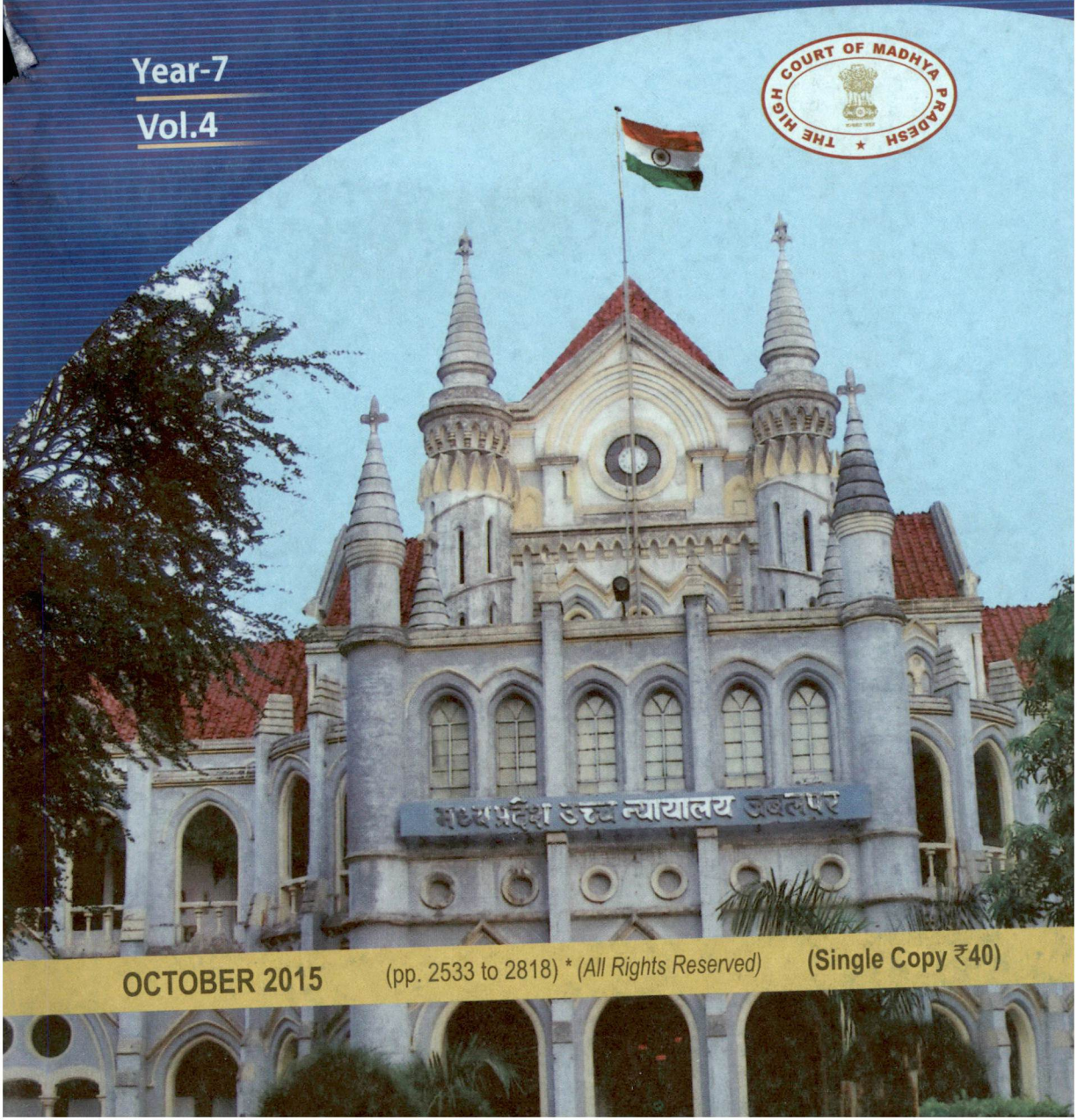
THE INDIAN LAW REPORTS

M.P. SERIES

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

Year-7

Vol.4



OCTOBER 2015 (pp. 2533 to 2818) (Single Copy ₹40)

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Representation of the People Act (43 of 1951), Sections 83(1), 123(4) & Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Cause of Action **– Respondent's application under Order 7 Rule 11 seeking rejection of Election Petition, on the ground of non-discloser of cause of action and that the material facts regarding corrupt practice are missing – Held – This is an undisputed fact that the name of respondent No. 1 is enrolled at Sr. No. 248 at Assembly Constituency No. 220, Ratlam City – It is also clear from the details of immovable property and the Bank account, that respondent No. 1 is permanent resident of Ratlam – Thus, it cannot be blamed that he has mentioned incorrect residential address in the nomination paper – Similarly – Closure report has been submitted in regard to Crime No. 286/1988, registered against respondent No.1 – Neither any cognizance was taken nor any charges were framed by Magistrate – Therefore, no case can be legally said to be pending against respondent No.1 – Thus, it cannot be held that**

respondent No.1 has concealed the fact in nomination form. [Paras Vs. Chaitanya Kashyap] ...2712

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराऐं 83(1), 123(4) एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – वाद हेतुक – चुनाव याचिका को नामंजूर किये जाने हेतु प्रत्यर्थी का आदेश 7 नियम 11 के अंतर्गत आवेदन, वाद कारण न दर्शाये जाने के आधार पर एवं यह कि भ्रष्ट आचरण संबंधी तात्विक तथ्य अनुपलब्ध हैं – अभिनिर्धारित – यह एक अविवादित तथ्य है कि प्रत्यर्थी क्रमांक 1 का नाम रतलाम शहर विधान सभा निर्वाचन क्षेत्र क्रमांक 220 के क्रम संख्यांक 248 पर तालिकांकित है – अचल संपत्ति एवं बैंक खाता के विस्तृत विवरण से भी स्पष्ट है कि प्रत्यर्थी क्रमांक 1 रतलाम का स्थायी निवासी है – अतः यह दोष नहीं लगाया जा सकता कि उसने नामांकन पत्र में निवास का गलत पता दर्शाया है – उसी प्रकार – प्रत्यर्थी क्रमांक 1 के विरूद्ध पंजीबद्ध अपराध क्रमांक 286/1988 के संबंध में खात्मा प्रतिवेदन प्रस्तुत कर दिया गया है – मजिस्ट्रेट द्वारा न कोई संज्ञान लिया गया न ही कोई आरोप विरचित किये गये – इसलिये विधिक रूप से प्रत्यर्थी क्रमांक 1 के विरूद्ध कोई प्रकरण लंबित होना नहीं कहा जा सकता – अतः यह अभिनिर्धारित नहीं किया जा सकता कि प्रत्यर्थी क्रमांक 1 ने नामांकन पत्र में तथ्यों का छिपाव किया। (पारस वि. चैतन्य कश्यप) **...2712**

Representation of the People Act (43 of 1951), Sections 83(1), 123(4) & Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Material particulars regarding corrupt practice **– Averments made with regard to false publication are not fulfilling the requirement of Section 123(4) of the Act – There is also no averment that the false publication was made at the instance of Respondent No. 1 – The advertisement is also not false – Material facts regarding corrupt practice are missing – Petition is rejected on both the grounds. [Paras Vs. Chaitanya Kashyap] ...2712**

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराऐं 83(1), 123(4) एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – भ्रष्ट आचरण के संबंध में तात्विक विशिष्टियां – मिथ्या प्रकाशन के संबंध में निर्मित प्रकथन अधिनियम की धारा 123(4) की आवश्यकताओं की पूर्ति नहीं करते – यह भी प्रकथन नहीं कि मिथ्या प्रकाशन प्रत्यर्थी क्रमांक 1 के अनुरोध पर तैयार किया गया था – विज्ञापन भी मिथ्या नहीं है – भ्रष्ट आचरण संबंधी तात्विक तथ्य अनुपलब्ध हैं – दोनों आधारों पर याचिका निरस्त। (पारस वि. चैतन्य कश्यप) **...2712**

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direct recruitments – Direct recruitees were given the senior scale and selection grade pay scale therefore, they took a march over and above petitioners – The anomaly remained and inspite of various opportunities and directions by High Court, such anomaly was not explained by respondents – Where the pay is regulated by Revision of Pay Rules, the provisions of Fundamental Rules and any other rules shall not apply to the extent they are inconsistent with the Revision of Pay Rules – If a person is working on the selection grade pay scale and is promoted on the post carrying the lesser pay scale at the initial stage, the benefit of pay protection is required to be granted – Fixation of pay scale is not in accordance with Revision of Pay Rules – Matter is referred to Highly Specialized Committee for grant of proper pay scale to petitioners on promotion from the post of Asstt. Surgeon Selection Grade and to take a final decision within four months from the date of receipt of certified copy of the order. [S.K. Saxena (Dr.) Vs. State of M.P.] **...2597**

सेवा विधि – वेतनमान – वर्ष 1993 के पश्चात् शल्य चिकित्सा विशेषज्ञ के पद 100% पदोन्नति से भरे जाने है – संशोधन के पूर्व, 60% पद सीधी भर्ती के द्वारा भरे जाने थे – याचिकाकर्ताओं को वर्ष 1994 में पदोन्नत किया गया तथापि इसके पूर्व कुछ सीधी भर्तियां की गयीं थी – सीधी भर्तियों को वरिष्ठ वेतनमान तथा चयन ग्रेड वेतनमान दिया गया अतः उन्होंने याचिकाकर्ताओं पर बढ़त हासिल कर ली – यह विसंगति विद्यमान रही तथा उच्च न्यायालय द्वारा विभिन्न अवसर तथा निर्देश देने के बावजूद प्रत्यर्थियों द्वारा इस विसंगति को स्पष्ट नहीं किया गया – जहां पर वेतन के पुनरीक्षण नियमों द्वारा वेतन नियंत्रित किया जाता है, वहां मूल नियमों के प्रावधान तथा अन्य कोई नियम उस सीमा तक लागू नहीं होंगे जहां तक वे वेतन के पुनरीक्षण नियम से असंगत हो – यदि कोई व्यक्ति चयन ग्रेड वेतनमान में कार्यरत है तथा उसे प्रारंभिक स्तर पर कम वेतनमान वाले पद पर पदोन्नत किया जाता है तो उसे वेतन सुरक्षा का लाभ दिया जाना अपेक्षित है – वेतनमान का निर्धारण वेतन के पुनरीक्षण नियमों के अनुरूप नहीं है – मामले को उच्च स्तरीय समिति के पास याचिकाकर्ताओं को सहायक शल्य चिकित्सक चयन ग्रेड के पद से पदोन्नति पर उचित वेतनमान प्रदान करने के लिए तथा आदेश की सत्यापित प्रतिलिपि की प्राप्ति के दिनांक से चार माह के भीतर अंतिम निर्णय लेने हेतु भेजा जाता है। (एस.के. सक्सेना (डॉ.) वि. म.प्र. राज्य) **...2597**

Service Law – Pension Scheme 1995 – **Held – Where the PF organization itself qualified the employees and took their contribution, these employees must be treated as eligible employees for the grant**

1948 will prevail over statutory law like Hindu Succession Act, 1956 – Held – No, the statutory law will have the overriding effect over the Coal Mines Provident Fund Scheme 1948. [Regional Commissioner Vs. Bhuria Bai] ...2777

उत्तराधिकार अधिनियम, (1925 का 39), धारा 373, 384, कोयला खान भविष्य निधि तथा प्रकीर्ण उपबंध अधिनियम, (1948 का 46), धारा 3 एवं कोयला खान भविष्य निधि, कोयला खान परिवार पेंशन एवं कोयला खान निक्षेप संबद्ध बीमा योजना, 1948, खंड 64 एवं हिंदू उत्तराधिकार अधिनियम, (1956 का 30), धारा 8 – उत्तराधिकार प्रमाणपत्र – खंड 64 के उपखंड (ii) का परंतुक – सम्मुख – हिंदू उत्तराधिकार अधिनियम, 1956 – क्या कोयला खान भविष्य निधि योजना, 1948 के उपबंध कानूनी विधि जैसे कि हिंदू उत्तराधिकार अधिनियम, 1956 पर अभिभावी होंगे – अभिनिर्धारित – नहीं, कानूनी विधि कां कोयला खान भविष्य निधि योजना, 1948 पर अध्यारोही प्रभाव रहेगा। (रीजनल कमिश्नर वि. भूरिया बाई) ...2777

Value Added Tax Act, M.P. (20 of 2002), Sections 2(o), 14 – Rebate of Input Tax **– Petitioner purchased material from a registered dealer after payment of VAT – Material was used for making a plant and machinery which was ultimately used for manufacturing final product – Provision of Section 14 is applicable – Matter remitted back for reconsideration in the light of interpretation. [Commercial Engineers & Body Building Company Ltd. (M/s.) Vs. Divisional Dy. Commissioner] (DB)...2668**

मूल्य वर्धित कर अधिनियम, म.प्र. (2002 का 20), धाराऐं 2(ओ), 14 – निवेश कर की छूट – याची ने एक पंजीकृत डीलर से मूल्य वर्धित कर का भुगतान करने के पश्चात् सामग्री क्रय की – सामग्री का उपयोग संयंत्र और मशीनरी बनाने हेतु किया गया जिसे अंततः अंतिम उत्पाद निर्मित करने के लिये उपयोग किया गया था – धारा 14 का उपबंध लागू होता है – निर्वचन के आलोक में पुनर्विचार हेतु मामला प्रतिप्रेषित। (कमर्शियल इंजीनियर्स एण्ड बॉडी बिल्डिंग कंपनी लि. (मे.) वि. डिवीजनल डिप्टी कमिश्नर) (DB)...2668

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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 (i) dated 08.09.2015, Page no. 2, regarding rules further to amend the Passport (Entry into India) Rules, 1950.]

MINISTRY OF HOME AFFAIRS

NOTIFICATION

New Delhi, the 7th September, 2015

G.S.R. 685(E).- In exercise of the powers conferred by section 3 of the Passport (Entry into India) Act, 1920 (34 of 1920), the Central Government hereby makes the following rules further to amend the Passport (Entry into India) Rules, 1950, namely:-

1. (1) These rules may be called the Passport (Entry into India) Amendment Rules, 2015.

   (2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Passport (Entry into India) Rules, 1950, in rule 4, in sub-rule (1), after clause (h), the following clause shall be inserted, namely :-

   "(ha) persons belonging to minority communities in Bangladesh and Pakistan, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who were compelled to seek shelter in India due to religious persecution or fear of religious persecution and entered into India on or before the 31st December, 2014-

   (i) without valid documents including passport

or other travel documents; or

(ii) with valid documents including passport or other travel document and the validity of any of such documents has expired:

[F. No. 25022/50/2015-F.I]

G.K. DWIVEDI, Jt. Secy.

Note : The principal rules were published vide number 4/5/49-F.I, dated the 25th April, 1950 and last amended vide number G.S.R. 132(E), dated the 26th February, 1992.

[Published in the Gazette of India (Extraordinary) Part II, Section 3, Sub-section (i) dated 08.09.2015, Page no. 3 regarding order further to amend the Foreigners Order, 1948.]

ORDER

New Delhi, the 7th September, 2015

G.S.R. 686(E).- In exercise of the powers conferred by section 3 of the Foreigners Act, 1946 (31 of 1946), the Central Government hereby makes the following order further to amend the Foreigners Order, 1948, namely:-

1. (1) This Order may be called the Foreigners (Amendment) Order, 2015.

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

2. In the Foreigners Order, 1948, after paragraph 3, the following paragraph shall be inserted, namely:-

"3A. **Exemption of certain class of foreigners.-** (1) Persons belonging to minority communities in Bangladesh and Pakistan, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who were compelled to seek shelter in India due to religious persecution or fear of religious persecution and entered into India on or before the 31st December, 2014-

(a) without valid documents including passport or other travel documents and who have

been exempted under rule 4 from the provisions of rule 3 of the Passport (Entry into India) Rules, 1950, made under section 3 of the Passport (Entry into India) Act, 1920 (34 of 1920); or

(b) with valid documents including passport or other travel document and the validity of any of such documents has expired.

and hereby granted exemption from the application of provisions of the Foreigners Act, 1946 and the orders made thereunder in respect of their stay in India without such documents or after the expiry of those documents, as the case may be, from the date of publication of this order in the Official Gazette."

[F. No. 25022/50/2015- F.I]

G. K. DWIVEDI, Jt. Secy.

Note: The principal Order was published in the Gazette of India vide No. 9/9/46-Political (EW), dated the 14th February, 1948 and last amended vide number GSR 56(E), dated the 24th January, 2008.

MADHYA PRADESH ACT
NO. 18 OF 2015

THE MADHYA PRADESH VEXATIOUS LITIGATION (PREVENTION) ACT, 2015

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Section :

MADHYA PRADESH ACT
NO. 18 OF 2015

THE MADHYA PRADESH VEXATIOUS LITIGATION (PREVENTION) ACT, 2015

[Received the assent of the Governor on the 26th August, 2015; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 26th August, 2015, page no. 702(2) to 702(4)]

An Act to prevent the institution or continuance of vexatious proceedings in courts.

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 Vexatious Litigation (Prevention) Act, 2015.

(2) It extends to the whole of the State of Madhya Pradesh.

(3) It shall come into force on such date as the State Government may, by notification in the official Gazette, appoint.

2. Leave of Court necessary for vexatious litigant to institute or continue any civil or criminal proceedings.- (1) If, on an application made by the Advocate General the High Court is satisfied that any person has habitually and without any reasonable ground instituted vexatious proceedings, civil or criminal, in any Court or Courts, whether against the same person or against different persons, the High Court may, after hearing that person or giving him an opportunity of being heard, order that no proceedings, civil or criminal, shall be instituted by him in any Court (and that any legal proceeding instituted by him in any Court before the order shall not be continued by him).-

(a) in the High Court of Madhya Pradesh without the leave of the High Court; and

(b) elsewhere in the State, without the leave of the District and Sessions Judge.

At the hearing of any such application, the Advocate General may appear through a pleader.

(2) Such leave shall not be given unless the High Court or the Judge, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is prima facie ground for the proceedings.

(3) No appeal shall lie against an order refusing leave for institution or Continuance of any proceedings by a person who is the subject of an order for the time being in force under sub-section (1) :

Provided that nothing in this sub-section shall apply to any appeal which may lie to or any proceeding before the Supreme Court.

(4) If it appears to the High Court that the person against whom an application is made under sub-section (1), is unable, on account of poverty, to engage a pleader, the High Court may engage a pleader to appear for him.

Explanation.- For the purpose of this section, "pleader" has the same meaning as in clause (15) of Section 2 of the Code of Civil Procedure, 1908 (V of 1908).

(5) Every order made under sub-section (1) directing any person to obtain leave before instituting or continuing proceedings shall be published in the official Gazette and may also be published in such other manner as the High Court thinks fit.

3. Proceedings instituted or continued without leave to be dismissed. - Any proceeding instituted or continued in any Court by a person against whom an order under sub-section (1) of the last preceding section has been made, without obtaining the leave referred to in that section, shall be dismissed by the Court :

Provided that this section shall not apply to any proceeding instituted for the purpose of obtaining such leave.

4. Exclusion of time required for obtaining leave, for computation of limitation period.- Where a person, against whom an order under sub-section (1) of Section 2 has been made applies for leave for institution of any proceeding, the time required by the High Court or the Judge, as the case may be, for deciding the application shall be excluded in computing the period of limitation (if any) prescribed under any law for the time being in force for instituting such proceedings.

Explanation.- In excluding such time, the date on which the application for leave was made to the proper authority and the date on which

such authority made its order on the application shall both be counted.

5. Power to make rules. The High Court may make rules for carrying out the purposes of this Act.

6. Saving. The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force for prevention of vexatious preceedings or other abuse of legal process, or which require consent, sanction or approval in any form of any other authority for the institution or continuance of any proceeding.

MADHYA PRADESH PROTECTED FOREST RULES, 2015

[Published in Madhya Pradesh Gazette (Extra-ordinary) dated 4th June, 2015, page no. 420(8) to 420(13)]

No. F-25-1-2004-X-3. - In exercise of the powers conferred by Section 32 and Section 76 of the Indian Forest Act, 1927 (16 of 1927) and in suppression of this Department's Notification No. F-25-1/X-3-04 dated 02.02.2005, the State Government, hereby, makes the following rules, namely :-

RULES

1. Short Title, Extent and Commencement.-

(1) These rules may be called the Madhya Pradesh Protected Forest Rules, 2015.

(2) These rules shall be applicable to the whole State of Madhya Pradesh.

(3) They shall come into force from the date of their publication in the official Gazette.

2. Definitions.-

(1) In these rules, unless the context otherwise requires:

(a) "Act" means the Indian Forest Act, 1927 (16 of 1927);

(b) "Bona fide livelihood needs", "community rights" and "minor forest produce" for the purposes of these rules shall have the

same meaning as assigned to them in The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (2 of 2007);

(c) "District Planning Committee" for the purposes of these rules shall have the same meaning as assigned to it in Madhya Pradesh Zila Yojana Samiti Adhiniyam, 1995 (No. 19 of 1995);

(d) "Duties of residents" means the duties of residents as provided in Rule 15 of these rules;

(e) "Government" means the Government of Madhya Pradesh;

(f) "Gram Sabha" shall have the same meaning as assigned to it in Madhya Pradesh Panchayat Raj avam Gram Swaraj Adhiniyam, 1993 (No 1 of 1994);

(g) "Gram Van Samiti" means the committee constituted by Gram Sabha as per the Government Resolution published in the Notification No. F 16-4-91-X-2, Dated 22 October, 2001;

(h) "Nistar" means and includes:-

(i) Timber of unreserved trees;

(ii) Dry fallen wood not fit for timber;

(iii) Dry bamboos and green bamboos where specifically mentioned;

(iv) Grasses other than Rusa, Khus or Sabai grass;

(v) Thorns other than those of Khair and Kardhai;

(vi) Leaves excluding tendu leaves;

(vii) Bark (Bakkal) of un-reserved trees; and

(viii) Minor minerals surface boulders, murum, sand, chhui and clay for works permitted under Rule 13 and for bona fide purpose within the same village for dwelling purposes.

(i) "Occupational Nistar" means nistar required for the purpose of carrying on an occupation as a means of livelihood except manufacturing of charcoal;

(j) "Paidawar" means and includes all edible roots, fruits and flowers, naturally exuded gum except the gum from Kullu trees, honey and wax;

(k) "Protected area" shall have the same meaning as assigned to it under The Wild life Protection Act, 1972 (53 of 1972);

(l) "Resident of a village" means a person who ordinarily resides in that village;

(m) "Urban area" shall have the same meaning as assigned to it in the Madhya Pradesh Land Revenue Code, 1959 (No. 20 of 1959).

(2) The words and expressions used but not defined in these rules, shall have the same meanings as assigned to them in the Indian Forest Act, 1927 (XVI of 1927) as applicable to the State of Madhya Pradesh.

3. Attachment of a Protected Forest.-

The Collector, in consultation with the Divisional Forest Officer and in accordance with the orders issued by the Government, may attach any Protected Forest or a part of it, not lying within any urban area or any protected area, to a village for the purpose of these rules or cancel the same for reasons to be recorded in writing.

4. Constitution of Gram Van Samiti.-

The Gram Sabha of concerned village shall constitute a Gram Van Samiti for the purpose of managing the protected forest attached to that village which includes the protection and development of the protected forest.

5. Nistar rights.-

(1) Subject to the provisions of these rules and orders issued by the Government or any other officer authorised by the Government for this purpose, residents of the village shall be permitted to obtain, either free of charge or on payment to the Gram Van Samiti for their nistar and paidawar requirements from the attached Protected Forest.

Explanation- The expression "Nistar requirements" and "Paidawar requirements" shall mean the Nistar and Paidawar, required for the

purpose of bonafide domestic consumption and livelihood needs.

(2) District Planning Committee shall in consultation with Divisional Forest Officer, from time to time fix rates payable to Gram Van Samiti for timber and fuel wood for Nistar, including occupational, Nistar removed from attached protected forests.

(3) The quantum of nistar and paidawar requirements permitted under sub-rule (1) shall be subject to the bonafide livelihood needs of each family and limited to availability of nistar material. Where available nistar material falls short of the total requirement, the nistar material shall be equitably rationed by the Gram Van Samiti.

(4) (a) The Divisional Forest Officer or any Forest Officer specially authorised by him not below the rank of Range Officer shall from time to time in consultation with the Gram Van Samiti specify the area from which the nistar is to be obtained each year and the villagers shall obtain their nistar only from such areas.

(b) The Divisional Forest Officer or any officer not below the rank of Range Officer authorised by the Divisional Forest Officer shall from time to time specify and reserve a reasonable area for the exercise of occupational nistar and communicate the quantum of additional material which could be obtained from such area under exploitation limited to availability of material, after meeting the "Nistar" and "Paidawar" requirements under sub-rule (1).

6. Closed Period.-

(1) Protected Forest attached to village shall remain closed for felling of trees and removal of timber and fuel-wood, under these rules, in the period beginning on 1st July and ending on 15th October every year, to be known as closed period.

(2) Gram Van Samiti in consultation with the concerned range officer, for the protected forest attached to it, may declare certain period or periods of a year as closed season, or may declare certain forest areas as closed areas for a specified period for collection of certain forest produce, or may impose limits on quantities of any minor forest produce that can be removed, or may require that certain sustainable harvesting practices for the collection or extraction of any minor forest produce shuld be followed.

(3) Fishing in water bodies existing in the attached protected forest will remain

closed for a period between 16th June to 15th of August every year.

7. Removal of timber and fuel wood.-

(1) Gram Van Samiti shall regulate the felling of trees and removal of timber and fuel wood from a protected forest attached to it, in consultation with the Range Officer.

(2) Every year before the beginning of the open period, the Range Officer shall communicate to the Gram Van Samiti the estimated quantity of the timber and fuel wood likely to be available for felling or removal in the protected forest attached to it.

(3) Gram Van Samiti shall decide the days when it intends to fell trees and communicate the same to the Range Officer.

(4) Felling of trees, in the protected forest attached to the village, shall be carried under the supervision of a Forest Officer deputed by Range Officer.

(5) The timber will be removed from the forest after putting a hammer mark on it for identification by the forest officer deputed by the Range Officer.

8. Sharing of forest produce.-

(1) The timber and fuel wood, surplus after the Nistar, including occupational Nistar requirements, may be disposed off by Gram Van Samiti.

(2) The proceeds from disposal of timber or fuel wood shall be first utilized for the protection and development of the forest. The surplus, if any, may be utilized by the Gram Van Samiti for the welfare of residents of the village.

(3) Notwithstanding anything contained in rule 5, Gram Van Samiti with the prior approval of the Government, can enter into an agreement with a company or a body corporate, owned, managed and controlled by the Government or engaged in a manufacturing activity for which any forest produce is a raw material, to share any forest produce from that protected forest attached to it as consideration for the investment made by that company or body corporate towards the development of that Protected Forest.

9. Cutting of trees and removal of timber.-

(1) The cutting and removal of trees and timber from the protected forests attached to a village shall be in accordance with the management plan, as provided in rule 12 and will be subject to the following conditions, unless permitted in writing by the range officer, namely:-

(i) No tree shall be girdled, pollarded or lopped.

(ii) No tree shall be wounded for the collection of gum and resin.

(iii) No tree shall be uprooted, burnt or injured in any other manner.

(iv) No tree under 21 cms girth at breast height shall be cut.

(2) Bamboos shall be cut subject to the following conditions unless forest department prescribe rules subject to the local conditions :-

(i) The cutting cycle for bamboos shall be at least 2 years. Annual coupe shall be divided into appropriate sections and felling shall proceed sectionwise, i.e. cutting in the next section shall be taken up after the previous section has been worked in accordance with these rules.

(ii) No live immature culm, viz. karla or the current season's culm and mahila or culm of the previous season, shall be cut.

(iii) Rhizomes of bamboos shall not be dug.

(iv) No bamboo clump containing less than ten live culms including karla and mahila shall be worked;

(v) In clump containing 10 or more live culms, the mature culms (other than those broken at a height of less than 20 cms.) that are left after cutting shall be uniformly spaced and their number shall be equal to at least twice the number of karlas subject to a minimum of 10 live culms.

Example:- In case there are 12 culms in a clump of which 3 are karlas then all the karlas i.e. 3 plus twice that number i.e. 6, total 9 culms should ordinarily have been left in the clump, but as this total is less than 10, one more culm shall be retained. That is, in all 3 karlas plus (10-3) i.e. 7 other culms excluding mahila, shall be left in the clump.

(vi) The height above ground level at which the culms are cut shall not be less than 15 cms. or more than 45 cms. and in any case not below the first inter node.

(vii) The cut shall be made with a sharp instrument so that the stump is not split.

(viii) All cutting debris shall be removed at least 30 cms. away from the periphery of the clump.

(ix) Karla and mahila bamboos shall in no case be used for making strips for tying bundles.

10. Transportation of forest produce.-

(1) All timber and fuel wood, removed from a protected forest under these rules, shall be first moved to a place in the village determined by the Gram Van Samiti, and then transported to any other place, if required.

(2) Transportation of timber and fuel wood from the village shall be regulated by the provisions of MP Transit (Forest Produce) Rules, 2000.

11. Grazing rights.-

(1) Residents of the concerned village shall be permitted to graze their cattle in Protected Forest attached to that village in accordance with Madhya Pradesh Grazing Rules, 1986:

Provided that no person shall graze cattle in grass-birs, fuel-cum-fodder reserves, areas under re-generation and plantation except with the prior permission of the Divisional Forest Officer. Sheep,

goats and camel shall not be allowed for grazing in attached protected area.

(2) Gram Van Samiti may permit grazing by cattle from other villages on such fee to be charged for grazing in the attached protected forest as may be fixed by it, in consultation with Range Officer, from time to time.

12. Management Plan.-

(1) Management of protected forest including cutting of trees, removal of timber and grazing shall be regulated, as per the provisions of the Management Plan of the protected forest attached to the village, prepared in consonance with these rules by the Range Officer-in consultation with the Gram Sabha.

(2) The Management Plan, so prepared, shall be put up before the concerned Sub Divisional Forest Officer for approval, who shall approve it after making such amendments as he deems necessary.

13. Clearing and breaking of land.-

The clearing and breaking up of land for cultivation or any other purpose is prohibited in protected forest attached to the village except for facilities mentioned below for the benefit of residents of the village -

(i) School;
(ii) Dispensary, hospital;
(iii) Anganbadi;
(iv) Drinking water supply and water pipeline;
(v) Construction of village ponds ;
(vi) Water and rain water harvesting structures;
(vii) Minor irrigation canal, and water distribution channels;
(viii) Construction and maintenance of roads;
(ix) Installation of photovoltaic power generating systems.

14. Protected Forest not attached to any Village.-

(1) Protected forest not attached to any village as per rule 3, shall be managed by the Divisional Forest Officer according to the

orders issued by the Government from time to time.

(2) The following acts are prohibited in every unattached protected forest except with the written permission of a forest officer not below the rank of a Range Officer:

(a) the cutting, sawing, conversion and removal of trees and timber, and the collection, manufacture and removal of forest-produce ;

(b) clearing and breaking up of land for cultivation or other purposes in such forests;

(3) In addition to the restrictions mentioned in sub rule (2), cutting of grass and pasturing of cattle in every protected forest lying in any urban area are also prohibited;

15. Duties of Residents.-

It shall be the duty of every resident of the village to :-

(a) prevent the commission of any offence which is in contravention of the provision of the act and is being committed in the protected forest area attached to the village;

(b) help in apprehending and initiating legal action against the person who has committed any offence in the protected forest area in contravention of the provision of the act;

(c) to report the forest officer about the offence committed in the attached protected forest and safeguard the forest area produce until the forest officer takes charge thereof;

(d) to help in extinguish the fire about which he has knowledge or has received information and to prevent the fire from spreading;

(e) to assist any forest officer or police officer demanding his aid for preventing the commission of any offence against the Act or these rules or in the investigation of any such offence.

By order and in the name of Governor of Madhya Pradesh,

Anoop Singh Rajput, Additional Secretary.

I.L.R. [2015] M.P., 2533
SUPREME COURT OF INDIA
Before Mr. Justice T.S. Thakur & Mr. Justice Adarsh Kumar Goel
Civil Appeal No. 10613/2014 decided on 1 December, 2014

STATE OF M.P. & ors. ...Appellants
Vs.
PARVEZ KHAN ...Respondent

Service Law - Compassionate appointment - Antecedents/ Character - Verification of antecedents **- Acquittal/discharge in criminal case pursuant to a compromise - Held - Candidate to be recruited to the police service must be worthy of confidence and must be a person of utmost rectitude and must have impeccable character and integrity - A person having criminal antecedents will not fit in this category - Even if he is acquitted or discharged, it cannot be presumed that he was completely exonerated - Impugned order set aside - Appeal allowed.** **(Paras 13 & 16)**

सेवा विधि – अनुकम्पा नियुक्ति – पूर्ववृत्त/चरित्र – पूर्ववृत्त का सत्यापन – समझौते के अनुसरण में आपराधिक प्रकरण में दोषमुक्त/आरोपमुक्त किया जाना – अभिनिर्धारित – पुलिस सेवा में भर्ती के लिये अभ्यर्थी को विश्वसनीय और अत्यंत सदाचारी व्यक्ति होना चाहिए और निर्दोष चरित्र एवं सत्यनिष्ठ होना चाहिए – आपराधिक पूर्ववृत्त का व्यक्ति इस श्रेणी में आने योग्य नहीं होगा – यदि उसे दोषमुक्त या आरोपमुक्त किया गया है तब भी यह उपधारणा नहीं की जा सकती कि उसे पूर्ण रूप से माफ किया गया था – आक्षेपित आदेश अपास्त – अपील मंजूर।

Case referred :

2013(7) SCC 685.

JUDGMENT

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

2. This appeal has been preferred against the Judgment and Order dated 20th March, 2012 of the High Court of Madhya Pradesh at Jabalpur in Writ Appeal No.262 of 2010.

3. The question raised for our consideration is whether the refusal by the competent authority to give compassionate appointment in police service on

the ground of criminal antecedents of a candidate who is acquitted for want of evidence or who is discharged from the criminal case on account of compounding can be justified.

4. Sultan Khan was serving with the Madhya Pradesh Police. He died in harness on 21st June, 2005. His son, the respondent Parvez Khan, applied for compassionate appointment. The competent authority sent his record for police verification. It was found that he was involved in two criminal cases. In one case, he was prosecuted for offences under Sections 323, 324, 325, 294 and 506-B/34 of the Indian Penal Code and in the other under Sections 452, 394 and 395 of the Indian Penal Code. The Superintendent of Police held that he was not eligible for appointment in Government service and closed his case.

5. The respondent challenged the said order by way of Writ Petition No.15052 of 2008 on the ground that in the first case he was acquitted on 31st January, 2007 and in the second he was discharged on account of compounding of offence.

6. Learned Single Judge did not find any merit in his contention in the writ petition and dismissed the petition. On appeal, the Division Bench took a different view. It was held that the object of verification was to verify suitability of a candidate for employment. Since the respondent was acquitted in both the criminal cases he could not be considered unsuitable. No reason had been given as to why after acquittal in the criminal case, the respondent was considered to be unsuitable. Accordingly, the Division Bench directed consideration of case of the respondent afresh in the light of observations in the order within three months. Aggrieved thereby, the appellant-State has preferred this appeal.

7. We have heard learned counsel for the parties.

8. Learned counsel for the State submitted that since on police verification, it was found that the respondent was involved in criminal cases involving moral turpitude, he could not be given appointment. Mere acquittal for want of evidence or discharge on account of compromise could not be taken to be conclusive for suitability of a candidate. The result of criminal proceedings was not conclusive of suitability of a candidate for recruitment to police service.

9. It is submitted that in a criminal case, a person cannot be punished in

absence of proof beyond reasonable doubt but the standard of proof required for consideration of suitability or otherwise of a candidate was not the same. Discharge on account of compounding of the offence by the victim depended upon the attitude of the parties. The victim may be prepared to settle the matter for any consideration other than innocence of the accused, but it did not wash off the criminal antecedents of an accused. Entering into police service required a candidate to be of character, integrity and clean antecedents. If a person is acquitted or discharged, it cannot always be inferred that he was falsely involved and he had no criminal antecedents. All that may be inferred is that he has not been proved to be guilty. Reliance has been placed on the decision of this Court in *Commissioner of Police vs. Mehar Singh*[1].

10. Learned counsel for the respondent supported the impugned order and submitted that some other similarly placed candidates had been given compassionate appointment. Two such instances have been pointed out by the respondent in the counter affidavit. He has also submitted that the State of Madhya Pradesh has issued Guidelines dated 5th June, 2003 for character verification of candidates for recruitment to Government service and such guidelines do no justify rejection of candidature of the respondent. One of the instances given is of ***Dilip Kumar Samadhiya son of Shri Jagdish Prasad Samadhiya*** against whom three criminal cases were registered prior to the recruitment in Government service but he was acquitted either on account of compromise or on account of benefit of doubt. Still, he was given appointment. Similarly, ***Jitender Sharma*** was recruited to Police service though he was tried for a criminal case, but acquitted on account of compounding or on the basis of benefit of doubt. As per Guidelines dated 5th June, 2003, an independent view can be taken only where candidate has concealed the information about pendency of trial and not where there is no such concealment, as in the present case.

11. After due consideration, we are of the view that the impugned order cannot be sustained. Refusal by the competent authority to recruit the respondent on the ground of criminal antecedents is not liable to be interfered with. The applicable Guidelines dated 5th June, 2003 inter alia provide :

> *"On the basis of merits and demerits by the Hon'ble Court the acquitted candidate will be eligible for the Government*

1. 2013 (7) SCC 685

Service."

The above guidelines show that acquittal is not conclusive. Even after acquittal, basis of order of the Court has to be gone into by the competent authority. Even after order based on compromise or lack of evidence may render a candidate ineligible. In the present case, the relevant part of the order of the Superintendent of Police is as follows:

> *"Action was taken in regard to the proceedings of compassionate appointment, character verification was got done, wherein vide Letter No. V.S./21/VHR/2007/17(F)283/07 dated 17.9.2007 of the Police Headquarters it was informed that a case under Section 294, 323, 506, 324, 34 of IPC had been registered against the applicant in Police Station Kotwali as Crime No.185/06 and the applicant was acquitted on the basis of a compromise by the Court on 23.2.2007. In the same manner in Crime No.494/06 under Section 394, 364, 451 of IPC a case was registered and vide judgment dated 31.1.2007 of the Court he was acquitted.*
>
> *Two separate crimes had been registered against the applicant, wherein in one case Section 394, 451, 365 of IPC are there and which come in the category of moral turpitude. In the judgment of the Court benefit of doubt has been given, therefore, as per the new guidelines of 2003 issued by the Government of Madhya Pradesh in respect of character verification the applicant Parvez Khan alias Sonu alias Raja has been found to be ineligible for Government service."*

12. In *Mehar Singh* (supra), the question considered by this Court was as follows :

> *"18. The question before this Court is whether the candidature of the respondents who had made a clean breast of their involvement in a criminal case by mentioning this fact in their application/attestation form while applying for a post of Constable in Delhi Police,*

who were provisionally selected subject to verification of their antecedents and who were subsequently acquitted/ discharged in the criminal case, could be cancelled by the Screening Committee of the Delhi Police on the ground that they are not found suitable for appointment to the post of Constable."

After considering the rival contentions, the Court held :

"23. A careful perusal of the policy leads us to conclude that the Screening Committee would be entitled to keep persons involved in grave cases of moral turpitude out of the police force even if they are acquitted or discharged if it feels that the acquittal or discharge is on technical grounds or not honourable. The Screening Committee will be within its rights to cancel the candidature of a candidate if it finds that the acquittal is based on some serious flaw in the conduct of the prosecution case or is the result of material witnesses turning hostile. It is only experienced officers of the Screening Committee who will be able to judge whether the acquitted or discharged candidate is likely to revert to similar activities in future with more strength and vigour, if appointed, to the post in a police force. The Screening Committee will have to consider the nature and extent of such person's involvement in the crime and his propensity of becoming a cause for worsening the law and order situation rather than maintaining it. In our opinion, this policy framed by the Delhi Police does not merit any interference from this Court as its object appears to be to ensure that only persons with impeccable character enter the police force.

24. We find no substance in the contention that by cancelling the respondents' candidature, the Screening Committee has overreached the judgments of the criminal court. We are aware that the question of co-relation between a criminal case and a departmental enquiry does not directly arise here, but, support can be drawn from the

principles laid down by this Court in connection with it because the issue involved is somewhat identical, namely, whether to allow a person with doubtful integrity to work in the department. While the standard of proof in a criminal case is the proof beyond all reasonable doubt, the proof in a departmental proceeding is preponderance of probabilities. Quite often criminal cases end in acquittal because witnesses turn hostile. Such acquittals are not acquittals on merit. An acquittal based on benefit of doubt would not stand on a par with a clean acquittal on merit after a full-fledged trial, where there is no indication of the witnesses being won over. In R.P. Kapur v. Union of India [AIR 1964 SC 787] this Court has taken a view that departmental proceedings can proceed even though a person is acquitted when the acquittal is other than honourable.

25. The expression "honourable acquittal" was considered by this Court in S. Samuthiram [2013 (1) SCC 598]. In that case this Court was concerned with a situation where disciplinary proceedings were initiated against a police officer. Criminal case was pending against him under Section 509 IPC and under Section 4 of the Eve-Teasing Act. He was acquitted in that case because of the non-examination of key witnesses. There was a serious flaw in the conduct of the criminal case. Two material witnesses turned hostile. Referring to the judgment of this Court in RBI v. Bhopal Singh Panchal [1994 (1) SCC 541] where in somewhat similar fact situation, this Court upheld a bank's action of refusing to reinstate an employee in service on the ground that in the criminal case he was acquitted by giving him benefit of doubt and, therefore, it was not an honourable acquittal, this Court held that the High Court was not justified in setting aside the punishment imposed in the departmental proceedings. This Court observed that the expressions "honourable acquittal", "acquitted of blame" and "fully exonerated" are unknown to the

Criminal Procedure Code or the Penal Code. They are coined by judicial pronouncements. It is difficult to define what is meant by the expression "honourably acquitted". This Court expressed that when the accused is acquitted after full consideration of the prosecution case and the prosecution miserably fails to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted.

26. In light of the above, we are of the opinion that since the purpose of the departmental proceedings is to keep persons, who are guilty of serious misconduct or dereliction of duty or who are guilty of grave cases of moral turpitude, out of the department, if found necessary, because they pollute the department, surely the above principles will apply with more vigour at the point of entry of a person in the police department i.e. at the time of recruitment. If it is found by the Screening Committee that the person against whom a serious case involving moral turpitude is registered is discharged on technical grounds or is acquitted of the same charge but the acquittal is not honourable, the Screening Committee would be entitled to cancel his candidature. Stricter norms need to be applied while appointing persons in a disciplinary force because public interest is involved in it.

27. Against the above background, we shall now examine what is the nature of acquittal of the respondents. As per the complaint lodged by Ramji Lal, respondent Mehar Singh and others armed with iron chains, lathis, danda, stones, etc. stopped a bus, rebuked the conductor of the bus as to how he dared to take the fare from one of their associates. Those who intervened were beaten up. They received injuries. The miscreants broke the side windowpanes of the bus by throwing stones. The complainant was also injured. This incident is undoubtedly an incident affecting public order. The assault on the conductor was preplanned and premeditated. The FIR was registered under Sections

143, 341, 323 and 427 IPC. The order dated 30-1-2009 passed by the Additional Chief Judicial Magistrate, Khetri shows that so far as offences under Sections 323, 341 and 427 IPC are concerned, the accused entered into a compromise with the complainant. Hence, the learned Magistrate acquitted respondent Mehar Singh and others of the said offences. The order further indicates that so far as offence of rioting i.e. offence under Section 147 IPC is concerned, three main witnesses turned hostile. The learned Magistrate, therefore, acquitted all the accused of the said offence. This acquittal can never be described as an acquittal on merits after a full-fledged trial. Respondent Mehar Singh cannot secure entry in the police force by portraying this acquittal as an honourable acquittal. Pertinently, there is no discussion on merits of the case in this order. Respondent Mehar Singh has not been exonerated after evaluation of the evidence.

28. *So far as respondent Shani Kumar is concerned, the FIR lodged against him stated that he along with other accused abused and threatened the complainant's brother. They opened fire at him due to which he sustained bullet injuries. The offences under Sections 307, 504 and 506 IPC were registered against respondent Shani Kumar and others. The order dated 14-5-2010 passed by the Sessions Judge, Muzaffarnagar shows that the complainant and the injured person did not support the prosecution case. They were declared hostile. Hence, the learned Sessions Judge gave the accused the benefit of doubt and acquitted them. This again is not a clean acquittal. The use of firearms in this manner is a serious matter. For entry in the police force, acquittal order based on benefit of doubt in a serious case of this nature is bound to act as an impediment.*

29. *In this connection, we may usefully refer to Sushil Kumar [1996(11) CC 605]. In that case, the respondent therein had appeared for recruitment as a Constable in Delhi Police Services. He was selected provisionally, but,*

his selection was subject to verification of character and antecedents by the local police. On verification, it was found that his antecedents were such that his appointment to the post of Constable was not found desirable. Accordingly, his name was rejected. He approached the Tribunal. The Tribunal allowed the application on the ground that since the respondent had been discharged and/ or acquitted of the offence punishable under Section 304, Section 324 read with Section 34 and Section 324 IPC, he cannot be denied the right of appointment to the post under the State. This Court disapproved of the Tribunal's view. It was observed that verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable for the post under the State. This Court observed that though the candidate was provisionally selected, the appointing authority found it not desirable to appoint him on account of his antecedent record and this view taken by the appointing authority in the background of the case cannot be said to be unwarranted. Whether the respondent was discharged or acquitted of the criminal offences, the same has nothing to do with the question as to whether he should be appointed to the post. What would be relevant is the conduct or character of the candidate to be appointed to a service and not the actual result thereof.

***30.** It was argued that Sushil Kumar must be distinguished from the facts of the instant case because the respondent therein had concealed the fact that a criminal case was registered against him, whereas, in the instant case there is no concealment. It is not possible for us to accept this submission. The aspect of concealment was not considered in Sushil Kumar at all. This Court only concentrated on the desirability to appoint a person, against whom a criminal case is pending, to a disciplined force. Sushil Kumar cannot be restricted to cases where there is concealment of the fact by a candidate that a criminal*

case was registered against him. When the point of concealment or otherwise and its effect was not argued before this Court, it cannot be said that in Sushil Kumar this Court wanted to restrict its observations to the cases where there is concealment of facts.

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33. So far as respondent Mehar Singh is concerned, his case appears to have been compromised. It was urged that acquittal recorded pursuant to a compromise should not be treated as a disqualification because that will frustrate the purpose of the Legal Services Authorities Act, 1987. We see no merit in this submission. Compromises or settlements have to be encouraged to bring about peaceful and amiable atmosphere in the society by according a quietus to disputes. They have to be encouraged also to reduce arrears of cases and save the litigants from the agony of pending litigation. But these considerations cannot be brought in here. In order to maintain integrity and high standard of police force, the Screening Committee may decline to take cognizance of a compromise, if it appears to it to be dubious. The Screening Committee cannot be faulted for that.

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35. The police force is a disciplined force. It shoulders the great responsibility of maintaining law and order and public order in the society. People repose great faith and confidence in it. It must be worthy of that confidence. A candidate wishing to join the police force must be a person of utmost rectitude. He must have impeccable character and integrity. A person having criminal antecedents will not fit in this category. Even if he is acquitted or discharged in the criminal case, that acquittal or discharge order will have to be examined to see whether he has been completely exonerated in the case because even a possibility of his taking to the life of crimes poses a threat to the discipline

of the police force. The Standing Order, therefore, has entrusted the task of taking decisions in these matters to the Screening Committee. The decision of the Screening Committee must be taken as final unless it is mala fide. In recent times, the image of the police force is tarnished. Instances of police personnel behaving in a wayward manner by misusing power are in public domain and are a matter of concern. The reputation of the police force has taken a beating. In such a situation, we would not like to dilute the importance and efficacy of a mechanism like the Screening Committee created by the Delhi Police to ensure that persons who are likely to erode its credibility do not enter the police force. At the same time, the Screening Committee must be alive to the importance of the trust reposed in it and must treat all candidates with an even hand."

13. From the above observations of this Court, it is clear that a candidate to be recruited to the police service must be worthy of confidence and must be a person of utmost rectitude and must have impeccable character and integrity. A person having criminal antecedents will not fit in this category. Even if he is acquitted or discharged, it cannot be presumed that he was completely exonerated. Persons who are likely to erode the credibility of the police ought not to enter the police force. No doubt the Screening Committee has not been constituted in the case considered by this Court, as rightly pointed out by learned counsel for the Respondent, in the present case, the Superintendent of Police has gone into the matter. The Superintendent of Police is the appointing authority. There is no allegation of *mala fides* against the person taking the said decision nor the decision is shown to be perverse or irrational. There is no material to show that the appellant was falsely implicated. Basis of impugned judgment is acquittal for want of evidence or discharge based on compounding.

14. The plea of parity with two other persons who were recruited can also not help the respondent. This aspect of the matter was also gone into by this Court in *Mehar Singh* (supra) and it was held :

"36. The Screening Committee's proceedings have been

assailed as being arbitrary, unguided and unfettered. But, in the present cases, we see no evidence of this. However, certain instances have been pointed out where allegedly persons involved in serious offences have been recommended for appointment by the Screening Committee. It is well settled that to such cases the doctrine of equality enshrined in Article 14 of the Constitution of India is not attracted. This doctrine does not envisage negative equality (Fuljit Kaur (2010 (11) SCC 455). It is not meant to perpetuate illegality or fraud because it embodies a positive concept. If the Screening Committee which is constituted to carry out the object of the comprehensive policy to ensure that people with doubtful background do not enter the police force, deviates from the policy, makes exception and allows entry of undesirable persons, it is undoubtedly guilty of committing an act of grave disservice to the police force but we cannot allow that illegality to be perpetuated by allowing the respondents to rely on such cases. It is for the Commissioner of Police, Delhi to examine whether the Screening Committee has compromised the interest of the police force in any case and to take remedial action if he finds that it has done so. Public interest demands an in-depth examination of this allegation at the highest level. Perhaps, such deviations from the policy are responsible for the spurt in police excesses. We expect the Commissioner of Police, Delhi to look into the matter and if there is substance in the allegations to take necessary steps forthwith so that policy incorporated in the Standing Order is strictly implemented."

15. Having given our thoughtful consideration, we are of the view that the Division Bench of the High Court was not justified in interfering with the order rejecting the claim of the respondent for recruitment to the police service by way of giving him compassionate appointment.

16. Accordingly, we allow this appeal and set aside the impugned order. There will be no order as to costs.

Appeal allowed.

I.L.R. [2015] M.P., 2545
SUPREME COURT OF INDIA
Before Mr. Justice Pinaki Chandra Ghose &
Mr. Justice Uday Umesh Lalit
Cr. Appeal No. 442/2010 decided on 3 July, 2015

STATE OF M.P. ...Appellant
Vs.
ANOOP SINGH ...Respondent

A. ***Juvenile Justice (Care and Protection of Children) Rules 2007, Rule 12(3) - Determination of age - Prosecutrix*** **- Birth certificate depicts birth on 29.08.1987 - Middle School Examination Certificate depicts birth on 27.08.1987 - Difference of two days - Reliability - Held - Difference of two days in dates is minor discrepancy and these certificates cannot be discarded for determination of age - Prosecutrix below 16 years of age. (Para 11)**

क. *किशोर न्याय (बालकों की देख–रेख और संरक्षण) नियम 2007, नियम 12(3) – आयु का निर्धारण – अभियोक्त्री* – जन्म प्रमाणपत्र 29.08.1987 का जन्म दर्शाता है – माध्यमिक विद्यालय परीक्षा प्रमाणपत्र 27.08.1987 का जन्म दर्शाता है – दो दिनों का अंतर – विश्वसनीयता – अभिनिर्धारित – तिथियों में दो दिन का अंतर मामूली विसंगति है एवं आयु के निर्धारण के लिये इन प्रमाणपत्रों को त्यागा नहीं जा सकता – अभियोक्त्री की आयु 16 वर्ष से कम।

B. ***Penal Code (45 of 1860), Sections 363, 366 & 376 and Juvenile Justice (Care and Protection of Children) Rules 2007 - Determination of age - Rule 12(3)(a)(i) to (iii)*** **- Birth Certificate and Middle School Examination Certificate, vis-a-vis Rule 12(3)(b) - Ossification Test - Held - The certificate produced as per Rule 12(3)(a)(i) to (iii) should have been relied firstly and in absence of it, the medical opinion under Rule 12(3)(b) ought to have been sought. (Para 14)**

ख. *दण्ड संहिता (1860 का 45), धाराऐं 363, 366 व 376 एवं किशोर न्याय (बालकों की देख–रेख और संरक्षण) नियम 2007 – आयु का निर्धारण – नियम 12(3)(ए)(i) से (iii)* – जन्म प्रमाणपत्र एवं माध्यमिक विद्यालय परीक्षा प्रमाणपत्र के संदर्भ में नियम 12(3)(बी) – अस्थि विकास परीक्षण – अभिनिर्धारित – सर्वप्रथम नियम 12(3)(ए)(i) से (iii) के अनुसार प्रस्तुत प्रमाणपत्र पर विश्वास किया जाना चाहिये और इसकी अनुपस्थिति में, नियम 12(3)(b) के अंतर्गत चिकित्सीय मत प्राप्त किया जाना चाहिए।

Cases referred :

(2013) 14 SCC 637, 2004 Cr.L.J. 3962.

JUDGMENT

The Judgment of the Court was delivered by : PINAKI CHANDRA GHOSE, J. :- The present Criminal Appeal has been preferred against the judgment and order dated 10.07.2008 passed by the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No.924 of 2006, whereby the High Court set aside the judgment of conviction and order of sentence passed by the learned Trial Court and acquitted the accused from all the charges levelled against him.

2. The facts of the present matter are that on 03.01.2003, at about 10:30 A.M. the prosecutrix was going to school along with her sister. On realizing that she had left behind her practical note book, she returned back and after taking the said note book she once again headed towards the school. When she reached near Tar Badi (wire fencing) near Hawai Patti, there was an Ambassador car standing there and as alleged, the accused respondent came out of the car, pulled the prosecutrix inside the car and forced her to smell something, as a result of which the prosecutrix became unconscious. As alleged by the prosecution, the prosecutrix was taken to some unknown place thereafter.

3. On regaining consciousness, the prosecutrix felt pain in her private parts. On the same day, she was admitted in the District Hospital, Satna in an unconscious condition and information about the incident was given to Laxmikant Sharma (P.W.8), the uncle of the prosecutrix. On 10.01.2003, the prosecutrix was discharged from the Hospital and sent back to her home where she narrated the incident and thereafter an F.I.R was lodged. During the course of investigation, the prosecutrix was sent for medical examination and her clothes were seized and slides were prepared. After receipt of the medical report, F.I.R was registered and site map of the spot was prepared. The Investigating Officer seized various articles which included the prosecutrix's birth certificate and certificate of the Middle School Examination, 2001. Along with that the relevant page (page No. 20) of the register of the U.S.A Hotel was also seized. After due investigation a charge-sheet was filed against the respondent for offences under Sections 363, 366 and 376 of the Indian Penal Code, 1860 ("I.P.C.") and the statements of the prosecution witnesses were recorded.

4. On 27.03.2003, the Judicial Magistrate, First Class Satna registered the Criminal Case No.116/2003 and passed the committal order. Accordingly, the case was transferred and was received by the Upper District Sessions Judge-III, Satna for trial.

5. The IIIrd Additional Sessions Judge, Satna, by his order dated 24.04.2006 passed in Special Case No.123/2003, convicted the accused under Sections 363, 366 and 376 of I.P.C. and held that all the offences against the respondent were proved beyond reasonable doubt. The respondent was awarded 7 years' rigorous imprisonment and fine of Rs.500/- for the crime under Section 363 I.P.C., 10 years' rigorous imprisonment and fine of Rs.1000/- for the crime under Section 366 I.P.C., and 10 years' rigorous imprisonment and fine of Rs.1000/- for the crime under Section 376 I.P.C. with default clauses. All the substantive sentences were directed to run concurrently.

6. Aggrieved by the aforesaid judgment and order passed by the IIIrd Additional Sessions Judge, Satna, the respondent preferred an appeal under Section 374(2) of Cr.P.C. before the High Court of Madhya Pradesh at Jabalpur, which was numbered as Criminal Appeal No.924 of 2006. The learned Single Judge of the High Court, by impugned judgment and order dated 10.07.2008, set aside the judgment and order of conviction passed by the Trial Court against the respondent. The High Court ruled that the decision of the Trial Court was not sustainable solely on the ground that the prosecution had failed to prove the fact that the girl was less than 16 years of age at the time of the incident. The reasons that weighed heavily with the ruling of the High Court were that, either the public prosecutor or P.W.7 Pramod Kumar Sharma (father of the prosecutrix) tried to file Ext. P/5 which was not part of the charge-sheet. Such type of evidence could not be created by any person except the Investigation Officer. It was for the prosecution to show that a particular document was taken on record during investigation but could not be filed. The prosecution could not create any new evidence which was not part of the investigation. Ext. P/5 and Ext. P/6 have variation in the date of birth of the prosecutrix. In certificate Ext.P/5 the date of birth was disclosed as 29.8.1987, whereas in certificate Ext.P/6 it has been disclosed as 27.8.1987. The High Court found this sufficient to disbelieve that the prosecutrix was below 16 years of age at the time of the incident. The High Court relied on the statement of PW-11 Dr. A.K. Saraf who took the X-ray of the prosecutrix and on the basis of the ossification test, came to the

conclusion that the age of the prosecutrix was more than 15 years but less than 18 years. Considering this the High Court presumed that the girl was more than 18 years of age at the time of the incident. The last ground taken by the High Court was that the girl was a consenting party and was more than 18 years of age at the time of the incident and thus, no offence against the accused has been proved.

7. We have heard the learned counsel appearing for the parties.

8. Before us, learned counsel for the State of Madhya Pradesh has raised the contention that the High Court gave undue importance to the difference of two days in the date of birth of the prosecutrix as per the birth certificate and the certificate of the Middle School Examination 2001, and erroneously held that this difference is sufficient to disbelieve the age of the prosecutrix. Further, the High Court ought to have appreciated the law laid down by this Court that regarding the determination of age, the birth certificate is the determining evidence.

9. The learned counsel appearing for the respondent, on the other hand, argued that the prosecution story is concocted as her evidence is not corroborated by the evidence of P.W.9 Jagdish Gupta, the Manager of the Hotel. Further, the respondent states that the prosecutrix did not give any resistance and there were no injury marks, which make it clear that she was a consenting party. In addition, the learned counsel argued that the prosecution did not explain as to why the Investigating Officer did not seize the birth certificate during the course of investigation.

10. We believe that the present case involves only one issue for this Court to be considered, which is regarding the determination of the age of the prosecutrix.

11. In the present case, the central question is whether the prosecutrix was below 16 years of age at the time of the incident. The prosecution in support of their case adduced two certificates, which were the birth certificate and the middle school certificate. The date of birth of the prosecutrix has been shown as 29.08.1987 in the Birth Certificate (Ext. P/5), while the date of birth is shown as 27.08.1987 in the Middle School Examination Certificate. There is a difference of just two days in the dates mentioned in the abovementioned Exhibits. The Trial Court has rightly observed that the birth certificate Ext. P/5 clearly shows that the registration regarding the birth was made on 30.10.1987 and keeping in view the

fact that registration was made within 2 months of the birth, it could not be guessed that the prosecutrix was shown as under-aged in view of the possibility of the incident in question. We are of the view that the discrepancy of two days in the two documents adduced by the prosecution is immaterial and the High Court was wrong in presuming that the documents could not be relied upon in determining the age of the prosecutrix.

12. This Court in the case of *Mahadeo S/o Kerba Maske Vs. State of Maharashtra and Anr.*, (2013) 14 SCC 637, has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

> "Rule 12(3): In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –
>
> (a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
>
> (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
>
> (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;
>
> (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.
>
> and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the

juvenile in conflict with law."

13. This Court further held in paragraph 12 of *Mahadeo S/o Kerba Maske* (supra) as under:

> *"Under rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3)(a)(i) to (iii), the medical opinion can be sought for.* In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of the ascertaining the age of a victim as well."
>
> (Emphasis supplied)

This Court therefore relied on the certificates issued by the school in determining the age of the prosecutrix. In paragraph 13, this Court observed:

> "In light of our above reasoning, in the case on hand, there were certificates issued by the school in which the proseuctrix did her V standard and in the school leaving certificate issued by the school under Exhibit 54, the date of birth has been clearly noted as 20.05.1990 and this document was also proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primary School, Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20.05.1990. the reliance placed upon the said evidence by the Courts below to arrive at the age of the prosecutrix to hold that the prosecutrix was below 18 years of age at the time of occurrence was perfectly justified and we do not find any grounds to interfere with the same."

14. In the present case, we have before us two documents which support the case of the prosecutrix that she was below 16 years of age at the time the incident took place. These documents can be used for ascertaining the age of the prosecutrix as per Rule 12(3)(b). The difference of two days in the dates, in our considered view, is immaterial and just on this minor discrepancy, the evidence in the form of Exts. P/5 and P/6 cannot be discarded. Therefore, the Trial Court was correct in relying on the documents.

15. The High Court also relied on the statement of PW-11 Dr. A.K. Saraf

who took the X-ray of the prosecutrix and on the basis of the ossification test, came to the conclusion that the age of the prosecutrix was more than 15 years but less than 18 years. Considering this the High Court presumed that the girl was more than 18 years of age at the time of the incident. With respect to this finding of the High Court, we are of the opinion that the High Court should have relied firstly on the documents as stipulated under Rule 12(3)(b) and only in the absence, the medical opinion should have been sought. We find that the Trial Court has also dealt with this aspect of the ossification test. The Trial Court noted that the respondent had cited *Lakhan Lal Vs. State of M.P.*, 2004 Cri.L.J. 3962, wherein the High Court of Madhya Pradesh said that where the doctor having examined the prosecutrix and found her to be below 18½ years, then keeping in mind the variation of two years, the accused should be given the benefit of doubt. Thereafter, the Trial Court rightly held that in the present case the ossification test is not the sole criteria for determination of the date of birth of the prosecutrix as her certificate of birth and also the certificate of her medical examination had been enclosed.

16. Thus, keeping in view the medical examination reports, the statements of the prosecution witnesses which inspire confidence and the certificates proving the age of the prosecutrix to be below 16 years of age on the date of the incident, we set aside the impugned judgment passed by the High Court and uphold the judgment and order dated 24.04.2006 passed by the IIIrd Additional Sessions Judge, Satna in Special Case No.123/2003.

17. Accordingly, this appeal is allowed. We direct that the respondent shall be taken into custody forthwith to serve out the sentence.

Appeal allowed.

I.L.R. [2015] M.P., 2551
SUPREME COURT OF INDIA
Before Mr. Justice Pinaki Chandra Ghose &
Mr. Justice Uday Umesh Lalit
Cr. Appeal No. 2244/2009 decided on 3 July, 2015

STATE OF M.P. ...Appellant
Vs.
KESHAR SINGH ...Respondent

A. ***Evidence Act (1 of 1872), Section 3 and Penal Code (45 of 1860), Section 376 - Rape*** **- Prosecutrix a minor girl of unsound mind**

- Her evidence could not be recorded as she was found incapable of understanding - Appreciation of evidence - Three witnesses deposed different version about the availability of prosecutrix after incidence - Inflicting of injuries by knife not supported by medical evidence - Statement unworthy of credit - Major inconsistency. (Paras 8, 9)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 एवं दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – अभियोक्त्री एक विकृत चित्त अप्राप्तवय बालिका – उसके साक्ष्य का अभिलेखन नहीं किया जा सकता क्योंकि वह सोचने समझने के लिए अक्षम पाई गई – साक्ष्य का मूल्यांकन – तीन साक्षियों ने घटना के पश्चात् अभियोक्त्री की उपस्थिति के संबंध में भिन्न कथन किये हैं – चाकू द्वारा चोटें पहुंचाई जाना, चिकित्सीय साक्ष्य द्वारा समर्थित नहीं – कथन विश्वास योग्य नहीं – गंभीर असंगति।

***B. Penal Code (45 of 1860), Section 376 - Rape - Medical Evidence - Medical Jurisprudence* - Oozing of blood from hymen - Necessary - If intercourse happened last 24 hours. (Para 9)**

ख. दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – चिकित्सीय साक्ष्य – चिकित्सीय विधिशास्त्र–योनिच्छद से रक्तस्त्राव – आवश्यक – यदि पिछले 24 घंटो में संभोग हुआ हो।

JUDGMENT

The Judgment of the Court was delivered by : **PINAKI CHANDRA GHOSE, J. :-** In the present case, there is concurrent decision of acquittal of the accused by the Sessions Court as well as the High Court of Madhya Pradesh. The offence alleged to have been committed in this case is rape, punishable under Section 376 of Indian Penal Code, 1860 ("IPC", for short).

2. The story of the prosecution is that the prosecutrix is a minor of unsound mind. On 09-11-1990 at around 8:30 a.m. when prosecutrix and her younger sister Nirmala (PW3) were going to their field with food for their father, the accused came and caught hold of the prosecutrix. He took her to some distance near a pond and committed rape on her. Prosecutrix's private parts had bled and the petticoat was blood-stained. On seeing this, PW3 Nirmala rushed to her father Gopal (PW4) and informed him of the incident. Then PW4 came to the prosecutrix who told him with the help of sign language (since she cannot speak properly) that the accused committed rape on her. He noticed that there were blood stains on her petticoat near the private parts. Thereafter,

PW4 took the prosecutrix to police station and lodged an FIR at 11:30 a.m. on the same day. Medical examination of the prosecutrix was conducted which revealed that the hymen was ruptured and the examining doctor Dr. (Mrs.) F.A. Qureshi opined that the prosecutrix was subjected to sexual intercourse. During investigation the accused was arrested on 21-11-1990 and was medically examined. He was found to be capable of performing sexual intercourse. The police filed charge-sheet against the accused with the charge of rape under Section 376 of IPC.

3. The prosecution produced PW1 Dr. Smt. F.A. Qureshi, PW2 Manohar Singh (uncle of the prosecutrix), PW3 Nirmala (younger sister of the prosecutrix), PW4 Gopal (father of the prosecutrix) and PW5 R.K. Mishra (Investigating Officer). Other witnesses were formal witnesses. It is important to note that the prosecutrix was also produced as a witness, being PW6, but it was found that she was not capable of understanding what was asked and made irrelevant answers. In the medical examination of the prosecutrix also, she is found to be 12-16 years old with low I.Q.

4. PW1 has deposed in her categorical finding that the private parts of the prosecutrix were injured, her hymen was ruptured and that she was subjected to sexual intercourse. The major eye witness in the present case is PW3 who is also a minor girl of 10 years. However, in her examination she was found to be competent witness as she answered the preliminary questions correctly and with understanding. She has in her examination-in-chief brought out the story that the accused, whom she knows, had caught her sister and taken her near the pond. According to her, he threw the prosecutrix on the ground, opened his pyjama and sat on her and gave the prosecutrix some money, which was thrown away by her. The witness further stated in her deposition that the accused filled the mouth of the prosecutrix with lungi, raised her petticoat and committed sexual intercourse and that the private part of the prosecutrix bled. She also stated that her uncle Manohar Lal arrived there on whose asking she went to her father in a car and told him about the incident. She has also stated that the accused had inflicted knife blows on the thigh of the prosecutrix. In the cross-examination, we find that the counsel for defence has asked the child witness (PW3) many leading questions, the implication of which the child witness would never be able to understand. Therefore, she has answered most of the questions with a mechanical one word answer "Yes", without any elaboration. In this way, the defence elicited from the child witness

the statements to the effect that the accused had given knife blows on the face, neck and thigh of the prosecutrix and that it was all these parts of the prosecutrix from where blood oozed out. In the same way she admitted the suggestion that she was read out a statement by police outside the Court and that she has made the same statement in the Court.

5. PW2 Manohar Lal (uncle of the prosecutrix) has also stated in his deposition that he saw the accused sitting over the prosecutrix and having his private part inserted in the private parts of the prosecutrix. He says on his coming to the place, the accused fled away. He further states that he had seen the accused giving knife blows to the prosecutrix as a result of which the thigh of the prosecutrix started bleeding. However, he also states that private parts of the prosecutrix were also bleeding. He further states that while leaving the two sisters on the road, he went to call the father of the prosecutrix (PW4) and when he came back along with PW4, he found them sitting where he had left them.

6. PW5 has corroborated the version of PW3 and said that he was informed of the incident by PW3 and he went to the prosecutrix where he found her petticoat blood-stained. He has deposed that his daughter (prosecutrix) had told him in sign language that the accused Keshar Singh had committed rape on her. According to this witness when he reached the place of incident, he found the prosecutrix sitting alone near a khankri tree and not on the road. He has further stated that he did not see the blood oozing out of thigh or private parts of the prosecutrix as, being her father, he could not examine her private parts but he confirms that the petticoat was blood stained.

7. In view of the above evidence, both the Sessions Court and the High Court found inherent inconsistencies in the statements of the prosecution witnesses. While PW2 and PW3 speak about knife blows being inflicted on thighs and blood oozing from there, the medical evidence does not support this theory. Further, PW3 said that she went to call her father PW4, while PW2 has said he had gone to call PW4. PW2 has also stated that when PW4 came along with him, they found the prosecutrix on the road, while PW4 has stated that he found the prosecutrix near khankri tree near a pond. Thus, the Sessions Court has rightly not considered the statement of the prosecutrix as she was found to be incompetent to understand the questions. In view of the above-mentioned inconsistencies, the Sessions Court found that although it is proved that rape was committed with the prosecutrix, but that it was done by

the accused was not proved.

8. We have heard the learned counsel for both the sides and also analysed the evidence in this case. We find that there are inherent inconsistencies in the case of the prosecution. The testimonies of two alleged eye witnesses, PW2 & PW3, are irreconcilable. PW2, the uncle of the prosecutrix says that he saw the accused sitting over the prosecutrix with his private part inside the private part of the prosecutrix when he was 25 feet away. We find this statement incredible for the reason that he could not have made such detailed observation from such a distance. Also, according to PW2, he had left the prosecutrix and PW3 on the road when he had gone to call PW4, while PW3 has completely contrary version where she states that she had gone to call PW4 leaving the prosecutrix with PW2. This creates a serious doubt as to who out of PW2 or PW3 stayed with the prosecutrix and who went to call PW4. Also PW2 stated that when he came with PW4, they found prosecutrix and PW3 on the road where PW2 had left them. However, PW4 states that it was PW3 who had come to inform him and he came with her to find the prosecutrix sitting alone near a tree next to the pond. In this way the three witnesses have three different versions. Moreover, both PW2 and PW3 have said that they saw accused inflicting knife blows at the prosecutrix on her thigh and blood oozed out on that account. This is completely unsupported by the medical evidence; no such injury by knife was found on the thigh of the prosecutrix.

9. We may note that PW3 had told about the accused inflicting knife blows in her examination in chief itself, and therefore, one cannot say she said so because of being misled by the cross-examiner. This is a major inconsistency in the testimony of both PW2 and PW3 which makes their statement unworthy of credit. Furthermore, the conduct of PW2 seems to be uncharacteristic of an uncle as he makes no mention of his raising any alarm or running towards the accused to apprehend him on seeing that the accused was sexually assaulting the prosecutrix. Also the medical evidence of Dr. Mrs. F.A. Qureshi on analysis seems to be not wholly supportive to the case of the prosecution. Dr. Quershi has accepted that if the sexual intercourse has happened in last 24 hours, then on touching the hymen fresh blood must necessarily ooze out. In saying so, she has approved what is written in the Modi's book on Medical Jurisprudence. However, she testifies that when she touched the hymen of the prosecutrix, no fresh blood oozed out. This may be contrasted to the fact that allegedly,

the medical examination of the prosecutrix was conducted within 12 hours of the alleged incident of rape. Had that been so, the prosecutrix must have bleeded fresh during the medical examination, but that did not happen. This shows that, probably, the sexual intercourse was done more than 24 hours back. In fact, Dr. Qureshi in her cross-examination has said that rupture of hymen was at the most 2-3 days prior to the medical examination. If this be so, the entire story of the prosecution would go out of the window. Further, there is another inconsistency to be found from the deposition of Dr. Qureshi. She has said in her statement that the girl she had examined was a healthy and 'normal' one. However, there is no dispute that the prosecutrix was far from normal as she was suffering from some mental disorder. Even when she was examined in Court, she was found to be of unsound mind. It would be highly unlikely and assumptuous on our part to say that even after conducting the whole examination of the prosecutrix, Dr. Qureshi may not have come to know of the mental disorder of the prosecutrix.

10. In view of the above reasoning, we are of the opinion that the case of the prosecution suffers from inherent inconsistencies and flaws. We do not find any merit in this appeal. Accordingly, this appeal is dismissed.

Appeal dismissed.

I.L.R. [2015] M.P., 2556
WRIT APPEAL
Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice J.K. Maheshwari
W.A. No. 552/2015 (Jabalpur) decided on 13 August, 2015

MRIDUL KUMAR SHARMA ...Appellant
Vs.
STATE OF M.P. ...Respondent

Constitution - Article 226 - Transfer - Stay till representation is decided **- Representation filed by employee does not create any right in his favour to remain at a same place from where he has been transferred - He must join at transferred place, even if he has to pursue remedy of representation - It is not for court to sit over the subjective satisfaction or dictate to concerned authority, being purely administrative matter - Court must eschew from issuing interim direction. (Paras 3 to 5)**

संविधान – अनुच्छेद 226 – स्थानांतरण – अभ्यावेदन का विनिश्चय किये जाने तक रोक – कर्मचारी द्वारा प्रस्तुत अभ्यावेदन उसे उसी स्थान पर बने रहने के लिये, जहां से उसे स्थानांतरित किया गया है, उसके पक्ष में कोई अधिकार सृजित नहीं करता – उसे स्थानांतरित स्थान पर पदभार ग्रहण करना चाहिए, यदि उसे अभ्यावेदन के उपचार का अवलंब लेना हो तब भी – यह न्यायालय के लिए नहीं है कि वैयक्तिक संतुष्टि पर विचार करे या संबंधित प्राधिकारी को आदेशित करे, क्योंकि यह शुद्ध रूप से प्रशासनिक मामला है – न्यायालय को अंतरिम निदेश जारी करने से बचना चाहिए।

Cases referred :

W.P. No. 12705/2015 decided on 04/08/2015, W.A. No. 381/2015 decided on 15/07/2015, (1989) 2 SCC 602.

V.K. Shukla, for the appellant.
Samdarshi Tiwari, Dy. A.G. for the Respondent/State.

ORDER

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

This is yet another writ appeal questioning the decision of the learned Single Judge who has rejected the writ petition challenging the transfer order dated 18.5.2015, transferring the appellant from District – Umaria to District – Sidhi. Learned Single Judge whilst rejecting the writ petition has, however, observed that the appellant is free to pursue representation before the appropriate Authority.

2. The argument before us is that the learned Single Judge has committed error in not giving the same benefit as given by the coordinate Bench (another Single Judge) on the same day. Reliance is placed on the order dated 4.8.2015 passed in W.P. No.12705/2015, wherein the coordinate Bench observed that till the representation of the writ petitioner in that case was decided by the appropriate Authority, the transfer order shall remain stayed. Indeed, that order was passed inspite of rejecting the relief claimed in the said writ petition questioning the transfer order.

3. Notably, both the orders are passed by the Single Bench of this Court and, therefore, cannot be cited as binding precedent in this intra Court appeal before the Division Bench. More so, the legal position is no more *res integra.*

The Supreme Court has consistently observed that the representation filed by the employee does not create any right in his favour to remain at the same place from where he has been transferred, until the representation is decided. The fact that representation is pending will be of no avail to the employee concerned. He must first join at the transferred place, even if he has to pursue remedy of representation. Whether the concerned employee should be permitted to remain at the same place until his representation is decided, is also the prerogative of the appropriate Authority. It is not for the Court to sit over that subjective satisfaction or dictate to the concerned Authority in that behalf, being purely administrative matter. Understood thus, the fact that coordinate Bench (Single Bench) had given relief to another writ petitioner on the same day cannot be the basis to grant same relief to this appellant.

4. Counsel for the appellant placed reliance on the decision of the Division Bench of this Court dated 15.7.2015 in W.A. No.381/2015. Observations in this decision, however, will be of no avail to the appellant in the face of the decision of the Supreme Court in the case of *Gujarat Electricity Board and another Vs. Atmaram Sungomal Poshani* reported in (1989) 2 SCC 602, which is directly on the point. In paragraph 4, the Supreme Court observed thus:

> "4. Transfer of a government servant appointed to a particular cadre of transferable posts from one place to the other is an incidence of service. No government servant or employee of Public Undertaking has legal right for being posted at any particular place. Transfer from one place to other is generally a condition of service and the employee has no choice in the matter. Transfer from one place to other is necessary in public interest and efficiency in the public administration. Whenever, a public servant is transferred he must comply with the order but if there be any genuine difficulty in proceeding on transfer it is open to him to make representation to the competent authority for stay, modification or cancellation of the transfer order. If the order of transfer is not stayed, modified or cancelled the concerned public servant must carry out the order of transfer. In the absence of any stay of the transfer order a public servant has no justification to avoid or evade the transfer

order merely on the ground of having made a representation, or on the ground of his difficulty in moving from one place to the other. If he fails to proceed on transfer in compliance with the transfer order, he would expose himself to disciplinary action under the relevant rules, as has happened in the instant case. The respondent lost his service as he refused to comply with the order of his transfer from one place to the other."

(emphasis supplied)

5. Be that as it may, in the present case, it is not as if the two writ petitions were kept pending and inconsistent "interim relief" granted therein. In fact, both the writ petitions have been finally disposed of. However, in one case limited protection has been given to the writ petitioner therein by another Bench. In our opinion, in the light of the principle expounded by the Supreme Court, referred to above, the Court must eschew from issuing such direction - as it inevitably results in dictating the concerned Authority in respect of administrative matter within his domain. Accordingly, the decision pressed into service, cannot be treated as a binding precedent on the matter in issue and will be of no avail to the appellant.

6. Accordingly, this appeal is devoid of merit. We, however, make it clear that it is for the appropriate Authority to entertain the representation filed by the appellant and including to consider the request of the appellant to allow him to continue at the same place or otherwise. The appellant must, as per the settled legal position, report to the transferred place and pursue his remedy of representation, particularly when the appropriate Authority before whom the representation is pending has so far not favoured the appellant by allowing him to continue at the same place. At best, we may only observe that the appropriate Authority must decide the representation expeditiously, preferably within two weeks.

7. Accordingly, the writ appeal is **rejected** with the above observations.

8. At this stage, counsel for the appellant submits that the appellant be permitted to withdraw this appeal and pursue remedy of representation. Hence, we allow the appellant to **withdraw** this appeal with the aforesaid observations.

Appeal rejected.

I.L.R. [2015] M.P., 2560
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No.14563/2013 (Jabalpur) decided on 10 September, 2013

RAMAVTAR & ors. ...Petitioners
Vs.
SHIVBHAJAN & anr. ...Respondents

A. Civil Procedure Code (5 of 1908), Order 26 Rule 9 - Issuance of Commission, to ascertain actual possession - **Such prayer could be considered at the stage of appreciation of evidence and not prior to that. (Para 4)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 26 नियम 9 – वास्तविक कब्जा सुनिश्चित करने के लिये, कमीशन जारी किया जाना – ऐसी प्रार्थना को साक्ष्य के मूल्यांकन के प्रक्रम पर विचार में लिया जा सकता है न कि इससे पहले।

B. Civil Procedure Code (5 of 1908), Order 26 Rule 9 - Issuance of Commission - **Stage of consideration - At the interlocutory stage - No party could be permitted to use the court process to collect evidence as agency - Evidence yet to be recorded. (Para 4)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 26 नियम 9 – कमीशन जारी किया जाना – विचार किये जाने का प्रक्रम – अंतर्वर्ती प्रक्रम पर – किसी पक्षकार को साक्ष्य एकत्रित करने की एजेंसी के रूप में न्यायालय की प्रक्रिया का उपयोग करने की अनुमति नहीं दी जा सकती – साक्ष्य अभिलिखित किया जाना बाकी है।

C. Constitution - Article 227 and Civil Procedure Code (5 of 1908), Section 115 - Scope of Interference - **Orders passed under the vested discretionary jurisdiction could not be interfered in writ or revisional jurisdiction. (Para 6)**

ग. संविधान – अनुच्छेद 227 एवं सिविल प्रक्रिया संहिता (1908 का 5), धारा 115 – हस्तक्षेप की परिधि – निहित वैवेकिक अधिकारिता के अंतर्गत पारित किये गये आदेशों में हस्तक्षेप रिट या पुनरीक्षण अधिकारिता में नहीं किया जा सकता।

Cases referred :

2011(3) MPLJ 333, 2012(2) MPWN 139, 2012(3) MPWN 168, 1982 MPWN 255, AIR 1973 SC 76.

Manoj Mishra, for the petitioners.

ORDER

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

The petitioners/defendants have filed this petition under Article 227 of the Constitution of India being aggrieved by the order dated 5/8/2013 passed by 2nd Civil Judge Class-II, Laundi, Distt. Chhatarpur in Original Civil Suit No. 81-A/2012 whereby their application filed under Order 26 Rule 9 of CPC for appointment of Commissioner and calling the report regarding actual possession of the disputed property at the initial stage of the suit has been dismissed.

2. Petitioners' counsel after taking me throw (sic:through) the averments of the petition along with papers placed on record and the impugned order argued that there is basic dispute between the parties regarding map of the disputed property and on account of that the dispute of possession has come into existence. In continuation of the same, by referring some paragraphs of the plaint, counsel submits that the respondent No.1/plaintiff has stated himself to be in possession of the disputed property while in the written statement, the petitioners have denied the same with a pleading that they are in possession of disputed land and in such premises to resolve such controversy between the parties and also to clarify that which party is in actual possession at the site of the property, the impugned application was filed on behalf of the petitioners for appointment of Commissioner to call the report. In the available circumstances, the trial Court ought to have allowed such application and called the report but the application has been dismissed under the wrong premises. In support of his arguments, he also placed reliance on earlier three decided cases of by this Court in the matter of *Kamal Singh and another Vs. Roop Singh (since dead) through LRs.and another* reported in 2011(3) MPLJ 333, in the matter of *Shivnarayan Vs Koshalya Bai* reported in 2012 (2) MPWN 139 and in the matter of *Beejanwala Talukdar Vs Radha Krishna Rai* reported in 2012(3) MPWN 168 and prayed to allow his application by setting aside the impugned order by admitting and allowing this petition.

3. Having heard learned counsel for the petitioners, keeping in view his arguments, I have carefully gone through the averments of the papers placed on record along with the impugned order so also the cited cases.

4. As per pleadings of the parties, the main dispute between them is relating to the actual possession over the disputed property whether the

plaintiff/respondent No.1 is in possession of the same or the same is in possession of the petitioners/defendants and such question could be considered by the trial Court in the light of the pleadings of the parties after framing issues and recording the evidence at the stage of appreciation of the same and not prior to that. At the interlocutory stage when the evidence of the parties is yet to be recorded, no party could be permitted to use the process of the court as an agency to collect the evidence for such party by allowing the application of order 26 rule 9 of the CPC as laid down by this court long before in the matter of *Laxman Vs. Ramsingh,* reported in 1982 MPWN 255 holding that no party should be permitted to use the Court as an agency to collect the evidence in support of him and in such premises the in cited case the application of Order 26 Rule 9 of CPC was dismissed by this Court. Such principle is directly applicable to the present matter.

5. The cases cited on behalf of the petitioners were decided on the boundaries dispute or relating to the mass disputes which is not the situation in the case at hand. So, the cited cases being on different issues are distinguishable with the present case. Consequently, the same is not helping to the petitioners.

6. In view of aforesaid discussion, I have not found any error, illegality or perversity of law in the order impugned, besides this, the impugned order has been passed by the trial Court under it's vested discretionary jurisdiction. Whenever any order is passed by the Subordinate Court under the vested discretionary jurisdiction, then the same could not be interfered in the revisional jurisdiction or in the writ jurisdiction. My such view is based on the principles laid down by the Apex Court in the matter of *The Managing Director (MIC) Hindustan Aeronautics Ltd. Balanagar, Hyderabad and another Vs. Ajit Prasad Tarway, Manager. (Purchase and Stores) Hindustan Aeronautics Ltd. Balanagar, Hyderabad reported* in AIR 1973 SC 76. In such a situation, the impugned order does not require any interference at this stage.

7. Consequently, this petition being devoid of merit deserves to be and is hereby dismissed at the initial stage of motion hearing. However, it is observed that after recording the evidence of both the parties before the trial Court, if some ambiguity is pointed out by either of the parties and to clarify the same any application for appointment of Commissioner to call the report is filed then the trial Court shall be at liberty to consider such application in view of the recorded evidence just to clarify such ambiguity and without influencing

from any observation or findings given by such court on the order impugned or by this court in the present order.

Petition dismissed.

I.L.R. [2015] M.P., 2563

WRIT PETITION

Before Mr. Justice U.C. Maheshwari

W.P. No. 14562/2013 (I) (Jabalpur) decided on 11 September, 2013

SANJAY KUMAR ...Petitioner

Vs.

PREM KUMAR ...Respondent

Accommodation Control Act, M.P. (41 of 1961), Section 13(3) - Dispute as to whom the rent is payable - Nature and stage of Enquiry **- Should be decided framing specific issue alongwith other issues on pleadings, after appreciation of material on record by judgment and decree.** **(Para 4)**

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 13(3) – विवाद कि भाड़े का भुगतान किसे किया जाना है – जांच का स्वरूप एवं प्रक्रम – अभिवचनों के अन्य विवाद्यकों के साथ विनिर्दिष्ट विवाद्यक विरचित कर अभिलेख की सामग्री का मूल्यांकन करने के पश्चात् निर्णय एवं डिक्री द्वारा इसका विनिश्चय किया जाना चाहिए।

Jaideep Sirpurkar, for the petitioner.

(Supplied: Paragraph numbers)

ORDER

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

1. The petitioner/defendant/tenant has filed this petition under Article 227 of the Constitution of India being aggrieved by the order dated 24.7.2013 passed by 4th Civil Judge Class-I, Chhindwara in Civil Suit No.116-A/2012 whereby his application filed under Section 13 (3) of M. P. Accommodation Control Act, 1961 (in short "the Act") with a prayer to decide the entitlement of respondent No.2 to 4 to receive the rent of disputed accommodation has been dismissed.

2. The petitioner's counsel after taking me through the impugned order along with the papers placed on record argued that as per provision of Section

13 (3) of the Act, the trial Court was duty bound to hold the inquiry on the aforesaid objection raised in the application by the petitioner and decide the question regarding entitlement of respondent No.2 to 4 to receive the rent of disputed accommodation. He fairly conceded that the relationship as landlord and tenant between respondent No.1 and petitioner is not under dispute and there is no dispute regarding terms of the tenancy between them. The petitioner is still depositing regular rent of the accommodation for respondent No.1 and not for others but contrary to the mandatory provision of Section 13 (3) of the Act without holding the requisite inquiry, only on the basis of the pleadings of the plaint, the trial Court has decided his application and held that the respondent No.1 was receiving the rent of disputed accommodation for himself and also on behalf of co-respondents No.2 to 4. The same not in-consonance with the facts and circumstances of the case and prayed for setting aside the impugned order and allowing his application with a direction to the trial Court to hold the inquiry as prayed by the petitioner by admitting and allowing this petition.

3. Having heard the counsel I have carefully gone through the impugned order and the papers placed on record. It appears from the averments of the plaint that respondent No.1 to 4 have filed the impugned suit for eviction of the petitioner from the disputed accommodation on the ground available under Section 12 of the Act. It also appears that the respondents have filed such suit by stating themselves to be the co-landlord with the respondent No.1 and in such premises the impugned order has been passed by the trial Court. I am apprised by the petitioner's counsel that the impugned suit is at initial stage and till passing the impugned order no written statement was filed but subsequent to that the same has been filed. In the written statement all the objection which have been raised in the impugned application have also been raised in the written statement.

4. I am of the considered view that the impugned order has been passed before recording the evidence and appreciation of the same but at the initial stage prima-facie impugned order does not appear to be contrary to the procedure because it should have been passed after holding inquiry, but inquiry does not mean that evidence of the parties should be recorded on the basis of the available document, the matter may be inquired on the basis of the available record by the trial Court to pass the interim order and such order or direction shall be deemed subject to final judgment and decree of the trial Court. So, in such premises by affirming the impugned interim order, the trial Court is directed

to frame the specific issues on the pleadings of the parties on all disputed questions as well on the questions raised in the written statement in special pleadings and after extending the opportunity to the parties to adduce the evidence on such issues and the same be decided (including the aforesaid question raised in the impugned application and decided at the interim stage by the impugned interim order) on their own merits. However, the trial Court shall be at liberty to pass the judgment and decree on the basis of the evidence which is to be recorded by such Court, without influencing from any findings or observation made either in the order impugned or in the present order. There shall be no order as to costs.

5. The petition is disposed of with aforesaid observation and directions.

Petition disposed of.

I.L.R. [2015] M.P., 2565
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No.18251/2013 (Jabalpur) decided on 24 October, 2013

KAMLESH & ors. ...Petitioners
Vs.
TARA DEVI & ors. ...Respondents

***A. Court Fees Act (7 of 1870), Section 35* - Notification of 1984 (as amended on 14-02-2011) of State Government - When the benefit of the same can be extended - To extend the benefit of the said notification to the plaintiff, enquiry is needed - No procedure of enquiry is provided in the notification - In such premises, trial court has a discretion to inquire into the matter according to its own way and decide the same in the judicial manner. (Para 5)**

क. न्यायालय फीस अधिनियम (1870 का 7), धारा 35 – राज्य सरकार की 1984 की अधिसूचना (14.02.2011 को यथा संशोधित) – इसका लाभ कब दिया जा सकता है – वादी को उक्त अधिसूचना का लाभ दिये जाने के लिये जांच आवश्यक है – अधिसूचना में जांच की प्रक्रिया उपबंधित नहीं – ऐसी स्थिति में, विचारण न्यायालय को अपने तरीके से मामले की जांच करने का और न्यायिक ढंग से उसका विनिश्चय करने का विवेकाधिकार है।

***B. Court Fees Act (7 of 1870), Section 35* - Manner of conducting enquiry - Anywhere in the statute where the word enquiry is**

used, the court is not always bound to call the report of any authority and appreciate the evidence in the light of such report - If on the basis of evidence adduced by the parties, the case could be decided, then there is no need to call the report of any authority either for assessing the annual income or the assets of the concerning plaintiff. (Para 6)

ख. न्यायालय फीस अधिनियम (1870 का 7), धारा 35 – जांच संचालित करने का ढंग – कानून में जहां कहीं भी जांच शब्द का प्रयोग किया गया है, न्यायालय किसी प्राधिकारी से प्रतिवेदन बुलाने और उक्त प्रतिवेदन के आलोक में साक्ष्य का मूल्यांकन करने के लिये सदैव बाध्य नहीं – यदि पक्षकारों द्वारा दिये गये साक्ष्य के आधार पर प्रकरण निर्णीत किया जा सकता है तब संबंधित वादी की या तो वार्षिक आय के या आस्तियों के निर्धारण हेतु किसी प्राधिकारी से प्रतिवेदन बुलाने की आवश्यकता नहीं।

Case referred :

2011(III) MPWN 107.

A. Usmani, for the petitioners.
Sanjay Dwivedi, for the respondent No.11.

(Supplied: Paragraph numbers)

ORDER

U.C. MAHESHWARI, J. :- The petitioners- defendants have filed this petition under Article 227 of the Constitution of India being aggrieved by the order dated 9.4.2013, (Ann.P-4) passed by the Vth Additional District Judge, Sagar in MJC No. 22/2011, whereby the application of the respondents-plaintiffs filed under the notification of 1984, which is further amended on 14.2.2011 promulgated by the State of M.P. under Section 35 of the Court Fee Act has been allowed and the respondent no. 1 is extended the benefit of exemption from payment of requisite court fee on the impugned suit.

2. The petitioners' counsel after taking me through the papers placed on record argued that looking to the number of assets of respondent no. 1- the plaintiff as stated in the reply filed on behalf of respondent no. 1 in the trial court so also in the impugned order, the respondent no. 1 could not have been extended the benefit of aforesaid notification. In continuation he said that out of aforesaid property, the respondent no. 1 is having the income of more than Rs.25,000/- p.a. but on appreciation of the evidence recorded by the trial

court such aspect has not been considered with proper approach. He also argued that the trial court has committed error in relying on the earlier decision of this court in the matter of *Shamubai and others Vs. Surendrasingh and others* reported in M.P. Weekly Note 2011 (III) MPWN 107 in extending the aforesaid benefit. Such case is squarely distinguishable from the facts of the case at hand. The cited case was decided taking into consideration the certificate of income of the concerning plaintiff issued by the Tahsildar while in the present matter the case was decided only on the basis of oral evidence adduced by the parties and no such report regarding income of respondent no. 1 was requisitioned from the court of Tahsildar. So in such premises, the impugned order is not sustainable and prayed to set aside the same by dismissing the impugned application of respondent no. 1 by admitting and allowing this petition.

3. Keeping in view the arguments advanced, I have carefully gone through the papers placed on record alongwith the impugned order as well as aforesaid case referred by the counsel.

4. True it is that above mentioned cited case was decided by the Coordinate Bench of this court taking into consideration some income certificate of the plaintiff issued by the Tahsildar, while the impugned case was decided by the trial court on the basis of evidence adduced by the parties.

5. I am of the considered view that to extend the benefit of aforesaid notification to the plaintiff like the respondent no. 1, the only enquiry is needed but under the provision of Section 35 of the Court Fee Act in the aforesaid notification no procedure of such enquiry has been provided. In such premises, the trial court had a discretion to enquiry into the matter according to its own way and decide the same in judicial manner.

6. Anywhere, in the statute where the enquiry word is used, the court is not always bound to call the report of any authority and appreciate the evidence in the light of such report. If on the basis of evidence adduced by the parties, the case could be decided, then there is no need to call the report of any authority either for assessing the annual income or the assets of the concerning plaintiff. In the case at hand, it is apparent that both the parties were extended opportunity to adduce the evidence on the aforesaid question and thereafter on appreciation of the evidence the impugned order has been passed and benefit of aforesaid notification has been extended to the respondent no.1.

So in such premises, only on the aforesaid technical ground that report of Tahsildar was not requisitioned, there is no scope in this petition even for admission.

7. Coming to consider the factual aspect of the matter, after perusing the impugned order and the deposition of the witnesses examined on behalf of the parties, I am of the considered view that evidence has been appreciated properly by the trial court for extending the aforesaid benefit to the respondent no. 1 by the impugned order. So in such premises, the same does not require any interference at this stage under Article 227 of the Constitution of India. Consequently this petition being devoid of any merit is hereby dismissed. However, it is observed that in pendency of the suit, if any source of regular income of more than Rs.25,000/- p.a of the respondent no. 1 is pointed out by the petitioners before the court with some authentic document, then the trial court shall be at liberty to reconsider such aspect and pass appropriate order in that regard.

8. C c as per rules.

Petition dismissed.

I.L.R. [2015] M.P., 2568
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No. 18465/2013 (Jabalpur) decided on 28 October, 2013

VINTI SOLANKI ...Petitioner
Vs.
ANIL KUMAR ...Respondent

A. Civil Procedure Code (5 of 1908), Order 1 Rule 10 - Plaintiff is dominus litis - **It is settled law that the plaintiff is the sole dominus litis of his litigation and has a right to implead a party according to his choice and contrary to his wish, he cannot be insisted either by any of the party of the suit or by the court unless there is any cause of action in the suit against such person to file the application under Order 1 Rule 10 of CPC to implead him/ her as party in the matter. (Para 5)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10 – वादी वाद का नियंत्रणकर्ता है – यह एक सुस्थापित विधि है कि वादी अपने वाद का एकमात्र वाद नियंत्रणकर्ता होता है तथा उसे अधिकार है कि वह अपनी पसंद के

अनुसार किसी पक्ष को पक्षकार बना सके तथा उसकी इच्छा के विरूद्ध उस पर न तो वाद के किसी पक्षकार द्वारा और न ही न्यायालय द्वारा जोर डाला जा सकता जब तक कि ऐसे व्यक्ति के विरूद्ध वाद में सि.प्र.सं. के आदेश 1 नियम 10 के अंतर्गत उसे पक्षकार बनाने हेतु आवेदन प्रस्तुत करने का वाद हेतुक न हो।

***B. Civil Procedure Code (5 of 1908), Order 1 Rule 10 - Whether petitioner is a necessary party* - Suit was filed for specific performance on the basis of agreement to sale, allegedly executed by respondent No. 2 in favour of respondent No. 1. - Nothing has been stated against the petitioner in the plaint and no relief is claimed against him - Petitioner is neither a necessary nor proper party and thus trial court has not committed any error in dismissing the application to implead the petitioner - However, in the peculiar facts of the case petitioner was extended liberty to file his separate suit against the respondents and other party on arising the occasion and on the basis of available cause of action. (Paras 7 & 12)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10 – क्या याचिकाकर्ता एक आवश्यक पक्षकार है – प्रत्यर्थी क्रमांक 2 के द्वारा प्रत्यर्थी क्रमांक 1 के पक्ष में कथित तौर पर निष्पादित किये गये विक्रय के करार के आधार पर विनिर्दिष्ट पालन हेतु वाद प्रस्तुत किया गया – वाद–पत्र में याचिकाकर्ता के विरूद्ध कुछ भी नहीं कहा गया है तथा उसके विरूद्ध कोई अनुतोष नहीं चाहा गया है – याचिकाकर्ता न तो आवश्यक न ही उचित पक्षकार है तथा इस प्रकार विचारण न्यायालय ने याचिकाकर्ता को पक्षकार बनाने के लिये प्रस्तुत किये गये आवेदन को खारिज करने में कोई त्रुटि नहीं कारित की है – तथापि, प्रकरण के विशेष तथ्यों में याचिकाकर्ता को प्रत्यर्थियों के विरूद्ध तथा अन्य पक्षकार के विरूद्ध यदि ऐसी स्थिति उत्पन्न हो तो तथा उपलब्ध वाद–हेतुक के आधार पर पृथक वाद प्रस्तुत करने की स्वतंत्रता प्रदान की गयी थी।

Cases referred :

2007 AIR SCW 6125, 1976 JLJ 84.

A.D. Mishra, for the petitioner.

(Supplied: Paragraph numbers)

ORDER

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

2. The petitioner-applicant has filed this petition under Article 227 of the

Constitution of India being aggrieved by the order dated 2.9.2013, (Ann. P-6), passed by the IVth Additional District Judge, East Niwar Khandwa in COS No. 10-A/2013, whereby her application filed under Order 1, Rule 10 of CPC in the impugned suit, filed by the respondent no. 1 against the respondent no. 2 by impleading the State of M.P. as respondent no. 3 as formal party for specific performance, permitting her to join as defendant has been dismissed.

3. The petitioner's counsel after taking me through the averments as well as paper placed on record and impugned order, argued that the property in dispute was initially the property of her father and father of respondent no. 2 and after demise of father contrary to the right of the petitioner, the same was got mutated by the respondent no. 2 in his own name and subsequent to that as alleged he has entered in agreement to sale the same with the respondent no. 1 and on arising the dispute in performance of such agreement between them, the respondent no. 1 has filed the impugned suit against the respondent no. 2 by impleading the State of M.P. as formal party for specific performance. In pendency of the suit, the petitioner in order to protect her interest in the property has filed the impugned application under Order 1, Rule 10 of CPC with prayer to implead her as defendant in the matter. In continuation, he said that if the petitioner is not permitted to join the impugned suit and if any decree is passed against the respondent no. 2, then his right vested in the property shall be affected and she would be deprived from her right in such property. He further said that in view of provision of Section 19 (b) of the Specific Relief Act 1963, if any decree is passed in the impugned suit in favour of the respondent no.1, then that shall affect the right of the petitioner. Thus, in such premises, she is necessary party in the matter and prayed for setting aside the impugned order by allowing her application by admitting and allowing this petition. He also placed his reliance of the Apex Court on a decision in the matter of *Sumtibai and others Vs. Paras Finance Col. Regd. Partnership Firm* reported in 2007 AIR SCW 6125.

4. Having heard the counsel at length, keeping in view the arguments advanced, I have carefully gone through the papers placed on record including the plaint, (Ann. P-1) and the petitioner's application, (Ann. P-4), its reply filed on behalf of respondent no. 1 so also the impugned order.

5. Before proceeding further to consider the question of admission of this petition on the factual matrix of the matter, I would like to examine the

matter in the light of settled principle on the question of sole dominus litus (sic:litis). It is settled principle of law that the plaintiff like the respondent no. 1 is sole dominus litus (sic:litis) of his litigation and has a right to implead a party according to his choice and contrary to his wish, he cannot be insisted either by any of the party of the suit or by the court unless compelling circumstances are available in the matter, unless there is any cause of action in the suit against such person to file the application under Order 1, Rule 10 of CPC to implead him/her as party in the matter.

6. It is undisputed fact in the case at hand that the respondent no. 1 has filed a suit for specific performance by impleading respondent no. 2, as defendant no.1 on the basis of the agreement dated 8.2.2007, which had taken place between him and respondent no.2. In such premises, the cause of action to file such suit was available only against respondent no. 2. So in such premises, the respondent no. 1 being sole deminus litus (sic:dominus litis) of his litigation could not be insisted by the court or by other person to implead the petitioner as defendant in the matter. If on conclusion of the suit, it is found by the trial court that if the right and interest of present petitioner is also involved in the matter, then on account of non impleadment of necessary party, the suit may be dismissed by such court and in such circumstances, the respondent no. 1 has to face the consequences of the same. So firstly in such premises, the petitioner could not have been permitted by the trial court to permit her to join the impugned suit as defendant.

7. Apart the aforesaid, on perusing the plaint, Annexure P-1, it is apparent that the respondent no. 1 has filed the impugned suit on the basis of alleged agreement to sale dated 8.2.2007, which has been as alleged executed by the respondent no. 2 in favour of respondent no. 1 and the same is not signed in any manner by the present petitioner. Even in the para of cause of action of the plaint, the cause of action is stated to be aforesaid date of the agreement, i.e. 8.2.2007 and 31.7.2008, on which the respondent no. 2 had refused to perform his part of contract and to execute the sale deed. It is apparent that nothing has been stated against the petitioner in the plaint. Even in the prayer clause, no relief has been prayed against the present petitioner. So in such premises, the petitioner does not appear to be either necessary party nor the proper party in the impugned suit of the respondent no. 1 and in such premises, the trial court has not committed any error in dismissing the application of the petitioner.

8. Long before in the matter of *Panna and another Vs. Jeewanlal and another* reported in 1976 JLJ, 84 the Full Bench of this Court has also answered the question that who is the necessary party in the suit and whose presence as proper party is required in the civil suit. In such case it was held 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) necessary party as indicated by the expression "ought to have been joined" and (b) proper 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 application fall in either of these categories.
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> 8. The Allahabad High Court in a Full Bench decision in the *Banaras Bank Vs. 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 Vs. 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.

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

10. In the available factual matrix of the matter the aforesaid citation is directly applicable and in such premises also the trial court has not committed any error in passing the impugned order and dismissing the petitioner's application.

11. So far the case law in the matter of *Sumtibai* (supra) cited by the petitioner's counsel is concerned, in such case some person was already a party in the matter and in pendency of the matter he passed away and thereafter the dispute with respect of his legal representatives had arisen whether such person being legal representatives of deceased party is co-owner of the property or not and in such premises, the case was decided, which is not the situation in the case at hand. So such case is not helping to the petitioner. So far principle laid down in such case is concerned, this court does not have any dispute.

12. In view of aforesaid, I have not found any perversity, illegality, infirmity or anything against propriety of law in the impugned order in dismissing the application of the petitioner filed under Order 1, Rule 10 of CPC. Consequently this petition being devoid of any merits deserves to be and is hereby dismissed at the stage of motion stage. However before parting with the petition, it is made clear that on arising the occasion or on the basis of available cause of action the petitioner under her available rights shall be at liberty to file his separate suit against the respondents and other party in accordance with the procedure prescribed under the law and this order shall not come in the way of the petitioner to file and prosecute such suit.

13. There shall be no order as to cost.

14. The petition dismissed as indicated above.

Petition dismissed.

I.L.R. [2015] M.P., 2574
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No.1195/2014 (Jabalpur) decided on 30 April, 2014

BRAJESH KUMAR PANDEY ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Constitution - Article 309 - Appointment - Right of a wait listed candidate* - Post of Rozgar Sahayak fallen vacant due to resignation given by a person appointed on merit basis - Petitioner is seeking appointment on the ground that he was placed in the waiting list - Held - Wait list candidate has no vested right to be appointed - He can only claim appointment when a selected candidate does not join and that too during the operative period of waiting list - Petition is dismissed. (Para 8)**

संविधान – अनुच्छेद 309 – नियुक्ति – प्रतीक्षा सूची के अभ्यर्थी का अधिकार – योग्यता के आधार पर नियुक्त एक व्यक्ति द्वारा त्यागपत्र दिये जाने के कारण रोजगार सहायक का पद रिक्त हुआ – याची इस आधार पर नियुक्ति चाह रहा है कि उसे प्रतीक्षा सूची में रखा गया था – अभिनिर्धारित – प्रतीक्षा सूची के अभ्यर्थी को नियुक्ति का कोई निहित अधिकार नहीं – वह नियुक्ति का दावा केवल तब कर सकता है जब कोई चयनित अभ्यर्थी पदभार ग्रहण नहीं करता और यह भी केवल प्रतीक्षा सूची की अवधि प्रवर्तनशील रहने के दौरान – याचिका खारिज।

Cases referred :

(2001) 10 SCC 237, (1997) 8 SCC 488, (1997) 4 SCC 283, (2004) 2 SCC 681.

A.K. Singh, for the petitioner.

(Supplied: Paragraph numbers)

O R D E R

SANJAY YADAV, J. :- Heard on admission.

2. Petitioner seeks direction to the respondents to appoint him on the post of Gram Rojgar Sahayak, Gram Panchayat Badagaon, Janpad Panchayat Sihawal District Sidhi, lying vacant after the resignation of incumbent holding the said post.

3. That, in pursuance to procedure adhered to for selection of Gram Rojgar Sahayak, Gram Panchayat Badagaon in the year 2010-2011, one Pawan Kumar Patel with 102.66 marks was placed at Serial No.1 in the merit list, whereas, the petitioner with 88.66 marks was placed in the waiting list. Pawan Kumar Patel was appointed as Gram Rojgar Sahayak.

4. That, later on, Pawan Kumar Patel was selected as Patwari in 2012 and after resigning from the post of Gram Rojgar Sahayak, he joined as Patwari; as a result whereof, the post of Gram Rojgar Sahayak, Gram Panchayat Badagaon fell vacant.

5. Petitioner, on 12.9.2012, filed an application for appointment as Gram Rojgar Sahayak on the ground that he, being in the waiting list, be given the appointment. The application though forwarded to the Joint Commissioner (Administration) M.P. Rajya Rojgar Parishad since did not reap any outcome, has led the petitioner to file this writ petition.

6. Question is when once the selection procedure has come to an end after selection is made whether subsequent happenings leading to vacancy of the post in question would give rise to any right to an incumbent in the waiting list of earlier selection.

7. At the outset, it may be mentioned that no Rule or Regulation has been commended at so as to meet out the exigency as has cropped up in the case at hand.

8. In *Sri Kant Tripathi v. State of U.P.* (2001) 10 SCC 237, it has been observed that "a wait-listed candidate has no vested right to be appointed, except when a selected candidate does not join and the waiting list is still operative, as was held by this Court in the case of *Surinder Singh v. State of Punjab* (1997) 8 SCC 488. In the case of *Sanjoy Bhattacharjee v. Union of India,* (1997) 4 SCC 283, this Court considered the right of a wait listed candidate and held that inclusion of candidates in merit list in excess of the notified vacancies, is not justified and waiting list candidates have no right to appointment".

9. Further, in *Bihar State Electricity Board v. Suresh Prasad* (2004) 2 SCC 681, it has been held -

> "7. .... As stated above a panel of 22 candidates was prepared for appointment under advertisement No. 3/86 and

respondent Nos. 1 to 7 fell beyond cut-off number. We are not shown any statutory recruitment rules which require the appellant-Board to prepare a waiting list in addition to the panel. The argument advanced on behalf of respondent Nos. 1 to 7 was in effect that when 18 candidates failed up turn up the appellant was bound to offer posts to candidates in the waiting list. No such rule has been shown to us in this regard. ...".

10. In view whereof, the relief as sought by the petitioner cannot be granted.

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

Petition dismissed.

I.L.R. [2015] M.P., 2576

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P.No. 2840/2014 (Gwalior) decided on 24 June, 2014

SHAKUNA KUSHWAH (SMT.) ...Petitioner

Vs.

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

***Electricity Supply Code 2004 (M.P.), Clause 2.1 - Occupier - Held* - That the term includes the owner or the person who is in occupation of the premises - Further, an occupier has right to seek electricity connection. (Para 8)**

विद्युत प्रदाय संहिता 2004 (म.प्र.), खंड 2.1 – अधिभोगी – अभिनिर्धारित – उस शब्द में, स्वामी या वह व्यक्ति जो परिसर का अधिभोग कर रहा है, समाविष्ट है – इसके अतिरिक्त एक अधिभोगी को विद्युत संयोजन चाहने का अधिकार है।

A.K. Nirankari, for the petitioner.

Anil Mishra, for the respondents.

ORDER

SUJOY PAUL, J. :- This petition filed under Article 226 of Constitution challenges the legality, validity and propriety of the order dated 24.04.2014 (Annexure P/1) where by the respondents have rejected the application of the petitioner seeking fresh electricity connection.

2. This is second visit of the petitioner to this Court. Earlier petitioner preferred application seeking electricity connection from the respondents. Respondents did not decide the said application which resulted into filing of WP No.2233/2014. This Court by order dated 09.04.2014 directed the respondents to decide the application within time limit. In turn, by order dated 24.04.2014 the application is rejected.

3. Shri A.K. Nirankari, learned counsel for the petitioner assailed the said order on the ground that petitioner is "occupier" and residing with her family in premises situated at Jai Vilas Palace. It is submitted that petitioner along with her husband is in occupation since 1982. Petitioner's husband retired from the service of Jai Vilas Palace in the year 2009. Later on, electricity supply which was provided by Palace was cut off on 16.03.2014. Thereafter the petitioner preferred application for grant of fresh electricity connection which was erroneously rejected by the authorities. It is urged that the reason assigned for not granting connection is not sustainable in law. It is submitted that respondents have erred in holding that in absence of permission of the owner of the palace, electricity connection cannot be granted. He drew attention of this Court on Clause 4.1 and 4.14 of the M.P. Electricity Supply Code, 2004 (Code).

4. Shri Anil Mishra, learned counsel for the other side supported the impugned order. It is urged that petitioner's husband is no more an employee of the palace. They are residing in the palace premises but no permission is obtained by them from the palace for the purpose of getting new electricity connection. In absence of any permission from the owner of the premises, new electricity connection cannot be provided to the petitioner. He placed reliance on letter dated 22.03.2014 (Annexure R/1) written by Shri H.S. Pachauri to the Executive Engineer. In this letter, Shri Pachauri on behalf of palace requested that no connection be provided to the former employees of palace in absence of no objection certificate "NOC" of the palace. Shri Mishra further submits that word "occupier" is not defined in the code and therefore, occupier means the person who is having NOC of the owner of the premises.

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

6. I have heard learned counsel for the parties and perused the record.

7. At the outset, I find that contention of Shri Mishra that word "occupier" is not defined, is factually incorrect. The word occupier is defined in Clause

2.1 (ff) of the Code, which reads as under:-

> (ff) 'Occupier' means the owner or the person in occupation of the premises where electrical energy is used or proposed to be used.

Clause 4.1 reads as under:-

> **Licensee's obligation to Supply**
>
> **4.1** The Licensee shall, on an application by the owner or occupier of any premises located in his area of supply, give supply of electricity to such premises within the time specified in this Code (refer clause 4.74), provided (a) the supply of power is technically feasible, (b) the consumer has observed the procedure specified in this code, and (c) the consumer agrees to bear the cost of supply and services as specified.
>
> **(Emphasis supplied)**

8. The definition of "occupier" makes it clear that it includes owner or the person who is in occupation of the premises. Thus, petitioner is covered in the definition of "occupier". Clause 4.1 aforesaid makes it clear that licensee is obliged to consider the application submitted by owner or "occupier". No provision is brought to the notice of this Court which mandates that application for connection can be entertained only when NOC / permission is given by the owner. The impugned order contain singular reason for rejection i.e. the permission is not obtained by the petitioner from the owner / palace. In the opinion of this Court, said reason is without any basis and runs contrary to clause 4.1 of the Code. Petitioner being an occupier has right to seek electricity connection. No other reason is assigned for not providing electricity connection to the petitioner.

9. On the basis of aforesaid, impugned order cannot be permitted to stand. The order dated 24.04.2014 is set aside. Respondents are directed to consider and provide the electricity connection (LT Connection) for domestic use to the petitioner in accordance with law forthwith.

10. Petition is allowed. No costs.

Petition allowed.

I.L.R. [2015] M.P., 2579
WRIT PETITION
Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice Alok Aradhe
W.P. No.9690/2014 (Jabalpur) decided on 24 September, 2014

SHISHUVENDRA SINGH TOMAR ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

(W.P. Nos. 9691/2014(s), 9817/2014(s), 9973/2014(s), 9976/2014(s), 10054/2014(s), 10055/2014(s), 10062/2014(s), 10063/2014(s), 10082/2014(s), 10124/2014(s), 10199/2014(s), 10301/2014(s), 10592/2014(s), 11094/2014(s)

Constitution - Article 226 - Education **- Professional Examination Board (Vyapam) conducting examination in 2012 for Selection of Junior Supply Officers and Inspectors (Weights and Measures) - Petitioners were appointed on those posts - Irregularities were committed in that examination - Vyapam cancelling the results of candidates, leading to filing of the present writ petitions - Held - VYAPAM did not set up any enquiry Committee of its own - VYAPAM had not independently inquired into the factual aspects, abdication of duty by VYAPAM - It is wrong to say that inquiry by VYAPAM would be empty formality - The impugned common order dated 13.06.2014 quashed and VYAPAM granted liberty to commence independent inquiry on the basis of information received from the investigating agency (S.T.F.). (Paras 17, 20, 22 & 26)**

संविधान – अनुच्छेद 226 – शिक्षा – कनिष्ठ आपूर्ति अधिकारी एवं निरीक्षक (नापतौल) के चयन हेतु व्यावसायिक परीक्षा मंडल द्वारा 2012 में परीक्षा ली गई – याचीगण उन पदों पर नियुक्त किये गये – उस परीक्षा में अनियमितताएं कारित की गई – व्यापमं ने अभ्यर्थियों का परिणाम निरस्त किया जिसके फलस्वरूप वर्तमान रिट याचिकाएं प्रस्तुत की गई – अभिनिर्धारित – व्यापमं ने अपने से कोई जांच समिति गठित नहीं की – व्यापमं ने स्वतंत्र रूप से तथ्यात्मक पहलुओं की जांच नहीं की, व्यापमं द्वारा कर्तव्य का त्याग किया गया – यह कहना गलत है कि व्यापमं द्वारा जांच खाली औपचारिकता होगी – आक्षेपित सामान्य आदेश दिनांक 13.06.2014 अभिखंडित किया गया तथा व्यापमं को अन्वेषण एजेंसी (एस.टी.एफ.) से प्राप्त जानकारी के आधार पर स्वतंत्र जांच आरंभ करने की स्वतंत्रता प्रदान की गई।

Cases referred :

W.P. No. 20342/2013 decided on 11.04.2014

Ritwik Parashar, for the petitioners in W.P. Nos. 9690, 9691, 10054, 10055, 10062, 10063, 11094 of 2014 (s).

R.N. Singh with *Veer Vikrant Singh,* for the petitioner in W.P. No. 9817 of 2014 (s).

K.C. Ghildiyal, for the petitioners in W.P. Nos. 9973, 9976 of 2014 (s).

G.K. Patel, for the petitioner in W.P. No. 10082 of 2014 (s).

Arpan J. Pawar, for the petitioner in W.P. No. 10124 of 2014 (s).

Atul Anand Awasthy, for the petitioner in W.P. No. 10199 of 2014 (s).

Ajay K. Shukla, for the petitioner in W.P. No. 10592 of 2014 (s).

Adwait Fouzdar, for the petitioner in W.P. No. 10301 of 2014 (s).

Piyush Dharmadhikari, G.A. for the respondents/State.

P.K. Kaurav with *Aditya Khandekar, Ashish Patel & Pankaj Raj Ahirwar,* for the respondents/VYAPAM.

ORDER

The Order of the Court was delivered by :

A.M. KHANWILKAR,C. J. :- These matters involve identical issues and more so arise out of the common order dated 13.06.2014 passed by Professional Examination Board (VYAPAM), Bhopal (hereinafter referred to as "VYAPAM" for the sake of brevity).

2. By the impugned order, VYAPAM revoked the examination results of these petitioners, in respect of examination conducted in 2012 for selection of Junior Supply Officer and Inspector (Weights & Measures), on the ground that they had indulged in unfair means during the examination within the meaning of Clause 2.11 of the Rule Book.

3. It is common ground that on the basis of the said examination results, the petitioners have been appointed against the vacant post in respect of which the selection process was conducted. As a result of the impugned order, the petitioners apprehended consequential action by their employer – State of Madhya Pradesh and therefore, rushed to this Court by way of present writ petitions challenging the correctness of the impugned order passed by VYAPAM dated 13.06.2014. The said order reads, thus:

"व्यावसायिक परीक्षा मण्डल, भोपाल

चंयन भवन मेन रोड न.1, चिनार पार्क (ईस्ट), भोपाल–462011

क्रमाक व्यापम/5–प–1–35–3787/2014 भोपाल, दिनांक 13.06.2014

/आदेश/

म0प्र0शासन खाद्य, नागरिक आपूर्ति एवं उपभोक्ता संरक्षण विभाग के अधीन खाद्य, नागरिक आपूर्ति एवं उपभोक्ता संरक्षण संचालनालय के अंतर्गत कनिष्ठ आपूर्ति अधिकारी तथा नियंत्रक, नापतौल, म0प्र0 के अंतर्गत निरीक्षक नापतौल के पदों पर भर्ती हेतु विभाग के अनुरोध पर व्यापम द्वारा आयोजित की गयी। कनिष्ठ आपूर्ति अधिकारी एवं निरीक्षक, नापतौल भर्ती परीक्षा 2012 के अंतर्गत अनियमितता परिलक्षित होने के उपरांत थाना स्पेशल टास्क फोर्स, भोपाल में अपराध प्रकरण क्रमांक 15/13 पंजीबद्ध किया गया। सहायक पुलिस महानिरीक्षक, स्पेशल टास्क फोर्स, म0प्र0, भोपाल द्वारा पत्र कमांक समनि/एसटीएफ/एचक्यू 789/2014 निरंक जो व्यापम को दिनांक 09.06.2014 को प्राप्त हुआ, के माध्यम से यह अवगत कराया गया कि कनिष्ठ आपूर्ति अधिकारी एवं निरीक्षक, नापतौल भर्ती परीक्षा 2012 में सम्मिलित 16 अभ्यर्थियों की व्यापम के स्ट्रांग रूम से जप्त ओ0एम0आर0 उत्तर शीट की राज्य परीक्षक प्रश्नास्पद प्रलेख (क्यूडी) पुलिस मुख्यालय, भोपाल से जांच कराए जाने पर उत्तर शीट्स में अलग अलग स्याही से गोले भरे जाने संबंधी जानकारी प्राप्त हुई है।

2. सहायक पुलिस महानिरीक्षक, स्पेशल टास्क फोर्स, मुख्यालय, भोपाल के उपरोक्त संदर्भित पत्र में उल्लेखित तथ्यों के आधार पर परिशिष्ट–1 में उल्लेखित 16 अभ्यर्थियों को कनिष्ठ आपूर्ति अधिकारी एवं निरीक्षक, नापतौल भर्ती परीक्षा 2012 की नियम पुस्तिका की कंडिका 2.11 के तहत यू0एफ0एम0 प्रकरण मान्य करते हुए इनका परीक्षा परिणाम तत्काल प्रभाव से निरस्त किया जाता है।

संलग्न–परिशिष्ट–1

(अध्यक्ष द्वारा अनुमोदित) संचालक

व्यावसायिक परीक्षा मण्डल

भोपाल"

As reference is made to Clause 2.11 of the Rule Book, we deem it appropriate to reproduce the same, which reads, thus:

"2.11 अनुचित माध्यम (Unfair means, UFM):–

अनुचित साधन (यू.एफ.एम.):– निम्नलिखित में से कोई भी क्रियाकलाप/

गतिविधी परीक्षार्थी द्वारा उपयोग में लाने पर उसे अनुचित साधन (यू.एफ.एम) के अंतर्गत माना जावेगा:–

(क) परीक्षा कक्ष में अन्य परीक्षार्थी से किसी भी प्रकार का सम्पर्क।

(ख) अपने स्थान पर किसी अन्य व्यक्ति से परीक्षा दिलाना या परीक्षार्थी के स्थान पर अन्य कोई अन्य व्यक्ति उपस्थित होना।

(ग) परीक्षा कक्ष में अपने पास किसी भी प्रकार की प्रतिबंधित सामग्री रखना।

(घ) परीक्षा के दौरान चिल्लाना, बोलना, कानाफूसी करना, ईशारे करना व अन्य प्रकार से संपर्क साधना।

(ड) अन्य परीक्षार्थी की उत्तरशीट या प्रश्नपुस्तिका से अन्य किसी प्रकार से नकल करना।

(च) अन्य परीक्षार्थी के साथ उत्तरशीट या प्रश्नपुस्तिका की अदला–बदली करना।

(छ) प्रतिबंधित सामग्री पाये जाने पर परीक्षार्थी द्वारा उसे सौपनें से इंकार करना या उसे स्वयं नष्ट करना।

(ज) नकल प्रकरण से संबंधित दस्तावेजों/प्रपत्रों पर हस्ताक्षर करने से मना करना ।

(झ) सक्षम अधिकारी के निर्देशों की अवहेलना/अवज्ञा करना या उनके निर्देशों का पालन न करना।

(ञ) सक्षम अधिकारी के निर्देशानुसार उत्तरशीट या अन्य दस्तावेज वापस नहीं करना या वापस करनें से मना करना।

(ट) परीक्षा कार्य में लगे कर्मचारियों/अधिकारियों को परेशान करना, धमकाना या शारीरिक चोट पहुँचाना।

उपरोक्त अनुचित साधनों तथा अभ्यर्थी के किसी अन्य कृत्य को पर्यवेक्षक/केन्द्र अधीक्षक/ वीक्षक द्वारा अनुचित साधन की श्रेणी माना जाता है, तो उस पर न्यायिक कार्यवाही की जायेगी। अभ्यर्थी की उत्तरपुस्तिका को अनुचित साधन के अंतर्गत मानते हुए मूलयांकन नहीं किया जायेगा तथा उसका अभ्यर्थित्व निरस्त कर दिया जायेगा। इसके अतिरिक्त किसी अन्य प्रकार के अनुचित साधन का उपयोग किये जाने पर अभ्यर्थी को पुलिस को आवश्यक कार्यवाही हेतु सौपा जायेगा और उसके विरूद्ध वैधानिक कार्यवाही की जायेगी।

यदि कोई व्यक्ति किसी अन्य उम्मीदवार के स्थान पर परीक्षा में सम्मिलित होता

है तो वह कृत्य पररूपधारण (IMPERSONMENT) की श्रेणी में आयेगा। पररूपधारण का कृत्य विधि के अनुसार अपराध है। ऐसे अपराध के लिए आवेदनकर्ता एवं उसके स्थान पर परीक्षा में बैठने वाला व्यक्ति विधि के अनुसार सजा या जुर्माना एवं दोनों से दण्डित किये जा सकेगें। साथ ही उम्मीदवार का परीक्षा परिणाम भी निरस्त किया जायेगा।

विभाग द्वारा दस्तावेजों के परीक्षण/सत्यापन व नियुक्ति के समय कोई आवेदक या उसके दस्तावेज फर्जी या संदिग्ध पाये जाते हैं, तो विभाग द्वारा उक्त अभ्यर्थी की नियुक्ति निरस्त करते हुए पुलिस थाने में रिपोर्ट दर्ज करवा कर मंडल को अवगत कराया जायेगा, ताकि मंडल स्तर पर संबंधित अभ्यर्थी का परीक्षा परिणाम निरस्त किया जा सके।"

4. Indeed, the purport of provision such as Clause 2.11 and the enabling power of VYAPAM has been expounded in *Ku. Pratibha Singh (Minor) vs. The State of Madhya Pradesh and others*[1] and companion cases decided by the Division Bench of this Court on 11th April, 2014.

5. The question that needs to be answered in the present petitions, however, is somewhat different. The first contention urged by the petitioners is that the impugned decision is vitiated, as no opportunity whatsoever was given to the petitioners before issuance of the said order. That inevitably renders the impugned order bad in law as it is vitiated being hit by principles of natural justice. As regards this contention, the respondents contend that this argument is answered in the abovesaid decision. However, this submission may be partially correct. In that, the requirement of observance of principles of natural justice would stand dispensed with only if the Court were to further accept the plea of the respondents (VYAPAM) that the action was taken against the respective petitioners being a case of mass-copying and not otherwise. Be that as it may, the challenge to the impugned order dated 13.6.2014 would succeed on the other grounds urged by the petitioners for which reason it may not be necessary for us to examine any other issue.

6. The other contention, is that, the impugned order merely refers to the fact that on examination of answer-sheets of the concerned petitioners it has been revealed that circles were filled by different ink. No more and no less. That fact, by itself, cannot be the basis to assume that the petitioners had indulged in unfair means during the examination. Moreover, the fact so recorded

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1 W.P. No.20342/2013 by High Court of M.P. (DB)

in the impugned order is not on the basis of any independent inquiry undertaken by VYAPAM but is solely founded on the intimation received from the Investigating Officer investigating the Crime No.15/2013 vide his letter dated 09.06.2014. In that case, it must necessarily follow that the impugned decision has been taken in abdication of its duty by VYAPAM - of undertaking scrutiny of the factual position before exercising such a drastic power - if not under dictation of Special Task Force (STF) investigating the crime.

7. It is further contended by the petitioners that even if it is found that VYAPAM has intrinsic authority to deal with cases of fraud and unfair means committed during the examination conducted by VYAPAM, it could have done so only after undertaking an independent inquiry and upon reaching to a definite conclusion that, in fact, in its opinion, such fraud has been played by the concerned candidates and not merely on the basis of report or communication received from STF. Further, at best, VYAPAM could have resorted to action on the basis of proved and substantiated fact before the Criminal Court and not with reference to the contents of the charge-sheet filed before the Criminal Court indicating complicity of the concerned candidate. In other words, VYAPAM could have resorted to such a drastic action only after the finding of guilt was recorded by the Criminal Court against the concerned candidate or on the basis of definite opinion formed by VYAPAM in an independent inquiry conducted by it. These are the broad submissions made on behalf of the petitioners, which will have to be decided on the basis of the respons given by the respondents.

8. The respondents, in particular, VYAPAM has filed a common reply-affidavit in Writ Petition No.9690/2014 (*Shishuvendra Singh Tomar vs. The State of Madhya Pradesh and others*) and has placed on record relevant communications and note-sheets in the official record maintained by VYAPAM.

9. During the pendency of these petitions, Special Task Force (STF), which is entrusted with the investigation of the criminal cases registered against the petitioners, was advised to file intervention application on the assertion that several crucial matters have come to its notice during the investigation of the criminal case and the same may be considered in larger public interest. However, we are of the considered opinion that in the context of limited challenge to the order passed by VYAPAM, which is purely a civil action, the STF can neither be said to be necessary nor proper party. As a result, the intervention applications (I.A. No.10009/2014 in W.P. No.9690/2014, I.A.

No.10005/2014 in W.P. No.9691/2014, I.A. No.10010/2014 in W.P. No.10199/2014 and I.A. No.10336/2014 in W.P. No.10592/2014) need not detain us any further.

10. Reverting to the stand taken by VYAPAM in the common reply-affidavit, the attempt is to point out that the impugned decision has been taken by VYAPAM on the basis of information received by VYAPAM in that behalf. Reference is made to the communications exchanged between the Investigating Agency (STF) and officials of VYAPAM.

11. The first communication received from the Investigating Officer of STF dated 25.11.2013, addressed to the Controller of VYAPAM, mentions that STF registered Crime No.15/2013 under Sections 420, 467, 468, 471 and 120-B of IPC, Sections 3(d), 1 and 2/4 of the M.P. Recognised Examination Act, 1937 and also under Section 65 and 66 of the Information Technology Act against 18 candidates, who had appeared in the Food Inspector Examination-2012 and who have taken illegal benefit and the investigation in that behalf was in progress. The STF, thereafter, seized all the original OMR sheets of the named 18 candidates (including the petitioners before this Court), on 29.11.2013. The officials of VYAPAM provided information, as was demanded by the Investigating Officer, vide letter dated 07.12.2013. During the investigation of the crime, the Investigating Officer obtained Expert's opinion with reference to the contents of the answersheets. That became available on 24th April, 2014 (Annexure A-1 at page-4 of Intervention Application). The Investigating Officer vide his letter dated 19th May, 2014 informed the Controller of VYAPAM that from the investigation done till then it is revealed that the named 15 candidates had indulged in unfair means during the examination and have been appointed against the concerned post on the basis of examination results declared by VYAPAM. The Investigating Officer, therefore, recommended to take action against the concerned candidates. In response to that communication, the Controller of VYAPAM requested the Investigating Officer by his letter dated 05.06.2014 to furnish report regarding the involvement of 15 candidates so that VYAPAM could initiate appropriate action against them.

12. Reliance is also placed on another communication dated 07.06.2014 sent by Controller, VYAPAM to the Assistant Inspector General of Police. This letter is sent with reference to communication dated 26.04.2014 received from Assistant Inspector General of Police whereby VYAPAM was called

upon to furnish original copy of the answer-sheets and original copy of Record of Attendance Sheet concerning the 18 named candidates. The Controller by his abovementioned letter, informed that the stated record has already been seized by Shri Gulab Singh Rajput, Dy.S.P., STF, Bhopal on 29.04.2014 and 24.05.2014 respectively from the office of VYAPAM. In response to the letter received from VYAPAM dated 05.06.2014, the Inspector General of Police by his letter dated 09.06.2014 informed the Controller, VYAPAM that the investigation done so far revealed that the named candidates have used different ink to fill the circles in the OMR sheets, as is revealed from Q.D. Report. The letter then recommends the Controller, VYAPAM to take appropriate action against the named 16 candidates. The note appended to the said communication further mentions that candidate Abhishek Singh Thakur (Roll No.704605), who has been named as one of the 16 candidates, however, has died due to accident on 11.10.2013.

13. Reliance is also placed on internal note-sheets of VYAPAM between 30.05.2014 to 11.06.2014 to point out that the entire matter was considered at different level and finally conclusion was reached that the stated 15 candidates had indulged in unfair means during the examination for which reason, their examination result was required to be cancelled. The said internal note-sheet has been appended as Annexure R-8 to reply filed by respondent No.3. The first note-sheet dated 30.05.2014 refers to the communication received from the Investigating Officer of STF dated 19th May, 2014 and the fact that the investigation in connection with Crime No.15/2013 was underway and the investigation done till then revealed that 15 named candidates had indulged in unfair means during the examination conducted by VYAPAM and succeeded in being appointed against the concerned posts of Junior Food Supply Officer/ Inspector (Weights and Measures). The note-sheet also explicitly mentions that the communication received from the office of STF recommends taking action against the named candidates. The file was, thereafter, processed at different level upto the highest level. From the notings of the different officials it is amply clear that the action is solely founded on the information furnished by the officials of Special Task Force about the evidence gathered during investigation indicating complicity of 16 candidates, who had appeared in the examination conducted by VYAPAM having resorted to unfair means by using different ink to fill the circles in the answersheets. There is no mention whatsoever that VYAPAM after receipt of intimation from the officials of Special Task Force decided to independently inquire into the correctness

of the factum of different ink used by those candidates to fill in the circles in the answer-sheet and whether that conduct by itself was sufficient to infer that the concerned candidate indulged in commission of unfair means during the examination. The remarks in all the note-sheets, instead, refer to the communication received from STF informing about status of investigation and possibility of involvement of 16 candidates (including the petitioners). Having referred to that communication received from Special Task Force, the concerned Authorities of VYAPAM jumped to the conclusion that it was a case covered by Clause 2.11 of the Rule Book meaning thereby the named 16 candidates indulged in unfair means during the examination and for which reason, their examination results deserved to be cancelled. The same position is manifest from the final order passed against the petitioners dated 13.06.2014, which is impugned in these petitions.

14. After having perused the impugned order dated 13.06.2014 and upon close scrutiny of the documents pressed into service by VYAPAM, it is amply clear that the impugned action of VYAPAM was ignited after receipt of communication from the officials of Special Task Force dated 19.05.2014, in particular. Upon receipt of that communication, admittedly, VYAPAM did not set up any enquiry committee of its own to inquire into the factual matter referred to in the said communication and more so, to examine the fact whether using of different ink to fill in the circles in the answer-sheets by the named candidates, by itself, amounted to unfair means committed during the examination or something more was necessary and further whether that something more can be discerned from the records available with VYAPAM. No doubt, the relevant record concerning the examination of named 16 candidates (including the petitioners) was seized by the Special Task Force on 29.11.2013. However, if VYAPAM wanted to conduct independent inquiry to ascertain whether it was a case of mass copying or mass malpractice and, in particular, commission of unfair means during the examination, it could have requested STF to make available the seized documents for the purposes of such inquiry. In other words, the indisputable fact emerging from the communications and note-sheets pressed into service, is that, VYAPAM purely went by the communication received from the Investigating Agency that the investigation of criminal case registered against the petitioners revealed that they used different inks to fill in the circles in the answer-sheet during the examination. In our opinion, that, by itself, cannot be the basis to proceed in the matter and more so, to pass such a drastic order of cancellation of the

examination results of the petitioners. In that, VYAPAM has not independently inquired into the factual aspects and including whether the fact of using different ink to fill in the circles in the answer-sheets by the candidate would be a case of unfair means as such, much less a case of mass copying or mass malpractice, so as to dispense with the requirement of giving opportunity of being heard to the candidate likely to be affected by its decision. Thus understood, it is a case of abdication of duty by VYAPAM. Inasmuch as, existence of such a drastic power is coupled with the duty to exercise that power with circumspection and by following fair procedure. Even if we do not intend to go into the argument as to whether the impugned action is taken under dictation of the Investigating Agency (Special Task Force), as there is other strong reason, which is so palpable from the record, to hold that the impugned order and the process adopted by VYAPAM to invoke the power of cancellation of results of the concerned candidates is untenable in law, the petitioners are entitled for relief of quashing of the impugned order on that basis alone.

15. Once it is held that the impugned order passed by VYAPAM dated 13.06.2014 is unsustainable and cannot stand the test of judicial scrutiny, the same is required to be quashed and set aside. It would necessarily follow that the impugned order cannot be made the basis to take any further action by the employer against the concerned petitioner. At the same time, quashing of the said order would not denude VYAPAM from initiating proper inquiry into the factual matters brought to its notice by the Investigating Agency to ascertain whether the factum of using different ink by the concerned candidate can be made basis for concluding that it was a case of unfair means and more so, a case of mass copying or mass malpractice. Dependent on the opinion to be formed in such independent inquiry, it would be open to VYAPAM to take the matter further including to cancel the examination results of the candidates. All questions in that behalf will have to be examined on its own merits in accordance with law at the appropriate stage.

16. Learned counsel for the respondent-VYAPAM was at pains to persuade us to take the view that the inquiry to be conducted by VYAPAM would be a mere formality. In that, the Experts, whose report was sought by the Investigating Agency, have already opined that different ink was used to fill in the circles in the answer-sheets by the same candidates during the examination. Further, the Experts were none other than the State Agency. Being independent Agency, there was no reason to doubt its opinion about

the use of different ink appearing in the answer-sheets of the concerned candidates. In other words, no fruitful purpose would be served by conducting independent inquiry to ascertain the same fact on which opinion has been given by the Experts.

17. In our opinion, that report may be a relevant material to be considered during the inquiry to be undertaken by VYAPAM. But, that report, by itself, will not be sufficient to answer the issue as to whether the act of commission or omission mentioned therein, is a case of commission of unfair means by the concerned candidate and more so, of resorting to mass copying or mass malpractice. Something more will have to be spelt out. Further, as observed by the Division Bench of this Court in the case of *Ku. Pratibha Singh* (supra), VYAPAM is the sole Authority to deal with all aspects concerning the examination conducted by it. Thus, the stand taken by VYAPAM that no independent inquiry would be necessary before exercise of power to cancel the examination results of the concerned candidates, does not commend to us.

18. For the same reason, we are not impressed by the argument of the respondents that from the record furnished by the Investigating Agency (STF) there was ample material to conclude that it was not only a case of using of different ink to fill in the circles in the answer-sheet during the examination by the same candidates but indicating a consistent pattern of the concerned candidates having left the circles blank and the same were later on filled in by the erring officials of VYAPAM, who used different ink or that it was a case of commission of organized unfair means during the examination. As aforesaid, in the independent inquiry, these aspects will have to be analyzed on its own merits.

19. Be that as it may, we find that neither the note-sheets nor the communications exchanged between the officials of VYAPAM and of Special Task Force, even remotely suggest that subjective satisfaction or conclusion of the appropriate Authority of VYAPAM, about the existence of facts constituting commission of organised unfair means by the concerned candidate or to be a case of mass copying or mass malpractice has been recorded. Instead, the note-sheets make it amply clear that VYAPAM merely went by the opinionated remark of the Investigating Agency and mistook its recommendation of taking action against the concerned candidates as sufficient, without conducting any independent inquiry of its own. A priori, it is a clear

case of non-application of mind by VYAPAM, if not abdication of its duty before exercising the drastic power of cancellation of examination results of the petitioners.

20. Having said this, we may now turn to the reported decisions on which reliance has been placed by the learned counsel for the respective parties. The Apex Court in the case of *State Bank of India and others vs. Palak Modi and another*[2] in paragraph 37, had occasion to deal with the issue of use of unfair means during the evaluation test/confirmation test held by the Bank. The Court, in similar circumstances, observed that the exercise was not preceded by an inquiry involving the private respondents and no opportunity was given to them to defend themselves against the charge of use of unfair means. Reliance was also placed on paragraph 46 of this judgment to point out that the Bank was directed to reinstate the private respondents with liberty for taking fresh decision in the matter after giving opportunity of hearing to the concerned persons. The petitioners have also relied on another decision of the Apex Court in the case of *Inderpreet Singh Kahlon and others vs. State of Punjab and others*[3], in particular, on the dictum in paragraphs 59, 94 and 95 as well as 146 to buttress the argument that the impugned order be quashed.

21. On the other hand, counsel for the respondent-VYAPAM has relied on the decision of the Apex Court in the case of *Board of High School and Intermediate Education, U.P. Allahabad and another vs. Bagleshwar Prasad and another*[4], in particular paragraph 11, to contend that since it is a case of mass copying or mass malpractice, the question of giving personal hearing to the petitioners did not arise. This judgment has been noticed by the Division Bench of this Court in the case of *Ku. Pratibha Singh* (supra). The respondents may be justified in taking this plea, provided, are in a position to substantiate that it was, in fact, a case of mass copying so as to dispense with personal hearing to be given to the candidates before cancelling their examination results. However, for the reasons already recorded, the impugned decision cannot be sustained but with liberty to VYAPAM to conduct independent inquiry before taking final decision. We would agree to the limited extent that depending on the outcome of the said inquiry it may be open to VYAPAM to consider whether to give personal hearing to the concerned candidate or otherwise. In that, if it is a case of mass copying or mass

2. (2013) 3 SCC 607
3. (2006) 11 SCC 356
4. AIR 1966 SC 875

malpractice, in law, there would be no obligation to give personal hearing to the concerned candidate.

22. Respondents also placed reliance on the decision of the Apex Court in the case of *Ram Preeti Yadav vs. U.P. Board of High School and Intermediate Education and others*[5] to contend that once it is found that it is a case of fraud, it will deprive the person indulging in such fraud of all advantages and benefits obtained thereby. No doubt, if VYAPAM were to conduct independent inquiry and finally conclude that it was a case of unfair means committed by the concerned petitioner during the examination, would be free to proceed against that candidate including by revoking his examination results and the consequences of such cancellation would follow in law. This aspect has already been considered by the Division Bench of our High Court in the case of *Ku. Pratibha Singh* (supra).

23. Reliance was then placed on another decision of the Apex Court in the case of *Chairman, All India Railway Recruitment Board and Another vs. K. Shyam Kumar and others*[6], in particular paragraphs 45 and 46 thereof, to contend that the decision-maker can rely on subsequent material to support the decision already taken when larger public interest is involved. There can be no quarrel with this proposition. In fact, even this principle has been applied by the Division Bench of this Court in the case of *Ku. Pratibha Singh* (supra). However, in the present case, it is noticed that VYAPAM has not independently dealt with the entire matter but has merely followed the recommendation made by the Investigating Agency without doing anything more. That position is discerned from the communications exchanged between VYAPAM and STF as also from the internal note-sheets on which reliance was placed by the respondents.

24. The respondents have then relied on the observations of the Apex Court in paragraph 8 in the case of *B. Ramanjini and others vs. State of A.P. and others*[7], which dealt with the issue of mass copying or leakage of question paper. The observations in this judgment may be useful during the independent inquiry to be conducted by VYAPAM before taking any final decision. Reliance was then placed on the decision in the case of *Biswa Ranjan Sahoo and others vs. Sushanta Kumar Dinda and others*[8]. In paragraph 3 of this judgment the Court after taking into account the factual

5. (2003) 8 SCC 311
6. (2010) 6 SCC 614
7. (2002) 5 SCC 533
8. (1996) 5 SCC 365

position, opined that it was a case of enormity of mass malpractices in the selection process and therefore, issuance of individual notices to all the candidates was not necessary.

25. In the case of *State of Maharashtra and others vs. Jalgaon Municipal Council and others,* (2003) 9 SCC 731, the Court dealt with the issue of basic principles to be adhered to for complying with the doctrine of natural justice and the excepted situations where a right of hearing has been excluded. For the reasons already noted, it is unnecessary to dilate on this decision any further.

26. Taking over all view of the matter, therefore, we have no hesitation in quashing and setting aside the impugned common order dated 13.06.2014 passed by VYAPAM and also direct the respondents not to give effect to the said order against the petitioners. At the same time, VYAPAM is granted liberty to commence independent inquiry on the basis of information received from the Investigating Agency (Special Task Force) and to proceed in the matter on the basis of the view formed in that inquiry. That inquiry will have to proceed on its own merits and in accordance with law. All questions in that behalf are left open.

27. Accordingly, all these writ petitions succeed and are disposed of on the aforestated terms with no order as to costs. With the disposal of these petitions all interim applications stand disposed of.

Petition Succeed.

I.L.R. [2015] M.P., 2592
WRIT PETITION
Before Mr. Justice Alok Aradhe
W.P. No. 18600/2011(Jabalpur) decided on 27 October, 2014

NETLAL PANCHE ...Petitioner
Vs.
SANTOSH MATRE & ors. ...Respondents

***Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122 - Recounting of votes - Not a matter of course - Secrecy of ballet papers* - Tinkering of, not to be permitted lightly - No irregularity took place at the time of polling - No written complaint was made by petitioner to the Returning Officer - Petitioner has failed to**

substantiate the allegation with regard to irregularity in the counting of votes - Petition dismissed. (Paras 8 to 10)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 122 – मतों की पुनर्गणना – प्रक्रिया का विषय नहीं – मतपत्रों की गोपनीयता – इधर उधर करने की अनुमति हल्के रूप से नहीं दी जानी चाहिए – मतदान के दौरान कोई अनियमितता नहीं घटी – याची के द्वारा निर्वाचन अधिकारी को कोई लिखित शिकायत नहीं की गई – याची मतगणना में अनियमितता के संबंध में आरोप सिद्ध करने में असफल – याचिका खारिज।

Cases referred :

2003(2) MPLJ 215 (SC), 2012(3) MPLJ 261; 2013(2) MPLJ 447, 2012(3) MPLJ 191, AIR 1982 SC 1569, AIR 1989 SC 640, AIR 1993 SC 367, (2000) 8 SCC 355, (2004) 6 SCC 331, 2009(1) SCC 170.

Shobha Menon with *Rahul Choubey,* for the petitioner.
Shashank Shekar, for the respondent No. 4.
Sanjay Dwivedi, G.A. for the respondent No.8.

ORDER

ALOK ARADHE, J. :- In this writ petition under Article 226 of the Constitution of India, the petitioner has assailed the validity of the order dated 20.10.2011 passed by the Election Tribunal constituted under the provisions of Madhya Pradesh Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as the Act) by which the election petition preferred by the petitioner under Section 122 of the Act, has been dismissed. In order to appreciate the petitioner's challenge to the impugned order, few facts need mention, which are stated infra.

2. The election for the post of Sarpanch for Gram Panchayat Nakshi, Janpad Panchayat Kirnapur, District Balaghat was notified in the year 2010. The petitioner as well as respondent No.1 to 4 contested the election. The counting of the votes was held on 18.1.2010 and respondent No.4 was declared elected, as he had secured four more votes than the petitioner. The petitioner made an application for re-count of the votes on 18.1.2010 to the Returning Officer of polling booth No.153. However, no decision on the application submitted by the petitioner was taken.

3. The petitioner filed an election petition under Section 122 of the Act.

The Election Tribunal vide order dated 10.5.2010 directed re-count of the votes and declared the petitioner as elected on the post of Sarpanch. The aforesaid order was subject matter of challenge in Writ Petition No.6749/2010(s). A Bench of this Court vide order dated 26.4.2011 allowed the writ petition on the ground that the order passed by the Election Tribunal is procedurally ultra-vires in as much as, the Election Tribunal did not record the evidence of the parties before passing an order of re-count of votes. It was further held that the election petition was decided by theTribunal in violation of Rule 11 of the Madhya Pradesh Nirwachan Niyam, 1995. Accordingly, the order dated 10.5.2010 passed by the Election Tribunal was quashed and the matter was remitted to the Election Tribunal to decide the election petition in accordance with law within a period of three months.

4. The Election Tribunal thereafter by order dated 20.10.2011 inter-alia held that the petitioner had filed an application for re-count of votes in respect of booth No.153 which was accepted by the returning officer. Similarly, it was held that in booth No.151 and 152, the polling took place peacefully and neither the candidates nor their agents raised any objection. The Election Tribunal also took into account the admission made by the petitioner in his cross-examination that he reached the polling booth No.153 after the counting of the votes was concluded and the petitioner does not have any complaint against the returning officer. It was further found that the petitioner in his statement further admitted that in the application for re-count of votes, did not state that any irregularity was committed during the counting of votes. The Election Tribunal also took into account the statement of the witnesses of the petitioner namely Suresh Kumar, Umesh Prasad and Suresh Prasad, while recording the finding that during the polling, nobody had raised any objection. Thus, the Tribunal held that no case for ordering re-count of votes is made out. Accordingly, the election petition preferred by the petitioner was dismissed. In the aforesaid factual background, the petitioner has approached this Court.

5. Learned senior counsel for the petitioner submitted that the petitioner had submitted an application for re-count of votes which ought to have been considered by the returning officer. It was further submitted that in any case, there is no prohibition under the Act, 1993 or under the Rules prohibiting the Court or the Tribunal to direct recount of votes. In support of the aforesaid submission, reliance has been placed on decision of Supreme Court in the case of *Sohanlal Vs. Babu Gandhi and others,* 2003(2) MPLJ 215 (SC). It

was further submitted that while deciding the election petition preferred by the petitioner, the Tribunal has taken into account extraneous matters. It was further submitted that even assuming that the petitioner had not raise any objection before the returning officer with regard to irregularity in counting of votes, the non-raising of objection would not come in the way of the petitioner in filing the election petition under Section 122 of the Act. In support of aforesaid submission, reference has been made to decision in the case of *Fundi Bai Vs. the Sub-Divisional Officer and Prescribed Authority (Revenue),* 2012(3) MPLJ 261. While inviting the attention of this Court to averments made in paragraphs 7 and 8 of the election petition, it was pointed out that there was sufficient material on record which the Tribunal ought to have taken into consideration while taking decision with regard to re-count of votes.

6. On the other hand, Mr. Shashank Shekhar, learned counsel for respondent No.4 submitted that under Rule 80 of the Madhya Pradesh Nirwachan Niyam, 1995, the candidate, or in his absence, his election agent or his counting agent, is required to make an application stating the grounds on which he demands re-count of votes. It is further submitted that in the application, no grounds were mentioned by the petitioner for making a demand for re-count of votes. It is further submitted that the Election Tribunal has taken into account the material available on record and has rightly come to the conclusion that no case for re-count of the votes in the facts and circumstances of the case is made out. It is further submitted that re-count of votes cannot be ordered as a matter of course and merely by making an allegation by a party. In support of his submission, learned counsel for respondents No.4 has placed reliance on a Division Bench decisions of this Court in the case of *GaneshRam Gayari Vs. Bagdiràm and others,* 2013(2) MPLJ 447 and *Hanumant Singh Vs. State of M.P. and others,* 2012(3) MPLJ 191.Mr. Sanjay Dwivedi, learned Government Advocate has supported the stand taken by Mr. Shashank Shekhar, learned counsel for respondent No.4.

7. Before dealing with the rival submissions made at the bar, I deem it appropriate to refer to the well settled legal position with regard to re-count of votes. When a petitioner seeks the relief of scrutiny and recount of ballot papers, the petitioner has to offer prima-facie proof of errors in counting and if errors in counting are prima-facie established, a recount can be ordered. See: *Ku. Shardha Devi Vs. Krishna Chandra Pant and others*, AIR 1982

SC 1569. In *P.K.K. Shamsudeen Vs. K.A.M. Mappillai Mohindeen and others*, AIR 1989 SC 640, it has been held that justification for an order of recount of votes should be provided by the material placed by an election petitioner on the threshold before an order for recount is made. It has further been held that the reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it. The right of a defeated candidate to assail the validity of an election result and seeking recounting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or Court should not order the recount of votes.

8. Similarly, in *Shri Satyanarain Dudhani Vs. Uday Kumar Singh and others*, AIR 1993 SC 367, it has been held that an order of recount cannot be granted as a matter of course and the secrecy of the ballot papers cannot be permitted to be tinkered lightly. In *Vadivelu Vs. Sundaram and others*, (2000) 8 SCC 355, it has been once again reiterated that recount of votes can be ordered very rarely in the election petition and on the specific allegation in the election petition that illegality or irregularity was committed while counting. The petitioner who seeks recount should allege and prove that there was improper acceptance of invalid votes or improper rejection of valid votes. If the Court is satisfied about the truthfulness of the allegation, it can 'order recount of votes. Similar view has been taken in the cases of *Chandrika Prasad Yadav Vs. State of Bihar and others*, (2004) 6 SCC 331 and *Uday Chand Vs. Surat Singh*, 2009(1) SCC 170;

9. In the backdrop of aforesaid well settled legal position, facts of the case may be seen. In the instant case, in paragraphs 7 and 8 of the election petition, the petitioner has averred that in booth No.153, 43 votes were illegally declared invalid whereas, the same were valid votes in favour of the petitioner. It has further been stated that 43 votes in favour of the petitioner were neither declared invalid nor counted by the returning officer. The petitioner in paragraph 4 of his examination-in-chief has admitted that no irregularity took place at the time of polling in three polling booths. In paragraph 7, the petitioner has stated that 43 valid votes in favour of the petitioner were declared invalid and in paragraph 8, the petitioner has stated that 43 invalid votes were not counted.

Similarly, the agent of the petitioner namely Manoharlal has stated that one Tulsi Sillare and the returning officer had declared the votes cast in favour of the petitioner as invalid. It was admitted by him in the cross-examination that no written complaint was made by him to the returning officer. It has also been admitted by him that in the affidavit filed on 5.2.2010, he has not stated that valid votes were declared invalid. Thus, if the averments made by the petitioner in paragraphs 6 and 7 of the election petition as well as his statement and statement of his agent is read, it is evident that petitioner has failed to substantiate the allegation with regard to irregularity in the counting of votes. The petitioner has failed to disclose any basis for the assumption that 43 valid votes in his favour were declared invalid by the returning officer. It is also relevant to mention here that on the date of polling itself, the petitioner had submitted an application (Ex.P/5) for recount of votes in which no grounds at all were disclosed, except by making bald allegation that there has been irregularity and illegality in the counting of votes. Thus, there is no material on record to order recount of votes. The petitioner has failed to make any specific allegation so as to enable this Court to order recount and has further failed to substantiate the averments made in the petition. The purity of election cannot be tarnished on the routine allegation and there cannot be any roving or fishing enquiry.

10. For the aforementioned reasons, I do not find any merit in the writ petition. Same fails and is hereby dismissed.

Petition dismissed.

I.L.R. [2015] M.P., 2597
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 15022/2007 (Jabalpur) decided on 14 January, 2015

S.K. SAXENA (DR.) & anr. ...Petitioners
Vs.
STATE OF M.P. & anr. ...Respondents

Service Law - Pay Scale **- Post of Surgical Specialist to be filled in by 100% promotion after the year 1993 - Prior to amendment, 60% of post were to be filled by direct recruitment - Petitioners were promoted in the year 1994 however, prior to that there were certain direct recruitments - Direct recruitees were given the senior scale and**

selection grade pay scale therefore, they took a march over and above petitioners - The anomaly remained and inspite of various opportunities and directions by High Court, such anomaly was not explained by respondents - Where the pay is regulated by Revision of Pay Rules, the provisions of Fundamental Rules and any other rules shall not apply to the extent they are inconsistent with the Revision of Pay Rules - If a person is working on the selection grade pay scale and is promoted on the post carrying the lesser pay scale at the initial stage, the benefit of pay protection is required to be granted - Fixation of pay scale is not in accordance with Revision of Pay Rules - Matter is referred to Highly Specialized Committee for grant of proper pay scale to petitioners on promotion from the post of Asstt. Surgeon Selection Grade and to take a final decision within four months from the date of receipt of certified copy of the order. (Paras 3 to 13)

सेवा विधि – वेतनमान – वर्ष 1993 के पश्चात् शल्य चिकित्सा विशेषज्ञ के पद 100% पदोन्नति से भरे जाने है – संशोधन के पूर्व, 60% पद सीधी भर्ती के द्वारा भरे जाने थे – याचिकाकर्ताओं को वर्ष 1994 में पदोन्नत किया गया तथापि इसके पूर्व कुछ सीधी भर्तियां की गयीं थी – सीधी भर्तियों को वरिष्ठ वेतनमान तथा चयन ग्रेड वेतनमान दिया गया अतः उन्होंने याचिकाकर्ताओं पर बढ़त हासिल कर ली – यह विसंगति विद्यमान रही तथा उच्च न्यायालय द्वारा विभिन्न अवसर तथा निर्देश देने के बावजूद प्रत्यर्थियों द्वारा इस विसंगति को स्पष्ट नहीं किया गया – जहां पर वेतन के पुनरीक्षण नियमों द्वारा वेतन नियंत्रित किया जाता है, वहां मूल नियमों के प्रावधान तथा अन्य कोई नियम उस सीमा तक लागू नहीं होंगे जहां तक वे वेतन के पुनरीक्षण नियम से असंगत हो – यदि कोई व्यक्ति चयन ग्रेड वेतनमान में कार्यरत है तथा उसे प्रारंभिक स्तर पर कम वेतनमान वाले पद पर पदोन्नत किया जाता है तो उसे वेतन सुरक्षा का लाभ दिया जाना अपेक्षित है – वेतनमान का निर्धारण वेतन के पुनरीक्षण नियमों के अनुरूप नहीं है – मामले को उच्च स्तरीय समिति के पास याचिकाकर्ताओं को सहायक शल्य चिकित्सक चयन ग्रेड के पद से पदोन्नति पर उचित वेतनमान प्रदान करने के लिए तथा आदेश की सत्यापित प्रतिलिपि की प्राप्ति के दिनांक से चार माह के भीतर अंतिम निर्णय लेने हेतु भेजा जाता है।

Case referred :

(2007) 9 SCC 337.

Shobha Menon with *Ankita Khare*, for the petitioners.
Nirmala Nayak, G.A. for the respondents/State.

ORDER

K.K. TRIVEDI, J. :- This writ petition under Article 226 of the Constitution of India is filed by the petitioners, two in number, working on the post of Surgical Specialist challenging the validity of the order dated 18.07.2007 (Annexure P-19) as also bringing the anomaly in the matter of grant of appropriate pay scale to the post of Surgical Specialist on account of passing an order of granting and conferring on them the senior scale and selection grade pay scale. By amending the relief, the petitioners have also called in question the order dated 30.07.1998/06.08.1998 (Annexure P-20). Mainly the following reliefs were claimed by the petitioners :

> "I. to issue a Writ of mandamus or such other appropriate writ, directing respondents to implement the recommendations of Singh Deo Committee, by amending the Recruitment Rule "Madhya Pradesh Public Health and Family Welfare (Gazetted) Service Recruitment Rules, 1988, by inserting higher pay scale as per direction of respondent No.1.
>
> II. to direct respondents to award the higher pay scale of Rs.4100 – 5300/- to petitioners on promotion and direct respondent Government to release the difference of pay along with interest thereof and compensation.
>
> (II-A). Order dated 30-7-/6-8-1998/P-20 is ultra vires, contrary to statutes and therefore liable to be set aside.
>
> III. to grant any other relief which this Hon'ble Court deems fit and proper under the facts and circumstances of the case, in the interest of justice.
>
> IV. to award the cost of the petition to the petitioner."

2. The contentions raised by the petitioners are that at present they are working as Surgical Specialist in different hospitals at Bhopal. However, they were initially appointed as Assistant Surgeon on selection through Madhya Pradesh Public Service Commission, in the year 1974 and were confirmed on the said post in the year 1978 and 1976 respectively. While the petitioners were continuing on the post, the Pay Commission recommendations were accepted by the State Government and Madhya Pradesh Revision of Pay Rules, 1990 were made. For the first time, three tier system of pay scale was

made applicable on the recommendations of the Pay Commission by the State Government by making the said rules, in exercise of powers conferred under the proviso to Article 309 of the Constitution of India. In terms of the aforesaid rules, a person serving in the junior pay scale on completing requisite years of service was to be given the benefit of senior pay scale. Similarly, the provisions were made for grant of selection grade pay scale. Though it was necessary to consider the cases of grant of selection grade pay scale to the petitioners as they were already granted the senior grade pay scale, action was not taken and, therefore, original application was filed before the Madhya Pradesh State Administrative Tribunal being O.A. No.141/1992, which came to be decided on 21.11.1994. The benefit of the order passed by the Madhya Pradesh State Administrative Tribunal was extended to the petitioners by amending the earlier order of conferring on them the senior grade and selection grade pay scale, on 10.11.1995.

3. Though the service recruitment rules were made in the year 1988, entitled as Madhya Pradesh Public Health and Family Welfare (Gazetted) Service Recruitment Rules, 1988 and as specific provision for promotion was made in the said rules but till the year 1993, no amendment whatsoever was made in the said rules. By way of amendment in the year 1993, three tier system of pay scale was included, in the shape of promotion. The fact remains that the post of Surgical Specialist was required to be filled in 100% by promotion after the amendment made in the year 1993. Only those, who were in the selection grade pay scale in feeder cadre post, were required to be considered for promotion.

4. Prior to the amendment, the post of Specialist was required to be filled in by two sources, 60% by direct recruitment and 40% by promotion of Assistant Surgeon. The recruitment on the initial post was to be made in the pay scale of Rs.3000-4000/- and on completion of six years of service, such a direct recruitee was required to be conferred senior scale of pay at Rs.3700-5000/- and on further completion of four years of service in the said pay scale, a higher pay scale known as selection grade in the scale of Rs.4100-5300/-. The petitioners were promoted on 13.12.1994 after the coming into force of the amendment made in the rules referred to herein above but there were certain direct recruitments after the appointment of the petitioner as Assistant Surgeon, on the post of Specialist.

5. Though the petitioners were given the promotion but those who were

subsequently recruited, have taken a march over and above them inasmuch as they were conferred the senior scale and selection grade pay scale. Though the petitioners were granted the benefit of senior scale and selection grade pay scale with effect from 01.04.1985 and 01.04.1989 respectively but they were given this benefit in the pay scale, which was made applicable to the post of Assistant Surgeon and not on the post of Specialist. As a result, even when the petitioners were regularly promoted, their pay was fixed in the lower stage than those who were junior to them and subsequently appointed on the post of Specialist.

6. This anomaly has remained in operation even when the State Government made the Pay Revision Rules again after accepting the recommendations of the Pay Commission in the year 1998. When these facts were pointed out by the petitioners that there was some anomaly, an order was issued on 30.07.1998/06.08.1998 directing that the Specialist if promoted from the post of Medical Officer (including the Assistant Surgeon) and even if they were treated to be given the pay scale of Rs.3700-5000/-, which was the selection grade pay scale for the post of Assistant Surgeon, they have to be treated as promoted on the very same pay scale and only one increment of pay would be given to them. Again the matter was represented by the petitioners but to their utter surprise, instead of removing the anomaly, order was issued on 18.07.2007 bifurcating certain posts from the post of Assistant Surgeon and upgrading them on the post of Specialist and further bifurcating the post of the Medical Officer into different category of senior scale and selection grade saying that seven posts of the Regional Director would be within the selection grade pay scale of the specialist. It is contended that such an anomaly has not been removed, as a result the pay of the petitioners is so fixed that they are getting lesser salary than what is being paid to their juniors. On the basis of these submissions, it is contended that the impugned orders are liable to be quashed and reliefs as claimed in the writ petition are required to be granted.

7. The respondents have filed their return denying such allegations made by the petitioners. However, unfortunately nothing is placed on record by the respondents to explain as to how even on promotion the petitioners are not entitled to higher pay scale, if they were working on the pay scale applicable to the post of Specialist in junior scale, when their claims were considered for grant of promotion on the post, as a feeder post of the petitioners was to be

treated as Assistant Surgeon Selection Grade. Again it has not been explained as to how the provisions of Fundamental Rule 22-D would not be attracted in the case of promotion of the petitioners, though the post of Specialist is naturally a post carrying higher responsibility than the post of Assistant Surgeon. When the matter was heard on certain occasions, this Court thought it better to refer the matter to the respondents for taking a decision. For the first time on 26.07.2012 though detailed directions were not issued but after hearing learned Counsel for the State, on the prayer of the said counsel, time was granted to file an affidavit explaining the impugned order dated 18.07.2007 (Annexure P-19). This order was not complied with and, therefore, again on 26.02.2013 this Court passed a detailed order. The relevant portion of the said order is reproduced below :

> "The controversy involved in this case appears to be only this much that when an officer getting the Senior Selection Grade Pay Scale is granted the next promotion on higher post, his salary is fixed in the lower pay scale and in this manner, he suffers the monetary loss. It is rightly pointed out that vide order dated 18.7.2007, such a class within the class was created by the respondent/State and to seek clarification in the same, this Court has specifically directed to produce the relevant record on the basis of which the order dated 18.7.2007 was issued. This was the specific order on 12.12.2008 passed by this Court which has been reiterated on 26.7.2012. However, when again the record was not produced, this Court has granted an opportunity to the respondent to produce the record or else an action was to be taken against the concerned authority. Today, also learned Deputy Government Advocate appearing for the respondents prayed for some more time to comply with the aforesaid order."

No affidavit to this effect was filed nor the query raised by the Court was satisfied. Time and again opportunities were granted but only this much was intimated that the original record is received and an affidavit to that effect would be filed.

8. On 30.07.2013 again after hearing learned Counsel for considerable time, this Court found that in fact there was no deliberation in respect of the controversy raised by the petitioners and that order dated 18.07.2007 was

not even explained in appropriate manner in the return filed by the respondents. Again since the anomaly was to be looked into by the respondents-State, a direction was issued to constitute a Committee and to consider the matter relating to the issuance of order dated 18.07.2007. The relevant portion of the order dated 30.07.2013 is quoted below :

> "It is seen from the record and controversy involved in the petition that unless the matter is looked into by the higher officials of the State and a decision is taken, it will be difficult to sort out the anomaly created in the grant of pay scale to the post of Specialist. These facts have been recorded by this Court on two occasions. While looking to the order dated 18/07/2007 placed on record as Annexure P-19, this Court has issued direction to produce the record for the purposes of examining whether the order dated 18/07/2007 was passed after due deliberation. It appears that such a controversy was neither foreseen nor was examined or anticipated by the respondents and therefore still it has to be examined whether the order dated 18/07/2007 was proper and correct order in view of the facts mentioned herein above.
>
> For the aforesaid purposes, it would be better if a meeting is convened by the departmental authorities, a consultation is done and the outcome of the said meeting is furnished to this Court by filing an affidavit of the Principal Secretary of the department. This is being ordered in view of the fact that nothing material has been pointed out with respect to the issuance of the order dated 18/07/2007 by the respondents in their return. The submissions made in the return are not sufficient to satisfy the queries or the objections raised by the petitioners in the present petition."

After passing of this order since again nothing was done, therefore, some stern action was taken by the Court on 12.08.2014 and then only an affidavit was filed by the respondents. The affidavit in short is that in fact the order dated 18.07.2007 contains four different orders/decisions taken by the State Government and in the meeting convened by the department in terms of the order of this Court, decision was taken to implement the order dated 18.07.2007. Justification of issuance of the said order was not again explained

by the respondents. The objection was filed by the petitioners with respect to such an affidavit stating that there was no such direction to implement the order dated 18.07.2007 issued by the Court, rather a query was raised as to what was the basis of issuing the order and why a post of Specialist was created in the pay scale of Rs.16400-20000/- without even suggesting any via-media to resolve the anomaly created by the department in the matter of revision of pay. Even after receipt of this objection, nothing has been done by the respondents.

9. The record and contentions reveal that even when on earlier occasion the representations were made by the petitioner and the Service Association, a High Power Committee was constituted in terms of the orders issued by the Cabinet of Ministers. The Chief Secretary of the State appointed a committee, which after due consideration made the recommendations that a higher pay scale of Rs.4100 – 5300/- should have been given to the Specialist in selection grade pay scale. This recommendation made by the Committee was never acted upon. On the other hand, the order impugned was issued. It is contended by learned senior Counsel for the petitioners that there should be a deliberation in respect of suggestion made by the Committee in terms of the decision taken by it and if the said recommendation was not acceptable, atleast the reasons should have been assigned as to why such recommendations were not acceptable. The contentions raised by learned Govt. Advocate for the State is that on due consideration the order was issued on earlier occasion giving the benefit of senior pay scale to the petitioners with retrospective effect. Since the Revision of Pay Rules were made in exercise of powers conferred by the proviso to Article 309 of the Constitution of India, it was not deemed necessary to make any amendment in the said rules. On the other hand, by subsequent order a classification was done in respect of the post of Specialist. This contention raised by learned Govt. Advocate further fortifies the fact that there was no justified reason assigned for making the class within the class. Why only in such circumstances the impugned order was issued when there was no amendment made in the rules as is categorically contended by the respondents and why a much higher pay scale was made applicable to those 2% posts, which were treated to be in the selection grade pay scale in the cadre of Specialist and what would be the manner of filling those posts was not indicated. Only this much was said that a senior selection grade pay scale would be made available after completion of six years of service on the selection grade pay scale. This apparently cannot be accepted as yet another class was

created within the cadre post of Specialist. Even otherwise if the order dated 18.07.2007 was to be implemented, it was necessary for the respondents to amend the statutory rules to insert such provisions in the rules as in absence of the rules it would be difficult for the respondents themselves to implement such an order.

10. It is seen that the controversy is one which ought to have been looked into by the Grievance Redressal Committee or a High Power Specialized Committee established in terms of the provisions of the Revision of Pay Rules and instructions issued in that respect. It is also to be seen that there was specific prescription of the pay scale after coming into force of the Revision of Pay Rules, 1998. The rules give power to the State Government to relax or suspend operation of any of the provisions of the rules only with a rider that such suspension or relaxation of the rules shall not operate to the disadvantage of the Government servant or the category of Government servant, as the case may be. The overriding effect of the rules as prescribed in Rule 13 of Revision of Pay Rules, 1998 is that where the pay is regulated by the Revision of Pay Rules, the provisions of Fundamental Rules and any other rules shall not apply to the extent they are inconsistent with the Revision of Pay Rules. Normally it has to be seen that the selection grade pay scale is prescribed on a higher pedestal. If a person is working on the selection grade pay scale and is promoted on the post carrying the lesser pay scale at the initial stage, the benefit of pay protection is required to be granted otherwise the very purpose of providing the selection grade pay scale would be frustrated. In the rules governing the services, the prerevised scales were mentioned in the schedules of the rules, which automatically stand amended by the Revision of Pay Rules. As such without there being any exercise of powers in terms of the Pay Revision Rules relaxing any condition, the respondent No.1 was not competent to issue the order dated 30.07.1998/06.08.1998 creating an anomaly in the matter of pay fixation of the petitioners, who admittedly were promoted in the higher pay scale from substantive rank of Assistant Surgeon after conferral of the senior and selection grade pay scale. Similarly, by order dated 18.07.2007 it was not open to the State Government to seek any amendment in the schedule of the rules. The well settled law is that amendment in the service rules can be made by the same method and in the same manner, the rules are made. If the administrative instructions

are issued, they will not take away the specific provisions made in the rules and, therefore, such administrative instructions are required to be treated as ultra vires or violative of the statutory provisions of the rules, specially the Revision of Pay Rules. The Apex Court in the case of *Punjab State Warehousing Corpn., Chandigarh vs. Manmohan Singh and another,* (2007) 9 SCC 337, has very categorically held in paragraph 12 that such an administrative instruction would not be sustainable in the eye of law.

11. From the analysis made herein above, it is clear that the orders impugned so issued were not in consonance to the provisions of the Revision of Pay Rules and, therefore, the same cannot be sustained or approved. The impugned orders dated 30.07.1998/06.08.1998 in so far as they prescribe grant of a minimum pay scale to the post of Surgical Specialist, which post is filled in by promotion of the Assistant Surgeons/Medical Officers working in the selection grade pay scale and the order dated 18.07.2007 issued in that respect, are declared as bad in law and are struck down.

12. Now the question is whether the relief, which is claimed by the petitioners can be granted by this Court. Which pay scale would be the appropriate pay scale is a job which is to be performed by the highly specialized committee. Notably in respect of the grievance of the persons in relation to grant of pay scale, after coming into force of the Revision of Pay Rules, the same is required to be referred to the Grievance Committee, which is highly qualified committee constituted by the State Government. Even if such a Committee is not in existence, it can be constituted again including those, who have the expertise, knowledge and experience in suggesting the appropriate pay scales for the concerning post. That being so, it would be appropriate to direct the respondents to constitute one such committee, refer the matter relating to grant of proper pay scale to the Specialists on promotion from the post of Assistant Surgeon Selection Grade and to take a final decision in the matter and grant such benefit to the petitioners from the date they were promoted on the said post of Specialists. Let this exercise be completed within a period of four months from the date of receipt of the certified copy of the order passed today.

13. Needless to say, looking to the previous conduct of the respondents, non-compliance of this order would be seriously viewed and this Court will not hesitate in initiating *suo motu* contempt proceedings

against the respondents in case the order is not complied with. However, the writ petition is kept pending for a period of four months by which time after complying with the order, the respondents would report the compliance to the Registrar General of this Court. In case of non-receipt of this compliance report, the case be listed after four months under caption 'Direction'. If the order is complied with and compliance report is submitted within the aforesaid period, the writ petition be treated as finally disposed of.

Petition disposed of.

I.L.R. [2015] M.P., 2607
WRIT PETITION
Before Ms. Justice Vandana Kasrekar
W.P. No. 25426/2003 (Jabalpur) decided on 3 March, 2015

G.D. PUROHIT ...Petitioner
Vs.
STATE OF M.P. & ors. ....Respondents

***Civil Services (Pension) Rules, M.P. 1976, Rule 9 - Recovery* - Penalty of deduction of 10% of the amount from the pension of the petitioner - No show cause notice was issued to the petitioner - Second enquiry on the same charge which could not be proved during first enquiry is not permissible - In first enquiry, charges are not found to be proved against the petitioner - As no financial loss caused to Bank, punishment imposed is too harsh and disproportionate - Order quashed - Respondents directed to release pension. (Paras 7 to 10)**

सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 9 – वसूली – याची की पेंशन से 10% राशि का कटौत्रा करने की शास्ति – याची को कोई कारण बताओ नोटिस जारी नहीं किया गया – उसी आरोप पर जिसे प्रथम जांच के दौरान साबित नहीं किया जा सका है, द्वितीय जांच अनुज्ञेय नहीं – याची के विरूद्ध प्रथम जांच में, आरोप सिद्ध नहीं पाये गये – चूंकि बैंक को कोई वित्तीय हानि कारित नहीं हुई, अधिरोपित शास्ति अधिक कठोर एवं अननुपातिक है – आदेश अभिखंडित – प्रत्यर्थीगण को पेंशन मुक्त करने के लिये निदेशित किया गया।

Cases referred :

2008(1) JLJ 291, (2008) 1 SCC (L&S) 63.

Shekhar Sharma, for the petitioner.
Vandana Shrivastava, P.L. for the respondents.

ORDER

Ms. Vandana Kasrekar, J. :- The petitioner has filed the original application i.e. O.A. No.2419/2000 challenging the order dated 4/1/2000 passed by respondent No.1 whereby the penalty of deduction of 10% of the amount from the pension of the petitioner has been imposed before the State Administrative Tribunal. After abolition of the Tribunal, the said application is transferred to this Court and is registered as W.P. No.25426/2003.

2. Brief facts of the case are that the petitioner was appointed on the post of Sub Auditor by an order dated 1.4.1961. He worked in the said department till he attained the age of superannuation. The respondent No.3 had issued a memo dated 26/3/1993 to the petitioner for instituting a departmental enquiry against him under the provisions of M.P. Civil Services (Conduct) Rules, 1964 on the basis of alleged inspection of Nagrik Bank, Sehore done by him. Along with the memo the petitioner was served with the copies of charge sheet, statement of allegation and documents. Thereafter respondent No.3 vide order dated 15/4/1993 appointed one Shri G.K. Haksar as Enquiry Officer for conducting the enquiry and one Sultan Singh, Cooperative Inspector was appointed as Presiding Officer. The enquiry officer conducted the enquiry and found that none of the charges levelled against him was found to be proved.

3. Being dissatisfied with the said report, respondent No.3 decided to make fresh enquiry against the petitioner and issued an order dated 6/3/1995 thereby appointing one Shri B.C. Uaike as enquiry officer and Shri K.S. Kirar as presiding officer. The enquiry officer thereafter submitted its report to respondent No.3 whereby he found that out of 11 charges, only charge No.1, 2, 5 and 9 were partly proved and charge No.3 and 10 were proved. On the basis of the said enquiry report, respondent No.1 passed an order dated 4/1/2000 thereby imposed the penalty of deduction of 10% from the amount of pension. Respondent No.3 conveyed the said order to the petitioner vide letter dated 3/11/2000. Being aggrieved by the said order, the petitioner has filed the present petition.

4. Learned counsel appearing for the petitioner submits that the order dated 4/1/2000 is illegal, arbitrary and contrary to the principles of natural

justice. He further submits that earlier a departmental enquiry was held against him and the enquiry officer does not found prove the charges against the petitioner. However, without affording him any opportunity of hearing, the respondents have initiated re-enquiry against him. For the said purpose, he relied on the judgment passed by this Court in the case of *B.S. Jaiswal Vs. State of M.P. and others*, reported in 2008(1) JLJ 291. He further submits that he was not given any opportunity to cross-examine the witnesses. Learned counsel for the petitioner further submits that the penalty imposed on the petitioner is too harsh and disproportionate to the charges levelled against him.

5. The respondents have filed their reply. Learned Panel Lawyer for the respondents submits that for the misconduct committed by the petitioner, a charge-sheet was issued and the enquiry officer as well as presiding officer were appointed for conducting the enquiry against the petitioner. She further submits that the enquiry was held against him as per the procedure prescribed in the C.C.A. Rules and the enquiry officer vide its letter dated 13/3/1995 and 29/7/1995 issued show cause notice to the petitioner.

6. I have heard learned counsel for the parties and perused the record. From perusal of the record, it appears that earlier a departmental enquiry was held against the petitioner and in the said enquiry, the enuqiry officer does not found the charges as proved against the petitioner and, therefore, a re-enquiry was decided to be held against the petitioner, however, before holding the re-enquiry, no show cause notice was issued to the petitioner. This Court in the case of *B.S. Jaiswal* (supra) has held as under :

> "Dissatisfied with the reply of the charge-sheet submitted by the petitioner, a disciplinary inquiry was conducted against him for the aforesaid charges of misconduct. The Inquiry Officer after conclusion of the inquiry submitted the inquiry report dated 6/12/1989 before the disciplinary authority. In the inquiry the Inquiry Officer did not find the petitioner guilty of both the charges and held that both the chages are not proved. The disciplinary authority, after going through the inquiry report dated 6/12/1989 submitted by the Inquiry Officer, disagreeing with the findings of the Inquiry Officer on both the charges, recorded the finding of guilt of the petitioner in regard to both the charges and imposed penalty of reduction of pay of the petitioner to the minimum of the pay-scale

> for a period of ten years and further ordered that the petitioner shall not be entitled for any increment during the said period of ten years and the period of suspension for all purposes shall be treated as period of suspension vide its order dated 14/2/1990 (Annexure A-10)"

7. So far as the show cause notices dated 13/3/1995 and 29/7/1995 are concerned, the same are issued by the enquiry officer after he was appointed as enquiry officer but before appointing the new enquiry officer, no show cause notice was issued to the petitioner. It is submitted that if the disciplinary authority is dissatisfied with the findings of enquiry officer, then show cause notice is required to be issued to the petitioner.

8. Similarly, Hon'ble the Apex Court in the case of *Kanailal Bera Vs. Union of India and others* reported in (2008) 1 SCC (L&S) 63, has held that the second enquiry on the same charge which could not be proved during first enquiry is not permissible. Hon'ble Apex Court in para-6 of the judgment has held as under :

> "Once a disciplinary proceeding has been initiated, the same must be brought to its logical end meaning thereby a finding is required to be arrived at as to whether the delinquent officer is guilty of charges levelled against him or not. In a given situation further evidence may be directed to be adduced but the same would not mean that despite holding a delinquent officer to be partially guilty of the charges levelled against him another inquiry would be directed to be initiated on the selfsame charges which could not be proved in the first inquiry."

9. In the present case also in the first enquiry charges are not found to be proved against the petitioner and, therefore, in the light of the judgment passed by the Apex Court, second enquiry on the same set of charge is not permissible. In the present case, as no financial loss is caused to the Bank and, therefore, the punishment imposed on the petitioner is too harsh and disproportionate.

10. In view of the aforesaid discussion, the petition is allowed. The order of penalty dated 4/1/2000 is hereby quashed and the respondents are directed to release the pension to the petitioner withheld by them.

Petition allowed.

I.L.R. [2015] M.P., 2611
WRIT PETITION

Before Mr. Justice Rajendra Menon & Ms. Justice Vandana Kasrekar
W.P. No. 3987/2008 (Jabalpur) decided on 12 March, 2015

HOARDING ADVERTISEMENT PEOPLE WELFARE ASSOCIATION & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

Constitution - Article 14, 243-X(b) and Municipal Corporation Act, M.P. (23 of 1956), Section 133 **- Collection of Tax - Delegation of power to Municipal Corporations subject to limitations and conditions - Article 243-X was incorporated to empower the Municipal Corporation to levy such taxes which was originally levied by State Govt. so as to make them independent units of self governance - Section 133(1) of Act, 1956 was thereafter amended and provision was incorporated for the purpose of empowering the Municipal Corporations to impose any Tax or Fee - However, imposition of tax is by resolution of Municipal Corporation and is subject to control of the State Government - Discretion is given to Municipal Corporation in the matter of fixation of tax and selection of minimum or maximum as may be required, and merely because the minimum or maximum rate of tax has not been fixed, the provision cannot be termed as unconstitutional. (Paras 15 to 31)**

संविधान – अनुच्छेद 14, 243–X(बी) एवं नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 133 – कर का संग्रहण – नगरपालिक निगमों को शक्ति का प्रत्योजन सीमाओं और शर्तों के अधीन – अनुच्छेद 243–*X* नगरपालिक निगम को सशक्त करने के लिए समाविष्ट किया गया जिससे वे ऐसे करों को उदग्रहित कर सके जो कि मूलतः राज्य शासन द्वारा उदग्रहित किये जा सके जिससे उन्हें स्वशासन की स्वतंत्र इकाई बनाया जा सके – अधिनियम 1956 की धारा 133(1) का तत्पश्चात् संशोधन किया गया तथा नगरपालिक निगमों को कोई भी कर अथवा शुल्क अधिरोपित करने के लिए सशक्त बनाने के उद्देश्य से प्रावधान समाविष्ट किया गया – तथापि, कर का अधिरोपण नगरपालिक निगम के प्रस्ताव से होता है तथा राज्य शासन के नियंत्रण के अधीन होता है – नगरपालिक निगम को कर के निर्धारण तथा न्यूनतम अथवा अधिकतम जैसी आवश्यकता हो के चयन के मामले में विवेकाधिकार दिया जाता है, तथा केवल इस कारण से कि कर की न्यूनतम अथवा अधिकतम दर निर्धारित नहीं की गयी है, इस प्रावधान को असंवैधानिक नहीं ठहराया जा सकता।

Cases referred :

AIR 1968 SC 1232, 1971(1) SCC 823, 1979 MPLJ 85, 1979 JLJ 688, 1997(2) MPLJ 333, 2002(5) SCC 466, 2004(1) MPLJ 390, 2012(1) MPHT 449, (2007) 8 SCC 338, 1983 MPLJ 286, 2007(1) MPHT 577, 1959 SCR 427.

A.M. Mathur with *Upadhyay & Sanjay Agrawal*, for the petitioners.
P.K. Kourav, Addl. A.G. for the respondents/State.
Naman Nagrath & Sanjay K. Agrawal, for the respondent Municipal Corporation.

ORDER

The Order of the Court was delivered by : **RAJENDRA MENON, J. :-** Challenging the constitutional validity in the matter of delegation of taxation power to the Municipal Corporations under Section 133 of the M.P. Municipal Corporation Act, 1956 (hereinafter referred to as "the Act of 1956") and contending that the powers conferred and delegated by the aforesaid statutory provisions suffers from the vice of excessive delegation of legislative powers and is violative of Article 14 and in breach of the conditions stipulated in Article 243-X(b) of the Constitution of India, this writ petition is filed. It is also said that as the provisions of Section 133 of the Act of 1956 does not prescribe any condition or limits as to the rate of taxation in the matter of display of advertisement through hoardings, therefore, the provision is unconstitutional. Further challenge in the writ petition is made to a resolution Annexure P/1 dated 29.4.2006 and another one bearing resolution No.1, whereby there is an increase in the advertisement tax which is corelated to the ground rent payable as fixed under the Collector guide line for the area where the advertisement is displayed. It is further said that the advertisement rate fixed is contrary to the Bhopal Municipal Corporation Advertisement Byelaws, 1967 (hereinafter referred to as "the Byelaws of 1964"). That apart, by amending the writ petition, certain increase in the advertisement rate vide resolution Annexure P/3 dated 24.3.2008 is also challenged on the ground that it is unreasonable and contrary to the statutory provisions.

2. Petitioner claims to be an association of Advertisers engaged in the business of conducting the work of advertisement through display of hoardings and advertisement board's in the City of Bhopal. It is said to be a society registered under the Society Registrikaran Adhiniyam. Petitioner No.2 is the

Secretary of the petitioner No.1 Association and the remaining petitioners are individual advertisers and Members of the Association. It is said that the association is raising the cause of its Members in the writ petition. According to the petitioner under Section 132 of the Act of 1956, the Municipal Corporation is empowered to impose obligatory or compulsory taxes as well as optional taxes. It is said that one of the optional taxes that can be imposed under Section 133(6) is the tax contemplated in sub clause (L) thereof i.e. a tax on advertisement other than the advertisement published in the Newspaper. It is further said that Section 133 of the Act of 1956 lays down the procedure for imposition of tax and fees by the Municipal Corporation and also a provision for increase of the tax. It is said that prior to amendment of the Act vide Act No.12 of 1995 sub section(1) of Section 133 (the unamended provision) required various detailed procedure to be followed by Municipal Corporation as is detailed in para 5.4 of the writ petition. However, for the present, as the same is not very relevant, we may not go in detail into the same. However, in this writ petition petitioners have challenged tax imposition on advertisement and hoardings on the following counts :-

(a) the constitutional validity and the power conferred on the Municipal Corporation under Section 133 is challenged on two counts, (1) that it is beyond the parameters of the powers conferred under Article 243-X(b) of the Constitution of India, as no conditions and limitations with regard to rate of tax is fixed, the same, runs in conflict to the constitutional provisions, is violative of Article 14 and 243-X, therefore, the same be declared as Ultra Vires. That apart, it is said that even if the provision is held to be Intra Vires, the power exercised by the Municipal Corporation for passing the impugned resolution in question and imposing the tax is unsustainable, because : (a) as no conditions with regard to maximum and minimum limits, in the matter of taxation is prescribed by the State Government and therefore, without such prescription by the State Government, the imposition of tax is unsustainable. It is said that without there being any maximum or minimum rate of tax prescribed by the State Government, imposition by the Corporation is unsustainable.

(b) that tax fixed and rate prescribed is unreasonable,

contrary to byelaws of Municipal Corporation, Bhopal and therefore, the same be quashed.

3. Shri A. M. Mathur, learned Senior Counsel along with Shri Upadhyay, learned Senior Counsel and ably assisted by Shri Sanjay Agrawal, argued that the provisions of Article 243-X(b) of the Constitution of India empowers the State to make a law by which it may assign to the Municipalities such taxes, duties, tolls and fees levied and collected by the State Government for such purposes but the assignment is subject to such limits and conditions as may be prescribed. It is said that while imposing the advertisement tax impugned in this petition, neither any conditions are laid down nor any limit with regard to rates of taxes prescribed and therefore, the provisions of Section 133 of the Act of 1956 is Ultra Vires of Article 243-X.

4. That apart, it was argued that as the provisions of Section 133 gives uncontrolled power to the State Government, and the Municipal Corporation to impose the tax without prescribing any conditions and limit this is violative of Article 14 of the Constitution.

5. Thereafter, it was tried to be emphasized that under Section 133 of the Act of 1956, even if the State Government can authorize the corporation to levy the tax by passing of resolution but permitting passing of the resolution in the matter of imposition of tax without there being any limitation, condition and prescribing a maximum and minimum limit for the rate of tax to be collected is arbitrary and unsustainable and therefore, the relief claimed for in this petition, be allowed. Shri A. M. Mathur, learned Senior Counsel and his associates counsel took us through the provisions of Section 132, Section 133, Article 14, Article 19(1)(g) of Constitution, the words "subject to such conditions and limits" as appearing Article 243-X and various other statutory provisions like Section 133 to say that when no condition and limit are prescribed for imposition of tax, the same is unsustainable. It is said that the State can delegate the power of taxing or can assign its right to collect tax to the Municipal Corporation but the same has to be done on such conditions and such limitations as may be prescribed by the State Government. In the instant case, as no conditions or limitation with regard to the rate of tax is prescribed, the resolution and power exercised by the Municipal Corporation is said to be unsustainable. It was also argued that under Section 366 of the Act of 1956 provisions for grant of license and permission is contemplated. In sub clause 11 thereof, it is provided that rate of license and permission fee can be renewed

only once in every three years and in the instance case as the rate of tax is being renewed every year. It is said that the same is in violation to requirement of Section 366. That apart, by referring to the manner in which tax is fixed, particularly with regard to the quantum of tax fixed, it is tried to be emphasized by referring to a detail chart produced in this regard to say that initially when the rate of tax was fixed in the year 2002-2003 it was based on a different formulae as is evident from the chart annexed to this petition and now with a rate increasing from the year 2002 continuously upto 2014, it is said that there is an increase of more than 7500% and therefore, this increase is arbitrary which cannot be permitted.

6. Referring to the following judgments of the Supreme Court and the Madhya Pradesh High Court and placing much emphasis on the question of non availability of any conditions or limits laid down for imposition of tax, challenge is made to the imposition of the duty. The judgments in this regard relied upon are : AIR 1968 SC 1232 *Municipal Corporation of Delhi Vs. Birla Cotton, Spinning and Weaving Mills;* 1971(1) SCC 823 *Gulab Chand Modi Vs.Municipal Corporation, Ahmedabad;* 1979 MPLJ 85 *Ganesh Ginning and Pressing Factory Vs. Municipal Council, Anjad;* 1979 JLJ 688 *Kishore Gupta Vs. Indore Municipal Corporation;* 1997(2) MPLJ 333 *Meera Khandelwal Vs. State of M.P. ;* 2002(5) SCC 466 *Nagrik Upbhogta Manch Vs. Union of India;* 2004(1) MPLJ 390 *Sakshi Gopal Verma Vs. State of M.P.*

7. It was argued that the powers exercised by the Municipal Corporation in the matter being contrary to the provisions of Article 243 and the Act of 1956 is unsustainable. Shri A. M. Mathur referred to the judgment of the Supreme Court in the case of *Birla Cotton, Spinning and Weaving Mills* (supra) and *Gulab Chand Modi* (supra) and emphasized that the power conferred on the Municipal Authorities for imposing the tax in question without there being any conditions imposed and limitation prescribed, is beyond the delegative power available as per the constitutional provision i.e. Article 243 and therefore, is liable to be declared as Ultra Vires. Referring to the words "subject to" and its interpretation in the case of *Sakshi Gopal Verma* (supra) by a Full Bench of this Court it is said that the delegation made by the State Government to the Municipal Corporation is beyond the condition prescribed under the constitutional provision. On the same analogy reliance is also placed on the judgment of the Supreme Court in the case of *Delhi Race Course.* Further a judgment of a coordinate Bench of this Court in the case of *Fun*

Multiplex Vs. State of Madhya Pradesh 2012(1) MPHT 449, is relied upon to say that the provisions are unconstitutional.

8. Reliance was also placed on a Division Bench judgments of this Court in the case of *Meera Khandelwal* (supra), in support of this contention with regard to constitutional validity of the provision. That apart, reference was made to the judgment of a Division Bench of this Court in the case of *Kishore Kumar Gupta* (supra) to canvas the contention that once the rates of fees to be laid down is prescribed under the byelaws any action taken for charging the fees in contravention to the byelaws, is illegal. Reference was made in this regard to Annexure P/6, the byelaw and the schedule of fee available at page 25 of the paper book to say that once by the byelaw a fees structure has been fixed, anything done contrary to this is unsustainable. Reliance was also placed on the judgment in the case of *Ganesh Ginning and Pressing Factory* (supra) to say that once a minimum and maximum limit is fixed by the byelaws, the Municipal Corporation has no power to increase the taxes beyond the limit prescribed. Shri A. M. Mathur, learned Senior Counsel also invited our attention to the provisions of Section 366 sub clause (11) to emphasize about the unreasonableness in the matter of fixing of tax and the fact about the tax fixed being highly disproportionate. Shri Updhyay, learned Senior Counsel also referred to Section 366(2), judgment in the case of 2007(8) SCC Pg.338" *Dharam Pal Sugar Ltd. Vs. State of Uttar Pradesh* to say that any action done without prescription of condition and fixing of limitation is unsustainable.

9. Refuting the aforesaid contentions Shri P. K. Kourav, learned Additional Advocate General who appears for the State Government argued on the question of Constitutional validity of the impugned provisions. He referred to the statements and objects with regard to the constitutional amendment brought into force w.e.f. 20th April, 1993, to part IX-A of the Constitution of India and tried to emphasize that while interpreting the provisions of the law in question and before deciding the question of its constitutional validity or otherwise, the purpose and reason why the Constitution was amended in the year 1993, should be taken note of and a decision taken. It was argued that the local bodies functioning in the various states had become weak and ineffective. There were failure in holding regular election, the local bodies were subjected to prolonged supersession and there was inadequate devaluation of power to these local bodies. With a view to remove all these deficiencies it was thought necessary to amend the constitutional provision

and incorporate necessary provisions relating to functioning of the urban local bodies, so as to give them more autonomy in the field of their proper functioning, to make their performance more effective and vibrant as an independent institute of self governance. It was said that if the statement and objects of the amendment is perused, it would be seen that apart from various other proposals made, the statement and object contemplates that with a view to make the local bodies, units of self governance, it was decided to give them powers for levy of taxes and duties and one of the object of the amendment was to empower the local bodies by making constitutional provision to empower them to levy of taxes and duties, by assigning of such taxes and duties to the Municipalities by the State Government and to promote them into independent units of self governance. It is said that the Constitution 74th Amendment enforced on 20th April, 1993 and its aims and objects would clearly show that Article 243(E) was incorporated to assign to the Municipalities the power of levying such taxes and duties and tolls which were initially collected by the State Government. It was argued by Shri P. K. Kourav that the words "subject to such conditions and limits" appearing in Article 243-X(b) speaks about laying down conditions for imposition of the tax and limiting the power of the Municipalities. It was argued by Shri Kourav that the word "limits" used in Article does not mean the financial limits or the maximum and minimum limit for imposing the tax or duties. It refers to the limitations to be imposed for exercising the delegated powers and the control to be exercised by the State Government in limiting arbitrary exercise of power by the Municipalities. It is argued by Shri P. K. Kourav that the Constitutional provision contemplates grant of discretion to the Corporation in the matter of imposition of tax based on various peculiar and special local conditions which may vary from one Corporation to another and even from one area to another within the limits of the same Municipal Corporation. It was argued that depending upon the economic and financial conditions of the area where the Municipal Corporation was functioning, powers were to be given to the Municipalities to impose the tax after assessing the local conditions. Shri Kourav referred to Section 129 of the Municipalities Act and various other provisions like Section 421 of the M.P. Municipality Act and the provisions of Chapter 9 of the Act of 1956 conferring various powers of control to be exercised by the State Government and argued that all these provisions were incorporated into the Act of 1956 to ensure that control of the State Government is maintained in the functioning of the Municipal Corporation and these controls are nothing but conditions and limitation prescribed with regard to exercise of power by

the Municipal Corporation as contemplated under Article 243(E) and is a system of check and balance by the Government to control the working of the Municipal Corporation at the same time the autonomy of the Municipal Corporation as an independent unit of self governance is maintained. Shri P. K. Kourav referred to the judgment of the Division Bench in the case of *Meera Khandelwal* (supra), para 16 and 17 of the said judgment and argued that while considering the constitutional validity of Section 129 of the M.P. Municipalities Act which is paramateria to the provisions of Section 133, similar submissions made have already been rejected by a coordinate Bench of this Court and therefore, it is tried to be argued that now there is no force in the submissions of the learned Senior Counsel for the petitioners. He referred to the provisions of Section 322(9) of the Act of 1956 and various other provisions to say that the State Government exercises various controls in the matter and the contention of the petitioners that the act is Ultra Vires is unsustainable.

10. Shri P. K. Kourav submitted that after constitutional amendment was incorporated, the provisions of Section 132(9) which initially existed was deleted on 25.8.2003 by amending Act 23 of 2003. Sub section 9 of Section 132 which originally reads as under was omitted :-

> "(9) The State Government may, by notification, in the Official Gazette, prescribe the maximum and minimum rate of any tax specified in this section, subject to which the Corporation shall determine the rate of such tax."

He emphasized that this omission was made to bring the provisions of Act of 1956 in confirmation with the requirement of Article 243-X of the Constitution of India and once the provision for prescribing maximum and minimum rate of tax is done away with the resultant conclusion is that Municipal Corporation has the discretion to fix the minimum and maximum limits.

11. Shri Naman Nagrath learned Senior Counsel and Shri Sanjay K. Agrawal, who also appeared for some of the Municipal Corporation in this case and other connected cases, argued in the same line as was argued by Shri P. K. Kourav and tried to justify the constitutional validity of the provisions in question. It was argued by them that conditions for controlling the activities of the Municipal Corporation as required under the Constitution are already inbuilt in the Act of 1956 and the limits are also laid down under which the power can be exercised and therefore, it is not appropriate to say that the provision is unsustainable. It was submitted that now after amending the

provisions of Section 132(9) of the Act of 1956, there is no necessity for fixing the maximum or minimum limit for imposition of tax, learned counsel invited our attention to a judgment of the Division Bench of this Court in the case of *M.T. Cloth Market Merchant Association, Indore Vs. Indore Municipal Corporation* 1983 MPLJ pg. 286, where the author of the said judgment Hon'ble Justice Shri G. P. Singh, Chief Justice (as he then was), after consider the judgment in the case of *Ganesh Ginning and Pressing Factory* (supra), has clearly laid down that a tax imposed by the Municipal Corporation under Section 132(6) cannot be held to be invalid only because no maximum or minimum limit of taxation is prescribed by the State Government. Placing reliance of this judgment and contending that the law laid down by *Ganesh Ginning and Pressing Factory* (supra), relied upon by Shri A. K. Mathur, learned Senior Counsel is not applicable because it was based on the then existing provisions of Section 127(2) of the Municipalities Act of 1961 and referring to the observations made in this regard by the Division Bench in para 8 in the case of *M.T. Cloth Market Merchant Association* (supra), it was argued that the contentions of the petitioners are not correct.

12. That apart, Shri Naman Nagrath, learned Senior Counsel again took us through various provisions of M.P. Municipal Corporation Amending Act 18/1997, Section 132(1) the object and purpose of the Act, the provision for Control contained in Chapter 10 of the Act of 1956, Section 66, Section 67, the judgments in the case of *Sakshi Gopal Verma* (supra) and in particular, *Birla Cotton, Spinning and Weaving Mills* (supra) and argued that conditions and limitations for imposition of tax and the duty is already provided for in the Act of 1956 and therefore, it is not necessary to incorporate separate provision. Shri Naman Nagrath, learned Senior Counsel in detail took us through the principles laid down by the Supreme Court from para 28 onwards upto para 33, 34 and 35 in the case of *Birla Cotton, Spinning and Weaving Mills* (supra) and tried to emphasize that the conditions and control to be exercised by the State Government as contemplated under Section 243-X does not relate to only laying down conditions by separate notification but if in the parent Act like the act of 1956 itself conditions are already available as is in the present case and when the Act of taxation, impugned is undertaken by a elected representative, who are representing the people then this condition itself is nothing but a check and balance, meeting the requirement of the constitutional mandate. Accordingly, Shri Naman Nagrath, learned Senior

Counsel argued that there is no merit in the contentions advanced by learned counsel for the petitioners. That apart, Shri Naman Nagrath, learned Senior Counsel and Shri Sanjay K. Agrawal demonstrated before us by pointing out that page 25 of the paper book referred to by the petitioners to say that the rate of tax is fixed by byelaws is not correct. It is pointed out that the Bhopal Municipal Corporation Advertisement byelaws 1967 starts from page 26 of the paper book and this is the byelaw, which was enacted in exercise of its power under Section 427 and 442 of the Municipal Corporation Act. Learned counsel took us through the entire byelaw to say that no where in the byelaw is there a maximum or minimum limit of tax prescribed nor is the rate of tax prescribed in the byelaws. It is argued by them that this byelaw only contemplates for certain procedure for giving right for advertisement. As far as notification at page 25 is concerned, it is the case of the respondents that this notification dated 27th February 1964 has been issued by the Municipal Corporation under sub section 1 of Section 132 read with Sub section 1(c) of Section 442 fixing the rate of tax separately. It is said that even the impugned rate of tax is fixed in accordance to this provision and therefore, it was submitted and explained to us that notification available at page 25 is not a byelaw as contended by the petitioner but it is separate notification passed by the Municipal Corporation imposing and notifying a tax as has been done in the present case. Finally it was summed up that in the facts and circumstances of the case, there is no constitutional or statutory violation which warrants reconsideration. They therefore, pray for dismissal of the petition.

13. Shri Naman Nagrath, learned Senior Counsel also invited our attention to the provisions of Section 133(1) of the M.P. Municipal Corporation Act, 1956 the procedure provided for passing of resolution at the time of final adoption of rate estimate and budget, its approval by the Municipal Corporation and by referring to certain observations made in this regard in the case of *Birla Cotton, Spinning and Weaving Mills* (supra) tried to argue that this provision itself is a control mechanism meeting the requirement of the constitutional mandate. It is further said that as the resolution is passed by the representative of the people it indicates that the requirement of the constitutional mandate as laid down by the Supreme Court in the case of *Birla Cotton, Spinning and Weaving Mills* (supra) is met with.

14. Shri Sanjay K. Agrawal, learned counsel appearing for the Bhopal Municipal Corporation in some of the cases brought to our notice a Division

Bench judgment of this Court in the case of *Sagardeep Advertising Pvt. Ltd.* 2007(1) MPHT Pg. 577 to say that the argument of Shri A. M. Mathur, learned Senior Counsel with reference to Section 366 and sub section 11 is unsustainable for the simple reason that in the case of *Sagardeep Advertising Pvt. Ltd.* (supra) this aspect of the matter has been considered and it has been rejected. Shri Sanjay Agrawal argued that for the purpose of taxation under Section 132(6), particularly with regard to advertisement tax, the provision of Section 366 cannot be made applicable as held by Division Bench in the case of *Sagardeep Advertising Pvt. Ltd.* (supra)

15. Having heard learned counsel for the parties, it is seen that the first question that warrants consideration is the challenge made to the constitutional validity of Section 133 in the matter of power granted to the Municipal Corporation for imposition of tax. It was argued that this power delegated to the Municipal Corporation is contrary to the provisions of Article 243-X of the Constitution.

16. Article 243-X of the Constitution gives power for imposition of tax/ fee and its delegation to the Municipalities. The Article contemplates that the legislature of a State may by law assigning to the Municipality such taxes, duties, tolls and fees levied and collected by the State Government for such purpose and subject to such conditions and limit. It is said that as the power conferred on the Municipal Corporation for imposition of tax and fee under Section 133 is without prescription of any limitation and condition in as much as the maximum and minimum limits for tax to be fixed is not stipulated. The power given to the Municipal Corporation under Section 133(1) of the Madhya Pradesh Municipalities Act is in vioation to the mandate of Article 243-X and Article 14 of the Constitution.

17. Article 243-X of the Constitution was incorporated after the 74th Amendment was made to the Constitution in the year 1993. It was found by the Parliament that many State local bodies have become weak and ineffective on account of a variety of reasons which included failure to hold regular elections, prolonged supersession and inadequate devolution of powers and function. Considering these inadequacy it was considered necessary to incorporate provisions relating to Urban local bodies in the Constitution for the purpose of giving them various powers which included the power of taxation. It is therefore, clear that the aims and object for bringing into force the 74th amendment to the Constitution and one of the object being to empower

the Municipalities and the Municipal Corporation to levy taxes and to assign to them such duties as were originally done by the State Government for the purpose of imposing of taxes. It is clear that Article 243-X of the Constitution was incorporated to empower the Muncipal (sic:Municipal) Corporation to levy such taxes which was originally levied by the State Government so as to make them independent units of self governance and the State Government was delegated this power to assign this duty to the Muncipal (sic:Municipal) Corporation. It is because of this reason that Section 133(1) of the M.P. Municipal Corporation Act, 1956 was amended w.e.f. 1.5.1995 by substituting Act 12 of 1995 and a provision incorporated for the purpose of empowering the Muncipalities (sic:Municipalities) to impose any tax or fee as may be prescribed under the M.P. Muncipalities (sic:Municipalities) Act. However, sub section (1) of Section 133 contemplates that the Corporation may by resolution at the time of final adoption of the budget estimate for the next financial year subject to provisions of the Muncipalities (sic:Municipalities) Act and such limitations and conditions as may be imposed by the State Government, impose the tax. It is therefore, clear that imposition of tax and fee by the Municipal Corporation under Section 133(1) is subject to the provisions of Madhya Pradesh Muncipalities (sic:Municipalities) Act, 1956 and limitations and conditions imposed by the State Government. Shri A. M. Mathur, learned Senior Counsel tried to argue that imposition of the conditions and limitations being absent in the provisions of Section 133(1) and the notification issued being without any limits for the maximum and minimum limit of tax to be imposed, the delegation of powers exercised by the Municipal Corporation is unsustainable.

18. The most important question is with regard to interpretation of the words "subject to such limitations and conditions" which appears in Section 133(1) so also the same words again appearing in Article 243-X-B. It was the contention of Shri Mathur, learned Senior Counsel that "subject to such limits and conditions" means not only the conditions and procedure for imposition of tax but also the maximum and minimum limit for imposition of tax.

19. However, Shri P. K. Kourav, learned Additional Advocate General had argued that the words "subject to such limitation and conditions" does not mean fixing of the maximum or minimum limits of taxation but it contemplates a provision for laying down certain measures of control to be exercised by the

State Government so as to limit the powers of the Muncipalities (sic:Municipalities) by ensuring that they discharge the powers delegated to them in a proper manner and their action in enforcing the delegated power is not arbitrary or unjustified. It is emphasised by Shri P. K. Kourav that the meaning of the words "subject to such limitations and conditions" does not refer to the conditions of prescribing the minimum and maximum rate of tax only.

20. In this regard if various provisions of Madhya Pradesh Municipalities Act are taken note of, it would be seen that various limitations and conditions are imposed by the State Government in this Act which restricts and controls the manner in which the power is to be exercised by the Municipal Corporation or the Muncipality (sic:Municipality) while imposing or recovering of taxes and fees, for eg. under Section 133(1) the Municipal Corporation is to pass a resolution at the time of final adoption of budget estimate for the financial year concerned, giving its intention for imposing any tax or fee as may be specified. Thereafter, sub section (2) contemplates that the resolution shall contain various provisions with regard to the manner in which tax is to be imposed, the clases of persons and description of property to be taxed, the amount or rate of tax or fees to be imposed, the system for assessment and collection of tax and sub section (3) says that the resolution as passed shall be conclusive evidence of imposition of the new tax or fee. Accordingly, it is clear that imposition of tax is by resolution of the Muncipal (sic:Municipal) Corporation and is subject to control of the State Government. Similar provisions for controlling the activities of the Muncipal (sic:Municipal) Corporation exercising its delegated powers are contained under various provisions of the Madhya Pradesh Muncipalities (sic:Municipalities) Act for eg. Section 27 contemplates a provision for estimation of income and expenditure to be prepared by the Commissioner and its supervision and control by the State Government. Budget estimates are prepared under Section 98.

21. Section 66 of the Act empowers the Corporation to take adequate provisions by means of measures which it can lawfully take for matters enumerated therein. Section 69 of the Act clothes the Corporation with Executive Powers for carrying out the purpose of the Act. Section 189-A empowers the Corporation to lease out the recovery of any tax and fees imposed by way of public auction to a private contractor subject to conditions and limitations prescribed by the State Government. Apart from the above, sections 76 to 85 contemplates provision for managing the Municipal properties

and liabilities. Section 80 deals with powers to ensure that streets, lands, public places, drains and other immoveable property are not sold or leased out save in accordance with the provisions of the Act. Chapter XXVI empowers the Corporation to control and manage streets within the limits of the Corporation. Section 322 empowers the Corporation for erection of walls, fences, rail, posts etc for preventing misuse of the Corporation's property.

22. Similar provisions are contained in section 322(2) and 335, wherein the Commissioner is empowered to prohibit by public notice, misuse of any building, wall, tree or board against public interest. Finally, the State Government is given the entire supervisory powers under section 421. If Section 421 of the Act is taken note of, it would be seen that every Act of the Muncipal (sic:Municipal) Corporation and every resolution passed, it is subject to the control of the State Government which can suspend execution of any resolution and prohibits its imposition. That being so, it has to be taken note of that various provisions are contained in M.P. Muncipal (sic:Municipal) Corporation Act like Section 421, 422 and 423 which empowers the State Government to control the manner in which the power is to be exercised by the Muncipal (sic:Municipal) Corporation. In this regard, if the principle of law laid down by the Supreme Court in the case of *Birla Cotton, Spinning and Weaving Mills* (supra) is taken note of it would be seen that it lays down certain principle, application of which indicates that the contentions advanced by Shri A. M. Mathur, learned Senior Counsel cannot be accepted. In the case of *Birla Cotton, Spinning and Weaving Mills* (supra), certain powers for collection of tax on consumption or sale of electricity imposed by the Delhi Muncipal (sic:Municipal) Corporation under the Muncipal (sic:Municipal) Corporation Act applicable in Delhi was challenged and in that case also the argument advanced was that the delegation for levy and collection of electricity duty is without any conditions or limitation. Hon'ble Supreme Court examined the provisions of Delhi Muncipalities (sic:Municipalities) Act and found that imposition of taxes under Section 150 of the Delhi Corporation Act contemplated provisions for imposing mandatory and optional taxes. In the State of Madhya Pradesh also similar provisions are available. Under Section 132 of the Madhya Pradesh Muncipal (sic:Municipal) Corporation Act, provisions are made for imposing complusory and optional taxes. Sub section (1) of Section 132 and the provisions of Clause 'A' to "F" thereof provides for imposition of compulsory taxes but sub section (6) of Section 132 speaks about optional taxes that may be imposed by the Muncipal (sic:Municipal)

Corporation subject to any general or special order given by the State Government. It is therefore, clear that advertisement tax which is a tax contemplated under Clause 'I' of Section 132(6) is an optional tax as considered by the Supreme Court in the case of *Birla Cotton, Spinning and Weaving Mills* (supra). Thereafter, the principle of law is discussed and from para 21 onwards, Hon'ble Supreme Court discusses the principle of law with regard to fixation of rates of taxes, checks and control to be exercised by Government when the power is delegated to the Municipal Corporation for imposition of tax. After referring to a judgment in the case of *Pandit Banarsi Das Bhanot Vs. State of Madhya Pradesh,* 1959 SCR 427, it is held by the Supreme Court that on the basis of various authorities, it is clear that it is not unconstitutional for the Legislature to leave it to the Executive to determine the details the relating to working of taxation law, including fixation of rate and the manner of fixing the rate for taxation. It has been held that once procedural safeguards, control and guidelines are available, it cannot be said that the legislative power of delegation exercised is an excess.

23. After reviewing all the judgments on the question from paragraph 28 onwards, Hon'ble Supreme Court discussed the imposition of guidelines and in paragraphs 28 and 29, the following principle are laid down:-

> "28. A review of these authorities therefore leads to the conclusion that so far as this Court is concerned the principle is well established that essential legislative function consists of the determination of the legislative policy and its formulation as a binding rule of conduct and cannot be delegated by the legislature. Nor is there any unlimited right of delegation inherent in the legislative power itself. This is not warranted by the provisions of the Constitution. The legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary for implementing the purposes and objects of the Act. Where the legislative policy is enunciated with sufficient clearness or a standard is laid down, the courts should not interfere. What guidance should be given and to what extent and whether guidance has been given in a particular case at all depends on a consideration of the provisions of the particular Act with which the Court has to deal including its preamble. Further it

appears to us that the nature of the body to which delegation is made is also a factor to be taken into consideration in determining whether there is sufficient guidance in the matter of delegation.

29. What form the guidance should take is again a matter which cannot be stated in general terms. It will depend upon the circumstances of each statute under consideration; in some cases guidance in broad general terms may be enough; in other cases more detailed guidance may be necessary. As we are concerned in the present case with the field of taxation, let us look at the nature of guidance necessary in this field. The guidance may take the form of providing maximum rates of tax upto which a local body may be given the discretion to make its choice, or it may take the form of providing for consultation with the people of the local area and then fixing the rates after such consultation. It may also take the form of subjecting the rate to be fixed by the local body to the approval of Government which acts as a watch-dog on the actions of the local body in this matter on behalf of the legislature. There may be other ways, in which guidance may be provided. But the purpose of guidance, whatsoever may be the manner thereof, is to see that the local body fixes a reasonable rate of taxation for the local area concerned. So long as the legislature has made provision to achieve that reasonable rates of taxation are fixed by local bodies, whatever may be the method employed for this purpose- provided it is effective it may be said that there is guidance for the purpose of fixation of rates of taxation. The reasonableness of rates may be ensured by fixing a maximum beyond which the local bodies may not go. It may be ensured by providing safeguards laying down the procedure for consulting the wishes of the local inhabitants. It may consist in the supervision by Government of the rate of taxation by local bodies. So long as the law has provided a method by which the local body can be controlled and there is provision to see that reasonable rates are fixed, it can be said that there is guidance in the matter of fix in rates for local taxation. As we have already said there is pre- eminently a case for delegating

> the fixation of rates of tax to the local body and so long as the legislature has provided a me-hod for seeing that rates fixed are reasonable, be it in one form or another, it may be said that there is guidance for fixing rates of taxation and the power assigned to the local body for fixing the rates is not uncontrolled and uncanalised. It is on the basis of these principles that we have to consider the Act with which we are concerned."
>
> (Emphasis Supplied)

24. However, when paragraph 29 reproduced hereinabove, is analysed, it would be seen that the form in which the guidelines or limitation is to be imposed cannot be laid down in general terms. It depends upon the circumstances of each statute under consideration. In some cases, guidelines may be in broad general terms and in some cases it may provide for fixing maximum rate of taxation or in some cases it may be left to the discretion of the local authority to make its choice in the matter of fixation of tax. Thereafter, from paragraph 30 onwards, the provisions of checks and balance already available in the statutory provision is taken note of and in paragraph 33 and again in paragraph 35 certain provisions of the Corporation Act applicable in the State of Delhi is considered and thereafter it is held that there are various provisions in the Act which are nothing but guidelines and terms of conditions laid down for the purpose of exercising the delegated power.

In paragraph 33, 34 and 35 the matter is so dealt with by the Hon'ble Supreme Court:

> ".33. The first circumstance which must be taken into account in this connection is that the delegation has been made to an elected body responsible to the people including those who pay taxes. The councillors have to go for election every four years. This means that if they have behaved unreasonably and the inhabitants of the area so consider it they can be thrown out at the ensuing elections. This is in our opinion a great check on the elected councillors acting unreasonably and fixing unreasonable rates of taxation. This is a democratic method of bringing to book the elected representatives who act unreasonably in such matters. It is however urged that S. 490 of the Art provides for the super-session of the Corporation in

case if is not competent to perform or persistently makes default in the performance of the duties imposed upon it by or under the Act or any other law or exceeds ,or abuses its power. In such a case the elected body may be superseded and all powers and duties conferred and imposed upon the Corporation shall be exercised and performed by such officer or authority as the Central Government may provide in this behalf. It is urged that when this happens the power of taxation goes in the hands of some officer or authority appointed by Government who is not accountable to the local electorate and who may exercise all the powers of taxation conferred on the elected Corporation by the Act. This however has not happened in the present case and we need not express any opinion on the question whether such officer or authority would be competent to increase the rates of taxes already fixed when the Corporation is superseded or can impose new taxes which were not there at the time of supersession. That is a matter which may have to be considered when such a situation arises; but so long as the power of taxation conferred by S. 150 is exercised by the elected body there will always be a check in the form of the members thereof having to face the electorate after every four years with the liability of being thrown out if they act unreasonably. This check which is inherent in an elected municipal body, must enter into the verdict whether the delegation to such a body, even though it is wide in extent, can be upheld on the basis that this is a method of controlling the actions of the elected body and setting a limit to which it can go in the matter of taxation, even though no maximum as such is provided in the Act. "

(Emphasis Supplied)

34. Another guide or control on the limit of taxation is to be found in the purposes of the Act. The Corporation has been assigned certain obligatory functions which it must perform and for which it must find money by taxation. It has also been assigned certain discretionary functions. If it undertakes any of them it must find money. Even though the money that has to be found may be large, it is not, as we have already indicated, unlimited for it must be only for the discharge of functions

whether obligatory or optional assigned to the Corporation. The limit to which the Corporation can tax is therefore circumscribed by the need to finance the functions, obligatory or optional which it has to or may undertake to perform. It will be not open to the Corporation by the use of taxing power to collect more than it needs for the functions it performs. It cannot, for example, raise the rate of taxation to such an extent, as to provide a surplus which is much more than what it needs for its existence in carrying out the functions assigned to it, subject to its having the minimum cash balance of Rs. 4,00,000 as provided in the Act at the end of a year. This is in our opinion another check which will guide the Corporation in fixing its rates of tax under s. 150 after taking into account the yield from obligatory taxes. Though the mere fact that specific purposes and functions are set out in an impugned Act may not be conclusive-it is one of the factors which should be taken into account along with other relevant factors. It cannot therefore be said that there is no guidance to the Corporation in the matter of fixing rates of optional taxes, though it must be admitted that a large discretion is left to it in this behalf. Even so there are limits to which the Corporation can go in fixing these taxes and those limits like the maximum fixed for obligatory taxes are the guidelines within which the taxing power of the Corporation with respect to optional taxes must be exercised. This power is exercised by the Corporation after debate by the elected representatives of the local area which the Corporation administers. In such circumstances we think that there is a limit and guidelines provided by the Act beyond which the Corporation cannot go.

35. Another limit and guideline is provided by the necessity of adopting budget estimates each year as laid down in s. 109 of the Act. That section provides for division of the budget of the Corporation into four parts i.e., general, electricity supply, transport, water and sewage disposal. The budget will show the revenue and expenditure and these must balance so that the limit of taxation cannot exceed the needs of the Corporation as shown in the budget to be prepared under the provisions of

the Act. These four budgets are prepared by four Standing Committees of the Corporation and are presented to the Corporation where they are adopted after debate by the elected representatives of the local area. Preparation of budget estimates and their approval by the Corporation is therefore another limit and guideline within which the power of taxation has to be exercised. Even though the needs may be large, we have already indicated that they cannot be unlimited in the case of the Corporation, for its functions both obligatory and optional are well defined under the Act. Here again there is a limit to which the taxing power of the Corporation can be exercised in the matter of optional taxes as well, even though ,there is no maximum fixed as such in the Act.".

25. If the aforesaid circumstances are applied in the backdrop of the provisions contemplated in the MP Municipalities Act, it would be seen that in this case also the power of levying, collecting and fixing the tax is entrusted to the Municipal Corporation through an elected body responsible to the people. All elections to the Council take place every five years and an assumption has to be drawn that the elected representative have acted or performed reasonably in the manner of fixing the rates of taxation, keeping in view the public interest.

26. If the principle as detailed hereinabove in paragraph 33 is taken note of, it is seen that the power of taxation in the State of MP is also exercised by an elected body, therefore, an assumption has to be drawn that there will always be a check in the form of the members doing so on the floor of the house when the taxation provisions are discussed before its adoption.

27. Finally, in paragraphs 37 and 38, the Hon'ble Supreme Court goes to lay down the following principle:

".37. Finally there is another check on the power of the Corporation which is inherent in the matter of exercise of power by subordinate public representative bodies, such as municipal boards. In such cases if the act of such a body in the exercise of the power conferred on it by the law is unreasonable, the courts can hold that such exercise is void for unreasonableness. This principle was laid down as far back as 1898 in Kruse v. Johnson(1) in connection with a bye-law made by a count council. In that case the county council made a certain bye-law and its validity was challenged on the

ground that it was unreasonable. The Court held that a bye-law could be struck down on the ground of unreasonableness but took pains to point out that in determining the validity of a bye-law made by a public representative body, such as a county council, the court ought to be slow to hold that the byelaw was void for unreasonableness. The Court further held that" a bye-law so made out ought to be supported unless it is manifestly partial and unequal in its operation between different classes, or unjust, or made in bad faith, or clearly involving an unjustifiable interference with the liberty of those subject to it." The same principle would apply to the fixation of rates of taxation and if per chance the Corporation fixes rates which are unreasonable, there is control in the court to strike down such an unreasonable impost.

38. On a careful consideration therefore of the various provisions of the Act, we must hold that the power conferred by s. 150 of the Act on the Corporation is not unguided in the circumstances and cannot be said to amount to excessive delegation."

28. From the aforesaid, it is clear that laying down of conditions and limitations does not mean that it has to come from the State Government in the form of orders, while imposing the tax. It can be done in the form of various provisions already incorporated in the Statute namely, in this case the MP Muncipal (sic:Municipal) Corporation Act,1956, and if the provisions of the Act of 1956 and the conditions and various limits prescribed controlling the activities of the Municipal Corporation as contained in the Act are taken note of, it would be clear that the conditions and limitations as laid down by the Supreme Court in the case of *Birla Cotton Spinning and Weaving Mills* (supra) is in existence and, therefore, on this count the Act cannot be termed as unsustainable.

29. Much emphasis was laid down by Shri A.M. Mathur, learned Senior Advocate, to say that because no minimum or maximum rate of tax is prescribed the entire resolution and the order for recovery of adequate tax is unconstitutional.

30. In this regard, it would be seen that prior to the amendment to the MP Municipalities Act, section 132(9) as it originally existed contemplated a provision for prescribing the maximum and minimum limits of tax to be imposed

by the Municipal Corporation. Sub-section (9) of Section 132 is reproduced in paragraph 10 of this judgment. However, this clause was deleted vide Amending Act 23 of 2003 with effect from 25.8.2003, and by removing the provision for prescribing the maximum and minimum limits as argued by Shri P.K. Kaurav, the MP Municipalities Act, power of taxation contained under section 132 was brought in accordance to the aims and object for incorporating Article 243(X). The aims and object of Article 243(X) of the Constitution has already been referred to hereinabove, which indicates that the powers of local and urban bodies being inadequate in various matters, including taxation, the constitutional amendment was made for incorporation Article 243 and by removing the limits for prescribing the maximum and minimum, the MP Municipalities Act was also brought in conformity with the requirement of Article 243(X) of the Constitution.

31. That being so, this conscious amendment by the State Government is clearly an indication of the fact that discretion is given to the Municipal Corporation in the matter of fixation of tax and selection of the minimum or maximum as may be required and merely because the minimum or maximum rate of tax has not been fixed, the provision cannot be termed as unconstitutional.

32. That apart, the question as to whether the provision becomes unconstitutional due to non-fixation of the minimum or maximum rate has already been considered by a Coordinate Division Bench of this Court in the case of *MT Cloth Market Merchants Association* (supra) and Hon'ble Justice G.P. Singh, as he then was, in paragraph 8 of the aforesaid judgment deals with the matter as under:

> ".8. The learned counsel for the petitioner then submitted that the imposition of all the three aforesaid taxes was invalid for the reason that no maximum or minimum has been prescribed by the State Government under section 132(6). A perusal of this provision would show that it is not obligatory for the Government to prescribe any maximum or minimum with respect to the amount or to the rate of taxes specified in Sub-sections (1) and (2) of Section 132. When these limits are prescribed, the Corporation's power of taxation must be exercised within the limits but omission to prescribe the maximum and minimum limits do not take away the power of

the Corporation to impose the taxes. The learned counsel relied upon *Ganesh Ginning and Pressing Factory Vs. Municipal Council, Anjad,* 1979 MPLJ 85 which related to the construction of Sections 127(2) and 130 of the MP Municipalities Act, 1961. Section 130 as then in force authorized the Municipal Corporation to vary the tax within the limits prescribed under Section 127(2). On a proper construction of this provision it was held that unless the limits were prescribed, the Municipal Council could not vary the tax. The language of those sections was entirely different and the case relied upon has no application here. .....".

33. From the aforesaid, it is established that merely because the maximum and minimum rate of tax has not been fixed, the provision will not become unconstitutional. Even the case of *Ganesh Ginning and Pressing Factory* relied upon by Shri A.M. Mathur is considered, explained in this case of MT Cloth Market Merchants Association.

34. Accordingly, now as all the contentions advanced by Shri Mathur in this regard are found to be unsustainable, we see no reason to uphold the arguments advanced, particularly in the light of the principle laid down by the Supreme Court in the case of *Birla Cotton Spinning and Weaving Mills* (supra), from paragraph 28 onwards and particularly in paragraphs 33, 34 and 35 of the aforesaid judgment.

35. Even though during the course of hearing, learned counsel for the parties had referred to various judgments namely, *Gulab Chand Modi* (supra), *Meera Khandelwal* (supra), *Nagrik Upbhogta Manch* (supra), *Delhi Race Course* (supra) and *Fun Multiplex* (supra), but considering the fact that for deciding the controversy involved in this petition, the principles laid down in the case of *Birla Cotton and Weaving Mills* (supra), *Sakshi Gopal Verma* (supra) and *M.T. Cloth Market Merchant Association* (supra) are sufficient. It is not necessary now to refer in detail all the other judgments.

36. As far as fixation of ground rent and the contention that the rate of tax fixed is exhorbitant, it would be seen that the same has been done by the Municipal Corporation keeping in view various factors like the population of the city, the economic conditions and developed nature of the city, the area where the advertisement is to be put; the situation, location and various other

factors which is different for various areas. Even in the matter of imposition of property tax in the case of *Sakshi Gopal Verma* (supra), this Court has held that fixation of tax based on situation and location of the house is proper.

37. That being so, as far as fixation of ground rent and the rate of tax is concerned, as the Corporation through its councilors-the elected body, has taken a decision to impose the tax at a particular rate, this Court does not deem it proper to interfere with such a decision taken. The right of the Municipal Corporation to fix taxes being in accordance with the procedure contemplated under law, no case is made out for interference on this count.

38. As far as the contention that in fixing the tax, the provisions of section 366(II) has been violated is concerned, this question has been considered by the Division Bench in the case of *M/s Sagardeep Advertising* (supra) and the matter has been dealt with in the following manner:

> "(a) The power to impose tax on advertisements and to regulate all activity including advertisements on Corporation land, streets and open spaces within the Corporation area and to charge rent or fee vests is in the Corporation.
>
> (c) that Section 366 of the Act only prescribes the general conditions of Licences and permissions but does not deal with the manner in which the application shall be processed nor does it prescribe any procedure to cater for a situation like the present one where several persons apply for installing advertisement boards or hoardings at the same place and same time or the manner in which their rival claims should be considered.....
>
> 17. As the respondent authorities in the instant case are levying tax and charging rent and not a fixed licence fee as envisaged by the taxing provisions, the contention of the learned counsel for the petitioner that in the absence of prescription of maximum and minimum limit, no fee can be levied by the Corporation deserves no consideration and is hereby rejected."

39. It is seen that the provisions of section 366 only prescribes the general

conditions for granting license and permission and does not deal with the question of advertisement, which is dealt with separately by a bylaw, therefore, the contention of the petitioner with regard to violation of section 366 cannot be accepted, as in Bhopal Municipal Corporation the provision for grant of advertisement is contemplated by a statutory Bye-law and therefore, the general provision of Section 366(II) with regard to license and permission will not apply. To that effect also, the grounds raised by the petitioner is not tenable and is accordingly rejected.

40. Apart from the aforesaid, during the course of hearing, learned counsel for the petitioner had invited our attention to a Notification available at page 26 of the paper-book and the by-laws of the Bhopal Municipal Corporation Advertisement Bylaws, 1967 to say that the impugned resolution now passed is contrary to the rate of tax fixed in the Notification dated 27.2.1984 available at page 25, which is termed to be the bylaw. An argument was tried to be advanced to say that the resolution now passed fixing the rate of tax is contrary to the bylaws is unsustainable.

41. In this regard it was pointed out by Shri Naman Nagrath, Shri P.K. Kaurav " Senior Advocates, and Shri Sanjay Agrawal that the Notification dated 7.2.1984 available at page 25 is not a bylaw. The bylaw is available from page 26 onwards and the Notification at page 25 is nothing but a resolution of the Municipal Corporation fixing the rate of tax in the year 1984.

42. We find this to be correct. If the Notification dated 27.2.1984 available on record is analysed, it would be seen that this Notification is issued by the Municipal Corporation, Bhopal and it only reproduces a resolution in the matter of fixing the tax for advertisement under section 133. What is filed at page 25 is a Notification issued by the Corporation and now the impugned resolution is also nothing but a subsequent act of the elected body in fixing the rate of advertisement. Accordingly, the Notification dated 27.2.1984 is also a Notification fixing the advertisement at that point of time. It is neither a bylaw nor part of the bylaw. It is an act akin to the one now undertaken by the Municipal Corporation in passing the resolution for fixing the rate of taxes only.

43. However, the bylaws of the Bhopal Municipal Corporation namely the Bhopal Municipal Corporation Advertisement Bylaw, 1967 is available from page 67 onwards and if this bylaw is analysed in its totality, it would be

seen that no minimum or maximum rate of tax is prescribed in this byelaw. On the contrary, bylaw 2(f) contemplates and provides that tax means a tax on advertisement imposed in accordance to the provisions of section 132(2)(b) and thereafter the bylaw only contemplates provisions for issuing an advertisement giving the work of advertisement and various other aspects indicated therein, but there is nothing in this fixing the maximum or minimum rate of advertisement.

43.(sic:44) That being so, the argument that was advanced to say that the maximum and minimum rate of tax fixed by the impugned Notification is contrary to the bylaws is a misconceived argument, which cannot be accepted. Once on due analysis of the totality of the circumstances, we have recorded a finding that the imposition of tax by the Bhopal Municipal Corporation in the matter does not suffer from the vices of being in excess of the delegation of power and when we find that the imposition made and the action taken is strictly in accordance to the constitution bench judgment of the Supreme Court in the case of *Birla Cotton Spinning and Weaving Mills* (supra), we see no reason to make any further indulgence in the matter. The arguments advanced are wholly misconceived and cannot be accepted.

38.(sic:45) Accordingly, the petition being devoid of merits is dismissed.

Petition dismissed.

I.L.R. [2015] M.P., 2636
WRIT PETITION
Before Mr. Justice R.S. Jha
W.P. No. 3617/2015 (Jabalpur) decided on 31 March, 2015

SANDIP TRIPATHI ...Petitioner
Vs.
STATE OF M.P. ... Respondent

Service Law - Appointment on Compassionate Ground - **Petitioner was appointed on the post of Shiksha Karmi Grade-III on compassionate ground in the year 1998 - Petitioner seeks appointment on the post of Asstt. Teacher as another person has been so appointed on compassionate ground - Held - Petitioner was appointed in the year 1998 and has filed the petition in the year 2015 - No averment that he was entitled to be granted appointment on the post of Asstt. Teacher on the basis of qualification held by him but was denied - Petitioner**

also failed to establish parity - Petition dismissed. (Paras 3 to 6)

सेवा विधि – अनुकंपा आधार पर नियुक्ति – याची वर्ष 1998 में अनुकंपा आधार पर शिक्षा कर्मी श्रेणी–3 के पद पर नियुक्त हुआ था – याची सहायक अध्यापक के पद पर नियुक्ति चाहता है क्योंकि एक अन्य व्यक्ति अनुकंपा के आधार पर इसी तरह नियुक्त हुआ है – अभिनिर्धारित – याची की नियुक्ति वर्ष 1998 में हुई थी और उसने वर्ष 2015 में याचिका प्रस्तुत की – कोई प्रकथन नहीं कि वह अपनी अर्हता के आधार पर सहायक अध्यापक के पद पर नियुक्ति प्रदान किये जाने हेतु हकदार था परंतु उसे इंकार किया गया – याची समानता स्थापित करने में भी असफल रहा है – याचिका खारिज।

Case referred :

(2010) 2 SCC 59.

Rajnesh Kumar Pandey, for the petitioner.

(Supplied: Paragraph numbers)

ORDER

R.S. JHA, J. :- Heard on the question of admission.

2. The petitioner has filed this petition praying for a direction to the respondent authorities to grant appointment to the petitioner on the post of Assistant Teacher w.e.f. 1998.

3. The prayer made by the learned counsel for the petitioner is based on the contention that the petitioner was granted compassionate appointment by the respondent authorities on the death of the petitioner's father who died while in harness as Shiksha Karmi Grade-III in the year 1998. It is contended that since then the petitioner is working on the said post. However, another person Shri Gyanendra Kumar Sharma was granted compassionate appointment on the post of Assistant Teacher in Sidhi District. It is submitted that in such circumstances as the petitioner is also entitled to claim parity, he has filed the present petition for a direction to the authorities to grant him appointment on the post of Assistant Teacher from 1998. It is submitted that the petitioner has filed a representation before the authorities which has not yielded any result and, therefore, the respondents be directed to decide the same.

4. Having heard the learned counsel for the petitioner, it is observed that the petitioner was appointed and is working as Shiksha Karmi Grade- III since 1998 whereas the petitioner has filed the present petition in the year

2015 without giving any reasonable acceptable explanation for the huge delay and laches of 17 years on his part. It is further clear that the petitioner has not made any contention or averment in the petition that the petitioner was entitled to be granted appointment on the post of Assistant Teacher on the basis of the qualification held by him but was denied the same nor has the petitioner been able to establish any parity with the said Shri Gyanendra Kumar Sharma who is from a different district than the petitioner.

5. The Supreme Court in the case of *Union of India and Others vs. M. K. Sarkar,* (2010) 2 SCC 59, has held that petitions that are filed after considerable delay and latches espousing dead cases cannot be reopened by issuing directions by the High Court for consideration of the representation in the following terms:-

> "14. The order of the Tribunal allowing the first application of respondent without examining the merits, and directing the appellants to consider his representation has given rise to unnecessary litigation and avoidable complications. The ill-effects of such directions have been considered by this Court in *C. Jacob v. Director of Geology and Mining,* (2008) 10 SCC 115 : (2008) 2 SCC (L&S) 961 (SCC pp. 122-123, para 9) -
>
> > "9. The courts/tribunals proceed on the assumption, that every citizen deserves a reply to his representation. Secondly, they assume that a mere direction to consider and dispose of the representation does not involve any 'decision' on rights and obligations of parties. Little do they realise the consequences of such a direction to 'consider'. If the representation is considered and accepted, the ex-employee gets a relief, which he would not have got on account of the long delay, all by reason of the direction to 'consider'. If the representation is considered and rejected, the exemployee files an application/writ petition, not with reference to the original cause of action of 1982, but by treating the rejection of the representation given in 2000, as the cause of action. A prayer is made for quashing the rejection of representation and for grant of the relief

claimed in the representation. The tribunals/High Courts routinely entertain such applications/petitions ignoring the huge delay preceding the representation, and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored."

15. When a belated representation in regard to a "stale" or "dead" issue/dispute is considered and decided, in compliance with a direction by the court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the "dead" issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches."

16. A court or tribunal, before directing "consideration" of a claim or representation should examine whether the claim or representation with reference to a "live" issue or whether it is with reference to a "dead" or "stale" issue. If it is with reference to a "dead" or "stale" issue or dispute, the court/ tribunal should put an end to the matter and should not direct consideration or reconsideration. If the court or tribunal deciding to direct "consideration" without itself examining the merits, it should make it clear that such consideration will be without prejudice to any contention relating to limitation or delay and laches. Even if the court does not expressly say so, that would be the legal position and effect."

6. In view of the aforesaid facts and circumstances, the petition filed by the petitioner suffers from delay and laches and as the direction as sought for by the petitioner cannot be issued as has been held by the Supreme Court in the case of *M. K. Sarkar* (supra), I do not find any merit in the petition which is, accordingly, dismissed.

Petition dismissed.

I.L.R. [2015] M.P., 2640
WRIT PETITION
Before Mrs. Justice S.R. Waghmare
W.P. No. 3169/2014 (Indore) decided on 6 April, 2015

JAYWANT ...Petitioner
Vs.
VARSHA & ors. ...Respondents

Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Amendment - **Application for amendment of plaint was filed when the defence evidence was going on - Allowing the application on payment of cost of Rs. 1000/- would not mitigate the circumstances - Delay not properly explained - Petition allowed - Amendment application rejected. (Para 6)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – संशोधन – वादपत्र में संशोधन हेतु आवेदन प्रस्तुत किया गया जब बचाव साक्ष्य चल रहा था – रू.1,000/– व्यय के भुगतान पर आवेदन को मंजूर किये जाने से परिस्थितियों की गंभीरता कम नहीं होगी – विलंब को उचित रूप से स्पष्ट नहीं किया गया – याचिका मंजूर – संशोधन आवेदन अस्वीकार किया गया।

Cases referred :

2008(4) MPLJ 269, 2010(4) MPLJ 643, 2009(3) MPLJ 122, 2013(2) MPLJ 22, 2014(3) MPLJ 331, 2015(1) MPLJ 92.

Brajesh Pandya, for the petitioner.
Radheshyam Yadav, for the respondents.

ORDER

MRS. S.R. WAGHMARE, J. :- By this petition under article 227 of Constitution of India, the petitioner Jaywant has challenged the order dated 06/02/2014 passed by the 4th Civil Judge, Class II, Indore in Civil Suit No.29A/ 14 allowing the application filed by the defendant under Order 6 Rule 17.

2. Briefly stated the facts of the case are that the plaintiff had filed an application under Order 6 Rule 17 of the C.P.C. pleading that since there was to be a partition of the disputed house and the front portion should be allowed to the plaintiff independently and independent possession to be granted to the plaintiff. Trial Court, on considering the application allowed the application

and hence the present petition by the defendant.

3. Counsel for the defendant/petitioner has vehemently urged the fact that considering the proviso to Order 6 Rule 17 of the C.P.C., the amendment should not be allowed after the trial had commenced, unless the Court came to the conclusion that in spite due diligence the party could not have raised the matter before commencement of the trial. The Counsel vehemently submitted that the application has been filed at the belated stage by the plaintiff when the issues were already framed, the plaintiff witnesses have been examined and the defendant/ petitioner was leading his evidence. He urged that the issues were framed on 07/05/2010 and recording of the plaintiff evidence had started on 09/02/2011. The recording of evidence of defence witnesses had also started and cross examination was being conducted when to fill up the lacuna, the present application has been filed. The application has been duly resisted. Besides, the Counsel also stated by the said amendment, the entire nature of the suit would be changed and in the circumstances the said amendment should not be allowed.

Counsel submitted that by the proposed amendment the nature of the suit will be changed since the very nature of the claim of the petitioner would be changed. Moreover, the cause of action which accrued to the plaintiff at the time of filing of the suit should include whole of the claim and facts not so pleaded, then it must be deemed that the plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of the Court and such right had already accrued to the petitioner/defendant and in pursuance to Order 2 Rule 2 of the C.P.C., plaintiff has omitted to sue in respect of the particular portion of his claim it should be deemed that he has relinquished his right and now he cannot take action afterwards and sue in respect of the portion so omitted.

Counsel submitted that the learned Judge of the trial Court has failed to consider the Proviso of Order 6 Rule 17 of the C.P.C. The words used are due diligence and the purpose of the proviso is to curtail delay and expedite the hearing of the case. Counsel place reliance on *Chander Kanta Bansal vs Ranjinder Singh Anand* 2008(4) M.P.L.J. page 269; *Mankunwarbai vs Vinod Kumar* 2010(4) M.P.L.J. page 643 and *Vidyabai and others vs Padmalatha and others* 2009(3) M.P.L.J. page 122 to state that the amendment should not be allowed after the trial has commenced and unless the Court comes to conclusion that in spite of due diligence the parties could not raise the matter before the commencement of the trial.

Counsel submitted that he has already pointed out that the case was at the time of cross examination of defence witnesses when the defendant was leading his evidence and valuable right under Order 2 Rule 2 had already accrued to the defendant/petitioner.

Counsel for the petitioner also placed reliance on *Virgo Industries (Eng.) Private Limited vs Venturetech Solutions Private Limited* 2013(2) M.P.L.J. page 22 to state the suit was for partition; in the present case the defendant has made his independent claim by his over tact (sic:overt act) then the plaintiff could not have come with such a prayer at such a late stage to claim the front portion of the house. Also relying on *Paraschand and others vs Rao Rajendra Singh and another* 2014(3) M.P.L.J. page 331 Counsel submitted that the plaintiff was well aware of the facts mentioned in the amendment application; yet did not explain delay and reasons for not incorporating same fact in his plaint. Then such an amendment application ought not to have been allowed and the order was quashed by the High Court. Similarly, in the matter of *Dashrath and another vsRajubai and another* 2015(1) M.P.L.J. page 92, the Court found that when due diligence was not exercised by the party, no application can be allowed after the commencement of the trial. Counsel for the petitioner prayed that the impugned order be set aside and the Trial Court be directed to continue the trial from the stage where it was stayed.

4. Counsel for the respondent, *per contra*, has vehemently urged the fact that undoubtedly an amendment application was filed at delayed stage, however, cause of action accrued to the plaintiff then on 16/12/2013 on the day of Dutta Jayanthi, the respondent categorically refused to partition the disputed part of the house and hence it was necessary to make specific averment in the plaint defining the claim of the plaintiff to the front portion of the house.

However, placing reliance on *Chander Kanta Bansal* (Supra) Counsel stated that the Apex Court has observed that Trial Court are not rejecting the application for amendment but it was necessary to consider whether the nature of the suit thus would have been changed and in the present circumstances the suit was filed for partition and nothing adverse would be caused to the respondent. The plaintiff was only defining his claim to the suit property and nothing new was being put forth to adversely change or affect the defendant. Moreover, Rs.1000/- as cost have already been imposed by Trial Court and the Trial Court has correctly held that the entire claim has to be considered at one go and that the amendment proposed was therefore bonafide. Counsel submitted that it was not proper for

the petitioner/defendant to object at this stage. Counsel prayed that petition was without merit and the same be dismissed.

5. On considering the above submissions, I find that it is utmost important to consider Order 2 Rule 2 of the C.P.C, Proviso 2 Order 6 Rule 17 of the C.P.C., to decide whether the amendment proposed by the plaintiff was bonafide apparently the suit was filed by the plaintiff in the year 2010 and when the issues were framed the plaintiff has completed recording of his evidence, the respondent has also started the recording of his evidence and cross examined several witnesses and now only for material particular the plaintiff has filed the said application to claim that in the portion the plaintiff is entitled to the front portion of the house and possession should be given independently to the plaintiff.

6. I find that the claim was already defined when the suit had been filed by the plaintiff in the year 2010. Merely saying that cause of action accrued on 16/12/13 would be incorrect under the circumstances Order 2 Rule 2 categorically states that however, suit shall include whole of the claim which plaintiff is entitled if the plaintiff omits to sue in respect of any portion of his claim then he shall not, after wards, sue in respect of that portion omitted. Undoubtedly he shall create an impediment to the actual physical portion of the house property as claimed by the respondent/plaintiff in the present petition. However, the fact that cannot be marginalized or blinked away is that due diligence could have always been exercised by the plaintiff as vehemently urged by the Counsel for the petitioner and under the circumstances merely imposing of cost of Rs.1000/-would not mitigate the circumstances and this Court is of the firm view that the delay has not been reasonably explained as to why the claim was not defined in the terms of the proposed amendment earlier at the time of filing of the suit and in this view of the matter, the petition is allowed. The impugned order is hereby set aside and only in the interest of justice; it is observed at the time of final decision of the suit, the Trial Court shall keep in mind; the amendment proposed by the plaintiff. The Trial Court is directed to proceed with the case as if amendment application has not been moved and amendment if any made be struck off.

7. The writ petition is allowed. Cost of Rs.1,500/-be paid to the Counsel, if certified.

C.c. as per rules.

Petition allowed.

I.L.R. [2015] M.P., 2644
WRIT PETITION
Before Mr. Justice Alok Aradhe
W.P. No. 21670/2013 (Jabalpur) decided on 15 April, 2015

YOGIRAJ SHARMA (DR.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Constitution - Article 226 - Departmental Enquiry - Judicial Review - Scope - **Court is not constituted as a Court of Appeal under Article 226 of Constitution - Court concerned to determine whether the enquiry is held by a competent authority and whether rules of Natural Justice are not violated - Whether there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that delinquent officer is guilty - High Court can not review the evidence and to arrive at an independent finding - If the decision of authority is vitiated by considerations extraneous to the evidence and merits case, or if conclusion made by authority, is wholly arbitrary or capricious and no reasonable person could have arrived at such a conclusion, only then interference is permissible. (Paras 10,11)**

क. संविधान – अनुच्छेद 226 – विभागीय जाँच – न्यायिक पुनर्विलोकन – विस्तार – संविधान के अनुच्छेद 226 के अंतर्गत, न्यायालय का गठन अपीलीय न्यायालय के रूप में नहीं किया गया है – न्यायालय यह निर्धारित करने से संबंधित है कि क्या जांच सक्षम प्राधिकारी द्वारा की गयी है तथा क्या प्राकृतिक न्याय के नियमों का उल्लंघन नहीं किया गया है – क्या ऐसा कोई साक्ष्य है, जो उस प्राधिकारी द्वारा स्वीकृत किया गया है जिसे जांच करने का कर्त्तव्य सौंपा गया है तथा जो साक्ष्य इस निष्कर्ष का युक्तियुक्त रूप से समर्थन करे कि अपचारी अधिकारी दोषी है – उच्च न्यायालय साक्ष्य का पुनर्विलोकन नहीं कर सकता और स्वतंत्र निष्कर्ष पर नहीं पहुँच सकता – यदि प्राधिकारी का निर्णय साक्ष्य तथा प्रकरण के गुणागुण से परे बाहरी कारणों से दूषित होता है, अथवा यदि प्राधिकारी द्वारा दिया गया निष्कर्ष, पूर्ण रूप से मनमाना अथवा अनुचित है तथा कोई भी युक्तियुक्त व्यक्ति इस तरह के निष्कर्ष पर नहीं पहुंच सकता है, केवल तब हस्तक्षेप अनुज्ञेय है।

B. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 14 & 15 - Procedure for imposing Penalties - **Charge sheet containing charges, statement of imputation of misconduct, list of documents and list of witnesses was supplied to petitioner - Petitioner**

was afforded an opportunity of inspection of documents - Supply of documents at the stage of written statement of defence is not required under Rule 14(4) - Petitioner never raised the plea of vagueness of charges in the departmental enquiry - Documents sought by petitioner were supplied to him - No question any prejudice on account of non-supply of documents arise - It is also clear from enquiry report that Enquiry Officer has assessed the evidence in respect of each article of charge and has recorded a finding after considering the defence of the petitioner - Departmental Enquiry has been conducted in accordance with Rules. (Paras 15 to 24)

ख. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14 व 15 – शास्तियां अधिरोपित करने की प्रक्रिया – आरोपों से युक्त आरोप–पत्र, कदाचार के आरोप का कथन, दस्तावेजों की सूची तथा साक्षियों की सूची याचिकाकर्ता को प्रदान की गई – याचिकाकर्ता को दस्तावेजों को निरीक्षण करने का अवसर प्रदान किया गया – नियम 14(4) के अंतर्गत प्रतिरक्षा के लिखित कथन के स्तर पर दस्तावेज प्रदान करना आवश्यक नहीं है – याचिकाकर्ता ने विभागीय जांच में कभी भी आरोपों की अस्पष्टता का अभिवाक नहीं किया है – याचिकाकर्ता द्वारा मांगे गये दस्तावेज उसे प्रदान किये गये – दस्तावेज की आपूर्ति न होने से किसी प्रकार के पूर्वाग्रह का कोई प्रश्न नहीं उठता – जांच प्रतिवेदन से यह भी स्पष्ट है कि जांचकर्ता अधिकारी ने आरोप के प्रत्येक बिंदु के संबंध में साक्ष्य का मूल्यांकन किया है तथा याचिकाकर्ता के बचाव को ध्यान में रखने के पश्चात् निष्कर्ष अभिलिखित किया है – विभागीय जांच नियमों के अनुसार संचालित की गई है।

C. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 14 & 15 - Non Supply of Enquiry Report **- Matter remitted back to the disciplinary authority from the stage of supply of enquiry report for proceeding further in accordance with Rules, 1966 - Disciplinary Authority while taking final decision in the matter shall also take a decision regarding entitlement of petitioner to consequential benefits if so - Writ petition disposed off. (Paras 24 & 25)**

ग. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14 व 15 – जांच–प्रतिवेदन की आपूर्ति न होना – नियम 1966 के अनुसार आगे की कार्यवाही करने हेतु जांच प्रतिवेदन की आपूर्ति के स्तर पर मामला अनुशासनात्मक प्राधिकारी को वापस प्रेषित किया गया – मामले में अंतिम निर्णय लेते समय अनुशासनात्मक प्राधिकारी इस संबंध में भी निर्णय लेगा कि याचिकाकर्ता पारिणामिक लाभ यदि कोई हो का हकदार है – रिट याचिका निराकृत की जाती है।

Cases referred :

2011 (3) MPLJ 317, (1986) 3 SCC 454, (2013) 6 SCC 515, (2011) 14 SCC 379, (2010) 2 SCC 772, AIR 1961 SC 1623, (1975) 1 SCC 155, (1967) 1 SLR 759, (2005) 1 LLN 242, (2009) 2 SCC 541, (1998) 7 SCC 569, (1993) Supp. 1 SCC 431, (2006) 7 SLR 849 (AP HC), (1994) 2 SCC 416, (2006) 5 SCC 88, (2009) 12 SCC 78, (2001) 1 SCC 65, (2010) 13 SCC 494, (2010) 11 SCC 278, (2010) 10 SCC 539, (2014) 7 SCC 340, (2013) 10 SCC 324, (2006) 7 SCC 558, (2011) 2 SCC 316, (1987) Suppl. SCC 518, (2006) 3 SCC 150, (2009) 10 SCC 32, 1999 SCC (L&S) 620, (2009) 8 SCC 310, (1997) 3 SCC 72, AIR 1963 SC 1723, (1995) 6 SCC 749, (2000) 1 SCC 416, (2012) 6 SCC 357, AIR 1994 SC 2166, (2013) 6 SCC 602, (1993) 4 SCC 723.

Siddharth Gupta, for the petitioner.
R.N. Singh with *Girish Kekre*, G.A. for the respondents.

ORDER

ALOK ARADHE, J. :- This writ petition has come up for adjudication afresh pursuant to an order of remand passed by the Division Bench in the background of facts which are stated infra.

2. The petitioner was promoted vide order dated 02.12.1998 to the post of Director, Public Health and Family Welfare, Government of Madhya Pradesh. By order dated 10.12.2007 the petitioner was compulsorily retired. The aforesaid order was subject matter of challenge in Writ Petition No.386/2008, which was allowed by order dated 14.11.2008. The order passed by learned Single Judge was upheld vide order dated 23.07.2009 passed by Division Bench in Writ Appeal No.134/2009 granting liberty to the respondents to proceed further against the petitioner in accordance with law. Thereafter, on 26.8.2009 a charge sheet was issued to the petitioner.

3. The Enquiry Officer after conducting enquiry submitted the report on 05.10.2012 to the Disciplinary Authority, which after taking into consideration the enquiry report, passed an order of dismissal of the petitioner from service on 02.4.2013. The petitioner filed W.P. No.7618/2013 against the said order which was withdrawn on 13.5.2013 with liberty to challenge the same in appeal before the Appellate Authority under Rule 23 of M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 (hereinafter referred to as

the "1966 Rules"). The appeal preferred by the petitioner was dismissed by the Appellate Authority vide order dated 23.11.2013.

4. The petitioner challenged the aforesaid order in the instant writ petition. The writ petition was disposed of by learned Single Judge vide order dated 18.11.2014 with the following directions:-

> "14. *In view of the findings recorded by this Court in the present case and in view of the law laid down by the Supreme Court in the case of B. Karunakar (supra) as well as keeping in mind the provisions of Rule 9(4) of the Civil Service Rules, the petition filed by the petitioner is allowed to the extent of setting aside the impugned order of punishment dated 2.4.2013 as well as the appellate order dated 23.11.2013 and the matter is remitted back to the disciplinary authority for proceeding further from the stage of furnishing of the enquiry report and thereafter strictly following the procedure prescribed by the provisions of the Civil Service Rules as well as by the Supreme Court in the cases of Managing Director ECIL, Hyderabad and others (supra) and R.P. Singh (supra) and the Government instructions issued from time to time in this regard including instructions regarding the steps to be taken after obtaining the opinion and advise of the Public Service Commission. It is further ordered that while the matter is remitted back for the aforesaid purpose, the petitioner would be reinstated in service and would be treated to have been placed under suspension from the date of the impugned order of dismissal. It is further ordered that the authority while taking a final decision in the matter shall also take a decision regarding the consequential benefits, if any, to which the petitioner would be entitled including payment of the period under suspension, backwages, etc. as held by the Supreme Court in the above cited cases.*
>
> *15. It is further made clear that this Court has not expressed any opinion on any of the other issues raised by the petitioner before this Court and, therefore, the*

petitioner would be liberty to take up all these issues before the authority as well as in any subsequent proceedings taken up by him. In other words, as I propose to set aside the impugned order only upon the grounds stated above, I do not think it necessary to advert to the other issues and grounds raised by the petitioner in the present petition which are left open to be decided at the appropriate stage."

5. Being aggrieved by order of learned Single Judge, the petitioner filed Writ Appeal No.884/2013. The Division Bench by order dated 05.1.2015 set aside the order dated 18.11.2014 passed by learned Single Judge and remitted the matter for fresh consideration. The relevant extract of the order reads as under:-

"Having perused the impugned judgment and the other record accompanying the memo of appeal and considering the arguments of both the sides, we are of the considered view that the learned single Judge has committed a manifest error in not dealing with the issue, which would go to the root of the matter. In other words, if the appellant was to succeed on the first contention that the entire enquiry is vitiated on account of the vagueness of the charges levelled against him, in which case, the question of ordering remand for further or fresh enquiry before the Disciplinary Authority would not arise. To buttress this argument, reliance has been placed on the two authorities of the Apex Court referred to above. If the main contention succeeds, the question of directing remand before the Authorities would not be necessary. In our opinion, the learned Single Judge ought to have dealt with this issue in the first place as it goes to the root of the matter and not merely confine the decision to one point as has been done.

We also find force in the argument of the appellant that the learned Single Judge ought to have addressed the other contention which was specifically raised during the arguments that non-supply of material documents has also vitiated the Departmental Enquiry. At the same time, we

may observe that the argument of the appellant that the Disciplinary Authority has overlooked the preliminary report and the favourable findings recorded therein which exonerates the appellant from the charges levelled, is a matter, which may not vitiate the entire disciplinary action as that error can always be corrected if and when occasion arises. In other words, that contention will not go to the root of the matter or entail in finding that the entire disciplinary action is vitiated.

Nevertheless, for the reasons already recorded, we deem it appropriate to set aside the judgment and order dated 18.11.2014 passed in WP No.21670/2013 and instead, relegate the parties before the learned single Judge for fresh consideration of the said writ petition on its own merits in accordance with law on all issues/grounds urged by the appellant except the opinion already recorded on the contention of the consequence of non-supply of the enquiry report and non-issuance of the show-cause notice."

6. Learned counsel for the petitioner submitted that charges levelled against the petitioner are vague, perfunctory and false in its contents. The necessary \documents, namely, record of Reproductive Child Health Care Society was never produced in the enquiry proceeding nor the same was supplied to the petitioner and in the absence of document the petitioner could not file his written statement of defence. It is further submitted that certain important witnesses, namely, P.L.Manglani and Joint Director, Dr.B.S.Chouhan were not examined as witnesses in the departmental eqnuiry (sic:enquiry) even though their names have been mentioned in the records of Departmental Enquiry as witnesses. It is also urged that Enquiry Officer has omitted to consider relevant material i.e. record of RCH Society. It is pointed out that the inquiry officer acts as a quasi judicial authority and is an independent adjudicator. However, the Enquiry Officer has sidelined the preliminary inquiry reports and should have summoned the records of Reproductive Child and Health Care Society. It is contended that there is no assessment of evidence of each article of charge and no separate finding has been recorded in respect of each article of charge by the Enquiry Officer, which amounts to violation of Rule 14(23) of 1966 Rules. It is further submitted that the incidence, manner and

nature of allegation ought to have been mentioned in the article of charges and since the departmental inquiry was based on documentary evidence, the same ought to have been supplied to the petitioner. It is also urged that there is no evidence to support the charges levelled against the petitioner and the defence of the petitioner has not been considered and the findings recorded by the inquiry officer are perverse.

7. It is argued that the ratio laid down by a Bench of this Court in case of *Swami Prasad Yadav Vs. State of M.P. And Others* 2011 (3) MPLJ 317 has not been followed by the Enquiry Officer and the copy of the inquiry report has not been supplied to the petitioner. Lastly it is urged that the order passed by the Division Bench is an open remand and right to obtain the documents in the departmental inquiry is co-related with Article 311(2) of Constitution of India. In support of aforesaid submissions reliance has been placed on the decisions in the cases of *Savai Singh Vs. State of Rajasthan,*(1986) 3 SCC 454, *Anant R.Kulkarni Vs. Y.P.Education Society and others,* (2013) 6 SCC 515, *Anil Glorkar Vs. Bilaspur Raipur Kshetriya Gramin Bank and others,* (2011) 14 SCC 379, *State of U.P.Vs. Saroj Kumar Sinha,* (2010) 2 SCC 772, *State of M.P.Vs. Chintaman Sadashiv Vishampayan,* AIR 1961 SC 1623, *State of Punjab Vs. Bhagat Ram,* (1975) 1 SCC 155, *Trilok Nath Vs. UOI & others,* (1967) 1 SLR 759, *Venkatesh Guru Rao Vs. Syndicate Bank* (KAR HC), (2005) 1 LLN 242, *UOI Vs. Prakash Kumar Tandon,* (2009) 2 SCC 541, *UOI Vs. Dinanath S.Karekar,* (1998) 7 SCC 569, *R.K.Vashishth Vs. UOI and others,* (1993) Supp.1 SCC 431, PCCF, *AP Hyderabad Vs. T.Bhaskar Rao,*(2006) 7 SLR 849(AP HC), *Dr.Ramesh Chandra Tyagi Vs. UOI and others,* (1994) 2 SCC 416, *M.V.Bijlani Vs. UOI & others,* (2006) 5 SCC 88, *Swami Prasad Yadav (supra), UOI Vs. Gyanchand Chattar,* (2009) 12 SCC 78, *UOI Vs. K.A.Kittu and others,* (2001)1 SCC 65, *PNB Vs. K.K.Verma,* (2010) 13 SCC 494, *Indu Bhushan Dwivedi Vs. State of Jharkhand and others,* (2010)11 SCC 278, *Mohd. Yunus Khan Vs. State of U.P and others,* (2010) 10 SCC 539, *UOI & others Vs. R.P.Singh,* (2014) 7 SCC 340, *Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya & others,* (2013) 10 SCC 324.

8. On the other hand, learned senior counsel for the respondents while inviting the attention of this Couirt (sic:Court). to the prayer clause of writ petition has submitted that petitioner has not sought the relief of quashment of

charge-sheet and enquiry report. It is further submitted that Rule 14(4) of 1966 Rules only requires the list of documents to be supplied. The petitioner has never raised any objection in the departmental enquiry that the charges levelled against him are vague. For the first time in the writ petition the issue with regard to vagueness of charges has been raised. It is further submitted that no ground was taken in the reply filed before the Enquiry Officer that charges levelled against the petitioner are vague and the petitioner participated in departmental enquiry. Therefore, the petitioner is estopped from raising such an issue. While referring to the charge-sheet dated 26.8.2009, it was pointed out that liberty of inspection of document was provided to the petitioner. However, he did not avail the same. It is further submitted that if the Department had not examined two important witnesses, namely, P.L.Manglani and Dr.B.S.Chouhan, the petitoner (sic:petitioner) could have examined them as defence witnesses. It is also submitted that petitioner never demanded the records of RCH society and since the Enquiry Officer has not placed reliance on the preliminary enquiry reports and the records of RCH society, therefore, it was not necessary to supply the same. it was pointed that all the documents sought for by the petitioner were supplied to him. It is also submitted that in view of order passed by Division Bench the order of remand is a limited remand, and the charges are specific, definite and clear and, therefore no prejudice was caused to the petitioner by alleged non-supply of documents. Lastly, it is submitted that power of judicial review is not directed against the decision but is confined to the decision making process and the Court does not sit in appeal over the merits of decision and it is not open to re-appreciate and re-appraise the evidence led before the Enquiry Officer and to examine the finding recorded by the Enquiry Officer as a court of appeal. In support of his submissions the learned senior counsel has placed reliance on the decisions in *Om Prakash Mann vs. Director of Education (Basic) & others,* (2006) 7 SCC 558, *Anant Kulkarni (supra), S.B.I. Vs. Bidyut Kumar Mitra and others,* (2011) 2 SCC 316, *Chandrama Tewari vs. Union of India,* (1987) Suppl. SCC 518, *Syndicate Bank and others vs. Ventakesh Gururao Kurati,* (2006) 3 SCC 150, *Biecco Lawrie vs. State of West Bengal,* (2009) 10 SCC 32, *Food Corporation of India vs. Padmakumar Bhuvan,* 1999 SCC (L&S) 620, *State of U.P. Vs. Man Mohan Nath Sinha and another;* (2009) 8 SCC 310, and *I.O.C. Ltd. and another vs. Ashok Kumar Arora,* (1997) 3 SCC 72.

9. In view of submissions made on both sides, following issues emerge for consideration in this writ petition:-

(a) Whether the order passed by the Division Bench is an order of open remand or limited remand?

(b) Whether the petitioner could not file his written statement of defence, in the absence of documents, which tantamounts to violation of Rule 14(4) of 1966 Rules?

(c) Whether the charges levelled against the petitioner are vague, perfunctory and false in its contents?

(d) Whether the petitioner has suffered any prejudice on account of non-supply of documents in the departmental enquiry proceeding ?

(e) Whether the petitioner has suffered any prejudice on account of non-production of records and non-supply of documents of RCH Society to him which amounts to violation of Rule 14(15) of 1966 Rules ?

(f) Whether the petitioner has suffered prejudice in the departmental enquiry proceeding on account of non- examination of witnesses, namely, P.L. Manglani and Dr. B. S. Chouhan ?

(g) Whether the Enquiry Officer omitted to consider the relevant material i.e. the record of RCH Society and has rightly sidelined three preliminary enquiry reports?

(h) Whether the Enquiry Officer has assessed the evidence in respect of each article of charge and has recorded finding on each article of charge and the reasons therefor in the enquiry report?

(i) Whether there is no evidence in the enquiry to sustain the charges against the petitioner and the defence of the petitioenr (sic:petitioner) has not been considered by the EnquiryOfficer in the enquiry report.

10. Before proceeding to deal with the issues involved in this writ petition, it is apposite to bear in mind the scope of judicial review with regard to interference with the decision of departmental authorities. In *State of A.P v. Sree Rama Rao,* AIR 1963 SC 1723 it has been held that High Court is not constitued in a proceeding under Article 226 of the Constitution as a court of appeal over the decision of the authorities holding a departmental enquiry

against a public servant. It is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Whether there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence. The aforesaid view has been reiterated by the Supreme Court in the case of *B.C.Chaturvedi vs. Union of India,* (1995) 6 SCC 749.

11. It is equally settled in law that interference with the decision of departmental authorities can be permitted, while exercising jurisdiction under Article 226 of the Constitution, if the decision of the authority is vitiated by considerations extraneous to the evidence and merits of the case, or if the conclusion made by the authority, on the very face of it, is wholly arbitrary or capricious and no reasonable person could have arrived at such a conclusion, or grounds very similar to the above. The Disciplinary Authority is the sole judge of the facts, if the enquiry has been properly conducted. The settled legal position is that if there is some legal evidence on which the findings can be based, then adequacy or even reliability of that evidence is not a matter for canvassing before the High Court in a writ petition filed under Article 226 of the Constitution. [See: *High Court of Judicature at Bombay vs. Shahsikant S. Patil and another;* (2000) 1 SCC 416]. Simialr view has been taken in *Registrar General, High Court of Patna vs. Pandey Gajendra Prasad and others,* (2012) 6 SCC 357.

12. In the case of *Krishan Yadav vs. State of Haryana*, AIR 1994 SC 2166 it has been held that there may be a case where the holders of public offices have forgotten that the offices entrusted to them are a sacred trust and such offices are meant for use and not abuse. Where such trustee turn to dishonest means to gain an undue advantage, the scope of judicial review attains paramount importance. It has further been held that the Court must bear in mind that judical (sic:judicial) review is not akin to adjudication on merit by reappreciating the evidence as an appellate authority. Thus, the Court is devoid of the power to re-appreciate the evidence and come to its own conclusion on the proof of a particular charge, as the scope of judicial review is limited to the process of making the decision and not against the decision

itself [See: *S.R. Tewari vs. Union of India,* (2013) 6 SCC 602].

13. Bearing in mind the aforesaid well settled legal propositions with regard to scope of judicial review in respect of interference with the decisions of departmental authorities, the issues in the writ petition are being dealt with *ad-seriatim.*

14. **Issue No.(a):**

The learned Single Judge in view of law laid down by the Supreme Court in the case of *Managing Director, ECIL, Hyderabad and others vs. B.Karunakar,* (1993) 4 SCC 723 had quashed and set aside the impugned order of punishment dated 02.4.2013 as well as the order dated 23.11.2013 passed by the Appellate Authority and had remitted the matter to the disciplinary authority for proceeding further from the stage of furnishing enquiry report and thereafter to proceed with the departmental enquiry against the petitioner in accordance with the procedure prescribed, in the 1966 Rules. The petitioner was directed to be reinstated in service and was treated to have been placed under suspension from the date of impugned order of dismissal. It was further directed that the Disciplinary Authority while taking final decision in the matter shall take a decision with regard to consequential benefits, if any, to which the petitioner would be entitled including the payment of period under suspension, backwages, etc. Being aggrieved, the petitioner preferred the writ appeal, namely, W.A.No.884/2014 by which the Division Bench remitted the matter for fresh consideration of writ petition on its own merits in accordance with law on all issues/grounds urged by the petitioner except the opinion already recorded on the contention of consequence of non-supply of the enquiry report and non-issuance of the show-cause notice. Thus, all the issues which have been raised by the petitioner except the issue relating to consequence of non-supply of enquiry report and non-issuance of show-cause notice, have to be dealt with in this writ petition. Thus, the first issue is answered by stating that it is permissible for the petitioner to raise all issues in the writ petition except the issues relating to consequence of non-supply of enquiry report and non-issuance of show-cause notice as the finding in this regard has already been upheld in favour of the petitioner by the Division Bench.

15. **Issue no. (b):**

Rule 14(4) and Rule 14(5)(a) & (b) of 1966 Rules, which have bearing

on the second issue, read as under:

"14. ***Procedure for imposing penalties.***

(4) The Disciplinary authority shall deliver or cause to be delivered to the Government servant a copy of the article of charge, the statement of the imputations of misconduct or misbehaviour and a list of documents and witnesses by which article of charge is propsoed (sic:proposed) to be sustained and shall require the Government Servant to submit, within such time as may be specified, a written statement of his defence and to state whether he desires to be heard in person.

5(a) On receipt of the written statement of defence, the discipilnary authority may itself inquire into such of the article (sic;articles) of charge as are not admitted or, if it considers it necessary so to do, appoint, under sub-rule (2), an inquiring authority for the purposes; (sic:purpose;) and where all the articles of charges have been admitted by the Government servant in his written statement of the defence the disciplinary authority shall record its finding on each charge after taking such eviedence (sic:evidence) as it may think fit and shall act in the manner laid down in rule 15.

(b) If no written statement of defence is submitted by the Government servant, the disciplinary authority may itself inquire into the articles of charge or may, if it considers it necessary to do so, appoint, under sub-rule (2), an inquiring authority for the purpose."

16. From perusal of Rule 14(4) of 1966 Rules it is evident that Disciplinary Authority is under an obligation to supply article of charge, statement of imputations of misconduct or misbehaviour and a list of documents and witnesses by which article of charge is proposed to be sustained and shall require the Government servant to submit, within such time, as may be specified, written statement of his defence and to state whether he is desires to be heard in person. It is noteworthy to state that there is no requirement in

the Rules for supply of documents at the stage of filing of written statement of defence. Rule 14(5)(b) provides for consequence of not filing written statement of defence. In such a case, the disciplinary authority may itself inquire into the article of charges or may, if it considers it necessary to do so, appoint, under sub-rule (2) an inquiring authority for the purpose.

17. In the instant case, by communication dated 26.8.2009 the petitioner was asked to submit written statement of defence within a period of 15 days and was directed to apprise the following:

(i) Whether the petitioner requires personal hearing?

(ii) Whether the petitioner wants to file any document or witness in his defence and the details of the record and witness which the petitioner wants to produce in his defence;

(iii) The petitioner was also asked to contact within a period of ten days in the office of Family Welfare & Health Department (Medical Branch I) to examine the documents alongwith the list of documents.

(iv) The petitioner was apprised that in case the written statement of defence was not filed within a period of 15 days, ex parte proceeding shall be taken against him.

18. Alongwith the aforesaid communication, the charge-sheet containing the charges, statement of imputation of misconduct, list of documents and list of witnesses were also sent to the petitioner, which was received by him on 20.09.2009. The list of witnesses contained the names of following four officers:

(a) Dr. P.N.S.Chouhan, Divisional Joint Director, Rewa Division, Rewa

(b) Rakesh Munshi, Joint Director (Planning & Management), Directorate, Health Services, Bhopal

(c) O.P.Garg, Retired Assistant Engineer (Transport), Directorate, Health Services, Bhopal

(d) V.K.Gupta, Assistant Grade-II, Directorate, Health Services, Bhopal.

The petitioner on receipt of aforesaid communication did not submit his written statement of defence. As per the version of the petitioner, he had submitted communication dated 30.9.2009, by which, he had demanded certain documents. However, it is pertinent to mention that aforesaid document is not

available in the record of the departmental enquiry proceeding which has been produced before this Court. The aforesaid document also does not bear any acknowledgement to show that it was received by the authority to whom it was addressed. Besides that, as stated supra, the supply of documents at the stage of written statement of defence is not required under Rule 14(4) of the 1966 Rules. The petitioner was afforded an opportunity of inspection of the documents. However, the petitioner even failed to avail of aforesaid opportunity. Therefore, the contention of the petitioner that petitioner was unable to file his written statment of defence in the absence of documents and the same tantamounts to violation of Rule 14(4) of the 1966 Rules does not deserve acceptance. Accordingly, the issue No.(b) is answered in negative.

19. **Issue No. (c):**

The proceeding in the departmental enquiry was commenced against the petitioner on 19.3.2010. The petitioner participated in the proceeding of departmental enquiry and submitted his written brief on 07.9.2012. Thus, the departmental enquiry was conducted against the petitioner in a span of about two and half years. The petitioner participated in proceeding of departmental enquiry without any demur and did not raise any objection at any stage of proceeding in the departmental enquiry that the charges levelled against him are vague. Even in written brief, which was submitted by the petitioner on 07.9.2012 before the Enquiry Officer, no such objection has been taken that the charges levelled against the petitioner are vague and perfunctory and, therefore, he was unable to submit effective reply to the charges. The petitioner is, thus, estopped from raising any issue with regard to vagueness of charges. [See: *Om Prakash Mann* (supra)].

Even otherwise, from perusal of article of charges and the statement of imputation of misconduct, which are reproduced below for the facility of reference, by no stretch of imagination, can be said that the same are vague or perfunctory.

:: *आरोप–पत्र* ::

डॉ. योगीराज शर्मा (निलंबित) तत्कालीन संचालक लोग स्वास्थ्य एवं परिवार कल्याण म.प्र. भोपाल विरूद्ध सिविल सेवा नियम (वर्गीकरण, नियंत्रण एवं अपली नियम–1966 के नियम– 14(3) के अंतर्गत निम्न आरोप अधिरोपित किये जाते हैं :–

" आरोप क्रमांक–01

यह कि आपने स्वास्थ्य एवं परिवार कल्याण मंत्रालय भारत शासन द्वारा परिवार कल्याण कार्यक्रम के अंतर्गत प्रदाय मटीज वाहन को योजनाबद्ध तरीके से एवं साजिशपूर्वक तरीके से प्राइवेट रजिस्ट्रेशन कराकर उक्त मटीज वाहन आपके द्वारा हड़प लिया गया था।

आरोप क्रमांक–02

यह कि आपने आर.टी..ओ. भोपाल को गुमराह कर गलत जानकारी के आधार पर मटीज वाहन का रजिस्ट्रेशन प्राइवेट नम्बर एम.पी. 04–एच.ए. 4684 कराया गया एवं इस हेतु शुल्क का भुगतान भी व्यक्तिगत रूप से किया गया।

आरोप क्रमांक –03

आपके द्वारा उपरोक्त वाहन का प्रायवेट नंबर से रजिस्ट्रेशन कराने के पश्चात् यह तथ्य सार्वजनिक होने पर आपने शासकीय अभिलेखों में हेराफेरी कर कूट अभिलेख तैयार किये गये ।"

:: अभिकथन–पत्रक ::

आरोप क्रमांक 01 के लिये :–

स्वास्थ्य एवं परिवार कल्याण मंत्रालय, भारत शासन द्वारा परिवार कल्याण कार्यक्रम के अंर्तगत मई 2002 में एक मटीज कार प्रदाय की गई थीं । आपने आर.टी.ओ. भोपाल को अपने पत्र क्र. स्टेनो–डी.पी.एच./2002/भोपाल, दिनांक 07.05.2002 मे भारत शासन से एक कार आर.सी.एच. प्रोजेक्ट से वाहन करना बताते हुए, वाहन का रजिस्ट्रेशन प्रायवेट नंबर से करने का अनुरोध किया था। आप इस तथ्य से भलीभांती अवगत थे कि शासकीय वाहन का रजिस्ट्रेशन नियमानुसार प्राइवेट नंबर मे नही कराया जा सकता हैं। इस प्रकार आपने आर.टी.ओ. भोपाल को गलत जानकारी देकर गुमराह करते हुए, वाहन का रजिस्ट्रेशन प्रायवेट नम्बर से कराया।

विभाग में भारत शासन से प्राप्त होने वाले शासकीय वाहनो के रजिस्ट्रेशन का कार्य परिवहन शाखा के सहायक यंत्री द्वारा कराया जाता था। किन्तु इस वाहन का रजिस्ट्रेशन आपके द्वारा व्यक्तिगत रूप से कराया गया एवं विभाग को इसकी कोई जानकारी भी नही दी गई। भारत शासन से परिवार कल्याण कार्यक्रम के अंर्तगत प्राप्त वाहनों को संचालनालय, स्वास्थ्य सेवाए की परिवहन शाखा में संधारित वाहन स्टॉक रजिस्टर में दर्ज किया जाता है जिसमे वाहन के इंजन नम्बर, चेसिस नम्बर, रजिस्ट्रेशन नम्बर, क्रय आदेश नम्बर एवं दिनांक का उल्लेख किया जाता है तथा इसका प्रमाणिकरण परिवहन शाखा के

प्रभारी अधिकारी द्वारा किया जाता है। उक्त स्टॉक रजिस्ट्रेशन में भारत शासन से परिवार कल्याण कार्यक्रम के अंर्तगत प्राप्त लगभग 500 वाहनों कि प्रविष्टी है, किन्तु उक्त मटीज वाहन नम्बर एम.पी.–04–एच.ए.–4684 की एंटी आपके द्वारा नही करायी गयीं।

आपके द्वारा आर.टी.ओ. भोपाल को प्रेषित पत्र को परिवहन शाखा से जारी नहीं कराते हुए अपनी निज साधना से जारी कराया एवं इसकी कार्यालयीन प्रति भी परिवहन शाखा को उपलब्ध नही कराना यह दर्शाता है कि आपने सुनियोजित तरीके से उक्त वाहन को हडपने की नीयत से वाहन का रजिस्ट्रेशन प्रायवेट नम्बर से कराया एवं शासन को धोखाधडी कर आर्थिक हानि पहुचाई।

आरोप क्रमांक–02 के लिये :–

इस संबंध में प्रमुख सचिव, म.प्र. शासन, परिवहन विभाग के पत्र दिनांक 24.03.07 में भी उनके द्वारा उक्त वाहन का रजिस्ट्रेशन प्रायवेट नंबर से कराने को अनियमित माना है । क्यों कि शासन के नियमानुसार शासकीय वाहन का रजिस्ट्रेशन एम.पी.–02 सीरीज में ही कराया जाना चाहिए । एम. पी.–02 सीरीज से शासकीय वाहन का रजिस्ट्रेशन कराने पर रजिस्ट्रेशन शुल्क एवं जीवनकाल रोड टैक्स आदि देय नही होता है। किंतु इसके बावजुद आपने उक्त मटीज वाहन का रजिस्ट्रेशन व्यक्तिगत रूप से प्रायवेट वाहन के रूप में रजिस्ट्रेशन नंबर एम.पी.–047एच.ए.4664 से दिनांक 06.0602 को आर.टी. ओ. भोपाल से कराया इस हेतु आपके द्वारा रजिस्ट्रेशन शुल्क एवं जीवनकाल रोड टैक्स आदि के लिये रूपये 14,706/– का भुगतान भी व्यक्तिगत रूप से वहन किया गया ।

आरोप क्रमांक–03 के लिये :–

आपके द्वारा उक्त शासकीय कार एम.पी.–04 एच.ए.4684 हडपने के संबंध में राज्य आर्थिक अपराध अन्वेषण ब्यूरो,लोकायुक्त संगठन एवं विभाग को शिकायते प्राप्त होने एवं इस संबंध में समाचार पत्रों में खबरें प्रकाशित होने से यह मामला सार्वजनिक हो गया। इस संबंध में म.प्र. विधान सभा में माननीय विधायको के द्वारा प्रश्न भी पूछे गये थे।

इस मामले से संबंधित विधान सभा तारांकित प्रश्न कमांक 562 (दिनांक 21.2.07) का जवाब आपके अनुमोदन से दिनांक 11.02.07 को मंत्रालय को प्रेषित किया गया था जिसमें उक्त वाहन को परिवार कल्याण कार्यकम के तहत प्राप्त होना बताया है तथा इसका रजिस्ट्रेशन प्रायवेट नंबर से संचालक लोक स्वास्थ एवं परिवार कल्याण के कराये जाने का उल्लेख किया है। इसी जवाब में वाहन के रजिस्ट्रेशन पर कुल रूपये 14,706/– व्यय

होने तथा उक्त व्यय श्री पी.एल.मंगलानी के द्वारा वहन किये जाने का भी उल्लेख किया गया है। इसके अतिरिक्त उक्त मटीज वाहन संभागीय संयुक्त संचालक, भोपाल को आबंटित होना भी बतायां है। इस प्रकार इस मामले में आपने अपने द्वारा की गई धोखधड़ी एवं आपराधिक कृत्य को छिपाने के लिये विभागीय अभिलेखों में हेरा–फेरी की एवं सदन को गुमराह करने का प्रयास कर सदन की अवमानना भी की है।

उपरोक्त उल्लेखित दिनांक 11.02.07 के पत्र में आपने वाहन के प्रायवेट रजिस्ट्रेशन पर हुए रूपये 14,706/– का भुगतान श्री पी.एल. मंगलानी के द्वारा किया जाना बताया। श्री मंगलानी आपके स्टेनो दिनांक 31.01.07 को सेवा हो चुके है इसके बाद आपने श्री मंगलानी को विभाग के तहत एक प्रोजेक्ट में कम्प्यूटर.ऑपरेटर के पद पर संविदा नियुक्ति का प्रलोभन देकर उनसे यह आवेदन प्राप्त किया की जून 2002 में उक्त मटीज वाहन के रजिस्ट्रेशन हेतु रूपये 14,706 का भुगतान उनके द्वारा किया गया था तथा इसकी रशीद गुम हो गई थी जो उन्हें उनकी सेवानिवृत्त के बाद मिल गई है। अतः उन्हे उक्त राशि का भुगतान कर दिया जाये। इसके बाद आपने दिनांक 26.03.07 को राज्य आर.सी.एच. सोसाइटी से इसका भुगतान कर आपने इस कृत्य को दबाने के लिये कूट अभिलेख तैयार करें।

आपके आदेश क. प.क./2002/111 दिनांक 21.02.2002 के द्वारा उक्त मटीज कार एम.पी.04–4684 का आबंटन संयुक्त संचालक स्वास्थ्य सेवायें भोपाल संभाग को किया गया है यह उल्लेखनीय है कि उक्त वाहन का रजिस्ट्रेशन आर.टी.ओ. भोपाल द्वारा दिनांक 06.06.02 को किया गया है। इसके अलावा उक्त आदेश विभाग की परिवार कल्याण शाखा से जारी किया गया है, जबकि वाहन आबंटन के आदेश विभाग की परिवाहन शाखा से जारी किये जाते है। आपके द्वारा जारी उक्त वाहन आबंटन आदेश की प्रति सूचना के अधिकार कानून के तहत संभागीय संयुक्त संचालक कार्यालय से जारी की गई है। आपको इस गलती का एहसास होने पर पुनः आपने उक्त वाहन का आबंटन आदेश कमांक <u>प.क्र.2002/398,</u> दिनांक 01–07–2002 के द्वारा संभागीय संयुक्त संचालक भोपाल संभाग को करने संबंधी फर्जी आदेश जारी करना बताया। यह आपके द्वारा शासकीय वाहन को हड़पने के कृत्य को छिपाने के लिये कूट अभिलेख तैयार करने एवं विभागीय अभिलेखों में हेरा–फेरी करना प्रमाणित करता है।

भारत शासन से परिवार कल्याण के तहत प्राप्त वाहन की प्रविष्टी विभाग के परिवाहन शाखा से संधारित वाहन स्टॉक रजिस्टर में शाखा के संबंधित अधिकारी के द्वारा की जाती है किंतु आपके द्वारा उक्त मटीज वाहन को हडपने का मामला सार्वजनिक होने पर आपने उक्त वाहन की प्रविष्टी

पिछली तिथि में किया गया एवं आपके द्वारा ही इसे प्रमाणित किया गया।

आपने उप सचिव, स्वास्थ्य विभाग को लिखे अपने पत्र कमांक स्टेनो/सं.लो.स्वा/07/371/ दिनांक 23.03.2007 में उक्त वाहन संभागीय संयुक्त संचालक भोपाल को आबंटित होना तथा वाहन का उपयोग प्राप्ति समय से ही शासकीय कार्य में होना बताया है। जबकि संभागीय संयुक्त संचालक के पत्र क.सभाग/स्टोर/वाहन/07/5590, दिनांक 09.10.2007 पत्र क सभाग/ वाहन/08/1632, दिनांक 05.03.2008 एवं पत्र कमांक संभाग/वाहन/1681 दिनांक 10–03–2008 में उक्त मटीज वाहन एम.पी. 04–एच.ए.– 4684 उनके कार्यालय में कभी प्राप्त होना नहीं बताया हैं।

आपने अपने पत्र कमांक स्थोर/2006–07/85, दिनांक 16–01–2007 एवं पत्र कमांक 3/प.क./लेखा/2007/90 एवं दिनांक 21–06–2007 के द्वारा रूपये 25380/– के वाहन कमांक एम.पी. 04–एच.ए.4684 पर हुए पी. ओ.एल. के व्यय के अनियमित भुगतान हेतु डॉ. बी.एन.चौहान, तत्कालीन संयुक्त संचालक भोपाल संभाग पर अपने पद एवं प्रभार का उपयोग कर अनैतिक दबाव डाला एवं उक्त भुगतान कराया है उक्त मटीज वाहन का उपयोग प्राप्ति से 20.092007 तक आपके द्वारा नियम विरूध्द तरीके से किया गया तथा इस अवधि का लॉगबुक भी संधारित नहीं की गई।

इस प्रकार आप अपने पदीय दायित्वों के निर्वहन में असफल रहें हैं। उक्त कृत्य कर आपने मध्यप्रदेश सिविल सेवा आचरण नियम, 1965 के नियम–3 के उप नियम एक के खण्ड (i)(ii) का उल्लंघन कर स्वयं को अनुशासनात्मक कार्यवाही का भागी बना लिया है।"

For the aforesaid reasons, the decisions relied upon by the petitioner in the cases of *Savai Singh* (supra)., *Anant R. Kulkarni* (supra), *Anil Golkar* (supra) and *Gyanchand Chhatar* (supra) have no application to the obtaining factual matrix of the case. Therefore, this issue is also answered in negative.

20. **Issue No.(d):**

The proceeding of the departmental enquiry shows that on 05.5.2010 the petitioner demanded copies of documents as per list and the proceeding was adjourned to 24.5.2010. On 24.5.2010, on account of absence of the petitioner the proceeding was adjourned to 08.7.2010. On 08.7.2010, it was recorded by Enquiry Officer that petitioner did not file his written statement of defence and, therefore, the proceeding was fixed for recording of evidence of departmental witnesses. On 07.2.2011, the Presenting Officer produced certain documents before the Enquiry Officer and the case was adjourned to

07.4.2011. The order-sheet recorded by the Enquiry Officer on 07.4.2011 reads as under:

"7/4/2011

प्रस्तुतकर्ता अधिकारी डॉ. ए.एन. मित्तल उपस्थित।

अपचारी अधिकारी डॉ. योगीराज शर्मा उपस्थित।

अपचारी अधिकारी द्वारा प्रस्तुत आवेदन पत्र सुना गया प्रस्तुतकर्ता अधिकारी ने व्यक्त किया कि अपचारी अधिकारी द्वारा बचाव में चाहे गये दस्तावेजों मे से अधिकांश दस्तावेज उन्हें उपलब्ध करा दिये गये है। प्रस्तुतकर्ता अधिकारी को निर्देशित किया गया कि वे उपलब्ध करायें गये दस्तावेजों की सूची प्रस्तुत करें परंतु उनके द्वारा ऐसी कोई सूची प्रस्तुत नही की गयी।

अपचारी अधिकारी ने एक आवेदन इस आशय का प्रस्तुत किया है कि उन्हें विषयांकित प्रकरण मे बचाव मे चाहे गये दस्तावेज प्राप्त नही हुए है आवेदन के साथ उन्होंने चाहे गये दस्तावेजों की सूची संलग्न की है। आवेदन पत्र की एक प्रति उन्होंने सीधे प्रस्तुतकर्ता अधिकारी को सोपी है तथा एक प्रति इस कार्यालय को उपलब्ध कराइ हैं।

अपचारी अधिकारी ने एक अन्य आवेदन इस आशय का प्रस्तुत किया है कि वे श्री डी.एस. निमारे सेवानिवृत्त उपसंचालक वित्त विभाग को अपना बचाव सहायक नियुक्त करना चाहते है अतः अनुमति प्रदान करने का कष्ट करें।

प्रस्तुतकर्ता अधिकारी बचाव मे चाहे गये दस्तावेज आगामी दिनांक को प्रस्तुत करें ।

श्री निमारे को अपचारी अधिकारी डॉ. योगीराज शर्मा के बचाव सहायक के रूप मे कार्य करने की अनुमति प्रदान की जाती है।

प्रकरण वास्ते बचाव दस्तावेज हेतु दिनांक 10.5.11

Thus, the aforsaid order-sheet is signed by the petitioner. It is evident that most of the documents were made available to the petitioner on 07.4.2011. Thereafter, on 27.6.2011 on the request made by the petitioner to produce the documents in his defence. The proceeding was adjourned to 04.8.2011. The order-sheet dated 27.06.2011 reads as under :-

"27/6/2011

प्रस्तुतकर्ता अधिकारी डॉ. ए.एन. मित्तल उपस्थित।

अपचारी अधिकारी डॉ. योगीराज शर्मा बचाव सहायक उपस्थित।

प्रस्तुतकर्ता अधिकारी ने बचाव दस्तावेज प्रस्तुत करने हेतु समय चाहा है। अतः प्रस्तुतकर्ता अधिकारी ने अनुरोध पर उन्हें उक्त दस्तावेज पेश करने हेतु समय दिया गया है।

प्रकरण वास्ते बचाव दस्तावेज हेतु दिनांक 4/8/11

The order-sheet recorded by the Enquiry Officar on 26.09.2011 reads as under :-

"26/9/2011

प्रस्तुतकर्ता अधिकारी डॉ. ए.एन. मित्तल उपस्थित।

अपचारी अधिकारी डॉ. योगीराज शर्मा बचाव सहायक संहित उपस्थित।

प्रकरण में अपचारी अधिकारी को बचाव हेतु पूर्ण दस्तावेज प्राप्त हो गये है अतः प्रकरण अब विभागीय साक्ष्य हेतु नियत किया जाता है

प्रस्तुतकर्ता अधिकारी को निर्देशित किया जाता है कि वे आगामी तिथि पर सभी साक्षियों को प्रस्तुत करें।

प्रकरण वास्ते साक्ष्य दस्तावेज हेतु दिनांक 27/12/2011

It is pertinent to mention here that petitioner has signed the order-sheet. Thus, it is evident that all documents including the documents which the petitioner wanted to produce in his evidence were supplied to him and the case was fixed for recording of statement of departmental witnesses. On 27.12.2011, the petitioner was present alongwith his Defence Assistant to cross examine the departmental witnesses. The order-sheet dated 27.12.2011 reads as under :-

"27.12.2011

प्रस्तुतकर्ता अधिकारी डॉ. ए.एन. मित्तल उपस्थित।

अपचारी अधिकारी डॉ. योगीराज शर्मा बचाव सहायक सहित उपस्थित।

प्रस्तुतकर्ता अधिकारी ने आज विभागीय साक्षी श्री राकेश मुंशी, श्री ओमप्रकाश मर्ग एवं श्री व्ही.के. गुप्ता का परीक्षण किया। प्रतिपरीक्षण उपरांत इन साक्षियों को उन्मुक्त किया जाता गया।

प्रस्तुतकर्ता अधिकारी को निर्देशित किया जाता है कि वे आगामी तिथि पर शेष साक्षियों को प्रस्तुत करें।

प्रकरण वास्ते साक्ष्य हेतु दिनांक 27/03/2011

On 24.7.2012 the witness, namely, Dr. P.N.S. Chouhan was cross-examined on behalf of the petitioner. The order-sheet dated 24.7.2012 reads as under :-

"24.7.2012:

प्रस्तुतकर्ता अधिकारी सुश्री शैलबाला मार्टिन उपस्थित।

अपचारी अधिकारी डॉ. योगीराज शर्मा बचाव सहायक उपस्थित।

प्रस्तुतकर्ता अधिकारी को आज विभागीय साक्षी डॉ. पी.एन. एस. चौहान का परीक्षण किया। प्रतिपरीक्षण उपरांत इस साक्षी को उन्मुक्त किया गया।

प्रस्तुतकर्ता अधिकारी ने अपनी ओर से अपना मामला बंद किया।

प्रकरण वास्ते प्रश्नोत्तर दिनांक 6/8/2012

On 06.8.2012, the petitioner was examined and he closed his evidence. Thereafter, the case was fixed for 23.8.2012 for filing of written brief. The petitioner filed his written brief on 07.9.2012. Thus, from perusal of order-sheets of the departmental enquiry proceeding, it is evident that the entire documents sought for by the petitioner were supplied to him. Therefore the question of any prejudice on account of non-supply of documents does not arise. The decisions relied by the petitioner in the cases of *State of Punjab* (supra), *Triloknath* (supra), *Venkatesh Guru Rao* (supra) and *Dinanath* (supra) are of no assistance in the facts of the present case. Accordingly, this issue is also answered in negative.

21. **Issues No.(e) & (f):**

From perusal of order-sheet dated 26.9.2011, it is evident that all the documents sought for by the petitioner in his defence were supplied to him. In any case, the petitioner was at liberty to summon the documents of RCH Society. Similarly, the petitioner could have examined witnesses, namley, P.L.Manglani and Dr.B.S.Chouhan as defence witnesses and, therefore, in the facts and circumstances of the case no prejudice, whatsoever, has been caused to the petitioner. Since the petitioner had not made any application for summoning the aforesaid witnesses, therefore, reliance placed on the decision in the case of *Prakash Kumar Tandon* (supra) is misconceived. Rule 14(15)

of the Rules reads as under :-

"14(15). If it shall appear necessary before the close of the case on behalf of the disciplinary authority, the inquiring authority may, in its discretion, allow the Presenting Officer, to produce evidence not included in the list given to the Government servant or may itself call for new evidence or recall and re-examine any witness and in such case the Government servant shall be entitled to have if he demands it, a copy of the list of further evidence proposed to e (sic:be) produced and an adjournment of the inquiry for three clear days before the production of such new evidence, exclusive of the day of adjournment and the day to which the enquiry is adjourned. The inquiring authority shall give the Government servant an opportunity of inspecting such documents before they are taken on the record. The inquiring authoity (sic:authority) may also allow the Government servant to produce new evidence, if it is of the opinion that the production of such evidence is necessary in the interest of justice.

Note:- New evidence shall not be permitted or called for or any witness shall not be recalled to fill up any gap in the evidence. Such evidence may be called for only when there is na (sic:an) inherent lacuna or defect in the evidence which has been produced originally."

From perusal of the enquiry report it is evident that the Enquiry Officer has, in its discretion, not called for new evdience (sic:evidence) and other than the one which is produced by the Department. Therefore, the question of infraction of Rule 14(15) of the 1966 Rules in the facts of the case does not arise. Accordingly, issues No.(e) & (f) are answered in the negative.

22. **Issue No.(g):**

From perusal of the enquiry report it is evident that the Enquiry officer has neither referred to the records of RCH Society nor relied upon three preliminary enquiry reports. The findings recorded by the Enquiry Officer are based on material on record. The Eqnuiry (sic:Enquiry) Officer on the basis of evidence adduced before it, has recorded findings and found the charges

to be proved. It is well settled legal position, as stated supra that it is not within the domain of this Court to reappreciate the evidence of departmental proceeding in exercise of its jurisdiction under Article 226 of the Constitution of India. Therefore, the aforesaid issue is answered accordingly.

23. **Issue No.(h):**

The extract of Rule 14(23) of the 1966 Rules, which is relevant for determining this issue, reads as under :-

> *"14(23)(i) After the conclusion of the inquiry, a report shall be prepared and it shall contain-*
>
> *(a) the articles of charge and the statement of the imputations of misconducts or misbehaviour;*
>
> *(b) the defence of the Government servant in respect of each articles of charge;*
>
> *(c) an assessment of the evidence in respect of each article of charge; and*
>
> *(d) the finding on each article of charge and the reasons therefor."*

The aforesaid Rule requires that report shall contain the article of charges, statement of imputations of misconduct, defence of government servant in respect of each article of charge, assessment of the evidence in respect of each article of charge and finding on each article of charge and reasons therefor. From perusal of enquiry report it is evident that it contains article of charges, imputation of misconduct and that the Enquiry Officer has assessed the evidence in respect of each article of charge and has recorded a finding in respect of each article of charge and has also assigned reasons therefor. Therefore, decision in *Swami Prasad Yadav* (supra) has no application to the facts of the instant case as the aforesaid decision is an authority for the proposition that if there is no analysis by the Enquiry Officer, the same would tantamount to violation of Rule 14(23) of 1966 Rules. Similarly, decision in *M.V. Bijlani* (supra) is of no assistance to the petitioner as Enquiry Officer has assessed the evidence and has assigned reasons for recording findings. There is no requirement under Rule 14(23) of the 1966 Rules that finding has to be recorded separately in respect of each article of charge. Therefore, the contention that there has been infraction of Rule 14(23) of the Rules cannot be accepted. Accordingly, this issue is answered in negative.

24. **Issue No.(i):**

From perusal of inquiry report it is evident that Enquiry Officer has analyzed the evidence adduced before him and recorded a finding for holding the charges to be proved against the petitioner. The contention of the petitioner that defence of the petitioner has not been considered is also factually incorrect as from paragraphs 13, 14 and 24 of the inquiry report it is evident that defence of the petitioner has duly been considered by the Enquiry Officer. Therefore, decision in the case of *K.A.Kittu* (supra) does not apply to facts of the case. The enquiry report, by no stretch of imagination, can be said to be either based on no evidence or the same can be termed as perverse. Accordingly, the aforesaid issue is also answered in the negative.

24. Thus, it is evident that departmental enquiry has been held against the petitioner in accordance with 1966 Rules. The petitioner has been supplied the documents and has been provided defence assistance. The petitioner was allowed to cross-examine the witnesses and was afforded opportunity to adduce evidence. On the basis of evidence adduced in Departmental Enquiry proceeding by the Enquiry Officer, the charges were found to be proved. Thus, no case for interference with the departmental enquiry proceeding under Article 226 of the Constitution of India is made out. However, admittedly, as has been held by the learned Single Judge, which finding has been affirmed by the Division Bench, copy of the enquiry report was supplied to the petitioner on 07.6.2013, after issuance of impugned order of termination on 02.4.2013. Further, admittedly the show-cause notice was also not issued to the petitioner before passing of impugned order of punishment. Therefore, in view of law laid down in *B.Karunakar* (supra) the impugned orders dated 02.4.2013 and 23.11.2013 passed by Disciplinary Authority as well as Appellate Authority are hereby quashed and set aside. The matter is remitted to the Disciplinary Authoirity for proceeding further from the stage of furnishing enquiry report and thereafter to proceed in accordance with the provisions of 1966 Rules. The petitioner is also directed to be reinstated in service and would be treated to have been placed under suspension from the date of order of dismissal. The Disciplinary Authority while taking a final decision in the matter shall also take a decision regarding entitlement of petitioner to consequential benefits, if any, to which the petitioner would be entitled including payment of salary for the period under suspension, backwages, etc.

25. With the aforesaid directions the writ petition is disposed of.

Petition disposed of.

I.L.R. [2015] M.P., 2668
WRIT PETITION
Before Mr. Justice Rajendra Menon &
Mr. Justice Sushil Kumar Gupta
W.P. No. 7628/2015 (Jabalpur) decided on 5 August, 2015

COMMERCIAL ENGINEERS & BODY BUILDING COMPANY LTD.(M/S) ...Petitioner
Vs.
DIVISIONAL DY. COMMISSIONER & anr. ...Respondents

A. Value Added Tax Act, M.P. (20 of 2002), Sections 2(o), 14 - Rebate of Input Tax - **Petitioner purchased material from a registered dealer after payment of VAT - Material was used for making a plant and machinery which was ultimately used for manufacturing final product - Provision of Section 14 is applicable - Matter remitted back for reconsideration in the light of interpretation. (Paras 10 to 16)**

क. मूल्य वर्धित कर अधिनियम, म.प्र. (2002 का 20), धाराऐं 2(ओ), 14 – निवेश कर की छूट – याची ने एक पंजीकृत डीलर से मूल्य वर्धित कर का भुगतान करने के पश्चात् सामग्री क्रय की – सामग्री का उपयोग संयंत्र और मशीनरी बनाने हेतु किया गया जिसे अंततः अंतिम उत्पाद निर्मित करने के लिये उपयोग किया गया था – धारा 14 का उपबंध लागू होता है – निर्वचन के आलोक में पुनर्विचार हेतु मामला प्रतिप्रेषित।

B. Constitution - Article 226 - Maintainability of petition - Alternative Remedy - **If a substantial legal question for interpretation is involved, Writ Court can directly interfere - As far as grant of benefit of rebate of input tax is concerned, is to be decided on admitted facts for which no dispute or enquiry into factual aspects of matter is called for - Petition maintainable. (Paras 7 to 9)**

ख. संविधान – अनुच्छेद 226 – याचिका की पोषणीयता – वैकल्पिक उपचार – यदि निर्वचन हेतु कोई सारवान विधिक प्रश्न अंतर्ग्रस्त है, रिट न्यायालय प्रत्यक्ष रूप से हस्तक्षेप कर सकता है – जहां तक निवेश कर की छूट के लाभ को प्रदान किये जाने का संबंध है, इसका निर्णय स्वीकृत तथ्यों पर किया जाना चाहिए जिसके लिए मामले के तथ्यात्मक पहलुओं की जांच या विवाद आवश्यक नहीं – याचिका पोषणीय।

Cases referred :

(1999) 7 SCC 448, (2004) 7 SCC 214, 2005(187) ELT 49 (Tri.Del.), 2005(191) ELT 383 (Tri. Mumbai), 1998 (99) ELT 54 (Tribunal), (1998) 4

SCC 90, W.P.(C) 10726/2006 decided on 24.05.2007 (Delhi High Court), (2006) 3 SCC Pg.1, 2012(20) STJ 411 SC, W.P. No. 2622/2013 decided on 03.02.2014, (2002) 7 SCC 515.

S. Ganesh with *Akshay Sapre*, for the petitioner
Samdarshi Tiwari, Addl. A.G. for the respondents/State.

ORDER

The Order of the Court was delivered by : **RAJENDRA MENON, J. :-** Challenge in this petition under Article 226 and 227 of the Constitution is made to an order dated 28.2.2015 passed by the Divisional Deputy Commissioner, Commercial Tax, Jabalpur, imposing tax liability on the petitioner's establishment in accordance to the provisions of Madhya Pradesh Value Added Tax (hereinafter referred to as "the VAT"). The legal question canvassed by the petitioner in this petition is as to whether the petitioner is entitled to Input tax credit while determining their liability under the VAT Act ? And as to what is the exact meaning of certain provisions contained in Section 14 of the M.P. VAT Act providing for Input tax credit? The issue is as to whether the petitioner is entitled to Input Tax credit in respect of tax paid Input purchased from a registered dealer used by the assessee in manufacturing of the final product ?

2. Petitioner has its manufacturing units in various places as are indicated in para 5.1 of the writ petition and its principal commercial place of business is situated in Napier Town, Jabalpur. They carry out manufacturing of the bodies for motor vehicles, their components, railway components and E.S.P. Components like filters to be used in power plants etc. Apart from manufacturing and sale of these articles job work on behalf of the railway administration is also carried out in the business premises of the petitioner.

3. It is a case of the petitioner that for the purpose of manufacturing bodies of motor vehicle, petitioner had purchased certain components for a total amount of Rs.97,99,69,327/- from a registered dealer M/s Vijay Steel Yard. The components so purchased are ultimately used in the manufacturing of the final product. Infact, the components purchased was used for fabricating plant and machinery which is then used for manufacturing of the final manufacturing product i.e. the motor vehicle body. It is a case of the petitioner that the material purchased from M/s Vijay Steel Yard were tax paid and are converted into components which is used for creating the final product,

therefore, the benefit of rebate on input tax as provided under Section 14 of the VAT Act is to be granted to the petitioner. However, as the revenue has held in the impugned assessment order that the material so purchased from M/s Vijay Steel Yard are consumed by the petitioner and not sold, the benefit of Section 14 or rebate on the input tax cannot be granted.

4. Shri S. Ganesh, learned Senior Advocate invited our attention to the provisions of Section 2(o) of the VAT Act, i.e. the definition of "Input Tax" as detailed herein under :-

> **"2(o)** "input tax" means an amount paid or payable by way of tax under Section 9 by a registered dealer in respect of the purchase of any goods specified in Schedule II, to a selling registered dealer and who is liable to pay tax under the said section on the sale of such goods".

And argued that the aforesaid definition of "input tax" means all and such Schedule II tax paid goods which are purchased by one registered dealer from another registered dealer after payment of tax by the selling registered dealer. It is said that material purchased from M/s Vijay Steel Yard, a registered dealer, was subjected to payment of tax and accordingly, the concept of "input tax" is applicable on such a sale. He thereafter referred to Section 14 of the VAT Act which contemplates a provision for rebate on income tax rebate on input tax, the said provision reads as under :-

> **"Sec.14. Rebate of Input tax**
>
> (1) Subject to the provisions of sub-section (5) and such restrictions and conditions as may be prescribed, a rebate of input tax as provided in this section shall be claimed by or be allowed to a registered dealer in the circumstances specified below-
>
> (a) Where a registered dealer purchases any goods specified in Schedule II other than those specified in Part III of the said Schedule within the State of Madhya Pradesh from another such dealer after payment to him input tax for –
>
> (1) .....
>
> (2) consumption or use for/in the manufacture or processing or mining of goods specified in Schedule II for sale

within the State of Madhya Pradesh or in the course of inter-state trade or commerce or in the course of export out of the territory of India; or

(3) .....

(4) use as plant, machinery, equipment and parts thereof in respect of goods specified in Schedule II; or ....."

(Emphasis Supplied)

According to Shri Ganesh, learned Senior Counsel, a bare perusal of Section 14(1)(a)(2) and (4) clearly indicates that rebate shall be permissible when the good purchased are utilized for consumption or use for / in the manufacturing or processing of mining of goods. Further Section 14(1)(a)(4) provides for rebate in case the purchased goods are used for plants, machinery, equipment and parts thereof in respect of goods specified in Schedule II. According to Shri Ganesh, goods purchased by the petitioner from another dealer are used for fabrication into plant and machinery for manufacturing of the finished product. Therefore, in the present case as the interpretation of Section 14 of the VAT Act is called in question, it is a pure question of law. This petition under Article 226 of the Constitution is maintainable as it is only this Court which can interpretate and decide such a complicated question of law. It is said that even though similar provision are contained in the Central Excise Act and rules framed therein with regard to grant of Input tax credit known as "MODVAT" and subsequently now known as "CENVAT" have been interpreted in various judgments but as the benefit of input tax on similar analogy under Section 14 of the VAT Act is yet to be decided, it is argued that petitioner is entitled to file the writ petition before this Court without resorting to the statutory remedy of appeal provided in the VAT Act. He argues that the following substantial questions are involved in the matter and therefore, petition should be entertained :-

(1) Can the benefit of Section 14 be denied on input steel materials, where VAT has already been paid on purchase from another dealer and the materials so purchased are used to fabricate plant and machinery which is then used for the manufacture of the end products sold by the petitioner ?

(2) Whether benefit of Section 14 can be extended

to goods purchased for fabrication of plant and machinery in order to produce the finished product ?

(3) Whether denial of benefit under Section 14 to purchases used for fabricating plant and machinery, which will ultimately be used for manufacturing the finished product, would amount to double taxation thereby defeating the very purpose and object of VAT Act ?

5. Shri Ganesh, learned Senior Counsel took us through the impugned assessment order dated 28th February 2015, he produced an authentic translation of the order and submitted that the only reason given in the impugned order for rejecting the benefit i.e. rebate of input tax to the petitioner is that the component purchased from M/s Vijay Steels Yard, Jabalpur, has been capitalized into plant and machinery and used by the petitioner. It is held that the material purchased from the aforesaid selling dealer has been consumed and the final component which was made have been produced from the machinery of the petitioner itself and thereafter sold. The department according to Shri Ganesh feels that the components purchased from the M/s Vijay Steels Yard, Jabalpur has been consumed by the petitioner in its plant and machinery which is then used for making of the final product and therefore, Section 14 is not applicable. Shri Ganesh argues that this approach of the department is totally incorrect and unsustainable. He says that even though there are no decided cases under VAT Act on such an issue but under the provisions of the Central Excise Act and the rules framed thereunder, in the matter of granting MODVAT credit now named as "CENVAT", similar provisions akin to Section 14 are available in Rule 57(A) and 57(C) of the Central Excise Rules, 1944 and he invites our attention to the said provision which reads as under :-

> "57A. Applicability.- (1) The provisions of this section shall apply to such finished excisable goods (hereinafter referred to as the "final products", as the Central Government may, by notification in the Official Gazette, specify in this behalf, for the purpose of allowing credit of any duty of excise or the additional duty under Section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be specified in the said notification (hereinafter referred to as the "special duty") paid on the goods used in or in relation to the manufacture of the said final products

(hereinafter referred to as the "inputs") and for utilizing the credit so allowed towards payment of duty of excise leviable on the final products, whether under the Act or under any other Act, as may be specified in the said notification, subject to the provisions of this section and the conditions and restrictions that may be specified in the notification:

Provided that the Central Government may specify the goods or classes of goods in respect of which the credit of specified duty may be restricted.

Explanation.- For the purposes of this rule, "inputs" includes

(a) inputs which are manufactured and used within the factory of production, in or in relation to, the manufacture of final products,

(b) paints and packaging materials, and

(c) inputs used as fuel, but does not include ---

Rule 57C. Credit of duty not to be allowed if final products are exempt - No credit of the specified duty paid on the inputs used [in the manufacture of a final product (other than those cleared either to a unit in a Free Trade Zone or to a hundred per cent Export- Oriented Unit)] shall be allowed if the final product is exempt from the whole of the duty of excise leviable thereon or is chargeable to nil rate of duty.

Rule 57F. (1) : The inputs in respect of which a credit of duty has been allowed under rule 57A -

(i) may be used in, or in relation to, the manufacture of final products for which such inputs have been brought into the factory; or

(ii) shall be removed, after intimating the Assistant Commissioner of Central Excise having jurisdiction over factory and obtaining a dated acknowledgment of the same from the factory for home consumption or for export under bond.

Provided that where the inputs are removed from the factory

for homes consumption on payment of duty of excise, such duty excise shall be the amount of credit that has been availed in respect of such inputs under rule 57A"

(Emphasis Supplied)

He submits that if the aforesaid provision is read it would be seen that it is pari materia with the provisions of Section 14(1)(a), (2) and (4) and therefore, by relying upon certain judgment of the Supreme Court while interpreting Rule 57(A), (C) and (F) to draw an analogy and apply it in the present case. Shri Ganesh, learned Senior Counsel invites our attention to the judgments of the Supreme Court in the case of *Collector of Central Excise, Pune & Others Vs. Dai Ichi Karkaria Ltd. And others*–(1999)7 SCC 448 and took us through the provisions of Section 57(A) the observations of the Supreme Court in para 18 thereof in support of his contention. Para 18 of the said judgment reads as under :-

"18. 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 acknowledgment 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 event it stands cancelled or, if utilised, 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."

(Emphasis Supplied)

Thereafter, he took us through another judgment of the Supreme Court in the case of *Escorts Ltd. Vs. Commissioner of Central Excise, Delhi* – (2004)7 SCC 214 and argued that in this case the assessee was a manufacturer of tractor and the final product that came out was the tractor. The intermediate product were the part which were manufactured, and then were used in producing final product of tractor. It was said that the intermediate product which was used for manufacturing the Tractor would not be the final product. In this case also benefit of MODVAT credit was granted. He invited our attention to the principles laid down in para 9 in support of his contention, so also para 10 where other judgments of the Supreme Court have been considered. Para 9 and 10 of the judgment in this case reads as under :-

> "9. In cases of manufacturers like the appellants, the final product is the tractor. The intermediate product would be parts which are manufactured for being used in the tractor. In such a case the parts would not be the final product. Thus, Rule 57C would have no application. The mere fact that the parts are cleared from one factory of the appellants to another factory of the appellants would not disentitle the appellants from claiming benefit of Notification No.217/86-CE dated 2.4.1986. As stated above, the notification itself clarifies that the inputs can be used within the factory of production or in any other factory of the same manufacturer.
>
> **10.** Mr. Lakshmikumaran relied upon the decision of this Court in the case of *CCE Vs. Hindustan Sanitaryware & Industries* wherein, in respect of this very notification, this Court has held that so long as duty is paid on the final product, the mere fact that duty was not paid on the intermediate product would not disentitle the manufacturer from the benefit of Notification No.217/86-CE dated 2.4.1986. In that case, the input was plaster of Paris, the intermediate product was moulds made out of the plaster of Paris, the final product was sanitaryware. In our view, the facts of that case are identical to the facts of the present case. The ratio laid down therein fully applies to this case."
>
> (Emphasis Supplied)

6. Thereafter, he referred to the judgment of Central Excise Tribunal of Delhi, Mumbai in support of his contentions and the judgments are reported in 2005(187) ELT 49 (Tri.Del.) - *Commr. Of Central Excise, Lucknow Vs. Seksaria Biswan Sugar Factory Ltd.*; 2005(191) ELT 383 (Tri. Mumbai) – *Vidyut Metallics Pvt. Ltd. Vs. Commissioner of Central Excise, Mumbai-VI* and 1998 (99) ELT 54 (Tribunal) – *SIEL Sugar Vs. Commissioner of Central Excise, Meerut* in support of his contention. Shri Ganesh accordingly argued that merely because the inputs purchased by the petitioner from M/s Vijay Steels was not directly used for manufacturing of the final product but as it was converted into a material (plant and machinery) which was ultimately used for manufacturing of final product, it is said that contention of the respondent cannot be accepted. It is argued that if such a contention is accepted, the benefit available to an assessee under Section 14 would be negated and this could never be the intention of the legislature.

7. As far as objection raised by the respondents, with regard to maintainability of the writ petition in view of the fact that a statutory remedy of appeal under the M.P. VAT Act is available, Shri Ganesh argues that this is not an efficacious remedy. Important questions of law with regard to interpretation of statutory provision are involved and when such a question is involved, a Writ Court can always interfere in such matters and for the said purpose relegating the petitioner to take recourse to the alternate remedy available is not necessary. In support of the aforesaid contention, he invites our attention to the judgment of the Supreme Court in the case of *Paradip Port Trust Vs. Sales Tax Officer and others* – (1998)4 SCC 90; a judgment of the Delhi High Court in W.P.(C) 10726/2006 – *Glaxo Smithkline Asia P.Ltd. Vs. Assessing Authority,* Special Zone Trade and Tax Department & Anr. decided on 24th May, 2007; another judgment of the Supreme Court in the case of *Bharat Sanchar Nigam Ltd. And another Vs. Union of India and others* – (2006)3 SCC Pg.1 to say that even if such an alternate remedy is available, if a substantial legal question for interpretation is involved, the Writ Court or the Supreme Court under Article 32 of the Constitution, can directly interfere, as such Courts are more competent or equipped to decide questions of law rather than quasi judicial authorities discharging statutory functions.

8. Shri Samdarshi Tiwari, learned counsel for the respondents submits that once the remedy of appeal under the statute i.e. Section 46(1) of the VAT Act is available and when the statutory authority are functioning, interference

directly by this Court is not called for. In support of his contention he invites our attention to the judgment in the case of *Zunaid Enterprises Vs. State of M.P. And others* – 2012(20) STJ 411 SC, a judgment of this Court in W.P. No.7872/2012 – *SVIL Mines Vs. Commissioner, Commercial Tax and another* judgment of this Court dated 3.2.2014 in W.P. No.2622/2013 – *Michigan Rubber (India) Ltd. Vs. State*, and argues that as mixed questions of law and fact are involved in this case and as there are serious disputed questions of fact, a Writ Court should not exercise its jurisdiction directly. Shri Samdarshi Tiwari took us through certain parts of the order passed by the Assessing Authority to emphasis that the question involved is not a pure question of law, it is mixed question of both law and fact and therefore, jurisdiction should not be exercised directly, that apart he argued that the interpretation of the department is correct and the benefit of input tax credit cannot be availed of by the petitioner for the simple reason that the material purchased after payment of tax is not directly used for manufacturing of the final product but is consumed by the petitioner. He submits that the interpretation advanced by Shri Ganesh is not correct.

9. We have heard learned counsel for the parties at length and we have also considered the rival contentions. Before adverting to consider the question of law, we may take note of the preliminary objection raised by Shri Samdarshi Tiwari, learned Dy. Advocate General, with regard to availability of a statutory remedy of appeal under Section 46(1) of the VAT Act. Normally when a statutory right of appeal is available to a party, discretionary jurisdiction under Article 226 of the Constitution are not exercised, particularly if questions of facts which are in dispute are also required to be scrutinized while deciding the matter. However, there are exceptions to this normal rule and there are large number of cases where bypassing the remedy of statutory appeal available, jurisdiction is exercised by the High Court under Article 226 of the Constitution. Even though Shri Samdarshi Tiwari tried to emphasize that there are disputed questions of facts involved in the matter, we are of the considered view that as far as the question of grant of benefit of rebate of input tax to the petitioner is concerned, it is a question to be decided on admitted facts for which no dispute or enquiry into factual aspects of the matter is called for. It is an admitted position that the assessee purchased certain material from M/s Vijay Steels amounting to Rs.97,99,69,327/-, (VAT paid) and claimed the rebate on input tax under Section 14. This material purchased, was used for creating the plant and machinery which is ultimately used for making the final

product and the duty was paid on the final product. According to the Revenue, because the material purchased from M/s Vijay Steels was consumed by the assessee in its plant and machinery to be used for making the final components and as this component (i.e. plant and machinery) which was created from the material purchased was not sold, they are not entitled for benefit of rebate on input tax. These are the simple and admitted facts and as its application for the purpose of granting benefit under Section 14 of the VAT Act is only required to be adjudicated by us, we see no disputed facts involved in the petition. That apart, the Supreme Court in the case of *Paradip Port Trust* (supra) has considered certain similar situation and has held that in such a situation the High Court should entertain the writ petition and consider such questions which involves interpretation of statutory provision instead of living it to the Taxing Authorities to interpret such a provision. In the case of *Bharat Sanchar Nigam Ltd.* (supra) the Hon'ble Supreme Court while exercising its jurisdiction under Article 32 of the Constitution had rejected similar objection with regard to availability of alternate remedy when competency of the State to levy Sales Tax in telecommunication service was questioned. In the case of *Glaxo Smithkline Asia P.Ltd.* (supra), the Delhi High Court has taken somewhat similar view and in a matter pertaining to interpretation of words "transfer of right to use any goods" which occur in Delhi Sales Tax Act has held that when question involved are of some importance and when they involve interpretation of certain provision or meaning of technical statute, the interpretation must be decided by the High Court and cannot be left exclusively to be dealt with by the statutory authorities. Analyzing the principles as laid down in the aforesaid case and taking note of the jurisdiction to be exercised by us in this petition, we are of the considered view that leaving it to the revenue to decide such a question may not be proper. Instead, it would be more appropriate if we deal with such questions and decide it in this petition under Article 226 of the Constitution as it is a question with regard to interpretation of statutory provision and no disputed question of fact as canvassed by Shri Samdarshi Tiwari are available. The judgments relied upon by Shri Samdarshi Tiwari are all cases where disputed questions of fact and law were involved and it was under those circumstances that this Court refused to interfere, whereas, in the present case such is not the position.

10. Accordingly, rejecting the objection raised by Shri Samdarshi Tiwari with regard to maintainability of this writ petition, we proceed to decide the matter on merits.

11. A comparison of the provision of Section 14 of the VAT Act with the provisions of Rule 57A explanation thereto along with Rule 57C and 57F indicates that both the provisions are infact paramateria with each other. Except for some difference in the words used if the provisions of Rule 57(A)(1)(a) of the Excise Rules is taken note of, it speaks about applicability of the provision to such finished excise goods (i.e. the final product) as may be specified in the notification, duty paid goods used in relation to the manufacture of the said final product. The words are "used in relation to the manufacture of the final product". Similarly in the Explanation (a) the word "input" has been explained to include "inputs which are manufactured and used within the factory of production, "in or in relation to, the manufacture of final products". Here again, the words are "use or in manufacture of final product". Likewise is Rule 57(F)(1)(i) also the words used are "in relation to the manufacture of final products". Similarly, if the said provisions are compared with Section 14, we find that the words used in Section 14(1)(a) and (4) are "used as plant, machinery, equipments and parts thereof, in respect of goods," instead of using the word "in relation to" as contained in the Excise Act, the words used here i.e. in VAT Act are "in respect of goods". Therefore, as per both these provisions, if inputs or goods purchased are used in relation to manufacture of final product and even if its use may be as a plant or machinery or equipments or part thereof, in respect of the goods, specified as the final product, the benefit of MODVAT, CENVAT or "input tax rebate" can be claimed. Meaning thereby, it is not necessary that the goods purchased from the registered dealer which is known as "input" should be used directly for manufacture of the final product. It is sufficient if the input is used in respect of or in relation to a plant or machinery or a equipment which is ultimately used for manufacturing the final product. That in fact, should be the interpretation of the provisions of the Section.

12. In fact, Section 14 of the VAT Act contemplates a provision for rebate of Input tax. Under Section 2(o) of the VAT Act, "input tax" it is an amount paid or payable by way of tax under section 9 by a registered dealer in respect of the purchase of any goods specified in Schedule II , to a selling registered dealer and who is liable to pay tax under the said section on the sale of such goods. Admittedly, the goods purchased by the present petitioner from M/s Vijay Steels, a registered dealer, is after payment of tax under the VAT Act i.e. as required under Section 9 of the VAT Act. Under Section 14(1)(a) and sub section (2) and (4) thereof, rebates are available on input tax which is permissible to be allowed to a registered dealer, when he purchases the goods from another such dealer after payment of input tax (as has happened in this case) and consumes or uses it for/ in the manufacture or processing or mining

of goods or uses it as plant, machinery, equipment and parts thereof, in respect of case specified in Schedule II. Admittedly, in this case petitioner has purchased the goods from a registered dealer which was tax paid and the goods so purchased has been used by the petitioner as plant and machinery, which in turn has been put to use for making the final product as is specified in Schedule II i.e. the motor vehicle body which is sold and duty is paid. From the order of the assessment it is seen that the Assessing Authority holds that if the components produced after manufacturing and processing of the material purchased from M/s Vijay Steels, is sold by the petitioner, they are entitled to rebate on input tax under Section 14 but because they have consumed it for use as a plant and machinery, they are not entitled to this benefit. This according to us cannot be the correct interpretation of Section 14(1)(a) sub rule (2) and (4) in view of the reasons and interpretation given by us in the preceding para.

13. That apart, in somewhat similar situation in the case of *Escorts* (supra) also the appellant therein where manufactures of Tractors they purchased duty paid inputs and used then for bringing out the final product i.e. Tractor. Here also the final product was the tractor and the intermediate product was infact the part which was manufactured in the first factory for being used for making the final product i.e. tractor. While considering this question the Supreme Court held after interpreting the provisions of Rule 57A and C that the intermediate product which was ultimately used for manufacturing product which was input for manufacturing the final product – tractor, was liable to be granted the benefit of MODVAT. In the case of *Escorts Ltd.*(supra) another judgment of Supreme Court in the case of *CCE Vs. Hindustan Sanitaryware & Industries* – (2002)7 SCC 515 has been considered. In the case of *Hindustan Sanitaryware* (supra) the inputs were plaster of Paris. Out of this Plaster of Paris the intermediate product i.e. moulds were made out and these moulds were used for making final product i.e. sanitary ware. The Plaster of Paris was purchased after payment of duty and therefore, it was held that the assessee is entitled for benefit of MODVAT/ CENVAT. If the case of the present petitioner assessee is analyzed in the backdrop of judgment of Supreme Court in the case of *Escorts Ltd.* (supra) and *Hindustan Sanitaryware* (supra), we find that the material purchased from M/s Vijay Steels was used by the assessee petitioner herein for converting it into plant and machinery. The plant and machinery was thereafter used for making the final product. Therefore, as the material purchased from M/s Vijay Steels after payment of VAT was used for making a plant and machinery which was ultimately used for manufacturing the final product, therefore, in the light of principles laid down in the case of *Escorts Ltd.* (supra)

and *Hindustan Sanitaryware* (supra), we see no reason for rejecting the preposition putforth by Shri Ganesh. Similar is the position with regard to manufacturing of sugar and various other products, considered and decided in similar manner by various Excise Tribunals in the judgment relied upon by Shri Ganesh.

14. The intention of the legislature in providing a provision for grant of rebate of input tax as contained in the VAT Act is akin to the provisions of MODVAT credit and CENVAT Credit applicable in Excise Law and when sub section 2 and 4 of Section 14(1)(a) indicates that the goods purchased by a registered dealer from another registered dealer after payment of duty is used by the purchasing registered dealer or is consumed in the manufacturing or processing of something or used as a plant, machinery, equipment and parts in respect of goods i.e. the final product is entitled for input rebate. If that be the intention of the legislature in giving input rebate to a dealer then it would be beyond the legislative purpose if the intention of the legislature is interpreted as done by the department by holding that the material used or consumed should be sold and should not be further used in respect of anything for the making of a final product which is ultimately sold. This could never be the intention of the legislature.

15. We need not dwell into this aspect of the matter any further for the simple reason that if the process for manufacturing of tractor which was considered by the Supreme Court in the case of *Escorts Ltd.* (supra) and *Hindustan Sanitaryware* (supra), as detailed in the case of *Hindustan Sanitaryware* (supra) is analyzed and if benefit of MODVAT and CENVAT could be granted in the said case and when we find that purpose of introducing Section 14 is akin to the provisions of MODVAT credit and CENVAT credit, there is no reason for us in not accepting the interpretation, as canvassed by Shri Ganesh and holding that in the present case also the petitioner is entitled to the benefit of rebate on input tax under Section 14.

16. Accordingly, we allow this petition and direct the Assessing Officer to reconsider the matter in the light of the interpretation given by us and grant input rebate to the petitioner in the matter of purchases made as detailed herein above.

17. With the aforesaid, this petition stands allowed and disposed of.

Petition allowed.

I.L.R. [2015] M.P., 2682
COMPANY PETITION
Before Mr. Justice Sujoy Paul
Comp. Pet. No. 4/1997 (Gwalior) decided on 30 April, 2014

JIYAJIRAO COTTON MILLS ...Petitioner
Vs.
B.I.F.R., NEW DELHI & ors. ...Respondents

Service Law - Pension Scheme 1995 **- Held - Where the PF organization itself qualified the employees and took their contribution, these employees must be treated as eligible employees for the grant of pension. (Para 33)**

सेवा विधि – पेंशन योजना 1995 – अभिनिर्धारित – जहां भविष्य–निधि संगठन ने स्वयंमेव कर्मचारियों को अर्ह बनाया और उनसे अंशदान लिया है, इन कर्मचारियों को पेंशन प्रदान किये जाने हेतु पात्र कर्मचारी माना जाना चाहिए।

A.K. Jain, Vivek Jain & Mahesh Goyal, in support of these IAs.
K.N. Gupta with *J.D. Suryavanshi & Ashish Saraswat,* for the Official Liquidator (OL).
R.K. Goyal, for the PF Organization.

O R D E R

SUJOY PAUL, J. :- I.A. Nos. 803/2012 AND 385/2013:

By filing IA No. 803/2012, the employees as per enclosed list (from *"Ishwar Krishna Tripathi to Ram Govind"*) (1032 in Nos.) prayed that the Provident Fund Organization (PF Organization) be directed to start pension for these employees by treating the pay and allowances payable on 4.5.1998.

2. The Official Liquidator (OL) has filed reply dated 12.8.2013. The PF Organization has also filed reply and stated that no relief is due to these employees.

3. Before dealing with the rival contentions, it is necessary to narrate certain relevant facts. Admittedly, J.C.Mill was wound up on 4.5.1998. The PF Organization is paying pension to 6036 employees. 1032 employees have preferred IA No. 803/2012 with the prayer mentioned above. It was supported by IA No.385/2013 filed by the Trade Union.

4. The stand of the applicants is that the PF Organization has deducted

fund/contribution of 8037 employees. This includes names of 1032 employees, for whom the present IA is filed. By drawing attention of this Court on the report of Commissioner, Shri Trivedi, it is contended that as per his report, 7836 employees were on the rolls and this list of 7836 employees includes names of present 1032 employees. It is common ground taken by Shri A.K.Jain and Shri Vivek Jain that since the contribution of 8037 employees is already deducted by the PF Organization, they are entitled to get pension as per the relevant Pension Scheme. By drawing attention of this Court on various provisions of Pension Schemes of 1971 and 1995, it is urged that 1032 employees are eligible and are entitled to get pension.

5. Shri K.N.Gupta, learned senior counsel drew the attention of this Court on a list, which is prepared by the OL and which was submitted before the PF Organization. In turn, the PF Organization informed about certain deficiencies. The attention of this Court is drawn on the objection of PF Organization dated 29.2.2012, wherein it was mentioned that the list sent by the OL does not contain his signature, in the list although pension account numbers are given but it was not in chronological order. It is further mentioned that it is not clear as to why along with 6036 members, the list of 1032 members was not sent. Certain other informations were also required from the OL. In turn, the OL by communication dated 22.5.2012 stated that the defects are cured, henceforth, the communication will contain the signature of OL/Competent Officer. As required, the list of 1032 employees was again sent by OL to the PF Organization. In turn, the PF Organization wrote a letter dated 1.8.2013, whereby it was informed to the OL that record is very old and process has been started to search the record. It will take some time and after getting the record, necessary information will be given. Thereafter, as canvassed by learned senior counsel, no communication is received by the OL from the PF Organization. It is only on 28.4.2014 an affidavit is filed by PF Organization in this case, which is signed by Shri Salim Beg Mugal. In this affidavit, it is contended that as per the information received from Indore Office, the relevant record of J.C.Mill desired by OL is not available. The record of only 6036 employees is available at Gwalior Office and no other record was deposited by the employer.

6. It is relevant to mention here that during the course of argument, learned counsel for the parties provided three compilations before this Court. It is urged by learned counsel that the documents filed along with the record are

again filed in these compilations and arguments were advanced on the basis of these compilations. These compilations are marked as "A", "B" and "C". Registry is required to keep these compilations in a sealed envelope along with the record.

7. The communication by the PF Organization dated 29.2.2012 is at page 15 of compilation "A", whereas reply of OL is at page 12 of the said compilation.

8. Learned counsel for the OL submits that as per the list prepared by the Commissioner, pension can be started in favour of 1032 employees. He further submits that PF Organization has already taken contribution of 8037 employees, which includes present 1032 employees. After having taken the contribution for the entire set of employees, it is not open to the PF Organization to deny pension to the deserving employees. It is submitted that along with the list furnished by OL, the pension account number and date of membership was given to the PF Organization. No sincere efforts were made to ascertain the same.

9. Shri R.K.Goyal, learned counsel for the PF Organization prayed for rejection of IAs. It is submitted that as per Para 2 (f) of 1971 Scheme, the option was required to be exercised by the employees. 1032 employees have not exercised any option to become member of 1971 Scheme. The attention is also drawn on Paras 3,4 and 6 of the said Scheme. It is submitted that the employer was required to submit a series of statutory forms as per 1971 Scheme and 1995 Scheme. The employer has not paid the cheque or draft nor paid the contribution of 1032 employees. In absence of fulfilling the statutory requirements under 1971 and 1995 Schemes, the pension is not payable to the employees. He relied on Para 18 of 1971 Scheme, which talks about allotment of pension number to the pensioner. It is submitted that in absence of any allotment of pension number, no pension is payable. By placing reliance on para 15 of this Scheme, it is contended that the employer has not fulfilled the statutory duty and, therefore, 1032 employees cannot get benefit. He submits that the employees whose statutory record was provided to the PF Organization by the employer, their pension has been started.

10. Shri R.K.Goyal, by relying on 1995 Scheme submits that along with the scheme, there are statutory Form Nos.1,2,3,4,6 and 7. By taking this Court to the entries of these forms, it is contended that the employer was required to furnish information and documents in different heads. In absence of furnishing these informations, the pension cannot be quantified and paid. In

nutshell, he submits that 1032 employees were neither member of 1971 Scheme nor can become member of 1995 Scheme. He also drew the attention of this Court on Paras 2,3,5,6,7,9,10,11 and 12 of 1995 Scheme. It is contended that the necessary requirement as per these Paras are not fulfilled with regard to 1032 employees and, therefore, they are not entitled for the monthly pension. He also relied on the Court order dated 22.4.2009, whereby this Court directed to give Rs.6,45,40,834/- to PF Organization in order to start revised pension to the existing employees. He submits that this order makes it crystal clear that the intention of this Court was to utilize the amount of contribution for the purpose of grant of revised pension to the employees, who were already receiving pension. Putting it differently, Shri Goyal submits that the employees, who were already getting pension, became entitled to get revised pension on the strength of the order dated 22.4.2009. Since this order was not put to test and has attained finality, no pension beyond revised pension for existing pensioners can be granted by this Court. By relying on the inspection report dated 11.4.2000, it is contended that the salary component of the year 1992 is considered in the inspection report. On a specific query from the Bench whether there exists any material to show that salary component of 1992 was considered in this inspection report, Shri Goyal submits that if number of employees and their contribution is calculated, it will come to the amount which is mentioned in the order dated 22.4.2009 and this amount can be achieved only if the salary component of 1992 is taken into account.

11. No other point is pressed by the parties.

12. I have heard learned counsel for the parties and perused the record in the light of submissions.

13. This Court on 9.1.2008 considered the OLR 16/0 filed by the OL. By order dated 9.1.2008, Shri Trivedi, retired District Judge was appointed as Commissioner to scrutinize the claim of the employees. The relevant portion of this order reads as under:-

> *"Official liquidator has filed OLR No.16/0 whereby he has prayed that some retired District Judge be appointed for scrutinising the claims of the labours as well as other secured creditors. None for the parties has objection for appointment of Shri S.S.Trivedi, retired District Judge residing at Sharda Vihar, Gwalior to scrutinise the claims.*

Official liquidator shall place all the claim received by him from the workers and the secured creditors before Shri Trivedi within a period of three weeks from today. Shri Trivedi shall scrutinise the claims and submit his report before this Court. If required, Shri Trivedi can also issue notice to a particular claimant, if he wants to do for decision of his case. It is further made clear that while deciding the claims, Shri Trivedi will keep in mind that if there are decrees passed by some competent court, then he will decide the claim accordingly and in accordance with the requirement of Company Law. If any worker has not filed any claim so far, he may file his claim before the official liquidator within a period of one month from today. The official liquidator shall forward his claim to Shri Trivedi within a period of fifteen days from the date of receipt of the claim. This exercise shall be completed by Shri Trivedi within a period of six months."

14. Thereafter, matter was again considered by this Court on 13.2.2008. By this order, two persons were provided to the Commissioner to undertake aforesaid exercise. The Commissioner prepared a report and along with the report filed two lists, which are marked as Annexures "A" and "B". Annexure "A" filed by the Commissioner contains the names of 7836 employees. The list, Annexure "A" is filed in Compilation "B" from page 190 to 400. The Commissioner has giving finding in 13 columns. The heads of these columns are as under:-

जे.सी.मिल लि. (बिरला नगर) के श्रमिक – कर्मचारियों की देनदारी सूची

कॉटन स्टॉफ (क्लर्क एवं टाईमकीपर)

क्र.	टिकिट नं.	नाम व पिता का नाम	पद	नियुक्ति दिनांक	सेवाकाल वर्ष/ महीना/ दिन	पी.एफ	कुल वेतन पेड हॉलीडे डी.ए. अन्य भत्ते	ग्रेच्युटी नियुक्ति दिनांक से परिसमापन दिनांक 04.05.98 तक 15 दिन प्रतिवर्ष	रिट्रेंचमेंट नियुक्ति दिनांक से परिसमापन दिनांक 04.05.98 तक 15 दिन प्रतिवर्ष	टोटल	एडवांस (कटोत्रा)	कुल देयक राशि
1	2	3	4	5	6	7	8	9	10	11	12	13

15. IA No. 5497/2007 was filed by PF Organization under Section 11 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for brevity, the "PF Act"). The caption of this application reads as under:-

> *"Application under section 11 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 for direction to the official liquidator for payment of the amount of contribution under the Employees Pension Scheme 1995 including the amount of interest and damages to the applicant organization."*

16. The Commissioner's report is taken into account by this Court on 8.4.2009. This Court opined as under on the said date :-

> *"I.A.No. 14863/06, I.A.No.16813/06 & I.A.No.16814/06.*
>
> *.....The report of the Commissioner is received. Hence these applications are disposed of as these workmen shall get their dues only in accordance with the report submitted by the Commissioner....."*
>
> *(Emphasis Supplied)*

A bare perusal of this finding shows that this Court in no uncertain terms made it clear that the workmen shall get dues as per the report of the Commissioner. Thereafter, this Court passed the order dated 22.4.2009, whereby permitting the PF Organization to utilise Rs.6,45,40,834/- for the purpose of granting revised pension.

17. The pivotal question is whether 1032 employees are entitled to get the pension ?

18. To determine this aspect, it is apt to quote certain provisions of 1971 Scheme. Para 1(3) reads as under:-

> *"(3) Subject to the provisions of Section 16 and sub-section (1-A) of Section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, this Scheme shall apply to the employees of all factories and other establishments to which the said Act applies or is applied under sub-section (3), or sub-section (4) of Section 1 or*

Section 3 thereof."

Para 2(f) of the Scheme reads as under:-

"2(f) 'reckonable service' means service rendered by a member of the Family Pension Fund in respect of which contributions are payable under this Scheme and includes any period of service in respect of which no wages are drawn by such member on account of temporary closure of the establishment, strike, lock-out or leave without pay, or for any other reason, of a similar nature or otherwise, and in respect of which contributions (both the member's and employer's shares) are payable by diversion from his Provident Fund Account as provided in sub-paragraph (2-A) of Paragraph 9 of his Scheme and also includes any period of service in respect of which wages are drawn but no contributions are payable in terms of subparagraph (4) of Paragraph 9 and which shall be deemed to have been paid for purposes of Paragraphs 28, 31 and 32 of this Scheme:

Provided that no period of service, in respect of which no wages are drawn by a member,--

(i) after the name of the member has been struck off from the rolls of the employer of the member; or

(ii) xx xx xx

(iii) after there ceases to be any amount I the fund or in the provident fund of an exempted establishment, as the case may be, lying to the credit of the member concerned,

shall be treated as reckonable service."

Para 3 of the Scheme reads as under:-

"3. Membership of the Family Pension Fund.-- Subject to sub-paragraph (3) of Paragraph 1, this Scheme shall apply to every employee--

(a) *who becomes a member of the Employees' Provident Fund or of Provident Funds of factories and other establishments exempted under Section 17 of the Act on or after the 1st day of March, 1971;*

(b) *who has been a member of the Employees Provident Fund or Provident Fund of factories and other establishments exempted under Section 17 of the Act immediately before the commencement of this Scheme and opts to exercise his option under Paragraph 4 :*

Provided that an employee who attains the age of more than 59 years on the date on which he would, but for this proviso, have become eligible for membership or have been required to become a member of this Scheme shall not be eligible for membership under this Scheme."

Para 9 of the Scheme reads as under :-

"9. Family Pension Fund.-- (1) From and out of th (sic:the) contributions payable by the employer and the employees in each month under Section 6 of the Act a part of the contribution, representing 1-1/6 per cent of the employee's pay along with an equivalent amount of 1-1/6 per cent from and out of the employer's contribution shall be remitted by the employer to the Family Pension Fund by a separate Bank Draft or cheque on the account of Family Pension Fund contribution in such manner as may be specified in this behalf by the Commissioner. The cost of the remittance, if any, shall be borne by the employer.

Relevant part of Para 10 of the Scheme reads as under:-

"10. Payment of contribution.--(1) The employer shall, in the first instance, pay both the contribution payable, to the Family Pension Fund by himself and also, on behalf of the member of the Family Pension Fund employed by

him directly or by or through a contractor, the contribution payable to the Family Pension Fund by such member."

19. Section 17 (1-A) of PF Act makes it clear that there is no exemption for the purpose of pension. The exemption, if any, is only to the extent of provident fund. If the Scheme of 1971 is examined, it will be clear that it is mandatory in nature. It is apt to mention here that 1032 employees have been engaged after 1.3.1971. Thus, in the opinion of this Court, they will be covered by Para 3 (a) of 1971 Scheme. The intention of scheme-maker since beginning was to cover each and every workman of the industry. Para 26 of 1952 Scheme also makes it clear that it is applicable to every employer.

20. It is interesting to mention here that the PF Organization filed an application on the basis of inspection report and showed that it quantified PF contribution of 8037 employees. The contribution was permitted to be given by the Company Court to the PF Organization. Admittedly, the said contribution of 8037 employees was already received by the PF Organization. The employees determined by the Commissioner for payment of pension were 6036 in number. Thus, for 2001 employees (8037-6036) they have received contribution but are not paying pension. This is not in dispute that as per the inspection report, the PF contribution was demanded for the period 1.7.1992 to 4.5.1998. The said amount is already paid to the PF Organization. If PF Organization has not demanded any contribution before 1.7.1992, it can be safely concluded that the contribution amount for the employees before 1.7.1992 was not due/payable. They demanded and received the amount from 1.7.1992 to 4.5.1998 for 8037 employees.

21. Apart from this, page 193 of compilation "A" (inspection report) contains following finding :-

"The squad has visited the estt. for inspection of records for calculation of dues under family pension scheme 1971, employees pension scheme 1995 and inspection charges under EPF scheme 1952 and EDLI scheme 1976."

(Emphasis Supplied)

This finding shows that the records were inspected for the purpose of determining the dues of eligible employees who are entitled under 1971 Scheme and 1995 Scheme. This report further shows that employees' share as well

employer's share was determined / quantified by the inspection team.

Page 209 of compilation "A" (Application for direction to the OL for depositing FPS / EPS contribution, filed by PF organization) shows that they have taken a specific stand that contributions towards PPF were received by the PF organization for the employees of J.C. Mills up to June, 1992. No contributions were received by them thereafter. Para 3 of this application reads as under:-

> *" (3) That, the contribution toward E.P.F. Were received in the office of the applicant upto June, 1992 and no contribution under the scheme thereafter."*
>
> *(Emphasis Supplied)*

In para 6 of this application it is averred by PF organization that the winding up order was passed on 4.5.1998 and as per Section 445 of the Companies Act, the employees will be deemed to be in employment from the date of closure i.e. 28.04.1992 to the date of winding up 04.05.1998.

22. Para 6 of 1995 Scheme reads as under :-

> ***"6. Membership of the Employees' Pension Scheme-*** *Subject to sub-paragraph (3) of paragraph1, this Scheme shall apply to every employee-*
>
> *(a) who on or after the 16th November, 1995 becomes a member of the Employees' Provident Funds Scheme, 1952 or of the Provident Funds of the factories and other establishments exempted by the appropriate Government under section 17 of the Act, or in whose case exemption has been granted under paragraph 27 or 27-A of the Employees' Provident Funds Scheme, 1952, from the date of such membership;*
>
> *(b) who has been a member of the ceased Employees' Family Pension Scheme, 1971 before the commencement of this Scheme from 16th November, 1995."*

As per Para 6 aforesaid, it is clear that the scheme is applicable to every employee who was the member of either 1952 Scheme or of Provident

Fund of factories or has been a member of Pension Scheme of 1971. The PF contribution/employee and employer share for the employees have been determined and received by PF organization after the period 1992. It is admitted by them as quoted above that prior to 92 they have received the contribution of the employees. Thus, it can be conclusively held that 1032 employees were covered under 1971 Scheme and their PF deduction was made by PF organization. Thus, they are entitled to be treated as member of 1995 Pension Scheme.

Aforesaid analysis further shows that once contribution is received up to year 1998, PF Organization treated the entire strength of employees, (8037 in Nos.) as covered under 1971 Scheme and 1995 Scheme.

23. In the present case, as pointed out by Shri K.N.Gupta, learned senior counsel, the record is not available which can throw light whether the statutory forms were filled up by the employer as per 1971 and 1995 Schemes and whether those forms were supplied to the PF Organization. The question is whether in absence of those forms, 1032 employees can be deprived from the benefit of the pension ?

24. As per section 13 of the PF Act, the Inspectors have wide powers to inspect the record, take photocopy and make search for the purpose of enforcement of the Act and Schemes made thereunder. Section 13 (1) (2) (b)(c) and (2-A) are reproduced for ready reference :-

> *"13. Inspectors.-- (1) The appropriate Government may, by notification in the Official Gazette, appoint such persons as it thinks fit to be Inspectors for the purposes of this Act/the Schemes/the Pension Schemes or the Insurance Scheme, and may define their jurisdiction.*
>
> *(2) Any Inspector appointed under sub-section (1) may, for the purpose of inquiring into the correctness of any information furnished in connection with this Act or with any Scheme or the Insurance Scheme or for the purpose of ascertaining whether any of the provsions of this Act or of any Scheme or the Insurance Scheme have been complies with in respect of an establishment to which any Scheme or the Insurance Scheme applies or for the purpose of ascertaining whether the provisions of this Act*

or any Scheme or the Insurance Scheme are applicable to any establishment to which the Scheme or the Insurance Scheme has not been applied or for the purpose of determining whether the conditions subject to which exemption was granted under section 17 are being complied with by the employer in relation to any exempted establishment--

(a) xxx xxx xxx

(b) at any reasonable time and with such assistance, if any, as he may think fit, enter and search any establishment or any premises connected therewith and require any one found in charge thereof to produce before him for examination any documents, books, registers and other documents relating to the employment of persons or the payment of wages in the establishment;

(c) examine, with respect to any matter relevant to any of the purposes aforesaid, the employer or any contractor from whom any amount is recoverable under section 8-A, his agent or servant or any other person found in charge of the establishment or any premises connected therewith or whom the Inspector has reasonable cause to believe to be or to have been, an employee in the establisment.

(2-A) Any Inspector appointed under sub-section (1) may, for the purpose of inquiring into the correctness of any information furnished in connection with the Pension Scheme or for the purpose of ascertaining whether any of the provisions of this Act or of the Pension Scheme have been complied with in respect of an establishment to which the Pension Scheme applies, exercise all or any of th (sic:the) powers conferred on him under clause (a), clause (b), clause (c) of clause (d) of sub-section (2)."

25. In the opinion of this Court, if the Inspectors have inspected the premises of the industry and prepared the inspection report, there is no manner of doubt that such report is prepared on the basis of the relevant statutory record/Registers prepared by the employer. On the basis of this record, the inspection report has quantified the number of employees as 8037. The PF contribution of Rs.6,45,40,834/- is already received by PF Organization. At a later point of time, the Commissioner Shri Trivedi quantified the employees as 7836. It is common ground of Shri A.K.Jain and Shri Vivek Jain that names of 1032 employees are already mentioned in the list prepared by the Commissioner containing the names of 7836 employees and, therefore, this list should be treated as authenticated list for the purpose of grant of pension.

26. Para 1(3) of 1995 Scheme is reproduced as under:-

> *"(3) Subject to the provisions of section 16 of Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), this Scheme shall apply to the employees of all factories and other establishments to which the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (19 of 1952) applies or is applied under sub-section (3) or sub-section (4) of section 1 or section 3 thereof."*

Para 2(iv) of 1995 Scheme reads as under :-

> *"(iv) "contributory service" means the period of "actual service" rendered by a member for which the contributions to the fund have been received or are receivable."*

Para 2(vi) reads as under:-

> *" "existing member" means an existing employee who is a member of the Employees' Family Pension Scheme, 1971."*

Para 2 (xv) defines "pensionable service", which reads as under:-

> *"(xv) "pensionable service" means the service rendered by the member for which contributions have been received or are receivable."*

Para 4 of 1995 Scheme reads as under:-

"4. Payment of contribution.-- (1) The employer shall pay the contribution payable to the Employees' Pension Fund in respect of each member of the Employees' Pension Fund employed by him directly or by or through a contractor.

(2) It shall be the responsibility of the principal employer to pay the contributions payable to the Employees' Pension Fund by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor;

Provided that the Central Government shall pay the contribution payable to the Employees' Pension Fund in respect of an employee who is a person with disability under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996) and under the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (44 of 1999) respectively, up to a maximum period of three years from the date of commencement of membership of the Fund."

Para 6 of 1995 Scheme is also relevant which is already reproduced in para 22 of this order.

Para 10 talks about determination of 'pensionable service' whereas Para 11 talks about determination of 'pensionable salary'. The formula for the purpose of determining the monthly member's pension is in Para 12. The formula reads as under:-

$$\text{"Monthly member's pension} = \frac{\text{Pensionable salary} \times \text{Pensionable service}}{70}$$

Paragraph 16(1) of 1995 Scheme reads as under:-

"16. Benefits to the family on the death of a member.--

(1) Pension to the Family shall be admissible from the date following the date of death of the member, if the member dies-

(a) while in service, provided that at least one month's contribution has been paid into the Employees' Provident Fund, or

(b) after the date of exit, but before attaining the age of 58 years, from the employment having rendered service entitling him/her to monthly member's pension but before the commencement of pension payment, or

(c) after commencement of payment of the monthly member's pension.

Note.-- The cases where a member has rendered less than 10 years eligible service on the date of exit but has retained the membership of the Pension Fund, and dies before attaining the age of 58 years, shall be regulated under sub-paragraph (8) of paragraph 12."

27. I do not see any merit in the contention of Shri R.K. Goyal, learned counsel for the PF Organization, that since in the Court order dated 22.04.2009, there was no direction to start pension for the present 1032 employees, no direction can be issued. A simple reading of said order of Company Court makes it crystal clear that the question of claim/entitlement of these 1032 employees was not at all under consideration before the Court. The Court had no occasion to deal with this aspect. Thus, that order cannot be read in the manner suggested by Shri Goyal nor it can be as impediment for deciding entitlement of 1032 employees.

28. The matter may be examined from yet another angle. The PF Organization after having received contribution from 1.7.1992 to 4.5.1998 for all 8037 employees cannot take 'U' turn and submit that this contribution is not for present 1032 employees. 8037 employees was the total strength of employees working on the date of inspection, i.e., 11.4.2000. The factory was wound up on 4.5.1998 and since 1032 employees were on the rolls on the date of winding up of the industry, their names must be treated as included in the list of 8037 employees, for whom contribution is already received by PF Organization. In any case, the list prepared by the Commissioner Shri Trivedi must be treated as authentic list for the purpose of deciding the dues of the workmen. Thus, if names of 1032 employees are included in the list prepared by the Commissioner (Annexure 'A'), such employees shall be entitled

for pension.

29. Though in the peculiar facts of this case, the documents/statutory forms filed by the employer may not be available but the fact remains that the PF Organization has treated them as employees and obtained their contribution. Thus, as per the Schemes of 1971 and 1995, 1032 employees must be treated to be eligible employees for the purpose of pension scheme provided their names find place in the list prepared by the Commissioner (Annexure 'A').

30. During the course of argument, learned counsel for the PF Organization has express inability of PF Organization to determine monthly member's pension. It is submitted that in absence of relevant record, it is not possible to determine the date of birth/age, length of service, amount of salary drawn etc. In absence of these data, the formula cannot be made applicable and monthly pension cannot be determined.

31. Para 10 of 1995 Scheme talks about pensionable service of the member. This is with reference to the contribution received or receivable. The PF Organization has already received the contribution. Para 11 defines pensionable salary, which is average monthly pay drawn during the contributory period of service in the span of 12 months preceding the date of exit from the membership of the Employees' Pension Fund. It is relevant to mention here that the Commissioner has prepared Annexure 'A' and it contains the date of appointment, total service rendered, amount of provident fund, total salary paid with certain allowances etc. Thus, the necessary ingredients for the purpose of determining pensionable salary are very much available in the report of the Commissioner. So far the date of birth/age is concerned, Shri Vivek Jain has filed the circular of PF Organization dated 12.12.2006. This circular deals with all possible contingencies for the purpose of determination of the age.

32. During the course of hearing of present IAs, this Court directed the OL to inform whether any record is available which can throw light on the date of birth/age of the employees. Shri K.N.Gupta, senior counsel filed a small compilation containing declaration and nomination forms of certain employees. In these forms, either age or date of birth of the employees is shown. A careful reading of circular dated 12.12.2006 aforesaid makes it clear that PF Organization is equipped with the enabling provision to determine the age of the employees. Thus, on the basis of contribution received by the PF Organization, the report of Commissioner and date of birth/age of

employees available with the OL, necessary ingredients for applying formula for the purpose of determining pension are satisfied. For this purpose, the OL needs to take necessary pains to prepare a detailed list of the employees containing their date of birth/age and furnish it to the PF Organization with a view to help the PF Organization to apply the formula as per Para 12 of 1995 Scheme.

33. In the peculiar facts and circumstances of this case, I am unable to agree with the contention of Shri R.K.Goyal that because relevant statutory forms were either not filled up or submitted by the employer or not available with PF Organization, the employees are not entitled to get pension. At the cost of repetition, in my opinion, after having inspected the relevant and statutory record of the industry, the PF Organization itself quantified 8037 employees and took their contribution. These employees must be treated as eligible employees for the purpose of grant of pension under 1995 Scheme.

34. On the basis of aforesaid analysis, these applications are allowed with following directions :-

(i) Shri A.K. Jain may add a column in the list of 1032 employees by indicating their serial number in the list of Commissioner's report (Shri Trivedi's report). This may be done within a week in order to provide momentum to the entire exercise required to be done. He shall supply copy of this list to the learned counsel for PF Organization and to the OL.

(ii) The OL shall scrutinize the record of 1032 employees and prepare a list by reflecting their date of birth / age. This list shall be prepared within three weeks and shall be supplied to the PF Organization.

(iii) The PF Organization shall calculate / determine the pension of 1032 employees as on 04.05.1998 by treating the relevant factors available on the said date. In the event of any difficulty in determining the age of employees, the PF Organization shall take assistance of its circular dated 12.12.2006. It is made clear that 1032 employees shall be entitled for pension only if their names are included in the list Annexure-A, prepared by the Commissioner Shri Trivedi. It will be open to the PF Organization to ascertain whether any

of those employees is already getting pension, in that event no pension shall be payable to them. It will be open to the OL and PF Organization to take necessary steps to identify the real person, who is entitled for pension. However, it is made clear that non- availability of prescribed form by the employer or any other paper formality will not be the reason to deny the pension to the persons whose names are included in Annexure 'A' aforesaid.

(iv) The PF Organization after receiving list by the OL aforesaid shall undertake exercise on its part and start regular pension to the employees within sixty days. Arrears of pension from due date shall be paid within six months therefrom.

35. The applications **(I.A.Nos. 803/12 and 385/13)** are allowed to the extent indicated above.

36. Nobody else is present to press other IAs. List the matter after ensuing summer vacation.

37. The Registry is directed to comply with the directions mentioned in para 6 of this order.

CC as per rules.

Order accordingly.

I.L.R. [2015] M.P., 2699
ELECTION PETITION
Before Mr. Justice G.S. Solanki
Election Pet. No. 30/2014 (Jabalpur) decided on 19 December, 2014

ARJUN KAKODIYA ...Petitioner
Vs.
KAMAL MARSKOLE & ors. ... Respondents

A. ***Representation of the People Act (43 of 1951), Sections 80, 81 & 100(1)(d)(iv) and Conduct of Election Rules, 1961, Rule 63(1) & (2) - Recounting of Votes*** **- Petition on the ground that the petitioner's application for recounting of votes has been refused by Returning Officer on frivolous grounds under the influence of ruling party although**

the same was filed at an appropriate stage - Held - There is no pleading in regard to non-compliance of instructions - There is also no specific pleading and proof regarding the influence as to who made the influence upon whom and how influence has been exerted upon the Returning Officer - Objection was also raised after completion of counting and after declaration of result - There was only suspicion which cannot form a basis for order of recount - Returning Officer has rightly rejected the application/objection. (Paras 16 to 18)

क. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराऐं 80, 81 व 100(1) (डी) (iv) एवं निर्वाचन का संचालन नियम, 1961, नियम 63(1) व (2) – मतों की पुनर्गणना – याचिका का आधार है कि मतों की पुनर्गणना हेतु याची के आवेदन को निर्वाचन अधिकारी द्वारा सत्ताधारी पक्ष के प्रभाव में मामूली आधारों पर अस्वीकार किया गया है, यद्यपि उसे समुचित प्रक्रम पर प्रस्तुत किया गया था – अभिनिर्धारित – अनुदेशों के अननुपालन के संबंध में कोई अभिवचन नहीं – प्रभाव के संबंध में भी कोई विनिर्दिष्ट अभिवचन एवं सबूत नहीं कि किसने किस पर प्रभाव डाला और कैसे निर्वाचन अधिकारी पर प्रभाव डाला गया है – आक्षेप भी मतगणना पूर्ण होने और परिणाम घोषित किये जाने के पश्चात् उठाया गया था – यहां केवल संदेह था जो पुनर्गणना के आदेश हेतु आधार निर्मित नहीं कर सकता – निर्वाचन अधिकारी ने उचित रूप से आवेदन/आक्षेप अस्वीकार किया है।

***B. Representation of the People Act (43 of 1951), Sections 80, 81 & 100(1)(d)(iv) and Conduct of Election Rules, 1961, Rule 63(1) & (2) - Irregularity in counting of Votes* - Petitioner has failed to plead and prove any irregularity committed in counting the votes and how such irregularities have materially affected the election of Respondent No. 1 - Petitioner has also failed to plead and prove that he was polled highest number of votes - Petition is dismissed. (Paras 26 to 28)**

ख. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराऐं 80, 81 व 100(1) (डी) (iv) एवं निर्वाचन का संचालन नियम, 1961, नियम 63(1) व (2) – मतों की गणना में अनियमितता – याची यह अभिवाक् करने एवं साबित करने में विफल रहा है कि मतों की गणना में कोई अनियमितता कारित हुई है तथा कैसे उक्त अनियमितताओं ने प्रत्यर्थी क्र. 1 के निर्वाचन को तात्विक रूप से प्रभावित किया है – याची यह भी अभिवाक् करने एवं साबित करने में विफल रहा है कि उसे सबसे अधिक संख्या में मत प्राप्त हुए हैं – याचिका खारिज।

Cases referred :

(2012) 3 SCC 314, 1993 Supp.(2) SCC 82, 1995 Supp.(3) SCC

318, 2004 (6) SCC 341, AIR 2010 SC 1227.

Prashant K. Badaria with *Ravindra Kumar Choudhary*, for the petitioner.

R.N. Singh with *Arpan J. Pawar*, for the respondent No.1.

JUDGMENT

G.S.SOLANKI, J. :- The petitioner has preferred this Election Petition under Section 80 read with Section 81 of Representation of People Act, 1951 (hereinafter referred to as the Act of 1951) calling in question the election of respondent no.1 as a member of Legislative Assembly of the State of Madhya Pradesh from 114 – Barghat (S.T.) Constituency District Seoni with prayer of calling the entire relevant records and the order for re-inspection/recount of votes polled in Legislative Assembly of the State of Madhya Pradesh from 114-Barghat (S.T.) Constituency and further declaration is sought that the election of respondent no.1 may be set aside and instead the petitioner be declared as duly elected candidate.

2. It is undisputed that petitioner was set up as official candidate of Indian National Congress for aforesaid 114- Barghat (S.T.) District Seoni Legislative Assembly Constituency and respondent No.1 was set up as an official candidate of the Bhartiya Janta Party for 114- Barghat (S.T.) District Seoni Legislative Assembly Constituency and other respondents were set up as official candidates for the different parties. It is also undisputed that the elections of aforesaid Assembly was held as per notified programme of Election Commission, date of polling was 25/11/2013 and date of counting and declaration of result was 8.12.2013. It is further undisputed that Shri Bharat Yadav, Collector Seoni District, Seoni was the District Election Officer and Shri K.C. Parte was appointed as Returning Officer and Sub Divisional Officer (Agriculture) Seoni was appointed as Officer In-charge for postal ballots pertaining to 114- Barghat (S.T.) District Seoni, Legislative Assembly Constituency.

3. Petitioner's case, in short, is that District Election Officer and Returning Officer have been under the influence of ruling party in the State (BJP) because apparent when at every step of counting of votes on 8.12.2013 they violated the model code of conduct. Petitioner continuously raised objections before the competent authorities, ultimately on the end of counting,

the petitioner made an objection/application for recounting of votes in writing on 8.12.2013 at 7.00 pm before the District Election Officer, Seoni District, Seoni. A copy of the same has been received by the Returning Officer 114-Barghat (S.T.) District Seoni Legislative Assembly Constituency regarding recounting of votes and postal ballots. But due to influence of ruling party recounting has not been conducted. Petitioner has raised major abnormality in counting of postal ballots but the District Election Officer and the Returning Officer rejected the same vide order dated 8.12.2013 at frivolous and false grounds and reasons.

4. Petitioner again made an application to the Chief Election Officer, New Delhi through Sub Divisional Magistrate, Barghat, District Seoni on 9.12.2013 but same has yet not been decided. Petitioner further filed a detailed representation to the District Election Officer through Returning Officer on 10.12.2013. After counting of votes there was a dispute in relation to number of postal ballots and its polling in favour of the candidates. Petitioner has got some suspicion on counting, therefore, petitioner has applied for recounting on the same reasons and grounds. Petitioner has applied for information relating to the number of postal ballots issued and received back after voting and petitioner got date wise different informations about the postal ballots from the different authorities. Copy of the information received from different authorities are Annexures-EP/6, EP/7 and EP/8. Petitioner has applied for certified copy of Form No.20 and other documents but due to influence of polling parties, same has not been supplied in time. It is further pleaded that petitioner has filed an application for recounting of votes under Rule 63(2) of Conduct of Election Rules at an appropriate stage but same was rejected on the frivolous grounds that petitioner has not raised any objection at proper stage. It is further pleaded that petitioner was polled the highest number of votes in counting of votes through electronic voting machine and as per newspaper Peoples Samaachar News, Jabalpur dated 9.12.2013 petitioner was declared as winning candidate by 728 votes. On the basis of aforesaid pleadings and grounds, prayer has been made for order of reinspection/ recounting of votes and for setting aside the election of respondent no.1 and further the petitioner be declared as duly elected candidate.

5. Respondent no.1 has denied all averment of the petition other than admitted facts and pleaded that pleading in regard to recounting of votes are vague and deficient. Though it is pleaded that the District Election Officer and

the Returning Officer were working under influence of ruling party and thereby they violated model code of conduct but no complaint in this regard was ever submitted by the petitioner to the said authorities or before the Observer of the Election Commission of India who was present at the spot throughout counting process. It is further submitted that on 8.12.2013, election result of 114 Barghat (S.T.) District Seoni Legislative Assembly Constituency was declared at 6.30 pm and application for recounting was filed by petitioner at 7.10 pm after declaration of the result. It is further submitted that postal ballots were counted at a threshold before the first round of counting. The counting agents of the petitioner at no point of time filed any objection with regard to number of postal ballots or the counting of the said postal ballots. On the contrary being satisfied with the counting process appended their signatures on Form No.17-C Part-II. It is submitted that there is no such pleading that any election agent has raised any objection during counting process. It is denied that petitioner was polled highest number of votes in counting of votes through electronic voting machine. It is further denied that petitioner was declared winning candidate by 728 votes. It is additionally pleaded that petitioner has failed to plead total number of votes polled in his favour and in favour of other candidates, details of postal votes and margin of his defeat etc. In absence of all such material facts petitioner has failed to raise the triable issue before this Court. It is further pleaded that petitioner has not pleaded any specific irregularities in the counting process in regard to the fact that how many votes were wrongly counted in favour of the returned candidate. He further failed to state as to how the election has been materially affected by such irregularities in the counting. In the absence of aforesaid pleading, there is no basis for seeking recount of votes. On the basis of foresaid pleading, it is submitted that petition deserves to be dismissed.

6. On the basis of aforesaid pleadings of the parties following issues have been framed: The respective finding is noted against each of them.

S.No.	Issues	Findings
1.	Whether the petitioner made the application for recounting of votes at appropriate stage but recounting has been refused by the returning officer on frivolous and false grounds and reasons?	No

2.	Whether the order passed by the returning officer (Annexure EP-3) for refusal of recounting is illegal?	No
3.	Whether the District Election Officer and the Returning Officer were working under the influence of the then ruling party?	No
4.	Whether there was any irregularity in the counting of votes (including postal ballots), consequently the election result of 114 Barghat Assembly Constituency has been materially affected?	No
5.	Whether the election petitioner has polled highest number of votes, so that he is entitled to be declared as duly elected candidate from 114 Barghat Assembly Constituency?	No.
6.	Relief and Costs?	Petition is dismissed. As per Para No. 30 & 31.

ISSUES NOS. 1, 2 & 3

Since all these issues are inter connected, therefore, these are considered together.

7. The petitioner has pleaded that the District Election Officer and the returning officer were under the influence of ruling party in the State (BJP) because apparent when at every step of counting of votes, they have violated model code of conduct. It is further pleaded that the petitioner continuously raised the objection before competent authorities, ultimately at the end of counting, the petitioner filed an objection/application (ExP-3) for recounting of votes in writing on 8.12.2013 at 7:00 PM before District Election Officer, Seoni but due to influence of the ruling party, no recounting has been conducted and the objection has been rejected on frivolous grounds vide order (Ep.P-9).

8. Respondent No. 1 has denied the aforesaid allegations and pleaded

that no complaint in this regard was ever submitted by the petitioner to the said authorities or before the observer of Election Commission of India, who was present on the spot throughout the counting process. It is further pleaded that counting agents of the petitioner were present there and they have signed Form No. 17-C Part II and the objection was raised after declaration of election result.

9. Petitioner Arjun Singh Kakodia (PW-1) in his statement has stated that at the time of counting of the postal ballots, he was not fully apprised by the counting staff in regard to counting of ballot papers. He further stated that his agents were also kept in dark. During counting of the ballot papers, he made oral objection but the counting officer informed him that such objection may be raised after completion of the counting, therefore, he could not file written objection during the counting. He has admitted in his cross-examination that at the time of counting of the ballot papers, his counting agent Sunil Rana (PW-3) was present on the counting table. He has further admitted that his counting agent did not make any objection before the returning officer, he only informed the petitioner. He has further admitted in his cross-examination that he only wrote in regard to suspicion in the counting of 16th round.

10. Sunil Rana (PW-3), who happened to be the counting agent of the petitioner at the counting table of the ballot papers, has stated that the counting officer has opened the envelop of the ballot papers before him and thereafter put it in the trays of respective candidates in favour of whom the ballot votes were given. He further added that which vote was in whose favour, he could not see. He further stated that he made objection before concerning officer but he told him to see the votes later-on. He further stated that he apprised the aforesaid fact to the petitioner and after discussion, the petitioner made objection before the returning officer. In examination-in-chief itself, this witness has admitted that he was apprised by the counting officer in regard to the fact that how many votes were received by each candidate but when they came out of the premises, they found some difference in the votes. He further admitted in his cross-examination that after completion of counting, he signed the paper prepared in regard to the counting. He further admitted that he had no knowledge in regard to the figures of votes except suspicion in regard to the counting.

11. Respondent No. 1 Kamal MarsKole (DW-1) has stated that the petitioner did not make any objection during the counting of the ballot votes.

Rudra Deo (DW-2), who happened to be the counting agent of respondent No.1, has specifically stated that witness Sunil Rana and one other Mahendra Bisen were the counting agents of the petitioner and they were present at the time of counting of ballot papers. He has specifically denied that at the time of counting, they were not apprised in regard to the ballot papers.

12. On critical analysis of the aforesaid evidence on record, it reveals that the petitioner or his agent Sunil Rana (PW-3) did not make any written or oral objection during the counting process. Further the petitioner has not dared to call any counting officer or counting staff to prove his case before this Court. The petitioner or his witness Sunil Rana have not pleaded or proved any fact as to how much votes were not counted in favour of the petitioner. Sunil Rana, who was present at the time of counting, specifically stated that except suspicion, he had no knowledge in regard to the number of votes.

13. I have gone through the objection/application (Ex.P-3), wherein nothing has been found in regard to number of votes or how the irregularities have been committed by the counting staff. What has been written in (Ex.P-3) is only to the effect that there was suspicion in counting of 16th round, therefore, prayer was made for recording of counting of 17th round. It further reveals that objection/application (Ex.P-3) was received by the returning officer on 8.12.2013 at 7:10 PM. The returning officer has mentioned the aforesaid time i.e. 7:10 PM, just beneath his signatures and seal.

14. So far as the contention of the petitioner that the returning officer was working under the influence of the ruling party (BJP) is concerned, petitioner Arjun Kakodia (PW-1) has not stated any particular instance to show that the returning officer was working under the pressure except the fact that when he filed the objection for recounting, the returning officer has taken the aforesaid application and passed the order after 1½ hours. He further stated that he made a tip of the fact that he filed the aforesaid objection before declaration of result but despite this fact, the returning officer rejected his application. He has further stated that instruction No. 14.108 given in the booklet of Election Commission (Ex.P-7) has not been complied with by the returning officer.

15. In the instant case, it is not disputed that the petitioner has not made any pleading in regard to instruction No. 14.108 mentioned in the booklet issued by the Election Commission. Learned Senior Counsel appearing for respondent No. 1 has argued that mere non-compliance or breach of

constitution or statutory provision by itself does not result in invalidity of election of the returned candidate as provided under Section 100(1)(d)(iv) of the Act of 1951. He has placed reliance on a decision of the Apex Court in *Mangani Lal Mandal Vs. Bishnu Deo Bhandari* – (2012) 3 SCC 314. In the said case there was breach and non compliance but there was no pleading as to suppression of information by the returned candidate in the affidavit filed along with the nomination papers with regard to his first wife and dependent children from her and further, non disclosure of their assets and liabilities, has materially affected the result of the election.

16. Similar is the situation here in the instant case. There is no pleading in regard to non-compliance of instruction 14.108 mentioned in the booklet issued by the Election Commission, therefore, evidence without pleading cannot be taken into consideration. Further there is no specific pleading and proof in regard to influence made by the ruling party as to who made the influence upon whom and how influence or pressure has been exerted upon the returning officer. Merely taking the objection or filing the application, which was itself cryptic in nature, does not establish that there was irregularities in the counting of ballot papers. Merely on the ground that the returning officer passed the order on the objection/application after 1½ hour, it cannot be said that he was influenced by the ruling party. Further it is apparent from order (Ex.P-9) passed by the returning officer on 8.12.2013 that the petitioner has filed his objection after completion of the 17th round and completion of counting of postal ballots, then why the agent of the petitioner has signed Form No. 17-C Part II after being satisfied with the counting. The application was filed after completion of 18th round as well as completion of whole counting and after declaration of the result, therefore, same was rejected.

17. Sunil Rana, election agent of the petitioner has admitted in his cross-examination that he had signed the aforesaid Form No. 17-C Part II and further admitted that he had only suspicion regarding counting, thus, it is clear that the application (Ex.P-3) was filed only on the basis of suspicion. Rule 63(1 & 2) of the Conduct of Election Rules, 1961, provides that after the completion of the counting, the Returning Officer shall record in the result sheet in Form 20 the total number of votes polled by each candidate and announce the same and after such announcement has been made, a candidate, or, in his absence, his election agent or any of his counting agents may apply in writing to the Returning Officer to re-count the votes either wholly or in

part stating the grounds on which he demands such re-count. On such an application being made the Returning Officer shall decide the matter and may allow the application in whole or in part or may reject *it in toto* if it appears to him to be frivolous or unreasonable.

18. On a bare perusal of objection/application (Ex.P-3), no such specific ground has been mentioned by the petitioner for recounting of votes pertaining to 16th round and ballot papers. There was only suspicion regarding counting of the votes, and only on the basis of suspicion, the order of recounting cannot be passed by the returning officer, therefore, it cannot be said that the order (Ex.P-3) passed by the returning officer, has been passed on frivolous and false grounds or same has been passed under the influence of the ruling party. Thus, in my opinion, the returning officer has rightly rejected the objection/ application filed by the petitioner vide order dated 8.12.2013 (Ex.P-9) and he has not committed any illegality in passing the aforesaid order.

19. On the basis of aforesaid discussion as well as oral and documentary evidence on record, issue Nos. 1, 2 and 3 are answered in negative.

ISSUES NOS. 4 & 5

20. The petitioner has pleaded that there was major abnormality in counting of postal ballots and there was dispute in relation to number of postal ballots and its polling in favour of the candidates. The petitioner was having some suspicion with respect to counting, therefore, he filed objection/application for recounting of the same. It is further pleaded that in regard to the number of postal ballots issued and received back after voting, the petitioner got date-wise different information about the postal ballots from different authorities. (Annexures- EP/6, EP/7 and EP/8) have been filed by the petitioner in support of the aforesaid pleading.

21. Respondent No. 1 has denied the aforesaid pleading of the petitioner and has specifically stated that the petitioner has failed to give details of total number of votes polled i.e. the votes polled in his favour and in favour of the other candidates and the details of postal ballots and margin of his defeat. It is further pleaded that there is no pleading in regard to irregularities in counting such as in what manner, at what time, at whose instance and for benefit of whom such irregularities have been committed and who was the witness of such irregularities. It is further specifically pleaded that the petitioner has also failed to state as to how the election of respondent No.1 has been materially

affected by any such irregularities in the counting.

22. Learned Senior Counsel appearing on behalf of respondent No. 1 has argued that recounting of votes should not be ordered as a matter of course in the absence of pleading of material facts supported by contemporaneous evidence. He has placed reliance on the decisions of the Apex Court in *Satyanarain Dudhani Vs Uday Kumar Singh and others* – 1993 Supp (2) SCC 82; *Charan Dass Vs. Surinder Kumar and others* – 1995 Supp (3) SCC 318; *M. Chinnasamy Vs. K.C. Palanisamy and others* – 2004(6) SCC 341.

23. In counter, learned counsel for the petitioner has submitted that so far as material fact is concerned, in stating the material fact, it will not do merely to quote the word of section because then efficacy of material fact will be lost. He has placed reliance on the decision of the Apex Court in *Ram Sukh Vs. Dinesh Aggarwal* – AIR 2010 SC 1227.

In the instant case, it is undisputed on record that the petitioner has not pleaded the words 'materially affected'. In order to resolve the aforesaid controversy, it is necessary to reproduce Section 100(1)(d)(iv) of the Act of 1951.

> **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.

24. A bare reading of aforesaid provision with Section 83 of the Act of 1951 leaves no manner of doubt that where a returned candidate is alleged to be guilty of non-compliance with the provision of the Constitution or the Act of 1951 or any rules or orders made thereunder and his election is sought to be declared void on such ground, it is essential for the election petitioner to aver by pleading the material facts that the result of the election, insofar as it concerned the returned candidate, has been materially affected by such breach or non-observance. If the election petition goes to trial then the election petitioner has also to prove the charge of breach or non compliance as well as establish that the result of election has been materially affected. It is only on the basis of such pleading and proof that the Court may be in a position to form opinion and record a finding that breach or non compliance with the provision of the Constitution or the Act of 1951 or any rules or orders made thereunder, has materially affected the result of the election before the election of the returned candidate could be declared void. It means mere non compliance or breach of the Constitution or the statutory provision noticed above, by itself, does not result in invalidating the election of a returned candidate under Section 100(1)(d)(iv) of the Act of 1951. It is obligatory duty of the petitioner to prove by leading the evidence that such breach or non observance of any rules or orders made thereunder has materially affected the election of the returned candidate.

25. So far as argument advanced by learned counsel for the petitioner that merely quoting the word of section is not necessary, is concerned, it is true that merely quoting the word of section is not necessary but at the same time there has to be the specific averments like how and in what manner the irregularities have been committed, who was the officer/staff, who committed the irregularities. On the strength of the decision of the Apex Court in *Ram Sukh Vs. Dinesh Aggarwal* (supra), learned counsel for the petitioner has argued that the ground of Section 100(1)(d)(iv) are made out in this case. But in the aforesaid case it was found that the petitioner of the case has failed to state material facts in regard to irregularity committed by the returning officer or any alleged omission on the part of the returning officer, without pleading and proof, Rules ipso facto has not materially affected the result of the election. In the aforesaid case specimen signatures of the polling agent are circulated, 80% of the polling was over and because of absence of polling agent, the voters got confused and voted in favour of the first respondent. On the basis

of the aforesaid fact, it was found that the pleading was vague and does not spell out as to how the election result was materially affected because of the aforesaid factors and election petition was dismissed at threshold.

In the instant case there is no such specific pleading in regard to breach of any rules or non observance of any direction made by the Election Commission in its booklet. On the contrary, it reveals from orders dated 20.3.2014 and 15.4.2014 passed by this Court that the aforesaid booklet (Ex.P-7) was filed subsequently after filing the election petition, as an afterthought. In these circumstances, if there is any non-observance of instruction No. 14.108 in regard to recounting of ballot papers by the returning officer, it would not be considered as a proved fact that the aforesaid non observance has materially affected the election of respondent No. 1.

26. So far as evidence led by petitioner Arjun Kakodiya and his witnesses Manoj Rahangdale, Sunil Rana and Sitaram Panchshwar is concerned, firstly they are unable to state anything in regard to the irregularities or non-observance of any rule at the time of counting and secondly it is on record that Sunil Rana, who happened to be the election agent of the petitioner, has admitted in his cross-examination that he was having only suspicion in regard to counting. He further admitted that he signed Form No. 17-C Part II. So far as evidence in regard to number of votes as mentioned in (Ex.P-8) is concerned, since there is no pleading as to how many votes were illegally counted in favour of the returned candidate, the evidence in this regard is of no value because it is well established principle of law that no evidence can be read without there being any pleading of the parties. In these circumstances, the petitioner has failed to plead and prove any irregularity committed in counting the votes/postal ballots and further failed to prove as to how such irregularities have materially affected the election of respondent No. 1.

27. So far as the contention of the petitioner that he was polled the highest number of votes, is concerned, again there is no specific pleading as to how many votes of the petitioner were illegally included in the votes of the returned candidate. In *Charan Das Vs. Surinder Kumar and others* (supra), in similar circumstances, the High Court had refused to order re-counting of votes, which decision was upheld by the Apex Court. In that case also the counting agent has signed certificate stating that they were fully satisfied with the conduct of the counting staff in respect of the votes. In these circumstances, the allegation of counting agents that they were kept away and were not allowed

to inspect the alleged rejection of ballot papers, was not considered believable. In the instant case also statement of Sunil Rana (PW-3) and other witnesses of the petitioner cannot be said to be believable that the counting officer did not show them the ballot papers.

28. Considering the overall facts and circumstances of the case and evidence on record, I am of the considered view that the petitioner has failed to prove that there is any irregularity in counting of votes including postal ballots, which has materially affected the election of respondent No. 1 and further failed to prove that the petitioner was polled highest number of votes so that he may be declared as duly elected candidate from 114 - Barghat (S.T.) Constituency District Seoni.

29. In view of the aforesaid discussion, issue Nos. 4 and 5 are also answered in negative.

30. On the basis of conclusion arrived at by this Court on issue Nos. 1 to 5, the petitioner has failed to prove the grounds of this petition taken under Section 100(1)(d)(iv) of the Act of 1951. Consequently, the petition is liable to be dismissed and is hereby dismissed.

31. The petitioner has to bear his own cost and cost of respondent No. 1 if certified or as per schedule.

A copy of this judgment be forwarded to the Election Commission as well as the Speaker of the State Legislative Assembly.

Petition dismissed.

I.L.R. [2015] M.P., 2712
ELECTION PETITION
Before Mr. Justice Jarat Kumar Jain
Election Pet. No. 18/2014 (Indore) decided on 5 January, 2015

PARAS ...Petitioner
Vs.
CHAITANYA KASHYAP & ors. ...Respondents

A. ***Representation of the People Act (43 of 1951), Sections 83(1), 123(4) & Civil Procedure Code (5 of 1908), Order 7 Rule 11 - Cause of Action*** **- Respondent's application under Order 7 Rule 11 seeking rejection of Election Petition, on the ground of non-discloser of cause of**

action and that the material facts regarding corrupt practice are missing - Held - This is an undisputed fact that the name of respondent No. 1 is enrolled at Sr. No. 248 at Assembly Constituency No. 220, Ratlam City - It is also clear from the details of immovable property and the Bank account, that respondent No. 1 is permanent resident of Ratlam - Thus, it cannot be blamed that he has mentioned incorrect residential address in the nomination paper - Similarly - Closure report has been submitted in regard to Crime No. 286/1988, registered against respondent No.1 - Neither any cognizance was taken nor any charges were framed by Magistrate - Therefore, no case can be legally said to be pending against respondent No.1 - Thus, it cannot be held that respondent No.1 has concealed the fact in nomination form. (Paras 8, 9, 11 & 17)

क. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराऐं 83(1), 123(4) एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – वाद हेतुक – चुनाव याचिका को नामंजूर किये जाने हेतु प्रत्यर्थी का आदेश 7 नियम 11 के अंतर्गत आवेदन, वाद कारण न दर्शाये जाने के आधार पर एवं यह कि भ्रष्ट आचरण संबंधी तात्विक तथ्य अनुपलब्ध हैं – अभिनिर्धारित – यह एक अविवादित तथ्य है कि प्रत्यर्थी क्रमांक 1 का नाम रतलाम शहर विधान सभा निर्वाचन क्षेत्र क्रमांक 220 के क्रम संख्यांक 248 पर तालिकांकित है – अचल संपत्ति एवं बैंक खाता के विस्तृत विवरण से भी स्पष्ट है कि प्रत्यर्थी क्रमांक 1 रतलाम का स्थायी निवासी है – अतः यह दोष नहीं लगाया जा सकता कि उसने नामांकन पत्र में निवास का गलत पता दर्शाया है – उसी प्रकार – प्रत्यर्थी क्रमांक 1 के विरूद्ध पंजीबद्ध अपराध क्रमांक 286/1988 के संबंध में खात्मा प्रतिवेदन प्रस्तुत कर दिया गया है – मजिस्ट्रेट द्वारा न कोई संज्ञान लिया गया न ही कोई आरोप विरचित किये गये – इसलिये विधिक रूप से प्रत्यर्थी क्रमांक 1 के विरूद्ध कोई प्रकरण लंबित होना नहीं कहा जा सकता – अतः यह अभिनिर्धारित नहीं किया जा सकता कि प्रत्यर्थी क्रमांक 1 ने नामांकन पत्र में तथ्यों का छिपाव किया।

***B. Representation of the People Act (43 of 1951), Sections 83(1), 123(4) & Civil Procedure Code (5 of 1908), Order 7 Rule 11 - Material particulars regarding corrupt practice* - Averments made with regard to false publication are not fulfilling the requirement of Section 123(4) of the Act - There is also no averment that the false publication was made at the instance of Respondent No. 1 - The advertisement is also not false - Material facts regarding corrupt practice are missing - Petition is rejected on both the grounds. (Paras 30, 31, 33)**

ख. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराऐं 83(1), 123(4) एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – भ्रष्ट आचरण के संबंध में

तात्विक विशिष्टियां – मिथ्या प्रकाशन के संबंध में निर्मित प्रकथन अधिनियम की धारा 123(4) की आवश्यकताओं की पूर्ति नहीं करते – यह भी प्रकथन नहीं कि मिथ्या प्रकाशन प्रत्यर्थी क्रमांक 1 के अनुरोध पर तैयार किया गया था – विज्ञापन भी मिथ्या नहीं है – भ्रष्ट आचरण संबंधी तात्विक तथ्य अनुपलब्ध हैं – दोनों आधारों पर याचिका निरस्त।

Cases referred :

1984 Cr.L.J. 1277, AIR 1970 SC 1153, 1990(2) SCC 189, 1995(1) SCC 684, 2012 (3) SCC 64, AIR 1957 SC 503, (1976) 3 SCC 252, (2009) 9 SCC 310, (2010) 4 SCC 81, AIR 2011 SC 906, (2007) 3 SCC 617.

Rohit Mangal, for the petitioner.
V.K. Jain, for the respondent No.1.
Archana Kher, for the respondent No.4.

ORDER

J. K. JAIN, J. :- THIS order shall govern disposal of IA No. 6731/2014, i.e. an application under Order VII Rule 11 r/w Section 151 of the Code of Civil Procedure (for brevity the Code), for rejection of election petition *inter alia* on the ground of non-disclosure of cause of action or a triable issue.

2. Assembly elections of State of Madhya Pradesh held on 25.11.2013, in the election, Petitioner and Respondent no.4 (Dr. Arun Purohit) were in a frey as independent candidate whereas the Respondent no.1 was the official candidate of Bhartiya Janta Party. The election results were declared on 8.12.2013 and the respondent no.1 was declared elected. In this petition, election of Respondent No.1 to MP legislative assembly constituency no. 220 Ratlam City (general) has been challenged on the grounds that (i) Respondent no.1 has furnished incorrect information in regard to his residential address and (ii) has concealed the fact in regard to pendency of criminal case in nomination form; and (iii) he committed corrupt practices by publishing a false statement of fact in newspaper.

3. The respondent no.1 has filed an application under Order VII Rule 11 r/w section 151 of Code for rejection of election petition on two grounds: (i) non-disclosure of cause of action or a triable issue in the petition and (ii) material facts and full particulars in regard to corrupt practices are missing. To clarify the grounds it is stated that the respondent no.1 has neither made any false declaration nor has concealed anything while submitting his nomination form. Respondent no. 4 was an independent candidate in the election and there is no averment in the petition

that respondent no.4 had published the advertisement in the newspaper at the instance of respondent no.1. However the publication was not false therefore it does not fall within the definition of corrupt practices. Thus from a bare perusal of the pleadings made in the petition and the documents filed alongwith the petition, it is clear that the respondent no.1 has neither guilty for non-compliance of any rules or orders made under the Representation of the People Act 1951 (herein after "Act") nor he has committed any corrupt practices. Therefore, the petition does not disclose any cause of action and make out any ground to set aside the election of respondent No.1. Hence, the petition deserves to be dismissed at the threshold.

4. In the reply of the application, the petitioner stated that he has clearly and specifically pleaded the material facts regarding the corrupt practices committed by Respondent no.1 and it is evident from the nomination form that respondent no.1 has furnished incorrect residential address and concealed the information in regard to pending criminal case. Thus he is guilty for false declaration and corrupt practices. It is further stated that it is settled principal of law that at the time of deciding the application under Order VII Rule 11 of Code, the Court is required to consider only the averments of election petition (Plaint) and documents. Whereas the Court cannot consider the reply of the petition and documents filed along with the reply. The grounds raised in the election petition are matter of fact and therefore it can be proved by evidence in the trial. Thus, the application deserves to be dismissed.

5. In order to appraise the merits of rival contentions in a right perspective, it would be desirable to deal with the grounds raised in the application as one by one.

Ground No.1 :-

[There is no cause of action or a triable issue in the petition.]

6. According to the Petitioner in the nomination form (Annexure P/5) respondent no.1 incorrectly mentioned that he is the resident of Vishaji Mansion Gali, M.G. Road Ratlam, whereas he is resident of 4th Floor, Hermes House, 78, Khan A.G. Khan Road, Worli sea-face Mumbai, as shown in pan card (annexure-P/1) and an abstract of details of company registered with the Registrar of Companies (Annexure-P/2). Thus he has furnished an incorrect information in the nomination form.

7. According to the Respondent no.1, he has mentioned correct residential address in the nomination form (Annexure-P/5). He is a permanent resident of Ratlam, he owns movable and immovable properties at Ratlam and is also having a business at Ratlam. This fact is evident from the details of immovable properties and bank accounts shown in column no. 7 (a) and 7 (b) of the nomination form. That apart, the section 5 of the Act prescribes that a person is entitled to contest an election of the State Legislative Assembly if he is an elector for any Assembly Constituency in that State. In the present case the name of respondent no.1 is enrolled in 220 Ratlam City (General) M.P. State at serial No.248 in part No.149. Thus, he fulfilled the requisite qualification.

8. After hearing learned counsel for the parties, I have gone through the record. In the part-I of nomination form (Annexure-P/5) the candidate has to mention his full postal address. The respondent No.1 has mentioned his full postal address as Vishaji Mansion Gali, M.G.Road, Ratlam. In the Annexure-P/ 2 it is mentioned that respondent no.1 being a Managing Director of Kashyap Sweeteners Ltd is presently residing at 4th Floor, Hermes House, 78, Khan A.G. Khan Road, Worli sea-face Mumbai. Section 5 of the Act provides that a person is entitled to contest an election of the State Legislative Assembly if is an elector for any Assembly Constituency in that State. In the nomination form at serial no.2 of part-I respondent no.1 has mentioned that his name is enrolled at serial no. 248 at Assembly Constituency No. 220, Ratlam City (General). This is an undisputed fact.

9. It is nowhere prescribed that the candidate has to disclose his permanent and present residential address in the nomination form. It is evident from the details of immovable properties and details of Bank Accounts shown in serial No.7(a) and 7(b) of nomination form. That respondent No.1 is permanent resident of Ratlam. Thus, it is clear that the respondent no.1 has mentioned correct residential address in nomination form (Annexure-P/5).

10. According to the petitioner, on 05.11.1988, crime no. 286/1988 registered at Police Station Ratlam u/s 420, 408 r/w 34 of IPC. Though the High Court while exercising jurisdiction u/s 482 of CrPC quashed the FIR on 12.4.1990 but the Hon'ble Apex Court by its order dated 6.8.1992 set aside the order of the High Court. Thus the respondent no.1 is still facing a criminal trial but he has not disclosed this fact in the nomination form. Learned counsel for the petitioner tried to impress that whenever an offence is registered at Police Station, in general sense it means a case before the Police Officer and upon information received by

the Magistrate, it will be presumed that the concerned magistrate has taken the cognizance of the case. In the present matter the investigation is still pending against the respondent no.1 therefore he should have furnished this information in his nomination form Annexure-P/ 5 but he has concealed this fact. Thus he is guilty for non-compliance of rules and orders made under the Act. To buttress the contention reliance has been placed on the following precedents.

Meaning of a case defined in:

(i) *P.V. Vijayaraghavan Vs CBI* (1984 CrLJ 1277)

(ii) *Bhimmappa Vs. Laxman* (AIR 1970 Sc 1153)

(iii) *J.C. Yadav Vs State of Haryana* (1990 (2) SCC 189)

Meaning of Cognizance defined in:

(i) *State of West Bengal Vs Mohd. Khalid* (1995(1) SCC 684)

(ii) *Subramanian Swamy Vs Manmohan Singh* (2012 (3) SCC 64)

11. On the other hand learned counsel for the respondent no.1 submitted that if any offence is registered at any police station, then it will not be treated as a case. In the nomination form the candidate has to furnish the information in regard to a case pending in the Court. A case is said to be instituted in a Court only when the Court takes cognizance of the offence. Undisputedly, no criminal case has been pending against the respondent no.1 in any Court. In support respondent No.1 has filed a letter dated 07.11.2013 of Superintendent of Police, Ratlam in which it is stated that closure report No.36 on 20.06.1989 has been submitted in regard to Crime No.286/88 for offence under Section 420, 408 registered at Police Station Audyogik Kshetra Ratlam and no investigation of any crime is pending and no criminal case is pending against respondent No.1. He submitted that learned counsel for petitioner cited many precedents without referring the facts of such case and the context in which such judgments were passed. Therefore, by no stretch of imagination an offence registered at Police Station in which closure report has been submitted, can be treated as a pending case. Thus, it is not required to furnish such information in nomination form. In the petition it is wrongly mentioned that respondent no.1 is facing trial of criminal case. The petitioner has not mentioned any number of criminal case and name of the Court in which the respondent no.1 is facing trial. Thus, the respondent no.1 has not concealed any fact in regard to pendency of any criminal case.

12. I have considered the arguments of learned counsel of the parties. It would be useful to refer the serial 5 of Part-A of the nomination form (Annexure-P/5), which is as under :-

"(5) I am/am not accused of any offence(s) punishable with imprisonment for two years or more in a pending case(s) in which a charge(s) has/have been framed by the court(s) of competent jurisdiction.

If the deponent is accused of any such offence(s) he shall furnish the following information:-

(i) The following case (s) is/are pending against me in which charges have been framed by the court for an offence punishable with imprisonment for two years or more :-:

A	Case/First Information Report No./Nos. together with complete details of concerned Police Station/ District State.	Not applicable
B	Section(s) of the concerned Act(s) and short description of the offence(s) for which charged	Not applicable
C	Name of the Court, Case No. and date of order taking cognizance:	Not applicable
D	Court(s) which framed the charge(s)	Not applicable
E	Date(s) on which the charge(S) was/were framed	Not applicable
F	Whether all or any of the proceeding(s) have been stayed by any Court(s) of competent jurisdiction	Not applicable

(ii) The following case(s) is/are pending against me in which cognizance has been taken by the court [other than the cases mentioned in item (i) above]:-

A	**Name of the Court, Case No. and date of order taking / cognizance:**	**Not applicable**
B	**The details of cases where the court has taken cognizance, section(s) of the Act(s) and description of the offence(s) for which cognizance taken**	**Not applicable**
C	**Details of Appeal(s) /Application(s) for revision (if any) filed against the above order(s)**	**Not applicable**

13. From the bare reading of the aforesaid serial no.5 it is clear that the candidate has to furnish the information in regard to a pending case or cases for any offence punishable with imprisonment for 2 years or more and in which Court has taken cognizance and framed charges.

14. Hon'ble Apex Court in the case of *J.C. Yadav Vs. State of Haryana* (1990) 2 SCC 189 held that the word 'case' in ordinary usage means 'event', 'happening', 'situation', 'circumstances'. The expression 'case' in legal sense means 'a case', 'suit' or 'proceeding in court or Tribunal'.

15. Hon'ble Apex Court in the case of *Asgar Ali Nazar Ali Singaporewalla Vs State of Bombay* reported in AIR 1957 SC 503 relying upon the meaning of the word "pending" as defined in stroud's judicial dictionary, edn.3, Vol.3, Page 2141, in which it was mentioned that a legal proceeding will be deemed to be "pending" from the date of original cognizance until it is concluded, held that the test for case said to be pending in a court of justice is when any proceeding can be taken in it.

16. With respect to the term "pending" the Code of Criminal Procedure 1973 in Chapter XIV specifically provides conditions requisite for initiation for proceedings which starts from cognizance of offences by Magistrates u/s 190 of the Cr.P.C. up till the prosecution provided in subsequent sections

upto section 199 of the CrPC. Thus it is quiet clear that the proceeding is initiated on cognizance of any offence taken by the Magistrate and not earlier to it. In this regard, reference may be made to a decision of the Apex Court in the case of *Devarapalli Lakshminarayan Reddy and others Vs. V.Narayana Reddy and Others* reported in (1976) 3 SCC 252 in which it was specifically held that from the scheme of the CrPC, the content and the marginal heading of section 190 and the caption of chapter XIV under which section 190 to 199 occur, it is clear that a case can be said to be instituted in a Court only when a court takes cognizance of an offence alleged therein.

17. With the aforesaid discussion, it is quiet apparent that a criminal case can be said to be pending and initiated only after cognizance has been taken for any offence by a Magistrate or charges have been framed therein and not before that. No document has been produced by the Petitioner to show that any cognizance had been taken or charges had been framed in the aforesaid offence registered at Police Station at Ratlam against Respondent No.1 prior to filing of nomination (Annexure-P/5). It is thus quiet apparent that at the time of filing of nomination paper along with required declaration, neither any cognizance was taken in that case nor any charges were framed therein and hence no case can be legally said to be pending against the respondent no.1 on that date. Hence, the respondent no.1 was not bound to mention any such case on the declaration required, especially when the said declaration did not require any information regarding filing of any FIR/complaint against the respondent no.1. Thus, I found no substance in the argument of learned Counsel for the petitioner that the respondent No.1 has concealed the fact in nomination form in regard to pendency of criminal case.

Ground No.2 :-

[The petitioner has not pleaded the material facts and has also failed to give full particulars of the alleged corrupt practices in the election petition.]

18. Learned Counsel for the respondent No.1 submitted that in paragraph 12 of the petition the averments were made in regard to false publication. But these averments are not fulfilling the requirement of Section 123 (4) of the Act and there is a total non-compliance of mandatory provisions contained in Section 83 (1) of the Act. Nowhere it is pleaded that the said publication was made at the instance of respondent No.1. The material facts are missing in the

petition, therefore, the petition is liable to be rejected at threshold. In support of the arguments learned Counsel has placed reliance on the judgments of Apex Court in case of *Anil Vasudev V/s. Naresh Kshali* (2009) 9 SCC 310 and *Laxmikant Bajpai V/s. Haji Yaqoob* (2010) 4 SCC 81.

19. It is further submitted that in the absence of specific averments that false publication was made at the instance of respondent No.1, it cannot be inferred that respondent No.1 committed corrupt practice. For this purpose learned Counsel for the respondent No.1 cited the judgment of Hon'ble Apex Court in the case of *Joseph M. Puthussery Vs. T.S.John* AIR 2011 SC 906.

20. Learned Counsel for the respondent No.1 submitted that however there is absence of material facts in regard to false publication, even though the advertisement is mere reproduction of the news which has already been published by the print and electronic media and the contents of the advertisement are not false. Publication of reproduction of the matter is not comes within the definition of corrupt practice. For this purpose learned Counsel cited the judgment of Hon'ble Apex Court in the case of *Joseph M. Puthussery* (supra).

21. On the other hand learned Counsel for the petitioner submitted that the pleadings are complete in all respects and the affidavit also fulfills the requirement of Section 83 (1) of the Act. In the petition and affidavit it has been specifically pleaded that false publication was made with the consent of respondent No.1. At this stage the Court cannot consider the correctness of allegations and evidence in support of averments by entering into merits of the case which would be permissible only at the stage of trial of the election petition. For this purpose learned Counsel has placed reliance on the decision of the Apex Court in the case of *Virendranath Gautam V/s. Satpal Singh* (2007) 3 SCC 617.

22. Now I have considered whether the material facts are averted in the petition.

23. The expression material facts has neither been defined in the Act nor in the Code. Hon'ble Apex Court in the case of *Laxmikant Bajpai* (supra) after considering catena of judgment reached to the conclusion that it is a settled legal position that an election petition must clearly and unambiguously set out all the material facts which the appellant is to rely upon during the trial and it must reveal a clear and complete picture of the circumstances and

should disclose a definite cause of action. In the absence of above, an election petition can be summarily dismissed. To see whether material facts have been duly disclosed or whether a cause of action arises, we need to look at the averments and pleadings taken up by the party.

24. According to the petitioner at the instance of respondent No.1, respondent No.4 has published a false advertisement in the newspaper. Thus, he has committed corrupt practice as defined in Section 123 (4) of the Act. The provisions of Section 123(4) of the Act which reads as under :"

> **The publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to the prejudice the prospects of that candidate's election."**

From perusal of the above provision, it is clear that if any publication is alleged to be a corrupt practice, the same must fulfill the following requirements :

" 1. Such publication must be made either by a candidate or his election agent.

2. If such publication is made by any other person, it must be made with the consent of a candidate or his election agent.

3. Publication must be false and the maker of such publication must believe it to be false or does not believe it to be true.

4. Such publication must be in relation to personal character or conduct or in relation to the candidature or withdrawal of any other candidate.

5. Such publication must be reasonably calculated to prejudice the prospects of that candidate's election.

25. Now it would be useful to refer averments made in para 12 of the petition in regard to corrupt practice which is as under :

> **"On 24.11.2013, one Arun Purohit who was contesting the election as an "Independent Candidate" has published a false advertisement in the newspaper viz. "Nai-Dunia" dated 24.11.2013 that the election of the petitioner held in 2008 is declared void by the High Court, when the judgment of the High Court is stayed by the Supreme Court. Copy of the order of Supreme Court is annexed and marked as Annexure P/9 to the petition. Thus, the respondent no.4 has published false news about the petitioner in the newspaper which has prejudiced the result of the election against the petitioner. The respondent no.4 subsequently withdrew his candidature and supported the respondent no.1 who as the candidate of "Bhartiya Janta Party" on 19.11.2013 in a public meeting of Chief Minister of M.P. At Do Batti Chouraha Ratlam. A complaint to that effect was made by the agent of petitioner to the Election Officer on 24.11.2013. Copy of the said complaint is annexed and marked as Annexure P/10 to the petition."**

26. Advertisement in question is as under :

> जागो .... मतदाताओ ... जागो
>
> जहां एक ओर ... 12 अप्रेल 2013 को उच्च न्यायालय इंदौर में तत्कालीन विधायक पारस सकलेचा के निर्वाचन को
>
> { शुन्य }
>
> घोषित किया है और उच्चतम न्यायालय में प्रकरण विचाराधीन है, जिस पर सुनवाई 3 दिसम्बर 2013 को होना है ।
>
> क्या आपका मत सार्थक होगा ?
>
> वहीं दूसरी ओर ... देश की अर्थव्यवस्था की बर्बादी की जिम्मेदार कांग्रेस, भ्रष्टाचार में डूबी केन्द्र सरकार जो हर मोर्चे पर असफल है ।
>
> क्या आपका मत सार्थक होगा ?

एक जागरूक मतदाता बनकर अपने मत का सदुपयोग कर नगर व प्रदेश के विकास हेतु योग्य उम्मीदवार के पक्ष में मतदान कीजिये ।

तो सोचिये ! ध्यान से सोचिंये !!

विकास के लिए सच्चे हकदार को जनादेश दीजिये ।

आपका शुभचिंतक

(फोटो)

डॉ. अरूण पुरोहित

27. From the aforesaid averments it is clear that there is no specific averment that such publication was made by respondent No.4 with the consent of respondent No.1 or his election agent. Respondent No.4 has published the advertisement and subsequently withdrew his candidature and supported the respondent No.1. On this basis inference cannot be drawn that the questioned advertisement was published with the consent of respondent No.1. For this purpose I would like to refer the judgment of Hon'ble apex Court in the case of *Joseph M. Puthussery* (supra) held as under :

> **"It is well-settled that to prove that the corrupt practice of a third person is attributable to a candidate under Section 123 of the Act, it must be shown that the candidate consented to the commission of such act. The finding that the appellant knew about such distribution because benefit of such distribution could only ensure to him, but he kept silent despite knowledge of such distribution, is nothing else but an unwarranted inference and surmise on the part of the court."**

28. Now it is to be seen whether questioned advertisement is false. As per the averments in the petition, the advertisement is false because in the advertisement it is mentioned that the election of the petitioner held in 2008 is declared void by the High Court but it is not mentioned that the judgment of the High Court is stayed by the Supreme Court. Whether non-mentioning of this fact amounts to false advertisement? There is no averment that the respondent No.4 having knowledge in regarding to stay order granted by Supreme Court, deliberately suppressed this fact in order to prejudice the prospects of the petitioner's election. In the advertisement it is mentioned that

the election of the petitioner held in 2008 is declared void by the High Court and the matter is pending before Supreme Court for hearing on 3rd December, 2013.

29. A bare reading of advertisement it is clear that the advertisement does not contain full facts, but it cannot be said that the advertisement is false.

30. Accordingly in the petition, the petitioner has utterly failed to fulfil the statutorily mandatory requirements while pleading relating to the corrupt practice. Even the material facts as to the consent of respondent No.1 or his election agent to the commission of alleged corrupt practice have not been pleaded at all. Apparently, the petitioner has not been able to point out as to who was involved in the corrupt practices. As aforesaid the advertisement is not false. Thus all the ingredients of corrupt practices are not made out.

31. Accordingly, the petition does not disclose cause of action or a triable issue and the material facts in regard to alleged corrupt practices are also missing.

32. It is settled proposition of law that the object of Order VII Rule 11 of the Code is to ensure that meaningless litigation, which is otherwise bound to prove abortive, should not be permitted to occupy the judicial time of the courts. If that is so in matters pertaining to ordinary civil litigation, it must apply with greater vigour in election matters where the pendency of an election petition is likely to inhibit the elected representative of the people in the discharge of his public duties for which the electorate have reposed confidence in him.

33. Thus the petition deserves to be rejected on both the grounds as no issue can be raised for trial in absence of complete, precise and specific pleadings in respect of alleged corrupt practices.

34. In the result, the petition stands rejected under Order VII Rule 11 (a) of the Code for want of any cause of action. The party shall bear their own costs.

35. A copy of this order be forwarded to the Election Commission as well as to the Speaker of the State Legislative Assembly.

Petition rejected.

I.L.R. [2015] M.P., 2726
APPELLATE CIVIL
Before Mr. Justice Sanjay Yadav
M.A. No. 161/2014 (Jabalpur) decided on 5 August, 2014

PUSHPA DEVI (SMT.) ...Appellant
Vs.
THE GENERAL MANAGER ... Respondent

Railways Act (24 of 1989), Sections 123(c)(2) & 124-A - Compensation claimed in lieu of death **- Deceased was aboard a General Compartment and must have got down at Station either to quench his thirst or may be because of the pressure of crowd to ease himself and found it difficult to aboard the train when it has started moving - It cannot be said that the deceased was not acting like a prudent man and deliberated a self inflicted injury - Deceased was a bona fide passenger and his death was an untoward incident - Judgment set-aside - Compensation of Rs. 4,00,000/- awarded with 7.5% interest - Appeal allowed. (Paras 15 to 18)**

रेल अधिनियम (1989 का 24), धारा 123(सी)(2) व 124–ए – मृत्यु के बदले में किया गया प्रतिकर का दावा – मृतक सामान्य श्रेणी के डिब्बे में यात्रा कर रहा था और हो सकता है कि वह अपनी प्यास बुझाने के लिए या भीड़ के दबाव से स्वयं को आराम देने के लिए स्टेशन पर उतरा था और जब रेलगाड़ी चलने लगी तो उसे रेलगाड़ी में चढ़ने में कठिनाई हुई – यह नहीं कहा जा सकता कि मृतक प्रज्ञावान व्यक्ति जैसे कार्य नहीं कर रहा था और उसने जानबूझकर स्वयं को चोट कारित की – मृतक सद्भावी यात्री था और उसकी मृत्यु एक दुर्भाग्यपूर्ण घटना थी – निर्णय अपास्त – प्रतिकर रू. 4,00,000/– 7.5% ब्याज के साथ अवार्ड किया गया – अपील मंजूर।

M. Shaffiqullah, for the appellant.
Govind Patel, for the respondent.

(Supplied: Paragraph numbers)

O R D E R

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

2. Appeal under Section 23 of the Railway Claims Tribunal Act, 1987 is directed against the Judgment dated 6.12.2013 passed in Claim application No.OA/IIu/BPL/2009/0418 whereby the compensation claimed in lieu of death of Anil Kumar Ahirwar by Appellants has been declined.

3. Death occurred on 20.01.2009 at Mandibamora Railway Station when the deceased while travelling from Bina to Bhopal in general compartment of Chattisgarh Express was thrown out because of the pressure of crowd. Death having occurred due to falling from train, led the appellant lay claim compensation claiming it due to untoward incident.

4. Railways however, denied as to deceased being a bonafide passenger and the death being due to untoward incident. It was further contended that the deceased met with the accident while he was boarding the moving train and thus was not the case of accidental falling (Section 123 (c) (2) of Railways Act, 1989) but was due to his own act (Section 124 A proviso (b) of 1989 Act).

5. Railway Claims Tribunal framed following issues-

"1- Whether the deceased Anil Kumar Ahirwar s/o Shri Ashok Kumar Ahirwar on 20.01.2009 was a bonafide passenger of Chattisgarh Express ?

2- Whether the death of the deceased Anil Kumar Ahirwar s/o Shri Ashok Kumar Ahirwar was caused due to an untoward incident as defined U/Sec.123 (c) (2) read with Section 124 of the Railways Act, 1989 ?

3- Whether the Respondent railways are protected under the exemption clause to Section 124-A of the Railways Act and is not liable to pay any compensation ?

4- Whether the applicants are the sole dependants of the deceased Anil Kumar Ahirwar s/o Shri Ashok Kumar Ahirwar and no other dependant ?

5- Relief ?"

6. While answering the issues No.1 and 4 in favour of claimant; however, non suited the claimants on the finding that it was the deceased who was at fault in boarding the moving train and therefore, the death was not due to untoward incident. The Tribunal relied upon the evidence of non-applicants witness on duty Pointsman who in his deposition had stated the deceased who was about to board the moving train was prevented but ignoring the warning he attempted to board the train, in process whereof he fell down and was run over.

7. The question which crops up for consideration is as to whether the

Tribunal erred in appreciating the evidence on record in holding that the death of Anil Kumar since was the result of his own act that despite of warning he attempted to board the moving train.

8. Section 124A stipulates that- "when in the course of working a railway an untoward incident occurs then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would entitle a passenger who has been injured or the dependant of a passenger who has been killed to maintain an action or recover damages in respect thereof. The railway administration shall notwithstanding anything contained in any other law, be liable to pay compensation to such extent as may be prescribed and to that extent only for loss occasioned by the death of, or injury to,a passenger as a result of such untoward incident."

9. Exception however is carved out by virtue of proviso which stipulates:

> "Provided that no compensation shall be payable under this section by the railway administration if the passenger dies or suffers injury due to -
>
> (a) suicide or attempted suicide by him ;
>
> (b) self inflicted injury;
>
> (c) his own criminal act;
>
> (d) any act committed by him in a state of intoxication or insanity;
>
> (e) any natural cause or disease or medical or surgical treatment unless such treatment becomes necessary due to injury caused by said untoward incident."

10. Thus in a case where the death is due to self inflicted injury the railway is exonerated from the compensation.

11. In the case at hand the respondents Railways in paragraph 3 of the written statement had taken a categorical stand that- 'It is submitted that the deceased and his friend were trying to board moving train No.8238 UP Chattisgarh Express at Mandibamora Station, his friend boarded the train but the deceased fell down because of the speed of the train and died on the spot. It is further stated that deceased was most careless and negligent about his personal safety and thereby exposed his life to the utmost danger which tantamount to self inflicted injury.' These contention are duly supported by non-applicant witness Ramgopal Rai

Pointsman 'A' station Mandibamora who stated:

"मैं दिनॉक 20.01.2009 को स्टेशन अधीक्षक मंडी खामोरा के अन्तर्गत ज्वाइंट A के पद पर पदग्रहण था । सुबह 8 बजे से रात्रि 8 बजे तक की थी, ट्रेन–क.–8238 4P छत्तीसगढ़ राज्य के समय प्लेट फार्म क–03 पर थी । मुझे उक्त ट्रेन को पास कराने हेतु आदेशित किया गया का, छत्तीसगढ़ एम्स जैसे ही रवाना हुए तो दो व्यक्ति दौड़ते हुये चलती ट्रेन को पकड़ने की कोशिश कर रहे थे। मैंने आवाज देकर उनको रोकने की कोशिश की थी और कहा की ट्रेन तेज हो गई है मत चढ़ो पबलिक में कुछ लोगो ने भी मना किया था, वह नही माने, उनमे से एक व्यक्ति ट्रेन में चढ़ गया था और दूसरा व्यक्ति हेण्डल पकडकर चढने का प्रयास कर रहा था और प्लेटफार्म और ट्रेन के बीच होता हुआ रेल्वे लाइन पर गिर गया और कटकर मर गया ।

इस संबंध में जी.आर.पी. ने मेरे बयान लिये थे ।

<u>प्रतिपरीक्षण द्वारा की सिराजुद्दीन आवेदक गण –</u>

घटना के समय स्टेशन बिलडिंग के सामने खड़ा था, यह कहना गलत है कि घटना के समय मेरे हाथ में झण्डी नही थी, स्वतः कहा की मैने सिग्नल एम्स चेन्ज किये थे । घटना के समय प्लेटफार्म पर भीड़ अधिक थी घटना के समय पानी नही बरस रहा था, चलती गाड़ी में दो के अलावा अन्य किसी व्यक्ति ने चढ़ने का प्रयास नहीं किया था । मुझे इस बात की ज़ानकारी थी कि मृतक कहा की यात्रा कर रहा था । घटना के बाद ट्रेन रूकी थी । मैं चेन पुलिंग ठीक करने गया था, यह बात सही है मृतक सामान्य डिब्बे में चढ़ने की कोशिश कर रहा था । यह कहना गलत है कि मैने घटना नहीं देखी थो ।

रामगोपाल
अभिसाक्षी"

12. In these given facts was the deceased not acting like a prudent man and whether he deliberately invited the trouble, is the question for consideration.

13. Self inflicted injury would mean where a person capable of rational voluntary action, act in a manner where in a person of the same state of mind would refrain to act in such condition. By way of example it can be understood in the given facts of present case that a normal person would board the object capable of moving only when it is stationary, as he is capable of assimilating that he may get hurt in boarding a moving object.

14. It is common scene at all the railway stations that they are over crowded. The tickets are not easily available and the commuters have to get in queue for the tickets for General Compartment water joints are not available

at easy distance causing inconvenience to the passenger and when they get (sic:got) down at the platform to fetch water, there always is a likelihood of missing the train. The General Compartments are overcrowded and at each ensuing station the crowd get added.

15. In the case at hand, the deceased was aboard a General Compartment and must have got down at Mandibamora either to quench his thrust or may be because of the pressure of crowd to ease himself and found it difficult to aboard the train when it has started moving. It cannot therefore, be said that the deceased was not acting like a prudent man and deliberated a self inflicted injury. The Tribunal in the considered opinion of this Court misconstrued the entire facts on record, resulting in perverse conclusion.

16. Consequently, the judgment is set aside.

17. In view whereof, this Court is of the considered opinion that Anil Kumar Ahirwar was a bonafide passenger and his death was within the purview of untoward incident within the meaning of Section 124-A of the Railways Act, the claimant is therefore, entitled to get Rupees Four Lacs towards compensation in lieu whereof, as provided in the Schedule to the Railway Accidents and Untoward (Incidents) Compensation Rules, 1990. The claimants are also entitled for an interest @ 7.5% from the date of filing of claim application till actual payment.

18. The appeal is allowed to the extent above. No costs.

Appeal allowed.

I.L.R. [2015] M.P., 2730
APPELLATE CIVIL
Before Mr. Justice M.C. Garg
S.A. No. 632/2007 (Gwalior) decided on 11 November, 2014

MAHARAJ SINGH & ors. ...Appellants
Vs.
MAHANT SINGH CHATURVEDI & ors. ... Respondents

***Criminal Procedure Code, 1973 (2 of 1974), Section 145 - Dispute relating to possession of immovable property* - The order passed by the SDM remains valid till the Civil Court decides the matter with respect to the title of the property - Merely because an order is passed u/s 145 and appellants were found in possession, it would not prove**

that the appellants were in adverse possession. (Para 5)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 145 – अचल संपत्ति के कब्जे से संबंधित विवाद – एस.डी.एम. द्वारा पारित आदेश वैध रहेगा जब तक कि संपत्ति पर हक के संबंध में सिविल न्यायालय विनिश्चय नहीं करता – मात्र इसलिये कि धारा 145 के अंतर्गत एक आदेश पारित किया गया और अपीलार्थीगण का आधिपत्य पाया गया, इससे यह सिद्ध नहीं होगा कि अपीलार्थीगण का प्रतिकूल कब्जा था।

Ashish Shrivastava, for the appellants.
None, for the respondents.

JUDGMENT

M.C. GARG, J. :- The appellants/plaintiffs have filed this appeal under Section 100 of the Code of Civil Procedure being aggrieved by the judgment and decree dated 3rd May, 2007 passed by I Additional District Judge, Bhind in Civil Appeal No.17 of 2006 affirming the judgment and decree dated 29.11.2005 passed by II Civil Judge Class I, Bhind in Civil Suit No.36A of 2005 whereby, the suit filed by the plaintiffs for declaration of title, correction of revenue entries and for recovery of possession was dismissed.

2. The Appellants filed a suit in the trial court seeking a declaration that the appellants were the owner of the disputed property. They also sought perpetual injunction seeking restrain order against the respondents for interfering into their possession. The basis of their claim was adverse possession. They also sought a declaration that sale deed executed by the respondent no.2 in favour of the respondents no.6 to 9 to be null and void as respondent no.2 had no right in the property. Later on, a gift deed allegedly executed by the respondent no.2 in view of the sale deed was also questioned.

3. The respondents denied adverse possession of the appellants. The trial court held that the appellants were not able to establish their substantive title or adverse possession so as to complete his case of adverse possession. Therefore, dismissed the suit.

4. It is submitted by learned counsel for the appellants that in both the courts below, possession of the appellants vide Ex.P/4 has been accepted. Ex.P/4 is an order passed by the revenue authorities under section 145 of Cr.P.C.

5. Such orders are passed by SDM only for maintaining the law and order that is to say if a complaint is made to the SDM under Section 145 of Cr.P.C, the SDM is only required to see as to who was in possession of the property within

two months next before the lodging of the said complaint. The order passed under Section 145 of Cr.P.C remains valid till the Civil Court decides the matter with respect to the title of the property by taking evidence by declaring that who has substantive possession of the suit property and who has a lawful right to have that property. Merely because, an order Ex.P/4 is passed under Section 145 of Cr.P.C and appellants were found in possession of the property next before the two months of lodging of the complaint, it would not prove that the appellants were in adverse possession of the property or have perfected their title so as to claim a declaration by way of adverse possession. In these circumstances, two courts below have not found the appellants having substantive possession of the suit property sufficient to hold that the appellants became owner by adverse possession and merely because, their possession has been found by SDM under section 145 of Cr.P.C, they cannot say that an order was passed so as to restrain the respondents from dispossessing the appellants except in accordance with law. Such injunction if granted, would be based upon the triple principles as contained under Order 39 Rule 1 and 2 of CPC that if (i). Prima facie case, (ii). balance of convenience and (iii) principles of natural justice. The prima facie case in favour of the plaintiffs shall be only if the plaintiffs have substantive right in the suit property which is not a case before us.

6. In these circumstances, the prayer made by the appellants cannot be accepted. Since there are consistent finding of facts by the two courts below holding that the appellants were not able to establish that they became owner of the property by completing their plea of adverse possession, no substantial question of law is involved in this appeal. This appeal is therefore, dismissed. No order as to the costs.

Appeal dismissed.

I.L.R. [2015] M.P., 2732
APPELLATE CIVIL
Before Mr. Justice M.C. Garg
S.A. No. 761/2006 (Gwalior) decided on 19 November, 2014

STATE OF M.P. ...Appellant
Vs.
KAMLESH KUMAR & ors. ... Respondents

Limitation Act (9 of 1908), Section 5 - Condonation of delay - **Reasons - Where the reasons given are hypothetical and presumptive, the unexplained delay cannot be condoned. (Paras 5 & 6)**

परिसीमा अधिनियम (1908 का 9), धारा 5 – विलंब के लिये माफी – कारण – जहां दिये गये कारण उपकाल्पनिक एवं उपधारित हैं, अस्पष्टीकृत विलंब, माफ नहीं किया जा सकता।

Cases referred :

AIR 2009 SC 217, AIR 2012 SC 1506.

B. Raj Pandey, G.A. for the appellant/State.
Anand V. Bhardwaj, for the respondents.

(Supplied: Paragraph numbers)

JUDGMENT

M.C. GARG, J. :- The appellants have not filed an additional affidavit despite grant of further time.

2. This Court has gone through the I.A. No. 14994/2006 filed by the appellants u/S 5 of the Limitation Act. The application reads as under:

> "2. That, the impugned judgment and decree was passed on 11.08.2004. This fact was informed by the Additional Public Prosecutor to the Collector in the month of March, 2006 alongwith the certified copy of the judgment and decree. Thereafter, the Nazal Tehsildar wrote a letter to J.P. Sharma, Govt Advocate to file an appeal. Opinion of Government pleaders was obtained on 02.04.2005 and 16.06.2005 in which it is the say of the pleader that there are no chances to success in the same. Thereafter, Collector wrote a letter to the Secretary of Revenue Department for filing the appeal on 18.07.2005, with specific averments that the land is a valuable land and the appeal should be filed. The Law and Legislative Department of the State Government granted permission vide letter dated 25.10.2005. The Collector appointed OIC in the matter. It is pertinent to note that the OIC collected the record of the case and thereafter contacted in the office of Advocate General on 24.08.2006. The appeal was prepared and thereafter the appeal was duly filed. However, there is a delay of 90 days, which is not deliberate, as per the law laid down by the Hon'ble Supreme Court, the delay deserves to be condoned."

3. Despite there being delay of more than two years, the appellant

mentioned only delay of 90 days. Not only that, in the aforesaid para they also quoted about the opinion given by the Government Pleader obtained on 02.04.2005, wherein, it was clearly opined that there is no chance of success, if the appeal was filed. Yet the Collector wrote a letter to the Secretary of the Revenue Department on 18.07.2005 for filing of the appeal, as if the Collector was going to put some new material for the success of the appeal. Even if, that was so, the appeal ought to have been filed within the time, but they took two years to file the same. This shows utter negligence on the part of the State.

4. Learned counsel for appellants also relied upon the judgment reported in AIR 2009 SC 217.

5. However, perusal of this judgment shows that the delay is to be condoned only when sufficient cause is shown. The appellants have not shown any sufficient cause, rather the reasons given are hypothetical and presumptive, as if the Collector will put new arguments to bring some new splash in the appeal. This is a high ended mistake on the part of appellants that instead of submitting that there was any genuine delay or there were some strong reasons for condoning the delay, they want to say as if Collector is more important than the Government Pleader, who has opined that there was no case for filing of this appeal.

6. The Hon'ble Apex Court in *Chief Post Master General and Ors Vs. Living Media India Ltd. And Another* reported in AIR 2012 SC 1506 has held that unless reasonable and acceptable explanation of delay and sufficient cause is shown, the application need not be accepted. Relevant para is quoted below : -

> "(13) In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/ years due to considerable degree of procedural red-tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Considering

the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay. Accordingly, the appeals are liable to be dismissed on the ground of delay".

7. In the case of Post Master General, Apex Court has taken note of the conduct of the State Government in number of cases where there is a delay which is unexplainable and has not agreed with the statements made by the learned counsel for the appellant merely because an application has been filed by the State, delay should be condoned.

8. Lastly, learned counsel for the appellant seeks more time to file an additional affidavit.

9. The Government has not filed an additional affidavit, despite time was granted to them vide order dated 06.08.2014. Even otherwise, looking to the reasons given in the application, in case an additional affidavit has been filed, it will serve no purpose, rather further delay the disposal of the case and therefore the prayer for grant of time is declined.

10. The application filed by the appellant is dismissed.

11. Consequently, the appeal also stands dismissed.

Appeal dismissed.

I.L.R. [2015] M.P., 2735
APPELLATE CIVIL
Before Mr. Justice Alok Verma
M.A. No. 2364/2005 (Indore) decided on 20 November, 2014

GAURISHANKAR ...Appellant
Vs.
SPECIALTY ELECTROMARS & ors. ... Respondents

***Motor Vehicles Act (59 of 1988), Section 163 and Evidence Act (1 of 1872), Section 59 - Proof* - Claims Tribunal although held that damages were caused to pair of bullocks and bullock-cart but held that appellant had failed to prove that he was owner of the same - Held - Provisions of**

Evidence Act do not apply with full force before Claims Tribunal - Certificates issued by Gram Panchayat conveys the meaning that bullocks & bullock-cart belongs to appellant - Compensation of Rs. 33,000/- directed to be paid towards loss of property - Appeal allowed. (Paras 4, 6 & 9)

मोटर यान अधिनियम (1988 का 59), धारा 163 एवं साक्ष्य अधिनियम (1872 का 1), धारा 59 – सबूत – यद्यपि दावा अधिकरण ने यह अभिनिर्धारित किया कि बैलों की जोड़ी को एवं बैलगाड़ी को क्षति कारित की गई परंतु यह अभिनिर्धारित किया कि अपीलार्थी यह साबित करने में विफल रहा कि वह उसका स्वामी था – अभिनिर्धारित – दावा अधिकरण के समक्ष साक्ष्य अधिनियम के उपबंध संपूर्ण बल के साथ लागू नहीं होते – ग्राम पंचायत द्वारा जारी किये गये प्रमाणपत्रों से यह अर्थ निकलता है कि बैलों की जोड़ी एवं बैलगाड़ी अपीलार्थी की है – संपत्ति की हानि की ओर रू.33,000/– का प्रतिकर अदा किये जाने के लिये निदेशित किया गया – अपील मंजूर।

R.N. Dave, for the appellant.

S.V. Dandawate, for the respondent No.3 / Oriental Insurance Company.

JUDGMENT

ALOK VERMA, J. :- This Miscellaneous Appeal is directed against the award passed by the 1st Additional Member, Motor Accident Claims Tribunal, Badawni in Claim Case no. 174/2004 dated 16/03/2005, by which, the learned Tribunal dismissed the application filed by the appellant in respect to damage caused to his pairs of bullocks and the bullock cart.

2. The brief facts relating to the present appeal are that on 15/04/2004, the present appellant was going from village – Segwal alongwith his servant Ramlal S/o Dashriya to village – Thikari. Near the field of one Indraprasad, the vehicle bearing registration no. M.H.-04-AW-8440, which was driven by respondent no. 2 and which was owned by respondent no. 1 dashed against the bullock-cart of the appellant, due to which, the appellant suffered serious injuries in his right leg and out of the pair of bullock, one died and another sustained serious injuries, due to which, he was rendered useless for pulling of the cart. The cart totally destroyed in the accident. The present appellant filed two separate applications, one for compensation in respect of the injuries caused to him and which was registered as Claim Case no. 173/2004 and which was allowed and compensation was awarded and the second for damages caused to his property i.e. pair of bullocks and the bullock-cart which was registered as Claim Case no. 174/2004, against which, this present

appeal is filed.

3. The learned Tribunal dismissed the application on the premise that the appellant failed to prove before the Tribunal that pair of the bullocks and the bullock-cart belonged to him and on this inference, the application was dismissed.

4. The learned Tribunal, while deciding the issue no. 4 inferred that it was proved that in the accident, the pair of bullocks sustained serious injuries and the bullock-cart was damaged. However, he inferred that the documents mentioned that the pair of bullocks and bullock-cart belonged to one Mayaram S/o Murar. The learned Tribunal further opined that the present appellant failed to prove the memorandum of loss, which was prepared during the investigation by police. He also failed to examine Mayaram S/o Murar, his father-in-law and Ramlal S/o Dashriya, who was servant. Before the learned Tribunal, the present appellant filed a certificate issued by Gram Panchayat-Mukundpura. However, again in receipt of this certificate also, the Tribunal observed that the appellant failed to examine the concerned who issued this certificate and not believing of the document, the learned Tribunal inferred that the present appellant failed to prove that the pair of the bullocks and the bullock-cart belonged to him and therefore, dismissed the application and did not award any amount as compensation.

5. I have gone through the evidence produced by the appellant before the learned Tribunal. In this respect, the first relevant document is requisition prepared by Station In-charge, Police Station – Thikri, Dist – Badwani and sent to veterinary doctor, Thikri dated 16/04/2004 Ex.-P/29. In this requisition, it was mentioned that the injured Gaurishankar S/o Ramsingh Yadav was going to village – Thikri and straw was loaded in the cart. Ramlal S/o Dashriya was his servant and Mayaram S/o Murar was his father-in-law who informed the police that both the bullocks sustained injuries in the accident and therefore, by this requisition, the veterinary doctor was requested by Station Incharge, Police Station – Thikri to treat the bullocks. It may be observed that in the requisition, it was clearly mentioned that the pairs of bullock and the bullock-cart belong to injured Gaurishankar S/o Ramsingh, however, in the medical certificate prepared by veterinary doctor, it was mentioned that owner of the bullocks was Mayaram S/o Dashriya. Naturally, when in the requisition, it was clearly mentioned that the bullocks and the bullock-cart belonged to the injured Gaurishankar S/o Ramsingh, the doctor was negligent in mentioning

the name of Mayaram S/o Dashriya as owner of the bullocks.

6. Next document is the certificate issued by Gram- Panchayat – Mukundpura. The learned Tribunal observed that this certificate was not proved according to law. However, before the Tribunal, the provisions of the Evidence Act is not applicable with full force. There is no evidence on record to challenge that the certificate was issued by Gram-Panchyat (sic:Panchayat), Mukundpura. So far as the contents of the certificate is concerned, it is true that it does not specifically mention that the bullocks and the bullock-cart belonged to the present appellant Gaurishankar S/o Ramsingh Yadav, however, reading the certificate in totality, it conveys the meaning that the property belongs to the injured Gaurishankar Next is the memorandum of loss which was also not proved by the appellant.

7. However, the learned Tribunal failed to appreciate that there was no pleadings of respondent no. 3 to the effect that the pair of bullocks and the bullock-cart did not belong to the present appellant. The whole averment in the application were mechanically denied. However, in the additional plea, it was not specifically mentioned that respondent no. 3 challenges the ownership of the pair of bullocks and the bullock-cart. Taking all the factors into consideration, I find that the learned Tribunal erred in inferring that the pair of bullocks and the bullock-cart did not belong to the present appellant.

8. So far as the amount of compensation is concerned, the appellant in his statement before the Tribunal in para – 3 states that he had purchased new pair of bullocks for Rs. 30,000/-. He had purchased the cart also for which, he paid Rs. 10,000/-. As such, for the pair of bullocks and the bullock-cart, he paid Rs. 40,000/-. However, taking the fact that the bullocks must have been purchased by him sometimes prior to the accident, their costs must be assessed as Rs.12,500/- for each bullock or Rs. 20,000/-for the pair of bullocks and the costs of the bullock-cart may be assessed as Rs.8,000/-. Accordingly, he is entitled to receive Rs. 33,000/- for the loss caused to his pair of bullocks and the bullock-cart.

9. Accordingly, the application filed by the appellant in Claim Case no. 174/2004 is accepted. It is directed that the respondents shall pay Rs. 33,000/- to the present appellant against the damages caused to the pair of bullocks and the bullock-cart. The respondents shall also pay interest @ 8% per annum from the date of filing of the application dated 23/07/2004 till the payment of the amount. The costs shall be borne by the respondents. The respondents

shall be liable to the payment of amount jointly and severally. Fees of the counsel shall be assessed at Rs. 2,000/-

C c as per rules.

Order accordingly.

I.L.R. [2015] M.P., 2739
APPELLATE CIVIL
Before Mr. Justice Alok Verma
M.A. No. 1670/2007 (Indore) decided on 26 November, 2014

VIMLA (SMT.) & anr. ...Appellants
Vs.
SHEIKH JABBAR ...Respondent

***Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurance Company - Insurance Policy* - Cover note appears to be prima-facie genuine - No cuttings are there and even it was properly stamped by the seal of the Company - Therefore, at the time of the accident the vehicle was insured by the Company. (Para 9)**

मोटर यान अधिनियम (1988 का 59), धारा 147 – बीमा कंपनी का दायित्व – बीमा पॉलिसी – जोखिम ग्रहण पत्र प्रथम दृष्ट्या वास्तविक प्रकट होता है – कुछ काटा नहीं गया है और कंपनी की मुहर (सील) द्वारा उचित रूप से स्टाम्पित था – अतः, दुर्घटना के समय कंपनी द्वारा वाहन बीमित था।

J.M. Poonegar, for the appellants.
Pradeep Gupta alongwith *Bhaskar Agrawal,* for the respondent/ Insurance Company.

JUDGMENT

ALOK VERMA, J. :- This Miscellaneous Appeal is directed against the award passed by learned Additional Member, MACT, Indore in Claim Case no. 249/2005 dated 10/10/2006, by which, learned Tribunal awarded an amount of Rs. 3,17,000/- as amount of compensation to the present appellants and also exonerated the Insurance Company from the liability of the payment of the amount.

2. The relevant facts are that deceased Bhagchand Daswani was the husband of appellant no. 1 and son of appellant no. 2. On 07/06/2004, he was going in his personal car bearing registration no. MP-09-HD-2004, which

was driven by driver Karim Bhai. When the car reached by-pass square Chalisgaon- Malegaon Road, the offending vehicle Metadore 407 bearing registration no. MH-18-E-7476 which was driven by respondent no. 1 Sheikh Jabbar, dashed the vehicle against the car, in which, the deceased was travelling. In the accident, deceased Bhagchand sustained serious injuries on his head and other parts of the body and died on the spot. In the accident, one Ghanshyam Seth and driver Karim Bhai also died.

3. Aggrieved of the impugned order, present appeal is filed on the ground that both the offending vehicles, Metadore 407 and the car, in which the deceased was travelling, were insured by respondent no. 3 and therefore, he is liable for payment of compensation amount. Second ground is that the amount of compensation i.e. Rs. 3,17,000/- is also not awarded as per the principles laid down by Hon'ble Apex Court, therefore, enhancement of compensation is also prayed for.

4. It may be considered first, whether the offending vehicle bearing no. M.H.-18-E-7476 was insured by respondent no. 3 ?. In this case, a photocopy of cover note is filed by respondent no. 2. The photocopy is alleged to be forged copy of the cover note issued by respondent no. 3 in respect of offending vehicle. The period of insurance according to the cover note is from 23/09/2003 to 22/09/2004. The accident took place on 07/06/2004. Accordingly, if this cover note is taken into consideration, it appears that the vehicle was insured by respondent no. 3. However, respondent no. 3 challenges the cover note and according to respondent no. 3, this cover note was not issued by Dhule Branch of the Company.

5. To substantiate this assertion, Vilas Saraf N.A.W.- 1 was examined. According to this witness, he was working as Development Officer in Dhule Branch of the Company. According to him, the vehicle was insured by respondent no. 3 from 23/01/2001 to 22/01/2002. Subsequent to this, no insurance policy was issued by the Company. However, during the cross-examination, he admits his signature on Ex.-P/14 from A to A. He also admits that the Company never filed any complaint before any police station in respect to Ex.P-14. Subsequent to this, he said that Ex.-P/14 was not produced in his office and therefore, there was no question of filing of any complaint in respect of Ex.-P/14. However, in cross-examination by respondent nos. 1 and 2, he told that he verified from the record of the office that the vehicle was not insured by the Company.

6. Learned Tribunal while considering the statement of this witness observed that though respondent nos. 1 and 2 were present during pendency of the application before the Tribunal, the respondents never examined themselves and submitted them to cross-examine in the case. If they appeared before the Court and stated on oath that the vehicle was insured by respondent no. 3, then it may be accepted that the vehicle was insured by respondent no. 3. however, they did not appear before the Court and did not rebut the evidence produced by the Insurance company.

7. After going through the impugned award, I find that the approach adopted by learned Tribunal was perverse and irrational. The present appellants were third party and they cannot suffer because respondent nos. 1 and 2 chose not to examine themselves before the Tribunal. Once, photocopy of the cover note was filed and copy of which is normally handed over to counsel for the insurance company, it was duty of the Insurance Company to ensure, whether the insurance policy was issued ? or if they assert that the cover note is forged and no policy is issued by the Company, they should take necessary action and prove it accordingly.

8. In this case, however, it is surprising that the officer admits his signature on Ex.-P/14. He also admits that the copy was not filed in the office of the Company and if it was filed, the Company would have in better position to say whether such policy was issued by the Company or not. If no such cover note was filed and available with the Company, then how he stated in para 4 of his statement that he checked from the record of the Company and such policy was issued without having cover note Ex.-P/14, how he would check the record correct.

9. Even otherwise, after going through Ex.-P/14, the cover note appears prima-facie genuine. No cuttings are there and even it was properly stamped by the seal of the company. In such circumstances, I find that the learned Tribunal erred while holding that the vehicle was not insured by respondent no. 3 and accordingly, I hold that at the time of the accident, the vehicle was insured by the Company.

10. The next question is in respect of quantum of compensation. From the copies of the Income-tax return filed by the appellants, it is clear that the deceased was having income from his business as well as from house property. Learned Tribunal while considering his annual income took in his consideration the statement of Ravi AW-4, who was working as Assistant with Chartered

Accountant Sanjeev Hingorani, who used to deal with income tax matter of the deceased. He specifically mentions income of the deceased from the business in various years. The same income was considered by the Tribunal in para 11, 12 and 13 of the award. However, the learned Tribunal only awarded Rs. 5000/- for mental and physical agony caused to the wife and mother of the deceased. The learned Tribunal should have considered loss of consortium in case of appellant no. 1 and loss of love and affection in case of mother appellant no. 2 separately. I find that the amount of Rs. 30,000/- for appellant no. 1 against loss of consortium and Rs,. 20,000/- against loss of love and affection for appellant no. 2 should be awarded. This apart, Rs.20,000/- should also be awarded for funeral expenses, against which, no amount was awarded. Thus, total amount comes to Rs. 3,82,000/-.

11. Accordingly, this appeal is allowed. The award passed by the learned Tribunal is modified to the extent that the compensation amount is enhanced from Rs. 3,17,000/- to Rs. 3,82,000/-. This amount shall carry interest @ 6% per annum from 30/09/2004 till actual payment of the amount or part thereof. For payment of the amount, all the respondents including respondent no. 3 shall be liable jointly and severely. Costs shall be borne by the respondents. The remaining directions issued by the Tribunal shall remain the same.

12. With the aforesaid modification in the award, this miscellaneous appeal stands disposed of.

C c as per rules.

Appeal disposed of.

I.L.R. [2015] M.P., 2742
APPELLATE CIVIL
Before Mr. Justice M.C. Garg
F.A. No. 396/2006 (Gwalior) decided on 29 January, 2015

ASHOK KUMAR GUPTA ...Appellant
Vs.
UNITED COMMERCIAL BANK ... Respondent

***Civil Procedure Code (5 of 1908), Order 9 Rule 5 and Order 5 Rule 20* - Appellants despite service report to the effect that the respondent Nos. 2 & 4 are not residing at the given address and despite granting time, not supplied correct address - Though fresh steps were**

taken but not at the correct address - Held - Paying process fee alone without supplying the correct address cannot be considered as compliance of the provision - However, final opportunity is given to the appellant to file correct address or in alternative file application under Order 5 Rule 20 for substituted service, subject to payment of cost of Rs. 5,000/-. (Paras 4 & 6)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 5 एवं आदेश 5 नियम 20 – अपीलार्थीगण ने इस प्रभाव के तामीली प्रतिवेदन के बावजूद कि प्रत्यर्थी क्रं. 2 व 4 दिये गये पते पर निवासरत नहीं है एवं समय प्रदान किये जाने के बावजूद, सही पता उपलब्ध नहीं कराया है – यद्यपि नये सिरे से कदम उठाये गये परंतु सही पते पर नहीं – अभिनिर्धारित – सही पता उपलब्ध कराये बिना मात्र आदेशिका फीस अदा करना उपबंध के अनुपालन के रूप में नहीं माना जा सकता – यद्यपि, अपीलार्थी को रू. 5000/– व्यय के भुगतान के अधीन, सही पता प्रस्तुत करने के लिए या विकल्प में प्रतिस्थापित तामील हेतु आदेश 5 नियम 20 के अंतर्गत आवेदन प्रस्तुत करने के लिए अंतिम अवसर दिया गया।

Amit Bansal, for the appellant.
Nitin Agarwal, for the respondent No.1.

(Supplied: Paragraph numbers)

ORDER

M.C. GARG, J. :- It is very surprising to note that appellant despite report of service of respondent no.2 and 4 that they are not residing at the given address as reported for 11.04.2014 have not taken steps for supplying the correct address, even though, they were granted time to do the needful on 11.04.2014. This time also as per the report dated 16.05.2014, it was again informed that respondents no.2 and 4 are not living at the given address. On 25.07.2014 also it was observed that respondent no.2 and 4 are not residing at the given address, when again appellant was directed to take steps within two weeks by paying fresh process fee and the correct address.

The defects have not been cured even till date.

Order 9 Rule 5 reads as under:

5. Dismissal of suit where plaintiff after summons returned unserved, fails for [seven days] to apply for fresh summons:[1 Where, after a summons has been issued to

the defendant, or to one of several defendants, and returned unserved, the plaintiff fails for a period of [seven days] from the date of return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons, the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that-

(a) he has failed after using his best endeavours to discover the residence of the defendant, who has not been served, or

(b) such defendant is avoiding service of process, or © there is any other sufficient cause for extending the time; in which case the Court may extend the time for making such application for such period as it thinks fit].

2. In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

2. The aforesaid provision is incorporated in the statute by way of amendment of civil procedure basically for the purpose that service is effected on the respondents as early as possible and if a report comes that service has not been effect for any reason specified in the aforesaid order, then an obligation was caused upon the party who wants service to be effected on the other side to take steps within seven days of the receipt of report. If this is not done then the mandate is to dismiss the suit.

3. In the present case, the appellant came to know about the report of service of respondent no.2 and 4 regarding their non-availability on the given address as per the office report dated 02.04.2014. Appellant was given opportunity to take fresh steps. Though fresh steps were taken, but not at the correct address. Process fee was filed for serving these respondents but the report time and again was of the same effect i.e. respondents no.2 and 4 are not available at the given address.

4. Paying process fee alone without supplying the correct address cannot be considered as compliance of the provisions of law. It was required upon the appellant to have filed an application under Order 5 Rule 20 CPC for

getting substituted service effected upon the respondents no.2 and 4. These steps were also required to be taken within seven days from the knowledge of report of service i.e. non-availability of respondents at the given address.

5. The amended provisions under Order 9 Rule 5 is that suit should be dismissed.

6. Since the appellant had been filing process fee of course, not the correct address, in the interest of justice, last and final opportunity is granted to the appellant to do the needful i.e. filing of fresh process fee and the correct address or in alternate, filing of application under Order 5 Rule 20. But that too will be subject to payment of cost of Rs. 5,000/- to be deposited in favour of M.P. State Legal Service Authority, within one week from today.

Notices issued be made returnable for 25.03.2015.

Order accordingly.

I.L.R. [2015] M.P., 2745
APPELLATE CIVIL
Before Mr. Justice Alok Aradhe
M.A. No. 1820/2006 (Jabalpur) decided on 13 July, 2015

SETH MOHANLAL HIRALAL (M/S) ...Appellant
Vs.
STATE OF M.P. ...Respondent
(Alongwith M.A. No. 2789/2006)

A. ***Arbitration and Conciliation Act (26 of 1996), Sections 8, 20, 34 & Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Section 20 - Appointment of Arbitrator - Jurisdiction of Civil Court -*** **During the pendency of application for appointment of arbitrator, Act 1983 came into force - Bar contained in Act 1983 with regard to Civil Court applies only from the date of Constitution of Arbitration Tribunal i.e. 01.03.1985 - Reference which is pending prior to Constitution of Tribunal is saved by Section 20(2) of 1983 Act - As application for appointment of arbitrator was already pending therefore, District Judge had jurisdiction to appoint arbitrator. (Para 7)**

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराऐं 8, 20, 34 एवं माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 20 – मध्यस्थ की नियुक्ति – सिविल न्यायालय की अधिकारिता – मध्यस्थ की नियुक्ति के लिये आवेदन लंबित रहने

के दौरान, अधिनियम 1983 लागू हुआ – सिविल न्यायालय के संबंध में अधिनियम 1983 में दी गई रोक केवल माध्यस्थम् अधिकरण के गठन के दिनांक से अर्थात् 01.03.1985 से ही लागू होगी – संदर्भ जो अधिकरण के गठन के पूर्व से लंबित है वह अधिनियम 1983 की धारा 20(2) द्वारा रक्षित है – चूंकि मध्यस्थ की नियुक्ति का आवेदन पूर्व से लंबित था, अतः जिला न्यायाधीश को मध्यस्थ नियुक्त करने की अधिकारिता प्राप्त थी।

***B. Arbitration and Conciliation Act (26 of 1996), Section 34 - Objections - Scope of interference*- If award is in conflict with public policy of India - Court would interfere with an award, if it is in violation of statute, interest of India, justice or morality, patent illegality, contravention of Act or terms of contract - Respondent's witness admitted that extra work of de-watering was done by appellant as an extra item - It was further held by Arbitrator that since the aforesaid amount was not included in award, therefore, the same was admittedly included by the Arbitrator as an extra item - Arbitrator had applied its mind - If two views are possible, view taken by Arbitrator would prevail - Trial court should not have disallowed the said item - Appeal allowed. (Paras 11 & 12)**

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 34 – आपत्तियां– हस्तक्षेप का विस्तार – यदि अधिनिर्णय भारत की लोकनीति के विरूद्ध है – किसी अधिनिर्णय में न्यायालय हस्तक्षेप करेगा, यदि वह कानून के उल्लंघन, भारत के हित, न्याय अथवा नैतिकता, प्रत्यक्ष अवैधता, अधिनियम अथवा अनुबंध की शर्तों के उल्लंघन में है – प्रतिवादी के साक्षी ने स्वीकार किया कि निर्जलीकरण का अतिरिक्त कार्य अपीलार्थी द्वारा अतिरिक्त मद के रूप में किया गया – मध्यस्थ द्वारा आगे यह भी अभिनिर्धारित किया गया कि चूंकि उपरोक्त धनराशि अधिनिर्णय में शामिल नहीं थी, अतः उसे मध्यस्थ द्वारा एक अतिरिक्त मद के रूप में स्वीकार करते हुए शामिल किया गया – मध्यस्थ ने अपनी बुद्धि का प्रयोग किया – यदि दो दृष्टिकोण संभावित हैं तो मध्यस्थ द्वारा लिया गया दृष्टिकोण अभिभावी होगा – विचारण न्यायालय द्वारा उक्त मद नामंजूर नहीं किया जाना चाहिए था – अपील स्वीकृत।

Cases referred :

1995 MPLJ 885, (1996) 1 SCC 435, AIR 2001 SC 2293, AIR 2004 SC 1887, AIR 2007 SC 2599, (2015) 3 SCC 49, (2004) 5 SCC 109, (2010) 1 SCC 80, (2010) 1 SCC 549, (2008) 16 SCC 128, (2008) 14 SCC 785.

R.C. Sobhani, for the appellant in M.A. No. 1820/2006 and for the respondent in M.A. No. 2789/2006.

Girish Kekre, G.A. for the respondent in M.A. No. 1820/2006 & for the appellant in M.A. No. 2789/2006.

ORDER

ALOK ARADHE, J. :- In these appeals preferred under section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") the parties have assailed the validity of the judgment dated 23.01.2006 passed by trial Court, by which the objections preferred by the appellant as well as respondent under section 34 of the Act against the award passed by the Arbitrator dated 28.07.2004, have been rejected. Since common questions of law and facts arise in these appeals, therefore, the appeals were heard analogously and are being decided by this common order. In order to appreciate the challenge to the impugned judgment, few facts need mention which are stated infra.

2. M/s.Seth Mohanlal Hiralal (hereinafter referred to as the "appellant") was awarded contract of construction of 'Sukha' acquaduct under Agreement No.2/1977-78. A dispute arose between the parties, pursuant to which, the appellant made a request for appointment of an Arbitrator on 14.1.1980 to the Superintending Engineering. Thereafter, the appellant filed an application for appointment of an arbitrator under section 8 read with section 20 of the Arbitration Act, 1940 (for short "1940 Act") before the District Judge, Hoshangabad on 26.09.1984. In the meantime, the State Legislature enacted Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 (for brevity "1983 Act"), with a view to establish a Tribunal to adjudicae (sic:adjudicate) the disputes, to which, the State Government or the Public Undertaking is the party. The 1983 Act came into force with effect from 12.10.1983 and on 01.3.1985 the M.P. Arbitration Tribunal was constituted. The District Judge, Hoshangabad decided the application submitted by the appellant under section 8 read with section 20 of 1940 Act by order dated 18.08.1998 and one Mr. K.S.Inaamdar, Retired Chief Engineer was appointed as an Arbitrator to adjudicate the dispute between the parties.

3. It is not disputed that the order dated 18.08.1998, by which the Arbitrator was appointed, was not challenged by the State Government (hereinafter referred to as the "respondent") before any higher forum. The Arbitrator with the consent of the parties directed that the claims of the respective parties shall be adjudicated as per the provisions of 1996 Act. It is also not in dispute that both the parties appeared before the Arbitrator without raising any objection and participated in the proceeding which was held under the 1996 Act. The Arbitrator passed an award on 28.07.2004 under the 1996

Act to the tune of Rs.2,80,980/- in favour of the appellant. However, rest of the claims filed by the appellant were rejected. The award passed by the Arbitrator was challenged by the parties under section 34 of the 1996 Act. The trial Court by judgment dated 23.1.2006 partially allowed the objection of the respondent and rejected the claim No.8(ii) of the appellant which was allowed by the Arbitrator and upheld the award for rest of the claims i.e. claims No. 1, 2 & 4. In the aforesaid factual background the appellant has challenged the aforesaid award in M.A.No.1820/2006, whereas the respondent has challenged the validity of the same in M.A.No.2870/2006.

4. Learned counsel for the appellant submitted that since prior to constitution of the Tribunal i.e. 01.3.1985 the appellant had filed an application for appointment of an Arbitrator before the District Judge, therefore, the proceeding initiated by the appellant under the provisions of 1940 Act was saved in view of section 20(2) of 1983 Act. In support of aforesaid submission reliance has been placed on the decision of Full Bench of this Court in the case of *State of Madhya Pradesh and others vs. M/s. Chahal and Company, New Delhi,* 1995 MPLJ 885. It is further submitted that respondent all along had participated in the proceeding which was conducted by the Arbitrator under 1996 Act and at no point of time, raised an objection that provisions of 1983 Act would apply. It is also pointed out that no such objection has either been taken in objection filed by respondent under section 34 of the Act or in the memo of appeal. It is further submitted that the order passed by the District Court has attained finality and binds the parties. It is also urged that the trial Court grossly erred in interfering with the award of the Arbitrator in so far as it pertains to claim No.8(ii). It was also pointed out that a sum of Rs.2,80,000/- was awarded to the appellant by the Arbitrator on account of extra item of de-watering which was not included in the contract. It was further pointed out that witness of the respondent had admitted in the cross-examination that the work of de-watering was executed by the appellant. It was argued that the finding recorded by the Arbitrator that an award of Rs.1 lac has been awarded to the appellant contrary to the terms and conditions of the contract is perverse and the judgment passed by the trial Court deserves to be set aside to the extent it interferes with the award passed by the Arbitrator.

5. On the other hand, learned Government Advocate submitted that since the contract in question is works contract, therefore, section 7 of the 1983 Act, which is a *non obstante* provision, would apply. It is further submitted

that the respondent had raised an objection in this regard before the Arbitrator as well as in proceeding under section 34 of the 1996 Act. However, the aforesaid objection was not properly dealt with, either by the Arbitrator or by the trial Court.

6. I have considered the submissions made by learned counsel for the parties and have perused the award. Admittedly, 1983 Act came into force on 12.10.1983 and the Tribunal was constituted under the 1983 Act on 01.3.1985. It is also not in dispute that prior to constitution of the Tribunal under the 1983 Act, the appellant had moved an application under section 8 read with Section 20 of the Arbitration Act, 1940 for appointment of an Arbitrator before the District Judge on 26.9.1984. Section 20(2) of the 1983 Act, which is relevant for the purpose of controversy involved in the instant case, reads as under:-

> *"20(2): Nothing in sub-section (1) shall' apply to any arbitration proceeding either pending before any arbitrator or umpire or before any Court or authority under the provisions of Arbitration Act, or any other law relating to arbitration, and such proceedings may be continued, heard and decided in accordance with agreement or usage or provisions of Arbitration Act or any other law relating to arbitration in all their stages, as if this Act had not come into force.'*

7. Section 20(2) of 1983 Act was interpreted by Full Bench of this Court in the case of *M/s. Chahal and Company, New Delhi* (supra) wherein it has been held that the bar contained in 1983 Act with regard to jurisdiction of the civil court applies only from the date of constitution of Arbitration Tribunal i.e. 01.3.1985 and the reference made under Arbitration Act, 1940, which is pending before the Civil Court prior to constitution of Tribunal is saved by section 20(2) of 1983 Act. Thus, it is evident that the application which was filed by the appellant for appointment of an Arbitrator under section 1940 Act was saved under section 20(2) of the 1983 Act which was pending on the date of constitution of Tribunal and, therefore, the District Judge had the jurisdiction to appoint the arbitrator in view of enunciation of law laid down by the Full Bench. For yet another reason, since no challenge to the order, by which arbitrator was appointed and which was passed inter-parties, was made by the respondent before the higher forum, therefore, the same binds the parties. [See: *Collector of Central Excise*

Hyderabad and others Vs. Vazir Sultan Tobacco Company Limited, Hyderabad and others, (1996) 1 SCC 435]

8. The Supreme Court in *Thyssen Stahlunion GMBH Vs. Authority of India Limited* while dealing with section 85(2)(a) of the Act has held that there is nothing in the language of section 85(2)(a) of the Act which bars the parties from agreeing to the applicability of the new Act. The aforesaid decision has been followed by the Supreme Court in the case of *Furest Day Lawson Limited vs. Jindal Experts Limited,* AIR 2001 SC 2293 as well as in the case of *Vishwant Kumar vs. Madan Lal Sharma,* AIR 2004 SC 1887 and *Udai Singh Dagar vs. Union of India,* AIR 2007 SC 2599.

9. In the backdrop of aforesaid well settled legal position the facts of the case in hand may be examined. From paragraph 3 of the award passed by the Arbitrator as well as the proceeding before the Arbitrator, it is evident that Arbitrator with the consent of parties had decided to adjudicate the dispute under the procedure prescribed under the 1996 Act. The appellant as well as respondent, without any demur or objection, participated in the proceeding before the Arbitrator. The Arbitrator rejected the contention raised on behalf of the respondent with regard to his jurisdiction to adjudicate the dispute, on the ground that the order by which the Arbitrator was appointed has attained finality, which even otherwise was provided under section 20(2) of 1983 Act.

10. It is pertinent to mention here that being aggrieved by the award, the appellant as well as the respondent filed objections under section 34 of the 1996 Act, which have been dealt with by the trial Court. Even in proceeding before the trial Court, the respondent did not take any objection that arbitration cannot be conducted in accordance with the provisions of 1996 Act.

11. The Supreme Court in the case of *Associate Builders vs. Delhi Development Authority,* (2015) 3 SCC 49 has dealt with the scope and ambit of section 34 of the Arbitration Act and after taking note of various previous judgments rendered by it with regard to scope of inference (sic:interference) with the arbitral award held that none of the grounds contained in section 34(2)(a) of the Act deals with the merits of the decision rendered by an arbitrator. It is only when the award is in conflict with the public policy of India as prescribed in Section 34(2)(b)(ii) of the Act that the merits of the arbitral award are to be looked into under certain specified circumstances. It has further been held that Court would interfere with an award passed by an arbitrator, if it is in violation of statute, interest of India,

justice or morality, patent illegality, contravention of the Act or terms of the contract. It was also held that the Court hearing an appeal does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus, an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once the arbitrator has applied his mind to the matter before him the court cannot re-appraise the matter as if it were an appeal and even if two views are possible the view taken by the arbitrator would prevail. [See: *Bharat Coking Coal Ltd Vs L.K.Ahuja,* (2004) 5 SCC 109, *Ravindra and Associates vs. Union of India,* (2010) 1 SCC 80, *Madnani Construction Corporation Private Limited vs Union of India and others,* (2010) 1 SCC 549, *Associated Construction vs. Pawan Hans Helicopter Ltd.* (2008) 16 SCC 128 and *Satna Stone & Lime Company Limited vs Union of India and others,* (2008) 14 SCC 785.

12. In the backdrop of well settled legal position, the facts of the case may be seen. In the instant case, the trial Court has interfered with the award passed by the Arbitrator and has disallowed the claim of Rs.1 lac awarded by the Arbitrator in respect of the claim No.8(ii) on the ground that there was no provision of de-watering in the contract and, therefore, the Arbitrator could not have awarded the amount of Rs.1 lac under the aforesaid award. From perusal of the record it is evident that the witness of the respondent, namely, S.S.Patel in his cross-examination has admitted that the work of de-watering was executed by the contractor as an extra item. The Arbitrator has further held that since the aforesaid amount was not included in the award, therefore, the same was admittedly included by the Arbitrator as an extra item and, therefore, the same has rightly been awarded by the Arbitrator. The Arbitrator has applied its mind to the matter before him and the Court cannot re-appreciate the matter as it was exercising the appellate jurisdiction, and if two views are possible, the view taken by the Arbitrator has to prevail. The trial Court, therefore, in the facts of the case has grossly erred in interfering with the claim awarded by the Arbitrator.

13. In view of aforesaid preceding analysis, I am inclined to quash the impugned judgment in so far as it interferes the claim awarded to the appellant and the award of the Arbitrator is restored.

14. For the aforementioned reasons, the appeal preferred by the appellant is allowed to the extent indicated above, whereas the appeal preferred by respondent is dismissed with costs.

Order accordingly.

I.L.R. [2015] M.P., 2752
APPELLATE CRIMINAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice Jarat Kumar Jain
Cr. A. No. 138/2008 (Indore) decided on 5 January, 2015

BALINDAR KUMAR & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 364-A, r/w Section 120-B - Abduction for ransom **- Abductee duly identified the appellants during identification parade - Revolver with cartridges, mobile phone and car were recovered at the instance of appellants - Appellants have also threatened to cause death or hurt in order to extort ransom - Held - Prosecution has to prove that the abductee was kept in detention and threatened to cause death or hurt in order to extort ransom and communicates that demand for ransom - Prosecution has proved all the three ingredients of Section 364-A of IPC - Trial Court has not committed any error in convicting and sentencing the appellants - Trial Court's order is maintained. (Paras 5, 27 to 30)**

दण्ड संहिता (1860 का 45), धारा 364-ए, सहपठित धारा 120-बी – फिरौती के लिए अपहरण – अपहृत ने पहचान परेड के दौरान सम्यक् रूप से अपीलार्थीगण को पहचाना – अपीलार्थीगण की निशानदेही पर कारतूस के साथ रिवॉल्वर, मोबाइल फोन और कार बरामद किये गये – फिरौती वसूलने के उद्देश्य से अपीलार्थीगण ने मृत्यु या उपहति कारित करने की धमकी भी दी – अभिनिर्धारित – अभियोजन को साबित करना होगा कि अपहृत को निरोध में रखा गया था और फिरौती वसूलने के उद्देश्य से मृत्यु या उपहति कारित करने की धमकी दी गई थी तथा फिरौती की मांग संसूचित की गई – अभियोजन ने भा.दं.सं. की धारा 364–ए के सभी तीन घटक सिद्ध किये हैं – विचारण न्यायालय ने अपीलार्थीगण को दोषसिद्ध और दंडित करने में कोई त्रुटि कारित नहीं की है – विचारण न्यायालय के आदेश को कायम रखा गया।

Cases referred :

2013 Cr.L.R. (MP) 763, (2007) 11 SCC 633, 2012(1) SCC 406.

Avinash Sirpurkar, for the appellants.
R.S. Parmar, P.L. for the respondent/State .

JUDGMENT

The Judgment of the Court was delivered by :
J.K. JAIN, J. :- THE appellants by preferring the appeal under Section 374 of the Code of Criminal Procedure [for short "the Code"] assailed the legality and validity of their conviction under Section 364-A read with Section 120-B of the IPC and consequent sentences of imprisonment for life and a fine of Rs.500-00 with default clause passed on 18.12.2007 by 20th ASJ (Fast Track Court), Indore in S.T. No.212/2005.

2. Briefly stated the prosecution case as unfolded before the Trial Court is that on 16.12.2004 Kailash Baheti (60 years) a businessman of Indore City left his residence for morning walk at 4.30 AM. It was stated that normally he returns back at home around 7.00 AM, but on the date of incident he did not return. Then around 7.30 AM his sons Sanjay and Vipin got worried about him and made enquiries. They found that their father's car was parked near Zanjeerwala Chouraha. Both the sons tried their best but they could not gather any positive information about their father. Thereafter Vipin went to Police Station Tukoganj, Indore and lodged the missing report of his father which was registered as Gumshudgi No.29/2004. On the same date, Sanjay received a call on his mobile-phone from an unknown person who introduced himself as Raja. Raja told him that his father (Kailash Baheti) is abducted and is in his possession and Rs.5 crores be kept ready to pay as ransom. Sanjay informed the police about the telephonic call which he has received on his mobile-phone. Thereafter police registered a case under Sections 364, 365, 368 and 120B of the IPC against unknown persons and started investigation. Mobile-phones of Vipin, Sanjay and land line phone of their residence were kept on surveillance and the conversations were recorded. It was found that on each communication, the abductors used different sim cards. Sanjay (son) and Santosh (son-in-law) negotiated with the abductors whereupon they agreed to accept Rs. one crore as ransom. The abductors asked Sanjay to come to Nagpur with Rs.one crore. Sanjay, Santosh and Radheyshyam reached Nagpur whereupon Sanjay received the message to come at Kolkata. Then they started by train for Kolkata. In the middle of journey Sanjay again got the message to get down at Bilaspur so as to deliver the ransom between Bilaspur and Nagpur. That as per the instructions of the abductors Sanjay and others

got down at Bilaspur and started waiting for further instructions of the abductors, in the meanwhile, they got the information that Kailash Baheti has been released and he has reached to Nagpur.

3. Meanwhile Indore police sent the information to neighboring States and requested them for apprehending the culprits. After lapse of a month, on 17.01.2005, during checking at Dharseema, District Raipur (C.G.) appellant Balvinder Singh, Khalid, Santosh Singh and Shailendra were arrested under Section 41 (2) of the Code, but Gopal Tiwari escaped. Gopal Tiwari @ Baba informed the appellant Sajid Ansari that police can arrest him at any time, therefore, he must release Kailash Baheti immediately. Thereafter Kailash Baheti was released in the forest between Wardha to Nagpur. Somehow Kailash Baheti reached Nagpur, then with the help of police he reached at Indore.

4. Kailash Baheti stated to Police that on 16.12.2004 at about 4.30AM he left his residence for morning walk. He stated that he parked his car near Zanjeerwala Chouraha and started walking. There he saw a man coming out of a Bolero car. The said man asked him about the location of some person's residence. Before he could reply, 78 persons surrounded him and he was pushed into the car and was taken away. The abductors tied a strip of cloth on his eyes and after travelling a long distance he was kept in a flat where the windows were covered by ply so he cannot see outside the flat. The abductors kept him as a hostage in that flat [No.3, Rupali Apartment, Laxmi Nagar Wardha, (M.S)] for about a month. During that period he under coercion wrote some letters to his sons for paying ransom to the abductors.

5. During investigation Kailash Baheti stated that he knew one of the accused Mukesh (since acquitted) who earlier worked as his driver. He identified the accused persons (appellants) in test identification parade. During further investigation, a revolver with cartridges, mobile Phones and a car was recovered from possession of the appellants. At the instance of appellants, application forms and other documents were recovered from the shopkeepers who sold the sim cards to the appellants. Call details were also collected from the concerned Service Providers. Voice samples of the appellants were sent to FSL Delhi and the documents were sent for examination to Government handwriting expert. After completing the investigation, final report was filed against appellantsherein and Ajay and Mukesh, in the Court of JMFC, Indore. The case was committed to the Court of Sessions, Indore. Then it was made over to 20th ASJ Indore for trial.

6. After hearing the parties and considering the material, learned ASJ framed charges against appellants under Sections 364A r/w 120B of the IPC. Appellants abjured their guilt. They pleaded false implication.

7. For proving the charge, prosecution examined as many as 56 witnesses. Prosecution also relied upon 191 exhibits and 31 articles. After completing the statement of prosecution witnesses, appellants were examined under Section 313 of the Code. They did not produce any witness in their defence. Defence relied upon 7 exhibits.

8. After hearing learned counsel for both the parties, learned ASJ recorded the conviction against Balvinder, Khalid, Sajid, Shailendra and Santosh under Section 364A r/w 120B of the IPC; whereas charges against Ajay and Mukesh were not proved, therefore, they were acquitted from these charges. Against the conviction and sentence, appellants have preferred this appeal.

9. We have heard Shri Avinash Sirpurkar, learned counsel for the appellants and Shri R.S.Parmar, learned Panel Lawyer for the Respondent/ State.

10. Learned counsel for the appellants submitted that no case has been made out against the appellants for an offence punishable u/s 364A of IPC in as much as ingredients of section 364A of IPC has not been established by the prosecution. There is no evidence that the appellants have caused any injury or have administered any threat of death to Kailash Baheti. The prosecution has not produced any recording/transcription or any document in regard to demand of ransom for release of Kailash Baheti. On the other hand the appellants have provided him food and essential medicines and when he was released, appellants gave him some of Rs. 500/-for his travelling expenses. There is no evidence that the appellants have demanded any ransom or procured any amount as ransom. From these facts it can be seen that at most the act of the appellants comes under the purview of section 365 IPC for which the maximum punishment provided is 7 years and in as much as the appellants have already served about 10 years of sentence therefore, the appeal be allowed and the appellants be released. For this purpose, he relied upon the judgment of this Court in the case of *Shahid Khan v/s State of M.P.* [2013.Cr.L.R. (MP) 763].

11. Learned counsel for appellants cited the judgment of Apex court in the case *Vishwnath Gupta vs. State of Uttaranchal* (2007)11SCC 633

and submitted that there are three stages in Section 364-A IPC, one is the kidnapping or abduction, second is threat of death coupled with demand of money and lastly when the demand is not met, then causing death. If the three ingredients are available, that will constitute the offence under Section 364-A IPC. In the present case prosecution has failed to prove these three stages of the offence. Therefore the conviction of the appellants u/s 364-A r/w 120-B IPC is liable to be setaside.

12. On the other hand, learned Panel Lawyer submitted that from the evidence of abductee Kailash Baheti, his son sanjay, son-in-law Santosh Muchhal and Radheyshyam it is proved that Kailash Baheti was abducted for ransom of Rs.5 crores. After negotiations, the appellants were agreed to accept Rs.one crore as ransom. It is also proved that Kailash Baheti was taken away from Indore to Wardha and was kept as a hostage in the flat for about a month by the appellants. Thus it is evident that due to the conduct of the appellants a reasonable apprehension arose in the mind of Kailash Baheti that he may be put to death or caused a grievous hurt by the appellants. It reveals from the evidence that appellants had no other intention except to extort the ransom. The facts of *Shahid Khan's* case (supra) are different, in that case an eye witness of a murder case, was abducted to create pressure on him that if he would give evidence against the accused persons of that murder case, then he may be put to death. Therefore, this judgment will not be helpful to the appellants. It was therefore submitted that the appeal deserves to be dismissed by confirming the order of conviction and sentence passed by the Trial Court.

13. We have given our anxious and most thoughtful consideration to the rival submissions of both the sides. We have also perused the judgment of trial court and have minutely gone through the evidence on record.

14. In so far as abduction of Kailash Baheti is concerned, it has been clearly established and cogently proved by the prosecution evidence that Kailash Baheti was abducted on 16.12.2004 at about 4.30 AM when he was on morning walk and was taken from Indore to Wardha and was kept in a flat for 32 days. For this purpose learned ASJ was right in relying upon the testimony of victim Kailash Baheti (PW-1) his son Sanjay Baheti (PW-17), his Soninlaw Santosh Muchhal (PW-42) and Radhyeshyam Sharda (PW-46) and it is further corroborated by prompt FIR (ExP-146). We saw no infirmity in the prosecution evidence nor in the findings recorded by the trial court in regard to abduction of Kailash Baheti.

15. Now it has to be seen that whether appellants were involved in the aforesaid abduction of Kailash Baheti? Kailash Baheti deposed that he was abducted by the appellants on 16.12.2004 and he remained with the abductors until 17.1.2005 i.e. for 32 days. During Test Identification Parade he identified the appellants. His evidence is natural and inspires confidence. Learned Counsel for the appellants has not challenged this finding that the appellants abducted Kailash Baheti. Thus it is proved beyond doubt that the appellants hatched a conspiracy and abducted Kailash Baheti and took him from Indore to Wardha and was kept in a flat for 32 days.

16. Now, let us consider whether the prosecution has established its case for the offence punishable u/s 364-A of IPC beyond reasonable doubt. If it is established that offender after kidnapping/abducting a person keeps him in detention and threatened to cause death or hurt in order to extort ransom and communicates that demand, he is guilty for kidnapping for ransom.

17. It is not necessary to deal with the statements of all the witnesses insofar as the instant controversy is concerned. It would be necessary to refer to the statements of a few witnesses so as to deal with the submissions advanced on behalf of the appellants.

18. Firstly we have considered that whether any threat to cause death or hurt was administered by the appellants to the victim Kailash Baheti and/or his sons? For this purpose we would refer some portion of the statement of Kailash Baheti (PW1) who deposed that

PARA-4 "फिर जिस गाडी में मुझे डाला गया था उसने चलना शुरू किया लगभग 15 मिनिट बाद मुझे प्यास लगी। तो मैने पानी मांगा। तो उनमें से किसी ने मुझे पानी की बोतल हाथ में दी। आधा घूंट पीने पर ही कड़वा लगने पर मैने पानी थूंक दिया। तब मुझे थप्पड़ मारा गया। इसके बाद मेरा मुंह सीट के नीचे कर दिया गया। थोड़ी देर बाद गाड़ी रूकी और कुछ सवारियों की अदला–बदली हुई इसके बाद लगभग 8 घण्टे तक गाड़ी लगातार चलती रही। इस अवधि में जब कभी कोई बस्ती नजदीक आती थी। तो मेरा सिर नीचे दबा दिया जाता था।"

PARA-6 "कार में बेठे–बेठे मेरी पट्टी खोल दी गयी और जिस फ्लेट में मुझे रखा गया था उसके गेट पर ही कार रोकी गयी थी। वह फ्लेट ग्राउण्ड फ्लोर का था। ऊपर मल्टी स्टोरी बिल्डिंग थी। कार से उतारकर मुझे सीधे फ्लेट के अंदर ले जाया गया। मेरे दोनों तरफ दो–दो तरफ आदमी खडे हो गये। जिन्होने मुझे इधर–उधर नहीं देखने दिया।"

PARA-7 "मैं उस फ्लेट में 32 दिन तक रहा। इतने दिनों मे मुझे उस फ्लेट के दो कमरों मे रखा गया। पहले वाले कमरें में खिड़कियां थी। लेकिन उनमें प्यायवूड लगाकर हवा रोशनीबंद

कर दी गयी थी। वहां लगभग चार घण्टे लाईट बंद रहती थी। कुछ दिनों बाद मुझे दूसरे कमरें मे शिफ्ट कर दिया गया था। इन 32 दिनों की अवधि में मुझे इतना डरा दिया गया था कि कभी मेने खिड़की खोलने या तोड़ने की कोशिश नही की। मुझसे कहा जाता था कि चुपचाप बैठे रहो। हमारे खिलाफ कुछ करने की कोशिश नहीं करना। इस अवधि में वहां जो लोग होते थें मैं उनसे बार–बार निवेदन करता था कि जो भी मुझसे लेना है लेकर मुझे छोड़ दो; या मैं दिला दूंगा। यह भी कहा कि किसी रिश्तेदार से मेरी बात करा दो तो मैं पैसे का इंतजाम कर दूंगा। या मुझ पर विश्वास हो तो मुझे छोड़ दो बाद में पैसे दे दूंगा।"

PARA-11 "लेकिन मेरे पास किसी को ज्यादा फटकने नही दिया जाता था। तथा मुझे हमेशा धमकाकर रखा जाता था। जब भी कमाण्डर बलीन्दर आता था तो मैं पैसो के बारें मे उससे पूछता था। कि पैसे मिल रहे है या नही। मुझसे मेरे लड़कों के नाम पर चिट्टीयां लिखवायी जाती थी कि इनको पैसा दे दो जो भी ये मांगते हैं। मैं बहुत परेशानी मे हूं मेरी जान खतरे मे है। मुझे यह कभी मालूम नही पड़ा कि मेरी रिहाई के लिए कुल कितना पैसा मांगा जा रहा है। अलग–अलग दिनों में चार–पांच चिट्टियां लिखवायी गयी। तब मैं बाद में फ्लेट में मौजूद अन्य लोगों से चिटठियों के जवाब के बारे मे पूछा करता था। तो वह कहते थें कि कमाण्डर से ही बात करना। "

PARA-12 "32 दिन बाद शाम को लगभग साढ़े 5–6 बजे का समय था। अचानक फ्लेट में मोबाईल के टेलीफोन की घण्टी बजी जो कि पहली बार बजी थी इसके पहले कभी मेने किसी को मोबाईल पर बात करते हुए नहीं देखा था। तब मोबाईल की घण्टी बजने पर जो आदमी मेरे लिये खाना बनाता था। उसने फोन पर बात की। तब वह बहुत ज्यादा घबराया हुआ था जैसे कोई बडी घटना घट गयी हो। मुझे डर लगा कि कहीं मुझे मार डालने का आदेश तो नहीं आ रहा है। उस समय फ्लेट में कुल तीन लोग थें। फिर टेलीफोन पर बात करने वाले आदमी ने मुझसे कहा कि तुम्हारी रिहाई का आदेश हो चुका है।"

"उस व्यक्ति से मैने अपने सीर पर हाथ रखवाकर पूछा कि क्या वास्तव में आप लोग मुझे छोड़ रहे हो ? और क्या आपको पैसा मिल चुका है ? तो उस आदमी ने कहा कि हां पैसा मिल चुका है और हम आपको छोड़ रहे हैं। "

From these facts it is clear that the appellants have threatened to cause death or hurt to Kailash Baheti in order to extort ransom. Thus, there is no force in the argument of the learned counsel for the appellants that the appellants have not administered any threat to cause death or hurt to Kailash Baheti.

19. Now we have considered that whether the appellants have demanded ransom of Rs.5 crores for releasing Kailash Baheti? For this purpose the statements of Kailash Baheti, his son Sanjay and son-in-law Santosh and one Radheyshyam would be useful.

20. Kailash Baheti also stated that under coercion he has to write letters [ExP-/ 1, P/2 & P/33] to his son. These letters are as under:

Exhibit – P/1

1–1–05

संजय,

मैं ठीक हूं इनकी व्यवस्था कैसे भी कर देवें । नीचे लीखे लोगों से पैसा इकट्ठा करके दे देवें और उनसे promise कर देवें कि मेरे आने से सारे चुकता कर देवेंगे ।

(1) Brij Mohanji

(2) Narayandasji

(3) Hemant Neema

(4) Guddu Lunawat

(5) Radheshyamji

(6) Indorilalji

(7) Tripathi

(8) Bhaktani

मुझे करीब 17 दिन हो गये हैं इनकी व्यवस्था ताबड़तोब करवा देवें । Risk तो लेनी ही पड़ेगी । पुलिस के चक्कर में नहीं पड़े । ध्यान रहे जल्दी जल्दी message करें क्योंकि यहां मन नहीं लग रहा है।

कैलाश बाहेती

Exhibit - P/2

संजय,

इनको रूपया दिल्ली कानपुर, नागपुर, जहां से भी अपने को मिल सके व्यवस्था करा देवें । सनीप मेहरा से try कर लेवें या डल Car कानपुर को try कर लेवें । जयदेव चौधरी आगरा को कर नहीं पावेगा फिर भी टाईम पर काम आ जावे । कोशिश करना कि राधेश्यामजी नागपुर व्यवस्था करा देवें एवं वो ही मजजसम कर देवें । मैं आने से जिसका भी रूपया लोगे उसे चुकाने की व्यवस्था कर दूंगा । सारी व्यवस्था जल्दी करने की व्यवस्था करा देवें ताकि मैं जल्दी से छुट सकूं । घर पर बच्चों से शुभ आशीष एवं भाईयों एवं दोस्तों एवं समस्त परिवार वालों से यथायोग्य कहना

कैलाश बाहेती

1 –1–05

Exhibit - P/33

7.15 A.M.

24.12.04

Dear Sanjay,

Kindly settle & pay money otherwise I will be in trouble. Do not go to Police. They can do nothing, so many days have been passed.

I have given number of Santoshji, Radheshyamji, Satish Mehra for collecting money. Number of "My Car" Dealer of Maruti Bhopal & Kanpur also I have given. Kindly Depute Radheshyamji for this settlement.

My Blessings to all in house.

कैलाश बाहेती

24–12–04

7.15 A.M.

21. It is true that these letters [Ex-P/ 1, P/2 & P/33] sent by Kailash Baheti and received by his Son Sanjay Baheti made no reference to any specific demand of the amount of ransom, however in these letters Kailash Baheti requested to arrange ransom amount for his release. His son Sanjay (PW17) deposed that on a day after his father's abduction, he received a phone call from an unknown person who stated that your father is safe in our custody and he demanded Rs.5 Crores. He further stated that after this telephonic conversation he received the letter by fax [Ex-P/33] and then Ex-P/1 & Ex-P/2 by courier. He further deposed that he was constantly in touch with the abductors on telephone. He also negotiated with the abductors and they were agreed to accept Rs. one Crore and as per their instructions he along with Santosh Mucchal (PW-42) and Radheyshyam (PW-46) went to Nagpur. After reaching Nagpur the abductors instructed them to reach Kolkata by Geetanjali Express but in between they were again directed to get down at Bilaspur, however they did not deliver the ransom amount as they received a message from the police officer that the abductors have been caught and their father is

safe. All these aforesaid facts have been corroborated by Santosh Muchhal (PW-42) and Radheyshyam (PW-46). It is seen that the testimonies of these witnesses remained unshaken in the cross-examination.

22. In such circumstances there is no force in contention of the learned counsel for the appellants that there was no demand of ransom by the appellants. It is also to be seen that from the facts it is apparent that there was no other intention of the appellants except to extort ransom after abducting Kailash Baheti.

23. It was strenuously argued by the learned counsel of the appellants that no CD in regard to conversation of demand of ransom was produced by the prosecution, and neither any mobile phone or landline phone were seized from the appellants. In the considered opinion of this Court, it does not in any way adversely affect the prosecution, if otherwise the evidence of prosecution witnesses is reliable and the Court is satisfied as to the circumstances leading to the demand of ransom by the appellants.

24. At this juncture we considered the judgment of this Court in case of *Shahid Khan* (supra). In *Shahid Khan's* case Dinesh Chandravanshi an eye witness of murder case was abducted, to create pressure on him that if he would give the evidence against the accused persons of that murder case then he may be put to death. In that case there was no demand of ransom which is one of the essential ingredient for the offence u/s 364-A of IPC whereas in the present case the appellants have abducted Kailash Baheti and they took him from Indore to Wardha and they kept him as a hostage in a flat at Wardha for 32 days. The appellants have demanded the ransom of Rs. 5 crore and after negotiation they agreed to accept ransom of Rs. one crore. From the conduct of the appellants it is proved that there was a reasonable apprehension that if the demand of ransom has not been fulfilled, Kailash Baheti would be put on death. Thus the *Shahid Khan's* judgment is not helpful to the appellants.

25. Now we have considered the judgment of *Vishwanath Gupta* (supra) which is heavily relied upon by the learned counsel of the appellants. Learned Counsel of the appellants tried to impress us that in *Vishwanath Gupta's* case Hon'ble Apex Court has held that there are three stages in Section 364-A of IPC. One is kidnapping or abduction, second is threat of death coupled with demand of money and lastly when the demand is not met then causing death. If these three ingredients are available, that will constitute an offence

u/s 364-A if (sic:of) IPC. We have considered this submission. In *Vishwanath's* case, the question before the Hon'ble Supreme Court was that when all the ingredients of the offence have not taken place at one place then which court had territorial jurisdiction to try the matter. The Hon'ble Supreme Court after elaborate discussion held that the offence u/s 364-A of IPC has three stages and the trial could be conducted at any of the court in which any one stage of the offence is committed. In this judgment, the Hon'ble Supreme Court has nowhere held that unless the aforesaid three stages are completed, the offence under section 364-A of IPC would not be made out.

26. We would however like to refer the judgment of the Hon'ble Supreme Court in case of *Akram Khan v State of West Bengal* reported in 2012(1) SCC 406.

> "28) In *Malleshi vs. State of Karnataka*, (2004) 8 SCC 95, while considering the ingredients of Section 364-A IPC, this Court held as under:
>
> > " 12. To attract the provisions of Section 364-A what is required to be proved is: (1) that the accused kidnapped or abducted the person; (2) kept him under detention after such kidnapping and abduction; and (3) that the kidnapping or abduction was for ransom....."
>
> To pay a ransom, as stated in the above referred Section, in the ordinary sense means to pay the price or demand for ransom. This would show that the demand has to be communicated.
>
> 29) We have already pointed out the evidence of PW-3 that he had received 8 or 9 calls from the accused persons demanding ransom for release of his son and the evidence of PW-7, an employee of a public telephone booth, also corroborates with the evidence of PW-3 who deposed that the calls were made on several occasions by the appellant from the telephone booth and on 2 or 3 occasions along with the child.
>
> 30) In *Vinod vs. State of Haryana,* AIR 2008 SC 1142, while reiterating the principles enunciated in *Malleshi* (supra), this

Court accepted the case of the prosecution and confirmed the conviction and sentence of life imprisonment imposed under Section 364-A IPC.

31) Though learned counsel for the appellant submitted that the case falls only under Section 363, namely, mere kidnapping and not under Section 364-A i.e., Kidnapping for ransom, in the light of the acceptable evidence led in by the prosecution, relied on and accepted by the trial Court and the High Court, we reject the said contention."

27. It is not necessary for the prosecution to establish the offence u/s 364-A of IPC that the abductors have actually extort some ransom and in not fulfilling the demand of ransom the abductee had been resulted in death. But the prosecution has to prove that the abductee was kept in detention and threatened to cause death or hurt in order to extort ransom and communicates that demand for ransom.

28. In the present case the prosecution has proved all the three ingredients of section 364-A of IPC which are enunciated in *Malleshi's case*. Thus the submissions of learned counsel for the appellants has no force that the case falls under 365 of IPC and not under section 364-A of IPC.

29. Now we have to consider as to whether the sentence imposed by the trial court is appropriate or not. The prosecution has proved beyond doubt that the appellants have committed offence punishable u/s 364-A r/w 120-B IPC. The offence shall be punishable with death or imprisonment for life and shall be liable to fine. Learned trial court awarded the sentence of imprisonment for life and fine of Rs.500/-with default clause. We are of the view that sentence passed by the learned ASJ is appropriate in the present facts and circumstances of this case.

30. From the above discussions, in our considered opinion the trial court has not committed any error in convicting the appellants for the offence as stated aforesaid. Consequently the appeal fails, conviction and sentence imposed by the trial court is maintained.

Appeal dismissed.

Appeal dismissed.

I.L.R. [2015] M.P., 2764
APPELLATE CRIMINAL
Before Mr. Justice Shantanu Kemkar & Mr. Justice N.K. Gupta
Cr.A. No.563/2010 (Jabalpur) decided on 21 September, 2015

CHANDRAMANI TRIPATHI ...Appellant
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 302 - Murder - Circumstantial Evidence **- Appellant was having illicit relations with deceased - Appellant was alone in the house along with the deceased - Presence of sperms on petticoat and vaginal swab clearly shows that there was a cohabitation soon before the death - Deceased was alive when the appellant entered inside the house otherwise, he would have immediately came out of the house, if the deceased was already dead - In view of Section 106 of Evidence Act it shall be presumed that the appellant was the person who killed the deceased - Appeal dismissed. (Paras 7 to 22)**

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – परिस्थितिजन्य साक्ष्य – अपीलार्थी के मृतिका के साथ अवैध संबंध थे – अपीलार्थी मकान में मृतिका के साथ अकेला था – पेटीकोट एवं वैजाइनल स्वैब पर शुक्राणुओं की उपस्थिति स्पष्ट रूप से दर्शाती है कि मृत्यु के तुरंत पहले सहवास हुआ था – जब अपीलार्थी ने मकान के अंदर प्रवेश किया तब मृतिका जीवित थी अन्यथा वह तुरंत मकान से बाहर निकलता यदि मृतिका पहले से मृत होती – साक्ष्य अधि. की धारा 106 को दृष्टिगत रखते हुए, यह उपधारणा की जायेगी कि अपीलार्थी वह व्यक्ति था जिसने मृतिका की हत्या की – अपील खारिज।

Cases referred :

(2006) 10 SCC 681, AIR 1956 SC 460

R.N. Dwivedi, for the appellant.
Pradeep Singh, G.A. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by :
N.K. Gupta, J. :- The appellant has preferred the present appeal being aggrieved with the judgment dated 24.2.2010 passed by the Special Judge and Additional Sessions Judge, Sidhi in Sessions Trial No. 162/2007 whereby the appellant has been convicted of the offence under Section 302 of the IPC

and sentenced to Life Imprisonment with fine of Rs.1000/-, R.I. for one month in default of payment of fine.

2. The prosecution's case, in short, is that on the night of 27.6.2007 at about 11:00 PM Lalita, the wife of the appellant shouted that a thief had entered in her locality at village Lehechua (Police Station Rampur Naikin, District Sidhi). When neighbours of the locality gathered, she told them that her husband had entered in the house of deceased Shyamwati. She also told them that she had locked the only door of the house of Shyamwati from outside. Thereafter, she opened the lock before the crowd, which was gathered, but the door was closed from inside and it could not be opened. Entire crowd stayed there till the morning. At about 6:00 AM in the morning, Sarpanch Gajendra Singh (PW-11) was called, on who's telling the appellant to come out, the appellant came out of the house and tried to escape but he was held by the crowd gathered at the spot. When some of the persons went inside the house of deceased Shyamwati, it was found that she was dead and her body was lying in the room. Ram Gopal Sahu (PW-3) immediately went to Police Station Rampur Naikin and gave a merg intimation Ex.P-4 to the Police Station. The Police has also registered a crime by the FIR Ex.P-5. The body of deceased Shyamwati was sent for the post mortem. Dr. Sandeep Bhalla (PW-1) performed the post mortem on the body of deceased Shyamwati with a team of Doctors and gave a report Ex.P-1. He found that deceased Shyamwati died due to throttling and nail marks were also found on her neck. During investigation the appellant was arrested, his nails were also cut for forensic examination. In the Forensic Science Laboratory's report Ex.P-16, sperms and semen particles were found on vaginal swab and petticoat of deceased Shyamwati. After due investigation, the charge sheet was filed before JMFC, Churhat, who committed the case to the Court of Session and ultimately it was transferred to the Additional Sessions Judge and the Special Judge under SC/ST (Prevention of Atrocities) Act, Sidhi.

3. The appellant abjured his guilt, he did not take any specific plea in the case and, therefore, no defence evidence has been adduced.

4. The trial Court after considering the prosecution evidence acquitted the appellant from the charge under Section 449, 376 of the IPC but convicted him for the offence under Section 302 of the IPC.

6. Since Hon'ble the Apex Court vide order dated 1.5.2015 in SLP (Criminal) No. 3405/2015 has requested this Court to finally decide the appeal

within 6 months, we have heard the matter out of turn.

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

7. The present case is dependent upon the circumstantial evidence. There is no ocular evidence in the case. There is nobody who has stated that he saw the appellant killing deceased Shyamwati by throttling, hence each and every circumstance shall be considered one by one. The first circumstance in the case is the nature of death of deceased Shyamwati. In this context, Dr. Sandeep Bhalla (PW-1) has proved his post mortem report Ex.P-1 in which he had mentioned that there were some abrasions and nail marks on the neck of the deceased. Her tongue was slightly out from her teeth. The blood was oozing from her nose and on opening, thick blood was found in the lungs, hence he opined that the deceased died due to throttling. Again some Court questions were asked to this witness, in which he has replied that death of deceased Shyamwati was homicidal in nature because the deceased could not commit throttling on her own. The offence of throttling is possible if it is done by someone else. After considering the evidence of Dr. Sandeep Bhalla (PW-1), his opinion is acceptable. There is nothing against that opinion to disbelieve it, hence the trial Court has rightly found that the death of the deceased was homicidal in nature.

8. Ram Gopal (PW-3), Ram Kumar (PW-4), Shiv Prasad (PW-5), Ram Rahish (PW-6) and Tejilal (PW-12) have stated that at about 11:00 PM, the wife of the appellant shouted about the entry of a thief and when these witnesses went to the spot, she told them that her husband entered in the house of deceased Shyamwati with whom he had illicit relations, therefore, to catch him red handed, she locked the only door of that house from outside. Thereafter, the witnesses called the appellant to open the door but he did not open the door. Out of the various persons gathered at the spot, many went back to their houses but Ram Gopal, Ram Kumar and Shiv Prasad stayed there for the entire night. Shiv Prasad went to Rewa at about 6:00 AM in the morning to call Ram Kripal, the husband of deceased Shyamwati, who was working at Rewa. When Sarpanch Gajendra Singh (PW-11) was called in the morning and he told the appellant to open the door, then the appellant opened the door and came out of the house of Shyamwati and tried to run away towards his house but was detained by the crowd.

9. Learned counsel for the appellant submits that all the witnesses are the relatives of deceased Shyamwati and they are telling a falsehood whereas

Sarpanch Gajendra Singh did not corroborate the testimony of these witnesses. Gajendra Singh (PW-11) has stated that when he went to the spot, the door of the house was already open and there was nobody in the house but the dead body of deceased Shyamwati was found in the house and the appellant was also standing as a witness in the crowd. Hence learned counsel for the appellant has submitted that the appellant was falsely implicated in the matter and Lalita, the wife of the appellant was the most important witness but she was not examined before the trial Court.

10. If the entire evidence adduced by the prosecution is considered, it appears that initially Lalita, the wife of the appellant, made a noise that a thief was there inside the house of Shyamwati and when the various persons from the neighbourhood have gathered at the spot, she told about the entry of her husband/appellant Chandramani Tripathi in the house. The conduct of Lalita, the wife of the appellant that she appended a lock on the only door of the house of Shyamwati, indicates that Lalita wanted to expose her husband and deceased Shyamwati so that in future her husband may not visit the house of Shyamwati again. It is also apparent that for entire night when the appellant did not open the door, Lalita unlocked the house of Shyamwati and in the morning when the door was opened, she was not present in front of the house of deceased Shyamwati, hence the possibility cannot be ruled out that initially Lalita wanted to expose her husband but when she found that deceased Shyamwati was killed and the matter became grave, then she had no option except to save her husband and, therefore, the prosecutor might have thought not to examine witness Lalita before the trial Court, hence due to non examination of Lalita, the wife of the appellant, no adverse inference can be drawn against the prosecution.

11. However, according to the witnesses, there was an allegation against the appellant that he had illicit relations with deceased Shyamwati and hence in the late night he entered in the house of Shyamwati. Dr. Sandeep Bhalla (PW-1) has also stated that he procured two slides of vaginal swab of deceased Shyamwati and also a petticoat, found on her body. Forensic Science Laboratory's report Ex.P-16 clearly indicates that sperms and semen particles were found on petticoat as well as slides of vaginal swab of deceased Shyamwati, which indicates that intercourse was done with deceased Shyamwati soon before her death. This is also one of the circumstance, which goes against the appellant.

12. Shiv Prasad (PW-5) has stated that at about 6:00 AM he was sent to call Ram Kripal, the husband of deceased Shyamwati from Rewa. Ram Gopal (PW-3) has stated that his brother Ram Kripal was selling ice-cream at Rewa and deceased Shyamwati was residing in the house with one child, hence it is also proved that the husband of deceased Shyamwati was not residing with her in that house in those days when the incident took place. This is also a circumstance against the appellant.

13. Ram Gopal (PW-3), Ram Kumar (PW-4), Shiv Prasad (PW-5), Ram Rahish (PW-6) and Tejilal (PW-12) have stated about the overt act of Lalita, the wife of the appellant that she collected the witnesses by shouting that some thief has entered in the house and thereafter when various persons of the locality gathered, she informed that her husband had illicit relations with deceased Shyamwati and he is inside the house. Some of the witnesses have turned hostile. Ram Rahish (PW- 6) has partly turned hostile. He has stated that after few hours he went to his house and he did not remain present at the spot till the morning, however, he has accepted that his house was adjacent to Shyamwati's house and when he was taking bath in the morning, he saw the appellant running from the house of deceased Shyamwati.

14. It is true that witnesses Ram Gopal (PW-3), Ram Kumar (PW-4), Shiv Prasad (PW-5), Ram Rahish (PW-6) are the relatives of deceased Shyamwati but no enmity of these witnesses is established with the appellant. They had no reason to give statement against the appellant without any basis. Tejilal (PW-12) has stated that the mother of the appellant came to the spot and requested to open the door. She also told the appellant to seek apology from his wife, however, such statement of Tejilal was not corroborated by other witnesses and such fact was not mentioned by him in his case diary statement Ex.D-2.

15. Witness Ram Kumar (PW-4) has stated that initially a lock was appended by the wife of the appellant but when she opened the lock, the crowd requested the appellant to open the door and come out but the appellant did not come out from that house in the night then the lock was appended by one Daddi. However, other witnesses did not corroborate the statement of Ram Kumar to the fact that a lock was also appended by Daddi but it appears that statement of Ram Kumar is natural unless Lalita, the wife of the appellant would have unlocked the door, the crowd could not request the appellant to come out. When the lock was removed by Lalita then the persons present

have found that the door was also closed from inside, hence it was natural for witness Daddi to lock the door from front side otherwise the culprit would have left the house of deceased Shyamwati in the absence of any person in front of the house. It is also stated by all the witnesses that in the morning the lock was opened in presence of Sarpanch Gajendra Singh and thereafter Gajendra Singh requested the appellant to come out and then he came out and ran towards his house, hence it is apparent from the statement of these witnesses that Lalita, the wife of the appellant removed the lock when the crowd was gathered but when the appellant did not come out side the house again lock was opened in the morning in front of Sarpanch Gajendra Singh, hence the statement of witness Ram Kumar appears to be correct that after sometime in the night when the appellant did not come out of the house, Daddi appended a lock so that the appellant may not go out in absence of any person in front of the house.

16. Witness Ram Gopal (PW-3) has also proved the spot map Ex.P-6 prepared by ASI Ram Chhabile Mishra (PW- 10). According to the spot map, in the house of deceased Shyamwati there were only two rooms and only one door to exit, hence there was no possibility that anybody else could have entered in the house to commit any crime.

17. Though, witnesses Ram Gopal (PW-3), Ram Kumar (PW- 4), Shiv Prasad (PW-5), Ram Rahish (PW-6) etc. were the relatives of deceased Shyamwati but there was no reason for them to blame the appellant that he had illicit relations with their sister-in-law deceased Shyamwati. Such blame could not be made by them upon their sister-in-law for fear of defamation of their own family. It is true that Sarpanch Gajendra Singh (PW-11) has turned hostile, however, he has accepted that he was called by the crowd in the morning, he went to the house and saw the dead body of deceased Shyamwati and he directed witness Ram Gopal to lodge the FIR at Police Station and Ram Gopal had immediately lodged the merg intimation Ex.P-4 and the FIR Ex.P-5. The door was opened at about 6 to 7 AM in the morning thereafter Sarpanch as well as other witnesses saw the dead body of deceased Shyamwati and thereafter Ram Gopal went to the Police Station on foot. The Police Station was 8 Kms away according to document Ex.P-5 and he had lodged the FIR at 9:45 AM.

18. Looking to the circumstances of the case, it appears that some time was required by Ram Gopal to get the door opened, thereafter, visit inside

the house and then ultimately, to visit the Police Station on foot, hence it cannot be said that the FIR was lodged with delay or it was a concocted FIR. The testimony of witnesses Ram Gopal, Ram Kumar, Shiv Prasad etc. is also duly corroborated by timely lodged FIR Ex.P-5. In these circumstances, if Sarpanch Gajendra Singh has turned hostile, the testimony of other witnesses cannot be discarded. Their testimony is duly proved by timely lodged FIR Ex.P-5. Their version is also corroborated by the post mortem report Ex.P-1 and FSL report Ex.P-16 that found that cohabitation was done with the deceased soon before the incident, hence it is proved beyond doubt that on shouting by Lalita that her husband was inside the house, the door was locked from outside and when the door was opened in the morning, no one except the appellant came out of the house of deceased Shyamwati and deceased Shyamwati was found dead.

19. The evidence of these witnesses shall be considered under Section 6 of the Evidence Act. They have given the circumstances soon before the incident and soon after the incident. There was nobody except the appellant in that house along with deceased Shyamwati for the entire night. Dr. Sandeep Bhalla in his post mortem report has clearly opined that the deceased died within 24 hours of the date and time of the post mortem. He performed the post mortem on 28.6.2007 at about 3:00 PM and, therefore, according to duration of death of deceased Shyamwati as opined by Dr. Sandeep Bhalla, the deceased would have died in the night when the appellant was inside the house with the deceased.

20. On the basis of the aforesaid discussion, it is proved that the appellant was the person who was with deceased Shyamwati in that night and it was found in the post mortem report and the FSL report that cohabitation was done with deceased Shyamwati in that night and, therefore, due to sole presence of the appellant in that house, it shall be presumed that it was done by the appellant. These circumstances indicate that the appellant had illicit relations with deceased Shyamwati and, therefore, he went inside the house in prosecution of such relations.

21. If Shyamwati was already dead when the appellant entered in the house, then he would have immediately come out of the house and there was no possibility that his wife could append a lock on the only exit door of the house of Shyamwati from outside, hence it is also a circumstance proved against the appellant that he had illicit relations with deceased Shyamwati and when he

entered in the house, Shyamwati was alive.

22. As discussed above, it is proved by the witnesses that in the morning when Sarpanch Gajendra Singh directed the appellant to come out, he came out by opening the door and started running towards his house. There was nobody except the appellant in the house and Shyamwati was found dead. It is also discussed above that death of deceased was homicidal in nature and, therefore, in view of Section 106 of the Evidence Act, it shall be presumed that the appellant was the person who killed deceased Shyamwati. In this connection, judgment passed by Hon'ble the Apex Court in *Trimukh Maroti Kirkan Vs. State of Maharashtra* – (2006) 10 SCC 681 may be referred. Though it is a matter relating to other inmates of the house if dead body of the wife is found in the house, but on same analogy when it is established that there was nobody except the appellant along with deceased Shyamwati for entire night in a closed house of two rooms and deceased Shyamwati was found killed, when the appellant left the house of deceased Shyamwati, then on same analogy, it was for the appellant to explain as to how deceased Shyamwati had died, hence in the light of the judgment passed by the Apex Court in *Trimukh Maroti Kirkan* (supra), a presumption shall be drawn against the appellant that he killed deceased Shyamwati unless he would have explained the position as to how deceased Shyamwati was killed. The appellant did not take any specific plea in his statement under Section 313 of the Cr.P.C. He simply denied all the allegations made against him. He did not give any explanation as to how Shyamwati has died.

23. At this stage, if all the circumstances, which are proved against the appellant, are considered together that death of deceased Shyamwati was homicidal in nature, soon before her death cohabitation was done with her, her husband was not residing with her, the appellant had illicit relationship with her, the appellant entered in the house when Shyamwati was alive and when he came out of the house, she was found dead, he was the only person who remained in the house for the entire night whereas there was only one door in the house, which was surrounded by various witnesses for the entire night, then the only conclusion will be drawn that the appellant had killed the deceased Shyamwati.

24. Learned counsel for the appellant has submitted that if the appellant had illicit relations with deceased Shyamwati and he went inside the house then there was no reason for him to kill the deceased Shyamwati. However, if

there was nobody in the house, who could kill deceased Shyamwati and it is for the appellant to explain as to how deceased Shyamwati has died and no explanation is given by the appellant then the submission made by the learned counsel for the appellant cannot be accepted. If Shyamwati had expired during the act of cohabitation or any other reason or the appellant wanted to get the advantage of any exception of Section 300 of the IPC then it was for him to give explanation. The death of deceased is homicidal and it is established that the appellant was the person who killed her. He did not give any explanation about the circumstances in which she died and, therefore, it cannot be said that the case of the appellant falls in the purview of culpable homicide not amounting to murder. It is a case of murder. The appellant killed deceased Shyamwati by throttling. So far as motive is concerned, it is settled view of the Apex Court that it is not required for the prosecution to prove the motive, if other circumstances are proved beyond doubt and chain of circumstantial evidence is complete then if motive is not proved then it makes no difference. The Apex Court has taken such a view from very beginning and such view has been expressed in various cases. It would be appropriate to refer the judgment passed by the Apex Court in the case of *Gurucharan Singh Vs. State of Punjab* (AIR 1956 SC 460) in which it is mentioned that where the positive evidence against the accused is clear, cogent and reliable, the question of motive is of no importance.

25. On the basis of the aforesaid discussion where the chain of circumstantial evidence is complete and it is proved beyond doubt that the appellant killed deceased Shyamwati, there is no reason to accept the appeal filed by the appellant. The trial Court has rightly convicted the appellant for the offence under Section 302 of the IPC. So far as sentence is concerned, the trial Court sentenced the appellant to life imprisonment, which is the minimum, therefore, there is no need to discuss anymore on the question of sentence.

26. On the basis of aforesaid discussion, there is no reason to accept the appeal filed by the appellant. Consequently, the appeal is hereby dismissed.

27. A copy of the judgment be sent to the trial Court along with its record for information.

Appeal dismissed.

I.L.R. [2015] M.P., 2773
CIVIL REVISION
Before Mr. Justice Sanjay Yadav
Civil Rev. No.191/2014 (Jabalpur) decided on 22 July, 2014

CHANDA BAI BHURA (SMT.) ...Applicant
Vs.
INDERCHAND BHURA ...Non-applicant

A. ***Specific Relief Act (47 of 1963), Section 6 - Suit for recovery of possession - Dismissal - Barred by Time*** **- Plaintiff dispossessed on 27.01.2004 - Suit filed on 14.10.2004 - Knowledge of dispossession shown in October, 2004 - Held - As the report of dispossession lodged on 27.01.2004, itself and the suit has not been filed within 6 months, so the suit is barred by time - Order of trial Court upheld - Revision dismissed. (Paras 7 & 9)**

क. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 6 – कब्जा वापस लेने हेतु वाद – खारिजी – समय द्वारा वर्जित – वादी को 27.01.2004 को बेकब्जा किया गया – 14.10.2004 को वाद प्रस्तुत किया गया – बेकब्जा किये जाने की जानकारी अक्टूबर 2004 में दर्शायी गयी – अभिनिर्धारित – चूंकि बेकब्जा किये जाने की रिपोर्ट 27.01.2004 को ही दर्ज की गई और वाद छः माह के भीतर प्रस्तुत नहीं किया गया है, इस तरह वाद समय द्वारा वर्जित है – विचारण न्यायालय के आदेश की पुष्टि की गई – पुनरीक्षण खारिज।

B. ***Specific Relief Act (47 of 1963), Section 6 - Suit for recovery of possession - Factum of possession*** **- Plaintiff's past possession not established - Held - As the past possession of plaintiff is not established, no question of dispossession arises - Revision dismissed. (Para 6)**

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 6 – कब्जा वापस लेने हेतु वाद – कब्जे का तथ्य – वादी का पूर्व का कब्जा स्थापित नहीं – अभिनिर्धारित – चूंकि वादी का पूर्व का कब्जा स्थापित नहीं, बेकब्जा किये जाने का प्रश्न उत्पन्न नहीं होता – पुनरीक्षण खारिज।

Atulanand Awashty, for the applicant.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- Heard on admission.

This revision, under Section 115 of the Code of Civil Procedure, 1908 filed by the plaintiff, is directed against judgment and decree dated 17.1.2014 passed by XVIIIth Additional District Judge, Jabalpur in Civil Suit No.12-A/2012.

2. The suit at the instance of the petitioner/plaintiff was for recovery of possession of House No.557 situated in Sarafa Bazar Jabalpur, *inter alia* on the contention that the suit property was received in partition by her husband, who were four brothers. The partition took place amongst them on 30.12.1982 which was reduced in writing; whereby, the houses bearing no.675, 676 were partitioned amongst four brothers. Whereunder, plaintiff's husband got House No.557 (new number) and the defendant got house no.558 (new number). That there were two tenants in the House No.557 viz. Hukumchand Danga and Brijkishore Saraf, who were evicted vide decree dated 28.10.2000 and 22.2.2002 respectively, the possession whereof was given to the attorney of plaintiff's husband. It was further contended that the defendant brought a suit : Civil Suit No.36-A/2003 against Virendra and others; wherein, application under Order 39 Rule 1 and 2 CPC was dismissed on a finding that he has failed to prove settled possession. Yet, on 27.1.2014, the defendant broke open the lock and door of the shop which was earlier in possession of Brijkishore Saraf and forcefully took possession of the suit property by putting new rolling shutter. This act, as contended, was during lifetime of her husband i.e. Premchand who expired on 14.6.2004. It was also pleaded that plaintiff's husband had left Jabalpur and settled in Bhilai where he had constructed his own house. It is further contended that after the death of her husband, she came to know in October, 2004 of the unlawful act of defendant which led her to file the suit under Section 6 of the Specific Relief Act, 1963 on 14.10.2004. It was also contended that the proceedings under Section 145 of the Code of Criminal Procedure, 1973 were also initiated before Sub-Divisional Officer.

3. The defendant, on his turn, denied the plaint allegation, contending *inter alia* that the suit under Section 6 of the Specific Relief Act, 1963 was barred by time. That, the plaintiff nor her husband were ever in possession of suit property which continued to remain in possession of the defendant. As regard to contention as to proceedings under Section 145 of the CrPC, it is

contended that against the order dated 30.8.2005, the defendant preferred a Cri. Revision No.325/2005 before the 12th Additional Sessions Judge who, by order dated 21.7.2006, set aside the order dated 30.8.2005 which, later on, was affirmed in Cri. Revision No.1439/2006, dismissed on 7.12.2006.

4. The trial Court on the basis of the rival contentions framed nine issues, of which issue no.2, 3 and 9 have been answered against the applicant/plaintiff. These issues are -

> (2) क्या वादी विवादित म.नं.557 (पुराना नं.675) सराफा बाजार, जबलपुर की स्वत्वाधिकारी है ?
>
> (3) क्या वादी से प्रतिवादी द्वारा विवादित मकान का आधिपत्य अवैध रूप से बलपूर्वक प्राप्त किया गया है ?
>
> (9) क्या दावा समय सीमा के अंदर है ?

5. As to issue no.2, the trial Court placing reliance on the admission by plaintiff Chandabai in paragraph 20 and 26 of her cross-examination that she is not aware of any property in the names of in-laws viz. Rikhab Das and Bhawarbai and as to the property of her husband and his brothers. That, she never asked her husband about receiving the property as no property was received by him. She also admitted the fact that she is not aware as to any portion of property received by her husband and his brothers. And, on the evidence of plaintiff witness no.2, recorded the finding that -

> 13. वादीगण की ओर से बंटवारानामा प्रदर्शित एवं प्रमाणित नहीं कराया गया है। कोई ऐसा दस्तावेज पेश नहीं किया है जिसमें उसका व उसके पति का नाम मालिक के रूप में दर्ज हो। ऐसा कोई दस्तावेज पेश नहीं है कि जिससे यह प्रमाणित हो कि वादग्रस्त सम्पत्ति वादिनी या उसके पति को बंटवारे में मिली थी । वादी ने अनु0वि0दण्डाधिकारी कोतवाली अनुभाग जबलपुर द्वारा विविध अपराधिक कं.–1355/04 धारा–145दं.प्र.सं. चंदाबाई बगैरह वि0 इंदरचंद भूरा बगैरह में पारित आदेश दिनांक–31.08.2005 की प्रमाणित नकल प्र.पी.–1 तथा तृतीय व्यवहार न्यायाधीश वर्ग–2 द्वारा व्यवहार वाद कं.–363अ/2003 इन्दरचंद वि0 वीरेन्द्र कुमार में पारित आदेश दिनांक 03.05.03 प्र.पी.–2 की प्रमाणित नकले पेश की है। प्र.पी. –1 द्वादश अपर जिला एवं सत्र न्यायाधीश फास्ट ट्रेक कोर्ट द्वारा दा. पु.कं. –325/2005 में पारित आदेश दिनांक 21.07.2006 से अनुविभागीय मजिस्ट्रेट कोतवाली जबलपुर द्वारा विविधि अपराधिक प्रकरण कं.–1355/04 अंतर्गत् द.प्र. सं. की धारा–145 में दिये गये आदेश दिनांक 31.05.2008 को अपास्त किया गया है। इन्दरचंद भूरा बगैरह की ओर से प्रस्तुत पुनरीक्षण याचिका स्वीकार की गई है। विवादित सम्पत्ति के आधिपत्य के संबंध में दिये गये आदेश को नहीं माना। अतः

प्रकरण में आई साक्ष्य एवं वादी साक्षियों की स्वीकारोक्ति एवं उपरोक्त को देखते हुए वाद प्रश्न "सिद्ध नहीं" निराकृत किया जाता है।"

6. Similarly, in respect of issue no.3, the trial Court placing reliance on the evidence of plaintiff's witness no.1 and 2 returned a finding that the plaintiff was not in possession of the suit property as would entitle her for relief under Section 6 of 1963 Act. In paragraph 15 and 16, the trial Court recorded following findings -

15. चंदाबाई भूरा (वा0सा0–1) ने प्रतिपरीक्षण में बताया है, कि उसके पति और हुकुमचंद एक साथ व्यवसाय के लिये भिलाई गये थे। फिर वह लोग वहीं रहने लगे। उसके स्वर्गीय पति ने भिलाई में ही मकान बनाया। वर्तमान में वह भिलाई में अपने स्व0 लड़के की बहू, रेखा भूरा, छोटी बहू रेणु भूरा एवं पुत्र वीरेन्द्र भूरा नाति नातिन के साथ रहती है। देवचंद व इंदू व उनके परिवार के सदस्य भिलाई में उनके यहां आते–जाते रहे। जनवरी 2004 से लेकर अक्टूबर 2004 तक वह जबलपुर आई या नहीं उसे याद नहीं है। उसके पति की मृत्यु के बाद उनके द्वारा छोड़ी गई सम्पत्ति किसी को नहीं मिली। उसके पति के साथ कोई सम्पत्ति थी ही नहीं तो क्या मिलती। उसके ससुर की दो पत्नी थी। उनके साथ उसका कभी कोई विवाद नहीं हुआ। उसके ससुर के दोनों पत्नियों से पैदा हुई संतानो के बीच सम्पत्ति को लेकर कोई विवाद नहीं हुआ। यह स्वीकार किया है कि भिलाई जाने के बाद चुनाव में वोट उसने भिलाई में ही डाले थे। उसके पति प्रेमचंद भी वहीं के मतदाता थे। भिलाई जाने के बाद और इस केस के पहले वह कभी अदालत नहीं आई। सम्पत्ति के संबंध में उसके पति और भाईयों में उसकी जानकारी के अनुसार कोई विवाद नहीं हुआ। देवचंद जी ने कभी सम्पत्ति के बारे में नहीं बताया, ना कोई बात की। केस लगाने के बाद उसने किसी से कभी नहीं पूछा कि प्रेमचंद को क्या मिला। वह इस मुकदमे चलने के पूर्व और चलने के बाद कभी थाने रिपोर्ट करने नहीं गई ।

16. डॉ0 देवचंद भूरा (वा0सा0–2) ने प्रतिपरीक्षण की कंडिका–35 में यह स्वीकार किया है, कि वह प्रेमचंद भूरा ने अपने जीवनकाल में प्रतिवादीगण के विरूद्ध वर्तमान वादग्रस्त सम्पत्ति के बावत् कोई भी दीवानी नालिस नहीं की। प्रेमचन्द भूरा भिलाई में रहते थे, उसे नहीं मालूम की उन्होने प्रतिवादी के विरूद्ध कभी कोई एफ.आई. आर दर्ज कराई थी,की नही। चंदाबाई भिलाई में रहती है। अतः उसे नहीं मालूम की उन्होने प्रतिवादी के विरूद्ध कभी कोई एफ.आई.आर. दर्ज कराई थी,कि नही। कंडिका–36 में यह स्वीकार किया है कि उसने स्व0 प्रेमचंद एवं चंदाबाई से इन्दल चन्द के विरूद्ध एफ.आई.आर.की है,कि नही। इस बाबत पूछताछ नहीं की। वादी एवं उसके साक्षी के प्रतिपरीक्षण से यह स्पष्ट हो रहा है कि वादग्रस्त स्थल पर वादी का कब्जा ही नहीं था तो उसे बलपूर्वक बेदखल किस प्रकार किया जा सकता है। भिलाई जाने के उपरांत वादी तथा उसके पति जबलपुर में नहीं रहे। वादग्रस्त मकान में उनका मालिकाना कब्जा नहीं था तो उन्हें बेदखल किस प्रकार किया गया

यह संदिग्द्ध हो जाता है। अतः प्रकरण में आई साक्ष्य से उक्त प्रश्न "सिद्ध नहीं" में निराकृत किया जाता है।

7. As to issue no.9, the trial Court observed in paragraph 21 -

> 21. वादी पक्ष के अभिवचन एवं कथनों के मुताबिक प्रतिवादी ने दिनांक 27.01.2004 को किरायेदार बृजकिशोर शराब की खाली दुकान के ताले एवं दरवाजे को तोड़कर नये रोलिंग शटर लगाकर दुकान में कब्जा कर लिया। मान्नीय म0प्र0 उच्च न्यायालय में कि.रि.कं. –1439/06 चंदाबाई वि0 इन्दरचंद में वादी द्वारा पेश रिवीजन खारिज किया गया, परंतु निर्णय दिनांक 07.12.2010 में यह घोषित किया है, कि वादीगण दिनांक 27.01.2004 को मकान नं.–557 से हटाये गये थे। थाना कोतवाली में दिनांक 27.01.2004 को रिपोर्ट भी दर्ज करायी गयी है। जबकि वादी के द्वारा यह दावा दिनांक–14.10.2004 को संस्थित किया गया है। जिससे यह स्पष्ट होता है, कि दावा छः माह के अंदर पेश नहीं हुआ है। फलतः उक्त वाद प्रश्न "नहीं" में निराकृत किया जाता है।

8. These findings being based on cogent evidence on record, in absence of any material evidence commended at do not warrant different conclusion then arrived at by the trial Court.

9. Having thus considered, there being no substance in the challenge, revision fails and is dismissed. No costs.

Revision dismissed.

I.L.R. [2015] M.P., 2777

CIVIL REVISION

Before Mr. Justice Sanjay Yadav

Civil Rev. No. 466/2013 (Jabalpur) decided on 13 August, 2014

REGIONAL COMMISSIONER ...Applicant

Vs.

BHURIA BAI & ors. ...Non-applicants

A. Limitation Act (36 of 1963), Section 5 - Condonation of delay - Date of knowledge - Delay of 1047 days **- Applicant not impleaded as a party either in succession case or at Appellate Stage - Knowledge on 24.03.2013, when order placed for compliance - Held - Applicant though a necessary party, not impleaded as a party - Sufficient cause shown explaining delay - Delay condoned. (Paras 1 & 3)**

क. परिसीमा अधिनियम (1963 का 36), धारा 5 – विलंब के लिये माफी –

जानकारी की तिथि – 1047 दिनों का विलंब – आवेदक को न तो उत्तराधिकार प्रकरण में न ही अपीली प्रक्रम पर पक्षकार के रूप में अभियोजित किया गया – 24.03.2013 को जानकारी हुई जब अनुपालन हेतु आदेश रखा गया – अभिनिर्धारित – यद्यपि आवेदक आवश्यक पक्षकार था उसे पक्षकार के रूप में अभियोजित नहीं किया गया – विलंब स्पष्ट करने के लिये पर्याप्त कारण दर्शाया गया – विलंब माफ किया गया।

B. Succession Act, (39 of 1925), Section 373, 384, Coal Mines Provident Fund & Miscellaneous Provisions Act, (46 of 1948), Section 3 and Coal Mines Provident Fund, Coal Mines Family Pension & Coal Mines Deposit Linked Insurance Scheme 1948, Clause 64 and Hindu Succession Act, (30 of 1956), Section 8 - Succession certificate **- Proviso to sub-clause (ii) of clause 64 - vis-a-vis - Hindu Succession Act, 1956 - Whether provisions of Coal Mines Provident Fund Scheme, 1948 will prevail over statutory law like Hindu Succession Act, 1956 - Held - No, the statutory law will have the overriding effect over the Coal Mines Provident Fund Scheme 1948. (Para 16)**

ख. उत्तराधिकार अधिनियम, (1925 का 39), धारा 373, 384, कोयला खान भविष्य निधि तथा प्रकीर्ण उपबंध अधिनियम, (1948 का 46), धारा 3 एवं कोयला खान भविष्य निधि, कोयला खान परिवार पेंशन एवं कोयला खान निक्षेप संबद्ध बीमा योजना, 1948, खंड 64 एवं हिंदू उत्तराधिकार अधिनियम, (1956 का 30), धारा 8 – उत्तराधिकार प्रमाणपत्र – खंड 64 के उपखंड (ii) का परंतुक – सम्मुख – हिंदू उत्तराधिकार अधिनियम, 1956 – क्या कोयला खान भविष्य निधि योजना, 1948 के उपबंध कानूनी विधि जैसे कि हिंदू उत्तराधिकार अधिनियम, 1956 पर अभिभावी होंगे – अभिनिर्धारित – नहीं, कानूनी विधि का कोयला खान भविष्य निधि योजना, 1948 पर अध्यारोही प्रभाव रहेगा।

Case referred :

1991 L.A.B.I.C. 650.

Anoop Nair with *K. Rohan,* for the applicant.
A.D. Mishra, for the non-applicant No.2.
M. Choubey, for the non-applicant No.3.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- There is delay of 1047 days in filing this Civil Revision condonation whereof, is being sought vide I.A.No.13265/2013. It is

contended that in a proceedings under Section 372 Indian Succession Act 1925 preferred by respondent no.1 Bhuria Bai, the applicant Regional Commissioner, Coal Mines, the keeper of Provident Fund of coal Mines employees was not impleaded as party.That with the passing of the impugned order dated 20.10.2010 in Misc.Civil Case No.5/2010, preferred under Section 384 of 1925 against the order dated 29.2.2008 in Succession Case No.5/2003, the applicant came to know on 24.3.2013 when the order was placed for compliance.That taking note of the provisions of the scheme of Provident Fund framed under Coal Mines Provident Fund and Miscellaneous Provisions Act 1948 and finding the Appellate Order contrary to the Scheme, a decision was taken to challenge the same in higher forum.And it was in the process there of the delay has occurred in filing the Civil Revision , which being not deliberate deserves to be condoned.

2. Though respondent no.2 has opposed the prayer for condonation.

3. However, taking into consideration the fact that the applicant was not impleaded as party in the Succession case, though the claim related to the share in the Provident Fund of the deceased employee of the Coal Mines sufficient ground is made out. The delay being duly explained deserves to be and is condoned.

4. With consent the matter is finally heard.

5. Brief facts are that Ghudan Kalar was employed as Tub loader with the Western Coal Fields Limited at Mohan Colliery who having died in harness led to the appointment of his son Suvesh on compassionate ground as operator who also died on 17.11.2002 leaving behind his mother, Bhuriabai and widow Usha bai. As the deceased while in service had nominated his mother to receive the provident fund, the nomination got, invalid (as per proviso to sub clause (b) of Clause 62 of Scheme) on Suvesh marrying Usha Bai and since Suvesh died without any nomination, the claimants were called upon to obtain a succession certificate which led the nonapplicant no.1 Smt. Bhuria Bai (mother of the deceased) to file an application for grant of succession certificate under section 372 of the Act of 1925, registered as succession case no.5/2003.

6. The trial Court vide order dated 29.2.2003 dismissed the claim on the findings that the applicant Smt. Bhuria Bai since did not implead minor children of the deceased Suvesh, the application was held to be not maintenable

(sic:maintainable) . This order has been reversed in an appeal under section 384 on a finding based on sub Section (3) of Section 373 of 1925 Act on the principle of best title, by taking into consideration that the minor children of deceased Suvesh were duly represented through their mother Usha Bai who had taken a defence of their right in the estate of late Suvesh. The Appellate Court by taking into consideration dependancy and succession ordered two shares in favour of widow and one share each to children and the mother,i.e., 40 % to widow and 20% each to children and the mother, by impugned order dated 10.8.2010.

7. Though none of the beneficiaries, have chosen to challenge the order.It is the Regional Commissioner, Coal Mines Provident Fund who challenges the order vide this Revision on the ground that the determination of the ratio of share is in contravention to the provisions of clause 64(ii) of the Coal Mines Provident Scheme 1948. It is urged that the Court having exceeded the jurisdiction , a material irregularity has crept in the impugned order which deserves to set aside, with direction that the determination of share would be as per ratio under clause 64(ii) of the same.

8. The scheme i.e, Coal Mines Provident Fund Coal Mines Family Pension And Coal Mines Deposit Linked Insurance Schemes has been framed by the Central Government in exercise of the powers conferred by Section 3 of the Coal Mines Provident Fund And Miscellaneous Provision Act 1948 (XLVI of 1948).

9. That clause 2 (h) of the Scheme defines "family" to mean:

> "Family" means -
>
> *[In the case of a male member, his wife, his children, whether married or unmarried, his dependent parents and his deceased son's widow and children.
>
> Provided that if a member proves that his wife has ceased under the personal law governing him or the customary law of the community to which the spouse belongs to be entitled to maintenance she shall no longer be deemed to be a part of the member's family in matters to which this scheme relates, unless and the member subsequently intimates by express notice in writing to the commissioner that she shall continue to be so

regarded ; and

@ [in the case of a female member, her husband, her children whether married or unmarried, her dependent parents, her husband's dependent parents and her deceased son's widow and children.]

Provided that if a member by notice in writing to the commissioner expresses her desire to exclude her husband from the family, the husband shall no longer be deemed to be a part of the member's family in matters to which this scheme relates unless the member subsequently cancels in writing any such notice.

Explanation-In either of the above two cases, if the child of a member +*[or, as the case may be, the child of a deceased son of a member] has been adopted by another persons and if, under the personal law of the adopter adoption is legally recognised such a child shall be considered as excluded from the family of the member ;

10. Clause 64 provides for accumulation of a deceased member. Sub Clause (ii) and the first proviso envisages:

"(ii) if no nomination subsists or if the nomination relates only to a part of the amount standing to his credit in the Fund, the whole amount or the part there of to which the nomination does not relate, as the case may be, shall become payable to the members of his family in equal shares.

Provided that no share shall be payable to-

(a) sons who have attained majority ;

(b) sons of a deceased son who have attained majority ;

(c) married daughters whose husbands are alive;.

(d) married daughters of a deceased son whose husbands are alive if there is any members of the family other than those specified in clauses (a), (b), (c) and (d) :

Provided further that the widow or widows, and the child or children of a deceased son shall receive between them in equal parts only the share which that son would have received if he had survived the member and had not attained the age of majority at the time of the member's death.

11. Contention of the Applicant is that the Appellate Court ought to have determined the ratio of share strictly as per clause 64 (ii) and first proviso and by not doing so it exceeded the jurisdiction.

12. The question is whether the Appellate Court exceeded the jurisdiction so vested, resulting in material irregularity.

13. Evidently, the appeal is under Section 384 of 1925 Act sub Section (1) whereof empowers the Appellate Court, that subject to the other provisions in part X of 1925 Act, to declare the person to whom the certificate should be granted.

14. Section 373 under Chapter X stipulates the procedure to be followed on an application under Section 372. Sub Section (3) of Section 373 empowers the Court to grant certificate to the applicant if it appears to it that prima facie he has the best title.

15. In the case at hand as per the definition clause 2(h) mother and the widow are included within the definition of family.And there being no evidence on record, that the mother was not dependant, the appellate Court is well within its jurisdiction in determining the ratio of share.

16. Though learned counsel for the applicant submits that the proviso to sub clause (ii) of Clause 64 of scheme restricts the accumulation in favour of class of persons mentioned therein; however, taking into consideration that the accumulation is a estate of the deceased employee statute which governs the right of survivers would hold the field and will have the overriding effect over the proviso to sub clause (ii) of clause 64. For example a Hindu dying interstate (sic:intestate) the succession in his property/estate would be as per Section 8 of Hindu Succession Act 1956.In that case curtailing of right of the successor to estate as per clause 64(ii) of scheme would be violative of the statutory right based on custom.

17. In this context a reference can be had of a Division Bench judgment of

Kerala High Court in *M.N.Bhaskaran V. V.K.Kalliani*: 1991 L.A.B I.C 650 wherein it is held:"

> "6.....on the death of subscriber before receiving the amount payable under the scheme it becomes part of his estate succession to which is governed by the law of succession applicable to him.Succession opens automatically on the death of the subscriber.The right of legal heirs so acquired under the law of succession on the death intestate of the subscriber cannot be defeated by any of the provisions in the scheme in question which is only a Scheme established by the Government in its executive power. A provision made in a non statutory scheme like the one in question even if it has the effect of excluding the legal heirs from claiming right to an asset of the deceased subscriber cannot override the provisions of law governing succession namely the Hindu Succession Act in this case . Supreme Court while considering the scope and effect of Section 39 of the Insurance Act, in the decision reported in *Sarbati Devi V.Usha Devi* (AIR 1984 SC 346):(1984 ALL LJ 194) has held thus at page SC 349 AIR 1984:
>
> "The summary of the relevant provisions of Section 39 establishes clearly that the policy holder continues to hold interest in the policy during his lifetime and the nominee acquires no sort of interest in the policy during the lifetime of the policy holder. If that is so, on the death of the policy holder the amount payable under the policy becomes part of his estate which is governed by the law of succession applicable to him. Such succession may be testamentary or intestate. There is no warrant for the position that Section 39 of the Act operates as third kind of succession which is styled as "statutory testament". The provision in sub section 6 of Section 39 which says that the amount shall be payable to the nominee or the nominees does not mean that amount shall belong to the nominee or nominees.The language of Section 39 is not capable of altering the course of succession under law".
>
> This court has also taken a same view about the effect

of nomination under Section 39 of the Insurance Act in the Full Bench decision reported in *Sarojani Amma V. Neelkanta Pillai* (1960 KLT. 1319) which was approved by the Supreme Court in *Sarbati Devi* Case. In the facts and circumstances of the case, we are of the view that same principles are applicable to regulate the rights and liabilities of the nominees and other legal heirs of the deceased subscriber under the scheme. Applying the above principle it has to be held that whatever may be the intention of the framers of the scheme in question, the nominee or nominees who may be a member or all the members of the subscriber family as defined in the scheme can receive payment of amount due under the scheme only the subject to the rights of all other legal heirs of the subscriber to claim their right to such amount in accordance with law governing succession."

18. In view whereof, the contentions that the Appellate Court exceeded the jurisdiction vested in it and has committed the material irregularity by not adhering to the ratio as delineated in clause 64(iii) is repelled.

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

Revision dismissed.

I.L.R. [2015] M.P., 2784

CRIMINAL REVISION

Before Mr. Justice Alok Verma

Cr. Rev. No. 874/2012 (Indore) decided on 27 November, 2014

AASHIQ KHAN ...Applicant

Vs.

ANISABAI @ ANNABEE ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Maintenance **- Proceedings u/s 125 Cr.P.C. are quasi criminal and quasi civil - Principles of appreciation of evidence as in civil cases are applied - No pleadings in the application regarding second marriage - Certificate regarding second wife not proved by signatories - Document should be properly proved before any interference on it - Document produced at cross-examination and applicant was not given opportunity to rebut -**

Held - Matter remanded back to trial court to give opportunity to respondent for incorporating amendment in application and to adduce evidence. (Paras 8 to 10)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरणपोषण – दं. प्र.सं. की धारा 125 के अंतर्गत कार्यवाहियां, अर्ध आपराधिक एवं अर्ध सिविल हैं – साक्ष्य के मूल्यांकन के सिद्धांत जैसे कि सिविल प्रकरणों में लागू होते हैं, लागू किये गये – आवेदन में द्वितीय विवाह के संबंध में कोई अभिवचन नहीं – द्वितीय पत्नी से संबंधित प्रमाणपत्र को हस्ताक्षरकर्ताओं द्वारा साबित नहीं किया गया – दस्तावेज पर किसी हस्तक्षेप से पहले उसे उचित रूप से साबित किया जाना चाहिए – प्रतिपरीक्षण में दस्तावेज प्रस्तुत किया गया और आवेदक को उसका खंडन करने का अवसर नहीं दिया गया – अभिनिर्धारित – प्रत्यर्थी को आवेदन में संशोधन करने एवं साक्ष्य देने का अवसर प्रदान किये जाने हेतु विचारण न्यायालय को मामला प्रतिप्रेषित किया गया।

J.K. Jain, for the applicant.
S.K. Meena, for the non-applicant.

ORDER

ALOK VERMA, J. :- This criminal revision is directed against the order passed by the learned Additional Sessions Judge, Kannod, District Dewas in Criminal Revision No.129/2011 dated 15.06.2012 which was in turn directed against the order passed by the learned Judicial Magistrate First Class, Khategaon District Dewas in M.Cr.C. No.39/2010 dated 27.07.2011 by which the learned Magistrate dismissed the application filed by the respondent Anisabai @ Annabee under Section 125 Cr.P.C. claiming maintenance from her husband/present applicant. The Revisional Court allowed the revision and set aside the order passed by the learned Magistrate and awarded monthly maintenance of Rs.2,000/- from the date of order i.e. 15.06.2012.

2. Being aggrieved by this order, the present revision is filed on the grounds that the Revisional Court erred in appreciating the evidence produced by the respondent. The Revisional Court misled and mis-appreciated the matter and the order is bad in law. On such grounds, the present applicant prays that the order of the Revisional Court dated 15.06.2012 be set aside.

3. It is undisputed that respondent was married to the present applicant five years prior to her filing the application under Section 125 Cr.P.C. before the Magistrate according to Muslims Customs. The respondent's case before

the learned Magistrate was that after marriage, the present applicant and his family members including his parents Kayum Khan, Mariumbee and maternal uncle Gaffar Khan was started ill-treating her and committing cruelty on her with a view to obtaining more dowry from her family. They demanded Rs.50,000/- from the family of the respondent. She also lodged a complaint in Police Station Satwas, District Dewas which was registered as Crime No.69/2010 under Sections 498-A, 323 and 506/34 of Cr.P.C.

4. The case of the present applicant before the learned Magistrate was that they never committed any cruelty and never ill-treated the respondent. According to the present applicant immediately after marriage, the respondent expressed that she did not like the present applicant and did not want to live with him. The applicant is even today ready and prepared to keep her with him, however, she refuses to live with him.

5. The learned Magistrate after recording the evidence inferred that no cogent and reasonable ground was shown by the respondent for her refusal to live with the present applicant and during her evidence, she stated that the present applicant married a second wife and, therefore, it was not possible to her to live with him. However, the learned Magistrate found that there was no pleadings of the respondent in her application under Section 125 Cr.P.C. that the present applicant married a second wife and, therefore, such a maintenance cannot be accepted.

6. However, when the matter travelled to the Revisional Court, the Revisional Court found that the proceedings under Section 125 Cr.P.C. is quasi criminal and quasi judicial and, therefore, strict interpretation of evidence should not be done. A human angle should be adopted while deciding the application under Section 125 of Cr.P.C.. Believing the certificate issued by Gram Panchayat Ambada dated 23.02.2011 (Ex.D/1), the Revisional Court reached to the conclusion that the present applicant married a second wife and was living with her whose name is Rehanabee.

7. On the basis of aforesaid grounds, the arguments of the learned counsel for applicant is that under the Muslims Law, the present applicant is entitled to keep more than one wife. Even if it is believed that he is living with a second wife, he is still ready to keep the respondent with him and both the wives can live together. However, the counsel for respondent argues that it may be true that under the Muslims Law, he can conduct more than one marriage.

However, under Section 125 Cr.P.C. second marriage by husband provides a valid ground to wife to leave company of her husband and live separately.

8. After going through the record, I find that there was no pleading by the present applicant in the application, she filed under Section 125 Cr.P.C. before the learned Judicial Magistrate First Class. The certificate issued by Gram Panchayat, Ambada which was signed by Sarpanch Akbar Khan and Secretary Mailash Markam was not proved properly as none of the signatories of the document were called from evidence before the Court by the present applicant. It is true that the proceedings under Section 125 Cr.P.C. are quasi criminal and quasi civil in nature. However, even if it may be assumed that principles of appreciation of evidence as applicable in civil cases are applied to the proceedings under Section 125 Cr.P.C., this document should have been properly proved before any interference can be drawn on the basis of the document. Otherwise, it would cause prejudice to the opposite party in the present case. There is variance in pleading and proved. Without any pleading, respondent adduced evidence in respect of second marriage by the present applicant. The document (Ex.D/1) was produced by the applicant during cross-examination of the present applicant which could have been produced earlier and proved according to the law. In fact, the present applicant was taken by surprised when the document was produced before him and he was not given any opportunity to rebut the same.

9. In such a situation, I find that the matter should be remanded back to the Court of Judicial Magistrate First Class.

10. Accordingly, this revision is allowed. The orders passed by the learned Revisional Court and the Judicial Magistrate First Class are set aside. The matter is remanded back to the Court of Judicial Magistrate First Class with a direction that the Court should be given opportunity to the respondent to incorporate suitable amendment in the application under Section 125 Cr.P.C. She should be given opportunity to adduce proper evidence in respect of (Ex.D/1) and thereafter, the learned Judicial Magistrate First Class should pass an order afresh.

11. With that observations and directions, the revision stands disposed of.

Revision disposed of.

I.L.R. [2015] M.P., 2788
CRIMINAL REVISION
Before Mr. Justice Subhash Kakade
Cr. Rev. No. 1001/2014 (Jabalpur) decided on 30 January, 2015

DILIP KUMAR ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, (M.P. Amendment) Act, 2007 (2 of 2008) Section 4 and Penal Code (45 of 1860), Sections 467, 468 & 471 - Court of JMFC - Stage of Trial **- Charge sheet was filed, charges were framed and 6 prosecution witnesses were already examined - Held - It cannot be held that trial had not reached advanced stage - Sessions Court did not discuss that how the 6 witnesses, who have been examined are of formal nature - Case remitted back to the Court of JMFC for start of trial from the stage of date when the case was fixed for recording of prosecution evidence - Revision allowed. (Paras 11 & 27)**

दण्ड प्रक्रिया संहिता, (म.प्र. संशोधन) अधिनियम, 2007 (2008 का 2), धारा 4 एवं दण्ड संहिता (1860 का 45), धाराऐं 467, 468 व 471 – न्यायालय, न्यायिक मजिस्ट्रेट प्रथम श्रेणी – विचारण का प्रक्रम – आरोप पत्र प्रस्तुत किया गया, आरोप विरचित किये गये तथा 6 अभियोजन साक्षियों का पहले ही परीक्षण किया गया था – अभिनिर्धारित – यह अभिनिर्धारित नहीं किया जा सकता कि विचारण अग्रवर्ती प्रक्रम पर नहीं पहुंचा था – सत्र न्यायालय ने विचार नहीं किया कि कैसे 6 साक्षीगण जिनका परीक्षण किया गया था वे औपचारिक प्रकृति के हैं – न्यायिक मजिस्ट्रेट प्रथम श्रेणी के न्यायालय को अभियोजन साक्ष्य अभिलिखित किये जाने हेतु नियत तिथि के प्रक्रम से विचारण आरंभ करने के लिये प्रकरण प्रतिप्रेषित – पुनरीक्षण मंजूर।

Cases referred :

Criminal Appeal No. 353/2013 arising out of SLP(Cri.) No. 5663 of 2011, 2008(3) MPLJ 311.

A. Usmani, for the applicant.
V.K. Pandey, P.L. for the non-applicant/State.

(Supplied: Paragraph numbers)

O R D E R

SUBHASH KAKADE, J. :- Starting from beginning:

On 05.02.1993 Crime No.48/93 was registered at Police Station Cantonment, Jabalpur. FIR *prima facie* discloses the applicant accuse (sic:accused) of committing forgery, cheating and criminal conspiracy with his companions related to the documents, i.e., migration certificates, mark-sheets etc. of the Educational Institutions Rani Durgawati Vishwavidyalaya, Jabalpur and Madhya Pradesh Board of Secondary Education, Bhopal and used these forged documents as original to gain illegally money from the students and cheated them.

2. Obviously, on the date of the registration of the case i.e. 05.02.1993 the offences punishable under Sections 467, 468 and 471 of IPC were triable by a Magistrate of First Class in the State of Madhya Pradesh in terms of the First Schedule the Code of Criminal Procedure, 1973, hereinafter in short "the Code" that's why after completion of investigation challan was filed before the J.M.F.C. Jabalpur, was registered as Criminal Case No.10685 of 2002.

3. In his turn learned J.M.F.C. Jabalpur has framed the charges against the accused persons on 19.02.2004 and they pleaded innocence on the ground of false implication.

4. During the trial in support of case the prosecution has examined first witness Shankarlal on 23.08.2004 as PW/1 and thereafter other witnesses Mukesh Kumar Koshta (PW/2), Omkar Thakur (PW/3), D.A. Dwivedi (PW/4), Sanjay Kumar Gupta (PW/5), Narayan Pasi (PW/5) and Rakesh (PW/6) were examined and cross-examined by the defence. On dated 15.07.2013 case was fixed for examined of remaining prosecution witnesses.

5. Shifting of the forum of trial: Above position of forum of trail (sic:trial) underwent a change on account of the Code of Criminal Procedure (Madhya Pradesh Amendment) Act of 2007 introduced by Madhya Pradesh Act 2 of 2008 which amended the First Schedule of the Code and among others made offences under Sections 467, 468 and 471 of the IPC triable by the Court of Sessions instead of a Judicial Magistrate First Class.

6. The Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007 is in the following words:

"An Act further to amend the Code of Criminal Procedure, 1973 in its application to the State of Madhya Pradesh.

Be it enacted by the Madhya Pradesh Legislature in the Fiftyeighth Year of the Republic of India as follows:

1. Short title. (1) This Act may be called the Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007.

2. Amendment of Central Act No.2 of 1974 in its application to the State of Madhya Pradesh. The Code of Criminal Procedure, 1973 (No. 2 of 1974) (hereinafter referred to as the Principal Act), shall in its application to the State of Madhya Pradesh, be amended in the manner hereinafter provided.

3. Amendment of Section 167 - .....

xxxx xxx xxx

4. Amendment of the First Schedule "In the First Schedule to the Principal Act, under the heading - Offences under the Indian Penal Code in column 6 against section 317, 318, 326, 363, 363A, 365, 377, 392, 393, 394, 409, 435, 466, 467, 468, 471, 472, 473, 475, 476, 477 and 477A, for the words Magistrate of First Class wherever they occur, the words Court of Sessions shall be substituted."

7. The First Schedule of the Code classifies offences under the IPC for purposes of determining whether or not a particular offence is cognizable or non-cognizable and bailable or non-bailable. Column 6 of the First Schedule indicates the Court by which the offence in question is triable.

8. The amendment received the assent of the President on 14th February, 2008 and was published in Madhya Pradesh Gazette (Extraordinary) on 22nd February, 2008.

9. The Madhya Pradesh Amendment extracted above has shifted the forum of trial of offences punishable under Sections 465, 467 and 471 of IPC from the Court of a Judicial Magistrate First Class to the Court of Sessions. Hence, learned J.M.F.C. Jabalpur committed the case to the Court of Sessions Jabalpur vide order dated 18.07.2013.

10. Then it was registered as Sessions Trial No.558/2013. The applicant raised objection regarding forum of trial and same was rejected by learned

Additional Sessions Judge, Jabalpur vide impugned order dated 15.04.2014, which reads as under:-

> "प्रकरण के अवलोकन से प्रकट है कि मौलिक साक्षी फरियादी की साक्ष्य अभी नहीं हुई है केवल औपचारिक साक्षी की साक्ष्य हुई है इस तरह न्यायिक मजिस्ट्रेट प्रथम श्रेणी द्वारा मौलिक साक्षियों का परीक्षण किया गया है और मामला एडवांश स्टेज पर पहुंच चुका है ऐसा नहीं कहा जा सकता है। इन परिस्थितियों में उक्त न्याय दृष्टांत *रमेश कुमार सोनी वि० स्टेट आफ म०प्र०* के परिपेक्ष्य में इस न्यायालय को भी प्रकरण की सुनवाई का क्षेत्राधिकार है।"

11. The applicant has challenged the impugned order filing this criminal revision under the provisions of Section 397(1) read with Section 401 of the Code. The main contention of learned counsel for the applicant is that after commencement of full fledged trial the charges were leveled against the applicants on dated 19.02.2004, prior to ten years from 22nd February, 2008 when the amendment came into force, the accused persons pleaded innocence on the ground of false implication and thereafter the prosecution also has examined above named six witnesses. Shri A. Usmani, learned counsel for the applicant had taken me through the entire facts of the case of *Ramesh Kumar Soni v. State of M.P.* (Criminal Appeal No.353/2013 arising out of SLP (Cri.) No.5663 of 2011) and further argued on the authority of the pronouncement of the Apex Court in this case that the learned Additional Sessions Judge, Jabalpur have committed grave error while holding that even after examination of six prosecution witnesses, trial is not at advanced stage as these examined witnesses are formal witnesses. Learned counsel finally argued that the impugned order is totally against the spirit of law laid down by the Apex Court in case of *Ramesh Soni* (supra).

12. Per contra, Shri V.K. Pandey, learned Panel Lawyer for the respondent/ State has submitted that after considering the verdict of the Apex Court in case of *Ramesh Soni* (supra) in its true sprit learned Additional Sessions Judge, Jabalpur have conformed the committal proceedings of case by the leaned J.M.F.C. Jabalpur in light of amendment made in the Code by Madhya Pradesh Amendment Act, 2007, which requires no interference.

13. Having heard the learned counsels for the parties, gone through the orders passed by the learned Courts below in light of above discussed legal position this Court has no hesitation to hold that the learned Additional Sessions Judge, Jabalpur have erred to observe the directions given by the Apex Court in case of *Ramesh Soni* (supra).

14. Reference to the High Court: Whenever, any amendment introduces in the existing provisions of law, difficulties, problems arises before the Courts who deals with amended law. In one such matter while facing some difficulties, problems arises due to this state amendment the Sessions Judge, Jabalpur, made a reference to the High Court on the following two consequent questions upon the amendment aforementioned:-

> 1. Whether the recent amendment dated 22nd February, 2008 in the Schedule-I of the Cr.P.C. is to be applied retrospectively?
>
> 2. Consequently, whether the cases pending before the Magistrate First Class, in which evidence partly or wholly has been recorded, and now have been committed to this Court are to be tried de novo by the Court of Sessions or should be remanded back to the Magistrate First Class for further trial?

15. A Full Bench of M.P. High Court in Re: Amendment of First Schedule of Criminal Procedure Code by Criminal Procedure Code (M. P. Amendment) Act, 2007 2008 (3) MPLJ 311, answered the reference and held that all cases pending before the Court of Judicial Magistrate First Class as on 22nd February, 2008 remained unaffected by the amendment and were triable by the Judicial Magistrate First Class as the Amendment Act did not contain a clear indication that such cases also have to be made over to the Court of Sessions. The High Court also held that all such cases as were pending before the Judicial Magistrate First Class and had been committed to the Sessions Court shall be sent back to the Judicial Magistrate First Class to proceed in accordance with law.

16. In case of *Ramesh Soni* (supra) investigation was pending as on 22nd February, 2008, when the amendment came into force and challan was filed after amendment came into force therefore, same was committed to the Court of Sessions for trial as per law. A prayer was made before the learned Sessions Court on the authority of the above decision of High Court in reference that although the police had not filed a charge-sheet against him, but investigation was pending as on the date of amendment came into force, therefore he had acquired the right of trial by Judicial Magistrate First Class. Amendment shifting the forum of trial to the Court of Sessions rendering the committal of his case to the Sessions Court and the proposed trial by the Court of Sessions is illegal.

17. Learned trial Court, rejected the prayer of Ramesh Soni on the ground

that since no charge-sheet has been filed before the Magistrate as on 22nd February, 2008, the date of amendment came into force, the case was exclusively triable by the Court of Sessions. This rejection order was affirmed by the High Court also affirmed the view of the trial Court and dismissed the revision petition filed by the Ramesh Soni therefore, he filed S.L.P. before the Apex Court.

18. The Apex Court dismissed the appeal of Ramesh Soni. The following passage is in this regard apposite:-

> "8. Applying the test judicially recognized in the above pronouncements to the case at hand, we have no hesitation in holding that no case was pending before the Magistrate against the appellant as on the date the Amendment Act came into force. That being so, the Magistrate on receipt of a charge-sheet which was tantamount to institution of a case against the appellant was duty bound to commit the case to the Sessions as three of the offences with which he was charged were triable only by the Court of Sessions. The case having been instituted after the Amendment Act had taken effect, there was no need to look for any provision in the Amendment Act for determining whether the amendment was applicable even to pending matters as on the date of the amendment no case had been instituted against the appellant nor was it pending before any Court to necessitate a search for any such provision in the Amendment Act. The Sessions Judge as also the High Court was, in that view, perfectly justified in holding that the order of committal passed by the Magistrate was a legally valid order and the appellant could be tried only by the Court of Sessions to which the case stood committed."

19. The Apex Court finally held:

> "25. The present case, in our opinion, is one in which we need to make it clear that the overruling of the Full Bench decision of the Madhya Pradesh High Court <u>will not affect cases that have already been tried or are at an advanced stage before the Magistrates in terms of the said decision.</u> (emphasis supplied)

20. On perusal of impugned order it is apparent that learned Additional Sessions Judge, Jabalpur did not discuss these facts that why in his opinion statements of earlier examined six prosecution witnesses are of formal nature? Same time learned Additional Sessions Judge, Jabalpur did not mention the names of the prosecution witnesses as their statements are of substantial nature.

21. The word advanced stage of the trial is nowhere defined in the Code, it can be gathered only from the facts of that particular case. There is no straight jacket formula to point out or to find out which stage is the advanced stage of the trial in any particular case.

22. This fact need not to be repeated that not only the case against the present applicant was pending before the learned J.M.F.C. Jabalpur 10 years prior to 2nd February and during furtherance of trial learned J.M.F.C. Jabalpur recorded the statements of above mentioned six prosecution witnesses, which cannot be denied by any angle that the trial was not at an advanced stage, therefore, learned J.M.F.C. Jabalpur committed error to commit the case to the Sessions Judge, Jabalpur.

23. It can be safely gathered from the peculiar facts and circumstances of the case of the applicant Dilip Kumar that the trial in his case before learned J.M.F.C. Jabalpur was positively in advanced stage.

24. The Apex Court also held:

> "19. The upshot of the above discussion is that the view taken by the Full Bench holding the amended provision to be applicable to pending cases is not correct on principle. The decision rendered by the Full Bench would, therefore, stand overruled but only prospectively. We say so because the trial of the cases that were sent back from Sessions Court to the Court of Magistrate First Class under the orders of the Full Bench may also have been concluded or may be at an advanced stage. Any change of forum at this stage in such cases would cause unnecessary and avoidable hardship to the accused in those cases if they were to be committed to the Sessions for trial in the light of the amendment and the view expressed by us."
>
> (emphasis supplied)

25. If we will examine the issue from this angle that who will suffer the hardship? in the facts and circumstances of the case in hand if the case of the applicant Dilip Kumar will be tried by the learned Additional Sessions Judge, Jabalpur denovo then he will be the worst sufferer.

26. In the result, while examining the correctness and propriety of impugned order dated 15.04.2014 passed by the learned Additional Sessions Judge, Jabalpur, it is found that the Court committed material error while reading the mandate of the Apex Court given in the case of *Ramesh Soni* (supra), hence this revision succeeds and is hereby allowed.

27. Now the learned Additional Sessions Judge, Jabalpur will immediately send back the record of the Sessions Trial No.558/2013 to the C.J.M. Jabalpur for the trial of the case filed on the basis of Crime No.48/93 registered at Police Station Cantonment, Jabalpur. Learned C.J.M. Jabalpur in his discretion tried the case himself or made over it to the competent court. The Court which will receive the case for trial will start the trial from the stage of date when case was posted for recording the statements of remaining prosecution witnesses. A copy of this order be made available to the learned Additional Sessions Judge, Jabalpur as well as to learned C.J.M. Jabalpur for information and compliance with the request that the learned Court will conclude the trial as early as possible after giving opportunity to both the parties as per law.

Revision allowed as above.

Revision allowed.

I.L.R. [2015] M.P., 2795
CRIMINAL REVISION
Before Mr. Justice Subhash Kakade
Cr. Rev. No. 245/2015 (Jabalpur) decided on 10 March, 2015

RADHE SHYAM MOURYA ...Applicant
Vs.
SMT. DASHMAT DEVI ...Non-applicant

A. ***Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Interim Maintenance*** **- Family Court allowing the application filed by the respondent/mother granted interim maintenance to the tune of Rs. 4,500/- per month in her favour - Held - Looking to the relationship as well as social and economic status of parties, Judge of the Family Court has come**

to a right conclusion and has also affixed a reasonable amount for interim maintenance - No interference - Revision dismissed. (Paras 1, 24 & 26)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – अंतरिम भरण–पोषण – कुटुम्ब न्यायालय ने प्रत्यर्थी/मां द्वारा प्रस्तुत आवेदन मंजूर करते हुए उसके पक्ष में रू. 4500/– प्रतिमाह के बराबर अंतरिम भरण–पोषण प्रदान किया – अभिनिर्धारित – पक्षकारों का रिश्ता और साथ ही सामाजिक एवं आर्थिक स्थिति को देखते हुए, कुटुम्ब न्यायालय के न्यायाधीश सही निष्कर्ष पर पहुंचे हैं और अंतरिम भरण–पोषण हेतु युक्तियुक्त रकम भी निश्चित की है – कोई हस्तक्षेप नहीं – पुनरीक्षण खारिज।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 126(1) Clause(b) - Territorial Jurisdiction **- Mother can file application for maintenance u/s 125 of the new Criminal Procedure Code in the district where she resides. (Para 23)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 126(1) खंड(बी) – क्षेत्रीय अधिकारिता – नयी दंड प्रक्रिया संहिता की धारा 125 के अंतर्गत भरण–पोषण हेतु आवेदन, मां उस जिले में प्रस्तुत कर सकती है जहां वह निवासरत है।

Cases referred :

AIR 2004 SC 2123, AIR 1978 SC 1807, AIR 1986 SC 984 : (1985) 4 SCC 337 : 1985 SCC (Cr) 556; (1985) 2 Crimes 872, 2009(1) MPLJ (Cri.)11, 1996 SCC (Cri) 44, 1990 Cri.L.J. 128.

Y.P. Sharma, for the applicant.

ORDER

Subhash Kakade, J. :- This revision under Section 397/401 of the Code of Criminal Procedure, 1973, here-in-after referred as "the Code", has been filed by the applicant-son being aggrieved by the order dated 10.01.2015, passed in Case No.235/2014, by the Principal Judge of Family Court Waidhan, District Singrouli, whereby the Family Court allowing the application filed by the respondent-mother granted interim maintenance to the tune of Rs.4,500/- per month in her favour.

2. The case of the respondent, 70 years old widow lady before learned Family Court was that her son, the applicant is posted at U.P. Electricity Board and getting salary of Rs.80,000/- per month. The Board has provided service to the applicant in lieu of acquisition of ancestral land. The applicant has also

received other ancestral property. The respondent is living with her daughter and son-in-law at village Ganiyari, District Singrouli since last one year as the applicant is avoiding her maintenance therefore, the respondent filed an application under Section 125 of the Code for maintenance of Rs.20,000/- per month along with application for grant of interim maintenance amount before learned Family Court.

3. The applicant entered his appearance on 19.01.2015 without filing reply, but raised objection by filing an application under the provisions of Section 126 of the Code. Objection made on the ground that the said application for maintenance as well as application for interim maintenance is beyond jurisdiction therefore, learned Family Court has no jurisdiction to hear this case. In support of his objection the applicant also filed documents.

4. The learned Family Court allowed the application for grant of interim maintenance in favour of the respondent after rejecting the grounds under challenge. Being aggrieved by the impugned order the applicant invoked revisional jurisdiction of this court by filing this revision.

5. Relying on the strength of law lay down by the Apex Court in case of *Vijay Kumar v. State of Bihar*, reported in [AIR 2004 SC 2123], learned counsel for the applicant submitted that learned Family Court failed to consider this fact of jurisdiction that the applicant who is working at U.P. Electricity Board is residing at village Kulmodi, District Sonbhadra (U.P.) as it is admitted position as per certificate Annexure D-4 and other documentary evidence i.e. Ration Card, Medical Book, Election I.D. and entire ancestral property is also situated at village Kulmodi. Hence, the application filed by the respondent-mother is not maintainable before the learned Family Court at Singrouli (M.P.) being hit on the ground of jurisdiction. The proceeding instituted under the provisions of Section 125 of the Code are civil in nature, hence the question of territorial jurisdiction is of utmost importance. The learned Family Court without considering the documentary evidence adduced by the applicant granted interim maintenance of Rs.4,500/- per month is apparently much excessive.

6. The object of the maintenance proceedings instituted under the provisions of Chapter IX of the Code are not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support.

7. Section 125 of the Code is a measure of social justice and is specially enacted to protect women, children and parents as noted by the Apex Court in *Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and Ors* reported in (AIR 1978 SC 1807) falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India, 1950.

8. It is also held by the Apex Court that interim maintenance *pendente lite* can be granted – Please see- *Savitri vs. Govind,* reported in [AIR 1986 SC 984: (1985) 4 SCC 337; 1985 SCC (Cr) 556; (1985) 2 Crimes 872].

9. The Apex Court in the case of *Shail Kumari Devi and another vs. Krishan Bhagwan Pathak,* 2009(1) M.P.L.J. (Cri.) 11 held that in absence of any express bar or prohibition the Court by necessary implication could make interim order of maintenance subject to final outcome of the application. It is further held that before amendment of 2001 ceiling of maintenance amount was Rs.500/- only and after an amendment it is open to a Court under amended law to fix such amount as it thinks fit.

10. It is admitted position that since last more than one year the respondent is living with her daughter at village Ganiyari under the territorial jurisdiction of District Singrouli (M.P.).

11. The Apex Court in the case of *Darshan Kumari (Smt.) Vs. Surinder Kumar*, 1996 SCC (Cri) 44 has held that, "Territorial jurisdiction of the Magistrate-Even temporary residence, if not casual, is sufficient to confer jurisdiction on Magistrate at that place or of the District concerned."

12. Mandate of Section 20 of The Hindu Adoptions and Maintenance Act, 1956 bounds a Hindu during his lifetime to maintain his legitimate or illegitimate children and his aged or infirm parents. Maintenance is a personal obligation. Liability of maintenance correlated with inheritance of the estate, therefore, one who inherits a share has also to bear the burden of maintenance liability.

13. On the face of the documents filed by the applicant not alone this position is admitted that the applicant in inheriting the ancestral property at Kulmodi, but it is also admitted fact that due to acquisition of ancestral land at Kulmodi the applicant also got the job in U.P. Electricity Board. As per salary slip the applicant is getting Rs.37,420/- as salary from the Board.

14. Now, the dollar question arises if own son, the applicant is not taking

care of his 70 years old widow mother then where she will go to survive and how she will maintain herself?

15. The concept of maintenance encompasses the provisions for food, clothing and the like and obviously a roof over the head.

16. The answer was discovered by the helpless lady who started living with her married daughter at village Ganiyari which falls under the territorial limits of learned Family Court, Singrouli. And the daughter was kind enough to oblige the helpless mother giving shelter, roof and fulfill the duties alike a son.

17. It is height of things, that ignoring maintenance of mother, now the applicant who is possessing ancestral property raised a preliminary objection on the basis of jurisdiction, because, knowing well this fact that on other grounds he cannot success in maintenance case filed by old mother.

18. Suppose, if the Court comes to the conclusion that the petition filed by the senior citizen before the learned Family Court Singrouli is without territorial jurisdiction, then what remedy will be left with the senior citizen? is also another angle for discussion. If this lady goes to resides at village Kulmodi, Sonbhadra (U.P.) for the sack of to get the interim maintenance amount, then series of problems will arises that at village Kulmodi who will take care of the old widow lady? Whether this displacement will not create problems for the old widow lady, who has no source of independent income as well as the applicant is not performing his duty to help her then where she will live and cooked her meal for survival at village Kulmodi?

19. Chapter IX "Order for maintenance of wife, children and parents" of the Code including Section 125 to 128, is inserted by legislation as special enactment meant for protection of wife, children and parents. These sections of Chapter IX of the Code are measure of social justice and special enactment to protect women, children and parents and falls within the Constitution sweep of Article 15(3) reinforced by Article 39 of the Constitution of India.

20. There is no dispute that this chapter contains the provisions which only gives effect to the natural duty of a man to maintain his wife, children and parents and is essentially a speedier remedy available against starvation to be disposed in a summary manner.

21. The proceedings under Chapter IV of the Code are in the nature of

civil proceedings, the remedy is a summary one and the person seeking that remedy is ordinarily a helpless person. So the words used in the Sections 125 to 128 of the Code should be liberally construed without doing any violence to the language.

22. In case of *Vijay Kumar* (supra) the applicant-son, a practicing lawyer at Patna filed an application for transfer of the case from Siwan to Patna alleging that an influential politician is behind his father-respondent, therefore, he would not get justice if the case is tried at Siwan as he could not even arrange a lawyer to represent him. Therefore, the facts of the case of *Vijay Kumar* (supra) are completely distinguishable from this case in hand of the respondent-mother.

23. On the other hand, while question was raised for maintenance even by step mother against the son in the case of *Ganga Sharan Varshney Vs Smt. Shakuntala Devi and another,* 1990 Cri.L.J. 128 it was held that;

"Keeping in view the intention of the Parliament behind, Cl. (b) of S. 126 (1) of the new Code should be liberally construed and should mean to enable the claimant in general whether wife, or child, or illegitimate child or mother or father to claim maintenance at the place where she or he resides. Hence it is concluded that a mother can file application for maintenance under S. 125 of the new Cr.P.C. in the district where she resides."

24. Considering the above enunciation of law it transpires that looking to the relationship as well as social and economic status of parties learned Judge of the Family Court has come to a right conclusion and has also affixed a reasonable amount for interim maintenance.

25. These facts need not to be repeated that since last more than one year the respondent-real mother of the applicant is living at village Ganiyari with her married daughter due to negligence of her son-applicant which falls under the territorial jurisdiction of District Singrouli (M.P.), therefore, learned Family Court Singrouli had jurisdiction to legally decide the case filed by the respondent.

26. Hence, the impugned order dated 10.01.2015 passed by the learned Principal Judge, Family Court Waidhan, District Singrouli is legal, proper and correct, and calls for no interference, therefore this revision petition is devoid of any merit, hence is disallowed at this initial stage.

Order accordingly.

I.L.R. [2015] M.P., 2801
CRIMINAL REVISION
Before Mr. Justice G.S. Solanki
Cr. Rev. No. 706/2015 (Jabalpur) decided on 23 April, 2015

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

Criminal Procedure Code, 1973 (2 of 1974), Section 389 - Suspension of Sentence **- Government servant sentenced by ACJM for offence u/s 409 of IPC to 4 years RI and fine of Rs. 3,36,705/- - Appellate Court suspended sentence of Jail but prayer for suspension of fine amount has been dismissed - Held - Order of appellate court modified to the extent that on depositing of Rs. 1,68,352/-, recovery of remaining fine shall remain stayed. (Paras 3 & 9)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 389 – दंडादेश निलंबित रखा जाना – सरकारी कर्मचारी को अतिरिक्त मुख्य न्यायिक दंडाधिकारी द्वारा भारतीय दंड संहिता की धारा 409 के अंतर्गत अपराध हेतु 4 वर्ष सश्रम कारावास एवं रु. 3,36,705/– के अर्थदंड से दंडित किया गया – अपीली न्यायालय ने कारावास का दंडादेश निलंबित रखा परंतु अर्थदंड के निलंबन हेतु प्रार्थना को खारिज किया – अभिनिर्धारित – अपीली न्यायालय का आदेश इस सीमा तक परिवर्तित किया गया कि रु. 1,68,352/– जमा किये जाने पर, शेष अर्थदंड की वसूली पर रोक रहेगी।

Case referred :

1999(1) MPLJ 57.

L.N. Sakle, for the applicant.
Pratibha Mishra, P.L. for the non-applicant/State.

(Supplied: Paragraph numbers)

O R D E R

G.S. Solanki, J. :- With the consent of learned counsel for both the parties, heard finally.

2. Applicant has preferred this revision petition u/s 397/401 of Cr.P.C being aggrieved by order dated 18/03/2015 passed by Sessions Judge, Khandwa in criminal appeal no. 57/2015 wherein jail sentence of the applicant has been suspended but prayer of suspension of fine amount has been stayed.

3. Facts, in short, giving rise to this petition are that applicant has been convicted u/s 409 of IPC and sentenced to undergo RI for 4 years & fine of Rs. 3,36,705/- with default stipulations. It is undisputed that appeal of the applicant has been admitted for final hearing and his jail sentence has been suspended but prayer of suspension of fine amount has been dismissed. Hence, this petition.

4. Learned counsel for the applicant submits that appellate Court has committed irregularity in exercising the jurisdiction under section 389 of Cr.P.C. It is further submitted that term 'sentence' includes subsequent sentence as well as sentence of fine therefore, appellate Court ought to have suspended the sentence of fine awarded to applicant. He placed the reliance on *Ramchandra Babulalji Shrivastava Vs. State of M.P.*, 1999 (1) MPLJ 571 and prays for modification of impugned order dated 18/03/2015.

5. Learned counsel appearing on behalf of State has supported the impugned order dated 18/03/2015 as well as the judgment dated 11/03/2015 passed by ACJM, Khandwa in criminal case no. 2986/2009 and prays for dismissal of this petition.

6. I have perused the impugned order, judgment passed by ACJM and heard the argument advanced by learned counsel for both the parties.

7. The expression 'sentence' of course, means, not only substantive sentence of imprisonment but also includes sentence of fine. Though the language of Section 389, Cr.P.C is silent in terms of the same, the appellate Court has to consider the two situations, while ordering suspension of sentence of fine. The one is to find out the reasons for suspending the sentence of fine and the next is to impose suitable conditions, as may be justified on the facts of reach (sic:each) case, in order to ensure that the order of sentence of fine which may ultimately be imposed on the appellant as a result of the appeal, can be executed without any difficulty.

8. It means appellate Court has jurisdiction to suspend the sentence of fine also for which there must be strong reason to show on record. It reveals from the impugned order that Sessions Court has refused to exercise his discretion for suspension of sentence of fine because applicant being a government servant was involved in misappropriation of huge amount of Rs. 6,73,410/-. It is true that in similar situation, co-ordinate Bench of this Court by considering the financial conditions and expenses of four family members

of the appellant, suspended the sentence of fine amount in the case of *Ramchandra Babulalji Shrivastava* (supra) but such fact has not been pleaded in the instant petition. On the contrary, it is pleaded and argued that only Rs. 26,334/- was found in possession of present applicant which ought to have been deposited in the bank by this applicant.

9. It reveals from the impugned judgment that misappropriation of public money of Rs. 6,73,410/- has been done by applicant and other three co-accused persons out of which Rs. 1,68,352/- appears to be recoverable from this applicant. Considering aforesaid aspect of the case, the order dated 18/03/2015 passed by appellate Court (Sessions Court) is modified in following terms:-

> Subject to depositing the fine amount of Rs. 1,68,352/ , on furnishing the bail bond of Rs. 40,000/- with one surety in the like amount for his appearance before the appellate Court till the disposal of the appeal and also on furnishing the personal bond of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of ACJM to ensure the remaining fine amount which may ultimately be imposed by appellate Court as a result of decision of the appeal, the applicant be released on bail.
>
> It is made clear that the recovery of the remaining fine amount shall remain stayed till the disposal of the appeal."

10. Revision petition is disposed of finally.

11. Certified copy as per rules.

Revision disposed of.

I.L.R. [2015] M.P., 2803
CRIMINAL REVISION
Before Ms. Justice Vandana Kasrekar
Cr. Rev. No. 1900/2006 (Jabalpur) decided on 1 September, 2015

AZMA SULTAN & ors. ...Applicants
Vs.
AUSAF AHMAD KHAN ...Non-applicants

***Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Divorced Muslim Woman* - Entitlement of maintenance during post iddat period - Divorced Muslim woman is entitled to get maintenance as long as she**

does not remarry - As applicant has not remarried, she is entitled to get maintenance - Order of trial court restored. (Paras 7 to 10)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – तलाकशुदा मुस्लिम महिला – इद्दत अवधि पश्चात् भरण–पोषण की हकदारी – तलाकशुदा मुस्लिम महिला भरण–पोषण प्राप्त करने की हकदार तब तक है जब तक कि वह पुनर्विवाह नहीं करती – चूंकि आवेदक ने पुनर्विवाह नहीं किया वह भरण–पोषण प्राप्त करने की हकदार है – विचारण न्यायालय का आदेश पुनःस्थापित।

Case referred :

(2010) 1 SCC 666.

Lalji Kushwaha, for the applicants.
None, for the non-applicant.

ORDER

Ms. Vandana Kasrekar, J. :- The applicants have filed this Civil Revision challenging the order dated 21/7/2006 passed by 2nd Additional Sessions Judge, Damoh in Criminal Revision No.122/2005 thereby rejecting the claim of applicant No.1 for maintenance.

2. Brief facts of the case are that applicant No.1 is the wife of the respondent. The marriage between applicant No.1 and the respondent was solemnized in the year 1990 in accordance with the custom and rites of Muslim Law. Out of the said wedlock, applicants No.2 to 4 were born. The allegation of applicant No.1 is that respondent thrown out her from her matrimonial house on 20/8/2003 and since then applicant NO.1 along with her three daughter are residing with her parents. Thereafter the applicants filed an application under Section 125 of Cr.P.C. for grant of maintenance of Rs.3,000/- per month to each of the applicants. The applicants in their application filed under Section 125 of Cr.P.C., has pleaded that the respondent/husband is having business of sale of milk and he is also T.V. And Radio Instructor in I.T.I., Govindpura, Bhopal wherefrom he is having a salary of Rs.20,000/- per month as well as he is earning Rs.1,000/- per day from the business of dairy.

3. The respondent/husband filed his reply and admitted the marriage and birth of three daughters but has alleged that applicant No.1 laid life of adultery. He further alleged that applicant No.1/wife has always gone to her parents house. He also alleged that applicant No.1 has independent source of income.

It is alleged by the respondent that he has divorced applicant No.1 on 23/11/2004 before Notary and, therefore, she is not entitled to get maintenance under Section 125 of Cr.P.C.

4. The trial Court vide its order dated 17/10/2005 allowed the application filed by the applicants and directed the respondent to pay Rs.1,000/- to each of the applicants towards their maintenance. Against the order passed by the trial Court, the respondents filed a revision before learned 2nd Additional Session Court who has rejected the maintenance granted by the trial Court to applicant No.1 on the ground that she is divorce Muslim lady and maintain the order of maintenance in favour of applicants No.2 to 4. Being aggrieved by the order dated 21/7/2006 passed by 2nd Additional Sessions Judge, Damoh, the applicants have filed the present revision before this Court.

5. Learned counsel for the applicants submits that the revisional Court has erred in refusing the maintenance to applicant No.1 on the ground that being a divorced lady she is not entitled to get the maintenance under Section 125 of Cr.PC after the period of *Iddat* and, therefore, the revisional Court has refused to grant maintenance in favour of applicant No.1. Learned counsel for the applicants has relied upon the judgment passed by the Apex Court in the case of *Shabana Bano Vs. Imran Khan,* (2010) 1 SCC 666 and has submitted that in the said judgment, the Apex Court has held that a Muslim woman entitlement to maintenance continues even in *post-Iddat* period as long as she does not remarry. He further argued that in the present case, applicant No.1 has not remarried and, therefore, she is entitled to get maintenance and, thus, the revisional Court has committed error in refusing the grant of maintenance in favour of applicant No.1.

6. Nobody appeared on behalf of the respondent, though served.

7. I have heard learned counsel for the parties and perused the record. From perusal of the record, it appears that applicant No.1 and respondent had entered into the marriage in the year 1990 and applicant No.1 has given birth to three daughters. Some time after marriage, respondent started misbehaving with the applicant No.1 and thrown her out from the matrimonial house and, therefore, the applicant No.1 has started living separately with her

three daughters in her parents house. From the record as well as the evidence, it is clear that applicant No.1 has not remarried.

8. Hon'ble the Apex Court in the case of *Shabana Bano* (supra) in paragraphs 23 and 24 has held as under :

> "23. Cumulative reading of the relevant portions of the judgments of this Court in *Danial Latifi* and *Iqbal Bano* would make it crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim woman.
>
> 24. In the light of the aforesaid discussion, the impugned orders are hereby set aside and quashed. It is held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of Cr.P.C. after the expiry of period of *Iddat* also, as long as she does not remarry. As a necessary consequence thereof, the matter is remanded to the Family Court at Gwalior for its disposal on merits at an early date, in accordance with law. The respondent shall bear the costs of litigation of the appellant. Counsel's fees Rs.5000."

9. From the plain reading of the judgment delivered by Hon'ble the Apex Court, it is clear that a divorced Muslim woman is also entitled to get maintenance from divorced husband as long as she does not remarry. In the present case, the applicant No.1 has not remarry and, therefore, she is certainly entitled to get the maintenance. Thus, the revisional Court has committed an error in refusing to grant the maintenance to applicant No.1.

10. Accordingly, the revision is allowed and the impugned order dated 21/07/2006 passed by the revisional Court, so far as by which the revisional Court has refused to grant maintenance to applicant No.1 is concerned, is hereby set aside and the order passed by the trial Court is hereby restored.

Revision allowed.

I.L.R. [2015] M.P., 2807
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Alok Verma
M.Cr.C. No.7222/2011 (Indore) decided on 24 November, 2014

LUDIRAM ...Applicant
Vs.
ANIL RAO & anr. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 145 - Proper opportunity **- Applicant was not given proper opportunity to adduce evidence as dates were preponed - Matter remanded back to the Court of Sub-Divisional Magistrate - Applicant should be given an opportunity to adduce oral and documentary evidence alongwith respondent - After recording the statements of the both the parties, fresh order should be passed. (Paras 8 & 9)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 145 – उचित अवसर – आवेदक को साक्ष्य प्रस्तुत करने के लिए उचित अवसर नहीं दिया गया क्योंकि तिथियों को पूर्वस्थगित किया गया था – अनुविभागीय मज़िस्ट्रेट के न्यायालय को मामला प्रतिप्रेषित – प्रत्यर्थी के साथ–साथ आवेदक को मौखिक एवं दस्तावेजी साक्ष्य प्रस्तुत करने का अवसर दिया जाना चाहिए – दोनों पक्षकारों के कथन अभिलिखित किये जाने के पश्चात्, नये सिरे से आदेश पारित किया जाना चाहिए।

Cases referred :

AIR 1997 SC 2320, AIR 1985 SC 472.

Archana Kher, for the applicant.
Manish Sharma, for the non-applicants.

O R D E R

ALOK VERMA, J. :- Heard.

This application is filed under Section 482 of Cr.P.C. and directed against the order passed by the learned Sub Divisional Magistrate, Neemuch in Criminal Case No.266/145 Cr.P.C./2010 dated 05.10.2010 and order passed by the learned Sessions Judge, Neemuch in Criminal Revision No.60/2011 dated 20.08.2011.

2. The brief facts giving rise to this application are that respondent No.1

Anil Rao filed an application under Section 145 of Cr.P.C. before the learned Sub Divisional Magistrate on 14.09.2010 to the effect that the disputed land bearing survey Nos.663, 664 and 666 total area 2.467 hectare belong to Shriram Temple Devsthan. The respondent No.1 is Pujari of the Temple. As Pujari, he was cultivating the land and sow the crop of Soybean on the land. The present applicant Ludiram forcibly took possession of the land and was trying to reap the harvest. The learned Sub Divisional Magistrate by the impugned order accepted the application filed by the respondent No.1 and ordered that the total income that the receiver appointed on the land received by selling the crop i.e. Rs.18,708/- be given to the respondent No.1 and also issued an advise to the present applicant that he should not interfere in possession of respondent No.1 over the suit property.

3. Aggrieved by this order, the present applicant filed a revision petition before the Sessions Judge, Neemuch. The Sessions Judge dismissed the revision by impugned order dated 20.08.2011 and confirmed the order passed by the learned Sub Divisional Magistrate. The present applicant filed this application under Section 482 of Cr.P.C. argues that the present applicant had possession over the suit property for a very long period of time and, therefore, it cannot be said that the respondent No.1 was dispossessed within the period contemplated by the proviso to Section 145 (4) Cr.P.C. He placed reliance on the judgment of Hon'ble Supreme Court in *R.C. Patuck Vs. Fatima A. Kindasa,* AIR 1997 SC 2320. The second part of his arguments is that there is a civil suit pending in respect of the suit property and, therefore, proceedings under Section 145 of Cr.P.C. cannot go on. For this, he placed reliance on the judgment of Hon'ble Supreme Court in *Ram Sumer Puri Vs. State of U.P.,* AIR 1985 SC 472. His third argument is that the learned Sub Divisional Magistrate did not provide him the opportunity to lead evidence and, therefore, the case should be remanded back with a direction to give him an opportunity to lead evidence and, thereafter, the learned Sub Divisional Magistrate should decide the case.

4. I have gone through the certified copies filed by the present applicant. In my opinion, opportunity to lead evidence was not granted to the present applicant by the learned Sub Division Magistrate. The order-sheet of record of Court of Sub Divisional Magistrate show that the application was filed before the Court of Sub Divisional Magistrate on 14.09.2010. Thereafter, the

respondent No.1 filed an application on 05.10.2010 under Section 146 of Cr.P.C. The application was decided ex-parte on 05.10.2010 itself and subsequent to this, a receiver was appointed. The receiver sold the crop and deposited the amount with police station Jeeran. The present applicant first time gave his appearance on 11.02.2011. He filed his reply on 28.02.2011 and then the case was fixed for evidence on 14.03.2011. On 14.03.2011, the learned Sub Divisional Magistrate was not available as he was busy in some other administrative work. Accordingly, the case was fixed on 21.03.2011. On that date, also the Sub Divisional Magistrate was not available and, therefore, the case was fixed on 28.03.2011.

5. The learned counsel for the applicant disputes the date fixed by the Court i.e. 28.03.2011. According to him, the date was fixed as 28.04.2011. However, after cutting it, the date was written as 28.03.2011. To substantiate his argument, he points out that in the same order-sheet in the March, the counsel signed and noted for 28.04.2011 and the date is clearly visible under his signature. He followed the similar procedure, when date of 21.03.2011 was fixed, he signed and below his signature, he wrote 21.03.2011. In the subsequent order, the date was first written as 28.04.2011, however, after cutting it the figure '04' was made '03' and again the date was written as 28.03.2011. On 28.03.2011, the non-applicant was stated to be absent and show his right to adduce evidence was closed. Surprisingly, the respondent No.1 also did not adduce any evidence and, therefore, the case was fixed for final argument. This is again surprising that on the same date, the respondent No.1 submitted a written argument which was taken on record and final order was passed on 31.03.2011.

6. It is clear from the above order-sheet that the date was initially fixed as 28.04.2011. This is also clear from the impugned order in which in para 5 of page 1 again date was mentioned as 28.04.2011. Looking to all these facts, I find that the argument put forth by the present applicant has forced in it. It appears that the date was preponed by the lower court. The final order was hurriedly passed and the present applicant was not given any opportunity to adduce evidence.

7. It is further unfortunate that the learned Revisional Court in para 14 while considering the argument of the present applicant that he was not given any opportunity to adduce evidence found that the case was fixed on

28.03.2011. On which date, the present applicant remained present before the Sub Divisional Magistrate. However, the learned Revisional Court did not notice the cuttings and discrepancies in dates that was mentioned at various places as indicated above.

8. In such a circumstances, I find that the assertion by the present applicant that he was not given proper opportunity to adduce evidence is correct and acceptable and accordingly, the matter in my opinion should be remanded back to the Court of Sub Divisional Magistrate and the present applicant should be given an opportunity to adduce evidence.

9. Accordingly, the application is allowed. The impugned order passed by the learned Sub Divisional Magistrate and the Revisional Court as aforesaid are set aside. The matter is remanded back to the Court of Sub Divisional Magistrate with a direction that the present applicant be given opportunity to adduce oral and documentary evidence along with respondent No.1 and after recording the statements of both the parties, fresh order should be passed.

10. With the aforesaid directions, the application stands disposed of.

Application allowed.

I.L.R. [2015] M.P., 2810

MISCELLANEOUS CRIMINAL CASE

Before Mrs. Justice S.R. Waghmare & Mr. Justice J.K. Jain

M.Cr.C. No. 5967/2013 (Indore) decided on 3 March, 2015

AJIT JAIN & anr. ...Applicants

Vs.

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

A. ***Criminal Procedure Code, 1973 (2 of 1974), Section 240 and Prevention of Corruption Act (49 of 1988), Section 13(1)(e) - Framing of Charge*** **- At the time of framing of charge, it is only to be ascertained that whether there is a prima-facie case available against the accused or not - The date of registered sale deed, date of sanction and the date of repayment of loan within short period amounts to suspicion and ground for prosecution. (Para 8)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 240 एवं भ्रष्टाचार

निवारण अधिनियम (1988 का 49), धारा 13(1)(ई) – आरोप विरचित किया जाना – आरोप विरचित किये जाते समय केवल यह सुनिश्चित करना है कि क्या अभियुक्त के विरूद्ध प्रथम दृष्ट्या प्रकरण उपलब्ध है अथवा नहीं – पंजीकृत विक्रय विलेख की तिथि, मंजूरी की तिथि एवं कम अवधि के भीतर ऋण के प्रतिसंदाय की तिथि संदेह की कोटि में आती है और अभियोजन हेतु आधार है।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Quashing of Charge **- Charge can be quashed only under exceptional circumstances when the same has been framed on vexatious and frivolous ground. (Para 8)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – आरोप अभिखंडित किया जाना – आरोप को केवल अपवादात्मक परिस्थितियों में अभिखंडित किया जा सकता है जब उसे तंग करने वाले और तुच्छ आधारों पर विरचित किया गया हो।

C. Penal Code (45 of 1860), Section 109 - Abetment **- There is direct allegation of conspiracy - It is not necessary that the abettor should concert in the offence with the person who commits it - It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed. (Para 8)**

ग. दण्ड संहिता (1860 का 45), धारा 109 – दुष्प्रेरण – षड्यंत्र का प्रत्यक्ष आरोप है – यह आवश्यक नहीं कि दुष्प्रेरक ने उस व्यक्ति के साथ जिसने उसे कारित किया है मिलकर अपराध किया हो – यह पर्याप्त है, यदि वह षड्यंत्र में संलग्न होता है जिसके अनुसरण में अपराध कारित किया गया है।

Cases referred :

(1975) 3 SCC 495, AIR (1960) SC 866, 2010(1) SCC 750, AIR 1928 Nag. 257, 2005 Cr.L.J. 4322 (Ker.), (1977) 1 SCC 816, 1962 Supp. (2) SCR 297, 2007(1) SCC 1, (2001) 1 SCC 369, (2004) 1 SCC 691, 2000(2) MPLJ 322, 2000(1) SCC 138, 1996(4) SCC 659.

Manish Vashistha & Sameer Vashistha, for the applicants.
Arvind Gokhale, for the non-applicant/SPE.
Mini Ravindran, Dy. G.A. for the non-applicant/State.

ORDER

The Order of the Court was delivered by : **MRS. S.R. WAGHMARE, J. :-** By this petition under Section 482 of Cr.P.C., the petitioners Ajit Jain and Dilip Jain are seeking quashment of the order framing charge dated 22.05.2013 (Annexure P/1) passed by the Court of 1st Special Judge-cum-Authorised Officer under M.P. Special Court Act, 2011, Indore and all proceedings pending and arising out of FIR No. 91/2011, dtd.09.08.2011 under the Prevention of Corruption Act, 1988.

2. Briefly stated the facts of the case in a nutshell are that in FIR bearing No.91/2011 is filed on 09.08.2011 for offence under Section 13(1)(e) read with Section 13(2) of Prevention of Corruption Act, 1988 against one M.K. Jain, Superintendent Engineer, RES at Indore (MP). He is the brother of the present petitioners Ajit Jain and Dilip Jain and it would be pertinent to note that the names of the petitioners did not figure in the aforesaid FIR and whereas petitioner No.1 Ajit Jain was the Professor in a Govt. College at Rehli, Distt. Sagar (MP). Petitioner No.2, Dilip Jain was an Assistant Engineer with MPSEB and posted at Makronia, Sagar, MP. However, on investigation the prosecution filed the charge-sheet (challan) bearing No.176/12 against Shri MK Jain as well as the petitioners and since the offences alleged against Shri MK Jain were under Section 13(1)(e) read with Section 13(2) of Prevention of Corruption Act, 1988 and Sections 420, 467, 468, 471 & 201 of the IPC; the petitioners were alleged to have committed the offence of abetment under Section 107 of IPC and the prosecution has pressed into service under Section 109 of IPC against them. The main allegations pertain to the fact that the petitioners are brothers and abetted the main accused Shri MK Jain in purchasing the property No.278, Scheme No.54 BG, Vijaynagar, Indore. And that the present petitioners are the benami co-holders of the said property; but, the actual and real owner is Shri MK Jain who purchased the property through ill-gotten wealth, hence the present petition.

3. Counsel for the petitioners has vehemently urged the fact that since the petitioners were neither named in the FIR nor was there any allegations of abetment the offence could not apparently be made out against them. Moreover the period assessment under the question is from 01.06.1981 to 09.08.2011 and the charges have been framed by order dated 22.05.2013. Counsel vehemently urged that the property in question was

purchased by a registered sale deed dated 26.02.2010 for Rs.60 lacs from one Smt. Mainabai Zindal and Smt. Rina Zindal; whereas proper permission was sought from the Govt. of MP by the main accused Shri MK Jain on 28.02.2010 and is available on record as well as along with the petition. It clearly indicates that the loan was properly sought from the IDBI after due sanction from the State Govt. the letter dated 28.02.2010 from Under Secretary, Govt. of MP clearly indicates that building permission was given by the IDA and in accordance with the Rule 19 of the MP Civil Services Rules, sanction was granted for construction of the house on plot No.278 and all the three brothers were granted sanction to seek a loan; therefore Counsel vehemently urged how could the present petitioners said to have aided and abetted the accused MK Jain to acquire the said property through illegal means. Besides Counsel contended that the loan had been paid by the brothers and also had been sanctioned in the name of all the three brothers on 30.01.2010. Similarly Counsel vehemently urged that Shri Ajit Jain who was a Lecturer and paid income tax had filed his Income Tax Returns to indicate that he earned about Rs.45 lacs per year and the other brother earned Rs. 49 lacs per year. Similarly Counsel for the petitioners have also vehemently urged the fact that the petitioners were holder of agricultural lands amounting to 49.27 acres at Sagar, MP and valued of Rs.100/- lacs and merely casting aspersions and not taking into consideration the documents filed by the petitioners clearly indicated the malafides on behalf of prosecution and to say that amassing disproportionate assets on the ground of suspicion and conjectures could not be sustainable in the eyes of law and the prosecution should not be permitted to abuse the process of law and the entire prosecution is malicious and based on incorrect source of informations which are absolutely false and erroneous. A vexatious complaint has been filed by one Shri Pramod Jain who was a driver of accused MK Jain. This driver married the daughter of MK Jain secretly at Ujjain on 09.09.2009 and thereafter tortured her immensely and started making demands for heavy dowry and, therefore, a false complaint had been filed by daughter of accused MK Jain against him. This complainant was also evicted by the accused MK Jain from their joint property bearing House No.278, Scheme No.54 BG, Vijaynagar, Indore and hence he has started filing a false complaint against MK Jain

and his brothers. All the documents, police reports were available on record; despite which, the present petitioners especially, the uncles were being falsely prosecuted and a such a course should not be permitted. It is a clear case of abuse of process of law.

4. He placed reliance on *Shri Ram Vs. The State of U.P.* [(1975) 3 SCC 495] to state that in order to constitute abetment, the abettor must be shown to have "intentionally" aided the commission of the crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough compliance with the requirements of Section 107; whereas there is no intention or mens rea as is being indicated to substantiate the charge of abetment under Section 109. The State Govt. had properly been informed of need for the loan and had been granted the sanctions as already stated above and hence it could not be said to be an incriminating evidence since mere facilitation cannot be interpreted to be an abetment. The physical act or instigation is strongly absent and Counsel prayed that the impugned order framing charge be set aside. Similarly Counsel submitted that active complicity was necessary concomitant for the offence of abetment which was absent in the present case and the burden of proof was clearly on the prosecution which it has failed to discharge. The FIR also does not contain the name of the present applicants.

5. Counsel placed reliance on *R.P. Kapur Vs. State of Punjab* [AIR (1960) SC 866] whereby it was urged that in cases falling under this category where the allegations made against the accused person do constitute offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge.

To bolster his submissions Counsel relied on *Gangula Mohan Reddy Vs. State of Andhra Pradesh* [2010 (1) SCC 750], AIR 1928 Nag 257, 2005 Cr.L.J. 4322 (Ker), *Krishnanand Agnihotri Vs. The State of MP* [(1977)1 SCC 816] and *Pramatha Nath Talukdar and Surendra Mohan Basu Vs. Saroj Ranjan Sarkar* [1962 Supp (2) SCR 297]. Counsel prayed that the impugned order framing charge be quashed.

6. Counsel for the respondents has categorically made allegations that if the registered sale deed relied on by the present petitioners is considered, it is dated 26.02.2010 whereas the sanction from the State Govt. is dated

28.02.2010. The loan from the Bank is dated 30.01.2010 and thus Counsel for the respondent/S.P.E. urged that it is a clear attempt to pass of ill gotten wealth. Moreover Counsel also urged that the entire loan amount of Rs.74 lacs was paid off within a short period of nine months. The one installment of Rs.13 lacs was paid on 25.09.2010 by cheque whereas within another period of three days on 28.09.2010 an amount of Rs.53,40,145/- was paid in cash by the accused MK Jain through his own account. The entire transaction of repayment has been done in the name of the single account of Shri MK Jain. This clearly indicated that the suspicious circumstances were available against the accused Shri MK Jain as well as the present petitioners. Moreover an objection was also raised that sanction has not been taken properly as required under the provision of law from the State Govt. of M.P. since the other brothers are also government servants, however, Counsel for the respondents urged that if the act pertains to committing of criminal offence does not a part of the duty of the government servant and no sanction is required. Counsel relied on *Prakash Singh Badal Vs. State of Punjab* [2007(1) SCC Page1]. Counsel also relied on State by *Central Bureau of Investigation Vs. S. Bangarappa* [(2001) 1 SCC 369 whereby the Apex Court had held that at the time of framing of charges under Sections 211 & 240 of the Cr.P.C., the Court should not undertake detailed analysis and evaluation of material at that stage. It has only to find whether the material adduced by prosecution was sufficient to proceed further. In case offence under S. 13(2) r/w S. 13(1)(e) of Prevention of Corruption Act, 1988 it is not necessary that charge can be framed only on failure of public servant to explain the excess or surplus assets. It does not mean that the court could not frame charge until the public servant fails to explain the excess or surplus pointed out to be the wealth or assets of the public servant concerned. This exercise can be completed only in the trial. In the present case the materials which the prosecution enumerated are sufficient to frame the charge for the offence under Section 13(2) read with Section 13(1)(e) of the Act. Relying on *State of M.P. Vs. Awadh Kishore Gupta and others* [(2004) 1 SCC 691] Counsel submitted that quashing of proceedings by appreciating the evidence was not permissible and even if the charge is framed at that stage, High Court cannot appreciate the evidence, but can evaluate material and documents on records to the extent of its prima facie satisfaction about the existence of sufficient ground for proceeding against the accused and offence under Prevention of Corruption Act, 1988, even if

the investigation was not completed. And quashing of investigation and proceedings by High Court acting upon documents annexed to the petition under Section 482 was held not proper. It was impermissible for High Court to look into materials, the acceptability of which was essentially a matter for trial and impugned judgment of High Court is liable to be set aside.

7. Counsel for the respondents prayed that the petition was without merit and the same be dismissed since it would not be proper under the circumstances to quash the charges at this stage or set aside the order framing charge primarily because the factual position cannot be bye-passed and investigation has been properly conducted and it would not be proper to weigh the merits to scrutinise the case at this stage as already stated above. The question which pertains to proof would also arise only after the trial is conducted and the prosecution is allowed to lead its evidence. Counsel for the respondents urged that merely because a loan has been sought by all the three brothers and only one of property has been explained, that explanation also is not satisfactory in the light of the repayment of the loan and the needle of suspicion is clearly on the present petitioners to have actively aided and abetted the main accused MK Jain in ill gotten wealth and Counsel prayed that the petition be dismissed.

8. On considering the above, we find that the dispute hinges on the fulcrum whether the petitioners were guilty of actively aiding and abetting the main accused MK Jain in the amassing of disproportionate assets. Section 107 also indicates that an act or illegal omission must takes place in pursuance of that conspiracy, and there must be a combining together of two or more persons in the conspiracy; secondly, an act or illegal omission must take place in pursuance of that conspiracy and in order to the doing of that thing. It is not necessary that the abettor should concert in the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed. And hence the dates, as pointed out by the Counsel for the respondents, are important in the case. The date of registered sale deed by which the accommodation has been purchased and the date of the sanction by the State Govt. and the date of payment and repayment of loans are all shrouded under cloud of suspicion and it would not be desirable to consider the motive at this stage. The requirement at this stage is merely to ascertain whether there is a prima facie case available against the accused and the

complaint requires to be looked into. For the reasons stated above and the prima facie doubt raised against the petitioners would thus under the present circumstances would not amount to a gross abuse of the process of the Court if the trial Court proceeds with the trial. The exceptional circumstance that would lead to the quashment of the charge sheet, would be only; if, on frivolous and vexatious ground a charge is being framed. The complicity as stated by the Counsel for the petitioners is required to be established and the repayment of loan by accused MK Jain alone through a single account within such a short period, undoubtedly, it amounts to a suspicion and ground for prosecution. We find that the petition cannot be entertained at this stage and the cases cited by the Counsel for the petitioners are of no use to the petitioners. We have found that the Apex Court has time and again held that it is well-established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. If the allegations made against the accused person do constitute offence alleged but there is either no legal evidence adduced, in support of the case or evidence adduced clearly or manifestly fails to prove the charge, then this Court can exercise jurisdiction under Section 482 of Cr.P.C. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. However, at present there is a direct allegation of conspiracy as well as taking and disbursement of the loan by all the three brothers in surprisingly when they are the government servants. So also it would be profitable to rely on *State of Madhya Pradesh vs. S.B. Johari and others* : 2000(2) MPLJ 322, whereby the Court held thus:

> "It is settled law that at the stage of framing the charge, the Court has to *prima-facie* consider whether there is sufficient

ground for proceeding against the accused. The Court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not, for convicting the accused. If the Court is satisfied that a *prima-facie* case is made out for proceeding further, then a charge has to be framed."

(Also see) *Umar Abdul Sakoor Sorathia vs. Intelligence Officer, Narcotic Control Bureau* : 2000 (1) SCC 138 ; *State of Maharashtra and other vs. Somnath Thapa and others*: 1996 (4) SCC 659.

Consequently, we find that the petition is without merit and the same is dismissed as such.

Petition dismissed.