supplied: Paragraph numbers)

ORDER

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

2. Petition at the instance of Joint Director, Health Services Incharge Regional Director, is directed against the order dated 04.08.2014; whereby, he has been placed under suspension in contemplation of a departmental enquiry.

3. At the very outset learned senior counsel has confined the challenge only to the competency of Commissioner, Health Services in suspending the petitioner.

4. Since the order of suspension has been challenged only on the ground of competency, preliminary objection raised on behalf of respondent State of Madhya Pradesh of alternative remedy of statutory Appeal is over ruled.

5. Before dwelling on the contention on behalf of the petitioner that being in the cadre of Director, it is beyond the powers of the Commissioner, Health Services despite there being a delegation of power in his favour under Rule 12(2) (a) and (b) of the Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules 1966 to impose penalties specified in clause (I) to (IV) of Rule 10 on class-I Government servant, to place the petitioner under suspension, apt it would be take note of provisions contained in the Madhya Pradesh Public Health and Family Welfare (Gazetted) services Recruitment Rules 2007 which is applicable to the petitioner and the relevant provisions

contained in 1966 Rules.

6. Rule 5 of the Rules 2007 specifies the classification of service, the scale of pay attached thereto and the number of posts included in the services in accordance with the provisions contained in Schedule-I.

7. As per Schedule-I, 4 posts of Director in grade Rs.37400-67000 + grade pay 10000; 10 posts of Director, State Training and Management Institute Gwalior/Regional Director, Health Services/ Director State Blood Transfusion Council/Additional Director State Aids Cell in grade Rs. 37400-67000 + grade pay 8900, 01 post of Director, State Health and Information Education & Communication Bureau, Bhopal in grade Rs.37400-67000 + grade pay 8700; 13 posts of Joint Director, Health Services (Divisional Officers 07/ Head Quarter 6) are included in group A class-I posts in grade pay 37400-67000 + grade pay 7600 (besides, other posts specified in Schedule-I which we are not presently concerned with).

8. Contention on behalf of the petitioner is that being a Joint Director, he is in the cadre of Director, therefore, exempted from being proceeded against by the Commissioner, Health Services.

9. The cadre in a service jurisprudence as held in *Chakradhar vs. State of Bihar*: AIR 1988 SC 959, has a definite legal connotation.

> "7-A. In service jurisprudence, the term 'cadre' has a definite legal connotation. In the legal sense, the word 'cadre' is not synonymous with 'service'. Fundamental Rule 9(4) defines the word 'cadre' to mean the strength of a service or part of a service sanctioned as a separate unit. The post of the Director which is the highest post in the directorate, is carried on a higher grade or scale, while the posts of Deputy Directors are borne in a lower grade or scale and therefore constitute two distinct cadres or grades. It is open to the Government to constitute as many cadres in any particular service as it may choose according to the administrative convenience and expediency and it cannot be said that the establishment of the Directorate constituted the formation of a joint cadre of the Director and the Deputy Directors because the posts are not interchangeable and the incumbents do not perform the same duties, carry the same responsibilities or draw the same pay. The conclusion is irresistible that the posts of the

Director and those of the Deputy Directors constitute different cadres of the Service. It is manifest that the post of the Director of Indigenous Medicine, which is the highest post in the Directorate carried on a higher grade or scale, could not possibly be equated with those of the Deputy Directors on a lower grade or scale."

10. Rule 9(4) of Madhya Pradesh Fundamental Rules defines cadre as "the strength of a service or a part of a service sanctioned as a separate unit."

11. Thus, a cadre is not synonymous to post, as construed by and on behalf of the petitioner.

12. The petitioner being a Joint Director in a grade Rs.15600-39100+Grade Pay 7600, though placed in group A Class-I service alongwith the Directors and even the Chief Medical & Health Officers and other officers lower in rank than the petitioner as specified in Schedule-I, it cannot be said that the petitioner is holding the post of Director.

13. Now, coming to relevant provisions of Rules 1966.

Rule 2(d) of 1966 Rules defines "disciplinary authority" to mean :

"(d) 'disciplinary authority' means the authority competent under these rules to impose on a Government servant any of the penalties specified in rule 10;"

Clause (a) and (b) of Sub-Rule (2) of Rule 12 stipulates :

"(2) Without prejudice to the provisions of Sub-rule (1), but subject to the provisions of Sub-rule (3), any of the penalties specified in Rule 10 may be imposed on-

(a) a member of State Civil Service by the Appointing Authority or the authority specified in the Schedule in this behalf or by any other authority empowered in this behalf by a general or special order of the Governor;

(b) a person appointed to a State Civil post by the authority specified in this behalf by a general or special order of the Governor, or by the Appointing Authority or the authority specified in the Schedule in this behalf."

Sub-Rule (1) of Rule 9 of 1966 Rules specifies :

> "9 (1) The appointing authority or any authority to which it is subordinate or the disciplinary authority or any other authority empowered in that behalf by the Governor by general or special order, may place a Government servant under suspension -
>
> (a) where a disciplinary proceeding against him is contemplated or is pending, or
>
> (b) where a case against him in respect of any criminal offence is under investigation, inquiry of trial:"

14. That a gazette notification dated 21.03.2006 is brought on record as Annexure R-1 with the return which delegates certain disciplinary powers to the Commissioner, Health Services in the following terms :

> "No.C-6-6-2005-3 EK. - In pursuance of clause (a) and (b) of sub-rule (2) of Rule 12 of the Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966, the Governor of Madhya Pradesh hereby empowers Commissioner, Health Services, Public Health and Family Welfare Department, Madhya Pradesh to impose the penalties specified in clauses (I) to (IV) of Rule 10 of the said rules on Class I (except the officers of the rank of Director) Government servants posted under his control."

15. Careful reading of the notification would reveal that except the officers holding the rank of Director, all Class-I Government servant posted under the control of Commissioner, Health Services, can be visited with the penalty specified in clause (I) to (IV) of Rule 10 of 1966 Rules.

16. Since the petitioner does not hold the rank of Director, it is well within the powers of Commissioner, Health Services, being a disciplinary Authority, to place him under suspension.

17. For these reasons, no interference is caused with the suspension of the petitioner.

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

Petition dismissed.

I.L.R. [2015] M.P., 2879
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 14943/2010 (Jabalpur) decided on 20 June, 2014

AJAY KUMAR SAHU ...Petitioner
Vs.
UNION OF INDIA & ors. ...Respondents

Service Law - Appointment **- Petitioner on being examined found fit for the post of Constable - Medical Admit Card for medical examination was issued to him - However same was received by him after the examination - Therefore, he could not participate in the medical examination - On being approached respondent declined him to undergo medical examination - Held - Since there is no denial of the fact that the letter issued for medical examination was delivered to the petitioner after the scheduled date of medical examination, denial of an opportunity for medical examination is not justified - Respondent shall give one opportunity and thereafter shall consider him for appointment on the basis of his performance. (Paras 8, 9 & 10)**

सेवा विधि – नियुक्ति – याची परीक्षण उपरांत आरक्षक के पद हेतु उपयुक्त पाया गया – चिकित्सकीय परीक्षण हेतु उसे चिकित्सा प्रवेश पत्र जारी किया गया – किंतु उसे वह परीक्षण के पश्चात् प्राप्त हुआ – अतः, वह चिकित्सकीय परीक्षण में शामिल नहीं हो सका – संपर्क करने पर प्रत्यर्थी ने उसका चिकित्सकीय परीक्षण करवाने से इंकार कर दिया – अभिनिर्धारित – चूंकि इस तथ्य को अस्वीकार नहीं किया गया है कि चिकित्सकीय परीक्षण हेतु जारी किया गया पत्र याची को चिकित्सकीय परीक्षण के लिये नियत तिथि के पश्चात् प्राप्त हुआ था, चिकित्सकीय परीक्षण के अवसर को अस्वीकार करना न्यायसंगत नहीं है – प्रतिवादी एक अवसर प्रदान करेगा तथा तत्पश्चात् उसके प्रदर्शन के आधार पर नियुक्ति हेतु उसका विचार करेगा।

K.N. Pethia, for the petitioner.
Surendra Pratap Singh, for the respondents.

(Supplied: Paragraph numbers)

ORDER

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

2. The question which arises for consideration is whether a candidate

can be deprived from consideration for appointment merely because he could not report for medical fitness examination on the scheduled date because the notice through ordinary post was not received in time.

3. Having applied for the post of Constable, Central Reserve Protection Force at Bhopal, the petitioner was examined on 29.11.2009 at Group Centre CRPF, Bangarasiyaf, Bhopal. Being found suitable, the petitioner was issued Medical Admit Card for medical examination scheduled on 11.09.2010 on 23.08.2010.

4. Evidently, the Medical Admit Card was sent through ordinary post, which the petitioner having received on 05.10.2010, he could not participate in the medical examination scheduled for 11.09.2010. On being approached, the respondents declined him to undergo medical examination.

5. Aggrieved, present petition has been filed seeking direction to respondents to permit him to undergo the medical examination and consider him for appointment on the post of Constable (General Duty).

6. It is contended on behalf of the petitioner that it was none of his fault in not appearing for medical examination on the scheduled date as the Medical Admit Card was received on 05.10.2010. Petitioner relies on the certificate issued by the Post Master, respondent No.4.

7. That, respondent No.4 in his return has admitted the fact that the letter sent by respondent No.2 by ordinary post was served on the petitioner on 05.10.2010. In paragraph 3,4 and 5 of the return it is stated by respondent No.4 that :

> "3. That, the answering respondent at the outset very humbly submits that the envelop which has been received by the petitioner through post office Ranital B.P., under Majholi S.O.Katni, and he himself filed a certificate Annex.P-4 by certificate dated 05.10.2010 that the said envelope was delivered by the post office Ranital on 05.10.2010 to him about 02.00 pm Copy of the GDS, MCDA dated 05.10.2010 has been filed by the petitioner which is disclosed the said fact in which the petitioner sought a relief against the answering respondent.
>
> 4. It is further submitted that the petitioner enclosed the

photocopy of the envelope which was enclosed with the application for which was sent by the respondent No.1 to 3 "by ordinary post" in which the petitioner himself affixed the Ordinary Stamp. It is pertinent to mention here that there is no such provision in the establishment of the answering respondent for maintaining the record of ordinary mail or letters in any of the post office. The ordinary letters are received and delivered immediately by the concerned post offices.

5. It is submitted that the respondent No.4 have effected that delivery of said ordinary letter to the petitioner and he has issued a certificate to the effect that the said letter has been delivered to petitioner on 05.10.2010 on the basis of the statement and the certificate issued by the Respondent No.4. It can be said that the said letter has been delivered to the petitioner on 05.10.2010. It is further submitted that it appears that the Respondent No.4 has not committed any illegality or irregularity by delivering the said envelope to the petitioner, because the date and time has been mentioned in the certificate. Hence it appears that after receiving the above mentioned envelope he had acted very promptly and delivered to the petitioner on the date and time which is mentioned in the certificate."

8. Though it is contended on behalf of respondents that due to incomplete address the delivery of letter is belated and the same is attributed to the petitioner. However, since there is no denial of fact that the letter sent by ordinary post was delivered by the postal department after the scheduled date, the petitioner cannot be blamed for not appearing for medical examination on the scheduled date.

9. In the realm of these facts, in the considered opinion of this Court, the respondents are not justified in not giving the petitioner an opportunity for medical examination.

10. Therefore, it is ordered that the respondents shall give one opportunity to the petitioner for medical examination on a date to be fixed by respondent No.2 and duly intimated to the petitioner at his address given in the petition by Registered letter acknowledgment due. And thereafter shall consider him

for appointment as Constable (General Duty) on the basis of his performance in the examination held on 29.11.2009.

11. Let the steps be taken within 60 days from the date of communication of this order.

12. The petition is finally disposed of in above terms.

Petition disposed of.

I.L.R. [2015] M.P., 2882
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 2984/2014 (Gwalior) decided on 24 June, 2014

BAIJANTI BAI (SMT.) ...Petitioner
Vs.
M.P. KSHETRIYA VIDYUT VITRAN CO. LTD. & ors. ...Respondents

***Electricity Act (36 of 2003), Sections 135 & 154 - Demand Notice - Civil Liability* - Complaint was filed for theft of Electricity - Special Court after full trial acquitted the petitioner - Special Court is bound and under statutory duty to determine civil liability - After the acquittal, the authorities have no power to assess the civil liability - Provisional assessment cannot be pressed into service against petitioner - Petition allowed. (Paras 11 to 13)**

विद्युत अधिनियम (2003 का 36), धाराऐं 135 व 154 – मांग का सूचना पत्र – सिविल दायित्व – विद्युत चोरी की शिकायत प्रस्तुत की गई थी – विशेष न्यायालय ने संपूर्ण विचारण पश्चात् याची को दोषमुक्त किया – विशेष न्यायालय, सिविल दायित्व का निर्धारण करने के लिये बाध्य है एवं कानूनी कर्त्तव्यबद्धता के अधीन है – दोषमुक्ति के पश्चात्, प्राधिकारियों के पास सिविल दायित्व निर्धारण की शक्ति नहीं है – अनंतिम निर्धारण को याची के विरूद्ध उपयोग में नहीं लाया जा सकता – याचिका मंजूर।

Cases referred :

1987 (II) MPWN 67, 1989 (II) MPWN 54, 2009(1) MPLJ 366, AIR 2003 SC 1354, AIR 2010 All. 115, AIR 1959 SC 93, 2002(1) SCC 633, 2011(2) MPLJ 690.

Chandresh Shrivastava, for the petitioner.
Anil Mishra, for the respondents.

ORDER

SUJOY PAUL, J. :- This petition filed under Article 226 of the Constitution is directed against the order Annexure P/4 whereby respondents have provisionally assessed Rs. 19302/- against the petitioner relating to her alleged act of electricity theft.

2. The case of the petitioner is that she is residing in the residential premises situated in Khurje Wala Mohalla, Lashkar, Gwalior. She occupied the residential premises after the death of her husband. It is urged that a complaint under Section 135 of the Electricity Act, 2003 is filed against the petitioner. The said complain was frivolous and therefore, the Special Court in Special Session No. 1083/2012 exonerated the petitioner. It is submitted that after her exoneration respondents are not justified in asking payment from the petitioner which was assessed in provisional assessment order dated 07.10.2011 (Annexure P/4). It is submitted that petitioner has already discharged her entire civil liabilities by making payment of electricity bills. Copy of bill dated 26.07.2013 is filed as Annexure P/5.

3. Shri Chandresh Shrivastava, learned counsel for the petitioner submits that electricity is essential amenity in present scenario. Depriving any citizen from electricity means violation of fundamental rights flowing from Article 21 of the Constitution. To bolseter his submission he relied on 1987 (II) MPWN SN 67 *(Kallo Vs. Ratan Devi)* and 1989 (II) MPWN SN 54 *(Lallamal Sharma Vs. Islami Begum)*. By relying on 2009 (1) MPLJ 366 *(Sangita Vs. State of M.P.)* Shri Chandresh Shrivastava submits that respondents have no authority, jurisdiction and competence to press Annexure P/4 into service after petitioner's exoneration by Special Court.

4. *Per Contra*, Shri Anil Mishra, learned counsel for the other side supported the order Annexure P/4. Shri Mishra submits that civil liabilities and duties are prevailing against the petitioner and therefore, action of the respondents is in accordance with law. He heavily relied on the judgment of Supreme Court reported in AIR 2003 SC 1354 *(J.M.D. Alloys Ltd. Appellant Vs. Bihar State Electricity Board and others)* He also relied on the judgment of Allahabad High Court reported in AIR 2010 Allahabad 115 *(Rais Ahmad Vs. U.P. Power Corporation Ltd. & Ors.)*. By placing reliance on letters dated 12.08.2010 Annexure R/1 and R/2 written by Special Judge (Electricty Act) it is urged that this letter of the learned presiding Judge makes

it clear that in view of judgment of Supreme Court in *JMD Alloys* (supra) despite exoneration of the accused in criminal case, civil liability continues and it is open to respondent company to recover the said civil liability.

5. No other point is pressed by learned counsel for the parties.

6. I have bestowed my anxious consideration on the rival contentions of the parties and perused the record.

7. The bone of contention of petitioner is that pursuant to provisional assessment order dated 07.10.2011, a complaint Annexure P/3 was filed before Special Judge which was registered as Special Session case No. 1083/2012. In para 8 of this complain it was prayed that civil liabilities be determined and recovered from the present petitioner. The Court below dismissed the said complaint on 07.03.2013. Petitioner submits that after adjudication of matter by Special Court and in absence of determining and imposing any civil liability on the petitioner, it is no more open to the respondents to implement Annexure P/4. Whereas the stand of the respondents is that it can be done in the light of Judgment of Supreme Court and Allahabad High Court, quoted above.

8. In case of *JMD* (supra) a FIR was lodged against the appellant. Criminal case was registered under Section 39/44 of the Indian Electricity Act which culminated in submission of a final report. The final report which was produced before the Magistrate was accepted and appellant was exonerated. The Apex Court in para 13 of said judgment opined that mere acceptance of final report by the Magistrate cannot amount to a finding by the Criminal Court that theft of electricity was not committed. The accused was not even summoned, no charge was framed nor any evidence was recorded. In such a situation, it cannot be held that the Criminal Court has recorded any finding to the effect that the petitioner has not committed theft of electricity. That apart, the purpose of a trial under Section 39/44 of the Indian Electricity Act is entirely different and the object is to punish and sentence the person who is alleged to have committed the offence. The trial of an accused in a criminal case can have no bearing in the matter of assessment made in accordance with the tariff of the value of electricity dishonestly abstracted or consumed. Therefore, the contention raised on the basis of alleged acceptance of the final report in the criminal case has absolutely no merit.

9. Aforesaid paragraph of Judgment of *JMD Alloys*(supra) makes it clear

that criminal case was closed because final report was accepted. No full fledged trial took place. Apart from this, purpose of trial under Section 39/34 of Electricty Act is entirely different and its object is to punish and sentence the person who is alleged to have committed the offence. A minute reading of this judgment further shows that in JMD, the Chief Engineer of electricity company issued show cause notice to JMD Alloys regarding assessment of amount with a view to give opportunity to put forth its case. After hearing the JMD Alloys, a final amount was determined by Chief Engineer. On the basis of these findings, the assessment has been made about compensatory amount under Clause 16.9 of the Tariff. Allahabad High Court in aforesaid judgment relied on the judgment of Supreme Court in the case of *JMD Alloys*. In that case also no full fledged trial took place and criminal case came to an end because of acceptance of closure report.

10. In the present case, the petitioner / accused was summoned before the Special Court. Evidence was led and after marshaling the evidence, charges were not found proved against the petitioner. It is not a case where acquittal is based on acceptance of closure report. Thus, in the present factual scenario; judgment of *JMD Alloys* and Allahabad High Court in *Rais Ahmad* (supra) cannot be pressed into service. Apart from this, it is apt to mention that Section 135 of the Electricity Act deals with theft of electricity. Section 152 deals with compounding of offence. Section 153 is an enabling provision for constitution of Special Court. State Government has appointed Special Courts for the purpose of speedy trial of offenses referred to in Section 135 to 140 and Section 150 of the Electricity Act. The procedure and power of Special Court is defined in section 154. The word "civil liability" is defined in explanation to sub Section 6 of Section 154 which reads as under :-

> Explanation – For the purposes of this section. "civil liability" means loss or damage incurred by the Board or licensee or the concerned person, as the case may be, due to the commission of an offence referred to in Sections 135 to 139.

Section 154 (5) and (6) read as under :-

154. Procedure and power of Special Court :-

> (5). The Special Court shall determine the civil liability against a consumer or a person in terms of money for theft of energy which

shall not be less than an amount equivalent to two times of the tariff rate applicable for a period of twelve months preceding the date of detection of theft of energy or the exact period of theft if determined whichever is less and the amount of civil liability so determined shall be recovered as if it were a decree of civil court.

(6) In case the civil liability so determined finally by the Special Court is less than the amount deposited by the consumer or the person, the excess amount so deposited by the consumer or the person, to the Board or licensee or the concerned person, as the case may be, shall be refunded by the Board or licensee or the concerned person as the case may be, within a fortnight from the date of communication of the order of the Special Court together with interest at the prevailing Reserve Bank of India prime leading rate for the period from the date of such deposit till the date of payment. **(Emphasis Supplied)**

11. Sub section 5 of Section 154 of the Electricty Act makes it clear that it is obligatory and mandatory on the part of Special Court to determine the civil liability. It is noteworthy that by Act 26 of 2007 (w.e.f. 15 .06.2007) legislature has substituted the words " Special Court may" and in lieu thereof inserted the words " Special Court shall". Thus, intention of the legislature is clear that Special Courts are bound and under a statutory and mandatory duty to determine the civil liability against the consumer. Special Court in the present case conducted a full fledged trial and exonerated the petitioner. It has not determined the civil liability against the petitioner. Civil liability needs to be determined by Special Court as per Section 154 of the Act. If it has failed to do so, it cannot be permitted to be determined in any other manner and therefore, provisional assessment cannot be pressed into service after delivering the judgment by the Special Court. This is settled in law that if something is required to be done in a particular manner pursuant to a legal provision, it has to be done in the same manner or not at all (See : AIR 1959 SC 93 *(Shri Baru Ram Vs. Smt. Prasanni and others),* 2002 (1) SCC 633 *(Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others),* 2011 (2) MPLJ 690 *(Satyanjay Tripathi & Anr. Vs. Banarasi Devi).*

12. At the cost of repetition, in the opinion of this Court, in the present case, the petitioner was subjected to full fledged trial before the Special court. The Special Court has not come to the conclusion that petitioner has committed any offence or caused any loss or damage to the Board. In absence of any

"civil liability" determined by the Court, Annexure P/4 cannot be enforced. If respondents were aggrieved by the order of Special Court in exonerating the petitioner or in not determining the "civil liability", they could have challenged the said order before before the higher forum. In absence thereto, Annexure P/4 cannot be pressed into service.

13. In *JMD Alloys* (supra) assessment was made by the Chief Engineer after affording adequate opportunity to the appellant therein. The acquittal in that case was solely based on acceptance of closure report. No full fledged trial was conducted. Judgment of *JMD Alloys* (supra) and Judgment of Allahabad High Court in *Rais Ahmad* (supra) are based on acceptance of closure report and therefore, have no application in the facts and circumstances of the present case. So far letters dated 12.08.2010 Annexure R/1 and R/2 written by Special Judge (Electricity Act) Gwalior are concerned, said letters are also of no assistance because in the said letters reliance is placed on *JMD Alloys* and *Rais Ahmad* (supra). Apart from this, this is settled in law that Judges speak through their judgments. There is no need to pass any executive / administrative order like Annexure R/1 & R/2 to explain the legal position. At the cost of repetition, I am constrained to observe that the Special Judge Electricity Act was not required to write such letters Annexure R/1 & R/2. The general letters Annexures R/1 & R/2 are of no assistance to the respondents in the present case. After delivering the judgment Annexure P/2, the Special Judge Electricity Act has become functious officio. It is his judgment which will determine the rights and liabilities of the parties interse. No executive order like Annexure R/1 & R/2 can determine the rights and liabilities.

14. As analyzed above, respondents have erred in taking the stand that "civil liability" is still there against the petitioner based on Annexure P/4. Thus, petition deserves to be and is accordingly allowed. It is made clear that after the judgment (in absence of challenging it before appropriate legal forum) in favour of the petitioner dated 07.03.2013, it is not open to the respondents to take any action based on Annexure P/4 against the petitioner. Thus, Annexure P/4 cannot be pressed into service against the petitioner in any manner whatsoever.

15. Petition is allowed to the extent indicated above. No Costs.

Petition allowed.

I.L.R. [2015] M.P., 2888
WRIT PETITION
Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice Alok Aradhe
W.P. No. 14833/2013 (Jabalpur) decided on 8 September, 2014

GAZETTED HEADMASTERS PRADESHIK SANGH
MADHYA PRADESH ...Petitioner
Vs.
STATE OF M.P. ...Respondent

(Alongwith W.P. Nos.15237/2013, 15394/2013, 15633/2013, 18519/2013, 15380/2013, 15478/2013, 15590/2013, 16307/2013, 12600/2014, 15256/2013, 15270/2013, 15355/2013, 15443/2013, 15475/2013, 15797/2013, 16257/2013, 16291/2013, 16292/2013, 16598/2013, 16621/2013, 16731/2013, 16867/2013, 16967/2013, 16968/2013, 17006/2013(s), 17367/2013, 17458/2013, 17586/2013, 17789/2013(s), 17887/2013, 18260/2013, 18787/2013, 18793/2013, 19038/2013, 19660/2013, 19663/2013, 19672/2013, 19732/2013, 3286/2014, 14747/2013, 15161/2013, 15266/2013, 15344/2013, 15351/2013, 15370/2013, 15431/2013, 15449/2013, 15456/2013, 15528/2013, 15538/2013, 15547/2013, 15597/2013, 15690/2013, 15753/2013, 16258/2013, 16298/2013, 18092/2013, 18438/2013, 18759/2013, 22203/2013, 18278/2013, 18305/2013, 17068/2013, 16099/2013, 16467/2013, 20635/2013, 1573/2014, 4323/2014, 4840/2014, 4846/2014, 15054/2013, 15440/2013, 15570/2013, 15955/2013, 16423/2013, 16430/2013, 16434/2013, 16435/2013, 16466/2013, 16680/2013, 17041/2013, 17060/2013, 17097/2013, 17180/2013, 17689/2013, 16676/2013, 17768/2013, 17972/2013, 18428/2013, 18590/2013, 18648/2013, 18791/2013, 18990/2013, 19666/2013. 348/2014, 800/2014, 6692/2014, 6693/2014, 15814/2013.)

Educational Service (School Branch) Recruitment and Promotion Rules, M.P. 1982, Rule 11-B, Panchayat Adhyapak Samvarg (Employment & Conditions of Service) Rules M.P. 2008, Rule 5 and Constitution - Article 16 **- Eligibility for recruitment to the post of Area Education Officer - Upper Division Teacher, Head Master of Middle Schools and 'Adhyapaks' of local body cadre who have 5 years of overall teaching experience must be considered to be eligible to**

appear in examination - 5 years teaching experience on their "Respective Posts" for appointment on the post of Area Education Officer is quashed.
(Paras 40 & 42)

शैक्षिक सेवा (विद्यालय शाखा) भर्ती तथा पदोन्नति नियम, म.प्र. 1982, नियम 11–बी, पंचायत अध्यापक संवर्ग (नियोजन तथा सेवा की शर्तें) नियम म.प्र. 2008, नियम 5 एवं संविधान – अनुच्छेद 16 – क्षेत्रीय शिक्षा अधिकारी के पद पर भर्ती के लिये पात्रता – उच्च श्रेणी शिक्षक, माध्यमिक शालाओं के प्रधान अध्यापक तथा स्थानीय निकाय संवर्ग के 'अध्यापक' जिन्हें कुल 5 वर्ष का शिक्षण अनुभव है, को परीक्षा में बैठने की पात्रता हेतु विचार किया जाना चाहिए – क्षेत्रीय शिक्षा अधिकारी के पद पर नियुक्ति के लिए उनके "संबंधित पदों" पर 5 वर्ष के शिक्षण अनुभव को अभिखंडित किया जाता है।

Cases referred :

AIR 1988 SC 1033, (1990) Supp. SCC 688, (2013) 2 SCC 772, AIR 2010 SC 1001, AIR 2008 SC 3182, AIR 2014 SC 2140, AIR 2014 SC 2175, 2009(2) MPHT 277, (1998) 4 SCC 598, (2010) 3 SCC 314, (2010) 5 SCC 349, (1970) 1 SCC 377, (2003) 2 SCC 632, (2008) 9 SCC 242, (2007) 10 SCC 269, (1974) 1 SCC 19, AIR 1996 SC 1627, 2000 Lab.I.C. 2152, (1980) 3 SCC 29, (2008) 2 SCC 65, (1991) 2 SCC 295, (2003) 6 SCC 535, (1994) 1 SCC 587, (1981) 4 SCC 130, (1991) 1 SCC 505, (2014) 5 SCC 101, (1985) 2 All ER 355, AIR 1955 SC 661, AIR 2004 SC 1340.

Rajendra Tiwari with *Pratichi Dubey,* for the petitioner in W.P. No. 17367/2013.

V.K. Shukla, for the petitioners in W.P. Nos. 15797/2013, 16731/2013,1573/2014.

D.K. Dixit, for the petitioners in W.P. No. 15270/2013, 15449/2013..

R.K. Samaiya, for the petitioner in W.P. No. 15753/2013.

P.N. Dubey, for the petitioner in W.P. No. 15370/2013.

Sanjay K. Agrawal, for the petitioners in W.P. Nos. 16867/2013 & 18260/2013.

Alok Pathak & Rajendra Mishra, for the petitioners in W.P. Nos. 16423/2013, 16430/2013, 16434/2013, 16435/2013, 18648/2013.

Praveen Verma, for the petitioners in W.P. Nos. 17586/2013,

18092/2013.

Mahendra Pateriya, for the petitioner in W.P. No. 17458/2013.

Jitendra Tiwari, for the petitioner in W.P. No. 15440/2013.

Shashank Verma, for the petitioner in W.P. No. 14833/2013.

Anshuman Singh, for the petitioners in W.P. Nos.12600/2014, 15380/2014.

Rajneesh Gupta, for the petitioners in W.P. Nos. 16676/2013, 12600/2014.

Nikhil Tiwari, for the petitioner in W.P. No. 15355/2013.

Rajesh Dubey, for the petitioners in W.P. Nos. 15478/2013, 15161/2013, 15237/2013, 16292/2013, 17789/2013.

Manoj Soni, for the petitioner in W.P. No. 15814/2013.

M.K. Rajak, for the petitioners in W.P. No. 16621/2013.

Anand Sharma, for the petitioners in W.P. Nos. 18438/2013, 19038/2013.

S.D. Mishra, for the petitioners in W.P.Nos. 18787/2013, 18793/2013.

Jitendra Arya, for the petitioner in W.P. No. 14747/2013.

Sudha Gautam, for the petitioners in W.P. No. 15431/2013, 16298/2013, 4323/2014.

Vinod Mishra, for the petitioner in W.P. No. 17972/2013.

Rohtash Babu Patel, for the petitioner in W.P. No. 18590/2013.

V.D.S. Chauhan, for the petitioners in W.P. Nos. 15256/2013, 15590/2013, 16257/2013.

Samdarshi Tiwari, G.A. for the respondents.

Sanjay Agrawal & Hitendra Singh, for the interveners in W.P. No. 14833/2013.

ORDER

The Order of the Court was delivered by : ALOK ARADHE, J. :- In this bunch of writ petitions the subject matter of challenge is order dated 25.7.2013 issued in exercise of executive power by the State Government by which the State Government has constituted State Education Service as well as the notification dated 22.8.2013 by which the M.P. Education Service (School Branch) Recruitment and Promotion Rules, 1982 have been amended and the advertisement dated dated 22.8.2013 by which the process of recruitment to the post of Area Education Officer has been set in motion. The petitioner in Writ Petition No.12600/2014 seeks quashment of selection process undertaken by M.P. On-line Limited pursuant to the aforesaid advertisement. The petitioner in W.P.No.17367/2013 has challenged the validity of the order dated 16.9.2013 issued by School Education Department which provides that the teaching experience of 'Adhyapaks' should be counted with effect from 01.4.2007 as 'Adhyapak' cadre has been constituted from the aforesaid date. The petitioners have also assailed the validity of the clarificatory memo dated 24.8.2013 issued by Commissioner, Public Instructions, Government of Madhya Pradesh, Bhopal by which clarification has been issued in respect of the qualification with regard to teaching experience as prescribed for recruitment to the post of Area Education officer in the Advertisement dated 22.8.2013.

2. The background facts leading to filing of these writ petitions, briefly stated, are that the petitioners are employed as Assistant Teachers, Upper Division Teachers, Head Masters of Middle School and Lecturers of Higher Secondary School in School Education Department whereas as some of them are employed as Varishtha Adhhyapaks (sic:Adhyapaks) in Government Schools managed by local bodies. The service conditions of Upper Division Teachers, Head Masters, Lecturers and Assistant Teachers, who are the employees of School Education Department, are governed by M.P. Education Service (School Branch) Recruitment and Promotion Rules, 1982 [hereinafter referred to as 'the 1982 Rules'] whereas, the service conditions of 'Adhyapaks', who are the employees of local bodies, are governed by M.P. Panchayat Adhyapak Samvarg (Employment and Condition of Service) Rules, 2008 [for brevity 'the 2008 Rules'].

3. Under the erstwhile Education Guarantee Schools, 'Gurujis' were employed to impart education to the students, who were later on upgraded

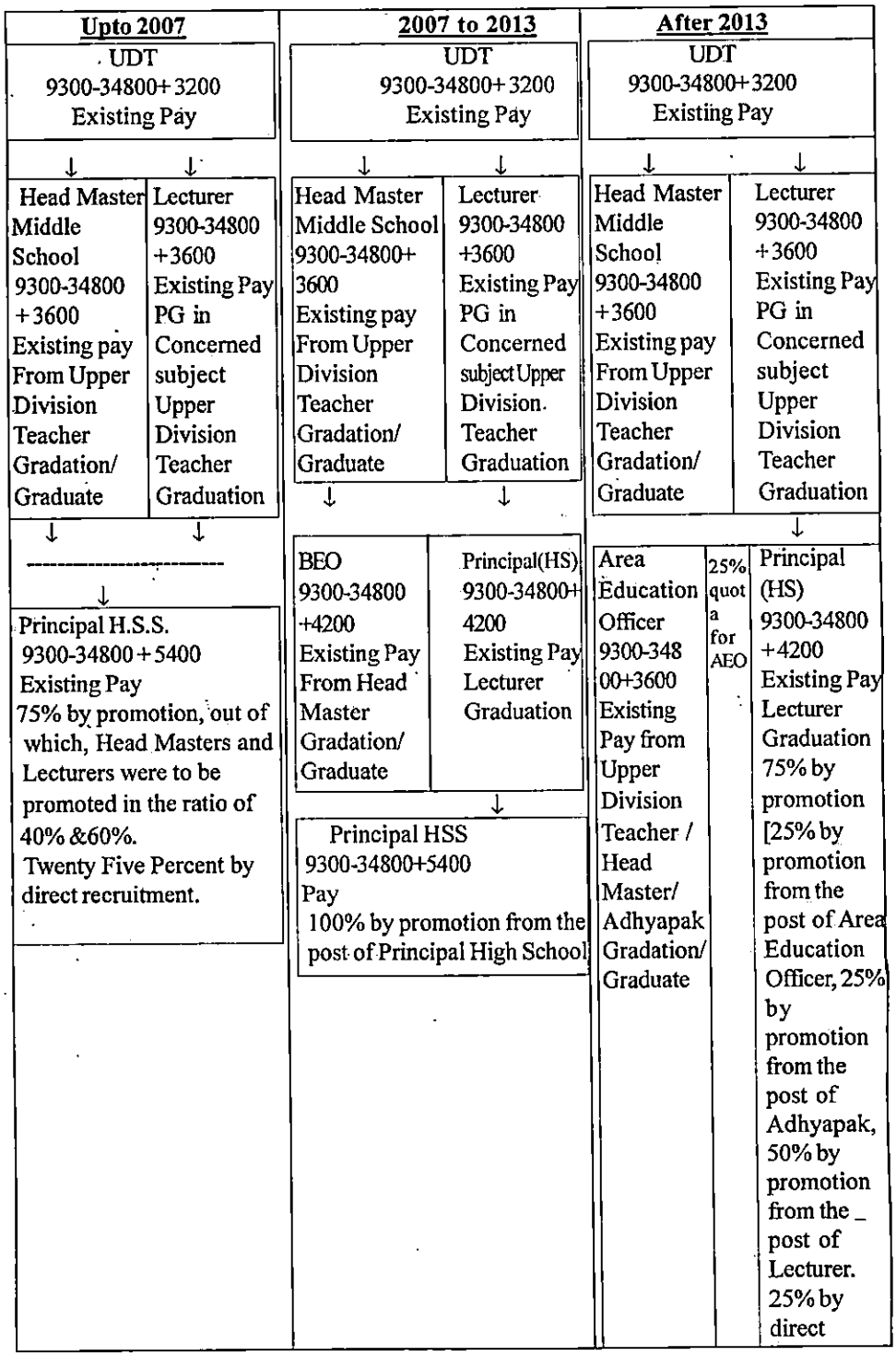
to the post of 'Samvida Shala Shikshaks' and thereafter were further upgraded to the post of 'Adhyapaks'. After the commencement of Right to Education Act, 2009, the Education Guarantee Schools were converted into primary schools. The erstwhile 'Shiksha Karmis' were inducted in service under the provisions of Madhya Pradesh Panchayat Shiksha Karmi (Recruitment and Conditions of Services) Rules, 1997 which were framed in exercise of power under sections 53, 70 & 95 of M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993. The Shiksha Karmis were recruited by the Selection Committee comprising of 5 members, out of which two members were senior government officers of the District. The educational qualification prescribed for the posts of Shiksha Karmis Grade-I, II & III under the Rules were Master Degree in Second Division in the concerned subject, Bachelor Degree in Second Division in the concerned subject and the Higher Secondary Certificate Examination or equivalent respectively. Similarly, in exercise of power under Section 433 read with section 58 of M.P. Municipal Corporation Act, 1956 the State Government framed Madhya Pradesh Municipality Shiksha Karmi (Recruitment and Conditions of Service) Rules, 1998. Rule 4 of the aforesaid Rules provides that number of posts shall not be increased except with the prior approval of the State Government. The State Government had the control in respect of the appointment and conditions of service of Shiksha Karmis under the said rules.

4. Thereafter, the State Government in exercise of power under section 95 read with section 70 of M.P. Panchayat Raj Awam Gram Swaraj Adhiniyam, 1993 framed Madhya Pradesh Panchayat Samvida Shala Shikshak (Employment and Conditions of Contract) Rules, 2005 under which 'Samvida Shala Shikshaks' were appointed. The agency authorized by the State Government was required to hold the eligibility examination for Samvida Shala Shikshaks. Under the aforesaid Rules the educational qualifications prescribed for the post of Samvida Shala Shikshaks Grades I, II & III were Master Degree in Second Division in the concerned subject, Bachelor Degree in Second Division in the concerned subject and the Higher Secondary Certificate Examination or equivalent respectively. Thereafter, the State Government in exercise of power under section 70 read with section 95 of Panchayat Raj Awam Gram Swaraj Adhiniyam, 1993 framed Madhya Pradesh Panchayat Adhyapak Samwarg

(Niyojan Avam Sewa Ki Sharten) Niyam, 2008. Under the said Rules the educational qualification prescribed for the post of Varishtha Adhiyapak, Adhyapak and Sahayak Adhyapak were Master Degree in Second Division in the concerned subject, Bachelor Degree in Second Division in the concerned subject and the Higher Secondary Certificate Examination or equivalent respectively. It is pertinent to mention here that Varishtha Adhiyapak, Adhyapak and Sahayak Adhyapak are imparting education in government schools managed by the local bodies like their counter parts in School Education Department.

5. Under the 1982 Rules Upper Division Teacher was the feeder post for promotion to the post of Head Master, Middle School as well as Lecturer, Higher Secondary School. The further channel of promotion prescribed in 1982 Rules for the post of Head Master Middle School/ Lecturer, Higher Secondary School was the post of Principal, Higher Secondary School, which carried the pay scale of Rs.8,000-13,500/-. The posts of Principals, Higher Secondary Schools were to be filled up to the extent of 75% by promotion and remaining 25% by direct recruitment. The aforesaid 75% posts, which were to be filled up by promotion, were to be filled up from amongst Head Masters and Lecturers in the ratio of 40% & 60% respectively. It is note worthy that under the 1982 Rules, in the set up of posts, the post of Head Master Middle School was not provided which was an ex cadre post, on which senior most Upper Division Teacher was nominated to work as Head Master with some financial benefits. The 1982 Rules were amended by notification of 2nd December, 1991 by which Rule 11(a) was inserted in the Rules which provided for direct recruitment on the post of Lecturer of Higher Secondary School which was to be made by the Commissioner, Public Instructions in consultation with the government from time to time. Thereafter, by notification dated 21.3.2007 the 1982 Rules were further amended and a new post of Block Education Officer was created.

6. The State Government in exercise of power under Article 166 of the Constitution of India issued an order dated 25.7.2013 by which the State Education Service was constituted. Thereafter, by notification dated 22.8.2013, the 1982 Rules were further amended. Under the 1982 Rules, as amended by notifications dated 21.3.2007 and 22.8.2013, the set up of posts as well as the channel of promotion are reproduced below for the facility of reference:-


Upto 2007
UDT
9300-34800+3200
Existing Pay
Head Master Middle School 9300-34800 +3600 Existing pay From Upper Division Teacher Gradation/ Graduate
Lecturer 9300-34800 +3600 Existing Pay PG in Concerned subject Upper Division Teacher Graduation
Principal H.S.S. 9300-34800+5400 Existing Pay
75% by promotion, out of which, Head Masters and Lecturers were to be promoted in the ratio of 40% &60%.
Twenty Five Percent by direct recruitment.
2007 to 2013
UDT
9300-34800+3200
Existing Pay
Head Master Middle School 9300-34800+ 3600 Existing pay From Upper Division Teacher Gradation/ Graduate
Lecturer 9300-34800 +3600 Existing Pay PG in Concerned subject Upper Division Teacher Graduation
BEO 9300-34800 +4200 Existing Pay From Head Master Gradation/ Graduate
Principal(HS) 9300-34800+ 4200 Existing Pay Lecturer Graduation
Principal HSS 9300-34800+5400 Pay
100% by promotion from the post of Principal High School
After 2013
UDT
9300-34800+3200
Existing Pay
Head Master Middle School 9300-34800 +3600 Existing pay From Upper Division Teacher Gradation/ Graduate
Lecturer 9300-34800 +3600 Existing Pay PG in Concerned subject Upper Division Teacher Graduation
Area Education Officer 9300-34800+3600 Existing Pay from Upper Division Teacher / Head Master/ Adhyapak Gradation/ Graduate
25% quota for AEO
Principal (HS) 9300-34800 +4200 Existing Pay Lecturer Graduation 75% by promotion [25% by promotion from the post of Area Education Officer, 25% by promotion from the post of Adhyapak, 50% by promotion from the post of Lecturer. 25% by direct

				recruitment (proposed) ↓ Principal H.S.S. 9300-34800+5400 Existing Pay 100% from Principal HS

7. By the notification dated 22.8.2013, the 1982 Rules were amended by which a new cadre of Area Education Officer was constituted. Rule 11-B of the Rules provides that post of Area Education Officer has to be filled up by selection by limited examination. Rule 11-B further provides that the post of Area Education Officer has to be filled up from amongst Head Masters of Middle School, Upper Division Teachers and 'Adhyapaks' of local bodies. Rule 11-B(ii) mandates that limited examination for appointment to the post of Area Education Officer shall be conducted by such an authority, as may be prescribed by the State Government. By virtue of amendment in the 1982 Rules, the Assistant Teachers and 'Varishtha Adhyapaks' as well as 'Adhyapaks' who did not have 5 years teaching experience are excluded from participation in the process of appointment of Area Education Officer. The grievance of Lecturers of Higher Secondary School is that in view of impugned amendment Upper Division Teachers and 'Adhyapaks' are being permitted to participate in the process of appointment of Area Education Officer and thus unequals are sought to be treated as equals and principles of merger of cadres have not been followed. Similarly, the grievance of the Headmasters is that even though they hold the post which is equivalent to post of Lecturer, yet under impugned amendment, they are being made to appear in the examination for appointment to the post of Area Education Officer to claim further promotion to the post of Principal, High School, whereas, Lecturers can directly be promoted to the post of Principal, High School.

8. The State Government issued an advertisement on 22.8.2013 by which the process for recruitment to the post of Area Education officer was initiated and M.P. On-line Limited was authorized to conduct the recruitment process. Thereafter, the School Education Department issued an order dated 16.9.2013 by which it was provided that since 'Adhyapak Samwarg' has been constituted with effect from 01.4.2007, therefore, the teaching experience in the aforesaid cadre has to be reckoned from the date of actual appointment and not prior to 01.4.2007. However, the aforesaid order provides that the period of service

of 'Adhyapaks' who are working as 'Jan Shikshak', Block Resource Coordinator and BAC shall be counted for teaching experience. Thereafter, clarificatory memo dated 24.8.2013 was issued by the Commissioner, Public Instructions, Government of Madhya Pradesh, Bhopal by which qualifications prescribed in the advertisement were clarified and it was provided that teaching experience of 5 years on a particular post, namely, posts of Head Master, Upper Division Teacher and 'Adhyapak' shall be taken into account to ascertain the eligibility of the candidates for participating in the process of recruitment for the post of Area Education Officer. In the aforesaid factual background, the petitioners have approached this Court.

9. Mr.Rajendra Tiwari, learned senior counsel for the petitioner in W.P.No.17367/2013 has submitted that interpretation putforth by the School Education Department vide order dated 16.9.2013 on the Rules as amended in 2013 is contrary to the same, as the Rules nowhere provide that teaching experience prior to 01.4.2007 in 'Adhyapak' cadre cannot be counted. It is further submitted that clarificatory memo dated 24.8.2013 is arbitrary and discriminatory and is contrary to the rules. Our attention has been invited to Rule 2(a), 2(b), 7, 8 & 11(2) of the Rules to contend that direct recruitment on the post of Area Education Officer cannot be made by departmental examination and the examination has to be conducted by M.P. Public Service Commission. Alternatively, it is submitted that in case the interpretation putforth by the School Education Department on the Rules vide order dated 16.9.2013 is accepted then the Rules amended by notification dated 22.8.2013 be declared *ultra vires* Articles 14 & 16 of the Constitution of India. It has also been urged that the advertisement is contrary to 1982 Rules as amended by notification dated 22.8.2013. In support of his submissions, learned senior counsel has placed reliance on the decision in *Ragghunath Prasad Singh vs. Secretary Home (Police) Department, Government of Bihar and others*, AIR 1988 SC 1033 and *Dr.Ms.O.Z.Hussain vs. Union of India,* (1990) Supp. SCC 688. Mr.Rajendra Mishra, learned counsel for the petitioners in Writ Petitions No.17068/2013, 18278/2013 and 18283/2013 has adopted the submissions made by learned senior counsel. Mr.R.B. Patel, learned counsel for petitioner in Writ Petition No.18590/2013 and Mr.S.K.Dubey, learned counsel for petitioner in Writ Petition No.20635/2013 have also adopted the submissions of Mr.Rajendra Tiwari, learned senior counsel.

10. Mr.Shashank Verma, learned counsel for the petitioners in Writ Petition

No. 14833/2013 submitted that in the year 2013 by way of amendment in the Rules the post of Area Education Officer has been created which carries the same scale of pay which is prescribed for the post of Headmaster and there is no career progression of the Head Masters, and the post of Area Education Officer is supervisory in nature and if the juniors to the petitioners are selected on the post of Area Education Officer, they would supervise the functioning of the petitioners who are seniors to them. It is also urged that in the Rules as amended in 2013 there is no provision regarding Head Master of Middle School. In support of his submissions, learned counsel for the petitioners has invited our attention to the averments made in paragraphs 12 & 13 of the return. Lastly, it is urged that the Head Masters and Lecturers are equivalent posts and the Lecturers can directly be promoted to the post of Principal, High School whereas Head Masters have to appear in the limited examination for recruitment to the post of Area Education Officer in order to be promoted to the post of Principal High School and the petitioners are being made to compete with their juniors.

11. Mr.Sanjay K. Agrawal, learned counsel for the petitioners in Writ Petition Nos. 16867/2013 and 18260/2013 submitted that petitioners have worked on the post of 'Adhyapaks' for the period of 4 years and 9 months and they have been recently promoted as 'Varishtha Adhyapaks' and have completed 6 months on the said post. However, they are being deprived of an opportunity to seek absorption in the government service by way of recruitment on the post of Area Education Officer, which is one time exercise. The exclusion of 'Varishtha Adhyapaks' from recruitment process for the post of Area Education Officer is *per se* arbitrary as 'Adhyapaks' who are juniors to the petitioners have been permitted to appear in the examination. Alternatively, it is submitted that expression 'Adhyapak' as used in the rule has to be read so as to include 'Varishtha Adhyapaks' as well as those 'Varishtha Adhyapaks' who do not have 5 years 'teaching experience. It is also urged that post of Area Education Officer is an administrative post and, therefore, the exclusion of the petitioners on the basis of experience of teaching on particular post is arbitrary. In support of his submissions learned counsel for the petitioners has placed reliance on the decisions in *Kallakkurichi Taluk Retired Official Association vs. State of Tamil Nadu,* (2013) 2 SCC 772, *B.Manmad Reddy and others vs. Chandra Prakash Reddy and others,* AIR 2010 SC 1001 and *Chairman, Punjab National Bank vs. Astamija Dash,* AIR 2008 SC 3182.

12. Mr. Alok Pathak, learned counsel for the petitioners in WP No.16423/2013, WP No.16435/2013, WP No.18648/2013 and WP No.16430/2013 has submitted that the petitioners are Adhyapaks and even though they do not have requisite teaching experience of five years, yet they are entitled to appear in the examination in question.

13. Mr.D.K.Dixit, learned counsel for the petitioner in Writ Petition No.15270/2013 has submitted that under Rule 6(4) of 1982 Rules, the Government has the power to prescribe method of appointment to a post after consultation with the General Administration Department. However, in the instant case no consultation with General Administration Department has been made. It is further submitted that the examination ought to have been held by the Public Service Commission and all eligible persons ought to have been allowed to appear in the examination. It is also submitted that 'Varishtha Adhyapak' should be allowed to appear in the process of appointment for the post of Area Education Officer. In support of his submissions, learned counsel for the petitioner has placed reliance on the decision of the Supreme Court in the case of *Dr.Subramanian Swamy vs. Director, Central Bureau of Investigation and another,* AIR 2014 SC 2140 and *Renu and others vs. District & Sessions Judge, Tis Hazari and another,* AIR 2014 SC 2175.

14. Mr.Nikhil Tiwari, learned counsel for the petitioner in Writ Petition No.15355/2013 has submitted that even though the petitioner holds substantive post of 'Varishtha Adhyapak' and has 5 years of teaching experience, however, he is not being permitted to participate in the process of recruitment for the post of Area Education officer on the ground that by order dated 24.7.2012 his services have been lent on deputation.

15. Mr.Rajesh Dubey, learned counsel for the petitioner in Writ Petitions No.16292/2013 and 17789/2013 has submitted that the expression 'Adhyapak' employed by the State Legislature in the amendment should be read as including 'Varishtha Adhyapaks'. In this connection, our attention has been invited to section 2(k) of M.P. Jan Shiksha Adhiniyam, 2002 and section 2(f) of M.P. Panchayat Adhyapak Samwarg (Employment and Conditions of Service) Rules, 2008.

16. Mr.P.N.Dubey, learned counsel for the petitioner in Writ Petition No.15370/2013 has submitted that the petitioners are Assistant Teachers and they hold the same qualifications as of 'Adhyapaks' employed in government

schools. However, the petitioners have been excluded from competing for appointment on the post of Area Education Officer. It is also submitted that under Rule 2(a) of the Rules, the appointing authority is the State Government whereas under the amendment made in the year 2013 in the Rules the appointing authority of the Area Education Officer is mentioned as Commissioner, Public Instructions which is hit by Article 13(2) of the Constitution of India. It is further submitted that in the Departmental Examination, the persons who are not the employees of the School Education Department, namely, 'Adhyapaks' of Government schools managed by the local bodies are being allowed to appear. While inviting our attention to M.P. Public Service Commission (Limitation of Functions) Regulations, 1957 it is pointed out that Departmental Examination has to be conducted by M.P. Public Service Commission. In support of his submissions, learned counsel has placed reliance on the decision in *Arun Singh Bhadouriya vs. State of M.P. and others*, 2009 (2) MPHT 277. Mr. Manoj Soni, learned counsel for the petitioner in WP No.15814/2013, Mr. R.K. Samaiya, learned counsel for the petitioner in WP No.15753/2013 and Mr. J. Arya, learned counsel for the petitioner in WP No.14747/2013 have adopted the submissions made by Mr. P. N. Dubey.

17. Mr.Anshuman Singh, learned counsel for the petitioner in Writ Petition No.15380/2014 has submitted that the petitioners are the Lecturers and by impugned amendment of 2013 in the Rules, the State Government has permitted the Upper Division Teachers, Head Masters of Middle School and 'Adhyapaks' of local bodies to participate in the process of recruitment for the post of Area Education Officer. Thus, the unequals are sought to be treated as equals. It is further submitted that avenues for the petitioners who Lecturers in Higher Secondary School for promotion to the post of Principal High School have been reduced from 100% to 50% and 25% posts of the Principal High School have been reserved for recruitment from 'Varishtha Adhyapaks' who cannot be treated at par with the petitioners as the petitioners hold class -II post whereas Adhyapaks hold local body posts and are not government servants. It is also urged that principles of merger of cadres as laid down by the Supreme Court in *S.P. Shivprasad Pipal v. Union of India and Others*, (1998) 4 SCC 598 and (2013) 7 SCC 335 have not been followed in the instant case. It is further contended that the classification which has been made by the respondents for participation for appointment to the post of Area Education Officer is fanciful and arbitrary. In support of the aforesaid submission,

reference has been made to the decision of the Supreme Court in *B. Manmad Reddy and Others v. Chandra Prakash Reddy and Others,* (2010) 3 SCC 314. Mr. Rajneesh Gupta, learned counsel for the petitioner in W.P.No.16676/2013 has adopted the submissions made by Mr. Anshuman Singh.

18. While canvassing the arguments in Writ Petition No.12600/2014 Mr. Anshuman Singh, learned counsel has submitted that examination in question is not being conducted by the authority prescribed under the Rules. While inviting our attention to Annexure- P-3 it is contended that examination in question is being conducted by M.P. On-line Limited which is joint venture company and is a paid service provider. It is also submitted that aforesaid joint venture company has no specific mandate to hold the examination and no order authorizing M.P. On-line Limited to conduct the examination has been issued prior to issuance of the impugned advertisement. It is also submitted that M.P. On-line is not an authority for the purpose of Rule 11(2) of the Rules as the joint venture company cannot be regarded as an authority. In support of aforesaid submission, reference has been made to the decision of Supreme Court in the case of *Union of India vs. Alok Kumar,* (2010) 5 SCC 349.

19. On the other hand Mr.Samdarshi Tiwari, learned Government Advocate submitted that the post of Area Education Officer has been created at the Sub Block Level to monitor the primary schools and middle schools which are situated in rural areas as well as in Tribal areas. It is further submitted that under the erstwhile Education Guarantee Schools 'Gurujis' were appointed who were later on upgraded to the posts of Samvida Shala Shikshaks and were further upgraded to the post of 'Adhyapaks'. It is also submitted that after commencement of Right to Education Act, 2009 the Education Guarantee Centres were converted to primary schools. Thus, Upper Division Teachers as well as Head Masters and 'Adhyapaks' of local bodies cadre, who are already working in rural areas, are well conversant with the local conditions and, thus, are better equipped to perform the duties of Area Education Officer. Accordingly, the State Government has taken a conscious decision to fill up the post of Area Education Officer by limited examination, as the person who is not in the system, may not be able to perform duties of the post in question in the remote rural areas and tribal areas. It is also pointed out that neither any writ petition has been filed by Upper Division Teacher or Head Masters of any private schools nor any ground with regard to propriety of holding the limited examination has been raised in the petitions. It is also urged that there

is no merger of cadres and only an opportunity is being afforded to participate in the process of recruitment to the post in question, to the Head Masters of Middle School, Upper Division Teachers as well as 'Adhyapaks' of local bodies cadre. While inviting our attention to M.P. Panchayat Shiksha Karmi (Recruitment and Conditions of Service) Rules, 1997, M.P. Municipality Shiksha Karmi (Recruitment and Conditions of Service) Rules. 1998, M.P. Panchayat Samvida Shala Shikshak (Employment and Conditions of Contract) Rules, 2005, M.P. Nagariya Nikaya Shala Shikshak (Employment and Conditions of Contract) Rules, 2005 and M.P. Panchayat Adhyapak Samvarg (Employment and Condition of Service) Rules, 2008, it is urged that qualifications prescribed for the post held by the persons governed under the aforesaid Rules are similar to that of their counter parts in government schools and nature of their duties is also similar to their counter parts in government schools. Thus, the inclusion of 'Adhyapaks' of local bodies cadre in the recruitment process cannot either be termed as arbitrary or discriminatory.

20. It is further contended by learned Government Advocate that the Lecturers of the Higher Secondary Schools have no locus to challenge the impugned amendment in the Rules as they are not eligible to participate for appointment on the post of Area Education Officer. It is also pointed out that the Lecturer, Higher Secondary School is a higher post and cannot be equated with the post of Head Master, Upper Division Teacher or Adhyapak. It is further submitted that Lecturer, Higher Secondary School on completion of 5 years of service is eligible for promotion to the post of Principal, High School. The contention of the petitioners that unequals are sought to be treated as equals is ill-founded as every classification is likely to create some inequality. It is also submitted that it is the prerogative of the employer to create cadres, categories and abolition & creation of posts and to prescribe the qualification for the same including the avenues of promotion as the same is in the realm of policy. In support of aforesaid submission, reliance has been placed on the decisions in the case of *Ganga Ram and others vs. Union of India and others,* (1970) 1 SCC 377, *P.U.Joshi and others vs. Accountant General, Ahmedabad and others,* (2003) 2 SCC 632 and *Union of India vs. Pushpa Rani and others,* (2008) 9 SCC 242.

21. It is also pointed out by learned Government Advocate that Lecturers as well as 'Varishtha Adhyapaks' can participate in the process of direct recruitment for the post of Principal, High School as quota of 25% is fixed for

direct recruitment for the post of Principal, High School and suitable amendment in this regard would be made in the Rules. It is also pointed out that the educational qualification for the post of Assistant Teacher is Higher Secondary, whereas the Upper Division Teachers, Head Masters and Adhyapaks who have been permitted to participate in the process of appointment for the post of Area Education Officer are graduates. Therefore, the Assistant Teachers cannot claim parity with Upper Division Teachers, Head Masters of Middle Schools as well as 'Adhyapaks'.

22. It is also argued that Head Masters, 'Adhyapaks' or Upper Division Teachers are imparting education in Middle School, therefore, the experience of teaching in primary schools cannot be taken into account. In support of aforesaid submission, learned Government Advocate has placed referred to the decision of the Supreme Court in *V.B.Prasad vs. Manager, P.M.D. Upper Primary School and others,* (2007) 10 SCC 269. It is also submitted that taking into account the duties which are to be performed by Area Education Officer, the experience as mentioned in the Rules has to be construed to mean the teaching experience either on the post of Head Master Middle School, Upper Division Teacher as well as 'Adhyapak' and the same cannot be construed to mean the over all teaching experience. It was also pointed out that clarificatory memo was accordingly issued on 24.8.2013 by the Commissioner, Public Instructions, Government of Madhya Pradesh, Bhopal.

23. Mr.Sanjay Agrawal and Mr.Hitendra Singh, learned counsel for the interveners in Writ Petition No.14833/2013 have supported the submissions made by learned Government Advocate and have referred to the decisions of Supreme Court in the cases of *State of Jammu & Kashmir vs. Triloki Nath Khosa*, (1974) 1 SCC 19, *State of A.P. Vs. Mc.Dowell and Co.* AIR 1996 SC 1627 and *B.M.Solanki and another vs. State of Gujarat and others*, 2000 Lab.I.C. 2152.

24. We have considered the rival submissions. At the outset we may deal with the issue of authority of M.P. On-line Limited to conduct the examination for appointment to the post of Area Educdation Officer raised in Writ Petition No.12600/2014 by the petitioner who is a Lecturer in School Education Department. Rule 11-B(2) of the 1982 Rules as amended by notification dated 22.8.2013 reads as under:-

"11-B(2) For appoitnment (sic:appointment) of Area

Education Officer, the limited examination shall be conducted by such an authority as may be prescribed by the Government."

It is pertinent to mention here that M.P. On-line Limited is a joint venture company of M.P. State Electronics Development Corporation Limited and M/s.Tata Consultancy Services Limited which was incorporated on 11.7.2006. The State Government by order dated 14.8.2013 has prescribed M.P. On-line Limited as an authority for conducting limited examination after obtaining approval of the Chief Minister in coordination. The validity of that order is not specifically put in issue. Thus, it can not be contended that M.P. On-line Ltd. had no authority to hold the examination. It is also note worthy that petitioner is a Lecturer who is not entitled to appear in the examination in question which has been conducted by M.P. On-line Limited. Therefore, in our considered opinion petitioner has no locus to challenge the authority of M.P. On-line Ltd. to conduct the examination in question. Besides that, M.P. On-line Limited has already conducted the examination on 08.9.2013 in which 22,834 candidates have appeared and the writ petition has been filed after 11 months i.e. in August, 2014. Therefore, the challenge to the authority of M.P. On-line Limited in any case is belated, which deserves to be repelled on the ground of laches and delay as well.

25. Now we may advert to the contention raised on behalf of the petitioners that for appointment to the post of Area Education Officer all candidates possessing prescribed qualification ought to have been permitted and the examination ought to have been held by Public Service Commission. By notification dated 22.8.2013, Rule 6 of 1982 Rules, which deals with method of recruitment has been amended and apart from direct recruitment, promotion and transfer, a new mode of recruitment, namely, recruitment by selection through limited examination is incorporated by way of Rule 6(i)(d). It is note worthy that post of Area Education Officer is created at Sub Block Level. An Area Education Officer is, *inter alia*, required to monitor the work of elementary education in 40 to 50 Primary as well as Middle Schools. Initially, the State Government had set up Education Guarantee Schools under the Education Guarantee Scheme in rural as well as tribal areas in which 'Gurujis' were employed to impart education. On coming into force of the Right to Education Act, 2009, the aforesaid Education Guarantee Schools were converted into primary schools and posts of 'Gurujis' were upgraded to the

posts of Contract Teachers and were further upgraded to the post of 'Adhyapaks' under the provisions of M.P. Panchayat Shiksha Karmi (Recruitment and Conditions of Service) Rules, 1997, M.P. Municipality Shiksha Karmi (Recruitment and Conditions of Service) Rules. 1998, M.P. Panchayat Samvida Shala Shikshak (Employment and Conditions of Contract) Rules, 2005, M.P. Nagariya Nikaya Shala Shikshak (Employment and Conditions of Contract) Rules, 2005 and M.P. Panchayat Adhyapak Samvarg (Employment and Condition of Service) Rules, 2008 respectively. The Primary Schools and the Middle Schools are sitaute in rural and tribal areas.

26. The 'Adhyapaks' of local bodies, Upper Division Teachers and Head Masters of Middle Schools are imparting education to students in rural and tribal areas and are well versed and are accustomed to living in such areas. Therefore, such persons would be able to effectively discharge the duties of the post of Area Education Officers, namely, supervision of Primary and Middle Schools which are sitaute in rural/tribal areas. A person from a different background may not be able to work in the remote, rural and tribal area. It is worth mentioning here that petitioners before us are either the employees of School Education Department or of local bodies. In other words, no other person has made any grievance with regard to limited examination. The object of holding the limited examination is to ensure that the persons who have the experience of working in remote rural and tribal areas are selected as Area Education Officers so that such officers are able to effectively discharge their duties. Therefore, no fault can be found with action of the respondents in holding limited examination.No provision of law has been brought to our notice that limited examination must be held only by the Public Service Commission. On the other hand, 1982 Rules, as amended by the notification dated 22.8.2013, provide that limited examination under the 1982 Rules can be held by an Authority which may be authorized by the State Government. Admittedly, the State Legislature is competent to frame such a rule, as no challenge has been made to the authority of the State Legislature to amend the 1982 Rules. As we have already held that M.P. On-line Limited is an authority authorised by the State Government to hold the examination as provided in Rule 11-B(2) of the 1982 Rules, therefore, it is not necessary for us to dilate further on the issue whether the examination ought to have been held through Public Service Commission.

27. Before proceeding further it is apposite to notice few well settled legal

propositions expounded by the Supreme Court with regard to matters relating to creation of posts, formation, structuring/ re-structuring of cadres, prescribing source/mode of recruitment as well as scope of judicial review in such matters.

28. In *Ganga Ram* (supra) the Supreme Court has held that mere pointing out inequality is not enough to attract the constitutional inhibition because every classification is likely in some degree to produce some inequality. The State is legitimatley empowered to frame rules of classification by securing the requisite standard of efficiency in services and the classification need not be scientifically perfect or logically complete. In applying the wide language of Articles 14 and 16 to concrete cases a doctrinaire approach should be avoided and the matter has to be considered in a practical way. Of course, to be outside the vice of inequality, such classification must, however, be founded on an intelligible differentia which on rational grounds distinguishes persons grouped together from those left out.

29. In the case of *Dr.N.C.Singhal vs. Union of India,* (1980) 3 SCC 29, it has been reiterated that the Government is a better judge of the interests of general public and if it is a better judge, it must have power to create a post depending upon exigency of service and requirements of general public. In *Pushpa Rani* (supra) it is held that the Court can not sit in appeal over the judgment of employer and ordain that a particular post be filled up by direct recruitment or promotion or by transfer.

30. It is well settled in law that power of creation of posts rests, with the State Government and whether a particular post is necessary is a matter which depends upon exigencies of situation and administrative necessity. [*See: State of Haryana vs. Navneet Verma,* (2008) 2 SCC 65]. It is equally settled legal proposition that power to reorganize the cadre is a policy deicision which is not open to judicial review unless it is malafide, arbitrary or bereft of any discernible principle. [See: *Director Lift Irrigation Corporation vs. P.K.Mohanty,* (1991) 2 SCC 295.]. In *P.U.Joshi* (supra) it has been held that questions relating to the constitution, parttern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotion and criteria to be fulfilled for such promotion pertain to the field of policy and is within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India. It has further

been held that State Government is well within its right to amend the Rules to constitute different categories of posts or cadres and to reconstitue (sic:reconstitute) and restruture (sic:restructure) the pattern and cadres/ categories of service as may be required from time to time by abolishing the existing cadres/posts and creating new cadres/posts.

31. In the background of aforesaid legal position we may now consider the petitioners' grievances. The educational qualifications and nature of duties for the posts of Lecturer, Higher Secondary School, Varishtha Adhyapak of local body, Head Master of Middle School, Upper Division Teacher, Adhyapak and Assistant Teacher are as follows:-

S.No.	Post	Educational Qualification	Nature of Duties
(i)	Lecturer, Higher Secondary School	Post Graduate Degree in concerned subject-minimum second division or equivalent qualification	Imparts Education in Higher Secondary School
(ii)	Varishtha Adhyapak	Master's Degree in II Division in concerned subject of equivalent and B.Ed./B.Ed. special education	Imparts Education in Higher Secondary School
(iii)	Head Master of Middle School	Graduate	Imparts Education in Middle School
(iv)	Upper Division Teacher	Graduate	Imparts Education in Middle
(v)	Adhyapak	Bachelor's Degree in Second Division in concerned subject or equivalent and B.Ed./B.Ed. (Special Eduation (sic:Education)/ B.T.C.D.Ed./D.S.E.)	Imparts Education in Middle &High School
(vi)	Assistant Teacher	Higher Secondary School Certificate Examination	Imparts Education in Primary School

In the instant case there is no merger of cadre by amendment in the Rules. But, only a new post of Area Education Officer has been created at the Sub Block Level in the set up of posts. The minimum qualification for the aforesaid post is Graduate Degree and Bachelor Degree in Education. The nature of duties performed by the Area Education Officer is administrative in nature and the primary function is to supervise the elementary education of Primary and Middle Schools. The posts of 'Varishtha Adhyapak' of local body cadre is a higher post, taking into account the educational qualification

prescribed for the post and the nature of duties performed by 'Varishtha Adhyapaks' of local bodies. For the post of 'Varishtha Adhyapak' the minimum qualification prescribed is the Post Graduate Degree in the concerned subject in second division and 'Varishtha Adhyapak' imparts education in Higher Secondary School. Similarly, for the post of Assistant Teacher the minimum qualification is Higher Secondary School Certificate Examination. The aforesaid post has lower qualification than the qualficiation (sic:qualification) presecribed (sic:prescribed) for the post of Head Master Middle School, Upper Division Teacher and 'Adhyapak' of local body. Thus, the pool of employees from which Area Education Officers has to be selected has been created on the basis of educational qualification and, therefore, the 'Varishtha Adhyapaks' and Assistant Teachers have rightly been excluded from pool from which the post of Area Education Officer is to be filled up. A careful scrutiny of the nature and duties of the post of Area Education Officer it is evident that the post is supervisory in nature and the Area Education Officer would not, in any manner, be supervising the work of their seniors as they do not have any power to write the confidential report of their seniors. Therefore, the contention that Area Education Officer who may be junior to the petitioners, namely, Head Master and Lecturers would supervise their work, cannot be accepted.

32. Now, we may deal with the grievance of the Lecturers that by permitting the Head Masters, Upper Division Teachers, 'Adhyapaks' of local body cadres to participate in the process of recruitment for the post of Area Education Officer, they are being treated at par with the Lecturer and would compete with the Lecturers for promotion to the post of Principal, High School. In substance, the grievance of the petitioners, who are Lecturers, appears to be that their chances of promotion are diminished. The aforesaid submission looks attractive at the first blush, however on a deeper probe, the same does not deserve acceptance. Taking into account the nature of duties performed by the Lecturer, Higher Secondary School as well as the qualification prescribed, the post of Lecturer is a higher post than that of Area Education officer. The Lecturer, Higher Secondary School on completion of 5 years is entitled to be considered for promotion to the post of Principal, Higher Secondary School, whereas the Area Education Officer is required to have 5 years experience on the post in order to be eligible for consideration for promotion to the post of Principal, High School. It is pertinent to mention here that quota has also been prescribed for promotion to the post of Principal, High School under the executive instructions and suitable amendment in the

Rule will be made by the State Government, as has been stated before us. The aforesaid quota provides that the post of Principal High School shall be filled in by promotion to the post to the extent of 75%. Out of aforesaid 75%, 50% post shall be filled up from the cadre of Lecturers, High School and remaining 25% posts shall be filled up from the cadre of Area Education Officers. The remaining 25% post of Principal High School shall be filled up by direct recruitment, in which, Lecturers of Higher Secondary as well as 'Varishtha Adhyapaks' can participate.

33. Thus, two cadres have been constituted for promotion to the post of Principal, High School. The post of Principal, High School is an administrative post. There is need of persons having administrative experience as well as teaching experience. The post of Principal, High School is sought to be filled up by two different cadres i.e. Area Education Officers and the Lecturers and separate quota, as stated above, has also been prescribed for them. For the post of Principal, High School, mixed cadre is sought to be prepared of the persons who have administrative and teaching experience. It is well settled in law that government can provide two cadres for promotion to the post. Reference in this connection may be made to the case of *Dwarka Prasad and others vs. Union of India and others,* (2003) 6 SCC 535. Once separate quotas are prescribed for promotion to the post and two cadres/channels are created for promotion to a particular post, the plea of discrimination does not arise. In this connection we may refer to a decision of Supreme Court in the case of *Secretary to the Government of Orissa vs. Laxmikant Nanda and others,* (1994) 1 SCC 587. It is also well settled in law that mere chances of promotion are not conditions of service, and the fact there is reduction in the chances of promotion does not tantamount to a change in the conditions of service. A right to be considered for promotion is a term of service, chances of promotion are not. [See: *State of Maharashtra vs. Chandrakant Anant Kulkarni*, (1981) 4 SCC 130, *Union of India vs. S.L.Dutta,* (1991) 1 SCC 505 and *Panchraj Tiwari vs. Madhya Pradesh State Electricity Board and others,* (2014) 5 SCC 101. Therefore, the contentions raised by the petitioners that unequals are sought to be treated as equals does not commend to us. We may point out that it is not the case of petitioners that action of respondents in creating post of Area Education Officer is either actuated by malafides or amounts to colourable exercise of power.

34. That apart, the challenge to the process of recruitment to the post of

Area Education Officer at the instance of Lecturer is premature at this stage, as after recruitment on the post of Area Education Officer, they would require 5 years' experience on the post of Area Education Officer in order to be eligible for promotion to the post of Principal, High School and they would be promoted to the post of Principal, High School against their quota of 25%.

35. We shall now advert to the grievance of the Head Masters that they are requied to appear in the examination for appointment on the post of Area Education Officer whereas Lecturers who hold the qualification for the post are entitled to be directly promoted as Head Master of the School on completion of 5 years service. Once again we may reiterate that the plea of discrimination is available to similarly situated persons who are differently treated. Taking into account the nature of duties performed by Head Masters of Middle School as well as the Lecturers of Higher Secondary Schools, both the posts cannot be held to be equivalent, as the Lecturers, Higher Secondary impart education in Higher Secondary Schools whereas Head Masters Middle School impart education in Middle Schools. Thus, nature of their duties are different and, therefore, the plea of discrimination is not available to them.

36. Now we shall consider the challenge to order dated 16.9.2013 as well as memo dated 24.8.2013 issued by the School Education Department as well as Commissioner, Public Instructions, Government of Madhya Pradesh, Bhopal, respectively, which provide that teaching experience on the post of 'Adhyapak' should be counted with effect from 01.4.2007 as 'Adhyapak' cadre has been constituted from the said date and that a candidate must have teaching experience of 5 years on the post of Head Master Middle School, Upper Division Teacher and 'Adhyapak', respectively.

37. It is well settled rule of statutory interpretation that when the material words are capable of bearing two or more constructions the most firmly established rule for construction of such words 'of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law)' is the rule laid down in *Heydon's* case which has 'now attained the status of a classic. The rule which is also known as 'purposive construction' or 'mischief rule', enables consideration of four matters in construing an Act: (I) What was the law before the making of the Act, (ii) What was the mischief or defect for which the law did not provide, (iii) What is the remedy that the Act has provided, and (iv) What is the reason of the remedy. The rule then directs that

the courts must adopt that construction which 'shall suppress the mischief and advance the remedy'. The rule was explained in the *Bengal Immunity Co. vs. State of Bihar* by S.R.Das, C.J.I. as follows: 'It is a sound rule of construction of a statute firmly established in England as far back as 1584 when *Heydon's case* was decided that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: (1) What was the common law before the making of the Act, (2) What was the mischief and defect for which the common law did not provide, (3) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth, and (4) The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress sub- the inventions and evasions for continuance of the mischief, and *pro privato commodo,* and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico.* [See: *Anderton vs. Ryan,* (1985) 2 All ER 355, *Bengal Immunity Co. Vs. State of Bihar*, AIR 1955 SC 661 and *National Insurance Company Limited vs. Baljit Kaur,* AIR 2004 SC 1340.] [See: Principles of Statutory Interpretation by Justice G.P.Singh, 13th Edition]

38. The relevant extract of the Advertisement dated 22.8.2013, order dated 16.9.2013 and clarificatory memo dated 24.8.2013 respectively are reproduced below for the facility of reference:-

2. शैक्षणिक योग्यता :–

म0प्र0 शासन के विद्यालयों में कार्यरत शिक्षक (उच्च श्रेणी शिक्षक) /प्रधान पाठक (प्रधानाध्यापक) माध्यमिक शाला / स्थानीय निकाय संवर्ग के अध्यापक जिन्हे विज्ञापन दिनांक को न्यूनतम 5 वर्ष का शैक्षणिक अनुभव (अध्यापक के लिये अध्यापक पद पर शैक्षणिक कार्य करने का न्यूनतम 5 वर्ष का अनुभव) अनिवार्य होगा एवं मान्यता प्राप्त विश्वविद्यालय से स्ताानक की उपाधि तथा शिक्षा शास्त्र में स्नातक (बी.,एड.) की उपाधि जो राष्ट्रीय अध्यापक शिक्षा परिषद से मान्यता प्राप्त होना चाहिए।

1. अध्यापक संवर्ग में कार्य अनुभव के वर्षों की गणना अभ्यर्थी के अध्यापक संवर्ग में वास्तविक नियोजन की तिथि से की जाए। चूँकि अध्यापक संवर्ग का गठन दिनांक 01.04.2007 से हुआ है । ऐसी स्थिति में इस तिथि के पूर्व के कार्य अनुभव की गणना न की जाए।

"म0प्र0" शासन के विद्यालयों में कार्यरत शिक्षक (उच्च श्रेणी शिक्षक) /प्रमान पाठक (प्रधानाध्यापक) माध्यमिक शाला / स्थानीय निकाय संवर्ग के अध्यापक

जिन्हे विज्ञापन दिनांक को न्यूनतम 5 वर्ष का शैक्षणिक अनुभव (अध्यापक के लिये अध्यापक पद पर शैक्षणिक कार्य करने का न्यूनतम 5 वर्ष का अनुभव) अनिवार्य होगा एवं मान्यता प्राप्त विश्वविद्यालय से स्नातक की उपाधि तथा शिक्षा शास्त्र में स्नातक (बी.,एड.) /प्रारंभिक शिक्षा शास्त्र में पत्रोपाधि (डिप्लोमा) अथवा राष्ट्रीय अध्यापक शिक्षा परिषद द्वारा मान्यता प्राप्त समकक्ष योग्यता । पढा जाए।

The relevant extract of the Notification dated 22.8.2013, by which 1982 rules have been amended reads as under:-

No.	Name of post	Minimum Age Limit	Maxmimum (sic:Maximum) Age Limit	Minimum Educational Qualifications and other requirements	Remarks
(1)	(2)	(3)	(4)	(5)	(6)
"4	Area Education Officer (AEO)	-	-	Graduate Decree from recognized University and B.Ed. which should be recognized by National Council for Teachers Education and Teachers (UpperDivision Teachers)Head Masters of Middle School/Adhyapak of local bodies cadre who has 5 years minimum teaching experience	Selection by limited examination from the post of Head Masters, Middle School and Teachers (Upper Division Teachers) and Adhyapak of Local Bodies Cadre

From careful scrutiny of the minimum educational qualification and other requirements prescribed for the post of Area Education Officer it is evident that the same is in three parts, namely:-

(i) Qualification i.e. "Graduate Degree" from recognized University and B.Ed. which would be recognized by National Council for Teachers Education;

(ii) The source from where the persons would be recruited to the post of Area Education Officer, namely, Head Master Middle School, Upper Division Teacher and 'Adhyapak' of local body cadre

(iii) The minimum teaching experience i.e. of 5 years.

Thus, it is evident that the minimum teaching experience is not referable

to any post.

39. In the instant case, by virtue of amendment in 2007 Rules, the Upper Division Teachers and the Head Masters of Middle School, had no further promotional avenues beyond the post of Block Education Officer even though they had educational qualification for promotion to the post of Principal, High School. Realizing this anomaly the legislature brought about the amendment in the year 2013 by which Upper Division Teachers and Head Masters were allowed to participate in the limited selection/recruitment process of Area Education Officer and separate quota for promotion was prescribed for them for the post of Principal High School. The 'Adhyapaks' of local body cadre who were performing duties like their counter parts in school Education Department and were imparting education in "Government Schools" are also given the opportunity to appear in the examination for appointment on the post of Area Education Officer. The anomaly crept in by way of amendment in 2007 rules is sought to be remedied by way of amendment in 2013 Rules.

40. The literal meaning given to the Rules would mean that only 'Adhyapak' of local body cadre is required to have 5 years experience whereas the requirement of teaching experience does not apply to the post of Upper Division Teacher and the Head Masters of Middle School. The literal construction in the instant case has to be avoided. If the interpretation to the teaching experience as prescribed in the Rules as mentioned in the advertisement and order dated 22.8.2013 and clarificatory memo dated 24.8.2013 is accepted, it would amount to promoting the anomaly as the person who is serving as Upper Division Teacher and may have 5 years teaching experience would be eligible to appear in the examination and whereas the person who is promoted from the cadre as Head Master and may not have 5 years' teaching experience on the promoted post, even though he is senior to the person holding the post of Upper Division Teacher. Exclusion of such candidate from the participation in the process of recruitment cannot neither be countenanced nor would satisfy the test of reasonableness. No tangible reason for excluding such candidate and the object sought to be achieved by amending the Rule is forthcoming. It is also pertinent to mention here that the post of 'Adhyapak' came into existence on account of merger of the post of 'Samvida Shala Shikshak' Grade-II with the post of 'Adhyapak' under the 2008 Rules. The nature of duties of Samvida Shala Shikshak Grade-II as well as Adhyapak are similar as both of them impart education in Middle Schools. However, if the teaching experience

of such 'Adhyapak' on the post of 'Samvida Shala Shikshak' Grade-II is not taken into account, he would be excluded from the process of recruitment for the post of Area Education Officer. Similarly, Upper Division Teachers who may not have teaching experience of 5 years on the post of Upper Division Teacher and may have served years of teaching experience on the post of Assistant Teacher would be excluded. It is pertinent to mention here that in some of the writ petitions an averment has been made that though the petitioners are posted as Assistant Teachers, yet they are imparting education in Middle and High Schools. That averment of fact has not been controverted in the return filed by the State.

41. The advertisement dated 22.8.2014 as well as the order dated 16.9.2013 and clarificatory memo dated 24.8.2013 issued by the respondents, therefore, are not in consonance with the Rules, as the teaching experience prescribed in the rules is not relatable to any post. The post of Area Education Officer is an administrative post. The Area Education is, *inter alia,* required to monitor 40-50 primary and middle schools and academic monitoring of elementary education. The object of process of selection is to appoint most suitable candidates for the post of Area Education Officer and purposive interpretation is to be given to avoid the anomaly which had crept in by amendment in the rules in the year 2007 which the legislature intended to rectify by amendment in the Rules in the year 2013. More so when the amendment of the Rule was to depart from the ordinary rule of direct recruitment on such post. Therefore, the minimum qualification prescribed in the Rules, in our considered opinion, and in the background of aforesaid well settled legal principles with regard to statutory interpretation has to be read as over all teaching experience on any teaching post in the Government Schools.

42. In the result, the challenge to the validity of the Rules, as amended by notification dated 22.2.2013, is hereby repelled. However, the order dated 16.9.2013 issued by School Education Department and clarificatory memo issued by the Commissioner, Public Instructions, Government of Madhya Pradesh, Bhopal dated 24.8.2013 and the advertisement dated 22.8.2013 in so far it prescribes that Upper Division Teachers, Head Masters Middle School and 'Adhyapaks', should have 5 years teaching experience on their "respective posts" for appointment on the post of Area Education Officer is hereby quashed. It is held that the Upper Division Teachers, Head Masters Middle Schools and 'Adhyapaks' of local body cadre who have 5 years' of over all

teaching experience in Government Schools must be considered as eligible to appear in the examination.

43. We have been informed by learned Government Advocate that such persons have been permitted to appear in the examination. In view of the aforesaid statement made by learned Government Advocate it is directed that the results of such Upper Division Teachers, Head Masters Middle School and 'Adhyapaks' who have appeared in the examination, which was held on 08.9.2013 for recruitment to the post of Area Education Officer be also declared. The interim order, if any, passed in the writ petitions are hereby vacated to enable the authorities to take the recruitment process forward in the terms of this pronouncement.

44. Accordingly, the writ petitions are disposed of.

Petition disposed of.

I.L.R. [2015] M.P., 2914
WRIT PETITION
Before Mr. Justice A. M. Khanwilkar, Chief Justice &
Mr. Justice K.K. Trivedi
W.P. No. 20172/2012 (Jabalpur) decided on 7 May, 2015

ANUJ ASSOCIATES (M/S) ...Petitioner
Vs.
NATIONAL MINERAL DEVELOPMENT CORPORATION LTD. & ors. ...Respondents

A. Tender - Requirement in NIT - To file experience certificate - Alongwith tender form - Whether Mandatory **- Yes, because its the proof of experience which touches the issue of eligibility and the same is highlighted by bold letters to attract the attention of all concern. (Para 9)**

क. निविदा – एन.आई.टी. में आवश्यकता – अनुभव प्रमाण–पत्र प्रस्तुत करना – निविदा प्रपत्र के साथ – क्या आदेशात्मक है – हां, क्योंकि वही अनुभव का प्रमाण है जिससे योग्यता के मुद्दे का पता चलता है तथा उसे ही सभी संबंधितों का ध्यान आकर्षित करने के लिए मोटे अक्षरों से उभारा जाता है।

B. Tender - NIT prescribed filing of experience certificate alongwith tender form - Non submission - Fatal - Form is defective **- Should be rejected at threshold - The requirement is mandatory. (Para 12)**

ख. निविदा – एन.आई.टी. द्वारा निविदा प्रपत्र के साथ अनुभव प्रमाणपत्र प्रस्तुत करना विहित किया गया – अप्रस्तुतीकरण – घातक – प्रपत्र त्रुटिपूर्ण – प्रारंभ में ही निरस्त किया जाना चाहिए – यह आवश्यकता आज्ञापक है।

C. Interpretation - "Liable to be rejected" and "shall be rejected" - Expression used in the document must be interpreted in the context it is executed. **(Para 9)**

ग. निर्वचन – "निरस्त करने योग्य" तथा "निरस्त किया जायेगा" – दस्तावेज में प्रयुक्त की गयी अभिव्यक्ति का निर्वचन उस संदर्भ में किया जाये जिसमें वह निष्पादित की गयी।

R.P. Agrawal with *A.M. Lal,* for the petitioner.
Anoop Nair, for the respondents No. 1 & 2.
Respondent No.3 is absent, though served.

ORDER

The Order of the Court was delivered by : **A.M. KHANWILKAR, C.J. :-** Heard counsel for the petitioner and respondents No.1 & 2. Respondent No.3 is absent, though served.

2. In this petition filed under Article 226 of the Constitution of India, the petitioner has questioned the tender process which has already culminated with the issuance of work order in favour of respondent No.3. The tender document of the petitioner has not been accepted.

3. The principal ground urged in this petition is that the tender document submitted by the respondent no.3 was not accompanied by proof of requisite experience and P.F. Code as per Clause 4(b) at item No.11 of NIT. In other words, the tender document submitted by the respondent No.3 was incomplete as it did not contain the mandatory documents to establish the eligibility of the respondent No.3 to participate in the tender process, to wit, experience certificate and P.F. Code. Those documents were mandatory as can be discerned from Clause 4 of the notice inviting tender dated 15.09.2012 and conjointly read with the format of letter of bidders Annexure-I paragraph 3 mandating submission of documents mentioned as enclosures thereunder and more particularly Clause 5 of the general terms and conditions of the tender specified in Annexure-II. In the notice inviting tender Clause 4 refers to the pre-qualifying requirements. It reads thus:

"**4. Pre – Qualifying requirements:** The bidders in order to qualify shall satisfy the following criteria.

(a) Average annual turnover of bidder during last 3 years ending 31st March of the previous financial year should be 18 lakhs.

(b) Professional Competence:

Proof of experience having successfully completed similar works during last three years ending on date of Tender opening shall be one of the following

(i) One similar work for the value not less than 60% of estimated cost i.e. Rs.162 lakhs

or

(ii) Two similar works for the value not less than 40% of estimated cost i.e. Rs.108 lakhs each

or

(iii) Three similar works for the value not less than 30% of estimated cost i.e. Rs.81 lakhs each.

(c) The bidders should submit Solvency Certificate issued by scheduled bank for a value of Rs.30 lakhs and the certificate should not be earlier than one month from due date of submission of the tender".

(emphasis supplied)

4. In Annexure-I, in the tender document titled as "Letter of Bidders", the bidder is expected to submit documents mentioned in paragraph 3 therein. Paragraph 3 of the said Letter of Bidders reads thus:

"3. I/We submit the relevant documents as detailed hereunder:-

ENCLOSURES;

1. Notice Inviting Tender duly signed on each page.

2. Instructions to Bidders duly signed on each page.

3. Declaration – (Annexure V) duly filled-in & signed.

4. General conditions of contract duly signed on each page.

5. Documentary evidence of experience i.e. Work order, in running of bus services.

6. Documentary evidence about financial capability.

7. Income-tax PAN & Service Tax Registration No.

8. DD/FDR duly discharged for the EMD amount and cost of tender documents, if downloaded.

9. In case of Partnership firm or Company, a copy each of Partnership Deed/Power of Attorney/Articles of Association & Memorandum of Association as the case may be.

10. Proof of Turnover details i.e. copy of balance sheet.

11. PF Code No.

12. Solvency Certificate".

(emphasis supplied)

5. In addition, we may usefully refer to Clause 5 of general terms and conditions of tender specified in Annexure-II, which reads thus:

> **"5. Documentary proof for experience, financial capabilities, turnover for the last three years (i.e. Balance sheet for last three consecutive years up to March 2012) with technical bid (Part-II), statutory compliances etc.** as given in clause no.3 of Annexure-I of NIT, shall be submitted alongwith the tender. The offers of those bidders not enclosing these documents are liable to be rejected".

6. On conjoint reading of the aforesaid stipulations there is no manner of doubt that submission of the proof of experience is a basic and mandatory requirement. That position is reinforced from the compliance to be made by the bidders while sending letter in the format prescribed in Annexure-I, especially noted in clause No.5 of the general terms and conditions. Clause No.5 has been highlighted in the tender document in bold. Clause 5 stipulates

submission of documentary proof for experience amongst other documents when technical bid (Part-II) and other statutory compliances as given in clause 3 of Annexure-I i.e. Letter of Bidders referred to above. These documents have been made mandatory. As a matter of fact, proof of experience is bare minimum that the bidder has to submit alongwith tender document to substantiate his eligibility to participate in the tender process as notified.

7. The argument of the respondent Nos.1 and 2, however, is that, non-submission of proof of experience or for that matter P.F. Code number did not warrant rejection of the tender document. It was always open to the appropriate Authority to permit the bidder to explain the position and to submit those documents or information in that process. The appropriate Authority is empowered to do so in view of Section-1-Institution of bidder compendium, extract whereof is appended to Annexure- R/1 to the reply-affidavit. Reliance has been placed on Clause serial No.12 in the Annexure-R/1. The same reads thus:

12	**25. Clarification of Bids** **25.1** To assist in the examination and comparison of Bids, the Employer may, at his discretion, ask any Bidder for clarification of his Bid, including break-down of unit rates. The request for clarification and the response shall be in writing or by cable, but no change in the price or substance of the Bid shall be sought, offered, or permitted except as required to conform the correction of arithmetic errors discovered by the Employer in the evaluation of the Bids in accordance with Clause 27.	During the processing / evaluation of the tender proposals, the tenderers may be required to attend to the OWNER'S office for discussions/ clarifications. Tenderers, on request from the OWNER, shall attend Tender discussions at their cost.	To accept CDDB clause in addition to NMDC Clauses.

8. On a bare reading of this clause, it is noticed that the appropriate Authority can call upon the bidder to assist in the examination and comparison of the bids to offer certain explanation. This provision, however, does not mean that the mandatory document which is required to be furnished to substantiate the eligibility of the bidder and necessary to be examined at the threshold as pre-qualifying requirement, can be submitted in the garb of clarification. The clarification can be in respect of matters, which are already

before the Authority and some further information in that behalf is required. Non-submission of proof of experience certainly warranted rejection of the tender document submitted by respondent No.3.

9. The Counsel for the respondent Nos.1 and 2 was at pains to contend that the provision made in Clause 5 of Annexure-II must be read as directory and not mandatory. According to respondents, the very nature of expression used "is liable to be rejected" and not "shall be rejected". It is well settled position that the expression used in the document must be interpreted in the context. When examined in the context whether the proof of experience is a mandatory document to be submitted alongwith the tender document, there can be no doubt that the expression "liable" must be treated as mandatory and not directory - because the proof of experience touches upon the issue of eligibility of the bidder. As aforesaid, Clause No.5 in Annexure-II providing for general terms and conditions of the tender has been highlighted in bold to attract the attention of all concerned and to impress upon them that submission of documents referred to therein are mandatory. Besides Clause No.5 of Annexure-- II, even the format of letter of bidders Annexure-I makes it amply clear that it was obligatory to enclose document of proof of experience as well as P.F. Code number alongwith the said letter being mandatory. If the argument of the respondents were to be accepted then even other documents referred to as enclosures in the letter of bidders would become dispensable and expendable, which contention cannot be countenanced.

10. In our opinion, submission of proof of experience alongwith the tender document in any case was a mandatory requirement. Understood thus, it should necessarily follow that the tender process finalized in favour of respondent No.3 is in excess of authority and in favour of person whose tender document should have been rejected at the threshold for want of proof of experience and having failed to substantiate eligibility to participate in the tender process.

11. Counsel for the respondents No.1 and 2 submits that both the bidders were invited to offer explanation by the appropriate Authority, in which, they participated and after completion of that procedure having found that respondent No.3 is the lowest bidder, contract has been awarded to him. The fact that the petitioner responded to the call given by the appropriate Authority to offer explanation in respect of certain matters, that does not take the matter any farther.

12. The moot question is : whether the tender document submitted by respondent No.3 fulfilled the mandatory requirement? If that is to be answered in the negative, all other incidental matters would be of no consequence, having held that tender document submitted by the respondent No.3 was defective for having failed to submit documentary proof of experience. It follows that the same should have been rejected by the appropriate Authority at the threshold.

13. The counsel for respondents No.1 and 2 lastly submits that even the petitioner is not eligible to participate in the tender process as the petitioner was relying on power of attorney executed in his favour in the year 2009. The tenure of that power of attorney had already expired and therefore the petitioner did not have legal authority to participate in the tender process. That is not the ground on which the tender document of the petitioner has been rejected. That question should have been examined by the appropriate Authority during the scrutiny of the documents submitted by the bidders. At the same time, we may observe that the substantive relief claimed by the petitioner is only to reject the technical bid of respondent no.3 and not for further relief that the contract should be awarded to the petitioner.

14. Moreover, since the work order issued to respondent No.3 is being quashed in terms of this order being consequence of invalid process, it would be open to the respondents No.1 and 2 to consider the eligibility of the petitioner to participate in the impugned tender process and if the appropriate Authority finds that the petitioner was eligible to participate in the said process, may take decision, as may be advised, as the tenure of contract notified in the tender notice was limited to three years and extendable by one year. It will be open to respondents No.1 and 2 to also consider inviting fresh tenders. All these aspects will have to be considered by the respondents No.1 and 2 on its own merits in accordance with law.

15. Suffice it to hold that the relief as claimed by the petitioner even if accepted, the petitioner cannot be given further relief of directing the respondents No.1 and 2 to award contract to the petitioner.

16. We are conscious of the fact that the petitioner has asked for residuary prayer of any other relief and may contend that the Court must mould the relief in favour of the petitioner, but in the fact situation of the present case, we

are not inclined to do so as the question regarding eligibility of petitioner itself has been raised, which will have to be examined by the appropriate Authority of respondents No.1 and 2 in the first instance.

17. Accordingly, this petition partly **succeeds** on the above terms with no order as to costs.

18. At this stage counsel for the respondents No.1 and 2 submits that since the Court has cancelled the contract awarded to respondent No.3 in furtherance of impugned tender process, the respondents No.1 and 2 be permitted to continue with the present arrangement until the fresh tender process is resorted to.

19. We find this request to be fair and appropriate. The respondents No.1 and 2 are granted four weeks time for that purpose. We also make it clear that it will be open to respondent No.3 to participate in the fresh tender process, if so advised, in spite of setting aside of the contract awarded to him in furtherance of the impugned tender process.

20. Ordered accordingly.

Order accordingly.

I.L.R. [2015] M.P., 2921
WRIT PETITION
Before Mr. Justice A. M. Khanwilkar, Chief Justice &
Mr. Justice K.K. Trivedi
W.P. No. 3854/2015 (Jabalpur) decided on 26 June, 2015

RAM SWAROOP CHATURVEDI ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

*A. **Minor Mineral Rules, M.P. 1996, Rule 7 - Grant of trade quarry - Sand Mining** -* **Whether the expression "for 2 years" must be construed as "Minimum 2 years" as per clause (2) of Rule 7 of the Rules 1996 - Held - No, the expression "for 2 years" in case of trade quarry means as upto 2 years or the time period as specified in the auction notice issued as per Form 15 - Petition disposed of. (Paras 5 to 7)**

क. गौण खनिज नियम, म.प्र. 1996, नियम 7 – व्यापार खदान का

प्रदान किया जाना – रेत खनन – क्या नियम 1996 के नियम 7 के खंड (2) के अनुसार अभिव्यक्ति "दो वर्ष के लिये" का "न्यूनतम 2 वर्ष के लिये" निर्वचन किया जाना चाहिये? – अभिनिर्धारित – नहीं, व्यापार खदान के संबंध में अभिव्यक्ति "दो वर्ष के लिये" का अर्थ है 2 वर्ष तक अथवा फॉर्म 15 के अनुसार, जारी की गयी नीलामी सूचना में विनिर्दिष्ट समयावधि – याचिका निराकृत।

B. ***Minor Mineral Rules, M.P. 1996, Rule 22 - Period of quarry lease*** **- Whether the provisions of Rule 22 is applicable on grant of trade quarry - Held - No, the provision of Rule 22 is applicable for duration of grant of quarry lease and not for grant of trade quarry. (Para 6)**

ख. गौण खनिज नियम, म.प्र. 1996, नियम 22 – खदान पट्टा की अवधि – क्या नियम 22 के उपबंध व्यापार खदान के प्रदान पर लागू होते हैं – अभिनिर्धारित – नहीं, नियम 22 का उपबंध खदान पट्टा के प्रदान की अवधि पर लागू होता है और न कि व्यापार खदान के प्रदान पर।

C. ***Minor Mineral Rules, M.P. 1996, Rule 37 - Agreement - Clause 26 - Arbitration Clause*** **- Dispute as to whether amenable to writ jurisdiction - Held - As there is Arbitration Clause in the agreement and efficacious and alternate remedy is available to the petitioner, so remedy of writ jurisdiction under Article 226 of the Constitution is not available for relief regarding refund of the amount deposited by the petitioner. (Para 13)**

ग. गौण खनिज नियम, म.प्र. 1996, नियम 37 – करार – खंड 26 – माध्यस्थम् खंड – क्या विवाद रिट अधिकारिता के अध्यधीन है – अभिनिर्धारित – चूंकि करार में माध्यस्थम् खंड दिया गया है तथा याची को प्रभावशाली एवं वैकल्पिक उपचार उपलब्ध है, अतः याची द्वारा जमा की गई धनराशि की वापसी के संबंध में अनुतोष के लिये संविधान के अनुच्छेद 226 के अंतर्गत रिट अधिकारिता का उपचार उपलब्ध नहीं है।

D. ***Constitution - Article 226 - Disputed question of fact*** **- Whether writ jurisdiction under Article 226 can be invoked - Held - No. (Para 13)**

घ. संविधान – अनुच्छेद 226 – तथ्य का प्रश्न विवादित – क्या अनुच्छेद 226 के अंतर्गत रिट अधिकारिता का अवलंब लिया जा सकता है – अभिनिर्धारित – नहीं।

Akshay Dharmadhikari, for the petitioner.
Samdarshi Tiwari, Dy. A.G. for the respondents/State.

ORDER

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

Two substantive reliefs have been claimed in this petition. The first relief is to direct the Collector to allow the petitioner to enjoy full tenure of 2 years of sand mining and to extend the period of lease agreement till 01.02.2017. The second relief is to quash the order dated 30.03.2015 (Annexure-P/14) and to direct the respondents to refund the amount deposited by the petitioner in compliance of the same.

2. The petitioner had participated in the auction process, which was commenced on the basis of auction notice dated 21.02.2013. The auction notice clearly indicated that the period during which participants would be entitled to avail of sand mining permission, will be till 31.03.2015 only. No doubt, the petitioner was the highest bidder and was, therefore, entitled for grant of trade quarry. The petitioner, however, was unable to execute the agreement till 2.2.2015 on account of circumstances, which, according to the petitioner, were beyond his control.

3. It is not in dispute that the agreement as executed by the petitioner is for the remainder auction period upto 31.03.2015. The petitioner, however, whilst executing the agreement registered protest and executed the agreement without prejudice on the assertion that the petitioner was entitled for minimum 2 years of tenure and not the remainder tenure upto 31.03.2015. The Authorities have not acceded to that request. As a result, the petitioner has approached this Court for direction against the Collector to allow the petitioner to avail of full tenure of 2 years of sand mining and therefore to extend lease agreement till 01.02.2017.

4. According to the petitioner, as per the mandate of Rule 7, the lease agreement for grant of trade quarry cannot be less than 2 years' tenure from the date of taking over possession. For that, the petitioner is relying on Rule 7 of the M.P. Minor Mineral Rules, 1996 (for brevity "Rules of 1996") and drawing analogy from Rule 22 of the Rules of 1996. Rule 7 of the Rules of 1996 reads thus:-

"7. Power to grant trade quarry.-

(1) .....

(2) The quarry of minerals specified in serial number 5 of Schedule I shall be auctioned for five years and quarry of minerals specified in serial numbers 1, 3 and 4 of Schedule II shall be auctioned for two years :

Provided that if contractor establishes cutting and polishing industry, for minerals specified in serial no.5 of Schedule I, within one year, then period of contract shall be exceeded to ten years at the place of five years and in such condition contract money shall be increased by 10% every year excluding first year.

(3) .....

(4) .....

(emphasis supplied)

5. On a bare reading of Rule 7, in particular Clause (2), it does give an impression that the auction for grant of trade quarry covered by serial No.1 in Schedule II should be for 2 years. The question is : whether the expression "for 2 years" must be construed as "minimum 2 years", as is contended by the petitioner.

6. In the first place, the petitioner has not challenged the terms specified in the auction notice. No such relief has been claimed in the present petition. If so, it is not open to the petitioner to argue contrary to the term so specified in the auction notice under which the petitioner is claiming right for grant of trade quarry. Further, the auction notice, we find, is in consonance with the statutory notice specified in Form 15 of the Rules. The statutory Form 15 stipulates that the Contractor will be allotted by public auction trade quarry for period ending 31st of March of the specified financial year from the date of taking over the possession of the quarry. The petitioner then relies on Rule 22 of the said Rules. However, the minimum period specified for grant of quarry lease in Rule 22 is applicable to the minerals specifically referred to in the said Rule. Admittedly, grant of trade quarry is not referred to amongst the minerals specified in Rule 22. Therefore, Rule 22 can have no application to the fact situation of the present case. This position is fairly accepted by the counsel for the petitioner.

7. Be that as it may, considering the fact that specific time frame (period) has been provided in respect of quarry of minerals referred to in Rule 22; and no such specific period is provided in respect of grant of trade quarry, it is not

possible to countenance the argument of the petitioner that the minimum tenure of 2 years should be granted even in case of grant of trade quarry notwithstanding the period specified in the auction notice (statutory notice issued as per Form 15). The expression "for 2 years" in case of trade quarry must, therefore, be construed to mean as upto to 2 years or the time period as specified in the auction notice itself.

8. Suffice it to observe that as no express legal provision has been brought to our notice, which mandates the fixed tenure of 2 years period for trade quarry after execution of the agreement so as to disregard the specific time frame is provided in the auction notice issued in consonance with Format 15 specifying the outer limit upto 31.03.2015, it is not open to argue to the contrary.

9. As noted earlier, the petitioner has executed agreement in furtherance of the auction notice specifying period till 31.03.2015 and has executed agreement is consonance with the said period. The fact that the petitioner protested or executed the agreement without prejudice, will not make any difference. For, the petitioner had participated in the auction process with open eyes that the period specified in the auction notice was only upto 31.03.2015. Thus, the petitioner can not be permitted to approbate and reprobate.

10 The fact that the petitioner was unable to execute the agreement because of fortuitous circumstances until 22.02.2015 will be of no avail to the petitioner. There is no express provision in the Rules of 1996 empowering the Authority to extend the tenure specified in the auction notice qua grant of trade quarry because of the grounds as are pressed into service. As aforesaid, the petitioner having failed to challenge the tenure specified in the auction notice dated 21.02.2013 and also acted upon the same with open eyes cannot be heard to complain about the said condition or seek relief contrary thereto.

11. Reverting to the second relief claimed in this writ petition by way of amendment, the petitioner has asked for quashing the order dated 30.03.2015 (Annexure-P/14). As a matter of fact, by that communication the tenure of trade quarry has been extended until 30.06.2015 in exercise of power under Rule 41(6) of the Rules of 1996. Sub-rule (6) stipulates that if the Authorities have failed to conduct auction due to reasons beyond the control of the State Government, the tenure of the Contractor, who has already been awarded mining lease and whose mining lease is subsisting, could be given extension for maximum 3 months on enhancement of 10% in contract money.

12. Notably, If the order dated 30.03.2015 (Annexure- P/14) is quashed, the limited benefit which has been extended to the petitioner till 30.06.2015 as a result of non conducting of auction within time, will also stand withdrawn. Indeed, the grievance of the petitioner is that the period should have been much more than 3 months and commensurate with 2 years tenure from the date of taking over possession after the agreement executed by the petitioner. That claim having been rejected in the earlier part of this judgment, we must rest this order with the finding that no infirmity can be found with the order dated 30.03.2015 (Annexure-P/14) for having limited the period of extension of 3 months because of the situation specified in Sub-rule (6) of Rule 41.

13. The second part of prayer clause (2A) is to direct the respondents to refund the amount deposited by the petitioner. This relief is obviously on the assumption that the offer given by the petitioner of contract amount was on the understanding that the petitioner would be given lease for minimum 2 years period. Thus, contract amount commensurate reduction for the period which has been lost by the petitioner, must be refunded to the petitioner. This is a matter giving rise to a dispute emanating from the terms and conditions specified in the agreement. Any dispute in that behalf, *Prima facie,* is amenable to remedy under Clause 26 (Arbitration Clause) of the agreement by way of Arbitration. As efficacious and alternative remedy is available to the petitioner; and, more so, the circumstances, which may be pressed into service to justify the relief of refund may involve disputed questions of facts, it may not be appropriate to invoke writ jurisdiction under Article 226 of the Constitution. That relief can be pursued by the petitioner by way of Arbitration proceedings or any other proceedings as may be permissible in law. All questions in that behalf will have to be decided on its own merits in accordance with law.

14. While parting, learned counsel for the petitioner submitted that in the event the Authorities were to accept the claim of the petitioner of refund of commensurate quantum of contract amount because of reduced time period available to the petitioner for the trade quarry, the petitioner may be permitted to purse remedy of refund of commensurate stamp duty amount paid on the agreement. We are not expressing any opinion on the correctness of this submission. But, if the petitioner has any remedy available in the law for refund of commensurate principal amount or for that matter towards stamp duty, is free to pursue the same in accordance with law. All question which are not decided in the present proceedings will have to be decided on its own merits

in accordance with law by the concerned Authority.

15. If any representation is submitted by the petitioner, we have no manner of doubt that the concerned Authority will decide the same expeditiously and preferably not later than two months from receipt thereof.

16. **Disposed of** accordingly.

Petition disposed of.

I.L.R. [2015] M.P., 2927
WRIT PETITION
Before Mr. Justice R.S. Jha
W.P. No. 5298/2007 (Jabalpur) decided on 1 July, 2015

REKHA PANDEY (SMT.) ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

Service Law - Termination - Natural Justice **- Petitioner applied for appointment on the post of Samvida Shala Shikshak Grade III - Although the petitioner failed to secure 40% marks in entrance examination as required under Rule 6 of M.P. Panchayat Samvida Shala Shikshak (Appointment and Conditions of Contract) Rules, 2001, but by mistake treating 42.64 marks as percentage obtained by petitioner, permitted her to participate in counseling and also granted an appointment - Subsequently her services were terminated - Held - No show cause notice is required to be issued as no useful purpose would have been served as issuance of such notice would be a useless formalities - If undisputed facts are involved, non issuance of notice to employee is not fatal - Petition dismissed. (Paras 6, 7 & 10)**

सेवा विधि – सेवा समाप्ति – नैसर्गिक न्याय – याची ने संविदा शाला शिक्षक श्रेणी तीन के पद पर नियुक्ति के लिये आवेदन किया – यद्यपि याची म.प्र. पंचायत संविदा शाला शिक्षक (नियुक्ति एवं संविदा की शर्तें) नियम, 2001 के नियम 6 के अंतर्गत प्रवेश परीक्षा में अपेक्षित 40% अंक अर्जित करने में असफल रहा, किंतु त्रुटिवश याची द्वारा अर्जित 42.64 अंकों को प्रतिशत मानते हुए उसे परामर्श में भाग लेने की अनुमति दी गई एवं नियुक्ति भी प्रदान की गई – तत्पश्चात् उसकी सेवायें समाप्त की गई – अभिनिर्धारित – कारण बताओ नोटिस जारी करना अपेक्षित नहीं, क्योंकि उक्त नोटिस जारी करना कोई उपयोगी प्रयोजन सिद्ध नहीं करता केवल निरर्थक औपचारिकता होगी – यदि अविवादित तथ्य शामिल हैं,

कर्मचारी को नोटिस जारी नहीं किया जाना घातक नहीं है – याचिका खारिज।

Cases referred :

(2014) 9 SCC 105, (2007) 4 SCC 54, (2007) 5 SCC 65, (2008) 9 SCC 31, (2014) 8 SCC 369, 2006(3) MPHT 39.

Avinash Zargar, for the petitioner.
Devesh Jain, G.A. for the respondent/State.
Tabrez Shekh, for the respondent No.3.

(Supplied: Paragraph numbers)

ORDER

R.S. JHA, J. :- Heard the learned counsel for the parties on IA No. 8729/2014 for vacating stay but on the request of the learned counsel for the parties, the matter is heard and decided finally.

2. The petitioner has filed this petition being aggrieved by the order dated 17.2.2007 by which the appointment of the petitioner on the post of Samvida Shala Shikshak Grade-III has been cancelled. The learned counsel for the petitioner submits that the petitioner had filed an application pursuant to the advertisement issued by the respondents for filling up 158 posts of Samvida Shala Shikshak Grade-III in Janpad Panchayat Bankhedi. For this purpose, the eligibility entrance examination was conducted by the Madhya Pradesh Professional Examination Board. The petitioner appeared in the entrance examination and was thereafter called for counseling by vide communication dated 19.09.2006 on the strength of a certificate issued by the respondent no. 3 Annexure P2.

3. It is stated that the respondents on scrutiny of the petitioner's documents issued an order of appointment dated 28.9.2006. Pursuant to which, she joined her duties on 6.10.2006. The petitioner in the petition has alleged that when the petitioner was continuously working on the post, she suddenly received an order dated 17.2.2007 by which her appointment was cancelled on the ground that she had not obtained minimum qualifying marks in the eligibility examination. The petitioner being aggrieved, had filed a representation before the higher authorities which was not considered and decided, hence the petitioner is constrained to file this petition.

4. It is submitted that the respondents authorities have passed the

impugned order cancelling the petitioner's appointment without giving any opportunity of hearing to the petitioner and without taking note of the fact that the respondent no.3 Madhya Pradesh Professional Examination Board had issued a certificate to the petitioner Annexure P/2 certifying that she was eligible for appointment on the post of Samvida Shala Shikshak Grade-III. It is further stated that inspite of the aforesaid certificate of the Professional Examination Board and inspite of the fact that the petitioner had been granted appointment after scrutinizing all her papers, the impugned order of cancellation has been issued, which deserves to be quashed.

5. The respondents filed their return and have stated that though the petitioner was granted appointment on the post of Samvida Shala Shikshak Grade-III, however, subsequently on scrutiny, it was found that the petitioner had obtained only 42.64 marks out total 130 marks i.e. below the minimum qualifying marks of 40% which is statutorily prescribed and required by Rule 6 of the Madhya Pradesh Panchayat Samvida Shala Shikshak (Appointment and Conditions of Contract) Rules, 2001 (for short hereinafter referred as "Rules 2001") and therefore, the respondents authorities issued the impugned order cancelling the petitioner's appointment.

6. It is submitted by the respondents that the petitioner has not obtained the minimum qualifying marks which is statutorily prescribed and therefore her appointment was patently illegal and had been made by mistake and on that count, the impugned order was issued cancelling her appointment. It is submitted by the respondents that the fact that the petitioner had obtained less than 40% marks is undisputed and in such circumstances, the respondents on discovering the mistake have issued the impugned order and therefore no fault can be found with the same.

It is also apparent from the perusal of the order sheets of this Court that the respondent no.3 was specifically asked to clarify as to whether mentioning of 42.64 marks in Annexure P2 which the certificate issued by the respondent no. 3, is mention of marks obtained or the percentage of marks. A perusal of the order passed by this court on 28.4.2015 makes it clear that the respondent no. 3 had clarified this aspect and has stated that 42.64 figure mentioned in Annexure P2 are the marks that have been obtained by the petitioner out of total 130 marks and is not the percentage of marks obtained by her. This court on 24.4.2015 went on to state that the controversy regarding actual marks and percentage is put to rest in view of the clear and specific

stand of the respondent no.3.

7. Having heard, the learned counsel for the parties and in view of the aforesaid facts, it is clear and undisputed that the petitioner had infact not obtained the minimum qualifying marks of 40% which is statutorily prescribed by Rule 6 of Rules 2001. However, the respondents authorities by mistake treating 42.64 marks as the percentage of marks obtained by the petitioner, permitted her to participate in the counseling and have also granted an appointment. It is further clear that when this mistake was discovered, the respondent authorities issued the impugned order cancelling the petitioner's appointment.

8. Even before this court, the petitioner has not been able to point out that the petitioner had obtained more than 52 marks or 40% in the qualifying examination as statutorily prescribed in Rule 6 of the Rules.

9. In view of the aforesaid undisputed and admitted facts, I am of the considered opinion that no fault can be found with the act of the respondents authorities in not complying with the principles of natural justice or issuing any notice to the petitioner as even if such a notice would have been issued, no useful purpose would have been served as issuance of such notice would be a useless formalities.

10. In the similar circumstances, the Supreme Court in the cases of *Gorkha Security Services vs. Government (NCT of Delhi) and Others*, (2014) 9 SCC 105, *Ashok Kumar Sonkar vs. Union of India and others*, (2007) 4 SCC 54, State of *Manipur and others vs. Y. Token Singh and others*, (2007) 5 SCC 65 and *Haryana Financial Corporation and Another vs. Kailash Chandra Ahuja,* (2008) 9 SCC 31 and *Hitendra Singh S/0 Bhupendra Singh and others Vs. Panjabrao Deshmukh Krishi Vidyapeeth by Registrar and others*, (2014) 8 SCC 369 as well as this court in the case of *Munna Lal Yadav vs. Dr. Hari Singh Gour and another*, 2006 (3) MPHT 39, has held that non issuance of a notice to the employee is not fatal to the order passed by the authorities when the facts involved are undisputed or in cases where the issuance of a notice would not serve any useful purpose and would be a useless formality.

11. It is contended by the learned counsel for the petitioner that the petitioner possesses a D.Ed. Certificate and therefore, is entitled for an additional 20 marks under Rule 9 of the Rules 2001. It is stated that if the

aforesaid 20 marks are awarded to the petitioner, she would even otherwise be entitled to an appointment.

12. Having heard the learned counsel for the parties, it is observed that the aforesaid benefit of marks of 20% would have had an impact on the claim of the petitioner only in case she would have obtained the minimum qualifying marks statutorily prescribed under Rule 6 of Rules 2001 which admittedly the petitioner has not obtained and therefore, denial or award of 20 marks for possessing D.Ed certificate does not in any manner help the petitioner or affect the result of the case. The contention raised by the petitioner in this regard, is accordingly rejected.

13. The learned counsel for the petitioner states that the petitioner has been permitted to work on account of an interim order passed by this Court on 7.5.2007. It is also submitted that though the petitioner has been permitted to work, she has not been paid remuneration since August 2013 till date and therefore, respondents authorities be directed to pay the dues of the petitioner for the services she had actually rendered.

14. The learned Government Advocate appearing for the respondent State submits that if the petitioner files the representation before the authorities, the same shall be examined and in case if it is found that the petitioner had actually worked, the remuneration shall be disbursed to her after examining the record.

15. In view of the aforesaid statement of the learned Government Advocate for the respondent/State while dismissing the petition, it is observed that the respondent authorities shall look into the representation and decide the same in case the petitioner produces a certified copy of the order passed today along-with copy of the petition within four weeks from today, the authority concerned shall thereafter, examine the record and on finding that some amount is due to be paid to the petitioner, the same shall be disbursed to the petitioner as expeditiously as possible preferably within a period of 3 months thereafter.

16. In view of the aforesaid and in view of the law laid down by the Supreme Court, I find no reason to entertain the present petitioner.

The petition filed by the petitioner is accordingly dismissed with the aforesaid directions.

C.C. as per rules.

Petition dismissed.

I.L.R. [2015] M.P., 2932
ELECTION PETITION
Before Mr. Justice G.S. Solanki
Election Pet. No. 2/2014 (Jabalpur) decided on 31 March, 2015

VANSHMANI PRASAD VERMA ...Petitioner
Vs.
RAJENDRA KUMAR MESHRAM & anr. ...Respondents

A. ***Representation of the People Act (43 of 1951), Section 33*** **- Filing of certified copy of Electoral Roll, where the candidate is enrolled - Mandatory provision.** **(Para 15)**

क. *लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 33* – निर्वाचक नामावली की प्रमाणित प्रति प्रस्तुत करना, जहां प्रत्याशी सूचीबद्ध है – आज्ञापक उपबंध।

B. ***Representation of the People Act (43 of 1951), Section 33(5)*** **- Certified copy of Electoral Roll not filed by candidate - Mere mentioning of serial number as elector in nomination form is not compliance of mandatory provision.** **(Para 15)**

ख. *लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 33(5)* – प्रत्याशी द्वारा निर्वाचक नामावली की प्रमाणित प्रति प्रस्तुत नहीं – नामांकन प्रपत्र में केवल निर्वाचक की क्रम संख्या का उल्लेख किया जाना आज्ञापक उपबंध का पालन नहीं है।

C. ***Representation of the People Act (43 of 1951), Sections 33(5) & 36(7) - Proof of Elector*** **- Copy of Electoral Roll or relevant part thereof or certified copy of relevant entries of such roll - Filed at the time of filing nomination form.** **(Para 15)**

ग. *लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 33(5) व 36(7) – निर्वाचक का सबूत* – निर्वाचक नामावली की प्रति या उसका सुसंगत खंड या उक्त नामावली की सुसंगत प्रविष्टियों की प्रमाणित प्रति –नामांकन प्रपत्र प्रस्तुत करते समय प्रस्तुत करना चाहिये।

D. ***Representation of the People Act (43 of 1951), Section 33(5)*** **- Stages of filing of certified copy of Electoral Roll - Firstly at the time of filing of nomination paper - Secondly at the time of screening.**

(Para 15)

घ. *लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 33(5)* – निर्वाचक नामावली की प्रमाणित प्रति प्रस्तुत करने के प्रक्रम – प्रथमतः नामांकन पत्र प्रस्तुत करते समय – द्वितीयतः जांच के समय।

E. Representation of the People Act (43 of 1951), Section 33(5) - **Onus/Burden of Proof of filing of certified copy of Electoral Roll is on the returned candidates (respondent) - As respondent failed to prove that he had filed certified copy of Electoral Roll, his nomination paper was wrongly accepted by returning officer. (Para 18)**

ङ. *लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 33(5)* – निर्वाचक नामावली की प्रमाणित प्रति प्रस्तुत किया जाना साबित करने का भार/दायित्व निर्वाचित प्रत्याशियों (प्रत्यर्थी) पर है – चूंकि प्रत्यर्थी यह सिद्ध करने में असफल रहा कि उसने निर्वाचक नामावली की प्रमाणित प्रति प्रस्तुत की थी, निर्वाचन अधिकारी द्वारा उसका नामांकन पत्र गलत रूप से स्वीकार किया गया था।

F. Representation of the People Act (43 of 1951), Sections 33(5), 36(2)(b) - Non-compliance of Section 33(5) - Fatal - **Candidate ineligible to contest election - Nomination liable to be rejected - Election set-aside. (Para 18)**

च. *लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 33(5) व 36(2)(बी) – धारा 33(5) का अननुपालन – घातक* – प्रत्याशी चुनाव लड़ने के लिये अपात्र – नामांकन अस्वीकार किये जाने योग्य – निर्वाचन अपास्त।

Cases referred :

AIR 1959 SC 93, AIR 1988 SC 1796.

Arvind Shrivastava with *Sumit Kanojiya*, for the petitioner.

Saurabh Tiwari with *Gaurav Tiwari*, for the respondent No.1.

JUDGMENT

G.S. Solanki, J. :- The petitioner has filed this petition under Section 80 read with S.81 of the Representation of the People Act, 1951 (for brevity 'the Act'), against the election of the returned candidate viz. respondent No. 1 to 81, Deosar Constituency of M.P. Legislative Assembly for which elections held on 25.11.2013 and result was declared on 10.12.2013 inter alia on the grounds that the petitioner is a voter of 81, Deosar Constituency for M.P. Legislative Assembly, his name is entered in voter list in Part 21 at Sr. No. 320. The petitioner submitted his nomination for aforesaid constituency reserved for scheduled caste; firstly he filed his nomination for as candidate sponsored

by Indian National Congress on 5.11.2013 and again filed two sets of nomination form on 8.11.2013 as an independent candidate. The petitioner has filed an authority letter in regard to allotment of symbol which has been made by the party in duly filled form No. A and B as required under Election Symbol (Reservation and Allotment) Order, 1968. The aforesaid letter was filed on 8.11.2013 before the stipulated limitation period. Aforesaid letter was given on behalf of Indian National Congress (for short the INC). It is pleaded that on that date there was large crowd gathered inside the chamber of the returning officer and the petitioner was there right from 2.40 PM. It is further pleaded that earlier in the day he has also submitted his candidature form as an independent candidate. It is further pleaded that returning officer closed the door from inside at 3 PM and announced that nomination form and other relevant documents will be received from the candidates and other persons concerned who are inside the chambers before 3 PM and consequently returning officer received nomination form, authority letter and other relevant documents from the candidates till 4.30 PM. The petitioner had also submitted authorithy letter even before 3 PM.

2. The scrutiny of nomination paper was conducted on 9.11.2013. The respondent filed an objection to the returning officer with the prayer for rejection of the petitioners nomination form as a candidate sponsored by the INC as the symbol allotted by the party has been submitted by him after 3 PM. The petitioner has replied the aforesaid objection with the request that he has filed the aforesaid symbol allotment authority letter within the stipulated period. It is further pleaded that the returning officer posted the hearing on objection for 11.11.2013 and after hearing the parties returning officer has rejected the nomination form of the petitioner as sponsored candidate by the INC on the ground that he submitted the symbol allotment authority letter at 4.05 PM which was after the expiry of limitation period of 3 PM of last day of filing the nomination form. Since returning officer has made false observation in regard to the arguments made by the petitioner, thus, it is obvious that the returning officer has malafidely rejected the petitioner's nomination form as candidate sponsored by the INC under the influence and pressure of the ruling party.

3. It is further pleaded that the petitioner's nomination form as an independent candidate has been accepted and he was forced to contest as an independent candidate and he stood second to the returned candidate i.e. respondent No. 1.

4. It is further pleaded that the petitioner and one Subhash Saket raised the objection against acceptance of nomination form of respondent No. 1 on the ground that respondent No. 1 was in Government service and the order accepting his resignation has not been signed by the competent authority and secondly it was objected that caste certificate submitted by respondent No. 1 was not valid and genuine and he does not belong to scheduled caste, therefore, his nomination form deserves to be rejected. The returning officer after hearing both the parties rejected the objection on 11.11.2013 and accepted nomination form of respondent No. 1. The petitioner again pleaded and summed up that the returning officer has wrongly rejected the petitioner's nomination form as a candidate sponsored by the INC and also wrongly accepted the nomination form of respondent No. 1 despite respondent No. 1 failed to furnish order of competent authority accepting his resignation, further failed to furnish certified copy of voter list to entitle him to contest the election from Deosar Constituency as he is a registered voter of 80, Singrauli Constituency. Without filing certified copy of relevant part of voter list, he was not eligible to contest election from 81, Deosar Constituency. Consequently, acceptance of nomination form of respondent No. 1 has materially affected the election results. On the basis of aforesaid pleadings and grounds the petitioner has prayed that election of respondent No. 1 be declared as null and void.

5. Respondent No. 1 has denied the pleadings made by the petitioner in the election petition and submitted that he raised an objection in respect of submission of sponsored symbol presented by the petitioner at 3:00 PM on the date of nomination and further pleaded that initially petitioner has filed a nomination form as an independent candidate and subsequently submitted the letter of authority of the INC sponsored him. It is further submitted that the petitioner has submitted his nomination as an independent candidate and he has not filed the letter of authority of INC before 3 O'clock. He submitted aforesaid authority at 4.05 PM which is not permissible as per rules, therefore, the nomination of the petitioner as sponsored candidate of the INC has been rightly rejected by the returning officer. It is further submitted that the returning officer acted in accordance with law, therefore, does not come within the purview of influence and pressure. It is further pleaded that the petitioner has not specifically pleaded that as to how and by whom and where and in which manner the returning officer was influenced or was pressurized by the ruling party. It is specifically denied that the petitioner was forced to

contest the election as an independent candidate. It is partly accepted that an objection was made by Subhash Saket in respect of resignation of respondent No. 1 from service and genuineness of the caste certificate, which objection was dealt with by the returning officer and was rejected. It has been specifically denied that respondent No. 1 has failed to submit order of competent authority accepting his resignation and certified copy of the voter list of 80, Singrauli Constituency. It is further pleaded that the petitioner has not filed any documents in support of aforesaid contentions, therefore, same has been specifically denied. On the basis of aforesaid reply, respondent No. 1 has prayed for dismissal of the instant election petition.

6. On the basis of the pleadings made by the parties, the following issues were framed. The corresponding answer is noted against each one of them :-

No.	Issue	Finding
(1)	Whether the returning officer has malafidely rejected the petitioner's nomination form as the candidate sponsored by the Indian National Congress under the influence of the then ruling party?	No
(2)	Whether respondent No. 1 was in government service at the time of acceptance of his nomination form by the returning officer?	No
(3)	Whether respondent No. 2 has committed illegality in accepting the nomination form of respondent No. 1?	Yes
(4)	Whether respondent No. 1 has failed to prove that his name was in the voter list of 80 Singrauli Constituency? (if so, effect)	Yes, he was not eligible to contest the election.
(5)	Whether respondent No. 1 has failed to submit valid Caste certificate for contesting the election from the	Not proved

	constituency reserved for scheduled caste category?	
(6)	Whether result of election of 81 Deosar Constituency was materially affected due to improper acceptance of nomination of respondent No. 1?	As per Para-19.
(7)	Relief and costs?	As per Para 20.

REASONS FOR THE FINDINGS

7. **Issue No.1** : Petitioner Vanshmani Prasad Verma (PW-2) has stated that he filed his nomination paper (Ex.P-6) as an authorized candidate of INC on 5.11.2013 and he filed another nomination paper (Ex.P-1) on 7.11.2013 and on 8.11.2013 at about 2:40 PM, he filed Form A and B. He has further stated that on that date, there was a crowd in the retiring room of the returning officer. At about 3:00 PM, the door of the room was bolted from inside and the returning officer took the documents from the candidates till 4:30 PM. He has further stated that on 9.11.2013 respondent No. 1 has filed an objection in regard to the fact that the petitioner has not filed Form A and B till 3:00 PM on 8.11.2013, therefore, his nomination paper be rejected.

8. The said objection was decided by the returning officer vide order (Ex.P-11) on 11.11.2013. He admitted in his cross-examination that he made an objection to the candidature of Harilal Prajapati on 9.11.2013 wherein he has not mentioned that he is the authorized candidate of the INC in place of Harilal. He further admitted that the returning officer has mentioned the time as 4:05 PM on the top of Form A and B but he further explained that same was wrongly mentioned by the returning officer. He further admitted that he did not write in his objection that the returning officer has malafidely entered the time as 4:05 PM.

9. Respondent No. 1 has stated that he had filed an objection in regard to the fact that the petitioner had filed Form A and B belatedly and aforesaid objection was decided by the returning officer vide Ex.P-11.

10. It reveals on perusal of Ex.P-10 that respondent No. 1 made objection in regard to the fact that petitioner has failed to file Form A and B within the stipulated time. It is further revealed from perusal of Ex.P-9 that the petitioner had expressed that he filed Form A and B before 3:00PM and it is further

mentioned that he has not filed Form A and B after 4:00 O'clock. It appears that the petitioner came to know that his nomination paper has been rejected on the ground that he has not filed Form A and B within the stipulated time i.e. before 3:00PM, this fact further finds support from Form A and B (Ex.P-7 and P-8) wherein the returning officer has mentioned the time as 4:05 PM on top of Form A. It is further revealed from the impugned order (Ex.P-11) dated 11.11.2013 that the petitioner filed another nomination as an independent candidate on 8.11.2013 at about 2:48 PM and check list was provided to him after he filed Form A and B along with the aforesaid nomination. Certainly, this point would have been mentioned in the check list. Though it is pleaded that the returning officer has acted malafidely but no such evidence has been adduced in regard to the fact that how he has acted malafidely. It is also on record that the petitioner had made objection against the nomination of Harilal Prajapti but if he was an authorized candidate of INC, certainly he would have mentioned this fact in his objection. It appears that when it was found that the nomination of Harilal Prajapati was going to be rejected on the ground that on the date of nomination, he was holding the office of profit because he was working as permanent government servant, then the INC allowed the petitioner to contest as sponsored candidate of the party and thereafter he belatedly filed Form A and B before the returning officer. Since the petitioner has not produced the returning officer to establish his case that he filed Form A and B before 3 O'clock on 8.11.2013, in these circumstances, it is presumed that the returning officer performed his official duty properly and regularly and made endorsement on Form A and B (Ex.P-7 and P-8), thus the petitioner has failed to prove that he has filed the nomination form within the stipulated period i.e. on or befor 3 O'clock on 8.11.2013.

In view of the aforesaid discussion, issue No. 1 is answered as Negative.

11. **Issue No. 2** : Petitioner Vanshmani Prasad Verma (PW-2) has stated that he made objection (PW-2) against the nomination of respondent No. 1 that he has not filed valid acceptance of his resignation by the authority concerned. Respondent No. 1 has stated that he resigned from the post of Chief Pharmacist, Northern Coal Fields Limited, Nehru Shatabdi Hospital, Jayant, District Singrauli. He specifically denied that his resignation was not accepted from the aforesaid post of Chief Pharmacist. He stated that he filed relevant letter (Ex.P-12) before the returning officer.

12. It reveals from a bare perusal of order (Ex.P-12) that the this official order was issued by Staff Officer (Karmik) NSC, Jayant, District Singrauli on the letter-head of Northern Coal Fields Limited, Nehru Shatabdi Hospital, Jayant as to the effect that resignation of respondent No. 1 has been accepted by the competent Officer and he has been relieved from the service of Chief Pharmacist w.e.f. 6.11.2013 and his name has been deleted from the Roll of the Company. It is further mentioned that this order has been issued after getting approval of the competent officer, which shows that the resignation of respondent No. 1 was duly accepted by the competent authority of Nehru Shatabdi Hospital, Northern Coalfields Limited, therefore, the order (Ex.P-5) passed by the returning officer on 11.11.2013 as to the effect that the resignation of respondent No. 1 has been accepted by the competent authority, does not suffer with any infirmity or illegality. In these circumstances, issue No. 2 is answered as negative.

13. **Issue No. 5** :- Though the petitioner has pleaded that respondent No. 1 has failed to submit valid caste certificate before the returning officer that he belongs to the scheduled caste category but in his statement nothing has been stated by the petitioner in regard to the aforesaid pleading. Further, it reveals that such objection has been made by one Subhash Saket but the petitioner has not adduced Subhash Saket in his evidence. Thus, the petitioner has failed to prove that respondent No. 1 has not filed the valid caste certificate before the returning officer. Consequently, issue No. 5 is answered as not proved.

14. **Issue Nos. 3 and 4** : The petitioner has pleaded that respondent No. 1 has failed to file certified copy of the voter list to entitle him to contest the election from 81 Deosar Constituency to show that he is a registered voter of 80, Singrauli Constituency and without filing the certified copy of relevant part of the voter list, he was not eligible to contest the election from 81, Deosar Constituency. In reply, respondent No. 1 has pleaded that the petitioner has not filed any document in this regard, therefore, the aforesaid pleading is denied. Petitioner Vanshmani Prasad Verma (PW-2) has stated that at the time of making objection he stated that name of respondent No. 1 Rajendra Kumar Meshram is not registered in 81, Deosar Legislative Assembly Constituency. His name is entered in the voter list on 80, Singrauli Constituency but he has not filed the copy of the electoral roll. Respondent No. 1 Rajendra Kumar Meshram has stated that his name has found place in the voter list of

Singrauli Constituency at Sr. No. 433. He has further stated that this fact has been mentioned by him in his nomination paper (Ex.P-2). He denied the suggestion of the petitioner that he has not filed the certified copy of the electoral roll before the returning officer.

15. It reveals on critical analysis of statement of respondent No. 1 that he only stated that his name has found place in Sr.No. 433 of voter list of 80, Singrauli Constituency and he mentioned this fact in his nomination paper. It is true that this fact has found place in the nomination paper, however, he has not stated that he had filed the certified copy of the aforesaid electoral roll before the returning officer. Mere mentioning of aforesaid fact in nomination form would not amount to compliance of mandatory provision of Section 33(5) of the Act of 1951. Thus, it is proved on record that respondent No. 1 had not filed the certified copy of the electoral roll of 80, Singrauli Constituency. As per Section 33(5) of the Act of 1951, respondent No. 1 was duty bound to file copy of the electoral roll of 80, Singrauli Constituency or relevant part thereof or certified copy of relevant entries of such roll at the time of filing nomination paper. It is further provided in Rule 36(7) of the Act of 1951 that for the purpose of this section, certified copy of entries in the electoral roll for the time being in force of the Constituency shall be conclusive evidence of the Act that person referred to in that entry is an elector for the Constituency. It means respondent No. 1 was having two opportunities; first at the time of filing nomination paper and secondly at the time of screening, he could have filed the certified copy of electoral roll of 80, Singrauli Constituency.

16. Learned counsel for the petitioner has submitted that the returning officer has committed illegality in not rejecting the nomination paper of respondent No. 1 on the ground that he has not complied with the provision of Section 33(5) of the Act of 1951. He has placed reliance on *Shri Baru Ram Vs. Smt. Prasanni and others* - AIR 1959 SC 93 and *Birad Mal Singhvi Vs. Anand Purohit* - AIR 1988 SC 1796. The Apex Court in both the aforesaid cases has specifically held that *"where the statute requires specific fact to be proved in specific way and it also provides for the consequences of non-compliance with the said requirement, it would be difficult to resist the application of penalty clause on the ground that such an application is based on technical approach"*.

17. In the light of the aforesaid principle when I assessed the facts and evidence of the instant case, I found that the petitioner came with a specific

pleading that respondent No. 1 has failed to file certified copy of the voter list of 80, Singrauli Constituency where his name was alleged to have been registered. In reply, respondent No. 1 has not come up with the case that he has filed the aforesaid certified copy of the voter list of 80, Singrauli Constituency. On the contrary, he pleaded that since the petitioner has not filed any document in this regard, therefore, the aforesaid pleading is denied. Primarily, this denial is not a specific denial and secondly, at the time of evidence also, respondent No. 1 has not stated in affirmative manner that he filed the certified copy of the aforesaid voter list before the returning officer. He only stated that his name has found place in 80, Singrauli Constituency at Serial No. 433. It means he has not complied with the provision of Section 33(5) of the Act of 1951. The Apex Court in *Birad Mal Singhvi Vs. Anand Purohit* (supra) has observed thus :-

> *.....Non-compliance with Section 33(5) is fatal to the nomination and no other mode is prescribed by the Act for proving the eligibility of the candidate. Section 33(5) prescribes a particular mode to prove eligibility of a candidate to contest election and S.36(2)(b) provides penal consequences. Therefore S. 33(5) is mandatory in nature. An elector of a different constituency is under a mandatory duty to prove his eligibility in the manner prescribed by S.33(5) of the Act and if he fails to do that, he must suffer the consequences contemplated by S. 36(2)(b) of the Act. The returning officer is under no legal obligation to make amends for the omission of a candidate, especially when the omission relates to a mandatory requirement.....*

18. In the instant case, the onus was on respondent No. 1 to prove that he has filed the certified copy of electoral roll of 80, Singrauli Constituency before the returning officer but he has failed to prove the aforesaid fact. In these circumstances, in my opinion, respondent No. 1 was not qualified to contest the election from 81, Deosar Constituency on the date of filing the nomination for the election of aforesaid Constituency and the returning officer has committed illegality in accepting the nomination paper of respondent No. 1 and also in not rejecting his nomination paper due to non-compliance of Sections 33(5) and 36(2)(b) of the Act of 1951. Thus, issue Nos. 3 and 4 are answered in affirmative, as a consequence thereof, the election of respondent

No. 1 is liable to be set aside.

19. **Issue Nos. 6 and 7** :- Since respondent No. 1 has not filed the certified copy of the voter list of 80, Singrauli Constituency in which his name was registered as an elector and thereby he has not complied with the mandatory provisions of Section 33(5) and 36(2)(b) of the Act of 1951, therefore, he was not eligible to be chosen to fill the seat of 81 Singrauli Constituency. In other words, he was disqualified to be chosen to fill the seat under the Act of 1951. Thus, this case is covered under Section 100(1)(a) along with Section 100(1)(d)(i) of the Act of 1951. Since respondent No. 1 was not eligible to contest the election from 81, Deosar Constituency of M.P. Legislative Constituency, therefore, now it is not necessary to consider whether the election of respondent No. 1 has been materially affected due to improper acceptance of nomination paper of respondent No. 1. The petitioner has succeeded in proving that respondent No. 1 has failed to comply with the mandatory provision of Sections 33(5) and 36(2)(b) of the Act of 1951

20. Resultantly, the election petition is allowed. The election of respondent No. 1 from 81, Deosar Constituency is hereby declared as null and void.

Respondent No. 1 to bear his own cost and cost of the petitioner.

Advocates' fee as per schedule, if certified.

The office is directed to send a certified copy of this judgment to the Election Commission and the Speaker of State Legislative Assembly within a week.

Petition allowed.

I.L.R. [2015] M.P., 2942
ELECTION PETITION
Before Mr. Justice G.S. Solanki
Election Pet. No. 16/2014 (Jabalpur) decided on 13 February, 2015

PUSHPENDRA SINGH HAZARI ...Petitioner
Vs.
LAKHAN LAL ...Respondent

A. ***Representation of the People Act (43 of 1951), Sections 87(1), 86 & 81(3) r/w Order 7 Rule 11 & r/w Section 151 C.P.C. - Objections*** **- Proper attestation of petition and its Annexures are not**

there - Signatures of the petitioner in petition and its annexures - Held - As the petition as well as the annexures bears signature of the petitioner so it amounts to sufficient attestation as per the provisions of Section 81(3) of the Act of 1951. (Para 15)

क. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराऐं 87(1), 86 व 81(3) सहपठित आदेश 7 नियम 11 व सहपठित धारा 151, सि.प्र.सं. – आपत्तियां – याचिका तथा उसके अनुलग्नकों का उचित सत्यापन नहीं किया गया – याचिका तथा उसके अनुलग्नकों में याची के हस्ताक्षर – अभिनिर्धारित – चूंकि याचिका तथा उसके अनुलग्नकों में याची के हस्ताक्षर हैं अतः यह अधिनियम 1951 की धारा 81(3) के उपबंधों के अनुसार पर्याप्त सत्यापन की कोटि में आता है।

***B. Representation of the People Act (43 of 1951), Section 87(1) & Vidhan Mandal Sadasya Nirhata Nivaran Adhiniyam, M.P., (16 of 1967), Section 3(1) - Removal of certain disqualifications* - Respondent was holding office of profit as President, District Co-operative Bank, Damoh - Disqualification - Held - Though, the respondent was holding the office of Profit on date of filing the nomination but said disqualification has been removed as per Section 3 of the Act of 1967 as District Co-operative Bank is registered under the Co-operative Societies Act and is engaged in performing Banking functions - Election Petition dismissed. (Paras 19 to 21)**

ख. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 87(1) एवं विधान मंडल सदस्य निर्हता निवारण अधिनियम, म.प्र.,(1967 का 16), धारा 3(1) – कतिपय अनर्हताओं को दूर करना – प्रत्यर्थी द्वारा जिला सहकारी बैंक, दमोह के अध्यक्ष के रूप में लाभ का पद धारण किया गया था – अनर्हता – अभिनिर्धारित – यद्यपि, नामांकन भरने की तिथि को प्रत्यर्थी लाभ का पद धारित किये हुआ था, परंतु उक्त अनर्हता को 1967 के अधिनियम की धारा 3 के अनुसार हटा दिया गया है, क्योंकि जिला सहकारी बैंक, सहकारी समिति अधिनियम के अंतर्गत पंजीकृत है तथा बैंकिंग कार्य करने में संलग्न है – निर्वाचन याचिका खारिज।

***C. Representation of the People Act (43 of 1951), Section 87(1) - Cause of Action* - Non-disclosure of pending criminal cases by respondent in nomination paper - Proforma Part II Serial No. 5 requires disclosure of criminal cases wherein charges have been framed - Held - Respondent has made disclosure of criminal case though charges have not been framed in it, so it cannot be said that election of petitioner materially affected - Election Petition dismissed. (Para 22)**

ग. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 87(1) – वाद हेतुक – नामांकन पत्र में प्रत्यर्थी द्वारा लंबित दांडिक प्रकरणों को प्रकट नहीं किया जाना – प्रोफार्मा भाग II अनुक्रमांक 5 में ऐसे दांडिक प्रकरण, जिनमें आरोप विरचित किये गये हैं, प्रकट किया जाना अपेक्षित है – अभिनिर्धारित – प्रत्यर्थी ने दांडिक प्रकरण को प्रकट किया है यद्यपि उसमें आरोप विरचित नहीं किये गये हैं, अतः यह नहीं कहा जा सकता कि याची का निर्वाचन तात्विक रूप से प्रभावित हुआ – निर्वाचन याचिका खारिज।

***D. Representation of the People Act (43 of 1951), Section 87(1) - Objection* - Alteration in affidavit and non-filling of certain columns in nomination paper - Held - Alteration in the affidavit are endorsed by small initials of respondent and important column in nomination paper has not been left blank, such non-compliance has not materially affected election of petitioner. (Para 23)**

घ. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 87(1) – आपत्ति – शपथपत्र में संशोधन तथा नामांकन पत्र के कुछ स्तंभों का रिक्त छोड़ा जाना – अभिनिर्धारित – शपथपत्र के संशोधनों को प्रत्यर्थी के लघु हस्ताक्षर से पृष्ठांकित किया गया है तथा नामांकन पत्र के महत्वपूर्ण स्तंभ को रिक्त नहीं छोड़ा गया है, उक्त अननुपालन ने याची के निर्वाचन को तात्विक रूप से प्रभावित नहीं किया है।

Cases referred :

(1983) 2 SCC 473, JT 1991(2) SC 503, (1999) 4 SCC 274, (2013) 2 SCC 239.

Arpan J. Pawar, for the petitioner.

Manoj Sharma with *Manish Awasthi*, for the respondent.

ORDER

G.S.SOLANKI, J. :- This order shall govern disposal of I.A. Nos. 45/2014, 46/2014 and 48/2014.

2. I.A. No. 46/2014 has been filed by the respondent under Section 87(1) of the Act of 1951 read with Order 6 Rule 16 of the CPC on the ground that pleadings made in Paragraph Nos. 1, 2, 9, 11, 12, 13 and 14 of the election petition are vague, unnecessary and frivolous, therefore, same are liable to struck off

3. The petitioner in the reply of the aforesaid application has denied the contentions raised by the respondent and has submitted that the pleadings of the election petition cannot be termed as scandalous or vexatious. It is further denied that the aforesaid pleadings of the election petition do not disclose any

cause of action. It is submitted that the pleadings of the aforesaid paragraphs have nexus and are relevant to resolve the issues involved in the case, therefore, this application is liable to be dismissed.

4. I have gone through the pleadings made in Paragraphs 1, 2, 9, 11, 12, 13 and 14 of the election petition. The pleadings made in Paragraphs 1, 2 and 9 are concise statement of the fact that the petitioner intended to file the election petition on the grounds mentioned under Sections 100(1)(a), 100(d)(i) and 100 (1)(d)(iv) of the Act of 1951. In my opinion, such type of pleadings are necessary for making foundation of the petition, therefore, same cannot be said to be vexatious and need not be struck-off.

5. The pleadings of Paragraph Nos. 11, 13 and 14 have been made in regard to non-compliance of Rules made under the Act of 1951 and they also appear to be necessary and cannot be said to he vexatious irrespective of the fact whether by such type of pleadings cause of action arises or not or such pleadings materially affect the election of the petitioner, therefore, they need not be struck-off under Order 6 Rule 16 of the CPC.

6. So far as pleadings made in Paragraph 12 of the election petition is concerned, the petitioner has pleaded non-compliance of the Notaries Act, "Which is not covered under Section 100(1)(d)(iv) of the Act of 1951. Section 100(1)(d)(iv) of the Act of 1951 reads thus:-

> **100 Grounds for declaring election to be void.**(1) Subject to the provisions of Sub-section(2) if the High Court is of opinion-
>
> (a).....
>
> (b).....
>
> (c).....
>
> (d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected
>
> (i).....
>
> (ii).....
>
> (iii) .....

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

the High Court shall declare the election of the returned candidate to be void.

7. The Rules of Notaries Act are not enacted under the Act of 1951, therefore, the ground of non-compliance of Notaries Act cannot be taken and thus, the pleadings made in Paragraph 12 of the election petition are unnecessary and liable to be struck off. The petitioner is directed to delete the pleadings made in Paragraph 12 of the election petition.

8. I.A. No. 45/2014 has been filed by the respondent under Section 87(l) of the Representation of People Act, 1951 and I.A. No. 48/2014 has been filed by the respondent under Sections 87(1), 86 and 81(3) of the Representation of People Act, 1951 (hereinafter to be referred to as the Act of 1951) read with Order 7 Rule 11 read with Section 151 of the CPC. Both the aforesaid applications are being considered together.

9. The respondent has filed these two applications on the ground that the petitioner has not complied with the mandatory provisions of Section 87(1), 86 and 81(3) of the Act of 1951 because the copy of. the election petition served upon the respondent has not been attested by the petitioner under his own signature to be a true copy of petition. It is further submitted that the annexures to the petition are the integral part of the petitioner and the same have not been signed by the petitioner. There is a glaring contradiction between the verification of petition and the affidavit filed in support of the petitioner. Photocopy of the petition has been filed as Document-1 for ready reference.

10. It is further submitted that the main plank of attack is that the respondent was holding the office of profit being the President of District Cooperative Bank, Damoh and was disqualified to contest the election but this fact is incorrect on the face of it and asmuch as the returning officer has clearly dealt with it and the relevant legislation covers the field viz, *M P Vidhan Mandal Sadasya Nirhata Nivaran Adhiniyam, 1967* (hereinafter referred to as the Act of 1967) wherein the office of the respondent despite office of profit has not come into the way of being elected as the member of Legislative Assembly due to removal of disqualification under Section 3 of the Act of 1967. Thus the petitioner has no cause of action against the respondent. It is further

submitted that no criminal case has been registered against the respondent in the year 2012 and if any case was registered, the charge was not framed, therefore, same would not be a disqualification under the Act of 1951. Thus, no cause of action arises in favour of the petitioner. The instant election petition is liable to be dismissed at threshold.

11. In the reply, the petitioner has denied that he has not complied with the provision of Section 81(3) of the Act of 1951 and it is submitted that he has annexed the duly attested copies to the main petition and he has supplied duly attested copy under his own signature to be a true copy to the respondent. It is further submitted that there is no contradiction between the verification and the supporting affidavit.

12. So far as objections in regard to cause of action pertaining to disqualification due to holding of the office of profit by the respondent and non mentioning of criminal case registered against the respondent in the year 2012 are concerned, the petitioner has not specifically denied the aforesaid objections raised by the respondent. It is only averred that the petition does not suffer from any vital defects which are incurable in nature, thus the petition requires trial and does not deserve to be dismissed at threshold, therefore, the applications are liable to be dismissed.

13. During the course of arguments, it is vehemently argued on behalf of the respondent that the petitioner has not supplied him duly signed and attested copy of the petition, therefore, there is non-compliance of mandatory provision of Section 81(3) of the Act of 1951. He has placed reliance on a decision of Apex Court in *M. Karunanidhi Vs. Dr. H.V. Hande and others* -(1983) 2 SCC 473.

14. On the contrary, learned counsel for the petitioner has submitted that since there is no particular form of attestation prescribed, mere signature without the words like true copy, is sufficient attestation under Section 81(3) of the Act of 1951. It is further submitted that true copy of election petition within the 'meaning of Section 81(3) does not mean absolutely exact copy but it is one which no reasonable person can misunderstand as not being the same as the original. He has placed reliance on the decisions of the Apex Court in *F. A. Sapa etc. etc. Vs Singora and others etc.* - JT 1991 (2) SC 503 and *T.M Jacob Vs. C. Poulose and others* - (1999) 4 SCC 274.

15. In *FA. Sapa etc. etc. Vs. Singora and others etc.* (supra), it has

been observed by the Apex Court that mere signature without the words like true copy, is sufficient attestation under Section 81(3) of the Act of 1951 and *T.M. Jacob Vs. .C. Poulose and others* (supra), it has been held that there should not be any. substantial variation of vital nature which can mislead such person to understand and meet the charge. In the instant case, I have perused the copy annexed to the petition as well as the copy which has been supplied to the respondent and same has been preserved as Document No. 1. It reveals that the copies bear signatures of the petition (sic:petitioner) on each page of the petitioner (sic:petition). It further reveals that all the annexures annexed with the petition also bear signatures of the petitioner along with the note of verification that these annexures are the photocopies of the original documents. Thus, it cannot be said that the petitioner has not complied with the provision of Section 81(3) of the Act of 1951.

16. coming to the question of cause of action; learned counsel for the respondent has submitted that petitioner has filed this petition on the sole ground enumerated .under Sections 100(1), 100(1)(d)(i) and 100(1)(d)(iv) of the Act of 1951. He has further submitted that petitioner has not denied specifically in regard to. the objection regarding disqualification as well as non disclosure of pending criminal cases and further in regard to violation of Rules made under the Act of 1951. It is further submitted that the provision of disqualification in regard to. holding the office of profit has already been removed by State enactment namely *The Madhya Pradesh Vidhan Mandal Sadasya Nirhata Nivaran Adhiniyam, 1967* (hereinafter referred to as the. Act of 1967). So far as the objection of disclosure of pending criminal cases is concerned, the respondent has already disclosed about pending Criminal Case No. 121/2013 wherein still the charges have not been framed. It is submitted that as per prescribed Proforma Part II, the disclosure of such cases is mandatory wherein the charges have been framed. It is further submitted that if any mistake has been committed in mentioning the year of criminal case, same does not amount to suppression of criminal antecedents from public in general and it will not materially affect the election of the respondent.

17. So far as violation of the Notaries Act is concerned, firstly the respondent has not violated any provision of the aforesaid Act and secondly same cannot be taken as a ground in the election petition. Thus, the petition does not disclose any cause of action, therefore, the instant election petition is liable to be dismissed at threshold. Learned counsel for the respondent has

placed reliance on the Act of 1967 and on the decision of Apex Court in *Purno Agitok Sangma Vs. Pranab Mukherjee* -(2013) 2 SCC 239.

18. Learned counsel for the petitioner has submitted that the provisions of the Act of 1967 are not applicable to the case of the respondent because the post of the President, District Cooperative Bank has not been included in the list of Schedule attached to the Act of 1967 and the District Cooperative Bank does not come under the definition of the Statutory Body, therefore, the instant election petition requires trial. Learned counsel for the petitioner has further submitted that the pleadings made in Paragraphs 11, 12 and 13 of the election petition in regard to non-compliance of the rules made under the Act of 1951. also require trial, therefore, the applications are liable to be dismissed.

19. I have heard the learned counsel for the parties at length and gone through the pleadings made in the election petition. The instant election petition has been filed mainly on three grounds; firstly the respondent was holding the office of profit as the President of District Cooperative Bank, Damoh, therefore, he was not qualified to be chosen to fill the seat of 54 Patharia Assembly Constituency, secondly the respondent has not disclosed about the criminal case pending against him and thirdly the respondent has made some alterations/ ratification in the affidavit sworn before the Notaries and some columns of the Nomination paper have been left blank. Section 3(1) of the Act of 1967 reads thus:-

> **3. Removal of certain disqualifications.-** (1) It is hereby declared that none of the offices of profit specified in the Schedule shall disqualify or shall be deemed ever to have disqualified the holder thereof for being chosen as, or for being, a member of the Legislative Assembly of Madhya Pradesh or the Legislative Council of Madhya Pradesh, as the case may be.

20. It is true that in the list of offices of profit under the Government mentioned in the Schedule, specific word President of District Cooperative Bank has not been mentioned but in Serial No 17 of the aforesaid list, Chairman or Vice Chairman, President or Vice President, Managing Director or Director of the Statutory Body have been included. The District Cooperative Bank has been created on the basis of the Cooperative Societies and the

Societies come under the definition of Statutory Body. The definition of Statutory body as provided under the Act of 1967 reads thus:-

> *Statutory Body* means any corporation, board, company, society or any other body of persons, whether incorporated or not, established, registered or formed by or under any law for the time being in force of exercising powers and functions under any such law.

21. A bare perusal of the aforesaid definition of Statutory Body makes it clear that the society must be registered or formed under any law for the time being in force of exercising powers and functions under any such law. In the instant case, the District Cooperative Bank is engaged in performing banking functions and is registered under the M P Cooperative Societies Act, 1960 and the President of the aforesaid Society/Bank is covered under the definition of the Statutory Body as mentioned in Serial No. 17 of the Schedule of the Act of 1967. In these circumstances, though the respondent was holding the office of profit on the date of filing the nomination, however, the said disqualification has been removed as per Section 3 of the Act of 1967, therefore, the respondent was eligible to be chosen as a member of 54 Patharia Assembly Constituency, thus no cause of action arose on this ground

22. So far as the ground of non-disclosure of pending criminal case is concerned, I have gone through the copy of nomination paper, which makes it apparent that the respondent has not suppressed any pending criminal case against him. He has specifically disclosed that Criminal Case No 121/2013 is pending against him and still the charges have not been framed. The Proforma Part II Serial No. 5 requires disclosure of such criminal cases wherein the charges have been framed but in the case of the respondent still the charges have not been framed, therefore, it cannot be said that the respondent has suppressed the fact of pendency of criminal case. The respondent has specifically disclosed about the pendency of criminal case pending against him, certainly the public at large can perceive that the criminal case is pending against the respondent and despite the pendency of the criminal case, the public has voted in favour of the respondent, in these circumstances on this ground also it cannot be said that the election of the petitioner has been materially affected

23. Coming to the objection with respect to alteration in the affidavit is

concerned, the respondent has made small initials above every alteration, thus there is no non-compliance of any provision of the Notaries Act. So far as pleading of non-filling of certain column in the nomination paper is concerned, the said nomination paper has been duly verified by the returning officer at the time of scrutiny of nomination paper. I have also gone through the copy of the nomination paper of the respondent, I do not find that any important column has been left blank by the respondent and in my opinion, such non-compliance has not materially affected the election of the petitioner.

24. In view of the aforesaid discussion, in my opinion, the petition does not disclose any cause of action on the basis of the pleadings made in the petition, which requires full-dressed trial. Consequently, I.A. Nos. 45/2014 and 48/2014 are hereby allowed. As a consequence thereof, the election petition is hereby dismissed for want of cause of action under Order 7 Rule 11 of the CPC. Parties to bear their own costs as incurred of this petition.

A copy of this order be forwarded to the State Election Commission as well as to the Speaker, Legislative Assembly.

Petition dismissed.

I.L.R. [2015] M.P., 2951
REVIEW PETITION
Before Mr. Justice S.K. Gangele & Mr. Justice S.K. Palo
Review Pet. No. 254/2011 (Gwalior) decided on 11 July, 2014

MANISH KUMAR SHARMA ...Petitioner
Vs.
JAGDISH & ors. ...Respondents

A. Civil Procedure Code (5 of 1908), Order 5 Rule 12 - Service of summons to the defendant - **It is no where mentioned that if the summons/notice is addressed giving the location of residence, the same can only be served at the residence and not at any other place - Hence, service to the petitioner at his shop is not illegal. (Para 11)**

क. *सिविल प्रक्रिया संहिता (1908 का 5), आदेश 5 नियम 12 – प्रतिवादी को समन की तामीली* – यह कहीं भी उल्लिखित नहीं है कि यदि समन/नोटिस में निवास स्थान का पता दिया हो उक्त को केवल निवास पर तामील किया जा सकता है एवं किसी अन्य स्थान पर नहीं – अतः याची को उसकी दुकान पर तामीली अवैध नहीं।

B. ***Administration of Justice*** **- Access to justice should not be misused as license to file misconceived and frivolous petitions.**
(Para 14)

ख. *न्याय प्रशासन* – भ्रमित करने वाली या निरर्थक याचिकायें प्रस्तुत करने की अनुज्ञप्ति के रूप में न्याय के अधिकार का दुरूपयोग नहीं किया जाना चाहिए।

H.K. Shukla, for the petitioner.

R.K.S. Kushwah, for the respondent No.1.

ORDER

The Order of the Court was delivered by : **S.K.PALO, J. :-** This review petition has been filed by the unsuccessful appellant under Order 47 Rule 1 of C.P.C for re-calling the order dated 09/09/2009, passed by Single Bench of this Court in Misc. Appeal No. 1116/2009, whereby the aforesaid appeal, preferred by the appellant Manish Kumar Sharma against the rejection of application under Order 9 Rule 13 of CPC has been rejected.

2. Brief facts just necessary for disposal of this review petition is that;

Non-applicant No.1 Jagdish filed a claim petition under Section 166 of Motor Vehicle Act claiming compensation to the tune of Rs. 11,36,000/- from the applicant in this case (non-applicant No.1 (Manish Kumar Sharma) and non-applicant No. 2 Kumar Pal Singh the owner and driver of the offending bus, on the ground that the applicant Jagdish was travelling as bona fide passenger in Bus bearing No. M.P.06/B.0031 on 18.4.1994. The bus owned Manish Kumar Sharma, was being driven by non-applicant No.2 Kumar Pal Singh rashly and negligently due to which it met with an accident. An FIR was lodged at Police Station, Kailaras. The applicant claimed that he sustained grievous injuries. The 1st Additional Motor Vehicle Accident Tribunal, Morena in Claim Case No. 432/1994, after due service of notice proceeded *exparte* against the non-applicants and pronounced the impugned award on 29.10.1998 and granted Rs. 22,000/-as compensation to the applicant, Jagdish.

3. The non-applicant registered owner of the vehicle filed an application under Order 9 Rule 13 read with 151 of CPC before the 1st M.A.C.T, Morena, which was registered as M.J.C. No. 11/07. After affording opportunities to both parties, decided the same on 12.8.2009. The application under Order 9 Rule 13 read with 151 of CPC as well application under Section 5 of Limitation

Act and was rejected.

4. This order was challenged before this Court by the non-applicant. / petitioner Manish Kumar Sharma under Order 43 Rule 1 (d) of CPC. The learned Single Bench decided the same as M.A. No. 1116/2009. It was observed that in view of the proviso to Order 9 Rule 13 of CPC there is no infirmity in the impugned order and the appeal is dismissed in limine as it devoid of merits. The learned Single Judge also observed as under:

> However, it is stated at Bar that the opportunity for evidence was prayed for which was not granted. The submission is contrary to the observation of the Court contained in para-1 in the impugned order. The appellant shall have a liberty to take appropriate legal recourse in the matter.

5. Feeling aggrieved by this order, the non-applicant registered owner of the bus Manish Kumar Sharma has filed this present review petition and claimed that no proper service was effected during the process of claim petition. Therefore, principle of natural justice has been violated and the petitioner deprived opportunity of hearing for ensuring substantial justice. It also claimed that the impugned order has been passed by the Single Bench merely on wrong observation made by the claim Tribunal. It is asserted that if is for the sake of argument it is presumed that Claims Tribunal issued summon to service at the resident of non- applicant at Chhoti Bazaria Morena, no reason has been assigned by the Process Server why it was served at a different address. Therefore, the learned Claims Tribunal committed error in observing that the summon was duly served. Hence, the order of the Claims Tribunal as well as the appellate Court is not tenable in the eyes of law.

6. Heard the rival contentions and perused the record.

7. In Claim Case No. 432/1994 (Jagdish Vs. Manish Kumar Sharma and other) notice was issued on 15.3.1996 for service to non-applicant / petitioner Manish Kumar Sharma. According to the report submitted by the Process Server, "Manish Kumar Sharma son of Gopal Sharma was found at his shop in near Barrier Morena". When he was asked to receive the notice, he refused to take it. The witness Deewan Singh son of Satnam Singh has also attested this endorsement on 13.05.1996. The report of Process Server, Rajendra Singh received by the Tribunal. The learned Claims Tribunal on this report proceeded ex-parte against non-applicant / petitioner Manish Kumar.

8. The claim of the petitioner that the notice was to be delivered at his resident's address, delivery of the same at his shop was irregular. Therefore, service cannot deemed to be proper.

9. This contention has no force. Rule 12 of Order 5 of CPC it is provided that as under:

> **R. 12. Service to be on defendant in person when practicable, or on his agent** -Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

10. In rule 13 it is provided that even service can be effected on agent by whom defendant carries on business -Where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf, service may be made on any adult member of the family, whether male or female.

11. It is no where mentioned that if the summon / notice is addressed giving the location of resident, the same can only be served at the resident and not at any other place. We deem it proper that the process server served the same to the non-applicant / petitioner at his shop is not illegal.

12. The petitioner did not deny the fact that he had a shop near the Barrier at Morena and there was no reason to disbelieve the report of the process server. That being so, we are fully in agreement with the order of the learned Single Judge.

13. Therefore, there is no error on the face of the record. Hence, the review petition is devoid of merits and is, therefore, dismissed.

14. Before parting with the order we would like to quote that, no litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner he wishes. However, access to justice should not be misused as license to file misconceived and frivolous petitions.

Petition dismissed.

I.L.R. [2015] M.P., 2955

APPELLATE CIVIL

Before Mr. Justice K.K. Trivedi

S.A. No. 927/2007 (Jabalpur) decided on 28 November, 2013

AFSAR ARA (SMT.) ...Appellant

Vs.

IQBAL SHARIF & anr. ...Respondents

A. ***Accommodation Control Act, M.P. (41 of 1961), Section 45, 23-A, 23-J & 12(1)*** **- Suit for eviction in Civil Court - By specified landlord alongwith other landlords - On ground of bonafide need alongwith other grounds mentioned in Section 12(1) - Maintainable. (Para 10)**

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 45, 23-ए, 23-जे व 12(1)– सिविल न्यायालय में बेदखली के लिये वाद – विनिर्दिष्ट मकान मालिक द्वारा अन्य मकान मालिकों सहित – धारा 12(1) में वर्णित अन्य आधारों सहित वास्तविक आवश्यकता के आधार पर – पोषणीय।

B. ***Accommodation Control Act, M.P. (41 of 1961), Sections 45, 23-A, 23-J and 12(1) - Specified Landlady - Eviction*** **- On the ground of bonafide need - Rent Controlling Authority only has jurisdiction. (Para 10)**

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 45, 23-ए, 23-जे व 12(1) – विनिर्दिष्ट मकान मालकिन – बेदखली – वास्तविक आवश्यकता के आधार पर – केवल भाड़ा नियंत्रण प्राधिकारी को अधिकारिता है।

C. ***Accommodation Control Act, M.P. (41 of 1961), Sections 45, 23-A, 23-J & 12(1) - Suit for eviction by Specified landlady*** **- Composite grounds which are not covered u/s 23-A, choice of litigant to choose the forum - Unless there is complete and specific bar created by law, right to choose the forum cannot be restricted. (Para 10)**

ग. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 45, 23-ए, 23-जे व 12(1)– विनिर्दिष्ट मकान मालकिन द्वारा बेदखली के लिये वाद – संयुक्त आधार जो धारा 23–ए के अंतर्गत आच्छादित नहीं है, वादकारी स्वेच्छा से फोरम का चुनाव कर सकता है – जब तक कि विधि द्वारा संपूर्ण एवं विनिर्दिष्ट वर्जन का सृजन न किया गया हो, फोरम चुनने के अधिकार को प्रतिबंधित नहीं किया जा सकता।

D. ***Accommodation Control Act, M.P. (41 of 1961), Section 45 - Jurisdiction & power*** **- No specific power conferred on Rent Controlling Authority - Landlord has choice to choose the forum. (Para 11)**

घ. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 45 – अधिकारिता एवं शक्ति – भाड़ा नियंत्रण प्राधिकारी को विनिर्दिष्ट शक्ति प्रदाय नहीं की गई है – मकान मालिक अपनी पसंद के फोरम का चुनाव कर सकता है।

Cases referred :

2009(1) JLJ 244, AIR 2002 SC 2573, 1998(1) MPLJ 461.

Nidhi Verma, for the appellant.
P.R. Bhave with *Dev Datt Bhave*, for the respondents.

J U D G M E N T

K.K.TRIVEDI, J.:- This second appeal by the appellant/plaintiff under Section 100 of the Code of Civil Procedure is against the judgment and decree dated 27.2.2007, passed in regular Civil Appeal No.258-A/2006 passed by XI Additional District Judge, Bhopal (Fast Track), in the appeal filed by the defendant/respondent No.1, arising out of the judgment and decree dated 27.7.2006 passed in regular Civil Suit No.44-A/2005 of the Court of I Addl. Civil Judge Class-I, Bhopal. The appeal was admitted for hearing on the following substantial questions of law :-

> "1. Whether the findings of the appellate Court holding the suit of the appellant, on the grounds of bonafide need of sub-letting and of non-payment of rent under Section 12(1) (a)(b) and (f) of the M.P. Accommodation Control Act, 1961 is and not maintainable in the Civil Court, is sustainable in view of decision of the apex Court in the matter of *Dhannalal Vs. Kalawatibai* reported in AIR 2002 SC 2572 and in the matter of *Sulochana Vs. Rajinder Singh* decided by Apex Court on 16.5.2008 in Civil Appeal No.3636 of 2008 ?
>
> 2. Whether the judgment and decree of the appellate Court reversing the findings of the trial Court decreeing the suit against the respondents on the grounds enumerated under Section 12(1)(f) of the M.P. Accommodation Control Act, is perverse and contrary to law ?"

2. The sole question which is to be examined is whether the appellant who is also entitled to claim herself being a specified landlady under the provisions of M.P. Accommodation Control Act, 1961 (hereinafter referred

to as the Act for brevity) as defined under Section 23-J was also entitled to file a suit for eviction of the tenant under the provisions of Section 12(1) of the Act or not before the Civil Court, and whether a decree could be granted for eviction of a tenant under the aforesaid provisions by the Civil Court or such jurisdiction is barred under the provisions of Section 45 of the Act.

3. Undisputedly, the appellant is a widow. She claimed to be the landlady of the respondent-tenant. It was alleged that the suit property was obtained in partition by the late husband of the appellant. After the death of husband, who expired on 30.9.1986, the appellant needed the suit accommodation for the purposes of starting a business for the major son of the appellant. It was also alleged that the respondent-tenant was in arrears of rent for many months and despite the demand, the rent was not paid. The respondent-tenant has sub-let the suit accommodation to the respondent No.2 without the consent of the appellant and, therefore, a composite suit for eviction of the tenant was filed. The suit was contested by the respondent-defendant on the grounds that the rent of the suit accommodation was paid, it was denied that suit shop was sub-let to the respondent/defendant No.2. It was contended that the enhanced rate of the rent was being paid by the respondent/defendant. It was contended that for the bonafide need of the suit shop in fact the appellant should have filed an application before the Rent Controlling Authority. This being so, it was contended that the suit was liable to be dismissed.

4. The trial Court framed the issues and after recording the evidence came to the conclusion that the appellant/plaintiff has failed to prove that the respondent/defendant No.1 has sub-let the shop to respondent/defendant No.2. It was also held that the respondent/defendant was not in arrears of rent. However, it was held that the suit accommodation was required bonafidely by the appellant for establishing the shop of her son and only on this count, the suit was decreed. The respondent/defendant preferred an appeal before the first appellate Court alleging that the suit for grant of decree of eviction of tenant could not have been decreed on bonafide requirement as the same is within the exclusive jurisdiction of the Rent Controlling Authority under the provisions of Section 23-A of the Act and thus to that extent, the suit of the appellant was barred before the Civil Court under the provisions of Section 45 of the Act. If after holding that the appellant requires the suit accommodation bonafidely for the need, instead of granting a decree, the trial Court should have directed the appellant to file an application under the provisions of Section 23-A Chapter-III A of the Act. This being so, it was contended that the decree

as granted by the trial Court was barred under the law and, therefore, the suit as a whole was liable to be dismissed. The first appellate Court allowed the appeal of the respondent/defendant, set aside the judgment and decree of the Court below. Hence, this appeal on the aforesaid substantial questions of law filed by the appellant.

5. It is, vehemently, contended by the learned counsel for the appellant that since a composite suit was filed by the appellant before the Civil Court in other grounds also mentioned in Section 12(1) of the Act, such a suit was maintainable. There is no bar created under the law that such a composite suit cannot be filed before the Court. It is further contended that in fact if a decree could not be granted under the provisions of Section 12(1)(a) and 12(1) (b) of the Act in a composite Civil Suit, the jurisdiction of the Civil Court is not specifically barred under Section 45 of the Act and, therefore, the findings recorded by the learned first appellate Court in this respect are perverse and are liable to be set aside. It is contended that in view of the law laid down by the Apex Court in the case of *Sulochana Vs. Rajinder Singh* [2009(1) JLJ 244], the bar under Section 45 of the Act could not come into play and the decree granted by the Court below was not to be set aside.

6. Per contra, it is contended by learned Senior counsel for the respondents that the law is not properly examined. There is a specific bar for exercising those powers which are conferred on the Rent Controlling Authority under Chapter-III A of Section 23-A of the Act and, therefore, even if a composite suit was filed, when other grounds on the basis of which, the jurisdiction of the Civil Court was availed of by the appellant, were not made out and the claim in that respect was rejected, the Civil Court become a Court having no jurisdiction to entertain the claim with respect to grant of decree of eviction on bonafide requirement. The suit as filed was not competent and, therefore, it was rightly dismissed by the lower appellate Court since this aspect was not considered by the trial Court. It is, thus, contended that the reversing judgment and decree passed by the first appellate Court is not liable to be interfered with and the appeal is liable to be dismissed.

7. First of all, the provisions of Section 45 of the Act are to be interpreted and to be understood as to whether a complete bar is created by the statute in exercise of jurisdiction by the Civil Court in such tenancy suit. For the said purposes, Section 45 of the Act is reproduced, which read thus :-

> **"45. Jurisdiction of Civil Courts barred in respect of certain matters.-** (1) Save as otherwise expressly provided in this Act, no Civil Court shall entertain any suit or proceeding in so far as it relates to the fixation of standard rent in relation to any accommodation to which this Act applies or to any other matter, which the Rent Controlling Authority is empowered by or under this Act to decide, and no injunction in respect of any action taken or to be taken by the Rent Controlling Authority under this Act shall be granted by any civil Court or other authority.
>
> (2) Nothing in sub-section (1) shall be construed as preventing a Civil Court from entertaining any suit or proceeding for the decision of any question of title to any accommodation to which this Act applies or any question as to the person or persons who are entitled to receive the rent of such accommodation."

A plain and simple reading of this provision makes it clear that unless there is expressly provided in the Act, any Civil Court shall not entertain any such or proceeding so far as it relates to the fixation of standard rent to any accommodation to which this Act applies or ***to any other matter which the*** Rent Controlling Authority is empowered by or under this Act to decide. Reading conjointly the special provision of Section 23 Chapter-III A of the Act, it is clear that a special provision is made for the specified landlord for filing a suit before any of the Rent Controlling Authority. The special provision as prescribed in Section 23-A is reproduced for consideration as a whole :-

> **"23-A. Special provision for eviction of tenant on ground of bona fine (sic:fide) requirement :-** Notwithstanding anything contained in any other law for the time being in force or contract to the contrary, a landlord may submit an application, signed and verified in a manner provided in Rules 14 and 15 of Order VI of the First Schedule to the Code of Civil Procedure, 1908 (V of 1908) as if it where a plaint to the Rent Controlling Authority on one or more of the following grounds for an order directing the tenant to put the landlord in possession of the accommodation, namely.:-

(a) that the accommodation let for residential purposes is required *"bona fide"* by the landlord for occupation as residence for himself or for any member of his family, or for any person for whose benefit, the accommodation is held and that the landlord or such person has no other reasonably suitable residential accommodation of his own in his occupation in the city or town concerned.

Explanation.- For the purposes of this clause, "accommodation let for residential purposes" includes -

(i) any accommodation which having been let for use as a residence is without the express consent of the landlord, used wholly or partly for any non-residential purpose;

(ii) any accommodation which has not been let under an express provision of contract for non-residential purpose;

(b) that the accommodation let for nonresidential purposes is required *"bona fide"* by the landlord for the purpose of continuing or starting his business or that of any of his major sons or unmarried daughters, if he is the owner thereof or for any person for whose benefit the accommodation is held and that the landlord or such person has no other reasonably suitable non-residential accommodation of his own in his occupation in the city or town concerned;

Provided that where a person who is a landlord has acquired any accommodation or any interest therein by transfer, no application for eviction of tenant of such accommodation shall be maintainable at the instance of such person unless a period of one year has elapsed from the date of such acquisition."

8. It is seen that the restriction on eviction of tenant prescribed under the provisions of Section 12 of the Act, similar words are used and it is specifically provided that for certain grounds, an action can be initiated against the tenant for his/her eviction by a landlord. There itself a bar created under Section 12 of the Act in the shape of protection to a tenant from eviction and only on certain grounds, a suit for eviction can be filed. The entire Act itself is

a special legislation to govern the rents and buildings within the State and, therefore, if one provision is made, making special or speedy provision for eviction of tenants in given circumstances, the bar under Section 45 of the Act will not completely come into play against the specified landlord. The intention of the legislature is not to forbid the specified landlord to resort to the remedies of filing of a suit before the Civil Court for eviction of tenants, completely rather there is a special provision for speedy trial of eviction cases of specified landlords, only on the ground of bonafide needs.

9. In reference to above, if the law laid down by the Apex Court in the case of *Dhannalal Vs. Kalawatibai and others* (AIR 2002 SC 2573) is looked into, in none but the specific words the Apex Court has said that a specified landlord if claims the eviction solely on the ground of bona fide need, he or she has to go before the Rent Controlling Authority. The three parameters prescribed by the Apex Court in paragraph 24 of the report read thus :-

> "(i) Where a claim for eviction is filed by a landlord, or a co-landlord, belonging to any one of the five categories defined in Section 23-J of the Act, as the sole applicant without objection by other co-landlords who have not joined as co-applicants and the nature of claim for eviction is covered by Section 23-A(b) of the Act, the proceedings would be only before the Rent Controlling Authority.
>
> (ii) where a claim for eviction is filed by a landlord or by such a co-landlord who does not belong to any of the categories defined by Section 23-J and the other co-landlord/ landlady failing in one of the categories defined in Section 23-J is not joined as co-plaintiff the claim shall have to be filed only by way of a suit instituted in a Civil Court.
>
> (iii) if the proceedings are initiated by such co-owner landlords, one or more of whom belong to Section 23-J category while some others are those not falling within the definition of 'landlord' under Section 23-J and the requirement pleaded provides a cause of action collectively to all the landlords arrayed as plaintiffs or applicants, the choice of forum lies with the landlords. They may file an application before

R.C.A. Under Chapter III-A or may file a civil suit in a Civil Court under Section 12 of the Act; in either case the proceedings would be competent and maintainable."

10. True it is that the need shown by the appellant was for the major son who was also entitled to claim himself as a landlord and a composite suit for bona fide need as also on other grounds as mentioned in Section 12(1) of the Act could have been filed jointly by the appellant along with other landlords, but if the appellant was willing to file the suit as specified landlady, she was required to go to the Rent Controlling Authority only on the ground of bona fide need under Section 12(1)(f) of the Act. The said need as is specifically mentioned under Section 23-A of the Act was to be looked into by the Rent Controlling Authority and not by the Civil Court. But, the suit was not filed by the appellant as a specified landlady only on the grounds of bona fide need. The suit was a composite one on the different grounds which are not covered under Section 23-A of the Act. It is the choice of the litigant to choose the forum and unless there is complete and specific bar created by law, the right to choose the forum cannot be restricted. This view has been expressed by the Full Bench of this Court in the case of *Ashok Kumar Shiv Prasad Verma Vs. Baboolal* [1998(1) MPLJ 461] where dealing with such a situation in paragraph 5 of the report, the entire consideration is done which reads thus :-

"5. We have bestowed our best of consideration to the interpretation of Section 11-A and we are of the opinion that the provision of Chapter III will not apply to Chapter III-A and not vice-versa. The learned Single Judge has only read it to mean that if the landlords defined in section 23-J seek a remedy of eviction of the tenant then they have only one forum and they cannot take the benefit of going to Civil Court along with other ground, with great respect, is not correct. In fact, this is not the intention of section 11-A. If any landlord wants to get a benefit of summary proceedings of the tenant, who is a landlord defined in section 23-J, then he can immediately invoke the remedy before the Rent Controlling Authority. But, if he does not want to invoke the benefit of that summary remedy then there is no prohibition for him to go to a Civil Court and seek remedy of eviction of the tenant on the basis

of reasonable bona fide requirement or on other grounds mentioned in section 12 of the Act. Section 45 does not prohibit the landlord defined in section 23-J from seeking a remedy before the Civil Court. Section 45 only says that n Civil Court shall entertain any suit or proceeding in so far as it relates to fixation of standard rent in relation to any accommodation to which this Act applies or to any other matter which the Rent Controlling Authority is empowered by or under this Act to decide and no injunction in respect of any action taken or to be taken by the Rent Controlling Authority shall be granted. A close reading of this section means that so far as the matter relates to fixation of rent in relation to the accommodation concerned, the Rent Controlling Authority will have the jurisdiction to decide the matter and for any other matter, which the Rent Controlling Authority is empowered by or under this Act to decide, no injunction in respect of any action taken or to be taken by the Rent Controlling Authority shall be granted by any Civil Court or other authority. A simple meaning of this is that if any matter in which suit has been filed by the landlord as defined in section 23-J, for eviction of the tenant on a reasonable bona fide requirement, then to the extent, the jurisdiction of the Civil Court is barred. But, if any landlord defined in section 23-J, files suit before the Civil Court raising a ground of reasonable bona fide requirement or on other grounds mentioned in section 12 of the Act, then the Civil Court can decide the matter and there is no prohibition. If the landlord defined in section 23-J files a simpliciter suit on the ground of reasonable bona fide necessity before the Rent Controlling Authority then in that case, the Civil Court will have no jurisdiction whatsoever. But to interpret section 45 to mean that the landlord defined in section 23-J will have no right to approach the Civil Court for eviction of the tenant on the ground of a reasonable bona fide requirement, will not be a correct interpretation of section 45. In fact, as already mentioned above, section 11-A is a restrictive provision that Chapter III will not be applicable to the landlords defined in section 23-J under Chapter III-A. But, if the landlord does

not want to avail the benefit of Chapter III-A and wants to litigate the matter before the Civil Court as ordinary landlord then section 45 of the Act will not come in his way. In fact, the benefit has been specially provided to the landlord defined in section 23-J whereby he does not cease to be ordinary landlord. The landlord can avail the expeditious remedy under Chapter III-A and if they do not want to avail the remedy under Chapter III-A and wants to litigate as an ordinary citizen, then it is their choice and they cannot be restricted to one particular forum. Alternative forum has been created for the benefit of these persons and that does not exclude the ordinary civil forum, if they do not want to avail the benefit of a privilege which has been created for them under the Act. Therefore, when Chapter III-A is specially inserted for the benefit of the landlords defined in section 23-J and to read it that excludes other civil forum with reference to section 45 will be frustrating the very purpose of the Act. Neither the Full Bench in the case of *Paraschand* (supra) nor the Division Bench in the case of *Bernard* (supra) has anywhere laid down that the jurisdiction of the Civil Court is barred for the landlords defined in section 23-J of the Act. The view taken by the learned Single Judge that since a special forum has been created under Chapter III-A; therefore, reading with section 45, the landlords defined in section 23-J has to resort to that particular forum and they cannot have a remedy before the Civil Court, with great respect, it is not the correct view taken by the learned Single Judge."

11. Yet, another aspect is required to be looked into. In the case of *Sulochana Vs. Rajinder Singh* (supra), the Apex Court was dealing with almost a similar matter where the bar was sought to be created as prescribed under Section 45 of the Act and the second appeal filed before this Court was allowed. The Apex Court exhaustively dealing with such provisions, came to the conclusion that where eviction of a tenant is sought on various grounds enumerated in Section 12(1) of the Act including a ground of bona fide need, even a specified landlord is required to approach the Civil Court as for the other reliefs decree cannot be granted by the Rent Controlling Authority under the provisions of Section 23-A of the Act. The only distinction in the present

case and in the said case was that there a decree for arrears of rent was also granted. However, the issue has been looked into widely by the Apex Court and it has been held that the parameters prescribed by the Apex Court in the case of *Dhannalal* (supra) were to be understood in light of the effective findings. If a composite suit was maintainable and ultimately except for grant of bonafide need, the Civil Court reached to the conclusion that no decree is required to be passed, it would be futile to ask the landlord who is not claiming himself a specified landlord, to go to the Rent Controlling Authority asking for such a relief. If in such circumstances, a relief is granted by the Civil Court, it cannot be said to be bad in law. If a suit was filed in such a manner, it was rightly treated to be within the jurisdiction of Civil Court. The provisions of Section 45 of the Act as explained herein above also do not confer any specific power on the Rent Controlling Authority only as it is open to the landlord to choose the forum. This being so, if after holding that a bona fide need is made out by the appellant for eviction of her tenant from the suit accommodation and if a decree is granted to this effect by the Civil Court, in a composite suit where the other grounds of eviction are not made out, it cannot be said that such a decree was beyond the jurisdiction of the Civil Court.

12. In view of the aforesaid, this appeal is allowed with costs. The judgment and decree of the first appellate Court is hereby set aside and the judgment and decree of the Civil Court is hereby affirmed. The appellant will get the costs of this appeal from respondents.

Appeal allowed.

I.L.R. [2015] M.P., 2965
APPELLATE CIVIL
Before Mr. Justice K.K. Trivedi
S.A. No. 935/2009 (Jabalpur) decided on 4 December, 2013

SUNIL KUMAR & ors. ...Appellants
Vs.
DILIP & anr. ... Respondents

A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(c) - Denial of title - **In earlier litigation, it was held that defendant/respondent is tenant - Subsequently, defendant claims to have entered into an agreement to purchase same property with the brother of plaintiff - Defendant/tenant failed to prove such agreement**

- Decree was rightly granted u/s 12(1)(c). (Para 8)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(सी) – हक से इंकार – पूर्ववर्ती वाद में यह अभिनिर्धारित किया गया था कि प्रतिवादी/प्रत्यर्थी किरायेदार है – तत्पश्चात्, प्रतिवादी यह दावा करता है कि उसने वादी के भाई के साथ उसी संपत्ति के क्रय का करार किया है – प्रतिवादी/किरायेदार उक्त करार को सिद्ध करने में असफल रहा है – धारा 12(1)(सी) के अंतर्गत उचित रूप से डिक्री प्रदान की गई।

***B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(c) - Derivative title* - Tenant not inducted by landlord who claims the derivative title - Principle of Estoppel would not apply against tenant. (Para 10)**

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(सी) – व्युत्पन्न हक – भूस्वामी द्वारा किरायेदार को प्रतिष्ठापित नहीं किया गया जो व्युत्पन्न हक का दावा करता है – विबंधन का सिद्धांत किरायेदार के विरूद्ध लागू नहीं होगा।

***C. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(c) and Evidence Act (1 of 1872), Section 116 - Estoppel* - In earlier suit of eviction between the parties, tenant-landlord relationship proved - Said finding was not challenged, merely because the suit was dismissed - Tenant would be bound by such findings and the principle of estoppel would be applicable against the tenant in subsequent suit - Tenant is estopped to deny the title of plaintiff. (Para 10)**

ग. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12 (1)(सी) एवं साक्ष्य अधिनियम (1872 का 1), धारा 116 – विबंधन – पक्षकारों के मध्य पूर्व के बेदखली के वाद में, किरायेदार–भूस्वामी संबंध सिद्ध – उक्त निष्कर्ष को चुनौती नहीं दी गयी मात्र इसलिये कि वाद खारिज कर दिया गया था – किरायेदार ऐसे निष्कर्षों से बाध्य होगा तथा पश्चात्वर्ती वाद में विबंधन का सिद्धांत किरायेदार के विरूद्ध लागू होगा – वादी के हक को अस्वीकृत करने के लिये किरायेदार विबंधित है।

Cases referred :

1979 MPLJ 155, 1994 MPLJ 619, AIR 1989 SC 2187, AIR 1999 SC 3584, 2005(1) MPJR 347.

R.K. Verma, for the appellants.

Deepak Panjwani, for the respondents

JUDGMENT

K.K. Trivedi, J. :- This appeal under Section 100 of the Code of Civil Procedure is filed by the appellant/plaintiff against the judgment and decree dated 4.5.2009 passed in Civil Appeal No.4-A/2008 by the Ist Addl. District Judge, Shahdol, whereby the judgment and decree dated 23.7.1999 passed in Civil Suit No.16-A/1987 by the Civil Judge Class-II, Burhar, has been reversed and the suit of the appellant/plaintiff has been dismissed. This appeal is admitted on the following substantial question of law :-

> "(i) Whether the first appellate court has committed error in reversing the judgment and decree passed by the trial Court decreeing the suit of the appellants against the respondents on the grounds enumerated under Section 12(1)(c) of the M.P. Accommodation Control Act, 1961 ?
>
> (ii) Whether the appellate Court has appreciated the evidence led by the parties contrary to the settled proposition of law ?

2. The appellant/plaintiff landlord filed a suit against the respondent/ original defendant seeking a decree of eviction, on the ground of Section 12(1)(c) of the M.P. Accommodation Control Act, 1961 (hereinafter referred to as the Act for brevity). It was contended that admittedly the respondent/ defendant was the tenant of the original appellant/ plaintiff. The respondent/ defendant has though taken the house for the purpose of residence, but after putting a lock on the same, he has shifted to Pendra, District Bilaspur (CG) and was not using it right from the year 1972. When a notice demanding vacation of the house after termination of the tenancy was issued, a reply was sent stating that the appellant/plaintiff was not the landlord, in fact, an agreement was got executed between a coparcener of the joint Hindu family by the respondent/defendant on 26.8.1981 for the purpose of sale of the said house, therefore, original plaintiffs were not entitled to grant of a decree of eviction.

3. The suit was contested by the respondent/defendant on the pleas that there was a family dispute in between the original plaintiff and other coparceners of the joint Hindu family and since the demise premises fell in share of one of the coparcener, in fact, the respondent-tenant got an agreement executed for the sale of the demise premises to him. This fact was well within the knowledge of the original plaintiff and he was required to file a claim for partition of the joint Hindu Family property which was not done. Ultimately, there was a

family dispute which had gone upto the Apex Court and, therefore, such a claim that the original plaintiff was the landlord of the respondent-tenant was not correct. It was, thus, contended that the suit was liable to be dismissed.

4. The Civil Court after framing of the issues recorded the evidence of the parties, reached to the conclusion that in fact, by disowning the land-lordship of the original plaintiff, a ground for eviction of the tenant was made out and, therefore, the suit was decreed in favour of the original plaintiff. Feeling aggrieved by the judgment and decree of the Civil Court, the respondent/ defendant preferred an appeal before the first Appellate Court, which after consideration of the evidence available on record, reached to the conclusion that the learned Civil Court has erroneously granted the decree in favour of the appellant/plaintiff and allowed the appeal. Hence, this appeal is filed, which is admitted only on the aforesaid substantial question of law.

5. It is, vehemently, contended by learned counsel for the appellant/plaintiff that evidence as available on record is required to be marshalled to see whether a ground under Section 12(1)(c) of the Act was made out to grant a decree against the respondent/defendant or not. It is pointed out that in the plaint itself, this fact was categorically pleaded. When a notice was issued to the respondent/defendant, there was no dispute nor any claim with respect to the share by any of the member of the joint Hindu family. In fact, the agreement was got executed on 26.8.1981, i.e. much before by the respondent/defendant when no suit was filed by any of the coparcener or the joint Hindu family members before the Court. The Civil Suit was filed by the said person, who executed the agreement in favour of the respondent/defendant only in the year 1982, which was decided on 4.9.1986. The notice was given by the appellant/plaintiff for eviction of the respondent-tenant after terminating the tenancy on 21.5.1987. The tenancy of the respondent/ original defendant was terminated with effect from 7.6.1987. Such a stand taken by the respondent/defendant was not available to him under the law as the litigation in between the so-called family members went upto the Apex Court where ultimately all the claims made by said Devendra Kumar were rejected by upholding the decrees of the Courts below and by way of sympathy, only an amount of Rs.75,000/- was awarded to the said person by the Apex Court that too, not as a cost on the appellants herein, therefore, such a plea raised by the respondent/ defendant was wholly unjustified. In view of the provisions of Section 111(1) (g) of the Transfer of Property Act, 1882, the respondent/defendant was stopped to raise such a plea as the lease was determined by the appellant/plaintiff in the manner indicated under the law and by raising such a plea, the respondent/defendant

has forfeited the right of defence. This particular aspect was properly appreciated by the learned Civil Court and a decree was granted in favour of the appellant/ plaintiff. The findings recorded by the Civil Court, were not to be reversed in the manner they have been reversed by the lower appellate Court. Thus, it is contended that the determination of the lease of the respondent/ defendant was just and proper and decree of eviction was to be upheld. The reversing judgment and decree of the lower appellate Court is liable to be set aside.

6. *Per contra*, it is contended by learned counsel for the respondent/ defendant that properly law was examined by the lower appellate Court and it was categorically held that in view of the law pronounced by this Court, based on the law laid down by the Apex Court, no such decree of eviction could be granted in favour of the appellant/plaintiff and, therefore, if a justified plea was raised by the respondent/defendant disowning the land lordship and title of the appellant/plaintiff over the demise premises, no ground under Section 12(1)(c) of the Act was made out to grant a decree of eviction against the respondent/defendant. Thus, it is contended that the error of law committed by the Civil Court in granting such a decree was corrected rightly by the lower appellate Court and such a judgment and decree is not liable to be interfered with. The appeal is, thus, liable to be dismissed.

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

8. First of all, it has to be considered whether a ground under Section 12(1)(c) of the Act could be said to be made out if ownership of the landlord over the demise premises is denied by the tenant in such circumstances? No much debate is required on this issue as this has been held in catena of decisions by this Court as well as by the Apex Court that such a denial would cause a serious prejudice to the landlord as is enumerated in Section 12(1)(c) of the Act and, therefore, denial or refusal of ownership or the title on the demise premises by a tenant in respect of a landlord is a good ground for eviction of the tenant from the demise premises. Next question which is required to be considered is, whether denial of such a title of the appellant landlord on the demise premises was bonafide or not ? From the pleadings made in the plaint, it is clear that there was some sort of litigation started on earlier occasion in respect of the very same demise premises. In the earlier suit, which was said to be filed in the Court of First Additional Civil Judge Class-II Shahdol, bearing Civil Suit No.47-A/1970, it was already held that the original defendant/respondent was the tenant of the appellant/plaintiff in the said demise premises on a monthly rent of Rs.12/-. It appears that this particular finding was

not challenged anywhere, and therefore, no reference to this was made in the written statement filed by the respondent/defendant. In paragraph 3 of the written statement, the respondent/defendant has admitted that there was a litigation between the appellant and the respondent in the Court of Civil Judge Class-II Budhar, District Shahdol. The other fact which is stated is relating to that the demise premises was not closed or was put under the lock by the respondent/ original defendant. He categorically contended at paragraph 13 of the written statement that a family dispute in between the appellant and Devendra Kumar, said to be brother of the appellant/plaintiff was going on. However, this suit was said to be filed in the year 1982. Admittedly, before 1982 Devendra Kumar had no right to enter into any agreement with the respondent/defendant for sale of the said house. How he was claiming 1/7 share in the property was not stated, but it is said that he executed an agreement with the respondent/defendant for sale of the very same demise premises to him. How such an agreement could be executed on 26.8.1981 Ex.P/11-A, is not clear. If he had admitted the position that in the earlier suit filed by the very same plaintiff/landlord, the respondent/defendant was proved to be a tenant, and the said Civil Suit filed in the year 1966, was decided in the year 1972 precisely on 10.4.1972 vide Ex.P/4, how could without there being any partition, an agreement could be got executed by one of the alleged member of joint Hindu Family for the sale of the demise premises to the respondent, is not stated anywhere in the written statement. This itself is enough to hold that fraudulently just to delay and deny the decree of eviction to the appellant, such a stand was taken by the respondent/defendant. This particular statement made by the respondent/defendant was never found proved that lawfully he has got the agreement executed in his favour by one of the member of the joint Hindu family, who exclusively had the share in the joint Hindu family property and in the said share, the demise premises was also included. This statement of the respondent/defendant itself was enough to grant a decree of eviction against him, which was rightly considered by the trial Court and rightly a decree was granted in favour of the appellant.

9. While reversing the judgment and decree of the Civil Court, the learned lower appellate Court has tried to summarise the statements of witnesses, but this particular aspect was never taken note of by the learned lower appellate Court and merely because it was said that a decree under Section 12(1)(b) of the Act could not be granted, the relief granted to the appellants by the trial Court in the shape of decree of eviction under Section 12(1)(c) of the Act was set aside. Such a finding recorded by the lower appellate Court thus cannot be said to be just and proper.

10. Learned counsel for the appellants has placed his reliance in the case of *Mirkhan Nathhekhan Vs. Kutab Ali Tayab Ali* (1979 MPLJ 155) wherein a Division Bench of this Court has taken note of the effect of disclaimer of derivative title. It is contended that the law is well settled that under what circumstances, principle of estoppel would be attracted and a tenant would not be evicted. If the landlord himself did not induct the tenant into the property, but claims his possession under a derivative title, such as assignee, donee, lessee, heir etc., then there is no question of estoppel against the tenant. The tenant already in possession is entitled to show that the plaintiff does not possess the derivative title he claims, but it is in some other person. If the respondent/ defendant was claiming that the title was not with the original plaintiff landlord and that the same was vested in someone else, it was his duty to show as to how such a person was entitled of the ownership of the demise premises. The onus cannot be shifted on the appellant/plaintiff. In a suit, if the landlord and tenant relationship is proved and the said finding is not called in question merely because the suit was dismissed, by the tenant still the tenant would be bound by such findings of the Court. That being so, in view of the law laid down by the Division Bench of this Court, the principle of estoppel would be squarely applicable against the respondent/ defendant and he is stopped to say that the appellants were not the owner of the demise premises. Further, relying in the case of *Bhagwati Prasad Vs. Rameshchand and others* (1994 MPLJ 619), learned counsel contends that even if such a denial is made, the same is not permitted to be taken back. In view of the fact that in the earlier suit, the tenancy was proved, the relationship of the landlord and tenant was also proved, it was not open to the respondent to file such written statement denying the title of the appellant over the demise premises. Further, relying in the case of *Majati Subbarao Vs. P.V.K. Krishna Rao* (deceased) *by L.Rs* (AIR 1989 SC 2187), it is contended that, even if this was not raised as a ground for grant of a decree against the respondent/defendant in the original plaint if a denial is raised in the written statement with respect to the title of the landlord, a ground is made out for grant of a decree of eviction of the tenant on this ground alone. Further, relying on the decision of the Apex Court in the case of *S. Thangappan Vs. Padmavathy* (AIR 1999 SC 3584), it is contended that a lawful default is made with respect to the denial of ownership or title of the landlord by a tenant, it has to be treated as a forbidden act of estoppel under Section 116 of the Evidence Act and the tenant would be liable to be evicted on this ground alone. Lastly, relying in the case of *Ranjit Narayan Vs. Laxman Bhai* [2005 (1) MPJR 347], it is contended that, if payment of rent itself is admitted by the tenant, a denial of title of landlord established a

ground of disclaimer of the title and in such a case the tenant is liable to be evicted. It is contended that in view of these laws, the decree passed by the Civil Court was not liable to be interfered by the lower appellate Court and, as such, the judgment and decree impugned is liable to be set aside.

11. After going through the law laid down by Courts and after marshalling the documents available on record as also examining the evidence, it is amply clear that wilfully, with a malafide intention, the respondent/defendant has denied the title of the appellant/plaintiff over the demise premises just to prolong the litigation. If in the earlier proceedings, a finding was already recorded against the respondent/ defendant that he was the tenant of the appellant/ plaintiff, except the execution of an agreement with the appellants, no agreement could be executed for sale of the demise premises to the respondent/ defendant by anyone. If such was the act, it was to be amply proved that the demise premises in fact fell in share of the said person by the respondent/ defendant, which he utterly failed to do so. In view of this, the judgment and decree of the lower appellate Court cannot be sustained.

12. Consequently, this appeal is allowed. The judgment and decree of the lower appellate Court is set aside and the judgment and decree of the Civil Court is affirmed. The appellants will get the cost throughout. Counsel fee at Rs.10,000/- (Rupees Ten Thousand) if pre-certified.

Appeal allowed.

I.L.R. [2015] M.P., 2972
APPELLATE CIVIL
Before Mr. Justice Alok Verma
M.A. No.1476/2007 (Indore) decided on 11 December, 2014

VIDHYA BAI (SMT.) ...Appellant
Vs.
KAILASHCHANDRA & ors ....Respondents

***A. Motor Vehicles Act (59 of 1988), Section 173 - Compensation* - Offending vehicle (Truck) was parked at the middle of road - Evidence for parking of truck supported by three witnesses including cleaner of truck - No evidence in rebuttal by Insurance Company - Finding of Tribunal that deceased was negligent as he was coming from back side of truck not proper. (Paras 7 & 8)**

क. मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर – वाहन जिससे दुर्घटना कारित हुई (ट्रक) सड़क के मध्य खड़ा किया गया था – ट्रक को खड़े किये जाने का साक्ष्य तीन साक्षीगण, जिसमें ट्रक का क्लीनर भी शामिल है, द्वारा समर्थित है – बीमा कंपनी द्वारा इसके खंडन में कोई साक्ष्य नहीं – अधिकरण का यह निष्कर्ष कि मृतक उपेक्षापूर्ण था क्योंकि वह ट्रक के पीछे से आ रहा था, उचित नहीं है।

***B. Motor Vehicles Act (59 of 1988), Section 173 - Dependency* -Claims Tribunal deducted 1/3 of annual income of deceased towards his personal expenses - Appellant/mother was given 1/3 of income of deceased and 1/3 of amount to wife of deceased - Wife has already remarried and remained ex-parte - Giving of 1/3 amount to wife of deceased not proper. (Para 9)**

ख. मोटर यान अधिनियम (1988 का 59), धारा 173 – आश्रितता – दावा अधिकरण ने मृतक के व्यक्तिगत खर्चों के मद में उसकी वार्षिक आय में से 1/3 भाग की कटौत्री की – अपीलार्थी/मां को मृतक की 1/3 आय का हिस्सा दिया गया तथा मृतक की पत्नी को धनराशि का 1/3 हिस्सा दिया गया – पत्नी ने पहले ही पुनर्विवाह किया है और एकपक्षीय रही है – मृतक की पत्नी को 1/3 धनराशि दी जाना उचित नहीं है।

***C. Motor Vehicles Act (59 of 1988), Section 173 - Compensation* - Deceased age 33 years - Earning Rs. 3000 per month - Dependency Rs. 2000/- per month - Multiplier of 16 applied - Total compensation of Rs. 4,01,500/- and interest @ 6% p.a. from the date of application. (Para 10)**

ग. मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर – मृतक आयु 33 वर्ष – आय रू. 3000 प्रतिमाह – आश्रितता रू. 2000/– प्रतिमाह – 16 का गुणक लागू किया गया – कुल प्रतिकर रू. 4,01,500/– तथा आवेदन की तिथि से 6% प्रतिवर्ष की दर से ब्याज।

J.M. Poonegar, for the appellant.
Shraddha Dixit, for the respondent No.2.
Shakti Sharma, for the respondent No.3/Insurance Company.

JUDGMENT

ALOK VERMA, J. :- This Miscellaneous Appeal is directed against the award passed by the learned Tribunal in Claim Case No.83/2006 dated 10.07.2006 by which, the learned Tribunal awarded Rs.92,500/- to the present appellant as compensation amount for death of his son in an accident that took place on 03.06.2001.

2. According to the appellant, her son Khelendra was going from Indore to Chapra road on his motorcycle. In Chapra, in front of Patidar Tire Remold Factory, a truck bearing registration No.C.I.F.1050 was parked by respondent No.2 in the middle of the road. Cement pipes were loaded on the truck. There was no indication behind the truck, no red light was on and due to this, the deceased could not see the parked truck and collided from behind. Due to impact of collision, the deceased sustained serious injuries and died on the spot. At the time of his death, his monthly income was Rs.5,000/per month and, therefore,before the Tribunal, an application under section 161 of Motor Vehicle Act was filed for awarding compensation amount of Rs.20,00,000/-.

3. Respondents No.1 and 2 filed reply of the application and denied that any accident took place by the vehicle as asserted by the present appellant in the application. The respondent No.3, Insurance Company, filed reply stating therein that the accident was not caused due to the negligence of the driver of the truck but, it was due to the negligent driving by the deceased himself, who was not careful enough while driving the motorcycle. Respondent No.4 – Meena bai is the wife of the deceased. After service of notice on her, she remained absent before the Tribunal and accordingly, the case proceeded ex-parte against her.

4. After recording the evidence by both the parties and after hearing both the parties, learned Tribunal passed the impugned award by which, it was held that the deceased was 50% liable for contributory negligence. The dependency of the present appellant was assessed to be Rs.1,000/while, the total annual income was assessed to be Rs.36,000/out of Rs.3000/per month, which was the monthly income assessed by the Tribunal. The Tribunal deducted 1/3 amount for his own expenses and 1/3 amount for expenses of the wife, who remained ex-parte before the Tribunal and then assessed the amount of the claim as Rs.78,000/-. After adding Rs.14,500/- on other counts like funeral expenses, loss of love and affection and mental agony, the Tribunal awarded total amount of Rs.92,500/-.

5. Aggrieved by the aforesaid award, the present appeal is filed by the appellant on the ground that there was 100% negligence of the truck driver as, the truck was parked on the tarred portion in the middle of the road and there was no indication by red light or by any cloth to caution the vehicle coming from behind. It was also the ground for appeal that the income assessed was very low as, he was earning Rs.5,000/per month and also the multiplier

of 13 used by the Tribunal was on the lower side and the proper multiplier looking to the age of the deceased should have been 16.

6. The Insurance Company also filed a cross objection stating that the accident was caused due to 100% negligence of the deceased and, therefore, the appellant is not liable for any amount.

7. Before the Tribunal, the appellant examined herself and in the statement given on affidavit, she stated that at the time of his son's death, his income was Rs.5,000/per month as, he was selling milk. The deceased had passed Higher Secondary School Certificate Exam and, therefore, he was earning the amount on his own. Apart from the appellant, Praveen Son of Ramprasad, brother of the deceased was also examined and 2 eye witnesses namely Jassu Son of Laxminarayan Rathore and Asgar Ali Son of Chhote Kha, who were coming on their motorcycle just 15 to 20 feet behind the deceased, were also examined. Apart from them, Mukesh was also examined, who was cleaner of the truck and at the time of the incident, he was eating food in the cabin. For deciding the question of negligence, statements of Jassu AW-3, Asgar AW-4 and Mukesh AW-7 are important. They all said that the truck was parked in the middle of the road. Specially, Mukesh AW-7, who was cleaner of the truck supported the contention of the appellant that the truck was parked in the middle of the road. No other evidence like site map prepared by the police is produced by both the parties.

8. In such situation, after going through the statements of these three witnesses, it is clear that the truck was parked in the middle of the road. As stated earlier, there is no evidence in rebuttal adduced by the insurance company and in such a situation, finding of the Tribunal that the deceased was himself negligent as he could have seen the parked truck had he been careful enough, does not appear to be proper and it is held that the accident took place due to the negligence of the respondent No.2, who parked the vehicle in the middle of the road.

9. Coming to the quantum of the compensation, the Tribunal assessed income of the deceased @ Rs.3,000/- per month. No documentary evidence in respect of his income or that he was running a business of selling milk is filed by the appellant and in such a situation, the assessment of the Tribunal in respect of income of the deceased in the year 2001 when, the accident took place, appears to be proper. However, the Tribunal deducted 1/3 amount as expenditures on the

deceased himself and 1/3 amount for his wife and assessed dependency of the present appellant as Rs.1000/-, which do not appear to be proper as, it is apparent that prior to his death, the deceased, his wife respondent No.4 and the present appellant were living together. However, prior to filing of the application by the appellant before the Tribunal, respondent No.4 wife of the deceased remarried another person and left house of the appellant. She was served a notice and still she chose to remain absent before the Tribunal and the case proceeded ex-parte against her and in such situation, household is still maintained by the present appellant and, therefore, deducting the amount for his wife is not proper at this stage. Accordingly, dependency should be taken as Rs.2,000/-per month.

10. Coming to the question of multiplier according to the age of the deceased, who was 33 years of age as, his date of birth is stated to be 14.09.1968 according to Ex.P-19, which is the marksheet of Higher Secondary School Examination, the multiplier should have been 16 and not 13. Accordingly, by applying the multiplier of 16, the amount should be calculated as 2000*12*16=3,84,000/-adding to it, the amount of funeral expenses, which appear on the lower side even in the year 2001 and should be raised to Rs.5,000/-, and the amount awarded by the Tribunal on other counts the total amount comes to Rs.4,01,500/-.

11. Accordingly, this appeal is allowed. It is directed that:-

i) The respondents No.1 to 3 shall pay amount of Rs.4,01,500/- to the appellant.

(ii) On this amount, from the date of filing of the application i.e. 27.09.2003, the respondents No.1 to 3 shall pay 6% simple interest per annum.

(iii) The amount already paid to the appellant shall be adjusted in the above amount and the amount of interest shall be calculated by diminishing balance method.

(iv) The remaining directions issued by the learned Tribunal shall remain the same.

12. With the aforesaid observations and directions, the appeal stands disposed of.

C.c as per rules.

Appeal allowed.

I.L.R. [2015] M.P., 2977
APPELLATE CIVIL
Before Mr. Justice M.C. Garg & Mr. Justice Sheel Nagu
F.A. No. 159/2013 (Gwalior) decided on 16 January, 2015

MAMTA BHARDWAJ ...Appellant
Vs.
MADHUSUDAN BHARDWAJ ...Respondent

A. Hindu Marriage Act (25 of 1955), Section 13(1)(ia) - Cruelty - **To constitute cruelty, the conduct complained should be grave and weighty so as to make cohabitation virtually unendurable - Human mind is extremely complex - What is cruelty in one case may not be a cruelty in another case - There can never be any straight jacket formula or fixed parameters for determining mental cruelty in matrimonial matter. (Paras 20 to 32)**

क. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(ए) – क्रूरता – क्रूरता संस्थापित करने के लिए जिस आचरण की शिकायत की गयी है वह गंभीर तथा वजनदार होना चाहिए जिससे सहवास लगभग असहनीय हो जाए – मानव मस्तिष्क अत्यंत जटिल है – एक प्रकरण में जो क्रूरता है वह दूसरे प्रकरण में क्रूरता नहीं भी हो सकती – वैवाहिक मामलों में मानसिक क्रूरता निर्धारित करने के लिये कभी भी कोई निश्चित सूत्र अथवा निश्चित मापदंड नहीं हो सकते।

B. Hindu Marriage Act (25 of 1955), Section 13(1)(ia) - Cruelty - **Appellant levelled allegations against the sister of husband that she is of shady character - She also filed various complaints u/s 498-A of I.P.C. and Protection of Women from Domestic Violence Act - She also filed various revisions against the orders granting bail - Appellant was guilty of inflicting cruelty upon her husband - Decree of divorce rightly granted - Appeal dismissed. (Paras 33 to 40)**

ख. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13 (1)(ए) – क्रूरता – अपीलार्थी ने अपने पति की बहन पर आरोप लगाया कि वह संदिग्ध चरित्र की है – उसने भा.दं.सं. की धारा 498–ए तथा घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम के अंतर्गत भी विभिन्न शिकायतें दर्ज करायी – उसने जमानत आदेशों के विरूद्ध भी विभिन्न पुनरीक्षण प्रस्तुत किये – अपीलार्थी अपने पति पर क्रूरता करने की दोषी थी – विवाह–विच्छेद की डिक्री उचित रूप से प्रदान की गयी – अपील खारिज।

Cases referred :

AIR 1988 SC 121, AIR 2002 SC 591, AIR 2002 SC 2582, AIR 2006 SC 1662, AIR 1986 Calcutta 150, (2013) 5 SCC 226, (2014) 7 SCC 640.

Appellant present in person.
Sarvesh Sharma, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by : **M.C. GARG, J. :-** This order shall dispose of this first appeal preferred by the appellant-Mamta Bhardwaj (wife) against her husband-Madhusudan Bhardwaj assailing the order passed by the Family Court under Section 19(1) of the Family Court Act whereby, the Principal Judge of the Family Court, Gwalior in Case No.117A/07 under Hindu Marriage Act filed by the respondent-Madhusudan Bhardwaj (hereinafter referred to as the "husband"), seeking dissolution of his marriage with the appellant decreed the same in favour of the respondent-husband and passed a decree dated 28th June 2013 dissolving the marriage between the parties by means of a decree of divorce.

2. According to the appellant, the judgment of the lower Court is not sustainable for the reasons that the appellant has failed to prove allegations on merit. His witnesses have not supported his case. There are number of contradictions in their statement. The main allegation made against his sister having illicit relationship with the respondent has also not been proved. It is further submitted, that it has been brought on record by the appellant in her evidence that it was the respondent and his family members who were treating the appellant with cruelty and in fact the case under Section 498-A of IPC was also registered against him because there was substance in the allegations made against the respondent and his family members. It is further submitted that even the order of maintenance passed under Section 125 of Cr.P.C. has not been complied with.

3. According to her the main controversy arose between the parties only because she could not give birth to a child. It is however the matter on record that the first petition for divorce was filed by the respondent against the appellant just after six months of the marriage, of course it was dismissed as pre-mature. The allegations of the respondent have been taken note of by the lower Court in the impugned judgment in para 2 as follows:-

2. विवाह के बाद अनावेदिका आवेदक के निवास स्थान 3–सरस्वती नगर में दाम्पत्य संबंधों का निर्वहन करने हेतु आई थी तथा आवेदक एवं अनावेदिका के दाम्पत्य संबंधों से कोई संतान उत्पन्न नहीं हुई है। आवेदक के परिवार में आवेदक के अतिरिक्त उसकी बहिन एवं उसके दो बच्चे तथा मां निवास करती हैं। अनावेदिका द्वारा शादी के पश्चात से ही आवेदक पर यह दबाब डाला जा रहा है कि आवेदक अपनी मां एवं बहिन को उक्त भवन से हटाकर किराये के मकान में भेज दे तथा उक्त मकान अनावेदिका के हित में संपादित करा दे। आवेदक द्वारा अनावेदिका को समझाये जाने पर अनावेदिका द्वारा आवेदक एवं उसकी मां बहिन के साथ क्रूरता पूर्ण व्यवहार कर मारपीट, गाली गलौज, कर मानसिक क्लेश की स्थिति निर्मित कर देती थी। आवेदक द्वारा अनावेदिका को समझाईश देने का कोई असर नहीं हुआ और उसके द्वारा प्रारंभ से ही भाई–बहिन के रिश्ते को शंकास्पद नजरों से देखा जाता है। अनावेदिका द्वारा आवेदक को कुत्ता कमीना, नीच खानदान का कहकर अपमानित किया जाता रहा। तथा मां बहिन को भी कुतिया हरामजादी जैसी गंदी गंदी गालियां दी जाती है। दिनांक 19.12.2006 को को शाम को 7 बजे अनावेदिका एवं उसके परिवार के सदस्य आवेदक के घर आए और आवेदक की मां एवं बहिन से कोरे कागजों पर हस्ताक्षर करने हेतु कहा और कहा कि वे मकान अनावेदिका के नाम कर दें। मना करने पर उन लोगों ने गाली गलौच किया तथा अनावेदिका ने आवेदक से उसकी बहिन के साथ अवैध संबंध होने वाली बात घर के बाहर निकलकर चिल्ला–चिल्लाकर कही जिसके कारण आवेदक के आसपास के पड़ौसी आवेदक एवं उसकी बहिन को शंकास्पद नजरों से देखते हैं। अनावेदिका ने आवेदक के चेहरे पर नाखूनों से वार किया जिससे आवेदक के चेहरे पर चोटे आई। उक्त दिनांक को ही अनावेदिका एवं उसके परिवार वाले अनावेदिका का सामान मय जेवरात जो आवेदक की ओर से शादी के समय चढ़ाया गया था अपने साथ लेकर चली गई। तत्पश्चात दिनांक 27.12.2006 को भी सुबह 10 बजे अनावेदिका एवं उसके परिवार के लोग आवेदक के घर आये और धमकी दी कि यदि सात दिन में मकान अनावेदिका के नाम नहीं किया तो पूरे परिवार को पुलिस कार्यवाही में जेल में सड़वा देंगें और मकान पर कब्जा कर लेंगे। इसकी शिकायत आवेदक द्वारा पुलिस थाना विश्वविद्यालय एवं पुलिस अधीक्षक ग्वालियर को लिखित में की। इसके बाद आवेदक द्वारा अपने अधिवक्ता के माध्यम से एक रजिस्टर्ड सूचना पत्र अनावेदिका को भेजा। अनावेदिका द्वारा उक्त नोटिस का जबाब दिनांक 15.02.2007 को प्रेषित कर आवेदक एवं उसकी बहिन पर चारित्रिक आरोप लगाये गये हैं जिससे आवेदक को काफी मानसिक पीड़ा पहुंची है।

4. There is no dispute that the parties were married to each other in accordance with the provision of the Hindu Marriage Act.

5. In the written statement cum counter claim the appellant also claimed the decree of restitution of conjugal rights under Section 9 of the Hindu Marriage Act. It was her case that just after one month of her marriage the respondent and his family had started raising demand of dowry. He treated the appellant with cruelty on account of demand of Rs.5 Lacs and a Car. In fact on 10.10.2006 the day of *Karvachauth*, the respondent and his mother and sister beat the appellant. They were not even giving food to her and keep the food articles under lock and similar treatment was given to her by his mother and sister because of which her backbone was fractured. In this regard she got herself treated on 28.12.2006. It is submitted that her relatives have been trying to persuade the respondent to take the appellant back but he always wanted his demands of dowry to be met as a precondition for the respondent in joining his company. It is submitted that the appellant even made a complaint in this regard at Mahila Thana in March 2007 and on account of that a case under Section 498-A of IPC and under Section 3 and 4 of the Dowry Prohibition Act was also registered. She also filed a case under Section 125 of Cr.P.C. wherein, the respondent refused to grant maintenance to her.

6. The lower Court has also noticed the facts of the case of the appellant in para 4 of the judgment as follows:-

> 04. अनावेदिका द्वारा जवाब दावा प्रस्तुत कर स्वीकृत तथ्यों के अलावा आवेदक के अन्य समस्त अभिवचनों को अस्वीकार किया गया है एवं प्रतिदावा धारा 9 हिन्दू विवाह अधिनियम के अन्तर्गत प्रस्तुत कर यह अभिवचन किया गया है कि अनावेदिका के विवाह में तीन लाख रूपये नगद और घर गृहस्थी का संपूर्ण सामान दिया गया था। किन्तु विवाह के एक माह बाद से ही आवेदक ने अनावेदिका के परिवार से दहेज की मांग प्रारंभ कर दी और उसके द्वारा पांच लाख रूपये नगर और कार की मांग पूरी नहीं किये जाने के कारण दिनांक 10.10.2006 को करवाचौथ के दिन अनावेदिका की आवेदक, उसकी मां एवं बहिन मीनाक्षी चौबे ने निमर्म पिटाई की थी। आवेदक एवं उसके परिवार वाले अनावेदिका को खाने को नहीं देते थे। खाने पीने का सामान ताले में बंद रखते थे। दिनांक 19.12.2006 को आवेदक उसकी मां तथा बहिन ने अनावेदिका की उसके पिता एवं भाई के समक्ष लात–घूसों से मारपीट की और धक्के देकर घर से बाहर निकाल दिया जिससे अनावेदिका की रीड़ की हड्डी में चोट आई थी जिसका परीक्षण दिनांक 20.12.2006 को कराया गया। अनावेदिका के रिश्तेदारों ने आवेदक को काफी समझाने का प्रयास किया लेकिन आवेदक अपनी जिद पर अड़ा रहा कि पांच लाख रूपये और एल्टो दो तो ममता को ले जायेगा नहीं तो तलाक दे देगा। इसके बाद अनावेदिका द्वारा फोन से संपर्क करने पर

आवेदक ने अनावेदिका को अपने साथ रखने से मना कर दिया। विवश होकर अनावेदिका ने माच 2007 में महिला थाने पर आवेदन पत्र प्रस्तुत किया जहां पर आवेदक ने अनावेदिका को अपने साथ ले जाने से स्पष्ट रूप से मना कर दिया तथा आवेदक के विरूद्ध धारा 498 ए भा.द.वि. तथा धारा 3 व 4 दहेज प्रतिशेध अधिनियम के तहत मामला पंजीबद्ध किया गया।

अनावेदिका ने आवेदक के विरूद्ध धारा 125 दण्ड प्रकिया संहिता के अंतर्गत भरण पोषण हेतु आवेदन पत्र प्रस्तुत किया गया जिसमें दिनांक 30.09.2008 को यह अभिनिर्धारित गया कि आवेदक ने अनावेदिका के भरण पोषण में उपेक्षा व इंकार किया है। धारा 498 ए भा.द.वि. के प्रकरण में जमानत पर छूटने पर आवेदक एवं उसकी माता तथा बहिन मीनाक्षी ने दिनांक 26.04.2007 को अनावेदिका को गाली गलौच कर धक्के मारकर घर से बाहर निकाल दिया, इसकी 000 शिकायत पुलिस थाना विश्वविद्यालय में की गई। तत्पश्चात अनावेदिका द्वारा अपनी ससुराल जाने का प्रयास किया किन्तु आवेदक ने अपने घर में घुसने नहीं दिया। आवेदक अनावेदिका का दहेज के लालच में परित्याग कर दूसरा विवाह करना चाहता है जबकि अनावेदिका उसके साथ रहकर दाम्पत्य संबंधों का निर्वाह करना चाहती है। अतः आवेदक की ओर से विवाह विच्छेद हेतु प्रस्तुत याचिका निरस्त करते हुए अनावेदिका के पक्ष में दाम्पत्य अधिकारों के पुर्नस्थापन की आज्ञप्ति पारित की जावे।"

7. On the pleadings of the parties, the trial Court framed the following issues:-

	वाद–प्रश्न	निष्कर्ष
1.	क्या अनावेदिका ने आवेदक के साथ कूरता पूर्ण व्यवहार कर उसे दाम्पत्य सुख से वंचित किया है?	हां
2.	क्या स्वयं आवेदक द्वारा अनावेदिका के साथ कूरतापूर्ण व्यवहार कर उसका परित्याग किया है?	सिद्ध नहीं
3	क्या आवेदक अनावेदिका के विरूद्ध विवाहविच्छेद का जय पत्र प्राप्त करने का अधिकारी है?	हां
4.	क्या अनावेदिका आवेदक के विरूद्ध दाम्पत्य संबंधों की पुर्नस्थापना की आज्ञप्ति प्राप्त करने की अधिकारिणी है?	सिद्ध नहीं

8. To prove his case the respondent examined himself, his sister Menakshi Choubey (PW/2) and his friend Shailendra who appeared as PW/3. He also brought on record Ex-P/1 to Ex-P/33 and relied upon the contents of those

documents in support of his case. On the other hand the appellant examined only herself besides relying upon the document Ex-D/1 to Ex-D/49.

9. Some undisputed facts which have been taken into notice by the lower Court reproduced in para 10 reads as under:-

> "10. प्रकरण में यह तथ्य तो निर्विवादित रूप से प्रकट हुआ है कि आवेदक का विवाह अनावेदिका के साथ दिनांक 02.06.2006 को संपन्न हुआ था और उन्हें कोई संतान उत्पन्न नहीं हुई है और विवाह के समय आवेदक मकान नंबर–3 सरस्वती नगर ठाटीपुर मुरार में जो कि उसके पिता ने स्वअर्जित संपत्ति से निर्माण कराया था, में निवास कर रहा है और आवेदक के अनुसार उसके पिता की मृत्यु के बाद उसकी मां के नाम नामान्तरण हुआ। आवेदक के परिवार में आवेदक के अतिरिक्त उसकी मां, बहिन औ उसके दो बच्चे निवास करते हैं चूंकि प्रार्थी की बहिन की आर्थिक स्थिति अच्छी न होने एवं पारिवारिक मतभेद होने के कारण, प्रार्थी की बहिन उस मकान के एक भाग मे सिलाई–कढ़ाई का कार्य करके अपना एवं अपने बच्चों का भरण–पोषण कर रही है।"

10. It may be observed here that the appellant has not engaged any counsel and has argued herself. She has also filed written arguments. She is M.A. LL.B. and offer of this Court to engage a counsel through legal Aid was declined. Efforts for mediation between the parties were also not successful. It shows that the appellant is an educated lady and is fully aware of her obligations in law.

11. Basic allegations of the respondent was that the appellant and her family members had been pressurizing the respondent to send the mother and sister-Menakshi from the matrimonial house to some other property by taking it on rent and transfer the property in which the parties had been residing in the name of the appellant. To pressurize the respondent to meet her aforesaid demand she had been treating the respondent his mother and his sister with cruelty. She had even abusing the respondent by using word "कुत्ता, कमीना, नीच खानदान का". Specific allegations have also been made by the respondent in support of his case by narrating incident of 19.12.06 by alleging that on that day at about 7.00 PM, the appellant, her brother and sister came to his house and treated the respondent and his family members with cruelty in presence of his friend Shailendra who appeared as PW/3. About that incident, it was alleged that on that day the family members of the appellant and appellant herself wanted the respondent to execute papers for transfer of matrimonial house in her name and on his refusal she abused the respondent and his sister. *She*

even made allegations that the respondent was having illicit relationship with his sister. Incident of 27.12.2006 is also referred to on which day threats were given to the respondent that if the house was not mutated within seven days in the name of the appellant, a false complaint will be lodged against the respondent and his family members.

12. On the other hand, according to the appellant in Ex-P/3 report lodged by the respondent dated 27.12.06 there was no mention about the allegations of illicit relationship between the respondent and his sister and this fact has been admitted by him in para 19 of cross-examination. Similarly in Ex-P/5 notice sent by the respondent through his advocate, again there is no mention about any allegation having made by the appellant about illicit relationship between the respondent and his sister.

13. Allegations have been scrutinized by the lower Court in the light of the statement made by the parties as also in their cross-examination and the contents of documents Ex.P/3 and Ex.P-5 in paragraph 13 and 14 of the judgment as under:-

> "13. अनावेदिका की ओर से किये गये उक्त तर्क के परिप्रेक्ष्य में हम प्रदर्श पी–3 का अवलोकन करें तो उक्त रिपोर्ट पुलिस थाना विश्वविद्यालय में दिनांक 27.12.2006 को की गई है। उक्त प्रदर्श पी–3 में आवेदक ने यह स्पष्ट रूप से उल्लेख किया है कि दिनांक 19.12.06 को अनावेदिका एवं उसके परिवार वाले उसके घर आये थे उस समय मेरी बहिन और मित्र शैलेंद्र भी घर पर थे ये सभी लोग कोरे कागजों पर मुझसे मेरी मां तथा बहिन से हस्ताक्षर करने की कहने लगे तथा कहा कि मकान ममता के नाम करना पड़ेगा, हम लोगों ने हस्ताक्षर नहीं किये तो इन सबने लात–घूसों से मारपीट की, ममता ने उसके चेहरे पर नाखूनों से वार किया जिससे खून निकल आया। मैने अपनी इलाज सहारा अस्पताल में कराया। उक्त रिपोर्ट में यह भी उल्लेख किया गया है कि परिवार की इज्जत के खातिर रिपोर्ट भी नहीं की थी। फिर दिनांक 27.12.06 को सुबह 10.00 बजे ये सभी लागे मेरे घर आये इन लोगों ने कहा कि ममता के नाम मकान करने के बारे में क्या सोचा यदि सात दिन में ममता के नाम मकान नहीं किया तो पूरे परिवार को झूठी पुलिस कार्यवाही कर जेल में सड़वा देंगें । तब दिनांक 27.12.2006 को यह रिपोर्ट की गई है।
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> 14. आवेदक ने अपने अधिवक्ता के माध्यम से दिनांक 29.12.2006 को प्रदर्श पी–5 का रजिस्टर्ड सूचना पत्र अनावेदिका को भेजा, नोटिस की रसीद प्रदर्श पी–6, यू पी सी की रसीद प्रदर्श पी–7 तथा अभिस्वीकृति पत्र प्रदर्श पी–8 आवेदक की ओर से प्रस्तुत की गई है। प्रदर्श पी–8 के अवलोकन से

यह स्पष्ट है कि उक्त नोटिस अनावेदिका को दिनांक 30.12.2006 को प्राप्त हो गया था और अनावेदिका की ओर से उक्त नोटिस का जवाब नोटिस प्राप्ति के एक माह पश्चात दिनांक 29.01.2007 दिया गया है।"

14. Reply given to Ex-P/5 by the appellant vide Ex-P/11 reflects upon her intention and give tacit support to her allegations about illicit relationship of respondent with his sister. The contents of the reply have been taken note by the lower Court in para 15 of the judgment which is reproduced here as under:-

"15. यहां पर हम इस तथ्य को दृष्टिगत रखेंगें कि अनावेदिका द्वारा आवेदक के द्वारा दिये गये सूचना पत्र का जो जवाब प्रदर्श प्रदर्श पी–11 दिया गया है, जिसके पद कमांक–2 में अनावेदिका द्वारा यह प्रश्न चिन्ह लगाया गया है कि मीनाक्षी चौबे अपने नवयुवक पुत्र एवं अविवाहित पुत्री सहित इस भवन में कब तक, निवास करेगी ? यह अज्ञात है। वास्तव में मीनाक्षी चौबे को विवाह के पश्चात दोनों बच्चों सहित पतिग्रह ग्रम परसोरिया जिला सागर स्थित अपनी ससुराल में निवास करना चाहिए। इसी पैरा में आगे यहां तक अनावेदिका ने लिखा है कि नोटिसी को विदित हुआ है कि आपने पक्षकार की बहिन श्रीमती मीनाक्षी चौबे पति अनिल चौबे निवासी ग्राम परसोरिया सागर में अपने पति अनिल चौबे का अकारण ही त्यजन कर रखा है। आपके पक्षकार की बहिन श्रीमती मीनाक्षी चौबे को दूसरों के सुखी वैवाहिक जीवन से डाह, कुढ़न, चिड़चिड़ाहट एवं वैमनस्यता होती है और इसी कारण वे नोटिस के साथ बढ़–चढ़कर मारपीट करती है एवं *भाई एवं मां के माध्यम से अवैध दहेज की मांग को उकसाती है। वे संदिग्ध चरित्र की मर्यादाहीन महिला रही ह।* बहिन के नाम पर कलंक श्रीमती मीनाक्षी चौबे पता नहीं किया लालच एवं मजबूरी वश भाई के साथ ही अवैध एवं कलंकित जीवनयापन को भी तैयार है।"

15. From the aforesaid the lower Court has taken a view that the appellant was making false allegations against the sister of the respondent and was alleging that she was a person of shady character and in fact wanted to oust her from matrimonial home. In this regard the trial Court has even noted cross-examination of the respondent in para 30 of the judgment which is reproduced in para 18:-

"18. इस संबंध में आवेदक का कथन के प्रति परीक्षण का पद कमांक–30 अवलोकनीय है, जिसमें उसने यह कहा है कि मीनाक्षी चौबे, सरस्वती नगर में वर्ष 2000 से रह रही है। यह भी स्वीकार किया है कि मीनाक्षी चौबे मेरे पिता की मृत्यु के पश्चात से 3 सरस्वती नगर में रह रही है, मेरी बहिन की शादी हो चुकी है। मेरी बहिन मीनाक्षी चौबे की शादी सागर में हुई है। यह भी स्वीकार

किया है कि मेरी बहिन सिलाई–कढ़ाई का काम करती है, बुटिक का काम नहीं करती। यह भी स्वीकार किया कि मेरी बहिन मीनाक्षी का उसके पति से कोई तलाक नहीं हुआ है, मैं मीनाक्षी चौबे को सागर से स्वयं लिवाकर लाया है, उस समय वह अस्वथ्य थी। उसके कुछ चोटें थीं गंभीर प्रोब्लम थी मेरी बहिन के पति सागर में ही रहते हैं। यह भी स्वीकार किया है कि मैने इस संबंध में थाने में अपने बहनोई के विरूद्ध कोइ रिपोर्ट नहीं की थी। यह भी स्वीकार किया है कि पुलिस थाने या न्यायालय में कार्यवाही करने से बहिन बेटी एवं परिवार की बदनामी होती है व इज्जत खराब होती है। इसी कारण से मैने किसी पुलिस थाने या न्यायालय में कार्यवाही नहीं की। मेरी बहिन व मेरे पिता के बीच अच्छे संबंध थे, कोई मनमुटाव नहीं था। प्रदर्श डी–2 का पत्र वही है जो मेरे पिता ने खदुकुशी करने के पूर्व परिवार वालों को लिखा था। मेरे पिता ने उस पत्र में लिखा था कि मेरी बहिन सागर में ही रहे ग्वालियर आकर रहने का मन न बनाये । स्वतः कहा कि मीनाक्षी के साथ उसके बाद उसकी ससुराल सागर में मारपीट हुई थी।"

16. The aforesaid explanation given by the respondent about not mentioning the allegations of the appellant against his sister are justifiable and would not contradict his allegations against his sister which were made by the appellant.

17. Para 22 of the judgment is also relevant which deals about the allegations of illicit relationship between the respondent and her sister. Para 22 reads as under:-

22. इस प्रकार अनावेदिका ने अपने पति और उसकी बहिन के अवैध संबंध होने का और कलंकित जीवनयापन करने का जो आक्षेप अपने जवाबदावे में लगाया है, यह आक्षेप एक ऐसा आक्षेप है, जो किसी भी भाई के लिये अत्ययधिक मानसिक पीड़ा पहुंचाने वाला है और अनावेदिका का उक्त कृत्य आवेदक के प्रति मानसिक कूरता की श्रेणी में आता है। मानसिक क्रूरता को अधिनियम में कहीं पर भी परिभाषित नहीं किया गया है लेकिन एक भाई एवं बहिन के मध्य इतना पवित्र रिश्ता होता है। यदि बहिन किसी परेशानीवश अपने मायके में निवासकर रही हो और उसकी भाभी ही उसका सहयागे करने बजाय, उस पर इस प्रकार के लांछन लगाये तो कोई भी भाई यह कतई बर्दाश्त नहीं कर सकता, जबकि आवेदक की बहिन स्वयं सिलाई–कढ़ाई का काम करके अपने एवं अपने बच्चों का भरण–पोषण कर रही हो। इन परिस्थितियों में अनावेदिका का अपने पति से यह कहना कि वह अपनी मां और बहिन को घर से बाहर निकाल दे, यह बहुत ही मानसिक पीड़ादायक स्थिति है।

18. In the light of the aforesaid conclusion drawn by the lower Court, it was held that the conduct of the appellant was such, which caused mental

cruelty upon the respondent of such kind which made it impossible for respondent to stay with appellant as her husband. The lower Court was satisfied in coming to the conclusion that besides the allegation made by the respondent against the appellant about specific acts of cruelty, her allegations against the sister of the respondent and suggestive averments in her reply to the notice given by the respondent to the appellant were the acts of mental cruelty. Paragraph 15 and 16 of the judgment in this regard is clear which are reproduced hereunder:-

> "15. यहां पर हम इस तथ्य को दृष्टिगत रखेंगें कि अनावेदिका द्वारा आवेदक के द्वारा दिये गये सूचना पत्र का जो जवाब प्रदर्श प्रदर्श पी–11 दिया गया है, जिसके पद कमांक–2 में अनावेदिका द्वारा यह प्रश्न चिन्ह लगाया गया है कि मीनाक्षी चौबे अपने नवयुवक पुत्र एवं अविवाहित पुत्री सहित इस भवन में कब तक, निवास करेगी ? यह अज्ञात है। वास्तव में मीनाक्षी चौबे को विवाह के पश्चात दोनों बच्चों सहित पतिग्रह ग्रम परसोरिया जिला सागर स्थित अपनी ससुराल में निवास करना चाहिए। इसी पैरा में आगे यहां तक अनावेदिका ने लिखा है कि नोटिसी को विदित हुआ है कि आपने पक्षकार की बहिन श्रीमती मीनाक्षी चौबे पति अनिल चौबे निवासी ग्राम परसोरिया सागर में अपने पति अनिल चौबे का अकारण ही त्यजन कर रखा है। आपके पक्षकार की बहिन श्रीमती मीनाक्षी चौबे को दूसरों के सुखी वैवाहिक जीवन से डाह, कुंढ़न, चिड़चिड़ाहट एवं वैमनस्यता होती है और इसी कारण वे नोटिस के साथ बढ़–चढ़कर मारपीट करती है एवं *भाई एवं मां के माध्यम से अवैध दहेज की मांग को उकसाती है। वे संदिग्ध चरित्र की मर्यादाहीन महिला रही हैं।* बहिन के नाम पर कलंक श्रीमती मीनाक्षी चौबे पता नहीं किया लालच एवं मजबूरी वश भाई के साथ ही अवैध एवं कलंकित जीवनयापन को भी तैयार है।"
>
> 16. अनावेदिका के उक्त जवाब से ही यह स्पष्ट है कि जो महिला अपने पति की बहिन के संबंध में ऐसे शब्दों का उच्चारण मात्र इस आधार पर कर रही है कि वह अपने मायके में निवास कर रही है तो इससे उसकी मानसिकता दर्शित होती है कि वह अपने पति की बहिन के संबंध में कहां तक अपशब्दों का प्रयोग कर सकती है। इससे यह दृष्टिगोचर होता है कि जो महिला अपने जवाब में अपने पति की बहिन के संबंध में यह कह रही हो कि वह किस लालच में और किस मजबूरीवश अपने भाई के साथ ही अवैध एवं कलंकित जीवनयापन को भी तैयार है, इससे आवेदक द्वारा अपने दावे में किये गये अभिवचन कि अनावेदिका उसकी बहिन के उसके अवैध संबंध होने का आक्षेप लगाती है, वह पूर्ण रूप से अनावेदिका के ही आचरण से दर्शित होता है।"

19. I have gone through the judgment of the lower Court and also gone into the written statement filed on behalf of the appellant.

Section 13 of the Hindu Marriage Act reads as under:-

> 13. Divorce. (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-
>
> [(i) x x x
>
> [(ia) has, after the solemnisation of the marriage, treated the petitioner with cruelty; or]
>
> [(ib) to (vii) x x x
>
> Explanation .- x x x

20. The word 'cruelty' has not been defined in the Hindu Marriage Act. To constitute cruelty the conduct complained should be *'grave and weighty'* so as to make cohabitation virtually unendurable. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.

21. In the celebrated book of D. Tolstoy "The Law and Practice of Divorce and Matrimonial Causes" (Sixth Edition, p. 61) defined cruelty in these words:

> "Cruelty which is a ground for dissolution of marriage may be defined as willful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger."

22. The Shorter Oxford Dictionary defines "cruelty" as "the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness".

23. The term "mental cruelty" has been defined in Black's Law Dictionary [8th Edition, 2004] as under:

> "Mental Cruelty - As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."

24. The concept of cruelty has been summarized in Halsbury's Laws of England [Vol.13, 4th Edition, Para 1269] as under:

> "The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exits."

25. In 24 American Jurisprudence 2d, the term "mental cruelty" has been defined as under:

> "Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish

actual instances of physical abuse."

26. In *Dr. N.G. Dastane* v. *S. Dastane*, (supra), the Apex Court has observed as under;

> "...whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the Respondent".

27. In the case of *Shobha Rani v. Madhukar Reddi*, AIR 1988 SC 121, the Apex Court has observed as under;

> "Section 13(1)(ia) uses the word "treated the petitioner with cruelty". The word "cruelty" has not been defined. Indeed it could not have been defined. It has been used in relation to human conduct or human behavior. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the Court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted."

The Court further observed;

> "The context and the set up in which the word "cruelty" has been used in the Section seems to us, that intention is not a necessary element in cruelty. That the word has to be

understood in the ordinary sense of the term in matrimonial affairs. If the intention to harm, harass or hurt could be inferred by the nature of the conduct or brutal act complained of, cruelty could be easily established. But the absence of intention should not make any difference in the case, if by ordinary sense in human affairs, that act complained of could otherwise be regarded as cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment."

28. In the case of *V. Bhagat v. D. Bhagat,* (Supra), the Apex Court has observed as under:

"Mental cruelty in Section 13 (1)(ia) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made."

29. Again in *Savitri Pandey v. Prem Chandra Pandey,* AIR 2002 SC 591, the Apex Court has observed as under;

"Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other.

> "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other."

30. In *Praveen Mehta v. Inderjit Mehta,* AIR 2002 SC 2582, the Apex Court has laid down as to what constitute cruelty;

> "Cruelty for the purpose of Section13(1)(ia) is to be taken as a behavior by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behavior or behavioral pattern by the other. Unlike the case of physical cruelty the mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehavior in isolation and then pose the question whether such behavior is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other."

31. The Apex Court in *Vinita Saxena v. Pankaj Pandit,* AIR 2006 SC

1662, has observed as under;

> "As to what constitute the required mental cruelty for purposes of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home.
>
> If the taunts, complaints and reproaches are of ordinary nature only, the court perhaps need consider the further question as to whether their continuance or persistence over a period of time render, what normally would, otherwise, not be so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer."

32. Human mind is extremely complex and human behavior is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behavior in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

33. It may be observed here that in matrimonial life, the possibility of such situation that the sister living in parents' house after her marriage is not an unusual situation. It quite often happen if her relationship with her husband is not very good and she did not feel comfortable then only option for her to live with her parents. Even if such living by the married daughter is for a long

period, this cannot be a reason for the sister-in-law to create a situation where relationship between the parties comes to such a situation that they are unable to live together which appears to be a situation created by the appellant and has given reason for filing of this divorce petition. She went to the extent of making allegation against the sister of the husband calling her a person of shady character.

34. Reference can also be made to the judgment delivered in the case of *Nemai Kumar Ghosh vs. Smt. Mita Ghosh* reported in AIR 1986 Calcutta 150. Para 8 of the aforesaid judgment is relevant which is reproduced here as under:-

> "On a conspectus of all these decisions cited hereinbefore, it is now well settled that if any imputations against the character of any spouse is alleged either by the wife or by the husband without any foundation and the same is based on mere suspicion, even in such cases such baseless allegations of illicit relationship amount to mental cruelty and it will be a valid ground for passing a decree of divorce under the provisions of S.13(ia) of the Hindu Marriage Act. We have already held hereinbefore on a consideration of the evidence on record that the respondent wife, since after her marriage with the appellant, became suspicious about his character and used to doubt that the appellant was in illicit connection with his own sister-in-law (elder brother's wife). This has caused serious mental pain and agony to the appellant inasmuch as it has been stated by the appellant and also pleaded in his petition that he held his sister-in-law in high esteem like his mother and it was under her care and affection that he was brought up and it was she and his elder brother who arranged his marriage with the respondent. In such circumstances, we are constrained to hold, considering the social status of the appellant who is now working as an officer, i.e. Branch Manager of the United Commercial Bank, that this behaviour on the part of the respondent amounted to mental cruelty and it gives sufficient reasons for the appellant to think that it would not be safe for him to live with the respondent. Furthermore, it appears that the respondent after their separation since Sept. 1977, not

only has no mind to patch up the differences and to return to the matrimonial home for the simple reason that she has not come up before this Court to contest the appeal even though this Court directed the appellant to serve notice of the appeal by registered post and file affidavit-of-service. Affidavit-of-service has been filed by the appellant stating that the Court's order has been complied with. But in spite of such service of notice, the respondent did not think it fit to contest the appeal. This bespeaks the mind of the respondent that she is not willing to go back to the matrimonial home even if this action becomes unsuccessful. In these circumstances, we are constrained to hold that this is a fit case where for ends of justice the application for divorce should be allowed. We are fortified by our above findings with the most pertinent observations of the Supreme Court made in the case of *Sm. Saroj Rani v. Sudarshan Kumar Chadha,* (1984) 4 SCC 90 at p. 98 : (AIR 1984 SC 1562 at p. 1566), paragraph 9 where their Lordships have held,

"Furthermore we reach this conclusion without any mental compunction because it is evident that for whatever be the reasons this marriage has broken down and the parties can no longer live together as husband and wife; if such is the situation it is better to close the chapter."

35. In recent judgment delivered by the Apex Court in the case of *K. Srinivas Rao vs. D.A. Deepa* reported in (2013) 5 SCC 226 in the following words:-

"27. We need to now see the effect of the above events. In our opinion, the first instance of mental cruelty is seen in the scurrilous, vulgar and defamatory statement made by the respondent-wife in her complaint dated 4/10/1999 addressed to the Superintendent of Police, Women Protection Cell. The statement that the mother of the appellant-husband asked her to sleep with his father is bound to anger him. It is his case that this humiliation of his parents caused great anguish to him. He and his family were traumatized by the false and indecent statement made in the complaint. His grievance appears to us

to be justified. This complaint is a part of the record. It is a part of the pleadings. That this statement is false is evident from the evidence of the mother of the respondent-wife, which we have already quoted. This statement cannot be explained away by stating that it was made because the respondent-wife was anxious to go back to the appellant-husband. This is not the way to win the husband back. It is well settled that such statements cause mental cruelty. By sending this complaint the respondent-wife has caused mental cruelty to the appellant-husband.

36. Besides the specific act of mental cruelty making false allegations against the sister of the respondent, it is also matter on record that the appellant filed various such complaint under Section 498-A of IPC under Domestic Violence Act. In those proceedings, the appellant even opposed the bail application went to the extent of filing revisions against the grant of bail to the respondent and his family members. Such conduct on the part of the appellant further constitute mental cruelty.

37. Just to appreciate as to what may constitute mental cruelty one may take note of the judgment of the Apex Court delivered in the case of *Malathi Ravi, M.D. vs. B.V. Ravi*, M.D. Reported in (2014) 7 SCC 640, wherein the Apex Court approvingly brought earlier judgment delivered on the subject in the case of *Samar Ghosh vs. Jaya Ghosh* reported in 2007 4 SCC 511 wherein some illustrative cases of mental cruelty were mentioned. The aforesaid discussion appears in para 30 of this judgment in the following words:-

"30. In *Samar Ghosh vs. Jaya Ghosh* this Court has given certain illustrative examples wherefrom inference of mental cruelty can be drawn. The Court itself has observed that they are illustrative and not exhaustive. We think it appropriate to reproduce some of the illustrations: (SCC pp. 546-47, para 101)

"(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial

life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

* * *

(iv) Mental cruelty is a state of mind. The feeling of deep anguish disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

* * *

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

* * *

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

* * *

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

38. Para 32 and 33 of the same judgment are also relevant which are reproduced here as under:-

32. In *Vishwanath Agrawal v. Sarla Vishwanath Agrawal,* while dealing with mental cruelty, it has been opined thus:

"22. The expression 'cruelty' has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status."

33. In the said case, analysing the subsequent events and the conduct of the wife, who was responsible for publication in a newspaper certain humiliating aspects about the husband, the Court held as follows:

"54...In our considered opinion, a normal reasonable man is bound to feel the sting and the pungency. The conduct and circumstances make it graphically clear that the respondent wife had really humiliated him and caused mental cruelty. Her conduct clearly exposits that it has resulted in causing agony and anguish in the mind of the husband. She had publicised in the newspapers that he was a womaniser and a drunkard. She has made wild allegations about his character. She had made an effort to prosecute him in criminal litigations which she had failed to prove. The feeling of deep anguish, disappointment, agony and frustration of the husband is obvious."

39. In view of the aforesaid, I do not find any infirmity in the conclusion drawn by the lower Court holding that the appellant was guilty of inflicting the cruelty upon the husband including mental cruelty of the worst kind. In such situation, the lower Court was justified in dissolving the marriage between the parties by decree of divorce under Section 13 (1) (ia) of the Hindu Marriage Act.

40. In such circumstances asking the respondent-husband to live with the appellant-wife in the matrimonial house as husband and wife by passing a decree of restitution of conjugal rights under Section 9 of the Hindu Marriage Act as prayed for by the appellant in the counter claim also, was rightly refused.

41. In view of the aforesaid, we find that the judgment delivered by the lower Court does not suffer from any infirmity. Accordingly, the appeal filed by the appellant is hereby dismissed.

Appeal dismissed.

I.L.R. [2015] M.P., 2998
APPELLATE CIVIL
Before Mr. Justice Alok Aradhe
F.A. No. 247/2001 (Jabalpur) decided on 21 July, 2015

JAWAHAR LAL NEHRU KRISHI VISHWAVIDYALAYA, JABALPUR ...Appellant
Vs.
J.H. KOTECHA & anr. ...Respondents
(Alongwith F.A. No. 248/2001)

A. Arbitration Act (10 of 1940), Section 34 - Scope of Judicial Review - **Court can interfere with the award only on the grounds set out in Section 30 i.e. whereas an arbitrator has misconducted himself or the proceeding, where an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceeding has become invalid and where an award has been improperly procured or is otherwise invalid - An award cannot be set aside merely on the ground that in the opinion of the Court award passed by the arbitrator would have been otherwise. (Para 13)**

क. माध्यस्थम् अधिनियम (1940 का 10), धारा 34 – न्यायिक पुनर्विलोकन का क्षेत्र – न्यायालय धारा 30 में दिए गए आधारों पर ही अवार्ड हस्तक्षेप कर सकता है, अर्थात् जब मध्यस्थ ने स्वयं अवचार किया हो अथवा कार्यवाही का कुसंचालन किया हो, जहां माध्यस्थम् का अधिक्रमण करते हुए न्यायालय द्वारा जारी किए गए आदेश के पश्चात् अवार्ड दिया गया हो अथवा जब माध्यस्थम् कार्यवाही अन्यथा अविधिमान्य हो गयी हों तथा जब कोई अवार्ड अनुचित तरीके से प्राप्त किया गया हो अथवा अन्यथा अविधिमान्य है – एक अवार्ड केवल इस आधार पर अपास्त नहीं किया जा सकता कि न्यायालय के अभिमत में मध्यस्थ द्वारा अवार्ड अन्यथा पारित किया होगा।

B. Arbitration Act (10 of 1940), Section 39 - Appeal - New Ground - **Raising a new ground in appeal for which no foundation was laid down in application for setting aside award is not permissible.**

(Para 16)

ख. माध्यस्थम् अधिनियम (1940 का 10), धारा 39 – अपील – नवीन आधार – अपील में एक नवीन आधार उठाना जिसके लिए अवार्ड अपास्त करने के लिए दिये गये आवेदन में कोई आधार प्रस्तुत नहीं किया गया अनुज्ञेय नहीं है।

C. *Arbitration Act (10 of 1940), Section 8 - Appointment of Arbitrator* - **Order of Court appointing sole arbitrator was challenged upto Supreme Court and the order of Court appointing sole arbitrator was upheld - As order appointing sole arbitrator has attained finality and binds parties, therefore, the appointment of sole arbitrator in place of Tribunal of arbitration consisting of three arbitrators cannot be challenged. (Paras 17, 18)**

ग. माध्यस्थम् अधिनियम (1940 का 10), धारा 8 – मध्यस्थ की नियुक्ति – एकल मध्यस्थ की नियुक्ति के लिए दिए गए न्यायालय के आदेश को उच्चतम न्यायालय तक चुनौती दी गयी तथा एकल मध्यस्थ की नियुक्ति करने वाले न्यायालय के आदेश को कायम रखा गया – चूंकि एकल मध्यस्थ की नियुक्ति के आदेश ने अंतिमता प्राप्त कर ली है तथा पक्षकारों पर बाध्य है, अतः माध्यस्थम् अधिकरण जिसमें तीन मध्यस्थ होने हैं की जगह एकल मध्यस्थ की नियुक्ति को चुनौती नहीं दी जा सकती।

D. *Arbitration Act (10 of 1940), Section 30 - Opportunity of hearing* - **Proceedings before arbitrator commenced on 29.11.1998 - On 23.09.2000, the arbitrator proceeded ex parte and passed ex parte award - From scrutiny of order sheets of proceedings, it is evident that the appellant adopted all possible tactics to linger on the proceeding before the arbitrator and on several occasions neither any officer nor counsel for the appellant appeared before arbitrator - Therefore, action of arbitrator in closing the right of the appellant to adduce evidence by taking into account the time limit fixed by the Court for delivery of award, was justified. (Paras 22 to 26)**

घ. माध्यस्थम् अधिनियम (1940 का 10), धारा 30 – सुनवाई का अवसर – मध्यस्थ के समक्ष कार्यवाही 29.11.1998 को प्रारंभ हुई – 23.09.2000 को मध्यस्थ द्वारा एकपक्षीय कार्यवाही की गयी तथा एकपक्षीय अवार्ड पारित किया गया – कार्यवाही के आदेश–पत्रों की संवीक्षा से यह सुस्पष्ट है कि मध्यस्थ के समक्ष कार्यवाही को लंबा खींचने के लिए अपीलार्थी ने सभी संभावित युक्तियां अपनाई तथा विभिन्न अवसरों पर न तो कोई अधिकारी न ही अपीलार्थी की ओर से कोई अधिवक्ता मध्यस्थ के समक्ष उपस्थित हुआ – अतः, अवार्ड देने के लिये न्यायालय द्वारा दी गयी समय–सीमा को ध्यान में रखते हुए मध्यस्थ द्वारा अपीलार्थी का साक्ष्य प्रस्तुत करने के अधिकार को समाप्त करने की कार्यवाही न्यायसंगत थी।

E. *Arbitration Act (10 of 1940), Section 29 & Interest Act, (14 of 1978), Section 3 - Pre Reference Interest* - **Where the agreement**

between the parties does not prohibit grant of interest, the arbitrator shall have power to grant interest - As award has been passed after coming into force of Act, 1978, therefore, Arbitrator had authority to award interest for pre-reference interest at 18% p.a. which has already been reduced to 10% by Addl. District Judge. (Para 30)

ङ. माध्यस्थम् अधिनियम (1940 का 10), धारा 29 एवं ब्याज अधिनियम, (1978 का 14), धारा 3 – पूर्व संदर्भ ब्याज – जहां पक्षकारों के मध्य करार ब्याज के अनुदान को प्रतिबंधित नहीं करता है; वहां मध्यस्थ को ब्याज का अनुदान करने की शक्ति प्राप्त होगी – चूंकि अवार्ड अधिनियम 1978 के प्रभावशील होने के बाद पारित किया गया है, अतः मध्यस्थ को 18% प्रतिवर्ष की दर से पूर्व संदर्भ ब्याज के लिए ब्याज प्रदान करवाने का प्राधिकार था, जिसे अतिरिक्त जिला न्यायाधीश द्वारा पहले ही 10% तक कम कर दिया गया है।

Cases referred :

AIR 1994 SC 490, (2006) 1 SCC 86, (2007) 4 SCC 697, AIR 1963 SC 1685, AIR 1992 SC 1918, AIR 1987 SC 2045, AIR 2003 SC 3028, (2007) 5 SCC 359, 2012(2) JLJ 321, AIR 1973 Punj. & Haryanana 114, AIR 1988 Patna 304, AIR 1992 SC 732, AIR 2004 Delhi 412, AIR 1999 SC 1101, AIR 1975 SC 1259, (2003) 12 SCC 144, 2009(6) SCC 414, (2013) 3 SCC 747, (2010) 4 SCC 518, (1996) 1 SCC 435, AIR 1963 SC 1685, (1988) 1 SCC 418, AIR 1992 SC 732, (2007) 2 SCC 720.

P.N. Dubey with *Naveen Dubey*, for the appellant.
Ashok Lalwani, for the respondent No.1.

J U D G M E N T

ALOK ARADHE, J. :- These appeals have been filed under Section 39 (1) (vii) of the Arbitration Act, 1940 (in short 'the Act') being aggrieved by the judgments dated 7.3.2001 passed by the Additional District Judge in Arbitration Case No.11-A/2000 and Arbitration Case No.32-A/2000 by which the objections preferred by the appellant against the awards dated 27.9.2000 passed by the sole arbitrator have been rejected. In order to appreciate the appellant's challenge to the impugned judgments, few facts need mention which are stated infra.

2. The respondent No.1 was appointed as consultant architect for construction of non-residential buildings which were financed by the Indian

Council for Agriculture Research, New Delhi and the agreements dated 24.11.1982, 2.12.1983 and 3.12.1983 were executed. Under the aforesaid agreements some of the buildings were constructed whereas some buildings could not be constructed for various technical reasons. As per the version of the appellant, the respondent No.1 was paid the fee which was calculated by it on the basis of cost incurred in construction of the buildings, on the basis of approval accorded by competent authority. The contracts of the respondent No.1 were terminated on 2.5.1988.

3. Being aggrieved, the respondent No.1 filed applications under Section 8 of the Act for appointment of an arbitrator. By order dated 17.4.1988, one Mr. Y.R. Khirwadkar was appointed as sole arbitrator to adjudicate the disputes between the parties. In respect of the agreements executed on 24.11.1982 and 2.12.1983, the arbitrator by award dated 27.9.2000 awarded a sum of Rs.8,63,329/- to the respondent No.1 along with interest at the rate of 18% per annum till actual payment is made. The respondent No.1 was also awarded a sum of Rs.25,000/- by way of compensation on account of breach of contract. In respect of agreement executed on 3.12.1983, the arbitrator by award dated 27.9.2000 awarded a sum of Rs.13,972/- along with interest at the rate of 18% per annum w.e.f. 15.9.1987 till actual payment is made to the respondent No.1 and also awarded a sum of Rs.25,000/- by way of compensation on account of breach of contract.

4. Being aggrieved by the aforesaid judgment passed by the Additional District Judge in Arbitration Case No.11A/2000, the appellant has preferred First Appeal No.247/2001 whereas against the judgment passed in Arbitration Case No.32 A/2000, the appellant has preferred First Appeal No.248/2001. Since, common questions of law and facts arise in these appeals, they were heard analogously and are decided by this common judgment.

5. Mr. P.N. Dubey, learned counsel for the appellant submitted that clause 9 of the agreement dated 2.12.1983 provides that arbitral tribunal shall consist of three members and, therefore, the sole arbitrator could not have been appointed by the Court under Section 8 of the Act and the impugned awards are ab initio void. In support of the aforesaid submission, learned counsel has placed reliance on the decision of the Supreme Court in AIR 1994 SC 490 and *State of Rajasthan v. Nav Bharat Construction Co.*,(2006) 1 SCC 86.

6. It is further submitted that agreement dated 2.12.1983 was executed

for non-residential purpose for Jabalpur, Sagar and Sehore however, the sole arbitrator in his award has awarded the claim in respect of other non-residential works also namely, agriculture college, Khandwa and Mandsaur which was not a part of National Agriculture Research Project. In other words, it was not a part of the agreement. Thus, while granting the claim for the works which were not part of the agreement, the arbitrator has misconducted himself. In support of the aforesaid submission, reliance has been placed on the decisions of the Supreme Court in the cases of *Food Corporation of India v. Chandu Construction and Another,* (2007) 4 SCC 697 and *Union of India v. A.L. Rallia Ram*, AIR 1963 SC 1685.

7. It is also submitted that the arbitrator grossly erred in invoking clauses 3 and 10 of the agreement and erred in holding that the aforesaid clauses give inherent power to include the work not contained in the agreements. It was also pointed out that the claim of the respondent No.1 was barred by limitation, as the claims were due in the year 1985 and the claims were submitted on 28.2.1991 i.e. beyond the period of three years. In support of the aforesaid submission, learned counsel for the petitioner has placed reliance on the decision in the case of *S. Rajan v. State of Kerala and Another*, AIR 1992 SC 1918.

8. It was also argued that since the complicated issues of law and fact were involved before the arbitrator, therefore, the same could not have been decided by him and the matter ought to have been referred to the Civil Court for adjudication. It was pointed out that even though the appellant preferred the counter claim to the tune of Rs.1.41 lacs before the arbitrator however, while passing the award, the arbitrator, even did not refer to the counter claim filed by the appellant which constitutes misconduct on the part of the arbitrator. It is urged that there was no provision in the agreements for grant of interest with regard to pre-reference period therefore, interest for pre-reference period could not have been granted by the arbitrator. In support of this submission, reliance has been placed in the decision in *A.L. Rallia Ram (*supra). It is also urged that the work was abandoned by the contractor and the payment of the amount for the work done was already made to the respondent. It is contended that the arbitrator devised his own method for computation of fee payable to the respondent No.1 contrary to the terms and conditions of the agreements.

9. It is also submitted that the respondent No.1 played fraud by

manipulating the agreement dated 2.12.1983 and inserted the words "and other stations" with ill-intention to seek false claims. However, the arbitrator failed to take note of the aforesaid aspect of the matter and is therefore guilty of misconduct. In this connection, learned counsel for the petitioner has referred to the decision in *A. Rangaswamy v. Balasubramania Foundry and Others,* AIR 1987 SC 2045.

10. Learned counsel for the petitioner while inviting the attention of this Court to the arbitral proceedings conducted on 5.7.2000, 26.8.2000, 27.8.2000, 9.9.2000, 17.9.2000 and 23.9.2000 submitted that arbitrator refused to grant adjournments and even when valid and cogent reasons were shown before him and proceeded ex parte which constitute misconduct on the part of the arbitrator. Lastly, while referring to Section 57 (2) (C) of the Indira Gandhi Krishi Vishwavidhyalaya Adhiniyam, 1987, it is submitted that the arbitrator grossly erred in granting claim of the aforesaid university in the impugned awards.

11. On the other hand, Mr. Ashok Lalwani, learned counsel for the respondent No.1 while inviting the attention of this Court to the agreement dated 2.12.1983 submitted that Jawaharlal Nehru Krishi Vishwavidyalaya, Jabalpur (In short 'the JNKVV') includes successor and assignee as well and include all buildings of the JNKVV. It is further submitted that the agreements were prepared in three copies, one copy was retained by the appellant and other one was retained by the respondent No.1. The respondent No.1 filed the copy in his possession along with the application under Section 20 of the Act. While referring to the documents dated 22.12.1983, 24.12.1984 and October, 1985, it was pointed out that the appellant has made payment in respect of other stations including Indore, Ambikapur which shows that the agreement is not forged. While inviting the attention of this Court to paragraph 4 of the reply to the application under Section 20 of the Act, it is submitted that the appellant had admitted in aforesaid paragraph that the payment was made to the respondent No.1 in respect of Khandwa and Mandsaur. It was pointed out that by order dated 15.5.2003 a Bench of this Court had directed the appellant to produce original agreement along with affidavit, however, the affidavit was not filed. In the memorandum of the revision, namely, Civil Revision No.139/1990 in paragraph 2 there is reference to other stations. It is also urged that the order appointing arbitrator has attained finality as the same has been upheld by the Supreme Court and, therefore, no challenge can

be made to the appointment of the arbitrator. It is contended that last running bill of the respondent No.1 pertains to the year 1987 and the application for appointment of an arbitrator was filed on 29.2.1988 therefore, the claims of the respondent cannot be said to be barred by limitation. The appellant did not prefer any cross-objection before the arbitrator therefore, question of adjudication of the same does not arise. It is also argued that the grounds which were not raised before the District Court, cannot be allowed to be raised for the first time in this appeal. In support of the aforesaid submission, learned counsel for the respondent has placed reliance on the decisions in *Central Bank of India v. Vrajlal Kapurchand Gandhi,* AIR 2003 SC 3028 and *Jagvir Singh and Others v. State (Delhi Admn.)* (2007) 5 SCC 359 and a decision of this Court in *Ramjilal Kulshrestha v. State of M.P. And Others*, 2012 (2) JLJ 321. *Mehar Singh v. State of Punjab*, AIR 1973 Punjab and Haryana 114 and *Bihar State Electricity Board v. M/s Khalsa Brothers*, AIR 1988 Patna 304. It is further submitted that even though there is no provision in the agreements for grant of interest for pre-reference period yet the respondent No.1 is entitled to the interest in view of the provisions of the Interest Act, 1978 and in view of Section 4 of the Indian Contract Act, 1872. In support of this submission, reliance has been placed in the decisions of the cases of *Secretary Irrigation, Department, Government of Orissa and Others v. G.C. Roy*, AIR 1992 SC 732, *M/s Saraswati Construction Co. v. Delhi Development Authority*, AIR 2004 Delhi 412 and *State of Orissa v. B.K. Routrary*, AIR 1999 SC 1101 It was urged that trial Court has grossly erred in reducing the interest awarded by the arbitrator without assigning any reason. Therefore, cross-objections preferred by the respondent No.1 deserves to be allowed. It was stated by learned counsel for the respondent No.1 that he is confining his claim in the counter claim only to the rate of interest and claim for compensation on account of breach of contract is abandoned. It is also contended that while dealing with the objection to the awards, the trial Court is not supposed to act as court of appeal and, therefore, cross objection of the respondent No.1 deserved to be allowed.

12. By way of rejoinder reply, learned counsel for the appellant submitted that three copies of the agreements were prepared. One was retained by the appellant, other one was retained by the respondent No.1 and the third one was retained by the Chief Engineer (Vice Chancellor). It is inconceivable that the vice chancellor would make any interpolation in the agreement. While

inviting the attention of this Court to the answer given to question no.20 by the respondent No.1 before the arbitrator in his evidence, it is submitted that the respondent has admitted that he himself made interpolation in the agreement. It is also argued that pure question of law can be raised at any stage of the proceeding.

13. I have considered the respective submissions made by learned counsel for the parties and have perused the record. The object of Arbitration is to obtain fair resolution of disputes by an impartial tribunal without unnecessary delay and expenses and the intervention by the Courts should be restricted. [See: *Russell on Arbitration*, Twenty-third Edition by David St. John Sutton, Judith Gill and Matthew Gearing] An arbitration in substance ousts the jurisdiction of the Court,except for the purpose of controlling the arbitrators and preventing misconduct and for regulating the procedure after award. The hearing on the merits of the award passed by the arbitrator is not permissible. The Court can interfere with the award only on the grounds set out in Section 30 of the Act namely where an arbitrator or an empire has misconducted himself or the proceeding, where and award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceeding has become invalid and where an award has been improperly procured or is otherwise invalid. It is well settled legal proposition that an award cannot be set aside merely on the ground that in the opinion of the Court award passed by the arbitrator would have been otherwise. In *K.P. Poulose v. State of Kerala and another*, AIR 1975 SC 1259 it has been held that misconduct under Section 30(a) of the Act connotes legal misconduct if the arbitrator on the face of the award arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring very material documents which throw abundant light on the controversy to help a just and fair decision. The aforesaid view was reiterated by the Supreme Court in the decision in the case of *Seth Mohanlal Hiralal Vs. State of M.P.* (2003) 12 SCC 144.

14 In *G. Ramachandra Reddy and Company v. Union of India and Another*, 2009 (6) SCC 414, the Supreme Court while setting out legal principles for interfering with the award passed by the arbitrator held that interpretation of a contract may fall within the realm of an arbitrator and the Court while dealing with an award would not reappreciate the evidence. It has further been held that the award containing reasons also, may not be interfered with unless the reasons are found to be perverse or based on a

wrong proposition of law and if two views are possible the Court will refrain itself from interfering. It is equally well-settled legal proposition that an arbitrator has to decide the dispute according to the legal right of the parties and not according to what he may consider fair and reasonable and re-appreciation of the evidence by the Court is permissible only when award is erroneous in law and amounts to misconduct by the arbitrator. [See: *P. Radhakrishna Murthy v. National Buildings Construction Corporation Ltd.,* (2013) 3 SCC 747]

15. In the backdrop of aforesaid well-settled legal position and in view of rival submissions made by learned counsel for the parties, the following issues emerge for consideration in these appeals namely:

(1) Whether the appellant can raise the grounds in this appeal which were not raised by it before the District Court.

(2) whether in view of clause 9 of the agreement dated 02/12/1983 sole arbitrator could be appointed by the Civil Court under Section 8 of the Act.

(3) Whether the respondent No.1 has played fraud by inserting the words and "other stations"in the agreement with ill intention to seek claims.

(4) Whether arbitrator committed misconduct in granting claims of the respondent in respect of the works which were not part of the agreements.

(5) Whether the arbitrator has wrongly invoked clause (3) & (10) of the agreements while passing the award.

(6) Whether the arbitrator has provided reasonable opportunity of hearing to the appellant.

(7) Whether non-consideration of the counter claim filed by the appellant by the arbitrator amounts of misconduct.

(8) whether the claims of the respondent No.1 are barred by limitation.

(9) Whether arbitrator has computed the fee payable to the respondent contrary to the terms and conditions of the agreement.

(10) Whether the arbitrator could have awarded interest @ 18% per annum for the per-reference period.

(11) Whether the cross objection filed by the respondent deserves to be allowed.

(12) Whether complicated issues of law could have been decided by the arbitrator.

(13) Whether arbitrator erred in law in granting claims of Indira Gandhi Krishi Viswavidyalaya in the impugned awards in view Section 57 (2)(c) of the Indira Gandhi Krishi Viswavidyalaya Adhiniyam 1987.

16. The Supreme Court in the case of *State of Maharashtra v. Hindustan Construction Company Limited*, (2010) 4 SCC 518 has held that raising a new ground in the memorandum of the appeal for which no foundation was laid down in the application for setting aside the award is not permissible. In view of the aforesaid enunciation of law, it is evident that new ground in the memorandum of appeal for which foundation was not laid in the application for setting aside the award cannot be raised. Accordingly, the issue number (1) is answered

17. Clause 9 of the agreement dated 2.12.1983 contains arbitration clause, is reproduced below for the facility of reference:

> "9. All questions of dispute arising out of or in respect of this agreement except as to any matters the decision on which are expressly provided for, shall be referred to a tribunal of Arbitration consisting of one member to be nominated by the employer, one member nominated by the architect and an umpire to be appointed by the Indian Council of Agriculture Research (ICAR). The decision of the arbitration shall be final and binding on both the parties to the agreement, within the meaning of Indian Arbitration Act 1940 and the Rules thereunder or any statutory modification or re-enactment thereof."

18. The respondent No.1 filed an application for appointment of an arbitrator on 29.2.1988 in First Appeal No.247/2001 whereas the same was filed on 4.5.1989 in First Appeal 248/2001. The sole arbitrator was appointed vide order dated 17.4.1998 by the Additional District Judge. An application for modification of the order was filed which was dismissed vide order dated 16.10.1998. The said order was upheld in Civil Revision No.1185/1999 vide order dated 1.10.1999 passed by the High Court. The aforesaid order was subject matter of challenge in SLP (C) No.18450-18451/1999 which was

dismissed vide order dated 17.12.1999. Thereafter, miscellaneous judicial case was filed for removal of the sole arbitrator, namely, MJC No.2/1999 which was also dismissed vide order dated 18.3.1999. The order passed by the Additional District Judge was upheld by the High Court in Civil Revision No.903/1999 which was dismissed vide order dated 1.10.1999. From the above narration of the facts, it is evident that the order of appointment of the arbitrator dated 17.4.1998 was challenged up to the Supreme Court and was upheld. Thus, the order by which the sole arbitrator was appointed to adjudicate the disputes between the parties attained finality and binds the parties. [See: *State of Kerala v. M.K. Kunhikannan Nambiar*, (1996) 1 SCC 435] Therefore, reliance placed by the appellant on the decisions in *Government of Andhra Pradesh v. K. Mastan Rao*, AIR 1994 SC 490 and *Nav Bharat Construction Co.* (supra) is of no assistance to them in the facts of the case. Thus, issue number (2) is answered in the affirmative and against the appellant.

19. Consequent upon launching of National Agriculture Research Project Scheme as a part of five year plan, the Indian Council for Agriculture Research, New Delhi entrusted the subprojects for their implementation including the civil works for execution to Jawaharlal Nehru Krishi Vishwavidyalaya, Jabalpur. As per the manual published by the National Agriculture Research Project Scheme, it was mandatory for the University to appoint an architect for planning and designing of these subproject buildings in consultation with the National Agriculture Research Project and to get them approved before their execution. As per the norms laid down by the National Agriculture Research Project, the applications were invited from the reputed firms of the architects along with the terms and conditions for planning and designing of the non-residential buildings of the University under the subprojects of the National Agriculture Research Project. The Executive Engineer vide letter dated 13.7.1982 informed that the respondent No.1 was selected by the Vice Chancellor and his selection was notified by the Executive Engineer vide letter dated 23.11.1982. Subsequently, two agreements were executed on 24.11.1982 for non-residential building of the University. Under the Agreement one building each was to be constructed at Morena, Tikamgarh and Ambikapur whereas under the Agreement dated 2.12.1983, the non-residential buildings at Jabalpur, Sihore and Sagar were to be constructed. Thereafter the work orders were issued to the respondent No.1. Clause 3 of the Agreements stipulated that the

architect would be paid stage wise fee by the employer in accordance with the schedule given thereto. Clause 10 of the agreements reads as under:

> 10. Notwithstanding what is mentioned in para 3 above, the parties above named shall be free to negotiate and agree upon different rates and different mode of payment for other works taking into consideration the nature of the work etc."

20. Admittedly, the respondent No.1 made a claim before the arbitrator for works executed by him in respect of Chhindwara, Khandwa, Mandsaur, Jhabua, Tikamgarh, Sihore, Jabalpur, Ambikapur and Jagdalpur. Out of the aforesaid places, four places, namely, Tikamgarh, Sagar, Sihore and Ambikapur are expressly mentioned in the agreements executed between the parties. In exercise of power conferred under clause 10 of the Agreement the Vice Chancellor approved the same rates in respect of other works as that of the non-residential buildings for all divisions which was intimated to the respondent No.1 by Executive Engineer vide communication dated 12.4.1984. The Executive Engineer vide letter dated 24.12.1984, informed the respondent No.1 that the suitable remuneration shall be paid for the KVK building Jhabua and the payment shall be made as per the Scheme. Subsequently, with the approval of the Vice Chancellor, the Executive Engineer at Jabalpur informed the Executive Engineer, Raipur for payment of construction of KVK building at Bilaspur. Thus, from perusal of the communications dated 24.12.1984 and 15.10.1985, it is evident that the respondent No.1 was asked to prepare and design buildings at Jhabua and Bilaspur and it was agreed that the payment shall be made to him as per the rate prescribed under the Agreement. From perusal of the communication dated 12.5.1987, it is evident that the Executive Engineer, requested the respondent No.1 to prepare sketch planning for construction of college building at Khandwa and Mandsaur. From perusal of the communication dated 22.12.1983, it is evident that the respondent was asked to commence the work for Jabalpur, Sagar, Sihore and other centres also and the payments were also made in respect of the other centres. Thus, it is evident that subsequently, the respondent No.1 was asked to execute the works in respect of the other centres and it was agreed between the parties that the fee shall be payable in respect of the other centres as per the rate prescribed in the Agreement which was done with the approval of the Vice Chancellor.

21. From perusal of paragraph 2 of the memorandum of Civil Revision

No.139/1990 filed by the appellant against the order dated 5.1.1990 passed by the Additional District Judge, it is evident that the appellant had admitted execution of agreement dated 2.12.1983 and work orders were issued on 22.12.1983 for carrying out the work at Jabalpur, Sagar, Sihore and other centres as well. Similarly, paragraph 4 of the application under Section 20 reveals that payments to respondent No.1 were made in respect of other stations as well. In case the agreement was not executed in respect of other stations, the appellant should not have made payments to the respondent No.1 and should have taken objection at the first available opportunity. However, neither such explanation is on record as to why payment was made to respondent No.1 in respect of other projects nor any explanation has been offered as to whay such objection was not taken. It is pertinent to mention here that clause 10 enable the parties to negotiate and agree upon different rates and different mode of payment for other works taking into consideration the nature of the work etc. In his statement before the arbitrator, in reply to question number 15, the respondent No.1 has stated that agreement was in respect of works throughout Madhya Pradesh. In reply to question number 20, it has been stated by respondent No.1 in duplicate copy he has carried out corrections himself, which were done in the original by the Executive Engineer. Thus, there is no admission on the part of the respondent No.1 that he has tampered with the original agreement. A Bench of this Court vide order dated 15.5.2003 had directed the appellant to file an affidavit of the concerned person in support of the allegations made by the appellant in the memorandum of the appeal, for the first time that there is tampering of the original documents. However, no such affidavit has been filed. From perusal of the award, it is graphically clear that before the arbitrator, the appellant has not raised any such contention that the respondent No.1 played fraud by inserting words "other stations" with ill-intention to seek the claims. The aforesaid contention has also not been made before the trial Court. The appellant has failed to file the affidavit as directed by a Bench of this Court vide order dated 15.5.2003. Therefore, the issue number (3) is answered in the negative. For the reasons assigned supra, the arbitrator has rightly invoked the clauses 3 and 10 of the agreement while passing the award and has rightly awarded the claims in respect of the works which were part of the agreements and thus not committed any misconduct. For the aforementioned reasons decisions relied on behalf of the appellant in *Chandu Construction* (supra) and *Union of India v. A.L. Rallia Ram*, AIR 1963 SC 1685 and *A. Rangaswamy*, (supra) are not applicable

to the facts of the case. Accordingly, the issue number (4) is answered.

22. The proceeding before the arbitrator commenced on 29.11.1998. On that day, letter was sent by the counsel for the appellant that staff of the appellant has been assigned election duties and they will be busy till the counting of the votes and therefore, the proceeding be adjourned. The arbitrator thereupon adjourned the proceeding to 2.1.1999. On 2.1.1999, the counsel for the appellant by a letter dated 23.12.1998 informed the arbitrator that the appellant has moved an application before the trial Court for removal of the arbitrator and therefore, the proceeding before the arbitrator should be deferred for a period of twenty-five days. Accordingly, the proceeding of the arbitration was adjourned till 5.1.1999. On 5.1.1999, the arbitrator received a telegram from the Executive Engineer of the appellant university stating that the proceeding before the arbitrator has been stayed by the Additional District Judge. Accordingly, the proceeding was adjourned. On 22.3.1999, the arbitrator received the order of the Court vacating the order of stay and dismissing the miscellaneous judicial case filed by the appellant. The Court had directed the arbitrator to pass an award within a period of four months from the date of receipt of copy of the order. Accordingly, the proceeding was taken up on 17.4.1999.

23. On 17.4.1999, the arbitrator received an intimation through telegram that High Court has stayed the proceeding before the arbitrator by an order dated 16.4.1999. The arbitrator thereupon adjourned the proceeding sine die on 16.10.1999, the counsel for the respondent No.1 produced certified copy of the order passed by the High Court dismissing the civil revision preferred by the appellant. Thereupon, the proceedings were adjourned to 25.10.1999. On 25.10.1999, the Registrar of the appellant sent an application by registered post acknowledgement due praying for staying the proceeding for a period of one month, till the matter regarding appointment of arbitrator is adjudicated by the Supreme Court. Accordingly the case was adjourned to 19.11.1999. On 19.11.1999, the arbitrator received a memo from the Additional District Judge, directing him to submit the award within a period of four months. Thereafter the proceeding was adjourned to 12.12.1999. On the said day, the Executive Engineer of the appellant was present who filed an application for adjournment on the ground that Special Leave Petition has been filed before the Supreme Court. Thereupon the arbitrator adjourned the case and directed that no further extension of time shall be granted to the

appellant to file the reply. On 28.12.1999, the appellant sent the reply and vakalatnama through the counsel which was incomplete. The proceeding was adjourned to 8.1.2000. On 8.1.2000, the vakalatnama and reply were taken on record and the proceeding was adjourned for 29.1.2000. On 29.1.2000 the arbitrator directed that both the parties should separate the claims and replies for the claims which arose out of different agreements and the proceeding was adjourned to 21.2.2000.

24. On 21.2.2000, certain additional documents as well as applications for amendment of the replies were filed which were allowed and the proceeding was adjourned to 11.3.2000. On 11.3.2000, the additional documents were filed by the appellant and the proceeding was fixed on 5.7.2000. On 5.7.2000, the counsel for the appellant sent a telegram for deferring the proceeding till 22.7.2000 on the ground that the officer incharge of the appellant is on medical leave. It was further submitted in the application that counsel himself is unable to attend the proceeding because of his personal engagement. Thereupon, the arbitrator recorded the following observations:

> "It is a serious matter that the respondent has taken this Court for a "Joy Ride". They have not taken the matter seriously and acted accordingly.
>
> On the basis of past record, I record over here that the respondents have spared no pains to delay the proceedings and stall them on some pretext which is totally against the letter and spirit of Arbitration Act, itself. As such they do not deserve extension of time."

Accordingly, in view of availability of limited time to conclude the proceeding of the arbitration, fixed by the Court, the proceeding was fixed on 15.7.2000 and the appellant was directed to remain present failing which the ex parte decision could be taken against him. It was directed that hearing which may commence on 15.7.2000, shall continue on subsequent dates also.

25 On 15.7.2000, the parties agreed to adduce evidence by way of affidavits. The next date of hearing was fixed for 22.7.2000. On 22.7.2000, the respondent No.1 adduced the evidence in the form of affidavit and the copies were supplied to appellant and the proceeding was fixed for 5.8.2000. On 5.8.2000, an application was sent by the appellant by Speed Post for

taking the documents on record which was allowed with the consent of the parties and the case was fixed for 11.8.2000. On 11.8.2000, the issues were framed and the case was fixed for 26.8.2000. On 26.8.2000, a telegram was sent by the appellant stating that the appellant has filed an application under Section 33 of the Act before the Additional District Judge about the jurisdiction of the arbitrator, about the agreement dated 2.12.1983. Thus, the proceeding was again adjourned to 27.8.2000. On 27.8.2000, the respondent No.1 was directed to submit estimate and extracts of bill duly signed by the competent authority. The parties agreed to adduce evidence finally by next date of hearing which was fixed on 9.9.2000. It was directed by the arbitrator that parties shall finally adduce evidence on 9.9.2000 and on 10.9.2000, the arguments shall be heard in the afternoon session. On 9.9.2000 the parties informed that the Court has extended the time for submission of the award till 30.9.2000. the next date of hearing was fixed on 16.9.2000 at guest house of the university. On 16.9.2000, the counsel for the appellant cross-examined the respondent No.1 and the proceeding was adjourned to 23.9.2000 for examination of witnesses of the appellant. On 23.9.2000, a letter sent by the FAX was received by the arbitrator by which a request was made that hearing may be deferred to after Navratri on the ground that witness namely, J.N. Pandey is ill and is not in a position to attend the proceeding and both the counsel for the appellant also expressed their inability to attend the proceeding. Thereupon the arbitrator recorded the following observations:

> "It is surprising that this extension of time was given at the instance of the respondents. Further in last two hearings it was made very clear that since the award is to be made by 30.9.2000 it is not possible to allow any postponement of hearing here after. This was categorically made clear to the respondents. Inspite of that they have not attended today."

26. The arbitrator thereafter heard the arguments and closed the case for award. Thus, from scrutiny of the ordersheets of the proceeding before the arbitrator, it is evident that the appellant had adopted all possible tactics to linger on the proceeding before the arbitrator and on several occasions neither any officer of the appellant nor the counsel had appeared before the arbitrator. At the instance of the appellant, extension of time was granted several times. The appellant took the proceeding before the arbitrator very casually. Thus, it cannot be said that the arbitrator has not provided reasonable opportunity of

hearing to the appellant. The trial Court has held that the appellant himself committed default for appearing before the arbitrator on 23.9.2000 without showing sufficient cause. Therefore, the action of the arbitrator in closing the right of the appellant to adduce evidence by taking into account the time limit fixed by the Court for delivery of the award, was justified. For the aforementioned reasons, it cannot be said that the arbitrator has not provided reasonable opportunity of hearing to the appellant. Accordingly issue number 6 is answered in the affirmative and against the appellant.

27. From perusal of the record of arbitration proceeding, it is evident that the appellant had not filed any counter claim. Therefore, the question of its consideration does not arise. The contention raised on behalf of the appellant regarding non-consideration of the counter claim filed by the appellant before the arbitrator amounts to misconduct, is based on incorrect factual premises. Accordingly, issue number 7 is answered.

28. From perusal of the order passed by the Additional District Judge, it appears that the appellant had not raised any objection before the trial Court that the claims of the respondent No.1 are barred by limitation. The aforesaid objection appears to have been raised before this Court for the first time. The said objection was neither raised before the arbitrator nor before the trial Court. The question whether or not the claims of the respondent No.1 are barred by limitation is a mixed question of law and fact in the fact situation of the case, which cannot be permitted to be raised first time in these appeals in view of the law laid down by the Supreme Court in *Hindustan Construction Company Ltd.* (supra). Even otherwise the last running bills of the respondent No.1 were of the year 1987 and the application for appointment of an arbitrator was filed on 29.2.1988 in First Appeal No.247/2001 whereas the same was filed on 4.5.1989 in First Appeal 248/2001. Therefore, it appears that the claims of the respondent No.1 are not barred by limitation. The decision relied on by the appellant in the case of *S. Rajan* (supra) deals with the period of limitation for filing of an application under Section 20 of the Act before the Court, therefore, the same is of no assistance to the appellant. Accordingly, the aforesaid issue is answered.

29. From close scrutiny of the award passed by the arbitrator, it is apparent that the arbitrator has computed the fee payable to the respondent No.1 as per the terms and conditions of the agreement and as per the rates approved by the Vice Chancellor. Therefore, the contention raised by the learned counsel

for the appellant that the fee of the respondent No.1 has been computed contrary to the terms and conditions of the agreement, cannot be accepted and the same is hereby repelled. Accordingly, the issue number 9 is answered.

30. The agreements executed between the parties do not contain any express prohibition for grant of interest for *ante lite* period i.e. pre-reference period. The interest on the sum awarded by an arbitrator can be granted under the provisions of the agreement or under the Interest Act, 1978. The Supreme Court in the case of *P. Radhakrishna Murthy* (supra) while referring to Constitution Bench decision of the Supreme Court in *Department of Irrigation v. Abhaduta Jena,* (1988) 1 SCC 418 and *Secretary Irrigation, Department, Government of Orissa and Others v. G.C. Roy*, AIR 1992 SC 732 has held that where the agreement between the parties does not prohibit grant of interest, the arbitrator shall have power to grant interest. The award has been passed by the arbitrator after coming into force of Interest Act, 1978, therefore, the arbitrator had the authority to award interest for pre-reference period under the provisions of Interest Act, 1978. The rate of interest at 18% per annum has already been reduced to 10% by the Additional District Judge. The Supreme Court in the case of *Krishn Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy and Another*, (2007) 2 SCC 720, while taking into account the economic reforms in the country in respect of an agreement pertaining to 1993 has reduced the rate of interest from 18% to 9%. Similarly in *P. Radhakrishna Murti*(supra) in respect of an agreement executed in the year 1988, the Supreme Court has upheld the order of the High Court reducing the rate of interest from 16.5% to 12%. Thus, the trial Court has already reduced the rate of interest from 18% to 10%. Accordingly, the issue numbers 10 and 11 are answered.

31. From perusal of the award, it is evident that no complicated issues of law and fact had arisen for consideration before the arbitrator. The objection raised by learned counsel for the appellant in this regard is vague as it has not specified as to which complicated questions of law and fact had arisen before the arbitrator which could not have been dealt with by him. Therefore, the contention raised by the appellant that the complicated issues of law and fact could not have been decided by the arbitrator, is repelled. Accordingly, the issue number (12) is answered.

32. So far as, the issue number (13) is concerned, from perusal of the objections filed by the appellant under Section 30 of the Act as well as

memorandum of the appeal, it is evident that the appellant has not raised any objection that the arbitrator has committed an error of law in granting claim in respect of the Indira Gandhi Krishi Viswavidyalaya in the impugned awards in view Section 57 (2)(c) of the Indira Gandhi Krishi Viswavidyalaya Adhiniyam 1987. The aforesaid contention has been raised first time before this Court which cannot be entertained in view of the law laid down by the Supreme Court in *Hindustan Construction Company Ltd.* (supra).

33. In view of the preceding analysis, the appeals filed by the appellant and cross-objections preferred by the respondent No.1, are dismissed. However, in the facts of the case, the appellant shall bear the costs of the proceedings.

Order accordingly.

I.L.R. [2015] M.P., 3016
APPELLATE CIVIL
Before Mr. Justice N.K. Gupta
M.A. No. 485/2005 (Jabalpur) decided on 22 September, 2015

PROPRIETOR EASTERN MINERALS CO. LTD. ...Appellant

Vs.

SMT. NISHA TOMAR & ors. ...Respondents
(Alongwith M.A. No. 1053/2005)

A. Motor Vehicles Act (59 of 1988), Section 166(1)(c) and Hindu Succession Act (30 of 1956), Sections 8, 9 & 11 - Legal Representatives (Claimants) - **Legal Representative would be a person who represents the Estate of the deceased - Claim Petition filed by brothers, and father was made non-applicant who is alive - According to Section 9 and 11 of Act, 1956, in absence of Class I heir, property would devolve amongst heirs of Category II of Class II - As deceased was not survived by Class I heirs, therefore, so long as father is alive, brothers of deceased cannot file claim petition as they are not successors of deceased. (Paras 14 to 16)**

क. मोटर यान अधिनियम (1988 का 59), धारा 166(1)(सी) एवं हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धाराऐं 8, 9 व 11 – विधिक प्रतिनिधि (दावेदार) – विधिक प्रतिनिधि वह व्यक्ति होगा जो कि मृतक की संपदा का प्रतिनिधित्व करता है

– दावा याचिका भाइयों द्वारा प्रस्तुत की गयी तथा पिता को अनावेदक बनाया गया जो कि जीवित है – अधिनियम 1956 की धारा 9 तथा 11 के अनुसार वर्ग I के वारिस की अनुपस्थिति में संपत्ति, वर्ग II की श्रेणी II के वारिसों के मध्य हस्तांतरित होगी – चूंकि मृतक अपने पीछे वर्ग I के वारिस नहीं छोड़ गया है, अतः जब तक कि पिता जीवित है, मृतक के भाई दावा याचिका प्रस्तुत नहीं कर सकते क्योंकि वे मृतक के उत्तराधिकारी नहीं हैं।

B. ***Motor Vehicles Act (59 of 1988), Section 166(1)(c) - Non-Applicant*** **- Legal representative of deceased was joined as non-applicant in claims petition - If a person is joined as non-applicant and if it is found that he is entitled to get compensation, it is not required that he should file claim petition to pay for his portion of compensation - Father of deceased who was joined as non-applicant is entitled to get compensation.** **(Para 17)**

ख. मोटर यान अधिनियम (1988 का 59), धारा 166(1)(सी) – अनावेदक – दावा याचिका में मृतक के विधिक प्रतिनिधि को अनावेदक के रूप में जोड़ा गया था – यदि किसी व्यक्ति को अनावेदक के रूप में जोड़ा जाता है तथा यदि यह पाया जाता है कि वह प्रतिकर पाने का हकदार है तो यह आवश्यक नहीं है कि वह अपने हिस्से के प्रतिकर के भुगतान हेतु दावा याचिका प्रस्तुत करे – मृतक का पिता जिसे अनावेदक के रूप में जोड़ा गया था, प्रतिकर पाने का हकदार है।

C. ***Motor Vehicles Act (59 of 1988), Sections 147, 166 - Liability of Insurance Company*** **- Appellant failed to prove that deceased was its employee and was travelling in dumper in prosecution of his job - Claims Tribunal rightly held that deceased was a passenger - As there was a violation of Insurance Policy, Insurance Company is not liable to pay compensation.** **(Paras 19, 20)**

ग. मोटर यान अधिनियम (1988 का 59), धाराऐं 147, 166 – बीमा कम्पनी का दायित्व – अपीलार्थी यह सिद्ध करने में असफल रहा है कि मृतक उसका कर्मचारी था तथा अपने कार्य के दौरान वह डंपर में यात्रा कर रहा था – दावा अधिकरण ने यह सही अभिनिर्धारित किया कि मृतक एक यात्री था – चूंकि बीमा पॉलिसी का उल्लंघन हुआ था, इसलिये बीमा कंपनी प्रतिकर का भुगतान करने के लिये दायी नहीं है।

Case referred :

1986 MPLJ 140.

Anoop Nair, for the appellant.
N.K. Salunke, for the respondents.

Asgari Khan, for the United India Company Ltd. (Insurer).

ORDER

N.K.GUPTA, J. :- Both the appeals are related with the common award dated 24.12.2004 passed in claim case no.38/2004 therefore, decided by the present common order.

2. The Miscellaneous Appeal No.485/2005 has been filed by the appellant/non-applicant no.2 owner of the vehicle against the award dated 24.12.2004 passed by the 3rd Motor Accident Claims Tribunal, Tikamgarh in claim case no.38/2004, whereby the compensation of Rs.1,60,000/- was awarded to the respondent nos.1, 2, 3 & 6 (claimant and non-applicant no.4 before the Tribunal).

3. The Miscellaneous Appeal No.1053/2005 has been filed by the appellants against the same award being claimants for enhancement of the award.

4. Facts of the case in short are that the appellants/claimants of Miscellaneous Appeal No. 1053/2005 have filed an application under Section 166 of the Motor Vehicle Act, 1988 before the Tribunal that on 21.11.1992, the deceased Bhagat Singh was travelling in a dumper bearing registration no. MP 07 A/6967, which was driven by the respondent no.1 Noor Mohammad, whereas the respondent no.2, the Minerals Company was owner of the said vehicle. The deceased Bhagat Singh had boarded the dumper from Prathvipur to reach Niwari Railway Station. On the way, due to rash and negligent driving of the respondent no.1, dumper met with an accident and Bhagat Singh had expired thereby. His income was pleaded and a compensation of Rs.12,50,000/- was demanded by the claimants. Non-applicant no.4, father of the deceased was added as a formal party.

5. The respondent no.1 remained *ex-parte* before the Tribunal.

6. The respondent no.2 has submitted a written statement that except the respondent no.4 Deshpat Singh, there were no legal representatives or successor of the deceased Bhagat Singh and therefore, the claimants could not get the compensation. It was also pleaded that the deceased Bhagat Singh was working as a cleaner in the institution of the respondent no.2 and therefore, if any liability of payment of compensation arises then, the respondent no.2, the Insurance Company is responsible for that liability. It is also pleaded that

an exaggerated sum has been claimed.

7. The respondent no.3, the Insurance Company has filed a written statement with the pleadings that the deceased was travelling in the dumper as a passenger and also the respondent no.1 did not have any valid and effective driving licence to drive the said vehicle, hence the dumper was driven in violation of policy conditions and therefore, the Insurance Company was not liable for payment of any compensation.

8. The Tribunal after considering the pleadings of the parties framed as many as five issues relating to negligence, violation of policy conditions, dependency of the claimants, computation of compensation, entitlement of the respondent no.4 and terms and conditions of the award. After getting the evidence of the parties recorded, the Tribunal has passed the award for a compensation of Rs.1,60,000/- granted to the claimants and the respondent no.4 against the respondent nos.1 & 2, whereas the Insurance Company was found absolved from its liability. It was also directed that 50% of the compensation will be received by the claimants and 50% compensation will be received by the respondent no.4 with the interest of 5.5% per annum. The compensation was payable from the date of filing of the application.

9. I have heard the learned counsel for the parties.

10. In Miscellaneous Appeal No.1053/2005, the appellants/claimants have preferred the said appeal for enhancement of the compensation amount. On the other hand, in Miscellaneous Appeal No.485/2005, the appellant/owner of the vehicle has challenged the award mainly on two counts, firstly, that the Insurance Company was liable to pay the compensation and secondly, the claimants were not entitled to get any compensation because they were not the legal representatives of the deceased therefore, the award passed by the Tribunal may be set aside. It is also pleaded that the respondent no.6 Deshpat Singh father of the deceased Bhagat Singh of Miscellaneous Appeal No. 485/2005 did not pray for any compensation and therefore, no compensation could be given to the respondent no.6 Deshpat Singh.

11. After considering the submissions made by the learned counsel for the parties, it is apparent that by these two appeals, the point of negligence has not been challenged by any of the appellant. Only three points are to be considered out of several issues framed by the Tribunal at present. Firstly, the amount of compensation, secondly entitlement of the claimants to get the

compensation and thirdly the liability of the Insurance Company for payment of compensation.

12. If the computation of compensation is examined then, it would be apparent from the evidence adduced by the claimants before the Tribunal that the deceased Bhagat Singh was the widower, who had no children of his own. Satendra Singh (AW-1) and Deshpat Singh (NA4W1) have stated that the deceased Bhagat Singh was prosecuting his agricultural work. However, Satendra Singh has added that he was also working as a watchman alongwith his agricultural work. Both of these witnesses have also stated that the deceased Bhagat Singh was employee of the concerned Minerals Company and he was getting a salary. According to Satendra Singh, the deceased Bhagat Singh was getting the salary of Rs.3,000/- per month, whereas Deshpat Singh has accepted that the deceased Bhagat Singh was getting the salary of Rs.700/- per month. If original plea of the claimants is considered then, it would be apparent that it was mentioned that he was prosecuting the business of milk supply and he was cultivating his fields therefore, his income was of Rs.4,000/- per month. It appears that to make the Insurance Company liable, the pleadings of non-applicant no.2 were adopted by the witnesses when they were examined before the Tribunal. No document was shown either by the claimants or the non-applicant no.2 that the deceased Bhagat Singh was working with the non-applicant no.2 or he was a cleaner in that vehicle therefore, these witnesses have told about his salary on their own assumptions. There is a lot of contradictions regarding amount of salary given by these witnesses. Hence, in absence of pleadings, it cannot be accepted that the deceased Bhagat Singh was employee of the non-applicant no.2 or was prosecuting a job of watchman.

13. So far as the agricultural income is concerned, it is apparent that the land left by the deceased Bhagat Singh has been occupied by the claimants and it was transferred in the name of claimant no.1. The Tribunal has counted a notional income of the deceased on the basis of IInd Schedule of the Motor Vehicle Act and his own expenditure was deducted therefore, the dependency of Rs.10,000/- per annum was found and looking to his age, the multiplier of 15 was granted. There is no reason to interfere in the calculation of income and dependency as done by the Tribunal. It would be apparent that non-applicant no.4 Deshpat Singh was resident of village Nivora, District Jhansi. He did not mention that the deceased was sending a portion of income to him. Since Yogendra brother of the deceased had already expired and the applicants

were residing with the deceased Bhagat Singh hence, it appears that he was sharing his entire income with the applicants. However, there is no reason to enhance the compensation as assessed by the Tribunal. The Tribunal did proportionate the compensation between the claimants and non-applicant no.4 in equal portion, whereas it is apparent that the deceased did not continuously send some portion of his income to the non-applicant no.4 and therefore, that dependency portion should be counted as 75% is to 25% between the claimants and non-applicant no.4.

14. The second point is that as to whether the claimants were not entitled to move the claim application or to get the compensation. In this context, the appellant of Miscellaneous Appeal No.485/2005 in its written statement took a plea that the claimants were not entitled for filing of such an application. Instead of a specific issue on this count, the issue no.4-B was framed by the Tribunal to find out whether the non-applicant no.4 was sole claimant to get the compensation. Learned counsel for the appellant of Eastern company has placed his reliance upon the judgment passed by the Single Bench of this Court in the case of *"M.P. State Road Transport Corporation Vs. Pehlad Bihari and others"* [1986 M.P.L.J. 140] in which, it is held that when father of the deceased was alive, brothers of the deceased were neither dependent nor legal representatives and therefore, they were not found entitled to claim any compensation. The Tribunal gave its stress on computation of compensation amount and the competency of the claimants was not at all considered however, it is a legal question and when it was raised before the Tribunal, it can again be raised before this Court. According to the Provision of Section 166(1)(c) of the Motor Vehicle Act, it would be apparent that on death of a person, his legal representatives can file a claim application and if, any of the legal representative is not joined as a claimant then, he should be joined as a non-applicant. The definition of the "legal representatives" is given in Section 2 (11) of the C.P.C., which indicates that the legal representative of the person would be a person, who represents the estate of the deceased after his death and therefore, the legal representatives should be decided on the basis of Hindu Succession Act because, the deceased Bhagat Singh was a Hindu.

15. In Section 8 of the Hindu Succession Act, 1956, it is provided that the property of a male Hindu on dying intestate shall devolve firstly, upon the heirs of Class-I given in the Schedule. According to the Section 9 of that Act, the person shown in Class-I shall get an equal share in the property. If, there

is no heir of Class-I then, heirs specified in Class-II of the Schedule shall get the property. For ready reference, first four categories of class-II in Schedule are given as under:-

I. Father.

II. (1) Son's daughter's son,

(2) son's daughter's daughter,

(3) brother

(4) sister.

III. (1) Daughter's son's son,

(2) daughter's son's daughter,

(3) daughter's daughter's son,

(4) daughter's daughter's daughter.

IV. (1) Brother's son,

(2) sister's son,

(3) brother's daughter,

(4) sister's daughter.

The matter is to be considered according to the Provisions of Sections 9 & 11 of the Hindu Succession Act for ready reference. Such Provisions are hereby mentioned as under:-

Section 9. Order of succession among heirs in the Schedule.-

Among the heirs specified in the Schedule, those in class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession.

Section 11. Distribution of property among heirs in class II of the Schedule.- The property of an intestate shall be divided between the heirs specified in any one entry in class II

of the Schedule so that they share equally.

According to the Sections 9 & 11 of that Act, if any heir of Class-I is available then, property shall not devolve on the heirs of Class-II of the Schedule and if, there is no heir available in the Class-I of the Schedule then, property shall be devolved amongst the heirs of category I in the Class-II equally and in absence of any heir in category I, the property shall be devolved amongst heirs of category II in Class-II.

16. In the present case, the deceased Baghat Singh had no wife, children or mother at the time of his death. Therefore, there was no heir available of Bhagat Singh in class-I. In class-II of that Schedule, in the first category, it is mentioned that the father alone would be an appropriate successor and in category II of class-II, it is mentioned that son's daughter's son, son's daughter's daughter, bother and sister of the deceased would be his successor. Hence, when Bhagat Singh has his father alive at the time of his death then, according to the Provisions of Sections 9 & 11 of the Hindu Succession Act, 1956 father of the deceased was the sole successor in the category I, of class-II of the Schedule and therefore, due to his presence, all the heirs of other categories are excluded. If, category of class-II is considered in respect of the claimants then, they do not even fall in the IInd category. They fall within the category IV of class-II in which brother's son and brother's daughter were also shown being a successor of the deceased. Hence, objection raised by the appellant in Miscellaneous Appeal No. 485/2005 appears to be correct. Since non-applicant no.4 Deshpat Singh was alive, he was the sole successor, who was dependent upon the deceased Bhagat Singh and therefore, the claimants were not competent to file an application under Section 166 of the Motor Vehicle Act because they were not the successors of the deceased Bhagat Singh when non-applicant no.4 was alive and hence, they were not entitled to get any compensation after the death of the deceased Bhagat Singh.

17. Learned counsel for the appellant of Miscellaneous Appeal No.485/2005 has submitted that non-applicant no.4 did not claim any compensation. On the contrary, he was made as a party in the case as non-applicant and in absence of his claim, he was not entitled to get the compensation. However, in the light of Provision of Section 166 (1)(c) of the Motor Vehicle Act, the claim application may be filed by any of the legal representative or all of them and according to the proviso of Hindu Succession Act, the legal representatives may be joined in the application as non-applicant so that in future, no

subsequent claim application may be filed. There is no provision of limitation in the Motor Vehicle Act for filing of application under Section 166 of the Motor Vehicle Act therefore, if it is decided that the non-applicant no.4 is not entitled to get any compensation then, it is for the non-applicant no.4 to file a fresh claim application and it will cause the multiplicity of the proceeding. When the legal representative of the deceased has been added as a party in the case and if, it is found that he was entitled to get the compensation then, it is not required in the light of Provision of Section 166 (1)(c) of the Motor Vehicle Act to pray for his portion of compensation. Under these circumstances, such plea cannot be accepted at this stage.

18. As discussed above, the claimants are not entitled to get any compensation for death of the deceased Bhagat Singh and the non-applicant no.4 is entitled for 25% of the compensation. The Tribunal has assessed the total compensation of Rs.1,60,000/- and therefore, a sum of Rs.40,000/- is to be provided to the non-applicant no.4. It is also clear from the order dated 13.7.2004 passed by the Tribunal under Section 140 of the Motor Vehicle Act that the compensation of Rs.50,000/- was granted to the claimants and non-applicant no.4 jointly and therefore, such compensation cannot be reduced to the minimum limit, which is fixed for no fault liability.

19. Third point in the case is that, as to whether the Insurance Company was liable for payment of compensation. It was tried by the appellant of Miscellaneous Appeal No.485/2005 to establish that the deceased was cleaner on the said dumper, however such plea was contrary to the pleadings as well as facts and circumstances. The claimants have pleaded that the deceased Bhagat Singh boarded on the dumper at Prathvipur to get down at Niwari railway station. If, he was a cleaner on the said dumper then, he was not required to board that dumper at Prathvipur. He must be available with the dumper from the very beginning when, the boulders were loaded in the dumper. After considering the plea taken by the appellant in Miscellaneous Appeal No.485/2005, Satendra Singh (AW-1) as well as Deshpat Singh (NA4W-1) have changed their evidence in contrary to their pleadings. If pleadings of the appellant of Miscellaneous Appeal No.485/2005 is examined then, it was mentioned that the deceased Bhagat Singh was working as a cleaner on the dumper bearing registration no. MP 07 A/6967, but the witness Satendra Singh could not get an appropriate hint on that defence. In para 1 of his statement, he has stated that at the time of incident, the deceased Bhagat

Singh was travelling in the dumper due to some work of the company. It was accepted by him in cross-examination that he was engaged for loading and unloading of boulders from the dumper and he was going with the dumper for unloading purposes.

20. If the deceased Bhagat Singh was appointed as a cleaner on a particular dumper then, he was not required to look after the loading or unloading of various dumpers for the eastern company. Deshpath Singh, who was resident of village Nivora, District Jhansi (U.P.) did not know much about the job of the deceased Bhagat Singh and therefore, it was the duty of the non-applicant no.2 to submit the record relating to employment of the deceased Bhagat Singh and to produce the same before the Tribunal at the time of evidence, but no evidence has been advanced from the side of non-applicant no.2 and the appellant of Miscellaneous Appeal No.485/2005. Hence, it was not proved that the deceased Bhagat Singh was a servant in the company of non-applicant no.2 or he was travelling in the dumper in prosecution of his job. Hence, the Tribunal has rightly found that he was a passenger in a goods vehicle and therefore, the dumper was driven by the non-applicant no.1 in violation of policy conditions. Hence, the Tribunal has rightly found that the Insurance Company was absolved from its liability to pay the compensation.

21. On the basis of aforesaid discussion, it is found that the claimants/ appellants of Miscellaneous Appeal No.1053/2005 were not legal representatives of the deceased Bhagat Singh and therefore, they were not entitled to get any compensation. After computing the compensation, it is found that the Tribunal has already granted an appropriate compensation and therefore, no enhancement is permitted. Hence, Miscellaneous Appeal No.1053/2005 filed by the appellants/claimants cannot be accepted. Under these circumstances, the Miscellaneous Appeal No.1053/2005 is hereby dismissed. The parties shall bear their own cost in that appeal. The appellant of Miscellaneous Appeal No.485/2005 could not prove that the Insurance Company was liable to pay the compensation. However, it is proved that the claimants were not legal representatives of the deceased Bhagat Singh and therefore, they were not entitled to get the compensation but non-applicant no.4 was entitled to get the compensation of Rs.50,000/- only and he alongwith the claimants have already received a sum of Rs.50,000/- as compensation of no fault liability. Hence, the Miscellaneous Appeal No.485/2005 is hereby partly allowed. The portion of award relating to payment of compensation to

Smt. Nisha Tomar, Satendra Singh and Dushyant Singh is hereby set aside, whereas on the basis of aforesaid discussion the non-applicant no.4 Deshpat Singh would be entitled to get a sum of Rs.50,000/-, which is already received by him jointly with the claimants as an award under Section 140 of the Motor Vehicle Act. Hence, no further payment is required to be done to the non-applicant no.4 and therefore, the appellant of M.A. No.485/2005 shall be entitled to get the remaining amount back, if it was deposited before the Tribunal in compliance of the award for its payment to the claimants and non-applicant no.4. No order as to costs.

22. A copy of the order be sent to the claims Tribunal alongwith its record for information and compliance.

Order accordingly.

I.L.R. [2015] M.P., 3026
APPELLATE CIVIL
Before Mr. Justice R.S. Jha
S.A. No. 422/2002 (Jabalpur) decided on 13 October, 2015

RAJENDRA PRASAD RAJORIYA ...Appellant
Vs.
SHIVCHARAN MALVIYA (DEAD) THROUGH LRs.
SMT. VIMLA BAI & ors. ...Respondents

A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(c) - Denial of Title - **Tenant/Appellant was inducted by Plaintiff/ Respondent - Appellant was continuously paying rent to Respondent - In written statement, the appellant admitted that respondent is the owner, however, by way of amendment he challenged the title of the respondent by alleging that the Will/Gift deed on the basis of which the respondent is claiming his title is not genuine - As the appellant had denied the title of the respondent, therefore, the Appellate Court rightly granted decree under Section 12(1)(c). (Paras 6,7)**

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(सी) – स्वत्व से इंकार – वादी/प्रत्यर्थी द्वारा किरायेदार/अपीलार्थी को प्रतिष्ठापित किया गया – अपीलार्थी प्रत्यर्थी को किराये का लगातार भुगतान कर रहा था – लिखित कथन में, अपीलार्थी ने यह स्वीकार किया कि प्रत्यर्थी स्वामी है, तथापि, संशोधन के द्वारा उसने प्रत्यर्थी के स्वत्व को यह आरोप लगाते हुए चुनौती दी कि वसीयत/दान

विलेख जिसके आधार पर प्रत्यर्थी अपने स्वत्व का दावा कर रहा है वास्तविक नहीं है – चूंकि अपीलार्थी ने प्रत्यर्थी के स्वत्व से इंकार किया था, अतः अपीली न्यायालय ने धारा 12(1)(सी) के अंतर्गत उचित रूप से डिक्री पारित की।

***B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(e) - Bonafide Requirement - Alternative Accommodation* - Plaintiff/respondent has already disclosed that he has two houses one in which he is residing and another which has been let out to the appellant/tenant - Appellant has not clarified in his written statement or in his statement in Court with regard to the existence of any other accommodation apart from the two accommodations - Courts below have already recorded concurrent findings of fact in respect of bonafide requirement - No Substantial Question of Law arises for consideration - Appeal dismissed. (Paras 9 to 14)**

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ई) – वास्तविक आवश्यकता – वैकल्पिक आवास – वादी/प्रत्यर्थी ने यह पहले ही प्रकट किया है कि उसके दो मकान है एक जिसमें स्वयं निवास कर रहा है तथा दूसरा जिसे उसने अपीलार्थी/किरायेदार को किराये पर दिया है – अपीलार्थी ने दो आवासों के अतिरिक्त किसी अन्य आवास के अस्तित्व के संबंध में अपने लिखित कथन एवं न्यायालयीन कथन में स्पष्ट नहीं किया है – निचले न्यायालयों ने पहले ही वास्तविक आवश्यकता के संदर्भ में तथ्य के समवर्ती निष्कर्ष अभिलिखित किये हैं – विचारण हेतु विधि का सारवान प्रश्न उत्पन्न नहीं होता – अपील खारिज।

Cases referred :

1991 JLJ 348, (1981) 3 SCC 103, 2010(3) MPLJ 359, (1990) 1 MPWN SN 192, 2009(2) MPLJ 156, (1999) 1 SCC 141, (2009) 5 SCC 264, (2011) 7 SCC 189, (2011) 1 SCC 158, (2012) 7 SCC 288, (2012) 8 SCC 148, (2013) 7 SCC 173.

D.K. Agrawal, for the appellant.
Sudeepta Choubey, for the respondents.

ORDER

R.S.JHA, J. :- This appeal has been filed by the appellant being aggrieved by the judgment and decree dated 15.3.2002 passed by the Second Additional District Judge, Hoshangabad in Civil Appeal No.16-A/2001

affirming and confirming the judgment and decree dated 15.1.2001 passed by the Civil Judge, Class-I, Itarsi, District Hoshangabad in Civil Suit No.2-A/1998 whereby the suit for eviction filed by the respondent/plaintiff has been decreed.

2. The brief facts leading to filing of the appeal are that the respondent/plaintiff filed a suit for eviction against the appellant on the grounds as stated in Sections 12(1)(a), 12(1)(e) and 12(1)(g) of the Madhya Pradesh Accommodation and Control Act (hereinafter referred to as "the Act").

3. It was contended by the respondent/plaintiff that he had two houses in the city of Itarsi. One was in his occupation and the other was let out to the appellant. It was also contended that on account of the fact that the two sons of the original plaintiff Shivcharan had got married and also had children, therefore, the house in his possession was not sufficient for the needs of his expanded family and therefore he had sought eviction of the appellant from the house, let out to the appellant. It was further contended that the appellant was in arrears of rent and that the appellant had damaged the premises also.

4. The trial court decreed the suit on the grounds stated in sections 12(1)(e) and 12(1)(g) of the Act. On an appeal being filed by the appellant, the first appellate Court while upholding the judgment and decree passed by the trial court has decreed the suit under sections 12(1)(c) and 12(1)(e) of the Act.

5. The learned counsel appearing for the appellant has raised two substantial questions of law before this Court; firstly that the appellant had in fact not denied the title of the respondent/landlord and he has only challenged his derivative title and therefore in view of the law laid down in the case of *Khuman Singh Vs. Nathuram* 1991 JLJ 348 the Court below has committed gross illegality in decreeing the suit on the grounds mentioned in section 12(1)(c) of the Act. The second substantial question of law sought to be raised by the learned counsel for the appellant is that the landlord has failed to specifically plead in his plaint that he has no other alternative suitable accommodation in the city of Itarsi and, therefore, in view of the law laid down by the Supreme Court in the case of *Hashmat Rai and another Vs. Raghunath Prasad* 1981 (3) SCC 103 and the decision of this Court rendered in the case of *Ramkishore Vs. Gyanchandra Jain* 2010 (3) MPLJ 359 another substantial question of law arises for adjudication in the appeal.

6. Having heard the learned counsel for the appellant, it is observed that the appellant had initially admitted the fact in his written statement that the respondent/plaintiff was his landlord. However, subsequently he amended the written statement and challenged the title of the respondent/plaintiff by alleging that the will/gift deed, on the basis of which he was claiming to be landlord, was not genuine. The first appellate Court on the basis of the facts and documents brought on record has found that in view of the subsequent amendment made by the appellant in the written statement, which had escaped the attention of the trial court, it is clear that the appellant had in fact assailed the title of the respondent/landlord in respect of the accommodation in question. It is also apparent that the first appellate Court has recorded a finding to the effect that the appellant was inducted by the respondent/plaintiff as a tenant and has throughout paid the rent to him and is continuously paying the rent to the respondent/plaintiff and it is only after filing of the suit, that he took up the plea denying derivative title of the respondent/plaintiff.

7. The first appellate Court in the circumstances found that in the present case, the appellant had denied the title of the landlord and, therefore, in view of the law laid down by the Supreme Court in the case of *Majoti Subba Rao Vs. P.V.K.Krishna Rao* 1990(1) M.P.W.N. SN 192 the ground for eviction of the tenant under section 12(1)(c) of the Act is made out. I do not find any perversity in the aforesaid finding of fact nor does a substantial question of law arise for adjudication in that regard in view of the aforesaid admitted and undisputed fact available on record.

8. The decision of this case rendered in the case of *Khuman Singh* (supra) relied upon by the learned counsel for the appellant has in fact no applicability to the facts of the present case inasmuch as in the case of *Manjoti Subba Rao* (supra), the landlord had changed during the course of the tenancy and it was in such circumstances the tenant had asserted that the original owner was the landlord and that the subsequent person claiming himself to be the landlord without notice was not the landlord. It was in such circumstances that this Court has held that such a change to the landlordship of the plaintiff would not result in making out the case under section 12(1)(c) of the Act. The facts of the present case are totally different and, therefore, the reliance placed upon by the learned counsel for the appellant on the decisions rendered in the cases of *Khuman Singh* (Supra) and *Manjoti Subba Rao* (supra) is totally misconceived.

9. As far as the second question raised by the learned counsel for the appellant is concerned, it is pertinent to note that the plaintiff in the plaint has himself stated that he has two houses in the city of Itarsi, one of which in his occupation and the other has been let out to the respondent/plaintiff and that as the accommodation in his possession is now insufficient for his needs, he is seeking eviction of the appellant from the other house for his personal bonafide residential need. In the statement made before the Court, Shivcharan (P.W.1) has further clarified this aspect and has also specifically and clearly stated that he has no other suitable accommodation in his possession in the city of Itarsi. This fact has been reiterated by the plaintiff's witness Om Prakash Malviya (P.W.3).

10. It is also clear from the perusal of the record that the appellant has not clarified in his written statement or in his statement in the Court with regard to the existence of any other accommodation apart from the aforesaid two accommodations belongs to respondent nor has he given any details of the same. In the circumstances, I am of the considered opinion that the present case is one where both the Courts below have rightly held that the respondent/ plaintiff has made out a ground under section 12(1)(e) of the Act against the appellant.

11. In the case of *Sujata Sarkar Vs. Anil Kumar Duttani,* 2009 (2) MPLJ 156, this Court, by placing reliance on the decision of the Supreme Court rendered in the case of *Hasmat Rai* (supra) and the case of *Ram Narain Arora Vs. Asha Rani and others,* 1999 (1) SCC 141, has held that the requirement of the provisions of Sections 12(1)(e) and (f) is that the appellant/plaintiff must show or bring material on record to establish that he has no other alternative suitable accommodation in the city and that a specific pleading in the plaint in this respect in writing is not mandatory and that in the absence of such pleading the plaintiff/landlord cannot be non-suited, if he is able to bring material on record through oral and documentary evidence to the effect that he has no other alternative suitable accommodation in the city. The decision rendered by this Court in the case of *Sujata Sarkar* (supra) has been affirmed and upheld by the Supreme Court in S.L.P. (Civil) No, 15238 of 2009 by dismissing the S.L.P. filed against it by order dated 20-1-2012. In the circumstances, as the respondent/plaintiff has brought sufficient evidence on record to establish that he has no other reasonably suitable accommodation in his possession and has also stated that he has two houses, one of which is in his occupation and the other is in the occupation of the appellant/defendant

and that in the changed circumstances he is in urgent need of the accommodation in possession of the appellant, therefore, the contention of the learned counsel for the appellant in this regard being misconceived is accordingly rejected and it is held that the aforesaid proposed substantial question of law does not arise for adjudication in the present appeal.

12. The reliance placed by the learned counsel for the appellant on the decisions rendered in the cases of *Ramkishore* (supra) is also misconceived as the facts of this case indicate that in that case the tenant had specifically pleaded the availability of a alternative suitable accommodation with the landlord which assertion was neither explained by the landlord/plaintiff in his evidence nor did he disclose the availability of the said accommodation in the plaint and it was in the total absence of any explanation or denial on the part of the landlord that this Court had rendered the decision. In the instant case the respondent/plaintiff in the plaint itself has specifically stated that he has two houses in the city of Itarsi one is in his possession and the other one has been let out to the appellant, which he requires for personal bonafide residential need for his family and therefore, the facts of the two cases are totally different. The reliance placed by the learned counsel for the appellant on the decision rendered in the case of *Ramkishore* (supra) is, therefore, misconceived.

13. Having perused the record, I find that the Courts below have already recorded a concurrent finding of fact in respect of the ground mentioned in sections 12(1)(e) of the Act. For the aforementioned reasons, I am of the considered opinion that no substantial question of law arises for consideration in this appeal as the jurisdiction of this Court to interfere with the findings of fact under Section 100 of CPC is limited to the case where the finding is either perverse or based on no evidence. This Court cannot interfere with the concurrent finding of fact until or unless the same is perverse or contrary to material on record as has been held by the Supreme Court in the cases of *Narayan Rajendran and another Vs. Lekshmy Sarojini and Others*, (2009) 5 SCC 264, *Nafazat Hussain Vs. Abdul Majeed and Others*, (2011) 7 SCC 189 and *D.R.Rathna Murthy Vs. Ramappa*, (2011) 1 SCC 158 and *Vishwanath Agrawal Vs. Sarla Vishwanath Agrawal*, (2012) 7 SCC 288, *Union of India Vs. Ibrahim Uddin and Another*, (2012) 8 SCC 148, *Vanchala Bai Raghunath Ithape (dead) by LR Vs. Shankar Rao Babu Rao Bhilare (dead) by Lrs. and Others*, (2013) 7 SCC 173.

14. The appeal filed by the appellant being meritless is accordingly

dismissed.

15. At this stage, the learned counsel for the appellant states that he be granted sometime to vacate the premises.

16. Looking to the long pendency of the litigation, I am of the considered opinion that the appellant is required to be given three months time from today to vacate the premises subject to the fact that he furnishes an undertaking on affidavit before the Court below that he shall deposit all arrears of rent and continue to deposit the current rent and that he would not create any third party rights or encumbrance in respect of the premises in question and keep the premises in good condition and shall himself vacate the premises by 13.1.2016 on his own. Such an undertaking along with an affidavit should be furnished by the appellant within two weeks from today, failing which the Court below would be at liberty to proceed immediately for executing the decree.

17. It goes without saying that if such an undertaking is furnished, the appellant shall be permitted to occupy the premises up to 13.1.2016.

18. With the aforesaid observations, the appeal filed by the appellant stands dismissed.

Appeal dismissed.

I.L.R. [2015] M.P., 3032
APPELLATE CRIMINAL

Before Mr. Justice S.K. Gangele & Mr. Justice B.D. Rathi

Cr. A. No. 117/2001 (Gwalior) decided on 23 April, 2014

GHANSHYAM SINGH RAGHUVANSHI ...Appellant

Vs.

STATE OF M.P. ...Respondent

*A. **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(2)(v) - Caste Certificate not filed*** **- Prosecution failed to prove the caste of prosecutrix. (Para 8)**

क. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(2)(v) – जाति प्रमाणपत्र प्रस्तुत नहीं किया गया – अभियोजन अभियोक्त्री की जाति साबित करने में असफल रहा।

B. ***Penal Code (45 of 1860), Section 376 - Rape*** **- According to prosecutrix, she was thrown on the ground - However, no external or internal injury was found - Investigating Officer has also admitted that during investigation, it was found that report of rape was false and prosecutrix was in habit of lodging false report - Appellant acquitted - Appeal allowed. (Paras 9 & 12)**

ख. दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – अभियोक्त्री के अनुसार उसे जमीन पर पटक दिया गया था – किंतु बाह्य या आंतरिक चोट नहीं पाई गई थी – अन्वेषण अधिकारी ने भी स्वीकार किया कि अन्वेषण के दौरान यह पाया गया था कि बलात्कार की रिपोर्ट मिथ्या थी एवं अभियोक्त्री मिथ्या रिपोर्ट करने की आदी थी – अपीलार्थी दोषमुक्त – अपील मंजूर।

Ankur Mody & Ruchi Mody, for the appellant.
R.K. Shrivastava, P.L. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : **B.D. Ratiii, J. :-** This Criminal Appeal has been preferred being aggrieved by the judgment of conviction and order of sentence dated 05.02.2001 passed by the learned Special & Sessions Judge, Shivpuri (M.P.) in Special Sessions Trial No.50/2000 (Atrocities) whereby the accused/appellant Ghanshyam Singh Raghvuanshi was convicted under Section 450, 376(1) of IPC read with Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities), Act, 1989 [for brevity "the Act"] and sentenced to suffer rigorous imprisonment for two years with a fine of Rs.500/- under Section 450 of IPC and imprisonment for life with a fine of Rs.5,000/- under Section 376(1) of IPC read with Section 3(2)(v) of the Act respectively with default stipulations. It was also ordered that on depositing the total amount of fine of Rs.5,500/-, same be paid to the prosecutrix as compensation.

2. As per the prosecution story, the incident occurred on 28.04.1999 at about 11 am. At the relevant point of time, when the prosecutrix was all alone in her house situated in village Indaar and her husband was also not present in the house as he had gone in the village, the accused in an drunken state entered into the house of the prosecutrix after committing house trespass. Thereafter, the accused caught hold of the prosecutrix, threw her on the ground and committed rape on her. It is alleged that before committing said act, the prosecutrix was also abused denoting her caste. After commission of the crime

the accused fled away. When the husband of the prosecutrix reached the house, the entire incident was narrated by the prosecutrix to him. Thereafter, FIR Ex.P-3 was lodged. Crime No.56/99 was registered. After completion of investigation, charge sheet was filed.

3. To bring home the charges, prosecution has examined as many as nine witnesses, namely, Dr. S.K. Majeji (PW-1), Dr. Smt V. Kumra (PW-2), Bhan Singh Sisodiya (PW-3), M.P. Singh Chouhan (PW-4), prosecutrix (PW-5), Sualal alias Raghuraj (PW-6), Lakhan (PW-7), G.S. Chouhan (PW-8) and Rajesh Kumar Singh (PW-9). Similarly, four witnesses were examined by the accused in defence, namely, Gudda (DW-1), Shivcharan (DW-2), Gyarsi (DW-3) and Virendra Singh (DW-4).

4. After taking into consideration the evidence adduced by the parties, impugned judgment of conviction and order of sentence was passed by the learned trial court. Hence, this appeal.

5. It is argued by Shri Ankur Mody, learned counsel appearing on behalf of the appellant, that the learned trial court has not appreciated the evidence available on record properly. Further, it was not considered that the prosecutrix was in the habit of making false reports against the villagers and after taking substantial amount from them she used to enter into compromise with them. Apart that no external or internal injuries were found present by the doctor on her private parts. Thus, on these grounds, learned counsel for the appellant submitted that the appeal be allowed and the appellant be acquitted of all the charges levelled against him.

6. Per contra, learned Panel Lawyer appearing on behalf of the State vehemently opposed the prayer made by the learned counsel for the appellant and submitted that the impugned judgment of conviction and order of sentence has been passed on proper appreciation of evidence on record and needs no interference. It is also submitted by him that in view of Section 53A of the Indian Evidence Act 1872 previous character or previous sexual experience of prosecutrix is not relevant factor in this case.

7. Having heard learned counsel for the rival parties and perused the impugned judgment and evidence available on record, we are of the considered view that the impugned judgment is liable to be set aside for the discussion made in the subsequent paras.

8. The learned Trial Court has not appreciated the evidence adduced by the parties on record in its true perspective. It was not considered by the learned trial court that caste certificate of the prosecutrix (PW-5) has not been produced by the prosecution to prove that at the time of incident the prosecutrix was belonging to Scheduled Caste community. In the aforesaid premises, the conviction inflicted on the appellant under Section 3(2)(v) of the Act appears to be bad in law.

9. So far as conviction in other offences is concerned, it also cannot be sustained because the prosecutrix (PW-5) deposed in para 1 of her evidence that she was caught hold of by the accused/appellant and thrown on the ground and thereafter rape was committed with her but Dr. Smt. V. Kumra (PW-2) who had examined the prosecutrix deposed in her statement that she has not found any external or internal injuries on the private parts of the prosecutrix as per Ex.P-2. So, it is unnatural that one is forcibly thrown on the ground and does not receive any injury. Similarly, on perusal of para 3, 4, 10 and 11 of the evidence of Prosecutrix (PW-5) and para 3 of the evidence of Gudda (DW-1), it is clear that the prosecutrix is in the habit of making false reports against the persons and after taking substantial amount from them she used to enter into compromise. Apart that, Lakhan (PW-7) who had reached the spot as per the evidence of prosecutrix (PW-8) in para 8 but Lakhanlal (PW-7) deposed that on the spot he saw that some altercation and hurling of abuses were going on between the prosecutrix, her husband and the appellant. He has not seen anything except this. This witness has not been declared hostile.

10. So far as objection in regard to Section 53A of the Indian Evidence Act raised by the learned Panel Lawyer is concerned, it is not applicable in this case. Section 53A of the Indian Evidence Act reads as thus:

> "53A. Evidence of character or previous sexual experience not relevant in certain cases.-In a prosecution for an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code (45 of 1860) or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim, or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.

We are not considering the fact whether the prosecutrix was in the habit of making illicit relationships with other persons. The fact which is to be considered is that whether she was in the habit of making false reports or not in regard to commission of rape. Therefore, the provisions contained under Section 53A of the Indian Evidence Act are not applicable in the present case.

11. Very important fact in this case is that M.P. Singh Chouhan (PW-4), Investigating Officer, deposed in para 3 of his evidence that during investigation it was also found that FIR lodged by the prosecutrix (PW-5) was false and the prosecutrix was in the habit of lodging reports of rape. It is stated by him that he has mentioned this fact in the case diary. It was also stated by him that when he was transferred from the concerning police station, thereafter charge sheet was filed in this case.

12. Looking to the facts and evidence on record as discussed hereinabove, we are of the considered view that the impugned judgment cannot be sustained and thus it is set aside. Accordingly, present appeal is hereby allowed and the accused/appellant is acquitted of all the charges levelled against him under Sections 450 and 376(1) of IPC read with Section 3(2)(v) of the Act. Appellant is on bail. His bail bonds shall stand discharged. It is also directed that if any fine amount has been deposited by him, same be refunded to him. Record of the trial court be sent back with the copy of the judgment to the trial court.

Appeal allowed.

I.L.R. [2015] M.P., 3036

APPELLATE CRIMINAL

Before Mr. Justice S.K. Gangele & Mr. Justice B.D. Rathi

Cr. A. No. 103/1999 (Gwalior) decided on 1 May, 2014

DILEEP ...Appellant

Vs.

STATE OF M.P. ...Respondent

(Alongwith Cr.A. No. 507/2003)

*A. **Penal Code (45 of 1860), Section 304-B - Acquittal** -* **The judgment of the acquittal should not be disturbed unless the conclusion drawn on the basis of evidence brought on record is found to be grossly unreasonable or manifestly perverse or palpably unsustainable - Further, if two views are possible then the view in favour of accused should be taken into consideration.** **(Para 9)**

क. दण्ड संहिता (1860 का 45), धारा 304–बी – दोषमुक्ति – दोषमुक्ति के निर्णय को तब तक नहीं छेड़ा जा सकता जब तक कि अभिलेख में आए साक्ष्य के आधार पर निकाला गया निष्कर्ष अत्यंत अनुचित अथवा प्रकट रूप से विकृत या सुस्पष्ट रूप से अपोषणीय पाया जाता है – आगे, यदि दो दृष्टिकोण संभावित हैं तो अभियुक्त के पक्ष वाले दृष्टिकोण पर विचार किया जाना चाहिए।

***B. Penal Code (45 of 1860), Section 304-B* - Soon before death - Father of deceased was present at the time of autopsy but did not allege against appellant - Allegations were made after 2-3 months of incident - No evidence that deceased was subjected to cruelty soon before her death - Other accused already acquitted as evidence of witnesses were not found trustworthy - Appellant entitled to be acquitted - Appeal allowed. (Paras 14, 15 & 19)**

ख. दण्ड संहिता (1860 का 45), धारा 304–बी – मृत्यु के शीघ्र पूर्व – मृतक के पिता शव परीक्षण के समय उपस्थित परंतु अपीलार्थी के विरूद्ध अभिकथन नहीं – घटना के 2–3 माह पश्चात् अभिकथन किये गये – कोई साक्ष्य नहीं कि मृत्यु के तुरंत पहले मृतक के साथ क्रूरता का व्यवहार किया गया – अन्य अभियुक्त पहले ही दोषमुक्त क्योंकि साक्षियों के साक्ष्य विश्वसनीय नहीं पाये गये – अपीलार्थी दोषमुक्ति का हकदार है – अपील मंजूर।

Madhukar Kulshreshtha, for the appellant in Cr.A. No. 103/1999.

Raghvendra Dixit, P.P. for the respondent in Cr.A. No. 103/1999 & for the appellant in Cr.A. No. 507/2003.

Sandeep Kulshreshtha, for the respondents in Cr.A. No. 507/2003.

JUDGMENT

The Judgment of the Court was delivered by : **B.D. Rathi, J. :-** The present judgment shall govern the disposal of both the cases (Cr.A.No.103/1999 & Cr.A.No.507/2003). Criminal Appeal No.103/1999 under Section 374 of the Code has been preferred by the appellant/accused against the judgment of conviction and sentence dated 11-02-1999 passed by learned First Additional Sessions Judge, Bhind in S.T. No.93/1998 whereby the appellant has been convicted for the offence punishable under Section 304-B of IPC and sentenced to undergo 10 years' rigorous imprisonment. Criminal Appeal No.507/2003 under Section 378 of the Code has been preferred by the State against the same judgment whereby respondents (remaining accused persons) have been acquitted of the offences punishable under Sections 304-B of Indian Penal Code (in short "IPC").

2. The prosecution case, in brief, is that the marriage of accused Dileep and Kalpana had taken place on 26-05-1994 at Bhind. After marriage Kalpana started living at village Kanathar and prior to death she was living at the matrimonial house situated at Mehgaon District Bhind. During life time and prior to this case, on the written report of Kalpana (Ex-P/16) made against her in-laws, the case for offence under Section 498-A of IPC was also registered as Crime No.123/1997 at Police Station Mehgaon District Bhind. The accusation of prosecution in this present case is that the accused persons used to demand dowry and on non-fulfillment of demand of dowry, the accused persons have started harassing Kalpana mentally and physically. On the information given by mother of deceased, Rampyari (PW-7) in regard to unnatural death of Kalpana due to burn injuries, Marg No.19/1997 was registered on 20-07-1997 and soon thereafter, the then SDO (P), Mehgaon reached at the place of incident. Upon enquiry in the Marg, FIR (Ex-P/12) was lodged at crime No.199/1997 at police station Mehgaon District Bhind for the offence punishable under Section 304-B and 34 of IPC on 10-08-1997. After completion of investigation, charge-sheet was filed against the accused persons for the said offences.

3. During trial, the accused persons pleaded not guilty to the charges framed under Sections 304-B and 34 of IPC and contended that they had been falsely implicated. It is imperative to note that the accused Patiram (father-in-law of deceased) had died during pendency of trial.

4. Leave to appeal sought by the State has been refused for other accused persons except present respondents. Respondent No.1 (Ashok) has died during pendency of appeal, therefore, the names of all these persons have been deleted from the array of respondents/accused vide order dated 09-05-2011 and 10-10-2003. In this way, State appeal is being decided only for respondents No.2 and 3.

5. By preferring Cr.A.No.507/2003, learned Public Prosecutor submitted that learned trial Court has not properly appreciated the entire evidence and material available on record though the case has been proved beyond reasonable doubt by cogent and reliable evidence thus the trial Court has committed error in acquitting the respondents/accused persons. Prayer was also made that the appeal be allowed and accused persons/respondents No.2 & 3 be convicted and sentenced accordingly.

6. On the contrary, Shri Sandeep Kulshreshtha, learned counsel appearing on behalf of respondents No.2&3/accused submitted that the judgment of acquittal for the offence punishable under Section 304-B of IPC is well merited. Prosecution has completely failed to prove its case beyond reasonable doubt, therefore, in acquittal no interference is called for. By supporting the contention of learned counsel for respondents No.2&3, Shri Madhukar Kulshreshtha (counsel in Cr.A.No.103/1999) submitted that learned trial Court has committed error in convicting the appellant for the offence punishable under Section 304-B of IPC and sentencing him to suffer 10 years' RI as no case is made out against him.

7. To bring home the charges, prosecution has produced as many as 17 witnesses, namely, Vijayram (PW-1), Vishwanath Singh (PW-2), Ramsingh (PW-3), Pancham Singh (PW-4), Ladeta Bai (PW-5), Bachhuram (PW-6), Rampyari (PW-7), Akhilesh (PW-8), Kunwarpal (PW-9), Balram (PW-10), Ramswaroop (PW-11), Lajjaram (PW-12), Narayan Datt (PW-13), Maniram (PW-14), Umesh Kumar Ikka (PW-15), Dr. B.S. Tomar (PW-16) and Indra Prakash Arjariya (PW-17). Accused persons have also examined as defence witness, namely, Kamlesh Kumar (DW-1) and Rajaram Swarnkar (DW-2).

8. Having regard to the arguments advanced by learned counsel for the parties, we have perused the entire evidence and material available on record, as well as the impugned judgment of trial Court.

9. It is well settled that the judgment of acquittal should not be disturbed unless the conclusion drawn on the basis of evidence brought on record are found to be grossly unreasonable or manifestly perverse or palpably unsustainable. Similarly, if two views are possible then the view in favour of accused should be taken in to consideration. Under criminal jurisprudence, accused do have the right to get benefit of doubt and it is the prosecution who has to prove its case beyond reasonable doubt, if it is not provided otherwise by law.

10. Learned Public Prosecutor submitted that as per the prosecution case since Kalpana was subjected to cruelty by all the accused persons and they all used to beat her, she had lodged the FIR on 25-04-1997 which was registered as Crime No.123/1997 (Ex-P/16) at Police Station Mehgaon. Thereafter, one Panchayat was also organized by the parties to resolve the

dispute in regard to cruelsome behaviour and demand of dowry, these circumstances in themselves were sufficient to prove that all the accused persons used to beat Kalpana and she was subjected to cruelty just before her unnatural death, therefore, the presumption as provided under Section 113(b) of Indian Evidence Act should be drawn against all the acquitted accused persons also.

11. On perusal of impugned judgment, it is clear that learned trial Court has discarded the entire evidence of prosecution witnesses on the ground that their evidence was full of omissions, contradictions and exaggerations in the following manner:

i- In para 10, learned trial Court has held that the FIR (Ex-P/16) was lodged by Kalpana and crime No.123/1997 was registered, after investigation charge-sheet (Ex-P/17) was filed. In this report, it was not mentioned by Kalpana that all the persons were involved in her harassment for demand of dowry and also that in what manner the offence was committed with her under Section 498-A of IPC, on this point the evidence of parents and brother of Kalpana, namely, Vijayram (PW-1), Rampyari (PW-7) and Akhilesh (PW-8) was not found trustworthy because of full with contradictions, omissions and exaggerations.

ii- In para 11, it was found by the trial Court that Kunwarpal (PW-9) and Balram (PW-10) both have turned hostile but from their version and the version of other witnesses, namely, Lajjaram (PW-12) and Maniram (PW-14) and Bachchuram (PW-6), it is clear that Panchayat was called by the parties to resolve the dispute and thereafter Kalpana has died under suspicious circumstances. In this Panchayat it was also discussed that Kalpana was never subjected to cruelty. She was living separately with her husband.

iii- In para 12, learned trial Court has held that the conversation took place between the parties in Panchayat in regard to demand of dowry and cruelty by accused persons towards Kalpana and for this purpose the witnesses, namely, Vijayram

(PW-1), Rampyari (PW-7), Bachchuram (PW-6), Maniram (PW-14), Lajjaram (PW-12), Kunwarpal (PW-9) and Balram (PW-10) were produced but the evidence of these witnesses was not found to be befitting because of full with contradictions, omissions and exaggerations.

iv- In paragraph 9, learned trial Court has further held that the evidence of witnesses was not reliable on the point that Kalpana was subjected to cruelty on non-fulfillment of demand of dowry made by the accused persons. Further it has been held in para 14 that the accused Kailashi Bai W/o Baijnath, Mahesh Kumar, Ramswaroop alias Paltoo, Vaikunthi and her son Rajesh were living separately in Mehgaon District Bhind, therefore they had not participated in the said crime. In FIR (Ex-P/12) only doubt was raised against Ramswaroop, Rajesh, Vaikunthi Bai, Mahesh Kumar and Kailashi Bai and this fact was ratified by the investigating officer (PW-17).

v- At the bottom of para 16 of impugned judgment, it has been held by the trial Court that from perusal of evidence of prosecution, it was not clear that after how many days from marriage, the demand of motorcycle in dowry was made by the accused persons and similarly it was also not proved that on which date Kalpana was assaulted on the pretext of non fulfillment of demand of dowry.

vi- In paragraph 17 it was held by the trial Court that the maternal uncle Bachchuram (PW-6) deposed in his evidence that after marriage of Kalpana for 2-3 years he had never gone to the house of Vijayram -father of deceased, therefore, the statement of Bachchuram that Kalpana used to complaint in relation to cruelty and demand of dowry against the accused persons become suspicious.

vii- In paragraph 18, learned trial Court has held that the prosecution witnesses have stated that acid was thrown on the face of Kalpana but this fact did not find place in the FIR (Ex-P/16) lodged by Kalpana herself, therefore, on this points

also, the statement could not be relied on.

viii- At the bottom of this para, further learned trial Court has held that on appreciation of evidence of prosecution it was cleared that the accused persons (except Dileep, Patiram and Ashok) were falsely implicated because in FIR (Ex-P/16) other accused persons were not named by Kalpana. This FIR was lodged on 25-04-1997, 3-4 months prior to the date of death of present crime. The statement of Rampyari (PW-7) mother of Kalpana was false and given in order to take revenge.

ix- In para 19, it was held by the trial Court that on perusal of FIR (Ex-P/16) lodged by Kalpana 3-4 months prior to the date of incident of this case, it seems that she was subjected to cruelty by Dileep, Patiram and Ashok, therefore, other accused persons have not committed any offence and they have been falsely implicated otherwise name of others were also mentioned in FIR. So far as these three persons were concerned Patiram had died during trial and Ashok has been acquitted by the trial Court as he was living separately for doing service in Panchayat Department at Guna and in paragraph 26 after appreciation of evidence, it has been held by the trial Court that Kalpana was subjected to cruelty by Dileep only on non-fulfillment of demand of dowry soon before her unnatural death, therefore, only Dileep is liable for the offence punishable under Section 304-B of IPC and presumption of Section 113(b) of Evidence Act can be drawn against Dileep only.

12. Now the core question before us for consideration is whether the trial Court was right in discarding the entire evidence of prosecution on the basis of omissions, contradictions and exaggerations and whether the prosecution has successfully proved the case against the accused -Dileep beyond reasonable doubt.

13. On perusal of entire evidence available on record, it is clear that the evidence of prosecution witnesses is full of omissions, contradictions and exaggerations, therefore, we are of the considered view that such type of evidence cannot be relied on. Thus, learned trial Court has not committed any

error in acquitting the respondents (of Cr.A.No.507/2003), after disbelieving the evidence of prosecution witnesses.

14. Now it has to be seen whether the conclusion arrived at by learned trial Court against Dileep is sustainable or not. For that purpose, the judgment passed in Criminal Case No.1835/1997 *(State of M.P. Vs. Ashok and other)* on 29-08-2000 by the Court of JMFC, Mehgaon is relevant. That criminal case was emanated from the FIR (Ex-P/16) lodged by Kalpana herself for the offence punishable under Section 498-A of IPC. By this judgment, all the three accused persons named therein including Dileep were acquitted by the trial Court and admittedly this judgment has attained finality. The entire evidence of prosecution witnesses were discarded by the trial Court because it was full of omissions, contradictions and exaggerations. Apart that the parents were present during autopsy of Kalpana but they have not lodged any report against the accused persons. Vijayram (PW-1) deposed in para 11 of his evidence that his statement was recorded by police after 2-3 months from this incident.

15. As regards conviction of accused Dileep, we will have to see that Criminal Case No.1835/1997 emanated from the FIR (Ex-P/16) lodged by Kalpana had failed down against all the accused persons including Dileep by the Court of JMFC, Mehgaon vide its judgment dated 29-08-2000, as the allegations made by Kalpana were not found proved and since this judgment of acquittal has remained unchallenged, therefore, it has attained finality. Apart that, in paragraph 22 Vijayram (PW-1) father of deceased deposed that at the time of post mortem he was present but has had never asked anyone that how and who has murdered his daughter and he has not lodged any complaint against the accused persons in relation to cruelty committed towards Kalpana, on the contrary it was stated by him that after 2-3 months of incident, his statement was recorded by the police, in such circumstances, it is clear that due to emotions towards his daughter, statements were given by parents and prosecution has registered the case but has failed to prove its case beyond reasonable doubt. This being so, we are of the considered view that conviction of Dileep is also liable to be set aside.

16. It was also submitted by learned Public Prosecutor that during autopsy three ante-mortem injuries were found present on the body of Kalpana. It shows that soon before death she was subjected to cruelty by all the family members.

17. In consideration of above contention, on perusal of record it is clear that the marriage of Kalpana (since deceased) was solemnized on 26-05-1994 and within 7 years of her marriage, she died due to burn injuries in unnatural circumstances. It is also an admitted fact that her dead body was found lying on the ground under the cart because the rows of cart had also burnt. During autopsy, it was found by Dr. B.S. Tomar (PW-16) that three ante-mortem injuries were found present on the body of Kalpana namely:

i- One simple injury was found at backside of shoulder of deceased.

ii- Second injury at the middle of back.

iii- Third injury at the maxilla of face.

All the injuries were caused by hard and blunt object.

18. On perusal of these simples injuries and opinion of doctor, we are of the considered view that due to fire, rows of cart might have been burnt, resultantly, Kalpana might have been fallen on the ground due to that above mentioned three injuries might have caused, therefore, in absence of other evidence it cannot be presumed that only due to these injuries, she was subjected to cruelty soon before her death by the accused persons.

19. Therefore, in absence of cogent and reliable evidence it cannot be held that Kalpana was subjected to cruelty soon before her unnatural death. Therefore, neither presumption is available under Section 113 (b) of Indian Evidence Act against the appellant or respondents nor any other evidence is available to connect them with the offence.

20. For the above discussions, in conclusion, the appeal preferred by the State (Cr.A.No.507/2003) against acquittal of respondents fails and is hereby dismissed having no substance.

21. The appeal preferred by Dileep against the judgment of conviction and sentence succeeds and is hereby allowed. Appellant -Dileep is on bail, his bail bonds stand discharged.

Copy of this order along with record be sent to the trial Court for information and necessary compliance.

Appeal allowed.

I.L.R. [2015] M.P., 3045
APPELLATE CRIMINAL
Before Mr. Justice S.K. Gangele & Mr. Justice B.D. Rathi
Cr. A. No. 593/1999 (Gwalior) decided on 1 May, 2014

RAMU & ors. ...Appellants

Vs.

STATE OF M.P. ...Respondent

***Penal Code (45 of 1860), Section 302 and Criminal Procedure Code, 1973 (2 of 1974), Section 157 - Copy of FIR to Magistrate* - Two eye witnesses who are son and brother of deceased have admitted their inimical relation with accused - Their evidence is full of contradictions and not in conformity with medical evidence - Their presence on spot doubtful - When presence of witnesses on spot at the time of incident and lodging of FIR is doubtful, the mandatory provisions of Section 157 Cr.P.C. have to be complied with by prosecution - Prosecution failed to prove that copy of FIR was sent to Magistrate - Prosecution also failed to prove blood stains on seized weapons - Appeal allowed. (Paras 6, 12, 17 to 20)**

दण्ड संहिता (1860 का 45), धारा 302 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 157 – मजिस्ट्रेट को प्रथम सूचना प्रतिवेदन की प्रति – दो चक्षुदर्शी साक्षी जो मृतक के पुत्र एवं भाई हैं उन्होंने स्वीकार किया कि अभियुक्त के साथ उनके संबंध वैमनस्यतापूर्ण थे – उनके साक्ष्य विरोधाभास से परिपूर्ण एवं चिकित्सीय साक्ष्य से भी पुष्टि नहीं – घटनास्थल पर उनकी उपस्थिति संदेहास्पद – जब घटना के समय घटनास्थल पर एवं प्रथम सूचना प्रतिवेदन दर्ज कराते समय साक्षियों की उपस्थिति संदेहास्पद हो, दं.प्र.सं. की धारा 157 के आज्ञापक उपबंधों का अभियोजन द्वारा अनुपालन करना होगा – अभियोजन यह साबित करने में असफल रहा कि प्रथम सूचना प्रतिवेदन की प्रति मजिस्ट्रेट को भेजी गई – अभियोजन जब्त आयुधों पर रक्त के धब्बे साबित करने में भी असफल रहा – अपील मंजूर।

Case referred :

AIR 2004 SC 26.

Shailendra Singh & Vinay Sharma, for the appellants.
Raghvendra Dixit, P.P. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : **B.D. RATHI, J. :-** This appeal, under Section 374 of the Code of Criminal Procedure, has been directed against the judgment of conviction and order of sentence dated 04.11.1999 passed by Special and Sessions Judge, Shivpuri (M.P.) in Special Sessions Trial No.122/97 whereby all the accused/appellants have been convicted under Section 148 of IPC and sentenced to undergo rigorous imprisonment for six months. They have further been convicted under Section 302/149 of IPC and under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and sentenced to undergo imprisonment for life each with a fine of Rs.2,000/- each with default stipulation.

2. At the outset, it may be mentioned here that since appellants No.2 and 8, namely Sardar Singh and Sarwanlal Rawat, have died and their names have been deleted vide orders dated 24/06/2009 and 21/12/2012, hence, this appeal stands dismissed against them as abated. Now, the appeal will survive only against remainders.

3. Prosecution story, in nutshell, is that in the intervening night of 7/8.11.1997 at about 03:00 am when complainant Kailash (PW-1) alongwith his uncle Jhiguria (PW-2) were at their well/field and irrigating their field from pump and the deceased Nakke was sleeping nearby well on the platform (Chabutara) at that time all the accused persons having deadly weapons like axe, lathis, luhangi, farsa came on the well, encircled and with intention to commit murder of Nakke attacked on him. Accused/appellants hurled abuses to him by caste. Thereafter, Jagdish (accused/appellant no.7) strangulated the deceased by his own scarf (safi). Then, Sardar Singh (accused/appellant No.2) inflicted axe blow on the right leg of the deceased and thereafter all belaboured lathi, luhangi and farsa blows on the person of the deceased Nakke and thereby committed his murder. Thereafter, Ramu (accused/appellant No.1) and Jagdish (accused/appellant No.7) threw the dead body of the deceased in the well. When Kailash (PW-1) alongwith Jhinguria (PW-2) screamed, Jagdish Jatav, Ram Singh Jatav and other persons of the village came there and on seeing them, accused persons fled away from the spot. Kailash (PW-1) lodged FIR (Ex.P-1) at Police Station. Thereafter, dead body was taken out from the well and Marg was registered by Investigating Officer Pradeep Sharma (PW-6).

Panchnama of dead body and site map were also prepared. The dead body was sent for autopsy which was conducted by Dr. D.K. Sirothiya (PW-5) who found four injuries on the person of the deceased including two incised wounds –one on the eyebrow and other on the right leg and one contusion on the right wrist. All these three injuries were found simple in nature and injury no.4 which was on the neck was the ligature mark caused by scarf which was tied over the neck, was found to be fatal. After investigation and recording the statements under Section 161 of the Code of Criminal Procedure, Police submitted charge-sheet against nine accused persons in the court. The trial court framed charges which were denied by the accused/ appellants. The accused pleaded complete innocence and preferred trial.

4. To bring home the charges, prosecution has examined as many as seven witnesses, namely, Kailash (PW-1), Jhinguriya (PW-2), Dropabai (PW-3), Jagdish (PW-4), Dr. D.K. Sirothiya (PW-5), Pradeep Sharma (PW-6) and B.S. Tomar (PW-7). Similarly, two witnesses were examined by the accused in defence, namely, Lakhu (DW-1) and Maharaj Singh (DW-2),

5. After taking into consideration the evidence adduced by the parties, impugned judgment of conviction and order of sentence was passed by the learned trial court. Hence, this appeal.

6. It is argued by Shri Shailendra Singh, learned counsel appearing on behalf of the appellants that the learned trial court has not appreciated the evidence available on record properly. It is contended by the learned counsel for the appellants that in this case there are only two eyewitnesses, namely, Kailash (PW-1) who is the son of the deceased and Jhingurya (PW-2) who is the brother of the deceased. But the statements of both these witnesses are not reliable because their evidence is full of contradictions, omissions and exaggerations. Apart that, prosecution has utterly failed to prove the compliance of mandatory provision contemplated under Section 157(1) of the Code of Criminal Procedure. Admittedly, there were inimical relationship between the appellants and the witnesses. Further, it is submitted that the corresponding injuries were also not found present by the doctor over the body of the deceased during conducting autopsy. Thus, on these grounds, learned counsel appearing for the appellants submitted that the present appeal be allowed and the appellants be acquitted of the charges levelled against them.

7. *Per contra,* Shri Dixit, learned Public Prosecutor appearing on behalf of the State vehemently opposed the prayer made by the learned counsel for the appellants and submitted that the impugned judgment of conviction and order of sentence has been passed on proper appreciation of evidence on record and needs no interference.

8. Having heard the arguments, put forth by the learned counsel for the rival parties, perused the impugned judgment, evidence and entire record, we are of the considered view that the impugned judgment of conviction and order of sentence deserves to be set aside for the discussion made in the subsequent paras.

9. It is admitted by Kailash (PW-1) in para 10 of his statement that there is an old dispute in regard to agricultural land with the appellants and also there was inimical relationship between them. In para 12, it was also admitted by him that one criminal case for the offence punishable under Section 307 of IPC was registered against him and was pending. Similarly, Jhinguria (PW-2) has also admitted in para 12 that a criminal case is pending against them, registered on the basis of FIR lodged by appellant Ramu.

10. From these statements, it is clear that there was inimical relationship between the witnesses and the appellants because of the dispute pertaining to agricultural land. One criminal case was also registered against both these witnesses who are the son and brother of the deceased. In this regard, the judgment of Hon'ble Apex Court rendered by it in the case of *Badam Singh Vs. State of M.P.* reported in AIR 2004 SC 26 is worth mentioning. Accordingly, the evidence of such eyewitnesses should be scrutinized very carefully.

11. Kailash (PW-1) deposed in para 1 of his statement that incident occurred at about 3 am when he and Jhinguria were doing irrigation. His father Nakke was sleeping on the platform and he was 30-40 steps ahead from him. At that time, Sardar, Jagdish, Sarwan, Pehalwan, Khuman, Rangi, Vijay Singh, Sitaram and Ramu Rawat, in all total 9 accused persons, came over there. His father was surrounded and beaten by means of using axe, farsa, luhangi and lathi. Then, the neck of his father was strangulated by means of a scarf (safi) by Jagdish.

12. Similar statement has been given by Jhinguriya (PW-2). But in the

FIR Ex.P-1, it has been mentioned that first of all, deceased Nakke was strangulated by Jagdish and thereafter he was beaten by arms as mentioned above. In the statement recorded under Section 161 of Cr.P.C., Ex.D-1, it was stated by Kailash that his father Nakke was first strangulated and thereafter beaten by using weapons by the accused persons and similar statement was given by Jhinguriya in Ex.D-2. On perusal of evidence of Kailash (PW-1) and Jhiguriya (PW-2), FIR Ex.P-1 and their statements recorded under Section 161 of Cr.P.C. it appears that there are material contradictions and omissions. These contradictions are also material because as per the post mortem report injuries found over the body of the deceased were ante-mortem meaning thereby deceased Nakke was beaten prior to his death and specially this fact of post mortem report was deposed by Kailash (PW-1) and Jhinguriya (PW-2) in the evidence as mentioned above. But in the FIR and in the police statement recorded under Section 161 of the Code of Criminal Procedure it was stated by them that first deceased Nakke was strangulated and when he had died thereafter he was beaten. In that event, injuries could not have been found ante-mortem.

13. It is submitted by Shri Dixit, learned Public Prosecutor appearing for the State, that these contradictions cannot be taken into consideration as material because in the FIR and the police statements it was mentioned that when accused party came on the spot, all of a sudden attack was made on Nakke, meaning thereby injuries were caused to him and which were found ante-mortem.

14. We are not inclined to accept the arguments put forth by Shri Dixit, learned Public Prosecutor, because admittedly there were nine accused persons armed with deadly weapons like axe, farsa, luhangi and lathi, therefore, if deceased Nakke was beaten by all the accused persons by using their respective arms, at least nine injuries ought to have been found over the body of the deceased but Dr. D.K. Sirothia (PW-5) found only four injuries. Out of them one was on the neck which pertained to strangulation and in the remaining three injuries two were incised and one was contusion. It is very unnatural and impossible that when one person is beaten by nine persons by using deadly weapons like axe, farsa, luhangi and lathi but receives on three injuries inflicted by weapons. Therefore, the contradiction as pointed out above is not only material but also pivotal. One more important aspect in this case is

that the corresponding injuries were not found present on the corpus of the deceased. Therefore, in the absence of corresponding injuries, the evidence of both these witnesses is also not reliable.

15. In FIR Ex.P-1 it was mentioned that the incident occurred at about 3 am. Dr. D.K. Sirothiya (PW-5) deposed in para 3 of his evidence that during conducting autopsy, internal examination, it was found by him that there was undigested food in the stomach of the deceased. In para 6, it is deposed by him that when deceased had taken food 4-5 hours prior to his death in that event undigested food will be found in stomach, meaning thereby if as per the prosecution story deceased Nakke had died at about 3 am on the spot just after the incident then food must have been taken at about 9 pm. But Kailash (PW-1) deposed in paragraph 6 of his evidence that we had taken food in the evening. Therefore, in such premises, it is also doubtful whether the incident had occurred at about 3 am or not or whether it was occurred in the midnight at about 0000 hours. Therefore, the presence of these witnesses on the spot is doubtful or in any way it is doubtful that the incident was seen by these witnesses. Therefore, it cannot be safely held that deceased Nakke was assaulted and thereafter was killed by the appellants.

16. Kailash (PW-1) in para 14 stated that an incised wound was caused by accused Khuman by means of farsa on the neck of deceased Nakke but this corresponding injury was also not found present on the body of the deceased Nakke.

17. In such types of cases when the presence of the witnesses on the spot is doubtful and time of incident as well as lodgment of FIR is doubtful then mandatory provisions contemplated under Section 157(1) Cr.P.C. have to be complied with by the prosecution. Otherwise it itself creates a very big doubt on the prosecution case. In this case, it was not proved by the prosecution that copy of FIR was immediately sent to the concerning Magistrate. In this regard, evidence of Pradeep Sharma (PW-6), ASI, is important. It was deposed by him in para 2 of his evidence that he cannot say whether the copy of the FIR was received by the Magistrate or not. He had not deputed any constable to send the said copy to the concerning Magistrate. He has not produced concerning dispatch book by which copy of FIR is usually sent to the concerning Magistrate. Similarly, B.S. Tomar (PW-7), investigating officer, has also deposed in para 17 of his evidence that he had not got the confirmation

whether the copy of the FIR was sent to the concerning Magistrate in compliance of Section 157(1) of Cr.P.C. or not.

18. Apart that we also find that the prosecution has failed to prove that any blood stains matching with deceased blood, were found on the weapons alleged to have been seized from the possession of accused persons and therefore in this manner also the judgment conviction and order of sentence is not sustainable in the eyes of law.

19. In view of the foregoing discussions and evaluation of evidence available on record, we are of the considered view that the prosecution has failed to prove charges as levelled against the accused/appellants, in regard to committing murder of Nakke who was admittedly belonged to a member of Scheduled Caste community, beyond reasonable doubt and therefore, it is held that the impugned judgment of conviction and order of sentence is liable to be set aside.

20. Accordingly, appeal succeeds and is hereby allowed. The judgment of conviction and order of sentence impugned herein is hereby set aside. Accused/appellants are acquitted of all the charges levelled against them. If any amount of fine has been deposited pursuant to the judgment impugned be refunded to the appellants. Their bail bonds stand discharged. A copy of this judgment be sent to the trial court for compliance.

Appeal allowed.

I.L.R. [2015] M.P., 3051
APPELLATE CRIMINAL
Before Mr. Justice S.K. Gangele & Mr. Justice S.K. Palo
Cr. A. No. 994/2011 (Gwalior) decided on 11 July, 2014

SHIV SINGH ...Appellant
Vs.
HARNARAYAN & ors. ...Respondents

Penal Code (45 of 1860), Section 307 - Attempt to murder - Against acquittal **- Complainant alleged in FIR that he had received gun shot injury in calf of left leg and in Court evidence it was stated that he had received gun shot injury in the calf of right leg - Doctor found only abrasion in calf of left leg and no gun shot injury was found**

- FIR also lodged after 3 1/2 hours - Trial court rightly acquitted the respondents - Appeal dismissed. (Paras 5, 6 & 8)

दण्ड संहिता (1860 का 45), धारा 307 – हत्या का प्रयत्न – दोषमुक्ति के विरूद्ध – शिकायतकर्ता ने प्रथम सूचना प्रतिवेदन में यह अभिकथित किया कि उसके बायें पैर की पिंडली पर पिस्तौल की गोली से चोट लगी एवं न्यायालयीन साक्ष्य में यह कथित किया कि पिस्तौल की गोली से उसके दांयें पैर की पिंडली पर चोट लगी – चिकित्सक ने बांये पैर की पिंडली पर केवल खरोंच का निशान पाया एवं पिस्तौल की गोली की चोट नहीं पाई गई थी – प्रथम सूचना प्रतिवेदन भी 3½ घंटे बाद दर्ज की – विचारण न्यायालय ने उचित रूप से प्रत्यर्थियों को दोषमुक्त किया – अपील खारिज।

J.P. Kushwah, for the appellant.
Raghvendra Dixit, P.P. for the respondent No.12/State.

JUDGMENT

The Judgment of the Court was delivered by : **S.K. Palo, J. :-** Feeling aggrieved by the judgment of acquittal passed by the 6th A.S.J. Bhind in S.T. No. 141/2006 (State of Madhya Pradesh Vs. Harnarayan and others) decided on 5.9.2011 by which the learned trial Court has acquitted all the accused persons / respondents under Sections 147,148 and 307/149 of IPC, has filed this appeal under Section 372 of Criminal Procedure Code.

2. The factual matrix of the case lies in a narrow compass;

The appellant is the complainant in S.T. No. 141/2006. It is alleged that on 25.12.2005 at about 10 AM near Sidh Baba Gate, which is situated near the residence of complainant Shiv Singh in village Githor, Thana Mehagaon, District Bhind the accused persons came in two vehicles some of them armed with mouzers and some with Lathi and Farsa. When the complainant was sitting in the Chabutra (platform), the accused persons fired in air, complainant was criminally intimidated. Some of the bullets fired hit on the complainant's doors and one bullet hit in his calf on the left leg and blood oozed from the wound. At that time, Harendra Singh and Dharmveer, sons of the complainant Shiv Singh and other villagers ie Ramvaran and Rajendra Singh came to the scene. When the complainant Shiv Singh hid in his house. The accused persons abused and dispersed. Complainant lodged a report at Police Station Mehagaon. Complainant medically examined, criminal case was registered

under Sections 147, 148 and 336, 307/149 of IPC before the JMFC Mehagaon.

3. After, the case was committed to the Session Court the Additional Sessions Judge, levelled the charges under Sections 147, 148 307/149 of IPC against the accused persons. They abjured guilt. In their examination they have stated that they are falsely implicated because of their enmity with the complainant. After adducing evidence, the learned 6th ASJ pronounced the impugned judgment and acquitted the respondents.

4. The complainant has filed this appeal on several grounds and stated that the statement of Harendra Singh, Dharmveer Singh, Ramvaran Singh and Rajendra Singh along with statement of complainant, Shiv Singh are sufficient to prove the case. The injuries caused to the complainant has been corroborative piece of evidence which has been over looked by the trial Court. Therefore, the trial Court has erred in acquitting all the 11 accused persons. It is prayed that the appeal be allowed and the accused persons / respondents be sentenced accordingly.

5. We have heard the arguments of both parties and gone through the record of the trial Court. The evidence elucidated the fact that the complainant Shiv Singh has claimed that he sustained gun shot injury in his calf on the left leg, as per his version in the FIR. In the statement before the trial Court he claimed that he received injury on the calf of the right leg. Not only this, the medical officer PW-4 Dr. R.K. Taneja has clearly and un-ambiguously stated that the wound on the calf of the left leg of the complainant was an abrasion and this injury is not a result of any gun shot or fire arm. Thus, it cannot be attributed to any gun shot.

6. The learned trial Court has also found that the FIR lodged after three and half hours, which is belated FIR and no justification has been given for the delay in lodging the FIR. The statement of complainant Shiv Singh PW-2 and so called eye witnesses PW-1 Dharmveer son of complainant Shiv Singh, Mangal PW-3, Harendra Sinigh, PW-6, Ramvaran PW-7 is concerned they have stated that the injury is caused by the fire arm is completely contradictory to the statement made by PW-4 Dr. R.K. Taneja. In the FIR Ex.P/1, it is mentioned that the accused persons fired in the air, the omission that the accused persons tried to kill Shiv Singh and fired gun shot in Ex.P/1 is very material.

7. Besides, the investigation Officer, H.S. Yadav PW-8 has deposed that there was no sign of any bullet or pallet hitting the walls, doors and other places at the spot, also goes to show that the version of the complainant and his witnesses are not corroborated. The incident said to have been taken place on 25.12.2005, whereas the statements of witnesses Rajendra Singh Dharmveer Singh PW-1, Mangal Singh PW-3 and Ramvaran PW-7, who are stated to have been present at the time of incident were recorded six months after the incident, i.e. on 14.6.2006. This also creates reasonable and probable doubts in the prosecution case.

8. Keeping in mind that the evidence available on record before the trial Court lay beyond any pale of controversy, the accused persons were acquitted. We find that the trial Court has not erred in pronouncing the judgment of acquittal. Therefore, it calls no interference.

9. Hence, this appeal is devoid of merits and the same is hereby dismissed.

Appeal dismissed.

I.L.R. [2015] M.P., 3054
APPELLATE CRIMINAL
Before Mr. Justice S.K. Gangele & Mr. Justice S.K. Palo
Cr.A. No.199/2001 (Gwalior) decided on 7 August, 2014

GUDDI BAI @ SAHODARA BAI ...Appellant
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 302 and Evidence Act (1 of 1872), Section 32- Multiple dying declarations **- In first dying declaration, the deceased stated that she got burnt accidentally - Second dying declaration was got recorded on the saying of Mahila Mandal and Chairman of Zila Panchayat - No smell of kerosene oil was found - Second dying declaration implicating the appellant not trustworthy - In order to test the reliability of a dying declaration the court has to keep in mind, the circumstances like the opportunity of the dying man for observation and that it has been made at the earliest opportunity and was not the result of tutoring by interested parties - Appeal allowed. (Paras 30 & 33)**

दण्ड संहिता (1860 का 45), धारा 302 एवं साक्ष्य अधिनियम (1872 का 1),

धारा 32 – बहुविध मृत्युकालिक कथन – प्रथम मृत्युकालिक कथन में मृतिका ने कथन किया कि वह दुर्घटनावश जल गयी – दूसरा मृत्युकालिक कथन महिला मंडल तथा जिला पंचायत अध्यक्ष के कहने पर दर्ज किया गया – मिट्टी तेल की कोई गंध नहीं पायी गयी – अपीलार्थी को अपराध में आलिप्त करने वाला दूसरा मृत्युकालिक कथन विश्सवसनीय नहीं है – मृत्युकालिक कथन की विश्वसनीयता की जांच हेतु न्यायालय को ऐसी परिस्थितियों को ध्यान में रखना चाहिए जैसे कि मरते हुए व्यक्ति को मिला पर्यवेक्षण का अवसर और यह कि वह यथाशीघ्र अवसर पर दिया गया हो तथा किसी हितबद्ध पक्षकार द्वारा सिखाने के परिणामस्वरूप नहीं था – अपील मंजूर।

Cases referred :

AIR 1996 SC 2439, 2013 CRLJ 1665, (2003) 6 SCC 443, AIR 1958 SC 198,

None, for the appellant.

Vivek Khedkar, Dy. A:G. & *Praveen Newaskar,* P.P. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : **S.K. Palo, J. :-** Aggrieved by the judgment dated 16.03.2001 passed by the Sessions Judge, Vidisha in Sessions Trial No.106/2000, whereby the learned Trial Court convicted the appellant under Sections 302 of IPC and sentenced her to undergo life imprisonment and also imposed fine of Rs.1,000/-, the appellant has filed this appeal under Section 374 (2) of Code of Criminal Procedure, 1973.

2. It is not disputed that deceased Saroj was married to accused Prahlad Singh, 4-5 years prior to the incident and the accused appellant Guddi Bai is mother-in-law of the deceased. The learned Trial Court acquitted Prahlad Singh the husband of the deceased.

3. Necessary relevant facts are stated hereunder to appreciate the case of the appellant and also to find out whether the appellant is entitled for the reliefs as prayed in this appeal.

4. On 27.05.2010, Smt. Saroj wife of accused Prahlad Singh aged about 25 years was brought to the District Hospital, Vidisha for treatment of burn. A dying declaration was recorded by the Tahsildar in which the injured Saroj

stated that due to cerain quarrel her mother-in-law poured kerosene oil on her and set fire by matchstick. During her treatment, because of extensive burn, she died on 28.5.2000, therefore, a criminal case was registered under Section 302 of IPC.

5. During the investigation, the spot map was prepared, statements of the witnesses were recorded. The dead body was sent for post-mortem and charge-sheet has been filed under Section 302/34 of IPC against the accused mother-in-law (Guddi Bai) and husband (Prahlad Singh) of the deceased.

6. The learned Trial Court framed charge under Section 302 of IPC in alternative Section 302/34 of IPC against accused Guddi Bai and under Section 302/34 against co-accused Prahlad Singh. The accused persons abjured guilt and pleaded innocence. In the examination of accused under Section 313 of Cr.P.C., the appellant Guddi Bai has stated that in the month of phalgun, Devi Singh (brother of the deceased) had taken gold necklace and bengals from Saroj. On its demand he did not return it, therefore, she asked Devi Singh to give the ornaments but he did not do so. The appellant has also taken the plea that she was ill at the time of incident and was not residing at Village Bhadora where the incident took place. On the information sent to her by her husband Bhawani Singh, she went to the hospital. Similar plea was taken by accused Prahlad Singh. He went further to state that in the early morning, he was sleeping outside the house. The kerosene oil lamp was kept at the patia. The kerosene oil lamp fell on her and she caught fire. He brought injured Saroj from the village at District Hospital, Vidisha by tractor. He sent the message to his father as well as to his in-laws.

7. The learned Trial Court after examination of the witnesses and the defence witnesses, pronounced the impugned judgment on 16.03.2001. The learned Trial Court acquitted the accused Prahlad Singh but has convicted the appellant accused Guddi Bai under Section 302 of IPC. The appellant has been sentenced to imprisonment for life and also imposed a fine of Rs.1,000/-, failing which, the accused appellant has been directed to undergo additional imprisonment for one year.

8. None appeared on behalf of the appellant at the time of final arguments. It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing. This is the requirement of the Code of Criminal Procedure on a plain reading of sections

385-386 of the Code of Criminal Procedure. The law does not enjoin that the Court shall adjourn the case, if both the appellant and his lawyer are absent. If the Court does so as a matter of prudence or indulgence, it is a different matter, but it is not bound to adjourn the matter. The law laid down in *"Bani Singh and others v. State of U.P.,* AIR 1996 SC 2439", can be profitably referred in this circumstances in which it is held that "Appeal – Both appellant and his lawyer absent on appointed day for hearing – Court not bound to adjourn case but should dispose of appeal on merits – Dismissal of appeal simpliciter for non-prosecution – Not contemplated".

9. In a recent judgment pronounced by the Hon'ble Apex Court in *K.S. Panduranga v. State of Karnataka*, 2013 CrLJ 1665, it has been very clearly and unambiguously observed that "it cannot be said that the Court cannot decide a criminal appeal in the absence of counsel for the accused even if the counsel does not appear deliberately or shows negligence in appearing. It depends upon the facts of each case".

10. In the present case, despite opportunities, none appeared for the appellant. The appeal is lingering on since 08.08.2001. The appellant is a lady and has been facing the trial since, 17.07.2000, therefore, in absence of the counsel for the appellant, we heard the matter.

11. We have in many occasions earlier held that crime should not go unpunished at the same time, we also keep in mind the basic principle of jurisprudence that innocent person should not be allowed to suffer.

12. In the present case, the prosecution has been solely banked on the "dying declaration" made by the deceased Saroj.

13. It is no doubt that the deceased, died due to severe and extensive burn injuries. The doctors who performed the postmortem have ascertained that the deceased Saroj Bai had flame burn 100% superficial to deep burn. Blackening of face, chest and upper part of upper limb on both side burning of hair of scalp, eye brows and lashes. Oedematons eye lids and lips alongwith face. Other than burn, no external injury over body is seen. The doctors performing post mortem also opined that "mode of death is shock due to extensive burn. Death duration is within 4 hrs of post mortem".

14. It would be pertinent to mention here that in the post mortem which has been performed within four hours after the death, the doctors have not

found any smell of "kerosene oil".

15. Dr. Azad Singhai, P.W.1 in his cross-examination in para 27 stated that had there been any smell of kerosene oil, they could have mentioned it in the report, but there was no such smell present. They have also stated that the burn is flame burn and on being asked in his cross-examination, he has answered that skin of her both hands were burnt. If the person with the burnt hands puts thumb impression, ridges would not be seen, where as the person who wrote the dying declaration is the Naib Tehsildar (P.W.2) has submitted that after the first dying declaration, Exhibit P-4, he has put the deponent's thumb impression.

16. Again after the second dying declaration, Exhibit P-5 also a thumb impression of the deponent was taken. All these makes the prosecution story clumsy and doubtful.

17. In the present case, the whole prosecution story hinges on the dying declarations of deceased Saroj.

18. The Hon'ble Apex Court has propounded the following in *P.V. Radha v. State of Karnataka,* (2003) 6 SCC 443 as follows:-

> "Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has not power of cross examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence."

19. Before dealing with the merits of the case, we would like to reproduce the dying declaration recorded in the present case. The first dying declaration which was recorded at 11.14 am is Exhibit P-4, which read as follows:-

"प्रश्नः तुम्हारा क्या नाम है ?	उः– सरोज
प्रश्नः तुम्हारे पति का नाम है ?	उः– प्रहलाद सिंह
प्रश्नः तुम्हारी उम्र क्या है ?	उः– 20 वर्ष
प्रश्नः तुम कहॉ की रहने वाली हो ?	उः– तिलक भदौरा
प्रश्नः तुम्हारे घर में कौन कौन है ?	उः– सास, ससुर, पति, एक बच्ची व अन्य लोग
प्रश्नः घटना कितने बजे की है ?	उः– सुबह 6 बजे की
प्रश्नः तुम्हारे साथ क्या हुआ ?	उः– आज सुबह 6 बजे मैने चुल्हा जलाने के लिये कॉच की ढिबरी जलाई थी। ऊपर पटिया पर ढिबरी रखी थी। अचानक वह नीचे गिर गई और फिर मुझे पता नही चला । पूरे कपड़ो मे आग लग गई।
प्रश्नः तुम्हे और कुछ कहना है ?	उः– नही। "

20. In this dying declaration Doctor on duty has certified about the consciousness and fitness of the patient.

21. Subsequently, after a letter (Exhibit P-9) given to the police by the father of the deceased, Kaluram P.W.6, police wrote a letter of request to the Naib Tahsildar to again record the second dying declaration. At 7.30 PM also, the doctor on duty has certified the consciousness and fitness of the patient. Second dying declaration is Exhibit P-5, which reads as follows:-

"प्रश्नः तुम्हारा नाम क्या है ?	उः– सरोज
प्रश्नः तुम्हारे पति का नाम क्या है?	उः– प्रहलाद प्रजापति
प्रश्नः तुम्हारे पिता का नाम क्या है?	उः– कल्लू
प्रश्नः तुम्हारी उम्र क्या है ?	उः– 20 वर्ष
प्रश्नः तुम्हारी शादी कब हुई ?	उः– 4 वर्ष पहले

प्रश्नः तुम्हारा मायका कहॉ है ? उः– पीपलधार

प्रश्नः तुम कहॉ रहती हो? उः– भदौरा

प्रश्नः तुम्हारे घर में कौन–कौन है ? उः– दो देवर, सास, ससुर, पति, एक बच्ची ,

प्रश्नः तुम दुबारा बयान क्यो देना चाहती हो ? उः– मै दुबारा बयान देना चाहती हूँ ।

प्रश्नः पहली बार बयान क्या किसके दवाब में किया था ? उः– हॉ दबाब में दिया था।

प्रश्नः घटना कितने बजे की है ? उः– 7 बजे सुबह की ।

प्रश्नः उस समय घर मे कौन – कौन था ? उः– सभी थे और सो रहे थे।

प्रश्नः तुम्हारे साथ क्या हुआ था ? उः– एक दिन पहले मेरा मेरी सास से झगड़ा हुआ था कि तुम रोटी अच्छी नहीं बनाती । इस बात पर मेरी सास ने मुझे मारा था। सवेरे उठकर मै चौका बर्तन कर रही थी। मेरी सास ने डिब्बी में जो मिट्टी का तेल रखा था , मेरे सर पर उडेल दिया और माचिस से आग लगा दी। मेरी सांस ने बचाने के लिये कुछ नही किया उल्टा यह कहने लगी कि इसने खुद आग लगाई । जब मेरे सास ने मुझे आग लगाई, उस समय वहॉ और कोई नहीं था। आग लगाने के बाद घर और गॉव वाले बचाने आये थे। सुबह मुझे मेरी सास ने डरा धमका गलत बयान दिलवा दिया था। मेरी सास मुझे अक्सर मारा करती थी।

प्रश्नः तुम्हे और कुछ कहना है ? उः– नहीं"

22. Keeping in mind that the application Exhibit P-9 was moved by the father of the deceased mentioning that at the time of the first dying declaration, they were not present, therefore, he requested for a second dying declaration. On the basis of this application, the police requested the Naib Tahsildar to record a dying declaration. In the second dying declaration, a leading question

was asked as to under whose pressure the first dying declaration was given. Whereas the Executive Magistrate has exceeded his jurisdiction in asking leading question knowing fully well that a leading question is not called for.

23. Hira Bai P.W.4 is the mother of the deceased. As per her version her son Devi Singh and her mother (grand mother of the deceased) on receiving the information reached hospital at 10 AM. They were present with the injured Saroj at the hospital. The first dying declaration was recorded at 11 AM.

24. Chotay Ram P.W.5 is the maternal uncle of deceased Saroj Bai. He actually performed the marriage of Saroj Bai with accused Prahlad Singh because the Kalluram father of the deceased is not financial sound.

25. Chotay Ram P.W.5 has been innocently admitted that Rajshree Bai is the wife of Rudra Pratap Singh. Rudra Pratap Singh is the local member of Legislature. Rajshree Bai is the Chairman of Zila Panchayat. Raj Shri Bai came to the hospital and told them to lodge a report. This fact has also been admitted by the mother of the deceased. Hira Bai P.W.4 in her cross-examination. In para 22, she has stated that ladies of Mahila Mandal, Vidisha came to the hospital in a jeep, they asked her to accompany them to the police station and report against the father-in-law and mother-in-law because her daughter is almost dying. This indicates that after the first dying declaration, on the saying of the Mahila Mandal and the Chairman of Zila Panchayat, the parents of the deceased changed and moved an application Exhibit P-9.

26. The story then twisted to make the case of demand of dowry. Incident took place after 4- 5 years of the marriage of the deceased whereas as Hira Bai P.W.4 has stated that the marriage took place 5 years before the incident. She has also admitted that in comparison to the accused persons, they are very poor. The accused Guddi Bai and husband Prahlad Singh have landed property which is more than four times to that of the parents of the deceased. She has also admitted that they don't have any source of income, therefore, the marriage was performed by the maternal uncle of the deceased. Their financial condition was not good. It was known to accused Guddi Bai. Despite that she agreed to get her son married to Hira Bai's daughter.

27. This indicates that the accused appellant was financially more sound and she knew that the parents of the deceased were not capable of giving dowry. The story of demand of dowry, therefore, seems to be not true.

28. As regarding the 'first dying declaration' having given under some pressure, it can be very well seen that the brother Devi Singh, grand mother and mother Hira Bai were present at the hospital from 10 am, whereas, the first dying declaration was recorded at 11.14 AM.

29. In the first dying declaration, the deceased has stated that she went to Kitchen for preparing tea. She kept the kerosene lamp on the patia (a sort of country made rack by placing a flat wooden or stone on the wall at a certain height) which fell down and she was set on fire due to which she was burnt. At the time of dying declaration she was conscious, cooperative and oriented regarding time, place and person. Thumb impression was also taken after recording the statement. The statement was read over and explained the contents of the documents to the injured. The medical officer made an endorsement that the injured was in a fit condition to make the statement.

30. The second dying declaration was recorded after meeting with her father and maternal uncle which creates suspicion.

31. The first dying declaration is not suffering from any infirmity. At the other hand, the second dying declaration is suffering from infirmity and not corroborated by other evidence. Infirmity because it was not read over and explained to the deponent. There is no corroboration, because in the second dying declaration the deceased has stated that one day before the incident her mother-in-law had beaten her for not preparing roti properly. This could be the cause of pouring kerosene oil and set her on fire by the mother-in-law is not only improbable but also offends commonsense.

32. The Hon'ble Supreme Court in *Khushal Rao v. State of Bombay*, AIR 1958 SC 198, held that "it could not be laid down as an absolute rule of law or even as a rule of prudence which has ripened into a rule of law, that a dying declaration cannot form the sole basis of conviction unless it is corroborated." It has been held therein that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made.

33. In the present case, in order to test the reliability of a dying declaration, the Court has to keep in mind, the circumstances like the opportunity of the dying man for observation and that it has been made at the earliest opportunity and was not the result of tutoring by interested parties.

34. The earlier dying declaration was Exhibit P-4 recorded at 11.14 am

and the second dying declaration was Exhibit P-5 recorded at 7.30 pm. The possibilities could not be ruled out that there could be ample chance of tutoring by interested parties.

35. In the case in hand, there are ample discrepancies in the second dying declaration, therefore, the same cannot be relied on for sustaining the conviction of the appellant.

36. On the anvil of the discussion made above, the second dying declaration of the victim that the appellant had set her ablaze cannot be held to be truthful, coherent and consistent. That being so, we cannot rely on the second dying declaration without any corroboration. Therefore, we are of the opinion that the learned Trial Court erred in relying on the second dying declaration Exhibit P-5 and based its judgment and conviction.

37. Accordingly, we allow this appeal, set-aside the impugned judgment of conviction and order of sentence passed by the learned Trial Court. The appellant is acquitted from the charge under Section 302 of IPC. The appellant is on bail, her bail bond and surety stands discharged.

Appeal allowed.

I.L.R. [2015] M.P., 3063
CIVIL REVISION
Before Mr. Justice Rohit Arya
Civil Rev. No. 67/2014 (Gwalior) decided on 30 June, 2014

MANOJ KUSHWAH ...Applicant
Vs.
CHHOTELAL & ors. ...Non-applicants.

Suits Valuation Act (7 of 1887), Section 8 and Court Fees Act (7 of 1870), Section 7(iv)(c) - Valuation of Suit **- Plaintiff filed suit for declaration that sale-deed is void - Plaintiff not party to sale-deed - Suit valued on the basis of land revenue and not on the basis of consideration amount - Held - That the value for the purpose of jurisdiction of the suit shall be dependent upon the value to be determined for computation of court fees - Plaintiff is required to pay fix court fee - Trial Court has not committed any illegality in accepting the valuation done by plaintiff - Revision dismissed.**

(Paras 6, 8 to 10)

वाद मूल्यांकन अधिनियम (1887 का 7), धारा 8 एवं न्यायालय फीस अधिनियम (1870 का 7), धारा 7(iv)(सी) – *वाद का मूल्यांकन* – वादी ने विक्रय–विलेख को शून्य घोषित करने हेतु वाद प्रस्तुत किया – वादी विक्रय–विलेख का पक्षकार नहीं है – वाद का मूल्यांकन भू–राजस्व के आधार पर किया गया न कि प्रतिफल की राशि के आधार पर – अभिनिर्धारित – यह कि वाद के क्षेत्राधिकार के उद्देश्य के लिये मूल्य न्यायालय शुल्क की गणना के लिये निर्धारित किये जाने वाले मूल्य पर निर्भर करेगा – वादी द्वारा निश्चित न्याय शुल्क अदा करना अपेक्षित है – विचारण न्यायालय द्वारा वादी द्वारा किये गये मूल्यांकन को स्वीकृत करने में कोई गलती नहीं की गई है – पुनरीक्षण खारिज।

Cases referred :

AIR 2010 SC 2807, AIR 1958 SC 245.

Kamal Jain, for the applicant.

ORDER

ROHIT ARYA, J. :- By this revision petition under section 115 of CPC, the petitioner questions the legality and validity of the impugned order dated 07/05/2014 passed by IV Civil Judge, Class-II, Gwalior in civil suit No.71A/2013 by which petitioner/defendant No.1's application under Order VII Rule 11 C.P.C., has been dismissed.

2. Facts necessary for disposal of this revision petition in narrow compass are that defendant No.1 has filed an application under Order VII Rule 11 C.P.C., *inter alia* contending that though the plaintiff has filed a suit for declaration that the sale deed in question is *null* and *void* as against him, the suit has been valued on the basis of land revenue payable on the agricultural land which is the subject matter of the sale deed whereas the sale consideration in the sale deed is Rs.6.00 lacs. According to the defendant No.1, the suit ought to have been valued on the basis of sale consideration and accordingly, *ad valerom* Court fee was required to be paid.

3. Trial Court has found that the plaintiff is not a party to the sale deed dated 28/02/2006. Plaintiff has also not claimed the relief of possession as he is in possession over the suit land. Accordingly, plaintiff has sought a declaration that the sale deed be declared as *null* and *void* against him and, therefore, plaintiff is not required to affix the court fee on the basis of sale consideration shown in the sale deed. Trial Court has further found that the suit has been

properly valued under section 8 of the Suit Valuation Act, 1887 (hereinafter referred to as 'the Act'). Proper court-fee has been paid. Accordingly, dismissed the application filed by the defendant No.1.

4. Learned counsel for the petitioner submits that the trial Court has wrongly justified the court-fee paid by the plaintiff as well as valuation of the suit. The trial Court has committed an error having rejected the objection of the defendant No.1 in that behalf and, therefore, prayed for setting aside of the impugned order.

5. Heard counsel for the petitioner and the material on record has been perused.

6. As the plaintiff is not a party to the sale deed and the plaintiff has only claimed the relief of declaration that the sale deed is *null* and *void* as against him, therefore, the plaintiff is required to affix fixed court-fees for the aforesaid relief as held by Hon'ble Supreme Court in the case reported in AIR 2010 SC 2807, *Suhrid Singh @ Sardool Singh Vs. Randhir Singh & otrs:*

> "7. In this case, there is no prayer for cancellation of the sale deeds. The prayer is for a declaration that the deeds do not bind the "coparcenery" and for joint possession. The plaintiff in the suit was not the executant of the sale deeds. Therefore, the court-fee was computable under section 7(iv)(c) of the Act. The trial Court and the High Court were, therefore, not justified in holding that the effect of the prayer was to seek cancellation of the sale deeds or that, therefore, court-fee had to be paid on the sale consideration mentioned in the sale deeds."

7. Law as regards suit valuation under section 8 of the Act is well settled and the provision is quoted below:

> "8. Court fee value and jurisdiction value to be the same in certain suits. Where in suits other than those referred to in the Court Fees Act, 1870 (7 of 1870), section 7, paragraphs v, vi and ix, and paragraph x, clause (d), court-fees are payable *ad valorem* under the Court-Fees Act, 1870, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall

be the same."

8. Since the value for the purpose of jurisdiction of the suit shall be dependent upon the value to be determined for computation of court-fee, the trial Court has rightly found that the suit was properly valued by the plaintiff for the purpose of jurisdiction. For ready reference, the judgment of Hon'ble Apex Court reported in AIR 1958 SC 245m *S. Ram. Ar. S. Sp. Sathappa Chettiar Vs. S. Ram. Ar. Rm. Ramanathan Chettiar (para 15)* is referred to.

> "15.....There can be little doubt that the effect of the provisions of S.8 is to make the value for the purpose of jurisdiction dependent upon the value as determinable for computation of court-fees and that is natural enough. The computation of court-fees in suits falling under S.7(iv) of the Act depends upon the valuation that the plaintiff makes in respect of his claim. Once the plaintiff exercises his option and values his claim for the purpose of court-fees, that determines the value for jurisdiction. The value for court-fees and the value for jurisdiction must no doubt be the same in such cases; but it is the value for court-fees stated by the plaintiff that is of primary importance. It is from this value that the value for jurisdiction must be determined. The result is that it is the amount at which the plaintiff has valued the relief sought for the purposes of court-fees that determines the value for jurisdiction in the suit and not vice versa. Incidentally we may point out that according to the appellant it was really not necessary in the present case to mention Rs.15,00,000 as the valuation for the purposes of jurisdiction since on plaints filed on the Original Side of the Madras High Court prior to 1953 there was no need to make any jurisdictional valuation."

9. As such, in the opinion of this Court, the trial Court has not committed any illegality or jurisdictional error in the impugned order.

10. The revision petition sans merit and is accordingly dismissed *in limine*.

Petition dismissed.

I.L.R. [2015] M.P., 3067
CIVIL REVISION
Before Ms. Justice Vandana Kasrekar
Civil Rev. No. 230/2013 (Jabalpur) decided on 22 September, 2015

HAR PRASAD & ors. ...Applicants
Vs.
MANIRAM & ors. ...Non-applicants

Civil Procedure Code (5 of 1908), Order 9 Rule 9 & Order 17 Rule 3 - Restoration of Civil Suit - Maintainability **- Application under Order 17 Rule 1 C.P.C. was dismissed and the suit was dismissed under Order 17 Rule 3 although the Evidence was not recorded and Plaintiff and his witnesses were absent - As suit was dismissed under Rule 17 Rule 3, the only remedy lies to the applicants to file an appeal against the said order - Although the Trial Court had no power to proceed under Order 17 Rule 3 and acted erroneously in doing so, but application under Order 9 Rule 9 was not maintainable and only remedy available is to file an appeal - Revision dismissed. (Paras 10 to 17)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 9 व आदेश 17 नियम 3 – सिविल वाद का पुनःस्थापन – पोषणीयता – सि.प्र.सं. के आदेश 17 नियम 1 के अंतर्गत आवेदन निरस्त किया गया तथा आदेश 17 नियम 3 के अंतर्गत वाद निरस्त किया गया यद्यपि साक्ष्य अभिलेखित नहीं किया गया तथा वादी और उसके साक्षी अनुपस्थित थे – चूंकि आदेश 17 नियम 3 के अंतर्गत वाद निरस्त किया गया तो आवेदकों के समक्ष उक्त आदेश के विरूद्ध अपील प्रस्तुत करने का एकमात्र उपचार उपलब्ध है – यद्यपि विचारण न्यायालय को आदेश 17 नियम 3 के अंतर्गत कार्यवाही करने की शक्ति प्राप्त नहीं थी और ऐसा करने में उसने गलती की है, परंतु आदेश 9 नियम 9 के अंतर्गत आवेदन पोषणीय नहीं था तथा अपील प्रस्तुत करना ही एकमात्र उपचार उपलब्ध है – पुनरीक्षण खारिज।

Cases referred :

1977 JLJ 147, 1962 MPLJ 325, 1964 MPLJ 919.

Vinod Mishra, for the applicants.
K.S. Jha, for the non-applicants.

ORDER

Ms. VANDANA KASREKAR, J. :- The petitioners have filed this Civil Revision challenging the order dated 25.04.2013 passed by Additional District Judge, Amarpatan, District Satna in Civil Appeal No. 17/2012 thereby affirming the order dated 10.05.2012 passed by Civil Judge Class-II, Amarpatan, District Satna in MJC No. 01/2012.

2. Brief facts of the case are that, the applicants had filed a suit for permanent injunction against the respondents restraining the respondents/ defendants from raising any construction over the land which was in front of his shopping complex admeasuring to 12x15 feet.

3. On 09.07.2009 the case was fixed for plaintiffs' evidence and on that date neither the plaintiffs nor their witnesses were present and an application was filed under Order 17 Rule 1 of the C.P.C. for adjournment.

4. The trial Court vide its order dated 09.07.2009 has rejected the said application and while rejecting the said application it was stated by the trial Court that the said order was passed by exercising the powers under Order 17 Rule 3 of the C.P.C.

5. The applicants thereafter, filed an application under Order 9 Rule 9 of the C.P.C for setting aside the order. It has been stated in the application that the Court ought to have exercised its power as prescribed under Order 17 Rule 2 of the C.P.C.

6. The trial Court vide order dated 10.05.2012 has dismissed the application filed by the applicants under Order 9 Rule 9 of the C.P.C as not maintainable and the trial Court has observed that the applicants should have filed an appeal against the said order. Being aggrieved by the order dated 10.05.2012 the applicants have preferred an appeal, which was dismissed by the Appellate Court vide order dated 25.04.2013. The appellate Court has affirmed the order passed by the Trial Court and submits that the application under Order 9 Rule 9 of the C.P.C was not maintainable.

7. The learned counsel for the applicants argues that the trial Court has acted illegally or with material irregularity in rejecting the application for setting aside the order dated 09.07.2009. He submits that the trial Court should have passed an order under Order 17 Rule 2 of the C.P.C instead under Order 17 Rule 3 of the C.P.C. He further argues that the Courts below have adopted

hyper-technical approach in rejecting the application filed by the applicants and merely because of wrong provision of law was mentioned in the application the same should not have been rejected and an opportunity to correct the same should have extended to him. He relied on the Full Bench Judgment passed by this Court in the case of *Ram Rao and Others Vs. Shantibai and Others,* 1977 JLJ 147.

8. On the other hand, the learned counsel appearing for the respondents supports the order passed by the trial Court as well as the Appellate Court. He argues that the Appellate Court as well as the Revisional Court have not committed any error in rejecting the application. He further submits that the Appellate Court can decide the correctness of the order only with reference to that provision and the appellate Court can not treat the dismissal under Order 17 Rule 2 of the C.P.C without specific provision has been mentioned by the trial Court itself. For the said preposition he relies on the two judgments passed by this High Court in the case of *Govardhan Badrilal Mahajan and Another Vs. Ganesh Balkrishna Deshmukh,* 1962 MPLJ 325 and *Maruti Damaji Ashtinkar Vs. Gangadhar Rao Kher,* 1964 MPLJ 919.

9. I have heard learned counsel for the parties and perused the record. Order 17 Rules 2 and 3 is reads as under:-

> **2. Procedure if parties fail to appear on day fixed-** Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it think fit.
>
> [Explanation-Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion proceed with the case as if such party were present.]
>
> **3. Court may proceed notwithstanding either party fails to produce evidence, etc.-** Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time

has been allowed, [the Court may, notwithstanding such default-

(a) if the parties are present, proceed to decide the suit forthwith, or

(b) if the parties are, or any of them is, absent, proceed under rule 2.

10. Order 17 Rule 2 provides for procedure if the parties fail to appear on the date which is faxed (sic:fixed) by the Court and as per this rule where, on the date to which the hearing of the suit is adjourned, the parties or any of them fail to appear, then the Court may proceed to disposed of the suit in one of the modes directed in that behalf by order IX.

11. Rules 3 of the said order provides the procedure when the parties to a suit fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary for the purpose of the suit, then the trial Court can proceed to decide the suit forthwith or to any party proceed under rule 2.

12. From perusal of the order it is clear that the trial Court has passed the order by dismissing the suit under Order 17 Rule 3 of the C.P.C as the plaintiffs' have failed to produced the evidence. As the suit was dismissed under order 17 Rule 3 of the C.P.C the only remedy lies to the applicants to file an appeal against the said order.

13. The Full Bench judgment relied on by learned counsel for the applicants is not applicable in the present case, as the judgment in the case of *Ram Rao and Others* (supra) has been passed under Order 17 Rule 2 of the C.P.C.

14. While in the present case the trial Court has passed the order under Order 17 Rule 3 of the C.P.C and, therefore, as per the judgment relied on by the learned counsel for the respondents in the case of *Govardhan Badrilal Mahajan and Another* (supra) and *Maruti Damaji Ashtinkar* (supra), it has been held that when an order is passed under the specific provision of law then the Appellate and Revisional Court can decide its correctness only with reference to this provisions.

15. In the light of the said judgment, as in the present case the trial Court has dismissed the suit by exercising the powers under Order 17 Rule 3 of the C.P.C and, therefore, the said order cannot be treated as an order under Order 17 Rule

2 of the C.P.C as held by this Court in the case of *Govardhan Badrilal Mahajan* (supra) which is read as under:-

> **"Civil Procedure Code (1908), O. 17, Rr. 2, 3 and O. 9, Rr. 8, 9-** Order passed under specific provision of law-Appellate or revisional Court can decide its correctness only with reference to that provision-Dismissal of suit for default-Decree drawn up under Order 17, rule 3 even though provisions of Order 17, rule 2 were more appropriate-Appellate Court cannot treat dismissal as one under Order 9, rule 8 read with Order 17, rule 2 and set it aside under Order 9, rule 9."

16. The judgment relied by the respondents in the case of the *Maruti Damaji Ashtinkar* (supra) in paragraph 5 is read as under:-

> "5. When the trial Judge expressly passed an order under Order 17 Rule 3 dismissing the suit although it had no power to proceed thereunder and acted erroneously in doing so, the plaintiff's only remedy was no doubt of filing the appeal which he did in the Court of the Additional District Judge, Jabalpur....."

17. In the said judgment the Single Judge of this Court has held that the trial Court has expressly passed an order under Order 17 Rule 3 of the C.P.C thereby, dismissing the suit. Although, it has no power to proceed thereunder and acted erroneously in doing so. The only remedy available to the plaintiffs is to file an appeal. Thus in the light of the judgment of trial Court as well as the Appellate Court have not committed any error in dismissing the application filed by the applicants on the ground that the same is not maintainable and only remedy lies to the applicants to file an appeal against the said order. Thus, no illegality or irregularity has been committed by the trial Court as well as the Appellate Court in passing the said order.

18. Thus the revision fails and is hereby dismissed without any order as to costs.

Revision dismissed.

I.L.R. [2015] M.P., 3072
CRIMINAL REVISION
Before Mr. Justice C.V. Sirpurkar
Cr. Rev. No. 1688/2015 (Jabalpur) decided on 1 October, 2015

MAMTA RAI (SMT.) ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Penal Code (45 of 1860), Section 306 - Abetment of Suicide - **Applicant after the death of her husband was having illicit relations with deceased - She financed the deceased for opening a medical store - Later on, she started pressurizing the deceased to return the money, she had invested in the medical store - Held - Deceased was ultrasensitive to the situation and chose to end his life - Commission of suicide by deceased was sheer exercise in escapism for which the applicant cannot be held to be legally liable because by no stretch of imagination, it can be said that the applicant had succeeded in creating such a situation for the deceased that he was left with no option but to commit suicide - Charges set aside - Applicant discharged. (Para 21)**

दण्ड संहिता (1860 का 45), धारा 306 – आत्महत्या का दुष्प्रेरण – प्रार्थिनी के अपने पति की मृत्यु के पश्चात् मृतक के साथ अवैध संबंध थे – उसने मृतक को मेडिकल स्टोर खोलने हेतु आर्थिक सहायता दी – बाद में, वह रकम वापस करने हेतु मृतक पर दबाव डालने लगी जो उसने मेडिकल स्टोर में निवेश की थी – अभिनिर्धारित – मृतक इस परिस्थिति के प्रति अतिसंवेदनशील था तथा उसने अपने जीवन का अंत करना चुना – मृतक द्वारा आत्महत्या करना सरासर पलायन का कदम था जिसके लिए प्रार्थिनी को कानूनी तौर पर जिम्मेदार नहीं ठहराया जा सकता क्योंकि किसी भी तरह से यह कल्पना नहीं की जा सकती तथा यह कहा जाये कि प्रार्थिनी मृतक के लिए ऐसी परिस्थिति उत्पन्न करने में सफल रही कि उसके पास आत्महत्या कारित करने के अलावा कोई विकल्प शेष नहीं था – आरोप अपास्त – प्रार्थिनी आरोपमुक्त।

Cases referred :

(2001) 9 SCC 618, 2010 Cr.L.J. 2110, (2009) 3 SCC 699, 2005(2) JLJ 224, 1995 Cr.L.J. 893.

Manish Dutt with *Bhupendra Kaurav*, for the applicant.
Divesh Jain, G.A. for the respondent/State.

ORDER

C.V. SIRPURKAR, J. :- This criminal revision filed under Section 397 read with section 401 of the Cr.P.C. on behalf of the applicant/accused Mamta Rai, is directed against the order dated 28.05.2015 passed by the Court of Sessions Judge, Chhattarpur, in S.T. No.94/2015, whereby learned trial Court had framed a charge for the offence punishable under Section 306 of the I.P.C. against the applicant/accused.

2. The case of the prosecution before the learned trial Court may briefly be summarized as hereunder: Applicant Mamta Rai is a widow in her early thirties, with two children. Her husband Kailash Chandra was a liquor contractor and died about 5 years ago in an accident. She lived with her children in quarter No.220 of Sun City Colony, Chhattarpur. Deceased Ravindra Yadav was also married and had a daughter. He had illicit relations with applicant Mamta Rai and was living with her for past two years. He lived-in with applicant Mamta Rai in quarter no. 220 of Sun City Colony, Chhattarpur. Applicant Mamta Rai had financed the deceased for opening a medical store in the name and style of Yadav Medical Store at Chhattarpur. Lately, she had started to pressurize the deceased to return the money, she had invested in the medical store. As a result, deceased felt trapped and was under severe mental tension.

3. At around 11.00 pm on 15.04.2014, applicant Mamta Rai was asleep in her home along with her children. Deceased Ravindra Yadav entered his room in her house. She heard something falling. She got up and found that the room of deceased Ravindra Yadav was bolted from inside. She peered from a slit and saw that deceased Ravindra Yadav was hanging by neck from the ceiling fan by a scarf (Dupatta). She cried and called Santosh and his wife. They pushed the door open and saw deceased Ravindra hanging from the fan; whereon, they ran away from the spot. Thereafter, she called Ajay Pal, who was a tutor of her children, to the spot. Thereafter, she cut the scarf (Dupatta) by which deceased was hanging from the ceiling fan with a sickle and brought the deceased Ravindra down. Ajay Pal asked her to take the deceased Ravindra to the hospital. Thereafter, she lodged marg intimation at around 11.30 pm the same night, in the police station.

4. After investigation, the police filed charge-sheet against the applicant Mamta Rai under Section 306 of the I.P.C. After hearing the applicant, learned

Session Judge framed charge against her as aforesaid.

5. Inviting attention of the Court to various authorities, it has been argued on behalf of the applicant that even if all allegation made against the applicant are taken at their face value, her act and conduct would not fall under the ambit of abetment of suicide.

6. Learned Panel Lawyer for the respondent State on the other hand, has support (sic:supported) the impugned order mainly on the ground that the applicant was pressurizing the deceased to return her money; therefore, the deceased was under severe mental stress. The applicant also had illicit live-in kind of relationship with the deceased, which added to his stress. It has further been submitted that the deceased had absconded for about a year after the incident.

7. The Court shall first consider whether there is sufficient material on record to proceed against the applicant Mamta?

8. A perusal of the case diary reveals that deceased left no suicide note. As such, the prosecution case is based almost entirely upon the marg intimation lodged by the accused/applicant, statements of witnesses, Naksha Panchnama Lash and postmortem report. The post mortem reveals that the deceased had ligature marks over the neck above thyroid cartilage. The doctor conducting the postmortem examination, opined that the ligature mark was ante-mortem in nature and the deceased died due to asphyxia caused by hanging. Thus, it is not disputed that the deceased committed suicide by hanging from the ceiling fan by a scarf (Dupatta).

9. During investigation, police recorded the statements of Pratibha Soni and Paritosh Soni, who were neighbours and who were informed by applicant Mamta Rai about the incident on telephone, Pratap Singh Yadav, father of the deceased, Anjali Yadav, wife of the deceased, Ajay Pal, tutor of children of the applicant, who was first to reach the spot after being called by the applicant Mamta Rai and Om Yadav and Sandhya Yadav, who were salesman in the medical shop run by the deceased. The prosecution story as may to culled out from aforesaid statements is that the applicant was a 32 years widow, having two children. Her husband Kailash Chandra Rai was a liquor contractor, who died in a motor accident about 5 years ago. About two years ago, the applicant had developed intimacy with deceased and was in a live-in relationship with him. The deceased was also married and had a daughter. His relations with his

wife were strained due to his illicit relations with the applicant.

10. Applicant had financed the medical shop open by deceased in the name and style of Yadav Medical Store. The applicant was pressurizing the deceased to return her money, which caused severe mental stress to the deceased and he felt trapped and helpless. Consequently, he committed suicide in the house of the applicant Mamta by hanging himself by a scarf from the ceiling fan.

11. Now the question that arises for consideration is that whether the conduct of the applicant as brought-forth in the statement of witnesses, constitutes abetment of suicide?

12. Section 306 of the Indian Penal Code reads as follows:

> *"306. Abetment of suicide.- If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extent to ten years, and shall also be liable to fine."*

13. Term abetment has been defined under section 107 of the Indian Penal Code which is as hereunder:

> *"107. Abetment of a thing.- A person abets the doing of a thing, who-*
>
> ***First**-Instigates any person to do that thing; or*
>
> ***Secondly**- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or*
>
> ***Thirdly**-Intentionally aides, by any act or illegal omission, the doing of that thing."*

14. It has been held by the apex Court in the case of *Ramesh Kumar Vs. State of Chattisgarh*, (2001) 9 SCC 618 that:

> *"To satisfy the requirement of instigation though it it not necessary that actual words must be used to that effect or what constitutes instigation must necessarily and*

specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. The present one is not a case where the accused had by his acts or omission or by a continued course of conduct created such circumstances that the deceased was left with no other option except to commit suicide in which case an instigation may have been inferred (Emphasis supplied)

15. The Supreme Court has observed in the case of *Gangula Mohan Reddy Vs. State of Andhra Pradesh,* 2010 Cr.L.J. 2110 (Supreme Court) that:

"20. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.

21. The intention of the Legislature and the ratio of the cases decided by this Court is clear that in order to convict a person under Section 306, IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he committed suicide".....

(Emphasis supplied)

16. The Supreme Court further observed in the case of *Ramesh Kumar Vs. State of Chhattisgarh,* (2001) 9 SCC 618 that:

"The present one is not a case where the accused had by his acts or omissions or by a continued course of conduct created such circumstances that the deceased was left with no option accept to commit suicide in which case an instigation may have been inferred."

17. Likewise in the case of *Milind Bhagwanrao Godse Vs. State of Maharashtra and another,* (2009) 3 SCC 699, it was observed that:

"The circumstances enumerated in the suicide note and oral evidence show that accused created circumstances which left no option for the wife but to take the extreme step of putting an end to her life."

18. On the same point, the High Court of Madhya Pradesh in the case of *Aman Singh Vs. State of M.P.*, 2005 (2) JLJ 224 observed as hereunder:

More so, in this case the accused has not by his acts or omission or by a continued course of conduct created such circumstances that the deceased was left with no other option except to commit suicide, in which an instigation may have been inferred.

19. It is pertinent to note that a co-ordinate Bench of this Court in the case of *Ved Prakash Vs. State of M.P.*, 1995 Cr.L.J. 893, with regard to suicide committed following attempts by the accused to recover his loan held as hereunder:

"The accused persons were charge-sheeted under section 306 read with section 34 of Indian Penal Code on the basis of a suicide note left by the deceased in which he had blamed all the five accused and held them responsible for his (suicidal) death. However, it was found that none of the accused had goaded or urged forward, provoked, incited or urged or encouraged the deccased to commit suicide. They merely goaded him to refund repay the amount of loan advanced by them to him. They never intended that the deceased should commit suicide. Moreover, the deceased could have lodged a report against accused who had allegedly tortured him and threatened him to kill. May be, as it sometimes happens, the police officials might have declined to record the report. In that case, he could have moved higher officials. But, instead of taking this legal and legitimate action, the deceased adopted an escapist course of committing suicide in order to take revenge from his alleged tormentors. No case for alleged commission of the was made out against the accused persons. The prosecution of the accused would

be nothing but abuse of process of law. The charge-sheet filed against accused Quashed under section 482 of Criminal Procedure Code."

20. In the case at hand, it has been established prima facie that the applicant/accused had live-in relationship with the deceased and had financed his medical shop. She was demanding back the money invested by her in the medical shop which caused severe mental stress to the deceased, as a result of which, he committed suicide by hanging. However, it is clear that the applicant had no intention of instigating or goading deceased to commit suicide, for the simple reason that with the suicide of deceased, her chances of recovering money invested in the shop, practically vanished. She could not conceivably foreseen that a demand for money as also her relationship with the deceased would lead to suicide by deceased.

21. The deceased was a young businessman. His relationship with his wife was strained. He had a daughter from his wife. On the other hand, applicant Mamta is a widow with two young children to raise. She had invested money in the medical shop run by the deceased. The nature of the financial relationship between the two is not clear from the statements of the witnesses. The police has not collected any document which would through light upon the nature of financial arrangement between the deceased and the applicant. In these circumstances, the applicant was perfectly justified in demanding her money back, from the deceased. In the situation the deceased found himself in, he had several options before him. One of them was to have faced any legal action that could potentially have been instituted by the applicant; however, he was ultrasensitive to the situation and chose to end his life. In aforesaid circumstances, commission of suicide by the deceased was sheer exercise in escapism on the part of the deceased, for which the applicant cannot be held to be legally liable because by no stretch of imagination, can it be said that the applicant has succeeded in creating such a situation for the deceased that he was left with no option but to commit suicide. The applicant had not reason to conceive the nexus between her demand for money from the deceased, which she had advanced and even her illicit relationship with the deceased; and the result thereof, which eventually ensued.

22. The fact that the applicant absconded for a period of about one year subsequent to the incident has no relevance, as she was the one, who lodged marg intimation within a hour and half of the incident.

23. Thus, there is no sufficient ground to proceed against the applicant Mamta Rai under Section 306 of the I.P.C. and the charge framed against her is not sustainable in the eyes of the law. As such, she is entitled to be discharged in respect of aforesaid offence.

24. In the result, this criminal revision succeeds. Applicant Mamta Rai is discharged in respect of the offence punishable under Section 306 of the I.P.C. She shall be set at liberty forthwith if she continues to be in custody and is not required in connection with any other case.

Certified copy as per rules.

Revision succeeds.

I.L.R. [2015] M.P., 3079
CRIMINAL REVISION

Before Mr. Justice Rajendra Mahajan

Cr. Rev. No. 1621/2015 (Jabalpur) decided on 15 October, 2015

ROHIT CHADHA ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8(c) & 21-B - Rexcof Cough Syrup* - As per notification dated 14.11.1985, a preparation containing not more than 100 mgs of Codeine Phosphate per dosage unit with the concentration of not more than 2.5% in undivided preparation is exempted from application of Section 21 of the Act, 1985 - As per report of Laboratory, each 5 ml Syrup containing 9.825 mg. Codeine Phosphate which is permissible - Merely because Syrup bottles in bulk were seized would not make it punishable in absence of any express penal provision - Applicant discharged.**

(Paras 8 to 11)

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराऐं 8(सी) व 21-बी – रैक्सकॉफ कफ सीरप – अधिसूचना दिनांक 14.11.1985 के अनुसार ऐसी तैयार दवा जिसमें प्रति खुराक 100 मि.ग्रा. से अधिक कोडीन फॉस्फेट नहीं है, के साथ अविभाजित तैयार दवा जिसमें 2.5% से अधिक सांद्रता को 1985 के अधिनियम की धारा 21 के अनुप्रयोग से छूट दी गयी है – प्रयोगशाला के प्रतिवेदन के अनुसार प्रति 5 मि.ग्रा. सीरप जिसमें 9.825 मि.ग्रा. कोडीन फॉस्फेट

मौजूद है जो कि अनुज्ञेय है – केवल इसलिये कि सीरप की बोतलें बहुलता में जब्त की गयी थी किसी अभिव्यक्त दंड के उपबंध की अनुपस्थिति में उसे दण्डित नहीं किया जा सकता – आवेदक उन्मोचित।

Cases referred :

1996 Cr.L.J. 3329 (P&H), 1997 Cr.L.J. 3104 (P&H), 1998 Cr.L.J. 1460 (P&H).

Manish Datt with *Chetan Jaggi,* for the applicant.
A.N. Gupta, P.L. for the non-applicant/State.

ORDER

RAJENDRA MAHAJAN, J. :- The applicant has preferred this criminal revision under Section 397 read with 401 of the Cr.P.C. feeling dissatisfied and aggrieved by the order dated 19.05.2015 passed by the Special Judge, Rewa under the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act'), in Special Case No.3/15, whereby the learned trial judge has framed the charges against the applicant under Sections 8(C) read with 21(B) of the Act, along with other co-accused persons.

2. The facts that are relevant and necessary for adjudication of this revision are given below:-

(2.1) On 15.11.2014, K.L. Verma, A.S.I. of the Police Station Churahata, district Rewa got a source information that Rohit Chadha, who is the applicant herein, and Amar Gupta have been illegally transporting in bulk quantity the Rexcof Cough Syrup (for short 'the syrup'), which is used by the drug addicts for intoxication as one of the ingredients of syrup is codeine phosphate a salt of codeine which is the derivative of opium, from Satna to Rewa via Rampur route in a Wagon-R car bearing registration No.MP-17-CA-1949. With the help of police force, he intercepted the car and found the applicant and Amar Gupta carrying 480 bottles of syrup, each bottle contains 100 m.l. syrup. They could not produce any licence or permit for transporting the syrup in the huge quantity. Thereupon, he seized all the bottles of the syrup along

with the car and lodged an F.I.R., on the basis of which a case is registered against them under Sections 8, 21 and 22 of the Act at Crime No.408/2014.

(2.2) On being interrogated by the police, the duo provided inputs as to purchase, transportation and sale of the syrup. On the basis of the inputs, the police found that there is a big racket for sale of the syrup to the drug addicts on premium and in the racket Kuldeep, Pankaj, Guddu @ Raj Kumar, Dinesh, Ratnesh, Rajmani, Jaheed Khan, Sanjeev and Vishal @ Kailash are involved. On various dates, the police seized the syrup from the possession of some of the aforesaid persons in huge quantity.

(2.3) Upon completion of investigation, the police charge-sheeted the applicant and the aforestated persons for the offences punishable under Sections 8, 21 and 22 of the Act.

(2.4) Having heard the learned counsel for the parties, and having perused the material on record, the learned trial judge framed the charges against the applicant and other co-accused persons under Section 8(C) read with 21(B) of the Act. Hence, this revision by the applicant.

3. The learned counsel for the applicant has submitted that the police had sent some bottles of the seized syrup as samples for chemical analysis to the ITL Labs Pvt. Ltd., Indore, which is recognized by the Government of Madhya Pradesh. According to the report of aforesaid laboratory, each bottle contains 100 ml. syrup and each 5 ml. syrup contains 9.825 mg. codeine phosphate, whereas a label pasted on each of the bottles claims 10 mgs. Having referred to the circular letters Nos. X-11029/27-D, dated 26.10.2005 and X-11029/09- D, dated 01.03.2009 issued by the Drugs Controller General India to all the State Drugs Controllers and notifications No. G.S.R. 588 (E), dated 30.08.2013, the learned counsel for the applicant submitted that the syrup is not a manufactured drug as per Section 2(11) of the Act as the concentration of codeine phosphate in it is mere 0.20% as compare to

permissible limit 2.5%. Hence, the syrup comes under the Schedule H-1 of the Drugs and Cosmetics Rule 1940. Consequently, the acts of purchase, stocking, transportation and sale of the syrup do not attract the provisions of the Act and the Rules 1985 made thereunder. He further submitted that the syrup is used in therapeutic practice for the treatment of cough. Therefore, no offence is made out against the applicant under Section 8(C) read with 21(B) of the Act. Consequently, the learned trial judge has committed gross errors of law and facts by framing the aforesaid charges against the applicant. Therefore, the impugned order of framing of charge insofar as it relates to the applicant deserves to be quashed. In support of the submissions, he placed reliance upon the decisions rendered in the matters of *Amrik Singh Vs. State of Punjab* [1996 Cr.L.J. 3329 (P&H High Court)] *Ashok Kumar Vs. Union of India*, (date of order 15.10.2014 passed in Criminal Appeal No.2976/2014 by Hon'ble Shri Justice Ajay Lamba of the Allahabad High Court) and *Deep Kumar Vs. State of Punjab* [1997 Cr.L.J. 3104 (P&H High Court)].

4. Per contra, learned Panel Lawyer for the respondent/State has supported the impugned order of framing of the charge. He argued that the syrup is widely consumed by the drug addicts for getting intoxication and the applicant is found in possession of huge quantity of syrup for which he has not offered any proper explanation let alone valid licence or permit, meaning thereby the seized quantity of syrup was meant for sale to the drug addicts on premium and not for therapeutic benefits. Hence, the learned judge has rightly framed the charges against the applicant.

5. A seminal question that arises for consideration is whether the syrup comes under the category of the manufactured drugs, as defined and made punishable under the Act?

6. Needless to say that no charge can be framed under the Act if the syrup does not fall within the sweep of the manufactured drug as defined in Section 2(11) of the Act or is exempted from the penal provisions of the Act by framing rules or issuing notifications or orders by the concerned Authority.

7. Section 21 of the Act provides for punishment for contravention in relation to the manufactured drugs and preparations. The term manufactured drug has been defined in Section 2(11) of the Act. It means inter alia any narcotic substances or preparation which the Central Government may declare by notification in the official gazette to be a manufactured drug.

8. In exercise of powers conferred by clause (xi) of sub-clause (b) of Section 2 of the Act, the Central Government has issued Notification No.S.O.826(E), dated 14th November, 1985, which declares certain narcotics substances to be manufactured drugs. The relevant Entry No.35 of the notification reads as follows:-

> "Methyl morphine (commonly known as 'Codeine') and Ethyl morphine and their salts (including Dionine), all dilutions and preparations except those which are compounded with one or more other ingredients and containing not more than 100 milligrams of the drug per dosage unit and with a concentration of not more than 2.5 percent in undivided preparations and which have been established in therapeutic practice."

9. From the perusal of the aforesaid entry, it is clear that a preparation containing not more than 100 mgs. of codeine phosphate per dosage unit with the concentration of not more than 2.5% in undivided preparations and which have been established in therapeutic practice is exempted from the application of Section 21 of the Act.

10. According to the aforestated report of the laboratory, each 5 ml. syrup contains 9.825 mg. codeine phosphate, which is permissible in view of aforesaid entry of the notification. Thus, it is held that the syrup is not a manufactured drug.

11. The learned panel lawyer has justified the prosecution of the applicant on the ground that he had been found in possession of huge quantity of the syrup for which he has not offered any convincing explanation, meaning thereby he wanted to sell the syrup on premium to the drug addicts as they use it for intoxication, whereas the syrup is meant for allopathic treatment of cough. This argument is not tenable for want of any express penal provision in the Act which prescribes the possession of the syrup beyond certain quantity is an offence. This view of mine is fortified by the observations made in the matters of *Amrik Singh Vs. State of Punjab* (Supra) and *Rajiv Kumar Vs. State of Punjab and another* [1998 Cr.L.J. 1460 P&H High Court].

12. It is pertinent to mention here that in Criminal Revision No.200/2015 *Shiv Kumar Gupta Vs. State of M.P.*, decided by the order dated 16.02.2015, the applicant has been charged under Section 8(B) read with 21 of the Act on the ground that he and his associates were found in possession

of 32 bottles of Cosome LCD Syrup and 38 bottles of Codex Syrup, which are cough syrups. In this case, Hon'ble Justice C.V. Sirpurkar has discharged the applicant of the aforesaid charge on the ground that 5 ml. dosage of the syrup contains 10 mg. codeine phosphate which is less than permissible limit of 2.5%. Hence, the aforesaid seized syrups are not manufactured drugs as defined under the Act. The view taken by his Lordship further strengthens the view which I have taken in the present case.

13. In the aforesaid premises, even if all the allegations made against the applicant in the charge-sheet are taken to be true on their face value despite that no charges under Section 8 read with 21 of the act is prima facie made out against the applicant. Consequently, this revision is allowed and impugned order of framing of charge insofar as it relates to the applicant is quashed and he is discharged of the charges under Sections 8(C) read with 21(B) of the Act.

14. A copy of this order be sent to the concerned area Drug Inspector with a direction to examine whether the applicant has contravened any provisions of the Drugs and Cosmetics Act, 1940 or the rules framed thereunder if so then, he is expected to initiate penal action against the applicant in accordance with law. He is further directed to submit the report in this court within three months from the date of receipt of this order.

15. Accordingly, this revision is finally disposed of.

Revision disposed of.

I.L.R. [2015] M.P., 3084
CRIMINAL REVISION
Before Mr. Justice Subhash Kakade
Cr. Rev. No. 1237/2015 (Jabalpur) decided on 27 October, 2015

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

Criminal Procedure Code, 1973 (2 of 1974), Section 311 - Recall of witness **- Accused filed application for recalling some witnesses for further cross-examination as applicant had not cross-examined them on some points - Held - Object underlying 311 Cr.P.C. is that there may not be failure of justice on account of mistake of either party - The determinative factor is whether it is essential to just decision of the**

case - Grant of fairest opportunity to accused to prove his innocence is the object of every fair trial - Discovery of truth is the essential purpose of any trial - Merely because mistake was committed, should not result in the accused suffering a penalty totally disproportionate to the gravity of error committed by his lawyer - Application for recall of witnesses allowed.
(Paras 8 to 15)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 – साक्षी को वापस बुलाया जाना – अभियुक्त ने कुछ साक्षियों के अतिरिक्त प्रतिपरीक्षण हेतु उन्हें वापस बुलाने के लिए आवेदन प्रस्तुत किया क्योंकि आवेदक ने कुछ बिंदुओं पर उनका प्रतिपरीक्षण नहीं किया था – अभिनिर्धारित – दं.प्र.सं. 311 का अंतर्निहित उद्देश्य यह है कि किसी भी पक्ष की भूल के कारण न्याय विफल नहीं होना चाहिये – निर्धारक कारक यह है कि क्या यह प्रकरण के उचित निर्णय के लिए आवश्यक है – अभियुक्त को अपनी निर्दोषिता सिद्ध करने के लिए उचित अवसर प्रदान करना प्रत्येक निष्पक्ष विचारण का उद्देश्य है – किसी भी विचारण का मुख्य उद्देश्य सत्य की खोज है – केवल इसलिये कि गलती कारित की गई, इसके परिणामस्वरूप अभियुक्त को अधिवक्ता द्वारा कारित त्रुटि की गंभीरता से पूर्ण रूप से अननुपातिक दंड नहीं दिया जायेगा – साक्षी को वापस बुलाने के लिए दिया गया आवेदन मंजूर।

Cases referred :

(2008) 15 SCC 652, (2000) 10 SCC 430, 1991 Supp.(1) 271, 2012(3) SCALE 550.

Nitin Shukla, for the applicant.
R.N. Yadav, P.L. for the non-applicant/State.

ORDER

SUBHASH KAKADE, J. :- Being aggrieved by impugned order dated 13.05.2015 passed by the learned First Additional Sessions Judges, Waraseoni District Balaghat in Case No.69/12 (State of M.P. Vs Jaidev), the accused/ petitioner has filed this petition under section 397/401 of the Code of Criminal Procedure,1973 here-in- after in short "the Code".

2. Learned trial Court by the impugned order rejected the application dated 13.05.2015 filed by the applicant under Section 311 of the Code for recalling the witnesses Rasheed Quereshi (PW/9), Piyush Goutam (PW/15), Manoj Kureel (PW/17) and A.K. Pouranik (PW/19) for their cross examination.

3. A case for the offence punishable under Section 420, 468, & 471 of IPC has been registered against the applicant and charge-sheet has also been filed in the Court of competent jurisdiction. During trial statement of these four witnesses were recorded, however, as the counsel for the applicant had not cross-examined on these above four witnesses on some point, therefore, an application for recalling them for further cross-examination was filed, which was rejected by learned trial Court, hence, this revision.

4. Shri Nitin Shukla, learned counsel for the applicants submitted that the order of rejecting application for recalling of witnesses for further cross examination amounts to denial of fair trial and will cause irreparable loss to the applicant. The recalling of these witnesses is just, reasonable and necessary to bring the entire facts and truth before the court so that applicant can get fair justice.

5. On the other hand, Shri R.N. Yadav, learned Panel Lawyer for the respondent/State submitted that the learned trial Court has rightly rejected the application for cross-examination of above four prosecution witnesses, therefore, revision petition deserves to be dismissed.

6. I have gone through the submissions made by learned counsel for the parties and also perused the impugned order and the material available on record.

7. Before dealing with merits, demerits of this revision petition, it would be appropriate to state the nature and extent of the power vested in the Courts under Section 311 Cr.P.C. to recall witnesses. The Apex Court in case of *Hanuman Ram vs. The State of Rajasthan and another* (2008) 15 SCC 652 held that the object underlying Section 311 was to prevent failure of justice on account of a mistake of either party to bring on record valuable evidence or leaving an ambiguity in the statements of the witnesses. The Apex Court observed:

> "7....'26...This is a supplementary provision enabling, and in certain circumstances imposing on the Court, the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine

such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts."

8. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquires and trials under the Code and empowers the Courts to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 of the Code the significant expression that occurs is at any stage of inquiry or trial or other proceeding under this Code. It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."

9. In this respect, it will be worthwhile to deal with some of the importance earlier decisions of the Supreme Court where the legal principles related to Section 311 of the Code have been dealt with and the principles of law laid down therein. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed by the Supreme Court in *Hoffman Andreas v. Inspector of Customs, Amritsar* (2000) 10 SCC 430. The following passage is in this regard apposite:

"6...In such circumstances, if the new Counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in

the fairest manner possible."

10. The extent and the scope of the power of the Court to recall witnesses was examined by the Supreme Court in *Mohanlal Shamji Soni v. Union of India & Anr.* 1991 Supp (1) 271, where the Apex Court observed:

> "27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fairplay and good sense appear to be the only safe guides and that only the requirements of justice command and examination of any person which would depend on the facts and circumstances of each case."

11. Discovery of the truth is the essential purpose of any trial or enquiry, observed a three-Judge Bench of the Supreme Court in *Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria through LRs.* 2012 (3) SCALE 550. A timely reminder of that solemn duty was given, in the following words:

> "35. What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice."

12. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.

13. Denial of an opportunity to recall the witnesses for cross-examination would amount to condemning the appellant without giving him the opportunity to challenge the correctness of the version and the credibility of the witnesses. It is trite that the credibility of witnesses whether in a civil or criminal case can be tested only when the testimony is put through the fire of cross-examination. Denial of an opportunity to do so will result in a serious miscarriage of justice.

14. After examining averments of application of defence as well as deposition sheets of these four prosecution witnesses it is clear that further cross examination of these four witnesses is necessary in interest of justice and to give opportunity to the

applicant for bringing the valuable evidence on record. Giving opportunity to the applicant for cross-examination of these four witnesses does not limit only for the benefit of the applicant as well as it will not weak the case of the prosecution, on other hand will be beneficial for scrutinizing the depositions of these witnesses. It is for the sacrosanct object that failure of justice on account of mistake of either party be ruled out. Grant of fairness opportunity to the accused to prove his innocence is the one and sole object of every fair criminal trial. Discover of the truth for the initial purpose of any criminal trial.

15. Merely because a mistake was committed, should not result in the accused suffering a penalty totally disproportionate to the gravity of the error committed by his lawyer.

16. In the result, I allow this revision petition, set aside the impugned order dated 13.05.2015 passed by the learned Trial Court and direct that the above named four prosecution witnesses shall be recalled by the learned Trial Court and an opportunity to cross-examine the said witnesses afforded to the applicant who shall bear all the expenses incurred for recalling of these witnesses. In fairness on the part of applicant, this opportunity to examine the witnesses, the needful shall be done on four dates of hearing, one each for every witness without causing any un-necessary delay or procrastination. The learned Trial Court shall endeavour to conclude the examination of these witnesses expeditiously and without unnecessary delay. The parties shall appear before the learned Trial Court on 24.11.2015

Revision Petition allowed.

I.L.R. [2015] M.P., 3089

TAX REFERENCE

Before Mr. Justice Rajendra Menon & Mr. Justice S.K. Gangele

Tax Ref. No. 4/2011 (Jabalpur) decided on 8 April, 2015

BHARAT HEAVY ELECTRICALS LIMITED (M/S) ...Applicant

Vs.

C.E.C., BHOPAL ...Non-applicant

*A. **Central Excise Rules, Rule 57-A & 57-G-(1) - MODVAT Credit - Entitlement*** - **Assessee entitled u/r 57-A - Merely because of the time frame fixed in making entries in Part II of RG-23-A and because of some error in making entry, benefit cannot be denied. (Para 12)**

क. केंद्रीय उत्पाद–शुल्क नियम, नियम 57-ए व 57-जी(1) – एम.ओ.डी.वी.ए.टी. जमा – पात्रता – नियम 57–ए के अंतर्गत निर्धारिती पात्र है – मात्र इसलिये कि आर जी–23–ए के भाग II में प्रविष्टियां करने की समयसीमा निश्चित है और इसलिये कि प्रविष्टि करने में कोई त्रुटि हुई है, लाभ से वंचित नहीं किया जा सकता।

***B. Central Excise Rules, Rule 57-A & 57-G(1) - Ultravires* - Notification issued u/r 57-G prescribing time limit for taking the credit - Right to avail credit conferred u/r 57-A and Rule 57-G provides the procedure - Thus, Central Govt. cannot curtail any right conferred by substantive provision of Rule 57-A - The notification is ultra vires. (Para 11)**

ख. केंद्रीय उत्पाद–शुल्क नियम, नियम 57-ए व 57-जी (1) – अधिकारातीत – नियम 57–जी के अंतर्गत जारी अधिसूचना जमा राशि लेने के लिये समय सीमा निर्धारित करती है – नियम 57–ए जमा राशि प्राप्त करने का अधिकार प्रदत्त करता है तथा नियम 57–जी प्रक्रिया उपबंधित करता है – अतः, नियम 57–ए के सारभूत उपबंध द्वारा प्रदत्त किसी भी अधिकार को केंद्र सरकार घटा नहीं सकती – अधिसूचना अधिकारातीत है।

***C. Central Excise Rules, Rule 57-A & 57-G(1) - MODVAT Scheme - Right to Credit - Accrued to the assessee* - On the date of payment of tax on raw material or inputs and the right get crystallized to them on receiving the inputs in factory. (Para 13)**

ग. केंद्रीय उत्पाद–शुल्क नियम, नियम 57–ए व 57-जी (1)– एम.ओ.डी.वी.ए.टी. योजना – निर्धारिती को जमा का अधिकार – कच्चे माल अथवा निविष्टियों पर कर के भुगतान की तिथि को प्रोद्भूत होता है तथा कारखाने में निविष्टियां प्राप्त करने पर वह अधिकार प्रबलता प्राप्त कर लेता है।

***D. Central Excise Rules, Rule 57-A & 57-G(1) - MODVAT Scheme* - Receipt of input mentioned in Part-I of a single comprehensive RG-23 - Evidence of crystallization of right to MODVAT credit - On the basis of inconsistency in Part II - Right to credit accrued already cannot be denied. (Para 14)**

घ. केंद्रीय उत्पाद–शुल्क नियम, नियम 57-ए व 57-जी(1)– एम.ओ.डी.वी.ए.टी. योजना – एकल व्यापक आर.जी–23 के भाग.I में उल्लिखित निविष्टि की प्राप्ति – एम.ओ.डी.वी.ए.टी. जमा पर अधिकार की प्रबलता का साक्ष्य – भाग II में असंगतता के आधार पर – पहले से ही उपार्जित जमा के अधिकार से इंकार नहीं किया जा सकता।

Cases referred :

1999 (106) ELT 3 (SC),1992 (112) ELT 353 (SC), 2014(306) ELT 551 (Guj.).

Z.U. Alvi, for the applicant/assessee.
S. Dharmadhikari, for the non-applicant.

ORDER

The Order of the Court was delivered by : **RAJENDRA MENON, J. :-** This is a Reference made by the Central Excise and Gold Appellate Tribunal, at the instance of the assessee, referring the following questions for consideration:-

"(i) Whether right (to the credit under the MODVAT Scheme as it stood on 29.06.1995) 'accrued to an assessee on the date when they paid the tax on the raw materials or inputs', as held by Hon.ble Supreme Court in para 6 of Eicher Motors Limited Vs. UOI – 1999 (106) ELT 3 (SC) and that such right gets crystallized in his favour 'instantaneously once the input is received in the factory on the basis of the existing scheme'.?

(ii) Whether act of making such receipt of the inputs in Part-I of the single comprehensive RG-23A account evidences comprehensive RG-23A account evidences such crystallization of the right to MODVAT credit in favour of assessee and thus amounts to 'taking of the credit' as envisaged in the Scheme or only the second (accounting) entry in the Part-II of the same RG-23A Account only constitutes the act of availment of right to the already accrued credit?

(iii) Whether the credit held by the CEGAT in para 5 of the final order to have been accrued to the applicant can be denied in law by CEGAT simultaneously holding it to be inadmissible."

2- By an order passed, the Tribunal on 17.10.2000, in Appeal No.E/1136/96-NB, contention of the assessee – M/s Bharat Heavy Electricals Limited, challenging disallowance of MODVAT credit to the tune of Rs. 35,07,645/- and recovery of the same under Rule 57-I of the Central Excise Rules and imposition of penalty was rejected.

3. The assessee is engaged in manufacturing of various excisable goods. They are availing the facility of MODVAT credit of duty paid on inputs, in terms of the provisions of 57A of the Central Excise Rules. It was found on the basis of the duty paying documents that in the months of July, August and September 1995, the assessee had taken MODVAT credit to the tune of Rs. 35,07,645/- on the strength of duty paying documents which was found to have been issued more than six months prior to the date on which credit was taken. It was the case of the Revenue that under Rule 57G(2), the manufacturer is required to file a declaration under Rule 57G(1) after obtaining the dated acknowledgement, take credit of the duty paid on inputs received and in accordance to the second proviso to sub-rule, the manufacturer is restrained from taking credit after six months of the date of issuance of any documents specified. It was found that in the entries made in the documents maintained under RG-23 A - Part I & II, even though in Part I the entry is made showing date of taking availment of MODVAT credit within the stipulated period of six months, but in Part II as the date was beyond six months, the Tribunal held that the facility of MODVAT cannot be extended as the assessee has not shown availing of the benefit in accordance to the requirement of the Rule.

4. Accordingly, by making the following observations -

> "In support of this contention, the appellants cited and relied upon the judgment of the Hon.ble Supreme Court in the case of *Eicher Motors*. We find that RG 23 A – Part I and Part II is a consolidated record. There are columns of credit and debit of duty only in Part II of RG-23A and not in Part I of RG-23A. Thus, we note that the entry in RG-23A Part II is the entry which is to be taken as the entry for computing the period of six months. The contention of the appellant that a right accrues, there is no denial of this contention. The right no doubt accrues but here the limited question is from which date the period of six months is to be counted. Since date of entry of credit taken is provided for only in RG-23A Part II and, therefore, this entry is material for our purpose. In the present case, the duty paying documents when examined in the light of entry in RG-23A Part II go beyond a period of six months. Therefore, following the ratio of the decision of the Larger Bench of this Tribunal in the case of *Kusum Ingots & Alloys Limited,* we hold that no MODVAT credit will be admissible

on the duty paying documents in the present case. The appeal is, therefore, dismissed."

the appeal was dismissed. Now, in this reference, we are required to consider the questions as referred to.

5. Having heard learned counsel for the parties, we find that section 57A of the Central Excise Rules, 1945 provides for admissibility of credit on duty paid on specific inputs used in manufacturing of a specified final product. The second proviso to sub-rule 57G(1) inserted with effect from 29.6.1995 contemplates as under:

> " ....The manufacturer shall not take credit after six months from the date of issue of any of the documents specified in the first proviso to this sub-rule".
>
> ***(Emphasis supplied)***

For availing of the aforesaid benefit, consequential accounting entries are to be made about the running total of the credit balance and the account input credit entries in RG-23A Part I & Part II respectively.

6. In this case, it is found that all the requirements of the statutory rules are met with by the assessee company, but it is only with reference to accounting and making entries in the RG-23 A - Part II that the dispute has risen. Even though in the entries made under Part I with regard to account of inputs, the entry is made showing a date within six months, but in Part II – the entry number showing the date is beyond six months and it is only because of this entry made in Part II that MODVAT credit has been denied to the assessee.

7. Admittedly, the Tribunal in its order on 17.10.2000 and in the portion reproduced hereinabove, has clearly held that RG-23 A Part I & Part II is a consolidated record, but it refused to grant MODVAT credit to the assessee because of the entry made in Part II, which was beyond six months.

8. In the case of *Eicher Motors Limited Vs. Union of India*, 1999 (106) ELT 3 (SC), it has been held that the provisions for facility of credit is as good as tax paid till adjustment of tax on future goods based on various commitments are made. It has been held that the provision for facility of credit granted to an assessee is a right accrued to the assessee on the date when they paid the tax on the raw material or the inputs and this right would continue until the facility available thereto gets worked out or until those goods existed.

In paragraph 6, the Hon.ble Supreme Court has dealt with the matter in the following manner:

> "6. ... Thus a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. Therefore, it becomes clear that Section 37 of the Act does not enable the authorities concerned to make a rule which is impugned herein and, therefore, we may have no hesitation to hold that the rule cannot be applied to the goods manufactured prior to 16.3.1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods."

9. The matter was again considered by the Supreme Court in the case of *Collector of Central Excise, Pune Vs. Dai Ichi Karkaria Limited,* 1992 (112) ELT 353 (SC), and after relying upon the judgment in the case of *Eicher Motors Limited* (supra), in paragraphs 17 and 18, the principle has been so crystallized:

> "17. It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which even it stands cancelled or, if utilized, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final

product manufactured on the very day that it becomes available.

18. It is, therefore, that in the case of Eicher Motors Limited (supra) this Court said that a credit under the MODVAT Scheme was 'as good as tax paid'."

(Emphasis supplied)

10. Therefore, in the case of *Baroda Rayon Corporation Limited Vs. Union of India,* 2014 (306) ELT 551 (Guj), the Gujarat High Court has considered question identical in nature as is posed before us. In the case of *Baroda Rayon Corporation Limited* also, the benefit of MODVAT credit was denied to the assessee only because of an entry made in RG-23 A Part I & Part II, showing a date beyond six months. In the said case, the principle of law governing grant of MODVAT credit; the requirement of Rules 57A and 57G; the law laid down in the case of *Eicher Motors Limited* (supra) and *Dai Ichi Karkaria Limited* (supra) have all been considered and it has been held by the Gujarat High Court in the aforesaid case has held that merely because the entry of date made in Part II is beyond six months, the benefit of MODVAT credit cannot be denied when from all other material available, including the entry made in Part I, it is found that the benefit can be granted to the assessee.

11. We are in full agreement with the principle laid down by the Gujarat High Court wherein also under similar circumstances, identical action has been quashed and MODVAT credit extended. We agree with the Gujarat High Court when it says that the right to avail all credit conferred under Rule 57A and Rule 57G only provides the procedure to be observed by the manufacturer. Therefore, when power is exercised under Rule 57G, the Central Government is not empowered to curtail any right conferred by the substantive provision of Rule 57A and, therefore, the Notification issued under Rule 57G prescribing the time limit for taking the credit as found by the High Court of Gujarat is found to be ultra vires, as it is beyond the power and is in conflict to the impugn provision of Rule 57A, these are based on the principle laid down by the Hon.ble Supreme Court in the cases of *Eicher Motors Limited* (supra) and *Dai Ichi Karkaria Limited* (supra).

12. Accordingly, in the facts and circumstances of the case, we are of the considered view that when the assessee was entitled to avail the MODVAT credit under Rule 57A, merely because of the time frame fixed in making the

entries in Part II of RG-23A, and only because of some error in making the entry, denial of the benefit cannot be permitted.

13. As such, we answer the question formulated and referred to us by hold that the right to the credit under the MODVAT Scheme accrued to the assessee on the date when they paid the tax on the raw material or inputs and when such a right gets crystallized in their favour once the input is received in the factory on the basis of the existing Scheme.

14. We further hold that the act of the assessee in making such receipt of input in Part I of a single comprehensive RG-23 A action is evidence enough with regard to crystallization of right to MODVAT credit and merely because in second accounting entry of Part II, there is some inconsistency, the right accrued already to receive the credit cannot be taken away.

15. We further hold that the credit which had accrued to the assessee could not be denied in law by the CEGAT holding it to be inadmissible merely because of the error in making entry in Part II of RG-23A.

16. Accordingly, quashing the impugned order of the Tribunal, the Reference is answered by holding that the assessee was entitled to avail of the credit and all benefits accruing to them thereto should now be granted.

17. Reference stands answered and accordingly disposed of.

Reference disposed of.

I.L.R. [2015] M.P., 3096

MISCELLANEOUS CIVIL CASE

Before Mr. Justice U.C. Maheshwari

M.C.C. No. 1362/2012 (Jabalpur) decided on 27 November, 2013

USHA BAI (SMT.) ...Applicant

Vs.

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

Limitation Act (36 of 1963), Section 5 - Condonation of delay - **Delay of 6 years and 86 days for filing the application for restoration - No proper explanation for delay - Application filed in very casual manner by stating some emotional grounds rather than the ground permissible under the law - Whenever and wherever under prescribed period the requisite proceeding under the right is not filed by a party then after**

expiration of such period a valuable right is created in favour of other party and such right could not be curtailed on the basis of any flimsy or insufficient ground - Appliction dismissed. (Paras 4 & 6)

परिसीमा अधिनियम (1963 का 36), धारा 5 – विलंब के लिए माफी – पुनःस्थापन हेतु आवेदन प्रस्तुत करने में 6 वर्ष तथा 86 दिन का विलंब – विलंब के लिए कोई उचित स्पष्टीकरण नहीं – विधि के अंतर्गत अनुज्ञेय आधारों के स्थान पर कुछ भावनात्मक आधार देते हुए अनौपचारिक रूप से आवेदन प्रस्तुत किया गया – जब भी और जहाँ कहीं किसी पक्षकार के द्वारा अधिकार के अंतर्गत अपेक्षित कार्यवाही विहित अवधि के अधीन प्रस्तुत नहीं की जाती है तब ऐसे अवधि के अवसान के पश्चात् अन्य पक्षकार के पक्ष में एक मूल्यवान अधिकार सृजित हो जाता है तथा ऐसे अधिकार को किसी भी कमजोर एवं अपर्याप्त आधार पर घटाया नहीं जा सकता – आवेदन खारिज।

Case referred :

AIR 1962 SC 361.

Yogendra Golandaz, for the applicant.
Amit Kumar Sharma, P.L. for the non-applicant/State.

ORDER

U.C. MAHESHWARI, J. :- Heard.

Applicant has filed this petition for restoration of W.P.No.1978/2000 which has been dismissed for want of prosecution vide order dated 14.7.06 along with IA No.13463/12 an application for condoning the delay in filing this petition as the same is filed barred by 6 years and 86 days as reported by the office.

2. Applicant's counsel after taking me through the averments of the IA said that considering the age of the applicant i.e 75 years, being old woman and senior citizen, her physical position and the poverty, the alleged delay in filing the petition be condoned. In continuation he said that earlier she engaged some other counsel who did not appear in the matter to protect her interest consequently the petition was dismissed for want of prosecution. With these submissions he prayed that considering the aforesaid cause as sufficient as per requirement of section 5 of the Limitation Act, by allowing the IA, the alleged delay be condoned.

3. The aforesaid prayer is opposed by the State counsel saying that in

view of the various proceedings of the original writ petition according to which on various dates since 24.3.2000 til dismissal on 14.7.06, no one was appeared to prosecute this petition and considering such circumstance, the petition was dismissed for want of prosecution so looking to such conduct of the petitioner in the aforesaid writ petition so also in the lack of sufficient explanation to condone the aforesaid long delay in filing this petition, mere on the aforesaid ground of illness, the old age and the financial scarcity of the applicant could not be treated to be the sufficient cause for condoning the alleged delay as per requirement of section 5 of the Limitation Act and prayed for dismissal of this IA along with the petition for restoration of the writ petition as barred by time.

4. Having heard the counsel, keeping in view the arguments advanced, I have carefully gone through the averments of the IA, it is apparent that in entire application, no proper explanation for condoning the delay of 6 years and 86 days has been mentioned. Even the concerning date on which the applicant had consulted to her Advocate and came to know about dismissal of the writ petition has not been mentioned. Such application has been filed in a very casual manner by stating some emotional grounds rather than the grounds permissible under the law. So, firstly in the lack of proper explanation of long delay in the application and the affidavit attached with it, the cause stated in the same could not be treated to be sufficient as per requirement of section 5 of the Limitation Act for condoning the alleged delay.

5. Apart the aforesaid, I have also gone through the proceedings of aforesaid writ petition according to which since 24.3.2000 till 14.7.06 on which the petition was dismissed for want of prosecution near about 8 dates were fixed but no one was appeared to prosecute such petition on behalf of the applicant on any of such date and considering such conduct also the dismissal order dated 14.7.06 was passed. So, in view of such conduct also, the applicant does not deserve for extending the relief to condone the aforesaid delay in filing the petition.

6. It is settled proposition of the law that whenever and wherever under prescribed period the requisite proceeding under the right is not filed by a party then after expiration of such period a valuable right is created in favor of other parties and such right could not be curtailed on the basis of any flimsy or insufficient grounds or unless the compelling circumstances are available in the matter which is not found in the present matter.

My aforesaid approach is based on the decision of the Apex Court in the matter of *Ramlal and others Vs. Rewa Coalfields Ltd.*- AIR 1962 SC-361 in which it was held as under :-

> "In construing S.5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree holder to treat the decree as binding between the parties and this legal right which has accrued to the decree holder by lapse of time should not be light heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the court to condone delay and admit the appeal. ***Placitum***

In view of the aforesaid discussion, it is held that the applicant has failed to prove any sufficient cause as per requirement of section 5 of the Limitation Act for condoning the aforesaid long delay in filing the petition for restoration. Consequently, the IA deserves to be and is hereby dismissed. In view of such dismissal, the annexed petition (MCC) being barred by time is also dismissed.

Application dismissed.

I.L.R. [2015] M.P., 3099
MISCELLANEOUS CIVIL CASE
Before Mr. Justice U.C. Maheshwari
M.C.C. No. 899/2011 (Jabalpur) decided on 17 December, 2013

JAMILA BI & ors. ...Applicants
Vs.
SMT. NAZMA AFZAL & anr. ...Non-applicants

Civil Procedure Code (5 of 1908), Section 115 - Civil Revision - Restoration **- Civil Revision dismissed due to non compliance of the peremptory order to file four different Civil Revisions - If any common order is passed by the subordinate court in identical cases of the different parties then such parties have a right to file common and joint proceeding before the superior court against such order and after making the payment of deficit court fees of three revisions by the applicant in the common the**

same ought to have been restored. **(Para 9)**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 115 – सिविल पुनरीक्षण – पुनःस्थापन – चार अलग–अलग सिविल पुनरीक्षण प्रस्तुत करने के अलंघनीय आदेश का अनुपालन न करने के कारण सिविल पुनरीक्षण खारिज – यदि अधीनस्थ न्यायालय द्वारा भिन्न पक्षकारों के समान प्रकरणों में कोई सामान्य आदेश पारित किया जाता है तब ऐसे पक्षकारों को ऐसे आदेश के विरूद्ध उच्चतर न्यायालय के समक्ष सामान्य तथा संयुक्त कार्यवाही प्रस्तुत करने का अधिकार है तथा आवेदक द्वारा तीन पुनरीक्षणों की न्याय शुल्क में कमी का सामान्य रूप से भुगतान करने पर उसे पुनःस्थापित कर दिया जाना चाहिए था।

Divesh Jain, for the applicants.

(Supplied: Paragraph numbers)

O R D E R

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

2. The applicants of C. R. No.432/10 have filed this petition, (according to cause title of the same) for restoration of M. C. C. No.463/2011 dismissed vide order dated 2.6.2011 by the Registrar Judicial (I) for non-compliance of the peremptory order dated 25.3 .2011 passed by this Bench.

3. As per office note dated 2.6.2011 the petitioner was entitled to comply the order dated 25.3.2011 till 1.4.2011 by curing the default raised by the office in C. R. No.432/10 but such defaults were not cured within the prescribed period, therefore such Civil Revision was not restored by the office and against such office note the petitioner has filed the present petition for restoration of aforesaid MCC.

4. As per record the aforesaid M. C. C. No.463/2011 has not been dismissed either by this Court or by the office in compliance of any order of the Court, only on account of non-compliance of the peremptory order of MCC No.463/11 the aforesaid C. R. No.432/2010 has not been restored.

5. As per submission of counsel inspite submitting the requisite court fees i. e. four times court fees in C. R. No.432/10 to cure the default in compliance of the aforesaid order dated 25.3.201(sic:25.3.2011) , when the aforesaid Civil. Revision filed against the common order passed by the Executing court in four different MJCs registered by the executing court at the instance of the applicants objectors under Section 47 of CPC was not restored then

the applicants have come to this Court with this petition.

6. The record of C.R. No.432/10 and M. C. C. No.463/11 are also placed with this petition.

7. On going through the said Civil Revision No.432/10, I have found that the petitioners have filed their separate applications under Section 47 of CPC in separate groups to protest the execution proceeding filed by the respondent No.1 before the Executing court and the Executing Court instead to entertain such applications in execution or in single MJC have entertain the same separately by registering the four different MJCs but on consideration decided all four MJCs by impugned common order dated 30.9.2010 and thereby the objections filed by the applicants in different groups were dismissed against which the aforesaid Civil Revision No.432/2010 was jointly filed by the applicants in consolidated manner against the common order of all four MJCs but on examining the matter by the office the objection was raised that four different civil revisions are required in the matter and thereafter when the applicants did not approach to the Registrar office to cure the default then the matter was listed before the Bench on 29.10.2010 and on such date the applicants were directed to cure the default raised by the Registry within the prescribed period and when the same was not cured within such prescribed period then revision was dismissed on account of non-compliance of peremptory order dated 29.10.2010, on which the applicants had filed MCC No.463/11, in which on consideration the aforesaid order dated 25.3.2011 was passed whereby the applicants were directed to cure the default within the prescribed period. But as per office note such direction was not complied with, consequently the Civil Revision was not restored and, on which the petitioners have come with this petition.

8. The applicants' counsel submits after passing the aforesaid order dated 25.3.2011 in M. C. C. No.463/11 in order to cure the default instead to file separate four different revisions the applicants have submitted deficit court fees, according to which they have paid Court fees of remaining three revisions in addition to court fees of single revision paid at the initial stage in said C. R. No.432/2010, inspite that only on account of non-filing the four different revisions the office has not restored the aforesaid civil revision stating that the order dated 25.3.2011 passed in MCC No.463/11 has not been complied with.

9. In view of the aforesaid and the settled proposition of law that if any common order is passed by the subordinate court in identical cases of the different parties then such parties have a right to file common and joint proceeding before the superior Court against such order and in such premises after making the payment of deficit court fees of three revisions by the applicants in the common and joint C. R. No.432/10 the same ought to have been restored by the office. In such premises it is held that subject to verification of payment of Court fees of four revisions in C. R. No.432/10, the same is entertainable and deserves to be restored and applicants are entitled to prosecute the same against all orders passed by the Executing Court in four different MJCs. Consequently, this petition is allowed and subject to verification of payment of Court fess of four revisions in C. R. No.432/10 the same directed to be restored with a further direction to list the same before the Bench in the week commencing 6.1.2014 for admission.

10. Accordingly, this M.C.C. is allowed in part

C.C. as per rules.

MCC partly allowed.

I.L.R. [2015] M.P., 3102
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice B.D. Rathi
M.Cr.C. No. 3892/2010 (Gwalior) decided on 28 July, 2014

SHARAD KUMAR AGRAWAL ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Explosive Substances Act (6 of 1908), Section 4 & 5 and Ammonium Nitrate Rules, 2012, Rule 3 **- Ammonium Nitrate was seized on 09.04.2009, Rules 2012 came into force on 11.07.2012 - Prior to that Ammonium Nitrate was not an explosive - No license was required before 11.07.2012 - Applicant cannot be prosecuted u/s 4 & 5 of Act, 1908 as no license was required - Application allowed. (Paras 9 & 10)**

विस्फोटक पदार्थ अधिनियम (1908 का 6), धारा 4 व 5 एवं अमोनियम नाइट्रेट नियम, 2012, नियम 3 – 09.04.2009 को अमोनियम नाइट्रेट अभिगृहीत किया गया था,

नियम 2012, 11.07.2012 में प्रभावी हुए – इसके पहले तक अमोनियम नाइट्रेट एक विस्फोटक नहीं था – 11.07.2012 के पहले अनुज्ञप्ति अपेक्षित नहीं थी – अनुज्ञप्ति अपेक्षित नहीं होने के कारण अधिनियम 1908 की धारा 4 एवं 5 के अंतर्गत आवेदक को अभियोजित नहीं किया जा सकता – आवेदन मंजूर।

Yogesh Chaturvedi, for the applicant.
J.M. Sahni, P.L. for the non-applicant/State.

ORDER

B.D. Ratiii, J. :- This petition, under Section 482 of the Code of Criminal Procedure, has been preferred for quashment of entire proceedings pending in Session Trial No.25/2010 in the Court of Sessions Judge, Mungaoli, District Ashok Nagar for the offence punishable under Section 4 and 5 of the Explosive Substances Act, 1908 which has arisen out of the Crime No.135/2009 dated 09.04.2009 registered at Police Station Chanderi, District Ashok Nagar (M.P.)

2. As per the prosecution case, on 09.04.2009 at about 08:05 pm a truck bearing number MP09 KB3627 was searched by the police. During search, 320 bags of Ammonium Nitrate were seized vide seizure memo dated 09.04.09. Relevant documents of registration, permit, fitness etc. were also seized. Initially, Crime was registered at outpost Rajghat, District Ashok Nagar and thereafter original FIR was registered at Crime No.135/2009 at Police Station Chanderi, District Ashok Nagar (M.P.) for the offence punishable under Sections 4 and 5 of the Explosive Substances Act.

3. After completion of the investigation, charge-sheet was filed and the case was committed to the Court of Session where Session Trial No.25/2010 was registered.

4. It is submitted by Shri Chaturvedi, learned counsel appearing on behalf of the petitioner that the substance, namely, Ammonium Nitrate was not the explosive substance on 09.04.2009 as defined under the Explosive Substances Act. In the gazetted notification of Government of India dated 11.07.2012 Ammonium Nitrate Rules 2012 were published and enforced from the date of its publication. Therefore, charges under Section 4/5 of the Explosive Substances Act could not be framed against the petitioner on the ground that bags of Ammonium Nitrate were seized in the year 2009.

5. Prayer was opposed by the learned Panel Lawyer, appearing on behalf of the respondent/State.

6. Having regard to the arguments advanced by the learned counsel for the parties, entire record has been perused.

7. Undisputedly, the rules namely Ammonium Nitrate Rules, 2012 came into force from the date of its publication which is 11th July, 2012. The Gazette Notification of Government India is dated 11.07.2012 by which rules have been published. Rule 3 which pertains to Ammonium Nitrate as an explosive substance would be deemed as explosive substance with effect from 11.07.2012 and not earlier to it.

8. As per the clarification issued by the Government of India on 18th March, 2009, Ammonium Nitrate per se is not an explosive and does not require any licence under either Explosives Act, 1884 or Explosive Substances Act, 1908.

9. Since the Ammonium Nitrate Rules, 2012 came into force only on 11.07.2012, therefore, earlier to commencement of these rules i.e. on 09.04.2009 if Ammonium Nitrate was found in the possession of the petitioner, no licence thereof was required since it was clarified by the Government of India vide its clarification dated 18th March, 2009 wherein specifically it has been mentioned that Ammonium Nitrate per se is not an explosive and does not require any licence under either Explosives Act, 1884 or Explosive Substances Act, 1908 at present.

10. Hence, this Court is of the view that because on 09.04.2009 no licence was required by the petitioner to carry on the trade of Ammonium Nitrate, therefore, he cannot be prosecuted and charged under Section 4 and 5 of the Explosive Substances Act.

11. *Ab judicato,* this petition succeeds and is hereby allowed. Charges framed under Sections 4 and 5 of the Explosive Substances Act are hereby quashed. Entire proceedings in regard to Sessions Trial No.25/2010 are hereby dropped. Petitioner is discharged. He is entitled to get seized articles as per law.

Petition allowed.

I.L.R. [2015] M.P., 3105
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Alok Verma
M.Cr.C. No. 17070/2013 (Jabalpur) decided on 19 September, 2014

ANIL KUMAR CHOUHAN @ ANIL SINGH CHOUHAN ...Applicant
Vs.
STATE OF M.P. & anr. ...Non-applicants

(Alongwith Cr.A. No. 2001/2012)

A. ***Penal Code (45 of 1860), Sections 420, 467, 468 & 471 - Cheating*** **- Society sold Plot No. 344 - It is alleged that the applicant/ purchaser made interpolation in the sale deed and added Plot No. 344-A however, no such plot is in existence as per lay out - Applicant is also alleged to have taken possession of Plot No. 345 - Applicant could not produce original documents in respect of Plot Nos. 344, 344-A before the police when matter was being investigated in compliance of order u/s 156(3) of Cr.P.C. - Allegations are required to be enquired upon - Application u/s 482 for quashing the proceedings dismissed. (Paras 6 to 20)**

क. दण्ड संहिता (1860 का 45), धाराएँ 420, 467, 468 व 471 – छल – सोसाइटी ने भूखंड क्रमांक 344 विक्रय किया – यह अभिकथित किया गया है कि आवेदक/क्रेता ने विक्रय विलेख में अंतर्वेशन किया एवं भूखंड क्रमांक 344–ए जोड़ दिया जबकि, अभिन्यास के अनुसार ऐसा कोई भूखंड अस्तित्व में नहीं है – यह भी अभिकथित किया कि आवेदक भूखंड क्रमांक 345 का कब्जा ले चुका है – दं.प्र.सं. की धारा 156(3) के अंतर्गत आदेश के पालन में जब मामले का अन्वेषण किया जा रहा था, आवेदक भूखंड क्रमांक 344, 344–ए के संबंध में पुलिस के समक्ष मूल दस्तावेज प्रस्तुत नहीं कर सका – अभिकथनों की जांच की जाना अपेक्षित – धारा 482 के अंतर्गत कार्यवाहियां अभिखंडित किये जाने के लिये आवेदन खारिज।

B. ***Criminal Procedure Code, 1973 (2 of 1974), Section 340 - Procedure in cases mentioned in Section 195*** **- Applicant filed a civil suit and filed interpolated documents - After dismissal of his application under Order 39 Rule 1 & 2, C.P.C., he filed Misc. Appeal - Two applications were filed u/s 340 of Cr.P.C. before the Trial Court as well as Appellate Court - Appellate Court rejected the application on the ground that enquiry is being done by the Trial Court - Subsequently, Civil Suit was dismissed in default however, the application filed u/s 340 of Cr.P.C. remained unconsidered - Trial Court directed to complete the enquiry and to proceed**

depending upon the outcome of the enquiry. (Paras 21 & 22)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 340 – धारा 195 में उल्लिखित प्रकरणों में कार्यवाहियां – आवेदक ने एक सिविल वाद प्रस्तुत किया एवं अंतर्वेशित दस्तावेज प्रस्तुत किये – सि.प्र.सं. के आदेश 39 नियम 1 एवं 2 के अंतर्गत उसके आवेदन को खारिज किये जाने के उपरांत उसने विविध अपील प्रस्तुत की – दं.प्र.सं. की धारा 340 के अंतर्गत विचारण न्यायालय के साथ ही अपीली न्यायालय के समक्ष दो आवेदन प्रस्तुत किये गये – अपीली न्यायालय ने आवेदन इस आधार पर अस्वीकार किया कि विचारण न्यायालय द्वारा जांच की जा रही है – तत्पश्चात्, सिविल वाद व्यतिक्रम में खारिज किया गया था यद्यपि दं.प्र.सं. की धारा 340 के अंतर्गत प्रस्तुत आवेदन पर विचार करने से रह गया – विचारण न्यायालय को जांच पूर्ण करने हेतु एवं जांच के निष्कर्ष पर निर्भर रहते हुये आगे कार्यवाही करने के लिये निदेशित किया गया।

Cases referred :

2012(II) MPJR 62, 2014 (2) MPHT 449, 2014(I) MPHT 545, (2014) 3 SCC 389, (2009) 14 SCC 696, (2005) 4 SCC 370.

Saurabh Sharma, for the applicant in M.Cr.C. No. 17070/2013 & for the respondent No.1 in Cr.A. No. 2001/2012.

Rajnish Choubey, P.L. for the respondent No.1 in M.Cr.C. No. 17070/2013 & for the respondent No.3 in Cr.A. No. 2001/2012.

Punit Shroti, for the respondent No. 2 in M.Cr.C. No. 17070/2013 & for the appellant in Cr.A. No. 2001/2012.

Ishan Mehta, for the respondent No.2 in Cr.A. No. 2001/2012.

ORDER

ALOK VERMA, J. :- As the factual background for the petition under Section 482 of Cr.P.C. (M.Cr.C. No. 17070/13) and (Criminal Appeal No. 2001/12) are the same they are being disposed of by this common order.

2. The facts in brief which form factual background for these two petition/ appeal are that the appellant in above Criminal Appeal is a Grah Nirman Sahkari Samiti, Jabalpur, ('the samiti' for short). The samiti filed an application before the Municipal Corporation, Jabalpur on 19.04.2011 that the samiti sold plot no. 344 in a colony developed by the samiti to the respondent No.1 Anil Singh Chouhan, who is petitioner No.1 in M.Cr,C. No. 17070/13. The respondent No.1 also encroached upon plot no. 345 illegally and raised construction over there. The respondent no.1 also made interpolation in the

sale dead (sic:deed) executed by the samiti in favour of the respondent No.1 and after plot no. 344 added plot no. 344-A. Similarly, in the area of the plot he added 1500 sq. feet and total area was shown as 3,000 sq. feet. (1500 +1500=3,000 sq. feet), also in the cost of the plot he added Rs. 6,000/- where costs of plot was written as Rs. 6,000/- and total costs was shown as 12,000/-(6000+6000=12,000/-). When he was asked to show cause why the construction raised by him should not be removed, he filed the reply stating therein that he purchased two plots from the samiti bearing numbers 344 and 344-A. However, the samiti asserts that in the approved lay out plan of the colony developed by the Samiti, there was no plot bearing number 344-A. In fact the respondent Anil Singh Chouhan encroached upon plot no. 345 showing it plot no. 344-A in the sale deed. He also stated in the reply that he raised the construction on the basis of approved map which he got approved from the Municipal Corporation. However, he could not produced any map approved by the Municipal Corporation for construction over the plot No. 344-A.

3. When the Municipal Corporation, Jabalpur which is respondent No.2 & 3 in Criminal Appeal and respondent No.1 in M.Cr.C. No. .17070/13 proceeded to remove the encroachment on plot No. 345, the respondent No.1 filed a Civil Suit before 8th Civil Judge, Class-II Jabalpur which was registered as Civil Suit No. 56-A/2012. The Civil Suit was for declaration and permanent injunction, however, he could not get temporary injunction from the Court of Civil Judge, Class-II, therefore, he filed Misc. Civil Appeal which was registered as Misc. Civil Appeal No. 17/2012. While this appeal was pending, the Samiti filed an application under Section 340 of Cr.P.C., in the Civil Suit bearing No. C.S. 56-A/2012 as well as before the 4th Additional Sessions Judge, Jabalpur in Misc. Civil Appeal No. 17/2012. The learned 4th Additional Sessions Judge, disposed of the application filed under Section 340 of Cr.P.C., by order dated 23.08.2012, dismissing the application and stating therein that the samiti had also filed an application before the learned Civil Judge Class-II, which was pending for disposal because an inquiry is pending by the learned Civil Judge Class-II as contemplated by Section 340 Cr.P.C., it was not found proper by the learned Additional Sessions Judge to take any action on the application under Section 340 filed by the Samiti, accordingly, the application was dismissed.

4. Aggrieved by this order the present appeal under Section 341 of Cr.P.C., is filed by the samiti. Meanwhile, it is stated that the Civil Suit was

dismissed by the Court of Civil Judge Class-II, as the respondent No.1 failed to remain present before the Court on the fixed date and the Court dismissed the Civil Suit in default. On 17.09.2012 and again 18.09.2012, the samiti filed two separate complaints under Section 190 Cr.P.C., in which separate applications under Section 156 (3) Cr.P.C., were filed requesting the Magistrate to direct the concerning police station to register an offence against the respondent No.1. The learned Magistrate called a report from the concerning police station. The concerning police station submitted a report on 18.10.2012, in which it was reported that inspite of several notices and oral intimation to the respondent. Anil Singh Chouhan failed to produce original documents in respect of plot No. 344 and 344-A, and therefore, a report to register an offence against the respondent is sent to higher authorities.

5. The learned Magistrate on 21.06.2013 passed an order and observed therein that as an offence under Sections 420, 467, 468, of IPC were registered by the police station, Garha, District Jabalpur, as crime No. 934/12 the relevance of applications under Section 156 (3) Cr.P.C., no longer exists and as such, the learned Magistrate dismissed the complaints under Section 190 Cr.P.C. The M.Cr.C. No. 17070/13 under Section 482 of Cr.P.C., is filed to quash the proceedings arising out of aforesaid FIR registered by the police station, Garha, Jabalpur.

6. First, I would proceed to consider the application under Section 482 of Cr.P.C., in M.Cr.C. No. 17070/13. This application is filed for seeking quashment of proceedings arising out of the aforesaid crime registered by the police station, Garha, Jabalpur, on the ground that the samiti (respondent No.2 in this petition) filed two separate complaints under Section 190 of Cr.P.C., one was filed on 17.09.2012 and another was filed on 18.09.2012. The learned Magistrate issued two separate memo under Section 157 (3) of Cr.P.C., one was issued on 24.09.2012 and second was issued on 01.10.2012.

7. The Samiti also filed two applications under Section 340 Cr.P.C., in Misc. Appeal filed by the applicant which was decided on 23.08.2012. The respondent samiti suppressed the fact that learned Additional Sessions Judge, observed that it was a matter of civil nature and by misrepresenting the fact the samiti got a crime registered against the petitioner.

8. According to the petitioner he had not done any interpolation in the record or any sale deed. The sale deed was executed in the year 1991 and

after 22 years the present complaint was filed. On this ground, the petitioner prayed that the proceedings arising out of Crime No. 934/2012 under Sections 420, 467, 468, 471, IPC be quashed.

9. The learned counsel for the petitioner has relied upon order of this Court in *Kewin B Ajit Vs. State of M.P. & Ors.* [2012 (II) MPJR 62], in which it was held that the documents which are related to FIR may be considered, at this stage, extra defence of the accused, if any cannot be taken into consideration. He also placed reliance of order of this Court *Ravikant Dubey Vs. State of M.P.* 2014 (2) MPHT, 449, *Roop Singh and Others Vs. State of M.P.* 2014 (1) MP.H.T. 545. He further placed reliance on the judgment of Hon'ble Supreme Court in the case of *Vijayander Kumar and Others Vs. State of Rajasthan and Another* (2014) 3 SCC 389. In this case the Hon'ble Supreme Court quoted the case of *Dalip Kaur's case* (2009) 14 SCC 696. In para-II of that case it was observed that

> "11. There cannot furthermore be any doubt that the High Court would exercise its inherent jurisdiction only when one or the other propositions of law, as laid down in *R. Kalyani Vs. Janak C. Mehta* is attracted, which are as under; (SCCp. 53, para 15)
>
> (1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a first information report unless the allegations contained therein, even if given face value and taken to be correct in their entirely, disclosed no cognizable offence. (2) For the said purpose the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.
>
> (3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.
>
> (4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue."

10. Reverting back to this case, the main contention of the petitioner is that two separate complaints were filed by the samiti under Section 190 Cr,P.C., and two separate applications were filed in these two complaints under Section 156 (3) of Cr.P.C. The Magistrate has also issued two memo for calling the report from the concerning police station. However, subsequently, when crime number 934/12, quashment of which is sought by this petition, was registered by the police station, Garha and Magistrate dismissed the complaints filed under Section 190 of Cr.P.C., on the ground that after registration of Crime the complaints under Section 190 of Cr.P.C., lost its relevance.

11. The learned counsel for the samiti, i.e. respondent No.2 in this M.Cr.C. No. 17070/13 stated that two complaints under Section 190 of Cr.P,C., were filed as two separate offences were allegedly committed by the present petitioner. One when he interpolated the documents and again when such documents were filed before the learned Civil Judge, Class-II and he tried to obtain temporary injunction under order 39 Rule (1) & (2) of Cr.P.C., in his favour, restraining the Municipal Corporation Jabalpur from removing the construction made by him on plot No. 344-A or as alleged by the samiti on plot No. 345.

12. After considering the rival contentions, I find that in fact so called complaints by the samiti before the learned Magistrate under Section 190 of Cr.P.C., were not complaints as such, but merely an application seeking direction of the Magistrate to the police station for investigation and registration of crime allegedly committed by the petitioner. As such even, if it is assumed that two separate applications were not needed no harm was caused to the petitioner. The police when he failed to produce the original documents, registered the crime, investigated the same and filed the charge sheet before the learned Magistrate.

13. The respondent would have got an opportunity to defend himself in the Criminal Case, however, he did not appear before the Magistrate and chose to remain absconding, and therefore, it is transpired from the record that the learned Magistrate passed an order on 30.11.2013, declaring the present petitioner absconding under Section 299 of Cr.P,C., issued the permanent warrant against the petitioner and consigned record of the Court, to record room.

14. Similarly two applications filed under Section 340 of Cr.P.C., also do not cause any prejudice to the present petitioner.

15. The appellate Court which was hearing the Misc. Appeal and dismissed the applications on the premise that application before the learned Civil judge, Class-II was pending for inquiry as contemplated under Section 340 of Cr.P.C.. However, subsequently the original civil suit, from which the said Misc. Appeal arose was dismissed in default. The application pending before the learned Civil Judge remained unconsidered. Therefore, so far as this petition under Section 482 of Cr.P.C., is concerned, it makes no difference if the police station Garha has registered the crime.

16. The next question arises for consideration is whether the crime can be registered without there being a complaint by the learned Civil Judge, Class-II before whom such documents which were allegedly forged and interpolated. Whereby on this point the judgment of the Hon'ble Supreme Court in the case of *Iqbal Singh Marwah and Another Vs. Meenakshi Marawah and another* (2005) 4 SCC 370, in this case it was held that if interpolation and forgery was done outside the Court and as such, forged and interpolated documents were filed before the Court, then embargo would by Section 195 (i) (b) (ii) of Cr.P.C., does not operate. It would be attracted only when offence enumerated in the said provisions have been committed with respect to documents, after they had been produced or given in evidence in any proceedings in a Court i.e. during the time when the documents were in *'custodia legis'*.

17. In this case, so far as the documents are concerned the allegations of the samiti itself were that they were interpolated/forged prior to they being produced before the Court and as such embargo put forth by Section 195 (i) (b)(ii) Cr.P.C., do not apply.

18. The counsel for the applicant also argues that the samiti slept over the alleged interpolation for 22 years then it started the proceedings against the applicant. However, it may be observed here that alleged interpolated documents were in custody of the applicant and when such interpolation came to the knowledge of the samiti, it started the proceedings. It does not help the applicant in any way.

19. This brought us to the final question for consideration whether the crime No. 934/12 registered against the petitioner is liable to be quashed. The investigation in the aforesaid crime has already completed as above, the charge sheet has been filed as the petitioner is absconding in the case. The

trial in the case has been put under the abeyance awaiting points to the petitioner in execution of permanent warrant issued against him.

20. The main question to be decided by the trial Court is whether the documents pertaining to plot No. 344 and 344-A, were interpolated and forged by the petitioner i.e. the matter of inquiry, inquired and not appropriate to interfere in the matter. In this proceedings under Section 482 of Cr.P.C., the grounds raised in this petition do not constitute ingredients necessary for interfere in this proceedings under Section 482 of Cr.P.C., and therefore, I find no merit in this case, accordingly this petition is liable to be dismissed,

21. Now we may proceed to consider the Civil Appeal No. 2001/2012, this appeal filed under Section 341 of Cr.P.C. Against the order of learned Additional Sessions Judge by which he dismissed the application filed by the appellant/samiti under Section 340 of Cr.P.C., as stated above. The aforesaid application was dismissed on premise that another application under the same provision is pending before the Court of Civil Judge, Class-II pending inquiry as contemplated by Section 340 Cr.P.C. However, as stated above again the civil suit was dismissed in default and therefore, proceedings under Section 340 Cr.P.C.,before the learned Court of Civil Judge, Class-II could not attain its logical conclusion. The basis for filing these applications before the two courts below was that the respondent Anil Singh Chouhan forged/interpolated documents pertains to plot No. 344 and he filed the civil suit before the Court of Civil Judge, Class-II and also filed an affidavit stating therein that he purchased not one but two plats (sic:plots) from the samiti. This fact was false and therefore, affidavit was also false. According to the appellant for filing the false affidavit attract provisions of Section 190 of Cr.P.C., and the Civil Judge class-II should have conducted preliminary inquiry and follow the procedure as provided by the Section 195 of Cr.P.C.

22. After going through the record it appears that while dismissing the civil suit by the Civil Judge, Class-II did not complete the inquiry under Section 340 Cr.P.C., and the application remained unconsidered when civil suit was dismissed in default. As such, I find that this appeal deserves to be allowed.

23. Accordingly, the Criminal Appeal is allowed with a direction that the Civil Judge, Class-II before whom the civil suit was pending prior to its dismissal in default shall conduct a brief inquiry as contemplated under Section 340 Cr.P.C., and shall proceed, depending upon outcome of the inquiry, according

to the procedure laid down by the law.

24. Accordingly, the Criminal Appeal No. 2001/2012 is allowed while M.Cr.C. No. 17070/2013 is hereby dismissed.

Order accordingly.

I.L.R. [2015] M.P., 3113
MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice U.C. Maheshwari & Mr. Justice Sushil Kumar Gupta

M.Cr.C. No. 12865/2012 (Jabalpur) decided on 1 October, 2014

AJITA BAJPAI PANDE (SMT.) ...Applicant

Vs.

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

Prevention of Corruption Act (49 of 1988), Section 19 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Sanction - **Observations were given by the trial Court while deciding Special case pending against co-accused person observing that the prosecution agency shall be at liberty to file fresh charge-sheet against the petitioner after obtaining the requisite sanction from the competent authority u/s 19 of Prevention of Corruption Act - Held - It could not be said that the sanction of the competent authority dated 10.07.2013 was influenced by any observation made by the trial Court in the impugned judgment - Petition did not have any question which requires any consideration on merit for which this petition could be admitted for final hearing - Applicaion dismissed. (Paras 16 & 22)**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 19 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – मंजूरी – विचारण न्यायालय द्वारा सह अभियुक्त के विरूद्ध लंबित विशेष प्रकरण को निर्णीत किये जाते समय इस टिप्पणी के साथ समुक्तियां दी गई कि अभियोजन एजेंसी, भ्रष्टाचार निवारण अधिनियम की धारा 19 के अंतर्गत सक्षम प्राधिकारी से अपेक्षित मंजूरी अभिप्राप्त करने के पश्चात्, याची के विरूद्ध नये सिरे से आरोप–पत्र प्रस्तुत करने के लिए स्वतंत्र होगी – अभिनिर्धारित – यह नहीं कहा जा सकता कि सक्षम प्राधिकारी की मंजूरी दिनांक 10.07.2013, विचारण न्यायालय द्वारा आक्षेपित निर्णय में दी गई किसी समुक्ति से प्रभावित थी – याचिका में कोई ऐसा प्रश्न नहीं जिसके गुणदोष पर कोई विचार किया जाना अपेक्षित हो जिसके लिये यह याचिका अंतिम सुनवाई हेतु स्वीकार की जा सके – आवेदन खारिज।

Cases referred :

AIR 1964 SC 1, AIR 1964 SC 703, (2007) 1 SCC page 1, AIR 1976 SC 789 = (1976) 2 SCC 128.

Manish Datt with *Rahul Sharma,* for the applicant.
Pankaj Dubey, standing counsel of Lokayukt for the non-applicant.

ORDER

The Order of the Court was delivered by :
U.C. MAHESHWARI, J. :- On behalf of the petitioner, this petition is preferred under Section 482 of the Cr.P.C. to quash and set aside some findings of the judgment dated 15.12.2011 passed by the 1st Additional Sessions Judge/ Special judge (constituted under the Prevention of Corruption Act, 1988) (in short 'the Act') in Special Case No.12/2009 till the extent of making observations that inspite the earlier order passed in Special Case No.11/2007 vide dated 15.7.2009, discharging the petitioner in the lack of proper sanction under section 19 of the Act by extending the authority to the prosecution to file the charge-sheet against the petitioner after obtaining the sanction for prosecution from the competent authority, but the Court has neither been apprised about any such proceedings nor any document in this regard has been filed while the liability to perform such act was on the investigation agency, with a further prayer to discharge the petitioner.

2. The petitioner being member of the Indian Administrative Service was posted for some period as Member (Finance) in the M.P. Electricity Board (in short 'the Electricity Board') in the year 1996-97. On information of committing the corruption in the Electricity Board by its officials in purchasing 2.5 to 10 Amperes and 5 to 20 Amperes Single Phase Energy Meters during the period of posting the petitioner by which they had caused the financial loss to the Electricity Board and the Government in crores, an Enquiry being Case No.29/98 was initiated. In such enquiry, prima facie it was established that the alleged offence was committed by the officials of Electricity Board, on which Enquiry Officer recommended for registration of the crime. After examining his report, a Crime No.46/2004 was registered against officials of Electericity (sic:Electricity) Board namely N.P.Shrivastava, S.K.Das Gupta, Prakash Chand Mandloi, Basant Kumar Mehta, Mohan Chand and present petitioner Smt.Ajita Bajpai Pande at Special Police Establishment, Lokayukt Organisation, Jabalpur for the offence punishable under Section 13(1)(d) read

with section 13(2) of the Act and Section 120-B of the Indian Penal Code. After holding the investigation on establishing the ingredients of the alleged offence, against aforesaid S.K.Das Gupta, the then Chairman of the Electricity Board, Smt.Ajita Bajpai Pandey, Indian Administrative Service and Member (T & D), the petitioner and against above mentioned other accused, the charge-sheet as Special Case No.12/2009 for their prosecution under the aforesaid offence was filed on dated 14.6.2007.

3. After filing the charge-sheet, on behalf of the present petitioner and S.K.Das Gupta, so also on behalf of Basant Kumar Mehta, the application under Section 197 of Cr.P.C. with the prayer that in the lack of requisite sanction for their prosecution from the competent authority, they be excluded and discharged from the alleged prosecution was filed. On consideration taking into account that the petitioner being I.A.S. Officer is still working as a public servant and in the lack of requisite sanction from the competent authority, the cognizance of the alleged offence could not be taken against her, by allowing her application, she was discharged with further observation that the prosecution agency shall be at liberty to file fresh charge-sheet against the petitioner after obtaining the requisites sanction from the competent authority under Section 19 of the Act, while such applications of the co-accused S.K.Das Gupta and Basant Kumar Mehta was dismissed by holding that they being retired from the post of public servant, no sanction for their prosecution is required against them under the provision of Section 197 of the Cr.P.C. or of the Act. In such premises, on the basis of such earlier filed charge-sheet, the case was proceeded to hold the trial against the co-accused N.P.Shrivastava, S.K.Das Gupta, Prakashchand Mandloi, Basant Kumar Mehta and Mohan Chand. After holding the trial against such accused, on appreciation vide impugned judgment dated 15.12.2011, all such co-accused have been convicted and sentenced under Section 13(1)(d) read with 13(2) of the Act and section 120-B of the Indian Penal Code for R.I. 3 years with fine of Rs.1,00,000/- in the earlier section while R.I. 6 months with fine of Rs.1000/- in later. As per finding of such judgment, it was found that by the alleged act, the accused have caused the loss of Rs.6,43,74,900/-. On appreciation of the evidence in the impugned judgment in Paras 17,18 and 19, it was stated as under:

> 17. बी. के.मेहता के इस प्रस्ताव को संदस्य वित्त श्रीमती आजीता बाजपेई पाण्डे की ओर से प्रस्तुत किया गया, जिन्होंने एन.पी. श्रीवास्तव के

प्रस्ताव की संख्या में परिवर्तन करते हुए जहां श्री श्रीवास्तव ने नकोड़ा मीटर नरसिंहगढ़ से 2.5–10 एम्पीयर सिंगल फेस के पैंतीस हजार एजर्नी मीटर क्रय करने का प्रस्ताव दिया था, जिसे अजीता बाजपेयी ने घटाकर पांच हजार तथा मेसर्स हाईटेक इंस्ट्रूटेशन नरसिंहगढ़ के मीटर्स क्रय करने के श्रीवास्तव के प्रस्ताव के स्थान पर पांच हजार मीटर क्रय करना प्रस्तावित किया। मेसर्स बेंटेक्स इलेक्ट्कल्स बीस हजार मीटर के स्थान पर दस हजार मीटर क्रय करना श्रीमती अजीता बाजपेयी ने जिन फर्मो के सस्ती दरों पर मीटर उपलब्ध थे उनकी संख्या पैंसठ हजार नग कम थी तथा इंडिया मीटर्स चेन्नई की महंगी दरें वाले मीटरों की संख्या पैंसठ हजार मीटर की संख्या को बढ़ाया, इस प्रकार उनके द्वारा प्रस्तावित पांच हजार इंपोर्टेट रजिस्टर मीटर पर कोई आपत्ति नहीं करते हुए संख्या को सत्तर हजार कर दिया, जो निविदा की शर्तो के विपरीत था।

18. इस प्रस्ताव पर अध्यक्ष श्री दास गुप्ता ने नोटशीट पर सदस्य टी एण्ड डी की ओर प्रेषित करते हुए टीप लिखी की सदस्य वित्त के विचारों पर यदि कोई तय हो तो व्यक्त करते हुए अपनी टीप देवें। अध्यक्ष की इस टीप पर सदस्य टी एण्ड डी श्री मेहता टीप दिया कि वे सदस्य वित्त द्वारा प्रस्तावित तादात विवरण से सहमत नहीं है। राज्य शासन के निर्देश हैं कि एस.एस.आई. यूनिट के सहयोग किया जावे, जिससे राज्य का विकास हो सके और यदि इस इन एस.एस.आई. यूनिट मेसर्स हाईटेक इंस्ट्रूमेंटेशन एवं नाकोड़ा मीटर्स को संतोष–जनक संख्या में मीटर्स प्रदाय करने को आदेश नहीं दिये जाते हैं तो यह उचित नहीं होगा कि, वे मुख्य अभियंता द्वारा एवं सदस्य वित्त द्वारा प्रस्तावित संख्या में मीटर्स क्रय की तालिका के अवलोकन के बाद प्रस्ताव दे रहे हैं।

19. इस प्रस्ताव के अनुसार यह स्पष्ट है कि इंडिया मीटर्स चेन्नई द्वारा इंपोर्टेड रजिस्टर वाले 2.5 से 10 एम्पीयर के पांच हजार नग मीटर्स क्रय के मुख्य अभियंता के प्रस्ताव पर सदस्य वित्त ने यह संख्या सत्तर हजार नग की एवं बाद में सदस्य वित्त टी एण्ड डी ने चालीस हजार नग का प्रस्ताव किया साथ ही 5 से 20 एम्पीयर के पिलफर मीटर दस हजार नग मेसर्स इंडिया मीटर चेन्नई से क्रय करने का प्रस्ताव दिया। इसी प्रस्ताव में 5 से 30 एम्पीयर के उच्च क्षमता वाले मीटर्स जिन्हें बेंटेक्स इलेक्ट्कल्स से दस हजार नग क्रय करने को प्रस्ताव था उसे अलग उसे अलग करते हुए मेसर्स टायर्स एण्ड ट्रांसफार्मर लिमिटेड ने पांच हजार नग एवं एलीमर इलेक्ट्रिकल्स से पांच हजार नग मीटर्स क्रय करने की अनुशंसा की तथा मेसर्स हाईटेक इंस्ट्रूमेंट का पांच हजार नग मीटर प्रदाय करने के आदेश तथा मेसर्स नाकोड़ा मीटर्स को पांच हजार मीटर्स प्रदाय आदेश दिये जाने संबंधी लेख किया।

4. Apart the aforsaid in Para 64 in the same judgment, it was stated as

under :-

> 64. किन्तु साथ ही विवेचक एच.पी. चौधरी यह भी स्वीकार करते है कि उच्च स्तरीय समिति के सदस्यों जिनने इंपोर्टेड रजिस्टर वाले मीटर खरीदने की सिफारिश की थी, जिन्हें इस प्रकरण में अभियुक्त नहीं बनाया गया है। यहां यह उल्लेख करना आवश्यक होगा कि विवेचक द्वारा पूर्व सदस्य वित्त एवं संयुक्त सचिव खान मंत्रालय, भारत सरकार के विरूद्ध भ्रष्टाचार निवारण अधिनियम की धारा 19 के अतंर्गत अभियोजन संचालन की स्वीकृति न होने से मेरे पूर्व के विद्वान न्यायाधीश द्वारा पारित आदेश पत्रिका दिनांक 15 जुलाई 2009 को उनके विरूद्ध संज्ञान नहीं लिये जाने से और उन्हें प्रकरण से उन्मोचित (डिस्चार्ज) किये जाने तथा अभियोजन के विधिवत भ्रष्टाचार निवारण अधिनियम की धारा 19 के अतंगर्त अभियोजन स्वीकृत प्राप्त कर पुनः अभियोग–पत्र प्रस्तुत करने का अधिकार अभियोजन पक्ष को सुरक्षित रखते हुए उक्त आदेश पारित किया गया है, किंतु इसके बावजूद भी अभियोजन पक्ष द्वारा 15 जुलाई 2009 के पारित उस आदेश से लेकर अभी तक इस संबंध में कोई कार्यवाही किये जाने हेतु न्यायालय को अवगत नहीं कराया गया है, और न ही इस संबंध में कोई अभिलेख पेश किया गया है, जबकि उक्त कृत्य एवं दायित्व पूर्व से अभियोजन पक्ष के निवर्हन का है।

5. Aforesaid observations made by the trial Court in the impugned judgment on appreciation of the evidence are challenged in the present petition on behalf of the petitioner stating that such observations being made without extending any opportunity of hearing to the petitioner are not sustainable. Such observations have prejudiced the right of the petitioner because on that basis, the respondent-prosecution agency has again started the proceeding to get the sanction for prosecution of the petitioner from the competent authority to prosecute her under the aforesaid offence.

6. It is further case of the petitioner that subsequent to the aforesaid order dated 15.7.2009 passed in Special Case No.11/2007 allowing her application filed under Section 197 of the Cr.P.C. and discharging her, the authority of the respondent had approached to the authority of State of Madhya Pradesh i.e. Law and Legislative Department for grant of sanction under Section 197 of the Cr.P.C. to prosecute the petitioner. On consideration, the requisite sanction under Section 197 of Cr.P.C. for prosecution of the petitioner for offence under section 120-B of the IPC was not given. Simultaneously, it was also observed that no recommendation is made for prosecution of the petitioner for the offence made punishable under section 13(1)(d) and 13(2) of the Act.

7. It appears from the petition and the papers placed on behalf of the petitioner, so also from the return and the papers placed with the return that the aforesaid recommendation of the Law and Legislative Department of the State of M.P. for not to grant the sanction u/s 19 of the Act for prosecution of the petitioner under the aforesaid offence of the Act was conveyed to the Government of India, Ministry of Personnel, Public Grievances and Pensions Department of Personnel and Training, the competent authority to consider the matter for grant of sanction under Section 19 of the Act to prosecute the public servant working as an IAS Officer.

8. Alongwith the return of the respondent No.1, the sanction order dated 10.7.2013 alongwith the covering letter of the same dated 11.7.2013 is placed on record. From such sanction order and covering letter given by the aforesaid competent authority of Central Government, it is apparent that after struck down the recommendation of the State Government not to grant sanction for prosecution of the petitioner, considering the available facts and circumstances of the case, such competent authority of Central Government to grant sanction has granted sanction under section 19 of the Act for prosecution of the petitioner under the aforesaid offence of the Act.

9. As per return, subsequent to grant of aforesaid sanction dated 10.7.2013 by the competent authority of Central Government/Union of India for prosecution of the petitioner, a charge-sheet has also been filed against her by the authority of the respondent on 5.1.2014 in the Court of 1st Additional Sessions Judge and Special Judge (constituted under the Act), Jabalpur as stated in Annexure R/1. In such premises, the trial of the case is pending against the petitioner.

10. As per further case of the petitioner, after refusing the sanction for her prosecution vide order dated 24.10.2011 by the State authority, there was no occasion in the matter with the authority of the Central Government/Union of India to reconsider the matter on the basis of the same facts and set of evidence available in the case diary u/s 19 of the Act for grant of sanction to prosecute the petitioner for the alleged offence of Section 13(1) (d) and 13(2) of the Act.

11. It is undisputed that this petition is not preferred for quashment of the aforesaid sanction order dated 10.7.2013 given by the competent authority of Government of India, Ministry of Personnel, Public Grievances and Pensions

Department of Personnel and Training of the Government of India to prosecute the petitioner. This petition is filed only against the above mentioned observations given by the trial Court in the impugned judgment delivered against the co-accused. As per grievances of the petitioner such observations being made without extending any opportunity of hearing to the petitioner are not sustainable. But on the basis of such observations by stating the same to be a finding of the trial Court, matter is being reconsidered by the authority to grant the sanction for her prosecution. Such situation is prejudicing the right of the petitioner and pursuant to it prayer to expunge such observations and finding from the impugned judgment of the trial Court has been made.

12. The petitioner's counsel after taking us through the petition as well as papers placed on the record including the aforesaid interim order dated 15.7.2009 passed in the earlier filed charge-sheet whereby the petitioner was discharged, the return and its annexed police report filed against the petitioner under Section 173 of the Cr.P.C. and the aforesaid sanction order of the competent authority of the Central Government dated 10.7.2013, argued that by making aforesaid observations by the trial Court in the impugned judgment, such Court has insisted the prosecution agency to get the fresh sanction for prosecution of the petitioner and pursuant to that the respondent agency had taken the steps and approached to the competent authority to consider the process for grant of sanction and in such proceedings, the sanction for prosecution of the petitioner has been granted by the competent authority of the Central Government. Accordingly, the observations and finding of the trial Court being prejudically affecting the right of the petitioner are not sustainable. In continuation, he said that it is settled proposition of law that after application of mind at the first instance if competent authority had refused the sanction for prosecution then subsequently on the basis of the same record and the set of facts, no sanction could be given contrary to the earlier order by the sanctioning authority. He also argued that if any order or finding is given by any Court or the authority without extending any opportunity of hearing to the affecting parties, then the same is contrary to the principle of natural justice and the same could not be sustained under existing law and prayed to expunge the aforesaid observation and finding of the trial Court given in the impugned judgment in respect of the process relating to grant of sanction for prosecution of the petitioner. In support of his contention, he has also placed reliance on the cases of the Apex Court in the matter of *Dr. Raghubir Sara Vs State of Bihar and another* reported in AIR 1964 SC 1 and in the matter of *State of*

Uttar Pradesh Vs. Mohammad Naim AIR 1964 SC 703. With these submissions, he prayed for admission and allowing this petition.

13. On the other hand, responding the aforesaid arguments Shri Pankaj Dubey, learned standing counsel of the respondent-Lokayukt said that it is apparent from the record that before filing the earlier charge-sheet in the Special Court (constituted under the Act) as Special Case No.11/2007, on which the cognizance on the matter was taken by such Court, the petitioner was already transferred from the post of M.P. Electricity Board to some other Department of the State or the Central Government and in such premises on the date of taking cognizance by the Special Judge in such earlier filed charge-sheet, although the petitioner was a public servant but was not working on the same post of the Electricity Board and therefore, in view of the law laid down by the Apex Court in the matter of *Prakash Singh Badal Vs. State of Punjab* reported in (2007) 1 SCC page 1, sanction for her prosecution was not required but contrary to this legal position, the Special Court vide order dated 15.7.2009 discharged the petitioner in the lack of requisite sanction for prosecution under Section 19 of the Act. So firstly he said that in the aforesaid circumstances, even in the lack of sanction for prosecution under Section 19 of the Act, the petitioner could be prosecuted effectively in the matter. In continuation he said that in case sanction is required in the matter then in the existing legal position, the petitioner being an IAS officer, her sanctioning authority was the competent authority of the Central Government and not the Law and Legislative Department or the G.A.D. of the State of Madhya Pradesh. So the refusal of the sanction for prosecution of the petitioner under Section 120-B of the IPC by the Law and Legislative Department of the State of M.P. vide order dated 24.10.2011 being passed without authority could not be deemed to be the effective and admissible order in the eyes of law. Apart this according to such order of the Law and Legislative Department of State of M.P. dated 24.10.2011 after refusal of the sanction to prosecute the petitioner for the offence under Section 120-B of the IPC, such authority has recommended not to grant sanction for her prosecution under section 19 of the Act for prosecution under section 13(1)(d) and 13(2) of the Act and it is apparent from the record that the recommendation was sent to the competent authority of the Central Government. Where after taking into consideration the aforesaid recommendation of the State of M.P., the same was struck down and in the facts and set of evidence available in the papers of the case diary, the requisite

sanction dt. 10.7.2013 to prosecute the petitioner for the offence of Section 13(1)(d) and 13(2) of the Act was granted under the provision of Section 19(1) of the Act. As such the Law and Legislative Department or any official of the State authority was/are not empowered to grant sanction for prosecution of the petitioner. She being an IAS officer, her sanctioning authority was/is the Central Government and therefore, the order of refusal of sanction by the State is not having any worth in the matter and when the sanction for prosecution of the petitioner was given by the competent authority of the Central Government then the petitioner has no locus or authority to challenge such sanction indirectly by way of challenging the abovementioned observations and findings of the impugned judgment passed and delivered against the co-accused by which each of them has been convicted and sentenced. In continuation, he said that mere perusal of the sanction order dated 10.7.2013 given by the competent authority of the Central Government of India, it is apparent that for giving such sanction besides the record of the case diary only recommendation letter of the Law and Legislative Department of the State of M.P. dated 24.10.2011 was taken into consideration and the same was struck down. Any finding or observation made by the trial Court in the impugned judgment was not taken into consideration in any manner by such competent authority to consider and grant sanction, so in such premises it is apparent that no right of the petitioner has been prejudiced in any manner on the basis of the observations and findings made by the trial Court in the impugned judgment. He further said that mere perusal of the aforesaid paras of the impugned judgment referred by the petitioner's counsel, it is apparent that anywhere in such paras, the trial Court has not given any direction to the authority to initiate or proceed to obtain sanction against the present petitioner, only in view of earlier order dated 15.7.2009 made some observation in respect of the conduct of the respondent-prosecution agency by stating that such authority after passing such interim order dated 15.7.2009 has not fulfilled its duties, therefore, such observations could not be said that the same had affected any right of the petitioner or prejudiced to her right in any manner. He further stated that there is no scope in the matter even for admission of this petition and prayed for dismissal of this petition at the initial stage of admission. In support of his contention, he placed reliance on the case of the Apex Court in the matter of *Parkash Singh Badal Vs. State of Punjab* reported in (2007) 1 SCC page 1, so also in the case of *Hukam Chand Shyamlal Vs. Union of India & others* reported in AIR 1976 SC 789.

14. Having heard the counsel at length, keeping in view the arguments advanced, we have carefully gone through the petition as well as papers placed on record alongwith the interlocutory order dated 15.7.2009 passed in Special Case No.11/2007 in which the impugned judgment has been passed subsequently, so also the aforesaid sanction order of the Law and Legislative Department of the State Government as well as the competent authority of the Government of India by which the sanction for prosecution of the petitioner has been granted.

15. Mere perusal of the concerning part of the impugned judgment referred by the petitioner's counsel and reproduced above, it is apparent that the trial Court anywhere has not directed the prosecution to take further steps to obtain the sanction for prosecution of the petitioner. Such Court only stated about aforesaid earlier order dated 15.7.2009 passed in Special Case No.11/2007 discharging the petitioner in the lack of appropriate sanction for prosecution under Section 19 of the Act, so also made some observation with respect of conduct of the prosecution agency stating that subsequent to interim order dated 15.7.2009 the prosecution agency neither apprised the Court regarding sanction nor filed any document in this regard, as such the same was duty of the prosecution. Such observations could not be deemed that the same has caused any prejudice to the petitioner. In any case, it could not be said that on the basis of such observations, the prosecution agency has proceeded to the competent authority of Central Government/Union of India for grant of sanction to prosecute the petitioner.

16. It is apparent from the record that vide order dated 15.7.2009 while discharging the petitioner from the Special Case No.11/2007 registered on the basis of earlier filed charge-sheet, the trial Court has extended the authority to the respondent agency to file fresh charge-sheet against the petitioiner (sic:petitioner) after obtaining the requisite sanction for prosecution from the competent authority, although subsequent to that the Law and Legislative Department vide dated 24.10.2011 has refused to grant sanction for prosecution of the petitioner under Section 120-B of the IPC and also recommended not to grant sanction for her prosecution in respect of the offence of Section 13(1)(d) and 13(2) of the Act but from the aforesaid discussion, it is apparent that the State of Madhya Pradesh or its authority is not the appointing authority of the petitioner and cannot remove her from service, therefore, such State authority did not have any power or authority under the

law to consider the matter for grant of sanction for prosecution of the petitioner. In the matter of the petitioner, the sanctioning authority was/is only the Government of India, and the aforesaid Department of Central Government after taking into consideration the aforesaid recommendation of the State of M.P. dated 24.10.2011 and by striking down the same and in the available set of evidence of the case has granted the sanction for prosecution of the petitioner vide order dated 10.7.2013 and pursuant, to it, the charge-sheet has also been filed and the trial of the same is probably pending before the Special Court. So in such Premises it could not be said that the sanction of the competent authority dated 10.7.2013 was influenced by any observation made by the trial Court in the impugned judgment. So in such circumstances, this petition did not have any question which requires any consideration on merits for which this petition could be admitted for final hearing.

17. In the case of *Hukam Chand Shyamlal Vs. Union of India & others* AIR 1976 SC 789=(1976) 2 SCC 128, it was held as under:

> "18. It is well settled that where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all, and all other modes of performances are necessarily forbidden. It is all the more necessary to observe this rule where power is of a drastic nature and its exercise in a mode other than the one provided, will be violative of the fundamental principles of natural justice....."

18. In view of aforesaid principles of the cited case, at the initial stage only the competent authority of the Central Government as appointing authority of the petitioner was empowered to grant sanction. Ultimately the same was granted by such authority vide order dated 10.7.2013, so in view of such sanction of the competent authority, the order of refusal of sanction and recommendation, for not grant of such sanction, of the Law and Legislative Department of the State of M.P. dated 2410.2011 is not helping to the petitioner in any manner and in such premises, by admitting this petition, contrary to law the petitioner could not be permitted to rely on such sanction order dated 24.10.2011 by ignoring the sanction of the competent authority of Union of India dated 10.7.2013.

19. We deem fit to consider this matter in the light of the case law of the

Apex Court in the matter of *Parkash Singh Badal Vs. State of Punjab* reported in (2007) 1 SCC 1 (supra) also. In such case, it was held as under:-

> 19. In *Habibulla Khan v. State of Orissa and Anr.* (1995 (2) SCC 437) it was held as follows:
>
> '12. However, it was contended that while the Governor had given sanction to prosecute the Chief Minister when he continued to be an MLA in *R.S. Nayak v. A.R. Antulay*, the question whether the sanction was necessary to prosecute an MLA as a public servant did not arise. It was, therefore, contended that although the offence alleged to have been committed during the appellants' tenure as Ministers, the appellants continued to be MLAs and, therefore, as public servants on the day of the launching of prosecution and hence sanction of the Governor under Article 192 of the Constitution was necessary. This question has also been answered in *R.S, Nayak v. A.R. Antulay*. Referring to this Court's decision in *State (S.P.E., Hyderabad) v. Air Commodore Kailash Chand* this Court held : (R.S.Nayak case SCC pp. 208-09, paras 25-26):
>
> "We would however, like to make it abundantly clear that if the two decisions purport to lay down that even if a public servant has ceased to hold that office as public servant which he is alleged to have abused or misused for corrupt motives, but on the date of taking cognizance of an offence alleged to have been committed by him as a public servant which he ceased to be and holds an entirely different public office which he is neither alleged to have misused or abused for Corrupt motives, yet the sanction of authority competent to remove him from such latter office would be necessary before taking cognizance of the offence alleged to have been committed by the public servant while holding an office which he is alleged to have abused or misused and which he has ceased to hold, the decisions in our opinion, do not lay down the correct law and cannot be accepted as making a correct interpretation of Section 6.
>
> Therefore, upon a true construction of Section 6, it is implicit

therein that sanction of that competent authority alone would be necessary which is competent to remove the public servant from the office which he is alleged to have misused or abused for corrupt motive and for which a prosecution is intended to be launched against him."

20. The principle of immunity protects all acts which the public servant has to perform in the exercise of the functions of the Government. The purpose for which they are performed protects these acts from criminal prosecution. However, there is an exception. Where a criminal act is performed under the colour of authority but which in reality is for the public servant's own pleasure or benefit then such acts shall not be protected under the doctrine of State immunity.

23. The main contention advanced by Shri Venugopal Learned senior counsel appearing for the appellant is that a public servant who continues to remain so (on transfer) has got to be protected as long as he continues to hold his office. According to the learned counsel, even if the offending act is committed by a public servant in his former capacity and even if such a public servant has not abused his subsequent office still such a public servant needs protection of Section 19(1) of the Act. According to the learned counsel, the judgment of this Court in *R.S. Nayak's* case holding that the subsequent position of the public servant to be unprotected was erroneous. According to the learned counsel, the public servant needs protection all throughout as long as he continues to be in the employment.

24. The plea is clearly untenable as Section 19(1) of the Act is time and offence related.

26. The underlying principle of Sections 7, 10, 11, 13 and 15 have been noted above. Each of the above Sections indicate that the public servant taking gratification (Section 7), obtaining valuable thing without consideration (Section 11), committing acts of criminal misconduct (Section 13) are acts performed under the colour of authority but which in reality are for the

public servant's own pleasure or benefit. Sections 7, 10, 11, 13 and 15 apply to aforestated acts. Therefore, if a public servant in his subsequent position is not accused of any such criminal acts then there is no question of invoking the mischief rule. Protection to public servants under Section 19(1)(a) has to be confined to the time related criminal acts performed under the colour or authority for public servant's own pleasure or benefit as categorized under Sections 7, 10, 11, 13 and 15. This is the principle behind the test propounded by this court, namely, the test of abuse of office.

20. In view of aforesaid, if the case in hand is examined then it is apparent that on the date of alleged offence, the petitioner was posted as Member (Finance) in the M.P. Electricity Board and as alleged committed the alleged offence but subsequent to that she was transferred to other Department of Central Government and therefore, although she was remained to be public servant after posting in other department but looking to the principles laid down in the aforesaid citied case, if before taking the cognizance in the matter, the concerning public servant/officer has already been transferred to some other Department of the State or other authority then to prosecute such public servant/officer, sanction under section 19(1) of the Act is not required and such principle is directly applicable to the present case. So in such premises, mere on the basis of observations and findings of the trial Court in the impugned judgment of earlier filed charge-sheet decided against the co-accused and specially when competent authority of Government of India has not given the alleged sanction of prosecution of petitioner on the basis of any of such observations of the impugned judgment then, by admitting this petition, the petitioner cannot be permitted to misuse the process and the procedure of law to prolong the trial of criminal case filed against her after obtaining the requisite sanction for her prosecution from the competent authority of Central Government. In the aforesaid premises, we are also of the view that this petition could not be admitted even for expunging any observation or finding of the impugned judgment of the trial Court.

21. So far as the case laws in the matter of *Dr.Raghubir Sara Vs. State of Bihar and another* reported in AIR 1964 SC 1, and *State of Uttar Pradesh Vs. Mohammad Naim* AIR 1964 SC 703 cited on behalf of the petitioner are concerned, after going through the same, this Court did not

have any dispute regarding principles laid down in those cases but in the aforesaid explained circumstances of the case at hand, any of such cited case law being distinguishable on facts is not helping to the petitioner even for admission of this petition.

22. In view of aforesaid discussion, we have not found any substance in the petition even for admission. Consequently it being devoid of any merit deserves to be and hereby dismissed.

Application dismissed.

I.L.R. [2015] M.P., 3127
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Alok Verma
M.Cr.C. No. 7216/2013 (Indore) decided on 28 November, 2014

ABDUL RASHID ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Section 216 and Penal Code (45 of 1860), Section 505(2)(1) - Alteration of charge* - Objectionable literatures and pamphlets were found in possession of applicant - However, to prima facie make out a case u/s 505(2)(1), there should be publication and circulation - No permission was granted u/s 196 of Cr.P.C. for offence u/s 505(2)(1)- Prima facie offence u/s 505(2)(1) of I.P.C. not made out - Order altering the charge set aside. (Paras 6 to 8)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 216 एवं दण्ड संहिता (1860 का 45), धारा 505(2)(1) – आरोप का परिवर्तन – आवेदक के कब्जे में आपत्तिजनक साहित्य एवं पुस्तिकाएं पाई गई – किंतु, धारा 505(2)(1) के अंतर्गत प्रथम दृष्ट्या प्रकरण बनाने के लिये प्रकाशन एवं वितरण होना चाहिये – धारा 505(2)(1) के अंतर्गत अपराध के लिये दं.प्र.सं. की धारा 196 के अंतर्गत कोई अनुमति प्रदान नहीं की गई थी– भा.दं.सं. की धारा 505(2)(1) के अंतर्गत अपराध के लिये प्रथम दृष्ट्या आरोप नहीं बनता – आरोप परिवर्तन का आदेश अपास्त।

Case referred :

1997(7) SCC 431,

Anuj Bhargava, for the applicant.
Himanshu Joshi, P.L. for the non-applicant/State.

ORDER

ALOK VERMA, J. :- This application under section 482 of Cr.P.C is directed against the order passed by the learned 3rd Additional Sessions Judge, Indore in Criminal Revision no. 468/2012 which in its turn was directed against the order passed by the learned JMFC, Indore in Criminal Case no. 9838/2001. Learned Revisional Court upheld the order passed by learned JMFC and therefore, this application under section 482 of Cr.P.C is filed for quashing the orders passed by both the courts below.

2. The brief facts for disposal of this application are that the present applicants along with other co-accused are facing a trial under sections 153-A and 188 of IPC as Criminal case no. 9838/2001.

3. According to the present applicants, prosecution evidence was closed on 23/02/2011. The prosecution moved an application on 24/02/2011 for further examining some witnesses which was allowed. However, the prosecution did not avail the opportunity and the case was fixed for final arguments. On 16/08/2011, final arguments were heard and the case was fixed for judgment. On 23/08/2011, the prosecution moved an application under section 311 of Cr.P.C for recalling of certain witnesses, which was dismissed by the trial Court. However, the Revisional Court allowed the application and the High Court set aside the order. The prosecution again moved an application on 12/04/2012 and then on 20/04/2012, the prosecution moved an application under section 216 of Cr.P.C for altering the charge. The Court vide order dated 10/05/2012 altered the charge and charge under section 505(2) of IPC was added.

4. The application was filed under section 216 of Cr.P.C by the prosecution who defeat the order passed by various courts dismissing their application under section 311 of Cr.P.C. The prosecution wants to recall the witness O.P. Kujur. When the prosecution failed, the present application was filed.

5. I have gone through the impugned order. The learned Revisional Court did not accept this submission of the present applicant that the offence under section 505(2)(1) of IPC is a minor offence in respect of the offence under section 153-A and 188 of IPC and therefore, no separate charge was required. Relying on the judgment delivered in the case of *Bilal Ahmad Kalu Vs. State* reported in 1997 (7) SCC 431, the learned Revisional Court observed that

these are two different offences and also observed that the pamphlets and literatures were seized from the possession of present applicant for promoting feeling of enmity, hatred or ill-will between different religious or racial or linguistic or regional groups or casts or communities. However, after going through the judgment of Hon'ble Supreme Court delivered in the case of *Bilal Ahmad* (Supra), in which, the Court observed in para 10 as under :

> "The common ingredient in both the offences is promoting feeling of enmity, hatred or ill-will between different religious or racial or linguistic or regional groups or castes or communities. Section 153A covers a case where a person by "words, either spoken or written, or by signs or by visible representations" promtes or attempts to promote such feeling. Under Section 505(2), promotion of such feeling should have been done by making and publishing or circulating any statement or report congaining rumour or alarming news. "

and then in para 12 as under under :

> "The main distinction between the two offences is that publication of the word or representation is not necessary under the former, such publication is sine qua non under Section 505. The words "whoever makes, publishes or circulates" used in the setting of Section 505(2) cannot be interpreted disjunctively but only as supplementary to each other. If it is construed disjunctively, any one who makes a statement falling within the meaning of Section 505 would, without publication or circulation, be liable to conviction. But the same is the effect with Section 153A also and then that Section would have been bad for redundancy. The intention of the legislature in providing two different sections on the same subject would have been to cover two different fields of similar colour. The fact that both sections were included as a package in the same amending enactment lends further support to the said construction. "

6. After going through these two paragraphs, it is clear that under section 505(2)(1) of IPC, promotion of such feelings should have been done by making publishing or circulating any statement and these three words should be read conjunctively and not disjunctively. As such, there should be

publication and circulation in the present case, however, only objectionable literatures, pamphlets were found in the possession of present applicant. Permission of the State Government as required under section 196 of Cr.P.C was granted only in respect of section 153-A and not under section 505(2)(1) of IPC which is also require under section 196 of Cr.P.C.

7. As such, in my opinion, altering the charge at such a late stage, without considering prima facia, the charge will make out or not, the courts below erred while holding that the charge under section 505(2)(1) of IPC prima facia (sic:facie) is made out on the same facts as alleged in the charge sheet. In such situation, I find that this application deserves to be allowed.

8. Accordingly, present application is allowed. The impugned order passed by the learned Revisional Court in Criminal Revision no. 468/2012 dated 02/07/2013 and the order passed by learned JMFC, Indore in Criminal Case no. 9838/2001 dated 10/05/2012 are set aside. The learned trial Court is directed to hear final arguments in the case and dispose of the case within three months after receiving certified copy of this order. Office is directed to immediately return back the records of the lower Court along with a copy of this order.

9. With such observations and directions, present applications stands disposed of.

C c as per rules.

Application disposed of.

I.L.R. [2015] M.P., 3130
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Alok Verma
M.Cr.C. No. 5306/2014 (Indore) decided on 28 November, 2014

ASHOK AGRAWAL ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Section 482 - For quashment of F.I.R.* - Cognizance taken by Magistrate on the letter issued by District Magistrate for offence u/s 188 of IPC - Held - Without complaint cognizance could not be taken - F.I.R. and proceedings before Magistrate**

quashed - Applicant discharged u/s 188, IPC. (Paras 2 to 4)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – प्रथम सूचना प्रतिवेदन का अभिखंडन – जिला मजिस्ट्रेट द्वारा जारी किये गये पत्र पर मजिस्ट्रेट द्वारा भा.दं.सं. की धारा 188 के अंतर्गत अपराध के लिये संज्ञान लिया गया – अभिनिर्धारित – शिकायत के बिना संज्ञान नहीं लिया जा सकता – प्रथम सूचना प्रतिवेदन एवं मजिस्ट्रेट के समक्ष कार्यवाहियां अभिखंडित – भा.दं.सं. की धारा 188 के अंतर्गत अपीलार्थी को आरोपमुक्त किया गया।

Cases referred :

2014 (1) JLJ 326, (2010) 9 SCC 567.

Nilesh Agrawal, for the applicant.
Manish Joshi, P.L. for the non-applicant/State.

ORDER

ALOK VERMA, J. :- This application under section 482 of Cr.P.C is directed against the order passed by learned 1st Additional Sessions Judge, Ratlam in Criminal Revision no. 76/2014. which in its turn, directed against the order passed by learned Judicial Magistrate Second Class, Ratlam in Criminal Case no. 2274/2011 dated 11/04/2014.

2. The facts necessary for disposal of this application are that on 29/08/2011, a charge-sheet was filed under section 188 of IPC on the ground that the present applicant promulgated the order passed by the District Magistrate under section 144 of Cr.P.C and in violation of the order, he sold textbook and notebook. By the impugned order dated 11/04/2014, the learned Judicial Magistrate considered the charge sheet and the objection raised by the present applicant that without any complaint filed by the District Magistrate, cognizance cannot be taken by the Magistrate under section 195 of Cr.P.C. The learned Courts below observed that the District Magistrate Rajendra Sharma addressed a letter dated 23/08/2011 to the Chief Judicial Magistrate, Ratlam and it was expected in the letter that the Court would take cognizance of the offence. Placing reliance on the judgment of Hon'ble Division Bench of this Court delivered in the case of *State of M.P. and other Vs. Jyotiraditya Sindhiya* reported in 2014 (1) JLJ 326, the case of the present applicant before the lower Court was that the cognizance under section 188 of IPC cannot be taken on charge-sheet filed by the police and can be taken only on

the complaint filed by the District Magistrate whose order was disobeyed. However, the Revisional Court observed that in none of the cases cited by the present applicant before him , the complaint as was present in the form of letter dated 23/08/2011 was present, and therefore, the Revisional Court observed that due to the letter dated 23/08/2011, the impugned order passed by the learned Judicial Magistrate was legal and no interference is called for. Under that premise, the revision was dismissed.

3. I have gone through the judgment of Hon'ble Division Bench delivered in the case of *Jyotiraditya Sindhiya* (supra), wherein it was held that the offence cannot be registered by police in view of the provisions of section 195 of Cr.P.C under section 188 of IPC. The Division Bench also relied upon the principles laid down by the Appellate Court delivered in the case of *C. Muniappan and others Vs. State of Tamil Nadu* reported in (2010) 9 SCC 567 and held that without complaint as defined by section 2(d) of Cr.P.C, cognizance cannot be taken under section 188 of IPC. Applying ratio of the case of *Jyotiraditya Sindhiya* (supra), I find that cognizance could not be taken by the Magistrate on the basis of FIR registered by police in Crime no. 124/2011. The defects cannot be cured merely by a letter by the District Magistrate addressed to the Chief Judicial Magistrate. In such situation, I find that this application filed under section 482 of Cr.P.C deserves to be allowed and the impugned order passed by the learned Revisional Court and the Judicial Magistrate are liable to be set aside.

4. Accordingly, this application is allowed. The impugned order passed by the learned Revisional Court in Criminal Revision no. 76/2014 dated 19/06/2014 and the order passed by the learned Judicial Magistrate in Criminal Case no. 2274/2011 dated 11/04/2014 are set aside. The FIR arising out of Crime no. 124/2011 registered by police station – Station Road, Ratlam under section 188 of IPC is quashed and also the proceedings before the learned Judicial Magistrate in Criminal Case no. 2274/2011 are quashed. The present applicant is discharged from the charge under section 188 of IPC.

With the aforesaid observations and the directions, present application stands disposed of.

C c as per rules.

Application allowed.

I.L.R. [2015] M.P., 3133
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Subhash Kakade
M.Cr.C. No. 12258/2015 (Jabalpur) decided on 27 October, 2015

MAHENDRA KUMAR PATEL ...Applicant
Vs.
SINDH HARDWARE STORE ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 315, 317 - To produce defence evidence **- Accused was permitted to appear as a defence witness u/s 315 of Cr.P.C. - His examination in chief was recorded and cross examination was deferred - On next day, he could not appear due to ill health and application u/s 317 was allowed and case was adjourned - On adjourned date the trial court closed the right of accused - Held - There is no reason on record for refusal to produce defence evidence particularly cross examination of applicant - To deny a litigant an opportunity is against criminal justice delivery system - Every party has right to be allowed sufficient opportunity to put up his case as well as his defence - Order of trial court set aside.**

(Paras 14 to 16)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 315, 317 – बचाव साक्ष्य प्रस्तुत करने हेतु – दं.प्र.सं. की धारा 315 के अंतर्गत अभियुक्त को बचाव साक्षी के रूप में उपस्थित होने की अनुमति दी गई – उसका मुख्य परीक्षण अभिलिखित किया गया एवं प्रतिपरीक्षण आस्थगित किया गया था – अगले दिन, वह खराब स्वास्थ्य के कारण उपस्थित नहीं हो सका एवं धारा 317 के अंतर्गत आवेदन मंजूर किया गया एवं प्रकरण स्थगित किया गया – स्थगन दिनांक को विचारण न्यायालय ने अभियुक्त का अधिकार समाप्त कर दिया – अभिनिर्धारित – बचाव साक्ष्य प्रस्तुत करने से इंकार का कोई कारण अभिलेख पर नहीं विशेष रूप से आवेदक का प्रतिपरीक्षण – वादकारी को अवसर देने से इंकार करना आपराधिक न्याय व्यवस्था के विरूद्ध है – प्रत्येक पक्षकार का अधिकार है कि उसे अपने बचाव के साथ ही अपना प्रकरण प्रस्तुत करने का पर्याप्त अवसर मंजूर किया जाये – विचारण न्यायालय का आदेश अपास्त।

Cases referred :

AIR 1968 SC 1050, (2010) 7 SCC 263, (1998) 8 SCC 612.

Ravendra Shukla, for the applicant.

ORDER

SUBHASH KAKADE, J. :- This petition under Section 482 of the Criminal Procedure Code, 1973, hereinafter referred to as "the Code" has been filed by the applicant/accused against the impugned order dated 19.06.2015 passed in Criminal Case No. 454/2015, by Judicial Magistrate First Class, Hoshangabad, whereby the Magistrate closed the right of the applicant for producing defence evidence.

2. The respondent/complainant has filed criminal case against the applicant for commission of offence punishable under Section 138 of the Negotiable Instrument Act (66 of 988) (sic:26 of 1881), hereinafter referred to as "the Act", before learned trial Court. It was alleged that the applicant has purchased the agricultural equipments on credit and payment was made through a cheque bearing No.022644 dated 08.06.2010 payable at Axis Bank, Hoshangabad, when the respondent deposited the cheque in his bank it was dishonored due to mis-match signature of the applicant.

3. Facts leading to present dispute summaries as that, plea of the applicant is that he does not purchased any agricultural equipments from the respondent; however his brother purchased the same and also made the payment by cash. While applicant examined under the provisions of Section 313 of the Code he has specifically denied all evidence put forth against him. The applicant voluntarily come forward to give evidence by written request and enters in witness box. When the case was fixed for evidence of the applicant and his witnesses, the applicant could not appear before learned trial Court due to illness and has filed an application under Section 317 of the Code for exemption of his personal presence, which were allowed but, learned trial Court closed the right of the applicant to produce the defence evidence on the ground that the applicant has already taken more time for the same purpose.

4. Shri Ravendra Shukla, learned counsel for the applicant submitted that learned trial Court has committed grave error in not extending the time for adducing the evidence for properly defend the case, hence the impugned order deserves to be set aside as it is against the cardinal principle of natural justice that every party should be allowed reasonable opportunity to prove its case.

5. Having heard learned counsel for the applicant, perused the impugned order and after going through the available record, the Court is of the opinion that this petition deserves to be allowed.

6. Section 315 of the Code, Accused person to be competent witness

What is required for availing of the benefits as per the provisions

contained in the section 315 of the Code are:-

(1) that there must be a trial in the criminal court;

(2) person applying to be examined under the provisions of the said provisions would be necessarily an accused;

(3) when the stage of invoking the provisions of the said Act has reached i.e. to say after conclusion of record of evidence of the prosecution followed by the explanations/submissions of the accused as required under sec. 313 of the Code is over;

(4) the evidence of such accused will to on oath as a witness;

(5) such evidence must be in disproving of the charges made against him or any person charged together with him at the trial is last requirement.

7. The pertinent aspect is that such evidence must be in disproving of the charges made against him or any person charged together with him at the same trial. Hence, the nature of evidence cannot be for strengthening the case of the prosecution to prove guilt of any of the accused, but must be in disproving of the charges made against him. This position is cemented by prohibiting any of the parties from commenting on the failure of the accused to examine himself on oath as a witness.

8. There is no compulsion involved in examination of the accused under sec. 315 of the Code. Art. 20(3) of the Constitution cannot be invoked to challenge the constitutionality of this section- *Tukaram G. Gaokar vs. R.N. Shukla and others*, AIR 1968 SC 1050.

9. Therefore, this section nowhere imposes any obligation on the Court to explain to the accused regarding his right to examine himself as a defence witness.

10. The Apex Court in case of *Selvi and others vs. State of Karnataka,* reported in (2010)7 SCC 263 observed that even though any accused is a competent witness in his/her own trial, he/she cannot be compelled to answer questions that could expose him/her to incrimination and the trial Judge cannot draw adverse inferences from the refusal to do so.

11. But, once the accused volunteers to give evidence by written request and enters the witness box, he subjects himself to all the liabilities of an ordinary witness.

12. The Apex Court in case of *Gajendra Singh and others vs. State of Rajasthan*, reported in (1998)8 SCC 612 observed that once the court allows the application of the accused to be examined as a defence witness and

commences recording his evidence, he cannot be denied opportunity to produce his documents merely because he did not produce the same earlier.

13. The accused person was earlier allowed to be examined under sec. 315 of the Code, but he did not choose to depose. The defence evidence was thereafter closed after giving adequate opportunities to the defence. In the circumstance the plea of violation of natural justice has no legs to stand upon.

14. In light of above discussed legal position, these facts required to be repeated that after statements recorded under the provisions of Section 313 of the Code the appellant/accused Mahendra Patel chooses to examine himself as witness to disproving of the charges made against him and after obtaining required permission under the provisions of Section 315 of the Code his examination-in-chief was also recorded on dated 16.05.2015 but, cross-examination was deferred. On the next date of hearing 19.06.2015 while the appellant was not present his application for exemption under the provisions of Section 317 of the Code were allowed but, when learned counsel for the appellant prayed for time to produce the defence evidence learned trial Court vide impugned order rejected the prayer and fixed the case for final hearing on 26.06.2015.

15. It is manifestly clear that when learned trial Court found the absence of appellant justified and also allowed the application filed under the provisions of Section 317 of the Code hence, any just reason was not on record for refusal to produce defence evidence particularly cross examination of the applicant.

16. To deny a litigant an opportunity on grounds, as discussed above is against the criminal justice delivery system. At this juncture, this cardinal principle of natural justice requires to be repeated that every party has right to be allowed sufficient opportunity to put up his case as well as his defence and reason is simple that the other party will also be at liberty to rebut it and can produce evidence for its rebuttal.

17. In light of above facts and circumstances of the case by allowing this petition, the order passed by learned trial Court is hereby quashed. Parties shall appear personally or through their counsel before learned trial Court (Judicial Magistrate First Class, Hoshangabad) on dated 19.11.2015. Thereafter, learned trial Court will give an opportunity to the applicant to produce his defence evidence. At the same time, learned trial Court will also made available appropriate opportunity to the respondent to rebut defence evidence put up by the applicant and also allow the respondent to produce further evidence for rebuttal, if so desire.

Petition allowed.