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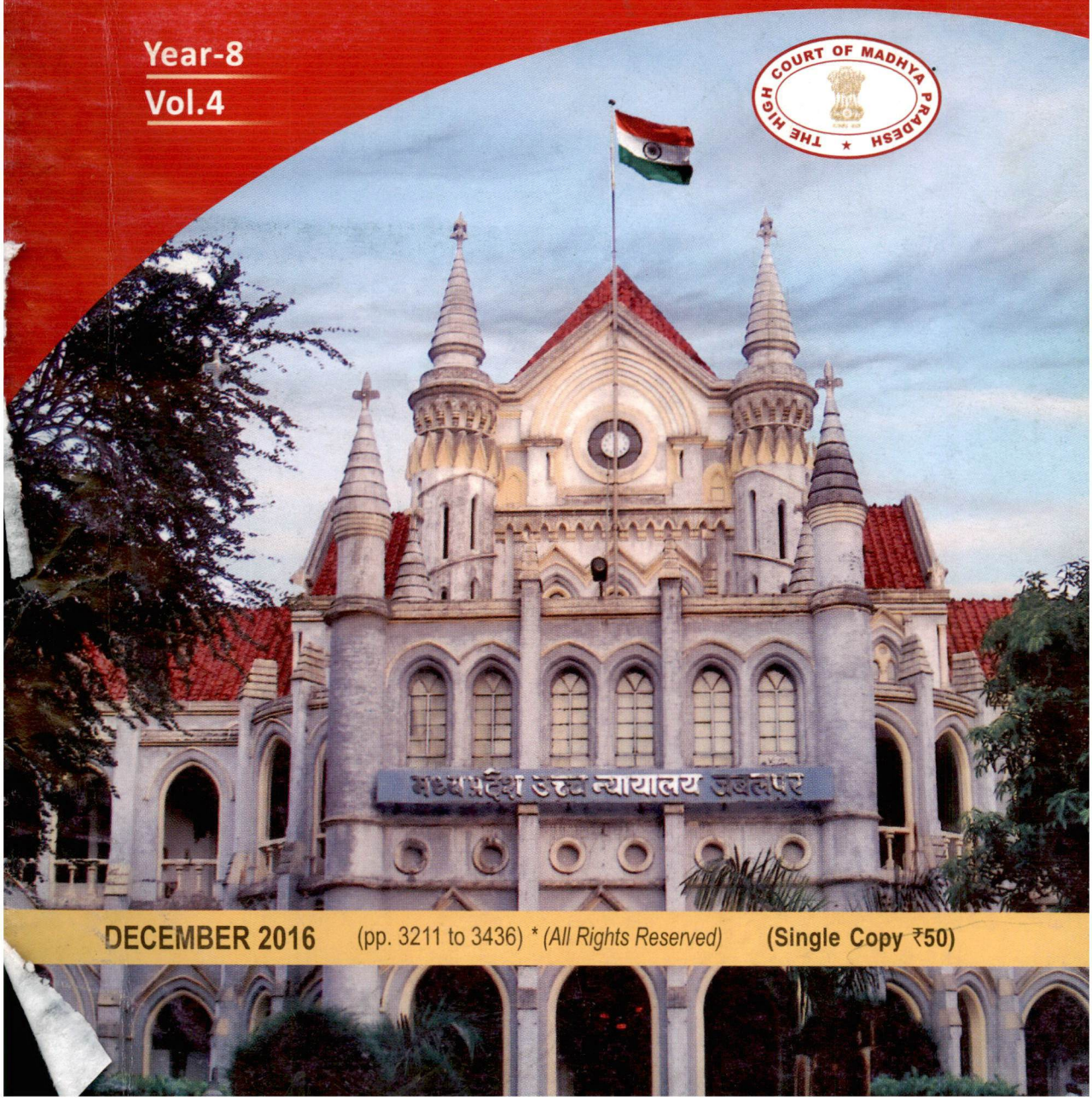

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***Constitution – Article 226 – Writ – Maintainability* – Order passed by Collector/Secretary, District E-Governance Society was called in question whereby, the contract granted to the petitioner was terminated on the ground that despite successfully running Lok Seva Kendra and without giving any notice regarding deficiency of service, contract was not renewed and a fresh RFP (Request for Proposal) was issued – Held – Since it was a pure and simple contract given to the petitioner to run Lok Seva Kendra, no time limit was vested in the petition to claim renewal of the contract – It is the discretion of the employer either to renew the contract or to issue fresh RFP – Same can not be questioned unless it is arbitrary or tainted with malafide to achieve some hidden agenda – Controversy is purely in the realm of contract – Writ Petitions in such cases are not maintainable – Petition**

assumes that he is in a position to redeliver the goods on payment of the debt and therefore, if he has put himself in a position where he is not able to redeliver the goods he cannot obtain a decree – A pawnee has both collateral and concurrent rights and can institute suit for the purpose of realization of said debt or promise while retaining the goods as collateral security – In the peculiar fact situation of the case as the plaintiff bank failed to sell the food grains which were perishable in nature despite request by the defendant and taking into account the fact that plaintiff bank is not in a position to deliver the food grains now, the Court directed that the plaintiff bank shall be entitled to recover the amount of debt along with 20% quarterly interest after adjusting the value of the food grains. [Vijay & Sons (M/s.), Mungavali Vs. Shivpuri Guna Kshetriya Gramin Bank] (DB)...2791

संविदा अधिनियम (1872 का 9), धारा 176 – गिरवीकर्ता द्वारा व्यतिक्रम की दशा में गिरवीदार के अधिकार – अभिनिर्धारित – गिरवीकर्ता द्वारा व्यतिक्रम के प्रकरण में, गिरवीदार ऋण पर वाद ला सकता है तथा संपार्श्विक प्रतिभूति के रूप में गिरवी को प्रतिधारित कर सकता है अथवा गिरवीकर्ता को विक्रय का युक्तियुक्त नोटिस देकर वह उसका विक्रय कर सकता है – गिरवीदार को गिरवी माल के प्रतिधारण के साथ ऋण की वसूली हेतु अनुमति नहीं दी जा सकती – ऋण हेतु वाद लाने का अधिकार यह धारणा करता है कि ऋण का संदाय करने पर वह माल को वापस करने की स्थिति में है और इसलिए, यदि उसने स्वयं को ऐसी स्थिति में लाया है जहाँ वह माल वापस करने में समर्थ नहीं तब वह डिक्री अभिप्राप्त नहीं कर सकता – गिरवीदार को संपार्श्विक और समवर्ती दोनों अधिकार प्राप्त हैं और संपार्श्विक प्रतिभूति के रूप में माल को प्रतिधारित करते हुए उक्त ऋण या वचन की वसूली के प्रयोजन हेतु वाद संस्थित कर सकता है – प्रकरण की विशिष्ट तथ्यात्मक स्थिति में, चूंकि वादी बैंक, प्रतिवादी द्वारा निवेदन करने के बावजूद विनश्वर प्रकृति के खाद्यान्न, का विक्रय करने में असफल रहा और इस तथ्य को विचार में लेते हुए कि वादी बैंक अब खाद्यान्न वापस सौंपने की स्थिति में नहीं है, न्यायालय ने निदेशित किया कि वादी बैंक खाद्यान्न के मूल्य को समायोजित करने के पश्चात् 20% त्रैमासिक ब्याज के साथ ऋण की वसूली करने के लिए हकदार होगा। (विजय एण्ड संस (मे.), मुंगावली वि. शिवपुरी गुना क्षेत्रीय ग्रामीण बैंक) (DB)...2791

***Contract – Judicial Review* – Cancellation of tender and re-inviting the same by reviewing minimum required license fee – Held – Scope of interference in such matter is limited unless shown to be arbitrary, discriminatory or suffering from *mala fides* – On the basis of participation in tender, bidder does not get any right to compel the authority to accept the bid – Bidder is only entitled to a fair, equal and**

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was granted and was filed on 13.08.2015 and charge was framed on 28.09.2015 – Held – Trial commence only at the stage of framing of charge and not when cognizance is taken – Court may proceed up to the stage of framing of charge without consent of District Magistrate – Charge can be framed after consent being granted and placed on record – Trial Court has ample power and discretion to receive any document before framing of charge – All documents are not required to be filed alongwith the final report. [Raju Adivasi Vs. State of M.P.] ...2821

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397 व 401 एवं विस्फोटक पदार्थ अधिनियम (1908 का 6), धाराएँ 4, 5 व 7 – अधिनियम, 1908 की धारा 4, 5 के अंतर्गत आरोप विरचित किये जाने को इस आधार पर चुनौती दी गई कि जिला मजिस्ट्रेट की सहमति, जैसा कि अधिनियम, 1908 की धारा 7 के अंतर्गत परिकल्पित है, आरोप पत्र के साथ प्रस्तुत नहीं की गई – जिला मजिस्ट्रेट द्वारा सहमति प्रदान की गई और 13.08.2015 को प्रस्तुत की गई तथा 28.09.2015 को आरोप विरचित किया गया था – अभिनिर्धारित – विचारण केवल आरोप विरचित किये जाने के प्रक्रम पर आरंभ होता है न कि जब संज्ञान लिया जाता है – न्यायालय, आरोप विरचित करने के प्रक्रम तक जिला मजिस्ट्रेट की सहमति के बिना कार्यवाही कर सकता है – सहमति प्रदान होने पर और अभिलेख पर लाये जाने के पश्चात् आरोप विरचित किया जा सकता है – विचारण न्यायालय को आरोप विरचित करने के पूर्व किसी दस्तावेज को प्राप्त करने की पर्याप्त शक्ति और विवेकाधिकार है – सभी दस्तावेजों को अंतिम रिपोर्ट के साथ प्रस्तुत करना अपेक्षित नहीं। (राजू आदिवासी वि. म.प्र. राज्य) ...2821

Criminal Procedure Code, 1973 (2 of 1974), Sections 397 & 401 and Penal Code (45 of 1860), Section 306 **– Quashing of charges sought on the ground that there is no evidence at all – Umadeo, lodger of the FIR, disclosed ignorance as to the cause that compelled the deceased to commit suicide and material on record never made out a *prima facie* case – Held – There is no evidence to show that the applicants were proximate cause or that the applicants had goaded, instigated or assisted the deceased in committing suicide – To be charged u/S 306 of Indian Penal Code, it would be essential for the prosecution to establish *prima facie* that the actions of the accused were directly responsible for instigating the deceased to commit suicide – Trial Court erred in framing charges – Applicants discharged. [Ramnaresh Vs. State of M.P.]** ...3127

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397 व 401 एवं दण्ड

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दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397, 401 व 319 – दण्ड प्रक्रिया संहिता की धारा 319 के अंतर्गत गिरफ्तारी वारन्ट जारी करने के आदेश को इस आधार पर चुनौती दी गई कि एक निजी व्यक्ति के आवेदन पर एवं न की किसी पीड़ित या अभियोजन के आवेदन पर पश्चात्वर्ती रूप से आवेदक को आरोपी के तौर पर आलिप्त किया गया, सुनवाई का कोई अवसर प्रदान नहीं किया गया एवं विचारण न्यायालय ने समन जारी करने की बजाय गिरफ्तारी वारन्ट जारी कर त्रुटि की – अभिनिर्धारित – (अ) धारा 319 दं.प्र.सं. के अंतर्गत अभियुक्त को आलिप्त किया जाना – चूंकि अभिलेख पर यह उपधारित करने के लिए पर्याप्त साक्ष्य है कि अभियुक्त आवेदक ने भी उपर्युक्त अपराध कारित किया है जिसे इस मामले में अभियुक्त नहीं बनाया गया था – उसका विचारण भी साथ में किया जा सकता है (ब) धारा 319 दं.प्र.सं. की व्याप्ति – न्यायालय के समक्ष जाँच अथवा विचारण के दौरान धारा 319 के अंतर्गत अपेक्षित साक्ष्य के तौर पर आई सामग्री पर ही न्यायालय विचार करने हेतु बाध्य है – न्यायालय द्वारा दं.प्र.सं. की धारा 319 के अंतर्गत शक्ति का प्रयोग स्वमेव या किसी व्यक्ति द्वारा जिसमें उसके समक्ष पूर्व से उपस्थित अभियुक्त भी शामिल हैं के आवेदन पर किया जा सकता है (स) सुने जाने का अवसर – दं.प्र.सं. की धारा 319 के अंतर्गत समन जारी होने के पूर्व सुने जाने का कोई अधिकार आवेदक को नहीं है – (द) गैर–जमानती वारन्ट का जारी किया जाना – अभिलेख पर ऐसा कुछ नहीं है जिसमें समन जारी करने की बजाय गैर–जमानती वारन्ट जारी करना अपेक्षित हो – अतः आवेदक के विरूद्ध समन जारी किया जाना चाहिए था – गैर–जमानती वारन्ट जारी किये जाने से संबंधित निदेश अपास्त। (मांगीलाल वि. म.प्र. राज्य) ...3371

Criminal Procedure Code, 1973 (2 of 1974), Sections 437 (1) & 437 (6) – See – Interpretation of statutes **[Bhagwan Vs. State of M.P.] ...3402**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 437 (1) व 437 (6) – देखें – कानूनों का निर्वचन (भगवान वि. म.प्र. राज्य) ...3402

Criminal Procedure Code, 1973 (2 of 1974), Section 437 (6) and Penal Code (45 of 1860), Sections 380 & 401 – Release on bail – Reason **– Trial could not be concluded within the period of 60 days from first date fixed for evidence – Application u/S 437 (6) of Cr.P.C. moved for release on bail – Rejected by Trial Court – Affirmed by Revisional Court – Challenge as to – Held – The applicants are tried for stealing large amount of gold & diamond jewellery & cash from a running train & its substantial part has been recovered, so offence is not an ordinary one but it is grave, applicants are resident of far away place (Bihar) – Facing trial in 11 similar offences – Members of inter-state gang – Habitual offenders – Delay is attributable to one of the**

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Judge had declined to grant bail to juvenile by upholding the reasoning of Juvenile Justice Board – Held – In view of the report of the Probation Officer and the circumstances under which the offence is alleged to have been committed and the fact that the guardians of the juvenile are clearly not in a position to exercise any disciplinary control over him, in case of release on bail, the juvenile would expose himself to moral, psychological and physical dangers – It would not be in the interest of justice to release him on bail – Revision is dismissed. [Prashant Mishra Vs. State of M.P.] ...2817

किशोर न्याय (बालकों की देख–रेख और संरक्षण) अधिनियम (2000 का 56), धाराएँ 12 व 15 – किशोर को जमानत प्रदान की जाना – विद्वान सत्र न्यायाधीश ने किशोर न्याय बोर्ड का तर्क कायम रखते हुए किशोर को जमानत प्रदान करने से मना किया – अभिनिर्धारित – परिवीक्षा अधिकारी के प्रतिवेदन को दृष्टिगत रखते हुए एवं परिस्थितियाँ जिसके अंतर्गत अभिकथित रूप से अपराध कारित किया गया है तथा तथ्य कि किशोर के संरक्षक स्पष्ट रूप से उस पर कोई अनुशासनात्मक नियंत्रण रखने की स्थिति में नहीं, जमानत पर छोड़े जाने की दशा में, किशोर स्वयं को नैतिक, मानसिक एवं शारीरिक खतरों में डालेगा – उसे जमानत पर छोड़ा जाना न्याय हित में नहीं होगा – पुनरीक्षण खारिज। (प्रशांत मिश्रा वि. म.प्र. राज्य) ...2817

Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Section 19 **– Removal of disqualification attaching to conviction – At the time of incidence and conviction by the Juvenile Justice Board, the petitioner was juvenile – As per Section 19(1) of the Act, the disqualification attached to the conviction is removed and it is made clear that conviction of the petitioner will not affect his service career in any manner. [Monu @ Kaushal Singh Bhadoriya Vs. State of M.P.]** ...*30

किशोर न्याय (बालकों की देख–रेख और संरक्षण) अधिनियम (2000 का 56), धारा 19 – दोषसिद्धि से संबंधित निरर्हता का हटाया जाना – किशोर न्यायालय बोर्ड द्वारा दोषसिद्ध किए जाने एवं घटना के समय याची किशोर था – अधिनियम की धारा 19(1) के अनुसार, दोषसिद्धि से संबंधित निरर्हता हटाई गई एवं यह स्पष्ट किया गया कि याची की दोषसिद्धि किसी भी प्रकार से उसके सर्विस कैरियर को प्रभावित नहीं करेगी। (मोनू उर्फ कौशल सिंह भदौरिया वि. म.प्र. राज्य) ...*30

Land Acquisition Act (1 of 1894), Section 4 – Publication of preliminary notification and powers of officers thereunder **– At the stage of notification, only locality is required to be mentioned and not the survey numbers or the names of the owners of land, as it is not**

possible to mention the same without entering into the exercise contemplated in Sub-Section 2 of Section 4 of the Act. [Omprakash Jaiswal Vs. State of M.P.] (DB)...2913

भूमि अर्जन अधिनियम (1894 का 1), धारा 4 – प्रारंभिक अधिसूचना का प्रकाशन एवं उसके अंतर्गत अधिकारियों की शक्तियाँ – अधिसूचना के प्रक्रम पर केवल परिक्षेत्र का उल्लेख किया जाना अपेक्षित है न कि सर्वे क्रमांक अथवा भू–स्वामियों के नाम उल्लेख किया जाना, क्योंकि अधिनियम की धारा 4 की उपधारा 2 में अनुध्यात प्रक्रिया प्रारंभ किए बगैर उनका उल्लेख करना संभव नहीं है। (ओमप्रकाश जायसवाल वि. म.प्र. राज्य) **(DB)...2913**

Land Acquisition Act (1 of 1894), Sections 4(1) & 5A **– In respect of those, who did not object to Section 4(1) notification by filing objection u/S 5-A, the said notification must be treated as being in force. [Omprakash Jaiswal Vs. State of M.P.] (DB)...2913**

भूमि अर्जन अधिनियम (1894 का 1), धाराएँ 4(1) व 5ए – उन व्यक्तियों के संबंध में जिन्होनें धारा 4(1) की अधिसूचना के संबंध में धारा 5–ए के अंतर्गत आक्षेप प्रस्तुत नहीं किये, उक्त अधिसूचना प्रभावशील मानी जानी चाहिए। (ओमप्रकाश जायसवाल वि. म.प्र. राज्य) **(DB)...2913**

Land Acquisition Act (1 of 1894), Section 5A – Hearing of objections **– The Land Acquisition Collector is duty bound to objectively consider the arguments advanced by the Objector and make recommendations duly supported by brief reasons as to why the particular piece of land should or should not be acquired and whether the plea put forward by the Objector merits acceptance – The recommendations made by the Land Acquisition Collector should reflect objective application of mind to the entire record including the objections filed by the interested persons. [Omprakash Jaiswal Vs. State of M.P.] (DB)...2913**

भूमि अर्जन अधिनियम (1894 का 1), धारा 5ए – आक्षेपों की सुनवाई – भू–अर्जन कलेक्टर कर्तव्यबद्ध है कि वह आक्षेपकर्ता द्वारा प्रस्तुत तर्कों पर निष्पक्ष रूप से विचार करे एवं संक्षिप्त कारणों द्वारा सम्यक् रूप से समर्थित ऐसी अनुशंसा करे कि क्यों एक विशेष भू–भाग अर्जित किया जाना चाहिए अथवा नहीं किया जाना चाहिए तथा क्या आक्षेपकर्ता द्वारा प्रस्तुत अभिवाक् स्वीकार योग्य है – भू–अर्जन कलेक्टर द्वारा की गई अनुशंसाओं में, हितबद्ध व्यक्तियों द्वारा प्रस्तुत आक्षेपों सहित संपूर्ण अभिलेख में निष्पक्षता से मस्तिष्क का प्रयोग दर्शित होना चाहिए। (ओमप्रकाश जायसवाल वि. म.प्र. राज्य) **(DB)...2913**

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नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 132(1)(सी)(डी)(ई) व 132(6)(ओ) – क्या भूतलक्षी माँग के कारण वर्ष 2010 से कर की वसूली अवैध है – अभिनिर्धारित – नहीं, चूँकि कर एवं उपकर पूर्ववर्ती वर्षों के होने एवं उनका भुगतान न किये जाने के कारण, उक्त वर्षों हेतु उनकी माँग, अधिनियम 1956 की धारा 133 के अंतर्गत प्रस्ताव पारित करने के उपरांत, की गई थी, इसलिए यह अभिवाक् भ्रामक है। (ईस्सरजी एजूकेशन सोसायटी वि. म.प्र. राज्य) (DB)...2982

Municipal Corporation Act, M.P. (23 of 1956), Section 136 and Municipality (Determination of Annual Letting Value of Building/ Lands) Rules, M.P. 1997, Rule 10(1) – Educational institution – **Whether exemption from payment of property tax under Section 136(c) of 1956 Act means exemption from filing the return – Held – No, even if an institution is exempted from payment of property tax under Section 136(c) of 1956 Act, then also it is obligatory for the owner to file the return as per Rule 10(1) of the 1997 Rules. [Essarjee Education Society Vs. State of M.P.]** (DB) ...2982

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 136 एवं नगरपालिका (भवनों/भूमियों के वार्षिक भाड़ा मूल्य का अवधारण) नियम, म.प्र. 1997, नियम 10(1) – शैक्षणिक संस्थान – क्या 1956 के अधिनियम की धारा 136(सी) के अंतर्गत संपत्ति कर के भुगतान में दी गई छूट का आशय विवरणी दाखिल करने में दी गई छूट से है – अभिनिर्धारित – नहीं, अधिनियम 1956 की धारा 136(सी) के अंतर्गत यदि किसी संस्थान को संपत्ति कर के भुगतान से छूट प्रदान भी की जाती है, तब भी 1997 के नियम 10(1) के अनुसार उसके स्वामी के लिए विवरणी प्रस्तुत करना बाध्यकारी है। (ईस्सरजी एजूकेशन सोसायटी वि. म.प्र. राज्य) (DB)...2982

Municipal Corporation Act, M.P. (23 of 1956), Sections 305 & 306 and Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013) – Constitution – Entry No. 5 of List II (State list) – Entry No. 42 of List III – **Whether Sections 305 & 306 of the Act of 1956 is repugnant to the Central Act of 2013? – Held – That the Act of 1956 (State Act) would squarely fall under Entry 5 of List II of Seventh Schedule and provisions u/S 305 & 306 are incidental thereto whereas the Act of 2013 (Central Act) is a law regarding acquisition etc. of land and falls under Entry 42 of List III of the Seventh Schedule, so the argument of repugnancy with the provisions of the Act of 2013 is not available, as the Act of 1956 falls under Entry 5 of List II and Act of 2013 falls under Entry 42 of list III and the question of repugnancy arises only**

when both the Union and State laws relate to a subject in List III – Argument of repugnancy is rejected. [Municipal Corporation, Bhopal Vs. Prem Narayan Patidar] (DB)...2938

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 305 व 306 एवं भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, (2013 का 30) – संविधान – सूची II की प्रविष्टि सं. 5 (राज्य सूची) – सूची III की प्रविष्टि सं. 42 – क्या 1956 के अधिनियम की धारा 305 तथा 306, 2013 के केन्द्रीय अधिनियम के प्रतिकूल है? – अभिनिर्धारित – यह कि 1956 का अधिनियम (राज्य अधिनियम) पूर्णतः 7 वीं अनुसूची की दूसरी सूची की प्रविष्टि 5 के अंतर्गत आता है तथा धारा 305 और 306 के अंतर्गत प्रावधान उसके आनुषंगिक होंगे जबकि 2013 का अधिनियम (केन्द्रीय अधिनियम) भूमि के अर्जन इत्यादि संबंधी विधि है और 7 वीं अनुसूची की तीसरी सूची की प्रविष्टि 42 के अंतर्गत आता है, अतः 2013 के अधिनियम के प्रावधान के साथ प्रतिकूलता का तर्क उपलब्ध नहीं है, क्योंकि 1956 का अधिनियम सूची II की प्रविष्टि 5 के अंतर्गत आता है तथा 2013 का अधिनियम तीसरी सूची की प्रविष्टि 42 में आता है और प्रतिकूलता का प्रश्न केवल तभी उठता है जब संघ और राज्य विधि दोनों ही तीसरी सूची के विषय से संबंधित हों – प्रतिकूलता का तर्क अस्वीकार किया जाता है। (म्यूनिसिपल कारपोरेशन, भोपाल वि. प्रेम नारायण पाटीदार) (DB)...2938

Municipal Corporation Act, M.P. (23 of 1956), Sections 305, 306, 322, 323 & 387, Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973), Section 56 and Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, (30 of 2013) – "Acquisition of Land" or "Vesting of Land" – Petitioners – Land owners **– Possession of land/buildings without acquiring the same and payment of compensation – Purpose – Construction/widening of Road/ Street – Against it Writ Petition – Relief – Compensation to be paid as per the Act of 2013 or under the provision of the Act of 1956 – Challenge as to by Municipal Corporation – Intra court Appeals – Held – As the possession of Land/buildings is being taken for specified use i.e. Construction/Widening of streets, so it will amount to "vesting of Land" under Section 305 of the Act of 1956 and not as "acquisition of land" – consequent to "vesting", the corporation is empowered to remove all obstructions and encroachments falling within the street by invoking power under Sections 322 and 323 of the Act of 1956 and if any loss or damage is caused to any person due to such act of removal, the owner is entitled for compensation as specified u/S 306 of the Act of 1956 & if owner is dissatisfied with the compensation amount then it can take**

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नगर तथा ग्राम निवेश अधिनियम, म.प्र. (1973 का 23), धारा 56 – 1973 के अधिनियम के अंतर्गत भूमि का अर्जन – प्रक्रिया – अभिनिर्धारित – यदि 1973 के अधिनियम द्वारा आच्छादित किए गए मामलों के संबंध में भूमि के अर्जन का सहारा लिया जाए, तब 1973 के अधिनियम में विनिर्दिष्ट प्रक्रिया के कारण, सहपठित केन्द्रीय अधिनियम जो मुआवजे की राशि के निर्धारण से संबंधित है, को देखा जाना चाहिए। (म्यूनिसिपल कारपोरेशन, भोपाल वि. प्रेम नारायण पाटीदार) (DB)...2938

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/18 (b) **– Appellant who is pillion rider cannot be said in conscious possession of alleged contraband – He is not owner of motorcycle – No specific evidence to show he had knowledge of the contraband kept in motorcycle – Not clear as to from which place he took lift on the motorcycle – Conviction & sentence set aside. [Ghanshyam Vs. State of M.P.]** ...3350

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8/18(बी) – अपीलार्थी जो की पीछे की सीट पर सवार था, अभिकथित विनिषिद्ध पदार्थ के सचेतन कब्जे में नहीं कहा जा सकता – वह मोटरसाइकल का स्वामी नहीं था – कोई विनिर्दिष्ट साक्ष्य नहीं जो यह दर्शाता हो कि उसे मोटरसाइकल में रखे विनिषिद्ध पदार्थ का ज्ञान था – यह स्पष्ट नहीं कि किस जगह से उसने मोटरसाइकल पर लिफ्ट ली थी – दोषसिद्धि एवं दण्डादेश अपास्त। (घनश्याम वि. म.प्र. राज्य) ...3350

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8/21 – Facts – Secret information **– Appellant having smack in his possession and waiting on railway platform to board Dehradoon Express – Information was reduced into writing and 'Panchnama' was prepared – Superior officer was informed before proceeding – A.S.I. alongwith three constables and two 'Hammals' proceeded to the spot – As per Section 50 of the Narcotic Drugs and Psychotropic Substances Act search was carried out – 100 gm. of contraband smack was seized – F.I.R. was registered – F.S.L. report positive – Charge sheet filed – Trial – Conviction and sentence – Appeal against – Held – The prosecution has examined two police witnesses but no independent witness has been examined – Two panch witnesses PW-1 and PW-2 turned hostile and rest of the witnesses are formal witness, so there is no other material to support the two prosecution witnesses – Except for 'Hammals' i.e. PW-1 and PW-2, no one else was available to the prosecution as independent witness – Prosecution case does not inspire**

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As there is material omission and contradiction in the statements of prosecution witnesses, prosecution has not brought on record the 'Dehati Nalishi' lodged by the present appellant nor medical record of injuries suffered by the appellant, non-seizure of weapons from the appellant etc., so the appellant is liable to be acquitted – Conviction & sentence imposed by the Trial Court set aside – Appeal allowed. [Rehman Vs. State of M.P.] (DB)...3106

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – अपीलार्थी – दोषसिद्धि – अन्य अभियुक्तगण को दोषमुक्त किया गया – प्रथम सूचना प्रतिवेदन – आक्षेप – अपीलार्थी ने अन्य अभियुक्तगण के साथ मिलकर हसीब पर हमला किया – अपीलार्थी द्वारा जवाबी प्रथम सूचना प्रतिवेदन – धारा 307 – अपील – आधार – साक्ष्य का मूल्यांकन उचित परिप्रेक्ष्य में नहीं किया गया – अभियोजन द्वारा सारवान् तथ्यों का छिपाव – अपीलार्थी से हथियारों की जप्ती न होना – अभिनिर्धारित – चूंकि अभियोजन साक्षीगण के कथनों में सारभूत लोप एवं विरोधाभास है, वर्तमान अपीलार्थी द्वारा दर्ज कराई गई 'देहाती नालिशी', अपीलार्थी को आई चोटों का चिकित्सा अभिलेख, अपीलार्थी से हथियारों की जप्ती न होना इत्यादि को अभियोजन द्वारा अभिलेख पर नहीं लाया गया है, इसलिए अपीलार्थी दोषमुक्त किए जाने योग्य है – विचारण न्यायालय द्वारा अधिरोपित दोषसिद्धि एवं दण्डादेश अपास्त – अपील मंजूर। (रहमान वि. म.प्र. राज्य) **(DB)...3106**

***Penal Code (45 of 1860), Section 302 – Murder – Facts –* Appellant attacked his cousin with a knife in the market – Injured was immediately taken to hospital – Declared dead – P.M. Report reveals homicidal death – During T.I. Parade, appellant identified by PW-1 – Seizure and recovery of knife – Motive – Long pending property dispute – F.I.R. lodged within 15 to 20 minutes of the incident – Trial Court – Conviction – Sentence – Appeal against – Held – There are overwhelming evidence against the appellant consisting of eye witnesses consistently speaking about the attack made by the appellant, oral dying declaration, seizure & recovery of knife proved by Panch Witness, motive for the crime proved, FIR was also lodged without delay – Conviction & sentence awarded by the trial Court upheld – Appeal dismissed. [Imran Hussain Vs. State of M.P.] (DB)...*41**

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – तथ्य – अपीलार्थी ने अपने रिश्ते के भाई पर बाजार में चाकू से हमला किया – आहत को तत्काल चिकित्सालय ले जाया गया – मृत घोषित – शव परीक्षण रिपोर्ट मानववध स्वरूप मृत्यु प्रकट करती है – शिनाख्त परेड के दौरान, अ.सा.–1 द्वारा अपीलार्थी की

caught red handed with tainted currency notes – Currency notes and jacket of the appellant seized – F.S.L. report positive – Trial Court – Conviction & Sentence – Appeal against – Held – It is nobody's case that the currency notes were handed over by the complainant to the appellant for any other purpose than by way of illegal gratification, so it is a necessary conclusion that the currency notes were given as a motive or reward for showing favour and this fact is duly supported by testimony of 18 prosecution witnesses – Conviction & sentence awarded by the Trial Court upheld – Appeal dismissed. [Gulab Singh Vs. State of M.P.] (DB)...*40

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1)(डी) व 13(2) – अपीलार्थी – सहायक उप–निरीक्षक, पुलिस – अवैध परितोषण – तथ्य – दुर्घटना मामला – प्रथम सूचना प्रतिवेदन – पक्षकारों के मध्य समझौता – अपीलार्थी द्वारा मामले को समाप्त करने हेतु अवैध परितोषण के रूप में 500/– रू. की मांग की गई – लोकायुक्त को परिवाद – अवैध मांग टेप रिकार्डर में अभिलिखित की गई – प्रकरण दर्ज किया गया – जाल बिछाया गया – अपीलार्थी दूषित करेंसी नोटों के साथ रंगे हाथों पकड़ा गया – करेंसी नोटों एवं अपीलार्थी की जैकेट को जब्त किया गया – एफ.एस.एल. रिपोर्ट सकारात्मक – विचारण न्यायालय – दोषसिद्धि एवं दण्डादेश – के विरूद्ध अपील – अभिनिर्धारित – यह किसी का मामला नहीं है कि परिवादी द्वारा अपीलार्थी को करेंसी नोट अवैध परितोषण के अलावा किसी अन्य प्रयोजन हेतु सौंपे गए थे, इसलिए यह आवश्यक निष्कर्ष है कि करेंसी नोटों को अपने पक्ष में कृपा दर्शाने के उद्देश्य से या इनाम के रूप में दिये गये थे एवं यह तथ्य 18 अभियोजन साक्षीगण की परिसाक्ष्य द्वारा सम्यक् रूप से समर्थित है – विचारण न्यायालय द्वारा पारित दोषसिद्धि एवं दण्डादेश की पुष्टि की गई – अपील खारिज। (गुलाब सिंह वि. म.प्र. राज्य) (DB)...*40**

***Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d) & 13(2) – Appellant – Assistant Sub-Inspector of Police – Illegal gratification – Sanction – Objection* – Authority has not considered the material before granting the sanction – Question of validity of sanction has not been pursued at the time of pendency of the trial – Held – Courts will not sit in appeal to judge the adequacy of material granting sanction – The object of the Act is not to provide to a public servant a safeguard for his incriminating act by raising the technical plea of invalidity of sanction – Provisions of the Act of 1988 are a safeguard for the innocent and is not a shield for the guilty – Objection turned down. [Gulab Singh Vs. State of M.P.] (DB)...*40**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1)(डी) व 13(2) – अपीलार्थी – सहायक उप–निरीक्षक, पुलिस – अवैध परितोषण – मंजूरी – आक्षेप – प्राधिकारी ने मंजूरी प्रदान करने से पूर्व सामग्री पर विचार नहीं किया – विचारण के लंबित रहने के दौरान मंजूरी की विधिमान्यता के प्रश्न का विचारण नहीं चाहा गया – अभिनिर्धारित – न्यायालय मंजूरी प्रदान करने वाली सामग्री की पर्याप्तता तय करने हेतु अपील नहीं सुनेंगे – अधिनियम का उद्देश्य, मंजूरी की अविधिमान्यता के तकनीकी अभिवाक् को उठाकर लोकसेवक को उसके अपराधरोपक कृत्य हेतु संरक्षण प्रदान करना नहीं है – 1988 के अधिनियम के उपबंध निर्दोषों के संरक्षण हेतु हैं और न कि दोषी हेतु ढाल – आक्षेप अस्वीकार किया गया। (गुलाब सिंह वि. म.प्र. राज्य) (DB)...*40

***Prevention of Corruption Act (49 of 1988), Section 11 and Penal Code (45 of 1860), Section 201 – Appellant* – Deposition writer cum stenographer in District Court – Allegations – Demanding and accepting bribe of Rs. 6000/- from accused persons for payment to a Judge in a sessions trial for obtaining judgment of acquittal – Accused persons borrowed money from PW-3 and paid it to the appellant before pronouncement of the judgment – Accused persons convicted of the offence u/S 201 of IPC – Complaint – Appellant summoned in chamber of the Judge – Appellant confessed of accepting Rs. 6000/- in presence of other Judges, Advocates etc. – Prosecution – Extra-Judicial confession – Other than Judges, none of the Advocates or other court staff or one of the accused person supported the prosecution case – Held – Evidence of the Advocates, most of them pretty senior cannot be put aside or ignored and the evidence of the Judicial Officers touching extra Judicial confession made by the appellant do not find support from any of the prosecution witnesses i.e. Advocates, court staff or the bribe giver etc. hence the appellant is given benefit of doubt – Conviction & sentence set aside – Appeal allowed. [Gopal Singh Vs. State of M.P.]** (DB)...*39

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 11 एवं दण्ड संहिता (1860 का 45), धारा 201 – अपीलार्थी – जिला न्यायालय में शीघ्रलेखक सह अभिसाक्ष्य लेखक – अभिकथन – सेशन विचारण में दोषमुक्ति का निर्णय प्राप्त करने हेतु, न्यायाधीश को देने के लिए अभियुक्तगण से रू. 6000/– रिश्वत की माँग करना तथा स्वीकार करना – अभियुक्तगण ने अ.स. 3 से पैसे उधार लिए तथा निर्णय की उद्घोषणा के पहले अपीलार्थी को दिए – भा.द.सं. की धारा 201 के अंतर्गत अपराध हेतु अभियुक्तगण दोषसिद्ध – परिवाद – अपीलार्थी को न्यायाधीश के चेम्बर में आहुत किया गया – अपीलार्थी ने अन्य न्यायाधीशगण, अधिवक्ताओं

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submission of application form particularly when there is no cut-off date appointed in the policy nor in the advertisement – Held – Yes, the petitioner held qualification of B.A. before the cut-off date of submission of application form and mark sheet was issued much before consideration for selection therefore, she was validly possessing graduation degree at the time of selection or at the time of consideration for selection and 10 marks can be awarded to her as the grant/conferral of degree is procedural or ministerial work – Further held – Since petitioner has annexed Ration Card showing her status as member of family possessing BPL Card and if the petitioner did not belong to a family below poverty line, then how ration card for a family living below poverty line has been issued, was not addressed by authorities while passing the impugned order and no documents or pleading in rebuttal has been preferred by the respondent State; therefore awarding of 10 additional marks cannot be excluded for the same. [Renu Devi (Smt.) Vs. Commissioner, Chambal Division, Morena] ...3298

सेवा विधि – आंगनवाड़ी कार्यकर्ताओं की नियुक्ति – स्नातक होने पर एवं गरीबी रेखा से नीचे वाले परिवार से संबंधित होने पर प्रत्येक को 10 अंक प्रदान किये जाने का विवाद्यक – अंतर्ग्रस्त प्रश्न – क्या किसी अभ्यर्थी को अतिरिक्त योग्यता के लिए अंक प्रदान किये जा सकते हैं, जिसने उक्त योग्यता उस पद के लिए आवेदन करने की दिनांक को अर्जित नहीं की, परंतु आवेदन पत्र जमा करने की अंतिम तिथि से पूर्व अर्जित कर ली हो विशेषतः तब जबकि न तो पॉलिसी में और न ही विज्ञापन में कोई अंतिम तिथि नियत की गई हो – अभिनिर्धारित – हाँ, याचिकाकर्ता ने बी.ए. की योग्यता आवेदन पत्र जमा करने की अंतिम तिथि से पूर्व ही धारित की थी एवं चयन हेतु विचार के काफी पूर्व ही अंकसूची जारी हो गई थी, अतः उसने चयन के समय अथवा चयन हेतु विचार के समय वैध रूप से स्नातक उपाधि धारित की थी एवं उसे 10 अंक प्रदान किए जा सकते हैं क्योंकि उपाधि प्रदान/प्रदत्त करना प्रक्रियात्मक या अनुसचिवीय कार्य है – आगे अभिनिर्धारित – चूंकि याची ने राशन कार्ड संलग्न करते हुए अपनी स्थिति गरीबी रेखा से नीचे वाला कार्ड धारण करने वाले परिवार के सदस्य के रूप में दर्शायी है एवं यदि याची गरीबी रेखा से नीचे वाले परिवार से संबंध नहीं रखती थी, तो गरीबी रेखा से नीचे रहने वाले परिवार का राशन कार्ड कैसे जारी किया गया, यह प्राधिकारियों द्वारा आक्षेपित आदेश पारित करते समय संबोधित नहीं किया गया था एवं प्रत्यर्थी राज्य द्वारा खंडन में कोई दस्तावेज या अभिवचन प्रस्तुत नहीं किए गए, इसलिए उक्त के लिए 10 अतिरिक्त अंकों का प्रदान किया जाना अपवर्जित नहीं किया जा सकता। (रेनू देवी (श्रीमती) वि. कमिश्नर, चंबल डिवीजन, मुरैना) ...3298

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प्रस्तुत किया गया था और दिनाँक 25.02.2008 तक पुस्तिकाओं की आपूर्ति की जानी थी और क्योंकि समय संविदा का सार (मूल तत्व) था और दिनाँक 28.03.2008 के पत्र द्वारा यह स्पष्ट किया गया था कि आपूर्ति 31.03.2008 तक की जानी चाहिए और उसके बाद आपूर्ति स्वीकार नहीं की जाएगी अर्थात् 31.03.2008 के बाद कार्य आदेश रद्द माना जाएगा – संसूचना दिनाँक 22.05.2008 को पत्र दिनाँक 30.01.2009 द्वारा वापिस लिया गया, अतः 31.03.2008 के बाद पुस्तिकाओं को मुद्रित करने के लिए मुद्रक के पास कोई उपयुक्त कारण नहीं था – खंड न्यायपीठ ने यह निर्देश देने में भूल कर दी कि 22.05.2008 तक मुद्रित पुस्तिकाओं को भी स्वीकार किया जाएगा क्योंकि दिनाँक 31.03.2008 के पश्चात् ऐसा कोई कार्य आदेश अस्तित्व में नहीं था – निर्देश – मुद्रक को दिनांक 31.03.2008 तक की गई आपूर्ति के लिए, यदि न किया गया हो भुगतान किया जाए – आक्षेपित आदेश अपास्त – अपील मंजूर। (म.प्र. राज्य वि. मे. रूचि प्रिंटर्स) (SC)...3213

Works Contract – Tender – Outsourcing the Work of House keeping and Security, Services for Hospital and Dispensaries – Technical & Financial bid – **Petitioner & Respondent No. 4 qualified the round of Technical bid thereafter, on evaluation of financial bid, petitioner did not qualify – Bids of Respondent No. 4 were accepted – Hence, this petition – Ground – Lowest Bidder – Some of the terms & conditions of the tender are arbitrary – Held –The rate quoted by the petitioner was vague/non-realistic and the remuneration quoted for labourers was not as per the terms & conditions of the tender and even otherwise, the scope of Judicial review in contractual matters is limited and there is no illegality in decision making process nor the decision is based on malafide grounds – Petition dismissed with cost of Rs. 2000/-. [Indoriya Security Force Vs. State of M.P.]** ...*26

संकर्म संविदा – निविदा – अस्पताल एवं औषधालयों के लिए गृह–व्यवस्था तथा सुरक्षा सेवाओं की आउटसोर्सिंग – तकनीकी एवं वित्तीय बोली – याची एवं प्रत्यर्थी क्र. 4 ने तकनीकी बोली की प्रक्रिया में अर्हता प्राप्त की तत्पश्चात् वित्तीय बोली के मूल्यांकन में याची को अर्ह नहीं पाया गया – प्रत्यर्थी क्र. 4 की बोलियाँ स्वीकार की गई – अतः यह याचिका प्रस्तुत की गई – आधार – न्यूनतम बोली लगाने वाला – निविदा की कुछ शर्तें एवं दशाएँ मनमानी हैं – अभिनिर्धारित – याची द्वारा उत्कथित दर अस्पष्ट/अवास्तविक थी तथा श्रमिकों हेतु उत्कथित पारिश्रमिक भी निविदा की शर्तों एवं दशाओं के अनुसार नहीं था, एवं अन्यथा भी, संविदीय मामलों में न्यायिक पुनर्विलोकन की व्यापकता सीमित होती है तथा विनिश्चय की प्रक्रिया में कोई अवैधता नहीं है, न ही विनिश्चय असद्भावना के आधारों पर आधारित है – रू. 2,000/– के हर्जाने के साथ याचिका खारिज। (इंदौरिया सिक्युरिटी फोर्स वि. म.प्र. राज्य) ...*26

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THE INDIAN LAW REPORTS M.P. SERIES, 2016

(VOL-4)

JOURNAL SECTION

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

[Notification published in the Gazette of India (Extraordinary) Part II, Section 3, Sub-section (ii) dated 21.10.2016, Page no. 2]

MINISTRY OF LAW AND JUSTICE
(Legislative Department)

NOTIFICATION
New Delhi, the 21st October, 2016

S.O. 3263(E). — In exercise of the powers conferred by section 169 read with section 60 of the Representation of the People Act, 1951 (43 of 1951), the Central Government after consulting the Election Commission hereby makes the following rules further to amend the Conduct of Elections Rules, 1961, namely:—

1. *(1)* These rules may be called the Conduct of Elections (Amendment) Rules, 2016.

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

2. In the Conduct of Elections Rules, 1961, in rule 23,—

(a) in sub-rule *(1)*, after the proviso, the following proviso shall be inserted, namely:–

"Provided further that the postal ballot paper may be transmitted by the Returning Officer by such electronic means as may be specified by the Election Commission for the persons specified in sub-clause (ii) of clause (a) of rule 18;

(b) after sub-rule *(1)*, the following sub-rule shall be inserted, namely:–

"*(1A)* Where a postal ballot paper is transmitted electronically, the

provisions of this rule and rules 22, 24 and 27 shall, *mutatis mutandis*, apply.".

[F. No. H-11019/1/2015-Leg.II]
Dr. G. NARAYANA RAJU, Secy.

Footnote : The principal rules were published in the Gazette of India, Extraordinary, *vide* number S.O.859, dated the 15th April, 1961 and last amended *vide* number S.O. 2969(E), dated the 16th September, 2016.

[Notification published in the Gazette of India (Extraordinary) Part III, Section 4, dated 29.11.2016]

MINISTRY OF LAW AND JUSTICE
(Department of Justice)

(NATIONAL LEGAL SERVICES AUTHORITY)

NOTIFICATION

New Delhi, the 28th November, 2016

F. No. 6(1)/95-NALSA.— In exercise of the powers conferred by Section 3A of the Legal Services Authorities Act, 1987 (39 of 1987) read with Rule 10 of the National Legal Services Authority Rules, 1995, the Central Authority hereby nominates Mr. Justice Dipak Misra, Judge, Supreme Court of India, as Chairman of the Supreme Court Legal Services Committee with effect from 27th November, 2016 and makes the following amendments in its Notification No. S.O. 115(E) dated 09.02.2000, namely:-

In the said Notification, for the serial number (1) and the entries relating thereto, the following shall be substituted namely:-

1. "MR. JUSTICE DIPAK MISRA – CHAIRMAN"
   Judge, Supreme Court of India.

ALOK AGARWAL, Member Secy.
[ADVT.-III/4/ Exty. /318 (123)]

Foot Note: The principal notification constituting the Supreme Court Legal Services Committee was published vide S.O. 115(E) dated 09.02.2000 and was subsequently amended vide Notifications dated 25.02.2000, 20.08.2000, 22.11.2001, 29.05.2002, 01.01.2003, 10.04.2003, 25.09.2003, 08.03.2004, 08.06.2004, 18.07.2005, 11.11.2005, 11.07.2006, 15.02.2007, 21.10.2008, 13.05.2009, 11.08.2009, 18.01.2010, 18.10.2011, 27.06.2012, 29.05.2014, 09.10.2014 and 17.12.2015.

NOTES OF CASES SECTION

Short Note

****(35)***

Before Mr. Justice Sujoy Paul

M.Cr.C. No. 4316/2015 (Gwalior) decided on 27 August, 2015

AWADESH SINGH ...Applicant

Vs.

RAHUL GANDHI & ors. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Sections 203, 204, 362, 401(2) & 482 **– Dismissal of complaint u/S 203 Cr.P.C. without noticing the other side – Held – Scheme of Chapter XVI of Cr.P.C. shows that accused person does not come into picture at all till process is issued – Non-applicants are not required to be heard – Court below had inherent jurisdiction to act in accordance with law – No prejudice is caused by this order to the applicant – No interference is warranted – Application dismissed.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 203, 204, 362, 401(2) व 482 – दण्ड प्रक्रिया संहिता की धारा 203 के अंतर्गत अन्य पक्ष को सूचित किए बिना परिवाद की खारिजी – अभिनिर्धारित – दण्ड प्रक्रिया संहिता के अध्याय XVI की योजना यह प्रदर्शित करती है कि प्रक्रिया जारी होने तक अभियुक्त व्यक्ति का उल्लेख प्रकरण में बिल्कुल नहीं आया – अनावेदकों को सुना जाना अपेक्षित नहीं है – निचले न्यायालय के पास विधि के अनुसार कार्यवाही करने की अंतर्निहित अधिकारिता थी – आवेदक पर इस आदेश से कोई प्रतिकूल प्रभाव कारित नहीं हुआ है – हस्तक्षेप की आवश्यकता नहीं – आवेदन खारिज।

Cases referred:

(2008) 2 SCC 705, AIR 1963 SC 1430, 1998 (2) MPLJ 321.

Anil Mishra, for the applicant.
K.C. Mittal and *Vinod Kumar Sharma,* for the non-applicant No. 1.
V.K. Bharadwaj with *Anvesh Jain,* for the non-applicant No. 2.
Vivek Khedkar, for the non-applicants No. 3 & 4.

NOTES OF CASES SECTION

Short Note

****(36)***

Before Mr. Justice Sujoy Paul

M.C.C. No. 364/2012 (Gwalior) decided on 23 June, 2015

BALVIR SINGH GURJAR @ RINKU ...Applicant

Vs.

SMT. NITU ...Non-applicant

(Alongwith M.C.C. No. 253/2013)

***Hindu Marriage Act (25 of 1955), Sections 21-A, 13, 10 & 9 – Practice and procedure – Joint and consolidated trial* – Petition u/S 13 and 9 of Hindu Marriage Act are inseparable – Can not be decided separately because either of the petition can be allowed and not the both – Section 21-A of Hindu Marriage Act covers the cases filed under Section 9 of the Act – Thus, subsequent petition must be transferred.**

हिन्दू विवाह अधिनियम (1955 का 25), धाराएँ 21–ए, 13, 10 व 9 – पद्धति और प्रक्रिया – संयुक्त एवं समेकित विचारण – हिन्दू विवाह अधिनियम की धारा 13 एवं 9 के अंतर्गत याचिका अविभाज्य हैं – पृथक से विनिश्चित नहीं की जा सकती क्योंकि दोनों में से कोई भी एक याचिका मंजूर की जा सकती है न कि दोनों – हिन्दू विवाह अधिनियम की धारा 21–ए, अधिनियम की धारा 9 के अंतर्गत प्रस्तुत प्रकरणों को आच्छादित करती है – अतः पश्चात्वर्ती याचिका को अंतरित किया जाना चाहिए।

Cases referred:

AIR 2008 RAJASTHAN 111, 2010 (2) MPLJ 633, 2010 (4) MPLJ 391, AIR 1981 SC 1143, AIR 1980 BOM 337, AIR 1977 PUNJ & HAR 373, (2010) 1 BOM CR 226.

S.S. Chauhan, for the applicant in M.C.C. No. 364/2012 & for the non-applicant in M.C.C. No. 253/2013.

R.V.S. Ghuraiya, for the applicant in M.C.C. No. 253/2013.

Dharmendra Dwivedi, for the non-applicant in M.C.C. No. 364/2012.

NOTES OF CASES SECTION

Short Note

****(37)***

Before Mr. Justice Sujoy Paul

Arb.C. No. 11/2014 (Gwalior) decided on 5 May, 2015

GAURAV CHATURVEDI & ors. ...Applicants

Vs.

MR. GIRDHAR GOPAL BAJORIA & anr. ...Non-applicants

Arbitration and Conciliation Act (26 of 1996), Sections 11, 14, 15 & 32 – Appointment of substitute arbitrator **– Application filed for – Whether maintainable – Appointed arbitrator terminated the proceeding observing that parties are not co-operating – Section 15(2) provides that where the mandate of arbitrator is terminated, a substitute arbitrator shall be appointed – Termination amounts to "withdrawal" and not "refusal" – Accordingly substitute arbitrator is appointed – Application allowed.**

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराएँ 11, 14, 15 व 32 – प्रतिस्थानिक मध्यस्थ की नियुक्ति – के लिए प्रस्तुत आवेदन – क्या पोषणीय है – नियुक्त मध्यस्थ ने यह समीक्षा करते हुए कि पक्षकारों द्वारा सहयोग नहीं किया जा रहा है कार्यवाही समाप्त कर दी – धारा 15(2) यह उपबंध करती है कि जहाँ मध्यस्थ का आदेश समाप्त हो गया है, एक प्रतिस्थानिक मध्यस्थ की नियुक्ति की जाएगी – समापन "प्रत्याहरण" की कोटि में आता है एवं "इंकार" की नहीं – तद्नुसार प्रतिस्थानिक मध्यस्थ की नियुक्ति की जाती है – आवेदन मंजूर।

Cases referred:

(2015) 2 SCC 52, 2015 (1) MPLJ 70, (2012) 7 SCC 71, 2009 (10) SCC 293, 2014 (9) SCC 288, (2007) 5 SCC 304, (2007) 7 SCC 684.

Jitendra Sharma, for the applicant.

S.K. Shrivastava, for the non-applicant.

NOTES OF CASES SECTION

Short Note (DB)

****(38)***

Before Mr. Justice P.K. Jaiswal & Mr. Justice Alok Verma

W.P. No. 420/2016 (Indore) decided on 14 March, 2016

GAYATRI PROJECT LIMITED &
B.C. BIYANI PROJECT PRIVATE LIMITED ...Petitioners
Vs.
NARMADA VALLEY DEVELOPMENT
DEPARTMENT & ors. ...Respondents

A. Constitution – Article 226 – Contractual matters – Proper Proceedings – **Writ Petition is not proper proceeding for adjudication of the disputes related to a contractual obligation – Ascertainment of facts based on contents of affidavit is impermissible in dealing with the contractual disputes – Such issues are needed to be decided after considering the evidence in arbitration proceedings, but not before the writ court.**

क. संविधान – अनुच्छेद 226 – संविदात्मक मामले – उचित कार्यवाहियाँ – संविदात्मक बाध्यता से संबंधित विवादों के न्यायनिर्णयन करने के लिए रिट याचिका उचित कार्यवाही नहीं है – संविदात्मक विवादों का निपटारा करने में शपथपत्र की अन्तर्वस्तुओं पर आधारित तथ्यों का अभिनिश्चय अननुज्ञेय है – ऐसे विवाद्यकों को माध्यस्थम् कार्यवाहियों में साक्ष्य पर विचार के पश्चात् विनिश्चित करने की आवश्यकता है, परन्तु रिट न्यायालय के समक्ष नहीं।

B. Constitution – Article 226 – Contractual Matters – Dispute of question of fact – **Bar of maintainability – No doubt, there is no absolute bar to the maintainability of the Writ Petition, even in contractual matter or where there are disputed questions of fact or even when monetary claim is based – At the same time discretion lies with the court, which under certain circumstances it can refuse to exercise.**

ख. संविधान – अनुच्छेद 226 – संविदात्मक मामले – तथ्य के प्रश्न का विवाद – पोषणीयता का वर्जन – निःसंदेह, रिट याचिका की पोषणीयता पर कोई आत्यंतिक वर्जन नहीं है, यहाँ तक की संविदात्मक मामले में या जहाँ तथ्य के विवादित प्रश्न हों या यहाँ तक कि जब आर्थिक दावा आधारित है – इसी के साथ विवेकाधिकार न्यायालय के पास होता है, जो कतिपय परिस्थितियों में, इसे प्रयोग

करने से इन्कार कर सकता है।

C. Constitution – Article 226 – Writ Petition for quashing show cause notice regarding "Condition of contract" and "Special Condition" – Maintainability – Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983) – **The Arbitration Tribunal can decide both questions of fact as well as questions of law – When the contract itself provides for a mode of settlement of disputes arising from the contract, for referring the matter to the M.P. Arbitration Tribunal under the M.P. Madhyastham Adhikaran Adhiniyam 1983 – There is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226 – Writ Petition has no merit and accordingly dismissed.**

ग. संविधान – अनुच्छेद 226 – "संविदा की शर्त" एवं "विशेष शर्त" से संबंधित कारण बताओ नोटिस को अभिखण्डित करने हेतु रिट याचिका – पोषणीयता – माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29) – माध्यस्थम् अधिकरण तथ्य के प्रश्न के साथ ही विधि के प्रश्न दोनों ही विनिश्चित कर सकता है – जब संविदा स्वयं ही संविदा से उत्पन्न विवादों का निपटारा करने की रीति के लिए मामले को मध्यप्रदेश माध्यस्थम् अधिकरण अधिनियम 1983 के अंतर्गत माध्यस्थम् अधिकरण को निर्दिष्ट करने हेतु उपबंधित करती है – कोई कारण नहीं है कि क्यों पक्षकार उक्त अनुतोष का अनुसरण एवं पालन न करें तथा अनुच्छेद 226 के अंतर्गत उच्च न्यायालय की असाधारण अधिकारिता का अवलम्ब लें – रिट याचिका में कोई गुणदोष नहीं है एवं तद्नुसार खारिज।

The order of the Court was delivered by : **P.K. JAISWAL, J.**

Cases referred:

2005 (4) MPLJ 325, W.P. No. 10875/2013 decided on 22.01.2015, 2007(4) MPLJ 610, (2002) 1 SCC 216, (2003) 7 SCC 410.

Vivek Dalal, for the petitioners.
Vivek Patwa, for the respondents No. 1 to 5.

NOTES OF CASES SECTION

Short Note (DB)

**(39)*

Before Mr. Justice S.K. Seth & Mr. Justice M.C. Garg

Cr.A. No. 791/2002 (Indore) decided on 10 July, 2012

GOPAL SINGH ...Appellant

Vs.

STATE OF M.P. ...Respondent

***Prevention of Corruption Act (49 of 1988), Section 11 and Penal Code (45 of 1860), Section 201 – Appellant* – Deposition writer cum stenographer in District Court – Allegations – Demanding and accepting bribe of Rs. 6000/- from accused persons for payment to a Judge in a sessions trial for obtaining judgment of acquittal – Accused persons borrowed money from PW- 3 and paid it to the appellant before pronouncement of the judgment – Accused persons convicted of the offence u/S 201 of IPC – Complaint – Appellant summoned in chamber of the Judge – Appellant confessed of accepting Rs. 6000/- in presence of other Judges, Advocates etc. – Prosecution – Extra-Judicial confession – Other than Judges, none of the Advocates or other court staff or one of the accused person supported the prosecution case – Held – Evidence of the Advocates, most of them pretty senior cannot be put aside or ignored and the evidence of the Judicial Officers touching extra Judicial confession made by the appellant do not find support from any of the prosecution witnesses i.e. Advocates, court staff or the bribe giver etc. hence the appellant is given benefit of doubt – Conviction & sentence set aside – Appeal allowed.**

भ्रष्टाचार निवारण अधिनियम, (1988 का 49), धारा 11 एवं दण्ड संहिता (1860 का 45), धारा 201 – अपीलार्थी – जिला न्यायालय में शीघ्रलेखक सह अभिसाक्ष्य लेखक – अभिकथन – सेशन विचारण में दोषमुक्ति का निर्णय प्राप्त करने हेतु, न्यायाधीश को देने के लिए अभियुक्तगण से रू. 6000/– रिश्वत की माँग करना तथा स्वीकार करना – अभियुक्तगण ने अ.सा. 3 से पैसे उधार लिए तथा निर्णय की उद्घोषणा के पहले अपीलार्थी को दिए – भा.द.सं. की धारा 201 के अंतर्गत अपराध हेतु अभियुक्तगण दोषसिद्ध – परिवाद – अपीलार्थी को न्यायाधीश के चेम्बर में आहुत किया गया – अपीलार्थी ने अन्य न्यायाधीशगण, अधिवक्ताओं इत्यादि की उपस्थिति में 6000/– रूपये लेने की संस्वीकृति की – अभियोजन – न्यायिकेतर संस्वीकृति – न्यायाधीशों के अतिरिक्त किसी भी अधिवक्ता या न्यायालय के अन्य कर्मचारी संवर्ग या अभियुक्त में से किसी ने भी अभियोजन प्रकरण का

समर्थन नहीं किया – अभिनिर्धारित – अधिवक्ताओं की साक्ष्य, जिनमें अधिकांश काफी वरिष्ठ हैं को अलग या अनदेखा नहीं किया जा सकता तथा न्यायिक अधिकारियों का साक्ष्य जो अपीलार्थी द्वारा किए गए न्यायिकेतर संस्वीकृति से संबंधित है, को किसी भी अभियोजन साक्षी अर्थात् अधिवक्ताओं, न्यायालय कर्मचारी संवर्ग या रिश्वतदाता इत्यादि से समर्थन नहीं मिला अतः अभियुक्त को संदेह का लाभ दिया जाता है – दोषसिद्धि तथा दण्डादेश अपास्त – अपील मंजूर।

The judgment of the Court was delivered by: **S.K. SETH, J.**

Short Note (DB)

****(40)***

Before Mr. Justice S.K. Seth & Mr. Justice M.C. Garg

Cr.A. No. 169/2002 (Indore) decided on 15 December, 2011

GULAB SINGH ...Appellant

Vs.

STATE OF M.P. ...Respondent

A. ***Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d) & 13(2) – Appellant – Assistant Sub-Inspector of Police – Illegal gratification – Sanction – Objection –*** **Authority has not considered the material before granting the sanction – Question of validity of sanction has not been pursued at the time of pendency of the trial – Held – Courts will not sit in appeal to judge the adequacy of material granting sanction – The object of the Act is not to provide to a public servant a safeguard for his incriminating act by raising the technical plea of invalidity of sanction – Provisions of the Act of 1988 are a safeguard for the innocent and is not a shield for the guilty – Objection turned down.**

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1)(डी) व 13(2) – अपीलार्थी – सहायक उप–निरीक्षक पुलिस – अवैध परितोषण – मंजूरी – आक्षेप – प्राधिकारी ने मंजूरी प्रदान करने से पूर्व सामग्री पर विचार नहीं किया – विचारण के लंबित रहने के दौरान मंजूरी की विधिमान्यता के प्रश्न का विचारण नहीं चाहा गया – अभिनिर्धारित – न्यायालय मंजूरी प्रदान करने वाली सामग्री की पर्याप्तता तय करने हेतु अपील नहीं सुनेंगे – अधिनियम का उद्देश्य, मंजूरी की अविधिमान्यता के तकनीकी अभिवाक् को उठाकर लोकसेवक को उसके अपराधरोपक कृत्य हेतु संरक्षण प्रदान करना नहीं है – 1988 के अधिनियम के उपबंध निर्दोषों के संरक्षण हेतु हैं और न कि दोषी हेतु ढाल – आक्षेप अस्वीकार किया गया।

***B. Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d) & 13(2) – Appellant – Assistant Sub-Inspector of Police – Illegal gratification – Facts* – Accident case – F.I.R. – Compromise between parties – Appellant demanding Rs. 500/- as illegal gratification for closing the matter – Complaint to Lokayukt – Illegal demand was recorded in a tape recorder – Case was registered – Trap laid – Appellant caught red handed with tainted currency notes – Currency notes and jacket of the appellant seized – F.S.L. report positive – Trial Court – Conviction & Sentence – Appeal against – Held – It is nobody's case that the currency notes were handed over by the complainant to the appellant for any other purpose than by way of illegal gratification, so it is a necessary conclusion that the currency notes were given as a motive or reward for showing favour and this fact is duly supported by testimony of 18 prosecution witnesses – Conviction & sentence awarded by the Trial Court upheld – Appeal dismissed.**

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1)(डी) व 13(2) – अपीलार्थी – सहायक उप–निरीक्षक पुलिस – अवैध परितोषण – तथ्य – दुर्घटना मामला – प्रथम सूचना प्रतिवेदन – पक्षकारों के मध्य समझौता – अपीलार्थी द्वारा मामले को समाप्त करने हेतु अवैध परितोषण के रूप में 500/– रू. की मांग की गई – लोकायुक्त को परिवाद – अवैध मांग टेप रिकार्डर में अभिलिखित की गई – प्रकरण दर्ज किया गया – जाल बिछाया गया – अपीलार्थी दूषित करेंसी नोटों के साथ रंगे हाथों पकड़ा गया – करेंसी नोटों एवं अपीलार्थी की जैकेट को जब्त किया गया – एफ.एस.एल. रिपोर्ट सकारात्मक – विचारण न्यायालय – दोषसिद्धि एवं दण्डादेश – के विरूद्ध अपील – अभिनिर्धारित – यह किसी का मामला नहीं है कि परिवादी द्वारा अपीलार्थी को करेंसी नोट अवैध परितोषण के अलावा किसी अन्य प्रयोजन हेतु सौंपे गए थे, इसलिए यह आवश्यक निष्कर्ष है कि करेंसी नोटों को अपने पक्ष में कृपा दर्शाने के उद्देश्य या इनाम के रूप में दिये गये थे एवं यह तथ्य 18 अभियोजन साक्षीगण की परिसाक्ष्य द्वारा सम्यक् रूप से समर्थित है – विचारण न्यायालय द्वारा पारित दोषसिद्धि एवं दण्डादेश की पुष्टि की गई – अपील खारिज।

The judgment of the Court was delivered by: **S.K. SETH, J.**

NOTES OF CASES SECTION

Short Note (DB)

****(41)***

Before Mr. Justice S.K. Seth & Mr. Justice M.C. Garg

Cr.A. No. 612/2005 (Indore) decided on 15 December, 2011

IMRAN HUSSAIN ...Appellant

Vs.

STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 302 – Murder – Facts – **Appellant attacked his cousin with a knife in the market – Injured was immediately taken to hospital – Declared dead – P.M. Report reveals homicidal death – During T.I. Parade, appellant identified by PW-1 – Seizure and recovery of knife – Motive – Long pending property dispute – F.I.R. lodged within 15 to 20 minutes of the incident – Trial Court – Conviction – Sentence – Appeal against – Held – There are overwhelming evidence against the appellant consisting of eye witnesses consistently speaking about the attack made by the appellant, oral dying declaration, seizure & recovery of knife proved by Panch Witness, motive for the crime proved, FIR was also lodged without delay – Conviction & sentence awarded by the trial Court upheld – Appeal dismissed.**

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – तथ्य – अपीलार्थी ने अपने रिश्ते के भाई पर बाजार में चाकू से हमला किया – आहत को तत्काल चिकित्सालय ले जाया गया – मृत घोषित – शव परीक्षण रिपोर्ट मानववध स्वरूप मृत्यु प्रकट करती है – शिनाख्त परेड के दौरान, अ.सा.–1 द्वारा अपीलार्थी की पहचान की गई – चाकू की जब्ती एवं बरामदगी – हेतुक – दीर्घकाल से लंबित सम्पत्ति विवाद – घटना के 15 से 20 मिनट के भीतर प्रथम सूचना प्रतिवेदन दर्ज – विचारण न्यायालय – दोषसिद्धि – दण्डादेश – के विरूद्ध अपील – अभिनिर्धारित – अपीलार्थी के विरूद्ध पर्याप्त साक्ष्य हैं जिसमें अपीलार्थी द्वारा किए गए हमले के बारे में सुसंगत रूप से कथन करने वाले चक्षुदर्शी साक्षीगण शामिल हैं, मौखिक मृत्युकालिक कथन, चाकू की जब्ती एवं बरामदगी पंच साक्षी द्वारा प्रमाणित अपराध का हेतुक भी साबित, बिना विलंब के प्रथम सूचना प्रतिवेदन दर्ज की गई – विचारण न्यायालय द्वारा दी गई दोषसिद्धि एवं दण्डादेश अभिपुष्ट – अपील खारिज।

The judgment of the Court was delivered by: **S.K. Seth, J.**

NOTES OF CASES SECTION

Short Note

****(42)***

Before Mr. Justice Sheel Nagu

W.P. No. 3382/2014 (S) (Gwalior) decided on 17 April, 2015

RAJ KUMAR RONIYA ...Petitioner

Vs.

UNION OF INDIA & ors. ...Respondents

Service Law – Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), Section 2(t) – Transfer **– Petitioner suffering from mental ailment – It was incumbent upon employer/respondents to have first ascertained as to whether the petitioner suffers from disability as defined in the Act of 1995 or not before transferring the petitioner to the post carrying lower rank – Held – Employer/respondents failed to apply it's mind while issuing the transfer order especially before ascertaining whether the petitioner suffers from disability as defined in Section 2(t) of 1995 Act or not – If the petitioner is suffering from the said disability, then the protections under Chapter VI are available to the petitioner.**

सेवा विधि – निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995 (1996 का 1), धारा 2(टी) – स्थानांतरण – याची मानसिक बीमारी से पीड़ित है – याची को निम्नतर श्रेणी के पद पर स्थानांतरित करने से पहले नियोक्ता/प्रत्यर्थीगण के लिए पहले यह अभिनिश्चित कर लेना अनिवार्य था कि क्या याची 1995 के अधिनियम में परिभाषित निःशक्तता से पीड़ित है या नहीं – अभिनिर्धारित – नियोजक/प्रत्यर्थीगण, स्थानांतरण आदेश जारी करते समय अपना मस्तिष्क लगाने में असफल रहा मुख्यतः यह अभिनिश्चित करने से पूर्व कि क्या याची 1995 के अधिनियम की धारा 2(टी) में परिभाषित निःशक्तता से पीड़ित है या नहीं – यदि याची कथित निःशक्तता से पीड़ित है, तब याची को अध्याय VI के अंतर्गत सुरक्षा उपलब्ध हैं।

Jitendra Sharma, for the petitioner.

Vivek Khedkar, Assistant Solicitor Gerneral for the respondents.

NOTES OF CASES SECTION

Short Note (DB)

**(43)*

Before Mr. Justice S.K. Seth & Mr. Justice M.C. Garg

Cr.A. No. 393/1997 (Indore) decided on 15 December, 2011

SHABBIR ...Appellant

Vs.

STATE OF M.P. ...Respondent

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8/21 – Facts – Secret information **– Appellant having smack in his possession and waiting on railway platform to board Dehradoon Express – Information was reduced into writing and 'Panchnama' was prepared – Superior officer was informed before proceeding – A.S.I. alongwith three constables and two 'Hammals' proceeded to the spot – As per Section 50 of the Narcotic Drugs and Psychotropic Substances Act search was carried out – 100 gm. of contraband smack was seized – F.I.R. was registered – F.S.L. report positive – Charge sheet filed – Trial – Conviction and sentence – Appeal against – Held – The prosecution has examined two police witnesses but no independent witness has been examined – Two panch witnesses PW-1 and PW-2 turned hostile and rest of the witnesses are formal witness, so there is no other material to support the two prosecution witnesses – Except for 'Hammals' i.e. PW-1 and PW-2, no one else was available to the prosecution as independent witness – Prosecution case does not inspire confidence – Judgment of conviction and sentence set aside – Appeal allowed.**

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 8/21 – तथ्य – गुप्त सूचना – अपीलार्थी अपने कब्जे में स्मैक लिए हुए, देहरादून एक्सप्रेस में बैठने हेतु रेलवे प्लेटफॉर्म पर प्रतीक्षा कर रहा था – सूचना को लेखबद्ध कर पंचनामा तैयार किया गया – प्रस्थान करने से पहले वरिष्ठ अधिकारी को सूचित किया गया – सहायक उप–निरीक्षक ने तीन सिपाही एवं दो 'हम्माल' के साथ घटनास्थल को प्रस्थान किया – स्वापक औषधि और मनः प्रभावी प्रदार्थ अधिनियम की धारा 50 के तहत तलाशी ली गई – 100 ग्राम विनिषिद्ध स्मैक जब्त की गई – प्रथम सूचना प्रतिवेदन दर्ज की गई – एफ.एस.एल. रिपोर्ट सकारात्मक पाई गई – अभियोग पत्र प्रस्तुत – विचारण – दोषसिद्धि एवं दण्डादेश – के विरूद्ध अपील – अभिनिर्धारित – अभियोजन ने दो पुलिस साक्षियों का परीक्षण किया परन्तु किसी स्वतंत्र साक्षी का परीक्षण नहीं किया गया है – दोनों पंच साक्षी अ.सा.–1 एवं अ.

सा.–2 पक्षद्रोही हो गए तथा शेष साक्षी औपचारिक साक्षी हैं, अतः दोनों अभियोजन साक्षियों का समर्थन करने हेतु अन्य कोई सामग्री नहीं है – 'हम्माल' जो कि अ.सा. –1 एवं अ.सा.–2 हैं के सिवाय कोई अन्य स्वतंत्र साक्षी के रूप में अभियोजन को उपलब्ध नहीं था – अभियोजन प्रकरण विश्वास उत्पन्न नहीं करता है – दोषसिद्धि एवं दण्डादेश का निर्णय अपास्त – अपील मंजूर।

The judgment of the Court was delivered by: **S.K. SETH, J.**

Short Note

****(44)***

Before Mr. Justice Alok Verma

C.R. No. 07/2016 (Indore) decided on 29 July, 2016

SHANTILAL (DR.) ...Applicant

Vs.

MODIRAM ...Non-applicant

A. Civil Procedure Code (5 of 1908), Section 115 – Maintainability – **Revision against order condoning delay in filing appeal arising from dismissal of eviction suit – Held – The order is such that if reversed then appeal would be dismissed as time barred, therefore order is revisable – Revision maintainable.**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 115 – पोषणीयता – बेदखली के वाद की खारिजी से उत्पन्न अपील प्रस्तुत करने में हुए विलंब की माफी के आदेश के विरूद्ध पुनरीक्षण – अभिनिर्धारित – आदेश ऐसा है कि यदि उलट दिया जाता है तो अपील समय वर्जित होने से खारिज होगी, अतः आदेश पुनरीक्षण योग्य है – पुनरीक्षण पोषणीय।

B. Evidence Act (1 of 1872), Section 101 – Burden of proof – **Medical Certificate can be proved either by medical practitioner or by person who suffered from disease and consulted doctor and if certificates were alleged to be forged one, then the burden lies on the person who alleges forgery.**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 101 – सबूत का भार – चिकित्सा प्रमाण–पत्र को या तो चिकित्सा व्यवसायी द्वारा या उस व्यक्ति द्वारा जो रोग से ग्रसित था तथा चिकित्सक से परामर्श लिया, साबित किया जा सकता है एवं यदि प्रमाण–पत्रों के कूटरचित होने का अभिकथन किया गया था तो साबित करने का भार उस व्यक्ति पर होगा जिसने कूटरचना का अभिकथन किया हो।

Case referred:

AIR 2008 SC 2607.

R.M. Deshpande, for the applicant.
M.N. Tiwari, for the non-applicant.

Short Note
****(45)***
Before Mr. Justice Prakash Shrivastava
W.P. No. 9005/2010 (Indore) decided on 7 April, 2015

SHERU KHAN ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Service Law – **Deleting the name from select list to the post of constable – Denying the appointment – Petitioner had suppressed the information relating to two criminal cases in which he was prosecuted – Therefore, respondents have committed no error in finding the petitioner unsuitable for the post of constable and striking out his name from select list.**

क. सेवा विधि – आरक्षक के पद के लिए चयन सूची से नाम हटाया जाना – नियुक्ति को अस्वीकार किया जाना – याची ने दो आपराधिक प्रकरणों से संबंधित जानकारी को छिपाया था जिसमें उसे अभियोजित किया गया था – इसलिए, प्रत्यर्थीगण ने याची को आरक्षक पद के लिए अनुपयुक्त पाने में एवं चयन सूची से उसका नाम काटने में कोई त्रुटि कारित नहीं की है।

B. Police Regulations, M.P. – Regulation 53 (c) – Requirement – **Candidate to have good moral character and antecedents – Considering the nature of discipline and standard which is required to be maintained in the police force, decision of respondents cannot be faulted.**

ख. पुलिस विनियमन, म.प्र. – विनियम 53(सी) – आवश्यकता – अभ्यर्थी का अच्छा नैतिक चरित्र एवं पूर्ववृत्त होना – अनुशासन की प्रकृति एवं मानक जो पुलिस बल में बनाए रखा जाना आवश्यक है पर विचार करते हुए, प्रत्यर्थीगण का आदेश दोषयुक्त नहीं पाया जा सकता।

NOTES OF CASES SECTION

Cases referred:

AIR 1978 SC 851, 2003 (3) SCC 437, (2005) 7 SCC 177, (2008) 1 SCC 660, (2010) 14 SCC 103, (2013) 9 SCC 363.

Sunil Jain with *Aviral Vikas*, for the petitioner.
Vinita Phaye, for the respondents.

I.L.R. [2016] M.P., 3211

SUPREME COURT OF INDIA

Before Mr. Justice Anil R. Dave, Mr. Justice A.K. Sikri, Mr. Justice R.K. Agrawal, Mr. Justice Adarsh Kumar Goel & Mrs. Justice R. Banumathi

C.A. No. 4060/2009 order passed on 17 March, 2016

MODERN DENTAL COLLEGE & RESEARCH CENTER & anr. ...Appellants

Vs.

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

A. ***Post-Graduate Medical Education Regulations, 2000 - Admission - Post Graduate Course - Private Medical Colleges*** **- 50% of the students pursuant to examination conducted by the applicant association and 50% of the students to be given admission as per the recommendation of the State. (Para 9)**

क. *स्नातकोत्तर आयुर्विज्ञान शिक्षा विनियमन, 2000 – प्रवेश – स्नातकोत्तर पाठ्यक्रम – निजी आयुर्विज्ञान महाविद्यालय* – 50% छात्रों को आवेदक संघ द्वारा संचालित परीक्षा के अनुसरण में एवं 50% छात्रों को राज्य की अनुशंसा पर प्रवेश दिया जाएगा।

B. ***Post-Graduate Medical Education Regulations, 2000 - Admission - Private Medical Colleges - Post Graduate Course -*** **Applicants permitted to select candidates on the basis of their inter-se merit for the session 2016-17 batch from the list of successful candidates. (Para 11)**

ख. *स्नातकोत्तर आयुर्विज्ञान शिक्षा विनियमन, 2000 – प्रवेश – निजी आयुर्विज्ञान महाविद्यालय – स्नातकोत्तर पाठ्यक्रम* – आवेदकों को सत्र 2016–17 के बैच हेतु अभ्यर्थियों का चयन सफल अभ्यर्थियों की सूची में से परस्पर मेरिट के आधार पर किये जाने की अनुमति दी गई।

ORDER

Heard the learned counsel.

2. The following prayer is made in this application :

"a) Direct that for the academic session 2016-17, the admission for all the seats in the private colleges in Under Graduate &

Post Graduate Courses would be given only on the basis of the Common Entrance Test conducted by the APDMC i.e. SSET, DMAT and Pre PGDMAT."

3. It would be pertinent to note that a similar prayer was made in I.A.No.74 of 2014 and the said application had been dismissed by an order dated 12th February, 2015. The said IA had been filed with respect to admission of students for the academic year 2015-16 whereas the present application is in respect of admission of students for the academic year 2016-17.

4. It has been brought to our notice by the learned counsel appearing for State of Madhya Pradesh that no averment has been made with regard to the earlier application, i.e., I.A.No.74/2014, which had been filed by the present applicants and was dismissed on 12th February, 2015.

5. There is no prayer in the present application for holding an examination for giving admission to students for the Academic Year 2016-17 in consonance with the arrangement which had been made in the interim order dated 27th May, 2009.

6. That apart, we also find that as per the provisions of Post-Graduate Medical Education Regulations, 2000, as amended from time to time, examination for admitting students for post graduate studies should have been concluded before 15th February, 2016. It is an admitted fact that no examination had been conducted by the applicants for the said purpose till date, though the last date of examination, i.e., 15th February, 2016, lapsed much earlier. Allowing the applicants to conduct the examination at this stage will disturb the entire schedule of admission stipulated in the afoesaid (sic:aforesaid) Regulations.

7. According to the aforesaid Regulations, the first round of counseling/ admission has to be concluded between 4th to 15th April, 2016, which is the next step.

8. We may record that a fervent plea was made by the learned senior counsel for the applicants to extend the date of conducting the examination till 31st March, 2016. However, we feel that it would not be possible for the applicants to hold the examination in a fair and transparent manner in such a short period and to start the first round of counselling/admission by 4th April,

2016 and conclude the same by 15th April, 2016.

9. As per the interim arrangement made under the orders dated 27th May, 2009, the medical colleges of State of Madhya Pradesh are permitted to admit 50% of the students in pursuance to the examination conducted by the applicant association whereas 50% of the students are to be given admission as per the recommendation of the State. We are informed that for the last few years, the State of M.P. is sending the names of the candidates from the merit list prepared of those who appeared in All India Examination held for the purpose. Same procedure be adhered to for this year as well.

10. Insofar as the All India Examination is concerned, it has already been held as per the stipulated time schedule and the result of the said examination has already been declared. Thus, a list of successful candidates, who have passed the said examination is available at present.

11. In the aforesaid circumstances, we permit the applicants, to select candidates, on the basis of their inter-se merit, for admission to 2016-17 batch of post-graduate course from the aforestated list of successful candidates.

12. The counselling shall be done by the State and the fees which might be collected from the students by the State shall be paid by the State to the concerned medical college.

13. In view of the above interim order, Interlocutory Application No.83 of 2015 stands disposed of.

Order accordingly.

I.L.R. [2016] M.P., 3213

SUPREME COURT OF INDIA

Before Mr. Justice V. Gopala Gowda & Mr. Justice Arun Mishra

C.A. No. 4817/2016 decided on 5 May, 2016

STATE OF M.P. & ors. ...Appellants

Vs.

M/S. RUCHI PRINTERS ...Respondent

(Alongwith C.A. No. 4818/2016 & C.A. No. 4819/2016)

***Works Contract - Printing of Bhu-Adhikar & Rin Pustikas* - Printing order placed on 16.01.2008 with the respondents - Supply of**

37, 07, 726 copies of Pustikas - Half to be supplied till 08.02.2008 - Rest to be supplied before 25.02.2008 - On 25.02.2008 modified booklet approved and printer asked to ensure supply - Letter dated 28.03.2008 fixing the time limit for supply of Booklets till 31.03.2008 - After 31.03.2008 no booklets will be accepted - Respondent challenging letter dated 28.03.2008 by way of Writ Petition - Petition allowed by High Court - State directed to accept the Rin Pustikas and to make the payment - State preferred Writ Appeal - Dismissal thereof - Held - As the order was placed on 16.01.2008 and booklets were to be supplied till 25.02.2008, and as time was essence of the contract and by letter dated 28.03.2008 it was made clear that the supply was to be made till 31.03.2008 and there after no supply will be accepted, so it means that after 31.03.2008 the work order is to be treated as cancelled - Communication dated 22.05.2008 has been recalled by letter dated 30.01.2009, so there was no rhyme or reason for the Printer to print the Booklets after 31.03.2008 - Division Bench erred in directing that the Booklets printed till 22.05.2008 be accepted as after 31.03.2008 as no work order was in existence - Direction - Payment be made to the Printer, if not made, for the supply made till 31.03.2008 - Impugned order set aside - Appeal allowed. (Paras 3, 7 & 8)

कार्य संविदा – मू–अधिकार एवं ऋण पुस्तिकाओं का मुद्रण – दिनाँक 16.01.2008 को प्रत्यर्थीगण को मुद्रण आदेश दिया गया – पुस्तिका की 37,07,726 प्रतियों की आपूर्ति – दिनाँक 08.02.2008 तक आधी प्रतियों की आपूर्ति की जानी थी – शेष प्रतियों की आपूर्ति 25.02.2008 के पूर्व की जानी थी – दिनाँक 25.02.2008 को संशोधित पुस्तिका को मंजूर किया गया तथा मुद्रक को आपूर्ति सुनिश्चित करने कहा गया – पत्र दिनाँक 28.03.2008 द्वारा पुस्तिकाओं की आपूर्ति के लिए दिनाँक 31.03.2008 तक समय सीमा तय की गई – दिनाँक 31.03.2008 के बाद पुस्तिकाएँ स्वीकार नहीं की जाएंगी – प्रत्यर्थी द्वारा रिट याचिका के माध्यम से पत्र दिनाँक 28.03.2008 को चुनौती दी गई – उच्च न्यायालय द्वारा याचिका मंजूर – राज्य को ऋण पुस्तिकाओं को स्वीकार कर भुगतान किये जाने हेतु निदेशित किया – राज्य ने रिट अपील दायर की – उसे खारिज किया गया – अभिनिर्धारित – जैसा कि कार्य आदेश दिनाँक 16.01.2008 को प्रस्तुत किया गया था और दिनाँक 25.02.2008 तक पुस्तिकाओं की आपूर्ति की जानी थी और क्योंकि समय संविदा का सार (मूल तत्व) था और दिनाँक 28.03.2008 के पत्र द्वारा यह स्पष्ट किया गया था कि आपूर्ति 31.03.2008 तक की जानी चाहिए और उसके बाद आपूर्ति स्वीकार नहीं की जाएगी अर्थात् 31.03.2008 के बाद कार्य आदेश रद्द माना जाएगा – संसूचना दिनाँक 22.05.2008 को पत्र दिनाँक 30.01.2009 द्वारा वापिस लिया गया, अतः 31.

03.2008 के बाद पुस्तिकाओं को मुद्रित करने के लिए मुद्रक के पास कोई उपयुक्त कारण नहीं था – खंड न्यायपीठ ने यह निर्देश देने में भूल कर दी कि 22.05.2008 तक मुद्रित पुस्तिकाओं को भी स्वीकार किया जाएगा क्योंकि दिनाँक 31.03.2008 के पश्चात् ऐसा कोई कार्य आदेश अस्तित्व में नहीं था – निर्देश – मुद्रक को दिनांक 31.03.2008 तक की गई आपूर्ति के लिए, यदि न किया गया हो भुगतान किया जाए – आक्षेपित आदेश अपास्त – अपील मंजूर।

JUDGMENT

The Judgment of the Court was delivered by : ARUN MISHRA, J. :- Leave granted.

2. The State has preferred the appeal as against the judgment and order passed by the High Court of M.P. in the writ appeal and the writ petitions decided by a common order dated 4.9.2012 dismissing the writ appeal and allowing the petitions, thereby directing the State Government to accept all materials which was ready for delivery on 22.5.2008 and quashing order dated 30.1.2009 cancelling the communication dated 22.5.2008. Further direction has been issued to make payment to the printers as per the terms and conditions of the order dated 16.1.2008 read with order dated 25.2.2008.

3. Facts in short referred to from SLP [C] No.32730/2013 – State of M.P. & Ors. v. M/s. Ruchi Printers indicate that the State Printing & Writing Articles Department of Madhya Pradesh through its Controller, invited quotations vide letter dated 2.1.2008 for printing Bhu-Adhikar and Rin Pustikas. On 16.1.2008 printing order was placed with M/s. Ruchi Printers for supply of 37,07,726 copies of Bhu-Adhikar and Rin Pustika. At least half of the booklets were to be supplied in the first lot till 8.2.2008 and the rest were to be supplied before 25.2.2008. On 25.2.2008 the Deputy Controller wrote a letter on behalf of the Controller while approving the modified booklet. The printers were asked to ensure the supply after printing the allotted work. On 28.3.2008 another letter was written that the time limit fixed was already over so rest of the work may be completed till 31.3.2008. After 31.3.2008 no booklets shall be accepted. The decision dated 28.3.2008 was questioned by filing writ petitions. Said writ petition filed by M/s. Ruchi Printers had been allowed by Single Bench vide common judgment and order dated 6.11.2008. State was directed to accept the supply of 10.75 lakhs of Rin Pustikas from M/s. Ruchi Printers and to make payment in accordance with the terms and conditions of the contract. In another W.P. No.10319/2008 decided by same

order, the single Bench asked the petitioner to approach the State Government and the Government to consider the claim in respect of the materials already supplied and to settle the claim if not already settled. No other relief was given.

4. Aggrieved by the order passed in the case of Ruchi Printers, State preferred a writ appeal which was heard and decided with writ petitions by impugned common order.

5. It was submitted on behalf of learned counsel appearing on behalf of the State that the High Court has erred in law in allowing the writ petitions and dismissing the writ appeal. As per the initial order, booklets were required to be supplied by 25.2.2008. Time was essence of contract. Though time was extended but it was made clear that after 31.3.2008 no such booklets will be accepted, later on its format had been changed for the subsequent year as such they were of no use to the State. The payment was required to be made only on account of booklets which were supplied till 31.3.2008. Letter dated 22.5.2008 was cancelled by the State Government on 30.1.2009 and supply after 31.3.2008 had not been accepted as it was of no use due to change of format. The writ petition could not be said to be an appropriate remedy for claiming the amount in case of non-statutory contract. The High Court has erred in directing the State Government to accept the booklets printed till 22.5.2008.

6. Learned counsel appearing on behalf of the respondents has supported the impugned judgment and orders passed by the High Court and has submitted that in the writ petition filed by Ruchi Printers, order had been passed by Single Bench on 6.11.2008 to make payment within three months as per the communication dated 22.5.2008. Thus there was no justification to recall the communication dated 22.5.2008 by issuance of letter dated 30.1.2009. As the booklets had been printed the High Court had rightly directed to accept the supply. Thus no case for interference is made out.

7. After hearing learned counsel for the parties, we are of the opinion that the order for printing booklets was placed with printers on 16.1.2008. The booklets were to be supplied on time bound basis by 25.2.2008. The respondents were well aware that the time was the essence of the contract and there was requirement of these booklets on time bound basis. Though communication dated 25.2.2008 approving format was issued but the

respondents very well knew that the time was the essence of contract and the printing of booklets was to be completed at the earliest. However as supplies were not made as stipulated, even within one month after 25.2.2008, another communication dated 28.3.2008 was issued by the Controller to supply Rin Pustikas before 31.3.2008. In case any work remains incomplete, the work order be treated as cancelled. Thus, in unequivocal terms, it was made clear that no booklets were to be received after 31.3.2008 and whatever booklets were ready they were to be supplied by 31.3.2008. Thus, in our opinion, there was no rhyme or reason for printers to print any booklets after cancellation of order w.e.f. 31.3.2008 till 22.5.2008. Printing of booklets after 31.3.2008 was wholly unauthorized. No doubt about it that on 22.5.2008 the Under Secretary had issued a communication that certain specified number of booklets may be accepted. However, the said communication had been recalled on 30.1.2009. The High Court, in our opinion, was not at all justified in enforcing the communication dated 22.5.2008 which was palpably illegal and there was reason for the printers to print the booklets after 31.3.2008. In view of aforesaid fact, the communication dated 22.5.2008 had been rightly cancelled on 30.1.2009 as these booklets were no more required by State Government due to further change of format of booklets. Even otherwise timely supply was necessary as per order dated 16.1.2008 though the communication dated 25.2.2008 was silent as to the time within which the supply was to be made. The printers were very well aware that booklets were required urgently and time was essence of the contract and time for supply could not have been more than what was originally stipulated. Sufficient time had been given to them to supply the booklets and the booklets supplied by them till 31.3.2008 had been accepted by the appellants and payment has also been made. Thus after the order for printing booklets stood cancelled on failure to supply within the stipulated period, the contract came to an end, there was no reason for the printers to print the booklets. No communication has been placed on record between 31.3.2008 and 22.5.2008 asking printers to print and supply the booklets. No right could be said to have accrued on the basis of palpably illegal communication dated 22.5.2008. The Division Bench of the High Court in the circumstances of the case has erred in directing that the booklets printed till 22.5.2008 be accepted. Booklets printed after 31.3.2008 were without any work order in existence. The communication dated 25.2.2008 did not confer on them a right to print books after 31.3.2008. Whatever booklets they had supplied till 31.3.2008 were accepted. Thus,

the High Court has erred in the facts of the case to interfere in contractual matter and by granting the relief. However, we observe that in case payment has not been made to the printers for booklets which were supplied till 31.3.2008, it shall be made forthwith.

8. Thus, the impugned judgment and order is set aside, the appeals are allowed. Parties to bear their own costs.

Appeal allowed.

I.L.R. [2016] M.P., 3218
FULL BENCH
Before Mr. Justice A.M. Khanwilkar, Chief Justice,
Mr. Justice Shantanu Kemkar & Mr. Justice J.K. Maheshwari
Comp. Pet. No. 10/2015 (Jabalpur) decided on 24 August, 2015

JONATHAN ALLEN ...Petitioner
Vs.
ZOOM DEVELOPERS PRIVATE LIMITED ...Respondent

A. ***Company Act (1 of 1956), Sections 433 (e) & 434*** **- Locus to file petition under - Unpaid salary/wages & emoluments - Employee of the company has locus to file Company Petition as having been filed by a creditor of the company - Petition is maintainable. (Para 29)**

क. *कम्पनी अधिनियम (1956 का 1), धाराएँ 433(इ) व 434* – के अंतर्गत याचिका प्रस्तुत करने हेतु अधिकार – असंदत्त वेतन/मजदूरी तथा परिलब्धियाँ – कम्पनी के कर्मचारी के पास कम्पनी याचिका प्रस्तुत करने के लिए अधिकार है जैसे कि कम्पनी के लेनदार द्वारा प्रस्तुत की जाती है – याचिका पोषणीय है।

B. ***Company Act (1 of 1956), Section 433 (e) - Debt - Meaning*** **- Any pecuniary liability, whether payable presently or in future or whether ascertained or to be ascertained - Any liability which is claimed as due from any person. (Para 17)**

ख. *कम्पनी अधिनियम (1956 का 1), धारा 433(इ)* – *ऋण* – *अर्थ* – कोई आर्थिक दायित्व, चाहे वह वर्तमान में देय हो अथवा भविष्य में या चाहे वह अभिनिश्चित किया गया हो अथवा किया जाना हो – कोई दायित्व जिसका किसी व्यक्ति से देय के रूप में दावा किया गया है।

C. ***Company Act (1 of 1956), Sections 433 (e) & 434*** **- Unpaid**

salary/wages of workman/employee is covered within the meaning of 'debts' under Section 433(e). (Para 12)

ग. कम्पनी अधिनियम (1956 का 1), धाराएँ 433(ई) व 434 – कर्मकार/कर्मचारी की असंदत्त वेतन/मजदूरी धारा 433(ई) के अंतर्गत 'ऋणों' के अर्थ के अंतर्गत आता है।

Cases referred:

AIR 1996 MP 85, (1966) 59 ITR 767, (1985) 3 SCC 398, (1998) 93 Company Cases 291 (AP), (2003) 116 Company Cases 448 (AP), (2006) 133 Company Cases 49 (Delhi), (1983) 1 SCC 228, (2002) 110 Company Cases 408, (2010) 10 SCC 553.

Vijayesh Atri, for the petitioner.
Kapil Jain, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by :

A.M. KHANWILKAR, C.J. :- This matter has been placed before the Full Bench in terms of order passed by the learned Company Judge dated 18.09.2013, in Company Petition No.4/2010. The question formulated for consideration reads thus:

> "Whether unpaid wages/salary of workman/employee can be covered within the meaning of debts under Section 433(e) of the Companies Act, 1956 and the view taken by learned Single Judge in the matter of *Pawan Kumar Khullar Vs. Kaushal Leather Board Limited,* reported in AIR 1996 MP 85 in this regard is correct?"

2. Briefly stated, the Company Petition for winding up of Respondent-Company is filed on the assertion that the respondent-Company had engaged the petitioner to manage the Asset Management Business in Singapore vide letter dated 05.03.2008 and subsequent employment letter dated 18.04.2008. The petitioner was accordingly appointed as the Chief Executive Officer of the respondent-Company and was assured payment of a gross annual salary of S$ 650,000 being S$ 54,166 per month. The petitioner was also offered two years employment, a fixed and guaranteed annual bonus of S$ 450,000. Further, the respondent-Company was fully satisfied by the services rendered

by the petitioner after his appointment and was receiving regular monthly salary till 31.03.2009. However, after 31.03.2009 as the respondent-Company failed and neglected to pay monthly salary to the petitioner in spite of several requests made by the petitioner to the respondent-Company in that behalf until 14.09.2009, which resulted in penury condition for the petitioner. The petitioner, therefore, resigned from service on 14.09.2009 by sending a resignation letter to the respondent- Company and also demanded his rightful dues including the outstanding salary of S$ 297,961.67 for the period between 1.4.2009 to 14.9.2009, the fixed and guaranteed bonus of S$ 131,250 for the period starting from 18.04.2009 till 14.09.2009, aggregating to S$ 879,211.67 which is equivalent to Indian Rs.3,00,69,039 (Rupees Three Crores Sixty Nine Thousand and Thirty Nine Only) at the conversion rate of Indian Rs.34.2 (Rupees Thirty Four and Two Paise) for each Singapore Dollar as on 14.09.2009.

3. According to the petitioner, in spite of repeated oral as well as written reminders, the respondent-Company paid no heed to discharge its debts payable to the petitioner towards outstanding salary and emoluments for the services rendered by him. The petitioner, however, was informed by the respondent- Company that the fund flow situation of the Company was yet to improve. Thus, being unconvinced with the excuse given by the respondent-Company, which was avoiding to discharge its obligation to pay its debt amount to the petitioner and was unable to pay the same, the petitioner sent a legal notice dated 26.09.2009 to the respondent-Company demanding a sum of S$ 879,211,67, giving the breakup of the amount.

4. According to the petitioner, the respondent-Company vide letter dated 14.12.2009 admitted its liability, by stating, *inter alia*, that the respondent-Company was facing financial crisis and unable to make the payment due to prevailing market situation. By the said communication, the respondent-Company also volunteered to amicably settle the matter with the petitioner. The petitioner vide letter dated 26.12.2009 responded by stating that he had shown enough patience for more than 6 months with a hope of settlement of his dues and for that had even given up his II year guaranteed bonus of S$ 131,250. Nevertheless, the petitioner informed that he was willing to discuss about amicable settlement, without prejudice to his rights and contentions. The respondent-Company, however, by letter dated 31.12.2009 even though admitted its liability to pay salary to the petitioner, raised issue of no business

brought by the petitioner, for which, was not entitled to receive any bonus. In the said communication, the respondent-Company, however, expressed willingness to pay only salary of the petitioner, amounting to S$ 297,961.67, in three to four installments because of the financial crisis faced by the respondent- Company. The petitioner by his letter dated 08.01.2010 reiterated that he was entitled to receive the sum of S$ 747,961.67 after foregoing II year guaranteed bonus of S$ 131,250. Finally, as the petitioner did not receive any favourable response from the respondent-Company nor his outstanding dues were settled, was forced to file Company Petition under Sections 433 and 434 of the Companies Act, 1956 (for brevity "Act"), on 27.01.2010.

5. Besides the Company Petition filed by the petitioner, two more Company Petitions have been filed against the respondent-Company being Company Petition No.3/2010 (filed by The Hongkong and Shanghai Banking Corporation) and Company Petition No.9/2011 (filed by UCO Bank).

6. In the Company Petition filed by the petitioner herein, the respondent-Company *inter alia* raised objection regarding the *locus* of the petitioner to pursue his claim of outstanding salary, wages and emoluments, which became payable to him whilst in service and employment of the respondent-Company. According to the respondent-Company, dues towards salary, wages and emoluments being remuneration, does not become "debt" within the meaning of Section 433(e) of the Act. The workman or employee of the Company cannot pursue claim in that behalf as Creditor that too by filing a Company Petition under Sections 433 and 434 of the Act. To buttress this submission, reliance was placed on the decision of the Single Judge of our High Court in the case of *Pawan Kumar Khullar Vs. Kaushal Leather Board Limited*[1].

7. The learned Company Judge, however, found force in the submission of the petitioner that the amount payable to the petitioner by the respondent-Company towards his outstanding salary, wages and emoluments was a debt on the Company within the meaning of Section 433(e) of the Act. The learned Company Judge adverted to the dictum of the Supreme Court in the case of *Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth-Tax (Central) Calcutta*[2]; and in the case of *Union of India Vs. Tulsiram Patel*[3]. Reference is also made to the decision of the Andhra Pradesh High

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1. AIR 1996 MP 85
2. (1966) 59 ITR 767
3. (1985) 3 SCC 398

Court in the case of *Capt. B.S. Demogray Vs. VIF Airways Ltd.*[4], M. *Suryanarayana Vs. Stiles India Ltd.*[5]; and of Delhi High Court in the case of *Argha Sen & Another Vs. Interra Information Technologies (India) Pvt. Ltd.*[6], to disagree with the opinion of the Coordinate Bench in the case of *Pawan Kumar Khullar* (supra). Accordingly, the learned Company Judge thought it appropriate to refer the question of law as formulated in the order dated 18.09.2013 to Larger Bench for consideration.

8. The counsel for the petitioner has relied on the opinion of the Andhra Pradesh High Court and Delhi High Court in support of his argument that the fact that the amount receivable by the petitioner was towards his unpaid salary, wages and emoluments would not cease to be "debt" in terms of Section 433(e) of the Act nor it is possible to suggest that the claim of such debt by the serving or former employee of the Company is anything short of claim by a Creditor. Further, even though the petitioner has ceased to be in the employment of the respondent-Company, the tag of employee or worker of that Company cannot be attached to him. If so understood, the opinion of the Coordinate Bench of this Court in *Pawan Kumar Khullar* (supra) will not come in his way in pursuing the claim under Sections 433 and 434 of the Act against the respondent- Company. Counsel for the petitioner has also relied on the extracts from the Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edition, Vol.1 (at pages 1129 to 1130) and Vol.2 (at pages 1238 to 1243), for the meaning of terms "Creditor" and "Debt" respectively.

9. *Per contra,* counsel for the respondent submits that the fact that the petitioner ceased to be in employment of the respondent-Company will make no difference to the nature of claim of the petitioner. It would still retain the colour of wages, salary and emoluments payable to an employee whilst he was in service of the respondent-Company. Being remuneration payable to an employee, it cannot be considered as a debt within the meaning of Section 433(e) of the Act, nor the status of the petitioner can be treated as Creditor ascribable to Section 439 read with Section 434(1)(a) of the Act. To buttress this submission, reliance has been placed on the dictum of the Supreme Court in *National Textile Workers' Union and Others v. P.R. Ramakrishnan and Others*[7]. According to the respondent, the Supreme Court, in no uncertain terms, has noted that workers are not included in the list of specifically enumerated

4. (1998) 93 Company Cases 291 (AP)
5. (2003) 116 Company Cases 448 (AP)
6. (2006) 133 Company Cases 49 (Delhi)
7. (1983) 1 SCC 228 (para 7 in particular)

persons in Section 439 of the Act and therefore have no right to prefer a petition for winding up of a Company. Further, the right to apply for winding up of a company being a creature of statute, none other than those on whom the right to present a winding up petition is conferred by the statute can make an application for winding up a company and no such right having been conferred on workers, they cannot prefer a winding up petition against the company. According to the respondent-Company, after this dictum, it is no more *res integra* that employees of the Company are not included within the meaning of the term "Creditor" mentioned in Section 439 of the Act. Thus, the learned Company Judge, following that principle, should have rejected the Company Petition filed by the petitioner. Reliance is also placed on the decision of the learned Company Judge of Bombay High Court in the case of *Mumbai Labour Union v. Indo French Time Industries Ltd.*[8], which, essentially, has answered the controversy before it following the dictum in the case of *National Textile Workers' Union* (supra). Learned counsel for the respondent has also invited our attention to Sections 529, 529A and Section 530 of the Act to contend that in view of express provision in the Act giving overriding preferential status to the payment of workman's dues, by necessary implication, it must follow that workers are excluded from pursuing remedy under Sections 433 and 434 of the Act, as also former workman/employee of the Company, for winding up of the Company. It was argued that any other interpretation would result in individual disgruntled workman/employee resorting to remedy under the Companies Act for winding up of the company. Further, that remedy would then be pursued not only by the individual workman/employee, but also by Workmen Trade Unions. The Workmen Trade Unions not only represent the cause of workmen/employees, but also former workmen/employees. For, the claim of workmen/ employees, who are members of the Trade Union, can be espoused only by the concerned Trade Unions. The interpretation given by the petitioner would encourage the Trade Unions to resort to remedy of winding up of the Company, to espouse the cause of its members, instead of pursuing other remedies prescribed by law for resolving such disputes. It is then submitted that the argument of the petitioner that being former employee of the respondent-Company, the legal position expounded by the Supreme Court will have no application to his claim, is also untenable. Reliance has been placed on the decision of Supreme Court in the case of *IBA Health (India) Private Limited v. Info-Drive Systems SDN. BHD*[9], in particular paragraph 34, which has cautioned the Company Courts to

8. (2002) 110 Company Cases 408 9. (2010) 10 SCC 553

keep in mind Public Policy Considerations while considering the relief of winding up of the Company. It is not only a matter of the interests of Creditors, but also interests of public at large.

10. At the outset, we may clarify that the issue under consideration is limited to the *locus* of the petitioner to institute Company Petition for winding up against the respondent-Company in respect of his claim for unpaid salary, wages and emoluments whilst he was in the employment of respondent-Company. We may not be understood to have expressed any opinion about the merits of that claim, which will have to be considered by the Company Judge after the reference is answered.

11. Indisputably, the petitioner was appointed by the respondent-Company vide employment letter dated 18.04.2008 to manage its Asset Management Business in Singapore. The petitioner submitted resignation vide letter dated 14.09.2009 for the stated reasons. According to the petitioner, he has not been paid his monthly salary and other emoluments as per the contract after 01.04.2009 and until the date of his resignation. The respondent-Company has not challenged the fact that the petitioner was employed in the Company between 18.04.2008 to 14.09.2009.

12. In the backdrop of the abovesaid facts, it must follow that the outstanding or unpaid wages/salary of the workman/ employee is a "debt" to be paid by the Company. The expression "debt" has not been defined in the Act. Going by the meaning of term "debts" as understood in common parlance, it is a sum of money due from one person to another. It would not only mean the obligation of the debtor to pay, but also the right of the Creditor to receive and enforce payment. Further, no distinction can be made between remuneration due to be recovered and the sum which is to be recovered as price of goods purchased on credit. The Supreme Court in the case of *Kesoram Industries and Cotton Mills Ltd.* (supra) after considering several decisions on the point from paragraph 23 onwards, summarized the position in paragraph 33, which is as follows:-

> "**33.** To summarize : A debt is a present obligation to pay an ascertainable sum of money, whether the amount is payable in *praesenti or in futuro; debitum in praesenti, solvendum in futuro.* But a sum payable upon a contingency does not become a debt until the said contingency has happened. ....."

13. The application for winding up of the Company, as predicated by Section 439 of the Act, can be presented by the specified enumerated persons. Clause (b) of Sub-section (1) thereof, mentions of any Creditor or Creditors, including any contingent or prospective creditor or creditors. The ground on which relief of winding up of Company can be pursued by the Creditor is ascribable to Section 433(e) of the Act. It envisages - where the company is unable to pay its debts. Where the company is unable to pay its debts, by a deeming provision inserted in the form of Section 434, it is envisaged that if the company fails to respond to the demand made by way of legal notice exceeding the specified amount, there is legal presumption that the company is unable to pay its debts. Indeed, that legal position is rebuttable. Going by the legislative Scheme, it is, therefore, amply clear that any creditor can invoke the jurisdiction of Company Court praying for winding up of Company.

14. Therefore, the moot question is : whether the petitioner qualifies the definition of creditor in the context of his claim regarding unpaid wages, salary and emoluments receivable from the respondent-Company where he was employed during the relevant period.

15. The expression "Creditor" is intrinsically linked to the expression "debt"/ "debts". Wherever it is a case of "debts", the person, who is entitled to receive the amount, as belonging to him, is necessarily a creditor. No provision of any statute much less of the Companies Act has been brought to our notice, which expressly or impliedly excludes the dues to be received by the employee – be it, in service or former employee – from the character of a debt to be paid by the Company; and for which reason the person so employed is not a creditor of the Company, within the meaning of Section 439 or any other provision of the Companies Act.

16. We may now deal with the decision of the learned Company Judge of Our High Court in the case of *Pawan Kumar Khullar* (supra). In that case also, the petitioner had filed Company Petition for winding up of the Company on the assertion of non-payment of his salary. The Company Judge observed that there is difference between debt and salary. Further, the salary is the remuneration paid to a person or employee in lieu of services rendered by him/her whereas debt is not remuneration. Debt is something which is borrowed by a person on settled terms and conditions and settled rate of interest and can be re-settled between the parties.

17. With utmost respect, we disagree with this opinion. It is not possible

to countenance that unpaid salary is not a debt, in view of the exposition of Supreme Court in *Kesoram Industries and Cotton Mills Ltd.* (supra) and also the meaning of expression "debt" as understood in common parlance mentioned in P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edition, Vol.2 at page 1238 till 1243. It is noted that debt means any pecuniary liability, whether payable presently or in future, or whether ascertained or to be ascertained. It means any liability which is claimed as due from any person. Indeed, it must be a legally payable amount or dues. In the Earl Jowitt's Dictionary of English Law, it is noted that debt is a sum of money due from one person to another. A debt exists when a certain sum of money is owing from one person to another. Debt denotes not only the obligation of the debtor to pay, but also the right of the creditor to receive and enforce payment. Referring to the case of *DPP v. Turner*, (1973)3 ALL ER 124, it is noted that debt normally has one or other of two meanings. It can mean an obligation to pay money or it can mean a sum of money owed. It is unnecessary to multiply the other illustrations, referred to in the said dictionary, except to mention that expression "debt" has to be given widest amplitude to mean any liability which is claimed as due from any person.

18. The Andhra Pradesh High Court has had occasion to consider similar issue in the case of *Capt. B.S. Demogray* (supra). Even in that case the petitioner, who had invoked remedy of Company Petition for winding up of the respondent- Company, was an employee of that Company and had resigned from the post of Trainee/Captain before institution of the petition. In that case, resignation was not accepted by the Company till the filing of the petition. In that sense, it was a case similar to the facts of Pawan Kumar Khullar, as the petitioner was in employment of the Company or worker of the Company. In the present case, however, it is admitted that the petitioner has already tendered resignation and there is nothing to indicate that resignation was still treated as pending. Be that as it may, the Company Judge of the Andhra Pradesh High Court disagreed with the view taken by the Company Judge of Our High Court in *Pawan Kumar Khullar* (supra). It will be useful to reproduce the relevant part of the said decision, which reads thus:

> "In the case of Kesoram Industries and Cotton Mills Ltd. v. CWT [1966] 59 ITR 767, the apex court, after discussing various decisions, has observed that (pages 780 and 787) :
>
> "a debt means a sum of money which

is now payable or will become payable in future by reason of present obligation *debitum in praesenti, solvendum in futuro.*

A debt involves an obligation incurred by the debtor and the liability to pay a sum of money in present or future. The liability must, however, be to pay a sum of money, i.e., to pay an amount which is determined or determinable in the light of factors existing on the date when the nature of the liability is to be ascertained."

The claim of short delivery of materials has been held to be debt in the case of *Kudremukh Iron Ore Co. Ltd. v. Kooky Roadways P. Ltd.* [1990] 69 Comp Cas 178 (Kar). The unpaid salary of an employee is liable to be recovered from the employer, because the employer is obliged to a pay it to the employee for the services rendered by it. As noted above, a debt is a sum which is to be recovered from a person who is obliged to pay the same and, therefore, no line of demarcation can be drawn between a remuneration due to be recovered and a sum which is to be recovered because a person has to pay for the price goods which has been purchased by him on credit. With respect I am unable to agree with the view taken by the learned single judge of the Madhya Pradesh High Court in the case of *Pawan Kumar Khullar v. Kaushal Leather Board Limited* [1996] 87 Comp Cas 130 : AIR 1996 MP 85. I, therefore, hold that an unpaid salary is also a debt."

19. This decision has been approved by the Division Bench of the Andhra High Court in the case of *M. Suryanarayana* (supra). Even in the case before the Division Bench, the petitioner was an employee of the respondent-Company and had resorted to Company Petition for winding up of the Company in respect of unpaid salary as debt within the meaning of Section 433(e) of the Act. The Division Bench referred to the meaning of word "debt" as given in Black's Law Dictionary, fifth edition, which, *inter alia*, mentions that there must be an existing obligation to pay sum of money now or in future.

The Division Bench proceeded to observe thus:

> "17. Before dealing with this specific question, the larger question raised by the learned counsel for the respondent-company that under no circumstance salary due to an employee or officer of the company could be a 'debt' in the context of Section 433(e) of the Act has to be considered for it goes to the root of the matter. This contention, in our considered opinion, is required to be noticed only to be rejected. It is trite that an employee or officer of the company, on completion of the wage period or salary period and after serving the company, acquires a right to claim wage/salary, as the case may be, and he assumes the character of a creditor and the company becomes a debtor. It cannot be gainsaid that an employee of the company, after serving a company for a wage period or salary period, say for a month, if he or she acquires a right to claim for payment of salary and if the company does not pay the salary within the stipulated time under the contract or the relevant regulations governing terms and conditions of service, undoubtedly the employee can bring a legal action to enforce his/her right to recover the salary due to him or her against the company. The definition of the word "debt", as understood in the well-known treatises as well as English and Indian courts, to put it pithily, means a sum of money which is presently payable. In other words, there must be debitum in presenti. There are no good reasons to take out 'salary due to an employee' from the company from the meaning of the word "debt" in the context of section 433(e) of the Act....."

20. After adverting to the decision of Our High Court in the case of *Pawan Kumar Khullar* (supra), the Division Bench of Andhra Pradesh High Court went on to observe as follows:-

> "..... With great respect, we are not in a position to accept the opinion of the learned single Judge of the M.P. High Court recorded in paragraph 4 of the above judgment as correct position in law. A learned single Judge of this Court, Krishna Saran Shrivastva, J., in Capt. B.S. Demogray v. VIF Airways Ltd, [1998] 94 Comp Cas 291 : [1998] 1 An.WR 743, had

occasion to consider the question whether the unpaid salary of an employee from the company could be a "debt". The learned judge, after referring to the judgment of the Madhya Pradesh High Court in *Pawan Kumar Khullar's* case [1996] 87 Comp Cas 130 : AIR 1996 MP 85, has held (page 293 of 94 Comp Cas) :

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We are in respectful agreement with the view taken by the learned single judge of this court in the above judgment. In deciding the question whether arrears of salary could be a "debt", in our considered opinion, section 530(1)(b) of the Act also in a way suggests that arrears of salary payable to an employee of the company can be treated as a debt. Section 530 deals with preferential payments in the matter of clearing the outstanding debts of the company. Section 530(1)(b) reads:

"Section 630. Preferential payment:- (1) In a winding up, subject to the provisions of Section 529A, there shall be paid in priority to all other debts-(a) ....

(b) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any employee, in respect of services rendered to the company and due for a period not exceeding four months within the twelve months next before the relevant date, subject to the limit specified in Sub-section (2):"

Section 530(1)(b) speaks of wages in respect of services rendered to the company as a preferential charge. If wages and salary payable to an employee of the company in respect of services rendered to it is made a preferential charge under the Act, there is no good or sound reason to take out the arrears of salary or salary already due to an employee of the company from the definition or meaning to the concept "debt" in the context of Section 433(e) of the Act. Therefore, we hold that in a given case, even arrears of salary due to an

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10 * ..... Already reproduced in paragraph 18 above.

employee of the company which is sought to be wound up can be a "debt" within the meaning of that term under Section 433(e) of the Act and it cannot be said as a general rule, that under no circumstance, arrears of salary or salary due to an employee of the Company can be a "debt"."

21. Besides the decision of the Division Bench of the Andhra Pradesh High Court, even the Company Judge of Delhi High Court has answered the issue against the Company. The argument canvassed before us that after the decision of the Supreme Court in *National Textile Workers' Union* (supra), in particular observations found in para 7 of the said judgment, the right to apply for winding up of Company being a creature of statute, and no such right having been conferred on the workers, they cannot prefer a winding up petition against a Company, has been examined. The background in which these observations have been made by the Supreme Court has been pithily analyzed by the Company Judge of the Delhi High Court, from pages 59 to 62; and concluded that the said observations are in the context of the argument raised on behalf of the Company in the said proceeding about the *locus* of the workers to intervene. In other words, the Court was dealing with the said argument of the Company that the workers have no right to be heard in the said proceedings and that extreme argument has been negatived.

22. Suffice it to observe that the Delhi High Court has justly analyzed the observations of the Supreme Court in *National Textile Workers' Union* (supra); and relying on Section 439 of the Act, has noted that when the worker becomes a Creditor, he will have a right to institute petition as a creditor of the Company. In substance, the Court has noted that it is one thing to refuse to entertain the prayer for winding up at the instance of the employee concerned, which is within the discretion of Company Court and can be done in larger interests of the public. But, to say that the worker has no locus to maintain petition for winding up of a company in respect of his claim for unpaid salary/ wages is untenable. The latter cannot be countenanced, in the light of the express provision in Section 439 read with Sections 433 and 434 of the Act. Taking any other view, would be re-writing the said provisions to mean that unpaid salary is not a debt within the meaning of Section 433(e) and the employee, who owes unpaid salary from the Company even after ceases to be employee of that Company is not a Creditor of the Company, in relation to the claim of unpaid salary and wages.

23. Notably, the Delhi High Court was also considering the petitions of two ex-employees and held that Company Petition for winding up filed by them against the Company in relation to unpaid salary/wages for the period when they were working with the respondent-Company, could be maintained by them as Creditors.

24. The decision of the Supreme Court in *IBA Health (India) Private Limited* (supra) pressed into service by the respondent, in our view, deals with completely different proposition. Further, we fail to understand as to how observations made in paragraph 34 of the said decision can support the argument of respondent-Company - that Company Petition by a former employee of the Company for recovery of his dues, is not maintainable.

25. That leaves us with the decision of the Company Judge of the Bombay High Court in the case of *Mumbai Labour Union* (supra). Even this decision has been correctly analyzed by the Company Judge of the Delhi High Court in the case of *Argha Sen* (supra). The apprehension of the respondent-Company that on the interpretation given by the Division Bench of the Andhra Pradesh High Court and Company Judge of the Delhi High Court, if accepted, may result in encouraging avoidable litigation to be filed by the disgruntled employees and Trade Unions, does not commend to us. The provision, such as, Section 439 read with Sections 433 and 434, providing for remedy to class of persons, cannot be interpreted on such apprehensions.

26. As aforesaid, none of the provisions in the Companies Act persuade us to take the view that the claim of worker or employee regarding his unpaid salary, wages or emoluments cannot be treated as debt or dues payable by the Company. Once that contention fails, it would necessarily follow that the workman is a Creditor of the Company to the extent of his unpaid wages and salary. This view is reinforced from Chapter-V of the Companies Act. For, Section 529, defines the purport of expression "workmen's dues". Further, Section 529A provides for Overriding Preferential Payments in respect of workmen's dues. There is preferential right to receive those dues guaranteed under Section 530 of the Act over other dues. The fact that special preference in payment of workmen's dues has been specified in the Act, does not mean that the workmen are excluded from the term "creditors" or that the amount of unpaid salary, wages or emoluments of the workmen is not a debt payable by the Company, as such.

27. Counsel for the respondent-Company invited our attention to Sub-section (5) of Section 530 of the Act including the distinction made between workman and the employee of the Company. The fact that no specific reference is made to the dues of employees in Section 529A unlike workmen's dues, to be paid as overriding preferential payments, does not mean that the amount receivable by the employees, who may not be workmen as such, is not a debt or that they are excluded from the term "creditors" in any manner. The remedy provided under Section 433 and 434 of the Act is to all the creditors, known by whatever description – be it, in respect of goods purchased from them or services rendered by them, as the case may be. It is not possible to exclude one amongst those, considering the sweep of Sections 433 and 434 and in Section 439 of the Act.

28. Reverting to the question referred for being considered by us, we may improvise the same as to whether the unpaid wages/salary of a former workman/employee, as in the present case, can be the foundation for resorting to remedy of winding up of Company under Sections 433(e) and 434 of the Act. We agree with the opinion of the Division Bench of the Andhra Pradesh High Court in *M. Suryanarayana* (supra) and of the Company Judge of the Delhi High Court in *Argha Sen* (supra).

29. We accordingly, hold that the employee of the Company has locus to file Company Petition in respect of his unpaid wages/salary and emoluments, as having been filed by a creditor of the Company. As a concomitant, the opinion of the learned Company Judge of our High Court in the case of *Pawan Kumar Khullar* (supra), is overturned.

30. While parting, we may clarify that we may not be understood to have expressed any opinion on the merits of the claim of the parties or for that matter on the question relevant for exercise of discretion of the Company Judge to entertain the Company Petition, in any manner. Those issues will have to be decided at the appropriate stage.

31. We further clarify that we may not be understood to have expressed any opinion on whether the Trade Unions have locus to espouse the cause of workmen/employees regarding unpaid salary/wages against the Company by way of a Company Petition. That question can be decided in appropriate proceedings, as it is not relevant in the present case.

32. We answer the issue referred to us on the above terms and direct

the Registry to forthwith place the matter before the Company Judge (Indore Bench) for further consideration in accordance with law.

33. We also place on record word of appreciation for the able assistance given by the counsel appearing for both the sides; and, in particular, in the matter of preparation and presentation of compilation of relevant decisions at the commencement of the hearing.

Order accordingly.

I.L.R. [2016] M.P., 3233
WRIT APPEAL
Before Mr. Justice S.K. Gangele & Mr. Justice Subodh Abhyankar
W.A. No. 807/2013 (Jabalpur) decided on 10 November, 2016

STATE OF M.P. & anr. ...Appellants
Vs.
RAM SAHAYAK NAGRIK ...Respondent

***A. Swatantrata Sangram Senani Niyam, 1972, Rule 2, Explanation No. 3 - 'Samman Nidhi'/Pension - Petitioner - Freedom Fighter - Claim for 'Samman Nidhi' rejected by the Government - Ground* - Non-submission of any document or evidence to show involvement in the freedom struggle - Challenge as to - Writ Petition - Grounds - Notified freedom fighter as per Government Gazette - Affidavit of recognized freedom fighter - Petitioner was underground for more than 3 months - Petition allowed - Appeal by State Government - Held - Learned Single Judge has rightly appreciated the documents on record in accordance with law - Appeal dismissed - State to comply with the order passed by the Writ Court forthwith without any delay and pay entire amount with interest @ 7% per annum within a period of 2 months. (Paras 2, 5 to 9)**

क. स्वतंत्रता संग्राम सेनानी नियम, 1972, नियम 2, स्पष्टीकरण क्र. 3 – 'सम्मान निधि'/पेंशन – याची – स्वतंत्रता सेनानी – 'सम्मान निधि' के लिए दावा सरकार द्वारा अस्वीकार किया गया – आधार – स्वतंत्रता संघर्ष में सहभागिता दर्शाते किसी भी दस्तावेज या साक्ष्य का प्रस्तुत न किया जाना – चुनौती के रूप में – रिट याचिका – आधार – सरकारी राजपत्र के अनुसार अधिसूचित स्वतंत्रता सेनानी – अभिज्ञात स्वतंत्रता सेनानी का शपथपत्र – याचिकाकर्ता 3 माह से अधिक अवधि तक भूमिगत था – याचिका मंजूर – राज्य सरकार द्वारा अपील – अभिनिर्धारित

– विद्वान एकल न्यायाधीश ने अभिलेख के दस्तावेजों का विधि के अनुसार उचित मूल्यांकन किया – अपील खारिज – राज्य सरकार रिट न्यायालय द्वारा पारित आदेश का बिना किसी विलंब के, तत्काल अनुपालन करे तथा दो माह की अवधि के भीतर 7 प्रतिशत की वार्षिक दर से ब्याज सहित संपूर्ण राशि का भुगतान करे।

B. ***Swatantrata Sangram Senani Niyam, 1972, Rule 2 - Freedom Fighters - 'Samman Nidhi'/Pension*** **- Standard of proof of participation in freedom movement - Case of Freedom Fighters has to be examined on the basis of probabilities and not on the touchstone of the test of 'beyond reasonable doubt'. (Paras 7 & 8)**

ख. स्वतंत्रता संग्राम सेनानी नियम, 1972, नियम 2 – स्वतंत्रता सेनानी – 'सम्मान निधि'/पेंशन – स्वतंत्रता आंदोलन में सहभागिता के प्रमाण का मानक – स्वतंत्रता सेनानियों के प्रकरण का परीक्षण, अधिसंभाव्यता के आधार पर और न कि 'युक्तियुक्त संदेह से परे' की कसौटी पर किया जाए।

Cases referred:

W.P. No. 2902/2012 order passed on 26.04.2013, 2012 STPL 376 SC, (2014) 10 SCC 352.

Pradeep Singh, for the appellant/State.
R.S. Khare, for the respondent.

ORDER

The Order of the Court was delivered by : **SUBODH ABHYANKAR, J. :-** The present appeal has been preferred by the State of Madhya Pradesh against the respondent - Ram Sahayak Nagrik assailing the order passed dated 26.4.2013 passed in Writ Petition No.1321/2009 whereby the learned Single Judge of this Court has granted Samman Nidhi/pension to the petitioner (respondent herein) with effect from the date when the claim of the petitioner was rejected to be considered as freedom fighter.

2. The facts, relevant to decide the present appeal are that the respondent – Ram Sahayak Nagrik had filed W.P. No.1321/2009 challenging the order dated 7.7.2008 passed by the Additional Secretary of the Government of Madhya Pradesh, Department of General Administration whereby the petitioner's claim for Swatantrata Sangram Senani Samman Nidhi was rejected on the ground that the evidence/documents submitted by the petitioner with

regard to his being underground during freedom movement are not verified and also that he had not submitted any document or evidence to show that he was involved in the freedom struggle. The aforesaid writ petition No.1321/2009 was allowed by this Court vide order dated 26.4.2013.

3. The order of the Writ Court dated 26.4.2013 is assailed only on the ground that this Court has relied upon the judgment passed in W.P. No.2902/2012 in the case of *Shri Sitaram Manav Dangi Vs. State of M.P.* against which the State has also filed a Writ Appeal No.812/2013 and if the same is allowed, foundation of the order of the writ court would also go. It was also argued by the learned counsel for the appellant that the learned Single Judge has erroneously accepted the evidence in the form of certificates of other freedom fighters, which were submitted by the respondent to substantiate his case.

4. We have heard learned counsel for the parties and perused the record.

5. From the record, it is apparent that the State has made certain rules to grant pension/financial assistance to the freedom fighters. The Rules are called Swatantrata Samgram (sic:Sangram) Senani Niyam 1972. In the aforesaid Rules, the explanation No.3 of Rule 2 provides as under :-

> "स्पष्टीकरण – तीन यदि कोई व्यक्ति उसे कैद या निरोध में रखे जाने के संबंध में जेल का प्रमाण पत्र पेश करने में असमर्थ हो तो नियम 2 के उपखण्ड (सात) को छोडकर, खण्ड (ख) के प्रयोजनों के लिये उस जिले के या समीपवर्ती किसी जिले के प्रख्यात स्वतंत्रता संग्राम सैनिक का प्रमाण पत्र पर्याप्त होगा ।"

6. The record shows that the petitioner is a notified freedom fighter and his name appears at serial no.183 in the M.P.District Gazette of Freedom Fighters as Annexure-P/2 and similarly, in recognition of his activities, he is shown to be a freedom fighter in the register of Distt. Tikamgarh at Serial No.190 as per Annexure- P/1. In addition to that, he has also filed affidavit/ certificate of Laxmi Narayan Nayak who is also a recognized freedom fighter wherein it is clearly mentioned that the respondent Ram Sahayak Nagrik was underground from 1st November, 1945 to 9th October, 1946 for more than three months. The petitioner has also filed affidavits/certificates of R.S.Tiwari and Shri Shyamlal Sahu who are recognized freedom fighter and they have certified that the respondent remained underground for more than three months during that period, thus, the requirement of the Rules of 1972 as stipulated

above is satisfied.

7. The learned Single Judge of the writ court had rightly relied upon the judgment rendered in the case of Shri Sitaram Manav Dangi and the law laid down by the Apex Court in the case of *Kamalbai Sinkar Vs. State of Maharashtra and others* reported in 2012 STPL 376 SC. In a recent judgment passed by the Apex Court in the case of *Union of India and another vs. Jai Kishan Singh (Dead) through legal representatives and others,* reported in (2014) 10 SCC 352 wherein the Hon'ble Apex Court has laid down that the standard of proof of participation in freedom movement should be liberal and in para 8 of the judgment observed as under:

> "**8.** The freedom fighter pension is a form of gratitude extended by an indebted nation in recognition of the sacrifice made by the freedom fighters to achieving independence. We are conscious of the fact that liberal approach has to be adopted in such matters so that rightful persons are not deprived of deserving benefit for lack of evidence, after a lapse of long time. It has been laid down by this Court that such cases have to be decided on preponderance of probabilities and standard of proof beyond reasonable doubt is not to be applied. Relying upon *Gurdial Singh v. Union of India in Kamlabai Sinkar v. State of Maharashtr*a this Court has laid down thus : (SCC p.756, paras 6-7)
>
> > "6. Having perused the above materials on record, at the very outset, we wish to refer to the observations made by this Court in regard to the grant of freedom fighters' pension in the decision in Gurdial Singh v. Union of India. In para 7 of the judgment, this Court has highlighted the manner in which such claims are to be considered for grant of freedom fighters' pension. It will be worthwhile to make a reference to the said passage before expressing our conclusion with regard to the claim of the appellant's husband in the case on hand.
> >
> > 7. Para 7 reads as under: (Gurdial Singh case, SCC p.14)

> "7. The standard of proof required in such cases is not such standard which is required in a criminal case or in a case adjudicated upon rival contentions or evidence of the parties. As the object of the Scheme is to honour and to mitigate the sufferings of those who had given their all for the country, a liberal and not a technical approach is required to be followed while determining the merits of the case of a person seeking pension under the Scheme. It should not be forgotten that the persons intended to be covered by the Scheme had suffered for the country about half-a-century back and had not expected to be rewarded for the imprisonment suffered by them. Once the country has decided to honour such freedom fighters, the bureaucrats entrusted with the job of examining the cases of such freedom fighters are expected to keep in mind the purpose and object of the Scheme. ***The case of the claimants under this Scheme is required to be determined on the basis of the probabilities and not on the touchstone of the test of 'beyond reasonable doubt'.*** Once on the basis of the evidence it is probabilised that the claimant had suffered imprisonment for the cause of the country and during the freedom struggle, a presumption is required to be drawn in his favour unless the same is rebutted by cogent, reasonable and reliable evidence."
>
> (emphasis in original)

In view of the above, we are of the considered view that the learned single judge has rightly applied the principles as reiterated above and appreciated the documents on record in accordance with law in arriving at the findings in favour of the petitioner.

8. The appeal W.A. No.812/2013 preferred by the appellant/State in the case of Sitaram Manav Dangi has already been dismissed by this Court as it was also heard analogously, hence this ground raised by the appellant also stands repelled.

9. Keeping in view the aforesaid facts and circumstances and in the light of the order passed in W.A. No.812/2013 (State of M.P. & another vs. Sitaram Manav Dangi and another), the present appeal filed by the State is hereby **dismissed** with no order as to costs. The appellant/State is directed to comply with the order passed by the writ court forthwith without any delay and pay the entire amount along with interest @ 7% per annum to the respondent within a period of two months from the date of receipt of certified copy of the order passed today.

Appeal dismissed.

I.L.R. [2016] M.P., 3238
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 21344/2012 (Jabalpur) decided on 30 March, 2015

VYANKATACHARYA DWIVEDI (DR.) & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

(Alongwith W.P. No. 21416/2012, W.P. No. 299/2013 & W.P. No. 3236/2013)

A. ***Service Law – Public Services (Promotion) Rules, M.P. 2002, Rules 4 & 6*** **– Maintainability of Writ Petition – Objection on the ground that all the promotees are not impleaded – Held – Since the immediate juniors who are promoted are impleaded as respondents, petitions are maintainable. (Para 12)**

क. *सेवा विधि – लोक सेवा (पदोन्नति) नियम, म.प्र. 2002, नियम 4 एवं 6* – रिट याचिका की पोषणीयता – इस आधार पर आक्षेप कि सभी पदोन्नत व्यक्तियों को पक्षकार नहीं बनाया गया है – चूँकि निकटतम कनिष्ठ जो कि पदोन्नत हुए हैं उन्हें प्रत्यर्थीगण के रूप में पक्षकार बनाया गया है, याचिकाएँ पोषणीय हैं।

B. ***Service Law – Veterinary Services (Gazetted) Recruitment Rules, M.P., 1966 and Public Services (Promotion) Rules, M.P. 2002,***

Rules 4 & 6 – Seniority–cum-merit/fitness – Criteria for grant of promotion **– Procedure adhered to by the Departmental Promotion Committee by laying down the criteria introducing the element of merit having overriding effect on seniority cannot be given the stamp of approval and the non-promotion of seniors as compared to juniors on the basis of these criteria deserves reconsideration on the basis of above analysis by holding a review Departmental Promotion Committee, wherein if seniors are adjudged suitable, the juniors who were promoted on the basis of criteria found to be contrary to Rule 4 & 6 of M.P. Public Services (Promotion) Rules, 2002 will have to give way – Petitions allowed. (Paras 26 & 28)**

ख. सेवा विधि – पशु चिकित्सा सेवाएँ (राजपत्रित) भर्ती नियम, म.प्र., 1966 एवं लोक सेवा (पदोन्नति) नियम, म.प्र. 2002, नियम 4 व 6 – वरिष्ठता–सह–योग्यता/उपयुक्तता – पदोन्नति प्रदान किये जाने हेतु मापदंड – वरिष्ठता पर अध्यारोही प्रभाव रखने वाले योग्यता के तत्व का मापदंड को निर्धारित करके विभागीय पदोन्नति समिति द्वारा अपनायी गई प्रक्रिया पर स्वीकृति की मुहर नहीं लगायी जा सकती है एवं इन मापदंड के आधार पर कनिष्ठों की तुलना में वरिष्ठों को पदोन्नति नहीं दी जाना, उपर्युक्त विश्लेषण के आधार पर पुनर्विलोकन विभागीय पदोन्नति समिति बनाकर पुनर्विचार किए जाने योग्य है, जिसमें यदि वरिष्ठ उपयुक्त ठहराये जाते हैं तो ऐसे कनिष्ठ जो कि म.प्र. लोक सेवा (पदोन्नति) नियम, 2002 के नियम 4 एवं 6 के विपरीत पाए गए, मापदण्ड के आधार पर पदोन्नत किए गए हैं उन्हें ऐसे वरिष्ठों को रास्ता देना होगा – याचिकाएँ मंजूर।

Cases referred:

(1996) 7 SCC 759, (2007) 6 SCC 704, AIR 1976 SC 789, AIR 1989 SC 582, (1998) 6 SCC 720, AIR 2010 SC 699, AIR 2010 SC 787, (2013) 11 SCC 746, (2010) 1 SCC 335.

D.K. Tripathi, for the petitioners in W.P. No. 21344/2012, W.P. No. 299/2013 & W.P. No. 3236/2013.

Ashish Anand Bernard, G.A. for the respondent/State.

D.K. Dixit, for the intervenor in W.P. No. 21344/2012.

Kishore Roy, for the petitioners in W.P. No. 21416/2012.

Harish Agnihotri, for the respondents No. 4 & 5.

ORDER

SANJAY YADAV, J. :- These batch of writ petitions, at the instance of Senior Veterinary Surgeons in the Department of Animal Husbandry and

Veterinary Services, Government of Madhya Pradesh, are directed against order-dated 10.12.2012; whereby, private respondents have been promoted to the post of Deputy Director/Civil Surgeon (Veterinary Services)/Animal Breeding Programme Officers, questioning the criteria for promotion adopted by the Departmental Promotion Committee.

2. It is not in dispute that services of the petitioners and private respondents are governed by M.P. Veterinary Services (Gazetted) Recruitment Rules, 1966 and that the promotions are governed by the Rules framed under proviso to Article 309 read with Article 16 and 335 of the Constitution of India, known as Madhya Pradesh Public Services (Promotion) Rules, 2002 (for brevity 'Rules of 2002') and as per Rule 4 read with Rule 6 thereof, the promotion from the post of Assistant Veterinary Surgeon (substantive post) to that of Deputy Director/Civil Surgeon (Veterinary Services), Animal Breeding Programme Officer, a Class I post is on the basis of "seniority subject to fitness".

3. That, Departmental Promotion Committee convened its meeting on 13.9.2012 to consider Assistant Veterinary Surgeon as on 1.4.2011 for the following vacancies -

Category	Actual Vacancies	Anticipated Vacancies
General Category – 119	112	7
Scheduled Caste – 26	22	4
Scheduled Tribes – 35	35	NIL

4. The criteria adopted by the Departmental Promotion Committee was-

7- पदोन्नति की कसौटियां तथा सामान्य प्रशासन विभाग के नियम "मध्यप्रदेश लोक सेवा (पदोन्नति) नियम, 2002 के संदर्भ में वर्गीकरण –

(अ) न्यूनतम कसौटी

समिति ने विचाराधीन पदोन्नति के लिए निम्नलिखित कसौटियां तय की –

(1) संनिष्ठा संदेह से परे हो एवं संनिष्ठा प्रमाणित हो ।

(2) वर्ष 2007 से वर्ष 2011 तक पॉच वर्ष के गोपनीय प्रतिवेदनों के आधार पर समग्र मूल्यांकन किया जाए। सामान्य प्रशासन विभाग के परिपत्र क्रमांक

सी–3–18–2001–3–एक दिनांक 11 जून 2002 की कण्डिका 6 की उपकंडिका 6 अनुरूप जैसा प्रश्नाधीन तिथि से 5 वर्षों के गोपनीय प्रतिवेदन नहीं है तो पिछले वर्ष के उपलब्ध गोपनीय प्रतिवेदन पर समिति ने विचार किया।

(3) समिति ने यह पाया कि विभाग में क+ एवं क श्रेणी के पर्याप्त उम्मीदवार हैं एवं पदोन्नति प्रथम श्रेणी में हो रही है। अतः योग्य एवं उचित उम्मीदवार आए इसीलिए सामान्य श्रेणी के पद के लिए उपयुक्तता के मापदण्ड के लिए न्यूनतम अंक 13 निर्धारित किए गए किन्तु अनुसूचित जाति के अधिकारियों के लिए उक्तानुसार पर्याप्त उम्मीदवार उपलब्ध न होने से कारण उपयुक्तता के मापदण्ड को शिथिल करते हुए 10 अंक निर्धारित किए गए।

(4) नियमों के नियम 7 में लोक सेवक के उपयुक्तता अथवा अनुपयुक्तता के रूप में वर्गीकृत करने का उल्लेख है। समिति ने यह ध्यान रखा कि किसी अधिकारी को सिविल सेवा वर्गीकरण नियम के तहत दण्डित किया जा चुका है तो उसका भी उपयुक्तता/अनुपयुक्तता निर्धारण में विचार किया गया।

(5) समिति ने पदोन्नति नियम 2002 की कंडिका 9 की उप कंडिका 6 के अनुसार पदोन्नति समिति द्वारा विचाराधीन अवधि के गोपनीय प्रतिवेदनों के मूल्यांकनों के आधार पर अंकों का निर्धारण स्वीकारकर्ता अधिकारी द्वारा किए गए मूल्यांकनों के आधार पर किया जावेगा। यदि समिति गोपनीय प्रतिवेदन में प्रतिवेदक अधिकारी तथा समीक्षक अधिकारी द्वारा किए गए मूल्यांकन के आधार पर स्वीकृतकर्ता अधिकारी के मूल्यांकन से सहमत नहीं है तो वह इसके लिए अपने कारण लिपिबद्ध करते हुए मूल्यांकन करेगी परन्तु समिति स्वीकृतकर्ता अधिकारी द्वारा किए गए मूल्यांकन के आधार पर प्राप्त अंक में केवल एक अंक बढा सकेगी अथवा घटा सकेगी। को भी ध्यान में रखा गया।

(ब) गोपनीय रिकार्ड का समग्र वर्गीकरण

(1) यह वर्गीकरण सामान्य प्रशासन विभाग के ज्ञापन क्रमांक सी–3–7/2002/3/1 दिनांक 6 जुलाई, 2002 के कंडिका– 9 में बताए गए आधारों पर निम्नानुसार किया गया।

रिकार्ड का वर्गीकरण	वर्गीकरण	अंक
उत्कृष्ठ	क+	4
बहुत अच्छा	क	3
अच्छा	ख	2
औसत	ग	1
घटिया	घ	0

(2) उक्त पद पर पदोन्नति के फीडर पद पर पशु चिकित्सा सहायक शल्यज्ञ, पशु चिकित्सा सेवाएं में दिनांक 1.1.2012 की स्थिति में अर्हता प्राप्त अधिकारियों के नाम विचार क्षेत्र में रखे गयें। अपेक्षित संख्या में अधिकारी पदोन्नति हेतु उपयुक्त पाये जाने के उपरांत शेष नामों पर विचार नहीं किया गया ।

5. That, on the basis of these criteria, the Departmental Promotion Committee enlisted 129 Assistant Veterinary Surgeon from Serial No.4 to 524 in the Gradation List within the zone of consideration.

6. Evidently, others like the petitioners, though senior, are declared ineligible as they are not found fulfilling the criteria 7(3), accordingly, superseded.

7. The procedure adopted by the Departmental Promotion Committee in shortlisting only such Assistant Veterinary Surgeons/Senior Veterinary Surgeon, having A+ and A, ACR's is being questioned on the ground that the DPC by introducing the element of comparative assessment of merits has violated the norms of selection provided under Rule 4 read with Rule 6(7) of Rules of 2002. It is contended that since these Rules envisage that promotion from Class II to Class I posts is on the basis of seniority subject to fitness with rider contained in sub-rule (7) of Rule 6, the promotion of juniors on the basis of criteria laid down vide 7(3) deserves to be set aside.

8. State of Madhya Pradesh and its functionaries, on their turn, however justify the criteria laid down by the DPC as incumbents and eligible persons were found more in number than the posts. It is contended that it is within the right of the DPC to have fixed minimum criteria to adjudge the merit even where the promotion is based on seniority subject to suitability.

9. Private respondents while adopting the stand taken by the State Government, raises an objection as to maintainability of the petitions as all the promotees are not impleaded. It is further contended that since the petitioners were not having A+ and A to their credit and juniors like respondents were fulfilling the criteria, petitioners' supersession cannot be faulted with. It is urged that the DPC being the best judge to ascertain the criteria for promotion and the promotion being not a right, no relief can be granted to the petitioners.

10. Considered the rival submissions.

11. As regard to the contention that all the promotees being necessary parties, having not been impleaded, the petition cannot be entertained. It is

observed that immediate juniors are impleaded as respondents in each of the petitions. It has been held in *V.P. Shrivastava v. State of M.P* (1996) 7 SCC 759 that -

> "14. The conclusion of the Tribunal that non inclusion of the affected parties is fatal to the appellants case is also unsustainable in law. It is to be stated that the appellants do not challenge the so called ad-hoc appointments of the promotee respondents but they do challenge the position of the said ad-hoc promotee respondents over the appellants in the seniority list. In other words the very principle of 'determination of seniority' made by the State Government is under challenge and for such a case State is the necessary party who has been impleaded. It has been held by this Court in the case of G.M. South Central Rly. v A.V.R. Siddhanti (1974) SCC 335 -
>
> "As regards the second objection, it is to be noted that the decision of the Railway Board impugned in the writ petition contain administrative rules of general application, regulating absorption in permanent departments, fixation of seniority, pay etc. of the employees of the erstwhile Grain Shop departments. The Respondents-petitioners are impeaching the validity of those policy decisions on the ground of their being violative of Articles 14 and 16 of the Constitution. The proceedings are analogous to those in which the constitutionality of a statutory rule regulating seniority of government servants is assailed. In such proceedings the necessary parties to be impleaded are those against whom the relief is sought, and in whose absence no effective decision can be rendered by the Court. In the present case, the relief is claimed only against the Railway which has been impleaded through its representative. No list or order fixing seniority of the petitioners vis-a-vis particular individuals pursuant to the impugned decisions, is being challenged. The employees who were likely to be affected as a result of the re-adjustment of the petitioner's seniority in accordance with the principles laid down in the Board's decision of October 16, 1952 were, at the most, proper parties

and not necessary parties, and their non-joinder could not be fatal to the writ petition."

...

16. Further in view of finding of the Tribunal that respondents 3 and 4 successfully safeguarded the interest of the promotees. The Tribunal erred in law in holding that non-inclusion of the affected parties is fatal to the proceeding. It has been held by this Court in the case of Prabodh Verma v State of U.P. (1984) 4 SCC 251 that -

"A High Court ought not to hear and dispose of a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least some of them being before it as respondents in a representative capacity if their number is too large to join them as respondents individually."

(Emphasis supplied)

12. In view of the principle of law laid down in *V.P. Shrivastava* (supra) and the fact that immediate juniors who are promoted are impleaded as respondents in each of these petitions, the objection as to maintainability of the petitions for non-impleading all the promotees is overruled.

13. As regard to contention that it is within the jurisdiction of the Departmental Promotion Committee to lay down the criteria, there can be no doubt as to proposition that suitability for promotion must be left to be decided by the DPC, but equally settled it is that the DPC must determine suitability according to the applicable rules (Please see : *Union of India v. Sangram Keshari Nayak* (2007) 6 SCC 704 wherein it is held -

"11. Promotion is not a fundamental right. Right to be considered for promotion, however, is a fundamental right. Such a right brings within its purview an effective, purposeful and meaningful consideration. Suitability or otherwise of the candidate concerned, however, must be left at the hands of the DPC, but the same has to be determined in terms of the rules applicable therefor. .."

14. It is also settled principle of law that when Rule provides for the criteria to be adhered to and the procedure to be followed, then it is incumbent that the exercise of power must be only in the mode provided by the statute (Please see : *Hukam Chand Shyam Lal v. Union of India* AIR 1976 SC 789, wherein it is held that "where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all, and all other modes of performance are necessarily forbidden". Further, in *Marathwada University v. Seshrao Balwant Rao Chavan* AIR 1989 SC 582, wherein it is held -

> 26. These principles of ratification, apparently do not have any application with regard to exercise of powers conferred under statutory provisions. The statutory authority cannot travel beyond the power conferred and any action without power has no legal validity. It is ab initio void and cannot be ratified.
>
> (Emphasis supplied)

15. In the case at hand, evidently and undisputedly, the procedure prescribed under Rule 4 & 6 of Rules of 2002 are applicable for promotion from Class II to Class I posts. Rule 4 stipulates -

> "4. Determination of basis for promotion.- (1) Promotion from class IV to higher pay scale of class IV, class IV to class III, class III to higher pay scale of class III, class III to class II, class II to higher pay scale of class II and class II to class I posts shall be made on the basis of "seniority subject to fitness".
>
> (2) Promotion from class I to higher pay scale of class I posts shall be made on the basis of "merit-cum- seniority".
>
> Provided that the Promotion from the post of sub- Engineer to Assistant Engineer in the Departments of Public Works, Water Resources, Public Health Engineering and also Panchayat and Rural Development shall be made on the basis of "merit-cum- seniority."

16. Whereas, Rule 6 lays down the procedure to be followed in case of promotion. Sub-rule (1), (4), (5), (6) and (7), which are relevant in the context, are extracted below -

"6. Promotion on the basis of seniority subject to fitness.-

(1) In such cases where the promotion is to be made on the basis of seniority subject to fitness, there shall be no zone of consideration for all categories.

...

(4) The meeting of the Departmental Promotion Committee shall be held every year. It shall consider the suitability of the public servants for promotion separately with reference to the vacancies of each year starting with the earliest year onwards. The Departmental Promotion Committee shall consider the suitability of the public servants for promotion to fill up the unfilled vacancies of the earlier year or years separately and prepare the select list for the relevant year accordingly. Thereafter the Departmental Promotion Committee shall consider the suitability of the public servants for promotion to fill up the existing and anticipated vacancies of the current year.

(5) The Departmental Promotion Committee shall assess the suitability of the public servants for promotion on the basis of their service record and with particular reference to the Annual Confidential Reports (ACRs) for 5 preceding years. However, in cases where the required qualifying service is more than 5 years, the Departmental Promotion Committee shall see the record with particular reference to the ACRs for the years equal to the required qualifying service.

(6) When one or more ACRs are not available for any reason for the relevant period, the Departmental Promotion Committee shall consider the ACRs of the years preceding the period in question.

(7) For filling up the posts by this method, the Departmental Promotion Committee shall consider the case of each public servants separately on the basis of his own merit , that is to say, that there shall be no need to make a comparative assessment of the merits of public servant. The Departmental Promotion Committee shall consider the records of each public

servant separately and shall categorize them as 'fit' or 'not fit'."

17. Thus, clear it is from these rules that in case of promotion from Class II to Class I post as, in the present case, the same is on the basis of 'seniority subject to suitability' and that there shall be no zone of consideration. And, that the Departmental Promotion Committee shall assess the suitability of the public servants from promotion on the basis of their service record and with particular reference to the Annual Confidential Reports (ACRs) for five preceding years. And, that the filling up the posts by the method under Rule 6, the DPC shall consider the case of each public servants separately on the basis of his own merit that there shall be no need to make a comparative assessment of the merits of public servant.

18. Another Rule which needs mention at this stage to understand the difference in procedure to be followed in case of promotion on the basis of seniority-cum-suitability and merit-cum- seniority is sub-rule (9) of Rule 7, which lays down the procedure to be adhered to in case of promotion on merit-cum-suitability. It stipulates -

> 7. Promotion on the basis of merit-cum-seniority.
>
> ...
>
> (9) The Departmental Promotion/Screening Committee shall make a relative/comparative assessment of the merits of public servants who are within the zone of consideration and make an overall grading of the public servants merit on the basis of their service records and place them in the categories as "Outstanding", "Very-Good", "Good", "Average" and "Poor" as the case may be. However, only those public servants who are graded as "Very-Good" an above will be included in the select list, by placing the public servants graded as "Outstanding" on top followed by those graded as "Very-Good", subject to availability of vacancies, with the public servants with the same grading maintaining their inter-se-seniority in the feeder cadre/part of the service/pay scales of post.

19. Thus, when compared with, the procedure laid down under Rule 7(9) aims at elimination by comparative assessment whereas, Rule 6(7) aims at

inclusion of seniors without taking recourse to comparative assessment by adjudging their suitability.

20. What then would "seniority subject to suitability" mean ?

21. Observing that in the matter of formulation of a policy for promotion to a higher post, the two competing principles which are taken into account are inter-se seniority and comparative merit of employees who are eligible for promotion, their Lordships in *B.V. Sivaiah v. K. Addanki Babu* (1998) 6 SCC 720 were pleased to hold -

> 18. We thus arrive at the conclusion that the criterion of 'seniority-cum-merit' in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit.

22. Following decisions can also be taken note of on the aspect of promotion based on seniority-cum-merit.

(i) In *Rajendra Kumar Srivastava v. Samyut Kshetriya Gramin Bank* AIR 2010 SC 699, it is held -

> 10. Thus it is clear that a process whereby eligible candidates possessing the minimum necessary merit in the feeder posts is first ascertained and thereafter, promotions are made strictly in accordance with seniority, from among those who possess the minimum necessary merit is recognised and accepted as complying with the principle of 'seniority-cum-merit'. What would offend the rule of seniority-cum-merit is a process where after assessing the minimum necessary merit,

promotions are made on the basis of merit (instead of seniority) from among the candidates possessing the minimum necessary merit. If the criteria adopted for assessment of minimum necessary merit is bona fide and not unreasonable, it is not open to challenge, as being opposed to the principle of seniority-cum-merit. We accordingly hold that prescribing minimum qualifying marks to ascertain the minimum merit necessary for discharging the functions of the higher post, is not violative of the concept of promotion by seniority-cum-merit.

(ii) In *Rupa Rani Rakshit v. Jharkhand Gramin Bank* AIR 2010 SC 787, it is held -

"7. ... On the other hand, the Bank proceeded to assess their inter-se-merit with reference to four criteria (period of service, educational qualification, performance during three years, and interview) by allocating respectively maximum marks of 40, 6, 24 and 30 (out of a total 100 marks) and then proceeded to promote those who had secured the highest marks in the order of merit. Thus there were two violations of the relevant rules : (i) promoting candidates on merit-cum-seniority and not on seniority-cum-merit; and (ii) assessing inter-se merit, inter alia with reference to marks allocated to different educational qualifications. It cannot, therefore, be said that the promotions made on 20.11.1990 were on the basis of seniority-cum- merit. Though the period of service was also considered as one of the factors for assessment of comparative merit, the procedure adopted for promotion was merit-cum-seniority. The High Court was, therefore, justified in interfering with the promotions. The directions given by the High Court for fresh process of promotion were in consonance with the Rules and principles of seniority-cum-merit. The appeals, therefore, have no merit.

...

10. .... Whenever a person is promoted to a post without following the rules prescribed for such promotion, he should

be treated as a person not regularly promoted to that post. Consequently, where promotions are governed by Rules, in computing the length of service, in the post to which an employee is promoted, it is not permissible to include the period of service rendered in pursuance of an illegal promotion which is subsequently set aside."

23. Thus, when promotion is on the basis of seniority-cum-merit, there is greater emphasis upon seniority even though the same is not the deciding factor. In *Balbir Singh Bedi v. State of Punjab,* (2013) 11 SCC 746, it is held -

"15. In view of the above, the law as regards this point can be summarised to the effect that, where a promotion is to be given on the principle of "seniority-cum-merit", such promotion will not automatically be granted on the basis of seniority alone. Efficiency of administration cannot be compromised with at any cost. Thus, in order to meet said requirements, all eligible candidates in the feeder cadre must be subject to a process of assessment to determine whether or not an individual in fact possesses the specified minimum necessary merit, and in the event that he does possess the same, his case must be considered giving due weightage to his seniority. Furthermore, the statutory authority must adopt a bonafide and reasonable method to determine the minimum necessary merit, as is required to be possessed by the eligible candidate."

24. In the context, reference can also be had of the decision in *Rajendra Kumar Srivastava v. Samyut Kshetriy*a (2010) 1 SCC 335 wherein their Lordships were pleased to hold -

"11. It is also well settled that the principle of seniority-cum-merit, for promotion, is different from the principle of 'seniority' and principle of 'merit-cum-seniority'. Where promotion is on the basis of seniority alone, merit will not play any part at all. But where promotion is on the principle of seniority-cum-merit, promotion is not automatic with reference to seniority alone. Merit will also play a significant role. The standard method of seniority-cum-merit is to subject all the

eligible candidates in the feeder grade (possessing the prescribed educational qualification and period of service) to a process of assessment of a specified minimum necessary merit and then promote the candidates who are found to possess the minimum necessary merit strictly in the order of seniority. The minimum merit necessary for the post may be assessed either by subjecting the candidates to a written examination or an interview or by assessment of their work performance during the previous years, or by a combination of either two or all the three of the aforesaid methods. There is no hard and fast rule as to how the minimum merit is to be ascertained. So long as the ultimate promotions are based on seniority, any process for ascertaining the minimum necessary merit, as a basic requirement, will not militate against the principle of seniority-cum-merit.

..

13. Thus it is clear that a process whereby eligible candidates possessing the minimum necessary merit in the feeder posts is first ascertained and thereafter, promotions are made strictly in accordance with seniority, from among those who possess the minimum necessary merit is recognised and accepted as complying with the principle of 'seniority-cum-merit'. What would offend the rule of seniority-cum-merit is a process where after assessing the minimum necessary merit, promotions are made on the basis of merit (instead of seniority) from among the candidates possessing the minimum necessary merit. If the criteria adopted for assessment of minimum necessary merit is bona fide and not unreasonable, it is not open to challenge, as being opposed to the principle of seniority-cum-merit. We accordingly hold that prescribing minimum qualifying marks to ascertain the minimum merit necessary for discharging the functions of the higher post, is not violative of the concept of promotion by seniority-cum-merit."

25. Keeping in mind the principle of law laid down as regard to promotion on the basis of seniority-cum-suitability/seniority-cum- merit, in the case at

hand, the relevant rules adverted to i.e. Rule 4 and the procedure required to be adhered to as stipulated under Rule 6 of Rules of 2002, the fixing of bench mark A+ and A for adjudging the eligibility as observed earlier has led to elimination of such seniors who does not have these gradings. Thus, an element of merit over seniority has been introduced by the DPC. This is further established by sub-clause (5) of Clause 7 of the criteria laid down by DPC, which envisages -

> (5) समिति ने पदोन्नति नियम 2002 की कंडिका 9 की उप कंडिका 6 के अनुसार पदोन्नति समिति द्वारा विचाराधीन अवधि के गोपनीय प्रतिवेदनों के मूल्यांकनों के आधार पर अंकों का निर्धारण स्वीकारकर्ता अधिकारी द्वारा किए गए मूल्यांकनों के आधार पर किया जावेगा। यदि समिति गोपनीय प्रतिवेदन में प्रतिवेदक अधिकारी तथा समीक्षक अधिकारी द्वारा किए गए मूल्यांकन के आधार पर स्वीकृतकर्ता अधिकारी के मूल्यांकन से सहमत नहीं है तो वह इसके लिए अपने कारण लिपिबद्ध करते हुए मूल्यांकन करेगी परन्तु समिति स्वीकृतकर्ता अधिकारी द्वारा किए गए मूल्यांकन के आधार पर प्राप्त अंक में केवल एक अंक बढा सकेगी अथवा घटा सकेगी। को भी ध्यान में रखा गया।

- which is in consonance with the procedure laid down under Rule 7(9) for promotion on merit-cum-suitability but is not in conformation with Rule 6 of Rules of 2002. Rather, the criteria laid down under sub-clause (3) and (5) of Clause 7 is antithesis to the basic rule of seniority subject to suitability as envisaged under Rule 4 read with Rule 6 of Rules of 2002.

26. Considered thus the procedure adhered to by the Departmental Promotion Committee by laying down the criteria introducing the element of merit having overriding effect on seniority cannot be given the stamp of approval and the non-promotion of seniors as compared to juniors on the basis of these criteria deserves reconsideration on the basis of above analysis by holding a review Departmental Promotion Committee, wherein if seniors are adjudged suitable, the juniors who were promoted on the basis of criteria found to be contrary to Rule 4 and 6 of Rules of 2002 will have to give way. For that, no separate notice need be issued to the juniors as their promotion were subject to final outcome.

27. Let the action be taken within three months from the date of communication of this order.

28. Petitions are allowed to the extent above. However, there shall be no order as to costs.

29. Let a copy of this common order be retained in connected petitions.

Petition allowed.

I.L.R. [2016] M.P., 3253
WRIT PETITION
Before Mr. Justice Rohit Arya
W.P. No. 4660/2015 (Gwalior) decided on 14 September, 2015

NATHURAM SHARMA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 64 – Election dispute – **Once the result has been declared, the only remedy to the person aggrieved with the declaration of result is to file election petition/ election dispute before the Registrar under Section 64 of the Act – The complaint on the ground of improper rejection of nomination papers can be made as one of the grounds in the Election Petition. (Paras 20 & 21)**

क. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 64 – निर्वाचन विवाद – एक बार जब परिणाम घोषित किया जा चुका हो, तब पीड़ित व्यक्ति के लिए एकमात्र उपचार यह है कि वह परिणाम घोषित होने के साथ ही अधिनियम की धारा 64 के अंतर्गत रजिस्ट्रार के समक्ष निर्वाचन याचिका/निर्वाचन विवाद प्रस्तुत करे – नामांकन प्रपत्रों की अनुचित खारिजी के आधार पर प्रस्तुत शिकायत को निर्वाचन याचिका में एक आधार बनाया जा सकता है।

B. Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 57 B – Preparation of Electoral Rolls – **The power under Section 57-B (2) relates to the preparation of electoral rolls and the conduct of all elections of cooperative society, and it does not extend to set aside the elections held for the reason of improper rejection of nomination papers and subject matter which is covered within the scope of election dispute under Section 64 of the Act. (Para 20)**

ख. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 57 बी – निर्वाचक नामावलियों का तैयार किया जाना – धारा 57–बी (2) के अंतर्गत शक्ति, निर्वाचक नामावलियों को तैयार किये जाने एवं सहकारी सोसाइटी के समस्त निर्वाचनों का संचालन किये जाने से संबंधित है, तथा इसका विस्तार नामांकन प्रपत्रों की अनुचित खारिजी के कारण आयोजित किये गये निर्वाचनों को अपास्त किये जाने हेतु तथा अधिनियम की धारा 64 के अंतर्गत निर्वाचन विवाद की परिधि

में आच्छादित होती विषय वस्तु पर नहीं है।

C. *Constitution – Article 226/227* – Scope of Jurisdiction of High Court in Election Matters, where the Authority has acted in excess of its' jurisdiction – Respondent No. 5 filed a complaint hurling serious allegations against Returning Officer including rejection and scrutiny of nominations and declaration of results under political pressure – The Collector conducted an enquiry and submitted the enquiry report before the Authority, and the Authority has stayed election – Held – The Authority has acted in excess of its' jurisdiction – The report submitted on a complaint of third person without notice to the Returning Officer and without verifying the record, could not form basis to justify stay of election by the Authority and thereby, restraining the elected office bearers to function – Writ Petition allowed – However, the Court declined to interfere into merits and demerits of factual disputes, as there being several allegations and counter-allegations. (Para 22)

ग. *संविधान – अनुच्छेद 226/227* – उन निर्वाचन मामलों में, उच्च न्यायालय की अधिकारिता का विस्तार जहाँ प्राधिकारी ने अपनी अधिकारिता का अधिक्रमण किया है – प्रत्यर्थी क्र. 5 ने रिटर्निंग अधिकारी के विरूद्ध राजनीतिक दबाव के अंतर्गत नामांकनों की छंटनी एवं खारिजी करने तथा परिणाम घोषित करने संबंधी गंभीर आक्षेप लगाते हुए एक परिवाद प्रस्तुत किया – कलेक्टर ने एक जाँच संचालित की और प्राधिकारी के समक्ष जाँच प्रतिवेदन प्रस्तुत किया, तथा प्राधिकारी ने निर्वाचन पर रोक लगा दी है – अभिनिर्धारित – प्राधिकारी ने अपनी अधिकारिता का अधिक्रमण किया है – अभिलेख का सत्यापन किए बगैर एवं रिटर्निंग अधिकारी को नोटिस दिए बगैर, किसी तीसरे व्यक्ति की शिकायत पर से प्रस्तुत किया गया प्रतिवेदन, प्राधिकारी द्वारा निर्वाचन पर रोक लगाये जाने को न्यायोचित ठहराने हेतु एवं उसके द्वारा चयनित पदाधिकारियों को कार्य करने से रोके जाने हेतु आधार नहीं बन सकता – रिट याचिका मंजूर – तथापि, न्यायालय ने तथ्यात्मक विवाद के गुणदोषों में हस्तक्षेप करने से इंकार कर दिया, क्योंकि उसमें अनेक आरोप–प्रत्यारोप है।

Cases referred:

1989 MPLJ 208, 2001 RN 411, (1995) 5 SCC 347, 1985 MPLJ 140, AIR 1952 SC 64, AIR 1978 SC 851.

D.P. Singh, for the petitioner.
Kamal Jain, G.A. for the respondent No. 1/State.
MPS Raghuvanshi, for the respondent No. 2.
Mukesh Sharma, for the respondent No. 6.

ORDER

ROHIT ARYA, J. :- This writ petition under Article 226 & 227 of the Constitution of India is directed against the communication dated 14/7/2015 addressed to Deputy Commissioner, Cooperative, District Bhind under the signature of Secretary, M.P. State Cooperative Election Authority, Bhopal in the context of election of members of Prathmik Krishi Sakha Sahkari Sanstha, Maryadit, Athar, District Bhind purportedly with the approval of the election authority staying the election with immediate effect.

2. Facts necessary for disposal of writ petition are to the following effect:-

Prathmik Krishi Sakha Sahkari Sanstha, Maryadit, Athar, District Bhind (hereinafter referred to as "Society") is a society registered under the provisions of M.P. Cooperative Societies Act, 1960 (for short "the Act"). For the purposes of election of members of Board of Directors, President/Vice President and representatives to be sent to other societies, M.P. State Cooperative Election Authority, Bhopal (hereinafter referred to as "Authority") issued the election programme (Annexure P/3). Respondent No. 6 was appointed as Returning Officer vide order dated 16th June, 2015. As per the election programme the date for publication of notice of election programme was fixed as 24/6/2015, for submission of nomination papers the date was fixed as 1/7/2015, for scrutiny of nomination papers and publication of valid nominations the date was fixed as 2/7/2015, for withdrawal of nomination papers and publication of final list of candidates with allotment of election symbols, the date was fixed as 3/7/2015, for polling, the date was fixed as 9/7/2015, for filling the seats through co-option the date was fixed as 10/7/2015, for notice to members to be elected as to the post of President/ Vice President and representatives to be sent to other societies, the date was fixed as 11/7/2015 and the date for declaration of name of President/Vice President and representatives to be sent to other societies was fixed as 14/7/2015.

On 1/7/2015 in prescribed Form 6 (ii), 31 nomination forms were received. After scrutiny of nomination forms on 2/7/2015, 21 nomination forms were rejected as candidates were found to be ineligible. 10 nomination forms were accepted as found to be eligible. There was no withdrawal of nomination. As per the programme, on 11/7/2015 meeting was called with due notice to all members as regards election of President/Vice President and representatives

to be sent to other societies scheduled on 14/7/2015. On 14/7/2015, all elected members were present and election of President/Vice President and representatives to be sent to other societies was held. After election, result was declared. No dispute or any complaint whatsoever was raised by respondent No. 5, who even otherwise was not a candidate in election or by any of the society members before the Returning Officer. Likewise, none of the candidates whose nomination paper was rejected, has filed either any complaint or raised any dispute at any point of time before the Returning Officer.

3. It appears that respondent No. 5 filed a complaint before the Collector, respondent No. 3 on 6/7/2015 hurling serious allegations against Returning Officer in the matter of election including rejection of nominations, scrutiny of nominations and declaration of results etc allegedly under some political pressure. As reflected from the impugned communication, the Collector conducted an enquiry and submitted the enquiry report before the Authority and the Authority has stayed the election.

4. Before adverting to respective contentions of learned counsel for the parties, it is considered apposite to refer to relevant provisions incorporated in the M.P. Cooperative Societies Act, 1960 and Rules made thereunder.

5. M.P. Cooperative Societies (Amendment) Act, 2012, Chapter VA has been inserted dealing with conduct of election of Cooperative Societies. Section 57-B deals with Election of Board of Directors and sub-section (2) thereof provides that superintendence, direction and control of the preparation of electoral rolls for, and the conduct of all elections of co-operative society shall vest in the State Co-operative Election Authority under the provisions of this Act and Rules made thereunder. Section 57-C provides for State Co-operative Election Authority. The State Government shall, by notification, in the Gazette, appoint a person as the Madhya Pradesh State Co-operative Election Authority, hereinafter called the 'Authority'. Section 57-D deals with functions of Authority. Section 57-F provides for power to issue directions by the Authority for conducting free, fair and impartial elections to any society or its committee or members.

6. In exercise of powers under sub-sections (1) and (2) of Section 95 of the M.P. Cooperative Societies Act, 1960 amendments in the Madhya Pradesh Cooperative Societies Rules, 1962 (for short "the Rules") have been made

vide notification No. F.5.3-2013-15-1 dated 26th June, 2013. Relevant provisions thereunder are as follow:-

> Chapter VA deals with procedure for conduct of elections in Cooperative Societies; whereunder, Rule 49-C provides for preparation of members list for election.
>
> Rule 49-D deals with appointment of Returning Officer. Rule 49-E deals with procedure for election of members of the Board of Directors. Inter alia sub-rule (3) provides for issuing election programme, sub-rule (4) provides for presentation of nomination papers, sub-rule (5) provides for scrutiny of nomination papers and sub-rules (8) provides as under:-
>
> *"(8) If the number of duly nominated candidates for election as members of Board of Directors is equal to or less than the number of seats to be filled, the Returning Officer shall declare in Form G-17 that there is no need for polling for such members and he shall intimate this fact to the society."*

7. As such, if number of nominated candidates for election is equal to seats to be filled, Returning Officer shall declare in Form G-17 that there is no need for polling for such members and accordingly information shall be furnished to society. Rule 49-F deals with election of chairman, vice chairman and representatives by the members of Board of Directors; whereunder, sub-rule (3) provides for as under:-

> *"(3) Where more than one valid nomination papers are not received for a post, the returning officer shall declare such candidate duly elected with regard to whom valid nomination paper has been received."*

8. Learned counsel for the petitioner contends that since 10 nominations were found eligible and total 10 seats were available in the Society, hence, no further election/polling was required in terms of sub-rule 3 of Rule 47-F. As not more than one valid nomination papers were received for a post, therefore, on 14/7/2015 in the presence of all elected members, the Returning Officer declared such candidates as duly elected and accordingly declared the results under sub-rule (3) of Rule 49-F of Rules as per election programme. As such

once, results were declared, the Authority had no jurisdiction to stay the election. It is further contended that if any person having locus standi, is aggrieved by the elections, he is always free to file an election dispute under Section 64 of the Act. The Authority has no jurisdiction to interfere with the results declared by Returning Officer under the Act and Rules framed thereunder.

9. It is further contended that even otherwise, the alleged communication staying the election so held is arbitrary, illegal and de hors facts on record. It is submitted that aforesaid impugned communication is sought to be justified on the basis of an enquiry allegedly held by the Collector on the complaint of respondent No. 5 dated 6/7/2015. Respondent No. 5 was not among the candidates having filed the nomination papers. None of the candidates having filed the nominations, have raised any question or dispute in the matter of rejection of nomination papers or declaration of results. None of the candidates, whose nominations were accepted were noticed on complaint and no opportunity was afforded by the Collector. Even the Authority while issuing the impugned communication solely acted upon the report of the Collector without notice and without seeing the record of Returning Officer. Learned counsel for the petitioner further contended that declaration of valid nominations for election of President/Vice President and representatives to be sent to other societies was in accordance with sub-rule (8) of Rule 49-E of the Rules and likewise the elections of President/Vice President and representatives to be sent to other societies on 14/7/2015 was also in accordance with sub-rule (3) of Rule 49-F. With aforesaid submissions, it is prayed that impugned communication deserves to be quashed.

10. To bolster his submissions learned counsel for the petitioner has relied on the judgment of this Court in the matter of *Radhey Shyam Sharma Vs. Chairman, Sewa/Vriha Sahahkari Samiti Lashkar, Gwalior and Ors,* 1989 MPLJ 208 to contend that the controversy involved in the aforesaid case was also similar to one in hand. This Court while rejecting the contention alleging colourable exercise of powers on the part of Returning Officer in the matter of rejection of nomination papers, has held that merely because as a result of acceptance of a particular number of nomination papers and if that number corresponds the number of seats to be filled up, it cannot be said that there was any design behind exercise of his powers by the Election Officer in doing so.

11. Learned counsel for the petitioner has also relied on the decision of this Court in the matter of *Ganesh and Ors. Vs. State of M.P. and Ors.*, 2001 RN 411; para 43 of which reads as under:-

> *"43. The core question is whether this Court should entertain the writ petition in view of the language employed under section 64 of the Act. True it is, on certain occasions this Court had interfered where there has been violation of the mandatory rules or mass rejection of the nomination forms. The learned counsel for the petitioners endeavoured hard to show that some of the cases are similar to the cases wherein this Court had interfered. With regard to valid appointment of Returning Officer, the cases which have been come before this Court at present are quite different than that of Thaneshwar Shyam Bihari Mishra (supra). In that case the appointment was vitiated being hit by the principle 'delegatus non protest delegate' and it was manifest on the face of it but the cases at hand require reference to various circulars and can be adjudicated by the Registrar. As far as the rejection of nomination papers in mass scale is concerned, as has been noticed earlier, in some cases singular petitioner has approached this Court. Quite apart from the above, in all circumstances it cannot be said that mass scale rejection or nomination papers would entitle the aggrieved persons to invoke the extraordinary jurisdiction of this Court. There may be justification for such rejection. To give a hypothetical example if a declaration is to be given under the Act but the same is not given by many a candidate whether fault can be found with the Returning Officer in law in rejecting the nomination papers. Whether opportunity was given tot he candidates at the time of scrutiny or not is another aspect altogether and remains int eh realm of facts which can be adjudicated by the Registrar. Thus, in my considered opinion, the decisions whether in there was interference are of not much assistance to the petitioners. As has been indicated in number of cases, in very exceptional case interference by this Court under Article 226 may be*

warranted but in the present batch of cases facts and circumstances do not so warrant and the petitioners can very well agitate their grievances before the Registrar of the Cooperative Societies."

12. Except respondents No. 2 and 6, none of the other respondents have filed counter affidavit.

13. Following contentions are advanced by learned counsel for respondent No. 2 :

In the light of provisions as contained under Section 57-B(2), the Authority has vide powers of superintendence, direction and control in the matter of election of cooperative society and therefore, Authority was fully competent to stay the election results declared on 14/7/2015. It is further contended that the complaint received on 7/7/2015 was duly notified to the Returning Officer for appearance before the Additional Collector on 13/7/2015, but he chose not to appear, therefore, after hearing the complainant, the report was prepared. Various irregularities were found on the part of Returning Officer while rejecting 21 nominations papers and declaring 10 nominations as valid nominations. Learned counsel has made reference to sub-rule (3) of Rule 49-G of Rules to contend that the Authority was within its jurisdiction while staying the election by impugned communication. Relevant part whereof reads as under:-

"(3) Fresh polling/election because of procedural irregularity-

(a) If on any polling booth any error or irregularities in procedure as is likely to vitiate the poll is committed at the polling both, the Returning Officer shall inform the matter immediately to Authority and shall also give a copy of the same to coordinator."

With the aforesaid submissions, learned counsel for the respondent prayed for dismissal of the petition.

14. Respondent No. 6 has also filed counter affidavit. It is contended that enquiry report dated 13/7/2015 by the Additional Collector on direction of the Collector vide letter dated 7/7/2015 with reference to the complaint of respondent No. 5 was the basis for staying the election declared on 14/7/2015

for which respondent No. 6 was never noticed for appearance before the Collector Office to remain present on 13/7/2015 as explained in detail in para 1 of the counter affidavit. As such, the report is prepared without hearing the respondent No. 6-Returning Officer and without verifying the record. It is further contended that after appointment of Returning Officer, the election programme was declared. 21 nominations were found ineligible, hence, rejected. 10 nominations were found eligible or valid. Thereafter, notice for meeting was issued on 11/7/2015 and meeting was held on 14/7/2015 for election of President/Vice President and representatives to be sent to other societies and election results were declared. It is further contended that none of the candidates filing nomination papers have raised any dispute at the time of rejection of nomination papers or till completion of elections and issuance of results of election. Even respondent No. 5, who otherwise not a candidate to election did not raise any dispute or complaint before respondent No. 6 at any point of time. It is further contended that even the veracity of the allegations made in the complaint, if examined, it is crystal clear that there is inherent contradictions and inconsistencies, as it is alleged in the complaint that returning officer was not present in the office of Society, by another complaint dated 9/7/2015 (Annexure R/2/4), it is alleged that on 1/7/2015 total 31 forms were received and 21 forms were rejected at home on 2/7/2015 without any reason under political pressure. On 13/7/2015 (Annexure R-2/7) in the statement before the Additional Collector, the complainant admitted that nomination forms were given on 1/7/2015 in office of Society but no scrutiny and withdrawal of form proceedings was held on 2nd and 3rd July, 2015. As such, three different statements by complainant are well evident. There is no explanation as to why complaint was not filed on 2nd and 3rd July, 2015 in the context of aforesaid facts and circumstances.

15. Heard learned counsel for the parties.

16. The preliminary question arose for consideration is as regards scope of jurisdiction of this Court under Article 226 of the Constitution of India in the matter of election dispute in the facts and circumstances of the case.

17. Having gone through the judgments cited by learned counsel for the petitioner; this Court is in respectful agreement with the ratio of decisions cited by learned counsel for the petitioner. This Court in aforesaid decisions has referred to and relied upon catena of judgments of Supreme Court and this Court in the context of scope of jurisdiction under Article 226 of the

Constitution of India in the matter of election disputes for which statutory remedy is provided for filing an election petition/dispute under the Act. However, this Court consider it apposite to refer to one of the judgments of Hon. Supreme Court in the matter of *Gajanan Krishnanji Bapat and Anr. Vs. Dattaji Raghobaji Meghe and Ors.*, (1995) 5 SCC 347 for exposition of law in the field. Para 12 of the aforesaid decision reads as under:-

> *"12.The right to elect and the right to be elected are statutory rights. These rights do not inhere in a citizen as such and in order to exercise the right certain formalities as provided by the Act and the Rules made thereunder are required to be strictly complied with. The statutory requirements of election law are to be strictly observed because the election contest is not an action at law or a suit in equity but it is a purely statutory proceeding unknown to the common law. The Act is a complete code in itself for challenging an election and an election must be challenged only in the manner provided for by the Act."*

18. Further a Division Bench of this court in the case of *Rajendra Shukla Vs. A.B.Qureshi, Assistant Registrar, Cooperative Societies, Bilaspur and Ors.*, 1985 MPLJ 140 has observed that writ petition cannot be entertained after declaration of election programme in view of proviso to Section 64 of the Act.

19. Further Section 64 of the Act deals with Disputes and inter alia provides by way of proviso as under:-

> *"Provided that the Registrar shall not entertain any dispute under this clause during the period commencing from the announcement of the election programme till the declaration of the results."*

20. Facts on record, reveal that Returning Officer in the process of scrutiny of nominations has rejected 21 nomination papers and found remaining 10 nominations as valid. Thereafter, meeting was convened on 14/7/2015. Election of President/Vice President and representatives to be sent to other societies was declared on 14/7/2015 in terms of Rule 49-F (3) of Rules, as such once the result has been declared, complaint on the ground of improper rejection of nomination papers, in the opinion of this Court can be made only by an

election petition/dispute under Section 64 of the Act as one of the grounds in the election petition. As complaint on the aforesaid premise, attributing motives and allegations against Returning Officer for enquiry by the Collector, is not envisaged either under the M.P. Cooperative Societies Act or Rules made thereunder for purpose of setting aside election. Authority in the purported exercise of powers of superintendence, direction and control under Clause (2) of Section 57-B of Act cannot exceed its jurisdiction to interfere with the result of elections acting upon report of the Collector and thereby staying the election result already declared. The power under Section 57-B (2) relates to the preparation of electoral rolls and the conduct of all elections of co-operative society and does not extend to set aside the elections held for the reason of improper rejection of nomination papers; subject matter which is covered within the scope of election dispute as provided for under Section 64 of the Act. Hon. Supreme Court in the case of *M.P.Ponnuswami Vs. The Returning Officer, Manakkal Constituency, Namakkal, Salem, District and Ors.*, AIR 1952 SC 64 in para 16 has held as under:-

> *"16. The conclusions which I have arrived at may be summed up briefly as follows:*
>
> *(1) Having regards to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time-schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.*
>
> *(2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the 'election"; and if any irregularities are committed while it is in progress and they belong to the category or class which under the law by which elections are governed, would have the effect of vitiating the "election" and enable the person affected to call it in question, they should be brought up before a special*

tribunal by means of an election petition and not be made the subject matter of a dispute before any court while the election is in progress."

(emphasis supplied)

21. In light of the aforesaid discussion, this Court holds that the Authority has acted in excess of its jurisdiction and the same finds support of judgments of this Court and Hon. Supreme Court. The contention of learned counsel for respondent no.2 that issuance of impugned communication (Annexure P/1) by the Authority was well within his jurisdiction in exercise of his powers of superintendence, control and direction under sub-section (2) of Section 57-B of the M.P. Cooperative Societies Act read with Rule 49-G (3) quoted above, in the opinion of this Court, is far-fetched and contrary to the settled legal position. As per the election programme, election of President, Vice President and Representatives to be sent to the other societies was declared on 14/7/2015. The powers under Section 57-B(2) is in relation to preparation of electoral rolls and conduct of election of the society and cannot be stretched to intermingle with election results declared with the aid of Rule 49-G (3) quoted above, which has no application to such situation. The only remedy available to person aggrieved by the declaration of result is to file election petition or election dispute before the Registrar under Section 64 of the Cooperative Societies Act. The reliance on the judgment of the Hon'ble Supreme Court in the case of *Mohindeer Singh Gill and Anr. Vs. The Chief Election Commissioner, New Delhi and Ors.*, AIR 1978 SC 851 is of no assistance to the petitioner.

22. In view of the aforesaid opinion formed by this Court on jurisdictional issue, this Court does not propose to interfere into the merits and demerits of factual disputes raised by the parties as there are allegations and counter allegations. Even otherwise, the report submitted by Additional Collector dated 13/7/2015 on a complaint of third person, not being a candidate to the election and without notice to Returning Officer and without verifying the record, could not form basis to justify stay of election by Authority and thereby restraining elected office bearers to function.

23. Accordingly, writ petition is hereby allowed and impugned communication (Annexure P/1) dated 14/7/2015 is hereby set aside.

Petition allowed.

I.L.R. [2016] M.P., 3265
WRIT PETITION
Before Mr. Justice Sheel Nagu
W.P. No. 6884/2014 (Gwalior) decided on 3 November, 2015

KUSMA RATHORE (SMT.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Constitution – Article 226 – Death in the police encounter – **Non-registration of the First Information Report – Seeking a direction to register case against the Police Officers – In the matter of death in a police encounter, the appropriate step is to prefer a written application to the Sessions Judge within whose territorial jurisdiction the incident in question took place, regarding abuse or lack of independent investigation or impartiality shown by any of the functionaries of the State involved in investigating process. (Para 11 C)**

संविधान – अनुच्छेद 226 – पुलिस मुठभेड़ में मृत्यु – प्रथम सूचना प्रतिवेदन दर्ज न किया जाना – पुलिस अधिकारियों के विरूद्ध प्रकरण दर्ज किये जाने हेतु निदेश चाहा गया – पुलिस मुठभेड़ में मृत्यु के मामले में उचित कदम यह है कि अन्वेषण प्रक्रिया में सम्मिलित राज्य के किसी भी कृत्यकारी द्वारा स्वतंत्र अन्वेषण अथवा निष्पक्षता में दर्शाए गए अभाव अथवा दुरूपयोग के संबंध में उस सत्र न्यायाधीश के समक्ष लिखित आवेदन प्रस्तुत किया जावे, जिसकी क्षेत्रीय अधिकारिता के अंतर्गत प्रश्नगत घटना घटित हुई।

Cases referred:

(2014) 2 SCC 1, (2014) 10 SCC 635.

A.S. Bhadoriya, for the petitioner.
Arvind Dudawat, Addl. A.G. for the respondents No. 1 to 3/State.
Anil Mishra, for the respondent No. 4.
Sangeeta Pachouri, for the respondent No. 7.
M.P.S. Raghuvanshi, for the respondent No. 9.

ORDER

SHEEL NAGU, J. :- The present petition is heard finally with the consent of learned counsel for the rival parties. The matter was listed on an application being I.A.No. 6166/2015 for recalling of order dated 20/08/2015.

2. This Court by interim order dated 20/08/2015 *prima facie* found that relief contained in clause 7.1 of the petition seeking direction for conduction of enquiry in crime No. 513/2014 registered at police station Gola Ka Mandir, Dist. Gwalior and crime No. 828/2014 registered at police station Bahodapur, Dist. Gwalior by CBI or an independent agency has become infructuous as investigation in both the offences were handed over to the CID on 05/11/2014 vide Annexure R-1.

3. By interim order dated 20/08/2015, this Court in regard to relief contained in clause 7.2 of the petition sought registration of offence u/S. 302 of IPC against erring police personnel. This Court while declining to make any comment on merits and relying upon the decision of the Apex Court in the case of *Lalita Kumari Vs. Government of U.P. & Ors.* reported in (2014) 2 SCC 1, directed that information furnished by the petitioner contained in Annexures P-19 & P-20 alleging offence against police personnel ought to be acted upon in terms of law u/S. 154 of Cr.P.C. Therefore, necessary directions in that regard were issued to comply with the statutory provision u/S. 154 of Cr.P.C. in terms of the law laid down in the case of *Lalita Kumari* (supra).

3.1 While seeking recalling of interim order dated 20/08/2015, learned counsel for the respondents raised singular contention that the said direction given in regard to prayer in clause 7.2 of the petition runs contrary to the decision of the Apex Court rendered in the case of *People's Union for Civil Liberties and Anr. v. State of Maharashtra & Ors.* reported in (2014) 10 SCC 635, whereby, Apex Court while dealing with the prayer of absence of any codified guidelines in regard to investigation of death in police encounter laid down guidelines in para 31 of its judgment.

3.2 Learned State counsel submits that para 31.16 of these guidelines, the family of the victim dying in police encounter is provided a forum to ventilate all the grievances against abuse or lack of independent investigation or impartiality by any functionary of the State conducting investigation in cases of police encounter. For ready reference and convenience paragraph 31.16 of the Guidelines is reproduced herein below :-

> *"31.16 If the family of the victim finds that the above procedure has not been followed or there exists a pattern of abuse or lack of independent investigation or impartiality by any of the functionaries as above*

mentioned, it may may make a complaint to the Sessions Judge having territorial jurisdiction over the place of incident. Upon such complaint being made, the Sessions Judge concerned shall look into the merits of the complaint and address the grievances raised therein."

4. From the above, it is evident that family of the victim in police encounter can make complaint to the Sessions Judge within whose territorial jurisdiction the encounter took place and on doing so the Sessions Judge is directed to look into the merits of the complaint and address the grievances raised therein.

4.1 In the face of above said law laid down in the case of *People's Union* (supra), learned State counsel contends that the direction issued by interim order dated 20/08/2015 is untenable. It is further contended that since a complete and exhaustive procedure is laid down by the decision in the case of *People's Union* (supra) dealing exclusively with police, all encounter causes and grievances arising out of the incident of police encounter vide crime No. 513/2014 registered at police station Gola Ka Mandir, Dist. Gwalior and crime No. 828/2014 registered at police station Bahodapur, Dist. Gwalior can very well be taken care of by the Sessions Judge having territorial jurisdiction over the incident.

5. This petition now survives only to the extent of relief in clause 7.2 and 7.3 of the petition which are reproduced herein below :-

7(2) यह की, प्रत्यार्थी क. 2 व 3 को आदेशित किया जावे कि याचिकाकर्ता द्वारा दोषी पुलिस आधिकारियों के विरूद की गई शिकायत एनेक्चर पी. 19 के अनुसार, दोषी पुलिस अधिकारियों के विरूद भा.द.वि. की धारा 302 का मामला पंजीबद्ध करें।

7(3) यह कि, प्रत्यार्थी क्र. 1 को आदेशित किया जावे कि याचिकाकर्ता तथा उसके दो बच्चों के भरणपोषण के लिए बीस लाख रूपये की क्षतिपूर्ति राशि प्रदान की जावे ।

6. The petitioner who happens to be widow of the victim who died in alleged police encounter giving rise to crime No. 513/2014 registered at police station Gola Ka Mandir, Dist. Gwalior and crime No. 828/2014 registered at police station Bahodapur, Dist. Gwalior prays for direction for taking action against the erring police personnel by registration of an offence of murder against them. The investigating process in crime No. 513/2014 registered at

police station Gola Ka Mandir, Dist. Gwalior and crime No. 828/2014 registered at police station Bahodapur, Dist. Gwalior is being conducted by CID.

7. The Apex Court, after noticing hiatus in law providing for specific procedure for conducting fair and impartial investigation in matters of police encounter, rose to the occasion and laid down specific guidelines in para 31 of the said judgment.

8. Perusal of above said detailed guidelines provided by Apex Court, it is revealed that all the eventuality arising from the incident of death in police encounter are taken into account including aspect of providing forum to the dissatisfied family member of the victim in police encounter in para 31.16 of the said decision of *People's Union* (supra).

9. After hearing learned counsel for the rival parties, this Court is of the considered view that the interim order dated 20/08/2015 to the extent it directs for acting upon written information vide Annexures P-19 & P-20 of the petition in terms of decision of the Apex Court in the case of *Lalita Kumari* (supra) deserves to be recalled on the anvil of law laid down by the Apex Court in the case of *People's Union* (supra).

9.1 This Court is conscious of the fact that the decision of the Apex Court in the case of *Lalita Kumari* (supra) was rendered by a Bench comprising of five Judges whereas decision in the case of *People's Union* (supra) was rendered by a Bench comprising of three Judges. However, the Apex Court in the case of *Lalita Kumari* (supra) in generic terms laid down the law as regards statutory obligation of the police under section 154 of Cr.P.C. on receiving information alleging commission of cognizable offence, while on the other hand the decision of the Apex Court in *People's Union* (supra) though rendered by a Bench of lessor strength of Judges dealt exclusively with the matter of investigation in incidents of death in police encounter and issues related therein.

9.2 The instant petition is a case arising out of an incident where death took place in alleged police encounter and, therefore, law laid down in the decision of the Apex Court in *People's Union* (supra) would squarely apply to the facts of the present case to the exclusion of the law laid down in the case of *Lalita Kumari* (supra). It is settled principle of law that special law supercedes the general law to the extent of commonality between the two

(Generalia specialibus non derogant).

9.3 In terms of the above discussion the interim order passed on 20/08/2015 so far as it directs the respondents to act upon Annexures P-19 & P-20 in terms of decision rendered in the case of *Lalita Kumari* (supra) is declared to be untenable and, therefore, is recalled.

10. As regards other direction of providing police protection, this Court by instant final order affirms the interim order of directing the Superintendent of Police, Gwalior to provide adequate and necessary security to Rameshwar Rajput who is one of the witness in the incident as and when the said witness seeks such police protection.

11. Accordingly, this petition stands disposed of with the following directions :-

a) CID is directed to conduct and conclude the investigation in crime No. 513/2014 registered at police station Gola Ka Mandir, Dist. Gwalior and crime No. 828/2014 registered at police station Bahodapur, Dist. Gwalior against the husband of the petitioner-widow impartially without any malice coming into play as expeditiously as possible.

b) The Superintendent of Police, Gwalior is directed to ensure police protection to the witness Rameshwar Rajput as and when the same is sought by him with utmost promptitude.

c) The petitioner is at liberty to prefer appropriate written application to the Sessions Judge within whose territorial jurisdiction the incident in question took place, as regards grievances contained in Annexures P-19 & P-20 dated 27/10/14 & 28/10/14 respectively, abuse or lack of independent investigation or impartiality shown by any of the functionaries of the State involved in investigating process. In case any such application is moved, the learned Sessions Judge shall deal with the same with utmost promptitude in terms of guidelines laid down by the Apex Court in the case

of People's Union (supra).

d) Prayer in regard to compensation shall remain open to the petitioner to claim in future as and when occasion arises and if law permits.

No order as to cost.

Order accordingly.

I.L.R. [2016] M.P., 3270
WRIT PETITION
Before Mr. Justice S.C. Sharma
W.P. No. 12065/2012 (Indore) decided on 2 March, 2016

SARITA MISHRA (SMT.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Constitution – Article 226 – Service Law*** **– Non payment of regular pay scale – Petitioner was appointed as Samvida Shala Shikshak Grade III on 3.2.2007 and later on was absorbed as Adhyapak – She was receiving fixed salary of Rs. 5000/- per month from the year 2007, though she was regular employee – Held – Respondents are directed to pay the arrears of regular pay scale salary with interest @ 8.5% per annum to the petitioner, if not paid within two months, the petitioner shall be entitled for 12.05% interest till the date of actual payment. (Paras 2, 12 & 14)**

क. *संविधान – अनुच्छेद 226 – सेवा विधि* – नियमित वेतनमान का भुगतान न किया जाना – याची को दिनांक 03.02.2007 को संविदा शाला शिक्षक वर्ग–III के तौर पर नियुक्त किया गया था एवं पश्चात् में अध्यापक के पद पर उसका संविलयन किया गया था – यद्यपि, वह एक नियमित कर्मचारी थी, वह वर्ष 2007 से प्रतिमाह नियत वेतन रूपये 5000/– प्राप्त कर रही थी – अभिनिर्धारित – प्रत्यर्थीगण को याची को 8.5% प्रतिवर्ष की दर से ब्याज सहित नियमित वेतनमान के वेतन के बकाया का भुगतान करने हेतु निदेशित किया गया, यदि बकाया का भुगतान दो माह के अंदर नहीं किया जाता है, तब याची वास्तविक भुगतान की तिथि तक 12.05% की दर से ब्याज पाने हेतु हकदार होगा।

B. ***Constitution – Article 226*** **– Commissioner, Public Education, M.P. is directed to conduct enquiry in respect of delay of**

payment of regular pay scale – State government is free to recover interest components from the Officer held guilty – Commissioner shall submit compliance report to the Court about enquiry. (Para 14)

ख. संविधान – अनुच्छेद 226 – आयुक्त, लोक शिक्षा, म.प्र. को नियमित वेतनमान के भुगतान में हुए विलंब के संबंध में जाँच करने हेतु निदेशित किया गया – राज्य शासन दोषी पाए गये अधिकारी से ब्याज के घटकों की वसूली करने हेतु स्वतंत्र होगा – आयुक्त, जाँच के संबंध में अनुपालन प्रतिवेदन न्यायालय के समक्ष प्रस्तुत करेगा।

ORDER

S.C. SHARMA , J. :- The petitioner before this Court Sahayak Adhyapak was appointed on the post of Samvida Shala Shikshak Grade-III at Government Primary School, Teh -Mhow, Dist - Indore on 03/02/2007. She was later on, absorbed as Adhyapak and posted in the primary school of the Indore Municipal Corporation.

2. The petitioner's grievance is that she is receiving a fixed salary of Rs. 5000/- per month, though she is a regular employee and the benefit of regular pay-scale for which she is lawfully entitled, has not been given to her from the year 2007.

3. Reply has been filed in the matter and the stand of the State Government is that the petitioner was appointed as Samvida Shala Shikshak Grade-III by the Chief Executive Officer, Janpad Panchyat (sic:Panchayat), Mhow on 03/02/2007. Later on, she was absorbed in the school under the control of Indore Municipal Corporation and therefore, the District Education Officer is not required to pay the salary to the petitioner.

4. Learned counsel for the State has vehemently argued before this Court that it is the Janpad Pandhyat (sic:Panchayat) Mhow who is required to pay the salary or it is the Indore Municipal Corporation who is required to pay the salary of the petitioner and not the State Government.

5. Mr. Anand Agrawal, learned counsel appearing for the Indore Municipal Corporation has vehemently argued before this Court that the salaries of all teachers working in the various schools under the Indore Municipal Corporation is being paid by the State Government only and the State Government through its District Education Officer is liable to pay salary in the present case also.

6. The Chief Executive Officer, Janpad Panchyat(sic:Panchayat), Mhow has opted not to appear before this Court, inspite of there being service of notice.

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

8. The circular dated 10/06/2011 is on record, which is an order directing the Joint Director, Education to ensure payment of salary to Adhyapak / Sahayak Adhyapak. There is another circular dated 02/01/2010 on record issued by the Joint Director, Public Education, M.P by which, all the District Education Officers were directed to prepare bills of all the teachers working in respective districts and to ensure the payments of all Adhyapak / Sahayak Adhyapak.

9. The aforesaid circulars make it very clear that in case, any Adhyapak/ Sahayak Adhyapak does not receive salary, the District Education Officer shall be held liable in the matter. The aforesaid circulars and orders are reproduced hereunder for ready reference.

लोक शिक्षण संचालनालय

मध्यप्रदेश

क्रमांक/शि.क्र./अंशदायी पेंशन योजना/2011/ /330
भोपाल दिनांक 10/06/2011

प्रति,

समस्त
संभागीय संयुक्त संचालक
जिला शिक्षा अधिकारी
मध्यप्रदेश

विषय :– संविदा शाला शिक्षक श्रेणी 1,2,3 से सहायक अध्यापक, अध्यापक एवं वरिष्ठ अध्यापक संवर्ग में संविलियन किये गये अध्यापकों का पदनाम परिवर्तन एवं अध्यापक संवर्ग हेतु अंशदायी पेंशन योजना अंतर्गत प्रान आवंटन हेतु भरे हुए फार्म भेजने के संबंध में ।

अध्यापक संवर्ग हेतु अंशदायी पेंशन योजना अंतर्गत माह अप्रैल 2011 के वेतन देयक में से मूल वेतन एवं मंहगाई भत्ते के 10 प्रतिशत का कटौत्रा किया जा रहा है। विभिन्न निकायों के अंतर्गत कार्यरत संविदा शाला शिक्षक श्रेणी 1,2,3 से अध्यापक संवर्ग में समय–समय पर नियमानुसार संविलियन कर आदेश जारी किये जाते है। यह एक निरंतर प्रक्रिया है। पोर्टल की मानिटरिंग के दौरान यह देखा

गया है कि संविलियन किये गये संविदा शाला शिक्षकों का पदनाम परिवर्तन पोर्टल पर तत्काल नही किया जाता। समय पर पदनाम परिवर्तन नही होने से अंशदायी पेंशन योजना अंतर्गत उन अध्यापकों का अंशदान काटा जाना संभव नहीं हो सकेगा। अतः समस्त आहरण संवितरण अधिकारियों को निर्देशित किया जाता है कि अध्यापक संवर्ग में संविलियन होते ही संबंधित संविदा शाला शिक्षक का तत्काल पदनाम परिवर्तन करने हेतु पोर्टल पर मांग की जाए एवं संबंधित जिला शिक्षा अधिकारी पोर्टल पर इसकी स्वीकृति देंगे। तत्पश्चात आहरण एवं संवितरण अधिकारी अध्यापक संवर्ग में संविलियन किये गये अध्यापकों को अंशदायी पेंशन योजना में सम्मिलित करने हेतु प्रान (PRAN) आवंटन फार्म भरवाकर निर्देशानुसार संचालनालय में प्रेषित करेंगे।

आहरण एवं संवितरण अधिकारी यह भी सुनिश्चित करेंगे कि वेतन तैयार करने के पूर्व के माह के वेतन देयक को कोषालय देयक क्रमांक इत्यादि की प्रविष्टि कर अनिवार्यतः लाक कर लिया जाए। क्योंकि केवल लाक करे हुए वेतन देयकों मे से ही अंशदायी पेंशन योजना के अंशदान की गणना की जायेगी।

इस आदेश का पालन सख्ती से सुनिश्चित किया जाए।

(अशोक बर्णवाल)

आयुक्त
लोक शिक्षण मध्यप्रदेश
भोपाल, दिनांक 16/06/2011

पृष्ठा. क्रमांक/शि.क./अंशदायी पेंशन योजना/2011/ /331

लोक शिक्षण संचालनालय, मध्यप्रदेश
गौतम नगर, भोपाल–462021
दूरभाष 0700–2000000 फैक्स 0755–2563651
ई–मेल dpiassembly-mp@nic.in

क्रमांक/शि.क./सी/01/09
भोपाल, दिनांक 02/01/2010

प्रति,

समस्त जिला शिक्षा अधिकारी,
मध्यप्रदेश।

विषय :– आपके जिलान्तर्गत कार्यरत अध्यापक संवर्ग एवं संविदा शिक्षकों को तत्काल वेतन भुगतान करने के संबंध में।

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विषयान्तर्गत निर्देशित किया जाता है कि आपके जिलान्तर्गत कार्यरत अध्यापक संवर्ग एवं संविदा शिक्षकों को तत्काल वेतन भुगतान करने हेतु समस्त आहरण संवितरण अधिकारियों को दिनांक 05.01.2009 को अपने कार्यालय में बुलाऐं एवं अपने समक्ष वैतन देयक तैयार करवाकर उसी दिन कोषालय में लगवाऐं जाना सुनिश्चित करें। संबंधितों को वेतन प्राप्त न होने की स्थिति में आपको व्यक्तिशः उत्तरदायी मानते हुए आपके विरूद्ध नियमानुसार कार्रवाई की जाएगी।

आयुक्त लोक शिक्षण के आदेशानुसार।

(वी.एस. सक्सेना)
संयुक्त संचालक
लोक शिक्षण, म.प्र.

भोपाल, दिनांक 02.01.2010

क्रमांक/शि.क./सी/01/10

प्रतिलिपि :–

1. विशेष सहायक, प्रमुख सचिव, म.प्र. शासन, स्कूल शिक्षा विभाग, मंत्रालय, भोपाल।
2. विशेष सहायक, आयुक्त, लोक शिक्षण, म.प्र.।
3. आयुक्त राज्य शिक्षा केन्द्र, भोपाल।
4. समस्त कलेक्टर्स, मध्यप्रदेश।
5. समस्त मुख्य कार्यपालन अधिकारी, जिला पंचायत, म.प्र.।
6. निज सहायक, संचालक लोक शिक्षण, म.प्र.।
7. समस्त संयुक्त संचालक, लोक शिक्षण, मध्यप्रेदश की ओर सूचनार्थ।

संयुक्त संचालक
लोक शिक्षण, म.प्र.

10. Not only this, the Additional Director, Finance has sanctioned a sum of Rs. 2 crores, meaning thereby, the State Government has sanctioned the sum of Rs. 2 crores and all the drawing / disbursing officers, who are the officers of the State Government, have been directed to ensure the payment of salary to all persons belonging to the cadre of teachers, which include Adhyapak / Sahayak Adhyapak, meaning thereby, the post, which the petitioner is holding.

11. Keeping in view the aforesaid executive instructions / orders issued by the State Government from time to time, it is the duty of the State Government to ensure the payment of regular salary to the petitioner from

03/02/2007.

12. Resultantly, the present writ petition is allowed. Respondent nos. 1 and 2 are directed to pay the arrears of salary by taking into account the regular pay-scale, for which, the petitioner is entitled right from 03/02/2007 till the date. Respondent nos. 1 and 2 shall also pay regular salary to the petitioner as she is working on the post of Sahayak Adhyapak. Respondent nos. 1 and 2 shall also pay the interest @ 8.5 per annum in respect of the arrears of salary as the petitioner has not been paid regular salary since 2007. Her entitlement in respect of the regular salary is not in dispute.

13 The aforesaid exercise of paying the arrears of salary and the regular salary be concluded within a period of 60 days from the date of receipt of certified copy of this Court.

14 The facts of the case is really shocking. For the reasons best known to the officer/s of the State Government, a poor Assistant Teachers has been made to run from the pillar to the post claiming a right of salary as she is working on the post of Sahayak Adhyapak and is not getting salary from the State Government. For the defaults on the part of certain officers, interest has been levelled in respect of the arrears of the salary, and therefore, the Commissioner, Public Education, M.P is directed to conduct fact finding inquiry, that too after granting all possible opportunities of hearing to the officer/s involved in the matter and thereafter, shall fix the responsibility in respect of delay of the payment of regular salary to the petitioner upon the officer/s and the State Government shall be free to recover the interest components from the officer/s, who is/are held guilty in respect of non-payment of the regular salary to the petitioner The exercise of conducting the inquiry be concluded within three months from the date of receipt of certified copy of this Court. The Commissioner, Public Education, M.P. shall also submit a compliance report to this Court about the outcome of the inquiry conducted by the Commissioner, Public Education, M.P. It is further made clear that in case, the arrears of salary and the regular salary are not paid within two months as aforesaid, the petitioner shall be entitled for interest @ 12.05 per annum from the date of her entitlement, till the amount is actually paid to the petitioner.

C c as per rules.

Order accordingly.

I.L.R. [2016] M.P., 3276
WRIT PETITION
Before Mr. Justice P.K. Jaiswal & Mr. Justice Alok Verma
W.P. No. 1901/2016 (Indore) decided on 29 March, 2016

RAJENDRA K. GUPTA ...Petitioner
Vs.
SHRI SHIVRAJSINGH COUHAN
CHIEF MINISTER OF M.P. & ors. ...Respondents

A. ***Constitution – Article 226 – Public Interest Litigation –*** **To stay process of issuance of e-Challans with help of Closed Circuits, Television Footage by Road Transport Officer – PIL must be real and genuine and not merely an adventure of knight errant borne out of wishful thinking – In present petition, petitioner has without any material, impleaded number of persons by their name for publicity purpose only, therefore, petition dismissed with cost of Rs. 10,000.**
(Paras 12 & 13)

क. संविधान – अनुच्छेद 226 – लोक हित वाद – सड़क परिवहन अधिकारी द्वारा सी.सी.टी.वी. फुटेज की सहायता से ई–चालान जारी होने की प्रक्रिया पर रोक लगाने हेतु – लोक हित वाद वास्तविक एवं यथार्थ होना चाहिए एवं न कि मात्र कोरी–अभिलाषा से उत्पन्न किसी भ्रमणकारी शूरवीर का साहसिक कारनामा – वर्तमान याचिका में, याची द्वारा बिना किसी सामग्री के कई व्यक्तियों को उनके नाम से मात्र लोक–प्रसिद्धि के प्रयोजन हेतु आलिप्त किया गया, इसलिए रू. 10,000/– के व्यय के साथ याचिका खारिज।

B. ***Constitution – Article 226 – Power of judicial review –*** **Do not ordinarily interfere with the policy decision of the executives unless the policy can be faulted with arbitrariness, unreasonableness or unfairness etc.**
(Para 7)

ख. संविधान – अनुच्छेद 226 – न्यायिक पुनर्विलोकन की शक्ति – सामान्यतः कार्यपालकों के नीतिगत निर्णय में हस्तक्षेप नहीं किया जाता, जब तक नीति में मनमानापन, अयुक्तियुक्तता या अनौचित्य इत्यादि, होने का दोष न हो।

C. ***Constitution – Article 226 – Public Interest Litigation – Locus Standi –*** **Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extra ordinary jurisdiction – A person acting *bonafide* and having sufficient interest in the proceedings of**

PIL will alone have a locus standi and can approach the court to wipe out violation of fundamental rights and genuine infraction of statutory provisions but not for personal gain or private profit or political motive or any oblique consideration – Petition dismissed. (Para 12)

ग. संविधान – अनुच्छेद 226 – लोक हित वाद – सुने जाने का अधिकार – आसाधारण अधिकारिता का सहारा लेकर न्यायालय को झूठे मुकदमेबाजों द्वारा प्रदूषित करने नहीं दिया जाना चाहिए – जो व्यक्ति सद्भावपूर्वक कार्य करता है एवं लोक हित वाद की कार्यवाहियों में पर्याप्त हित रखता है, एकमात्र उसे सुने जाने का अधिकार होगा तथा वह मौलिक अधिकार के उल्लंघन एवं वास्तविक वैधानिक प्रावधान के व्यतिक्रम के विरूद्ध न्यायालय पहुँच सकता है, परंतु व्यक्तिगत लाभ या निजी लाभ या राजनैतिक उद्देश्य या किसी परोक्ष प्रतिफल हेतु नहीं।

D. Words & Phrases – "Mala fide" – The allegations regarding mala fide cannot be vaguely made – It must be specific and clear and the person against whom it is alleged must be made party. (Para 8)

घ. शब्द एवं वाक्यांश – "असद्भावपूर्वक" – असद्भावना संबंधित कथन अस्पष्ट रूप से नहीं किये जा सकते – यह विनिर्दिष्ट एवं स्पष्ट होने चाहिए तथा वह व्यक्ति जिसके विरूद्ध अभिकथन किये गये हैं उसे पक्षकार बनाया जाना चाहिए।

Cases referred:

2010 (2) MPLJ 443, (2014) 6 SCC 36, 2006 (7) Scale 41.

Petitioner *Rajendra K. Gupta,* is present in person.

O R D E R

The Order of the Court was delivered by :

P.K. JAISWAL, J. :- The petitioner has filed the instant public interest litigation, with the relief to stay the process of issuance of e-challans with the help of Close Circuit Television Footage by Road Transport Officer and e-challans which have already been issued be cancelled and the amount recovered on the basis of e-challans shall be returned to all concerned. He has also prayed for issuance of writ of mandamus, directing all the concerned authorities to keep CCTV recording in custody till the end of process.

2. The petitioner has also impleaded the Chief Minister, Home Minister of the State, Chief Secretary, Government of Madhya Pradesh; Director General of Police, Bhopal; Inspector General of Police, Indore Division,

Indore; Deputy Inspector General of Police, Indore Division, Indore; Commissioner, Municipal Corporation, Indore; Superintendent of Police (Traffic), Indore; Deputy Superintendent of Police by name. In page No.3 of the writ petition, he has also mentioned the name of Hon'ble the President of India. Last paragraph of writ petition at page 6 and paragraph No.3 at page No.4 are relevant, which read, as under: -

> "पीआईएल याचिका/आवदेन दाखिल करने के मुख्य आधार :– 01. नियम विरूद्व एवं शासन के द्वारा प्रकिया शुरू किए बिना एवं ई–चालान की अनुमति/अधिसूचना/नोटिफिकेशन जारी किए बिना ई–नोटिस, फोटो युक्त नोटिस भेज कर चालान की राशि, डॉक व्यय व अन्य व्यय यातायात पुलिस विभाग इंदौर के द्वारा वसूलने के संबंध में याचिकाकर्ता के द्वारा मा. श्री शिवराजसिंह जी चौहान मुख्यमंत्री, मा. श्री बाबूलाल जी गौर *गृहमंत्री,* श्री ऍन्टोनी डिसा मुख्य सचिव म.प्र. शासन भोपाल, श्री प्रमुख सचिव गृह मंत्रालय म.प्र. शासन, भोपाल, श्री दुबे जी संभागायुक्त इंदौर, श्री संतोष कुमार सिंह डीआईजी इंदौर, श्री मनीष सिंह जी निगमायुक्त सहित वरिष्ठ अधिकारियों के समक्ष मय दस्तावेजों के उक्त व निम्न बिन्दुओं के संबंध में दिनांक 02/02/2016 एवं 15/02/2016 एवं 23/02/2016 व अन्य दिनांक को लिखित शिकायतें दर्ज करवाई, किन्तु कोई कार्यवाही नही की गई, ना ही केमरों के माध्यम से फोटो बना कर ई–नोटिस भेज कर चालान व अन्य व्यय की राशि वसूलना बंद किया । **ऐनेक्चर –2** (शिकायतों की प्रतियां)
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> 02. चौराहो, तिराहो व अन्य सीनों पर स्ऑप लाईन, जेब्रा लाईन (झेब्रा लाईन) स्पीड ब्रेकर आदि बनाने के नियमों का पालन नही किया जा रहा है, कही भी, कितनी भी दूरी पर नियमों का पालन किए बिना निर्धारित मापदण्डों के पूर्ण विपरीत, मनमर्जी से चौराहो, तिराहों व अन्य स्थानों पर स्टॉप लाईन, जेब्रा (झेब्रा लाईन) बना देने आदि कारण यातायात अव्यवस्थित हो रहा है और जनता यातायात नियमों का पालन नही कर पा रही है।
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> 03. राज्य शासन ने अभी ई–चालान बनाये जाने के लिए इंदौर में प्रकिया ही प्रारम्भ नही की है। यह मा. श्री बाबूलाल जी गौर गृहमंत्री म.प्र. शासन के द्वारा विधानसभा में प्रश्न कं 736 अंतारांकित दिनांक 09/12/2015 के उत्तर में दिए गए जवाब से प्रमाणित होता है अर्थात यह भी प्रमाणित होता है कि इंदौर यातायात पुलिस के अधिकारियों द्वारा विधायिका/चुनी हुई सरकार/केबिनेट/शासन के क्षेत्राधिकार का भी उल्लंघन किया जा कर उनके क्षेत्राधिकार का हनन भी किया है। ऐनेक्चर –3 (विधानसभा जवाब की प्रतिलिपी)
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> 04. टेक्नोसिस कम्पनी के कर्मचारियों के साथ साठ–गांठ कर यातायात पुलिस विभाग के अधिकारी/थाना प्रभारी फर्जी तरीके से फोटो बना कर ई–नोटिस, फोटो

युक्त नोटिस भेज कर जनता से जबरन वसूली कर रहे है।

05. चौराहों पर लगे केमरें बार–बार और कईबार बंद हो जाते है। केमरों की वीडियों रिकार्डिंग व अन्य साक्ष्य आरटीआई के तहत मांगने पर नही दिए जाते है और बहाना बना दिया जाता है 30 दिन के बेक अप का।

06. जिस अवधि में चौराहे पर लगे केमरे बंद रहते है उस अवधि के भी ई–नोटिस, फोटो युक्त नोटिस भेजे जा रहे है।"

"**03.** फर्जी तरीके से फोटो बना कर ई–नोटिस, फोटो युक्त नोटिस भेजना और व्यय सहित राशि की वसूली करना। **04.** पद और अधिकारियों का दुरूपयोग करना। **05.** पुलिस और अन्य कर्मचारियों का डर दिखाकर जनता को डराना **06.** न्यायपालिका का दुरूपयोग करना। **07.** जनता से सरकार की छवि खराब करना। **08.** स्टॉप लाईन, जेब्रा (झेब्रा) लाईन, स्पीड ब्रेकर आदि बनाने के नियमों का पालन नही करना। **09.** यातायात में सुधार नही होना क्योंकि जिम्मेदारों के द्वारा नियमों का पालन नही करने से जनता की सहभागीता प्रशासन, यातायात पुलिस को नही मिल पाती है क्योंकि जनता में भारी रोष रहता है, जनता चिढ़ी रहती है। किसी भी योजना के लागू होने पर उसके सफल होने और विकास के लिए यह बड़ी हानि है। 10. यातायात व्यवस्था ठीक करने, सम्भालने की बजाए अधिकतर समय जनता से चालान बना कर जबरन राशि की वसूली में पुलिस अधिकारियों, कर्मचारियों का लगा रहना। टारगेट की तरह राशि वसूली जाती है जिससे यह प्रमाणित होता है कि जानबूझकर और जबरन चालान बनाये जाते है व अन्य। "

3. The contention of the petitioner is that the Traffic Police have no power to issue e-notice on the basis of the recording of the CCTV camera, nor they have any power to issue e-challan on the basis of the footage of CCTV recording in violation of the Traffic Rules and prayed for the following relief: -

"मांग/राहत :– तत्काल ई–नोटिस, केमरों के माध्यम से फोटो बना कर नोटिस भेज कर चालान की राशि वसूले जाने पर रोक लगाई जाए, अब तक भेजे गए समस्त एवं पेंडिंग ई–नोटिस और फोटो युक्त नोटिसों को निरस्त किया जाए, स्ऑप लाईन, जेब्रा लाईन (झेब्रा लाईन) स्पीड ब्रेकर बनाने के नियमों का पालन करवाया जों, बिना प्रकिया पूर्ण किए ई–नोटिस, केमरों से फोटो बना कर के चालान की वसूली गई राशि जनता को मय ब्याज के लौटाई जाने, केमरों की वीडियों रिकार्डिंग का रिकार्ड चालान के निराकरण तक रखने एवं अनुशासनात्मक एवं दण्डात्मक कार्यवाही करने का आदेश देने का निवेदन है।

4. The issuance of e-challan to the persons, who are violating the Traffic Rules, is going on all over the world. None of the persons aggrieved, who

have deposited challan, are aggrieved by any action of the Traffic Police. The Traffic Police to provide smooth movement of traffic and to follow the Traffic Rules by four wheelers and two wheelers installed CCTV Cameras on public roads, so that if any person, violates the Traffic Rules, appropriate action be taken against them under the Traffic Rules. This practice and procedure is going on all over the world.

5. The petitioner is challenging the action of the Traffic Police, and therefore, he has wrongly impleaded them as a necessary party; that too, by their names.

6. It is not the case of the petitioner that by issuing e-challan, the respondents are violating any administrative guidelines / circulars not having statutory force and causing any legal injury to the writ petitioner.

7. The full Bench of this Court in the case of *Chingalal Yadav V/s. State of M.P.* reported as 2010 (2) MPLJ 443 has held that the Courts interference with policy is erroneous or on the ground that a better fairer or wiser alternative is available. Legality of the policy and not the wisdom of the policy is the subject matter of judicial review. The Courts in exercise of their powers of judicial review, do not ordinarily interfere with the policy decision of the executives unless the policy can be faulted with arbitrariness, unreasonableness or unfairness etc.

8. In the present writ petition by name impleaded Hon'ble Chief Minister, Chief Secretary, Director General of Police, I.G. Police, DIG Police, Commissioner – Municipal Corporation, Indore, Superintendent of Police (Traffic), Indore, Deputy Superintendent of Police whereas, there is no ground to assume that they acted *'mala fide'*. It is well settled that the allegations regarding *'mala fide'* cannot be vaguely made. It must be specific and clear and the persons against whom, it is alleged must be made party. The law casts a heavy burden on the person alleging *'mala fide'* to prove the same on the basis of facts that are either admitted or satisfactorily established and / or logic inference deducible from the same. This is particularly so when the petitioner alleges malice in fact in which event it is obligatory for the person making any such allegation to furnish particulars that when number of *'mala fides'* on the part of the decision maker vague and general allegations unsupported by the requisite particulars do not provide a sound basis for the Court to conduct an enquiry into their veracity.

9. In the present case, on 31.12.2013, the Director General Police has taken a decision to install Intelligent, Traffic Management System CCTV capable of generating e-challan for city Indore for smooth running of traffic. After implementation of the aforesaid scheme, tender was invited and CCTV camera was installed for the period from January 2015 to January 2016. E – notices have been issued from 15 squares. Total 42310 notices have been issued from RLVD system cameras, which was installed in 14 squares and fine was imposed. None of the person to whom fines were imposed from time to time challenged the same or filed as such writ petition nor aggrieved by the aforesaid action.

10. It may not be out of place to refer to the report given by three member Committee head (sic:headed) by Justice K.S. Radhakrishnan appointed by the Honourable Supreme Court, by order dated 22.04.2014, to scrutinize and monitor the enforcement of statutory provisions including the Motor Vehicles Act for making the road safer. The said Committee has held in its report dated 19.08.2015 that unless strong and urgent measures are taken to deal with speeding, drunken driving, red-light jumping, violation of helmet laws and seat belt laws, use of mobile phones while driving and overloading, a number of accidents and fatalities will continue to remain high. The Committee asked the Chief Secretaries of all States and Union Territories to take stern action against violators of law under the provisions of Section 19 of the Motor Vehicles Act, 1988, read with Rule 21 of the Central Motor Vehicles Rules, 1989, by passing an order disqualifying the offender from holding the driving licence for a specified period and also by sending to imprisonment wherever it is provided under the law. It also directed that the helmet laws be made applicable all over the country, both for main and pillion riders and suggested two wheeler owners to carry an extra helmet with them. When the Committee constituted by the Hon'ble Apex Court itself has come out with many strong and stringent measures to deal with traffic offences, the directions given by the State Government and District Collector are in consonance with the provisions of law.

11. The Apex Court also in the case of *S. Rajaseekaran v. Union of India & others* reported in (2014) 6 SCC 36 directed the Government of each State to effectively implement and enforce all the provisions of the Motor Vehicle Act in respect of which, the States have the authority and obligation to so act under the Constitution.

12. It is well settled law that, there must be real and genuine public interest involved in the litigation and not merely an adventure of knight errant borne out of wishful thinking. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction. A person acting *bona fide* and having sufficient interest in the proceeding of public interest litigation will alone have a locus standi and can approach the court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration and prayed for dismissal of the writ petitions [see *Kusum Lata V/s. Union of India & Ors* ., reported as 2006 (7) Scale 41].

13. For these reasons, we are of the view that the writ petition filed by the petitioner has (sic:is) devoid of any substance and he has without any material impleaded number of persons by their names for publicity purpose only and, therefore, we dismiss the writ petition with cost of Rs.10,000/-. Cost amount be deposited within a period of six weeks from today, failing which the respondents are free to take appropriate action for recovery of the cost amount.

Petition dismissed.

I.L.R. [2016] M.P., 3282
WRIT PETITION
Before Mr. Justice S.C. Sharma
W.P. No. 4844/2015 (Indore) decided on 21 June, 2016

SANTOSH BHARTI ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 14 and Police Regulations, M.P., Regulation 270 – **Compulsory retirement – Enquiry officer has treated the news paper report as gospel truth – The Enquiry Officer's report stands vitiated, not only this, the Preliminary Enquiry conducted behind the back of the petitioner has also been relied by the Enquiry Officer – Enquiry Officer on the basis of Preliminary Enquiry Report held the petitioner guilty and he has been thrown out of the job without there being any substantive evidence – Appellate authority has also not at all considered the service record of the**

petitioner and dismissed the appeal in a most casual and mechanical manner – Therefore, inquiry report and appellate order quashed – Petitioner reinstated in service – Petition allowed. (Paras 35, 38, 41 & 42)

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14 एवं पुलिस विनियमन, म.प्र., विनियम 270 – अनिवार्य सेवानिवृत्ति – जाँचकर्ता अधिकारी ने समाचार पत्र की रिपोर्ट को दैवीय सत्य माना – जाँचकर्ता अधिकारी का प्रतिवेदन दूषित माना गया, यही नहीं याची के पीठ पीछे संचालित की गई प्रारंभिक जाँच पर भी जाँच अधिकारी द्वारा विश्वास किया गया – जाँच अधिकारी ने प्रारंभिक जाँच प्रतिवेदन के आधार पर याची को दोषी ठहराया एवं बिना किसी सारभूत साक्ष्य के उसे नौकरी से निकाल दिया गया – अपीली प्राधिकारी ने भी याची के सेवा अभिलेख पर कदापि विचार नहीं किया एवं बहुत ही आकस्मिक तथा यंत्रवत् तरीके से अपील खारिज कर दी – अतः जाँच प्रतिवेदन एवं अपीली आदेश अभिखण्डित किया गया – याची को सेवा में पुनः स्थापित किया गया – याचिका मंजूर।

Cases referred:

(2012) 3 SCC 178, 2015 (1) MPLJ 632, (2009) 1 SCC (L & S) 398, 2006 SCC (L & S) 840.

L.C. Patne, for the petitioner.
Neelam Abhyankar, for the respondent/State.

ORDER

S.C. SHARMA, J. :- The petitioner before this Court is aggrieved by an order passed by the competent Disciplinary Authority dated 04/04/2014 by which a major punishment of compulsory retirement has been inflicted upon the petitioner. The petitioner is also aggrieved by order dated 03/12/2014 passed in appeal by Director General of Police.

2. The facts of the case reveal that the petitioner at the relevant point of time was posted as Inspector in Reserve Scheme, Dhar (Police) and it is alleged that he was unauthorizedly absent from the duty on 14/09/2012. It is also alleged that on 03/10/2012 at Indore, he took an auto rickshaw and purchased a bottle of liquor. It is further alleged that after consuming liquor, he assaulted the auto driver and misbehaved in public.

3. On the basis of the aforesaid incident, the petitioner was placed under suspension by an order dated 04/10/2012. A Preliminary Enquiry took place

in the matter and in the Preliminary Enquiry, the petitioner was not associated in any manner. It was conducted behind the back of the petitioner. Shri Vikram Singh, City Superintendent of Police, Pithampur, Distt. Dhar submitted a preliminary enquiry report. It has been argued by Shri Patne that at no point of time, the petitioner was associated with the preliminary enquiry.

4. The facts of the case further reveal that the petitioner's suspension order was revoked approximately after 15 days by an order dated 27/10/2012 and a charge sheet was issued on 19/11/2012 levelling of two charges of misconduct. The first charge was that on 03/10/2012 under the influence of alcohol, the petitioner has abused the common public and has also abused the senior officers of the department and has assaulted the auto rickshaw driver. The second charge relates to violation of conduct rules on account of incident which took place on 03/10/2012.

5. The petitioner has submitted a detailed and exhaustive reply to the competent disciplinary authority and has categorically denied the allegations levelled in the charge sheet. The disciplinary authority has passed an order imposing a punishment of Rs.1,000/- upon the petitioner by an order dated 29/12/2012.

6. It has been further contended that the Inspector General of Police has taken *suo-motu* cognizance of the matter by issuing a show cause notice, by invoking the provision of regulation 270 of the Police Regulation. The petitioner did submit a reply to the aforesaid show cause notice and denied the allegations made against him and has also informed the Inspector General of Police that he is the member of Scheduled Caste and has received as many as 367 awards out of which 8 are special awards.

7. The Inspector General of Police by an order dated 09/06/2013 has finally passed an order directing the disciplinary authority to conduct a regular departmental enquiry as provided under Rule 14 of the M. P. Civil Services (Classification, Control and Appeal) Rules, 1966. Thereafter, a Presenting Officer and an Enquiry Officer was appointed by order dated 11/06/2013.

8. Shri Patne has vehemently argued before (sic:this court that) the Enquiry Officer has acted as an Presenting Officer in the present case. He has conducted very extensive examination-in-chief of the petitioner which is consisting of as many as 45 questions (Page No.64) and the Presenting Officer while submitting his brief has also observed that the Enquiry Officer has

conducted a detailed examination-in-chief of the delinquent officer.

9. Shri Patne has argued before this Court that the Enquiry Officer while cross-examining the witness has not at all asked all the clarificatory questions which are permissible, on the contrary, he has conducted a very extensive cross-examination (Page No.39 and 42). He has also read out the statements of the auto rickshaw driver, on the basis of whose statements, a show cause notice was initially issued to the petitioner. The statement of the auto driver reflects that it was not the petitioner who has misbehaved with him. The auto rickshaw driver in the enquiry has stated that he was told to sign a blank paper during the Preliminary Enquiry and he has signed the blank paper and no such incident has taken place in his presence.

10. Shri Patne has vehemently argued before this Court that the findings arrived at by the Enquiry Officer, reflects that the findings are not supported by evidence and therefore, consequential order of compulsory retirement dated 04/04/2014 deserves to be quashed. He has also stated that the order passed by the appellate authority, by which the appellate authority has dismissed the appeal in a mechanical manner, also deserves to be set aside. It has also been argued that the appellate authority has stated in its order that the present petitioner was earlier also punished on four occasions for consuming alcohol and his contention is that at no point of time in entire service carrier the petitioner was punished for consuming alcohol. He submits that the appellate order also deserves to be set aside.

11. Shri Patne has also argued before this Court that the entire action against the petitioner is based upon the media report and the media report was not the part of the departmental enquiry and they were not exhibited during the departmental enquiry to prove the allegation. He submits that the media report published in the news paper is of no evidentary value unless and until it is proved.

12. The order passed by the competent disciplinary authority reveals that the enquiry was finalized by the disciplinary authority by taking into account the news paper clippings in respect of the incident which took placed on 03/10/2012.

13. Shri Patne has also argued that the petitioner on account of illness submitted a leave application and was not present on duty and a certificate in this regard is on record in form No.4 which is duly signed by the Government

Doctor. His contention is that the Enquiry Officer has safely ignored the medical certificate as he was bent upon to held the petitioner guilty and therefore, Shri Patne prays for quashment of impugned orders.

14. On the other hand, learned Government Advocate has vehemently argued before this Court that the question of interference by this Court in respect of the punishment orders dated 04/04/2014 and 03/12/2004, does not arise. She has stated that the petitioner was posted at Dhar and was unauthorizedly absent from the duty on 14/09/2012 and 03/10/2012 (for two days). She has also argued that he came to Indore and misbehaved with public at large and also with the officers of the police and therefore, as he is indisciplined man, he has rightly been terminated from the services.

15. She has further argued that the respondents have conducted a Preliminary Enquiry and finally a punishment of imposing fine of Rs.1,000/- was inflicted upon him by an order dated 29/12/2012. The respondents have further stated that they have subsequently issued a show cause notice for holding the Departmental Enquiry and the notice was issued by the Inspector General of Police who is the revisional authority keeping in view the Regulation 270 of the Police Regulation.

16. It has been further stated that the departmental enquiry was conducted by the respondent and thereafter, the enquiry officer has submitted a report after affording proper opportunity of hearing to the petitioner and the disciplinary authority has imposed the punishment of compulsory retirement upon the petitioner. It has been stated that appeal was dismissed and thereafter, the mercy petitioner (sic:petition) has also been dismissed.

17. The respondent have also stated that the petitioner has misbehaved in public after consuming liquor and has caused a dent to the image of Police Department and therefore, the punishment order does not warrant any interference. The respondents have also stated that after the petitioner was compulsory retired, he has again consumed liquor and has misbehaved with general public and the respondents have enclosed news paper clippings in support of the aforesaid averment. The respondents have prayed for dismissal of the writ petition.

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

19. In the present case, the petitioner a police officer has been inflicted by

a punishment of compulsory retirement by order dated 04/04/2014 and the appeal has been dismissed on 03/12/2014 by the appellate authority. The mercy petition has also been dismissed on 25/08/2015. As per the stand taken by the respondents, the petitioner has consumed alcohol and came to MIG, Police Station. He has assaulted the auto driver and has abused the senior officers of the department. A Preliminary Enquiry has taken place in the matter and it is an undisputed fact that the Preliminary Enquiry was conducted behind the back of the petitioner. The petitioner was placed under suspension on 04/10/2012 and his suspension was immediately revoked on 27/10/2012. A charge sheet was issued on 19/11/2012 and on 29/12/2012 a punishment of Rs.1,000/- has been inflicted upon him.

20. Thereafter, a show cause notice was issued under Regulation 270 of the Police Regulation and the petitioner did file a reply to the aforesaid show cause notice. The Inspector General of Police was heavily influenced by the news paper clippings has passed an order on 09/06/2013 (Page No.32) directing a Departmental Enquiry in the matter and the punishment order dated 29/12/2012 was quashed.

21. The last paragraph of the order passed by the Inspector General of Police (Page No.33) reveals that he has taken into account the news paper report published in a news paper and also the Preliminary Enquiry report, meaning thereby, on the basis of the news paper report and the Preliminary Enquiry which was held behind the back of the petitioner, the Inspector General of Police has passed the order.

22. Thereafter, a Departmental Enquiry was held and it is an undisputed fact that the Enquiry Officer has conducted examination in chief of the petitioner which contains as many as 45 questions which is an extensive examination-in-chief (Page No.64). The Presenting Officer in his written brief (Page No.99) has categorically stated that a lengthy examination-in-chief was conducted by the Enquiry Officer.

23. Not only this, the Enquiry Officer has also conducted cross-examination of material witness (Page No.39 and 42). The questions asked by the Enquiry Officer are not at all clarificatory questions and he has conducted cross-examination at length. This establishes that the Enquiry Officer has not acted as a judge but has acted as a prosecutor.

24. The another important aspect of the case is that as per the imputation

of misconduct the petitioner was under the influence of alcohol and has assaulted the auto driver and has also abused senior officers of the department. At no point of time the authorities have taken pains to get the petitioner medically examined. There is no medical examination report on record. On the contrary, the auto driver during his examination-in-chief has categorically stated that the petitioner has never purchased any liquor from any liquor shop nor has assaulted him at any point of time. During his cross-examination also he has retreated that at no point of time, the petitioner has abused him or has abused any other person or was under influence of the liquor. It was the auto driver who was the prime witness and on whose complaint the entire action has taken place.

25. The cross-examination of auto driver conducted by the Presenting Officer reads as under:-

"कूट परीक्षण द्वारा प्रस्तुतकर्ता अधिकारी श्री विजयशंकर द्विवेदी नगर पुलिस अधीक्षक धार जिला धार –:

प्रश्न–1 आप ऑटो चलाते हो?

उत्तर हॉ मैं ऑटो चलाता हू।

प्रश्न–2 ऑटो स्वयं का है अथवा भाड़े का है?

उत्तर– ऑटो भाडे का है।

प्रश्न–3 ऑटो मालिक का नाम क्या है और किस ठेकेदार के अण्डर में ऑटो चलाते हो ?

उत्तर– जिस समय मेरे साथ घटना हुई थी उस समय मैं ऑटो मालिक रामदास काकाजी का रिक्शा चलाता था, जिसके ठेकेदार संतोष गोयल थे,

प्रश्न–4 घटना के समय कौन सा ऑटो भाड़े का चला रहे थे

उत्तर– घटना के समय मैं ऑटो एमपी 09–टी–7770 चला रहा था?

प्रश्न–5 ऑटो कितने बजे से कितनी बजे तक ऑटो चलाते है?

उत्तर– मैं सुबह 08.00 बजे से रात्रि 12.00 बजे तक ऑटो इंदौर में किराये से चलाता हू।

प्रश्न–6 आप रात्रि 09.30 बजे घटना दिनांक 03.10.12 को कहा पर थे?

उत्तर– मुझे याद नही है, मैं उस दिनांक को कहां पर था ।

प्रश्न–7 गंगवाल बस स्टैण्ड से दिनांक 03.10.12 को रात्रि में ऑटो से कोई सवारी विजय नगर जाने हेतु बैठाई गई थी ।

उत्तर– मेरे द्वारा एक सवारी बैठाई गई थी ।

प्रश्न–8 ऑटो में बैठी सवारी द्वारा राजमोहल्ले की शराब दुकान से एमडी की बोतल खरीदी थी?

उत्तर– नहीं खरीदी थी।

प्रश्न–9. ऑटो में बैठी सवारी द्वारा कोई गाली–गलौच व थप्पड़ मारा था ।

उत्तर– नहीं।

प्रश्न–10 आप गाली–गलौच एवं थप्पड़ मारने के कारण थाना एमआईजी इंदौर गये थे

उत्तर– नही गया था ।

प्रश्न–11 वहां पर पुलिस वाले अधिकारी/कर्मचारी आ गये थे ।

उत्तर– कोई पुलिस अधिकारी/कर्मचारी नहीं आये थे ।

प्रश्न–12 ऑटो में बैठी सवारी को पुलिस थाने में ही छोड़कर आ गये थे।

उत्तर– मेरे द्वारा कोई सवारी नही बैठी थी ।

प्रश्न–

प्रश्न–13 दिनांक 10.10.12 को नगर पुलिस अधीक्षक पीथमपुर श्री विक्रमसिंह को जो कथन तुमने दिये थे, उन कथनों में उल्लेखित तथ्य पुलिस अधिकारी के दबाव में आकर घटना की सही जानकारी नहीं बता रहे हो।

उत्तर– नहीं।

प्रश्न–14 कोई प्रलोभन या पुलिस अधिकारी के दबाव के कारण आप सही कथन नहीं दे रहे हो?

उत्तर– मुझे कोई प्रलोभन या पुलिस अधिकारी का दबाव नही है, क्योंकि मैं ऑटो रिक्शा चलाता हूं और मेरे ऑटो में कई पुलिस अधिकारी बैठते रहते है।"

26. Inspite of their being a categorical denial on the part of the person

who has informed the police, the petitioner has been punished. The petitioner was not well and as stated by him, he did submit an application for leave and an entry was also made in this regard in 'Rojnamcha Sanha' 823 / 14/09/2012. The petitioner after availing the leave has reported back on duty and has also submitted a fitness certificate issued by the competent Government Doctor, however, for the reasons best known to the Enquiry Officer, the 'Rojnamcha' was not summoned and the Enquiry Officer without their being any evidence of unauthorized absence has held the petitioner guilty.

27. The Enquiry Officer in the concluding paragraph (Page No.128) has concluded that the petitioner was under the influence of alcohol and has abused senior officers of the department. However, he has held that charge in respect of alleged misbehaviour with common public is not proved. In the present case, there was a composite charge as reflected from the charge-sheet. It is reflected that on 03/10/2012, the petitioner under the influence of liquor has abused the common public and has used unparliamentary language towards senior officer of the department.

28. The genesis of the charge was that the report lodged by the auto driver and who was examined in the Preliminary Enquiry, has categorically stated in the departmental enquiry that the petitioner has not used any unparliamentary language at any point of time. Charge has been proved only on the basis of the Preliminary Enquiry report and on the basis of the news paper clippings as well as on the basis of statements of other police personnels and not on the basis of the statement of auto driver who was present at the time the incident which allegedly took place in the police station.

29. The another important aspect of the case is that a large number of people were present at the time incident. Not a single independent witness has been examined by the Enquiry Officer in the matter and based upon the Preliminary Enquiry which was conducted behind the back of the petitioner, the petitioner could not have been punished in the manner it has been done. In fact the findings arrived by the Enquiry Officer are perverse findings and therefore, the consequential punishment order passed by the disciplinary authority and the order passed by the appellate authority as well as the order passed by the authority dismissing the mercy petition has to pave the path of extinction.

30. Shri Patne has vehemently argued before this Court that even if it is

assumed that the petitioner was unauthorizedly absent, the authorities were required to prove that it was a willful absence. He has heavily placed reliance upon a judgment delivered by the apex Court in the case of *Krushnakant B. Parmar Vs. Union of India and Another* reported in (2012) 3 SCC 178. He has placed reliance on paragraph No.17 and 18 of the aforesaid judgment and the same reads as under:-

> *"17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence can not be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant.*
>
> *18. In a Departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in absence of such finding, the absence will not amount to misconduct."*

31. In the present case, the petitioner's absence was not a willful absence. He has submitted an application for leave and on account of illness he was absent only for a day. Subsequently, he has submitted a medical fitness certificate also, issued by competent government doctor and therefore, the alleged misconduct relating to absence, if any, will not amount to misconduct.

32. Not only this, in another case decided by the Hon'ble Supreme Court in the case of *Raghubir Singh Vs. General Manager, Haryana Roadways, Hissar* reported in 2015(1) MPLJ 632 in paragraphs No.29 and 30 has held as under:-

> *"29. Further, assuming for the sake of argument that the unauthorised absence of the appellant is a fact, the employer is empowered to grant of leave without wages*

or extraordinary leave. This aspect of the case has not been taken into consideration by the employer at the time of passing the order of termination. Therefore, having regard to the period of unauthorised absence and facts and circumstances of the case, we deem it proper to treat the unauthorised absence period as leave without wages. In our view, the termination order is vitiated since it is disproportionate to the gravity of misconduct alleged against him. The employment of the appellant-workman with the respondent is the source of income for himself and his family members' livelihood, thereby their liberty and livelihood guaranteed under Article 21 of the Constitution of India is denied as per the view of this Court in its Constitution Bench decision in Olga Tellis & Ors. v. Bombay Municipal Corporation and Ors. wherein it was held as under:-

> *"32.....The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be In*

accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life....."

30. The appellant workman is a conductor in the respondent-statutory body which is an undertaking under the State Government of Haryana thus it is a potential employment. Therefore, his services could not have been dispensed with by passing an order of termination on the alleged ground of unauthorised absence without considering the leave at his credit and further examining whether he is entitled for either leave without wages or extraordinary leave. Therefore, the order of termination passed is against the fundamental rights guaranteed to the workman under Articles 14, 16, 19 and 21 of the Constitution of India and against the statutory rights conferred upon him under the Act as well as against the law laid down by this Court in the cases referred to supra. This important aspect of the case has not been considered by the courts below. Therefore, the impugned award of the Labour Court and the judgment & order of the High Court are liable to be set aside."

33. In the aforesaid case the apex Court has held that in case of unauthorized absence, the employer is empowered to grant of leave without wages or extraordinary leave. In the present case, the same could have be (sic:been) done in case of alleged unauthorized absence, if any, of the petitioner. However, the fact remains that the petitioner not at all unauthorizedly absent on that particular day. After submitting application the petitioner has left Dhar and came to Indore and therefore, the charge sheet and the findings arrived at by the Enquiry Officer and consequential orders deserves to be quashed.

34. In the present case, the petitioner has been made victim of media trial.

The Enquiry Officer as well as the disciplinary authority have placed heavy reliance upon the news paper clippings and the Preliminary Enquiry report which was conducted behind the back of the petitioner. In Departmental Enquiry, documentary evidence has to be proved in the manner other documents are required to be proved. The contents of documentary evidence has to be proved by examining the witnesses. The Hon'ble Supreme Court in the case of *Roop Singh Negi Vs. Punjab National Bank and Others* reported in (2009) 1 SCC (L&S) 398 in paragraph No.14 has held as under:-

> *"14. Indisputably, a departmental proceeding is a quasi judicial proceeding. The Enquiry Officer performs a quasi judicial function. The charges leveled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the Investigating Officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the Enquiry Officer on the FIR which could not have been treated as evidence."*

35. Keeping in view the aforesaid judgment as in a mechanical manner, the Enquiry Officer has treated the news paper report as gospel truth, the Enquiry Officer report stands vitiated. Not only this, the Preliminary Enquiry conducted behind the back of the petitioner has also been relied by the Enquiry Officer and therefore, in light of aforesaid judgment the inquiry report deserves to be quashed.

36. Shri Patne has also placed reliance upon a judgment delivered by the apex Court in the case of *Narendra Mohan Arya Vs. United Indian Insurance Co. ltd. and Others* reported in 2006 SCC (L&S) 840. Paragraph No.26 of the aforesaid judgment reads as under:-

> *"26. In our opinion the learned Single Judge and consequently the Division Bench of the High Court did not*

pose unto themselves the correct question. The matter can be viewed from two angles. Despite limited jurisdiction a civil court, it was entitled to interfere in a case where the report of the Enquiry Officer is based on no evidence. In a suit filed by a delinquent employee in a civil court as also a writ court, in the event the findings arrived at in the departmental proceedings are questioned before it should keep in mind the following: (1) the enquiry officer is not permitted to collect any material from outside sources during the conduct of the enquiry. [See State of Assam & Anr. V. Mahendra Kumar Das & Ors.[(1970) 1 SCC 709 : AIR 1970 SC 1255] (2) In a domestic enquiry fairness in the procedure is a part of the principles of natural justice [See Khem Chand V. Union of India & Ors., AIR 1958 SC 300 and State of Uttar Pradesh v. Om Prakash Gupta, (1969) 3 SCC 775]. (3) Exercise of discretionary power involve two elements (i) Objective and (ii) subjective and existence of the exercise of an objective element is a condition precedent for exercise of the subjective element. [See K.L. Tripathi V. State Bank of India & Ors. [(1984) 1 SCC 43 : AIR 1984 SC 273]. (4) It is not possible to lay down any rigid rules of the principles of natural justice which depends on the facts and circumstances of each case but the concept of fair play in action is the basis. [See Sawai Singh V. State of Rajasthan [AIR 1986 SC 995] (5) The enquiry officer is not permitted to travel beyond the charges and any punishment imposed on the basis of a finding which was not the subject matter of the charges is wholly illegal. [See Director (Inspection & quality Control) Export Inspection Council of India & Ors. Vs. Kalyan Kumar Mitra & Ors. [1987 (2) CLJ 344]. (6) Suspicion or presumption cannot take the place of proof even in a domestic enquiry. The writ court is entitled to interfere with the findings of the fact of any tribunal or authority in certain circumstances. [See Central Bank of India Ltd. V. Prakash Chand Jain, AIR 1969 SC 983, Kuldeep Singh v. Commissioner of Police and Others, (1999) 2 SCC 10]."

37. In the aforesaid case, the apex Court has laid down the parameters for conclusion of the Departmental Enquiry. Shri Patne has vehemently argued that the Enquiry Officer without there being any evidence against the petitioner that he was intoxicated, has proceeded ahead with the enquiry. There is a procedure prescribed to conduct the medical examination but the same was not done for the reasons best known to the authorities and therefore, as the procedure prescribed under the M. P. Civil Services (Classification, Control and Appeal) Rules, 1966 and the procedure prescribed by the apex Court has not been followed, the findings arrived at by the Enquiry Officer are perverse findings and are hereby quashed.

38. The present case reflects it is a very sorry state of affairs in the matter of conducting the departmental inquires, the Enquiry Officer on the basis of news paper clippings and on the basis of Preliminary Enquiry Report held the petitioner guilty and he has been thrown out of the job without their being any substantive evidence.

39. Media has succeeded in the present case in getting the petitioner thrown out of the job. The most shocking aspect of the case is that the Preliminary Enquiry has been conducted behind the back of the petitioner while establishing the charges against the petitioner. The Inspector General of Police who has issued notice to the petitioner has also taken into account the media report and the Preliminary Enquiry Report. The disciplinary authority has also taken into account the media report and the Preliminary Enquiry Report. The respondents have thrown the petitioner out of the job without there being any material evidence.

40. The respondents have filed return after compulsorily retiring the petitioner and have stated that the petitioner has again consumed alcohol. The news paper clipping in this regard has also been enclosed alongwith the return as Annexure-R/3. It appears that the petitioner is being chased by the respondents even after the relationship of master and servant has come to an end.

41. The appellate authority while dismissing the appeal of the petitioner has categorically written in its order that the petitioner was punished earlier on four occasions for consuming alcohol. The petitioner who is a bright police officer has received as many as 367 awards and at no point of time was punished for consuming alcohol on duty. There is a categorical ground taken

by the petitioner in the writ petition and the respondents have not at all denied the aforesaid averment. It means that the appellate authority has also not at all considered the service record of the petitioner and based upon some incorrect information which was supplied to the appellate authority by its sub-ordinate officer has dismissed the appeal in a most casual and mechanical manner. Learned counsel for the petitioner has further argued that the petitioner has not received any adverse remark in his 28 years of his service carrier and he has been thrown out of the job in the most casual and mechanical manner.

42. Resultantly, in the considered opinion of this Court, the writ petition deserves to be allowed and Annexure-P/5 dated 29/12/2012, Annexure-P/19 dated 04/04/2014 passed by the disciplinary authority and Annexure-P/21 dated 03/12/2014 passed by the appellate authority and order dated 25/08/2015 passed in mercy petition are hereby quashed. The petition stands allowed with the following directions:-

a) The respondents in light of the present judgment shall pass an appropriate order in the matter of payment of full pay, allowances and regularization for the period the petitioner was under suspension i.e. w.e.f. 04/10/2012 to 27/10/2012.

b) The petitioner is out of job since 04/04/2014 and he has been compulsorily retired and therefore, so far as grant of back wages is concerned, the amount paid towards pension shall be adjusted towards back wages and there will be no recovery from the petitioner in respect of the amount paid to the petitioner as pension. However, he will not be entitled for any further back wages for the period he was out of the job and the period shall be treated as spent on duty for all the purposes except for back wages.

c) It has also been stated by Shri Patne that the juniors to the petitioner have been promoted to the next higher post of Deputy Superintendent of Police. It is needless to say that the petitioner shall be entitled for all consequential benefits including promotion to the next higher post of Deputy Superintendent of Police and

further next higher post. In case, the petitioner has been found fit for promotion to the post of Deputy Superintendent of Police by the DPC, the benefit of promotion to the petitioner be extended within a period of 30 days from today with all consequential benefits.

d) The respondents are directed to reinstate the petitioner forthwith in service.

With the aforesaid, writ petition stands allowed.

No order as to costs. C. C. as per rules.

Petition allowed.

I.L.R. [2016] M.P., 3298
WRIT PETITION
Before Mr. Justice Anand Pathak
W.P. No. 1037/2011(Gwalior) decided on 19 July, 2016

RENU DEVI (SMT.) ...Petitioner
Vs.
COMMISSIONER, CHAMBAL DIVISION, MORENA & ors. ...Respondents

Service Law – Appointment of Anganwadi workers – **Issue of awarding 10 marks each for being graduate and belonging to BPL family – Question involved – Whether marks for additional qualification can be awarded to a candidate who has acquired said qualification not on the date when he applied for the post but before the last date of submission of application form particularly when there is no cut-off date appointed in the policy nor in the advertisement – Held – Yes, the petitioner held qualification of B.A. before the cut-off date of submission of application form and mark sheet was issued much before consideration for selection therefore, she was validly possessing graduation degree at the time of selection or at the time of consideration for selection and 10 marks can be awarded to her as the grant/conferral of degree is procedural or ministerial work – Further held – Since petitioner has annexed Ration Card showing her status as member of family possessing BPL Card and if the petitioner did not belong to a family below poverty line, then how ration card for a family living below poverty line has been issued, was not addressed by authorities while**

passing the impugned order and no documents or pleading in rebuttal has been preferred by the respondent State; therefore awarding of 10 additional marks cannot be excluded for the same. (Paras 18 to 23 & 28 to 30)

सेवा विधि – आंगनवाड़ी कार्यकर्ताओं की नियुक्ति – स्नातक होने पर एवं गरीबी रेखा से नीचे वाले परिवार से संबंधित होने पर प्रत्येक को 10 अंक प्रदान किये जाने का विवाद्यक – अंतर्ग्रस्त प्रश्न – क्या किसी अभ्यर्थी को अतिरिक्त योग्यता के लिए अंक प्रदान किये जा सकते हैं, जिसने उक्त योग्यता उस पद के लिए आवेदन करने की दिनांक को अर्जित नहीं की, परंतु आवेदन पत्र जमा करने की अंतिम तिथि से पूर्व अर्जित कर ली हो विशेषतः तब जबकि न तो पॉलिसी में और न ही विज्ञापन में कोई अंतिम तिथि नियत की गई हो – अभिनिर्धारित – हाँ, याचिकाकर्ता ने बी.ए. की योग्यता आवेदन पत्र जमा करने की अंतिम तिथि से पूर्व ही धारित की थी एवं चयन हेतु विचार के काफी पूर्व ही अंकसूची जारी हो गई थी, अतः उसने चयन के समय अथवा चयन हेतु विचार के समय वैध रूप से स्नातक उपाधि धारित की थी एवं उसे 10 अंक प्रदान किए जा सकते हैं क्योंकि उपाधि प्रदान/प्रदत्त करना प्रक्रियात्मक या अनुसचिवीय कार्य है – आगे अभिनिर्धारित – चूंकि याची ने राशन कार्ड संलग्न करते हुए अपनी स्थिति गरीबी रेखा से नीचे वाला कार्ड धारण करने वाले परिवार के सदस्य के रूप में दर्शायी है एवं यदि याची गरीबी रेखा से नीचे वाले परिवार से संबंध नहीं रखती थी, तो गरीबी रेखा से नीचे रहने वाले परिवार का राशन कार्ड कैसे जारी किया गया, यह प्राधिकारियों द्वारा आक्षेपित आदेश पारित करते समय संबोधित नहीं किया गया था एवं प्रत्यर्थी राज्य द्वारा खंडन में कोई दस्तावेज या अभिवचन प्रस्तुत नहीं किए गए, इसलिए उक्त के लिए 10 अतिरिक्त अंकों का प्रदान किया जाना अपवर्जित नहीं किया जा सकता।

Cases referred:

2000 (4) supreme 645, 2006 (2) SCC 315, (2003) 9 SCC 519, (1997) 4 SCC 18, (2000) 5 SCC 262, (2002) 1 SCC 124, (2011) 9 SCC 445, 2011 (2) MPLJ 324.

P.C. Chandil, for the petitioner.
R.P. Gupta, Dy. G.A. for the respondents No. 1, 3, 4 & 5/State.
P.D. Bidua, for the respondent No. 2.

ORDER

ANAND PATHAK, J. :- The present writ petition under Article 226 & 227 of the Constitution of India has been filed by the petitioner challenging the order dated 18/01/2011 (Annexure P/1) passed by the Commissioner, Chambal Division, Morena in case No.18/2010-2011/Appeal (आ.बा.) as well

as the order dated 30/10/2010 passed by the Additional Collector, District Morena in case No.109/2009-10/Appeal.

2. The matter pertains to appointment of petitioner on the post of Anganwadi Worker at Anganwadi center, Ratanpura, Tehsil, Porsa, District Morena.

3. The respondents/State has earlier issued guidelines dated 10/07/2007 (Annexure P/7) in respect of selection and appointment of Anganwadi Workers and Assistant in the State of Madhya Pradesh. The said scheme under Clause v-1 provided the essential qualifications for appointment of an Anganwadi Worker. As per the said guidelines, the minimum qualification prescribed for an Anganwadi worker in the urban and rural areas is Higher Secondary (10+2 Board or 11th passed). As per Clause v-2 of the said guidelines, the total marks to be awarded to a candidate is 100 marks while determining the merit list. The additional qualification or the circumstances as contemplated in the said clause prescribed different marks for different circumstances/exigencies like; if a candidate is a graduate then he would get 10 marks and if a candidate is a member of family belonging to below poverty line then he would get 10 additional marks. In other words, minimum educational qualification of 12th class was prescribed for the post of Anganwadi Worker and additional qualifications as prescribed contain additional marks.

4. As per the said guidelines, advertisement was issued on 6th August, 2009 (Annexure P/6) in a newspaper for appointment of Anganwadi Worker and Assistant for which 17/08/2009 was prescribed as last date for submission of the application forms. In response to the said advertisement, petitioner and respondent No.2 have applied for the post of Anganwadi Worker however, at that time the petitioner possessed the degree of B.A. IInd year but before last date of submission of application form i.e. 17/08/2009, an important development has taken place in the form of declaration of result of B.A. final year pertaining to the petitioner on 14/08/2009. The relevant document in respect of declaration of result has been placed by the petitioner as part of Annexure P/3 at page 17. Therefore, as per the said guidelines, according to the counsel for the petitioner, the petitioner became entitled for getting additional 10 marks for being a graduate.

5. The Project Officer, Integrated Child Development Sevices (sic:Services) (ICDS), Porsa District-Morena had declared provisional result

vide Annexure P/8, wherein respondent No.2 stood at S.No.1 in the merit list with 45.30 marks wheres,(sic:whereas,) petitioner stood at S.No.5 with 36.90 marks but because of the fact that petitioner has attained graduation on 14/08/2009 before last date of submission of the application form i.e., 17/08/2009, therefore, she represented before the District Level Committee constituted as per the guidelines of the State apprising them about her status as graduate. The said committee, on due scrutiny found submissions of the petitioner (in respect of declaration of her result of B.A. final year on 14/08/2009) worth consideration. Thereafter, the Project Officer, ICDS had issued the appointment order to the petitioner on 20/04/2010 (Annexure P/10).

6. The said order of appointment was put to challenge by respondent No.2 by way of filing the appeal before the Collector, District-Morena and the Collector has passed the impugned order dated 30/10/2010 (Annexure P/2) setting aside the appointment of the petitioner and directing to appoint respondent No.2 in place of petitioner on the post of Anganwadi Worker.

7. Being aggrieved by the said order, petitioner preferred an appeal before the Commissioner, Chambal Division, District-Morena. The Commissioner while considering the contention of the petitioner has passed an interim order dated 08/11/2010 (Annexure P/11) and granted stay over the order of the Collector, impliedly the petitioner was allowed to continue to work on the post of Anganwadi Worker. Later on, after hearing both the parties, final order has been passed on 18/01/2011 (Annexure P/1) wherein the Commissioner, Chambal Division has rejected the appeal preferred by the petitioner and affirmed the order dated 30/10/2010 passed by the Collector, District-Morena.

8. The impugned orders have been passed mainly on two grounds; First, she did not possess the qualification of graduation at the time of submission of her form and secondly, on the ground that petitioner does not belong to family below poverty line (BPL card holder).

9. Being aggrieved by the same, the petitioner has approached this Court seeking quashment of the order dated 30/10/2010 passed by the Collector, District-Morena and order dated 18/01/2011 passed by the Commissioner, Chambal Division, District-Morena.

10. According to counsel for the petitioner, although the petitioner has

submitted the application form before 14/08/2009 but immediately after submission of her form, result of B.A. final has been declared and therefore, she became entitled to be called and considered as graduate before 17/08/2009 and also became entitled to receive 10 additional marks for being a graduate. However, mark-sheet of B.A. final was received by the petitioner on 19/08/2009. If the additional 10 marks would have been added in the total marks received by the petitioner then she would have been rose to S.No.1 in the merit list with 46.30 marks and would have been entitled for the post of Anganwadi Worker. According to the petitioner, in fact the District Level Committee had earlier found her as a graduate and had awarded 10 additional marks in her total marks thus, rightly revised the list and placed the petitioner at S.No.1 in the merit list, but the same was changed by the authorities in impugned orders.

11. It is submitted by learned counsel for the petitioner that the petitioner has submitted her Ration Card (Antodaya Ration Card, 2003) alongwith the rejoinder (Annexure P/13) wherein the details of the family including name of petitioner finds place. The said rejoinder was not replied by respondents by way of filing additional return thus, submissions of the petitioner went un-rebutted in respect of her status as a member of the family living below poverty line (BPL Card holder). Once the ration card has been issued by the same office/authority then they cannot doubt her status as BPL card holder.

12. Petitioner relied upon the judgments rendered by the Hon'ble Supreme Court in the matter of *Bhupenderpal Singh & Ors. Vs. State of Punjab & Ors.* as reported in 2000 (4) supreme 645 and in the matter of *Mohd. Sartaj and Another Vs. State of U.P. and Others* as reported in 2006 (2) SCC 315.

13. Per contra, respondent/State have filed reply and contested the case of the petitioner on the ground that at the time of filing of the application form, petitioner was not a graduate and therefore, she could not be considered and treated as graduate. The District Level Committee although, earlier entertained the objection of the petitioner, which was not in its domain therefore, the recommendation of the District Level Committee was rightly turned down by the Collector, District-Morena in the impugned order, subsequently, affirmed by the Commissioner, Chambal Division.

14. Respondent No.2/contesting respondent while filing the reply, has

drawn the attention of this Court to the application form filled by the petitioner (Annexure R-2/II), which according to counsel for respondent No.2 nowhere indicates that the petitioner is a graduate. Therefore, according to respondent No.2, petitioner cannot be treated as graduate, as the application form dated 12/08/2009 does not contain the particulars of B.A. final or graduation of the petitioner. Respondent No.2 raises the ground that the mark-sheet has been issued to the petitioner on 19/08/2009 i.e., two days after the cut-off date of submission of the form (17/08/2009), therefore, the qualification of the petitioner has to be construed from the date of issuance of mark-sheet and earlier declaration of the result on 14/08/2009 (even if it is declared) does not entitle the petitioner to be treated as graduate. Further submission of the respondent No.2 is that the charge of the post of Anganwadi Worker has been handed over to respondent No.2 by the petitioner herself and therefore, respondent No.2 is working at present on the said post hence the interim order dated 08/11/2010 has no significance.

15. Respondent No.2 has also doubted the status of the petitioner as member of the family living below poverty line because according to her, the Tahsildar has cancelled the Ration Card of the petitioner at the time of consideration of her selection.

16. Learned counsel for respondent No.2 relied upon the order dated 15/01/2009 passed by this Court in W.P. No.3187/2008 (Reena Tomar Vs. State of M.P. and Others) seeking parity viz a viz her case.

17. Heard counsel for the parties and perused the record.

18. It is an admitted fact that the advertisement of appointment of Anganwadi Workers was issued on 04/08/2009 wherein last date for submission of the form was prescribed as 17/08/2009. The allocation of marks for additional qualification was also prescribed in the guidelines. Perusal of same makes it clear that 10 marks were to be awarded to a candidate who happened to be a graduate and 10 marks were to be awarded to a candidate belonging to a family living below poverty line. As far as, question of petitioner as member of family living below poverty line is concerned, the petitioner has annexed Annexure P/13 with the rejoinder (Ration Card) which shows the status of petitioner as member of family possessing BPL card. If the petitioner did not belong to a family below poverty line, then how ration card (Annexure P/13) for a family living below poverty line has been issued in the year 2013,

was not addressed by authorities while passing the impugned order.

19. No documents or pleadings in rebuttal of the same has been preferred by respondent/State or by the contesting respondent No.2. In absence of any rebuttal, the same has taken to be admitted, therefore, no ground remains in respect of authenticity of the petitioner as member of BPL card holder and 10 additional marks cannot be excluded for the same.

20. The core question involved in the present case is; Whether 10 marks can be awarded to the petitioner for her graduation (B.A.) in the present facts and circumstances of the case or not ?

21. The last date of submission of application form was 17/08/2009 whereas advertisement was issued on 04/08/2009. Responding to the said advertisement petitioner has applied on 12/08/2009 and showed her educational qualification as B.A. IInd year as she rightly mentioned so because on 12/08/2009, she was not a graduate and on the said date, her result of B.A. final has not been declared. Soon after filing of her application form on 12/08/2009 but certainly before 17/08/2009 her result has been declared on 14/08/2009 wherein she got successful in passing B.A. final, elevating her status as a graduate. Even otherwise, mark-sheet was received by the petitioner on 19/08/2009 i.e., two days after the last date of submission of form but certainly before selection. The guidelines (Annexure P/7) nowhere prescribed the last date for such exigencies.

22. Here in the present case, the petitioner held qualification of B.A. before the cut off date of submission of the application form. Even otherwise, her mark-sheet has been issued on 19/08/2009, a date much before consideration for selection therefore, she was validly possessing the graduation degree at the time of selection or at the time of consideration for selection.

23. The question whether the candidate must have prescribed educational and other qualifications as on the particular date specified in the Rule or the advertisement is no longer res integra. In the catena of the decisions, the Hon'ble Supreme Court has held that the candidate must possess the mandatory qualifications on the particular date specified in the Rule or the advertisement.

24. The Hon'ble Supreme Court in the matter of *Bhupinderpal Singh & Ors. Vs. State of Punjab & Ors.* as reported in 2000 (4) supreme 645 has held that eligibility qualification for selection/appointment of the post should

be determined on the last date/cut-off date of receiving application.

25. The question raised in this controversy is also available in the judgment rendered by the Hon'ble Supreme Court in the case of *Shankar K. Mandal and Others Vs. State of Bihar and Others* as reported in (2003) 9 SCC 519. After relying upon the earlier judgment of the Supreme Court in the case of *Ashok Kumar Sharma Vs. Chander Shekhar* as reported in (1997) 4 SCC 18, *Bhupinderpal Singh Vs. State of Punjab* as reported in (2000) 5 SCC 262, *Jasbir Rani Vs. State of Punjab* as reported in (2002) 1 SCC 124 and in the matter of *Alka Ojha Vs. Rajasthan Public Service Commission* as reported in (2011) 9 SCC 445, it is laid down by the Supreme Court, that the cut off date by reference to which the eligibility requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules. Thereafter, it is stated that if there is no cut-off date appointed by the rules then such date shall be as appointed for the purpose in the advertisement calling for applications. Finally, it is laid down by the Supreme Court that if there is no such date appointed either in the recruitment rules or in the advertisement then the eligibility criteria shall be applied by reference to the last date appointed by which the applications were to be received by the competent authority.

26. The Coordinate Bench of this Court in the matter of *Ashish Singh Vs. State of M.P. and Others* as reported in 2011 (2) MPLJ 324 has also taken the same view.

27. The aforesaid three principles as laid down by the Supreme Court for determining the cut-off date and if the aforesaid principles are applied in the present case, it would be seen that neither in the policy nor in the advertisement the cut-off date is appointed.

28. That being so, the cut-off date has to be determined as last date by which applications were to be received by the competent authority and the said date would be 17/08/2009 as is evident from the advertisement and if that be so then on 17/08/2009, the petitioner was a graduate because her result of B.A. final has been declared on 14/08/2009.

29. In the present case, the mandatory/prescribed qualification in respect of educational qualification was Higher Secondary which petitioner already possessed on the last date of submission of application form therefore, the petitioner possess the mandatory qualification as on 17/08/2009. Only

question in respect of additional qualification remains in the present case because the petitioner is seeking the help of her graduation degree for getting 10 additional marks. From the result of the petitioner, once it is established that she passed the B.A. final then, she is entitled to be treated as a graduate and to get the benefit of graduation by way of additional 10 marks, as on 17/08/2009.

30. The grant/conferral of degree is procedural or ministerial work. The substantive right has accrued to the petitioner once the result has been declared on 14/08/2009 and that result proved to be genuine one. It is not the case of the respondents that petitioner did not qualify B.A. final, or the result declared on 14/08/2009 pertaining to the petitioner was false or mis-statement. In absence of such exigency, it is established that petitioner acquired qualification before the last date of submission of application.

31. Even otherwise, the petitioner stood as more educationally qualified and meritorious then (sic:than) respondent No.2 because of her graduation degree, therefore, her efforts to be more educated cannot be sacrificed at the alter of non-justifiable grounds.

32. The purpose of issuing provisional list itself suggest that no irregularity may creep in the selection procedure and no prejudice may cause to any candidate.

33. Another aspect needs consideration is that once the order of stay dated 08/11/2010 has been passed by the Commissioner, Chambal Division, Morena, in the appeal preferred by the petitioner, then instead of allowing petitioner to continue to work, respondent/State has acted arbitrarily in taking the charge from the petitioner on 11/11/2010 and handed it over to respondent No.2. The said act of the respondents/State is in violation of the stay order granted by the Commissioner, Chambal Division, District Morena as appellate authority.

34. The judgment relied upon by respondent No.2 does not help the cause of respondent No.2 in any manner. The said judgment operates in different factual realm.

35. Thus, in totality of the circumstances, the petitioner succeeds and the writ petition is hereby allowed. The impugned order dated 18/01/2011 (Annexure P/1) passed by the Commissioner, Chambal Division, Morena in case No.18/2010-2011/Appeal (आ.बा.) as well as the order dated 30/10/2010 passed by the Additional Collector, District Morena in case No.109/2009-10/

Appeal are hereby set aside.

36. Respondents are directed to reinstate/reappoint the petitioner on the post of Anganwadi Worker while removing respondent No.2 from the said post.

No order as to costs.

Petition allowed.

I.L.R. [2016] M.P., 3307
WRIT PETITION
Before Mr. Justice Vivek Agarwal
W.P. No. 4731/2016 (Gwalior) decided on 29 July, 2016

TRIMURTI CHARITABLE PUBLIC TRUST & anr. ...Petitioners
Vs.
MUNIKUMAR RAJDAN & ors. ...Respondents

A. Public Trusts Act, M.P. (30 of 1951), Section 8(2) – Question involved – **Whether provisions of Section 8 (2) of M.P. Public Trust Act, 1951 are mandatory – Held – Non compliance of said provision by the Court for long 15 years could render the proceedings before the trial court as without jurisdiction. (Paras 5 & 6)**

क. लोक न्यास अधिनियम, म.प्र. (1951 का 30), धारा 8 (2) – अंतर्ग्रस्त प्रश्न – क्या म.प्र. लोक न्यास अधिनियम, 1951 की धारा 8(2) के उपबंध आज्ञापक हैं – अभिनिर्धारित – न्यायालय द्वारा कथित उपबंधों का 15 वर्षों की लंबी अवधि तक अननुपालन, विचारण न्यायालय के समक्ष कार्यवाहियों को बिना क्षेत्राधिकार की बनाता है।

B. Civil Procedure Code (5 of 1908), Order 1 Rule 10 – Question involved – **Whether an application under Order 1 Rule 10 could have been allowed in the garb of mandatory compliance of Section 8 (2) of M.P. Public Trust Act, 1951 – Held – In the name of the mandatory notice to the State Government, Registrar Public Trust could not have been impleaded as a party on an application under Order 1 Rule 10 filed at the behest of the plaintiff. (Paras 5 & 8)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10 – अंतर्ग्रस्त प्रश्न – क्या आदेश 1 नियम 10 के अंतर्गत एक आवेदन को म.प्र. लोक न्यास अधिनियम, 1951 की धारा 8(2) के आज्ञापक अनुपालन की आड़ में अनुमति दी जा सकती है – अभिनिर्धारित – राज्य सरकार को आज्ञापक सूचना के नाम पर

वादी के कहने पर आदेश 1 नियम 10 के अंतर्गत प्रस्तुत आवेदन पर रजिस्ट्रार लोक न्यास को पक्षकार नहीं बनाया जा सकता है।

Cases referred:

AIR 1957 SC 363, 1981 MP Weekly Notes 175, 1981 JLJ 496, 1966 MPLJ Short Note 106.

V.K. Bhardwaj with *A.V. Bhardwaj*, for the petitioners.
B.K. Agrawal and *Anmol Khedkar,* for the respondents.
(Supplied: Paragraph numbers)

ORDER

VIVEK AGARWAL, J. :- The petitioners are aggrieved by order dated 04.07.2016 passed by the court of 7th Additional District Judge, Gwalior whereby application under Order 1 Rule 10 of CPC filed by the plaintiff Munikumar Rajdan has been accepted on the ground that provisions contained in Section 8 (2) of the Madhya Pradesh Public Trust Act, 1951 are mandatory.

2. Learned counsel for the petitioners submits that no order could have been passed which prejudices the interest of the present petitioners after such a long time gap especially when suit was filed by the plaintiff Munikumar Rajdan in the year 2000 and in the written statement specific plea was taken that the suit which has been filed seeking declaration for cancellation of registration of the trust has to necessarily include Registrar Public Trust as a party and same has not been impleaded as a party, therefore, the suit is not maintainable. Therefore, now after 16 years of institution of the suit, application under Order 1 Rule 10 of CPC is not maintainable.

3. Learned counsel for the petitioners also submitted that as per the provisions contained in Section 8 (2) of Madhya Pradesh Public Trust Act, 1951 the civil court is required to give notice to the State Government through the Registrar and the State Government, if it so desires, shall be made a party to the suit. Therefore, an application under Order 1 Rule 10 of CPC was not maintainable at the instance of the plaintiff and was only a deliberate attempt to delay the proceedings in the suit. It has also been submitted that amendment taking away the right accrued to party by elapse of time should not be allowed as has been laid down in the case of *Prigonda Hongonda Patil vs. Kalgonda Shidgonda Patil and others* as reported in AIR 1957 S.C. 363 so also on the decision of this High Court as reported in 1981 M.P. Weekly Notes 175

Shankarlal vs. Kothari & Co. Ratlam so also on the decision of this High Court in the case of *Beesa Porwal Jain Shwetambar Teerth Sangodhia & Anr. vs. Poonamchand* as reported in 1981 JLJ 496 to bring home the issue that application under Order 1 Rule 10 of CPC could not have been allowed causing prejudice to the present petitioners. On the other hand, learned counsel for the respondents has relied on the decision reported in 1966 MPLJ Short Note 106 *Swami Vidyanand Saraswati vs. Hazarilal Choubey.*

4. As per the judgment in the case of *Prigonda Hongonda Patil* (supra), the ratio of the judgment is that all amendments ought to be allowed which satisfy the two conditions (a) not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. In the case of *Shankarlal* (supra), the ratio is that court action or inaction of court should not prejudice a party. In the case of *Beesa Porwal Jain Shwetambar Teerth Sangodhia* (supra), this Court held that under the provisions of Section 8 (2) of Madhya Pradesh Public Trust Act, 1951 notice to the State Government through Registrar should have been sent after the institution of the suit as the issuance of notice is mandatory. It has been further held that any order passed by the trial court prior to issuance of notice is without jurisdiction. Same is the ratio of the case of *Swami Vidyanand Saraswati* (supra).

5. Thus, in this backdrop, two things needs to be examined. (i) If the provisions of Section 8 (2) of Madhya Pradesh Public Trust Act, 1951 are mandatory, (ii) whether an application under Order 1 Rule 10 of CPC could have been allowed in the garb of mandatory compliance of Section 8(2) of Madhya Pradesh Public Trust Act, 1951.

6. `Non-compliance of the said provision contained in Section 8 (2) of Madhya Pradesh Public Trust Act, 1951 by the court for long 15 years could render the proceedings before the trial court as without jurisdiction as has been held in the case of *Beesa Porwal Jain Shwetambar Teerth Sangodhia* (supra).

7. The rights would have been accrued in favour of the petitioners only when judgment and decree would have been passed by the trial court, therefore, it cannot be said that any right which had already accrued have been taken away by the action of the trial court if it decides to make a mandatory compliance of the provisions contained in Section 8 (2) of Madhya

Pradesh Public Trust Act, 1951 but what is to be seen is that whether in the name of compliance of Section 8 (2) of Madhya Pradesh Public Trust Act, 1951, application under Order 1 Rule 10 of CPC would have been allowed.

8. Order 1 Rule 10 (2) of CPC deals with authority of the court to strikeout or add parties. This is distinct from the mandatory requirement of Section 8 (2) of Madhya Pradesh Public Trust Act, 1951 to issue notice to the State Government through Registrar and, therefore, the trial court clearly exceeded its authority in allowing the application under Order 1 Rule 10 of CPC whereby allowing the plaintiff to add Registrar Public Trust as a party. Section 8 (2) of Madhya Pradesh Public Trust Act, 1951 only requires notice and leaves it to the discretion of the Registrar to approach the court and express its desire to be made a party, if he so requires. The learned trial court to save its own skin in not following the mandatory provisions of Section 8 (2) of Madhya Pradesh Public Trust Act, 1951 and without distinguishing the difference between issuance of notice and addition of a party, allowed the application under Order 1 Rule 10 of CPC which is far in excess of the requirement of Section 8 (2) of Madhya Pradesh Public Trust Act, 1951. Thus the trial court has just acted illegally and the impugned order dated 04.07.2016 deserves to be quashed and is quashed. It is held that in the name of mandatory notice to the State Government, Registrar Public Trust could not have been impleaded as a party on an application under Order 1 Rule 10 of CPC filed at the behest of the plaintiff.

9. The impugned order is set aside and petition is allowed.

10. Certified copy as per rules.

Petition allowed.

I.L.R. [2016] M.P., 3310
WRIT PETITION
Before Mr. Justice J.K. Maheshwari
W.P. No. 11515/2013 (Jabalpur) decided on 17 August, 2016

GAYATRI DEVI (SMT.) & ors. ...Petitioners
Vs.
STATE OF M.P. & anr. ...Respondents

A. Urban Land (Ceiling and Regulation) Act (33 of 1976), Sections 10(3), 10(5) & 10(6) and Urban Land (Ceiling and Regulation)

Repeal Act (15 of 1999), Sections 3(2) & 4 – Ceiling proceedings – **Original owner Smt. Godavari Bai – Land declared surplus as per Section 10(3) of 1976 Act on 04.06.1981 – Final Notification published on 14.03.1986 – Godavari Bai died on 13.09.1982 – Notice u/S 10(5) of 1976 Act for delivery of possession issued in name of Godavari Bai, who died prior to issuance of notice – Notice received by one Mukesh Dubey – Defence – Possession already taken on 19.08.1988 or on 03.03.1992 – Held – Notice u/S 10(5) of the 1976 Act was issued in the name of deceased holder Godavari Bai, who was already dead, so issuance of notice u/S 10(5) of the Act is invalid and service on one Mukesh Dubey does not satisfy the requirement of Section 10(5) of 1976 Act – Proceedings for delivery of possession on 19.08.1988 or on 03.03.1992 were on papers only & defacto possession has not been taken & even proceedings u/S 10(6) of the Act of 1976 has not been drawn – Ceiling proceedings pending under the 1976 Act before commencement of the repeal Act shall abate – Name of petitioners be restored in the revenue records & name of State Government be deleted – Petition allowed.** **(Paras 9 to 11)**

क. नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम (1976 का 33), धाराएँ 10(3), 10(5) व 10(6) एवं नगर भूमि (अधिकतम सीमा और विनियमन) निरसन अधिनियम (1999 का 15), धाराएँ 3(2) व 4 – अधिकतम सीमा कार्यवाहियाँ – वास्तविक स्वामी श्रीमति गोदावरी बाई – 1976 के अधिनियम की धारा 10(3) के अनुसार 04.06.1981 को भूमि अधिशेष घोषित – 14.03.1986 को अंतिम अधिसूचना प्रकाशित – 13.09.1982 को गोदावरी बाई की मृत्यु हुई – 1976 के अधिनियम की धारा 10(5) के अंतर्गत कब्जे के परिदान की सूचना गोदावरी बाई के नाम पर जारी हुई, जिसकी मृत्यु सूचना जारी होने के पूर्व हो चुकी थी – सूचना किसी मुकेश दुबे को प्राप्त हुई – बचाव – कब्जा पूर्व में ही 19.08.1988 को अथवा 03.03.1992 को ले लिया गया – अभिनिर्धारित – 1976 के अधिनियम की धारा 10(5) के अंतर्गत सूचना मृतक धारक के नाम से जारी हुई, जिसकी पहले ही मृत्यु हो चुकी थी, इसलिए अधिनियम की धारा 10(5) के अंतर्गत सूचना जारी करना अविधिमान्य है एवं किसी मुकेश दुबे को सूचना की तामीली 1976 के अधिनियम की धारा 10(5) की आवश्यकताओं की पूर्ति नहीं करती – 19.08.1988 या 03.03.1992 को कब्जे की परिदान की कार्यवाहियाँ केवल कागजों पर थी एवं वस्तुतः कब्जा लिया नहीं गया है एवं यहाँ तक कि अधिनियम 1976 की धारा 10(6) के अंतर्गत कार्यवाहियाँ भी नहीं की गई हैं – निरसन अधिनियम के प्रवर्तन के पूर्व, 1976 अधिनियम के अंतर्गत लंबित अधिकतम सीमा कार्यवाहियाँ उपशमित होंगी – याचीगण के नाम राजस्व अभिलेख में पुनः स्थापित किए जाएँ एवं राज्य सरकार का नाम हटाया जाए –

याचिका स्वीकृत।

B. *Words & phrases* – **Definition – "Voluntary surrender", "Peaceful dispossession", "Forceful dispossession", Prejudice".**
(Paras 7, 12 to 14)

ख. *शब्द एवं वाक्यांश* – परिभाषा – "स्वेच्छया अभ्यर्पण," "शांतिपूर्ण बेकब्जा", "बलपूर्वक बेकब्जा", "प्रतिकूल प्रभाव"।

Cases referred:

(2013) 4 SCC 280, W.P. No. 407/2014 decided on 07.04.2015, 2012 (3) MPLJ 75, (2015) 2 SCC 390, (2015) 4 SCC 325, (2009) 10 SCC 501, (2012) 1 SCC 792, AIR 1954 SC 340.

Brian D'silva with *Abhijit Awasthy,* for the petitioner.
Bramhadatt Singh, G.A. for the respondents/State.

ORDER

J.K. MAHESHWARI, J. :- Invoking the jurisdiction under Article 226 of the Constitution of India seeking quashment of the order Annexure P/10 dated 21.2.2013, passed by the competent authority with direction to abate the proceedings under the Urban Land (Ceiling & Regulation) Repeal Act; and the respondents be restrained to dispossess the petitioners, and also to remove the name of the State Government, with further direction to record the name of the petitioners in revenue records, this petition has been preferred.

2. The facts born out from the pleadings are that Smt. Godawari Bai was the holder of the Khasra No.87 and 228/3 area 8536.32 square meters of village Purwa, Settlement No. 162, Patwari Halka No. 28, Tehsil and District Jabalpur. By an order dated 4.6.1981 passed by the competent authority the said land has been declared in surplus vesting in the State Government as per Section 10(3) of the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as 'the Principal Act'). After final notification, proceedings under Section 10(5) of the Act were initiated by the competent authority on 26.7.1986 and by issuing the notice delivery of possession of surplus land within thirty days was directed otherwise Tehsildar (Nazul) may take possession in accordance with law. It is the contention of the petitioner that Godawari Bai was died on 13.9.1982, however notice issued under Section 10(5) by the Competent Authority in the name of dead person could

not be served on her. As per service report, notice was received by one Mukesh Dubey, who was not having any blood relation with the deceased or the family of petitioners. It is said, he was not the person in possession of the surplus land. It is urged the notice issued in the name of a dead person is void, however showing service of the said notice on dead person delivery of possession is invalid. It is further contended, no notice was issued or served on the petitioners who are the legal heirs of the holder and in possession of the land. Thus plea taken by the respondents that possession has been taken from the holder or from the person in possession is factually incorrect and against the law laid down by Hon'ble the Supreme Court in the case of *State of Uttar Pradesh v. Hari Ram*-(2013) 4 SCC 280. The said judgment has been followed by this Court in the case of *Thamman Chand Koshta v. State of M.P. & others*-W.P. No. 407/2014 decided on 7.4.2015. Thus, as per the provisions contained in Section 4 of the Urban Land (Ceiling & Regulation) Repeal Act, 1999 (hereinafter referred to as 'the Repeal Act'), if possession has not taken on the date of commencement, all the proceedings pending before the Competent Authority under the Principal Act would abate. Learned senior counsel has referred the original record produced by the State Government and also the findings of the order impugned with regard to possession, thereby petitioners were found in actual physical possession though wrongly classified as unauthorized. Thus looking to the aforementioned facts, petitioners are in possession of the land in question and as per repeal act, these proceedings stood abate, however appropriate directions may be issued.

3. Per contra, learned Government Advocate representing the respondent-State has argued with vehemence, that after vesting of the land Competent Authority had issued the notice dated 26.7.1986 to Godawari Bai (land holder), which was served on Mukesh Dubey on 9.9.1986, who might be in the family or grand son of the deceased. As the possession was not voluntarily surrendered within the time specified, therefore, ex-parte possession has taken by the Naib Tehsildar (Nazul) on 19.8.1988 in front of two witnesses. However, the arguments as advanced by petitioner to abate the proceedings in the context of the Repeal Act is of no consequence. Learned Government Advocate placed reliance on the judgment of this Court in the case of *Manohar Kumari Daga & others vs. State of M.P. & others*-2012(3) MPLJ 75 and submitted that in case the notice was issued in the name of the deceased (holder of the land), and it was served on the grand son, however, no prejudice has been caused to the petitioners. On the above

submission, it is prayed that the order passed by the Competent Authority may be upheld dismissing this petition.

4. After having heard learned counsel appearing on behalf of both the parties and on perusal of the original record produced by State Government; in the facts, it is not in dispute that as per the order of the Competent Authority dated 4.6.1981 the land of Godawari Bai was declared surplus and final notification was published on 14.3.1986. It is also not in dispute the holder of land Godawari Bai died on 13.9.1982 after the order of vesting of land and prior to its final notification in the official gazette. By filing W.P. No. 8372/2007, in the first round, petitioners made the challenge to the proceedings of Sections 10(5) and 10(6) of the Principal Act in the context of Section 4 of the repeal act, which was decided on 13.7.2007 directing Competent Authority to consider the factum of delivery of possession affording an opportunity of hearing to the petitioner and to decide all the contentions including the validity of the previous proceedings of taking over of the possession. In furtherance to the said direction, the competent authority has passed the order Annexure P/10 on 21.2.2013 holding that the notice issued to Godawari Bai under Section 10(5) of the Act was received by his son on 9.9.1986, but during course of argument it is said that notice under Section 10(5) was served on grand son Mukesh Dubey, and Najb Tehsildar (Nazul) had taken the possession on 10.9.1988 in accordance with law. It has also been said that at present the petitioners are in unauthorized possession on the land, which cannot be protected.

5. In the context of the said factual aspect, the issue cropped up for determination in this case are; whether on vesting of the land belong to Godawari Bai, and on her death, its possession has rightly been taken from the persons in possession (petitioners) following the procedure as prescribed under Sections 10(5) and 10 (6) of the Principal Act? If possession of the land is not taken as per procedure prescribed, would it amounting to the proceedings pending, and as per Section 4 of the Repeal Act it would abate?

6. To advert these issue, first of all the provisions of Section 10(5) and Section 10(6) of the Principal Act are relevant, however, reproduced as under:

> **"Section 10 (5)** Where any vacant land is vested in the State Government under sub-section (3), the competent authority may, by notice in writing, order any person who may be in

possession of it to surrender or deliver possession thereof to the State Government or to any person duly authorized by the State Government in this behalf within thirty days of the service of the notice.

(6) If any person refuses or fails to comply with an order made under sub-section (5), the competent authority may take possession of the vacant land or cause it to be given to the concerned State Government or to any person duly authorised by such State Government in this behalf and may for that purpose use such force as may be necessary."

On perusal thereto, it is apparent that after vesting of the land in the State Government under sub-section (3) of Section 10, the Competent Authority under sub-section (5) of Section 10 may by notice in writing to any person, who may be in possession, direct to surrender or deliver possession thereof to the State Government or any person duly authorized by the government in this behalf within thirty days from the date of service of notice. In compliance to the said notice if person refuses or fails to comply the orders, the Competent Authority may take possession of the land or cause it to be given to the concerned State Government or any person duly authorized or by competent authority even by using force, if necessary, taking recourse as prescribed under sub-section (6) of Section 10 of the Principal Act.

7. The scope and applicability of the provision of Section 10(5) and 10(6) of the Act has been duly considered by Hon'ble the Apex Court in the case of *Hari Ram* (Supra) and held as under:

Voluntary Surrender

31. The 'vesting' in sub-section (3) of Section 10, in our view, means vesting of title absolutely and not possession though nothing stands in the way of a person voluntarily surrendering or delivering possession. The court in *Maharaj Singh v. State of UP and Others* (1977) 1 SCC 155, while interpreting Section 117(1) of U.P. Zamindari Abolition and Land Reform Act, 1950 held that 'vesting' is a word of slippery import and has many meaning and the context controls the text and the purpose and scheme project the particular semantic shade or nuance of meaning. The court in *Rajendra Kumar*

v. Kalyan (dead) by Lrs. (2000) 8 SCC 99 held as follows:

> "28. ....We do find some contentious substance in the contextual facts, since vesting shall have to be a "vesting" certain. "To vest, generally means to give a property in." (Per Brett, L.J. Coverdale v. Charlton. Stroud's Judicial Dictionary, 5th edn. Vol. VI.) Vesting in favour of the unborn person and in the contextual facts on the basis of a subsequent adoption after about 50 years without any authorization cannot however but be termed to be a contingent event. To "vest", cannot be termed to be an executor devise. Be it noted however, that "vested" does not necessarily and always mean "vest in possession" but includes "vest in interest" as well."

32. We are of the view that so far as the present case is concerned, the word "vesting" takes in every interest in the property including de jure possession and, not de facto but it is always open to a person to voluntarily surrender and deliver possession, under Section 10(3) of the Act.

33. Before we examine sub-section (5) and sub-section (6) of Section 10, let us examine the meaning of sub-section (4) of Section 10 of the Act, which says that during the period commencing on the date of publication under sub-section (1), ending with the day specified in the declaration made under sub-section (3), no person shall transfer by way of sale, mortgage, gift or otherwise, any excess vacant land, specified in the notification and any such transfer made in contravention of the Act shall be deemed to be null and void. Further, it also says that no person shall alter or cause to be altered the use of such excess vacant land. Therefore, from the date of publication of the notification under sub- section (1) and ending with the date specified in the declaration made in sub-section (3), there is no question of disturbing the possession of a person, the possession, therefore, continues

to be with the holder of the land.

Peaceful dispossession

34. Sub-section (5) of Section 10, for the first time, speaks of "possession" which says where any land is vested in the State Government under sub-section (3) of Section 10, the competent authority may, by notice in writing, order any person, who may be in possession of it to surrender or transfer possession to the State Government or to any other person, duly authorized by the State Government.

35. If *de facto* possession has already passed on to the State Government by the two deeming provisions under sub-section (3) to Section 10, there is no necessity of using the expression "where any land is vested" under sub- section (5) to Section 10. Surrendering or transfer of possession under sub-section (3) to Section 10 can be voluntary so that the person may get the compensation as provided under Section 11 of the Act early. Once there is no voluntary surrender or delivery of possession, necessarily the State Government has to issue notice in writing under sub-section (5) to Section 10 to surrender or deliver possession. Sub-section (5) of Section 10 visualizes a situation of surrendering and delivering possession, peacefully while sub-section (6) of Section 10 contemplates a situation of forceful dispossession.

Forceful dispossession

36. The Act provides for forceful dispossession but only when a person refuses or fails to comply with an order under sub-section (5) of Section 10. Sub-section (6) to Section 10 again speaks of "possession" which says, if any person refuses or fails to comply with the order made under sub- section (5), the competent authority may take possession of the vacant land to be given to the State Government and for that purpose, force - as may be necessary - can be used. Sub-section (6), therefore, contemplates a situation of a person refusing or fails to comply with the order under sub- section (5), in the event of which the competent authority may take

possession by use of force. Forcible dispossession of the land, therefore, is being resorted only in a situation which falls under sub-section (6) and not under sub-section (5) to Section 10. Sub-sections (5) and (6), therefore, take care of both the situations, i.e. taking possession by giving notice that is "peaceful dispossession" and on failure to surrender or give delivery of possession under Section 10(5), than "forceful dispossession" under sub-section (6) of Section 10.

37. Requirement of giving notice under sub-sections (5) and (6) of Section 10 is mandatory. Though the word 'may' has been used therein, the word 'may' in both the sub-sections has to be understood as "shall" because a court charged with the task of enforcing the statute needs to decide the consequences that the legislature intended to follow from failure to implement the requirement. Effect of non-issue of notice under sub-section (5) or sub-section (6) of Section 10 is that it might result the land holder being dispossessed without notice, therefore, the word 'may' has to be read as 'shall'.

The judgment of *Hari Ram* (supra) has further been relied upon by a Three Judge Bench of the Apex Court in the case of *D.R. Somayajulu, Secretary, Diesel Loco Shed and South Eastern Railway House Building Cooperative Society Limited Visakhapatnam and others vs. Attili Appala Swamy and others*-(2015) 2 SCC 390 and after considering the effect of the provisions of Repeal Act, restating the principle of the judgment of *Hari Ram* (supra) the Apex Court remitted the matter to the High Court for determination of the issue of actual physical possession on the date of commencement of the Repeal Act.

8. In the matter of taking over of the possession in the context of the Land Acquisition Act, the Apex Court in the case of *Velaxan Kumar Versus Union of India* and reported in (2015) 4 SCC 325 has held that the manner to take over the possession of the land acquired must be the procedure enshrined for taking over of the possession as per the provisions of law. If the possession has not been taken following the procedure as laid down it is not amounting to delivery of possession. In the said judgment the Apex Court has also relied upon on the judgment of *Sitaram Bhandar Society Versus Govt. (NCT of Delhi)* reported in (2009) 10 SCC 501. The Apex Court in the case

of *Raghbir Singh Sehrawat Versus State of Haryana and others* reported in (2012) 1 SCC 792 has interpreted the word vesting of the land into the Government on taking of the possession. While dealing the said issue it is held by the Court that taking of possession means of taking the actual physical possession and not symbolic or possession on paper.

9. In view of the said legal position, in the context of the facts of the present case, it is to be examined whether actual physical possession of surplus land has already been taken by the State Government following the procedure prescribed or it is with the petitioner. On perusal of the original record, it reveals that after vesting of the land in the State Government under Section 10(3), the Competent Authority passed an order on 26.7.1986 to issue notice for taking the possession of surplus land. The said notice was issued in the name of holder Godawari Bai, though she was died on 13.9.1982, prior to the date of issuance. But by this notice she was asked to surrender or deliver the possession to Naib Tehsildar (Nazul) within thirty days, otherwise directed him to take possession. Looking to the above said facts, it is apparent, notice under Section 10(5) was issued after four years of the death of Godawari Bai (holder of land) on 26.7.1986, however it cannot be served on dead person. As per the requirement of Section 10(5) the said notice ought to be issued in the name of the persons who are in possession after vesting of the land, but it was not issued in the name of the person in possession. On perusal of the proceedings of the competent authority dated 4.6.1981 it reveals that Godawari was having four sons and one daughter-in-law namely Jugal Kishore, Nand Kishore, Harishanker, Umashankar and Gayatri Devi. Thus competent authority was aware about the names of legal heirs and the notice may be issued to them who are the persons in possession. But the notice was issued in the name of deceased holder Godawari Bai, who was already dead. In my considered opinion, the issuance of the said notice under Section 10(5) of the Act, is invalid, however, treating it to be served on the deceased indicating service on one Mukesh, requirement of Section 10(5) asking voluntarily surrender of possession within thirty days, from the date of service has not been satisfied.

10. Reverting to the arguments advanced by learned Government Advocate that the notice was served on one Mukesh Dubey, who presumably or might be the grand son of late Godawari Bai, but nothing has brought on record to substantiate the said argument, more so in the order impugned (Annexure P- 10), Mukesh Dubey has said to be the son of deceased, however

both the said plea is without any material hence not acceptable looking to their own order dated 4.6.1981. It is also not on record that Mukesh Dubey was the person in possession, however, relying upon the service of notice on Mukesh Dubey possession taken *ex-parte* by Tehsildar (Nazul) is against the procedure prescribed. In the case of *Hari Ram* (supra) the Apex Court has clarified the meaning of voluntary surrender of possession, peaceful dispossession and forceful dispossession. In this regard, on perusal of the document dated 19.8.1988 of the Tehsidar (sic:Tehsildar) attached with the original record, the possession has been taken *ex-parte* from the Godawari Bai in front of two witnesses though she was dead as long as more than six years back. However, service of notice on dead person and to take possession *ex-parte* from the dead person cannot treated to be the compliance of Section 10(5) of the Principal Act. It is also to be noted here that possession has also not taken from Mukesh Dubey the alleged son or grand son. In case notice was received by Mukesh Dubey, and on failure to comply the order of the competent authority, proceedings under Section 10(6) of the Principal Act ought to be drawn against the holders or against him and by issuing notice, if peaceful possession has not delivered, then it may be taken forcefully by the person authorized by the State Government in this behalf or by the competent authority. But, no proceedings of Section 10(6) of the Principal Act has drawn on record. Thus, in absence of any proceedings under Section 10(6), even in case of peaceful dispossession the document showing delivery of possession in front of two witnesses dated 9.8.1988 is of no consequence. In addition, the record of Tehsildar further indicates that another notice under Section 10(5) dated 21.2.1992 was issued to late Godawari Bai for delivery of possession on or before 3.3.1992 and by an undated document available in the original record the possession has again been taken, without drawing any proceeding under Section 10(6) of the Act. Meaning thereby, both the proceedings indicting (sic:indicating) delivery of possession on 19.8.1988 or on 3.3.1992 were on papers and *de facto* possession has not taken following the procedure prescribed. In view of the forgoing discussion it is crystal clear that after vesting of the land, possession has not been taken from the holder, or from the person in possession complying the provisions of Section 10(5) and 10(6) of the Act by the Competent Authority or by the person authorized or by the State Government, therefore it can safely be held that actual physical possession has not been taken following the procedure established by law.

11. The Urban Land (Ceiling and Regulation) Act, 1976 has been repealed

by the Urban Land (Ceiling and Regulation) Repeal Act, 1999. Section 3 deals the 'saving', as per Section 3(1) of the Repeal Act makes it clear that the repeal of the Principal Act shall not affect after vesting of the land where the possession has been taken over by the State Government or any person duly authorized by the government or by the competent authority. Sub-Section 2 of Section 3 makes it further clear that after vesting of the land under sub-section (3) of Section 10 of the Principal Act if possession has not been taken over by the State Government or any person duly authorized by the government in this behalf or by the competent authority and any amount has been paid by the State Government with respect to such land then such land shall not be restored unless the amount paid has not been refunded to the State Government. In the present case, as discussed hereinabove, it is apparent that after vesting of the land, the possession following the procedure under Section 10(5) and 10(6) has not been taken, and as per the return of the State Government amount has not been calculated or paid to the petitioners or to the holder of the land. In absence thereto as per Section 3(2) and proviso of Section 4 of the Repeal Act, the proceedings relating to any order made or purported to be made under the Principal Act shall be pending immediately before the commencement of the repeal act, before the Court/Tribunal or authority and it shall abate. The judgment of the Apex Court in the case of *Hariram* (supra) is on the same context wherein it is held that after vesting of the land under Section 10(3) of the principal Act for the purpose of delivery of possession of the said land service of the notice under Section 10(5) and 10(6) of the Act is mandatory. The Apex Court observed that sub-section (5) of Section 10 of the Act, first time, speaks about "possession" using the word that "where any land is vested" in the State Government under sub-section (3) of Section 10, the competent authority may, by notice in writing, order any person, who may be in possession of it to surrender or transfer possession to the State Government or to any other person duly authorized by the State Government. In para-35 of the said judgment it has been observed that if de facto possession has already been passed on to the State Government by two deeming provisions under sub-section (3) of Section 10 there was no necessity of using the expression "where any land is vested" under sub-section 5 of Section 10. Thus, surrendering or transferring of possession under sub-section (5) of Section 10 can be voluntary so that the person may get the compensation as provided under Section 11 of the Act at an early date. Once there is no voluntary surrender or delivery of possession, the State Government has to

issue the notice in writing necessarily under sub-section (5) of Section 10 to surrender or deliver possession. The said sub-section visualizes the situation of surrendering and delivering possession peacefully while sub-section (6) of Section 10 contemplates situation of peaceful dispossession or forceful dispossession. Thus, looking to the statutory mandate, interpreted by the Apex Court expressing the method and manner to comply the provisions of Section 10(5) and (6), the arguments advanced by the respondents that no prejudice is caused to petitioners in view of the judgment of *Manohar Kumari Daga* (supra) requires consideration.

12. To advert the said argument first of all it is required to understand what is theory of prejudice, which means to allow exclusion of relevant evidence if probative value is substantially outweighed by danger of unfair prejudice. As per Black's Law Dictionary the word 'prejudice' is defined a forejudgment; bias, partiality, preconceived opinion. A leaning towards one side of a cause for some reason other than a conviction of its justice. As per Venkataramaiya's Law Lexicon the word 'prejudice' has been considered in the context of Section 11 of the Suits Valuation Act in the judgment of *Kiran Singh v. Chaman Paswan*-AIR 1954 SC 340 which reads as under:

> "What is meant by "prejudice" in Sec. 11 of the Suits Valuation Act. Does it include errors in findings on questions of fact in issue between the parties? If it does, then it will be obligatory on the Court hearing the second appeal to examine the evidence in full and decide whether the conclusion reached by the Lower Appellate Court are right. If it agrees with those findings, then it will affirm the judgment; if it does not, it will reverse it. That means that the Court of second appeal is virtually in the position of a court of first appeal.
>
> So far, the definition of "prejudice" has been negative in terms-that it cannot be mere change of forum or mere error in the decision on the merits. What then is positively prejudice for the purpose of Sec. 11. That is a question which has agitated courts in India ever since the enactment of the section. It has been suggested that if there was no proper hearing of the suit or appeal and that had resulted in injustice, that would be prejudice within Sec. 11 of the Suits Valuation Act. Another instance of prejudice is when a suit which ought to have been

filed as an original suit is filed as a result of under-valuation on the small cause side. The procedure for trial of suits is the Small Cause Court is summary; there are no provisions for discovery or inspection; evidence is not recorded *in extenso,* and there is no right of appeal against its decision."

13. On perusal of the aforesaid, it is apparent that prejudice means the element of bias, partiality, preconceived opinion of pre-designed judgment or thought process towards one side without out-viewing other part of the argument would mean the unfair prejudice. In the case of *Kiran Singh* (supra) in the context of suit valuation the issue was considered. On consideration, it was found that if valuation changes and suit is required to be filed in a court as a result of under-valuation then the proceedings of Small Causes Court which is summary in nature would attract, therefore, the change thereof may cause prejudice. In the said context, the theory of prejudice requires consideration in the present case.

14. In the facts of the case, first of all it is required to explain that if any statute or rule contemplates to do a thing in a particular manner specifying its compliance to follow in the manner so prescribed, it ought to be done in the same manner. In the case in hand, where the property was belong to the deceased holder declared surplus vesting it in the State Government. Petitioners are the legal heirs of deceased, who may inherit the property if it is not vested in State Government. As discussed above, the notice was issued in the name of a dead person which cannot be served on him, but the possession was taken in front of two witnesses from the said dead person without issuing and serving to the petitioners and following the procedure as contemplated under Section 10(5) and 10(6) explained by the judgment of *Hari Ram* (supra) of the Apex Court. The petitioners are the legal heirs and were found in possession as per the findings recorded in the order impugned Annexure P/10 though their possession is said as unauthorized. However on discussion it is apparent the actual physical possession has not been taken from them following the procedure prescribed, thus on conjoint reading of Section 3(2) and Section 4 of the Repeal Act, such proceeding be deemed to pending and it shall abate by commencement of the Repeal Act in the year 2000. Meaning thereby, if possession has not been taken over on the date of commencement of the Repeal Act then it would amounting to the proceedings pending under the Principal Act and such proceedings would abate and in consequence thereto the legal heirs of the deceased holder would retain the same property as

inherited from the deceased holder. But, in case the possession has been taken over on the land as per the procedure prescribed then it would not amounting to the proceedings pending and the Repeal Act would not attract in the case. Therefore, the discussion made hereinabove and in the light of the judgment of the Apex Court in the case of *Hari Ram* (supra) where it has been clarified that what would be the voluntary surrender of possession, peaceful dispossession, forceful dispossession and how it can be possible following the procedure as per Section 10(5) and 10(6). In case the *de facto* possession is not taken, then by operation of the subsequent law i.e. repeal act, such proceeding is having no consequence and the theory of prejudice cannot be applied in such cases. In view of the aforesaid discussion and in the light of Apex Court judgment of *Hari Ram* (supra), judgment of this Court in the case of *Manohar Kumar Daga* (supra) is hereby explained.

15. In the present case the notice under Section 10(5) of the Act was issued in the name of the holder of land, who was already died on the date of its issue and the notice was not issued in the name of persons who were in possession of the land on drawing the proceedings under Sections 10(5) of the Act. As discussed presuming service of the said notice on the dead person, if possession has taken in front of witnesses *ex-parte*, without drawing the proceedings of Section 10(6) of the Act, the said procedure is not known under the Principal Act, and as interpreted by the judgment of Apex Court in *Hari Ram* (supra) . Thus, in my considered opinion, it is to be held that the actual physical possession of the land bearing Khasra No.87 and 228/3 area 8536.32 square meters of village Purwa, Settlement No. 162, Patwari Halka No. 28, Tehsil and District Jabalpur has not been taken, following the procedure prescribed, by the competent authority or by Naib Tehsildar (Nazul), on the date of commencement of the Repeal Act, therefore, these proceedings shall abate. Accordingly the questions as posed for discussion are answered in favour of the petitioners against respondents.

16. Consequently, this petition succeeds and is allowed. The order impugned Annexure P/10 dated 21.2.2013 is hereby set aside. It is held that possession of the surplus land has not been taken as per procedure prescribed under Section 10(5) and 10(6) of the Principal Act, however, as per Section 4 of the repeal act, such proceedings stood abate. However, it is directed that the name of the petitioners be restored in the revenue records deleting the name of State Government within the period of three months from the date of

communication of this order. In the facts of the case, parties are directed to bear their own costs.

Petition allowed.

I.L.R. [2016] M.P., 3325
WRIT PETITION
Before Mr. Justice Vivek Agarwal
W.P. No. 555/2006 (Gwalior) decided on 15 September, 2016

SIYARAM SHARMA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Constitution – Article 311 – Protection thereof to a daily wager whether permissible – **Held – A daily wager is not the holder of Civil Post and protection under Article 311 is not available to him – Further held – Petitioner's termination order could not have been passed by the Authority subordinate to the Superintendent who was his Appointing Authority – The Superintendent works under the overall supervision of Collector and the High Court in W.P. No. 5181/2005 directed the Collector to look into the grievance of the petitioner, therefore, the act of the Collector in passing the order both in his capacity as a Superior Authority to the Appointing Authority and also in terms of directions of the H.C. cannot be faulted with. (Paras 7 & 9)**

क. संविधान – अनुच्छेद 311 – क्या दैनिक वेतन भोगी को संरक्षण अनुज्ञेय है – अभिनिर्धारित – एक दैनिक वेतन भोगी सिविल पद का धारक नहीं है एवं अनुच्छेद 311 के अंतर्गत उसे संरक्षण उपलब्ध नहीं है – आगे अभिनिर्धारित – याचिकाकर्ता का सेवा समाप्ति का आदेश, अधीक्षक जो कि उसका नियुक्ति प्राधिकारी है, के अधीनस्थ प्राधिकारी द्वारा पारित नहीं किया जा सकता था – अधीक्षक कलेक्टर के संपूर्ण पर्यवेक्षण के अधीन कार्य करता है एवं उच्च न्यायालय ने रिट याचिका क्र. 5181/2005 में कलेक्टर को याची की शिकायत पर विचार करने के लिए निदेशित किया, अतः, कलेक्टर का आदेश पारित करने का कृत्य उसकी दोनों क्षमता में, नियुक्ति प्राधिकारी से वरिष्ठ प्राधिकारी के रूप में एवं उच्च न्यायालय के निर्देशों के अनुसार, गलत नहीं माना जा सकता।

B. Government Servants (Temporary and Quasi-Permanent Service) Rules, M.P. 1960, Rule 1(2) – **Whether these Rules govern the services of a daily wager also – Held – Rules apply to a person holding civil post and thus does not cover daily wager – Claim of the petitioner**

that he has attained quasi-permanent status as he joined as chowkidar on daily wages and continued as such is not correct. (Para 8)

ख. शासकीय सेवक (अस्थायी एवं स्थायीवत् सेवा) नियम, म.प्र. 1960, नियम 1(2) – क्या ये नियम एक दैनिक वेतन भोगी की सेवाओं को भी शासित करते हैं – अभिनिर्धारित – नियम सिविल पद धारित व्यक्ति को लागू होते हैं एवं इस प्रकार ये दैनिक वेतन भोगी को आच्छादित नहीं करते – याची का दावा कि उसने अर्ध–स्थायी स्थिति प्राप्त कर ली है क्योंकि उसने दैनिक वेतन पर चौकीदार के रूप में पदभार ग्रहण किया था एवं इसी पद पर निरन्तर रहा सत्य नहीं है।

Case referred:

(2005) 3 SCC 409.

D.K. Katare, for the petitioner.
Kamal Jain, G.A. for the State.

ORDER

VIVEK AGARWAL, J. :- Petitioner has filed this writ petition challenging the order dated 17.1.2006 passed by respondent No.2 by which services of the petitioner were terminated. According to the petitioner, his services have been terminated without giving any show-cause notice to him and without conducting any enquiry into the matter, therefore, the order of termination is illegal, arbitrary and un- constitutional. According to the petitioner, he was in continuous service for 9 years and thus had acquired the status of quasi permanent servant and thus entitled to protection under Article 311 (1) of the Constitution. It is also submitted that since respondent No.2 is not his appointing authority, therefore, he was not competent to terminate him.

2. The brief facts, which are not in dispute, are that petitioner was appointed as Chowkidar in the year 1997 on daily wages by the Superintendent of Rescue Home for a period of 89 days. It is mentioned in the appointment order itself that his services are being engaged on daily wages and if they are not found satisfactory, they can be dispensed with without giving any notice. Petitioner has also filed Annexure P/4 which is also an order in regard to engagement of the petitioner for 89 days in which it is clearly mentioned that the services of the petitioner being on daily wage basis, can be dispensed with without giving any intimation and he will not have any claim for government service.

3. It is also not in dispute that earlier petitioner had filed W.P.No.5181/2005 (S) complaining that respondent No.4 i.e. the Superintendent of Rescue

Home, Morena, was harassing the petitioner, and therefore, a direction was issued to respondents No.2 and 3 i.e. Collector Distt. Morena and Deputy Director, Panchayat and Social Welfare Department, Morena, to look into the grievance of the petitioner and take appropriate action in accordance with law and the petition was disposed of.

4. Learned counsel for the State has submitted that impugned order was passed after affording reasonable opportunity of hearing to the petitioner. It is apparent that petitioner was not performing his duties properly. Respondents have filed copy of show-cause notice dated 10.4.05, show notice (sic:show cause notice) dated 22.4.03, show cause notice dated 2.11.05 and reply dated 7.11.2005 furnished by the petitioner. In his reply, petitioner has admitted that he could not report on his duty in time because he could not get any transport to report on his duty and submitted that mistake on his part be condoned. Respondents have also placed on record correspondence dated 16.1.2006, which took place between the Deputy Director, Panchayat and Social Welfare Department, Morena, and the Superintendent, Rescue Home, Morena, to show that petitioner was not functioning properly. It was pointed out that in 1998, 4 children had run away. Similarly, on 10.4.03, 22.3.03 and 13.12.04 so also on 10.4.05 certain children had run away from the Rescue Home. It was also pointed out that petitioner was engaged in supplying tobacco and smoking material to the boys staying in Rescue Home. It has also made a reference to the note-sheet written by the Principal Magistrate, Juvenile Justice Court dated 13.4.2005 pointing that in presence of the Chokidar i.e. the petitioner certain boys had disappeared, and therefore, there can be danger to the life of the boys staying in the Rescue Home.

5. Copy of the note-sheet written by the Principal Magistrate, Juvenile Justice Court, Morena, is on record in which there is a categorical note for removal of Chowkidar for the safety of the juvenile children lodged in the Rescue Home. In view of the aforesaid background, impugned order Annexure P/1 has been issued by the Collector, therefore, there is no illegality or arbitrariness in the order passed by the Collector, Morena.

6. The issue to be adjudicated in the present case is whether the protection available under Article 311 of the Constitution is available to a daily wager like the petitioner and whether petitioner had attained status of a quasi permanent employee in terms of the provisions contained in the M.P. Government Servants (Temporary and Quasi-Permanent Service) Rules, 1960

(in short "the Rules of 1960") and whether the Collector was entitled to issue the impugned order removing the petitioner.

7. As far as Article 311(1) of the Constitution is concerned, it deals with dismissal, removal or reduction in rank of persons employed in civil service of the Union or an all India service or a civil service of a State or to a holder of a civil post. It is now settled that a daily wager is not a holder of a civil post, and therefore, the first argument advanced by the learned counsel for the petitioner that there is violation of the provisions contained in Article 311 of the Constitution is not sustainable. In the case of *Karnataka State Road Transport Corporation and another Vs. S.G.Kotturappa and another* as reported in (2005) 3 SCC 409, the Supreme Court has held that casual employee/labour- Badli worker does not enjoy a status and his services may be discontinued like that of a probationer, if he is not found suitable for the job for which his services were utilised. It has been further held that in case of termination of service if the dismissal is based on proved misconduct, then there is no requirement of further hearing. What is needed for employer in a case of termination of services is to apply objective criteria for arriving at the subjective satisfaction. In the present case, petitioner was not only given opportunity of hearing, but a reasoned order has been passed by the Collector fulfilling the requirement of application of objective criteria for arriving at the subjective satisfaction.

8. The second issue is regarding applicability of the provisions of Rules of 1960. Rule 1(2) clearly provides that these rules shall apply to all persons who hold a civil post under the State Government, but who do not hold a lien on any post under the Government of this State, the Government of India or any other State Government. Rule 1(3) further provides that nothing in these rules shall apply to -

(a) Government servants engaged on contract;

(b) Government servants not in whole time employment;

(c) Government servants paid out of contingencies;

(d) persons employed in work-charged establishments; and

(e) such other categories of Government servants as may be specified by the State Government by notification in the Gazette.

Thus, it is apparent that petitioner, who had joined as Chowkidar on daily wages and continued as such, will not be governed by the provisions of Rules of 1960, therefore, claim of the petitioner that he had attained quasi -permanent status is not correct.

9. Petitioner's third challenge is to the competency of the Collector to pass impugned order. The law is already settled. The petitioner's termination order could not have been passed by a authority subordinate to the Superintendent who was his appointing authority. The Superintendent of a Rescue Home, so also the Deputy Director of Panchayat and Social Welfare Department works under the overall supervision of the Collector and in fact in W.P.No.5181/2005 (S), this Court had directed the Collector to look into the grievance of the petitioner, therefore, the act of the Collector in passing the impugned order both in his capacity as superior authority to the appointing authority and also in terms of the directions issued by this Court cannot be faulted with. Besides this, the State Government has delegated the disciplinary authority on the Collector in terms of the provisions contained in Rule 12 of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 for class III and IV employees. In terms of such delegation in relation to class III and IV staff, the act of the Collector in issuing the impugned order cannot be faulted with. Thus, there is no infirmity or illegality in the order passed by the Collector, Morena. Hence, this petition fails and is dismissed.

Petition dismissed.

I.L.R. [2016] M.P., 3329
APPELLATE CIVIL
Before Mr. Justice Rohit Arya
M.A. No. 1662/2011 (Gwalior) decided on 13 June, 2016

BRIJPAL & ors. ...Appellant
Vs.
MRS. MUNNI BAI & ors. ...Respondent

(Alongwith M.A. No. 1/2012, M.A. No. 2/2012, M.A. No. 3/2012, M.A. No. 4/2012, M.A. No. 5/2012, M.A. No. 6/2012, M.A. No. 7/2012, M.A. No. 8/2012, M.A. No. 9/2012, M.A. No. 10/2012, M.A. No. 11/2012, M.A. No. 12/2012, M.A. No. 13/2012, M.A. No. 14/2012, M.A. No. 15/2012, M.A. No. 16/2012, M.A. No. 17/2012, M.A. No. 18/2012, M.A. No. 19/2012, M.A. No. 21/2012, M.A. No. 22/2012, M.A. No. 23/

2012 & M.A. No. 24/2012)

A. Motor Vehicles Act (59 of 1988), Section 173 – Miscellaneous Appeal – **Against the order passed in review petition – Deceased was travelling in a bus, due to rash and negligent driving of the offending vehicle (tractor) the same dashed against the bus – The offending vehicle was hypothecated with UCO Bank under hire purchase agreement – As per agreement between the bank and the insurance company the bank had got the vehicle insured with the insurance company and has been paying the premiums – As such the liability is on Bank to pay the premiums – The policy was purchased on 21.04.2006 after debiting of amount of premium from loan account of the borrower and the draft was prepared on 21.04.2006 – If the draft is prepared on 21.04.2006 and submitted to the insurance company on 26.06.2006 this by itself would not lead to the conclusion that the bank had *ante* dated the same in collusion with the appellants to cover the risk of accident occurred in the intervening night of 24/25.04.2006 – Appeal allowed. (Paras 3 & 14)**

क. मोटर यान अधिनियम (1988 का 59), धारा 173 – विविध अपील – पुनर्विलोकन याचिका में पारित आदेश के विरूद्ध – मृतक एक बस में सफर कर रहा था, आक्षेपित वाहन (ट्रैक्टर) को उतावलेपन एवं उपेक्षापूर्ण तरीके से चलाने के कारण वह बस से टकरा गया – आक्षेपित वाहन अवक्रय करार के अन्तर्गत यूको बैंक के साथ दृष्टि बंधक था – बैंक और बीमा कंपनी के मध्य करार के अनुसार बैंक ने बीमा कंपनी से वाहन का बीमा कराया था एवं प्रीमियम का भुगतान कर रहा था – इस प्रकार प्रीमियम का भुगतान करने का दायित्व बैंक पर है – ऋणी के ऋण खाते से प्रीमियम की राशि के विकलन के पश्चात् दिनाँक 21.04.2006 को पॉलिसी का क्रय किया गया तथा दिनाँक 21.04.2006 को ड्राफ्ट तैयार किया गया – यदि ड्राफ्ट 21.04.2006 को तैयार किया गया था और दिनाँक 26.06.2006 को बीमा कंपनी को प्रस्तुत किया गया था तो यह अपने आप में इस निष्कर्ष पर नहीं पहुँचाएगा कि बैंक ने अपीलार्थीगण के साथ दुस्संधि कर दिनाँक 24/25.04.2006 के मध्यरात्रि में घटित दुर्घटना के जोखिम को समाविष्ट करने के लिए उक्त को पूर्व दिनांकित किया था।

B. Review – Scope – **It is the settled position that review is invoked only if there is any error apparent on the face of record and not on basis of the allegations. (Para 16)**

ख. पुनर्विलोकन – परिधि – यह सुस्थापित स्थिति है कि पुनर्विलोकन का अवलंब केवल तभी होगा यदि अभिलेख की कोई प्रकट त्रुटि हो और न कि

आरोपों/अभिकथनों के आधार पर।

Ashish Saraswat, for the appellants.
S. Gajendragadkar, for the respondent/Insurance Company.

ORDER

ROHIT ARYA, J. :- These appeals arise out of the one and same incident and common order passed by the Motor Accidents Claims Tribunal whereby review petitions have been heard and allowed of by the impugned order. For the purpose of disposal of these cases, facts in M.A.No.1662/2011 are now dealt with.

2. Appellants/owner and driver of tractor No.UP 80-W-7679 being aggrieved by the order of the Motor Accident Claims Tribunal, Ambah, District Morena dated 30/8/2011 in Case No.8/2009 (Review Petition) have filed this appeal.

3. Facts relevant for disposal of this appeal are to the effect that on 25/4/2006 the deceased-Rashid Khan S/o Alauddin was travelling in a bus bearing No.MP 06-B-1699. Due to rash and negligent driving of tractor bearing No.UP 80-W-7679 (hereinafter referred to as the offending vehicle) owned by one Asharam (appellant No.2) driven by Brijpal (appellant No.1), the same dashed against the bus at Bah Fatehabad Road, Baba Ki Tiwariya falling within territorial jurisdiction of Police Station Fatehabad, District Agra as a result Rashid Khan died leaving behind six members in the family viz., wife, sons, mother and younger brothers. The tribunal taking into consideration the evidence placed before it, reached the conclusion that due to rash and negligent driving of the tractor, the accident occurred and the offending vehicle, i.e., the tractor being insured with the National Insurance Company (respondent No.7), it is held liable to pay the compensation. For calculation of the amount of compensation,the tribunal has taken into consideration that the deceased-Rashid Khan was engaged in tailoring job, his annual income was assessed at Rs.36,000/- per year, dependency of claimants was adjudged at Rs.27,000/- and Rashid Khan being of the age of 36 years multiplier of 16 was applied and accordingly, compensation was awarded to the tune of Rs.3,65,000/- with 6% interest per annum vide award dated 20/3/2008. No appeal was preferred by the insurance company. However, after lapse of about two years six months on 30/6/2009 a review application was filed by the insurance

company alongwith an application under Section 5 of the Limitation Act for condonation of delay. Reply to such application was also filed by the appellants.

4. Relevant facts as pleaded in the review petition are to the effect that claim petitions were filed on the factual premise that the offending vehicle was insured with the Insurance Company and the said policy was renewed by policy dated 26/04/2006 with effect from 21/04/2006 to 20/04/2007. The accident since had occurred in the mid-night of 24/25-04-2016, therefore, the Insurance Company is liable for payment of compensation. As a result, award was passed on 20/3/08. However, as the accident had occurred within 05 days' from the date of renewal of insurance policy on 21/04/2006, in view of internal circulars of the Insurance Company, such cases are classified as "Close Proximity". Therefore, to avoid possibility of any fraud or collusion, the matter was got investigated by the Insurance Company through a private investigator, Shishram Singh (P.W.1). During investigation, it is found that the offending vehicle was purchased under hire purchase agreement financed by Uco Bank, Branch Pinahat Agra, State of Uttar Pradesh. There was a tie up between Uco Bank with the Insurance Company on terms and conditions whereof the offending vehicle was required to be insured. It was the obligation of the Uco Bank to ensure insurance of the offending vehicle and pay premium regularly. The Bank has shown to have prepared draft No.614658 dated 21/04/2006 of premium amount and thereafter the same was shown to have been dispatched by the Bank to the Insurance Company whereas the same was made available with the Insurance Company only on 25/04/2006. But, the insurance policy was made effective from 21/04/2006 on the strength of the aforesaid demand draft. It was also found that demand draft Nos.614653 to 614657 were of later dates, viz., 22/04/2006, 24/04/2006 & 25/04/2006 whereas subsequent demand draft No.614658 in question was shown to have been prepared 21/04/2006, but, the same could have been prepared either on 25/04/2006 or thereafter. As such, there was collusion between owner of the offending vehicle and the Bank in preparation of the demand draft with ante date to avoid liability and ensure fastening of the liability on the Insurance Company in respect of the accident occurred in the mid-night of 24/25-04-2006.

5. Appellant/owner has filed reply to the aforesaid applications of review and condonation of delay. The allegations of fraud and collusion levelled against the appellant with the Bank were emphatically denied. The offending vehicle;

tractor with registration No.UP80-W-7679 was hypothecated with the Uco Bank, Branch Pinahat Agra, State of Uttar Pradesh under the hire purchase agreement. As per the procedure in vogue, the Bank used to debit the premium amount from the loan account of the original appellant/owner of the offending vehicle, Asharam (since dead) now represented by his legal heirs Shiv Singh & another and thereafter, the amount was transferred to the Insurance Company for renewal of the policy. The appellant/owner has no role to play in the aforesaid transaction. It is denied that the draft No.614658 towards the premium amount was not prepared on 21/04/2006. It is submitted that only after debiting the amount of the premium from the loan account of the appellant/owner on 21/04/2006, the demand draft was prepared, otherwise, the Insurance Company could not have issued the renewal cover note of the policy with effect from 21/04/2006 if the draft was prepared on the subsequent date. That apart, the insurance policy at no point of time was cancelled by the Insurance Company. As a matter of fact, the award was passed by the Motor Accidents Claims Tribunal on 20/03/2008 and the private investigator was appointed by the Insurance Company after lapse of two years six months. During pendency of the original proceedings, no such objection was raised by the Insurance Company. It is submitted that in one of the cases, viz., Munni Bai in the execution proceedings, the Insurance Company has already deposited the entire amount of the award, i.e., Rs.5,15,626/- vide exhibits D/1, D/2 and D/3 on 09/07/2009. Hence, there is no explanation forthcoming as to why after such long lapse of time since the award was passed, the private investigator was appointed.

6. That apart, the private investigator has prepared the report on surmises and conjectures. At no point of time ever noticed the appellant in the so called enquiry/investigation but made allegations of fraud and collusion against the appellant. With the aforesaid factual assertions, it was contended that after the award was passed under section 166 of the Motor Vehicles Act, there is no provision for review of the award by the Motor Accidents Claims Tribunal. Even otherwise if the proceedings under Order XLVII Rule 1 CPC are found to be available to the respondent/Insurance Company, the scope of review thereunder is limited and that too the same is required to be filed within thirty days from the date of the award. The application for condonation of delay is skeleton in nature without any plausible explanation for the delay caused. Hence, the explanation offered in the application for condonation of delay under section 5 of the Limitation Act by no stretch of imagination could be

said to have been satisfactory in nature for the purpose of condonation of delay of two and half years'.

7. It was also contended that the so called enquiry/investigation is not upon complete verification of facts and documents, particularly the terms and conditions of the agreement between the Bank and the Insurance Company in the matter of insurance of the vehicles. The conclusion of fraud and collusion appears to have been drawn only for the reason that the demand draft Nos.614653 to 614657 were prepared subsequent to demand draft No.614658 in question. Therefore, according to the private investigator, Shishiram Singh (P.W.1), the demand draft No.614658 could not have been prepared prior thereto and is *ante* dated. This conclusion is not only perverse in nature but also *de hors* terms and conditions of the agreement between Bank and Insurance Company and practice in vogue of the Bank inasmuch as if exhibit P/2 is carefully perused, preparation of the demand draft Nos.614653 to 614657 though are subsequent to demand draft No.616458 in question but demand draft nos. 614660 and 614661 are prepared on 21/04/2006. Actually, there are many books for preparation of demand drafts against vouchers issued after debiting the amount from the accounts of the borrowers. In this case what is relevant is procedure followed by the Bank for debiting the amount from the loan account of the appellant by preparing voucher and against the same demand draft was prepared and submitted to the Insurance Company by the Bank. Therefore, the serial number of the demand draft is of no relevance *qua* the date on which the same was prepared. The terms and conditions of agreement between the Bank and the Insurance Company vide circular dated 27/01/2004 (Annexure P/7 in connected W.P.No.181/2014) in the matter of renewal of policy *inter alia* provides as under:

> "2. Where the earlier has been expired the renewal coverage may be granted without physical inspection of the vehicle provided the premium has been debited by the bank after debiting the account of borrower and also after obtaining the confirmation from the bank official that to the best of their knowledge the vehicle is on the road worthy condition and not accident has taken place in between the expired policy period."

It is therefore, contended that as per the aforesaid clauses what is relevant for a valid policy was that of debiting the premium amount from the account of the borrower for a valid policy. It is not the case of the Insurance Company

that premium amount for renewal of the policy was not debited from the account of the appellant/borrower on 21/4/06. As such, only for the reason that with prior serial numbers some demand drafts were prepared on subsequent dates, this by itself could not have been said to be an instance of *ante* dating of draft amounting to fraud. Such an allegation is also falsified by the fact that in the communication exhibit P/2, the Bank has also shown that the demand drafts of later numbers, viz., 614660 and 614661 were also prepared on 21/04/2006. There is no explanation given by the so called investigator in that behalf. Under such circumstances, the conclusion drawn by the investigator is in fact and effect against the terms and conditions in-between the Bank and the Insurance Company as well as policy of the Bank in the matter of preparation of demand drafts after debiting the amount from the account of the borrower. In fact, the so called investigation is based on surmises and conjectures. Hence, the report could not be basis seeking review of the award dated 20/03/2008 passed by the Motor Accidents Claims Tribunal.

8. The Tribunal negated the submissions advanced by the appellants and concluded that fraud was played upon by the Bank in collusion with the appellants by preparing draft no. 614658 of the premium amount of offending vehicle (Tractor No. UP80-W- 7679) which though was of 26/4/2006, yet the same was *ante* dated as 21/4/2006 to cover the risk of accident occurred in the intervening night of 24/25.4.2006. Consequently, reviewed the Award dated 20/3/08 and set aside the same.

9. Taking exception to the impugned order, learned counsel for the appellants besides reiterating the submissions made before the Tribunal in review proceedings, also further referred to evidence of witnesses to substantiate the contention that as a matter of fact no fraud was played either by the appellants or by the Bank as such. Rameshwar Prasad (AW2) in paragraph 21, Officer of the Insurance Company, has deposed that it is true that appellants Asharam and Brajpal did not play any fraud with the Company. In para 15 he deposed that appellant Asharam had never come to the office of the Company for deposit of premium. In para 19 he has deposed that the insurance policy dated 21/4/06 issued by the Insurance Company was never cancelled. The witness explained the procedure that there was tie up between the Insurance Company and the Bank in the matter of deposit of premium. The Bank has deposited the premium with the Insurance Company twice by demand draft (DD). Against deposit of premium by the Bank, Insurance Policy

was issued for the period 21/4/06 to 20/4/07. In paragraph 26 it is stated that for the alleged fraud, neither any complaint was filed in the police station nor any proceedings were initiated in the Court of law. In paragaphs 23 and 24 it is stated that after passing of the Award, the Insurance Company has deposited the entire Award amount in respect of one of the claimants Munni Bai in Execution Case No. 71/07-08 (Ex.D/1, D/2 and D/3).

10. Pramod Kumar (AW1), Branch Manager, UCO Bank, Pinahat, District Agra, in paragraphs 3 and 6 has stated that **voucher was prepared** on 21/4/06 (Ex.P/4). He has clarified that there are number of books containing draft leaves. Many a times when one or two drafts are left to be prepared, then the same are prepared later.

11. In the backdrop of the aforesaid contentions and referring to the evidence on record, learned counsel for the appellants contends that there was no fraud played upon the Insurance Company and, therefore, the impugned order deserves to be set aside.

12. *Per contra* learned counsel for the respondent-Insurance Company has supported the order passed by the Tribunal.

13. Heard, learned counsel for the parties.

14. Undisputedly, the offending vehicle (Tractor No. UP80-W- 7679) was hypothecated with UCO Bank, Branch Pinahat on being purchased under hire purchase agreement. As per the tie up between UCO bank and Insurance Company, the Bank had got the vehicle insured with the Insurance Company and has been paying the premiums periodically. As such, the liability was that of the Bank to pay the premiums. The policy was purchased on 21/4/06 after debiting of the amount of premium from the loan account of the borrower and the draft was prepared on 21/4/06 as per the record of the Bank and oral evidence of Pramod Kumar (AW1). There is no documentary evidence on record to displace the aforesaid evidence. At this stage, it is relevant to refer to the relevant extract quoted above of letter dated 27/01/2004 (Annexure P/7 in connected W.P.No.181/2014) which in fact and in effect clinches the issue. The letter has neither been looked into by the Private Investigator Shishram Singh (AW3) nor by the Tribunal. A careful perusal thereof reveals that in the event insurance policy has expired, the renewal coverage can be granted without physical inspection of the vehicle provided premium has been debited by the Bank after debiting the account of borrower..... (remaining

part of the clause is not relevant to the controversy involved in the instant case as no case is set up by the Insurance Company on the strength of the aforesaid part of clause). There is no denial to the fact that the voucher was prepared on 21/4/06 and the draft was prepared on 21/4/06. Under such circumstances, if the draft is prepared on 21/4/06 of the premium amount but submitted before the Insurance Company on 26/4/06, this by itself would not lead to the conclusion that the Bank had *ante* dated the same in collusion with the appellants to cover the risk of accident occurred on the intervening night of 24/25.4.06. Such a conclusion is totally perverse and without any basis.

15. The Tribunal has failed to appreciate the fact that preparation of draft by the Bank is a routine matter and is prepared by more than one person after preparation and compliation (sic:compilation) of vouchers. There are number of books that contain blank draft leaves. Therefore, if against the voucher of earlier date, draft is prepared on a later date or *vice versa*, this by itself would not lead to the conclusion that the draft was *ante* dated. What is relevant is debiting of premium amount from the loan account and preparation of voucher as without voucher draft cannot be prepared. Therefore, no fault is found with the policy issued on 21/4/06 covering the risk period 21/4/06 to 20/4/07. It appears that inference of fraud was drawn in relation to demand draft no. 614658 dated 21/4/06 issued in favour of National Insurance Company Limited only on the basis of a letter issued on 18/9/10 by the UCO Bank to the Insurance Company under the RTI wherein information with regard to five preceding and five succeeding draft numbers with dates of issuance has been mentioned, for the reason that draft no.614658 shown to be issued on 21/4/06 could not have been issued on that date as earlier draft numbers were issued on later dates. However, the Tribunal failed to take note of the fact that even the later draft numbers like 614660 and 614661 were also issued on 21/4/06 and as such presumption of fraud could not have been drawn merely on the strength of said letter, moreso when the procedure has been explained by the Bank witness as regards preparation of drafts as discussed above.

16. Now, coming to the question of scope of review, the law is well settled by now that review is invoked only if there is any error apparent on the face of record and not on the basis of allegations of fraud having no foundation and also being contrary to the material placed on record and that too after a gap of 2 years 6 months.

17. Consequently, the appeals succeed and the impugned order is set aside. Copy of this judgment be retained in each of the connected appeals.

Order accordingly.

I.L.R. [2016] M.P., 3338
APPELLATE CIVIL
Before Mr. Justice A.K. Joshi
S.A. No. 684/2015 (Jabalpur) decided on 25 October, 2016

JAGANNATH ...Appellant
Vs.
SMT. SARJOO BAI & anr. ...Respondents

A. Civil Procedure Code (5 of 1908), Section 100 – Second Appeal – Facts – **Suit by Appellant/Plaintiff for declaration of title and for perpetual injunction – Counter claim – Claim for declaration of title and for perpetual injunction by Respondent/Defendant No. 1 – Admitted fact – Smt. Dropta Bai was the original owner of the suit property on basis of registered sale deed dated 25.09.1975 who expired in the year 2003 as issueless and intestate – Plaintiff claimed the suit property on basis of the fact that plaintiff is second husband of Dropta Bai after "Chhod Chhutti" of first husband Ramlal – Defendant No. 1/Respondent No. 1 claiming suit property as being of her husband and Dropta Bai executed an agreement on 27.09.1975 in favour of husband of Defendant No. 1 – Trial Court – Partially decreed suit of Appellant/Plaintiff by granting decree of perpetual injunction – Counter claim was totally dismissed – First Appellate Court – Dismissed both the suit as well as the counter claim – Second appeal by plaintiff – Held – It is not proved by the appellant/plaintiff that Dropta Bai has taken legal divorce from the first husband nor the customary "Chhod Chhutti" was pleaded or established, Dropta Bai cannot be regarded as legally wedded wife of the plaintiff – Question of facts raised by the appellant does not call for any interference – Consequently, appeal dismissed in limine.**

(Paras 8 to 10,12 and 13)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील – तथ्य – अपीलार्थी/वादी द्वारा स्वत्व की घोषणा एवं स्थायी व्यादेश हेतु वाद – प्रतिदावा – प्रत्यर्थी/प्रतिवादी क्र. 1 द्वारा स्वत्व की घोषणा एवं स्थायी व्यादेश हेतु

दावा – स्वीकृत तथ्य – दिनाँक 25.09.1975 के पंजीकृत विक्रय विलेख के आधार पर श्रीमति द्रोपता बाई वाद सम्पत्ति की मूल स्वामी थी जिसकी सन् 2003 में निःसंतान एवं बिना वसीयत किए ही मृत्यु हो गई – वादी ने वाद सम्पत्ति पर इस आधार पर दावा पेश किया कि वह द्रोपता बाई के पहले पति रामलाल से 'छोड़ छुट्टी' होने के बाद उसका दूसरा पति है – प्रतिवादी क्र. 1/प्रत्यर्थी क्र. 1, वाद सम्पत्ति उसके पति की होने के नाते दावा कर रहा है तथा द्रोपता बाई ने दिनाँक 27.09.1975 को प्रतिवादी क्र. 1 के पति के पक्ष में एक करार किया था – विचारण न्यायालय – स्थायी व्यादेश की डिक्री प्रदान करते हुए अपीलार्थी/वादी के वाद को आंशिक रूप से डिक्रीत किया गया – प्रतिदावा पूर्णतः खारिज किया गया था – प्रथम अपीली न्यायालय – वाद एवं प्रतिदावा दोनों खारिज किये गये – वादी द्वारा द्वितीय अपील – अभिनिर्धारित – अपीलार्थी/वादी द्वारा साबित नहीं किया जा सका है कि द्रोपता बाई का पहले पति से कानूनी रूप से विवाह विच्छेद हुआ है और न ही प्रथागत 'छोड़ छुट्टी' का अभिवाक् किया गया या स्थापित किया गया, द्रोपता बाई को वादी की विधिक रूप से विवाहित पत्नी नहीं माना जा सकता – अपीलार्थी द्वारा उठाये गये तथ्यों के प्रश्न में किसी हस्तक्षेप की आवश्यकता नहीं – परिणामतः अपील आरम्भ में ही खारिज।

***B. Specific Relief Act (47 of 1963), Sections 37 & 41 (j) – Perpetual injunction – Decree* – Held – Even if possession of plaintiff was found proved on the suit land but in absence of any legal right or title, relief of perpetual injunction cannot be granted. (Para 14)**

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धाराएँ 37 व 41 (जे) – स्थायी व्यादेश – डिक्री – अभिनिर्धारित – यद्यपि वाद भूमि में वादी का कब्जा साबित पाया गया परन्तु किसी विधिक अधिकार अथवा स्वत्व की अनुपस्थिति में, स्थायी व्यादेश का अनुतोष प्रदान नहीं किया जा सकता।

Cases referred:

(1996) 1 Vidhi Bhasvar 159, (1994) 5 SCC.

Sanjay Sarwate, for the appellant.

ORDER

A.K. Joshi, J. :- This second appeal is filed under Section 100 of the Code of Civil Procedure against the common judgment and decree passed by the First ADJ, Khandwa in regular Civil Appeal Nos.1-A/2013 and 3-A/2013 on 02.03.2015, whereby the Appeal No.1-A/2013 filed by Smt Sarjoo Bai was partially allowed in reference to the decree of the trial Court regarding perpetual injunction, but was partially dismissed in relation to the counter

claim filed by Sarjoo Bai and the regular Appeal No.3-A/2013 filed by original plaintiff Jagannath was totally dismissed and both of these appeals were filed against the judgment and decree passed by the Second Additional Judge to the Court of First Civil Judge, Class-II, Khandwa in Civil Suit No.69A/2009 on 30.10.2009, whereby the suit of plaintiff Jagannath was partially decreed only in reference to the relief of perpetual injunction and the counter claim filed by defendant No.1 Smt. Sarjoo Bai was totally dismissed.

2. Undisputedly, original plaintiff Jagannath and original defendant No.1 Smt. Sarjoo Bai belongs to the caste "Kunbi" and the agricultural lands bearing survey No.1100 area 0.24 hectare and land bearing survey No.1103 area 1.57 hectare, total area 1.81 hectare of Gram Chhirwel of Tahsil and District Khandwa is disputed lands of the relating suit and it was purchased by Smt. Dropta Bai (deceased) by registered sale-deed dated 25.09.1975. Smt. Dropta Bai was wife of Ramlal, who had expired in the year 2003 issueless and intestate. It is also undisputed that by an order dated 20.03.2002 of the mutation register of village concerned, disputed lands were mutated in the name of plaintiff Jagannath, but the above-mentioned order was cancelled by an order dated 19.01.2008 (Ex. D-6) passed in relating revenue appeal.

3. Plaintiff Jagannath filed plaint before the trial Court on 30.10.2009 on pleadings that after the death of previous Bhoomiswami Dropta Bai, disputed lands are recorded in his name in revenue papers. Dropta Bai after ending her matrimonial relation with husband Ramlal, had performed second marriage with him, according to customs of their caste and the name of the plaintiff was recorded in revenue papers, voting papers and bank accounts as husband of Dropta Bai in her lifetime and the plaintiff Jagannath and Dropta Bai had lived in village Chhirwel from 1983-84 up-to the time of Dropta Bai's death in the year 2003 as husband and wife. Plaintiff Jagannath has sold 1.101 hectare as part of total land of disputed land bearing survey No.1103 by a registered sale-deed dated 12.06.2006 to the purchaser Gadbad. Defendant No.1 Smt. Sarjoo Bai and her brother Gulab Chand on 26.10.2009 had threatened the plaintiff to dispossess from the disputed lands and the matter was reported to police station Chhaigaon Makhan. Thus, suit was filed for a decree of declaration of title of plaintiff and for perpetual injunction.

4. Defendant No.1 Sarjoo Bai denied all the adverse pleadings despite above-mentioned admitted facts in her Written Statement filed on 14.09.2010

and in the same Written Statement, she filed her counter claim on pleadings that the disputed lands remained jointly recorded in the name of Kanhaiya, who was husband of defendant No.1 and Trilokchand till the year 1985-86, but thereafter Trilokchand become monk and for about previous 40 years the disputed lands were remained in exclusive title and possession of Kanhaiya. Dropta Bai had executed an agreement on 27.09.1975 (Ex. D-10) in favour of Kanhaiya in relation to retransfer of disputed lands on the basis of that defendant No.1 Sarjoo Bai had become Bhoomiswami of the disputed lands. Plaintiff Jagannath was never married to Dropta Bai and he was living as a servant with Dropta Bai and by taking undue advantage of this capacity, Jagannath got his name mutated in revenue papers in relation to disputed lands. On receiving the information about mutation of Jagannath, defendant No.1 Sarjoo Bai had filed revenue appeal, which was allowed by the SDO, Khandwa and the mutation order dated 20.03.2002 passed in favour of Jagannath was cancelled and Jagannath's revenue revision has also been dismissed by an order dated 11.11.2009 and the remanded mutation proceedings were pending before the Tahsildar Tappa, Chhaigaon Makhan. Plaintiff Jagannath is trying to forcefully dispossess the defendant No.1 and for recording his name in revenue papers, thus the relief of declaration of title and perpetual injunction were also claimed by defendant No.1 Sarjoo Bai by her counter claim.

5. Plaintiff Jagannath denied the pleadings of the counter claim filed by defendant No.1 Smt. Sarjoo Bai repeating his plaint allegations.

6. The trial Court framed six issues and after recording the evidence for the parties and hearing gave findings that Dropta Bai was not legally wedded wife of plaintiff Jagannath; Jagannath is not a legal heir of the deceased Dropta Bai in relation to disputed lands; defendant No.1 Sarjoo Bai is also not a legal heir of the deceased Dropta Bai; Sarjoo Bai is also not entitled to get the disputed lands as a legal heir; it was not proved that the disputed lands are in possession of defendant No.1 Sarjoo Bai, it was proved that the plaintiff Jagannath is in continuously possession holder of the disputed lands since lifetime of Dropta Bai. The counter claim of defendant No.1 Sarjoo Bai is time barred and the trial Court totally dismissed the counter claim of defendant No.1 Sarjoo Bai and it partially dismissed the suit of Jagannath in relation to the relief of declaration of title, but as the possession of Jagannath was found proved on disputed lands, it partially decreed this suit of plaintiff Jagannath

only in relation to the relief of perpetual injunction. The First Appellate Court, in light of the provision of Section 37 and Section 41(j) of the Specific Relief Act, 1963, recorded the finding that as the plaintiff Jagannath has failed to prove any legal right in disputed lands, thus in absence of legal rights, he is not entitled for discretionary relief of perpetual injunction. In other words, the learned Appellate Court has totally dismissed the suit of plaintiff Jagannath and has maintained the decree of trial Court in relation to dismissal of counter claim of defendant No.1 Sarjoo Bai passed by the trial Court.

7. Learned counsel for the appellant has contended that it was proved by the documentary evidence and oral evidence of witnesses that the plaintiff Jagannath and Dropta Bai were living as husband and wife for a long period and the name of Jagannath was mentioned as husband of Dropta Bai in voting papers, bank account and revenue records, thus the findings recorded by both of the lower Courts are erroneous that the divorce of Dropta Bai from her first husband Ramlal was not proved and the second marriage performed by Dropta Bai with plaintiff Jagannath in the form of "Pat Marriage" was not proved and as the possession of the plaintiff was found proved on the suit lands by both of the lower Courts, the First Appellate Court had erred in allowing the appeal of respondent No.1 partially in reference to the relief of perpetual injunction granted by the trial Court.

8. It is true that under the provisions of Indian Evidence Act, when a man and woman lived has (sic:as) husband and wife for a long period, then a presumption can be drawn of their marriage, but this presumption is not available, when the woman had been legally wedded previously to a different man. Admittedly, deceased Dropta Bai was legally wedded wife of Ramlal. It was necessary for plaintiff to prove that Dropta Bai had taken legal divorce from her first husband Ramlal. It is clear that on this point, no reliable evidence was produced by the plaintiff and it could not be presumed that Dropta Bai had taken legal divorce from her husband, as afterward she was living with plaintiff as his wife.

9. Learned counsel for the appellant contended placing reliance on a citation reported as *Ramcharan Vs Ramesh* [(1996) 1 Vidhi Bhasvar 159] that "Chhodchhutti" is a recognized custom of divorce where one spouse may give up the other spouse and "Bichhia" is a recognized custom of marriage where a lady may remarry another man after giving up former husband. But, in the same citation, it has also been held that findings of marriage and divorce

by customs are findings of fact. It is well established that such customs relating to divorce and second marriage are to be specifically pleaded and proved by the alleging party. Here, it would be significant to give the total pleadings made by the plaintiff Jagannath in his plaint, on this point:-

> "3. यह कि श्रीमती द्रोपताबाई के पति रामलाल से द्रोपताबाई का वैवाहिक सबंध समाप्त होने के पश्चात द्रोपताबाई ग्राम छिरवेल में अपनी माता के साथ रहती थी, तथा ग्राम छिरवेल में रहते हुये द्रोपताबाई ने वादी से जाति रिवाज के मुताबिक दूसरा विवाह किया जिसके अनुसार श्रीमती द्रोपताबाई ने अपने नाम के साथ पति के स्थान में वादी का नाम हर जगह दर्ज कराया यहां तक की राजस्व खसरे में द्रोपताबाई ने स्वयं पति के स्थान में वादी का नाम दर्ज कराया।"

10. It is clear from the above-mentioned total pleadings of the plaintiff Jagannath made in the plaint that even the commonly used name of the customs relating to divorce and second marriage have not been mentioned. Similarly, it is not mentioned that after what period from first marriage of Dropta Bai with Ramlal, their alleged divorce was happened at which place and even there is no any indication about time or gap between alleged divorce and second marriage of Dropta Bai. Similarly, there is no definite evidence given by the plaintiff witness Jagannath (PW-1) and Govind (PW-2) on these points.

12. In examination-in-chief, filed by the plaintiff Jagannath (PW-1) in the form of an affidavit, there is no specification about the name of customs relating to divorce and second marriage were given and similarly there is no indication about the time gap between first marriage of Dropta Bai and Ramlal and alleged divorce and thereafter second marriage. Plaintiff Jagannath deposed that the husband of Dropta Bai, Ramlal was resident of village Takley. In cross-examination (para-11) plaintiff deposed that after about 40 years of the marriage Dropta Bai with Ramlal, Dropta Bai returned to village Chhirwel, which was her parent's village. In para-12, plaintiff deposed that the matrimonial tie between Ramlal and Dropta Bai had ended after 35-40 years after their marriage, but admitted that there is no any legal divorce from any Court between them, but voluntarily deposed that as their community custom, the elder people (Panch) of the society performed their "Chhodchhutti". In cross-examination, plaintiff deposed that he performed marriage with Dropta Bai in "part form" prevailing in their community. There is no definite pleadings and evidence about the alleged "Chhodchhutti" between Dropta Bai and Ramlal and it is not clear that in which village and in which year this alleged "Chhodchhutti" was happened. No any other witness was produced by the

plaintiff on the point of alleged "Chhodchhutti" between Dropta Bai and her legally wedded husband Ramlal.

13. According to evidence of Jagannath (PW-1) and Govind (PW-2) in village Chhirwel, Dropta Bai had lived with plaintiff Jagannath as his wife for a long period till death of Dropta Bai. But it would be significant to mention here that in the registered sale-deed (Ex.P-1) executed on 25th September 1975, by which Dropta Bai purchased the disputed lands from vendor Chhagan, the name of husband of purchaser Dropta Bai is typed as Ramlal, though at that time Dropta Bai was shown as a resident of village Chhirwel. Thus, it is clear that even after the time when Dropta Bai started living in village Chhirwel after the marriage and was purchasing agricultural lands, her husband was Ramlal. It would not have been possible, if before purchasing this land, any "Chhodchhutti" had happened between Ramlal and Dropta Bai. In Bhoo Adhikar Pustika, relating to same land (Ex. P-2), the name of Dropta Bai is written as "Dropta Bai W/o Ramlal", it appears that afterwards the name of husband Ramlal has been circled and over or below on different pages of Bhoo Adhikar Pustika, the name of plaintiff Jagannath has been written, but the name of Ramlal has not been struck out, though has been circled. In state of above-mentioned pleadings and evidence of appellant/plaintiff Jagannath, he is not able to get any help from the above-mentioned citation. It is clear that Dropta Bai had not obtained any legal divorce or customary "Chhodchhutti" from her husband Ramlal. In such state of pleadings and evidence of the appellant, both the lower Courts have not committed any error in holding that Dropta Bai had not obtain any divorce from her husband Ramlal and in such situation, she could not be legal wife of plaintiff Jagannath, though it appears that in Ration Card of village concerned, in some loan papers and in voting papers, the name of her husband is shown or recorded as Jagannath.

14. It is true that possession of the plaintiff was found proved on suit land, but the learned Appellate Court had referred to specific legal provisions of the Specific Relief Act 1963, under which in absence of any legal right or title, perpetual injunction could not be granted [please see *Premji Rataney Shah Vs. Union of India,* (1994)5 SCC]. It appears that the evidence produced by the parties before the trial Court has been properly and legally appreciated by the learned Appellate Court, which does not require any interference in this second appeal.

15. In view of above, I am of the considered view that there is no any

substance or circumstance in the matter giving rise to any question of law rather than substantial question of law. The question of facts raised by the appellants does not call for any interference. Consequently, the appeal fails and is hereby **dismissed** in limine. No costs.

Appeal dismissed

I.L.R. [2016] M.P., 3345
APPELLATE CIVIL
Before Mr. Justice S.K. Awasthi
S.A. No. 784/2005 (Gwalior) decided on 27 October, 2016

RATANLAL ...Appellant
Vs.
SHIVLAL & ors. ...Respondents

A. Civil Procedure Code (5 of 1908), Order 22 Rule 9 – Abatement of Appeal – **Held – Statement was made before the Court regarding death of appellant and two weeks' time was sought for moving appropriate application, but no application was filed – Application for setting aside abatement showing reasons contrary to the statement made earlier before the Court – Appeal stands abated by operation of law and abatement cannot be set aside for the aforesaid reason. (Paras 9 & 10)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 22 नियम 9 – अपील का उपशमन – अभिनिर्धारित – अपीलार्थी की मृत्यु के संबंध में न्यायालय के समक्ष कथन किया गया था एवं उचित आवेदन प्रस्तुत करने हेतु दो सप्ताह का समय चाहा गया था, परंतु कोई आवेदन प्रस्तुत नहीं किया गया – उपशमन को अपास्त किये जाने हेतु प्रस्तुत आवेदन में दर्शित कारण पूर्व में न्यायालय के समक्ष किए गए कथन के विपरीत थे – विधि के प्रवर्तन द्वारा अपील का उपशमन किया गया है तथा उपरोक्त कारण के आधार पर उपशमन को अपास्त नहीं किया जा सकता है।

B. Limitation Act (36 of 1963), Section 5 – Sufficient cause – **While considering the application for condonation of delay, liberal approach has to be adopted, but while adopting liberal approach, the Court cannot ignore principle of law that law comes to rescue all vigilant litigants. (Para 7)**

ख. परिसीमा अधिनियम (1963 का 36), धारा 5 – पर्याप्त कारण – विलंब की माफी हेतु प्रस्तुत आवेदन पर विचार करते समय उदार दृष्टिकोण अपनाया जाना चाहिए, परंतु उदार दृष्टिकोण अपनाते समय न्यायालय विधि का यह

सिद्धांत अनदेखा नहीं कर सकता कि विधि सभी जागरूक पक्षकार की सहायता करती है।

Cases referred:

(2005) 12 SCC 198, (1985) 1 SCC 431, 2009 (1) MPLJ 510, (2015) 1 SCC 680.

D.D. Bansal, for the appellant.
Tej Singh Mahadik, for the respondents No. 1 & 8.
None for other respondents.

JUDGMENT

S.K. Awasthi, J. :- This appeal is by the appellant/plaintiff against the judgment and decree dated 3.3.2005 passed by First Additional District Judge, Shivpuri in Civil Appeal No. 2A/2001, reversing the judgment and decree dated 25.11.2000 passed by First Civil Judge Class-2, Shivpuri in Civil Suit No. 98A/1999.

2. During the pendency of this appeal, the sole appellant/plaintiff Ratanlal died on 11.10.2008. Thereafter, after lapse of a period of more than six years, the legal representatives of deceased appellant filed an application under Order 22 Rules, 3 and 11 CPC for bringing the legal representatives of deceased appellant on record, together with an application under Order 22 Rule 9 CPC, read with Section 5 of Limitation Act CPC on 20.1.2015 to condone the delay in filing the application under Order 22 Rule 3 and 11 CPC and to set aside the abatement. In the applications the legal representatives/applicants contended that the appeal was filed in the year 2005 and then it was listed only in the year 2014. On 28.3.2014 appeal was admitted for final hearing and notices were directed to be issued to the respondent. Again the case was listed on 15.9.2014. From the service report, it came to the knowledge that the respondent No.6 had died and counsel was directed to take steps for substitution of legal representatives of deceased respondent No.6. On 1.10.2014 and 12.11.2014 the case was listed for the same purpose. As the legal representatives of deceased respondent No.6 were already on record as respondents No.7 and 8, therefore, the name of respondent No.6 was ordered to be deleted on 11.12.2014. Thereafter, the counsel sent a letter on the address of the appellant, thereupon wife of the appellant along with son Devendra contacted the counsel and told about the death of appellant Ratanlal.

On their instructions, the applications were prepared and submitted before this Court.

3. It is also contended that the applicants/legal representatives of the deceased appellant were not aware about pendency of present second appeal and further son of deceased appellant, namely, Devendra was in jail and he was released from jail on 20.4.2013. In these circumstances, the application for setting aside the abatement could not be filed within the prescribed period of limitation, therefore, delay deserves to be condoned and applications be treated to be within time and legal representatives of deceased Ratanlal be taken on record. In support of his submissions, learned counsel for the appellant placed reliance on the judgments in the cases of *Prithvi Raj (Dead) by Lrs. vs. Collector, Land Acquisition, H.P. and another* (2005) 12 SCC 198; *Ram Sumiran and others vs. D.D.C. and others* (1985) 1 SCC 431; and, *Perumon Bhagvathy Devaswom, Perinadu Village vs. Bhargavi Amma (dead) by LRs and others,* 2009(1) MPLJ 510.

4. Learned counsel for the respondents opposed the applications and stated that the averments of the applications and reasons for delay in filing the applications are false and fabricated. It is also submitted that son of deceased appellant, namely, Chandrakant is well to do and educated person. He is Deputy Director in the Industry Department and residing in Gwalior itself. He knows the process and procedures of law as well as the factum of death of appellant. The reasons shown in the application for not filing it in time are not justified and prayed for rejection of the applications as well as dismissal of the appeal as abated.

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

6. It is borne out from the record that this second appeal was filed by original plaintiff Ratanlal in the year 2005 and thereafter it was listed on 6.3.2014 for hearing. On that date appellant Ratanlal was reported to have died and two weeks' time was prayed for filing appropriate application for bringing on record the legal heirs of deceased appellant but thereafter no application was filed and on 28.3.2014 this Court heard the argument on the question of admission and appeal was admitted for final hearing and notices were directed to be issued to the respondents for final hearing of the appeal. Then the case was listed on 15.9.2014, 1.10.2014, 12.11.2014 and

11.12.2014 but no application was moved for bringing the legal representatives of deceased sole appellant Ratanlal on record. In fact this appeal ought to have been dismissed as abated due to the death of sole appellant/plaintiff Ratanlal only on 6.3.2014 when it was listed for hearing but no step has been taken by the learned counsel for bringing the legal representatives of the deceased plaintiff on record.

7. It is true that while considering the application for condonation of delay, liberal approach has to be adopted and on this proposition of law there are several judicial pronouncements, some of them have already been relied on by learned counsel for the appellant, as mentioned above, but while adopting liberal approach the Court cannot ignore another principle of law that the law comes to rescue all vigilant litigants.

8. In the case of *H.Dohil Constructions Company Pvt.Ltd. vs.Nahar Exports Limited and another,* (2015) 1 SCC 680, the Hon'ble Apex Court observed in following manner:-

> "24. When we apply those principles of *Esha Bhattacharjee v. Raghunathpur Nafar Academy*, (2013) 12 SCC 649 to the case on hand, it has to be stated that the failure of the respondents in not showing due diligence in filing of the appeals and the enormous time taken in the refiling can only be construed, in the absence of any valid explanation, as gross negligence and lacks in bona fides as displayed on the part of the respondents. Further, when the respondents have not come forward with proper details as regards the date when the papers were returned for refiling, the non-furnishing of satisfactory reasons for not refiling of papers in time and the failure to pay the court fee at the time of the filing of appeal papers on 6.9.2007, the reasons which prevented the respondents from not paying the court fee along with the appeal papers and the failure to furnish the details as to who was their counsel who was previously entrusted with the filing of the appeals cumulatively considered, disclose that there was total lack of bona fides in its approach. It also requires to be stated that in the case on hand, not refiling the appeal papers within the time prescribed and by allowing the delay to the extent of nearly 1727 days, definitely calls for a stringent scrutiny and

cannot be accepted as having been explained without proper reasons. As has been laid down by this Court, courts are required to weigh the scale of balance of justice in respect of both the parties and the same principle cannot be given a go-by under the guise of liberal approach even if it pertains to refiling. The filing of an application for condoning the delay of 1727 days in the matter of refiling without disclosing reasons, much less satisfactory reasons only results in the respondents not deserving any indulgence by the court in the matter of condonation of delay. The respondents had filed the suit for specific performance and when the trial court found that the claim for specific performance based on the agreement was correct but exercised its discretion not to grant the relief for specific performance but grant only a payment of damages and the respondents were really keen to get the decree for specific performance by filing the appeals, they should have shown utmost diligence and come forward with justifiable reasons when an enormous delay of five years was involved in getting its appeals registered."

9. The crucial fact which defeat the appeal is that on 6.3.2014 a statement was made before this Court that the appellant has expired and two weeks' time was sought for moving appropriate application, thereafter no application has been preferred for setting aside the abatement or for bringing the legal representatives on record. Moreover, the contents of the application seeking setting aside of abatement show that the legal representatives gathered knowledge only after 11.12.2014 when the counsel sent a letter to him, which runs contrary to the statement made before this Court on 6.3.2014. It may also be observed that the application filed under section 5 of Limitation is vague and does not offer sufficient explanation for the delay caused in moving the application for abatement.

10. Consequently, having left with no other option this Court is of the considered opinion that the appeal has abated by operation of law and sufficient ground has not been canvassed for setting aside the abatement in view of the discussion made herein above.

11. In the result, this appeal stands dismissed as abated.

Appeal dismissed.

I.L.R. [2016] M.P., 3350
APPELLATE CRIMINAL
Before Mr. Justice Ved Prakash Sharma
Cr.A. No. 16/2009 (Indore) decided on 20 September, 2016

GHANSHYAM & anr. ...Appellants
Vs.
STATE OF M.P. ...Respondent

A. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 42, 50, 52, 52 A, 55 & 57 – **Information received from secret source was recorded, memorandum was prepared and sent through special messenger to S.P. – Evidence of witnesses stands corroborated – Compliance of Section 42 well proved – Contraband was disposed of before Judicial Magistrate First Class and marked as article – Section 52 A duly complied – Contraband recovered from dicky of motorcycle, not from person of appellants – Section 50 of the Act not applicable – Seized contraband were duly sealed and were sent per messenger to FSL – As per FSL report, seal was found intact and contraband tested positive for opium 3.56% morphine – Section 55 duly complied – Detailed report with regard to seizure & arrest prepared and was sent on the same day to Additional SP – Corroborated by evidence of other witnesses – Compliance of Section 57 duly proved – Conviction maintained.** **(Paras 15 to 22)**

क. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 42, 50, 52, 52 ए व 57 – गुप्त स्त्रोत से प्राप्त सूचना को अभिलिखित किया गया, ज्ञापन तैयार किया गया तथा विशेष संदेशवाहक द्वारा पुलिस अधीक्षक को भेजा गया – गवाहों के साक्ष्य संपुष्ट पाए गए – धारा 42 का अनुपालन भली–भांति सिद्ध – विनिषिद्ध पदार्थ को न्यायिक मजिस्ट्रेट प्रथम श्रेणी के समक्ष नष्ट किया गया था तथा वस्तु के रूप में चिन्हित किया गया – धारा 52 ए का सम्यक् रूप से अनुपालन – विनिषिद्ध पदार्थ को मोटरसाइकल की डिक्की से बरामद किया गया, ना कि अपीलार्थीगण के शरीर से – अधिनियम की धारा 50 लागू नहीं होती – जब्त विनिषिद्ध पदार्थ को विधिवत सील किया गया तथा एफएसएल को संदेशवाहक द्वारा भेजा गया – एफएसएल रिपोर्ट के अनुसार, सील अक्षत पाई गई तथा विनिषिद्ध पदार्थ की जाँच करने पर अफीम में 3.56% मार्फिन सकारात्मक पाया गया – धारा 55 का सम्यक् रूप से अनुपालन – जब्ती तथा गिरफ्तारी संबंधी विस्तृत रिपोर्ट तैयार की गई तथा उसी दिन अतिरिक्त पुलिस अधीक्षक को भेजी गई – अन्य साक्षियों की साक्ष्य द्वारा संपुष्ट – धारा 57 का अनुपालन सम्यक् रूप से सिद्ध – दोषसिद्धि कायम रखी गई।

***B. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/18 (b)* – Appellant who is pillion rider cannot be said in conscious possession of alleged contraband – He is not owner of motorcycle – No specific evidence to show he had knowledge of the contraband kept in motorcycle – Not clear as to from which place he took lift on the motorcycle – Conviction & sentence set aside. (Paras 23 & 24)**

ख. स्वापक औषधि और मन:प्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8/18(बी) – अपीलार्थी जो की पीछे की सीट पर सवार था, अभिकथित विनिषिद्ध पदार्थ के सचेतन कब्जे में नहीं कहा जा सकता – वह मोटरसाइकल का स्वामी नहीं था – कोई विनिर्दिष्ट साक्ष्य नहीं जो यह दर्शाता हो कि उसे मोटरसाइकल में रखे विनिषिद्ध पदार्थ का ज्ञान था – यह स्पष्ट नहीं कि किस जगह से उसने मोटरसाइकल पर लिफ्ट ली थी – दोषसिद्धि एवं दण्डादेश अपास्त।

Cases referred:

(2004) 7 SCC 566, (2003) 10 SCC 198, (2001) 9 SCC 57, (2009) 8 SCC 539, (2010) 3 SCC (Cri) 748, 2009 (2) JLJ 148, 2011 (2) EFR 1, 2004 SCC (Cri) 2028, 2009 Cr.L.R. (M.P.) 27, 2011 (1) EFR 214, 2010 Cr.L.R. 9 (M.P.) 711.

Vikas Jain, for the appellants.
C.S. Ujjainiya, P.P. for the respondent/State.

ORDER

VED PRAKASH SHARMA, J. :- This appeal under Section 374 of the Code of Criminal Procedure, 1973, (for short 'the Code'), has been preferred against the judgment and order dated 15/12/2008 rendered by Special Judge (Narcotics), Mandsaur in Special Case No. 62/2000, whereby and whereunder the appellants have been held guilty for the offence under Section 8/18(b) of the Narcotics and Psychotropic Substances, Act, 1985 (for short 'the Act') and each has been convicted to undergo 10 years RI and to pay a fine of Rs.1 Lac with default clause.

2. The prosecution case, briefly stated, is that on 09/05/2000, M.P. Singh Parihar (P.W. 5), the then ASI, Police Post Datauda, Police Station Bhavgarh, District Mandsaur, received a secret information that two persons namely-Ghanshyam Patidar (Appellant No.1) and Poonam Chand (Appellant No.2) are going from village Pareliya Lalmuha to village Riccha Lalmuha on a Motorcycle bearing registration No. MP-14-F-4801 to deliver the opium to

some person. The information was recorded in the daily diary and a memorandum (Ex.P/6) was prepared in this regard. M.P. Singh Parihar (P.W.5), in view of the paucity of time, without obtaining search warrant, decided to lay a trap to caught hold the named persons. Memorandum Ex.P/7 was prepared in this regard and the copy of the both memorandums was sent to Additional S.P., Mandsaur. Thereafter, Shri Parihar (P.W.5) alongwith other Police Officials and panch witnesses namely -Rajendra Singh (P.W.8) and Pawan Singh (P.W.7), arranged a trap.

3. Allegedly, after about half an hour, Police Party found a motorcycle approaching towards them. The same was intercepted by the police party. Ghashyam Patidar (Appellant No.1) was riding the motorcycle while Poonam Chand (Appellant No.2) was sitting as pillion rider. M.P. Singh Parihar (P.W.5) informed both of them, vide Ex.P/9 and P/10 in writing, about their right to be searched before Magistrate or Gazetted Officer and on their willingness to be searched by the Police party, search was carried out. Nothing offending was found in the personal search, however, on search of the motorcycle, 6.150 Kgs. Opium, was found in a polythene bag lying inside the dikki of the motorcycle, M.P. Singh Parihar (P.W.5) seized the same on the spot in presence of panch witnesses after complying with necessary formalities. Two samples, each weighing 30 gm. were drawn from the substance, sealed and marked as article 'A1' and 'A2'. Remaining contraband substance was also separately sealed. The motorcycle as well as its registration papers were also seized. The appellants were arrested. Same day a report (Ex.P/5) regarding their arrest and seizure was sent to Additional S.P., Mandsaur. Next day i.e. On 10/05/2000 one sample of the contraband article was sent for Forensic Laboratory, Indore, vide (Ex.P/28), the chemical Examiner, vide (Ex.P/29), opined that the substance was coagulated juice of opium poppy having 3.56% morphin.

4. After usual investigation, appellants were charge-sheeted for the offence under Section 8/18(b) of 'the Act'. The appellants abjured the guilt and claim to be tried. In their examination under Section 313 of 'the Code', the appellants pleaded total innocence and claimed false implication.

5. The learned trail (sic:trial) Court Judge, on appreciation of oral and documentary evidence, vide the impugned judgment, convicted and sentenced the appellants as stated here-in- above.

6. The conviction and sentence has been challenged on the ground that the seized contraband was not produced before the Court, therefore, the

recovery of alleged opium becomes seriously doubtful. It is further contended by the learned counsel for the appellants that sections 42, 50, 52, 52-A and 57 of 'the Act' were not complied with in letter and spirit. It is also submitted that the independent witnesses had not supported the prosecution case, therefore, learned Special Judge has seriously erred in recording conviction on the basis of evidence of Police Officers, who are interested witnesses. Thus, it is contended that conviction and sentence awarded against the appellants, is contrary to law and evidence hence , liable to be set-aside.

7. Per contra, learned Counsel for the respondent/State has submitted that in the instant case Opium was recovered from the dicky of the Motorcycle belonging to appellant Ghanshyam, and that Poonam Chand was sitting with him on the motor cycle as pillion rider, therefore, Section 50 of 'the Act' was not attracted, which is applicable in the cases of personal search.

8. It is further submitted by the learned Counsel for the State that the samples of alleged contraband were duly drawn and sealed on the spot. The same were sent to the Forensic Laboratory and that as per report the Chemical Examiner, the substance recovered from the dicky of the Motorcycle was found to be coagulated juice of Opium poppy. It is further submitted that Section 42, 52 and 57 of 'the Act' were scrupulously complied with inasmuch as information with regard to the receipt of secret information was recorded and sent to the Superior Official before laying the trap and that after seizure and arrest again a detailed report was sent to the Additional S.P. It is also submitted that nothing is there to indicate that the concerned Police Officials had any enmity or animosity with the appellants or were interested in falsely implicating them, therefore, the learned Trial Court has rightly relied upon the testimony of Police Officials and that no interference is called for in the impugned judgment.

9. Heard the learned Counsel for the parties and perused the record.

10. In the backdrop of the rival submissions made by the learned Counsel for the parties, following points need to be considered in the instant case:

(i) Whether the learned Trial Judge has erred in relying upon the testimony of Police Officials in absence of corroboration from independent source?

(ii) Whether Section 42, 50, 52, 52-A , 55 and 57 of 'the Act' were duly complied by the Police?

TESTIMONY OF POLICE OFFICIALS:

11. As regards evidential value of the testimony of police officer(s), though it has been contended by the learned counsel for the appellants that such testimony in absence of corroboration from an independent source cannot be relied upon to record conviction , however, the settled position of law is that conviction can be based on the testimony of a police officer, provided the court is of opinion that the witness is truthful and trustworthy. In this connection the law laid down by Hon'ble the apex Court in *Lopchand Naruji Jat & Anr. vs. State of Gujarat*, (2004) 7 SCC 566, *Abdul Majid abdul Hak Ansari vs. State of Gujarat,* (2003) 10 SCC 198 and *P.P. Beeran vs. State of Kerala,* (2001) 9 SCC 57 can usefully be referred.

12. The evidence of M.P. Singh Parihar (P.W.5) and other police witnesses needs to be examined in the aforesaid legal background. The defense, in a searching cross-examination, has not been able to elicit anything material so as to discredit M.P. Singh Parihar (P.W.5). In para 14 he has admitted that he is under suspension however, this fact by itself, in absence of a serious anomaly or contradiction cannot be a ground to disbelieve him. M.P. Singh Parihar(P.W.5) in his cross-examination has denied the suggestion that motorcycle in question was already lying at the spot (para-14). In fact on a query made from RTO Mandsaur, vide Ex.P/28 it was found that Motorcycle bearing Registration No. MP-14 F-4801 (Hero Honda) was registered in the name of Ghanshyam Patidar s/o Laxminarayan i.e. appellant No.1. Appellant Ghanshyam, has not stated in his examination under Section 313 of the Code that he had left his motorcycle on the spot. No evidence in support of the plea that motorcycle was already lying at the spot was adduced therefore, the version put forth by Shri M.P. Singh Parihar (P.W.5) that he intercepted the motorcycle being driven by appellant Ghanshyam, on which Pooran Chand was sitting as pillion rider, being free from any serious anomaly, omission or contradiction is found to be trustworthy.

13. It has been strongly contended by learned Counsel for the appellants that panch witnesses Pawan Singh (P.W.7) and Rajendra Singh (P.W.8) have not supported the prosecution version hence, the prosecution case becomes suspicious. In this connection it is noticeable that Pawan Singh (P.W.7) and Rajendra Singh (P.W.8) have not denied their signatures on various document i.e. Ex.P/6 to Ex.P/11. They have not come out with a satisfactory explanation as to why they had put their signatures on a number of documents. It is not

their case that they were forced to put their signatures on these papers. Had it been the case they could have complained to the Superior Police Officers but in absence of any such complaint, a bare denial by these witnesses, that nothing happened before them, is not quite trustworthy. It clearly transpires from the conduct of these witnesses that they are not interested in revealing true facts. Both these witnesses have been declared hostile by the prosecution and have been contradicted by their police statement recorded under Section 161 of 'the Code' In such premises, simply because panch witnesses have not supported the prosecution case, it cannot be said that the police has concocted various documents and framed a false case to persecute the appellants.

14. Though appellant Ghanshyam, in his cross-examination under Section 313 of 'the Code' has taken a plea that his debtors in collusion with police had falsely implicated him. However, no specific suggestion in this regard has been made to M.P. Singh Parihar (P.W.5). This witness in para 11 has admitted that in search of the person of Ghanshyam, Rs.5,500/- were found with Ghanshyam. However, it cannot be said that this money was not accounted for by him because there is specific mention in Ex.P/22 - the arrest memo of Ghanshyam, that cash Rs.5,500/- was found on his person . Had there been any intention on the part of M.P. Singh Parihar (P.W.5) to commit breach of trust with regard to the aforesaid amount, he should not have made an entry in this regard in the arrest memo of Ghanshyam. Thus, the plea of false implication on account of enmity does not carry weight and has rightly been rejected by the learned Trial Court.

SECTION 42, 50, 52, 52-A , 55 AND 57 OF 'THE ACT':

15. Section 42 of 'the Act' requires that if an authorised Officer has reason to believe from personal knowledge or information received from some source that a person is dealing in narcotic drug or a psychotropic substance, such information should be taken down in writing except in a case of urgency. Section 42(2) of 'the Act' further requires that the information so recorded should be forthwith sent to the Superior Officer. The Apex Court in *Karnail Singh vs. State of Haryana* (2009) 8 SCC 539 has held that provisions of Section 42(2) of 'the Act' are mandatory. Thus, the prosecution is required to prove compliance of Section 42 of 'the Act' in letter and spirit. In the instant case, M.P. Singh Parihar (P.W.5) has clearly deposed that the information received by him from secret source was recorded vide Ex.P/6 and as there was paucity of time and that he reasonably felt that if efforts are

made to obtain search warrant, the culprits can escape, therefore, memorandum Ex.P/7 was prepared in this behalf and copies of memo Ex. P/6 and P/7 were forthwith sent per special messenger- Constable Ramesh Giri (P.W.3) to Additional S.P. Mandsaur. Ramesh Giri (P.W.3) has corroborated M.P. Singh Parihar (P.W.5) on this point. Further, the evidence of these witnesses in this behalf stands corroborated with the testimony of Shambhu Singh (P.W.2)-the then Reader of Additional S.P. Mandsaur, who has deposed that on 9.5.2000 Constable Ramesh Giri (P.W.3) had come with copy of two memos which were handed over to him and that he endorsed a receipt on Ex.P/3 and P/4 in this behalf. There is nothing to disbelieve the aforesaid testimony of M.P. Singh Parihar (P.W.5), Ramesh Giri (P.W.3) and Shambhu Singh (P.W.2), which further stands corroborated by relevant memorandum Ex.P/3 and P/4 which bear receipt by Reader of SDOP. The defense has not been able to demonstrate that the aforesaid evidence is concocted or suffers from serious anomaly, hence, the same deserves to be accepted. Thus , in the instant case, the compliance of Section 42 of 'the Act' is found well proved and, therefore, the finding recorded by the learned Trial Court in this regard cannot be said to be erroneous.

16. Referring to - *Noor Aga vs. State of Punjab and another,* (2010) 3 SCC (Cri) 748, *Laxminarayan v. State of M.P.*, 2009 (2) JLJ 148, *Ashok @ Dangra Jaiswal vs. State of M.P.,* [2011 (2) EFR 1], *Jitendra and another vs. State of M.P.*, 2004 SCC (Cri) 2028, *Kanwarlal vs. State of M.P., through Distt. Magistrate, Mandsaur,* 2009 Cr.L.R. (M.P.) 27, *Kailash vs. State of M.P., through – P.S. Nahargarh,* [2011 (1) EFR 214] and *Dinesh & Jogaram vs. State of M.P.*, 2010 Cr.L.R. 9 M.P.) 711], it has been argued by the learned counsel for the appellant that contraband – opium, said to have been seized from appellants, was not produced as an article before the Court, therefore, it cannot be said that Section 52-A of 'the Act' was duly complied with, hence, the appellant deserves to be acquitted.

17. Per contra, learned counsel for the State has invited attention of this Court to statement of M.P. Singh Parihar (P.W.5), who has deposed that the contraband was disposed of before Judicial Magistrate First Class on 30/06/2001. Further attention is drawn to para 10 of the deposition of M.P. Singh Parihar (P.W.5) wherein he has stated that both the packets of samples were produced before the Court and duly marked as "Article -A" and "Article -B". There is nothing to disbelieve the testimony of M.P. Singh Parihar (P.W.5) on

this point which does not suffer from any material contradictions or anomaly. It is not the case of the prosecution that seized substance was changed with some other substance.

18. The cases relied upon by the learned counsel for the appellant are very much distinguishable on facts. In *Noor Aga's* case, (supra), even the samples of contraband material, were not produced before the Court (see: para – 96). In *Laxminarayan's* case, (supra), also the samples of the seized contraband were not produced before the Court (see: para 23). In *Ashok's* case, (supra), no explanation was offered for non-production of the seized substance (see: para 12) However , in the instant case, M.P. Singh Parihar (P.W.5) has clearly deposed that contraband was duly disposed of in presence of Judicial Magistrate First Class Shri Chhaparia. In *Jitendra's* case, (supra), the Investigating Officer was not even examined before the Court, thus, creating a serious dent in the prosecution case (para 6), which is not the position in the instant case.Thus, in the facts and circumstances of the case, it cannot be said that Section 52-A of 'the Act' was not duly complied with.

19. As regards compliance of Section 50 of 'the Act', though contraband was recovered from the Dicky of the motorcycle, and not from the person of the appellants, therefore, strictly speaking Section 50 of 'the Act' was not applicable, still it is found from the record that notices Ex.P/9 and Ex.P/10 were given to appellants so as to apprise them about their right to be searched before the Gazetted Officer or nearest available Magistrate and further that they consented for the search being carried out by M.P. Singh Parihar (P.W.5). There is no reason to disbelieve the testimony of M.P. Singh Parihar (P.W.5) on this point which stands corroborated by contemporaneous documents (Ex.P/9 to Ex.P/12). Hence, it cannot be said that Section 50 of 'the Act' was not duly complied with.

20. As regards compliance of Section 55 of 'the Act', it is found from the evidence available on record that the packets of the samples drawn from the seized contraband and the packet of remaining substance were duly sealed, first by personal seal of M.P. Singh Parihar (P.W.5) and thereafter at Police station by A.S.I. Om Prakash (P.W.6) with the seal of Police Station and were kept in the Malkhana of Police Station, as per Malkhana Register entry (Ex.P/1C). Further, very next day i.e on 10/05/2000, the samples, vide memo Ex.P/28, were sent per messenger to FSL, Indore, where, as per FSL report (Ex.P/29), the seal was found intact and the contraband tested positive for

opium, having 3.56% morphine .Thus, it cannot be said that Section 55 of 'the Act' was not duly complied with.

21. As regards plea as to non-compliance of section 57 of 'the Act', from the testimony of M.P. Singh Parihar (P.W.5) it is found that detailed report (Ex.P/5) with regard to the seizure and arrest was prepared and was sent on the same day to Additional SP, which has been corroborated by Shambhu Singh (P.W.2) - the reader of the Additional SP, Mandsaur, who has deposed in para 2 that copy of Ex.P/5 was received by him on 09/05/2000. Thus, the compliance of the Section 57 of 'the Act' is dully proved, as held by the learned trial Court.

22. From the information provided by the RTO, District – Mandsaur, vide Ex P/28 (dated 26 /05/2000), the motorcycle in question was found to be registered in the name of appellant No.1 – Ghanshyam. The defense raised by appellant Ghanshyam that his motorcycle was lying in an open place, has not been found plausible and acceptable, therefore, he being the owner of motorcycle, it logically flows that he was in conscious possession of the contraband.

23. However, as regards appellant Puranchand, who was a pillion rider, it cannot be said beyond reasonable doubt that he was also in conscious possession of the alleged contraband because, ***firstly,*** he is not the owner of the motorcycle, ***secondly*** – there is no specific evidence to show that he had the knowledge of the contraband being kept in the motorcycle. It is further not clear as to from which place he took lift on the motorcycle. The learned trial Court has not considered these aspects , therefore, the finding regarding culpability of Puranchand , in absence of proof beyond reasonable doubt, with regard to his conscious possession, cannot be sustained and benefit of doubt must be given to him.

24. Accordingly, as regards appellant Ghanshyam, the appeal having no merits, deserves to be and is accordingly, hereby dismissed. As regards Puranchand, the appeal is allowed; the conviction and sentence recorded against him is hereby set aside and he is acquitted of the charge for offence under Section 8/18(b) of the Act. If not required in any other case, he should be forthwith set at liberty.

Certified copy as per rules.

Order accordingly.

I.L.R. [2016] M.P., 3359
APPELLATE CRIMINAL
Before Mrs. Justice Anjuli Palo
Cr.A. No. 100/2002 (Jabalpur) decided on 22 November, 2016

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

A. ***Penal Code (45 of 1860), Sections 366 & 376 – Abduction – Rape – Trial Court – Conviction & Sentence – Appeal against – Grounds*** **– Prosecutrix travelled alongwith the appellant after alleged abduction from one place to another by walking, bus etc. and remained out for 3 days – No injury mark on her body – Held – Inspite of many opportunities to resist, shout or run away during the course of long journey the prosecutrix choose to remain silent which creates doubt about her allegations and it points out that the prosecutrix was a willing party to the act and she herself has eloped with the appellant – Conviction & sentence set aside – Appellant acquitted – Appeal allowed. (Paras 6 to 13 & 16 to 19)**

क. *दण्ड संहिता (1860 का 45), धाराएँ 366 व 376 – अपहरण – बलात्संग – विचारण न्यायालय – दोषसिद्धि एवं दण्डादेश – के विरूद्ध अपील – आधार* – अभियोक्त्री ने अभिकथित अपहरण के बाद अपीलार्थी के साथ एक से दूसरे स्थान तक चलकर, बस इत्यादि से यात्रा की तथा 3 दिनों तक बाहर रही – उसके शरीर पर चोट के कोई निशान नहीं – अभिनिर्धारित – लंबी यात्रा के दौरान प्रतिरोध करने, चिल्लाने अथवा भागने के कई अवसरों के बावजूद अभियोक्त्री मौन रहती है जो कि उसके अभिकथनों पर संदेह उत्पन्न करता है तथा यह इंगित करता है कि अभियोक्त्री उस कृत्य के लिए रजामंद पक्षकार थी एवं वह स्वयं अपीलार्थी के साथ भागी – दोषसिद्धि एवं दण्डादेश अपास्त – अपीलार्थी दोषमुक्त – अपील मंजूर।

B. ***Penal Code (45 of 1860), Section 362 – "Abduction" – Meaning*** **– To constitute abduction there must be absence of will on part of the person abducted. (Para 12)**

ख. *दण्ड संहिता (1860 का 45), धारा 362 – "अपहरण" – अर्थ* – अपहरण गठित करने हेतु अपहृत व्यक्ति की ओर से रजामंदी का अभाव होना चाहिए।

Cases referred:

2007 CRLJ 1355, 1995 CRLJ 3974 (SC), AIR 1977 SC 1307, 2008

CRLJ 2856.

K.S. Rajput, for the appellant.
K.S. Patel, for the respondent.

JUDGMENT

ANJULI PALO, J. :- This appeal has been filed under Section 374(2) of Criminal Procedure Code against the judgement and sentence dated 28.11.2001 passed by the learned Special Judge (Prevention of Atrocities), Sehore in Special Case no. 291/2000 by which appellant has been convicted under Section 366 and 376 of IPC and sentenced to undergo rigorous imprisonment for 5 years and 7 years along with fine of Rs. 500/-, respectively.

2. In brief, the prosecution story is that on 05.08.2000 at night the appellant Goverdhan with the help of other accused persons abducted the prosecutrix aged about 18 years from the lawfull custody of her parents from Village Nibukheda under Police Station Bawadia with intent to compel her or knowing it to be likely that she will be compelled to marry a person against her will or in order that she may be forced or seduced to illicit intercourse and forcibly committed rape with her. On the next day morning at about 7:00 am they took her to Sehore to the residence of appellant's sister (at Village Kudi) and then took her to Kalapahad for 2 days and committed rape with her. Then they left the prosecutrix at Village Nibukheda. She reached her home and informed about the incident to her parents. On 19.08.2000, the brother of the prosecutrix filed a missing person report at Police Station Bilkisganj. Crime was registered under Section 366 and 376(2)(g) of IPC against the appellant and other co-accused persons. After investigation, charge-sheet was filed before the Trial Court and charges under Section 366 and 376(2)(g) of IPC were framed by the learned Trial Court against the appellant and other co-accused person. They abjured guilt and claimed false implication.

3. On the basis of the testimony of prosecutrix and the FSL report regarding chemical examination of swab of the prosecutrix, the learned Trial Court found that only appellant had abducted and committed rape with the prosecutrix. Learned Trial Court also found that the testimony of the prosecutrix has been corroborated by her brother Prahalad (PW-6), mother Prembai (PW-7), uncle Kamal Singh (PW-9). The learned Trial Court has not accepted the defence story of the appellant, that a love relationship existed between the appellant and the prosecutrix. On the above grounds the appellant

was convicted under Section 366 and 376 of IPC and sentenced as aforesaid.

4. This appeal has been filed on the ground that the impugned judgement is contrary to law and facts of the case. The Court below has erred by relying upon testimony of the prosecutrix who is a major and a married lady. Learned Trial Court convicted the appellant on the basis of the contradictory and weak type of prosecution evidence by ignoring the delayed FIR. There is no sufficient explanation about the delay in report. The medical report do not support the version of the prosecutrix. Hence, it is prayed that the impugned judgement be set aside and the appellant be acquitted from the charges levelled against him.

5. Heard the parties at length and perused the record. It is observed that the appellant was convicted under Section 366 and 376 of IPC. Section 362 of IPC defines "abduction" – whoever by force compels or by any deceitful means, induces any person to go from any place, is said to abduct that person. In the light of the above provisions, evidence of prosecutrix and her near relatives is to be evaluated.

6. Prosecutrix (PW-2) in her examination-in-chief deposed that at the time of incident at about 12:00 PM she went to attend nature's call with her younger sister Shanti (PW-5) and while returning home, the appellant and one Bhogiram (co-accused) abducted her and took her to the forest then the appellant committed rape on her. At that time she did not resist for the appellant had threatened to kill her. Then the appellant and his friends Bhogiram, Jalam, Babulal along with the prosecutrix, proceeded from the forest and reached Jhagariya. From Jhagariya they boarded bus for Sehore and from Sehore they walked to the village Kudi where appellant's sister lived. The prosecutrix went to Black Hill (Kalapahad) with the appellant and stayed there for two days and during this period, the appellant again committed rape on her.

7. Statement of the prosecutrix (PW-2) shows that she never resisted the appellant during the intercouse (sic:inercourse), neither she cried nor shouted for any help. She only said that ***"mein marr jaungi to tumhare mathe aungi"***. Then they reached Pipalton and stayed there for one night in a hut. Appellant left her at village Sohanchhapri at about 7:00 pm and threatened to kill her.

8. In Para 23 of her cross examination, prosecutrix (PW-2) again has stated that when she reached Jhagariya bus-stand and moved from Jhagariya

to Sehore, they met many people. From Sehore they proceeded for Kalapahad which took 3 hours. During this long journey, the prosecutrix have had many opportunity to resist, shout or run away but she chose to keep silent which creates doubt on her, resulting in adverse inference which could be drawn against her that she was not compelled to go with appellant instead she was a willing party and went with the appellant on her own and hence culpability of appellant / accused is doubtful.

10. In *Ashok Kumar Thakur Vs. State of MP* reported in 2007 CRLJ 1355, this Court has held that :

> ***"During traveling in bus prosecutrix had opportunity to run away but neither did she ran away nor shouted for help from the fellow passengers. It was held that it would be inferred that she was a consenting party and conviction was not proper."***

11. In her cross-examination in Para 19, the prosecutrix (PW-2) admitted that she knew the appellant prior to the incident. Her father Karan Singh (PW-3) stated that after 3 days of the incidence the prosecutrix returned back to home at about 8:00 pm. Brother of the prosecutrix Prahlad (PW-6) in Para 2 of the cross-examination stated that the prosecutrix left home with a plastic suitcase. This indicates that the prosecutrix has voluntarily left her house. These circumstances show that the testimony of prosecutrix is doubtful. She may be considered as a willing party.

12. To constitute "abduction" there must be absence of will on the part of the person abducted. A person commits offence of abduction when by force compels or by deceitful means induces one to go from one place to another. Thus, when the prosecutrix left the house of her father on her own will, she was taken by the accused / appellant by walking, traveled in a bus, through a busy market area and she never cried, nor shouted or called anybody for help, the conduct of the prosecutrix indicate that she had eloped with the appellant/accused. No abduction is committed. The testimony of the prosecutrix (PW-2) in this regard is found unreliable.

13. From the testimony of the prosecutrix as well as her conduct shows that her relationship with the appellant was cordial. Prosecutrix was a married lady. She had no injury on her body. She has stated that appellant committed rape on her thrice in the forest and other places. It is very important to note

that the prosecutrix (PW-2) has deposed in Para 28 and 29 in her cross-examination that after they left the village Neebukheda, the appellant went to drink water and attended nature's call many times while all this time the prosecutrix waited for the appellant on the road at a distance.

14. In the case of *Shyam Vs. State of Maharashtra* reported in 1995 CRLJ 3974 (SC), it was held that where prosecutrix had not put up struggle or had not raised any alarm while being taken away by the accused, it was a case of elopment (sic:elopement) of victim and voluntarily submitting her to accused.

15. In case of *Pratap Mishra Vs. State of Orissa* reported in AIR 1977 SC 1307, it was held that :

> *"The fact of sexual intercourse however, is required to be established by the prosecution at any rate. In doing so, the presence or absence of injury on the body of the woman concerned is material."*

16. In the present case, Dr. Smt. Manju Saxena (PW-11) who examined the prosecutrix (PW-2) did not find any injury on her private parts or body during the medico-legal examination of the prosecutrix. No swelling was find in the vagina. However, found that vagina admitted two fingers easily. In such circumstances, prosecution story seems doubtful.

17. In case of *Diganta Majumdar Vs. State of Assam* 2008 CRLJ 2856 it was held that:-

> *"conviction of the accused was not proper because in the matter of abduction and rape, relationship between the parties were cordial, testimony of the prosecutrix was not reliable. It was also not corroborated by the medical evidence. Apart from this, there was no injury on her body. Thus, it was held that the acquittal of the accused was proper."*

18. On the basis of aforesaid discussion, appeal filed by the appellant appears to be acceptable and therefore, it is hereby allowed. The conviction as well as sentence imposed by the trial Court for offence under Sections 366 and 376 of IPC is hereby set aside. The appellant is acquitted from all the charges levelled against him. If the appellant has deposited the fine amount

before the Trial Court, the same shall be refunded to him.

19. The appellant is on bail. His presence is no more required before the Court. His bail bond shall stand discharged.

20. Copy of the judgement be sent to the trial Court along with its record for information.

Appeal allowed.

I.L.R. [2016] M.P., 3364
CIVIL REVISION
Before Mr. Justice S.A. Dharmadhikari
C.R. No. 72/2010 (Gwalior) decided on 9 May, 2016

ANIL TRIPATHI ...Applicant
Vs.
SMT. URMILA TRIPATHI & anr. ...Non-applicants

***Court Fees Act (7 of 1870), Section 7(iv)(c) – Rejection of application filed under Order 7 Rule 11 of CPC* – Partition deed is a registered document and relief claimed is of declaration of the partition deed to be null & void and for permanent injunction – Plaintiff is a party to the partition deed, and as such, he is required to pay and affix the ad-valorem court fees. (Para 9)**

न्यायालय फीस अधिनियम (1870 का 7), धारा 7(iv)(सी) – सि.प्र.सं. के आदेश 7 नियम 11 के अंतर्गत प्रस्तुत आवेदन खारिज किया जाना – बंटवारा विलेख एक पंजीकृत दस्तावेज है तथा बंटवारा विलेख को अकृत एवं शून्य घोषित किये जाने एवं स्थायी व्यादेश की घोषणा हेतु अनुतोष का दावा किया गया है – वादी बंटवारा विलेख में पक्षकार है तथा इसलिए उसके द्वारा मूल्यानुसार न्यायालय शुल्क अदा किया जाना एवं चस्पा किया जाना अपेक्षित है।

Cases referred:

(2006) 5 SCC 353, 1968 SC 956, AIR 1958 SC 245, AIR 1973 (2) 2384, 2010 (12) SCC 112, 2012 (5) MPHT 276, 2009 (3) MPHT 113, 2011 (2) MPHT 488, 2010 (1) MPHT 338.

Kamal Jain, for the applicant.
None for the non-applicants even though served.

ORDER

S.A. DHARMADHIKARI, J. :- This revision under Section 115 CPC arises out of order dated 15/03/2010 passed by the II Additional District Judge, Gwalior, whereby the application under Order 7 Rule 11 CPC has been rejected.

2. Facts necessary for disposal of this revision are that the plaintiff/ respondent has filed a suit for declaration of the Partition Deed as null and void and for permanent injunction. Accordingly, to the petitioner/defendant suit was arbitrarily valued by the plaintiff for Rs. 4,00,000/- as mentioned in the partition deed and had affixed Rs. 2000/- fixed Court fee for declaration and Rs. 100/- Court fee for permanent injunction. As such, ad-veloram (sic:valorem) Court fee under Section 7 (iv) (c) of the Court Fee (sic:Fees) Act, 1878 (sic:1870) (herein after referred to as "Act") was required to be paid in view of the fact that the partition deed dated 30/11/2000 has been registered with the Sub-Registrar office and the same is an admitted position.

3. In response to the aforesaid objection, the respondent/plaintiff submitted that the application under Order 7 Rule 11 CPC lacks bonafides and has been belatedly filed. He has properly valued the suit and has affixed appropriate Court fees and the Court has not directed regarding payment of Court fees and as such application under Order 7 Rule 11 CPC is not maintainable. The suit has been properly valued and the Court had pecuniary jurisdiction to entertain the suit.

4. The Trial Court has rejected the objection and held that the plaintiff had not sought any declaration on partition of the property but has sought declaration of the partition deed to be null & void, therefore, the plaintiff is not required to pay ad veloram (sic:valorem) Court fee.

5. Being aggrieved, the petitioner/ defendant has assailed the order dated 15/03/2010 questioning the legality, validity and propriety of the impugned order. It is inter alia contended that admittedly the partition deed dated 30/11/2000 is a registered document. The learned counsel for the petitioner contended that there is a presumption that registered document was validly executed, unless such presumption is displaced by leading evidence to the contrary. Onus is upon the person alleging or disputing the factum of execution of the registered partition deed.

6. The learned counsel for the petitioner has relied upon the judgment of

the Apex Court (2006) 5 SCC 353, *Prem Singh & Other Vs Birbal & Others* in which in paragraph 27 it has been held that :-

> "There is presumption that a registered document is validly executed. A registered document, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, respondent has not been able to rebut the said presumption."

The petitioner has also relied on judgment of Apex Court reported in 1968 SC 956, *Ningawwa Vs. Byrappa Shiddappa Hirekurab*ar in support of this contention.

7. The contention of the petitioner appears to have force and the plaintiff being party to the partition deed, he is liable to pay ad-voleram (sic:valorem) Court fee under Section 7 (iv) (c) of the Court Fee (sic:Fees) Act.

8. With regard to determination or computation of Court fees the Apex Court has held that the question of Court fees must be decided having regard to the averments made in the plaint itself and the decision on merits can not affect the same ; AIR 1958 SC 245 *Sathappa Chettiar VS Ramanathan Chettiar.* Further, the Apex Court in *Shamsher Singh Vs Rajinder Prasad & Others* AIR 1973 (2) 2384 has laid down the principle that (i) whether the plaintiff's suit will have to fail for failure to ask for consequential relief is of no concern to the Court at that stage and (ii) the Court should look into the allegations in the plaint to see, what is the substantive relief that is asked for. Mere astuteness in drafting the plaint will not be allowed to stand in the way of court looking at the substance of the relief asked for.

9. Looking to the aforesaid settled principle of law, it can be concluded that the partition deed is a registered document and the relief claimed is of declaration of the partition deed to be null & void and for permanent injunction. The plaintiff is party to the partition deed and as such he is required to pay and affix ad voleram (sic:valorem) court fee under Section 7 (iv) (c) of the Act.

10. The above proposition is based on the various judgments passed in the identical issues. The learned counsel for the petitioner placed reliance on the judgment reported in 2010 (12) SCC 112, 2012 (5) MPHT 276, 2009 (3) MPHT 113, 2011 (2) MPHT 488 and 2010 (1) MPHT 338 in support of his contention.

11. From the above discussion, the settled legal position and factual matrix of the case, the impugned order as passed by the Trial Court is not sustainable, therefore, the same is set-aside. The plaintiff/respondents is liable to pay ad voleram (sic:valorem) Court fee on the valuation of partition deed in terms of Section 7 (iv) (c) of the Act. The Trial Court shall grant reasonable time to the plaintiff to pay the deficit Court fee before it proceeds further on merits in accordance with law. The Revision Petition stands allowed. No order as to costs.

Revision allowed.

I.L.R. [2016] M.P., 3367
CIVIL REVISION
Before Mr. Justice Alok Verma
C.R. No. 194/2014 (Indore) decided on 26 July, 2016

REVA ASSOCIATES (M/S) & anr. ...Applicants
Vs.
SARJUBAI & ors. ...Non-applicants

A. Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Effect of non-joinder of necessary party – **Suit for cancellation of sale deed cannot be dismissed only on the ground of non-joinder of necessary party – The plaintiffs are at liberty to implead the necessary parties if they so desire – Even after an opportunity is granted to the applicants for impleading necessary parties in the suit and parties are not impleaded then only the suit can be dismissed for non-joinder of necessary parties. (Para 13)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 – आवश्यक पक्षकार के असंयोजन का प्रभाव – विक्रय विलेख को निरस्त करने हेतु वाद को सिर्फ आवश्यक पक्षकार के असंयोजन के आधार पर खारिज नहीं किया जा सकता – वादीगण यदि चाहें तो वे आवश्यक पक्षकारों को अभियोजित करने के लिए स्वतंत्र हैं – आवेदकगण को वाद में आवश्यक पक्षकारों को अभियोजित करने का अवसर प्रदान किये जाने पर भी तथा यदि पक्षकारों को अभियोजित नहीं किया जाता है केवल तभी वाद को आवश्यक पक्षकारों के असंयोजन के लिए खारिज किया जा सकता है।

B. Limitation Act (36 of 1963), Article 109 – Provisions applicability – Limitation – **The case is filed for setting aside the alienation, admittedly done by the father of the plaintiff – The time from which period of limitation commence is the date of alienation and the total period prescribed is 12 years – Therefore, as suit is filed**

within 12 years of the date of alienation by late Narayansingh – The suit on the basis of averment made in the plaint appears to have been filed within limitation. (Para 13)

ख. परिसीमा अधिनियम (1963 का 36), अनुच्छेद 109 – प्रावधानों की प्रयोज्यता – परिसीमा – यह प्रकरण वादी के पिता द्वारा स्वीकृत रूप से किये गये अन्यसंक्रामण को अपास्त करने हेतु, प्रस्तुत किया गया है – परिसीमा की अवधि अन्यसंक्रामण की दिनाँक से प्रारम्भ होती है एवं कुल समयावधि 12 वर्ष विहित की गई है – अतः, चूँकि स्व0 नारायण सिंह द्वारा अन्यसंक्रामण किये जाने की दिनाँक से 12 वर्ष के भीतर वाद प्रस्तुत किया गया है – वाद पत्र में किये गये प्रकथनों के आधार पर वाद समयावधि भीतर प्रस्तुत किया जाना प्रकट होता है।

Cases referred:

1977 (4) SCC 467, 2012 (8) SCC 706, (1999) 5 SCC 222, AIR 1928 Bombay 383, (2015) 8 SCC 390, (1994) 4 SCC 294.

R.S. Chhabra, for the applicants.

None, for the non-applicants after service of SPC to the non-applicants.

ORDER

ALOK VERMA, J. :- This civil revision is directed against the order passed by the learned Civil Judge Class- I, Sanwer, District-Indore in Civil Suit No.01-A/2014 whereby the learned Civil Judge dismissed an application filed under Order 7 Rule 11 CPC.

2. The relevant facts are that the plaintiffs are legal representatives of deceased-Narayansingh, who died on 14.09.2010. During his lifetime deceased - Narayansingh executed a sale deed in favour of applicant No.1-M/s Reva Associates in respect of suit property. After death of said Narayansingh, the plaintiffs filed the present suit on 09.01.2014 and prayed cancellation of sale deed in respect of share of the plaintiffs, as according to the plaintiffs, the suit property is an ancestral property, which was recorded in name of late Narayansingh being head and karta of the family. It is further averted in the plaint that plaintiffs remained in possession of the suit property and never parted possession even after execution of sale deed by Narayansingh.

3. The present applicants filed an application under Order 7 rule 11 CPC on the ground that the plaintiffs had not impleaded all the legal representatives of deceased- Narayansingh, and therefore, the suit suffers from non-joinder

of necessary parties and as such the suit is not maintainable. The second ground taken by the applicants was that the suit filed by the plaintiffs is barred by limitation, and therefore, suit is not maintainable.

4. The respondents opposed the application on the ground that they are in possession of the suit property and under Article 109 of Limitation Act, the limitation prescribed for the suits filed by Hindu governed by Mitakshara law to set aside his father's alienation of ancestral property.

5. Before the trial court, the applicants relied on judgment of Hon'ble Apex Court in case of *T. Arivendam vs. Satyapal and others*; 1977 (4) SCC 467 and *Church of Charitable Trust vs. Punniman Education Trust*; 2012 (8) SCC 706 in which it was held that when a suit is filed to harass the defendant, such suit should be dismissed under Order 7 Rule 11. However, the learned trial court opined that the suit was not filed merely to harass the defendant and similarly, the applicants also cited judgment of Hon'ble Apex Court in case of *Veena Murlidharan Hemdev and others vs. Kanhaiyalal Lokram Hemdev and others*; (1999) 5 SCC 222.

6. Further, the applicants also relied on Article 59 of Limitation Act where according to them for cancellation of such sale deed, limitation prescribed is 3 years.

7. The learned trial court after taking into consideration the case law produced by the applicants and also relied on case of judgment of Bombay High Court in case of *Chintaman vs. Bhagwan*; AIR 1928 Bombay 383 which was related to Limitation Act 1908 and the trial court held that under Article 126 of old act where the possession is not transferred as averted by the plaintiffs in the plaint, limitation prescribed is 6 years, and therefore, the trial court found that the suit is within limitation and on the point of non-joinder of necessary parties, the learned trial court opined that merely because non-joinder of necessary parties suit cannot be dismissed under Order 7 Rule 11 because the parties can be impleaded at any stage.

8. Even after notice given to the respondents, none appeared on their behalf. Further an SPC was issues (sic:issued) still no one appeared on behalf of the respondents.

9. The learned counsel for the applicants placed reliance on judgment of Hon'ble Apex Court in the case of *Fatehji and Company and another vs. L.M. Nagpal and others*; (2015) 8 SCC 390 in which it was held that under Article 54

of Limitation Act, suit for specific performance of agreement to sell immovable property, period prescribed is 3 years and further, he placed reliance on judgment of Hon'able Apex Court in case of *Kenchegowda (since deceased) by LRs vs. Siddegowda @ Motegowda;* (1994) 4 SCC 294 in which it was held that suit for partition is not maintainable without impleading all the co-sharers.

10. The plaintiffs sought following reliefs in the plaint :-

> "**A.** That, the suit property described is the ancestral property of the plaintiffs and it be Declared that the plaintiffs are entitled to their rights in the suit property by partition. (emphasis applied).
>
> **B.** It be Declared that the registered sale deed bearing No.1A/602 dated 05.04.2008 executed by deceased Narayan in favour of the defendant no.1 is not binding on the plaintiffs.
>
> **C.** Permanent Injunction to the effect that on the basis of the registered sale deed and mutation in the revenue records, the suit property be not alienated.
>
> **D.** Cost of the suit be awarded to the plaintiffs from the defendants."

11. The first ground taken by the applicants is that the suit is barred by limitation. On this point, the counsel for the applicants submits that on this matter provisions of Article 59 of Limitation Act 1963 would apply. Article 59 of 1963 provides as under :-

Description of suit	**Period of limitation**	**Time from which period begins to run**
To cancel or set aside an instrument or decree or for the rescission of a contract	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him.

12. From the reading of Article 59, it is apparent that it is for setting aside an instrument or decree or it is for the rescission of a contract. However, in the present case, the case is filed for setting aside the alienation admittedly done by father of the plaintiffs and this case is governed by Section 109 of

Limitation Act 1963. Though, on this aspect, the learned trial court referred Article 126 which is old Act of 1908. The corresponding article of new Act of 1963 is 109. The Article 109 of Limitation Act provides as under :-

Description of suit	Period of limitation	Time from which period begins to run
By a Hindu governed by *Mitakshara* law to set aside his father's alienation of ancestral property.	Twelve years	When the alienee takes possession of the property.

13. In the new Article 109, the time from which period of limitation is date of alienation and the total period prescribed is 12 years. The time commencement of period of limitation does not take upon transfer of possession, and therefore, as suit is filed within 12 years of date of alienation by late Narayansingh, this suit on the basis of averments made in the plaint appears filed within limitation. So far as the non-joinder of necessary parties are concerned, the learned lower court rightly observed that only on the ground of non-joinder of necessary parties, suit cannot be dismissed under Order 7 Rule 11 of CPC. The plaintiffs are at liberty to implead the necessary parties if they so desire. Even after an opportunity is granted to the applicants for impleading necessary parties in the suit and parties are not impleaded then only the suit can be dismissed for non-joinder of necessary parties.

14. Accordingly, at this stage, I find no merit in this civil revision and the civil revision is accordingly dismissed.

Revision dismissed.

I.L.R. [2016] M.P., 3371
CRIMINAL REVISION
Before Mr. Justice J.P. Gupta
Cr.R. No. 3010/2015 (Jabalpur) decided on 30 June, 2016

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

Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401 & 319 **– Order issuing arrest warrant u/S 319 of Cr.P.C. assailed on the ground that the applicant has been implicated as an accused subsequently on the application filed by a private person and not by the victim or the**

prosecution, no opportunity of hearing has been afforded and the Lower Court erred by issuing arrest warrant instead of issuing summons – Held – (A) Implication of accused u/S 319 of Cr.P.C. – Since there is sufficient evidence on record to presume that the applicant accused has also committed the aforesaid offence who was not made accused in the case – He could be tried together (B) Scope of Section 319 of Cr.P.C. – Court is bound to consider only the material came before Court during the inquiry or trial as evidence as required u/S 319 of the Cr.P.C. – Power u/S 319 of Cr.P.C. can be exercised by the court suo motu or on application by someone including the accused already before it (C) Opportunity of hearing – Applicant has no right to be heard before issuing summons u/S 319 of Cr.P.C. (D) Issuance of non-bailable warrant – There is nothing on the record in which instead of summoning, non-bailable warrant is required to be issued – Hence, summons ought to have been issued against the applicant – Direction relating to issuance of non-bailable warrant is set aside. (Paras 3, 5, 6, 9, 10, 12 & 13)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397, 401 व 319 – दण्ड प्रक्रिया संहिता की धारा 319 के अंतर्गत गिरफ्तारी वारन्ट जारी करने के आदेश को इस आधार पर चुनौती दी गई कि एक निजी व्यक्ति के आवेदन पर एवं न की किसी पीड़ित या अभियोजन के आवेदन पर पश्चात्वर्ती रूप से आवेदक को आरोपी के तौर पर आलिप्त किया गया, सुनवाई का कोई अवसर प्रदान नहीं किया गया एवं विचारण न्यायालय ने समन जारी करने की बजाय गिरफ्तारी वारन्ट जारी कर त्रुटि की – अभिनिर्धारित – (अ) धारा 319 दं.प्र.सं. के अंतर्गत अभियुक्त को आलिप्त किया जाना – चूंकि अभिलेख पर यह उपधारित करने के लिए पर्याप्त साक्ष्य है कि अभियुक्त आवेदक ने भी उपर्युक्त अपराध कारित किया है जिसे इस मामले में अभियुक्त नहीं बनाया गया था – उसका विचारण भी साथ में किया जा सकता है (ब) धारा 319 दं.प्र.सं. की व्याप्ति – न्यायालय के समक्ष जाँच अथवा विचारण के दौरान धारा 319 के अंतर्गत अपेक्षित साक्ष्य के तौर पर आई सामग्री पर ही न्यायालय विचार करने हेतु बाध्य है – न्यायालय द्वारा दं.प्र.सं. की धारा 319 के अंतर्गत शक्ति का प्रयोग स्वमेव या किसी व्यक्ति द्वारा जिसमें उसके समक्ष पूर्व से उपस्थित अभियुक्त भी शामिल हैं के आवेदन पर किया जा सकता है (स) सुने जाने का अवसर – दं.प्र.सं. की धारा 319 के अंतर्गत समन जारी होने के पूर्व सुने जाने का कोई अधिकार आवेदक को नहीं है – (द) गैर–जमानती वारन्ट का जारी किया जाना – अभिलेख पर ऐसा कुछ नहीं है जिसमें समन जारी करने की बजाय गैर–जमानती वारन्ट जारी करना अपेक्षित हो – अतः आवेदक के विरूद्ध समन जारी किया जाना चाहिए था – गैर–जमानती वारन्ट जारी किये जाने से संबंधित निदेश अपास्त।

Cases referred:

(2014) 3 SCC 92, (2007) 4 SCC 773, (2014) 3 SCC 321.

Satyam Agarwal, for the applicant.
Akhilesh Singh, P.L. for the non-applicant/State.

ORDER

J.P. GUPTA, J. :- The applicant-accused has filed this criminal revision under section 397 read with section 401 of the Code of Criminal Procedure being aggrieved by the judgment dated 9.10.2015 passed by First Additional Sessions Judge, Astha, District Sehore, in Sessions Trial No.192/2010 whereby application moved by a private person under section 319 of Cr.P.C. was allowed and arrest warrant is issued against the applicant.

2. The brief facts of the case in short are that in the court of 1st Additional Sessions Judge, Astha, District Sehore, Sessions Trial No.192/2010 is pending against seven accused persons for offence under sections 147, 148, 149, 307, 323 and 325 of I.P.C. The story of the prosecution is that on 29.5.2010 at about 3.30. PM when victim Mahendra Singh was sitting in his own house, present applicant Mangilal along with other co-accused persons, against whom the aforesaid sessions trial is pending, came there and assaulted him by iron rod and lathi. It is further alleged that when brother of victim Gulab Singh came there to save brother Mahendra Singh, accused persons also assaulted him. The matter was reported to the police and the injured was taken to the hospital for medical checkup. The police station Siddhiqgunj registered the offence vide Crime No.77/2010 against the applicant and other co-accused persons; but after investigation charge-sheet was filed against co-accused persons except the applicant. Thereafter, on the basis of evidence came on record during the trial and looking to the material submitted by the prosecution along with the charge-sheet, the learned lower court below passed the impugned order on the application submitted by the co-accused under section 319 of the Cr.P.C. The court below directed that the applicant be arrayed as accused in the case and be summoned by non-bailable warrant. Against the impugned order, this revision has been filed on the ground that impugned order is contrary to law and unsustainable.

3. Learned counsel for the applicant submitted that during investigation the police did not find any evidence against the applicant. It was found that at the time of incident he was on his duty as Govt. servant and this fact had been enquired by the S.D.M. and reported to the police. On the basis of the report police exonerated him from the case and no charge-sheet was filed against him. The applicant has been implicated subsequently due to animosity and in

this regard application has been moved by the private person and not by the victim or the prosecution, which is not maintainable. Apart from it, no opportunity of hearing before disposal of this application has been given to the applicant-accused. Further, learned lower court has committed gross error of law in issuing arrest warrant instead of issuing summons. The impugned order is against the settled principles of law and passed arbitrarily, therefore, it deserves to be quashed.

4. Learned Panel lawyer appearing on behalf of the State has opposed the revision petition and supported the impugned order and prayed for its rejection.

5. Having considered the submissions of learned counsel for the parties and on perusal of the record it is found that during the trial injured witness PW1 Mahendra Singh and PW2 Gulab Singh have categorically stated that in the incident dated 29.5.2010 applicant accused also took active participation along with other co-accused persons and the same statements were given by them during the investigation and the name of the applicant is also mentioned in the FIR. In the aforesaid circumstances, in the case there is sufficient evidence or material on record to presume that the applicant accused has also committed the aforesaid offence who was not accused in the case and he could be tried together with the accused persons for the aforesaid offences.

6. So far as second contention that during investigation, inquiry was made by the S.D.M. and finding was given that at the time of incident the applicant was doing official work in the office is concerned, the same is neither on record nor submitted before the learned court and the same can be considered only at the time of defence as a piece of evidence of plea of alibi. On the basis of so called report of the S.D.M., the order passed by the court below under section 319 of Cr.P.C. cannot be assailed as the court is bound to consider only the material came before the court during the inquiry or trial as evidence, as required under section 319 of the Cr.P.C.

7. The object of the provision of section 319 of Cr.P.C. is that real culprit should not get away unpunished. It is based on the doctrine of *judex damnatur cum noces absolvitur* (Judge is condemned when guilty is acquitted). The learned lower court has considered the evidence and material against the accused in accordance with the directions and interpretation of the Constitution Bench of the Hon'ble Apex court in the case of *Hardeep Singh vs. State of Punjab*, (2014)3 SCC 92, in which it is held that power under section 319 of

the Cr.P.C. can be exercised at any time after commencement of the court inquiry into an offence, i.e. which commences before the Court with filing of the charge-sheet or the complaint. Further, it is also held that word "evidence" for the purpose of exercising power under section 319 Cr.P.C. to add the accused has to be broadly understood and not literally as evidence brought during a trial. It includes oral or documentary evidence adduced before the court during trial, and apart from such evidence, any material coming before the court after taking of cognizance of offence and during inquiry by the court before commencement of trial, may not be evidence *stricto sensu;* but can be utilized to corroborate evidence recorded in the Court after commencement of trial and for exercising power under section 319 Cr.P.C.

8. In view of the aforesaid legal position, learned lower court has rightly came to the conclusion that there is *prima facie* sufficient material against the applicant to array him as accused in the case.

9. So far as next contention of learned counsel for the applicant regarding not giving opportunity of hearing before passing the impugned order is concerned, the applicant has no legal right to be given an opportunity of hearing before passing such order. As no notice of hearing is given to the accused person when he is summoned on taking cognizance on a charge-sheet or complaint, he has a right to defend himself only after his appearance in the Court. Similarly, the applicant has no right to be heard before summons under section 319 Cr.P.C. Hence, the aforesaid contention has no legal impact in the case.

10. Learned counsel for the applicant has also contended that in this case on the application of the co-accused person impugned order under section 319 Cr.P.C. has been passed while such order cannot be passed on the application of the private person except the prosecution or the complainant or victim. Hence, the impugned order is bad in law. This contention is also not correct as the three Judge Bench of the Apex Court in the case of *Y.Saraba Reddy Vs. Puthur Rami Reddy and another*, (2007)4 SCC 773, has explained the scope and ambit of section 319 Cr.P.C. It is observed that power under section 319 Cr.P.C. can be exercised by the courts *suo motu* or on an application by some-one including the accused already before it. If it is specified that any person other than the accused has committed any offence and the Court should try together with the accused. Hence, the contention raised by the applicant accused that the impugned order cannot be passed on

the application of the accused is worthless.

11. Another contention of the learned counsel for the applicant is that the learned lower court has committed gross error of law in issuing arrest warrant instead of summons, therefore, the impugned order is incorrect and contrary to law. This contention has substance as the Hon'ble Apex court in the case of *Vikas Vs. State of Rajasthan*, (2014)3 SCC 321 has categorically observed that :-

> "Our Constitution, on the one hand, guarantees the right to life and liberty to its citizens under Article 21 and on the other hand imposes a duty and an obligation on the judges while discharging their judicial function to protect and promote the liberty of the citizens. The issuance of non-bailable warrant in the first instance without using the other tools of summons and bailable warrant to secure attendance of such a person would impair the personal liberty guaranteed to every citizen under the Constitution.
>
> There cannot be any straitjacket formula for issuance of warrants but as a general rule, unless an accused is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided. The conditions for the issuance non-bailable warrant are, firstly, if it is reasonable to believe that the person will not voluntarily appear in court, or secondly if the police authorities are unable to find the person to serve him with a summon and thirdly if it is considered that the person could harm someone if not placed into custody immediately. In the absence of the aforesaid reasons, the issue of non-bailable warrant a fortiori to the application under section 319 Cr.P.C. would extinguish the very purpose of existence of procedural laws which preserve and protect the right of an accused in a trial of a case. The court in all circumstances, in complaint cases at the first instance should first prefer issuing summons or bailable warrant failing which a non-bailable warrant should be issued."

12. In the present case, learned court below has not examined and considered the material before taking decision of issue of non-bailable warrant. The applicant is a Govt. servant and there is no other circumstances appear from the record in which instead of summoning, non-bailable warrant is required

to be issued, hence, in this case instead of non-bailable warrant summons ought to have been issued against the applicant. Accordingly, the impugned order is liable to be modified; but due to mere aforesaid error the whole impugned order cannot be said to be contrary to law.

13. In view of the aforesaid discussions, the finding that there is sufficient evidence and material to presume that the applicant has also committed the offence for which he could be tried together with the accused person for the aforesaid offences, therefore, the applicant be summoned for prosecuting in the offence, is hereby affirmed. So far as, the direction relating to issuance of non-bailable warrant is concerned, the same is set aside and is modified with a direction that instead of issuing non-bailable warrant, summons be issued to the applicant.

14. With the aforesaid direction, this revision petition stands disposed of.

Revision disposed of.

I.L.R. [2016] M.P., 3377
CRIMINAL REVISION
Before Mr. Justice Sheel Nagu
Cr.R. No. 180/2011 (Gwalior) decided on 4 July, 2016

RAM RATI ...Applicant
Vs.
STATE OF M.P. & anr. ...Non-applicants

A. ***Criminal Procedure Code, 1973 (2 of 1974), Section 397 r/w 401 – Criminal Revision – Revision against the order of rejection of the order of the cognizance – What the court will consider at the time of taking the cognizance*** **– Prior to exercising the power u/S 204 of the Cr.P.C. it is required to ensure that there is a sufficient ground to proceed to issue the summons to the police – The term "sufficient ground" is nothing but the satisfaction to the magistrate that essential ingredients of the offence alleged are made out from the reading of the allegation contained in the complaint u/S 200 of Cr.P.C. and the supporting statement u/S 202 of Cr.P.C. (Para 6.5)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 सहपठित धारा 401 – आपराधिक पुनरीक्षण – संज्ञान आदेश के अस्वीकृति आदेश के विरूद्ध पुनरीक्षण – संज्ञान लेते समय न्यायालय क्या विचार करेगा – दं.प्र.सं. की धारा 204 के अधीन

शक्तियों का प्रयोग करने से पहले यह सुनिश्चित कर लेने की आवश्यकता है कि पुलिस को समन जारी करने की कार्यवाही करने के लिए पर्याप्त आधार है – शब्द "पर्याप्त आधार' कुछ नहीं अपितु मजिस्ट्रेट की संतुष्टि है, कि दं.प्र.सं. की धारा 200 के अंतर्गत परिवाद में किए गए अभिकथन को पढ़ने के बाद तथा दं.प्र.सं. की धारा 202 के अंतर्गत समर्थक कथन से, अभिकथित अपराध के आवश्यक तत्व बनते हैं।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 154 – First information report* – This section obliges the police to register the offence if information furnished discloses commission of cognizable offence – The police has no authority to dwell into the veracity or probative value of the allegation. (Para 6.3)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – प्रथम सूचना प्रतिवेदन – यह धारा पुलिस को, अपराध को पंजीकृत करने के लिए बाध्य करती है यदि दी गई सूचना संज्ञेय अपराध कारित किया जाना प्रकट करती है – पुलिस को आरोप की सत्यता या प्रमाणक मूल्य पर ध्यान केन्द्रित करने का कोई प्राधिकार नहीं है।

Cases referred:

1999 Cr.L.J. 4113, 1976 Cr.L.J. 1533.

M.L. Yadav, for the applicant.
A.S. Rathore, P.L. for the non-applicant/State.
S.K. Tiwari, for the complainant.

ORDER

SHEEL NAGU, J. :- The revisional powers of this Court u/S 397 read with Sec. 401 Cr.P.C. are invoked to assail the revisional order dated 30.12.2010 passed by Second Additional Sessions Judge, Mungawali, District Ashoknagar (M.P.) in Case No. 93/2010 allowing the revision filed by the accused/respondent no.2 herein against the order dated 30.12.2010 by which cognizance was taken by the learned Magistrate for offence punishable u/S 354 of IPC against accused/respondent no.2 herein.

2. The present revision has been filed by the complainant prosecutrix Bharti.

3. Learned counsel for the rival parties are heard on the question of admission.

4. The facts disclosed herein are that on 21.04.2010, the prosecutrix at about 10 PM.in the night was searching for her husband when she arrived at

the well of the accused Ramcharan Patel situated on the periphery of the village Morgakalan, Police Station Koparia, District Ashoknagar, where the husband of the prosecutrix used to visit frequently to have liquor with some of his friends. The prosecutrix heard 8 to 10 people talking. Prosecutrix called out for her husband. On hearing the voice of prosecutrix Ramcharan Patel appeared. When the prosecutrix asked accused Ramcharan Patel for the whereabouts of her husband he caught hold her hand. On being objected to by the prosecutrix, the said accused offered money to the prosecutrix. On this the prosecutrix asked the accused to leave her and cried for help but to no avail. Thereafter, the prosecutrix alleges that accused abraced her and she was thrown to the ground whereafter she ran away from the spot. On reaching home, the prosecutrix informed the incident to her brother-in-law (Jeth) Shayam Lal that the accused Ramcharan Patel tried to outrage her modesty. One Rajesh is said to have witnessed the incident. Thereafter the incident was reported to the police but since no FIR was lodged a criminal complaint was filed before competent Court of criminal jurisdiction by the prosecutrix which was followed by recording of statement of prosecutrix in August, 2010 Shayam and Rajesh on 10.09.2010. Theareafter, by the order dated 21.10.2010 the trial Court found that prima facie offence punishable under Section 354 of IPC appears to be made out and directed the prosecutrix to pay PF so that summons could be issued to the accused.

5. Aggrieved, the accused approached the Revisional Court of ASJ, Mungawali, District Ashoknagar (M.P) by filing revision which has been allowed by the impugned order dated 30.12.2010 by recording finding that no offence u/S 354 IPC is made out for the following reasons:-

1. the contents of the written complaint dated 21.04.2010, 04.05.2010 and 19.05.2010 preferred by the prosecutrix to the police authorities are writ large with contradictions regarding the incident.

2. the statement of prosecutrix u/S 202 Cr.P.C., disclosed that when she was thrown to the ground by the accused she cried for help in response to which the accused offered her RS.20,000/- for remaining quite and yielding to his sexual advances. The first revisional court noticed that these allegations are not contained in the written complaint filed before the Magistrate.

3. Written complaint under Section 200 of Cr.P.C. of the prosecutrix *inter alia* reveals that immediately after the incident she went her home and disclosed the incident to her brother-in-law (Jeth) Shyamlal whereas Shaymlal in his statement recorded under Section 202 of Cr.P.C. disclosed that the prosecutrix informed him about the incident the next day in the morning.

4. The statement of the prosecutrix under Section 202 of Cr.P.C. Interaila (sic:*inter alia*) is to the extent that the incident was witnessed by Rajesh who had stated on seeing the incident that "Ghalat Kaam kar rahe ho?". Whereas witness Rajesh in his statement under Section 202 of Cr.P.C., does not say so.

5. On an inquiry conducted by the police on the instruction of the Magistrate, it was revealed that there was rivalry between the accused and the prosecutrix arising out of dispute in Panchayat elections.

6. The question that falls for consideration before this Court is as to whether improvements, contradictions and embellishments found in the contents of the written complaint u/S. 200 of Cr.P.C. and the statements of various witnesses recorded u/S. 202 Cr.P.C are sufficient to throw out the case of the prosecutrix at the threshold or not.

6.1. The judicial scrutiny which is required to be undertaken by the trial court at the stage of taking cognizance in complaint filed under Section 200 Cr.P.C. is based upon the allegations contained in the complaint and the supportive statements of the complainant and the witnesses recorded under Section 202 of Cr.P.C.

6.2. The trial Court has to arrive at satisfaction that prima facie essential ingredients of offence are made out for taking cognizance to direct the proposed accused to come forward to record his statement. The exercise is to be undertaken by the trial court at the stage of taking cognizance is somewhat akin to the exercised (sic:exercise) undertaken by the police under Section 154 Cr.P.C.

6.3. Section 154 Cr.P.C. obliges the police to register the offence if information furnished discloses commission of cognizable offence. The police

have no authority to dwell into the veracity or probative value of the allegations.

6.4. Though the material available with the police while exercising it's powers under Section 154 of Cr.P.C. is much limited than the material available with the Magistrate while exercising powers u/S. 204 of Cr.P.C. The reason is obvious as the police merely has the oral or written information regarding commission of cognizable offence whereas the Magistrate not only has the written complaint containing the allegations of commission of offence but also supportive statements of the witnesses who depose in support of the complaint.

6.5. The Magistrate thus while exercising it's power under Section 204 of Cr.P.C. is required to ensure that there is sufficient ground to proceed to issue summons to the police. The term "sufficient ground" is nothing but the satisfaction of the Magistrate that essential ingredients of the offence alleged are made out from the reading of the allegations contained in the complaint u/S.200 Cr.P.C. and the supporting statements under Section 202 Cr.P.C.

6.6. Accordingly the degree of satisfaction of the Magistrate in regard to commission of offence alleged is more than the degree of satisfaction required by the police while exercising its powers under Section 154 Cr.P.C. but less than the degree of satisfaction required by the trial court while framing of charge.

6.7. On the anvil of the abovesaid discussion in regard to scope of judicial scrutiny required to be undertaken by the trial court to arrive at it's satisfaction about taking cognizance of offence alleged in a complaint filed under Section 202 Cr.P.C., the factual matrix containing in the present case are required to be decided.

6.8. For convenience and ready reference , it would be apt to reproduce relevant section ;

> *Sec 354 IPC. Assault or criminal force to woman with intent to outrage her modesty.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.*

6.9. A plain reading of the above provision disclosed the following basic

ingredients :-

1. Assault or use of criminal force against a woman ;

2. With an intention to outrage or knowing it to be likely that offender will thereby outrage her modesty.

The first ingredient merely contemplates assault or use of criminal force. Assault has been defined under Section 351 IPC is as follows ;

351 of IPC *Assault.—Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault. Explanation.—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.*

Criminal force is defined u/S. 350 IPC which is reproduced below ;

350 IPC Criminal force.—Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other

6.10. A comparative analysis of Section 350 and Section 351 discloses that criminal force is a specie whereas assault is genus. A criminal force is part of assault. An assault can take place without exercise of criminal force. However criminal force can exist independent of an assault.

7. In the instant case written compliant u/S. 200 Cr.P.C. dated 26.05.2010 filed by the prosecutrix inter-alia discloses that when the prosecutrix arrived at the scene of crime at about 10 PM in the night on

20.04.2010 and asked about the whereabouts of her husband, the accused Ramcharan Patel caught hold of her and tried to misbehave with her and asked her not to cry for help by offering money to her. The prosecutrix has further stated in the complaint that when she resisted and asked the accused to leave her, the accused embraced her and threw her to the ground. Thereafter, the prosecutrix alleges that she struggled and somehow got free and away from the spot.

7.1. Without dwelling into the statements of other two witnesses Shyamlal and Rajesh under Section 202 Cr.P.C., if the statement of the prosecutrix is seen, the basic ingredients of assault and criminal force as defined u/Ss 351 and 350 of IPC respectively are made out. The accused/ respondent No.2, by holding the hand and throwing down the prosecutrix on the ground with lewd intention without the consent of the prosecutrix, exercised criminal force. The allegations prima facie indicate that the intention of the accused/respondent No.2 was to outrage and violate the modesty of the prousecutrix (sic:prosecutrix). Thus, from the bare reading of the allegations made in the complaint supported by the statements of the prosecutrix u/S. 200 Cr.P.C., the basic ingredients of offence punishable under Section 354 IPC are made out.

7.2 As regards contradictions, embellishments, and improvements found by the first revisional court while indulging in a comparative assessment of the written complaint under Section 200 Cr.P.C. and the statements of witnesses under Section 202 Cr.P.C., it is needless to emphasize that these elements ought not to be looked into at the stage of taking cognizance which is too early a stage to indulge in the process of evaluation of material/allegations to find out as to whether conviction is possible or not. So long as the basic ingredients of the offence alleged are made out by the written complaint and the statement of the complainant, the contradictions, embellishments and improvements even if they exist in the entire prosecution story ought to be left alone and postponed for being considered at the stage of framing of charge which arises only after the statements of the accused and his witnesses are recorded. The relevant extracts of some decisions of the different courts on the interpretation of term "sufficient ground" found under Section 204 (1) Cr.P.C are extracted below for ready reference and convenience:-

In *R.T. Arashu v. State of U.P.,* reported in 1999 Cr.Lj 4113

The meaning of the expression "sufficient ground" used

in section 204 is that a prima facie case is made out against the accused. The test under this section is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. If there is prima facie case and the accused may have a defence, in spite of this, the process has to be issued.1The Magistrate has to be simply satisfied that there are sufficient grounds for proceedings against the accused, and not whether there are sufficient grounds for conviction.[2]

In *Smt. Nagamma v. Veeranna Shivalingappa Konjalgi.*, reported in 1976 Cr.Lj 1533

"At the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused. It is not the province of the Magistrate to enter into a detailed discussion of the merits or demerits of the case nor the High Court can go into this matter in its revisional jurisdiction which is a very limited one."

1958 Mad LJ (Cri) 1000

Section 204 only contemplates the issue of process where the Magistrate is satisfied that there is sufficient ground for proceeding. No enquiry by the Magistrate is contemplated at this stage. An extensive discretionary power is conferred on the Magistrate in his capacity as Magistrate and this discretionary power is to be exercised judicially according to rules of reason and justice and the Magistrate must act within the four corners of the Code. The complainant should allege facts, which, if relied upon would constitute the offence charged. All that the Magistrate has to do is to consider the statement on oath and where the matter had been referred to the police for enquiry, the police report as well, and from his own conclusions as to whether there is a prima facie case.3 The provisions which enjoin the courts to satisfy themselves about the prima facie nature of a criminal charge, before

issuing a process, must be intended, in the absence of a clear suggestion to the contrary, to be mandatory.[4]

8. In view of the observations, factual and legal (supra) this court is of the considered view that the first revisional court has wrongly exercised it's jurisdiction by interfering with the order of taking cognizance passed by the trial court on 21.10.2010.

9. Accordingly, the impugned order of the first revisional Court dated 30.12.2010 passed by Second Additional Sessions Judge, Mungawali, District Ashoknagar (M.P.) in Case No. 93/2010 (Criminal) is hereby set aside thereby restoring the order of taking cognizance of the trial court dated 21.10.2010.

10. Needless to emphasize that the Trial Court shall proceed from the stage where complaint was quashed by the first revisional court.

11. No cost.

Order accordingly.

I.L.R. [2016] M.P., 3385
CRIMINAL REVISION
Before Mr. Justice S.K. Palo
Cr.R. No. 2553/2015 (Jabalpur) decided on 25 July, 2016

DHARMENDRA SINGH ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

A. ***Criminal Procedure Code, 1973 (2 of 1974), Section 319 – Powers u/S 319 are discretionary and extraordinary and to be exercised sparingly and only where strong and cogent evidence is available against the person – Powers u/S 319 should not be used on mere opinion that some other person may also be guilty of offence and it should also not be used in casual or cavalier manner.*** **Para 14)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – धारा 319 के अंतर्गत शक्तियाँ वैवेकिक एवं असाधारण होतीं हैं तथा उनका प्रयोग मितव्यततापूर्वक और केवल वहाँ किया जाना चाहिए जहाँ व्यक्ति के विरूद्ध प्रबल एवं तर्कपूर्ण साक्ष्य उपलब्ध हो – धारा 319 के अंतर्गत शक्तियों का प्रयोग मात्र इस मत के आधार पर नहीं किया जाना चाहिए कि कोई अन्य व्यक्ति भी अपराध का दोषी हो सकता है तथा शक्तियों का प्रयोग आकस्मिक अथवा लापरवाहीपूर्वक तरीके से भी नहीं किया जाना चाहिए।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 319 – **Requirement of Section 319 – It contemplates a situation where the evidence adduced by the prosecution not only implicates the other person, but is sufficient for the purpose of convicting that other person. (Para 15)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – धारा 319 की अपेक्षा – यह एक ऐसी स्थिति अनुध्यात करती है, जहाँ अभियोजन द्वारा प्रस्तुत साक्ष्य न केवल अन्य व्यक्ति को अपराध में आलिप्त करती हो, अपितु उक्त साक्ष्य उस अन्य व्यक्ति की दोषसिद्धि के प्रयोजन हेतु भी पर्याप्त हो।

Cases referred:

(2009) 3 SCC 329, AIR 2014 SC 1400, AIR 2009 SC 2792, AIR 2009 SC 1248.

Surendra Singh with *Ashwani Kumar Dubey,* for the applicants.
Vaibhav Kumar Tiwari, P.L. for the non-applicant/State.

(Supplied: Paragraph numbers)

ORDER

S.K. Palo, J. :- On an application under Section 319 Cr.P.C. filed by the prosecution, the learned Second ASJ, Khurai, District Sagar by his order dated 28/09/2015 directed the petitioners to appears before the Court on 28/10/2015 in connection with S.T. No.293/2014 for offences punishable under Section 302 read with Section 34 IPC.

2. Filtering the unnecessary details, the facts to be requisite stated for disposal of this revision under Section 397 read with Section 401 Cr.P.C. is that, deceased Bhanu S/o Ramji (PW/6) had gone to attend the marriage of Ramraj and returned to village at 6:30 p.m. Bhanu Singh was found sitting with the petitioners, Bhupendra, Ramraj and accused Jitendra. Surendra, brother of deceased Bhanu informed by these people that they are going to attend the marriage of sister of Sanjay Latoriya. Bhanu did not return home in the night. On the next morning at 6:30 Mahendra Singh saw the dead body of Bhanu Singh and informed the Chawkidar/Pancham Kotwar. They lodged a report at Police Station. Panchnama was prepared. The stones used for inflictioning of injuries to Bhanu were seized. When Ramraj was asked about the incident, he informed that they had gone to attend the marriage at Khurai and returned around 12 in the night. The dead body of Bhanu was sent for

postmortem. On the left side of his chest, Khusbu was inscripted, "Khusbu" is the sister of accused/Jitnedra. Bhanu had intimacy with Khusbu, the sister of accused Jitendra. Charge-sheet was filed against accused Jitendra.

3. During the course of recording of evidence, statement of Mahendra Singh (PW/3) was recorded. On the basis of which the application under Section 319 Cr.P.C. for impleading the petitioners as accused persons was moved by the prosecution. The learned trial Court on the basis of this statement allowing the application under Section 319 Cr.P.C., directed to summon the petitioners for impleading them as accused persons. The petitioners assailed the impugned order stating that the petitioners are implicated without sufficient reasons. There is no prima facie case made out against the petitioners. The petitioners, therefore, seek relief to set aisde the impugned order.

4. In view of the above contentions, the evidence recorded in the present case has to be analyzed. Mahendra Singh (PW/3) in his testimony has stated that when he was going to attend the marriage at Khurai, he saw accused Jitendra along with deceased Bhanu at the village Tiraha. He discloses in his statement that the accused persons including the present petitioners have killed Bhanu by inflicting injuries by means of stones. Ramji (PW/6) also narrates that on the left side of the chest Bhanu inscripted the name of "Khusbu", therefore, Jitendra, the brother of Khusbu was annoyed with him. Hence, Jitendra with the help of Bhupendra Singh, Dharamendra Singh and Ramraj have killed Bhanu. These witnesses have not claimed that they have seen the deceased being murdered by the accused persons and the present petitioners. These witnesses have asserted or made the statement by conjuncture.

5. Statement of Khusbu under Section 161 Cr.P.C. show that she was having friendly relationship with Bhanu. Bhanu had given a cell phone to her. She often used to speak to Bhanu. On 20/06/2014, when she was with her sister, Rama in the first floor of her house her parents and younger brother Abhishek sleeping in the upstairs and her elder brother Jitendar was sleeping in the ground floor. She did speak to Bhanu on his Mobile. Bhanu informed her that he is at Khurai attending a marriage. After 15-20 minutes, Bhanu rang up and informed her that he is standing near the tap behind her house and asked her to join him. She went meet him. At that time, Jitendra was sleeping in his room. After their meeting Bhanu left and she returned to her room. Jitendra was again found sleeping. After few minutes, she again called Bhanu on his cell phone but it did not respond. Then she went to sleep. She

heard the caries (sic:cries) of female folk of the village in the morning. Then she came to know that Bhanu has been killed near the dam.

6. In the light of the same, if the evidence is analyzed deceased Bhanu had gone to attend the marriage in Khurai along with the accused persons and returned. After 11 p.m., he called Khusbu to meet him. Hence, the last seen theory with the accused Jitendra and the present petitioners is not attracted.

7. Learned senior counsel, Shri Surendra Singh referred the decision of *Brindaban Das & others Vs. State of West Bengal* reported as (2009) 3 SCC 329 and contended that the evidence does not disclose that the petitioners have committed any crime. The last seen theory is not applicable, therefore, the learned trial Court had committed an error in allowing the application under Section 319 Cr.P.C. filed by the prosecution and summoning the petitioners in absence of any evidence against them.

8. He also referred decision of the Apex Court rendered in *Hardeep Singh Vs. State of Punjab & others* reported as AIR 2014 SC 1400 and contended that the evidence on the basis of which the petitioners have been arraigned is not evidence sufficient to show that prima facie case is made out.

9. Learned Panel Lawyer for the State opposing the contentions submits that Section 319 Cr.P.C. springs out of the doctrine judex damnatur cum nocens absolvitur (judge is condemned when guilty is acquitted) and this doctrine must be used while explaining the ambit and spirit of Section 319 Cr.P.C.

10. On perusal of the statement of witnesses recorded under Section 161 Cr.P.C. and the testimony of witnesses, it show that neither Mahendra Singh (PW/3) nor Ramji (PW/6) are the eye-witnesses to the incident. They only assert that the deceased was seen in the company of accused Jitendra and the petitioners at 9 p.m.but before the deceased had gone to Khurai for attending the marriage. The statement recorded under Section 161 Cr.P.C. of Khusbu gives an idea that after 11 p.m., the deceased returned from the marriage and went to meet her. This show that after the deceased was seen with the petitioners, he had gone to meet Khusbu. Therefore, the theory of last seen does not find place in the present case.

11. Hon'ble the Apex Court has observed that before the Court exercised its discretionary jurisdiction in terms of Section 319 Cr.P.C., it must arrive at a satisfaction that there exists a possibility that the accused so summoned in all likelihood would be convicted.

12. In *Sarabjit Singh & Anr. Vs. State of Punjab & Anr.* in AIR 2009 SC 2792, the Hon'ble Apex Court has observed that:

> *"....For the aforementioned purpose, the Courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned..... Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the Court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the Court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction. Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof viz. (i) an extra ordinary case, and (ii) a case for sparingly (sic sparing) exercise of jurisdiction, would not be satisfied."*

13. A similar view was adopted in *Brindaban Das & Ors. Vs. State of West Bengal*, AIR 2009 SC 1248, observing that the Court is required to consider *whether such evidence would be sufficient to convict the person being summoned.* Since issuance of summons under Section 319, Cr.P.C., entails a de novo trial and a large number of witnesses may have been examined and their re-examination could prejudice the prosecution and delay the trial, the trial Court has to exercise such discretion with great care and perspicacity.

14. Power under Section 319, Cr.P.C. is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised and not in a causal and cavalier manner.

15. On the quality of the evidence adduced by the prosecution as far as the petitioners are concerned, it is difficult to hold that any amount of certainty that the same would in any probability secure a conviction against the petitioners. The evidence which seeks to connect the petitioners with the commission of offence is hear say in nature. Section 319 Cr.P.C. contemplates a situation where the evidence is adduced by the prosecution not only implicate the person other then (sic:than) the name adduced but is sufficient for the purpose of convicting the person to whom the summon is issued. It is logical that there must be evidence against a person in order to summon him to trial, although he is not named in the charge-sheet or he is discharged from the case, which would warrant his prosecution, therefore, that a good chance of his conviction.

16. Since in the present case, except for the statement of Mahendra Singh (PW/3) and Ramji (PW/6) strongly believe the murder of Bhanu was pre-planned and there were many conspirators involved, there is no direct evidence of the complicity of the petitioners in the incidence. Hence, it would not be appropriate to subject the petitioners to trial by invoking the provisions of Section 319 Cr.P.C., therefore, this Court find it fit to allow the petition and set aside the order dated 28/09/2005 passed by the learned Second ASJ, Khurai, District Sagar.

17. Revision allowed. Order dated 28.09.2005 is set aside.

Revision allowed.

I.L.R. [2016] M.P., 3390
CRIMINAL REVISION

Before Mr. Justice S.K. Gangele & Mr. Justice H.P. Singh

Cr.R. No. 1400/2016 (Jabalpur) decided on 31 August, 2016

BAHADUR SINGH GUJRAL ...Applicant

Vs.

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

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 397 r/w 401 and Prevention of Corruption Act (49 of 1988), Section 7 – Revision against framing of charge – Complaint against applicant* – Demanded Rs. 300/- from each employee against release of their arrears of 6th Pay Commission – *Prima facie* case made out against the applicant – Trial Court framed charge accordingly – Held – Trial Court is not required to**

weigh the evidence produced alongwith the charge sheet & there is strong suspicion against the applicant from the material produced on record – Order framing charge upheld – Revision partly allowed. (Paras 8 & 9)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 सहपठित धारा 401 एवं भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 7 – आरोप विरचित किए जाने के विरूद्ध पुनरीक्षण – आवेदक के विरूद्ध परिवाद – प्रत्येक कर्मचारी से उनकी 6वाँ वेतन आयोग की बकाया राशि के निर्मोचन के बदले 300/– की माँग की – आवेदक के विरूद्ध *प्रथम दृष्ट्या* प्रकरण बनता है – तद्नुसार विचारण न्यायालय द्वारा आरोप विरचित किया गया – अभिनिर्धारित – विचारण न्यायालय द्वारा अभियोग पत्र के साथ प्रस्तुत किए गए साक्ष्य का मूल्यांकन करना अपेक्षित नहीं है एवं अभिलेख पर प्रस्तुत की गई सामग्री से आवेदक के विरूद्ध प्रबल संदेह है – आरोप विरचित करने का आदेश अभिपुष्ट – पुनरीक्षण अंशतः मंजूर।

***B. Prevention of Corruption Act (49 of 1988), Sections 7 & 13(1)(d)(I)(III) and Criminal Procedure Code, 1973 (2 of 1974), Sections 187 & 384 – Sanction – Government Servant – Sanction order – Narration* – Sanction granted to file charge sheet on the ground that competent authority is appointing authority – Held – As there is no finding recorded by the Authority concerned that it has perused the record and has applied its mind before granting sanction – Order of sanction to prosecute the applicant is quashed – Liberty given to consider the case for grant of sanction in accordance with law – Revision accordingly disposed of. (Paras 10 to 15)**

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7 व 13 (1)(डी)(I)(III) एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 187 व 384 – मंजूरी – शासकीय सेवक – मंजूरी आदेश – वृत्तांत – आरोप पत्र दाखिल करने की मंजूरी इस आधार पर दी गई कि सक्षम प्राधिकारी ही नियुक्ति प्राधिकारी है – अभिनिर्धारित – चूँकि संबंधित प्राधिकारी द्वारा कोई निष्कर्ष अभिलिखित नहीं किया गया है कि उसने अभिलेख का परिशीलन किया है एवं मंजूरी देने से पूर्व अपने मस्तिष्क का प्रयोग किया है – आवेदक को अभियोजित करने की मंजूरी का आदेश अभिखंडित – विधि के अनुसार मंजूरी प्रदान करने हेतु मामले पर विचार करने के लिए स्वतंत्रता दी गई – तद्नुसार पुनरीक्षण निराकृत।

Cases referred:

2012 (9) SCC 460, 2013 (5) SCC 762, AIR 1979 SC 366, AIR 1990 SC 1869, 2005 (1) SCC 568 = AIR 2005 SC 359.

Amrit Ruprah, for the applicant.

Pradeep Singh, G.A. for the non-applicant.

ORDER

The Order of the Court was delivered by : **H.P. Singh, J. :-** This Revision has been filed by the applicant under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code' for short), arising out of the order dated 11.05.2016 passed in Special Case No.2/2016 by Special Judge, (Prevention of Corruption Act), Chhindwara (MP), whereby charge punishable under Section 7 of the Prevention of Corruption Act, 1988, has been framed against the applicant.

2. The prosecution story in nutshell is that at the relevant time, the applicant was posted as Lower Division Clerk, in the Area Leproscopy office at Chhindwara and he was given additional charge of Accountant in Community Health Centre (hereinafter referred to as CHC for short), Bichhua. On 30.8.2012, a complaint was made by employees of CHC against the applicant for demanding illegal gratification of Rs.300/- from each employee against release of their arrears of 6th Pay Commission of 3rd instalments to Sub Divisional Officer (Revenue) Saonsar and on submitting that complaint, FIR was lodged under Crime No.243/12 on 5.12.2012 by Police Station Bichhuwa, District Chhindwara. Before filing Challan, permission for prosecution against the applicant was sought from the competent authority, which was granted by CMHO Chhindwara on 5.12.2015 under Section 187 & 384 of Code read with Section 13(1)(d) (I) (III) of Prevention of Corruption Act. Subsequently, again in reference to the letter of Investigating Officer, CMHO Chhindwara, wrote a letter dated 22.1.2016 granting permission for prosecution against the applicant under Section 187 & 384 of Code and Section 7 of Prevention of Corruption Act. After completing the investigation and other formalities, Challan has been filed.

3. Learned trial Court vide its order dated 11.5.2016 found that prima facie case is made out against the applicant under Section 7 of the Prevention of Corruption Act, 1988, and framed charge accordingly, who abjured the guilt.

4. Learned counsel for the applicant submits that learned trial Court has failed to appreciate the factual aspects of the case and has wrongly framed

charge against the applicant. He further submits that omnibus and general allegations have been made with regard to demand of illegal gratification on the ground of malice. Despite that, the applicant had already released the amount of arrears of 6th Pay Commission to the employees concerned for the relevant period. Learned counsel further submits that the witnesses examined in the departmental enquiry have not supported the case of prosecution, therefore, allegation against the applicant itself does not constitute the ingredients of Section 7 of Prevention of Corruption Act. Upon these submissions, learned counsel for the applicant prayed for quashing the charge framed against the applicant.

5. On the other hand, learned Govt. Advocate appearing on behalf of the non-applicant/State has submitted that learned trial Court after appreciation of evidence has rightly framed the charge against the applicant. He prays for dismissal of the revision.

6. We have considered the rival submissions of learned counsel for the parties and perused the records.

7. Section 7 of the Prevention of Corruption Act, 1988, provides specifically about Public servant taking gratification other than legal remuneration in respect of an official act. It prescribes that whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than [three years] but which may extend to [seven years] and shall also be liable to fine.

8. Complaint against applicant is that during working as Govt. servant, he had demanded Rs.300/- from each employee against release of their arrears of 6th Pay Commission. Meaning thereby, he had demanded and accordingly agreed to accept gratification other than remunerations. Evidence have been

collected during the course of investigation, support the averments of complainant. It is well established principle of law that at this stage trial Court is not required to weigh the evidence produced alongwith the charge sheet and if a strong suspicion arises from the material produced before the trial Court, charge can be framed against the accused.

9. In *Amit Kumar Vs. Ramesh Chandra and another* [2012 (9) SCC 460], the Supreme Court has held that presumption of accused committing an offence is not a presumption of law Such presumption may be weaker than a prima facie case. In *Vinay Tyagi Vs. Ishad Ali @ Deepak and others* [2013 (5) SCC 762], the Supreme Court has held that the prosecution case at the stage of framing of charge has to be examined on plea of demurrer i.e. assuming it to be true and presumption made at this stage is of weak and mild nature. In *Union of India Vs. Prafulla Kumar Samal* (AIR 1979 SC 366), the Supreme Court has held that at the time of framing of charge (s) the judge would not make a roaming enquiry into the pros and cons of the matter and weigh the evidence as if he would conduct the trial. The Court has to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The similar view is taken by the Supreme Court in *Niranjan Singh K.S. Punjabi Vs. Jitendra Bhimraj Bijjaya* (AIR 1990 SC 1869). In *State of Orissa Vs. Debendra Nath Padhi* [2005 (1) SCC 568 = AIR 2005 SC 359], a three Judges Bench of the Supreme Court has laid down the law that at the stage of framing of charge (s) the trial Court is only required to consider the charge-sheet and the material annexed therewith. At that stage, the defence of the accused cannot be considered.

10. The next point raised by the learned counsel for the applicant finds substance that the sanction was not accorded in accordance with law. The order of sanction to prosecute the applicant dated 5.12.2015 has been filed as Annexure P/10 alongwith the petition. It is mentioned in the order that matter was referred to the Additional Director for grant of sanction, however, no opinion had been received up to that date. "Hence, being the appointing authority, I grant sanction to file charge-sheet in the Court." It is not mentioned in the order that the authority had perused the record of the case and considered the material available on record to accord sanction. Only it is mentioned that being the appointing authority sanction is granted to produce charge-sheet before the Court.

11. The Apex Court in number of decisions has held that sanction to

prosecute a government employee is not a mere formality, it requires application of mind, which means that the authority who had accorded sanction had to consider the record and thereafter, apply its mind that there is ample material available against the employee to accord sanction or not.

12. The Apex Court in the matter of *Superintendent of Police (C.B.I.) vs. Deepak Dhowdhary and others* reported in AIR 1996 Supreme Court 186 has held as under :

> *"We find force in the contention. The grant of sanction is only an administrative function, though it is true that the accused may be saddled with the liability to be prosecuted in a Court of law. What is material at that time is that the necessary facts collected during investigation constituting the offence have to be placed before the sanctioning authority and it has to consider the material. Prima Facie, the authority is required to reach the satisfaction that the relevant facts would constitute the offence and then either grant of refused to grant sanction. The grant of sanction, therefore, being administrative act the need to provide an opportunity of hearing the accused before according sanction does not arise. The High Court, therefore, was clearly in error in holding that the order of sanction is vitiated by the violation of the principles of natural justice."*

13. In the present case, there is no finding recorded by the authority that it has perused the record and applied its mind before granting sanction. Hence, the order for grant of sanction to prosecute the applicant is contrary to law.

14. Consequently, the petition is allowed in part. The order of framing of charge is upheld, however, the order of grant of sanction to prosecute the applicant is hereby quashed. It is further observed that the competent authority is at liberty to consider the case of the applicant for grant of sanction in accordance with law and thereafter, the trial Court shall proceed in the matter in accordance with law.

15. Accordingly, the revision is finally disposed of.

Revision partly allowed.

I.L.R. [2016] M.P., 3396
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Rajendra Menon &
Mr. Justice Sushil Kumar Palo
M.Cr.C. No. 19227/2015 (Jabalpur) decided on 24 February, 2016

RAJEEV LOCHAN SHARMA & ors. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Prevention of Corruption Act (49 of 1988), Section 19 – Sanction for prosecution **– Proof of consideration of relevant material and application of mind by the Authority– Held – Sanction order itself shows that while passing the order Competent Authority has examined relevant facts, documents and evidence – Thus, there was due application of mind by the Sanctioning Authority – No interference is warranted – Application dismissed. (Paras 15 & 18)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 19 – अभियोजन हेतु मंजूरी – प्राधिकारी द्वारा सुसंगत सामग्री पर विचार किए जाने एवं मस्तिष्क के प्रयोग किये जाने का साक्ष्य – अभिनिर्धारित – मंजूरी आदेश स्वतः ही यह दर्शाता है कि आदेश पारित करते समय सक्षम प्राधिकारी ने सुसंगत तथ्यों, दस्तावेजों एवं साक्ष्य का परीक्षण किया है – इसलिए, मंजूरी प्राधिकारी द्वारा मस्तिष्क का सम्यक् रूप से प्रयोग किया गया था – हस्तक्षेप की आवश्यकता नहीं है – आवेदन खारिज।

Cases referred:

(2014) 11 SCC 431, (1995) 6 SCC 225, (2010) 14 SCC 527, (1997) 7 SCC 622, (2013) 8 SCC 119, (2005) 4 SCC 81.

Anil Khare with *Harjas Chhabra*, for the applicants.
Pankaj Dubey, for the (SPE) Lokayukta.

ORDER

The Order of the Court was delivered by :
S.K. Palo, J. :- This petition under Section 482 Cr.P.C. has been filed by the petitioners requesting to invoke the inherent jurisdiction of this Court under Section 482 Cr.P.C to set aside and quash the sanction for prosecution order

dated 27.12.2014 issued by the Managing Director, M.P. State Mining Corporation and the order dated 08.10.2015 passed by the Special Judge (Prevention of Corruption), Bhopal in Special Case No. 5/2015, whereby the learned trial Court has declined to allow the application filed by the petitioners in which they requested the Court to disallow the sanction for prosecution and to discharge the petitioners.

2. The petitioners (Ram Lochan Sharma, Anil Prakash Soni and Ramji Prasad Chaudhary) are being prosecuted for offences under Section 7 read with Section 13 (1) (D) and 13 (2) of the Prevention of Corruption Act, 1947 for allegedly demanding and accepting illegal gratification of Rs. 5,000/- on 16.4.2013 and were trapped by the Special Police Establishment, Lokayukta (SPE). Charge sheet has been filed before the learned trial Court. An application was moved in which it was contended by the petitioners that the Managing Director, M.P. State Mining Corporation Limited, Bhopal issued the sanction order on behalf of the Board of Directors of the Corporation. But, the sanction letter dated 27.12.2014 does not reflect so. It is also contended that the sanction order was granted by the Board of Directors as per the resolution No. 239 (B) but on the basis of which documents or evidence, such sanction has been granted is not made clear. Hence, sanction order dated 27.12.2014 is not a valid "sanction."

3. Learned trial Court, by the impugned order, has disallowed the said contentions and held that at this stage the merits of the sanction order cannot be discussed. The sanction order was issued by the competent Authority, Managing Director for prosecuting the accused persons, after applying his mind, therefore, it is a valid sanction order.

4. Shri Anil Khare, learned Senior counsel submits the following points:-
(i) The sanction order dated 27.12.2014 is without application of mind by the Managing Director.

(ii) The competent Authority has not referred whether the relevant materials were placed before him or not.

5. Learned Senior Counsel has placed reliance on *"P.L. Tatwal Vs. State of M.P.* (2014) 11 Supreme Court Cases 431" in which it is held that the "grant of sanction is a serious exercise of power by competent authority which has to take a conscious decision on the basis of relevant materials-Elaborate discussion in sanction order however is not necessary-But either

decision making on relevant materials should be reflected in the order or it should be capable of proof before the Court-On facts, expressing doubt on the validity of sanction order, tiral (sic:trial) court directed to conduct enquiry as to whether relevant materials were before the competent authority and whether authority referred to that material prior to giving sanction for proseucition (sic:prosecution) of appellant- Prevention of Corruption Act, 1988-Ss. 19,13 (1)(d) and 13(2)-Criminal Procedure Code, 1973, S.197."

6. Shri Pankaj Dubey, learned counsel for the respondent vehemently opposed the above contentions and justified the sanction order dated 27.12.2014 and the impugned order of the trial Court, contending that "sanction" implies application of mind. It is an administrative action. The accused persons have been caught red handed accepting the bribe. Upon completion of investigation and after the valid sanction, charge sheet has been filed, therefore, the interference in the impugned order is not called for.

7. The singular question that emanates for consideration in this petition is whether the sanction order dated 27.12.2014 is a valid one.

8. In *Supt. of Police (CBI) Vs. Deepak Chowdhary,* (1995) 6 SCC 225, it has been held that "the grant of "sanction" is only an administrative function, though it is true that the accused may be saddled with the liability to be prosecuted in a court of law. What is material at that time is that the necessary facts collected during investigation constituting the offence have to be placed before the sanctioning authority and it has to consider the material. Prima facie, the authority is required to reach the satisfaction that the relevant facts would constitute the offence and then either grant or refuse to grant sanction."

9. Grant of sanction is a sacrosanct act and is intended to provide safeguard to a public servant against frivolous and vexatious litigations. Grant of sanction is only an administrative function and the sanctioning authority is required to prima facie reach the satisfaction that relevant facts would constitute the offence Satisfaction of the sanctioning authority is essential to validate an order granting sanction.

10. For a sanction order, no specific type, design, form or particular words have been prescribed, therefore, in accordance with the common sense and requirements of justice, all the order of sanction must show that the relevant materials were placed before the sanctioning Authority and the said Authority

considered those materials and the order sanctioning the prosecutrix (sic:prosecution) resulted there from.

11. At paragraph 5 of the order dated 27.12.2014, the Managing Director while allowing the sanction for prosecution made it clear that

> "5. और चूंकि मैं पद प्रबंध संचालक, दि मध्यप्रदेश स्टेट माइनिंग कार्पोरेशन लि0, उपर्युक्त श्री राजीव लोचन शर्मा पुत्र स्व0 श्री वीर नारायण शर्मा, प्रभारी अधिकारी (वाहन)/उप–महाप्रबंधक (भौमिकी) को सेवा से पृथक करने में सक्षम हूं और चूंकि उक्त आरोपी के संबंध में प्रस्तुत तथ्यों एवं अभिलेखों एवं साक्ष्य का सूक्ष्म परीक्षण करने के पश्चात् मैं (प्रबंध संचालक, दि मध्यप्रदेश स्टेट माइनिंग कार्पोरेशन लि0,) संतृष्ट हूं कि उक्त श्री राजीव लोचन शर्मा, प्रभारी अधिकारी (वाहन)/उप–महाप्रबंधक (भौमिकी) को न्यायालय में उपर्युक्त अपराधा के लिये अभियोजन किया जावे।"

This indicates that the sanctioning Authority after having gone through the facts, documents and the evidence on record has granted "sanction" after applying his mind.

12. Learned Senior counsel for the petitioners has also placed reliance on *State of Himachal Pradesh Vs. Nishant Sareen* (2010) 14 SCC 527 in which - the respondent said to have been caught red handed accepting bribe from the complainant-Upon completion of investigation, Vigilance Department sought sanction under Section 19 from Government to prosecute respondent-Principal Secretary found no justification in granting sanction to prosecute respondent- Sanction was refused-Vigilance Department took up matter again with Principal Secretary for grant of sanction-Competent Authority reconsidered matter and granted sanction to prosecute respondent-No fresh material was available for further consideration-Held, sanction to prosecute public servant on review may be granted only where fresh materials have been collected by investigating agency subsequent to earlier order and matter is reconsidered by sanctioning authority in light of fresh materials-Power of sanctioning authority, being not of continuing character, could have been exercised only once on same materials-."

13. In the present case, we found that the sanction order dated 27.12.2014 gives a detailed description of the crime and the Managing Director, who is competent Authority to remove the petitioners from their services, has issued the "sanction order" after applying his mind. We are to see that it is incumbent

on the prosecution to prove that valid sanction has been granted by the sanctioning Authority after being satisfied that a case for sanction has been made out. The sanction order expressly shows that the sanctioning Authority has perused the material placed before it and after consideration of the circumstances has granted sanction for prosecution. The prosecution may prove by adducing the evidence that the material was placed before the sanctioning Authority and its satisfaction was arrived at upon perusal on the material placed before it. We hasten to add that if the sanctioning Authority has perused all the materials placed before it and some of them have not been proved that would not vitiate the order of the sanction.

14. Counsel for the petitioners referred the case of *Mansukhlal Vithaldas Chauhan Vs. State of Gujarat* (1997) 7 SCC 622 in which it is ruled that Criminal Procedure Code, 1973, S.197-Sanction for prosecution- Requisites of a valid sanction -Independent application of mind to the facts of the case as also material and evidence collected during investigation by the authority competent to grant sanction- essential -Sanction issued by an authority on the directions of the High Court, held, was invalid because there was no independent application of mind by that authority- High Court direction had taken away discretion of the authority not to grant sanction and it was left with no choice but to mechanically accord sanction in obedience of the mandamus issued by the High Court-Prevention of Corruption Act 1947, S.6-Prevention of Corruption Act, 1988, S.19 (1).

15. In the present case, resolution of the Board of Directors was passed, which is a procedural matter. But adverting to para 5 of the sanction order, does give a clear idea that the said order was passed by the Managing Director/ competent Authority after examining the facts, documents and the evidence.

16. In this regard, our view is also fortified by the decision rendered in *State of Maharashtra Vs. Mahesh G Jain* (2013) 8 SCC 119 in which it has been held, "Public Accountability, Vigilance and Prevention of Corruption-Prevention of Corruption Act, 1988-S. 19(1)-Sanction for prosecution-Application of mind- Proof- Sanction order may itself show consideration of relevant material by authority-Prosecution may also adduce evidence showing that authority reached its satisfaction on basis of materials placed before it-Criminal Procedure Code, 1973, S.197."

17. Learned counsel for the respondent referred the case of *C.S.*

Krishnamurthy Vs. State of Karnataka (2005) 4 SCC 81 in which Hon'ble the Apex Court has held that Prevention of Corruption Act, 1947- S. 6(1)- Sanction for prosecution- Order granting-Validity of- Application of mind by sanctioning authority- proof that all particulars were placed before the sanctioning authority for due application of mind -Necessity of- Held, is required when the sanction order is not a speaking one- When the sanction order itself is eloquent enough, then in such case only formal evidence has to be produced that the sanction was accorded by a competent person with due application of mind- On facts, the sanction order itself disclosing that the incumbent was being prosecuted under the 1947 Act for accumulating assets disproportionate to his known source of income and he failed to give satisfactory account for the same- Further, evidence given that the sanction was accorded by the competent authority after going through the police report and after discussing the matter with the legal department- Held, facts mentioned in the sanction order were eloquent enough- Thus there was due application of mind by the sanctioning authority -Hence, the sanction was valid- View taken by trial court that all papers were not placed before the court to show the proper application of mind, was not correct -Prevention of Corruption Act 1988 S 19."

18 In the case in hand, the sanction order is a speaking order and has been given on due application of mind by the sanctioning Authority. We find no reason to set aside the sanction order and the order of the trial Court.

19. Before saying Omega, we may hasten to reproduce para 20 of the order propounded by Hon'ble the Apex Court in the case of *State of Maharashtra Vs. Mahesh G Jain* (2013) 8 SCC 119 for a general guidance to the trial Court which reads as **"In these kind of matters there has to be reflection of promptitude, abhorrence for procrastination, real understanding of the law and to further remain alive to differentiate between hypertechnical contentions and the acceptable legal proponements. While sanctity attached to an order of sanction should never be forgotten but simultaneously the rampant corruption in society has to be kept in view. It has come to the notice of the Supreme Court how adjournments are sought in a maladroit manner to linger the trial and how at every stage ingenious efforts are made to assail every interim order. It is the duty of the court that the matters are appropriately dealt with on proper understanding of law of the land.**

Minor irregularities or technicalities are not to be given Everestine status. It should be borne in mind that historically corruption is a disquiet disease for healthy governance. It has the potentiality to stifle the progress of a civilized society. It ushers in an atmosphere of distrust. Corruption fundamentally is perversion and infectious and an individual perversity can become a social evil.

20. For the reasons and discussions mentioned above, the petition is not liable to be allowed and hence is dismissed.

Application dismissed.

I.L.R. [2016] M.P., 3402

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice C.V. Sirpurkar

M.Cr.C. No. 12453/2016 (Jabalpur) decided on 25 July, 2016

BHAGWAN & ors. ...Applicants

Vs.

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

*A. **Criminal Procedure Code, 1973 (2 of 1974), Section 437 (6) and Penal Code (45 of 1860), Sections 380 & 401 – Release on bail – Reason*** – **Trial could not be concluded within the period of 60 days from first date fixed for evidence – Application u/S 437 (6) of Cr.P.C. moved for release on bail – Rejected by Trial Court – Affirmed by Revisional Court – Challenge as to – Held – The applicants are tried for stealing large amount of gold & diamond jewellery & cash from a running train & its substantial part has been recovered, so offence is not an ordinary one but it is grave, applicants are resident of far away place (Bihar) – Facing trial in 11 similar offences – Members of inter-state gang – Habitual offenders – Delay is attributable to one of the accused who had applied for being treated as a Juvenile, so weighty ground exist for denial of bail u/S 437 (6) of Cr.P.C. – No interference in impugned order called for – Application u/S 482 of Cr.P.C. dismissed. (Paras 22 & 23)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 437 (6) एवं दण्ड संहिता (1860 का 45), धाराएँ 380 व 401 – जमानत पर छोड़ना – कारण – साक्ष्य हेतु नियत प्रथम दिनांक से 60 दिनों की अवधि के भीतर विचारण पूर्ण नहीं किया जा सका – दं.प्र.सं. की धारा 437(6) के अंतर्गत जमानत पर छोड़े जाने हेतु आवेदन प्रस्तुत किया गया – विचारण न्यायालय द्वारा नामंजूर – पुनरीक्षण न्यायालय द्वारा अभिपुष्ट –

संबंधी चुनौती – अभिनिर्धारित – आवेदकगण पर चलती ट्रेन से बड़ी मात्रा में सोने एवं हीरे के आभूषण एवं नकदी चुराने के आरोप में विचारण किया गया एवं उसकी पर्याप्त मात्रा बरामद कर ली गयी, अतः अपराध कोई साधारण नहीं बल्कि गंभीर है, आवेदकगण दूर की जगह (बिहार) के निवासी हैं – 11 समान अपराधों में विचारण का सामना कर रहे हैं – अन्तर्राज्यीय गिरोह के सदस्य हैं – अभ्यस्त अपराधीगण – विलम्ब का कारण अभियुक्त में से एक को माना जा सकता है जिसने किशोर मानने हेतु आवेदन किया, अतः धारा 437 (6) दं.प्र.सं. के अंतर्गत जमानत को अस्वीकार करने के लिए वजनदार आधार मौजूद है – आक्षेपित आदेश में हस्तक्षेप की कोई आवश्यकता नहीं है – धारा 482 के अंतर्गत प्रस्तुत आवेदन खारिज।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 437 (6) – Release on bail – Factors for consideration **– Certain principles enumerated. (Paras 19 & 20)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 437 (6) – जमानत पर छोड़ा गया – विचार योग्य तत्व – कतिपय सिद्धांत बताए गए।

C. Interpretation of statutes – Criminal Procedure Code, 1973 (2 of 1974), Sections 437 (1) & 437 (6) **– Whether bail u/S 437 (6) of Cr.P.C. cannot be refused for the reasons which are generally invoked for refusing bail u/S 437 (1) of Cr.P.C. – Held – Reason for refusing bail u/S 437 (1) & 437 (6) of Cr.P.C. may sometimes be over lapping, so it cannot be regarded as absolute propositions of law – 2009 Cr.L.J. 4766 (Riza Abdul Razak Zunzunia Vs. State of Gujarat) discussed. (Para 21)**

ग. कानूनों का निर्वचन – दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 437 (1) व 437 (6) – क्या धारा 437 (6) दं.प्र.सं. के अंतर्गत जमानत उन आधारों पर अस्वीकार नहीं की जा सकती, जो धारा 437 (1) दं.प्र.सं. के अंतर्गत जमानत अस्वीकार करने के लिए साधारणतः अवलम्बित किये जाते हैं – अभिनिर्धारित – धारा 437 (1) एवं धारा 437 (6) दं.प्र.सं. के अंतर्गत जमानत अस्वीकार करने के कारण कभी–कभी परस्परव्यापी हो सकते हैं, इसलिए इसे विधि की आत्यंतिक प्रतिपादनाएं नहीं माना जा सकता – 2009 Cr.L.J. 4766 (रिजा अब्दुल रज्ज़ाक झुनझुनिया वि. गुजरात राज्य) चर्चा की गई।

Cases referred:

2000 CRI.L.J. 2644, 2006 (3) MPHT 371, 2003 (1) MPWN Note 16, 2005 (II) MPWN Note 138, 2011 CRI.L.J. 5002, 2010 CRI.L.J. 347, 2010 CRI.L.J. 508, 2009 CRI.L.J. 4766, 2008 CRI.L.J. 4613, 2008 CRI.L.J. 2750, 2006 CRI.L.J. 1594.

Manish Tiwari, for the applicants.
P.K. Pandey, G.A. for the non-applicant/State.

ORDER

C.V. SIRPURKAR, J. :- This miscellaneous criminal case has been instituted on an application under Section 482 of the Cr.P.C. By way of this petition challenge has been made by the petitioners/accused persons Bhagwan, Virendra, and Mukesh to the order dated 05.07.2016 passed by the Court of Special Sessions Judge, Bhopal in Cr.R.No.277/2016, whereby the order dated 31.05.2016 passed by the Court of JMFC, Bhopal in Criminal Case No.1970/2016, dismissing the application of the petitioners/accused persons under Section 437 (6) of the Cr.P.C., was affirmed.

2. The facts giving rise to this miscellaneous criminal case may briefly be stated thus: the petitioners are facing trial before the Court of JMFC, Bhopal, for offences punishable under Sections 380 and 401 of the IPC. After framing of charge on 14.03.2016, the case was fixed for the first time for recording of evidence on 28.03.2016. However, the trial could not be concluded within the period of 60 days from 28.03.2016. The petitioners were in custody during the whole of the said period; therefore, the petitioners moved an application under Section 437 (6) of the Cr.P.C. for their release on bail. The application was rejected by the trial Court by order dated 31.05.2016. Consequently, the petitioners filed criminal revision before Special Sessions Judge, Bhopal, which was also dismissed by impugned order dated 05.07.2016.

3. The courts below rejected the application under section 437 (6) on following grounds:

(1) As per the prosecution case, the petitioners and co-accused persons stole a strolly bag containing diamond and gold jewelry worth Rs.31,00,000/- and Rs.4,00,000/- in cash from the complainant, who was traveling in Pushpak Express. The jewelry and cash worth Rs.33,05,764/- was recovered from the possession of the petitioners and co-accused persons during investigation. Thus the offence is serious.

(2) The petitioners are resident of Begusarai, Bihar. They are said to be members of an inter-state gang which specializes in committing theft in moving trains.

(3) Petitioners are facing trial in 11 offences other than the present one.

Thus, they are habitual offenders.

(4) If the petitioners are released on bail, they would flee from justice and are unlikely to face the trial.

(5) One of the co-accused persons Gulshan moved an application on 11.04.2016 pleading that he was a minor. The inquiry with regard to his age was concluded on 07.05.2016 and he was held to be a major. Thus, the period from 11.04.2016 to 07.05.2016 was consumed in the inquiry. As such, the delay, at least in part, was attributable to the accused persons.

4. The impugned order has been assailed mainly on the grounds that sub-section (6) of section 437 is mandatory in nature. In case, the trial is not concluded within the stipulated period of 60 days from the first date of evidence, the accused is entitled to be released on bail. Thus, by rejecting the application of the petitioners under Section 437 (6) of the Cr.P.C., the Courts below have deprived the petitioners of their constitutional right to liberty. The reasons advanced by the Courts below for rejecting the application are not germane to section 437 (6); therefore, it has been prayed that the impugned order be set aside and the petitioners be directed to be released on bail.

5. Learned Panel Lawyer for the respondent/State on the other hand, has supported the impugned order.

6. On due consideration of the rival contentions, the Court is of the view that this miscellaneous criminal case must fail for the reasons hereinafter stated:

Sub-section 6 of section 437 of the Cr.P.C. reads as hereunder:

> *(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate,* ***unless for reasons to be recorded in writing, the Magistrate otherwise directs.***

7. Before proceeding certain judicial pronouncement may be noted. A co-ordinate bench of this Court in the case of *Ram Kumar alias Raj Kumar Rathore v. State of M.P.*, 2000 CRI. L. J. 2644 has held as follows:

5. Looking to the provision referred to above it is but clear that it is mandatory in nature, and the mandate is that if the Magistrate is trying a case in which the accused has been charge for a non-bailable offence and the trial has not concluded within a period of sixty days from the first date of recording the evidence in the case and that the accused had remained in custody during the whole of such period of sixty days, then he becomes entitled to be released on bail, provided of course, the Magistrate does not reject the same recording in writing his reasons therefor. Circumscribing the undisputed factual circumstances in the ambit of the provisions of Section 437(6) of the Code of Criminal Procedure it is apparent that they hold the field and apply here from all four corners. In rejecting the bail application of the petitioner the learned trial Magistrate and the learned Fourth Additional Sessions Judge, Gwalior, have no doubt given their reasonings as required under the above provisions of the Code of Criminal Procedure but they are simply to the effect that if the petitioner were to be released then it is doubtful that he would be attending the Court on each and every date fixed by the Magistrate. These reasonings indicating the apprehension of the learned Courts below, by no stretch of imagination, could be termed as judicious, and therefore, they are not of such a nature as to thwart and wash off the mandatory character of the provisions of Section 437(6) of the Code of Criminal Procedure. I am of the considered view that the statutory right given to the accused by the above provisions cannot be taken away in such a fashion. Since the petitioner had althrough remained in custody during the said period of more than sixty days from the first date fixed for recording the evidence, he would be deemed to have been clothed with the right to be released on bail. The rejection of his application under Section 437(6) of the Code of Criminal Procedure by the learned trial Magistrate and later the dismissal of his revision petition by the learned Fourth Additional Sessions Judge, Gwalior, was nothing but the

abuse of the process of Court and had given rise to the miscarriage of justice.

8. Another co-ordinate bench in the case of *Nanda v State of Madhya Pradesh,* 2006(3) M.P.H.T. 371 has held as hereunder:

> *The reasons assigned by the Trial Magistrate as well as by Revisional Court are hardly sufficient to hold that the Magistrate concerned could not conclude the trial within the prescribed period of 60 days. The long list of 42 witnesses was submitted. In such circumstances there appears no possibility to conclude the trial within the prescribed period. Though the charges levelled against the applicant accused are severe in nature and the theft of huge amount is involved, even though the provisions of S. 437 (6) of the Code has to be followed by the Court.*

9. In *Rajendra v. State of M.P.,* 2003 (1) MPWN Note 16, the bail was refused under Section 437(6) of the Code on the ground that there is special provision for bail under Section 59A(ii) of the M.P. Excise Act.

10. In *Damodar Singh Chauhan v. State of M.P.,* 2005 (II) MPWN Note 138 the Magistrate had refused bail on the ground that during the statutory period of 60 days the trial could not be concluded since one or two dates were taken by the accused for calling of the documents.

11. In the case of *Jitendra alias Jeetu v. State of Rajasthan,* 2011 CRI. L. J. 5002, Rajasthan High Court has held that:

> *7. A bare perusal of the provision clearly reveals that although it uses the word "shall", the word "shall" cannot be interpreted to make a mandatory provision. For, while the sub-clause uses the word "shall", it also empowers the Magistrate to decline the benefit of the said sub-clause after recording his reasons. Once a discretion has been bestowed on the Magistrate, the provision cannot be held to be mandatory in nature. Unlike, Section 167(2), Cr.P.C. which grants a statutory bail, by operation of law, under Section 437(6) Cr.P.C. it is not mandatory that the bail has to be granted.*

11. A bare perusal of the impugned order clearly reveals that the learned Magistrate has noticed the fact that there are about 298 witnesses to be examined. Obviously, the examination of 298 witnesses cannot be done over night. It will certainly require a great length of time for the trial court to record the testimonies of 298 witnesses. Therefore, according to this Court cogent reasons have been given by the learned trial court.

12. In the case of *Mukeshkumar Ravishankar Dave v. State of Gujarat*, 2010 CRI. L. J. 347 the GUJARAT HIGH COURT has observed that:

17. Therefore, if the provisions of sec. 437(6) of the Code are closely considered, it appears that enough care has been taken by the legislature. There is an inbuilt exception provided leaving it to the discretion of the magistrate or the court when the words used are "unless for reasons to be recorded in writing." These words carve out an exception to the general proposition or the rule which is provided in Sec. 437(6) of Cr. P.C. Therefore, on the one hand, when this provision has been made enabling the court to exercise the discretion, the exception is also carved out that while exercising such discretion or considering such application, if such application is turned down, the magistrate is obliged to record reasons for that. In other words, this itself would suggest that when the discretion is left with the magistrate as per the language of Sec. 437(6) itself, it cannot be said to be mandatory as sought to be canvassed.

26. Moreover, the judgment of this court in the case of Jigar Mayurbhai Shah, (2008 Cri LJ 2750) (supra) has specifically referred to the relevant factors like the gravity of offence, quantum of punishment, the manner in which the offence is committed. These aspects will have to be considered also in light of the judgment of the Constitution Bench of the Hon'ble Apex Court in the case of Raj Deo Sharma, (1998 Cri LJ 3281) (supra) and referring to the aspect of delay has analysed as to what are the relevant

aspects to be considered. In other words, the guidelines or the factors may not be specifically enumerated, but the aforesaid factors could be broad parameters for considering an application under Sec. 437(6) of the Code.

13. In the cases of *Atul Bagga (in Jail) v. State of Chhattisgarh,* 2010 CRI. L. J. 508 CHHATTISGARH HIGH COURT has held that:

It would, thus, appear that under the first limb of sub-section (6) of Section 437 of the Code where the trial of a person accused of any non-bailable offence is not concluded within a period of 60 days from the first date fixed for taking evidence in the case the law mandates that such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate. The second limb of sub-section (6) of Section 437 of the Code carves out an exception and empowers the Magistrate to refuse bail for reasons to be recorded in writing. It is, therefore, open to a Magistrate to refuse bail under sub-section (6) of Section 437 of the Code where the Magistrate assigns reasons in writing which are amenable to scrutiny by a superior Court for examining whether the Magistrate was justified for reasons recorded by him in writing in refusing bail under sub-section (6) of Section 437 of the Code. If the reasons assigned by the Magistrate justify refusal of bail and cannot be termed arbitrary then the order refusing bail by the Magistrate under sub-section (6) of Section 437 of the Code would be in accordance with law and not open to interference in revision.

11. The question that arises for determination is as to what factors should weigh with the Magistrate while refusing part of bail under sub-section (6) of Section 437 of the Code. In my considered opinion, apart from the gravity of offence and the quantum of punishment, one or more of the following factors, among others may weigh with the Magistrate while refusing bail :

(a) the overall impact of the offence and the release of the

person accused of such offence on the society,

(b) the possibility of tampering of evidence by the accused,

(c) the possibility of the accused absconding if released on bail, and lastly

(d) the delay in conclusion of the trial within a period of 60 days if attributable to the accused.

13. Thus the seriousness of the economic offences of high magnitude for which the petitioner was charged, the overall impact of the offence and the release of the person accused of such offence on the society, the possibility that the petitioner, if released on bail was likely to influence the witnesses or tamper with the prosecution evidence, the fact that other co-accused were absconding would be relevant factors for refusing bail under sub-section (6) of Section 437 of the Code.

14: Again, in the case of *Riza Abdul Razak Zunzunia v. State of Gujarat,* 2009 CRI. L. J. 4766 GUJARAT HIGH COURT has observed that:

The right to bail under the proviso to Section 167(2) is an absolute right and there is no discretion on the part of the Magistrate to withhold a bail in such a situation even for reasons to be recorded in writing; whereas the right to be released on bail under Section 437(6) is not an absolute right inasmuch as the Magistrate may for the reasons to be recorded in writing not release the accused on bail. The proviso to Section 167(2) of the Code is intended to speed up the investigation by the police so that a person does not have to languish unnecessarily in prison facing trial. Similarly, the provisions of sub-section (6) of Section 437 is intended to speed up trial without unnecessarily detaining a person as an undertrial prisoner.

In the opinion of this Court, the factors which should be kept in mind while considering an application under Section 437(6) would be different from the factors that are to be taken into consideration while deciding an application for

regular bail. Though it may not be possible to lay down any exhaustive list of such factors which may be taken into consideration while deciding the application under Section 437(6) of the Code, some relevant factors would be whether the trial has been delayed on account of the default on the part of the applicant; whether the accused has at any stage during the course of investigation or as an under trial prisoner been absconding; if having regard to the facts of the case there is every likelihood of his jumping bail; or if there are special circumstances due to which it may be deemed expedient not to exercise powers under Section 437(6), etc. But bail cannot be refused for reasons which are generally invoked for refusing bail.

15. Later in the case of *Patel Vinodbhai Manibhai Patel v. State of Gujarat,* 2008 CRI. L.J. 4613GUJARAT HIGH COURT observed that:

4. This Court has also decided in Criminal Misc. Application No. 945 of 2005 decided on 5-5-2005 that it is not mandatory under Section 437(6) of the Code of Criminal Procedure on the part of the trial Court to enlarge the accused on ball, no sooner did. 60 days are over from the first date fixed for taking evidence in Criminal case, if other cogent and convincing reasons are recorded by the trial Court.

Accused is applying for adjournment and subsequently says now, 60 days are over from first date fixed for taking evidence and he must be enlarged on bail under Section 437(6) of Code Criminal Procedure. This advantage of his own wrong, cannot be availed for getting bail under Section 437(6) of Code Criminal Procedure.

16. In the case of *Jigar Mayurbhai Shah v. State of Gujarat,* 2008 CRI. L. J. 2750, accused was not held to be entitled to grant of bail in view of gravity of offence, quantum of punishment and manner in which accused was involved in committing offence by GUJARAT HIGH COURT.

17. In *Didar Singh v. State of Jharkhand,* 2006 CRI. L. J. 1594 JHARKHAND HIGH COURT has observed that:

11. The contention advanced on behalf of the petitioner that if the trial Court is not concluded within a period of sixty days from fixed date for evidence then accused who is in custody has to be released on bail cannot be accepted as from the plain reading of the aforesaid provision, it is clear that the said provision under Section 437(6) is not mandatory in nature as Section 167(2) of the Cr.P.C. which provides that if the investigation is not completed within a period of ninety days or sixty days as the case may be then the accused is entitled to be released on bail mandatorily irrespectively of the merit of the case. Under Section 167(2) Cr.P.C., the right to be released on bail is absolute under the provision of Section 437(6) of the Cr.P.C. which is not mandatory in nature, the entitlement of the accused to be released on bail is dependent upon the reasons to be recorded in writing by the Magistrate for refusal to release him on bail. The reasons may be several, therefore, it is the discretion of the trial Court either to release or not to release an accused under the aforesaid provision for the reasons to be recorded in writing. There is no doubt that discretion of the trial Court has to be exercised judicially and not arbitrarily. It is found that the trial Court has exercised its discretion either refusing or granting bail in exercise of power under Section 437(6) of the Cr.P.C. is justifiable in the facts and circumstances of a particular case then such exercise of discretion is not liable to be interfered with unless it is found that discretion so exercised by the trial Court is wholly improper, unjustified and arbitrary.

18. A perusal of aforesaid authorities makes it abundantly clear that sub-section 6 of section 437 does not create an absolute and indefeasible right to be released on bail, in favour of the accused. In that sense, it cannot be equated with sub-section 2 of section 167 of the Cr.P.C. The Magistrate conducting the trial is invested with discretion to refuse to release the accused on bail, for the reasons to be recorded in writing. There can be no doubt that the discretion vested in the Magistrate must be exercised on the settled judicial principle and the exercise must not be arbitrary and capricious. Once the discretion has

been exercised in a judicious manner, it is not liable to be interfered with unless the higher Court is of the view that the exercise of jurisdiction was improper, unjust and arbitrary.

19. The legislature has given no indication as to the reasons which might be germane for declining the bail to accused under Section 437 (6) of the Cr.P.C.; however, as has been noted above, collective judicial wisdom over the years, seek to provide guidelines for exercise of discretion to the Magistrate. Various judicial pronouncements have recognized certain principle which may govern the exercise of discretion by the Magistrate under Section 437 (6) of the Cr.P.C.

(1) Gravity of offence, quantum of punishment and manner in which the accused was involved in committing offence.

(2) Large number of witnesses to be examined on behalf of the prosecution and quantum of prosecution evidence to be placed before the Magistrate.

(3) Delay in progress of trial attributable to the accused.

(4) Whether the accused or a co-accused had been absconding at any stage during the course of inquiry, investigation or trial,.

(5) Likelihood of jumping bail having regard to the facts and circumstances of the case.

(6) Overall impact of the offence and release of the person accused of such offence on the society.

(7) Likelihood of tempering with the evidence by the accused in case of his release on bail.

20. Aforesaid list of course is enumerative and not exhaustive, as there may be other relevant factors in a case which may have a bearing on the exercise of discretion by the Magistrate.

21. The presence of all or any of the aforesaid factors may influence the Court in declining to release the accused on bail. In the case of *Riza Abdul Razak Zunzunia* (supra), the Gujarat High Court has observed that the bail cannot be refused for the reasons which are generally invoked for refusing bail under section 437(1) of the Code of Criminal Procedure; however, with due respect, aforesaid observations cannot be made as an absolute proposition of law. Reasons for

refusing bail under section 437(1) of the Code of Criminal Procedure and 437(6) of the Code of Criminal Procedure may sometimes be overlapping. It is obvious that there needs to be something more for denying bail under sub-section (6) than mere grounds on which the bail may be refused under sub-section (1), for the simple reason that the accused would be in jail after 2 months from the first date of evidence only where the grounds for refusing bail under section 437(1) are in existence. If same reasons are cited again for denying bail under section 437(6), it would render the provision under sub-section (6) of section 437 otiose. However, broadly speaking, it may be observed that mere probability, without any reasonable basis, that the accused would abscond if released on bail or accused had prayed for adjournment once or twice, should not be cited as reasons for denying bail to the accused.

22. When we examine the case at hand in the backdrop of aforesaid legal position, it may be seen that accused persons are being tried for offence of stealing large amount of gold and diamond jewelry and cash from a running train. A substantial part of the jewelry had been recovered from their possession. As such this is not an ordinary offence. The petitioners are resident of a faraway place. They are facing trial in 11 similar offences other than the present one, which provides reason to believe that they are members of an inter-state gang which commits theft/robbery in trains. Thus, they are habitual offenders and there is a reasonable apprehension that if they are released on bail, it would be extremely difficult to procure their presence before the Court to face trial. It is also relevant that the delay, at least in part, is attributable to accused Gulshan, who made an application for being treated as a juvenile, which was ultimately rejected. As such, weighty grounds exist for denial of bail to the accused persons under section 437(6) of the Code of Criminal Procedure. Thus, it cannot be said that learned Magistrate exercised its jurisdiction in an arbitrary or capricious manner. Thus, interference in the impugned order is unwarranted. However, the accused persons have a right to fair and speedy trial. Therefore, it would be appropriate to direct the trial Court to conduct the trial of the offence expeditiously.

23. Consequently, this application under section 482 of the Code of Criminal Procedure is **dismissed.** The trial Court is directed to dispose of the case in an expeditious manner.

Application dismissed.

I.L.R. [2016] M.P., 3415
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Anurag Shrivastava
M.Cr.C. No. 12107/2016 (Jabalpur) decided on 8 September, 2016

SAGAR NAMDEO ...Applicant
Vs.
STATE OF M.P. & anr. ...Non-applicants

A. ***Criminal Procedure Code, 1973 (2 of 1974), Section 482*** **– Quashing of trial u/S 482 – Offences punishable under Special Act not precluded. (Para 12)**

क. *दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482* – धारा 482 के अंतर्गत विचारण को अभिखंडित किया जाना – विशेष अधिनियम के अंतर्गत दण्डनीय अपराध प्रवारित नहीं।

B. ***Criminal Procedure Code, 1973 (2 of 1974), Sections 482 & 320 – Exercise of inherent powers u/S 482 of Cr.P.C. for compounding of non-compoundable offences punishable under Special Act*** **– If offence is petty, not grievous in nature, against an individual, not causing adverse social impact on society, not tends to defeat the purpose of Special Act – Also to consider circumstances leading to commission of crime, act of accused, manner in which crime committed, previous conduct, antecedents of accused and impact of crime on victim and his family etc. (Paras 10 & 12)**

ख. *दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 482 व 320 – विशेष अधिनियम के अन्तर्गत दण्डनीय अशमनीय अपराधों के प्रशमन हेतु, दण्ड प्रक्रिया संहिता की धारा 482 में अन्तर्निहित शक्तियों का प्रयोग* – यदि व्यक्ति के विरूद्ध अपराध लघु है, गंभीर प्रकृति का नहीं है, समाज पर विपरीत सामाजिक प्रभाव नहीं डालता हो, न ही विशेष अधिनियम के प्रयोजन को विफल की ओर प्रवृत्त करता हो – अपराध कारित करने की ओर अग्रसर करने वाली परिस्थितियाँ, अभियुक्त का कृत्य, अपराध किये जाने का ढंग, पूर्व आचरण, अभियुक्त का पूर्ववृत्त एवं पीड़ित व उसके परिवार पर अपराध का प्रभाव इत्यादि को भी विचार में लिया जाना चाहिए।

C. ***Criminal Procedure Code, 1973 (2 of 1974), Sections 482 & 320, Penal Code (45 of 1860), Sections 354 & 354-D and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989),***

***Section 3 (1-11)* – Permission for compounding of offence – Investigation report reveals that accused has been continuously pressurizing & threatening the complainant and her family for marriage – Marriage of complainant could not be fixed – In view of conduct of accused and all facts & circumstances, permission to compound the offences cannot be given. (Para 14)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 482 व 320, दण्ड संहिता (1860 का 45), धाराएँ 354 व 354–डी एवं अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3 (1–11) – अपराध के प्रशमन हेतु अनुमति – अन्वेषण रिपोर्ट यह प्रकट करती है कि अभियुक्त विवाह के लिए परिवादी एवं उसके परिवार पर निरन्तर दबाव बना रहा है एवं धमका रहा है – परिवादी का विवाह तय नहीं हो सका – अभियुक्त के आचरण तथा सभी तथ्यों एवं परिस्थितियों को दृष्टिगत रखते हुए, अपराधों के प्रशमन हेतु अनुमति प्रदान नहीं की जा सकती।

Cases referred:

(2014) 6 SCC 466, (2012) AIR SCW 533, 2016 (2) MPLJ (Criminal) 194.

Sunil Kumar Pandey, for the applicant.
V.K. Pandey, P.L. for the non-applicant No. 1/State.
Y.M. Tiwari, for the non-applicant No.2.

ORDER

ANURAG SHRIVASTAVA, J. :- In this petition filed under Section 482 of Cr.P.C. invoking inherent powers of this Court, applications bearing I.A. No.15808/2016 and No.15809/2016 are moved for compounding of the offences punishable under Sections 341, 354, 354-D, 506 of IPC and Section 3(1-11) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, which is non-compoundable offence as per Section 320 of Cr.P.C.

2. As per prosecution case on 22.03.2015 respondent No.2/complainant (Girl) submitted an application before the Police Station-Lakhnadon alleging therein that the applicant Sagar Namdeo is pressurizing her for marriage and on refusal, he is threatening her as well as her family members to kill. He used to follow her on way to school and tries to make undue contact with her. When the marriage of complainant is settled and engagement has been made then the applicant threatened the in-laws of complainant and asked them not to marry with complainant. Because of this threatening, they have refused to perform marriage. The complainant belongs

to scheduled caste. On the basis of this written complaint, the police registered FIR vide Crime No.128/2015, for the offences punishable under Sections 341, 354, 354-D, 506 of IPC and Section 3(1-11) of SC/ST (Prevention of Atrocities) Act and after completion of investigation, the charge-sheet has been filed and at present, the trial is pending before the Special Judge, (Atrocities) Seoni, bearing Special Case No.32/2015.

3. It is also evident that during pendency of trial the complainant had moved an application under Section 320(2) of Cr.P.C. alongwith a compromise seeking permission to compromise the alleged offences with accused. The trial Court had rejected the application vide order dated 22.02.2016, wherein it has been observed by the Court that at the time of verification of compromise, complainant was weeping, therefore, it appears that she was not voluntarily entered into settlement and compromising the case. Being aggrieved by the impugned order, this petition has been filed.

4. In this Court also the parties have settled all their disputes and want to compromise the matter. I.A. Nos.15808/2016 and No.15809/2016, applications under Section 320(1) and Section 320 (2) of Cr.P.C. have been filed alongwith the affidavits by the parties.

5. As per order of this Court, the contents of compromise has been verified by Registrar (J-I) on 16.08.2016. The complainant has expressed in clear unequivocal terms that disputes have been resolved and she has entered into compromise voluntarily without any fear undue influence or coercion.

6. Since the offences under Section 354, 354-D of IPC and Section 3(1-11) of Atrocities Act, 1989, are non-compoundable therefore, a question arises as to whether or not the proceedings can be quashed on the basis of compromise in non-compoundable offences under a Special Act in particular facts of this case.

7. Learned counsel for the applicant argued that the alleged offences are not of serious nature. Complainant and accused have resolved their differences amicably and they are living peacefully. The settlement would lead to more good; better relations between them, therefore, keeping in view the first offence of applicant, and there is no possibility of conviction in the trial, the inherent power under Section 482 of Cr.P.C. ought to be exercised by the Court for compounding the non-compoundable offences as directed by Hon'ble Supreme Court in *Narendra Singh. Vs. State of Punjab* (2014) 6 SCC 466.

8. Learned Panel Lawyer for the State has vehemently objected to compounding of offences and argued that the offences under SC/ST (Prevention of Atrocities) Act are non-compoundable and also looking to the conduct of applicant/accused, the permission for same should not be granted.

9. It is not disputed that the applicant/accused has been prosecuted in the trial Court for the offences under Sections 341, 354, 354-D, 506 of IPC and Section 3(1-11).of SC/ST (Prevention of Atrocities) Act. The offences under Section 354, 354-D of IPC and Section 3(1-11) of SC/ST (Prevention of Atrocities) Act are non-compoundable. Hon'ble Supreme Court in the case of *Gian Singh Vs. State of Punjab and another* (2012) AIR SCW 533 held that the power of High Court in quashing a criminal proceedings or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power vis;(i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim.

10. Now the main question which has to be considered is whether in offences arising under Special Act, whether the power under Section 482 of Cr.P.C. is to be exercised or not? Hon'ble Apex Court in *Narindra Singh Vs. State of Punja*b (2014) 6 SCC 466 after considering the case law *Gian Singh* (Supra) described certain guideline for exercising inherent powers under Section 482 of Cr.P.C. for compounding of non-compoundable offences. The relevant para 29 contain the directions as below:

> *29- In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the*

criminal proceedings:

29.1- Power conferred under Section 482 of Cr.P.C. is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are no compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2- When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure;

(i) ends of justice, or

(ii) to prevent abuse of the process of any court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3- Such a power is not to be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for the offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4- On the order hand, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5- While exercising its power, the High Court is to

examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases;

11. The Co-ordinate Bench of this Court in *Ashish Vs. State of M.P.* 2016 (2) MPLJ (Criminal) 194 while considering the compounding of offences punishable under Section 392 IPC r/w Section 11/13 Madhya Pradesh Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981 observed in para 11 and 12 as below:-

(11) It is noticeable in the case of Narinder Singh (Supra) that in the guidelines contained in para 29.3, the Apex Court held that the offences which fall within the purview of 'special statutes' should not be quashed under section 482, Cr.P.C. Merely because the parties have come to terms and compromise is reached between the accused and victim.

(12) The usage of the term 'Special Statute" obviously relates to statutes which have been promulgated by the legislature in regard to certain kind of offences which are though covered by the sweep of the Indian Penal Code but on account of changing social and economic set up have become more menacing thereby requiring specialized forums, procedures and punishments to be dealt with.

12. On consideration of above case law and principles laid down by Hon'ble Apex Court, it appears that the guidelines regarding exercise of powers under Section 482 of Cr.P.C. in quashing the prosecution on the ground of compounding of offences involving offences under Special Act can be termed as illustrative rather than exhaustive. Simply only on the ground that the case involving offences punishable under Special Act, the Court is not precluded from exercising the powers given under Section 482 of Cr.P.C. to quash the trial. If the offence is petty, not grievous in nature, against an individual/victim, not causing adverse social impact on society at large and not tends to defeat the very purpose of Special Act, then the power under Section 482 of Cr.P.C. may be exercised following the guidelines of Hon'ble Supreme Court given in *Narinder Singh's* case (Supra). While exercising this power apart from above

factors the Court has to consider all other facts like circumstances leading to commission of crime, act of accused, manner in which the crime is committed, previous conduct and antecedents of the accused alongwith impact of crime on victim and his family etc..

13. In present case the offence under Section 3(1-11) of SC/ST (Prevention of Atrocities) Act is non-compoundable. This Act is Special Act: The object of the Act is to prevent the commission of offences of atrocities against members of the SC and ST, to provide for Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith are incidental thereto. This is social legislation enacted for protection of SC/ST community from higher section of society.

14. In present case the investigation report reveals that the applicant has been continuously pressurizing and threatening the complainant and her family for marriage purposes. Because of his threatening, the marriage of complainant could not be fixed. Therefore, keeping in view the conduct of applicant and all facts and circumstances of this particular case, the permission to compound the offences cannot be given even though the parties have come to terms with each other.

15. In view of above, I.As. No.15808/2016 an (sic:and) No.15809/2016 for compounding of non-compoundable offence under Sections 354, 354-D of IPC and Section 3(1-11) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 is considered and rejected.

16. It is also made clear that the parties may compound the offences which are compoundable under Section 320 of Cr.P.C. before the trial Court, if the fresh application in this regard may be filed before the trial Court.

17. Since, this petition under Section 482 of Cr.P.C. is solely based on the factum of parties have entered into the settlement, which has been declined by this Court by not granting permission to compound the offence, therefore, the present petition under Section 482 of Cr.P.C. also stands dismissed.

18. Any finding recorded in this order shall not prejudice either rights of the applicant to defend himself during trial or that of prosecution.

No costs.

Petition dismissed.

I.L.R. [2016] M.P., 3422
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Atul Sreedharan
M.Cr.C. No. 17501/2016 (Jabalpur) decided on 20 October, 2016

RAJENDRA KORI ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 438 – Anticipatory bail – Granting of – **Where the accused has not been arrested by the Investigating Agency nor been subjected to custodial interrogation – Case for grant of bail – After filing of charge sheet – Application for bail — Denial of bail without adequate cause and sufficient reasons for pretrial incarceration, would result in infringement of civil liberties of the accused. (Para 11)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – अग्रिम जमानत – प्रदान किया जाना – जहाँ अभियुक्त को अन्वेषण एजेन्सी द्वारा गिरफ्तार नहीं किया गया और न ही उसे पूछताछ हेतु अभिरक्षा में लिया गया – जमानत प्रदान करने हेतु प्रकरण – अभियोग पत्र प्रस्तुत किये जाने के पश्चात् – जमानत के लिए आवेदन – उचित हेतु एवं पर्याप्त कारणों के बिना विचारणपूर्व कैद के लिए जमानत अस्वीकार किये जाने का परिणाम अभियुक्त की नागरिक स्वतंत्रता का उल्लंघन होगा।

B. Practice & Procedure – Issuance of Notice – **By Investigating Agency to prospective accused requiring to appear before Trial Court on the date of filing of charge sheet – No such provision in the Code of Criminal Procedure. (Para 6)**

ख. पद्धति और प्रक्रिया – नोटिस जारी किया जाना – अन्वेषण एजेन्सी द्वारा पूर्वेक्षित अभियुक्त को अभियोग पत्र प्रस्तुत होने की दिनाँक को विचारण न्यायालय के समक्ष उपस्थित होना अपेक्षित – दण्ड प्रक्रिया संहिता में ऐसा कोई प्रावधान नहीं।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 204 – **Appearance of accused before Trial Court – Only when the Trial Court takes cognizance of offence and issues process and never before that. (Para 9)**

ग दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 204 – विचारण न्यायालय के समक्ष अभियुक्त की उपस्थिति – केवल तब जब कि विचारण न्यायालय अपराध का संज्ञान ले तथा आदेशिका जारी करे एवं उससे पहले कभी नहीं।

Cases referred:

AIR 1968 SC 117, (1998) 5 SCC 749.

Som Prakash Mishra, for the applicant.
J.K. Jain, Assistant Solicitor General for the non-applicant/CBI.

ORDER

ATUL SREEDHARAN, J. :- This is an application under Section 438 of the Code of Criminal Procedure, 1973 for grant of anticipatory bail on behalf of applicants **Rajendra Kori and Vivek Nema** who are apprehending their arrest for offences under sections 120-B,420 of the Indian Penal Code and sections 13(1)(d) read with section 13(2) of the Prevention of Corruption Act, registered at Police Station C.B.I. A.C.B. Jabalpur, District Jabalpur, vide Crime No. RC0092016A0006

2. The present case arises from the above said crime number in which the applicants herein, who are private parties are stated to have entered into a conspiracy with the Branch Manager of SME Branch of the Canara Bank at Jabalpur and fraudulently got transferred into the account of the Digamber Jain Mandir Trust, an amount of Rs.4,80,00,000/- by way of RTGS.

3. The Ld. Assistant Solicitor General has argued that the applicants herein had connived with the Branch Manager and had got three demand drafts issued in their favour without there being a requisite balance in their account due to which the said demand drafts were dishonoured. However, upon being coaxed by the applicants herein, the Branch Manager of the Canara Bank, SME Branch, Jabalpur, who is also a co-accused, is alleged to have transferred the above said amount into the account of the Digamber Jain Mandir Trust.

4. The learned Assistant Solicitor General has further argued that the transfer of the said amount into the account of the trust was subsequent to the dishonour of the said demand drafts which was issued in favour of the applicants herein. By this, the learned Assistant Solicitor General has sought to establish prima facie, that an unlawful loss of public money and a concomitant unlawful gain to themselves was caused by the applicants herein along with the Branch Manager, allegedly for purchase of land for the above said trust.

5. Learned counsel for the applicants on the other hand has submitted

that as and when required by the CBI, the applicants presented themselves before the investigating agency and joined investigation. At no point of time during the course of investigation did the investigating agency ever exercise their powers of arrest and custodial interrogation. Thereafter, the investigation was completed and the charge sheet was to be filed on 23.9.2016 and the investigating agency, in the usual course, issued notice to the applicants herein to present themselves before the learned Trial Court for the formalities relating to bail. The applicants moved an application for anticipatory bail before the Special Judge (CBI), Jabalpur on 23.9.2016, which was dismissed on the same day, against which they have come before this Court for bail under section 438 of the Cr.P.C. The applicants have stated that their apprehension of an arrest by the Trial Court is real as a co-accused had moved an application for regular bail before the Trial Court and instead was sent to judicial custody by the Trial Court after dismissing his bail application.

6. There is no provision in the Code of Criminal Procedure for the issuance of a notice by the investigating agency requiring the prospective accused person to appear before the Trial Court on the date on which the charge sheet is filed. The Investigating Agency in the course of investigation has the authority under section 160 Cr.P.C to issue notice to such persons who have knowledge about the commission of the offence to appear before the police and join investigation. Under the said provision, a notice can also be issued to an accused person to appear before the investigating agency as the said section does not proscribe the issuance of such a notice to a person accused of an offence. However, once the investigation is complete and the charge sheet is to be filed under section 173(2) Cr.P.C, there vests no further right or authority with the investigating agency to summon the accused persons, save as is provided under section 173(8), to carry out further investigation. The Trial Court also cannot and must not expect the accused persons who are named in the charge sheet to be present before it on the date on which the charge sheet is filed by the investigating agency, as there is no presumption that the trial court will take cognizance of the offences against the prospective accused person(s) named in the charge sheet, by exercising jurisdiction under section 190 (1) (b) Cr.P.C.

7. As settled by the Supreme Court in *Abhinandan Jha Vs. Dinesh Mishra* - AIR 1968 SC 117, when a charge sheet is filed by the Police, the Magistrate has three options. (1) He may accept the charge sheet and proceed

with the case by issuing process to the accused persons or (2) he could reject the charge sheet and direct the Police to carry out further investigation under section 156(3) of the Cr.P.C or (3) simply reject the charge sheet altogether after hearing the de facto complainant and close the case.

8. The Trial Court is not the Handmaiden or a Lady-in-Waiting of the investigating agency that it shall do the bidding of the prosecution. The act of the police/investigating agency of issuing notice to the prospective accused, directing itself to be present in Court on the day the police files the charge sheet is presumptuous to say the least, bordering on contumacious conduct. Only the Trial Court can decide whether or not it requires the attendance of the accused and none other. When the police issues such a notice to the prospective accused, what it is necessarily stating is that the Trial Court **WILL** take cognizance of the offences against the prospective accused upon the filing of the charge sheet and proceed against it. The very thought that the Trial Court will mechanically take cognizance of the offences mentioned in the charge sheet and proceed against the accused is abominable and would result in a trust deficit in the criminal justice administration by projecting a view that the Trial Court would do as desired by the prosecution.

9. Taking cognizance of an offence and securing the presence of a person to stand trial as accused is a solemn judicial function which the Trial Court discharges and the same cannot be done in a cavalier manner at the mere asking of the investigating agency only because they have investigated the case and filed a charge sheet. In this regard, it will do well to reiterate the observations of the Supreme Court in *Pepsi Foods Ltd., Vs. Special Judicial Magistrate* - (1998) 5 SCC 749, wherein at paragraph 28, the Supreme Court observed **that "The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto"**. Though the said observations were made in a matter arising from a complaint case, the principle stated therein is equally applicable in cases where a person is sought to be summoned to stand trial in a case based upon a police report U/s. 173(2) Cr.P.C. The requirement of presence of an accused before the Trial Court for the first time, is a power to be exercised exclusively by the Trial Court and the same cannot be usurped by the police/investigating agency. The taking of cognizance will normally be followed by the issuance of process to the accused U/s. 204 Cr.P.C and it is only on the receipt of the summons u/s. 204 Cr.P.C that an accused is bound to remain present before the Trial Court on the designated day. The Trial

Court has sufficient powers under the code to secure the presence of the accused if it is of the opinion that the accused is deliberately trying to avoid the service of process. If the prospective accused appears in Court pursuant to the notice of the investigating agency and on that day, the Trial Court, after perusing the charge sheet arrives at the opinion that the same is deficient and does not disclose the commission of any offence to take cognizance of and remits the charge sheet to the police for further investigation u/s. 156(3) Cr.P.C, then in such a case, the prospective accused is put to unnecessary hardship resulting in the wastage of his time and resources involved in appearing before the Court for no reason whatsoever. This scenario is more pronounced where the prospective accused has to come from another state or any faraway place. Therefore, a person is only bound to appear before a Trial Court as an accused after the Trial Court takes cognizance of the offence(s) against such person(s) as stated in the charge sheet and issues process u/s. 204 Cr.P.C and never before that.

10. Thus, whenever a charge sheet is filed before a Trial Court, the investigating agency has no authority to issue a prior notice to a prospective accused person as no such authority is vested in them under the Code of Criminal Procedure. If such a notice is issued to an accused person and he does not appear before the Trial Court on the date when the charge sheet is filed, the Trial Court shall issue a non-bailable warrant for securing his presence until and unless it goes through the proeedure of issuing process under section 204 Cr. P.C and in those exceptional circumstances/cases, in which it appears to the Trial Court that a person so required shall not respond to such summons, the Trial Court may also issue warrants bailable or non-bailable in addition to such summons under section 204 Cr.P.C after citing its reasons for the same.

11. Where the accused has not been arrested by the investigating agency during the course of investigation and has not been subjected to custodial interrogation, then the same is a case for grant of bail by the Trial Court when such an application is moved after the filing of the charge sheet. Denial of bail in such a case, without adequate cause and citing sufficient reasons for pretrial incarceration, would result in the infringement of the civil liberties of the accused along with his right under Article 21 of the Constitution of India as the said arrest would be absolutely without purpose.

12. Looking into the facts and circumstances of the case and the fact that the applicants herein were never arrested during the course of investigation, I see no reason why the Damocles sword of imminent arrest must be kept hanging

over their heads only because the charge sheet has been filed. Under the circumstances, I am inclined to allow the instant application for grant of anticipatory bail. Accordingly, I direct that in the event of their arrest, they be released on bail forthwith upon their furnishing a personal bond in the sum of **Rs.50,000/- each (Rupees Fifty Thousand only)** with one solvent surety in the like amount each to the satisfaction of the Police Officer competent to arrest them, subject to the conditions enumerated in Section 438(2) of the Code of Criminal Procedure, 1973.

Certified copy as per rules.

Application allowed.

I.L.R. [2016] M.P., 3427
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice G.S. Ahluwalia
M.Cr.C. No. 11021/2016 (Gwalior) decided on 8 November, 2016

KAMLESH DIWAKAR ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 311 – Object and Scope **– Held – The object underlying Section 311 of Cr.P.C. is that there should not be a failure of justice on account of mistake of any of the party in bringing valuable evidence on record – The Section is not limited only for the benefit of the accused but a witness can be summoned even if his evidence would support the prosecution case – However, the first part of the Section is discretionary – Further held – The Court is not empowered under the provisions of Cr.P.C. to compel either the prosecution or the defence to examine any particular witness but in weighing the evidence the court can take note of the fact that the best evidence has not been given and can draw an adverse inference – However in the facts of the present case where the prosecution witness has not supported the theory of 'last seen together' an application under Section 311 was filed to substitute another witness to prove circumstance of 'last seen together', which is not permissible, otherwise, there would be no end to the trial. (Paras 8 & 17)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 – उद्देश्य एवं विस्तार

– अभिनिर्धारित – दण्ड प्रक्रिया संहिता की धारा 311 का अन्तर्निहित उद्देश्य यह है कि अभिलेख पर महत्वपूर्ण साक्ष्य लाने में किसी भी पक्ष की भूल के कारण न्याय की विफलता नहीं होनी चाहिए – यह धारा केवल अभियुक्त के लाभ हेतु सीमित नहीं है बल्कि साक्षी को भी समन भेजा जा सकता है भले ही उसका साक्ष्य अभियोजन प्रकरण का समर्थन करे – किन्तु, धारा का प्रथम भाग वैवेकिक है – आगे अभिनिर्धारित – दण्ड प्रक्रिया संहिता के अन्तर्गत न्यायालय अभियोजन या प्रतिपक्ष को साक्ष्य का परीक्षण करने हेतु बाध्य करने के लिए सशक्त नहीं है परन्तु साक्ष्य का मूल्यांकन करते समय न्यायालय इस तथ्य को विचार में ले सकता है कि सर्वोत्तम साक्ष्य नहीं दिया गया है एवं प्रतिकूल निष्कर्ष निकाल सकता है – किन्तु वर्तमान मामले के तथ्यों में जहाँ अभियोजन साक्षी ने "अंतिम बार साथ देखे जाने" के सिद्धांत का समर्थन नहीं किया है, किसी अन्य साक्षी को प्रतिस्थापित करने हेतु धारा 311 के अन्तर्गत आवेदन प्रस्तुत किया गया ताकि वह 'अन्तिम बार साथ देखे जाने' की परिस्थिति साबित कर सके, जो अनुज्ञेय नहीं है, अन्यथा, विचारण की समाप्ति नहीं होगी।

Cases referred:

1999 (7) SCC 604, 2006 (7) SCC 529, AIR 2007 SC 3029, AIR 2013 SC 3081.

Vivek Mishra, for the applicant.
Jai Prakash Sharma, P.L. for the non-applicant/State.

ORDER

G.S. AHLUWALIA, J. :- This petition under Section 482 of Cr.P.C. has been filed against the order dated 14.09.2016 passed by Additional Sessions Judge (Special Judge M.P. Dacoity Avam Vyapaharan Prabhavit Kshetra Adhiniyam) Lahar, District Bhind in S.T. No. 2586/2016 by which the application filed by the complainant under Section 311 of Cr.P.C., for summoning one Jaiveer, has been allowed.

2. The applicant is facing trial for offences punishable under Sections 302, 363, 364-A of IPC and under Section 11/13 of MPDVPK Act.

3. The facts of the case in short, which are necessary for the disposal of this petition, are that a boy namely Vikram had gone to his school on 13.08.2015 at 11:00 AM but thereafter he did not come back. Gum Insaan report was lodged, and later on the dead body of deceased Vikram was recovered from a well situated at Dikoli. The dead body was identified by the relatives of the deceased Vikram. The police after completing the investigation filed the charge sheet against the applicant for the above mentioned offences.

It is not out of place to mention here that the case is based on circumstantial evidence..

4. After the prosecution case was over and the statement of the accused under Section 313 of Cr.P.C. was recorded, it appears that the complainant filed an application under Section 311 of Cr.P.C. stating that Vimlesh (PW-1) has stated in his evidence that Brijendra @ Jaiveer who is the resident of Dhanuk Ka Pura, P.S. Nayagaon, District Bhind had informed him that he had seen the deceased Vikram alive in the company of the applicant, therefore, it was prayed that Brijendra @ Jaiveer be called for his examination as a witness as it is essential for the just decision of the case.

5. Refuting the contention of the complainant, the applicant filed his reply and pleaded that Brijendra @ Jaiveer is a real brother-in-law (Sala) of Kamlesh (P.W.8), the father of the deceased Vikram. It was further stated that initially the prosecution had examined one Veer Kumar (PW-7) to prove the circumstance of last seen together but as Veer Kumar (PW-7) has not supported the prosecution case therefore, now the complainant wants to examine the real brother-in-law of Kamlesh in place of Veer Kumar. It was further stated that had Jaiveer seen the deceased for the last time in the company of the applicant, then he would have certainly informed the witnesses as well as the police, and the police would have recorded his statement. It was pleaded that in fact an attempt is being made to fill up the lacuna as Veer Kumar (PW-7) has not supported the prosecution case.

6. The trial court by the impugned order allowed the application on the ground that it is true the statement of Jaiveer was not recorded during the merg investigation as well as under Section 161 of Cr.P.C. and his statement under Section 164 of Cr.P.C. was also not got recorded. Similarly, in the statement of Vimlesh (PW-1) recorded under Section 161 of Cr.P.C. as well as under Section 164 of Cr.P.C. this fact was not mentioned that Jaiveer had seen Vikram in the company of the applicant. However, the application has been allowed only on the ground that inspite of the fact that Vimlesh (PW-1) has stated in his examination-in-chief, that Jaiveer had informed him that he had seen the deceased in the company of the applicant but the applicant has not cross-examined Vimlesh (PW-1) on this statement. Therefore the court below came to the conclusion that for the just decision of the case it is essential to summon Jaiveer as a witness. Accordingly, the application filed by the complainant under Section 311 of Cr.P.C. was allowed.

7. Before considering the facts of the case, it is essential to consider the basic principle underlying Section 311 of Cr.P.C. Section 311 of Cr.P.C. reads as under:-

> "311. Power to summon material witness, or examine person present.- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re- examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

8. The object underlying Section 311 of Cr.P.C. is that there should not be a failure of justice on account of mistake of any of the party in bringing valuable evidence on record. The Section is not limited only for the benefit of the accused but a witness can be summoned even if his evidence would support the case of prosecution. However, the first part of the section is discretionary and if the court is of the view that it is necessary to examine a witness for a just decision of the case then it shall be obligatory on its part to summon that witness. The court is not empowered under the provisions of Cr.P.C. to compel either the prosecution or the defence to examine any particular witnesses but in weighing the evidence the court can take note of the fact that the best evidence has not been given and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from the facts elucidated in the evidence, in such cases the court should act under the second part of the section. Sometimes the examination of the witness may result in what is thought to be loopholes but it is purely a subsidiary factor and whether the new evidence is essential or not must depend on the facts of each case, and has to be determined by the court.

9. In the case of *Raj Deo Sharma (II) vs. State of Bihar* reported in 1999 (7) SCC 604, the Supreme Court has held as under:-

> "9. We may observe that power of the court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the five-judge Bench in A.R. Antulay case nor in Kartar Singh case such power has been restricted for achieving speedy trial.

> In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the court under Section 311 of the Code. We make it clear that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person."
>
> (Emphasis added)

10. In *U.T. Of Dadra and Nagar Haveli and another vs. Fatehsinh Mohansinh Chauhan* reported in 2006 (7) SCC 529, the Supreme Court has further held as under:-

> "15. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused resulting in miscarriage of justice."
>
> (Emphasis added)

11. In *Iddar & Ors. vs. Aabida & Anr.* reported in AIR 2007 SC 3029, the Supreme Court while observing the object underlying under Section 311 Cr.P.C. has held as under:-

> "11. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not

limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is 'at any stage of inquiry or trial or other proceeding under this Code'. It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."

(Emphasis added)

12. The Supreme Court in the case of *Rajaram Prasad Yadav vs. State of Bihar and another* reported in AIR 2013 SC 3081, while taking note of various judgments dealing with an application under Section 311 of Cr.P.C. has enumerated the following principles which are required to be borne in mind by the courts while deciding an application under Section 311 of Cr.P.C. which reads as under:-

"23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

c) If evidence of any witness appears to the Court to be

essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

d) The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should

afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

13. Before considering the facts of the case, it is important to mention that the undisputed fact is that Vimlesh (PW-1) had never informed the police in his statement under Section 161 of Cr.P.C. that Jaiveer has told him about the fact that the deceased was seen in the company of the applicant for the last time. Further the statement of Vimlesh was recorded under Section 164 of Cr.P.C., however, the fact of disclosure of circumstance of "Last Seen Together" was missing. Similarly, the police has also not recorded the statement of Jaiveer. In order to prove the circumstance of "Last Seen Together", the police had recorded the statement of one Veer Kumar. It is also not out of place to mention that Jaiveer was even not cited as a witness. In other words, Jaiveer was neither here or there in the prosecution case.

14. Keeping the above principles of law in mind, when the facts and circumstances of the case are considered, it is clear that initially the prosecution had come up with a specific case, that as per the statement of one Veer Kumar,

the deceased Vikram was seen alive, in the company of the applicant. However, Veer Kumar (PW-7) did not support the prosecution case and was declared hostile. Thus, it is clear that in order to overcome that lapse or lacuna which has arisen because of non support of prosecution case by Veer Kumar (PW-7), the complainant by filing an application under Section 311 of Cr.P.C. has tried to substitute another witness in place of Veer Kumar (P.W. 7).

15. In case of *Rajaram Prasad Yadav* (supra) while laying down the principles, the Supreme Court has also laid down the principle that "the additional evidence must not be received as a disguise or to change the nature of the case against any of the party."

16. It has further been held in the case of *Rajaram Prasad Yadav* (supra) that the court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible.

17. Thus, when the complainant found that the important witness of the prosecution has not supported the prosecution theory of "Last Seen Together", then by filing an application under Section 311 of Cr.P.C. it has tried to substitute another witness in place of Veer Kumar, to prove the circumstance of "Last Seen Together", which is not permissible, otherwise, there would never be an end to the Trial and whenever, it is realised, that the prosecution witness has not supported prosecution case, then some other witness would be introduced and would be cited as an important witness for just decision of the case.

18. Thus, an application filed under Section 311 of Cr.P.C. by the complainant to substitute the witness in place of Veer Kumar (PW-7) cannot be said to be essential for the just decision of the case specifically when Vimlesh (PW-1) had never disclosed either in his merg statement or in his statement under Section 161 of Cr.P.C. or under Section 164 of Cr.P.C., that he was ever informed by Jaiveer that the deceased Vikram was seen alive for the last time in the company of the accused/applicant. Merely because a specific question has not been put by the defence to Vimlesh (PW-1) during his cross-examination pointing out that he had not informed the police, either in his statement under Section 161 of Cr.P.C. or in statement under Section 164 of Cr.P.C. about the information given by Jaiveer, would not *ipso facto* mean that summoning of Jaiveer as a substitute witness in place of Veer Kumar

(PW-7) is necessary for just decision of the case.

19. Accordingly, the order dated 14.09.2016 passed by the Court of Additional Sessions Judge (Special Judge M.P. Dacoity Avam Vyapaharan Prabhavit Kshetra Adhiniyam) Lahar, District Bhind is set aside. The application filed under Section 311 of Cr.P.C. by the complainant is hereby rejected. The trial court is directed to proceed with the matter in accordance with law.

Order accordingly.